Neutral Citation Number: [2019] EWHC 2384 (Fam)

Case No: FD18F00035

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION AND THE ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25/09/2019

Before:

The Rt. Hon. Sir Andrew McFarlane
President of the Family Division

- -

Between:

THE QUEEN (on the application of TT) — **Claimant**

- and -

THE REGISTRAR GENERAL FOR ENGLAND AND WALES — **Defendant**

- and –

SECRETARY OF STATE FOR HEALTH AND SOCIAL CARE [1]
MINISTER FOR WOMEN AND EQUALITIES [2]
SECRETARY OF STATE FOR THE HOME DEPARTMENT [3]
YY (A Child) (By his Litigation Friend, CLAIRE BROOKS) [4]

Interested Parties

AIRE CENTRE

Interveners

- -
- -

Hannah Markham QC and Miriam Carrion Benitez (instructed by **A City Law Firm**) for the **Claimant**
Sarah Hannett (instructed by **Government Legal Service**) for the **Defendant**
Ben Jaffey QC and Sarah Hannett (instructed by **Government Legal Service**) for the **1st, 2nd and 3rd Interested Parties**
Michael Mylonas QC, **Susanna Rickard and Marisa Allman** (instructed by **Cambridge Family Law Practice**) for the **4th Interested Party**
Samantha Broadfoot QC and Andrew Powell (instructed by **Pennington Manches Cooper LLP**) for the **Interveners**

Hearing date: 11th – 15th February 2019 and 2nd May 2019

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

THE RIGHT HONOURABLE SIR ANDREW MCFARLANE

This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the children and members of their family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

The Rt. Hon. Sir Andrew McFarlane P:

1. In this case the court is required to define the term 'mother' under the law of England and Wales. Down the centuries, no court has previously been required to determine the definition of 'mother' under English common law and, it seems, that there have been few comparable decisions made in other courts elsewhere in the Western World. Hitherto, a person who has given birth to a child has always been regarded as that child's mother. The issue arises in modern times where an individual, who was born female, undergoes gender transition and becomes legally recognised as male before going on to conceive, carry and give birth to a child, with the result that the parent who has given birth is legally a man rather than a woman. The question posed to this court is: Is that man the 'mother' or the 'father' of his child?

2. In *Re the Human Fertilisation and Embryology Act 2008 (Cases A, B, C, D, E, F, G and H)* [2015] EWHC 2602 (Fam), Sir James Munby P encapsulated [at paragraph 3] the importance of the issue of parenthood:

> "The question of who, in law, is or are the parent(s) of a child born as a result of treatment carried out under this legislation – the issue which confronts me here…. It is, as a moment's reflection will make obvious, a question of the most fundamental gravity and importance. What, after all, to any child, to any parent, never mind to future generations and indeed to society at large, can be more important, emotionally, psychologically, socially and legally, than the answer to the question: Who is my parent? Is this my child?"

In the present case, that the Claimant is in every sense the parent of his child is not in doubt. The question raised here is: 'Is this person my mother or my father?'.

3. The claim relates to the parental status of a trans-gender man in relation to his child. In hearing the case, and now preparing this judgment, I have at all times been acutely aware of the importance of the case to the Claimant and to all those who are affected by issues relating to trans-gender in the wider community. The words of Baroness Hale in *R (C) v Secretary of State for Works and Pensions* [2017] UKSC 72 aptly encapsulate the impact on the lives of individuals who are affected by matters relating to trans-gender:

> "1. "We lead women's lives: we have no choice". Thus has the Chief Justice of Canada, the Rt Hon Beverley McLachlin, summed up the basic truth that women and men do indeed lead different lives. How much of this is down to unquestionable biological differences, how much to social conditioning, and how much to other people's views of what it means to be a woman or a man, is all debateable and the accepted wisdom is perpetually changing. But what does not change is the importance, even the centrality, of gender in any individual's sense of self. Over the centuries many people, but particularly women, have bitterly resented and fought against the roles which society has assigned to their gender. Genuine equality between the sexes is still a work in progress. But that does not mean that such women or men have not felt entirely confident that they are indeed a woman or a man. Gender dysphoria is something completely different - the overwhelming sense that one has been born into the wrong body, with the wrong anatomy and the wrong

> physiology. Those of us who, whatever our occasional frustrations with the expectations of society or our own biology, are nevertheless quite secure in the gender identities with which we were born, can scarcely begin to understand how it must be to grow up in the wrong body and then to go through the long and complex process of adapting that body to match the real self. But it does not take much imagination to understand that this is a deeply personal and private matter; that a person who has undergone gender reassignment will need the whole world to recognise and relate to her or to him in the reassigned gender; and will want to keep to an absolute minimum any unwanted disclosure of the history. This is not only because other people can be insensitive and even cruel; the evidence is that transphobic incidents are increasing and that transgender people experience high levels of anxiety about this. It is also because of their deep need to live successfully and peacefully in their reassigned gender, something which non-transgender people can take for granted."

The Factual Context

4. A decade ago, the Claimant [TT], 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, and in 2014, he underwent a double mastectomy. His passport and NHS records were amended to show his gender as male. TT states, and I readily accept, that his family came to accept the transition some years ago and that in the work environment his colleagues have never known him to be anything other than a male.

5. In September 2016 TT, under medical guidance, suspended testosterone treatment and later commenced fertility treatment in England and Wales at a clinic ['the clinic'] which is registered for the provision of such treatment under the Human Fertilisation and Embryology Act 1990 ['HFEA 1990']. The aim of the treatment was to achieve the fertilisation of one or more of TT's eggs in his womb. Records from the clinic show that TT's gender was registered as 'M' for male. In order to maximise the prospects of success, testosterone therapy was suspended.

