

THE HIGH COURT

[2021] IEHC 785

[2020 No. 575 JR]

BETWEEN:

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

APPLICANTS

– AND –

MINISTER FOR FOREIGN AFFAIRS AND TRADE

RESPONDENT

JUDGMENT of Mr Justice Max Barrett delivered on 2nd December 2021.

SUMMARY

In early-2017 an application for an Irish passport was made in respect of Master C, an English-domiciled child. Master C's parents (also domiciled in England) are, by virtue of an English parental order, Mr A (who holds dual Irish-UK citizenship) and Mr B (who holds UK citizenship). No decision has yet been made by the Minister on Master C's passport application. For the reasons set out in this judgment, the court will make an order directing the Minister to decide the passport application. A main focus in these proceedings has been the meaning and effect of s.7(1) of the Irish Nationality and Citizenship Act 1956, as amended. The court concludes that Master C has been an Irish citizen from birth by virtue of that section.

I

Background

1. Mr A and Mr B are two married gentlemen. Mr A enjoys citizenship of Ireland and also of the United Kingdom. His husband, Mr B, is a citizen of the United Kingdom. They live, and are domiciled in, England. Their son, Master C, was born a short few years ago in the United Kingdom by way of a successful, lawful surrogacy arrangement. Master C presently enjoys citizenship of the United Kingdom only. It is his fathers' desire to get him an Irish passport that has led to these proceedings. The proceedings were heard over two days, on 23rd and 24th November. Mr A's grounding affidavit details how the parties ended up before this Court:

"9. Subsequent to the birth of [Master C]...a UK birth certificate was issued which recorded [the birth mother]...as the mother of [Master C]...and recorded [Mr B]...as his father.

10. In...2015 [Mr B]...and I applied to the...Family Court for a Parental Order in respect of [Master C]...pursuant to s.54 of the [United Kingdom's] Human Fertilisation and Embryology Act 2008. The said Parental Order was granted on [Stated Date]....

12. I say and believe and am advised that under UK law [there is expert evidence before the court from an English solicitor that establishes this] the effect of this Parental Order is to reassign parentage of [Master C]...from [Mr B]...and [the birth mother]...to [Mr B]...and me.

13. On foot of the said Parental Order the parental rights of [the birth mother]...were extinguished and a revised birth certificate was issued in respect of...[Master C]. Pursuant to the said revised birth certificate and as a matter of UK law, [Mr B] and I are the parents of...[Master C]....

Passport Application

14. In early 2017 an application was made to the Department of Foreign Affairs and Trade...for an Irish passport in respect of...[Master C]. On 11th April 2017 I received an email from...the Department stating that a number of similar

applications had been made and that advice was awaited from the Office of the Attorney General in respect of these applications....

15. By letter dated 7th July 2017...[a] Passport Officer wrote to...[Mr B] and me...indicating that the Department intended to refuse the application for a passport on the basis that for the purposes of the Irish Nationality and Citizenship Act 1956...a parent was understood to mean either the mother or father of the child or a male adopter. The same letter invited us to provide the Department [with] any further information or evidence in advance of the decision....

16. I say that we decided to respond to this letter by seeking an extension of time for the filing of further information....

17. I say that the said extension was granted and our solicitor proceeded to file a detailed legal submission on 17th October 2017....

18. I say that there followed a series of letters from our solicitors to the Department seeking a formal acknowledgement of our written submission, which letters were sent on 22nd November 2017, 2nd February 2018 and 18th April 2018....

19. I say that I personally wrote to [the Passport Officer]...by letter dated 19th April 2018 stating that we had not received an acknowledgement of our submission and that we regarded the silence as disappointing....

20. I say that I personally sent an email to [the Passport Officer]...on 12th June 2018 stating that I believed it to be unreasonable that we had had no response from the Department....

21. I say that by letter dated 19th September 2018 [emphasis added] the Department wrote to our solicitors acknowledging the receipt of our submission on 17th October 2017. [Emphasis added]. The letter further stated that the issues raised in our submission were noted but that the Passport Office was 'bound by the legislation that is currently in place'....

