

Interview with Justice Hedley
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It is still unusual for a serving High Court judge, especially one specialising in family law, to give an interview to the media, but Mr Justice Hedley has decided to tell this programme about his concerns about British couples who go abroad to have surrogate babies. He has spoken to our reporter Jon Manel who is here now:

Jon Manel: Four weeks ago a judgment was handed down at the Royal Courts of Justice in London about a baby known only by the initials 'IJ'. It has gone unnoticed but it contains details of a quite extraordinary story. A British couple went to the Ukraine to find a woman willing to become a surrogate mother. Under the law in the Ukraine the baby's parents were the British couple. Under the law here in Britain the Ukrainian woman and her husband were the parents. Stuck between two conflicting legal systems the baby in effect became stateless and parentless. There were major difficulties trying to get the baby through immigration into Britain. Not only that, but this was a commercial surrogacy arrangement which British law is designed to try to prevent. After hearing an application by the British couple to be legally recognised as the baby's parents, the judge, Mr Justice Hedley, agreed to give the surrogacy agreement retrospective approval. He has done this on at least four occasions. He agreed to speak to me on the condition that we wouldn't talk about any specific case.

Justice Hedley: I have done quite a lot of these commercial surrogacy cases and been extremely anxious at the difficulties people have got themselves into. Usually through entering into them without beginning to appreciate the legal implications of doing so and it just seemed important to say something about that.

Jon Manel: What would be your warning then to people who are considering going abroad with a view of entering into a surrogacy arrangement?

Justice Hedley: Well I think the most important thing is to ensure that you have really talked through its implications, preferably with people who have gone that way before you, but it is the immigration implications that are particularly important.

Jon Manel: And then there is the issue of payments which are made to the surrogate mother. Commercial surrogacy arrangements are still meant to be against the law here.

Justice Hedley: They are against the law here. All that's permitted here is the payment of reasonable expenses. The cases that we have from overseas invariably involve extra payments by way of compensation to the surrogate.

Jon Manel: You say that commercial surrogacy arrangements are against the law here, but on a few occasions now you have retrospectively approved surrogacy arrangements which have involved payments which have in your view gone beyond reasonable expenses. They have basically been commercial arrangements.

Justice Hedley: That is absolutely right and the statute does give power to the High Court retrospectively to authorise these payments and of course the reason we do so is not because we want to encourage commercial surrogacy but because of the impossible position in which the child born as the result of the arrangement finds themselves when they are back in this country. Under the law as it presently is, the child's welfare is the courts paramount consideration and if a parental order is not made the child will remain parentless and stateless and clearly the court is not at all keen on leaving a child in that position. But we are still entitled to, and do, scrutinise these payments to make sure that they are not oppressive, that they haven't overborne the will of the surrogate, that they are not simply buying children by people who have been held not fit to have children in this country. Those kinds of things are still scrutinised and could still prevent an order being made.

Jon Manel: But I think you have said that would only happen in the clearest case of the abuse of public policy.

Justice Hedley: I think that has to be right because of my duty to treat the welfare of the child as the paramount consideration in the final balance.

Jon Manel: Which does mean in effect that these couples are getting away with commercial surrogacy arrangements despite the law trying to prohibit that?

Justice Hedley: Well the law simply doesn't permit it to happen, it's not a criminal offence as far as I know, but if there is to be control it has to be exercised before the child gets back in the country, either by preventing people doing things overseas which I doubt parliament can do, or preventing them re-entering at the border which has obvious problems. Commercial surrogacy is a highly controversial matter ethically and at the end of the day by the time the case gets to me the best I can do normally is to focus on the welfare of the child. If that means that the will of parliament has been subverted, well that is, I think, a matter that parliament would have to address.

Jon Manel: You have expressed concerns now in judgments going back several years but the same issues seem to be coming up again and again and it seems nothing has been resolved.

Justice Hedley: Well I think one of the reasons I was very happy to talk in an interview like this was because exactly that, that clearly a number of matters that have been raised haven't found their way into the public domain and a number of people have found themselves getting themselves into a mess unnecessarily and their children into a mess unnecessarily so hence the desire to say something. I think the best I can hope for is that people contemplating these arrangements will prepare for them properly and not allow themselves to be caught as some in the past have been.