'WHERE DO I BELONG?' STATELESSNESS OF CHILDREN BORN THROUGH TRANSNATIONAL SURROGACY ARRANGEMENTS

Vilmah Balakrishnan

Every child has the right to acquire a name and a nationality.[44]

The concept of family has been a fluid concept throughout history and across cultures. However, the advancement of Artificial Reproduction Technology (ART) has changed our perception of family, parenthood and the creation of life significantly. One of the common arrangements in which ART has been applied is in surrogacy. Today, surrogacy has gained acceptance over adoption and is regarded as a preferred method of conceiving a child especially for infertile couples, same-sex couples and single persons who intend to have a child of their own.[45] Surrogacy is an alternative to creating a family, besides having children naturally or adopting. Although the birth of a child is usually a joyous occasion, having to deal with the legal complications which accompany a child born of surrogacy has now become the bane of it is intended or commissioning parents. One of the most challenging issues prevalent in transnational surrogacy is how to deal with the statelessness of a child born through surrogacy.[46] Conflicts in national laws regarding conferment of citizenship and by the lack of international consensus on the legality of surrogacy have resulted in the birth of children who are not recognised as citizens of any nation.[47] In all transnational surrogacy arrangements, the countries that may provide citizenship to a child born through surrogacy are either the country of birth where the surrogacy agreement was entered into or, the receiving country where the commissioning or intended parents are from. When the law of neither country does not recognise the child as its citizen, the child becomes stateless.

Statelessness has a debilitating effect on individuals. In children born through surrogacy, the effects of statelessness are amplified and can result in the denial of human rights and an increased vulnerability to abuse. Without citizenship, stateless children suffer from lack of access to education, employment, health care, registration of birth, marriage or death, property

* Senior Lecturer, Faculty of Law and Government, HELP University.

44 Art 7 United Nation Convention on the Rights of the Child, United Nations Treaty Series 1577 3.

45 Eager couples willingly seek artificial reproductive technology at exorbitant prices ranging from USD100000 to USD150000. See 'Agency Fees & Surrogate Mother Costs' (*Fertility Source Companies*) <https://www.fertilitysourcecompanies.com/surrogacy/looking-for-surrogate-costs-and-financing> accessed 20 August 2019; 'How Much Does Surrogacy Cost?' (*Sensible Surrogacy*) <https://www.sensiblesurrogacy.com/surrogacy-costs> accessed 20 August 2019.

46 Art 1 Convention Relating to the Status of Stateless Persons, Sept 28, 1954, 360 UNTS 117 states that a stateless person is one who is 'not considered as a national by any State under the operation of its law.'

47 See e.g. Emma Batha, 'International Surrogacy Traps Babies in Stateless Limbo', *Reuters Health News* (*The Hague*, 18 September 2014) <https://www.reuters.com/article/us-foundation-statelessness-surrogacy/international-surrogacy-traps-babies-in-stateless-limbo-idUSKBN0HD19T20140918> accessed 15 August 2019.

rights, having no legal protection and no right to vote. They may also encounter travel restrictions, social exclusion, and heightened vulnerability to sexual and physical violence, exploitation and human trafficking. Therefore, it is the obligation of each state involved in surrogacy to ensure that the surrogate-born child is given the necessary recognition and/or assistance required for safe passage through their national borders to ultimately 'go home' with its commissioning or intended parents. The ensuing paragraphs of this essay contain an examination the following matters, first, a review of the judicial and administrative initiatives in India and the United Kingdom in dealing with 'statelessness 'of surrogate children; second, an examination of whether and how a surrogate child's rights may be protected under the existing legal framework in Malaysia; and, finally establish what lessons Malaysia can learn from India and the United Kingdom in handling the issue of citizenship of surrogate children. This essay focuses on India and the United Kingdom as points of reference as both have adjudicated extensively on the issue of statelessness of surrogate-born children. In this respect, both jurisdictions have much to contribute towards the development of a coherent framework for adjudication on this complex issue. Although the Indian courts have long struggled to develop this framework, they have nevertheless adopted exemplary provisional measures to prevent the prolonged separation between the child and its intended parents and administratively regulated surrogacy arrangements. The English courts, on the other hand, have established a clear legal standard and although the observance of public policy remains key, conceded that the child's welfare is the court's paramount consideration.

