Neutral Citation Number: [2020] EWCA Civ 559

Case Nos: C1/2019/2730
C1/2019/2767

**IN THE COURT OF APPEAL (CIVIL DIVISION)**
**ON APPEAL FROM THE HIGH COURT OF JUSTICE**
**FAMILY DIVISION AND ADMINISTRATIVE COURT**
**Sir Andrew McFarlane P**
**[2019] EWHC 2384 (Fam)**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29 April 2020

**Before:**

**THE RT HON THE LORD BURNETT OF MALDON**
**LORD JUSTICE CHIEF JUSTICE OF ENGLAND AND WALES**
**THE RT HON LADY JUSTICE KING**
and
**THE RT HON LORD JUSTICE SINGH**

- - - - - - - - - - - - - - - - - - - - -

**Between:**

| | |
|---|---|
| **THE QUEEN (on the application of**<br>**(1) ALFRED McCONNELL**<br>**(2) YY (by his litigation friend Claire Brooks))** | **Appellants** |
| **- and -** | |
| **THE REGISTRAR GENERAL**<br>**FOR ENGLAND AND WALES** | **Respondent** |
| **- and -** | |
| **(1) SECRETARY OF STATE FOR**<br>**HEATH AND SOCIAL CARE**<br>**(2) MINISTER FOR WOMEN AND EQUALITIES**<br>**(3) SECRETARY OF STATE FOR**<br>**THE HOME DEPARTMENT** | **Interested Parties** |
| **- and -** | |
| **THE AIRE CENTRE** | **Intervener** |

- - - - - - - - - - - - - - - - - - - - -
- - - - - - - - - - - - - - - - - - - - -

**Ms Hannah Markham QC and Ms Miriam Carrion Benitez**
(instructed by **Laytons LLP**) for the **First Appellant**
**Mr Michael Mylonas QC, Ms Susanna Rickard and Ms Marisa Allman**
(instructed by **Cambridge Family Law Practice**) for the **Second Appellant**
**Mr Ben Jaffey QC and Ms Sarah Hannett** (instructed by **the Government Legal Department**) for the **Respondent and Interested Parties**
**Ms Samantha Broadfoot QC and Mr Andrew Powell**

(instructed by **Pennington Manches Cooper LLP**) for the **Intervener**

Hearing dates: 4 and 5 March 2020

- - - - - - - - - - - - - - - - - - - - -

# Approved Judgment

**Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 10:30 a.m. on Wednesday, 29 April 2020.**

**The Lord Burnett of Maldon CJ, Lady Justice King and Lord Justice Singh:**

Introduction

1. The central question on this appeal is whether the First Appellant, Alfred McConnell (whose name was at one time anonymised to TT), a transgender man and holder of a gender recognition certificate, is entitled to be registered as the "father", or otherwise "parent" or "gestational parent", on the birth certificate of his son, YY, to whom he gave birth. YY is the Second Appellant. An anonymity order remains in place in relation to YY.

2. The Respondent, who is responsible for maintaining the register of births and deaths, decided that Mr McConnell had to be registered on the birth certificate as YY's "mother". Mr McConnell applied for judicial review of that decision, which was refused on 25 September 2019 by the President of the Family Division, sitting in the Administrative Court.

3. In addition, an application was made on behalf of YY for a declaration of parentage under section 55A of the Family Law Act 1986. On that application the President, sitting in the Family Court, made a declaration that Mr McConnell is YY's mother and accordingly has parental responsibility for him for that reason by virtue of section 2(2) of the Children Act 1989. This declaration followed inevitably from the reasoning of the President in refusing the claim for judicial review.

4. The President granted permission to appeal to this Court against both orders generally.

Factual background

5. About a decade ago, Mr McConnell, who had been registered as female at birth and who was then aged 22 years, transitioned to live in the male gender. He began medical transition with testosterone therapy in 2013. He then, in 2014, underwent a double mastectomy. His passport and NHS records were amended to show his gender as male.

6. In September 2016, Mr McConnell, under medical guidance, suspended testosterone treatment and later commenced fertility treatment at a clinic registered for the provision of such treatment under the Human Fertilisation and Embryology Act 1990 ("the HFEA 1990"). The aim of that treatment was to achieve the fertilisation of one or more of his eggs in his womb. Records from the clinic show that his gender was registered as "M" for male.

7. In January 2017, he issued an application under the Gender Recognition Act 2004 ("the GRA") to obtain a gender recognition certificate confirming that he was male. Determination of an application for such a certificate is made by a panel constituted under the GRA. The panel evaluates paper applications without a hearing. In addition to the application form and historical medical reports confirming diagnosis of gender dysphoria, Mr McConnell submitted a *pro forma* declaration stating that he "intend[ed] to continue to live in the acquired gender until death". The GRA panel granted his application. A gender recognition certificate confirming his gender as male was issued on 11 April 2017. The legal effect of a certificate is that the gender of the person to

whom the certificate relates "becomes for all purposes the acquired gender": see section 9(1) of the GRA. This is, however, subject to exceptions, to which we will return.

8. On 21 April 2017, Mr McConnell underwent intrauterine insemination fertility treatment at the clinic, during which donor sperm was placed inside his uterus. The process was successful and Mr McConnell became pregnant. He carried the pregnancy to full-term and, in January 2018, gave birth to a son, YY.

9. Mr McConnell was required, and sought, to register YY's birth. Upon communication with the Registry Office, he was informed, by a decision dated 22 January 2019, that he would have to be registered as the child's "mother", although the registration could be in his current (male) name.

