



INTER-COUNTRY SURROGACY AND THE IMMIGRATION RULES

This leaflet explains some basic requirements of United Kingdom law and guidance regarding surrogacy and what must be done to allow children who have been born abroad as a result of an inter-country surrogacy arrangement to be brought into the United Kingdom under the Immigration Rules. This information applies to children born abroad as the result of a surrogacy arrangement, who wish to join the sponsoring couple in the United Kingdom. This leaflet is a guide and is not an authoritative statement of the law, but it aims to answer the immigration questions that are most likely to arise.

Further information on provisions in the Immigration Rules relevant to surrogacy can be found on the UK Border Agency website: www.ukba.homeoffice.gov.uk under "Law and Policy", which contains the following pages:

Definition of "a parent":

<http://www.bia.homeoffice.gov.uk/policyandlaw/immigrationlaw/immigrationrules/introduction/>

Children, (See half way down page for: paras 297 – 309; & Adopted Children paras 309a – 316F):

<http://www.bia.homeoffice.gov.uk/policyandlaw/immigrationlaw/immigrationrules/part8/>

Further information on Surrogacy generally including the Human Fertilisation & Embryology Act, can be found on the Department of Health website at: www.doh.gov.uk (search under surrogacy), and at:

http://www.dh.gov.uk/en/Publicationsandstatistics/Lettersandcirculars/LocalAuthorityCirculars/AllLocalAuthority/DH_4004636

IMPORTANT NOTE FOR ALL CONSIDERING AN INTER-COUNTRY SURROGACY ARRANGEMENT:

2. Please note that United Kingdom law applies to everyone who is resident here, whether or not they are British citizens or EEA nationals and whether or not their residence here is permanent. (EEA nationals should read Appendix 3, below.) There are no international agreements which govern or set out minimum standards in surrogacy arrangements and those contemplating such arrangements must remember that they, and any child they seek to bring into the United Kingdom who is born as the result of such an arrangement, will be subject to United Kingdom law. Those considering such arrangements should take especial care when considering the law and guidance of other countries, as their definitions and practices are very likely to differ from those of the United Kingdom.

3. Those who are considering entering into a surrogacy arrangement abroad are strongly advised to take expert legal advice before making any arrangements.

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What is Surrogacy?

4. Surrogacy is a word that covers a variety of situations where, for whatever reason, a woman carries and bears a child on behalf of someone else. The woman who carries and bears the child is the “surrogate mother”. However, she can do this without being genetically related to the child. The sperm and egg necessary to create the embryo can come from donors and the embryo can be implanted into her. In such circumstances any resulting child may have no genetic connection with the surrogate mother or her husband, (if she has one).

5. **Please note that where neither of the commissioning couple have a genetic connection with the child, there will be no possibility of UK legislation allowing for the commissioning couple to obtain a Parental Order, (see below).**

6. It is vital to remember that no matter what the genetic make-up of the child, UK law sees the woman who carries and bears the child as the legal mother. If she is married at the time of her artificial insemination or the implantation of an embryo, UK law will see her husband as the legal father, unless it is shown that he did not consent to the implantation of the embryo or the artificial insemination. This remains the case even where the surrogate mother is a foreign national residing abroad, because the interpretation of the Immigration Rules is in accordance with UK law and so it is UK law that will govern the definitions used. Even if the surrogate mother’s home country sees the commissioning couple as the “parents” and issues documentation to this effect, UK law and the Immigration Rules will not view them as “parents”. Only where the surrogate mother is single is there a chance of UK law viewing the sperm donor/commissioning male as the legal “father”.

Who are the Commissioning couple?

7. The “commissioning couple”, are the people who decide to enter into a surrogacy arrangement in order to engender a child for them to bring up. One of the commissioning couple may be unable to produce eggs or sperm, or even if they can produce them, the female partner may be unable to carry a child. The commissioning couple may reach a private arrangement direct with the surrogate mother or by way of a clinic. Surrogacy arrangements are not enforceable as contracts and cannot be enforced in the UK courts by any of the parties concerned.

Surrogacy and Parental Responsibility.

8. Under UK law, when a child is born to a surrogate mother, the parental responsibility for that child rests with the surrogate mother and, if she is married, with her husband unless it can be shown that he did not consent to the artificial insemination or implantation of the embryo. Where the child was not conceived by those methods, there is a presumption that the surrogate mother’s husband is the father of the child. This presumption may be rebutted by evidence that the commissioning man is the genetic father. As the surrogate mother is recognised as the legal mother, section 30 of the Human Fertilisation and Embryology Act 1990 (HFE Act 1990) provides a procedure by which the commissioning couple can acquire parental rights. The surrogate mother and the “legal” father must give full and free consent for the parental order. Such consent is not effective until the child is at least six weeks old, (see: section 30(6) of the HFE Act 1990), and exists to ensure that the surrogate mother is sure she has made the correct decision. There are other limits contained in section 30 in relation to obtaining parental orders, (see para. 17 below). These include: that the commissioning couple are married; the child was conceived by IVF, (in vitro fertilisation), GIFT, (gamete intra-fallopian transfer), or DI, (donor insemination); the child is living with the commissioning

couple; and no payment other than reasonable expenses has been made.

9. Where a male commissioning adult has provided the sperm to the surrogate mother, (and can demonstrate this by way of a DNA test by an accredited company - see Appendix 4, below), he will be the genetic father unless he is a sperm donor. Section 28 of the HFE Act 1990, (and part 2 of the Human Fertilisation and Embryology Act 2008), deems the husband of a woman treated with donor sperm to be the father of the child and designates any man treated together, (or having a fatherhood agreement with), with the woman as the father if the couple are not married. In surrogacy, if the surrogate is married, her husband will be treated as the child's father, unless it can be shown that he did not consent to the treatment services. The surrogate's husband will be required under section 30 to give his consent to the grant of a parental order to the commissioning couple. If the surrogate is not married, and is treated in a licensed clinic, it has been held that section 28 (or Part 2 in the 2008 Act) does not apply to the commissioning father, in order to deem him the legal father¹. If partial surrogacy is established by self-insemination, however, the commissioning father is the child's legal father. He could with the surrogate's agreement, simply seek a residence order but the commissioning woman would have no legal relationship with the child. Where the child is handed over and the commissioning parents wish to become recognised as the parents, they have two main options: adoption or parental orders. Parental orders under section 30 of the HFE Act 1990 are discussed below.