22. By letter dated 3rd December 2018 our solicitors wrote to the Department asking for an update on the passport application. By letter dated 13th December 2018 [emphasis added] the Department wrote to our solicitors indicating that clarification was still awaited.

23. I say that by letter dated 23rd December 2019 [emphasis added] our solicitors wrote to the Department calling on the Minister to make a decision and stating that the within proceedings would issue within 28 days if the decision was not made....

24. I say that no further correspondence has been received from the Department....

26. *I say that...[Mr B]...and [Master C]...and I have suffered distress and inconvenience by reason of the delay. We have been caused to remain in a situation of persistent uncertainty as to the citizenship and passport status of one of our children. It is of great emotional significance to me in particular that our son should be entitled to have the same nationality as me....”.*

2. The statement of grounds indicates the following principal reliefs to be sought: (1) an order of *mandamus* directing the Minister to make a decision as to whether to issue an Irish passport in respect of Master C; (2) an order of *mandamus* directing the Minister to issue an Irish passport in respect of Master C; (3) a declaration that the failure of the Minister to issue an Irish passport in respect of Master C constitutes a disproportionate interference with the applicants’ rights pursuant to Articles 40.1, 40.3 and Article 42A of the *Bunreacht*; (4) a declaration that the failure of the Minister to issue an Irish passport in respect of Master C constitutes a failure, contrary to the provisions of s.3 of the European Convention on Human Rights Act 2003, on the part of the Minister to perform his functions in a manner compatible with the ECHR and in particular that it constitutes a disproportionate interference with the applicants’ rights pursuant to Arts 8 and 14 ECHR; (5) damages (including damages for breach of statutory duty and/or breach of constitutional duty and/or pursuant to s.3 of the Act of 2003); (6) the costs of the proceedings.

3. Before proceeding further, the court notes the Minister’s contention that this application was started out of time for the purposes of O.84 of the Rules of the Superior Courts (‘RSC’). It is surprising that in a case where the Minister, in breach of his statutory duty, has failed for several years to determine an application and where that failure is ongoing, he would seek to make an issue of time, but he has. However, it seems to the court that his contentions in this regard must fail. The Minister at no point has taken any formal step that is adverse to the interests of the applicants. No formal decision that has irreversible effects has been taken. No interim decision has been taken that is substantive and determined matters irreversibly. Apart from looking for extra submissions, granting extra time for same, and engaging in some incidental correspondence, the Minister appears otherwise to have done nothing of substance as regards determining the passport application made in early-2017. Every day his delay continues and increases. In those circumstances the court does not see that time has even begun to start running for the purposes of O.84. Even if the court is wrong in this regard, the Minister

acknowledges that he has suffered no detriment, and no reason presents why any necessary extension would not be granted.

II

Breach of Statutory Duty

4. The Minister has a statutory duty under Part 2 of the Passports Act 2008 to issue passports. Under s.12(1) of the Act of 2008 “[t]he Minister shall refuse to issue a passport to a person if... (a) the Minister is not satisfied that the person is an Irish citizen”. Administrative bodies are required to perform their statutory functions and a failure to do so can justify an order of mandamus (*White Maple Developments Ltd v. Donegal Co. Council* [2013] 2 I.R. 548). Administrative bodies must, however, be allowed a reasonable time to make their decisions (*Nearing v. Minister for Justice, Equality and Law Reform* [2009] IEHC 489).

5. The application for a passport in this case-was made in early-2017. It is now approaching Christmas 2021. By any measure the Minister has had a more than reasonable time to decide the passport application and has failed to do so. (In this case he has argued that Master C is not entitled to an Irish passport because he is not entitled to Irish citizenship. So the Minister is clearly minded to issue a refusal, even though he has not yet done so). The Minister has failed to issue a decision pursuant to s.12(1) in a reasonable time and stands in breach of his statutory duty in this regard. As no decision has been made, the court does not see that there has been non-compliance with s.12(3) of the Act of 2008 to this time. (Section 12(3) provides that “Where the Minister refuses to issue a passport to a person under this section, the Minister shall inform the person by notice in writing of the decision and the grounds for the refusal”).