What is Surrogacy?

The word 'surrogate' has its origin in the Latin word 'surrogatus', a past participle of 'surrogare', meaning 'a substitute, that is, a person appointed to act in the place of another'. According to the Black's Law Dictionary, surrogacy means the process of carrying and delivering a child for another person.[48] Thus surrogacy is an arrangement in which a surrogate mother is a woman who carries a child for someone else, usually an infertile couple. Surrogacies can take two forms - gestational and traditional. Gestational surrogacy is a pregnancy in which one woman usually, the genetic mother provides the egg, which is fertilised, and another woman, the surrogate mother, carries the foetus and gives birth to the child. The surrogate mother has no genetic link with the child because she did not contribute any form of genetic material during the IVF cycle. Traditional surrogacy, on the other hand, is a pregnancy in which a woman provides her egg, which is fertilised by artificial insemination, and carries the foetus and gives birth to a child for another person. The surrogate mother, in this case, is both the genetic and the gestational mother of the child.

Parentage

Traditionally, legal parentage is linked to the conception and birth of a child. The biological parents are often considered as the legal parents of a naturally born child. Biology and genetics dictate that legal parents are those who contribute to the genetic make-up of a child, which would be the male who contributed the sperm and the female who contributed the egg. The woman who physically gave birth to the child was the mother. If the child was born into

[48] Black's Law Dictionary 1674 (10th edn 2014).

a marriage, the presumption is that the baby was the child of the husband and wife. However, if a child was born out of wedlock, then the child is legally the child of the mother.

Surrogacy, however, defies our traditional views of legal parentage as several persons may contribute in a variety of ways in the 'conception and birth' of a child born through surrogacy. In a surrogacy arrangement, a child may have up to five parents, the commissioning or intended parents (who may or may not have contributed towards the genetic make-up of the child), the surrogate mother, anonymous donors of the egg and the sperm. When the child is born, the child does not have legal ties with the surrogate mother who acts merely as the gestational carrier. The surrogate lacks legal rights as a parent as she often contracts away that right when she agrees to become a surrogate. The donors, on the other hand, are completely anonymous and they too would have contracted away any sort of legal parental rights over the child. Due to the severance of the traditional biological ties between the woman who physically births the child and the child himself, courts can no longer use the biological approach to determine parentage of a child born through gestational surrogacy.

In jurisdictions such as the United States of America, both the courts[49] and states[50] have only begun to lean towards intentional parentage. The parent or parents are considered the intentional parents because "[b]ut for their acted-on intention, the child would not have existed."[51] In the case of *Johnson v Calvert,*[52] Ana Johnson agreed to gestate an embryo created using the gametes of Mark and Crispina Calvert. In the seventh month of her pregnancy, Johnson demanded payment for her services and threatened to keep the child if the payment was not forthcoming. In response, the Calverts sued to establish their rights to the child. At the trial held after the birth of the child, the Court held that the parents based on the genetic relationship between them declared the contract enforceable and terminated the visitation rights Johnson had been granted pending the outcome of the trial. Johnson appealed first to the California Court of Appeal and the California Supreme Court and both affirmed the decision of the trial court. The Supreme Court asserted that either a genetic contribution or a gestational contribution could support a declaration of maternity under California law and could not find a legislative preference for either one. Faced with two equally viable claims for maternity, the Court with the aid of scholarly opinion[53] decided to use intention as manifested in the surrogacy agreement to break the tie. Without the Calvert intent, declared the Court, the child would never have existed. Under this analysis, Johnson became a mere facilitator of the Calvert's intent; any intent she had had in asserting the parentage was subordinated to theirs; it is clear that had she asserted these same intentions before agreeing, the Calverts would most definitely have withdrawn from the project. In *Re Marriage of Buzzanca*, the California Court of Appeals clarified that intentional parentage is the legal determination in surrogacy cases even when the intended parents did not contribute any type of biological make-up to the child.[54] Additionally, the courts observed Article 8 of the Uniform Parentage Act 2000 (UPA) which requires that the intended parents be married, and both spouses must be parties to the gestational agreement. The prospective gestational mother, her husband if she is married, and

---

49 *Johnson v Calvert*, 851 P 2d 776, 782 (Cal 1993); see also in *Re Marriage of Buzzanca*, 72 Cal Rptr 2d 280, 282.