Domestic Law: Regulations & Offences: Surrogacy Legislation

10. The Department of Health holds the lead responsibility for making law and policy on Surrogacy in the United Kingdom. The Human Fertilisation and Embryology Act, (HFE. Act 1990) applies to all of the United Kingdom and is the Act which regulates parental orders². Other aspects of Surrogacy are regulated by the Surrogacy Arrangements Act 1985. There are no international agreements or Conventions which regulate how surrogacy should be managed between countries so anyone considering entering into an inter-country surrogacy arrangement must remember that if they reside in the United Kingdom, they are subject to United Kingdom law and the definitions which underlie it. This is of vital importance as the definition of who constitutes "a parent" for the purpose of United Kingdom law affects whether a child born abroad as the result of a surrogacy arrangement, may be brought into the United Kingdom under the Immigration Rules.

11. Surrogacy is a difficult area of law due to the ethical, legal and social issues that arise from it. The Department of Health has two basic principles which underpin surrogacy arrangements:

- that there should be no financial inducement to encourage surrogacy arrangements and third parties should not profit from making such arrangements, and
- the surrogate mother cannot be bound by any contractual obligation to give up her child, i.e. she must have the final choice about whether or not to hand over the baby.

¹ Re Q (A Minor) (Parental Order) 1996 1FLR

² Amendments have been made to the HFE Act 1990 and the Surrogacy Arrangements Act 1985 by the Human Fertilisation and Embryology Act 2008 (HFE Act 2008). In relation to surrogacy, sections 54 and 55 of the HFE Act 2008 make amendments to section 30 of the 1990 Act. These come into force in April 2010.

Current United Kingdom Law

The UK's current position, taken from Department of Health guidance, is as follows:

The Surrogacy Arrangements Act 1985

This initial legislation was amended by the Human Fertilisation and Embryology Act in 1990.

12. The Surrogacy Arrangements Act 1985 sought to outlaw profit-making agencies from assisting in the creation of surrogacy arrangements. It makes any payment to third parties illegal and bans advertising in relation to surrogacy.

13. Section 2 makes it a criminal offence to make surrogacy arrangements on a commercial basis. No criminal offence is committed by either the surrogate mother or the commissioning couple if, between them, it is agreed that payments will be made to the surrogate mother. However any other person, company or agency that for payment negotiates, makes or otherwise assists in a surrogacy arrangement commits the offence, (see footnote below).

14. Section 3 makes it a criminal offence to carry advertisements about surrogacy in any newspapers etc... and to distribute such advertisements.³

15. Section 4 deals with offences. On conviction for an offence under section 2, a person is liable to a fine and/or imprisonment; and to a fine for conviction under section 3.

16. The Surrogacy Arrangements Act 1985 was amended by section 36 of the Human Fertilisation and Embryology Act 1990 and section 59 of the Human Fertilisation Act 2008 (not yet in force).

The Human Fertilisation and Embryology Act 1990

17. The 1990 Act gave legal effect to the wider recommendations in the Warnock Report and followed a consultation paper in 1986 and a White Paper in 1987. It contains two provisions in respect of surrogacy:

- Section 30 - allows the courts to make an order providing for a child to be treated in Law as the child of a couple if certain conditions are met as follows:
 - the child is genetically related to at least one of the commissioning couple;
 - the surrogate mother has consented to the making of the parental order (or is incapable of doing so or cannot be found) no earlier than six weeks after the birth of the child;
 - the commissioning couple are married to each other and are both aged 18 years or over⁴;
 - the commissioning couple have made the application within six months of the child's birth;
 - **no money other than reasonably incurred expenses has been paid in respect of the surrogacy arrangement unless authorised by the court;**

³ When the provisions of the Human Fertilisation and Embryology Act 2008 come into force, a non-profit making body (surrogacy agency) will be allowed to make a not for profit charge for facilitating surrogacy arrangements and compiling information, and they will be allowed to advertise those services for which they make a charge.

⁴ When the provisions of the Human Fertilisation and Embryology Act 2008 come into force, unmarried and same sex couples will be able to apply for parental orders.

- the child is living with the commissioning couple; and
- the commissioning couple are domiciled in the United Kingdom, the Channel Islands or the Isle of Man.

18. In other words, provided that all these conditions are met, this provision enables the court to order that the commissioning couple in a surrogate arrangement are to be treated in law as the parents without their having to adopt the child. A court considering an application for a parental order will be assisted by a detailed written report from an independent specialist social worker.

- Section 36 - introduced section 1A into the 1985 Act to provide that 'no surrogacy arrangement is enforceable by or against any of the persons making it', i.e. surrogacy contracts are unenforceable in the courts. This means that the surrogate mother cannot be required by the commissioning parents under any contractual provision to hand over her child, nor can the commissioning parents be required to hand over any money, or recover any money paid to the surrogate mother under the terms of such a contract, or take responsibility for the child.

19. In addition, section 27 of the 1990 Act provides that, in respect of treatment which is regulated by the Act, "the woman who is carrying or has carried a child as a result of the placing in her of an embryo or of sperm and eggs, and no other woman, is to be treated as the mother of the child". This is relevant where IVF or donor insemination (which are regulated by the Act) are involved.

The role of social services

20. When section 30 of the 1990 Act came into force in 1994, guidance was issued to Local Authorities and Health Authorities, (LAC(94)25), which explained how the regulations made under section 30(9), (which modified the adoption legislation), operated. That guidance also requires Local Authority Social Services Departments to make enquiries when they are aware that a child has been, or is about to be, born as the result of a surrogacy arrangement in order to satisfy themselves that the child is not at risk as a result of the arrangement. The provisions of the Children Act 1989 permit the local authority to intervene if they consider the child is suffering, or is likely to suffer, significant harm. In those circumstances the local authority can seek a care order.

Parental responsibility

21. Where the commissioning couple wish to assume parental responsibility they may seek a Parental Order under section 30 of the 1990 Act (see paragraph 17 above). Any such order made by the court confers parental responsibility on them and extinguishes it in respect of anyone else. Until the making of the order the surrogate, (carrying), mother remains the legal mother of the child. The 1990 Act also contains complex provisions relating to the paternity of the child.