III

Status of Parties

6. It is a fundamental principle of Irish private international law that matters relating to a person’s civil status are governed by the law of that person’s domicile (see *W v. W* [1993] 2 I.R. 476 (at p.493), Binchy, W., *Irish Conflicts of Laws* (1998), p.45, and Fawcett and Carruthers (eds) *Cheshire, North & Fawcett: Private International Law*, 15th ed., p.145). Here, all of the

applicants are domiciled in England. As a consequence, the parental status of the two adult parties falls to be determined by English law, and here the Parental Order comes into play. As Mr A has sworn (and his averment in this regard is echoed by the expert evidence of an English solicitor that is before the court) “*On foot of the said Parental Order the parental rights of [the birth mother]...were extinguished and a revised birth certificate was issued in respect of the Third Named Applicant. Pursuant to the said revised birth certificate and as a matter of UK law...[Mr B] and I are the parents of...[Master C]*”. It follows that Mr A (who is the relevant parent for the purposes of s.7(1)) falls to be recognized and treated as a parent for the purposes of s.7(1) of the Irish Nationality and Citizenship Act 1956.

IV

Irish Nationality and Citizenship Act 1956 – 1

7. Section 7 of the Act is entitled “*Citizenship by Descent*”. Section 7(1) of the Act of 1956 (as amended) provides as follows:

“A person is an Irish citizen from birth if at the time of his or her birth either parent was an Irish citizen or would if alive have been an Irish citizen”

8. As mentioned above: it is a fundamental principle that matters relating to a person’s civil status are governed by the law of that person’s domicile; and, for the reasons previously stated, Mr A, a dual citizen of Ireland and the United Kingdom falls to be read, since the making of the United Kingdom Parental Order, as one of Master C’s parents when it comes to s.7(1).

9. There are two ostensibly reasonable ways of reading s.7(1). These are as follows. (1) The Minister considers that s.7(1) falls properly to be read as meaning that the Irish citizen-parent must have been the parent at the time of birth. (If the Minister is correct then Master C is not an Irish citizen from birth by virtue of s.7(1) because Mr A was not his parent at the time of birth). (2) Mr A considers that s.7(1) falls properly to be read as meaning that he, Master C’s parent, must have been an Irish citizen (he was) at the time when his child was born. (If he is correct then Master C *is* an Irish citizen from birth by virtue of s.7(1) because Mr A was an Irish citizen at the time when Master C was born). Which is the proper way to read s.7(1)? The

court answers that question later below. Before doing so it turns to consider a number of points of relevance.

V

Principles of Statutory Interpretation

10. The applicable principles of statutory interpretation have recently been reiterated in *X v. Minister for Justice* [2020] IESC 30 and *C.M. v. Minister for Justice* [2017] IESC 76. The starting point is, of course, the literal approach. The question is whether the intention of the Oireachtas is self-evident from statute. As McKechnie J. observes in his judgment in *C.M.*, at para.57, “[I]f the objective intent of [the Oireachtas]...is self-evident from the ordinary and natural meaning of the words or phrases used, then the task is at an end, and the court’s function has been performed.” The ‘problem’ with s.7(1) of the Act of 1956 is that it is not the case that the interpretation put forward by the Minister is “self-evident from the ordinary and natural meaning of the words or phrases used”.

11. If the literal approach does not yield an answer in the manner contemplated by McKechnie J. in the just-quoted text, then the court moves to a purposive interpretation. The nature of purposive interpretation is described by McKechnie J. in para.59 of his judgment and encapsulated in statutory format by s.5 of the Interpretation Act 2005, sub-section (1) of which reads, amongst other matters, as follows:

“In construing a provision of any Act (other than a provision that relates to the imposition of a penal or other sanction)...(a) that is obscure or ambiguous, or (b) that on a literal interpretation would be absurd or would fail to reflect the plain intention of...the Oireachtas, the provision shall be given a construction that reflects the plain intention of the Oireachtas...where that intention can be ascertained from the Act as a whole”.