10. He challenged the Registrar's decision by bringing a claim for judicial review on 3 April 2018. His primary claim was for a declaration that as a matter of domestic law he was to be regarded, and hence entitled to be registered, as YY's "father", or otherwise "parent" or "gestational parent". His secondary and alternative claim, on the basis that domestic law requires his registration as "mother", was for a declaration of incompatibility under section 4 of the Human Rights Act 1998 ("the HRA") on the ground that the domestic regime is incompatible with his and/or YY's Convention rights under Articles 8 and 14 of the European Convention on Human Rights ("the Convention").

11. YY issued an application for a declaration that Mr McConnell is YY's "father" under section 55A of the Family Law Act 1986. There was a further informal application for the Court to make an order under the Children Act 1989, granting him parental responsibility for YY (this was contingent on the judicial review/declaration applications).

12. Mr McConnell has made no secret of his identity. Indeed he has sought to raise public awareness of the situation in which he finds himself as a man who gave birth to a child by making a documentary called 'Seahorse', which has been shown at a number of film festivals and was broadcast by the BBC in September 2019. His anonymity order was varied in a separate judgment issued by the President on 11 July 2019: [2019] EWHC 1823 (Fam).

## Decisions under appeal

13. The President considered both Mr McConnell's claim for judicial review, with an appended application for a declaration of incompatibility, and YY's application for a declaration of parentage at the hearing before him. The facts were not in dispute and the Court did not have to hear oral evidence.

14. After setting out the factual background, the relevant legislation and the parties' submissions, the President began his analysis of the issues in domestic law at para. 123. He set out his provisional conclusions on those issues at para. 149. They were provisional in the sense that he wished to revisit them in the light of his consideration of human rights law. He did so from para. 245 and concluded that there was no incompatibility between his provisional views and the Convention rights: see para. 273

(in relation to Article 8) and para. 277 (in relation to Article 14). He therefore confirmed that his overall conclusions remained the same at para. 280, where he set them out as follows:

i) At common law a person whose egg is inseminated in their womb and who then becomes pregnant and gives birth to a child is that child's "mother".

ii) The status of being a "mother" arises from the role that a person has undertaken in the biological process of conception, pregnancy and birth.

iii) Being a "mother" or "father" with respect to the conception, pregnancy and birth of a child is not necessarily gender-specific, although until recent decades it invariably was so. It is now possible, and recognised by the law, for a "mother" to have an acquired gender of male, and for a "father" to have an acquired gender of female.

iv) Section 12 of the GRA is both retrospective and prospective. By virtue of that section the status of a person as the father or mother of a child is not affected by the acquisition of gender under the GRA, even where the relevant birth has taken place after the issue of a GRC.

Relevant provisions of the Births and Deaths Registration Act 1953

15. Section 1(1) of the Births and Deaths Registration Act 1953 ("the 1953 Act") requires the birth of every child born in England and Wales to be registered by the registrar for the sub-district where the child is born by entering such particulars in a register as may be prescribed.

16. There is both a long form of the certificate and a short form. It is only the long form which will contain particulars about parentage, since the short certificate must not do so: see section 33(2) of the 1953 Act.

17. The 1953 Act itself does not require the name of a father or mother to be inserted on a birth certificate, nor does it define those words. It does, however, define the words "father" and "mother", in the context of an adopted child, as being the child's "natural father" and "natural mother": see the interpretation section, section 41(1).

18. Regulations have been made under the 1953 Act: see the Registration of Births and Deaths Regulations 1987 (SI 1987 No. 2088). Regulation 7(1) requires the particulars which must be put in a birth certificate to be those set out in a prescribed form. Regulation 7(2) provides that, except as otherwise provided in the Regulations, "the particulars to be recorded in respect of the mother, father or other parent of a child shall be those appropriate as at the date of its birth."

Relevant provisions of the GRA

19. A person of either gender who is aged at least 18 may apply for a gender recognition certificate on the basis (so far as material) of living in the other gender: see section

1(1)(a) of the GRA. The application is to be determined by a Gender Recognition Panel: see section 1(3). Sch. 1 makes further provision in relation to such panels.

20. Section 2 sets out the criteria for the grant of a gender recognition certificate. In the case of an application under section 1(1)(a), section 2(1) provides that those criteria include that the applicant (a) has or has had gender dysphoria; (b) has lived in the acquired gender for at least two years; and (c) intends to live in the acquired gender until death.

21. Section 4(1) provides that, if a Gender Recognition Panel grants an application under section 1(1), it must issue a certificate. Section 4(2) provides that this must be a full gender recognition certificate if the applicant is neither married nor in a civil partnership.

22. The provisions which lie at the heart of these appeals are sections 9 and 12 of the GRA. They read as follows:

> "9 General
>
> (1) Where a full gender recognition certificate is issued to a person, the person's gender becomes for all purposes the acquired gender (so that, if the acquired gender is the male gender, the person's sex becomes that of a man and, if it is the female gender, the person's sex becomes that of a woman).
>
> (2) Subsection (1) does not affect things done, or events occurring, before the certificate is issued; but it does operate for the interpretation of enactments passed, and instruments and other documents made, before the certificate is issued (as well as those passed or made afterwards).
>
> (3) Subsection (1) is subject to provision made by this Act or any other enactment or any subordinate legislation.
>
> […]
>
> 12 Parenthood
>
> The fact that a person's gender has become the acquired gender under this Act does not affect the status of the person as the father or mother of a child."

Ancillary matters

23. There are two matters which we mention briefly in order to put them to one side, since, in our view, they are not germane to the essential issues which arise on these appeals.