6. In January 2017 TT issued an application under the Gender Recognition Act 2004 ['GRA 2004'] in order to obtain a 'Gender Recognition Certificate' confirming that he was male. Determination of an application for a Gender Recognition certificate ['GR certificate'] is made by a panel constituted under the GRA 2004. The panel evaluates applications on paper and without a hearing. In addition to the application form and historical medical reports confirming diagnosis of gender dysphoria, the Claimant submitted a pro-forma declaration stating that he 'intends to continue to live in the acquired gender until death'. The GRA panel granted TT's application. A GR certificate confirming his gender as male was issued on 11 April 2017. The legal effect of a GR certificate is that the person to whom the certificate relates '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 …)' [GRA 2004, s 9(1)].

7. On 21 April 2017, TT underwent intrauterine insemination (IUI) fertility treatment at the clinic during which donor sperm was placed inside his uterus. The process was successful and conception occurred with the result that TT, a registered male, became pregnant. TT carried the pregnancy to full-term and, in January 2018, he gave birth to a son, YY.

8. The issue in these proceedings relates to the registration of YY's birth. Upon communication with the Registry Office, TT was informed that he would have to be registered as the child's 'mother', although the registration could be in his current (male) name. TT wishes to be registered as 'father' or, if not 'father', then 'parent' and thus on 3 April 2018 he brought a claim in Judicial Review to quash the decision of the Registrar General [RG]. In addition if, contrary to his main contention, the court holds that as a matter of domestic law TT must be registered as YY's 'mother', TT contends that that outcome represents a breach of his and YY's rights under the European Convention on Human Rights ['ECHR'] to the extent that the court should issue a Declaration of Incompatibility under Human Rights Act 1998 ['HRA 1998'], s 4.

9. In the course of this judgment the term 'non-trans' is used as the opposite of 'trans'. Thus a 'non-trans man' refers to a person who has been male since birth and continues to live in that gender, as opposed to a 'trans-man' who is a person born female but who has subsequently transitioned to male.

The Statutory Context

Gender Recognition Act 2004

10. The Gender Recognition Act 2004, which came into force in 2005, makes provision for and in connection with change of gender. The following provisions of the GRA 2004 are relevant to the present claim:

11. GRA 2004, s 1 provides for applications for GR certificates:

> "**1 Applications**
>
> (1) A person of either gender who is aged at least 18 may make an application for a gender recognition certificate on the basis of—
>
> (a) living in the other gender, or
>
> (b) having changed gender under the law of a country or territory outside the United Kingdom.
>
> (2) In this Act "the acquired gender", in relation to a person by whom an application under subsection (1) is or has been made, means—
>
> (a) in the case of an application under paragraph (a) of that subsection, the gender in which the person is living, or
>
> (b) in the case of an application under paragraph (b) of that subsection, the gender to which the person has

changed under the law of the country or territory concerned.

(3) An application under subsection (1) is to be determined by a Gender Recognition Panel.

(4) Schedule 1 (Gender Recognition Panels) has effect."

12. The relevant parts of GRA 2004, s 2 are:

"**2 Determination of applications**

(1) In the case of an application under section 1(1)(a), the Panel must grant the application if satisfied that the applicant—

(a) has or has had gender dysphoria,

(b) has lived in the acquired gender throughout the period of two years ending with the date on which the application is made,

(c) intends to continue to live in the acquired gender until death, and

(d) complies with the requirements imposed by and under section 3.

(2) In the case of an application under section 1(1)(b), the Panel must grant the application if satisfied—

(a) that the country or territory under the law of which the applicant has changed gender is an approved country or territory, and

(b) that the applicant complies with the requirements imposed by and under section 3.

(3) The Panel must reject an application under section 1(1) if not required by subsection (1) or (2) to grant it."

13. GRA 2004, s 3 requires that an application for a GR certificate is supported by medical evidence relating to gender dysphoria and by a statutory declaration by the applicant that the applicant meets the conditions in s 2(1)(b) and (c). GRA 2004, s 4 provides that if a Gender Recognition Panel grants an application it must issue a GR certificate.

14. By GRA 2004, s 8(1) unsuccessful applicants for a GR certificate have a right of appeal against a decision to reject their application and, by s 8(5):

"(5) If an application under section 1(1) … is granted but the Secretary of State considers that its grant was secured by fraud, the Secretary of State may refer the case to the High Court, Family Court or Court of Session."

15. The group of sections between GRA 2004, s 9 and s 21 appear under the heading "Consequences of issue of gender recognition certificate etc". Section 9, which is headed "General", is plainly of central importance in these proceedings:

> **"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."

16. GRA 2004, s 10 provides for 'registration' and ss 11 to 11D relate to aspects of 'marriage' and 'civil partnership'.

17. The second provision which is of central relevance to this case is GRA 2004, s 12 which relates to 'parenthood':

> "12. 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."

18. The group of sections in the GRA 2004 under the heading of 'Consequences of issue of gender recognition certificate etc' concludes with the following sections (as originally enacted):

> 13 Social security benefits and pensions
> 14 Discrimination
> 15 Succession etc.
> 16 Peerages etc.
> 17 Trustees and personal representatives
> 18 Orders where expectations defeated
> 19 Sport
> 20 Gender-specific offences
> 21 Foreign gender change and marriage

Human Fertilisation and Embryology Acts 1990 and 2008

19. The principal recommendations of the Committee of Inquiry into Human Fertilisation and Embryology [the 'Warnock Committee'], which was established in July 1982 and reported in 1984, were embodied in the Human Fertilisation and Embryology Act 1990. In addition to establishing the Human Fertilisation and Embryology Authority ['the HFEA'] as the overall regulatory body for the provision of treatment services connected

with artificial conception, the HFEA 1990 introduced the basic concepts and structures which, subject to amendment, continue to apply in this field.

20. The HFEA 1990, whilst still to a large degree in force, has been substantially amended and, with respect to the matters raised in the present case, it has been superseded by provisions in the HFEA 2008.

21. HFEA 1990, s 2, which remains in force, sets out the definition of certain key terms and phrases including:

> '"treatment services" means medical, surgical or obstetric services provided to the public or a section of the public for the purpose of assisting women to carry children.'

