

HCMP 797/2021

[2022] HKCFI 747

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE
MISCELLANEOUS PROCEEDINGS NO 797 OF 2021

IN THE MATTER of a joint
application by T (“**1st Applicant**”)
and L (“**2nd Applicant**”)

and

IN THE MATTER of an application
under Section 12 of the Parent and
Child Ordinance (Cap 429)

and

IN THE MATTER of a minor named
B, a boy (“**Minor**”) born in October
2020

BETWEEN

T 1st Applicant

L 2nd Applicant

and

N 1st Respondent

R 2nd Respondent

The Minor (through his guardian
ad litem The Official Solicitor) 3rd Respondent

Before: Hon B Chu J in Chambers (Not Open to Public)

Date of Hearing: 2 December 2021

Date of Director of Immigration's Submissions: 20 January 2022

Date of Official Solicitor's Report: 25 February 2022

Date of Social Investigation Report: 28 February 2022

Date of Judgment: 16 March 2022

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A. *INTRODUCTION*

1. This is an application made by the applicants under section 12 the Parent and Child Ordinance, Cap 429 (“**PCO**”). The applicants (collectively “**Applicants**” or respectively “**1st Applicant**” and “**2nd Applicant**”) are seeking essentially a parental order, namely a declaration that the Minor B is to be regarded in law as the Applicants’ child.

2. B was born by a surrogate mother in the Republic of Georgia with the sperm of the 1st Applicant. B has since his birth remained in Georgia and is now about 17 months old.

3. The main issues in this application are (1) whether time should be extended under s 12(2) of the PCO as the originating summons was issued only on 8 June 2021, more than 6 months after B was born; (2) whether the requirement under section 12(3)(a) of the PCO should be dispensed with, or whether B's "home" was with the Applicants or either of them at the time of the issue of the originating summons and at the time of the order is made; and (3) whether the payments made by the Applicants for the surrogacy arrangements should be authorised and approved by the Court under s 12(7) of the PCO.

4. The respondents are the surrogate mother and her husband who live in Gerogia (they will be referred to herein collectively as "**Rs**" and respectively as the "**R1**" and "**R2**").

5. The originating summons was first fixed for a directions hearing before this Court on 14 July 2021 ("**1st Hearing**"). Counsel Ms Alison Choy appeared for the Applicants at the hearing and had raised procedural issues of (i) whether the Official Solicitor should be appointed to act for B; (ii) whether the Department of Justice, the Immigration Department and the Social Welfare Department should be served with the papers and/or joined; and (iii) whether a social investigation report should be called. In the originating summons, the Applicants had also applied for

interim custody, care and control of B and also leave to serve the papers out of jurisdiction.

6. The immediate concern this Court had at the 1st Hearing was whether the Court has any jurisdiction over B who had not been brought to Hong Kong and further the Applicants had not applied for any parental order, or an order for custody, care and control of B in Georgia to enable them to bring B into Hong Kong. The Court was informed that there were practical difficulties in obtaining any parental orders or custody orders in Georgia, but there was no legal opinion submitted. Further, it was submitted on behalf of the Applicants that they were applying for a *dispensation* with the requirements of PCO but no authorities were submitted as to why the Court has power to dispense with any requirements of the PCO. In the end, this Court declines to order any social investigation report as B had not yet been brought to Hong Kong and there were no submissions as to the purpose of calling for a social investigation report or the contents of the report or the extent of investigation. There were also no particular submissions as to why the Official Solicitor should or should not be directed to represent B.

7. As a result, at the 1st Hearing, this Court only gave leave for service to be effected on Rs outside jurisdiction and various other procedural matters including a direction for the originating summons be set down for a substantive hearing¹. The Court also directed that the Applicants to serve papers in these proceedings on the Director of Immigration.

¹ A:21-24

8. Rs were eventually served with the originating summons and all relevant documents and notified of these proceedings and they indicated in their respective acknowledgment of service that they would not contest these proceedings.

9. The substantive hearing was fixed on 2 December 2021 (“**2nd Hearing**”).

10. The originating summons and the accompanying documents were duly served on the Director of Immigration. Thereafter, there appeared to be communications between the Director and the Applicants’ solicitors. In a letter dated 13 August 2021², the Director had explained that he could not answer the Applicants’ invitation to attend before the High Court Registry to fix a hearing date for the substantive hearing as he had no knowledge of what information was required and he could not refer the case to the appropriate section. The Applicants did not seek any further directions and/or clarification from this Court, nor was this Court alerted of the Director’s response until the 2nd Hearing.

11. The Director did not appear at the 2nd Hearing. Thereafter on 22 December 2021, after the 2nd Hearing, I directed a further letter be sent to the Director requesting him to let the Court know whether he intended to intervene in these proceedings and to make submissions on policy issues. The Director’s response will be set out later in this judgment.

² D:631

12. As set out later, after the 2nd Hearing, this Court also directed that B be joined as a party to these proceedings and that B be separately be represented by the Official Solicitor who was also directed to lodge a report to this Court. The Court further directed a social investigation report (including an international social investigation report) be called for together with a suitability assessment report. The reasons for these directions will be explained later in this judgment.

B. BRIEF FACTUAL BACKGROUND

13. The factual background has been set out in the Applicants' Skeleton Submissions and also the various reports.

14. The 1st Applicant (aged 35) and the 2nd Applicant (aged 53) are both Hong Kong Permanent Residents. They married in Guam in 2018.

15. According to the Applicants, the 2nd Applicant was diagnosed with uterine fibroid and menorrhagia in mid 2016, after the Applicants got engaged. After a surgery to remove her uterus in 2016, the 2nd Applicant was unable to have children naturally.

16. The Applicants wanted to have their own children. As the 2nd Applicant was not able to, they decided to resort to the services of an egg donor.

17. In 2018, the Applicants were introduced to New Life Georgia, a surrogacy agency based in Georgia (“**Agency**”), through its Chinese

representative. They entered into amongst other things the first agreement with the Agency (“**1st Agency Agreement**”), so that the Agency could locate an egg donor and a surrogate mother.

18. In late 2018, the Applicants travelled to Tbilisi, Georgia, where the 1st Applicant underwent a sperm retrieval procedure, in order for his sperm to be retrieved and subsequently fused with the eggs of the then egg donor by way of in-vitro fertilisation (“**IVF**”).

19. Several fertilised eggs were formed with the 1st Applicant’s sperm and the egg donor’s eggs. They were later transferred to the uterus of a surrogate mother in June 2019. Unfortunately, the procedure did not result in any pregnancy.

20. In July 2019, the Applicants decided to undergo another set of procedure with a 2nd egg donor, and a 2nd surrogate mother, who is R1. The applicants entered into amongst other things a second agreement with the Agency (“**2nd Agency Agreement**”), following which the Applicants travelled to Tbilisi again in order for the TSH’s sperm to be retrieved.

21. Several fertilised eggs were then formed with TSH’s sperm and the 2nd egg donor’s eggs. An embryo transfer was performed in October 2019 to R1. Unfortunately, this second attempt did not result in pregnancy either.

22. Meanwhile, a tri-partite surrogacy agreement (“**Surrogacy Agreement**”) was entered into on 21 February 2020 among the Applicants (through their lawful attorney), R1 and the 2nd egg donor.

23. Another embryo transfer was done to R1 in February 2020, which finally resulted in R1’s pregnancy.

24. B was born in Georgia in October 2020. He was issued a birth certificate in Georgia on 28 December 2020 and the Applicants were stated thereon as his parents.

25. The 1st Applicant and B have undergone a DNA test in Georgia, which confirmed that there is a 99.9999% that the 1st Applicant is a biological father of B³.

26. According to the Applicants, it was only after B’s birth that the Applicants realised that B could not be brought to Hong Kong. It was the evidence of the 1st Applicant that he was specifically told by the Director that without a parental order, B being a non-Hong Kong resident would not be allowed entry at all.

27. Since his discharge from the hospital, B has been in the care of a pair of Georgian nannies, who are husband and wife (“**Nannies**”). The situation remains the same as at present.