24. The first is that there was some debate, both in the evidence and in the parties' submissions, around the question whether the decision taken by the Respondent in this case was different from other decisions which have been taken in the past. On behalf

of the Appellants it was submitted that there had been a "*volte face*". On behalf of the Respondent this was denied, although it was accepted that there may have been erroneous decisions made in the past. In our view, this debate cannot affect the true issues which arise for this Court to determine, which are issues of law. Those issues relate, first, to the correct interpretation of the legislation, in particular sections 9 and 12 of the GRA; and, secondly, to the compatibility of that interpretation with the Convention rights.

25. The second matter is this. Before the President, and to some extent before us, there was argument about the HFEA 1990 and the Human Fertilisation and Embryology Act 2008 ("HFEA 2008"). In particular there was debate about whether the infertility treatment which was given to Mr McConnell could lawfully be given to a man as opposed to a woman. The President addressed this issue, in particular at paras. 150-169 of his judgment. He was troubled by the fact that, despite an invitation to take part in the proceedings, the Human Fertilisation and Embryology Authority ("the Authority") had not done so.

26. In all the circumstances we do not consider it necessary or appropriate to comment on the question whether treatment was lawfully provided under the HFEA 1990 and HFEA 2008 for the following reasons. First, there is no dispute about this in the present case between the parties. Secondly, neither the clinic nor the Authority has taken part in these proceedings, so it would not be right to comment on their conduct. Thirdly, a similar issue of law may arise in future cases, in which it does have to be determined and it would only be right to do so after hearing full argument. Fourthly, as the President noted at para. 129 of his judgment, the issues of law which do arise in these appeals cannot turn on the happenstance of whether conception took place naturally or by means of treatment under the HFEA 1990 and HFEA 2008.

27. It is therefore to those issues that we now turn:

    i) The correct interpretation of the GRA, in particular sections 9 and 12.

    ii) If the Court would otherwise reach an interpretation of that legislation which would be adverse to the Appellants, whether it is required to give a more favourable interpretation from their point of view as a result of an incompatibility with the Convention rights, in particular Article 8. If there would otherwise be an incompatibility with the Convention rights, the obligation in section 3 of the HRA is clear: so far as possible, the legislation must be read and given effect in a way which is compatible with the Convention rights. If a compatible interpretation is impossible, then the Court has the power (although not a duty) to make a declaration of incompatibility under section 4 of the HRA.

## The issue of interpretation

28. Although there has been much discussion, both in the High Court and in this Court, as to the meaning of "mother" at common law and in the relevant legislation, the critical issue which this Court has to decide as a matter of statutory interpretation is whether section 12 of the GRA is retrospective only in effect or whether it can also have

prospective effect. The Appellants submit that it can only have retrospective effect, i.e. that the issuance of a gender recognition certificate does not affect the status of a person as being either the mother or the father of a child if that child was born before the certificate was issued. They submit that in a case like the present, where YY was born after the certificate was issued to Mr McConnell, section 12 can have no effect. The Respondents submit that it has both retrospective and prospective effect.

29. In our judgement, the Respondents' (and the High Court's) interpretation of section 12 (namely that it is both retrospective and prospective in its effect) is clearly the correct one. This is for the following reasons.

30. First, that is its ordinary meaning: on its face the provision is not limited to events occurring before a certificate was issued.

31. Secondly, if it were interpreted as having only retrospective effect, that would render otiose the provisions of section 9(2). The birth of a child is clearly capable of being an event occurring before a certificate was issued. Section 9(2) therefore already caters for that situation and makes it clear that the certificate does not affect what has happened already.

32. Thirdly, the wording of section 12 is very similar to the wording (including the tenses used) in other sections of the GRA which (as the Appellants accept) mark out exceptions to the general effect of a certificate pursuant to section 9(1). An example can be found in section 16, which deals with peerages and titles: it is clear (and the Appellants accept) that that provision has both retrospective and prospective effect after the issue of a gender recognition certificate.

33. Fourthly, where Parliament in the same Act wished a provision to have retrospective effect only, it made that clear through express language: see the words of section 15 of the GRA. That section, which has the side note "Succession etc.", provides that the fact that a person's gender has become the acquired gender does not affect the disposal or devolution of property under a will or other instrument "made before the appointed day", in other words the date when that provision was brought into force.

34. On behalf of the Appellants it was urged upon us that we should give an interpretation to the legislation which is in keeping with contemporary moral and social norms. Reliance was placed on the well-established principle of statutory construction that statutes are "always speaking": see *Owens v Owens* [2018] UKSC 41; [2018] 3 WLR 834, at para. 30 (Lord Wilson JSC), citing *R (Quintavalle) v Secretary of State for Health* [2003] UKHL 13; [2003] 2 AC 387, at para. 9 (Lord Bingham of Cornhill). As Lord Bingham put it there:

> "If Parliament, however, long ago, passed an Act applicable to dogs, it could not properly be interpreted to apply to cats; but it could properly be held to apply to animals which were not considered as dogs when the Act was passed but are so regarded now."

35. We confess that we find it difficult to see how that principle of statutory construction assists in resolving the issue which arises in the present context, which is whether section 12 of the GRA has only retrospective effect. If, and in so far as the argument is that that the word "mother" is no longer to be regarded as it would have been many years ago, or even at the time that the GRA was enacted in 2004, it seems to us that is precisely what the President sought to do in his judgment, when he construed that concept to mean the person who gives birth to a child rather than a gender-specific word like "woman". Secondly, if and in so far as the argument is that the word "mother" should be construed as "father", that would offend against the principle as enunciated by Lord Bingham that the word "dog" cannot be construed to mean "cat". Thirdly, if and in so far as the argument is that the word "mother" should be replaced by a new term such as "parent" or "gestational parent", that would not be an exercise in interpretation at all but would amount to judicial legislation.