Introduction to Surrogacy, Nationality and the Immigration Rules

22. This section of this leaflet seeks to explain how the different possible Surrogacy scenarios can be linked to whether a child born as the result of a surrogacy arrangement will become a British citizen by birth, or may be allowed to enter the United Kingdom under the

Immigration Rules, or under EU law, or may have to apply outside of the Rules. There are three main possible scenarios in a surrogacy arrangement, (depending upon the genetics involved), and there are three legal routes whereby a child born as the result of a surrogacy arrangement may be brought into the United Kingdom, (depending upon the recognised legal connection between the commissioning couple and the resulting child). However, the possible scenarios and the immigration routes do not always equate to each other and therefore the leaflet first outlines the three “surrogacy scenarios”, (“A”, “B” & “C”), and the three routes or processes which allow for the entry of a child, (“Routes a, b, & c”). Inter-country surrogacy is complicated, but once you have identified which surrogacy scenario describes your situation (or most likely future situation), you will then be able to see which nationality or immigration route(s) or process(es) are relevant to you.

Surrogacy scenarios

23. There are many possible surrogacy arrangements but most fall within the main scenarios set out below. These take no account of any law or regulation of surrogacy which exists in other countries because, for the purposes of the Immigration Rules, only United Kingdom law is relevant.

24. The three main possible scenarios are:

- | | |
|------------|---|
| Scenario A | The male of the commissioning couple has a genetic connection with the child and the surrogate mother is unmarried. |
| Scenario B | The male of the commissioning couple has a genetic connection with the child and the surrogate mother is married. |
| Scenario C | The female of the commissioning couple has a genetic connection with the child, (the surrogate mother can be unmarried or married). |

Scenario A

25. Where the situation is as described in scenario A, above: i.e. the male of the commissioning couple provides the sperm, (and thus has genetic connection with the child), and the surrogate mother is unmarried, the male who provides the sperm will be considered for immigration and nationality purposes, as the resultant child’s father, so long as he is so identified on official documentation and can prove his connection by way of accredited DNA evidence, (see Appendix 4, below). He may be able to establish his paternity to the extent that he can pass on British citizenship to the child, (obviously only if he is himself a British citizen), or be able to sponsor the child’s entry to the United Kingdom under the Immigration Rules. (The latter is only possible where the surrogate mother gives up Parental Responsibility for the child.) If the child is brought to the UK and application made to the courts for a Parental Order under Section 30 of the HFE Act within six months of the child’s birth (but excluding the first six weeks of the birth and all the other requirements of the Act are fulfilled), a Parental Order may be made in respect of the commissioning couple thus conferring parental responsibility on them. At present it is not legally possible for unmarried couples, same-sex partners or civil partners to gain parental responsibility under section 30 of the HFE Act. Once the provisions contained in the Human Fertilisation and Embryology Bill 2008 are commenced, parental orders may be accessed by these couples. Readers must therefore take care to check the up to date position on this.

Scenario B

26. Where the situation is as described in scenario B, above: i.e. the male of the

commissioning couple has a genetic connection with the child and the surrogate mother **is married**, the male who provides the sperm will **not** be considered as the resultant child's father if the child was conceived as a result of artificial insemination or the implantation of an embryo, unless it is shown that the surrogate mother's husband did not consent to the treatment. This is because for the purposes of immigration and nationality, UK law views the woman who carries and bears a child as the child's mother and her husband as the father.

27. Although under UK law regulating Human Fertilisation and Surrogacy, this presumption of fatherhood is rebuttable where the child was conceived as a result of sexual intercourse, this is **not** the case for nationality purposes. Section 50(9) of the British Nationality Act 1981 provides that the surrogate mother's husband will be the father of the child, irrespective of the details of conception. Therefore the commissioning couple are advised that they must not rely on any future rebuttal of the surrogate mothers' husband being the child's father as a means of establishing that the child has British citizenship, and should expect to have to apply for an Entry Clearance in order to bring the child into the United Kingdom under the Immigration Rules, not by way of the child automatically acquiring British citizenship and coming in on a British passport.

28. The man who provided the sperm will not be able to establish his paternity if the surrogate mother is married and the child was not conceived through artificial insemination or the implantation of an embryo, unless it can be shown that the surrogate mother's husband did not consent. The commissioning man will be **unable** to pass on his British citizenship to the child, nor be able to sponsor the child's entry to the United Kingdom under the Immigration Rules. (This will remain the case even after the relinquishing of parental responsibility by the surrogate mother and her husband.) In order to bring the child to the UK, the surrogate mother and her husband will have to give up their parental responsibility and an application will have to be made for entry clearance to bring the child to the UK **outside** the Immigration Rules. If this is successful and the child is brought to the UK and application made to the courts for a Parental Order under Section 30 of the HFEA within six months of the child's birth, (but excluding the first six weeks after birth, and the other requirements of the Act are fulfilled), a Parental Order may be made in respect of the commissioning couple, i.e. the man who provided the sperm, (and who can demonstrate this by way of DNA evidence – see Appendix 4, below), and his wife.

Scenario C

29. Where the situation is as described in scenario C, above: i.e. the female of the commissioning couple has a genetic connection with the child, no matter what the surrogate mother's marital status, the female who provides the egg will **not** be considered as the resultant child's mother. In order to bring the child to the UK the surrogate mother and, if she is married, her husband, will have to give up their parental responsibility and an application will have to be made for entry clearance to bring the child to the UK **outside** the Immigration Rules. If this is successful and the child enters the UK and an application made to the courts for a Parental Order under Section 30 of the HFEA within six months of the child's birth, (but excluding the first six weeks after birth, and the other requirements of the Act are fulfilled), a Parental Order may be made in respect of the commissioning couple, i.e. the woman who provided the egg and her husband.

The legal routes for bringing a child, born as the result of a Surrogacy arrangement, to the United Kingdom under the Immigration Rules.

30. Because of the different scenarios that can arise in inter-country surrogacy and the restrictions they impose, the way that a child born as the result of a surrogacy arrangement may be brought into the United Kingdom will depend on individual circumstances. The routes

are:

Route a If the child gains British citizenship automatically, he/she will not require entry clearance at all, but may freely enter the UK once a British citizen passport has been obtained on his/her behalf.

