



Preventing and Addressing Statelessness

In the Context of International Surrogacy Arrangements

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Abstract

Everyone has the right to acquire a nationality. However, situations of statelessness persist. International commercial surrogacy presents a very specific contemporary challenge because in such cases it may be difficult for the child's legal parentage to be established or recognised. This may result in serious consequences for the child including statelessness. Recognising this lack of harmonisation and potential child rights violations, a variety of actors are currently mapping State approaches to surrogacy. Furthermore, the Secretariat of the Hague Conference on International Law has also been analysing legislation in order to identify existing gaps and to consider possible reforms. There is a need to continue research in this field and to propose practical and feasible solutions. As with individual cases, any measures adopted and implemented to address the challenges presented by international surrogacy should make the best interests of the child a primary consideration and leave no child stateless.

Keywords

surrogacy – statelessness – best interests of the child

1 The Right to a Nationality and the Persistence of Statelessness

As established in the Universal Declaration of Human Rights¹ and the Convention on the Rights of the Child (CRC),² everyone has the right to acquire

* This article does not necessarily represent the views or positioning of UNICEF.

1 Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) (UDHR) art 15(1).

a nationality. In particular, it follows from the CRC and the best interests principle that a child must not be left stateless for an extended period of time and, therefore, must acquire nationality at birth or as soon as possible after birth.³ Despite this, children often face barriers in obtaining a nationality and statelessness persists, not only in the developing world, but around the globe.⁴

The main causes of statelessness have been linked to problems caused by State succession, discrimination and arbitrary denial or deprivation of nationality as well as technical causes.⁵ This last category may include cases where there are conflicts between the nationality laws of different States or between other administrative or legal measures that may impact on the application of nationality laws. For example, in many countries, birth registration and recognition of legal parentage are prerequisites to establishing the nationality of a child. Indeed, it has been argued that legal parentage is ‘the gateway through which many of the rights of children, and obligations to children, flow’.⁶ This gateway to nationality and realisation of rights may be effectively blocked in cases of international surrogacy.

2 The Challenge and Complexity of International Surrogacy

Advances in reproductive technology and increasingly varied forms of family households,⁷ along with the ease of modern communications and

2 Convention on the Rights of the Child (adopted 20 November, entered into force 2 September 1990) UNGA Res 44/25 (CRC) art 7.

3 UN High Commissioner for Refugees (UNHCR) ‘Guidelines on Statelessness No. 4: Ensuring Every Child’s Right to Acquire a Nationality through Articles 1-4 of the 1961 Convention on the Reduction of Statelessness’ (21 December 2012) HCR/GS/12/04 <<http://www.refworld.org/docid/50d460c72.html>> accessed 16 September 2013, para 11.

4 UNHCR ‘Mapping Statelessness in the Netherlands’ (November 2011) <<http://www.refworld.org/docid/4eef65da2.html>> accessed 15 September 2013. This UNHCR mapping study emphasized that statelessness “is not confined to the developing world or distant countries; all across the globe there are people who live or survive without the elementary benefits of a nationality”.

5 UNHCR, *Nationality and Statelessness: A Handbook for Parliamentarians* (20 October 2005) <<http://www.refworld.org/docid/436608b24.html>> accessed 15 September 2013.

6 Permanent Bureau of Hague Conference on Private International Law (HCCH), ‘Private International Law Issues Surrounding the Status of Children, including Issues arising from International Surrogacy Arrangements’ (2011) Preliminary Document No 11, 4; HCCH, ‘A Preliminary Report on the Issues arising from International Surrogacy Arrangements’ (2012) Preliminary Document No 10, 20.

7 HCCH, ‘Private International Law Issues Surrounding the Status of Children, including Issues arising from International Surrogacy Arrangements’ (n 6).

travel, have led to an increase in so called ‘surrogacy tourism’.⁸ Approaches to surrogacy vary greatly:⁹ in some countries all forms of surrogacy are prohibited by law; in others, only altruistic, non-commercial forms may be permitted (regulated); while some States permit all forms (permissive); and in the remaining cases, national law does not deal with surrogacy at all (unregulated). Intending parents request another to carry a child for them, with the intention that they will take custody of the child following birth and parent the child as their own. Such person(s) may, or may not be, genetically related to the child born as a result of the arrangement.¹⁰ Intending parents may take advantage of these discrepancies in States’ approaches to surrogacy in order to commission a child abroad when it is not possible in their home country.