50 The Uniform Parentage Act 2000.

51 In *Re Marriage of Buzzanca*, 72 Cal Rptr 2d 280, 282.

52 Ibid (n 6).

53 Marsha Garrison, 'Law Making for Baby Making: An Interpretive Approach to the Determination of Legal Parentage' (2000) 113 Harvard Law Review; Janet L Dolgin, *Defining the Family: Law, Technology, and Reproduction in an Uneasy Age* (New York University Press 1997).

54 Ibid (n 8).

the donors must relinquish all rights and duties as the parents of a child conceived through assisted reproduction. This provision seeks to minimise possible areas of controversy, as well as areas of litigation on the issue of parentage.

Citizenship

The link between citizenship and parentage is an inextricable one. Citizenship is commonly conferred through one of two ways - *jus soli* or *jus sanguinis*. *Jus soli* (right of soil) means that nationality is acquired through birth on the territory of the state. *Jus sanguinis* (right of blood) means that nationality is acquired from birth through descent or ancestry. The two principles are not mutually exclusive, and a country's nationality may operate under both principles. In the context of surrogacy, if a couple hires a surrogate in a foreign nation which confers citizenship under the *jus soli* principle, citizenship will be bestowed on the child depending on where the baby is born, not the nationality of the surrogate (or the parents). The child would not be born stateless, although the couple's native country may not recognise the child as a citizen. By contrast, a couple who has hired a surrogate in a nation which observes the principles of *jus sanguinis* may find that their child is not recognised as the citizen of any nation. In countries which do not permit a parent to pass on nationality to their child, a child born in a foreign country risks becoming stateless if that country does not permit citizenship based on birth in the territory alone. In such a case, even a foreign birth certificate, may not carry any weight beyond providing factual evidence as to the conclusion regarding legal parentage reached under foreign law.[55]

Acquiring citizenship in a country which confers citizenship based on legal parentage becomes an arduous task especially when both the country of birth and the receiving country have differing views on the legality of surrogacy arrangements. Ukraine laws, for instance, automatically recognise the intended parents as the child's legal parents although the child is born to a Ukraine surrogate. Samuel Ghilain[56] was a child born in Ukraine to a surrogate commissioned by his intended parents, a pair of married men of Belgian nationality. The Belgian intended parents were regarded by Ukrainian law as Ghilain's legal parents. Nevertheless, as Belgian law was silent on the legality of surrogacy arrangements, the Belgian government denied Samuel citizenship because it had no legal basis to recognise the Ukrainian birth certificate. Samuel was not legally granted citizenship by either Ukraine or Belgium. He became a stateless child.

A country's laws on surrogacy may fall into one of these four categories - 1. The law is completely silent on surrogacy and its legality, e.g. Belgium and Malaysia; 2. All surrogacy

---

[55] Ireland, New Zealand, the United Kingdom and Israel, could be said to fall within this grouping because no weight is placed on the foreign birth certificate. Instead, these countries require DNA testing of the intended parent, and the registration and acquisition of nationality are only permitted if a genetic link is established with one of the intended parents. See Sharon Shakargy, Israel, 242; Claire Achmad, New Zealand, 305; Michael Wells-Greco, United Kingdom, 369; Maebh Harding, Ireland, 224 in Katarina Trimmings & Paul Beaumont, *International Surrogacy Agreements: An Urgent Need for Legal Regulation at the International Level* (Hart Publishing 2011).