Route b If the male of the commissioning couple meets the definition of “a parent” for the purpose of the Immigration Rules, there is a route of entry for the child under paragraph 297 of the Immigration Rules as a dependent child.

Route c If either of the commissioning couple has a genetic connection with the child, entry outside the Rules at discretion may be possible, on condition that application to the UK courts for a Section 30 Parental Order is made within 6 months of the birth.

Route “a”, entry as a British citizen – the Nationality Aspects of Surrogacy

31. The first way of bringing the child to the UK is as at *Route “a”* immediately above. This situation requires the circumstances of scenario A, (see above). Here the male of the commissioning couple provides the sperm, (and thus has genetic connection with the child), and the surrogate mother is unmarried; thus the male who provides the sperm will be considered as the resultant child’s father, (at least for the purposes of immigration and nationality), so long as he is so identified on official documentation and can prove his connection by way of accredited DNA evidence. In some circumstances his paternity may allow him to pass on British citizenship to the child.

Route “a”: The Nationality Act

32. Surrogacy arrangements bring about complex issues regarding the nationality of the child in question. The relevant statutory provisions for nationality issues relating to surrogacy arrangements are sections 2 and 50 of the British Nationality Act 1981 (“the 1981 Act”).

33. Section 2 of the 1981 Act provides that a person born outside the United Kingdom will be a British citizen at birth if either parent was then a British citizen otherwise than by descent or was a British citizen serving outside the UK in Crown or similar service.

34. Section 50(9)-(9C) of the Act, (read in conjunction with the British Nationality (Proof of Paternity) Regulations 2006), defines who is the “parent” of a child born after 1 July 2006:

- the mother is the woman who gives birth to the child, and
- the father is either
 - (a) the mother’s husband, if any, at the time of the child’s birth,
 - (b) any person who is treated as the father under s. 28 of the Human Fertilisation and Embryology Act 1990, or
 - (c) (and only if neither (a), nor (b) above, applies), a person who is proven to be the father by the production of either
 - (i) a birth certificate identifying him as such, and issued by the competent registration authority within 12 months of the birth of the child to which it relates, or

(ii) such other evidence (e.g. a DNA test report or court order) as may satisfy the Secretary of State in this point.

35. Readers should be aware from paragraph 27, (“Scenario B”), see above, that there are slight differences between the Human Fertilisation Acts and the Nationality Acts with regard to whom is automatically viewed as a parent. For the purposes of the British Nationality Act 1981, where treatment takes place outside the UK, Section 50(9) of the British Nationality Act 1981 provides that the surrogate mother’s husband will be the father of the child, irrespective of the details of conception. Therefore for nationality matters, in practical terms, paragraph (b) above will not apply and the issue of who is the father of the child will therefore depend on whether the surrogate mother was married at the time of the birth. If she was married, her husband will be seen as the child’s father. If she was not married, a man named on the birth certificate or producing other evidence of paternity (as per paragraph (c)(ii) above) can be regarded as the father. The surrogate child of a man who is a British citizen, as described in s.2(1)(a)-(c) of the 1981 Act, may in such cases become a British citizen.

36. Given the complexity of this issue, prospective commissioning couples should carefully consider the likelihood of a resultant child being able to automatically gain British citizenship in this way, before they enter into a surrogacy arrangement. Where the child does automatically acquire British citizenship at birth, an application for a British citizen passport can be made on behalf of the child, at the nearest British Diplomatic Post in the child’s country of birth. Once issued, the child will be able to travel freely to the United Kingdom with no need for entry clearance.

37. Where British citizenship is not automatically acquired, once paternity and/or parental responsibility is established, a child can be Registered as a British citizen, (see para 43 and 44, below for relevant criteria). Registration under Section 3(1) of the British Nationality Act confers “British citizenship other than by descent” upon the child. This is the same status as if they had been born in the United Kingdom to a British citizen parent. This means that they can pass on British citizenship to any children they have.

38. Application forms are available from the Nationality Directorate, (for contact details see below), or from any British Diplomatic Post. If the applicant child is in the United Kingdom on the date of application, the application should be sent direct to the Nationality Directorate. If the child is abroad, the application should be made to the nearest Diplomatic Post.

39. British citizens are not subject to control under United Kingdom Immigration legislation, but they must be able to prove their status when seeking admission to this country. This may be done by producing either a United Kingdom passport which describes the holder as a British citizen or a certificate of entitlement to the right of abode.

Route “b” – entry under the Immigration Rules for dependent children

40. The second way of bringing a child to the UK is as set out in paragraph 30 *Route “b”* above. This is where the male of the commissioning couple meets the definition of “a parent” for the purpose of the Immigration Rules and there is a route of entry under paragraph 297 of the Immigration Rules as a dependent child. This situation would require the circumstances of scenario A, (see above), i.e. the male commissioning adult or male of the commissioning

couple provides the sperm, (and thus has genetic connection with the child), and the surrogate mother is unmarried, the male who provides the sperm will be considered as the resultant child's father, so long as he is so identified on official documentation and can prove his connection by way of accredited DNA evidence, (see Appendix 4, below). Where he cannot pass on British citizenship to the child, (for example because he is not a British citizen himself or is a British citizen by descent and cannot pass his status on to the child), but can still establish his paternity to the child and, if the surrogate mother has renounced her parental responsibilities (at least 6 weeks after the birth), it will be open to him to apply for entry clearance on behalf of the child, at the nearest British Diplomatic Post in the child's country of birth. If successful, this will enable him to bring the child to the UK under Paragraph 297 of the Immigration Rules and the child would be granted Indefinite Leave to Enter the UK (For the requirements of this provision of the Rules – see Appendix 1, below.)

Route “c” – entry at discretion, outside of the Immigration Rules.

41. The third way of bringing a child to the UK is as set out at *Route “c”* above. This situation would require the circumstances of either scenario B or scenario C, (see above). If either of the commissioning couple has a genetic connection with the child, entry outside the Rules at the discretion of the Secretary of State may be possible, but such entry clearance will only be granted on condition that a Section 30 Parental Order is applied for within 6 months of birth and where evidence suggests that such an order is likely to be granted, (see paragraph 59 (g) below, for the list of requirements).