In that definition the word 'women' has understandably been the focus of submission and counter-submission during the present hearing. Although much of the work of clinics licensed by the HFEA involves establishing conception by more sophisticated scientific means, for example implanting of a live embryo established from a donor egg and donor sperm, or IVF (in vitro fertilisation) where an egg harvested from a person is fertilised in the laboratory by donor sperm before being replaced in that person's womb, the phrase 'treatment services' also encompasses intrauterine insemination ('IUI') where donor sperm is simply introduced into the womb in the expectation that conception will occur naturally.

22. By HFEA 1990, s 11, the Human Fertilisation and Embryology Authority is authorised to licence clinics to undertake 'treatment services'; such licences must comply with the parameters set out in HFEA 1990, Sch 2, para 1 [the terms of which are not of relevance to this case]. It is of note, therefore, that HFEA legislation only permits the HFEA to license a clinic to provide services to assist 'women to carry children'. The HFEA Code, and TT's experience, demonstrate that clinics are currently providing treatment services to trans-men. Counsel for the government argued that, during the provision of treatment, trans-men are treated as 'women' in order to come within the provisions of the HFEA legislation. Counsel for TT and YY refuted that submission and argued that, under the Equality Act 2010, clinics must offer services to both women and men. These submissions were not developed as the legality of the treatment is not an issue in the present claim. It is, however, a point that the HFEA, the Government and those interested in these matters in Parliament may wish to consider further in the interests of legislative clarity.

23. HFEA 2008, ss 33 to 48, under the heading of 'Parenthood in Cases Involving Assisted Reproduction', set out definitions for the terms 'mother' [s 33] and 'father' [ss 35 to 41] before making specific provision with respect to the 'effect of sections 33 to 47' in s 48. Sections 42 to 47 concern 'cases in which woman to be the other parent' and do not relate to the present claim.

> "**33 Meaning of "mother"**
>
> (1) 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.

(2) Subsection (1) above does not apply to any child to the extent that the child is treated by virtue of adoption as not being the woman's child.

(3) Subsection (1) above applies whether the woman was in the United Kingdom or elsewhere at the time of the placing in her of the embryo or the sperm and eggs."

It is of note that s 33 applies where 'an embryo' or 'sperm and eggs' are placed in a woman; no reference is made to the artificial insemination of a person's own eggs, which is the process in the present case that lead to YY's birth.

24. HFEA 2008, ss 35 to 41 make extensive provision for the definition of 'father' in a range of different circumstances, in each case the status of father is defined with respect to a man's relationship with a woman who has had an embryo or sperm and eggs placed in her or where conception is via artificial insemination. It is accepted that none of these stated statutory circumstances apply to TT with respect to YY.

25. HFEA 2008, s 48, which makes provision for the effect of ss 33 to 47, proceeds on the basis set out in s 48(1)-(2):

"(1) Where by virtue of sections 33, 35, 36, 42 or 43 a person is to be treated as the mother or father or parent of a child, that person is to be treated in law as the mother, father or parent (as the case may be) of the child for all purposes.

(2) Where by virtue of sections 33, 38, 41, 45 or 47 a person is not to be treated as a parent of the child, that person is to be treated in law as not being a parent of the child for any purpose."

Submissions have focussed on the question of whether any part of ss 33 to 48 applies to the circumstances of the present case.

26. HFEA 1990, ss 31ZA to 31ZG make provision relating to the keeping of and disclosure to an applicant over the age of 16 of information regarding the genetic parentage of an applicant who was conceived as a result of donor sperm.

Births and Deaths Registration 1953

27. The Births and Deaths Registration Act 1953 ['BDRA 1953'] establishes a requirement that the birth of every child born in England and Wales must be registered by the registrar of births and deaths for the sub-district in which the child was born by entering prescribed details in the register of [BDRA 1953, s 1(1)]. The provisions of the BDRA 1953 are primarily focussed upon the duty to register and, as such, are not of direct concern in these proceedings. As is well known, a full birth certificate contains details of a child's parentage, however, by BDRA 1953, s 33, a person is entitled to obtain a 'short certificate of birth' which 'shall not include any particulars relating to parentage or adoption' contained in the birth records and registers.

28. In the interpretation section, BDRA 1953, s 41, the terms 'father' and 'mother' are defined for the purposes of that Act as follows:

> '"father", in relation to an adopted child, means the child's natural father"
>
> '"mother", in relation to an adopted child, means the child's natural mother".

Registration of Births and Deaths Regulations 1987

29. The Registration of Births and Deaths Regulations 1987 ['RBDR 1987'] make provision for the process of registration by a registrar. Regulation 7 stipulates the 'Particulars to be registered and form of register':

> "7. (1) The particulars concerning a live-birth required to be registered pursuant to section 1(1) of the [BDR] Act shall, subject to the provisions of these Regulations, be those required in spaces 1 to 13 in Form 1 and that form shall be the prescribed form for registration of live-births for the purpose of section 5 of the Act (which provides for registration of births free of charge).
>
> (2) Except as otherwise provided in these Regulations the particulars to be recorded in respect of the parents of a child shall be those appropriate as at the date of its birth."

30. 'Form 1' referred to in reg 7 is set out in Schedule 2 of the RBDR 1987. The 'spaces' in Form 1 that are relevant to the present proceedings are spaces 4, 5 and 6 which relate to 'Father' and require, respectively, 'name and surname', 'place of birth' and 'occupation', and spaces 7, 8, 9 and 10 relating to 'mother', which require 'name and surname', 'place of birth', 'maiden name/surname at marriage if different from maiden name' and 'usual address if different from place of child's birth'.

31. It is of note that it is only a 'mother', and not a 'father', who is required to state a 'usual address if different from place of child's birth'.

32. The 1987 Regulations were amended by the Registration of Births and Deaths (Amendment) (England and Wales) Regulations 2008 to take account of changes made by the HFEA 2008. The amendment regulations substituted a new template for Form 1 in which space 4, which had formerly related to 'Father', now relates to 'Father/Parent'. It is the Government's case before this court that the reference to 'Parent' in space 4 of Form 1 is confined to those cases where a woman is to be a second female parent to a child pursuant to HFEA 2008, ss 42 and 43.