³ B:255-269

C. *SURROGACY LAW: SECTION 12 OF THE PCO*

28. The PCO came into effect on 19 March 1993, although the commencement date for section 12 was 19 June 1993⁴. Section 12 provides as follows:-

“12. Parental orders in favour of gamete donors

(1) The court may make an order providing for a child to be regarded in law as the child of the parties to a marriage (referred to in this section as *the husband* and *the wife*) if—

(a) the child has been carried by a woman other than the wife as the result of the placing in her of an embryo or sperm and eggs or her artificial insemination;

(b) the gametes of the husband or the wife, or both, were used to bring about the creation of the embryo; and

(c) the conditions in subsections (2) to (7) are satisfied.

(2) The husband and the wife must apply for the order within 6 months of the birth of the child or, in the case of a child born before the commencement* of this section, within 6 months of such commencement.

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

(a) the child’s home must be with the husband and the wife or either of them; and

(b) the husband or wife, or both of them, must—

(i) be domiciled in Hong Kong;

(ii) have been habitually resident in Hong Kong throughout the immediately preceding period of 1 year; or

(iii) have a substantial connection with Hong Kong.

⁴ See footnote to section 12(2)

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- (4) At the time of the making of the order both the husband and the wife must have attained the age of 18 years.
- (5) The court must be satisfied that both the father of the child (including a person who is the father by virtue of section 10), where he is not the husband, and the woman who carried the child have freely, and with full understanding of what is involved, agreed unconditionally to the making of the order.
- (6) Subsection (5) does not require the agreement of a person who cannot be found or is incapable of giving agreement and the agreement of the woman who carried the child is ineffective for the purposes of that subsection if given by her less than 6 weeks after the child's birth.
- (7) The court must be satisfied that no money or other benefit (other than for expenses reasonably incurred) has been given or received by the husband or the wife for or in consideration of—
- (a) the making of the order;
- (b) any agreement required by subsection (5);
- (c) the handing over of the child to the husband and the wife; or
- (d) the making of any arrangements with a view to the making of the order, unless authorized or subsequently approved by the court.
- (8) Subsection (1)(a) applies whether the woman was in Hong Kong or elsewhere at the time of the placing in her of the embryo or the sperm and eggs or her artificial insemination.
- (9) Where an order is made under subsection (1), the Registrar of the court shall notify the Registrar of Births and Deaths, in such manner as may be prescribed, of the making of that order.
- [cf. 1990 c. 37 s. 30 U.K.]

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29. Section 12 of the PCO was modelled on section 30 of the then Human Fertilisation and Embryology Act 1990 in England (“**1990 Act**”). However, the underlined words in section 12(3)(a) “or either of them” and in section 12(7)(d) “or subsequently approved” do not appear in section 30 of the 1990 Act. Section 30 has now found its way into section 54 (for an application made by two persons) of the Human Fertilisation and Embryology Act 2008 (“**2008 Act**”). There is also a section 54A added in the 2008 Act for an application made by one person. Notwithstanding, the above underlined words in section 12 of our PCO do not appear in section 54 of the 2008 Act.

30. In short, our section 12(3)(a) is differently worded from section 30(3)(a) of the 1990 Act, in that section 30(3)(a) provides that, “the child’s home must be with the husband and the wife”, rather with either of them. Further, after section 30 of the 1990 Act became section 54 of the 2008 Act, section 54(4)(a) of the 2008 Act provides that “the child’s home must be with the applicants”, and section 54A(3)(a) provides that, in an application by one person “the child’s home must be with the applicant”.

31. There is no information in the *Legislative Council Brief for the Parent and Child Bill* dated 3 June 1992, or in the *Official Record of Proceedings of the Legislative Council* dated 24 June 1992, which can shed light as to why the Hong Kong section 12 (3)(a) is differently worded from section 30(4)(a) of the 1990 Act. In any event, I have not been referred to any information which will assist in explaining why our section 12(3)(a) is differently worded.

32. Ms Choy has referred this Court to the observation made by the Court of Appeal in *DD v LKW* [2008] 2 HKLRD 523, that when the Hong Kong statutory provisions are almost identical to the English counterpart, and when there is no discernible economic context of the these two places, the English approach to the interpretation of the relevant provisions should be followed in Hong Kong⁵. Ms Choy has submitted that as our section 12 is modelled on the English provision, the UK approach in interpreting the English provision should be followed in Hong Kong.

33. This has in fact been the approach adopted by Queeny Au-Yeung J in *FH v WB* [2019] HKCFI 1748, HCMP 1313/2018, 15.07.19⁶ namely that as the Hong Kong provision and the English provision have almost identical wording and there is no discernable difference in the social and economic context between UK and Hong Kong, the UK approach in the interpretation of section 12 of the PCO should be followed in Hong Kong. I follow such approach.

34. Ms Choy has referred the Court to *In re Z (Children) (Foreign Surrogacy: Allocation of Work, Guidance on Parental Order Reports (FC))* [2017] 4 WLR 5 (referred in this judgment simply as *In re Z (Children) (Foreign Surrogacy)*), which is not to be confused with another recent English case *Re Z (Parental Order: Child's Home)* which will be referred to later in this judgment.

⁵ At paras 65, 88, 94

⁶ See paragraph 60, *FH v WB*

35. In *In re Z (Children) (Foreign Surrogacy)*, applications were made by the commissioning father and his wife, both British citizens domiciled in England, for parental orders under s 54 of 2008 Act in respect of twin girls born to a gestational surrogate in India as a result of IVF following a commercial surrogacy agreement entered into between the surrogate and the commissioning father and his wife. The twins remained effectively stranded in India because of an inordinate delay in the issue of their travel documents and did not travel to the UK with the commissioning parents until May 2015, by which time they were just over a year old.

36. In his judgment, Russell J had set out an overview of the law in relation to applications of parental orders⁷ and further set out guidance on allocation of work and on parental order reports (“**Guidance**”)⁸. The Guidance was approved by Sir James Munby P, the then President of the Family Division. I understand that the Guidance has remained in force and in any event, my attention has not been drawn to any further update or amendment of the Guidance.

37. With what was set out by Russell J in mind, I will endeavor to also provide a brief summary of the law in relation to the applications under section 12 for parental orders, with reference to our own statutory provisions and the currently available decisions on surrogacy in Hong Kong as follows:

- (1) Parental Orders are a creature of statute and can only be made by the court by virtue of the statutory law, and applicants must

⁷ At paras 52 – 70, *In re Z (Children) (Foreign Surrogacy)*

⁸ See paras 8-9, 71-88

comply with the provisions of section 12 of PCO and follow the procedural rules⁹.

- (2) The child’s best interests and/or welfare must be the court’s paramount consideration¹⁰. Although this is not specified in our statutory provisions, it has been held by Au-Yeung J in *FH v WB*, *supra*, the welfare/best interests principle applies to applications for parental orders¹¹. I would also add that, as is parallel with adoption law, of paramount consideration is the child’s welfare/best interests “*throughout [the child’s] lifetime*”, that is the welfare of the child has to be considered from a lifelong perspective rather than just through childhood¹². In Hong Kong, there is no statutory provision in relation to any welfare checklist but the “Adoption Checklist”¹³ has been referred to in this court’s decision *Director of Social Welfare v YPC* [2020] 5 HKLRD 233, HCMP 705/2020¹⁴, and further in *S v T* [2021] HKCFI 2854, HCMP 461/2021, 23.09.21. I am of the view that in considering the welfare/best interests of a child in an application under section 12 for a parental order, the courts in Hong Kong should have regard to the Adoption Checklist as an *aide memoire*¹⁵.