36. On behalf of Mr McConnell Ms Hannah Markham QC invited the Court to give a more restrictive interpretation to section 12 by reference to what was said in the Explanatory Notes which accompanied the GRA. In particular, she relied on para. 43, which said of section 12 that:

> "This provides that though a person is regarded as being of the acquired gender, the person will retain their original status as either mother or father of a child. The continuity of parental rights and responsibilities is thus ensured."

Ms Markham emphasised that the evident purpose of section 12 was thus to ensure "continuity" but no more.

37. In principle the Explanatory Notes to an Act of Parliament are an admissible aid to its construction: see *R (Westminster City Council) v National Asylum Support Service* [2002] UKHL 38; [2002] 1 WLR 2956, at para. 5 (Lord Steyn). However, as Lord Steyn said, this is in so far as the Explanatory Notes "cast light on the objective setting or contextual scene of the statute, and the mischief at which it is aimed". We do not consider that the Explanatory Notes to the GRA are inconsistent with what we regard as the correct interpretation of sections 9 and 12 but, in any event, if they were, those Notes could not alter the true interpretation of the statute. Our task is to construe what Parliament has enacted, not what the Explanatory Notes say it enacted.

38. At one time it was intended by Mr Michael Mylonas QC, on behalf of YY, to take the Court to statements in Parliament, in accordance with the rule in *Pepper v Hart* [1993] AC 593. During the course of the hearing, however, he abandoned any such intention, so we need say no more about that save for this. We would observe that the provisions of sections 9 and 12 of the GRA are not ambiguous nor do they otherwise fall into one of the gateways in *Pepper v Hart* which would have justified reference to statements made in Parliament.

39. The Respondent was correct, applying the ordinary interpretation of section 12 of the GRA, to register Mr McConnell as the mother of YY.

40. We must therefore address the second main issue which arises in this appeal: whether the otherwise correct interpretation of sections 9 and 12 of the GRA would give rise to an incompatibility with Convention rights.

41. In doing so we emphasise the true nature of the exercise in which a court engages when asked to assess the compatibility of primary legislation with Convention rights. There were times during the hearing before us when it appeared that there may be a misunderstanding about the nature of that exercise. For example, it was suggested to us that, when enacting the GRA, Parliament had not given any, or any sufficient, thought to the issue which now arises in this appeal and that therefore no margin of appreciation should be afforded to Parliament in this respect. It was also suggested that we should have regard to various documents such as submissions by civil servants put before ministers in the last few years, which it was said show that insufficient consideration has been given to the issues which now arise. Such suggestions are contrary to fundamental principle.

42. The true nature of the exercise which the courts must perform when assessing the compatibility of primary legislation with Convention rights was set out by the House of Lords in *Wilson v First County Trust Ltd (No. 2)* [2003] UKHL 40; [2004] 1 AC 816, in particular at paras. 61-67 (Lord Nicholls of Birkenhead). The following propositions are apparent from that passage. First, the court's task is an objective one, to assess the compatibility of the legislation with Convention rights, by reference to the well-known criteria, such as whether it has a legitimate aim and whether it conforms with the principle of proportionality. Secondly, that task has to be performed at the time when the issue comes before the court, just as it would be performed by the Strasbourg Court at the time when a case comes before it. Thirdly, the court is not concerned with the adequacy of the reasons which were put forward by ministers or others for the legislation as it proceeded through Parliament; indeed that would infringe the principle in Article 9 of the Bill of Rights 1689, that a court may not question proceedings in Parliament. It follows that the court is not concerned with the adequacy or otherwise of what may have been said by civil servants advising ministers at the time of the legislation being considered, still less subsequently. What matters is whether the legislation enacted by Parliament is or is not compatible with the Convention rights.

43. Before we turn to consider whether the natural interpretation of sections 9 and 12 of the GRA is incompatible with Convention rights, as was submitted on behalf of the Appellants, we will summarise the development of the case law in the European Court of Human Rights which led to the enactment of the GRA.

## The development of the case law in the European Court of Human Rights

44. The traditional rule in English law was that a person's sex was determined once and for all at the time of birth: see *Corbett v Corbett* [1971] P 83. It followed therefore that people who were then called transsexuals could not marry in their new gender since, at that time, a marriage required there to be a union of one man and one woman. That remained the law until Parliament permitted same-sex marriages in 2013.

45. The traditional rule of English law was the subject of challenge under the European Convention on Human Rights in a series of cases beginning with *Rees v UK* (1986) 9 EHRR 56. Initially the Court found that English law was not incompatible with the Convention, because there was no consensus in Council of Europe states and the matter fell within the margin of appreciation afforded to those states. The margin of appreciation, however, narrowed. The series of cases culminated in the decision of the

Grand Chamber of the Strasbourg Court in *Goodwin v UK* (2002) 35 EHRR 18, in which for the first time that Court held that there was a violation of the Convention, in particular Article 8. It was that decision which led to the enactment of the GRA.