Children Act 1989: Parental Responsibility

33. Following the birth of any child, it is important to understand who does, or does not, have parental responsibility for him or her under the Children Act 1989 ['CA 1989']. A child's 'mother' automatically has parental responsibility for the child from birth. Similar automatic attribution of parental responsibility is granted to certain categories of father. In other cases, the attribution of parental responsibility will follow from agreement, registration or a court order. The CA 1989, s 2 makes provision for 'Parental responsibility for children':

> "2 **Parental responsibility for children.**

(1) Where a child's father and mother were married to each other at the time of his birth, they shall each have parental responsibility for the child.

(1A) Where a child—

(a) has a parent by virtue of section 42 of the Human Fertilisation and Embryology Act 2008; or

(b) has a parent by virtue of section 43 of that Act and is a person to whom section 1(3) of the Family Law Reform Act 1987 applies, the child's mother and the other parent shall each have parental responsibility for the child.

(2) Where a child's father and mother were not married to each other at the time of his birth—

(a) the mother shall have parental responsibility for the child;

(b) the father shall have parental responsibility for the child if he has acquired it (and has not ceased to have it) in accordance with the provisions of this Act.

(2A) Where a child has a parent by virtue of section 43 of the Human Fertilisation and Embryology Act 2008 and is not a person to whom section 1(3) of the Family Law Reform Act 1987 applies—

(a) the mother shall have parental responsibility for the child;

(b) the other parent shall have parental responsibility for the child if she has acquired it (and has not ceased to have it) in accordance with the provisions of this Act.

(3) References in this Act to a child whose father and mother were, or (as the case may be) were not, married to each other at the time of his birth must be read with section 1 of the Family Law Reform Act 1987 (which extends their meaning).

(4) The rule of law that a father is the natural guardian of his legitimate child is abolished.

(5) More than one person may have parental responsibility for the same child at the same time.

(6) A person who has parental responsibility for a child at any time shall not cease to have that responsibility solely because some other person subsequently acquires parental responsibility for the child.

(7) Where more than one person has parental responsibility for a child, each of them may act alone and without the other (or others) in meeting that responsibility; but nothing in this Part shall be taken to affect the operation of any enactment which requires the consent of more than one person in a matter affecting the child.

(8) The fact that a person has parental responsibility for a child shall not entitle him to act in any way which would be incompatible with any order made with respect to the child under this Act.

(9) A person who has parental responsibility for a child may not surrender or transfer any part of that responsibility to another but may arrange for some or all of it to be met by one or more persons acting on his behalf.

(10) The person with whom any such arrangement is made may himself be a person who already has parental responsibility for the child concerned.

(11) The making of any such arrangement shall not affect any liability of the person making it which may arise from any failure to meet any part of his parental responsibility for the child concerned."

34. CA 1989, ss 4, 4ZA and 4A make provision for acquisition of parental responsibility for a child by a father, second female parent or step-parent respectively; section 4, relating to 'father' states:

"4 **Acquisition of parental responsibility by father.**

(1) Where a child's father and mother were not married to each other at the time of his birth, the father shall acquire parental responsibility for the child if—

(a) he becomes registered as the child's father under any of the enactments specified in subsection (1A);

(b) he and the child's mother make an agreement (a "parental responsibility agreement") providing for him to have parental responsibility for the child; or

(c) the court, on his application, orders that he shall have parental responsibility for the child.

(1A) The enactments referred to in subsection (1)(a) are—

(a) paragraphs (a), (b) and (c) of section 10(1) and of section 10A(1) of the Births and Deaths Registration Act 1953;

(b) paragraphs (a), (b)(i) and (c) of section 18(1), and sections 18(2)(b) and 20(1)(a) of the Registration of Births, Deaths and Marriages (Scotland) Act 1965; and

(c) sub-paragraphs (a), (b) and (c) of Article 14(3) of the Births and Deaths Registration (Northern Ireland) Order 1976.

(1B) The Secretary of State may by order amend subsection (1A) so as to add further enactments to the list in that subsection.

(2) No parental responsibility agreement shall have effect for the purposes of this Act unless—

> (a) it is made in the form prescribed by regulations made by the Lord Chancellor; and
>
> (b) where regulations are made by the Lord Chancellor prescribing the manner in which such agreements must be recorded, it is recorded in the prescribed manner.
>
> (2A) A person who has acquired parental responsibility under subsection (1) shall cease to have that responsibility only if the court so orders.
>
> (3) The court may make an order under subsection (2A) on the application—
>
> (a) of any person who has parental responsibility for the child; or
>
> (b) with the leave of the court, of the child himself,
>
> subject, in the case of parental responsibility acquired under subsection (1)(c), to section 12(4).
>
> (4) The court may only grant leave under subsection (3)(b) if it is satisfied that the child has sufficient understanding to make the proposed application."

35. If TT is YY's 'mother', he will have had parental responsibility for YY from the moment of birth in accordance with CA 1989, s 2(2). If, on the other hand, TT is YY's 'father', then he will not automatically have parental responsibility for YY, which is only afforded to a father who is married to the child's mother [CA 1989, s 2(1)]. If, as a result of these proceedings, TT becomes registered as YY's 'father' under the BDRA 1953, then he will acquire parental responsibility [CA 1989, s 4(1)(a)]. In addition, if he is the 'father', TT may be accorded parental responsibility by means of a court order under CA 1989, s 4(1)(c).

Domestic case law

36. The impact of gender change with respect to parenthood is a new and developing area of law, not only domestically, but also across the globe. There is little reported case law on the topic, save, in this jurisdiction, for one first instance decision in the Administrative Court by Hickinbottom J, as he then was: *R (JK) v The Registrar General (The Secretary of State for the Home Department and others intervening)* [2015] EWHC 990 (Admin); [2016] 1 All ER 354. Given the relatively close factual nexus with the present case, the dearth of other authority and the respect to be afforded to a judge who is greatly experienced in these matters, the decision in *JK* merits close attention.