⁹ At para 52, *per* Russell J, *In re Z (Children) (Foreign Surrogacy)*

¹⁰ See para 52, *supra*; in Hong Kong, the welfare principle has been replaced by the best interests principle since 2012: see section 3 of Guardianship of Minors Ordinance, Cap 13 but for all intents and purposes, “welfare” and “best interests” are synonymous: *Rayden and Jackson on Divorce and Family Matters*, 18 ed chapter 36.14, 36/11

¹¹ See Section D, paragraphs 59-60, *FH v WB*

¹² At paras 52, and 61, *In re Z (Children) (Foreign Surrogacy)*

¹³ The “Adoption Checklist” was based on section 1 of the Adoption and Children Act 2002; see Column 2 in Schedule 1 of The Human Fertilisation and Embryology (Parental Orders) Regulations 2010, which accompany the 2008 Act, and which applies the adoption welfare checklist to applications for parental orders

¹⁴ At paras 69-75

¹⁵ See para 32

- (3) Before granting a parental order, the court must be satisfied that all the relevant conditions in section 12 of PCO have been met and the approach to an application for a parental order requires a similar degree of case and caution as that to an application for adoption. The requirements for the making of a parental order should not and cannot be dispensed with¹⁶.
- (4) The preliminary conditions for making an application for a parental order are set out in sections 12 (1) to (4) of PCO.
- (5) The provisions of section 12(1) require that the applicants *are parties to a marriage, namely husband and wife*, and as held by Au-Yeung J in *S v J (Surrogacy: Wardship)*, [2017] 5 HKLRD 129, HCMP 1857/2016¹⁷, a single applicant is incompetent to make an application for a parental order. Under section 12(1)(b), the gametes of either the husband or the wife, or both, have to be used to bring about the creation of the embryo. Under section 12(8), the woman carrying the child (the gestational surrogate) does not need to be in Hong Kong at the time of the placing in her of the embryo or the sperm and eggs or her artificial insemination.
- (6) Section 12 (2) provides that the application must be made during the period of 6 months beginning with the day on which the child is born. As said by Russell J in *In re Z (Children)(Foreign Surrogacy)*, there are limited circumstances in which a court can consider an application issued after a period of 6 months referring to the decision of Sir James Munby P, the then President of the Family Division in

¹⁶ See para 53, per Russell J, *supra*

¹⁷ See Holding (1)

Re X (A Child)(Parental Order: Time Limit) [2015] Fam 186¹⁸. In *FH v WB*, Au-Yeung J has also referred to *Re X* and noted that the then President had held to construe the time limit as barring forever an application made beyond 6 months could not have been intended by Parliament as it would be too draconian, but having said this, Au-Yeung J pointed out that the then President was careful to say that he intended to lay down no principle beyond that which appeared from the authorities and that his decision was limited to the facts of that case¹⁹. Subsequently, it has been held by Au-Yeung J in *Re A & B (Parental Order: s 12 Parent and Child Ordinance, Cap 429)* [2019] 5 HKLRD 366, HCMP 1571/2018 amongst other things that the court has power to extend the time having regard to the welfare principle and principles of statutory interpretation and that the court will consider a basket of factors including the length of the delay, the explanation for the delay, the merits of the application and the prejudice that may be caused if no parental order is granted, and these factors will be considered in the light of the welfare of the child as the first and paramount consideration of the court²⁰.

- (7) The applicants must satisfy the jurisdictional requirements in section 12(3) and in particular under section 12(3)(a), the child's home must be with the husband and the wife or either of them at the time of the application and at the time of the making of the order. As set out later in this judgment, it has been held by Mrs Justice Knowles in *Re Z (Parental Order:*

¹⁸ Para 56 per Russell J, *supra*

¹⁹ At paras 63-83, *FH v WB*

²⁰ At paragraphs 25 and 26, *Re A & B*

Child's Home) [2021] EWHC 29 (Fam) that the concept of "home" may be construed flexibly and the term "home" must be given a wide and purposive interpretation²¹.

(8) Both the husband and the wife must be 18 years old at the time of the making of the order under section 12(4). The wording means that they or either of them may themselves be a minor at the time of the surrogacy arrangement or at the time of the application provided all the other conditions are satisfied, and that by the time of the order being made, they have both reached the age of majority.

(9) Under the provisions of sections 12 (5) and (6) of PCO, the court must be satisfied that both (i) the *father* of the child (including a person who is the father as defined in section 10 of the PCO) and (ii) the woman who carried the child (gestational surrogate) have freely, and with full understanding of what is involved, agreed unconditionally to the making of the order, and that the agreement of the woman who carried the child is *ineffective if given by her less than 6 weeks after the child's birth* [these provisions are to be compared with section 54(6) of the 2008 Act where the person whose agreement/consent is essential is not confined to a "father", but any other person who is "a parent" of the child and who is not one of the applicants, which may include the female civil partner of the gestational surrogate²²].

(10) Under section 12(7), the court has the power to authorize, or subsequently approve, payments/benefits (other than for

²¹ See paragraphs 28-31, *Re Z (Parental Order: Child's Home)*

²² See para 58, *In re Z (Children) (Foreign Surrogacy)*

expenses reasonably incurred) which have been given or received by the husband or the wife for or in consideration of (a) to (d) set out thereunder and this is notwithstanding that commercial surrogacy is not lawful in Hong Kong, as the child is born outside jurisdiction²³. In *Re LH & LW (Expenses for Intended Surrogacy)* [2021] 3 HKLRD 707, Au-Yeung J declined to give prior authorization of expenses, whether reasonable or non-reasonable, to be incurred under a commercial surrogacy arrangement, as although the applicants were acting in good faith and free from moral taint, their intended agreement with the surrogacy agency was a commercial surrogacy arrangement in breach of section 17 of Human Reproduction Technology Ordinance, Cap 561 (“**HRTO**”). [Note: section 54(8) of the 2008 Act is differently worded from our section 12 (7) and has no reference to subsequent approval; but this did not seem to have deterred the English Courts from making such retrospective approval orders²⁴];.

- (11) The need for the court to consider issues of public policy extends to welfare/best interests of a child and to ensure that commercial surrogacy agreements entered into overseas are not used to circumvent childcare laws in Hong Kong, resulting in the approval of arrangements in favour of people who would not have been approved as parents on welfare/best interests grounds under any set of existing law such as adoption for example if the age of the commissioning parents would have

²³ See para 60, per Russell J, *In re Z (Children) (Foreign Surrogacy)*

²⁴ See amongst others, *in re A and Y (Parental Order: Retrospective Authorisation of Payments)* [2011] EWHC 3147 (Fam); [2012] 1 FLR 1347 cited by Russell J in paragraph 63 in *In re Z, supra*

excluded them as potential adopters and/or they have previously been turned down for adoption²⁵. The court must take care not to be involved in anything that looks like payment for buying children overseas²⁶. The court cannot be a party to any arrangements which give effect to or sanction commercial surrogacy agreements even if they are legal in the country in which the surrogacy agreement was entered into and where birth took place.

(12) In Hong Kong, it has been said by Au-Yeung J in *Re A & B*, a parental order will be granted except in the clearest case of abuse of public policy²⁷.

(13) Finally, upon a parental order being made, the Registrar of the court has to notify the Registrar of Births and Deaths under section 12(9).

38. The above is a brief summary of section 12 of PCO. I will also set out hereinafter some procedural matters.

²⁵ At para 64, per Russell J, *In re Z (Children) (Foreign Surrogacy)*

²⁶ At para 62, *In re Z (Children) (Foreign Surrogacy)*, Russell J citing Hedley J in *In re L (A Child) (Parental Order: Foreign Surrogacy)* [2010] EWHC 3146 (Fam); [2011] Fam 106

²⁷ At para 25(1)

*D. THE PROCEDURE FOR AN APPLICATION UNDER
SECTION 12 OF THE PCO*

D.1 Generally

39. In England & Wales, the Human Fertilisation and Embryology (Parental Orders) Regulations 2010 which accompany the 2008 Act came into force in April 2010 (“**2010 Regulations**”) and the Family Procedure Rules 2010 (“**FPR 2010**”) came into force on 6 April 2011. Part 13 of the FPR 2010 and Part 12 (as applied under Rule 13.2) set out the procedure for applications under section 54 of the 2008 Act.

40. In Hong Kong, section 18(1)(a) of the PCO provides that the Chief Justice may make rules providing for the practice and procedure to be applied in any application under section 6 or 12 of the PCO. So far as this Court is aware, no specific procedural rules have been made pursuant to section 18(1)(a) for applications under section 12 of PCO.

41. An application for a parental order under section 12 of PCO may be commenced in the District Court or the High Court. If the application is commenced in the District Court (Family Court), the Rules of the District Court, Cap 336H (RDC) shall apply, with necessary modifications, and if the application is commenced in the High Court, the Rules of the High Court Cap 4A (RHC) shall apply, with necessary modifications. In particular, under our rules, leave is required for service out of jurisdiction and leave is also required for adducing expert evidence.

42. Although there are currently no specific procedural rules for applications under section 12 of PCO, as seen in the Final Report in May 2015 of the Judiciary's Review of the Family Procedure Rules, one of the recommendations is that, subject to the reservation as set out about the use of practice directions in the Interim Report (in August 2014), and subject to any amendments/updates to be adopted only if applicable to Hong Kong and with necessary modifications, the FPR 2010 should be adopted as the broad, basic framework for the new Family Procedure Rules in Hong Kong.