12. The case at hand falls clearly within the purposive approach (s.5). Section 7(1) of the Act of 1956 is clearly capable of more than one meaning. That has the result that the court is obliged to use the purposive approach. In this regard it seems to the court, most clearly, that the policy which underpins s.7(1) is to prevent those who become Irish citizens later in life from conferring

Irish citizenship on children that they had at a point in time when they were not Irish citizens. The section has nothing to do with preventing changes in parental status. The purposive approach to reading s.7(1) therefore clearly favours the reading of s.7(1) for which the applicants have canvassed.

VI

Temporal Issues

13. Section 7(1) of the Act of 1956 provides as follows:

“A person is an Irish citizen from birth if at the time of his or her birth either parent was an Irish citizen or would if alive have been an Irish citizen”

14. Counsel for the Minister contended that the meaning of this provision is perfectly clear, that the effect of s.7(1) is that citizenship is determined at a particular moment in time. He pointed, in particular, to the words “*from birth*”, and suggested that this must be taken as meaning (and meaning only) that there must be a parent at the time of birth who is an Irish citizen. But when one looks at s.7(1) it is at least as open to the interpretation put forward by the applicants, *i.e.* that Mr A, Master C’s parent, must have been an Irish citizen (he was) at the time when his child was born. Section 7(1) certainly means that the person who *is* the parent must have been an Irish citizen at the time of the birth of the child. Section 7(1) does *not* say when that question of parenthood falls to be resolved. If one examines the provision very finely, there are, however, indicia within it which suggest that the meaning urged upon the court by the applicants is the correct one. Parsing s.7(1) closely, it states:

*“A person **is**¹ an Irish citizen from birth if at the time of his or her birth either parent **was**² an Irish citizen or would if alive have been an Irish citizen”* [Emphasis added].

¹ “*is*” is in the present tense.

² “*was*” is in the past tense even though it would have been open to follow the opening “*is*” with a further ‘*is*’ at this point.

Counsel for the applicants also drew the attention of the court to the wording in Art.9.2 of the Constitution. That provision is concerned with persons born in Ireland and so is not strictly relevant to the case at hand. (Master C was born in England). Nonetheless, counsel drew the court's attention to how Art.9.2 refers to "a *person born in...Ireland...who does not have, at the time of the birth of that person, at least one parent who is an Irish citizen*" [emphasis added]. Such wording, he notes, had it been used in s.7(1), would have put the Minister's arguments as to the meaning of s.7(1) beyond doubt. However, such wording was not used. In other words it would have been very easy for the Oireachtas to include wording in s.7(1) that would undoubtedly have had the effect that the Minister contends for and the Oireachtas, tellingly, elected not to use such wording.

15. There was a curious suggestion on the part of the Minister that if the court were to accept the interpretation canvassed for by the applicants, that would be to conclude that the Oireachtas when it came to s.7(1) had engaged in retrospective legislation. That, with respect, is wrong. Retrospective legislation is legislation that alters vested legal rights. That is very different from legislation which provides for something to have backdated effect but which does not alter vested legal rights: such legislation is not at all unknown and there is no presumption against it. (Indeed the court cannot but note that in this case there is something of an example *par excellence* of such backdated legislation in that the UK legislation under which Mr A and Mr B got married back-dates the deemed date of their marriage to the date when they entered into their civil partnership).

16. The Minister contended that people should know at the time of their birth whether they are Irish citizens or not. But even on the Minister's case that is not always what happens, so his contention just cannot hold good. As counsel for the applicants observed in this regard:

"If you just postulate a case...in which a child is born to the birth mother and the father to whom the birth-mother is married. The mother isn't Irish; the father is. That child has Irish citizenship from birth....But subsequently it might become clear that the Irish married person is not in fact the genetic father, and according to the State's view of life that child would lose his right to automatic Irish citizenship. So...it is clear that...on the State's interpretation...it is possible for that sort of status to alter depending upon circumstances as time develops."

