

Spotlight shone on international surrogacy



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In this article [Ralph Marham, Barrister at APB](#), shares his insight into international surrogacy.

International surrogacy has come under the spotlight recently with the news that the Chinese actor Zheng Shuang was dropped by the luxury fashion brand Prada, after her former partner accused her of abandoning their two US-born surrogate children. The row erupted after Mr Zhang Heng accused Ms Shuang of abandoning the two children before

their birth when their relationship ended a year ago. Mr Heng took to Weibo to reveal that he was stuck in the US, looking after "two young and innocent lives" and that his situation was "helpless."

There is currently no international regulation of surrogacy, partly because there is no uniform position on how to approach it. Surrogacy laws vary greatly from country to country and legislation is often shaped by history, culture and social values. For example, in most EU countries there is a total ban on surrogacy as it is seen as violating the dignity of women. Other countries, such as Russia, Ukraine and certain states in the US, permit commercial surrogacy as they see it as an expression of women's autonomy.

In England and Wales, commercial surrogacy is a criminal offence and prohibited, but "altruistic" surrogacy is permitted. The legal pathway is complicated. If a child is born following a surrogacy arrangement, the surrogate will be the legal mother and if she is married, her husband will be the legal father. If the surrogate is not married, the biological father of the child will be the legal father but will not necessarily have parental responsibility. This is the case no matter where the child is born. In order to permanently extinguish the surrogate's legal parentage and transfer it exclusively to the intended parents, an application to the Court for a parental order must be made. There are a number of criteria that must be met before the order is granted (set out in s.54 of the Human Fertilisation and Embryology Act 2008). Furthermore, international surrogacy arrangements are not recognised, which causes legal uncertainty for the intended parents and the child if the criteria for a parental order are not met or if no application is made.

There are clearly serious ethical issues stemming from the potential exploitation of women in poorer countries, and the dangers of treating children like commodities. Strict regulation of surrogacy is essential to protect these women and children, however a blanket ban is not the answer. There is a growing need for an international agreement between countries to provide recognition of orders when it comes to such a fundamental right as parentage.

The Hague Conference on Private Children International law (HCCH) has set up a working group of experts to address the lack of regulation around international surrogacy. They have already made a number of recommendations. There is a recognition that free and informed consent of the surrogate must be the primary safeguard of any international agreement. They have also recognised the need for certainty in international surrogacies, which could be achieved through the development of a framework for the international recognition of legal parentage established by judicial decision. A co-operation mechanism between states would also be necessary at the recognition stage to check compliance with established safeguards.

Another way to minimise the risks around international surrogacy is to improve domestic legislation. One reason why couples resort to travelling abroad is the lack of surrogates in the UK, which is caused by the prohibition of profitable remuneration. Another is the legal uncertainty for intended parents, who have to rely on the goodwill of the surrogate to consent to the making of the parental order. The Law Commission has recommended that the government should consider the creation of a new pathway to legal parenthood in surrogacy, which would allow intended parents to be legal parents from birth. Serious consideration should also be given to permitting commercial surrogacy in the UK. This would recognise the simple reality that many couples are already entering such arrangements abroad, and payments are often retrospectively authorised by the Court in parental order applications. The Supreme Court recently endorsed the use of commercial surrogacy in the context of a case concerning damages and held that costs incurred abroad were recoverable in principle (*Whittington Hospital NHS Trust v XX* [2020] UKSC 14). In short, a change in legislation would reduce the need for these couples to potentially seek risky and unethical arrangements in unregulated surrogacy markets.