International surrogacy presents a very specific contemporary challenge because in such cases¹¹ it may be difficult for the child’s legal parentage to be established or recognised.¹² The child may be able to demonstrate a relation to several adults such as: a genetic link to a biological intending parent, a social link to the other intending parent as well as a link to the gestational surrogate mother.¹³ Although the intending parents and surrogate mother will most likely all possess a nationality, it may not be possible for them to pass this on to the child. Furthermore, it may be impossible for the child to acquire either the nationality of the State of his or her birth or the nationality of his or her parents (intending parents or surrogate mother).

For example, if the country of birth does not apply the *jus soli* principle, the child may not automatically be recognised as a national. This is especially the case when the intending parents have been listed as the parents on the birth certificate. This may be the case when one or both of the parents is the genetic parent and when there is an understanding that this is a case of ‘surrogacy

8 Tine Lin, ‘Born Lost: Stateless Children in International Surrogacy Arrangements’ (2013) 21 *Cardozo Journal of International and Comparative Law* 553 <http://www.cjicl.com/uploads/2/9/5/9/2959791/21.2_lin_cjicl.pdf> accessed 15 September 2013.

9 *Ibid.* 552; Oireachtas Library & Research Service, ‘Surrogacy, Parentage and Citizenship: Ireland in the Wider World’ (2013) 3 *Spotlight* 9. <<http://www.oireachtas.ie/parliament/media/housesoftheoireachtas/libraryresearch/spotlights/spotSurrogac.pdf>> accessed 15 September 2013; HCCH, ‘A Preliminary Report on the Issues arising from International Surrogacy Arrangements’ (n 6).

10 HCCH, ‘A Preliminary Report on the Issues arising from International Surrogacy Arrangements’ (n 6).

11 HCCH, ‘Private International Law Issues Surrounding the Status of Children, including Issues arising from International Surrogacy Arrangements’ (n 6) 6-11 (case examples).

12 *Ibid.* 4.

13 Oireachtas Library & Research Service (n 9).

tourism' where it is not intended for the child to reside or to grow up in that country. At the same time, if the country of the intending parents only applies the *jus sanguinis* principle, the child may experience difficulty having his or her claim to nationality recognised by the competent authority¹⁴ from that country, especially when that State takes the view that the child should have the nationality of the surrogate (birth) mother or when surrogacy is illegal¹⁵ in that State. When the competent authority, such as a consulate abroad,¹⁶ refuses to recognise the registration of the child, he or she is not considered as a national for the purposes of Article 1(1) of the 1954 Convention.^{17,18} Indeed, difficulties in establishing legal parentage have left children in such circumstances stateless: without the recognition or protection of any State and at risk of human rights violations.

Aware of the gaps in legislation, which may cause serious complications and negatively impact upon children's rights, some governments have published warnings for prospective intending parents on the Internet.¹⁹ For instance, the Belgian government has issued a note explaining that due to the existing legislative void, they are unable to recognize the effects of any foreign documents provided in the context of international surrogacy and, therefore, unable to recognise legal parentage or to provide the child with a travel document.²⁰ In such cases, parents are discouraged from pursuing surrogacy and advised to turn to the relevant court in order to attempt to remedy the situation after the birth of a child by a surrogate.