43. In light of the above, and subject to our RDC/RHC, the procedural approach in the FPR 2010 may also be of guidance to applications under section 12 in Hong Kong.

D.2 Where to commence the application

44. Under section 2 of the PCO, the "court" means the High Court or the District Court. There is no stipulation that an application under section 12 of the PCO has to be commenced in the High Court, and the District Court has concurrent jurisdiction under section 12 to make a parental order, subject to its discretion to transfer the application to the High Court under section 16 as set out below.

45. Section 16 of the PCO provides that, where an application under section 6 or 12 is made to the District Court, the District Court (a) may, if it considers that the case is one which for any reason ought to be dealt with by the High Court; or (b) shall, if so ordered by the High Court, transfer the matter to the High Court.

46. The 1st case involving an application for a parental order under section 12 of PCO was *Re D (Parental Order: s 12 Parent and Child Ordinance, Cap 429)* [2015] 1 HKLRD 229, DCMP 60/2014, and the application was commenced in the Family Court of the District Court. As seen in the decision of 7 October 2014 made by the then Deputy Judge Ivan Wong, the application was transferred by him up to the Court of First Instance of the High Court under section 16 of PCO having regard to the novelty of issues and special complexity involved in the case, one of which was whether the payments made by the applicants should be approved by the court under section 12(7). Since the transfer decision in *Re D*, so far as this Court is aware, all applications for parental orders under section 12 of PCO have been commenced in the High Court.

47. As said by Russell J in paragraph 71 of *In re Z (Children) (Foreign Surrogacy)*, parental order applications of overseas surrogacy or those with an international element, particular those where the children were born outside the jurisdiction as a result of a surrogacy agreement whether it was commercial or not invariably involve some legal complexity. It can also be seen in that case that there was a delay in the case being allocated to a specialist High Court judge and this had contributed to the delay in the resolution of the difficulties faced by the children and the applicants in the case²⁸. This led to Russell J in issuing the Guidance including a direction that all proceedings pursuant to section 54 of the 2008 Act where the child's

²⁸ At para 7

place of birth was outside of England and Wales should be allocated to be heard by a judge of the Family Division of the High Court.

48. Having considered the above, I am of the view that it is appropriate for applications for parental orders under section 12 of PCO involving foreign surrogacy and/or where the subject child was born outside Hong Kong to be commenced in the High Court.

49. It is noted that there had been cases concerning applications for parental orders under section 12 where the subject child was also made a ward of the High Court under section 26 of the High Court Ordinance, Cap 4²⁹. Upon a child being made a ward, any application concerning that child will usually be made in the High Court under the wardship proceedings, unless otherwise directed by the wardship judge, and this would include any application for a parental order in respect of that child under section 12 of the PCO.

50. It is not a requirement that the subject child in an application under section 12 of the PCO be made a ward. Further, the High Court may decline to exercise wardship jurisdiction over a child where there is no good reason for the child to be made a ward, and/or where there is a lack of jurisdiction over the child. Whether to make the subject child a ward will depend on the circumstances of each case.

²⁹ Eg *S v J*, and *S v T*

D.3 Mode of application

51. Under PD 15.12, applications under the PCO fall under the definition of “Family Proceedings” in paragraph 4 thereof. Under paragraph 13 of PD 15.12, the appropriate mode of beginning any Family Proceedings should be by way of originating summons, in the expedited form, ie Form No 10 in Appendix A, or if applicable, in the *ex parte* form, ie Form No 11 in Appendix A, unless otherwise directed by the Court. Hence, subject to any rules or practice directions otherwise, this is currently the appropriate mode of beginning an application under section 12 of the PCO.

52. Paragraph 14 of PD 15.12 states that where the mode of beginning of Family Proceedings is by way of originating summons, and that notwithstanding Order 7, rule 2(2) of the RHC/RDC, the parties are called “applicant” and “respondent” instead of “plaintiff” and “defendant”.

D.4 Parties to the application

53. Under section 12(2) of PCO, the applicants for a parental order are the husband and the wife, being the parties to a marriage.

54. Part 13.3 of the FPR 2010 sets out who should be the respondents to an application for a parental order which include the woman who carried the child (Part 13.3(2)(a) and “the other parent” if any (Part 13.3(2)(b))³⁰, any person in whose favour there is provision for contact (Part

³⁰ “the other parent” is defined in Part 13.1(2)

13.3(2)(c)), and any other person or body with parental responsibility for the child at the date of the application (Part 13.3(2)(d)). Under Part 13.4, the court may also at any time direct that any other person or body made a respondent to the proceedings or a respondent be removed from the proceedings.

55. Under the above provisions of Part 13, the woman who carried the child (the gestational surrogate) and her husband, if she was married at the time of the surrogacy, have to be made respondents in the application. In *FH v WB*, it was suggested to the court that as there are no such statutory provisions in Hong Kong, it may not be necessary to join the gestational surrogate and her husband. Au-Yeung J rejected such submission and held that the default position should be the same as that under the provisions of the FPR 2010 and that the gestational surrogate and her husband must be made parties to the proceedings but the court may be flexible in terms of dispensation with service or removal of respondents in an appropriate case. This issue arose again in *Re A & B*, and although Au-Yeung J maintained the view that that the gestational surrogate should be made a party in the application, she opined that the husband of the surrogate mother may stand in a different position in that in a case, such as *Re A & B*, where the gestational surrogate kept the surrogacy arrangements secret from her husband. However, Au-Yeung J was of the view that it would only be in the clearest cases where the husband was not aware of and had not consented to the surrogacy that he need not be joined or served³¹.

³¹ See paras 82 and 83, *Re A & B*

D.5 The applicants' supporting evidence

56. The originating summons procedure is set out in Order 28 of RHC /RDC and the applicants must follow these procedural rules, which includes filing with the court the affidavit evidence they intend to rely under Order 28 rule 1A of RHC/RDC within the time stipulated.

57. As set out by Au-Yeung J in *Re A & B*, the applicants should make full and frank disclosure of facts surrounding the surrogacy arrangement³². As seen in *In re Z (Children)(Foreign Surrogacy)*, the applicants are required to file evidence with the relevant documentation exhibited setting out in detail their case, to include the background of the surrogacy arrangement and of the surrogate mother and her husband, wife or partner, where and how the treatment took place³³.

58. As for expenses, as said by Au-Yeung J³⁴, it is not sufficient for the applicants to state the expenses in the form of a lump sum. They should give a breakdown of the expenses eg the medical check-up fees, hospital expenses, foreign legal fees, counselling fees, insurance, loss of income of the gestational surrogate, accommodation, travelling expenses etc. Documentary evidence of the expenses should be produced.

³² At para 80, *Re A & B*

³³ See para 54, per Russell J, *supra*, in line with the English provisions

³⁴ At para 85, *Re A & B*, see also para 123 of *FH v WB*

D.6 *The social investigation report (and if appropriate, an international investigation report)*

59. In UK, the parental order report is prepared by a “parental order reporter”. Under Part 13 of the FPR 2010, upon an application being made for a parent order, the court will appoint a “parental order reporter” and will fix a timetable for the filing of amongst other things any report from a parental order reporter, and the court will consider amongst other things whether to give a direction that a confidential report of the parental order reporter to be disclosed to each party to the proceedings.

60. A parental order reporter is defined in Rule 13.1(2) of Part 13 to mean:

‘parental order reporter’ means an officer of the service or a Welsh family proceedings officer appointed to act on behalf of a child who is the subject of parental order proceedings;’

61. The powers and duties of the “parental order reporter” are set out in rule 16.35 of Part 16 of the FPR 2010 and reproduced in paragraph 84 of *In re Z (Children) (Foreign Surrogacy)*. As seen in rule 16.35(1), the parental order reporter is to act on behalf of the child upon the hearing of any application in proceedings to which Part 13 applies with the duty of safeguarding the interests of the child. Rule 16.35(2) further provides that-

“(2) The parental order reporter must –

(a) investigate in the case of a parental order under-

(i) section 54(1) of the 2008 Act, the matters set out in section 54(1) to (8) of that Act;

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(ii) section 54A(1) of the 2008 Act, the matters set out in section 54A(1) to (7) of that Act.