42. In these circumstances it will be necessary for one of the commissioning couple to be able to demonstrate both to the courts and to the entry clearance officer that a genetic connection with the child exists, by way of DNA evidence which will be of sufficient integrity to be acceptable to the UK courts, (see appendix 4 – below). Without this level of proof, the UK courts will not grant a Section 30 Parental Order and so entry clearance will not be granted outside the Immigration Rules at the discretion of the Secretary of State.

Applying for Citizenship after the child has been the subject of a Parental Order, (i.e. after entry to the U.K. by way of Routes b or c and after the Parental Order is obtained)

43. If a child fits the circumstances of scenario B, where the commissioning male is genetically related to the child, an application to register the child as a British citizen under section 3(1) of the British Nationality Act 1981, the Secretary of State will normally grant the application if the following criteria are met:

- a. s/he is satisfied about the paternity of the child; and
- b. s/he has the consent of all those with parental responsibility; and
- c. s/he is satisfied that, had the child been born to the father legitimately,
 - i. the child would have had an automatic claim to British citizenship under **s.1(1)** or **s.2(1)** of the British Nationality Act 1981; or
 - ii. the child would have had an entitlement to registration under either **s.1(3)**, **s.3(2)** or **s.3(5)**; or
 - iii. s/he would normally have registered under **s.3(1)**; and, if appropriate,
- d. there is no reason to refuse on character grounds.

44. If the commissioning father is not genetically related to the child (as in scenario C), an application to register the child as a British citizen under section 3(1) of the British Nationality Act 1981, the Secretary of State will normally grant the application if the following criteria are met:

- a. s/he has the consent of all those with parental responsibility; and
 - b. s/he is satisfied that, had the child been born to the man legitimately,
 - i. the child would have had an automatic claim to British citizenship under **s.1(1)** or **s.2(1)** of the British Nationality Act 1981; or
 - ii. the child would have had an entitlement to registration under either **s.1(3)**, **s.3(2)** or **s.3(5)** (see **Chapters 8, 10** or **11**); or
 - iii. s/he would normally have registered under **s.3(1)**; and, if appropriate,
 - c. there is no reason to refuse on character grounds; and
 - d. the man has been granted either:
 - an order under **s.30** of the **Human Fertilisation and Embryology Act 1990**, or
 - an order by a foreign court, within whose jurisdiction the child was born, directing that he be treated, in law, as the child's father.
45. Applications should be made on form MN1 which is available from the Liverpool Nationality Office, (see contacts section).

Human Fertilisation and Embryology Act 2008

46. The Human Fertilisation and Embryology Act 2008 has received Royal assent, and its provisions will come into force at various stages. This Act makes changes to the criteria for those who are eligible to apply for parental orders and makes changes to the Surrogacy Arrangements Act 1985. These changes are **not** yet in force. Prospective "commissioning couples" are strongly advised to check and obtain appropriate legal advice before embarking upon surrogacy arrangements, to ensure that they are aware of the current legal position as it applies to them.

The process for bringing a child born abroad as the result of a surrogacy arrangement to the United Kingdom

47. On deciding that you wish to enter into a surrogacy arrangement, you will need to assess, (given your own particular genetic situation and the likely marital status of the surrogate mother), which of the surrogacy scenarios, (as outlined above), will apply to you.

48. If you know that your circumstances equate to Scenario A and *route "a"*, i.e. that the surrogate mother will be unmarried and that the male of the commissioning couple can provide sperm and you are sure that he can confer British citizenship on any offspring, you will know that you will not have to make any application for entry clearance for the child. Instead you will be able to visit your nearest British Diplomatic Post and make an application for a British citizen passport on behalf of the child, which once issued, can be used by the child to enter the UK freely. Even where this is the case you are **strongly advised** to make contact with the nearest British Diplomatic Post before the child is born, to make certain that this route will be available to you and maintain other options should automatic transmission of citizenship not be possible.

49. If your circumstances equate to Scenarios B or C, or to Scenario A where you know that you will not be able to pass on British citizenship to any child, you will need to use either *Route "b"*, (entry under the Immigration Rules), or *route "c"*, (outside of the Immigration Rules), to sponsor the entry of the child. Both of these options require you to make an application for Entry Clearance on behalf of the child. This application should be made at the nearest British Diplomatic Post. You are **strongly advised** to make contact with the nearest British Diplomatic Post well before the

child is born, to make sure that any difficulties can be dealt with as early as possible. The necessity of making the application to the UK courts for the Section 30 Order within 6 months of the child's birth means that as much as possible should be done in advance of the birth so as to minimise the possibility of any delay prejudicing getting the Order.

50. If you know that neither of you will be able to provide any genetic material towards the creation of a child, you will not be able to commission a child under a surrogacy arrangement and then obtain a Section 30 Parental Order.

51. Many children in the UK need an adoptive family and so you might wish to consider adoption. You can find out more about adopting a child in the UK and from abroad at: <http://www.direct.gov.uk/en/Parents/Adoptionfosteringandchildrenincare/index.htm> and from the leaflet: "**Inter - country Adoption and the Immigration Rules**", which is available by post, or on the UK Border Agency website at: <http://www.ukba.homeoffice.gov.uk/ukresidency/eligibility/partnersandchildren/adoptedchild/> If you choose to adopt a child who lives overseas, it is vital that you choose an adoption agency in the UK which is registered to deal with inter-country adoptions that can help you through the process. Various conditions and requirements apply to the bringing of children into the UK for adoption, or after adoption abroad, and failure to comply with these is an offence; similarly, adoption legislation restricts the making of payments in connection with adoption.

What is entry clearance?

52. An entry clearance is a visa, entry certificate or other document which is issued for the purpose of travel to the United Kingdom. It is regarded as evidence of the holder's eligibility to enter the United Kingdom. Applications for entry clearance must be made to the Entry Clearance Issuing Post, (normally a British Embassy, High Commission or other Diplomatic Mission, collectively known as British Diplomatic Posts), in the country of territory in which the child is living which has been designated to issue entry clearances. Where there is no Post in the country where the child is living, an application may be made to a designated Post elsewhere. In some countries UK Visas have agreements with Commercial Partners, and in these cases applicants should submit applications through these Partners. Details of the Posts which are designated for this purpose, fees, information on how to apply for entry clearance and entry clearance application forms may be obtained either from the British Diplomatic Post concerned or by writing to:

U.K. Visas
Foreign and Commonwealth Office
King Charles Street
London. SW1A

There is also a U.K. Visas website at: www.ukvisas.gov.uk

53. Guidance on the time it will take an Entry Clearance Officer to process an application and further information concerning specific countries may be obtained from the relevant Post.