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- 14 UNHCR 'Guidelines on Statelessness No. 1: The definition of "Stateless Person" in Article 1(1) of the 1954 Convention relating to the Status of Stateless Persons' (20 February 2012) HCR/GS/12/01 <<http://www.refworld.org/docid/4f4371b82.html>> accessed 16 September 2013.
- 15 HCCH, 'A Preliminary Report on the Issues arising from International Surrogacy Arrangements' (n 6) 9. Surrogacy arrangements reached in contravention of the law are void and unenforceable in terms of their legal effects.
- 16 Vienna Convention on Consular Relations (adopted 24 April 1963, entered into force 19 March 1967) art 5(f).
- 17 Convention Relating to the Status of Stateless Persons (adopted on 28 September 1954, entered into force 6 June 1960) Economic and Social Council Res 526 A (XVII) (1954 Convention) art 1 (1): A stateless person is defined as a person who is not considered as a national by any State under the operation of its law.
- 18 UNHCR 'Guidelines on Statelessness No. 1' (n 14) para 32.
- 19 HCCH, 'A Preliminary Report on the Issues arising from International Surrogacy Arrangements' (n 6) 19.
- 20 Belgian Ministry of Foreign Affairs, 'Consular Information: Children Born of a Surrogate Mother' <<http://www.diplobel.us/BelgianCitizens/Nationality/surrogatemother.asp>> accessed on 15 September 2013.

Additionally, the Permanent Bureau of Hague Conference on Private International Law (HCCH) has noted that: 'While adoption may be a route for an intending mother to acquire legal parentage in some States, this can be far from straightforward since there may be rules which prohibit an adoption being granted where the prospective adoptive parents took part in a procurement which is unlawful or contrary to public policy'.²¹

On the other hand, in States that expressly permit and regulate surrogacy, the 2012 HCCH study highlights that some may allow for a 'pre-approval' process where the surrogacy arrangement must be presented and approved before any agreement or medical treatment may proceed. In other permissive State regimes, regulation takes the form of a set procedure for intending parents to obtain legal parentage *ex post facto*. Legislation governing legal parentage varies among States, as do procedures for transfer of parentage. In reviewing existing practice in States that favour regulation, the HCCH found that, while States may have varying requirements for the transfer of legal parentage, the paramount consideration is placed on the best interests of the child.²²

3 Potential Measures to Address Statelessness in the Context of International Commercial Surrogacy in the Long and Short-Term

3.1 *Possibilities for Multilateral Regulation and Harmonisation of Private International Law*

As international surrogacy arrangements are a form of private international law, there have been calls for a new international convention to regulate such matters. It is argued that such a private international law instrument would provide more protection for surrogate mothers and also be in the best interests of the child as it would prevent cases of statelessness. The HCCH Secretariat has acknowledged that 'this *global* phenomenon may ultimately demand a *global* solution'.²³ The Hague Adoption Convention²⁴ has been suggested as

21 HCCH, 'A Preliminary Report on the Issues arising from International Surrogacy Arrangements' (n 6) 10.

22 Ibid. 14.

23 Ibid. 30.

24 Hague Conference on Private International Law, *Hague Convention on the Protection of Children and Co-operation in Respect of Inter-country Adoption* (29 May 1993) (Hague Adoption Convention).

model in many respects, though it is recognised that there are many significant differences between adoption and surrogacy.²⁵

However, it has been cautioned that even the adoption of a new convention may not be without drawbacks.²⁶ A new convention will not provide a full solution. On the one hand, it will take time to negotiate and not all States may ratify it. On the other hand, some cases²⁷ may still fall outside that future framework.²⁸ Furthermore, even if an agreement on private international law rules were reached, the new convention may contain an *ordre public* clause allowing State parties to prevent the application of foreign law or the recognition of a foreign decision where it would be contrary to its public policy.²⁹

3.2. *Recommendations for Measures to be Taken in the Short-Term*

Therefore, while further consideration is given to the most appropriate and best way to approach the possible drafting and implementation of a new convention on related issues in the long-term, immediate measures need to be taken in order to respect the best interests of children concerned.

The framework provided in *General Comment No 5*³⁰ from the Committee on the Rights of the Child is a useful tool for outlining the general measures that should be taken to implement the CRC and improve respect for children's rights. While such General Comments are not legally binding on States, they provide authoritative guidance on the interpretation and application of the Convention. The paragraphs below describe how some key general measures, such as legislative reform, data collection, co-ordination mechanisms and

25 HCCH, 'A Preliminary Report on the Issues arising from International Surrogacy Arrangements' (n 6).

26 Lin, 'Born Lost' (n 8).

27 For example, the cases of same-sex couples may not be covered by the future convention as this is unlikely to be agreed. The 'medical visa' currently required by the Indian Government is an interesting example of how future regulation may develop and it is only granted to a foreign man and woman who have been married for at least two years. See more at: Ministry of Home Affairs - Government of India, 'Type of visa for foreign nationals intending to visit India for Commissioning Surrogacy and conditions for grant visa for the purpose' <<http://mha.nic.in/pdfs/CS-GrntVISA-29112.pdf>> accessed 15 September 2013.