37. The applicant in *JK* was a transgender woman ['JK'] who was married to a woman and was the biological father of two children. The issue in the case related to the manner in which JK's relationship to each child was to be shown on their respective birth certificates. The first child had been born prior to gender transition and, following the birth, JK, who had not transitioned at that stage, had been registered as the father. Gender transition was in progress after the conception of the second child but before birth. A GR Certificate was issued after the second birth and prior to the hearing before

Hickinbottom J. The Registrar General ['RG'] refused JK's request to be shown as 'parent' or 'father/parent' on the birth certificates of the two children.

38. JK brought judicial review proceedings against the RG arguing that the full birth certificates of her children would reveal that she was transgender, and that the requirement that she be shown as 'father' was therefore a breach of her and her children's right to respect to private life under ECHR, Art 8. She submitted that, as the registration Form 1 contained a category 'father/parent', the RG had a discretion whether to delete one of those two terms and the registrar's decision in her case not to delete 'father' was arbitrary. In the alternative, JK argued that the RG had acted in a discriminatory manner in breach of Art 8 taken with Art 14 and the RG was required to justify that discrimination against her.

39. In the course of a full and careful judgment, Hickinbottom J accepted that requiring a transgender person to disclose her previous gender by not allowing a change to official documents to show the individual's chosen gender affected her Art 8 right to private life and potentially affected the Art 8 rights of her children to keep private the fact that their father was transgender. Given the importance attached by the ECtHR to the recognition of a person's chosen gender, the interference in Art 8 rights was a material one. The interference was, however, in accordance with the law and, although the format of Form 1 presented an apparent option between 'father/parent', these were, as a matter of law, two mutually exclusive terms. The term 'parent' is restricted in its use, under the HFEA 2008, to a second female who is to be treated as a parent to a child under the specific terms of that Act.

40. Hickinbottom J held that the scheme of the BDRA 1953 and the RBDR 1987 did not give the registrar a discretion to choose between 'father/parent' or to delete one or other of those terms; in the circumstances of *JK*, the registrar had been required to delete 'parent' and leave 'father'. The judge concluded, on the issue of proportionality and necessity, that a balance had to be struck between harm to the individual on the one hand, and the rights and interests of others (including the public interest) on the other. Within the balance, the public interest in having coherent administrative systems was an important consideration. Sexual identity and the choice of gender represented important elements of an individual's identity. However, parentage was also a vital element in identity. The statutory registration scheme pursued the legitimate aim of respecting the right of the child to know, and have properly recognised, the identity of his or her biological father. Having regard to the relatively wide margin of appreciation that Hickinbottom J held would be applied by Strasbourg, he concluded that the UK government had been entitled to conclude that the interference with Art 8 rights inherent in the scheme was outweighed by the interference with the rights and interests of other individuals and the public interest that would be caused by not having such a restriction.

41. There are several significant differences to note between *JK* and the present case. Firstly, in *JK* the court had to have regard to the Art 8 interests of JK's spouse, who was the mother of the two children; no similarly placed individual's interests are relevant in the present case. Secondly, unlike JK, TT obtained legal recognition of his male identity through the grant of a GR certificate prior to YY's birth. The challenge in *JK* was entirely based upon analysis under the ECHR, whereas TT's primary challenge is based upon what are said to be the inevitable consequences of the issue of the GR Certificate and GRA 2004, ss 9 and 12 with the result, it is argued, that, as a matter of domestic law and irrespective of the ECHR, following the issue of a GR

Certificate a parent is to be afforded the status of 'mother' or 'father' dependant upon their acquired gender, or at the very least is not to be afforded the contrary gender-specific status. It follows that, whilst the decision in *JK* may very well inform focussed analysis under the ECHR if that is necessary in the present case, the judgment will not be of direct relevance to the question of domestic statutory interpretation.

42. The parties have each relied upon specific passages from the judgment of Hickinbottom J in *JK* to support their submissions and, having now given a brief introduction to the case, I will reproduce relevant parts of the judgment when describing the case presented by each side in due course.

The Factual Context

43. I have already briefly summarised the factual context [paragraphs 4 to 7]. There is no dispute as to the underlying facts and the court did not hear oral evidence. It is therefore accepted that TT has, or has had, gender dysphoria and has lived in his acquired gender as a male for a significant period, far exceeding the minimum of two years required by the GRA 2004, s 2(1)(b). The court was told that TT's application for a GR certificate was supported by medical evidence relating to gender dysphoria (as required by GRA 2004, s 3) and a copy of the declaration (again as required by s 3) has been produced. The declaration, which is a tick-box template, has a tick by the following statement:

> "I intend to live full time as a male until death".

44. In the same period that TT declared to the GR panel that he intended to continue to live as a male until his death, he suspended the programme of testosterone therapy that he had adhered to since 2013 in order to reinvigorate his reproductive system and he actively engaged in arranging for IUI treatment in order to achieve a viable pregnancy by the artificial insemination of one or more of his ova with donor sperm. During the hearing, through his counsel, TT told the court that the fact that he was at the time undergoing fertility treatment was not disclosed to the GR Panel. No relevant question was specifically asked as part of the application process before the panel and he had not volunteered the information.

45. The Secretary of State has the right to refer a GR certificate to the High Court or Family Court if he considers that its grant has been secured by 'fraud' [GRA 2004, s 8(5)]. At a preliminary hearing, I enquired whether there was to be any challenge to the validity of the GR certificate in the light of the close chronological alignment of the GR certificate application with the Claimant's IUI treatment. Having taken instructions, Ms Sarah Hannett, on that occasion acting both for the Secretaries of State and for the RG, confirmed that there was to be no such challenge and that the judicial review proceedings would proceed on the basis that the certificate was valid. This position was confirmed by Mr Ben Jaffey QC at the final hearing, although he reserved the right to refer to TT's behaviour as part of any submissions on proportionality; in the event this, potentially striking, aspect of the factual background was not in fact referred to in submissions. I have therefore ignored it in my analysis of the issues.