46. It is important to appreciate, however, that the sort of case which the Strasbourg Court had in mind was "the case of fully achieved and post-operative transsexuals": see para. 93 of its judgment. In enacting the GRA Parliament took a different course. It did not impose a requirement for surgery or for there to be a transition physiologically to the new gender. Parliament went further than the judgment of the Strasbourg Court strictly required. We were informed at the hearing that in many states it was necessary for a trans person to be sterilised before being recognised in their acquired gender and that the most obvious physical attributes of the former gender had to be extinguished. In that context we note the decision of the Strasbourg Court in *AP, Garçon and Nicot v France* (App Nos. 79885/12, 52471/13 and 52596/13), in which the Court held that a requirement that a trans person be sterilised in order to receive legal recognition breached Article 8 of the Convention. In any event, that is not the position which Parliament took in enacting the GRA. It is that fact which has led to the physical possibility that a trans man such as Mr McConnell can conceive, become pregnant and give birth to a child. He is by no means unique. The material before the Court shows that there are other trans men who have been able to bear children in both this country and abroad.

47. Furthermore, as the Strasbourg Court made clear in *Goodwin*, at para. 93, the UK could no longer claim that the matter fell within the margin of appreciation "save as regards the appropriate means of achieving recognition of the right protected under the Convention." That caveat was and remains important.

48. It is also important to appreciate that *Goodwin* itself did not concern the position of a child. It concerned the law relating, for example, to the birth certificate of the trans person. The only case in which the Strasbourg Court has considered the position of a child born to a trans person is *X, Y and Z v UK* (1997) 24 EHRR 143. Even that case was not directly analogous to the present because the trans man (X) did not give birth to the child (Z). Rather it was Y who gave birth to Z, after treatment by artificial insemination by donor. Y was entered on Z's birth certificate as being the mother. The Registrar General refused to enter X on the birth certificate at all. The part of the register where the father could be put was therefore simply left blank. We note that, as a result of legislative changes in this country since that case, X would now be registered as the "parent" although not as the "father". This would certainly be so if X and Y were married to each other or were civil partners: see section 42 of the HFEA 2008.

49. In *X, Y and Z* the Strasbourg Court found there to be no violation of the Convention: see in particular paras. 49-51 in relation to Article 8. The Court was clearly concerned in particular about the impossibility of predicting the extent to which the interests of children could best be protected and it did not wish to impose "any single viewpoint": see para. 51. It is also important to observe, as Mr Ben Jaffey QC reminded us on behalf of the Respondents, that *X, Y and Z* was a decision of the Grand Chamber.

50. Furthermore, the decision in *X, Y and Z* has been cited with approval by the Strasbourg Court more recently, and after the decision in *Goodwin*: see *Hamalainen v Finland* (2014) 37 BHRC 55, in particular at paras. 67 and 75. In that last passage the Grand Chamber the Grand Chamber of the Strasbourg Court said:

> "In the absence of a European consensus and taking into account that the case at stake undoubtedly raises sensitive moral or ethical issues, the Court considers that the margin of appreciation to be afforded to the respondent State must still be a wide one …"

In that context, it cited *X, Y and Z*, at para. 44. It went on to state:

> "This margin must in principle extend both to the State's decision whether or not to enact legislation concerning legal recognition of the new gender of post-operative transsexuals and, having intervened, to the rules it lays down in order to achieve a balance between the competing public and private interests."

51. To similar effect is the Advisory Opinion of the Strasbourg Court in *Request No P16-2018-001*, a case in which the French Court of Cassation requested an opinion from the Court under Protocol No. 16. At para. 51 of its Opinion the Grand Chamber of the Court said:

> "… There is no consensus in Europe on this issue: where the establishment or recognition of a legal relationship between the child and the intended parent is possible, the procedure varies from one State to another … The Court also observes that an individual's identity is less directly at stake where the issue is not the very principle of the establishment or recognition of his or her parentage, but rather the means to be implemented to that end. Accordingly, the Court considers that the choice of means by which to permit recognition of the legal relationship between the child and the intended parents falls within the State's margin of appreciation."

Against that background of the case law we turn to the issue of compatibility with the Convention rights in the present case if what would otherwise be the correct interpretation of sections 9 and 12 of the GRA were adopted.

## The human rights issue

52. The first question is whether there is an interference with the Appellants' rights under Article 8. The Respondents concede that there is, at least at the level of this Court, although they reserve their position should the case go further.

53. In our view, that concession is correctly made. We analyse briefly why that is so. There has been much discussion both in the High Court and in this Court about whether the word "mother" is any longer to be regarded as being a gender-specific word, in other words only applying to a woman; but in our view, it is important to appreciate the nature

of the underlying issue under Article 8 which touches the interpretation which the Respondents advance as to the true meaning of section 12 of the GRA.

54. On that interpretation (which the High Court accepted and which we also would accept on the natural interpretation of the legislation) the general effect of section 9(1) of the GRA is displaced to the extent that an exception to it applies. For present purposes the relevant exception is contained in section 12. It follows that, although for most purposes a person must be regarded in law as being of their acquired gender after the certificate has been issued, where an exception applies, they are still to be treated as having their gender at birth. For that reason, in our view, it is not possible simply to say that Parliament has "de-coupled" the concept of "mother" from gender, as Mr Jaffey suggested at the hearing before us. This appears to be how the Authority has interpreted the effect of the judgment of the High Court in the present case by amending its code of practice in December 2019 to reflect this point: see para. 6.30.