54. Since 2 October 2000, entry clearance officers in British Diplomatic Posts overseas have issued new-style entry clearances. These entry clearances now have a "Valid from" date as well as a "Valid until" date and allow the holder to travel to the United Kingdom on an unlimited number of occasions during the validity shown. Persons arriving in the United Kingdom with one of these entry clearances, which show the conditions of stay, will not require

their passports to be stamped with leave to enter by an Immigration Officer on arrival. Instead, the Immigration Officer will stamp the passport with the date of arrival on the first entry only. Thereafter, on subsequent arrivals, the holders of such entry clearances will normally be subject only to a document check, provided that the holder is returning in the same capacity and continues to meet the requirements of the Immigration Rules.

What are the immigration requirements?

55. Whether you are applying under *route "b"*, (within the Immigration Rules), or under *route "c"*, (outside of the Rules), all children coming for settlement in the United Kingdom will require Entry Clearance prior to their travel here. The only exceptions to this are where the child is a British citizen, (see paragraphs 31 to 39 & 43 to 45), or holds the nationality of another European Economic Area Country, (but EU/EEA nationals **must** read Appendix 3 to see whether they can sponsor the entry of a legally unrelated child). It is important to remember what was said at paragraph 6, (above), as only if someone meets the definition of "a parent", (as set out at paragraph 6 of the Immigration Rules), is the person viewed as "a parent" for the purposes of the Immigration Rules and therefore able to use *route "b"* as set out above and make an application under the Immigration Rules. Where someone who gave genetic material towards the creation of a child born as the result of a surrogacy arrangement and can demonstrate this by way of accredited DNA evidence, (see Appendix 4, below), they should use *route "c"* by making an application outside the Immigration Rules. Even though the application will be outside the Rules, applicants must meet as many of the Rules' requirements as they can. The immigration requirements are set out in the Immigration Rules⁵. In summary, the parents must be able to show that:

- they are present and settled in the United Kingdom, i.e. living here lawfully with no time limit on their stay, or if EEA nationals can demonstrate that they have acquired "Permanent Residence"; and
- they are able to maintain and accommodate the child adequately without recourse to additional public funds for the child, (see Appendix 2, below, for a list of "Public Funds").

56. In addition, they must show that the child:

- is under 18 years old;
- is not leading an independent life, is unmarried and has not formed an independent family unit;
- (unless the subject of a Hague Convention adoption) has broken any ties with his family of origin/surrogate mother;
- holds a valid United Kingdom entry clearance for entry in this capacity.

57. NOTE: UK- based commissioning couples hoping to adopt a child who has been "gifted" or given to them by relatives abroad, must note that there is very little chance of them being able to bring the child into the UK. The UK's international obligations prevent any acceptance of such practices. Even if a foreign adoption has been completed, the requirements of the immigration rules will prevent an entry clearance being issued to

⁵ Paragraphs 6 & 309A - 316 of HC395 and Paragraphs 316A – 316F of HC 395 as amended by CM5253, HC538, HC 1224 Cm 4851 & CM5829 - see Appendix 1

such a child, and the requirements of the HFEA will prevent the making of a Parental Order.

58. Every child who is not a British citizen and is coming to live in the United Kingdom permanently must obtain entry clearance before travelling to this country. You are strongly advised not to book a flight to the United Kingdom for your child until entry clearance has been issued. If you do so, it may be necessary for you to change your travel plans and await completion of the entry clearance process.

What documents do I need to provide for Entry Clearance in a Surrogacy case?

This is Relevant for Scenarios B & C & for Routes “b” & “c” & virtually identical documentation will be necessary for Scenario A & Route “a”.

59. You must provide all of the following documents, through the Diplomatic post. **Documents must be in original form.** Those which are not in English must be accompanied by certified translations.

a), settlement application form VAF2 (available from UK Visas, address above), the child's passport, 2 recent passport sized photographs and the appropriate fee;

b), the child's original birth certificate showing his name at birth;

c), evidence from the clinic you commissioned in your Surrogacy arrangement, confirming your biological involvement in the creation of the child and accredited DNA evidence that one of you is genetically related to the child, (see Appendix 4, below for list of accredited companies);

d), where the child has been abandoned, a certificate of abandonment from the authorities previously responsible for the child's care, or, where the surrogate mother has given up her parental responsibilities for the child, a document attesting to her having given up her rights which is legally valid in her home country;

e), any adoption or guardianship order (where applicable);

f), passport(s) of the commissioning couple or other evidence to show that they have settled status in the United Kingdom, such as a birth certificate, registration or naturalisation certificate;

g), evidence that the commissioning couple can meet the requirements necessary to obtain a Parental Order under Section 30 of the HFEA, and that they intend to apply and have the necessary time to make an application for such an order within six months of the child's birth. The requirements for a Section 30 Order are that:

- the child is genetically related to at least one of the commissioning couple;
- the surrogate mother has consented to the making of the Parental Order (or is incapable

- of doing so or cannot be found) no earlier than six weeks after the birth of the child;
- the commissioning couple are married to each other and are both aged 18 years or over;
- the commissioning couple have made the application within six months of the child's birth;
- no money other than reasonably incurred expenses has been paid in respect of the surrogacy arrangement unless authorised by the court;
- the child is living with the commissioning couple; and
- the commissioning couple are domiciled in the United Kingdom, the Channel Islands or the Isle of Man;

h), bank statements and an accountant's letter or pay slips which show the monthly incomings and outgoings of the adoptive parent(s) and details of their accommodation in the United Kingdom.

60. You may be asked to provide further additional documents. It may also be necessary for the Entry Clearance Officer to interview some or all of the parties involved. Please note that the Entry Clearance Officer must be satisfied that you can maintain and accommodate the child without recourse to public funds and may ask for documents to confirm your financial status. (See Appendix 2 for a definition of "Public Funds" for immigration purposes.)