(b) so far as the parental order reporter considers necessary, investigate any matter contained in the application form or other matter which appears relevant to the making of the parental order; and

(c) advise the court on whether there is any reason under section 1 of the 2002 Act (as applied with modifications by the Human Fertilisation and Embryology (Parental Orders) Regulations 2018) to refuse the parental order.

(3) The parental order reporter must also provide the court with such other assistance as it may require.

(4) The parental order reporter's duties must be exercised in accordance with Practice Direction 16A.

(5) A report to the court by the parental order reporter is confidential.”

62. As set out in the Guidance issued by Russell J, it is a matter for CAFCASS (Children and Family Court Advisory and Support Service) to allocate the case to the relevant officer to act as parental order reporter, subject to their own guidance and the Guidance set out by Russell J³⁵. The parental order reporter is part of CAFCASS.

63. Au-Yeung J has held in *FH v WB* the welfare/best interests principle does apply to the interpretation of section 12 by reason that section 12 specifically deals with an application where the subject is a child and she has further set out the following 3 reasons in support of her holding³⁶:

³⁵ At para 73

³⁶ At para 51

- (1) S 3(1) of the Guardianship of Minors Ordinance, Cap 13 (“**GMO**”) requires the court to take into account the welfare principle;
- (2) Article 3 of the Convention on the Rights of the Child (“**CRC**”) requires the best interests of the child to be taken into account in all actions concerning children; and
- (3) S 12 PCO is drafted in materially similar terms as the UK counterpart and the authorities in the UK do regard welfare of a child as the paramount consideration.

64. Further, in *Re A & B*, Au-Yeung J has said that in the interests of the child, the court would not rubber stamp an application for parent orders and that the court will adopt an inquisitorial role to investigate the circumstances before giving the parental order³⁷.

65. In particular, section 3(1)(a)(i)(B) of GMO requires the court in considering the best interests of the child to give due consideration to amongst other things any material information including any report of the Director of Social Welfare available to the court at the hearing.

66. Although currently there are no statutory provisions in Hong Kong for a parental order reporter to be appointed or for the calling of a “parental order report” in respect of a child subject of a section 12 application, to assist the courts in adopting an inquisitorial role in considering the subject child’s best interests/welfare, I am of the view that

³⁷ At para 80, *Re A & B*

the High Court has jurisdiction, whether inherent or otherwise, to call for an investigation report which is akin to a “parental order report” from the Director of Social Welfare. As has been said, the social work officer is the court’s “eyes and ears”, and such a report would provide independent investigation on the applicants’ case. This is in particular important when the respondents in these applications, namely the gestational surrogate and her husband, often reside in a foreign jurisdiction and do not oppose the applications and/or do not even participate in the proceedings and the courts only hear from one side, namely the applicants.

67. In *S v T*, this Court had called for a social investigation report in that case, although in that case the jurisdiction of the court was not questioned as the subject child was present in Hong Kong and was made a ward of the court. The powers and duties of the parental order reporter in Rule 16.35 of Part 16 of the FPR 2010 were not drawn to my attention in that case. In the circumstances, this Court did not specify any matters into which the social work officer should investigate.

68. Having now considered the English provisions, I am of the view they may serve as a guidance as to the contents of the social investigation report which should be called for in applications for parental orders in Hong Kong. In short, as set out in Rule 16.35 (2) of Part 16 of the FPR 2010 and to put this in the Hong Kong context, a social work officer in preparing an investigation report for the purpose of an application for parental order under section 12 of PCO should in my view investigate, all the circumstances of the case including:

- (i) matters set out in section 12(1) to (7) of PCO;
- (ii) so far as the reporter considers necessary, any matter contained in the applicants' supporting affidavits or other matter which appears relevant to the making of the parental order;
- (iii) whether there is any reason under the Adoption Checklist factors (as applied to section 12 applications) to refuse the parental order;
- (iv) matters which are normally investigated in a "Suitability Assessment Report" including whether the applicants have any criminal records.

69. Further, in line with paragraph 10.1 of the UK Practice Direction 16A, the social work officer may, in particular –

- (a) contact or seek to interview such persons as the social work officer thinks appropriate or as the court directs; and
- (b) obtain such professional assistance as is available which the social work officer reporter thinks appropriate or which the court directs be obtained.

70. The social work officer preparing the investigation report may find the practice guidelines and fact-sheets published on the CAFCASS website of assistance.

71. Under the FPR 2010, the parental order report is confidential. Under Rule 13.12 under Part 13, the court will consider whether to give a direction that a confidential report of the parental order reporter be disclosed

to each party to the proceedings and before giving such a direction, the court will consider whether any information should be deleted. I see no reason why this practice should not be followed in the case of an investigation report called for in section 12 parental order proceedings.

72. In *In re Z (Children) (Foreign Surrogacy)*, the role of the CAFCASS officer/CAFCASS Cymru/parental order reporter and the extent and nature of their investigations was one issue that Russell J had specifically sought assistance upon from CAFCASS Legal, *in particular whether it was necessary for the child or children who are subjects of applications for parental orders under section 54 of the 2008 Act to be seen by the parental order reporter for the welfare report to be properly prepared.*

73. Having heard from the representative from CADCASS Legal, and having considered the practice of parental order reporters in general and their practice guidance and the fact-sheets they published for applicants in parental order proceedings, it was the view and guidance of Russell J that *the parental order reporter's investigation in any case must include the child being seen with the applicants unless there are compelling and exceptional reasons based on the child's welfare why such observations cannot take place or where there is sufficient independent evidence pertaining to the child's welfare from an alternative source*³⁸.

74. Russell J had gone on to say that the judgment of Theis J in *In re A (Foreign Surrogacy: South Africa)* [2015] EWHC 1756; [2015] Fam

³⁸ At para 86, per Russell J

Law 1051 is one reported case where the court, *exceptionally*, was able to accept the parental order reporter's recommendations when he did not see the child with the applicants, and although he had not seen the child he had the benefit of a comprehensive independent report from a South African social worker on which both he and the court could rely³⁹.

D.7 Foreign law expert report

75. Au-Yeung J has held in *Re A & B*, that where the surrogacy arrangement and/or birth took place outside Hong Kong, expert evidence should be adduced to show, at least, whether or not surrogacy is permitted in that foreign jurisdiction, how the law defines the legal relationship amongst the surrogate mother, her husband, the child and the commissioning parents. As said by Au-Yeung J, this would assist the court on the issue of whether there has been abuse of public policy⁴⁰. I agree.

D.8 Whether the child should be separately represented

76. In *S v J*, the Official Solicitor was not directed to represent the subject children but was present at the hearing before Au-Yeung J as an *amicus* to assist the Court. In *FH and MH*, the Official Solicitor was appointed to be the guardian ad litem for the twins who were made respectively the 3rd and the 4th respondents in that case, as well as the gestational surrogate and her husband who were the 1st and 2nd respondents. In *Re A v B*, Au-Yeung J directed that the Official Solicitor be served as well

³⁹ At para 87

⁴⁰ See para 85

as the gestational surrogate. The Official Solicitor had appeared in the 2nd hearing in that case and had provided assistance to the Court.

77. As set out in paragraph 13 of *PDSL 6: Guidance on Separate Representation for Children in Matrimonial and Family Proceedings*, whether the subject child needs to be separately represented should be decided by the judge on a case by case basis and where the circumstances justify it.

78. In *AB v CD and the Children (Foreign Surrogacy: Children out of the Jurisdiction)* [2019] EWFC 22 (Fam), Theis J was of the view that due to unusual history of that case and the fact that it was likely the children would remain abroad the children were joined as parties, and that the parental order reporter became the “Children’s Guardian”⁴¹.

D.9 Whether the Director of Immigration should be served or notified and/or joined

79. As seen in *In re Z (Children) (Foreign Surrogacy)*, an issue had arisen earlier in those proceedings as to whether the court should make a parental order which would have had the effect of conferring British citizenship allowing the children to travel to the UK as British citizens⁴². As Russell J had said, applications for parental orders could not be used to circumvent immigration law, citing Munby J, as he then was, at paragraph 53 of *In re A (Care Proceedings: Asylum Seekers)* [2003] EWHC 1086

⁴¹ As defined in the FPR 2010

⁴² At para 95

(Fam); [2003] 2 FLR 921. Russell J had pointed out that although it is established practice in adoption applications with international elements for the court to notify the Home Office and asks whether it wishes to intervene, it is not always necessary to do so in applications for parental order applications nor is it required by Part 13 of FPR 2010. However, on the facts of the case, notification and/or invitation should have been given to the Home Office, the passport office and the Foreign and Commonwealth Office at the first opportunity after it had become apparent that there were difficulties in the children leaving India⁴³.