28 Lin, 'Born Lost' (n 8).

29 HCCH, 'A Preliminary Report on the Issues arising from International Surrogacy Arrangements' (n 6), 28.

30 UN Committee on the Rights of the Child, 'General comment no. 5: General measures of implementation of the Convention on the Rights of the Child' (27 November 2003) UN Doc CRC/GC/2003/5.

independent human rights institutions, may be used to prevent and address statelessness.

3.2.1 Ratification of Other Key International Human Rights Instruments and Legislative Measures

With regards to preventing and addressing cases of statelessness, an important step would be ratification of the 1954 and 1961 Conventions³¹ by those States which have yet to ratify. This may of course necessitate reform of domestic legislation, particularly laws governing the granting of nationality.

3.2.2 Collection and Analysis of Disaggregated Data and Documentation of Case Studies

While the complexity and challenges of international surrogacy cases have been highlighted from time to time in the media or debated before the courts, comprehensive data about the real scale of the practice as well as the outcomes for children concerned is sorely lacking.

The European Parliament (EP) and HCCH Secretariat have started to map current State policy and practices, but there is a need for better data collection at the national level in order to assist both with identification of cases as well as the formulation of responses to this relatively new phenomenon. A recent EP study³² found an increasing prevalence of surrogacy in the European Union (EU), but also confirmed that there is only limited data available and a need to improve systems to routinely record relevant information across all EU Member States. The EP study also calls for further empirical and qualitative research to inform policy and legislative work in this area.

3.2.3 Clear Accountability and Co-ordination Mechanisms

General Comment No 5 also makes the case for strategic concerted efforts, notably national action plans, as well as clear accountabilities and co-ordination mechanisms. Similarly, UNHCR recommends the creation of specific stateless determination procedures,³³ which could assist States to

31 Convention on the Reduction of Statelessness (adopted 30 August 1961; entered into force 13 December 1975) 989 UNTS 175 (1961 Convention) <<http://www.refworld.org/docid/3ae6b39620.html>> accessed 16 September 2013.

32 European Parliament, *A Comparative Study on the Regime of Surrogacy in EU Member States* (European Parliament 2013) <<http://www.europarl.europa.eu/delegations/en/studiesdownload.html?languageDocument=EN&file=93673>> accessed on 15 September 2013.

33 UNHCR 'Guidelines on Statelessness No. 2: Procedures for Determining whether an Individual is a Stateless Person' (5 April 2012) HCR/GS/12/02 <<http://www.refworld.org/docid/4f7dafb52.html>> accessed 16 September 2013.

meet their obligations under the 1954 Convention. Since these procedures, where they exist, are relatively new and still under development in specific national contexts, it is currently unclear which role they may play in addressing problems caused by international surrogacy. Such procedures could potentially be used to identify and to document cases as well as to refer affected families to appropriate actors dealing with naturalization and citizenship. In this regard, it is interesting to note that the UNHCR Belgium mapping study recommends the creation of a focal point in the Ministry of Justice to whom individuals and professionals can refer with questions related to nationality.³⁴ Following the successful model of the Hague Conventions,³⁵ States might establish a Central Authority to serve as a conduit for arranging surrogacy agreements.³⁶

It has also been considered as a possible step forward in the European Union context to introduce an enhanced co-operation procedure whereby each Member State would identify a central authority that would be responsible for consulting and co-ordinating between the different existing legal regimes of Member States on surrogacy related matters such as civil registration.³⁷

3.2.4 Monitoring by Independent Human Rights Institutions and Ombudsperson for Children

Ombudspersons for Children may also play a role in monitoring individual cases, commenting on draft legislation and advocating for necessary changes. For example, the Special Rapporteur on Child Protection has commented on proposed legislative reforms in this area in Ireland.