61. If an entry clearance application is refused, there may be a right of appeal to the Asylum and Immigration Tribunal.

How long can the child stay?

62. For those who are not British citizens the period for which the child is admitted under the Immigration Rules will depend on the entry clearance granted. It might also be dependent on any limitations on the stay of the commissioning couple or adoptive parents. A child may be admitted:

- if they have a recognised legal relationship with the man who provided the sperm and who is himself either a British citizen or is "settled" in the United Kingdom, then an application can be made under paragraph 297 of the Immigration Rules for Indefinite Leave to enter the United Kingdom. This would mean that the child would be able to enter the UK and remain here permanently. (Please note that Indefinite Leave can lapse if the child leaves the UK and stays outside the UK for more than 24 months.);
- if the commissioning couple can demonstrate that they are capable of meeting the requirements necessary to obtain a Parental Order under Section 30 of the HFEA, the child may be granted leave to enter the United Kingdom for a period of 12 months at the discretion of the Secretary of State outside the Immigration Rules. After the child is admitted and once the commissioning couple have been granted a Parental Order by the court, they should apply for Indefinite Leave to Remain on behalf of the child and may subsequently make an application to register the child as a British citizen under Section 3(1) of the British Nationality Act 1981;

63. An application may be made to the UK Border Agency for the time limit on the child's stay to be removed on completion of the Parental Order proceedings. Where children are brought into the United Kingdom without a legal parent or close relative, they are treated as a privately fostered child under the Children Act 1989 or equivalent legislation. On arrival in the United Kingdom, you must notify the council that the child is living with you so that they can monitor the child's welfare. (Please note that in Northern Ireland you must notify the local HSS Trust, not the council.)

Useful addresses and telephone numbers:

HOME OFFICE

For information about immigration matters:

**Home Office
UK Border Agency
Public Enquiry Office**
Lunar House
40 Wellesley Road
CROYDON
CR9 2BY
Tel: 0870 606 7766

For information about nationality matters:

**Home Office
United Kingdom Border Agency
Nationality Directorate**
3rd Floor
India Buildings
Water Street
LIVERPOOL
L2 0QN
Tel: 0151 237 5200

DEPARTMENT OF HEALTH

For information about Surrogacy:

DH enquiries: 020 7210 4850; e-mail: dhmail.gsi.gov.uk

DEPARTMENT for CHILDREN SCHOOL & FAMILIES, & DEVOLVED AUTHORITIES

England:

**for Children, Schools
and Families**

Area D, Ground Floor
Mowden Hall
Staindrop Road
DARLINGTON
County Durham
DL3 9BG
Tel: 01325 39 13 34; (Open 13:30-16:30 Mon-Wed).
Fax: 01325 391 396
e-mail: ica.darlington@dcsf.gsi.gov.uk

Scotland:

**Children & Young People's Department
Group**

Scottish Executive
Area 2C
Victoria Quay
EDINBURGH
Scotland
EH6 6QQ
Tel: 0131 244 3663
Fax: 0131 244 3547

Wales:

**Children's Health and Social Care
Directorate
Welsh Assembly Government**
Cathays Park
CARDIFF
Wales
CF10 3NQ
Tel: 02920 825 472 / 823 668
Fax: 02920 823 142

Northern Ireland:

**Department of Health, Social Services
and Public Safety
Child Care Policy Directorate**
Room D1.4
Castle Buildings
Stormont
BELFAST
Northern Ireland
BT4 3SQ
Tel: 02890 522 942
Fax: 02890 522 500

Requirements to be met by a person seeking indefinite leave to enter the United Kingdom as the child of a parent, parents or a relative present and settled or being admitted for settlement in the United Kingdom

It should be noted that when children, (i.e. usually the biological child of the sponsoring parent, but see the Immigration Rules, paragraph 6 [as amended by CM5253 & HC538] for the definition of a “parent” for the purposes of the Immigration Rules), are considered under this area of the Immigration Rules, Paragraphs 297 - 303 of HC 395 are applied.

You or the child must show that he:

- is seeking leave to enter to join a parent or relative in one of the following circumstances:
 - both parents are present and settled in the United Kingdom; or
 - both parents are being admitted on the same occasion for settlement; or
 - one parent is present and settled in the United Kingdom and the other is being admitted on the same occasion for settlement; or
 - one parent is present and settled in the United Kingdom or being admitted on the same occasion for settlement and the other parent is dead; or
 - one parent is present and settled in the United Kingdom or being admitted on the same occasion for settlement and has had sole responsibility for the child's upbringing; or
 - one parent or a relative is present and settled in the United Kingdom or being admitted on the same occasion for settlement and there are serious and compelling family or other considerations which make exclusion of the child undesirable and suitable arrangements have been made for the child's care; and
- is under the age of 18; and
- is not leading an independent life, is unmarried and has not formed an independent family unit; and
- can and will be maintained and accommodated adequately without recourse to public funds in accommodation which the parent, parents or relative owns or occupies exclusively; and
- holds a valid United Kingdom entry clearance for entry in this capacity.

Entry clearance for admission in this capacity is mandatory.

Appendix 2

PUBLIC FUNDS

For immigration purposes, "public funds" currently means:

Income-based jobseeker's allowance (JSA);
attendance allowance;
severe disablement allowance;
carer's allowance;
disability living allowance;
income support;
child tax credit;
working tax credit;
a social fund payment;
child benefit;
housing benefit;
council tax benefit;
state pension credit;
housing and homelessness assistance;

Please note:

1. The list of public funds, which are taken into account for immigration purposes, may change.
2. Under Inland Revenue Regulations, Child Tax Credit and Working Tax Credit are not generally available to those who are subject to Immigration control, e.g. a child seeking entry. However, adopting parents who are settled in the United Kingdom and therefore not subject to Immigration control would be entitled to claim Child Tax Credit provided they satisfy all the usual entitlement rules.