80. In *S v J*, the Director of Immigration had intervened in the proceedings and was represented by Mr Todd, Counsel instructed by the Department of Justice acting on behalf of the Director of Immigration. As set out therein, the Director had asked for DNA paternity test reports to show the genetic relationship between the husband and the children and the probabilities of the husband being genetically related were found to be over 99.99% for each child. The Director considered that the children in that case, who had been brought into Hong Kong on visitor visas, fell within Article 24 (3) of the Basic Law and paragraph 2 (c) of Schedule 1 to the Immigration Ordinance, Cap 115, namely a person born outside Hong Kong of the husband who at the time of birth of the children was a Chinese citizen, and the children were issued permanent identity cards by the Immigration Department. As seen in *S v J*, the Director had provided helpful input and assistance to the Court.

⁴³ Per Russell J, at paragraph 97

81. Whether the Director of Immigration should be invited to intervene will depend on the circumstances of each case.

82. With the above in mind, I turn to the present application.

E. THE REPORTS

E.1 Submissions on behalf of the Director of Immigration

83. As there appeared from the Applicants' evidence at the 1st Hearing that there were problems in B leaving Georgia and entering Hong Kong, I had directed that the papers in these proceedings be served on the Director of Immigration. However, as no one had made clear to the Director as to why he was served with the papers, the Director did not indicate any stance or attend the 2nd Hearing.

84. Having considered what was said by Russell J in *In re Z (Children) (Foreign Surrogacy)* mentioned earlier, after the 2nd Hearing, I directed a further letter be sent to the Director requesting him to let the Court know whether he intended to intervene and to make submissions on policy issues.

85. On 20 January 2022, Mr Harvik Tse, Government Counsel of the Department of Justice lodged submissions on behalf of the Director of Immigration. The Director explained why he did not attend with the Applicants' solicitors to fix a hearing date or to turn up at the 2nd Hearing, which explanation this Court accepts. The Director declines to comment on whether the surrogacy arrangement made by the Applicants is lawful or

not but it is made clear by the Director that this is not to be construed as his endorsement of the surrogacy arrangement. The Director takes a neutral stance in these proceedings and wishes to be excused from any hearings.

86. It has however been helpfully set out in Mr Tse's submissions that the Director notes that the 1st Applicant (THC) is a Hong Kong permanent resident of Chinese nationality and there is a birth certificate showing that the Applicants are the B's parents. There is also a DNA report verifying that the 1st Applicant is the biological father of B and B has not acquired any foreign nationality. Taking into account such information of B's status, as pointed out by the Director, one of the ways for the 1st Applicant to bring B into Hong Kong is to apply for a HKSAR passport on B's behalf.

87. Although it was the 1st Applicant's evidence that he had made various telephone enquiries with the Immigration Department, there appeared to have been no written enquiries or any proper formal application ever made by the 1st Applicant for a Hong Kong Permanent Identity Card and/or a HKSAR passport for B prior to the application herein. It is not clear why the Applicants were never advised to lodge a proper formal application and to send to the Director B's birth certificate and the DNA report in support thereof.

88. Further, the Applicants' response to Mr Tse's submissions on behalf of the Director was rather perplexing. Instead of making an immediate application for the issue of the Hong Kong Permanent Identity Card and HKSAR passport for B, the Applicants' solicitors wrote to the

Court on 20 January 2022 merely noting the Director's stance and simply maintaining that the Applicants' application for the parental order is to be proceeded, which is neither here nor there. It is not clear why the Applicants failed to make the formal application for the Hong Kong Permanent Identity Card and the HKSAR passport for B at the first opportunity.

89. On 28 January 2022, the Court had to further direct that the 1st Applicant should apply for a HKSAR passport for B and to bring B to Hong Kong which will assist the Director of Social Welfare and also the Official Solicitor ("OS") to prepare their respective reports, and further directed that the Applicants' solicitors to report to the Court within 14 days the progress of the application.

90. It was only on 9 February 2022 that the Applicants' solicitors wrote to notify the Court that the 1st Applicant did, subsequent to their letter to the Court on 20 January 2022, make an application for B's HKSAR passport on 27 January 2022.

91. On 28 February 2022, the Applicants' solicitors wrote to report that the 1st Applicant had obtained both the Hong Kong Permanent Identity Card and the HKSAR passport for B on 27 February 2022. However, there was no indication in the Applicants' solicitors' letter as to when B would be brought back to Hong Kong. This resulted in another letter sent by the Court to the Applicants' solicitors and eventually on 3 March 2022, the Applicants confirmed to this Court with copies of electronic tickets that they would be leaving Hong Kong on 23 March 2022 on Qatar Airways to Tbilisi

via Doha and that they and B should be leaving Tbilisi on 29 March 2022, arriving in Hong Kong on 30 March 2022.

E.2 The Official Solicitor's Report ("OS Report")

92. As mentioned earlier, in *AB v CD and the Children (Foreign Surrogacy: Children out of the Jurisdiction)* supra, Theis J was of the view that due to unusual history of that case and the fact that it was likely the children would remain abroad that the children were joined as parties.

93. In the present case, it had appeared at the 2nd Hearing that B was likely to remain in Georgia for some time. After that hearing, and having considered what was said in *AB v CD*, on 29 December 2021, this Court directed that B be joined as a party in these proceedings and for the Official Solicitor to be appointed his guardian ad litem.

94. Ms Eunice Ip for the Official Solicitor ("OS") submitted her helpful and detailed OS Report on behalf of B on 25 February 2022.

95. As pointed out by the by Ms Ip in the OS Report, the Applicants had obtained two legal opinions from a Professor Nino Bogveradze, an attorney at law at the Kordzadze Law Office LP of Georgia, and a professor in Georgian American University on Georgian surrogacy law. Professor Bogveradze opined in his 1st legal opinion that the surrogacy arrangement and its procedure resulting in the birth of B complied with the laws of Georgia. In his 2nd legal opinion, the Professor has explained that there is no pre parentage court order any special committee approval before or after

birth of a child born out of surrogacy arrangement or any other court order required to be obtained for the recognition of intended parents as legal parents of a child and for listing intended parents as parents on the child's birth certificate.

96. The OS notes that the present application was taken out less than 2 months out of time, which was a relatively short delay compared with the lifelong welfare of B and having regard to the best interests of B and the harm that may be caused if no parental order is granted, the OS has no objections to the grant of time extension, and further the OS has no objection to the Applicants' suggestion of adopting a flexible interpretation of the term "home with" even though B is not physically living together with the Applicants under the same roof due to the special circumstances of this case but hopefully that by the time of the making of the order B will then be living at the Applicant's home.

97. The OS also has no objection to the Applicants' application for retrospective approval of the expenses incurred in connection with the surrogacy arrangements.

98. To summarise, the OS has no objection to the present application and the reliefs sought.

E.3 The social investigation report ("SIR")

99. As mentioned earlier, after the 2nd Hearing, and having considered Part 13 and Part 16 of the FPR 2010, and also *In re A (Foreign*

Surrogacy: South Africa), I have directed a social investigation report, including an international social investigation report, to be lodged by the Director of Social Welfare in the present proceedings, along the lines of Rule 16.35(2) of the FPR 2010. Subsequently, I further directed that the social work officer should investigate matters which are normally investigated in a “Suitability Assessment Report” as in adoption cases.

100. As seen in the SIR, the matter was referred by the social work officer to the Cross-boundary & Inter-country Social Service of the International Social Service (Hong Kong Branch) for an international social investigation report on 7 January 2022, but the International Social Service replied on 11 January 2022 that they did not have any network over Georgia. As there were no other means proposed for an international social investigation report to be prepared, subsequently, this Court dispensed with the calling of such a report.

101. In light of the Court directing that the SIR should include matters in a Suitability Assessment Report, information gathered by a social work officer of the Adoption Unit has also been included in the SIR.