46. Following the conclusion of the substantive hearing in February 2019, the legal teams acting for TT and YY became aware that TT had, apparently over the course of the past three years, been co-operating in the production of a one-hour documentary film. It latter became apparent that the sole subject of the documentary was TT, his desire to

become pregnant and his journey through fertility treatment, conception via IUI to the birth of his son, YY. Further information indicated that the film was due to receive its world premiere at a film festival in New York in the coming weeks, and that that date would coincide with the publication in the UK of an article in a national newspaper describing TT as a transgender male who had given birth.

47. The film, entitled 'Seahorse', which the court has seen, features TT throughout. He is openly named using his correct name in the film and in the credits. The film includes a detailed account of TT's intimate thoughts about the process of conception, pregnancy and birth. It also includes footage that shows in clear detail both TT undertaking an IUI process and YY's birth.

48. The newspaper article, which appeared in a magazine section, included a full-page portrait photograph of TT, named him and identified him as a journalist on the same paper.

49. 'Seahorse', has been shown at a dozen or more international and domestic film festivals, was broadcast on BBC Two on 10th September 2019 and made available thereafter on BBC iPlayer for one month.

50. As a result of these developments, the court heard an application made on behalf of various mainstream media outlets for a relaxation of the anonymity injunction which had previously applied to these proceedings. In a judgment handed down on 11 July 2019, I allowed that application with the result that TT's identity was removed from the protection of the anonymity injunction (neutral citation [2019] EWHC 1823 (Fam)). The injunction continues to apply to protect the identity of YY.

51. As a result of the removal of anonymity, TT has now been identified as Freddy McConnell.

52. The identity of TT is almost entirely irrelevant to the issues of law raised in these proceedings (the only exception being with respect to the weight to be attributed to public knowledge of his identity in relation to analysis of his Art 8 rights to private life). As the hearing of this application has proceeded by referring to Mr McConnell as TT throughout, and as this judgment was largely complete at the time of the removal of the anonymity injunction, I have continued to refer to the Claimant as TT rather than using his real name.

Judicial Review Proceedings

53. TT seeks to be registered as 'father' or 'parent' and thus on 3 April 2018 he brought a claim to quash the decision of the Registrar General [RG], followed by a further application for a Part 8 Declaration of Incompatibility under HRA 1998, s 4. As a result of this latter application, the Secretary of State for Health and Social Care, the Minister for Women and Equalities and the Secretary of State for the Home Department ['the Secretaries of State'] became interested parties.

54. The Human Fertilisation and Embryology Authority ['HFEA'] was given notice of these proceedings but indicated that it did not intend to intervene (although reserving the right to intervene in any appeal). Although the actions of the HFEA and of the clinic are not directly relevant to the legal issues that fall to be determined as to TT's status

with respect to YY, it would have been valuable for the court to have had assistance through submissions on behalf of the HFEA on the operation of the HFEA legislation and, in particular, on the question of whether or not the clinic was acting within its license in providing treatment services to TT.

55. YY is an Interested Party and is represented through his litigation friend, a retired CAFCASS High Court guardian of many years' experience.

56. On 21 December 2018 the AIRE Centre (Advice on Individual Rights in Europe), which is a charity focussed upon promoting understanding of European rights, made an application to intervene by written submissions only which was permitted. In the event at the oral hearing the court gratefully received oral submissions by Miss Samantha Broadfoot QC (leading Mr Andrew Powell) on behalf of the AIRE Centre.

Declaration of Parentage Application

57. In addition to the judicial review proceedings and declaration of incompatibility application pursued by TT, on 14 August 2018 an application for a Declaration of Parentage under the Family Law Act 1986, s 55A was issued on behalf of YY. That application was heard alongside TT's applications in these proceedings.

The Evidence

58. The court has received written evidence from the following:

    a) The Claimant;

    b) Alison Tighe, Joint Head of Civil Registration Policy at the Registrar General;

    c) Jeremy Mean, Head of Policy for HFEA issues at the Department of Health and Social Care;

    d) Elysia McCaffrey, Interim Director of the Government Equalities Office;

    e) Clare Brooks, YY's Litigation Friend;

    f) Nuala Mole, the AIRE Centre.

59. Clare Brooks advised the court regarding YY's best interests on the following basis:

> "As to the contents of the birth certificate, in my view it is important for YY's identity and self-esteem that his birth certificate reflects the reality of his life. The person who gave birth to him was and is male. 'Father' means 'male parent'. That is exactly what TT is. The birth certificate could reflect this reality by either listing TT as 'father' or 'parent'. Anything else gives the impression of something secretive or shameful. This could lead YY to feeling excluded from society and that he is different or odd.
>
> I note that YY's birth certificate will only have one parent listed, which will inevitably invite questions about the 'missing' parent. Although lots of children do

> not have a father listed, a missing mother is currently unusual and this may well be picked up on. However, if TT is listed as 'mother', the questions are likely to be even more intrusive given that T is clearly a male name. This would cause YY distress and again give rise to feelings of being different."

Ms Brooks also advised that for TT to be registered as 'mother' would put him back to square one in his fight for recognition as a man, and this would be likely to have an indirect adverse impact on YY.

60. In a further statement Ms Brooks advised that for YY to have to use his short birth certificate would be 'evasion' and would indicate to YY that he and TT had something to hide and that something was wrong. She considered that YY 'is being penalised by current archaic rules on birth certificate registration [which] have not kept up with changes in medical science and social mores.' Ms Brooks concluding opinion was that it was 'overwhelmingly' in YY's best interests for TT to be registered as his father.

61. Within Ms Tighe's statement [page D39, paragraph 46] there is an admission that prior to 2016 the RG had 'in some cases previously applied section 12 of the GRA as only relating to children born before the issue of a GR certificate, and also registered a post GR certificate transgender man according to his birth gender, the government's now settled view as to the construction of section 12 of the GRA is that a transgender parent should always be registered in line with their birth gender'. In submissions, this description of the Government's position has been described as a 'U-Turn'. The RG had not, however, previously recorded a person giving birth to a child as anything other than the child's 'mother'.