17. This may be a useful point at which also to treat with the argument made as regards s.11 of the Act of 1956 which makes specific provision as regards the citizenship of adopted

children. Counsel for the Minister contended that the State’s interpretation of s.7(1) must be correct as there would be no need for s.11 if the applicants’ interpretation of s.7(1) is correct – because adopted children would fall within the reading of s.7 canvassed for by the applicants. However, s.11 merely makes the position of adoptive children clear, rather than leaving it to interpretation of s.7, which (as this case has surely shown) requires close interpretation. In other words, the fact that the Oireachtas, in s.11, decided to make the position clear for adopted children does not mean that the State’s interpretation of s.7 in these proceedings is correct. All it shows is that the position was made clear for adopted children, nothing more.

VII

Section 6 of the Interpretation Act 2005 and *O’R*

18. Having reached the conclusions reached in Section III above, the court does not see that it needs to treat with s.6 of the Interpretation Act 2005. The argument concerning s.6 (and the related argument concerning *O’R v. An tArd Chláraitheoir* [2014] 3 I.R. 533) concerned the proper meaning to be given the word “*parent*” in s.7(1) of the Act of 1956. The conclusions reached in Section III mean that the court does not have to treat further with this issue.

VIII

Constitution

19. As to the constitutional points raised in this case, counsel for the applicants indicated that the submissions made on the Constitution were “*relevant only to the meaning of ‘parent’*” and hence did not fall to be adjudicated upon if the court agreed with the applicants (it does) as to Mr A’s being the undoubted parent of Master C for the purposes of s.7(1) of the Act of 1956 (he is for the reasons stated in Section III above). As a consequence, the court does not treat in this judgment with the constitutional points raised.

IX

European Convention on Human Rights Act 2003

i. *Menesson, etc.*

20. Section 2 of the European Convention on Human Rights Act 2003 provides as follows:

“(1) *In interpreting and applying any statutory provision or rule of law, a court shall, [1] in so far as is possible, and [2] subject to the rules of law relating to such interpretation and application, do so in a manner compatible with the State’s obligations under the Convention provisions.*

(2) *This section applies to any statutory provision or rule of law in force immediately before the passing of this Act or any such provision coming into force thereafter.*”

[Emphasis added].

21. As the court has sought to make clear by highlighting certain portions of s.2, the duty of interpretation established by s.2(1) is subject to the restrictions identified at [1] and [2].

22. In accordance with the rules of statutory interpretation (as considered previously above) the interpretation of s.7(1) of the Act of 1956 for which the applicants have canvassed in this case is not just an interpretation that is open to the court but is also the correct interpretation. What s.2 of the Act of 2003 does is to bring the decisions/opinions of the European Court of Human Rights into play in this regard. A consideration of such decisions/opinions further buttresses the court in its reasoned conclusion that the interpretation of s.7(1) of the Act of 1956 for which the applicants have canvassed in this case is the correct interpretation.

23. The court has been referred, in particular, to the decision of the European Court of Human Rights in *Menesson v. France* (Application No. 65192/11) and the later Advisory Opinion (Request No. P-16-2018-001). That decision and advisory opinion indicate that the State is under an obligation to provide some means of recognition of a relationship through surrogacy. That much is agreed by all sides. What the decision and advisory opinion also indicate is that this recognition must include a means of accessing a parent’s nationality.

24. In *Menesson*, two children born in the United States via a surrogacy arrangement were denied legal recognition, in France, of their relationship with their intended parents, even

though that relationship was legally recognized in the United States. The European Court of Human Rights decided that the children's right to respect for private life had been violated, reasoning that the right to respect for private life included the ability to determine details of one's identity, (including the identity of one's legal parents). At para.97 of its decision in *Mennesson*, the Court observes as follows, in terms that have a striking resonance in the case at hand:

“Whilst Article 8 of the Convention does not guarantee a right to acquire a particular nationality, the fact remains that nationality is an element of a person's identity (see Genovese v. Malta, no. 53124/09, §33”, 11 October 2011). As the Court has already pointed out, although their biological father is French the third and fourth applicants face a worrying uncertainty as to the possibility of obtaining recognition of French nationality under Article 18 of the Civil Code....That uncertainty is liable to have negative repercussions on the definition of their personal identity”.