102. Suffice to say, it was reported by the social work officer Ms Shum Kin Ling in the SIR that the Applicants would be flying to Georgia to escort B to Hong Kong, and that it is recommended by Ms Shum that a thorough observation and comprehensive assessment can then be conducted further with the presence of B in Hong Kong. I have directed that a copy of the SIR be released to the Applicants.

F. THE REQUIREMENTS UNDER SECTION 12 OF PCO

103. As set out earlier, the main issues in the present proceedings concern sections 12 (2), (3), and (7) of the PCO. Having considered what has been set out in the OS Report as to the other conditions under section 12 of PCO, I accept they have been satisfied.

G. THE REQUIREMENT UNDER SECTION 12(2) – WHETHER TIME SHOULD BE EXTENDED

104. The Applicants returned to Hong Kong on 1 March 2020. The 1st Applicant's evidence shows that after quarantine, they contacted their present legal team in about mid April 2021. Although they would need to obtain various necessary documents to support their application, there was no reason why the application could not be filed immediately first with supporting documents to be produced in supplemental affirmations. Having said this, I accept there was no evidence suggesting that there was any bad faith on the part of the Applicants behind such delay.

105. As said by the OS, the present application was taken out less than 2 months out of time, which is a relatively short delay compared with the lifelong welfare of B. Having considered the circumstances of this case, I am prepared to grant an extension of time for the present application.

H. THE REQUIREMENT UNDER SECTION 12 (7) – WHETHER THE PAYMENTS MADE BY THE APPLICANTS FOR THE SURROGACY ARRANGEMENTS SHOULD BE AUTHORISED

106. The payments made by the Applicants for the surrogacy arrangement totalled USD 52, 575 including the following:

- (a) Agency fees (USD 21,800)
- (b) Payment to R1 (surrogate mother) for embryo transfer (USD 250 for each transfer, totaling USD 500)
- (c) Monthly payments to R1 during pregnancy (USD 400 per month totaling USD 3,200)
- (d) payment to R1 after birth of B (USD 9,400)
- (e) Expenses for accommodation and travel expenses of R1 (USD 2,735)
- (f) Medical expenses of R1 (USD 14,440)
- (g) Disbursements including B’s birth certificate (USD500)

107. According to Professor Bogveradze, there were no requirements or regulations established under the statutes as to the fees and/or the compensation payable to surrogate mothers, donors, intermediary agencies and/or the clinic involved in the surrogacy arrangements. The Laws of Georgia do not prohibit or limit such payments, do not make any reference to “reasonable compensation” nor determine any basis for determining the compensation as reasonable. Further according to the

information provided by the National Statistics Office of Georgia, average monthly nominal earnings in Georgia for 2020 amounted to 1, 227.3 GEL (approximately USD 365).

108. Professor Bogveradze in her 1st Legal Opinion considered that the agency fees plus disbursements for the IVF, the medical expenses for R1 and other disbursements were reasonable considering the average fees generally determined in Georgia for such arrangements. Further, the payments for embryo transfer, monthly payments during pregnancy, surrogacy charge, expenses for accommodation, travel expenses, displacement and diets were also considered as reasonable compensation considering that the payments to R1 included not only the lost income and the relevant expenses during pregnancy and childbirth period, but also compensation for her “moral expense” for difficulties related to the pregnancy and childbirth.

109. The Applicants had produced transfer slips as evidence of a total sum of USD 15,835 being paid direct to R1 and not through the Agency, to ensure that R1 was not being exploited by the Agency.

110. As submitted by the OS, there was no evidence that the Applicants had not acted in good faith or intended to defraud the authorities or there was a “*moral taint*” in their dealings with R1. Further, given the Applicants had a genuine need to resort to surrogacy and had used the 1st Applicant’s own sperm and have shown unconditional love and care for B, there was nothing to show that there was an abuse of public policy.

111. Having considered the circumstances of this case and notwithstanding the provisions of the HRTO, having considered what was said by Queeny Au-Yeung J in *FH v WB*, *supra*⁴⁴, I am prepared to grant retrospective authorization of the expenses incurred under section 12 (7).

*I. THE REQUIREMENT UNDER SECTION 12(3)(A) -
WHETHER B'S HOME WAS WITH THE APPLICANTS OR
EITHER OF THEM AT THE TIME OF THE APPLICATION
AND OF THE MAKING OF THE ORDER*

I.1 Dispensation of the requirement under section 12 (3)(a)

112. In the originating summons, the Applications seek an order for the requirement under section 12 (3)(a) be dispensed with, which was also what they indicated during the 1st Hearing.

113. This is misconceived. As seen in the authorities cited earlier, applicants for a parental order must comply with the requirements of section 12 of PCO and *per* Russell J, the requirements for the making of a parental order should not and cannot be dispensed with. There are no authorities submitted on behalf of the Applicants to support their application for dispensation. In any event, during the 2nd Hearing, it was no longer submitted on behalf of the Applicants that this Court should dispense the requirement under section 12(3)(a).

⁴⁴ At paras 158, 172

I.2 The law

114. It is submitted by Ms Choy on behalf of the Applicants that the word “home” in s12(3)(a) does not necessarily have to mean the *physical home*, and that the Court should construe the word “home” in a sufficiently broad manner, that even though the Applicants and the Minor do not share a physical home together, they may still be regarded as having the same “home” for the purposes of section 12 (3)(a).

115. Although there have been various surrogacy judgments in Hong Kong as mentioned earlier, the section 12 (3) (a) point in the present case is a novel point which has never been determined in Hong Kong.

116. Ms Choy had referred this Court to English authorities where in situations where the minor was not living under the same roof, or not in the same jurisdiction, as the applicants (ie the commissioning parents).

117. A recent case was *Re Z (Parental Order: Child’s Home)* [2021] EWHC 29 (Fam). As pointed out by Mrs Justice Knowles therein, there have been several cases in England which have adopted a broad and purposive construction of what is meant by “*the child’s home*”:

“28. Several cases have already set out a broad and purposive construction of what is meant by “*the child’s home*”. The following may reasonably be derived from those authorities which have adopted that construction referred to above:

- a) The concept of home may be construed flexibly;
- b) Applicants living separately and/or having two separate homes is not, per se, fatal to a determination that the child

had their home with the applicants at the relevant time (see paragraph 67 of Re X (A Child) (Surrogacy: Time Limit) [2014] EWHC 3135 (Fam);

c) Each case is fact dependent and will require an assessment of such matters as when it could be said was the last time the child had his or her home with the applicants. This would include consideration of factors such as when they shared a home with the child and if they have not, why not, if they have, but that has ceased, why and in what circumstances and whether the child could still be said to have their home with the applicants, even construing that term flexibly;

d) the term “*home*” must be given a wide and purposive interpretation and the terms is not and should not be restricted to cases where the applicants live together under the same roof (paragraph 58 of Re A (A Child: Surrogacy: s 54 criteria) [2020] EWHC 1426 (Fam).

29. The prospective nature of s 54(4)(a) was considered in the matter of AB (Foreign Surrogacy: Children out of the Jurisdiction) [2019] EWFC 22, which concerned difficulties that had arisen in terms of the subject children’s immigration status. In that case, the children were not living in this jurisdiction by the time of the final hearing in February 2019. It is not possible to discern from the judgment when they may have been able to gain entry to this jurisdiction, the applicants in that case having not, at the time of the hearing, made any immigration application. The court recognized the roles played by both parents in terms of their care of the children (who remained living with wider family members) insofar as, separately, the applicants had travelled to Tehran to help care for the children. It was clear, that the applicants had not cared for the children together at any stage nor was it clear when they might do so in the future. Irrespective of those factors, the court was able to construe the terms of s 54(4)(a) so as to grant the parental orders as sought.”

118. As set out above, each case is clearly fact dependent.

I.3 The evidence in the present case

119. The evidence of the Applicants and the information in the SIR can be summarised as follows:

- (1) At the very beginning of the process, they already raised queries as to whether this whole arrangement would be legal. The PRC representative of the Agency reassured them that it would be legal and that they would have no problem bringing the Minor back to Hong Kong after the process.
- (2) It was on the above basis that they agreed to the services of the Agency. After two rounds of IVF and three embryo transfers involving two egg donors and two surrogate mothers, R1 finally gave birth to B in October 2020.
- (3) According to the Applicants, they were not able to arrive at Tbilisi until about a month after the birth of B because of the travel restrictions put in place by the Georgian Government due to Covid-19, where foreigners were not allowed entry unless they had an entry permit which was issued on a case-by-case basis. The Applicants were only able to obtain such a permit in late October 2020.
- (4) There were also problems with the flights. There were no direct flights from Hong Kong to Georgia. International flights were often cancelled during that time due to Covid-19. Their initial flight in early November 2020 was cancelled and they eventually managed to arrive in Tbilisi about 9 days later, namely on 14 November 2020.