62. The court also had the benefit of expert evidence commissioned by each side:

    a) Professor Sally Hines, Professor of Sociology and Gender Studies at the University of Leeds (Claimant); and

    b) Peter Dunne, Lecturer in Law at the University of Bristol (Government).

In the event, the expert evidence did not feature prominently in submissions. I will not therefore take space here summarising it, but will, so far as it is relevant, refer to it during the later stages of this judgment.

The Parties' Cases in Outline

(a) TT's Case in Outline

63. The Claimant's primary submission is that if GRA 2004, ss 9 and 12 are correctly interpreted, the RG is obliged to register TT as 'father' on YY's birth certificate. Miss Hannah Markham QC, leading Miss Miriam Benitez, for TT submits that GRA 2004, s 9(1) is unequivocal in stipulating that following the issue of a GR certificate the relevant individual is to be regarded as having the acquired gender 'for all purposes' and that, therefore, for the purpose of determining his status as parent to his child, YY, TT is a male parent and therefore YY's 'father'.

64. It is further submitted that, as GRA 2004, s 9(2) is in similarly unequivocal terms in providing that s 9(1) 'does not affect things done or events occurring before the

certificate is issued', it can safely be assumed that the recognition of the new gender *will* affect all things occurring after the issue of the certificate. GRA 2004, s 9(2) is, it is submitted, entirely prospective in its focus and in no manner retrospective.

65. RBDR 1987, reg 7(2) requires 'the particulars to be recorded in respect of the parents of a child shall be those appropriate *as at the date of its birth*' [emphasis added]. Miss Markham's case is that, provided a child's birth occurs after the issue of a GR certificate, GRA 2004, s 12 relating to parenthood does not restrict or modify the effect of s 9 as, by the time of birth, the parent will have become the acquired gender and, by reason of s 9, their status as 'mother' or 'father' will be determined by reference to that acquired gender. TT's case in this regard is therefore based upon the assumption that, for all purposes, the gender of a parent determines whether that parent is a 'mother' or a 'father', without exception, so that the terms 'male parent' and 'father' are entirely synonymous.

66. The Claimant's secondary submission is that, if the case advanced by the RG and the Secretaries of State is correct, and TT must, under English law be registered as YY's 'mother', that result is a clear breach of TT's private and family life rights under ECHR, Art 8. In those circumstances TT would be regarded, under the law, as living in 'an intermediate zone', being regarded as male for all purposes save for parenthood when, as a 'mother', he would be regarded as female. That outcome would place TT, and those like him in similar circumstances, in an impossible dilemma of having to choose between either having a family or remaining childless but recognised fully in law and for all purposes in their acquired gender.

67. In the context of ECHR Art 8, TT's case is that the Government's interpretation is unnecessary, disproportionate and fails to strike a fair balance between the competing interests of the individuals concerned and the wider community. In so far as it is argued that the European Court of Human Rights ['ECtHR'] would afford the UK a 'margin of appreciation' on this issue, Miss Markham submits that any such margin would be construed narrowly in the light of the principle, which is said to be firmly established across Europe, that transgender people should be afforded full legal recognition in all areas of life.

68. Separately, it is argued that the difference in treatment which results in TT, a male, being registered as 'mother', arises from his transgender status, which is an 'identifiable characteristic' rendering differences in treatment due to transgender status analogous to differences in treatment on the grounds of race, nationality, gender and sexual orientation, in that they are particularly serious and require particularly weighty justification.

69. Miss Markham and Miss Benitez neatly summarised TT's essential case at paragraph 128 of their Skeleton Argument:

> 'Having due regard to the complete facts of this case and the principles extolled in the jurisprudence of this court and the ECtHR, since the State permitted TT to undergo hormone treatment, live his life as a man for a significant part of his adult life and then, after he had gone through the required procedure and obtained a Gender Recognition Certificate, permitted him to undergo artificial insemination with led to the birth of YY, the State should reasonably be expected to accept the consequences and take all the measures needed to enable TT to live [a] normal

> [life], free from discrimination in any circumstances, under his new identity and with respect for [his] right to private and family life.'

(b) YY's Case in Outline:

70. On behalf of YY, Mr Michael Mylonas QC and Miss Marisa Allman support and adopt the submissions made on behalf of TT, together with those filed on behalf of the AIRE Centre. In the event that the court were to consider that there is no alternative but to interpret GRA 2004, s 12 and HFEA 2008, s 33-47 as requiring the RG to register TT as YY's mother, a declaration is sought that those provisions are therefore incompatible with YY's ECHR Art 8 rights in conjunction with Art 14.

71. Mr Mylonas submits that the first question to be determined is whether TT is YY's mother, or father, or parent as a matter of law and that the appropriate vehicle for such a determination is within YY's application for a Declaration of Parentage under Family Law Act 1986, s 55A ['FLA 1986']. YY accepts that the RG does not have a discretion as to how to register his birth. It is, however, asserted that the RG's decision that TT should be registered as YY's mother is unlawful and wrong in law, and that the RG will be bound by a determination of the Family Division as to TT's parental status.

72. In contrast to TT's case, Mr Mylonas on behalf of YY is explicit in asserting that Parliament has failed to provide for the circumstances of YY's conception within the legislative scheme of the HFEA 2008 or elsewhere. It is submitted that YY's parentage does not fall within HFEA 2008, ss 33-47 which applies to a 'woman' and, where specific means of artificial reproduction are set out, they do not include IUI by donor sperm.

73. Mr Mylonas, relying on established ECHR jurisprudence and on the UN Convention on the Rights of the Child ['UNCRC'], submits that YY's best interests are relevant to the ECHR evaluation in this case. In this regard, it is argued that there is no evidence that registering TT as YY's father would not be in YY's best interests. It is said to be inconceivable that YY will not come to know of the circumstances of his birth and it is in his interests for the legal status of his male parent to be recorded as such, namely as 'father', so that the legal position reflects the reality of the circumstances in his family life.

74. In support of the assertion that it is in YY's interests for TT to be registered as his father, Mr Mylonas relies upon:

    a) The opinion of YY' litigation friend;

    b) The evidence of YY's parent, namely TT;

    c) The evidence of an expert witness, Sally Hines;

    d) General evidence, emanating from Government publications and elsewhere, as to transphobia.