25. The Court in its judgment in *Mennesson* indicated that it can never be in the best interests of the child to deny legal recognition of the relationship between the child and the intended *and* biological father. Following this decision, the French courts allowed the registration of an intended father as the legal father, if he was also the biological father, but did not extend such recognition to the intended mother. (She had to adopt her spouse's child, provided she was married to the biological and intended father). In 2017, the Mennessons requested a new decision regarding their appeal against the Paris Court of Appeals' decision in 2010 to annul the legal recognition of both parents' relationship with their two children. The French *Cour de Cassation* then requested an advisory opinion from the European Court of Human Rights for the purposes of re-examining that appeal. The advisory opinion is perhaps even more relevant to the case at hand than the *Mennesson* decision because the advisory opinion was concerned with a situation in which the affected person (as here) was a non-genetic parent of the child. In its advisory opinion the European Court of Human Rights observes, amongst other matters, as follows:

“40. The lack of recognition of a legal relationship between a child born through a surrogacy arrangement carried out abroad and the intended mother thus has a

*negative impact on several aspects of that child's right to respect for its private life. In general terms, as observed by the Court in *Menesson and Labassee*, cited above, the non-recognition in domestic law of the relationship between the child and the intended mother is disadvantageous to the child, as it places him or her in a position of legal uncertainty regarding his or her identity within society (§§ 96 and 75 respectively). In particular, there is a risk that such children will be denied the access to their intended mother's nationality which the legal parent-child relationship guarantees; it may be more difficult for them to remain in their intended mother's country of residence (although this risk does not arise in the case before the Court of Cassation [nor does it present here]...)"*.

26. What the above-referenced decision and advisory opinion of the European Court of Human Rights bring acutely into play is the necessity for Ireland to provide a means of recognition of a relationship which gives rise to an entitlement on the part of Master C to have access to the Irish nationality of Mr A, his father.

27. Part of the Minister's response to this was to say that the rights of the applicants are not engaged in this case. That is, with respect, factually wrong. Unlike in *Menesson*, here there has been real damage. Application has been made for a passport for Master C; the Minister has made no decision on the application (lodged in early-2017) but has come to court arguing that Master C is not entitled to a passport (and so is clearly minded to refuse, albeit that he has not done so). So there is actual damage here that had not actually accrued to the children in *Menesson*. Hence the rights of the applicants, in particular Master C, *are* engaged. The Minister's response in this regard is also wrong when one considers *Menesson*. The whole point in *Menesson* was to look at *child* rights and to conclude that the failure by France to recognise a child's relationship with the parents was a breach of child rights.

28. Another part of the Minister's response was that although (as recognised in *Menesson*) the State is under an obligation to provide some means of recognition of a relationship through surrogacy, there are means by which this can be done under Irish law. Thus, the Minister pointed to (i) the Child Protection Convention and suggested that that might recognise parental responsibility (there is no suggestion, however, that it recognises parental status), and (ii) s.16 of the Act of 1956 (which allows the Minister to dispense with the conditions of naturalisation

in various cases, including where an applicant for naturalisation has “*Irish associations*”). However, it is worth recalling what the obligation in *Menesson* is: it is an obligation *actually* to provide a means by which the relationship between Mr A and Master C can be recognised, and *actually* to provide a means by which Master C can gain access to the Irish nationality of Mr A. It is not good enough, with all respect, for the Minister to have his counsel point in court to a Convention and a section of an Act that, it is suggested, *may* enable these applicants to have access to some form of advantage. At the very least, if this line of contention was to succeed, one would have expected the Minister or a suitable official to aver on oath that ‘Here is what Ireland *actually* does to ensure that Master C has access to an arrangement that recognises his relationship with Mr A and *actually* has access to an arrangement that ensures that he will have access to the same nationality as Mr A’. The Minister must show the reality of a means of achieving the foregoing and has singularly failed to do so. The only obvious means of achieving the foregoing (and the only one that is before the court and being discussed in real terms) is the obvious one: access via s.7(1) of the Act of 1956 to the ultimate end of an Irish passport.