[56] See Koppen (VRT television broadcast Jan 27, 2011) available at http://www.youtube.com/watch?v=GiC7oG8fgwU.

contracts are prohibited, e.g. France[57] and Germany;[58] 3. Surrogacy is permitted if it is for altruistic purpose, e.g. United Kingdom;[59] 4. All forms of surrogacy are permitted, e.g. India,[60] Ukraine,[61] and Israel[62]. The conferment of citizenship is the prerogative of every sovereign state, which may impose the terms of eligibility for citizenship, a principle recognised by international instruments and judicial bodies. It is the exercise of this autonomy and authority which often becomes the point of contention in the ongoing dialogue concerning stateless children.[63]

Dealing with Statelessness in India and the United Kingdom

As countries struggle to keep abreast with the speed of evolving artificial reproductive technologies, various legislative, judicial and administrative efforts are being made around the world to deal with the issue of statelessness of children born through surrogacy. In some cases, stateless surrogate children have received citizenship purely through the administrative process. In Iceland for example, an Icelandic couple who were intended parents to a surrogate-born child sought the assistance of parliamentarians who granted the child, citizenship without the family having to go through the regular adoption process.[64] In dealing with this aspect of the discussion, reference shall be made to two important jurisdictions, India and the United Kingdom. As stated earlier, both countries have significantly contributed towards dealing with the issue of stateless surrogate children. The Indian courts, in particular, have resolved the issue of stateless surrogate children, albeit, on narrow grounds that provide little precedential impact on future cases on surrogacy. Conversely, in the United Kingdom, the courts have taken to resolve the issue by weighing up 'the best interests of the child' as the paramount consideration.

As a starting point, the problems presented by the conflict of laws in a case involving transnational gestational surrogacy agreement can be appreciated in the case of Baby Manji.[65]

---

57 Code Civil [C Civ] Art 16-17 (Fr).

58 Embryonenschutzgesetz-ESchG [The Embryo Protection Act], Dec 13 1990, BGBL, 1 at 1762, §13c,13d,14b (Ger).

59 Surrogacy Arrangement Act 1985.

60 *Yamada v Union of India* (2008) 13 SCC 158 (India). Supreme Court of India held that the absence of legislation dealing with surrogacy implied that India did not prohibit commercial surrogacy. The Supreme Court further held in the case of *Union of India & Anor v Jan Balaz & Ors* in 2015 that commercial surrogacy was not recognised under Indian laws. The Assisted Reproductive Technologies (Regulations) Bill 2010 which was intended to regulate legal and medical aspects of surrogacy still languishes in the Parliament without being passed.

61 Fam Code Art 123 (United Kingdom).

62 Agreements for the Carriage of Fetuses (Approval of Agreement and Status of the New Born Child) Law, 5756-1996 (Hebrew).

63 Katarina Trimmings & Paul Beaumont, *International Surrogacy Arrangements: An Urgent Need for Legal Regulation at the International Level* (Hart Publishing 2011) 627, 633; Austin Caster, 'Note & Comment, Don't Split the Baby: How the U.S. Could Avoid Uncertainty and Unnecessary Litigation and Promote Equality by Emulating the British Surrogacy Law Regime' (2011) 10 Conn Pub Int LJ477, 507-511; Rutuja Pol, 'Law of Commercial International Surrogacy Agreements' (2017) 48 Geo J Int'l L 1309, 1329.

64 See 'Icelandic Couple Plan Return with Surrogate Baby' (*Iceland Review Online*, 21 Dec 2010) <icelandreview.com/news/icelandic_couple_plan_return_with_surrogate_baby/> accessed 20 August 2019.

65 The Citizenship Act, No. 57 of 1955 §4 (India); Kokusekiho [Nationality Law], Law No 147 of 1950, Art 2(1) (Japan).

Dr Yamada and his wife, Yuki, hired a surrogate in India to carry an embryo created from the husband's sperm and an egg from an anonymous donor. The couple subsequently divorced before the birth of the child. The terms of the surrogacy agreement provided that the intended father, Dr Yamada would retain sole custody of Manji in the event of a separation. When Manji was born, the Indian Government officials were perplexed as to who should be named as her mother. Manji had three potential mothers - the Indian surrogate, Yuki (Mrs. Yamada) and the anonymous donor. None of them wanted custody of the child. A birth certificate was consequently issued listing Dr Yamada as the father and without the name of the mother. Section 3 of the Citizenship Act, 1955 states that persons born in India after 2003 may only acquire Indian citizenship if at least one of her parents is an Indian citizen.[66] Under the circumstances, Manji could not acquire Indian citizenship because her biological and legally recognised father, Dr Yamada, was not an Indian citizen. Japan, on the other hand, did not have laws regulating surrogacy and recognised only gestational mother as the 'mother' of a child – in this case, the Indian surrogate. Further, Japanese laws dictated that any child born out of wedlock, could not be recognised as a Japanese citizen unless legally acknowledged by its father before its birth. Having failed to receive the necessary recognition from India or Japan, Manji became a stateless child.