The Status of E.U. / E.E.A. Nationals in the United Kingdom

1. European Economic Area, (EEA) nationals residing and exercising Treaty rights in the United Kingdom are not “settled” for the purposes of the Immigration Rules, unless they have become entitled to “Permanent Residency” status in the U.K. If they do not have “Permanent Residency” they cannot sponsor the entry of a child under, (or outside of), any of the Immigration Rules. EEA Nationals can, once they can demonstrate that there has been a continuous exercise of Treaty rights in the UK for a period of five years, apply for a document to declare that they have acquired “Permanent Residency”. This application should be made using form EEA3, which is free of charge and which can be found on the U.K.B.A. website at: <http://www.ukba.homeoffice.gov.uk/sitecontent/applicationforms/eea/eea3> . Please note that when making an application for Entry Clearance to sponsor a child’s entry to the UK under the provisions in the Immigration Rules, (i.e. as route “B” above), or outside the Rules, (i.e. as route “C” above), EEA nationals must be able to **demonstrate** that they have acquired “Permanent Residence” in the U.K., and this is most easily done by way of confirmation from UKBA. (i.e. EEA nationals should apply for confirmation of their “permanent residency” from the UKBA as long as is possible in advance of their leaving the U.K. to sponsor a child to enter the UK.)

2. All EU/ EEA Nationals should note that:

a), On 30th April, 2006, the UK implemented European Free Movement Directive 2004/38 by way of the “Immigration (European Economic Area) Regulations 2006”. This established a right for EEA Nationals to gain “Permanent Residence” in the UK by virtue of having exercised, and continuing to exercise, a “Treaty right” here. The period of exercising “Treaty rights” which is necessary to establish this is five years, which must be demonstrated by production of the appropriate documentation. Obtaining confirmation of “Permanent Residence” may be done at Lunar House by appointment, or by post, (for address see contacts section above).

b), A European Economic Area, (EEA) national, is a national of a contracting state to the EEA Agreement signed at Oporto in 1992 and includes Norway, Iceland, Lichtenstein and member states of the European Union, (i.e. The United Kingdom, Austria, Belgium, Bulgaria, Republic of Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden). Switzerland is expressly included in the “Immigration (EEA) Regulations 2006”, and therefore Swiss nationals will be able to qualify for “Permanent Residence” in the same way as EU nationals. Gibraltar is a constituent part of the EU as a British Overseas Territory, and British Overseas citizens with a connection to Gibraltar are regarded as UK nationals, but there are exemptions in some areas, e.g. Common External Tariff, healthcare & child benefit.

c), Andorra, Monaco, San Marino and Vatican City are not member States of the EU or EEA but all have various agreements either with the E.U. or their larger immediate neighbours. (e.g. Andorra, Monaco & San Marino participate in the customs union, Vatican City does not.)

d), The United Kingdom of Great Britain and Northern Ireland is a member State of the European Union. However, it must be remembered that Jersey, Guernsey, and the other Channel Islands, and the Isle of Man, do not form part of the United Kingdom, (they are Crown Dependencies), and therefore are not part of the European Union nor

of the European Economic Area. Residents of these islands will need to contact their island's own Government's officials in connection with immigration arrangements. (For contact details see below.) EEA Nationals must note that any period of residence on the Channel Islands or the Isle of Man is not residence in the UK, (& therefore also not residence in the EU or EEA), for the purpose of establishing a right of "Permanent Residence" in the United Kingdom.

Acceptable DNA Tests

Entry Clearance Officers and UK Border Agency caseworkers can only accept as evidence of a relationship, a DNA test report from an organisation accredited by Her Majesty's Courts Service (HMCS). HMCS is empowered to prescribe the conditions that a body must meet in order to be eligible for accreditation. The body or company must apply for accreditation, have a valid ISO 17025 Certificate and undertake to comply with the Code of Practice and Guidance on Genetic Paternity Testing Services. (This Code of Practice is the responsibility of the Department of Health.) UK Border Agency decisions are ultimately challengeable in the Family Courts and therefore it is necessary to adhere to the same criteria with regard to the acceptability of evidence.

HMCS has a publicly available list of accredited bodies and companies. At the time of this instruction, the accredited bodies were:

Name: Alpha BioLaboratories Ltd

Address: Bioscience Building, Crown Street, Liverpool, L69 7ZB

Tel: 0845 505 0001

Fax: 0845 505 0002

www.alphabiolabs.co.uk

Name: Anglia DNA Services Ltd

Address: Norwich Research Park, Colney Lane, Norwich, NR4 7UH

Tel: 08454 565 365

Fax: 01603 450 945

www.angliadna.co.uk

Name: Barts and The London, Queen Mary University of London

Address: Haematology ICMS, Barts and The London, 4 Newark Street, London, E1 2AT

Tel: 020 7882 2274

Fax: 020 7882 2183

www.icms.qmul.ac.uk

Name: Complement Genomics Ltd. (trading as dadcheck ®)

Address: Unit 128i Bioscience Centre, Business and Innovation Centre, Sunderland, SR5 2TA

Tel: 0191 516 6500/6632

Fax: 0191 516 6005

www.dadcheck.com

Name: Crucial Genetics

Address: F1 House, Road 4, Winsford Industrial Estate, Winsford, Cheshire, CW7 3QN

Tel: 0870 8888 088

Fax: 0870 8888 089

www.crucialgenetics.com

Name: Eurofins Medigenomix GmbH

Address: Fraunhoferstr 22, D82152, Planegg/Martinsried, Germany

Tel: 0800 321 3236

Fax: 020 8711 6700

www.eurofinsmedigenomix.co.uk

Name: The Forensic Science Service Ltd

Address: Sales and Operational Planning Office, Trident Court, 2920 Solihull Parkway, Birmingham Business Park, Birmingham, B37 7YN

Tel: 0845 120 7272

Fax: 0121 770 9289

www.paternity.forensic.gov.uk

Name: LGC Diagnostics Department

Address: LGC Building, Queens Road, Teddington, Middlesex, TW11 ONJ

Tel: 020 8943 8400

Fax: 020 8943 8401

www.lgc.co.uk/paternity

Name: Orchid Cellmark Ltd

Address: Blacklands Way, Abingdon Business Park, Abingdon, Oxon, OX14 1YX

Tel: 01235 528 609

Fax: 020 8943 8401

www.cellmark.co.uk

We can therefore only accept DNA test reports from the above nine organisations in collection with any Inter-country Surrogacy application. You should note that this list is liable to change over time.