ii. Non-Application of *Menesson* in One Very Different English Case

29. Having been referred by the Minister to the decision of the High Court of England and Wales in *R. (H.) v. Secretary of State for Health and Social Care and Ors.* [2019] EWHC 2095 (Admin) the court feels compelled to treat with it, even though *H* was a very different case to this one. *H* was a surrogacy case in which there was an unfortunate breakdown in relations between, on the one hand, the intending parents, and, on the other hand, the surrogate mother and her husband. One consequence of this was that ss.35 and 38 of the United Kingdom’s Human Fertilisation and Embryology Act 2008 became relevant. The effect of those provisions, in the context presenting, was that it was not really possible for anyone other than the husband of the surrogate mother to be treated as the father. That had the effect (or possible effect) that one of the parents who had arranged the surrogacy might not be able to pass on his Brazilian citizenship to the child. In the course of her judgment, Lieven J. observes, amongst other matters, as follows:

“The Claimant places very great reliance on the decision in Menesson and the reference to the need for ‘full recognition’ of the legal relationship with the biological father. However, there are in my view critical distinctions between the

UK statutory scheme and that in France, as considered in Mennesson. What led to the breach of article 8 in France was the absolute inability of the children to have their genetic father accorded legal status. Most importantly in the UK there is provision in the HFEA for the genetic father to establish legal parenthood through the parental order provisions in s.54 HFEA 2008. [Court Note: No similar provision presents in the case at hand for the purposes of Irish law.]. There was no equivalent of this process in Mennesson. Ultimately the reason that s.54 cannot be relied upon here by A, is that C and D do not consent. However, the Claimant does not seek to argue that s.54 and the consent requirement is incompatible. In any event, for reasons that I will expand upon below a requirement for consent does not appear to me to be disproportionate. There is nothing in Mennesson that would suggest that a provision such as s.54 would not provide the ‘de facto enjoyment of civil status’, as referred to in [100] of the judgment, which would be sufficient to meet any alleged article 8 breach.”

30. The above paragraph is a critical paragraph in the judgment because it explains why the judgment in *Mennesson* does not govern *H*. There is no similar provision in Ireland to s.54 of the United Kingdom’s Human Fertilisation and Embryology Act 2008, *i.e.* there can be no making of a like order under Irish law. So the circumstances which led Lieven J. to hold that *Mennesson* did not apply just do not present here.

31. Later in her judgment, Lieven J. looks at the issue of ‘fair balance’, observing, amongst other matters, as follows:

“In terms of the ‘fair balance’, the direct impacts on H of A not being named on the birth certificate are limited. The Claimant put forward two specific matters, namely Brazilian nationality and inheritance. The evidence is not absolutely clear but I am prepared to accept that, if A was named on the birth certificate, H would have an automatic right to Brazilian citizenship, whereas as the position stands she would have to apply. That may be a detriment, but it is not possible to know whether H would wish to be a Brazilian citizen. Certainly, at the present time there is no evidence of any harm to H from her not being a Brazilian citizen....The evidence on inheritance impacts was even more speculative. It is possible that there could be theoretical detriment....However, such detriment can plainly be overcome by A

making testamentary provision for the Claimant, so any such harm is both theoretical and fully capable of being mitigated.”