Baby Manji remained in India under the care of her paternal grandmother after Dr Yamada returned to Japan. In August 2008, an Indian non-profit organisation, Satya, filed a writ of habeas corpus on the grounds that the grandmother did not have the legal authority to have custody of Manji. The Rajasthan High Court ordered that Manji be produced and the grandmother petitioned to the Indian Supreme Court. In September 2008, the Indian Supreme Court dismissed Satya's petition without a judgement on its merits. The Court then left Manji's rights to be protected and defended by The National Commission for Protection of Child Rights. It also ordered that the administrative process of obtaining travel documents be done upon the advice of the Solicitor General. The local passport office issued a temporary identity certificate to Manji to facilitate Manji's travel to Japan.

In another similar case, The Supreme Court of India again made an exemption to allow for surrogate born twins to leave India for 'home' with temporary travel documents. In the case of Jan Balaz, an Indian surrogate gave birth to twins for a German couple, Jan Balaz and Sussane Lohle in January 2008. Balaz's sperm and an anonymous donor's egg were employed to conceive the child. Birth certificates acknowledging Balaz and Lohle as the twins' legal parents and passports were initially issued. But the birth certificates were later amended to reflect the surrogate mother as the mother of the twins. Balaz was ordered by the High Court of Gujarat to surrender the passports for the twins on the grounds that the laws were silent on the issue of grant of passport for surrogate children and was required to apply for a certificate of identity.

Balaz surrendered the passport but petitioned the same for the return of the passports. The court note that surrogacy was prohibited in Germany and punishable with an imprisonment sentence of up to a maximum of three years. Nonetheless, the High Court of Gujarat considered the twin's rights as being paramount and issued the passports. The Government of

---

[66] S. 3(1) Citizenship Act 1955 reads -
…every person born in India, the time of his birth;
(c) on or after the commencement of the Citizenship (Amendment) Act, 2003, where—
(i) both of his parents are citizens of India; or
(ii) one of whose parents is a citizen of India and the other is not an illegal migrant at the time of his birth, shall be a citizen of India by birth.

India filed an appeal to the Supreme Court, challenging whether a surrogate mother could be considered a legal parent under the Citizenship Act 1955. The Court was reluctant to grant the twins Indian citizenship and handed the matter to the Central Adoption Resource Authority (CARA).[67] Although the CARA Guidelines did not provide for the adoption of children born through surrogacy, The Supreme Court directed CARA to provide an exemption, in this case, to allow for the children to be adopted by the intended parents.

Conversely in the United Kingdom, although the English courts require strict compliance with the statutory provisions, a common thread which can be seen in almost all of the decisions made by the English courts in handling cases of transnational gestational surrogacy, is the exercise of a great deal of discretion and flexibility. The decisions of the courts repeatedly indicate how this discretion is exercised in the best interest of the surrogate child. Commercial surrogacy is prohibited in the United Kingdom under the Surrogacy Arrangement Act 1985 and the Human Fertilisation and Embryology Act 2008 (hereinafter referred to as HFEA 2008). Rules governing the determination of legal parentage is provided in section 54(1) of the HFEA 2008. The HFEA 2008 also provides that a parental order may be issued if the provisions in sections 56 (6) and (8) are satisfied by the applicants.

In *Re W*,[68] the court had to decide if significant sums paid to the surrogate mother, which were made after the American surrogacy agent drafted an agreement, were disproportionate to reasonable expenses. Although it was conceded that payments other than for expenses reasonably incurred were unlawful in the state in which the surrogate lived, the judge ruled that the biological parents acted in good faith and were not aware of any difficulties until the issue was raised by their lawyers in this jurisdiction. The judge, therefore, authorised the payments under section 54 (8) of the HFEA 2008 and granted parental orders in favour of the biological parents.