4 Partial Remedies to Prevent and Reduce Statelessness in Line with the Best Interests of the Child

Some States have already initiated partial remedies to the problems created by international surrogacy such as recognising foreign birth certificates simply to establish legal paternity or providing emergency travel documents to allow a

34 UNHCR 'Mapping Statelessness in Belgium' (October 2012) <<http://www.refworld.org/docid/510of4b22.html>> accessed 15 September 2013. See recommendation 32 on page 36.

35 HCCH, 'Private International Law Issues Surrounding the Status of Children, including Issues arising from International Surrogacy Arrangements' (n 6).

36 Sarah Mortazavi, 'It Takes a Village to Make a Child: Creating Guidelines for International Surrogacy' (2012) 100 *Georgetown Law Journal* 2249.

37 European Parliament, *A Comparative Study on the Regime of Surrogacy in EU Member States* (n 32).

child to enter a State.³⁸ Such measures ensure respect for family unity and allow the child to stay with his or her intending parents rather than to be placed in institutional care. At the same time, 'some States provide a degree of flexibility with their immigration rules to enable the child to enter the State in order that the position can be regularised once the child is "home"'.³⁹

The EP study also identified the deepening of civil status mutual recognition and related proposals, which would result in the free movement of public documents and the creation of a European civil status office, as potential solutions to some of the practical issues raised by international surrogacy. As was noted in an earlier Green Paper, the EU is considering the feasibility of EU action to facilitate the recognition of legal parentage in other EU Member States.⁴⁰

In many countries, there is an important role for national courts in deciding upon these cases. The decisions of courts in England and Wales, which have made the child's welfare a paramount concern⁴¹ as well as respecting the best interests of the child, have been recognised as good practice. Courts have also held that the illicit nature of surrogacy arrangements under domestic law could not be given greater weight than the best interests of the child.⁴²

Some have argued that the regime to address statelessness is not strong enough to offer an effective remedy to stateless children born from surrogacy arrangements.⁴³ Yet, there has been unprecedented progress in recent years leading to new ratifications of the 1954 and 1961 Conventions, improved procedures for birth registration and identification of stateless persons, as well as the adoption of new statelessness determination procedures in many countries.⁴⁴ In some of these countries, it may be time to consider whether these procedures could also provide solutions for stateless children born from

38 Oireachtas Library & Research Service (n 9) 11.

39 HCCH, 'A Preliminary Report on the Issues arising from International Surrogacy Arrangements' (n 6) 24.

40 European Commission, 'Less bureaucracy for citizens: promoting free movement of public documents and recognition of the effects of civil status records' (Green Paper) COM(2010) 747 <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52010DC0747:EN:NOT>> accessed on 16 September 2013.

41 Lin, 'Born Lost' (n 8). See also *Re: L (A Minor)* [2010] EWHC 3146 (Fam) <<http://www.bailii.org/ew/cases/EWHC/Fam/2010/3146.pdf>> accessed 15 September 2013.

42 HCCH, 'A Preliminary Report on the Issues arising from International Surrogacy Arrangements' (n 6) 10.

43 Lin, 'Born Lost' (n 8).

44 UNHCR, 'Note on Statelessness' (4 June 2013) EC/64/SC/CRP.11 <<http://www.refworld.org/docid/51d2a884.html>> accessed 16 September 2013.

international surrogacy arrangements or whether there is a need to create other new measures to assist such children to acquire the nationality of their intending parents.

Whether States are considering the adoption of new legislative or policy measures, or responding to individual cases, efforts to address the challenges presented by international surrogacy should make the best interests of the child⁴⁵ a primary consideration and leave no child stateless.

45 For further authoritative guidance on the interpretation and application of the best interest principle see: UN Committee on the Rights of the Child, 'General comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration (Art. 3, para. 1)' (29 May 2013) UN Doc CRC /C/GC/14. <http://www2.ohchr.org/English/bodies/crc/docs/GC/CRC_C_GC_14_ENG.pdf> accessed 15 September 2013.