32. As can be seen from the just-quoted text, Lieven J. was in the somewhat difficult position of having to gauge in an English court the possible future import of Brazilian law for an infant child in England which might or might not wish to claim Brazilian citizenship at some future time, and also whether or not detriment presented, the court being willing to assume one possible form of detriment and not being persuaded that the other presented, or at least could not readily be overcome. That is a very different factual matrix from that which presents in the case at hand. This is a case being heard by an Irish court, looking at Irish law. It is, moreover, a case in which, as touched upon previously above, there is real evidence of practical harm: application has been made for a passport for Master C and the Minister, though he has as yet made no decision on the application (lodged in early-2017), has come to court arguing that Master C is not entitled to a passport. So there is actual damage at play here.

iii. The Case at Hand

33. Unlike the case before Lieven J., the judgment of the European Court of Human Rights in *Mennesson* and the later advisory opinion *do* apply in the case at hand and point inexorably to the conclusion that, at the Convention level, Ireland is obliged to provide not just for a means of recognition of the surrogacy relationship between Mr A and Master C but also, in the context of this case, for a form of recognition that would enable Master C to have access to the Irish nationality of Mr A. There is no evidence before the court of any means whereby this might be done other than the means being pursued here (being the passport application). There was some speculation by counsel for the Minister at the hearing of this matter as to suggested other means; however, the evidence before the court is that *the* means by which one passes on Irish citizenship to one's child is through the means that actually present in this case, namely in an application for a passport in which reliance is placed ultimately on s.7(1) of the Act of 1956. When it comes to the interpretation of s.7(1) of the Act of 1956, the court is required to bring s.2 of the Act of 2003 to bear and arrive at an interpretation of s.7(1) that is compliant with Ireland's obligations under the ECHR, *i.e.* an interpretation that is reflective of the obligation upon Ireland to have (and demonstrate the existence of) a means whereby the undoubted right of Master C to have access to the Irish nationality of Mr A may be achieved. The interpretation that achieves this end is that which has been urged on the court by the applicants.

X

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34. It will be clear from the foregoing that the court considers the correct reading of s.7(1) of the Act of 1956 to be that advanced by the applicants.

XI

Conclusion

i. Reliefs Now to be Granted.

35. Arising from the above, in terms of the reliefs now to be granted: (1) the court will grant an order of *mandamus* directing the Minister to make a decision as to whether to issue an Irish passport in respect of Master C; (2) it does not seem to the court that it is necessary to grant an order of *mandamus* directing the Minister to issue an Irish passport to Master C for (a) unless the Minister appeals this judgment then, pursuant to the order of *mandamus* that is being granted, a passport will issue, and (b) if the Minister decides to appeal this judgment, a stay would fall in any event to be granted. The court will hear the parties as to costs.

ii. Damages.

36. Damages are among the reliefs claimed. There has been a clear breach of statutory duty. A breach of statutory duty can be capable of yielding damages. However, the court is mindful that neither side has made any oral or written submissions concerning damages. So it seems to the court that the most appropriate and fairest way of proceeding in this regard is to allow/request the parties at the costs hearing to make any and all submissions as they may wish to make concerning the issue of damages.

**TO MR A AND MR B:
WHAT DOES THIS JUDGMENT MEAN FOR YOU AND MASTER C?**

Dear Mr A and Mr B

In the previous pages I have written a quite long judgment about your case. The judgment is full of legal language and you may find it less than easy to understand. I am aware that family law judgments touch on important issues in people's personal lives. So I now typically add a 'plain English' note to the end of my family law judgments explaining briefly what I have decided. That is the least you deserve. Everyone else in this case will get to read this note but really it is for your benefit. (The Minister is well able to read and understand my judgment for himself).

Because lawyers like to argue over things, I should add that this note, though a part of my judgment, is not intended to replace the detailed text in the rest of my judgment. It is merely intended to help you understand better what I have decided. Your lawyers will explain my judgment in more detail to you.

I have referred to you as Mr A and Mr B in my judgment (and to your son as Master C). This makes my judgment (and this note) a bit impersonal but it is done to preserve your anonymity.

In early-2017 an application for an Irish passport was made in respect of your son, Master C. That application remains outstanding. For the reasons set out in my judgment, I will direct the Minister to decide the passport application. As you know from the hearing, a main focus of the argument was on the meaning and effect of section 7(1) of the Irish Nationality and Citizenship Act 1956. In my judgment I explain why I consider that Master C has been an Irish citizen from birth by virtue of that section.

I wish you and your children every good fortune in life.

Yours sincerely

Max Barrett (Judge)