In *Re X (A Child)*[69], a parental order was granted even though the six-month time limit for application of the order had expired. In another case, *Re F & M*[70], despite the concerns raised about the relationship of the applicants and whether it was, in fact, an enduring family relationship as required by section 54(2)(c) of the HFEA 2008 and the status and legality of the agreement entered into in Thailand, the court made parental orders in respect of both children. In the case of[71], a parental order was granted following an Indian surrogacy arrangement that took place 6 years earlier.

A trend which continues to be apparent in a majority of decisions of the English Family Court on the issue of citizenship of surrogate children is how the courts have placed the

---

67 CARA is a statutory body under the Ministry of Women & Children Development which regulates and oversees in-country and inter-country adoption. It is designated as the Central Authority to deal with inter-country adoptions under the provisions of The Hague Convention on Inter-Country Adoption, 1993 and ratified by Government of India in 2003. CARA primarily deals with adoption of orphan, abandoned and surrendered children through its associated or recognised adoption agencies.

68 *Re W* [2013] EWHC 3570 (Fam).

69 *Re X (A Child)* [2014] EWHC 3135 (Fam).

70 *Re F&M* [2016] EWHC 1594 (Fam).

71 *Re B* [2016] EWFC 77 (Fam).

interest of the child above the public policy considerations relating to the prohibition of commercial surrogacy.[72]

Laws Related to or Remotely Related to Surrogacy in Malaysia

The question of whether children born through surrogacy are entitled to enter Malaysia by virtue of Malaysian citizenship by descent is both complex and uncertain. To begin with, it must be noted that Malaysia is silent on surrogacy arrangements and its legality resulting in the absence of any form of legislation which directly refers to surrogacy in Malaysia. This is by and large because Malaysia has no legislation on surrogacy agreements and there are no reported cases on surrogacy. The ensuing paragraphs are devoted to the examination of legislation and decisions which may remotely relate to handling surrogacy arrangements.

All matters pertaining to the determination of citizenship of a person is provided in the Federal Constitution of Malaysia. Article 14 (1)(b) of the Federal Constitution states that subject to the provisions of this Part, every person born on or after Malaysia Day, and having any of the qualifications specified in Part II of the Second Schedule, which refers to persons born on or after Malaysia Day who are citizens by operation of law. Generally, Article 14(1)(b) of the Federal Constitution encapsulates the requirement of citizenship by *jus soli* that is, the place of birth; while paragraph 1(e) of Part II of the Second Schedule of the Federal Constitution which includes the words 'not born a citizen of any country 'encapsulates the requirement of citizenship by *jus sanguinis*, that is, by blood or lineage. Thus, it would appear that an applicant for citizenship in Malaysia would need to satisfy both the requirements of *jus soli* and *jus sanguinis*[73] in order to fulfil the requirements of Article 14(1)(b) and paragraph 1(e) of Part II, Second Schedule of the Federal Constitution. However, in the context of transnational gestational surrogacy, where a surrogate child is born in a country outside of Malaysia, the Malaysian intending or commissioning parent must establish paragraph 1(b) of Part II, Second Schedule of the Federal Constitution.[74] It must be noted that the phrase 'by

---

[72] In *Re L (A Minor)* [2010] EWHC (Fam) 3146, the Court remarked that "[the child's] welfare is no longer merely the court's first consideration but becomes its paramount consideration." The Court proceeds to state that "notwithstanding the paramountcy of welfare, the court should continue carefully to scrutinise applications for authorisation order under section 54(8) with a view to policing the public policy in *Re S*." In *Re S* [2009] EWHC (Fam) 2977, the Court identified the public policy considerations in deciding whether to grant a parental order – first, the exploitation of women who act as surrogates; second, to prevent the commercialisation of reproduction, and finally, to protect the interests of current and future children born through surrogacy.