55. We recognise that the circumstances of this case do not present as serious a potential interference with Article 8 rights as the Strasbourg Court found was the case in *Goodwin* in 2002, when the law did not recognise a person's change of gender at all and regarded their gender as having been fixed for all time at the time of birth. Nevertheless, we are not concerned with a trivial interference. It is true that the circumstances in which the long-form birth certificate recording someone in Mr McConnell's position as "mother" are limited. For most purposes the short-form certificate will suffice. That does not include reference to the status of Mr McConnell as being YY's mother. It is for the more basic reason of this being an example of the state requiring a trans person to declare in a formal document that their gender is not their current gender but the gender assigned at birth. That represents a significant interference with a person's sense of their own identity, which is an integral aspect of the right to respect for private life in Article 8. It is also an interference with the right to respect for family life of both Mr McConnell and his son because the state describes their relationship on the long form of YY's birth certificate as being that of mother and son; whereas, as a matter of social life, their relationship is that of father and son.

56. Thus accepting that there is an interference with the Appellants' rights under Article 8(1), we turn to the provisions of Article 8(2), because that interference is in principle capable of being justified. If it is justified, there will be no incompatibility between the natural interpretation of section 12 of the GRA and the requirements of the HRA.

57. The first question which arises under Article 8(2) is whether the interference is "in accordance with the law". In the present appeal it was not suggested that it is not. Clearly it is in accordance with the law. Legislation governs the matter and it is accessible, clear and foreseeable. It therefore has the requisite quality of law for the purposes of the Convention.

58. The second question is whether there is a legitimate aim for the interference. There clearly is. It consists of the protection of the rights of others, including any children who are born to a transgender person, and the maintenance of a clear and coherent scheme of registration of births. It is important in this context to bear in mind that this is a question to be addressed at a general level. It does not turn on the facts of this or any other particular case. The question is not whether it would be in the best interests of YY to have the person who gave birth to him described as his mother on the long-

form birth certificate. The question is whether the rights of children generally include the right to know who gave birth to them and what that person's status was.

59. The next question is whether the interference complies with the principle of proportionality. The requirements of proportionality in the human rights context are now well established: see e.g. the decision of the Supreme Court in *Bank Mellatt v HM Treasury (No. 2)* [2012] UKSC 39; [2012] AC 700, at paras. 20 (Lord Sumption JSC) and 74 (Lord Reed JSC). There are four questions to be asked:

    i) Is there a sufficiently important objective which the measure pursues?

    ii) Is there a rational connection between the means chosen and that objective?

    iii) Are there less intrusive means available?

    iv) Is there a fair balance struck between the rights of the individual and the general interests of the community?

60. It was not suggested, as we understood the submissions, that the first two questions cause any difficulty in the present appeal. In any event, in our view, the objectives pursued by the state in this context are sufficiently important to warrant an interference with Article 8 rights and there is a rational connection between those objectives and the means chosen to achieve them. We turn therefore to the third and fourth questions.

61. In approaching those questions, it is important to emphasise certain fundamental features of this case.

62. First, the context is one in which difficult and sensitive social, ethical and political questions arise.

63. Secondly, it is important to appreciate that it is not only a question of interpreting one particular legislative provision in a way which might be different from its natural interpretation. As the parties themselves submitted during the hearing, there are many, inter-linked pieces of legislation which may be affected if the word "mother" is no longer to be used to describe the person who gives birth to a child.

64. We were told at the hearing by counsel for Mr McConnell that the word "mother" is used 45 times in the Children Act 1989 alone. Importantly, in our view, that is the word that is used in section 2(2)(a) of that Act. It provides that a mother has automatic parental responsibility for a child from the moment of birth. No-one else has that automatic parental responsibility, including the father. There is no need for any registration document for that purpose. The fact of giving birth to a child has that effect as a matter of operation of law. It can readily be understood why this could be important in practice. From the moment of birth someone must have parental responsibility for a newly born child, for example, to authorise medical treatment and more generally to become responsible for its care.

65. Furthermore, as Mr Jaffey submitted, it cannot simply be a question of this Court substituting a word such as "parent" for the word "mother". This is because the word "parent" has a distinct meaning which has been given to it by Parliament in other legislation. This has been the product of considered legislative change over several decades, in various statutes, including the HFEA 1990 and the HFEA 2008. The legal

position under the HFEA 2008 was succinctly summarised by Helen Mountfield QC (sitting as a deputy High Court judge) in *R (K) v Secretary of State for the Home Department* [2018] EWHC 1834 (Admin); [2018] 1 WLR 6000, at para. 51:

> "… under the 2008 Act, at birth a child always has one mother, who is the woman who bore her; may also have a female or male co-parent; may never have more than one male parent; and may not have more than two parents by birth."

66. Social and scientific developments over the last half century have meant that Parliament has addressed the status of a person who gives birth to a child but who is not genetically related to them, either because there has been a surrogacy arrangement or because there has been a method of conception such as *in vitro* fertilisation ("IVF"). In those contexts, the policy choice of Parliament is that the person who gives birth to a child is always described as the mother of that child, even if (for example) it was not her egg which was fertilised. Moreover, the law is clear that a child only ever has one mother, although there may be more than one "parent". The commissioning parents will be described as "parents" but never as "mother".

67. Thus, in the context of IVF, section 33(1) of the 2008 Act stipulates that:

> "The woman who is carrying or who 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."

68. In the context of surrogacy, section 1(2) of the Surrogacy Arrangements Act 1985 provides that:

> "'Surrogate mother' means a woman who carries a child in pursuance of an arrangement –
>
> (a) made before she began to carry the child, and
>
> (b) made with a view to any child carried in pursuance of it being handed over to, and parental responsibility being met (so far as practicable) by, another person or other persons."