- (5) Before their arrival, B was visited by a representative from the Agency who updated the Applicants B's situation via What's App.
- (6) When they arrived, B was still in hospital due to various complications, but the nurses at the hospital had sent them photos or videos almost daily to let them know about B's situation. It would appear that it was only around 22 November 2020 that the Applicants were able to see B at the hospital⁴⁵.
- (7) In the SIR, the social work officer Ms Shum reported that the Applicants visited B "bi-daily" at the hospital⁴⁶.
- (8) In late 2020, the Covid-19 situation got worse. Georgia was locked down completely. Governmental departments were shut down. Curfew was imposed. The Applicants were not able to obtain B's birth certificate until 28 December 2020.
- (9) While waiting for the Georgian Government to resume work, the 1st Applicant ran out of annual leave and had to return to Hong Kong first and he in fact left Georgia on 1 December 2020, while the 2nd Applicant remained to care for B. They had rented an apartment in Georgia for their stay and finally B was discharged from hospital on 26 December 2020 and was under the care of the 2nd Applicant.
- (10) The Applicants said they had always been under the mistaken belief, or were given the wrong advice to the effect, that as long as B had a birth certificate, they could apply for a "travel pass" from the Chinese Consulate in Tbilisi, and B could be brought

⁴⁵ See B: 237

⁴⁶ At para 19, pg 5

back to Hong Kong. To this end, the 1st Applicant left Hong Kong on 10 February 2021 and re-joined the 2nd Applicant in Tbilisi again.

(11) However, when they attended the Chinese Consulate in Tbilisi (as advised by the Agency), they were told that such travel pass only enabled them to travel to Mainland China, but not to Hong Kong.

(12) According to the Applicants, they were very shocked and did not know what to do. They gave the Hong Kong Immigration Department a call and revealed everything to them frankly. They were told by the Immigration Department that it would not accept any such “travel pass”, and the only route open to them was to obtain a parental order. In any event, due to Covid-19, no foreigners would be allowed entry to Hong Kong.

(13) The Applicants’ evidence was that they had to return to Hong Kong to seek legal advice and the 1st Applicant had to return to Hong Kong for work. According to them, the 2nd Applicant not being an English speaker could not remain in Georgia for extended periods alone. As such, they hired the Nannies to care for B in Tbilisi⁴⁷. The contract was for one year as from 25 February 2021 but the contract could be extended. The Applicants then flew back to Hong Kong on 1 March 2021.

(14) The Applicants have stayed in touch with the Nannies since then. They were speaking to the Nannies and B on a daily basis via WhatsApp, Facebook Messenger, and video calls. They have paid close attention to everything B did. The

⁴⁷ The 1st Applicant’s 1st Affirmation, at paras 59, 61-64 A:38

Applicants' evidence is that they are desperate to reunite with B soon.⁴⁸

120. It is also the Applicant's evidence that they have always been ready to welcome B into their family home. Their evidence is that they did not expect that the process would take so long, and in fact, they had long prepared the necessary furniture and fittings to make the home suitable for B.

I.4 Discussion and Conclusion

121. B was in the physical care of the 2nd Applicant for about from 26 December 2020 until 1 March 2021 and in the joint physical care of the Applicants from 10 February 2021 until 1 March 2021. In short, B was in the 2nd Applicant's care for about 2 months and in the 1st Applicant's care for only about 18 days.

122. Although the Nannies are not extended family members of the Applicants, they have rendered good care under the supervision of the Applicants. I accept the evidence shows that the Applicants have used all their best endeavours to care for the child through remote means. Adopting a wide and purposive interpretation, and a flexible construction of the term "home", I find that B's home was with the Applicants at the time of their

⁴⁸ The 1st Applicant's 1st Affirmation, para 66, A:40; and the 1st Applicant's 2nd Affirmation, at paras 11-14, A:64

application herein. In light of the order I intend to make, B's home should be with the Applicants in Hong Kong if and when the parental order is made.

J. THE BEST INTERESTS OF B AND PUBLIC POLICY

123. In Mr Tse's submissions on behalf of the Director of Immigration, there are no particular issues on public policy raised. As mentioned earlier, the Director takes a neutral stance in these proceedings although he has stressed that this is not to be construed as any endorsement on his part of the surrogacy arrangement.

124. As set out earlier, the court is to ensure that commercial surrogacy agreement entered into overseas are not used to circumvent childcare laws in Hong Kong, resulting in the approval of arrangements in favor of people who would not have been approved as parents on welfare/best interests grounds under any set of existing law such as adoption *for example if the age of the commissioning parents would have excluded them as potential adopters and/or they have previously been turned down for adoption.*

125. As set out earlier, the child's best interests must be the court's paramount consideration. Ms Ip has in the OS Report set out those relevant factors in the Adoption Checklist for the Court's consideration, for which I am grateful.

126. However, before I come to a final view, I am concerned that in the present case, the social work officer has not had a proper chance to

observe B being in the physical care of the Applicants. In this respect, I have in mind the view and guidance of Russell J in *In re Z (Children) (Foreign Surrogacy)*, namely that the parental order reporter's investigation *must include the child being seen with the applicants* unless there are compelling and exceptional reasons based on the child's welfare why such observations cannot take place or where there is sufficient independent evidence pertaining to the child's welfare from an alternative source.

127. In *In re A (Foreign Surrogacy: South Africa)*, Theis J had had the benefit of a comprehensive independent report from a South African social worker on which the court could rely.

128. In the present case, as said, no international social investigation report is available as to the current circumstances of B. There have no submissions put forward as to what compelling and exceptional circumstances as to why the social work officer cannot see B with the Applicants physically, in particular when B will be brought to Hong Kong at the end of this month. In fact, as mentioned earlier, the social work officer Ms Shum has also recommended that a comprehensive assessment can only be conducted further with the presence of B in Hong Kong.

129. This Court had also understood that normally in a Suitability Assessment Report, the social work officer would also obtain information as to whether the applicants had any previous criminal record. This appears to be missing in the present report.

130. In any event, having considered all the above, and B's best interests, I am of the view that B should be brought to Hong Kong first before my final decision on the parental order.

131. I will direct that the social work officer to see B with the Applicants physically and to make further investigation after B's arrival and completion of quarantine requirements, if any, and to submit a supplemental report within two months thereafter, together with a supplemental Suitability Assessment Report containing a confirmation as to whether the Applicants have any previous criminal record. I give leave to the OS to file a supplemental report if she deems it necessary, also within two months after B's arrival and completion of quarantine requirements, if any.

K. ORDER

132. My order is thus:

- (i) The originating summons be further adjourned to a hearing of estimated length of 30 minutes to be fixed on an early date not less than one week after the lodging of a supplemental social investigation report, a supplemental suitability assessment report and any supplemental report from the Official Solicitor;
- (ii) The Director of Social Welfare to submit a supplemental social investigation report within two months after B's arrival in Hong Kong and completion of quarantine requirements, if any, and such report should include observation and investigation made of B being seen with the Applicants physically;

- (iii) The Director of Social Welfare to submit a supplemental suitability assessment report within two months after B's arrival in Hong Kong and completion of quarantine requirements, if any and to include whether the Applicants have any previous criminal record;
- (iv) Leave to the Official Solicitor to submit a supplemental report, if she deems necessary, within two months after B's arrival in Hong Kong and completion of quarantine requirements, if any;
- (v) Costs reserved.

(Bebe Pui Ying Chu)
Judge of the Court of First Instance
High Court

Ms Alison Choy, instructed by Chiu, Sezto & Cheng, for the 1st and 2nd Applicants

The 1st Respondent, acting in person and absent

The 2nd Respondent, acting in person and absent

Ms Eunice Ip of the Official Solicitor, for the 3rd Respondent

Mr Harvik Tse, Government Counsel of Department of Justice for the Director of Immigration