[73] *Jus soli* and *jus sanguinis* were explained in the case of *Singh v Commonwealth of Australia* [2004] HCA 43, which was referred to in the case of *Chin Kooi Nah (suing on behalf of himself and as litigation representative to Chin Jia Nee, child) v Pendaftar Besar Kelahiran dan Kematian, Malaysia* [2016] 7 MLJ 717 at p 747 as follows:

> "By the late nineteenth century, international law recognised two well-established rules for acquiring nationality by birth: *jus soli* and *jus sanguinis* (The Australian Legal Dictionary (1997)) defines *jus soli* to mean: a right acquired by virtue of the soil or place of birth. Under this right, the nationality of a person is determined by the place of birth rather than parentage. Nationality is conferred by the state in which the birth takes place; and defines *jus sanguinis* to mean: a right of blood. A right acquired by virtue of lineage. Under this right, the nationality of a person is determined by the nationality of their parents, irrespective of the place of birth."

[74] 1. Subject to the provisions of Part III of this Constitution, the following persons born on or after Malaysia Day are citizens by operation of law, that is to say:

operation of law' requires the simple verification of facts in order to satisfy the requirements of any of the paragraphs in Article 14(1)(b) Part II Second Schedule of the Federal Constitution. There is no room under Article 14 of the Federal Constitution for the court to exercise any discretion or to consider any public policy when applying the wordings of Article 14(1)(b) Part II Second Schedule. Therefore the duty lies on the surrogate child to show that his intended father was a Malaysian citizen at the time of the child's birth.[75]

If, on the other hand, a child is born in Malaysia under a surrogacy arrangement for foreign intended parents, there is no clarity in the existing laws in Malaysia which would protect or provide rights to the surrogate child which encourages the smooth movement of the child to the country of its intended parents. It must be noted, however, that despite the existence of a plethora of cases decided by apex courts in Malaysia, it is still uncertain as to how these courts will deal with the issue of citizenship and statelessness involving a child born through surrogacy.

Another legislation which requires reference is the Registration of Adoption Act 1952 (hereinafter referred to as 'the Act'). The Act may be relevant in dealing with the registration of an adopted surrogate child in Malaysia. Upon returning to Malaysia with the child, the intended parent would need to apply for a *de facto* adoption under the Act. A preliminary point to be noted is that the Act does not make any reference to the adoption of a child born through surrogacy. Nevertheless, section 6(1) of the Act prescribes that the application for a *de facto* registration must be made under the following circumstances; first, when the child is under the age of eighteen years and has never been married; second, the child is in the custody, brought up, maintained and educated by any person, or by a couple, as his, her or their own child under any *de facto* adoption, and third, for a period of not less than two years continuously and immediately before the date of such application. The Act also requires the applicant and the child to appear before the Registrar and produce such evidence either oral or documentary as may satisfy the Registrar that the *de jure* adoption did take place. This essentially means that the applicants must prove the existence of a temporary visa, a valid travel passport, foreign adoption order or any other document issued by the country of birth which evidences before making the application. On successful application for the de facto adoption, the intended parent will be issued with a certificate of adoption and not a birth certificate. A certificate of adoption has the same validity as the birth certificate and can be used for the purpose of school registration, application for an identity card, application for a

(a) …;
(b) every person born outside the Federation whose father is at the time of the birth a citizen and either was born in the Federation or is at the time of the birth in the service of the Federation or of a State; and
(c)…;
(d)…;
(e) every person born within the Federation who is not born a citizen of any country otherwise than by virtue of this paragraph.

[75] In *Haja Mohideen MK Abdul Rahman & Ors v Menteri Dalam Negeri & Ors* [2007] 6CLJ 662 at 673, Kang Hwee Gee J (later JCA) explained that the applicant, in that case, was a citizen by operation of law pursuant to Article 14(1)(b) Part II Second Schedule (c) by literally applying the requirement of the paragraph. He remarked that "…there is in fact only one primary qualification in the true sense that an applicant must satisfy to qualify as a citizen of this country, that is to say, that his father must be a citizen when he was born."

passport and other official transactions. However, the issuance of a certificate of adoption does not entitle a child to citizenship.[76]