69. The legal position was summarised by Baroness Hale of Richmond in *Whittington Hospital NHS Trust v XX* [2020] UKSC 14, at para. 9: "the surrogate mother is always the child's legal parent unless and until a court order is made in favour of the commissioning parents."

70. On an application made by two people the court may make an order providing for a child to be treated in law as the child of the applicants. This is achieved by means of a "parental order": see section 54(1) of the HFEA 2008 and section 54A(1) in the case of a single applicant.

71. Similar issues arise in the context of adoption. The relevant legislation is now the Adoption and Children Act 2002 ("the 2002 Act"). The policy choice made by Parliament once more is that the person who gives birth to a child is the mother and is the only mother. That is how she will be described on the birth certificate. That is the only birth certificate there will be for that child but it is marked "adopted" once an adoption order is made: see para. 1(2) of Sch. 1 to the 2002 Act. An adopted person is to be treated in law as if born as the child of the adopters or adopter: see section 67 of the 2002 Act. Once the order is made the natural mother becomes a former parent, without parental responsibility. An adoption certificate is kept by the Registrar General in a separate Adopted Children Register, which is maintained under section 77 of the 2002 Act. The Registrar General is required to make traceable the connection between the record marked "adopted" and the corresponding entry in the Adopted Children Register: see section 79(1) of the 2002 Act.

72. The third fundamental feature of the case is that there is no decision of the Strasbourg Court which suggests the interpretation advanced by the Appellants. The approach which the courts take under the HRA is in general to keep pace with the jurisprudence of the Strasbourg Court but not to go beyond it: see *R (Ullah) v Special Adjudicator* [2004] UKHL 26; [2004] 2 AC 323, at para. 20 (Lord Bingham of Cornhill) and *R (Al-Skeini) v Secretary of State for Defence* [2007] UKHL 26; [2008] AC 153, at paras. 105-106 (Lord Brown of Eaton-under-Heywood).

73. We were informed that there is a case pending in the Strasbourg Court which arose from Germany. As we understand it there is a statutory definition of "mother" under the German Civil Code (BGB) at §1591, which reads: "The mother of a child is the woman who gave birth to it (*Mutter eines Kindes ist die Frau, die es geboren hat*)." The German legislative scheme relating to transgender persons, which is contained in the *Transexuellengesetz* (TSG), is similar to the GRA. Under §10 of that law, the effect of a transgender person's successful application to be recognised as of the "other" gender is that they are seen as "of" that gender. As with section 12 of the GRA, the TSG contains a provision at §11 concerning "parent-child relationships". It stipulates that the decision that a transgender person is to be recognised as of the "other" (acquired) gender leaves the legal relationship between that person and their parents/children undisturbed (*unberuehrt*).

74. In the decision of the Federal High Court of 6 September 2017 (XII ZB 660/14) the facts were broadly similar to those of the present case: a female-to-male trans person obtained a decision effecting a change of gender prior to giving birth to a child via sperm donation. The trans man was registered both in the birth register and for the purposes of the child's birth certificate as "mother".

75. The Court interpreted the effect of the domestic scheme (§ 1591 BGB and § 11 TSG) as requiring the trans man's registration as "mother". It held that the fact that the trans man was recognised as belonging to the male gender at the time of the child's birth did not affect the assignment of "status" as mother. §11 TSG was properly considered an exception to §10 TSG; recognition in the "new" gender with all its antecedent "gender-dependent" rights and duties, was subject to the express exception for parent-child relationships. The Court laid emphasis on the right of a child of a trans person to know its origins (*Abstammungsrecht*).

76. The Federal High Court considered Article 8 of the Convention. It emphasised the wide margin of appreciation accorded to Contracting States relating to the legal recognition of trans identities. This wide margin of appreciation was grounded in the need to balance private/public interests and competing Convention rights. Germany had not overstepped this margin by requiring a trans person's status as "father" or "mother" to a child born to them to be determined with respect to their reproductive role, as opposed to in accordance with the "new" legal gender of the transgender person. There was an absence of European consensus. The German legal provisions adequately took into account: (i) the public interest in the coherence of the national legal order; and (ii) the child's right to personal knowledge of his/her parentage, which is also protected by Article 8(1) of the Convention.

77. The trans man then initiated proceedings in the Federal Constitutional Court but that Court declined to hear the complaint (Az. I BvR 2831/17).

78. We cannot exclude the possibility that the Strasbourg Court may disagree with the courts in Germany, although we respectfully suggest that their reasoning is compelling. On any view, we should not pre-empt the Strasbourg Court's decision.

79. Fourthly, and related to the third point, there is no European consensus in the Council of Europe on the issue which arises in the present appeal. The evidence suggests that some states have taken the step of reforming their law so as to achieve what in effect the Appellants seek to achieve. In a majority of jurisdictions, however, where legislation or case law exists, a person who gives birth to a child, irrespective of their legal gender, has to be registered as that child's "mother": see the report of Peter Dunne, a lecturer in law at the University of Bristol, dated 3 August 2018, at para. 88.

80. That point is relevant to what the Strasbourg Court describes as the "margin of appreciation" to be afforded to the Contracting States in the application of the Convention. The concept of a margin of appreciation is not directly relevant when courts in this country apply the HRA. This is because it is a concept of international law and not domestic law, governing the relationship between an international court and Contracting States. Nevertheless, it is well established that there is an analogous concept which does apply in domestic law under the HRA, which has been variously described as a "discretionary area of judgement", a "margin of discretion" or in other ways, for example to refer to the appropriate weight which is to be given to the judgement of the executive or legislature depending upon the context: see e.g. *R v Director of Public Prosecutions, ex p. Kebilene* [2000] 2 AC 326, at 381 (Lord Hope of Craighead); and *A v Secretary of State for the Home Department* [2004] UKHL 56; [2005] 2 AC 68, at para. 39 (Lord Bingham of Cornhill). For convenience we will refer here to the "margin of judgement".