Current Developments in Malaysia and Final Remarks

In a recent article in The Sun,[77] Malaysian Health Minister, Datuk Seri Dr Dzulkefly Ahmad remarked that Malaysia has become one of the preferred destinations for couples from other countries to treat infertility and achieve pregnancy through in vitro fertilisation (IVF) and has a success rate of 30%. He added that at present, there were 52 private IVF centres nationwide, as well as four at public hospitals in Kedah, Kuala Lumpur, Likas and Terengganu. Approximately a year ago, the CEO of Malaysia Healthcare Travel Council (MHTC), declared that Malaysia aims to become a fertility and cardiology hub in Asia and that the Malaysian success rate in IVF procedure has been very comparable with other countries. She added that China's removal of the one-child policy has also opened up a huge opportunity for Malaysia. "We will target China, of course. In 2017, an average of 6,000 - 7,000 in-vitro fertilisation cycles were performed and we've estimated that it will increase to 20,000 cycles by 2020. This service was done at a fraction of the cost charged in other countries," she said.[78]

Over the past decade, the number of clinics offering fertility treatment for infertile couples has sharply increased. It is, however, unknown whether such clinics indulge in the practice of arranging an agreement between Malaysian surrogate mothers and local or foreign intended parents. As in-vitro fertilisation procedures have a strong link with surrogacy arrangements, it is probable that infertile intended parent may enter into arrangements to have their child carried by a surrogate, if the female spouse cannot carry and birth the child herself.

Considering the plans in place for the future of medical tourism in Malaysia, the absence of a legal stance on the legality of surrogacy and legislative measures when dealing with the issue of citizenship of a surrogate child will leave Malaysia in a vulnerable position. As a popular destination for IVF technology in the near future, the Malaysian parliament has the obligation to enact legislation to regulate surrogacy which includes procedural safeguards to reduce instances of statelessness. Parliament may also need to regulate IVF and medical aspects of surrogacy by setting out a uniform guideline.

Administratively, the Ministry of Home Affairs may need to issue new and strict visa regulations for those who travel to Malaysia for IVF purposes and surrogacy arrangements. Foreigners who visit Malaysia to receive IVF treatment must be issued a medical visa instead of a tourist visa. Whether or not Malaysia recognises surrogacy as valid in the future, it must become obligatory for the foreign couple to provide a letter from their respective embassies stating that their country recognises surrogacy and will permit the child to travel with its biological parents to their home country.

---

[76] *Lee Chin Pon & Anor v Registrar-General of Births and Deaths, Malaysia* [2010] (unreported).

[77] Dr Dzulkefly, 'Malaysia among Preferred Destinations for IVF' *The Sun* (Kuala Lumpur, 7 April 2019) <https://www.thesundaily.my/local/malaysia-among-preferred-destinations-for-ivf-dr-dzulkefly-MC765583> accessed 30 August 2019.

[78] Lydia Nathan, 'Medical Tourism Expected to Reach RM2.8b in Revenue by 2020' *The Malaysia Reserve* (Kuala Lumpur, 4 September 2018 <https://themalaysianreserve.com/2018/09/04/medical-tourism-expected-to-reach-rm2-8b-in-revenue-by-2020/> accessed 15 August 2019.

Further, domestic courts addressing the citizenship of surrogate children, in the near future, may consider the standard that has been adopted by the courts in the United Kingdom in resolving the issue in the best interest of the child. However, the courts must be mindful of the public policy considerations behind the prohibition of surrogacy but maintain the child's welfare as its paramount concern.

As a receiving country, Malaysia must make every effort to ensure that the surrogate child's rights are not violated and this includes the issuance of a temporary one-time-only travel certificate to ensure that the child is not forcibly separated from his parents. If Malaysia is unwilling or unable to confer citizenship, there is little which can be done as a burden then lies on the country of birth to ensure that the child does not remain stateless.

Conversely, if Malaysia is the country of birth, it may have little or no incentive in conferring citizenship on a surrogate-born child. Citizenship is usually conferred on the grounds of a genuine connection of existence between the child and his parents. This connection may not exist between the child and its surrogate mother when there had no plans for the child to remain and reside with her in the country of birth. Having obtained the financial benefits of permitting surrogacy while lacking regulatory measures would unfairly cause the surrogate child to become a stateless individual. Under these circumstances, Malaysia must take absolute responsibility in ensuring that the stranded child is united with his intended parents.