81. This brings us to an important aspect of this case. The margin of judgement which is to be afforded to Parliament in the present context rests upon two foundations. First, there is the relative institutional competence of the courts as compared to Parliament. The court necessarily operates on the basis of relatively limited evidence, which is adduced by the parties in the context of particular litigation. Its focus is narrow and the argument is necessarily sectional. In contrast, Parliament has the means and opportunities to obtain wider information, from much wider sources. It has access to expert bodies, such as the Law Commission, which can advise it on reform of the law. It is able to act upon draft legislation, which is usually produced by the Government

and often follows a public consultation exercise, in which many differing views can be advanced by members of the public. Both Government and Members of Parliament can be lobbied by anyone with an interest in the subject in hand. The political process allows legislators to acquire information to inform policy decisions from the widest possible range of opinions. We have no idea, for example, whether all trans men object to the use of the word "mother" to refer to them when they have given birth to a child. It may be that some at least wish to have the automatic responsibility for the child to whom they have given birth which section 2 of the Children Act 1989 currently gives them. Moreover, we do not have evidence before this Court as to how other members of society would feel if they were no longer to be referred to on their child's birth certificate as a mother or a father but simply as "parent 1" and "parent 2". Those were among the possible ways forward which were suggested on behalf of the Appellants. In our view this illustrates how inapt the subject-matter is for determination by the courts as compared with Parliament. If there is to be reform of the complicated, inter-linked legislation in this context, it must be for Parliament and not for this Court.

82. The second foundation is that Parliament enjoys a democratic legitimacy in our society which the courts do not. In particular, that legitimises its interventions in areas of difficult or controversial social policy. That is not to say that the courts should abdicate the function required by Parliament itself to protect the rights which are conferred by the HRA. The courts have their proper role to play in the careful scheme of the HRA, as Lord Bingham emphasised in *A v Secretary of State for the Home Department*, at para. 42. In appropriate cases that can include making a declaration of incompatibility under section 4 in respect of primary legislation where an incompatibility between domestic legislation and Convention rights has been established and the interpretative tool provided by section 3 does not provide a solution. Democratic legitimacy provides another basis for concluding that the courts should be slow to occupy the margin of judgement more appropriately within the preserve of Parliament.

## The United Nations Convention on the Rights of the Child

83. We heard submissions from Ms Samantha Broadfoot QC on behalf of the AIRE Centre, about the 1989 United Nations Convention on the Rights of the Child ("CRC"), in particular Article 3(1), which provides that, in all actions concerning children, including action by legislative bodies, "the best interests of the child shall be a primary consideration". It should be noted, as has often been emphasised by courts in the past, that this does not require that the best interests of the child shall be a "paramount" consideration, nor even that they should be "the" primary consideration, only that they are "a" primary consideration.

84. Ms Broadfoot also placed reliance on General Comment 14 (2013) issued by the United Nations Committee on the Rights of the Child, in particular para. 6, where it is said that Article 3(1) of the CRC imposes three requirements: a substantive requirement, a procedural requirement and a principle of legislative interpretation.

85. Although the CRC has not been incorporated into domestic law by Parliament, and therefore cannot directly found rights in domestic law, both the Strasbourg Court and domestic courts will have regard to it when interpreting Article 8 of the Convention. Furthermore, the views of the UN Committee on the Rights of the Child are

"authoritative guidance" on the CRC: see e.g. *R (DA) v Secretary of State for Work and Pensions* [2019] UKSC 21; [2019] 1 WLR 3289, at para. 69 (Lord Wilson JSC). But, as Lord Wilson emphasised in that passage, a General Comment is no more than guidance, which is not binding even on the international plane, so that it may "influence" but never "drive" a conclusion that the CRC has been breached.

86. In the present context, where we are concerned with a legislative measure, not a decision on the facts of a particular case, what Article 3(1) of the CRC requires is that the best interests of children generally should be taken into account as a primary consideration when striking a balance in legislation. In our judgement, that is precisely what Parliament has done in enacting a carefully crafted set of provisions which balance the rights of transgender people and others, including their children. The view that Parliament has taken is that every child should have a mother and should be able to discover who their mother was, because that is in the child's best interests. Others may take a different view and in time may be able to persuade Parliament to take a different view. What cannot be doubted is that Parliament has taken into account the best interests of children as a primary consideration.

Article 14 of the Convention

87. Strictly speaking the grounds of appeal before this Court did not raise Article 14 of the Convention, which confers the right to equality in the enjoyment of the other Convention rights. Nevertheless, we heard short submissions about it from the AIRE Centre. We can deal with this argument briefly. Like the President, at paras. 274-277 of his judgment, we consider that Article 14 raises no separate issue in the circumstances of this case. Any difference of treatment which is contained in the relevant legislation is objectively justified for the reasons we have already set out in relation to Article 8.

88. In our view, there is no incompatibility between sections 9 and 12 of the GRA, on their natural interpretation, and Convention rights. There is therefore no need to give them anything other than their natural interpretation.

Conclusion

89. The legislative scheme of the GRA required Mr McConnell to be registered as the mother of YY, rather than the father, parent or gestational parent. That requirement did not violate his or YY's Article 8 rights. There is no incompatibility between the GRA and the Convention. In the result we dismiss these appeals.