75. On behalf of YY the following relief is sought:

    i) Grant of TT's application for a declaration of incompatibility;

ii) Quashing of the RG's decision that TT should be registered as YY's mother on the ground that that decision was unlawful;

iii) A declaration that TT is the father of YY under FLA 1986, s 55A;

iv) An order granting TT parental responsibility for YY under Children Act 1989, s 4;

v) A direction that the RG should register TT as YY's father in accordance with BDRA 1953, s 10(1)(e);

vi) A declaration that HFEA 2008, ss 33-47 are incompatible with YY's ECHR Art 8 rights read in conjunction with Art 14;

vii) A declaration that the provisions of the BDRA 1953 and the RBDR 1987 are incompatible with YY's ECHR rights, in particular under Art 8 in conjunction with Art 14.

(c) AIRE Centre Case in Outline

76. The AIRE Centre, which does not seek any specific outcome to the proceedings, did not make any detailed submissions on the matter of construction of the domestic provisions, on the basis that these had been fully ventilated by the other parties. Instead, and most helpfully, it provided detailed analysis and submissions focused upon relevant international and European jurisprudence and standards.

77. The central submission of the AIRE Centre is succinctly set out at paragraph 6 of the Skeleton Argument prepared on its behalf by Miss Broadfoot and Mr Powell:

> "In summary, it is the AIRE Centre's submission that, if the Defendant's domestic construction is held to be correct, the current legislative framework for the registration of children born within transgender families fails to accord the rights of the child sufficient importance and respect. It is submitted that there is a profound incongruence with the child's familial reality under the current system that has the potential to have a harmful impact on the children of transgender parents through the state's inability to recognise the child's parent appropriately. The Defendants' expert, Peter Dunne, has previously stated, in an article published in *International Family Law* in 2015 that, under the current scheme, the children of transgender parents are 'confronted with a system which is confused, unclear and incapable of catering for their specific family dynamics' and furthermore, any solution proffered by the relevant decision makers must respect 'the dignity, integrity and practical realities of transgender families'. The AIRE Centre would respectfully agree with those conclusions.'

(d) RG and Secretaries of State Case in Outline:

78. The RG and the Secretaries of State invited the court to refuse permission or to dismiss the substantive claim for reasons summarised at paragraph 6 of the Skeleton Argument prepared by Mr Ben Jaffey QC and Miss Sarah Hannett as follows:

i) 'The RG's duty in law is to register the claimant as YY's mother. Specifically, the RG does not have a power to register the claimant as YY's father or as his parent. Pursuant to section 12 of the GRA 2004, a GRC does not affect the status of a trans-person as a mother or father to a child, even if the child is born after the issue of a GRC.

ii) As to the claim under the HRA 1998, the case raises complex issues of public policy about how best to protect the rights and interests of trans-people and their families in legislation. It is an area in which the European Court of Human Rights recognises that the United Kingdom should have a wide margin of appreciation, and one in which the decisions of the legislature should be accorded considerable respect.

iii) The RG and the Secretaries of State accept (for the purpose of the hearing of this claim only) that the legislative scheme interferes with the rights of the Claimant and YY under Article 8(1) of the ECHR and therefore requires justification under Article 8(2).

iv) The interference is justified by the need to (i) have an administratively coherent and certain scheme for the registration of births, and (ii) the rights and interests of others, notably but not exclusively, the right of a child to know - and have properly recognised - the identity of the person who carried and gave birth to him or her. This is an important and consistent principle that applies throughout birth registration legislation, including in relation to surrogacy, adoption and in relation to the children born by donor conception. The interference is proportionate, particularly having regard to the respect to be given to the legislature in this context, the measures introduced by legislation to protect against discrimination and harassment and maintain confidentiality, the absence of workable alternatives and given that there is no decision of the ECtHR requiring a trans-parent to be recorded as the parent of his or her child in his or her acquired gender.

v) For the same reasons, there is no breach of article 14 of the ECHR in respect of either the claimant or YY.'

79. On the basis that a declaration of parentage is merely declaratory of existing legal rights, the RG and the Secretaries of State submit that YY's application for a declaration logically falls to be determined after the determination of the Claimant's application for judicial review.

[1] The Statutory Scheme

Gender Recognition Act: submissions

80. The Claimant's case is pitched firmly on the basis that there is only one sustainable interpretation of GRA 2004, ss 9 and 12 and that interpretation requires TT to be regarded by the RG as YY's father. The submission is based on two propositions:

a) By GRA 2004, s 9(1), 'where a full gender recognition certificate has been issued to a person, the person's gender becomes *for all purposes* the acquired gender' [emphasis added].

b) By s 9(2), subsection (1) 'does not affect things done, or events occurring, before the certificate was issued'. It can therefore be safely assumed that the recognition of the new gender will affect all things done after the issue of a GR Certificate.

81. Interpreted on that basis, Miss Markham submits that GRA 2004, s 12, dealing with parenthood, neither restricts nor qualifies the compulsory requirement of s 9 provided that two conditions are satisfied, namely that:

a) The mother or father acquired the assigned gender by way of a full GR Certificate; and

b) The GR Certificate was issued prior to the birth of the child, and, hence, the acquisition of parental status.

82. Where these two conditions are satisfied, TT's case is that, as a consequence of GRA 2004, s 9, a person named in the GR certificate must be treated in law in conformance with her or his acquired gender and, with regard to parental status, must be regarded as a 'mother', if their acquired gender is female, or a 'father', if their acquired gender is male. This proposition linking parental status with gender is at the centre of TT's case.

83. Miss Markham prays in aid the Explanatory Note issued with the GRA 2004 in support of this interpretation, paragraphs 27 to 29 of which refer to s 9:

"**Section 9: General**

27. Subsection (1) states the fundamental proposition that once a full gender recognition certificate is issued to an applicant, the person's gender becomes for all purposes the acquired gender, so that an applicant who was born a male would, in law, become a woman for all purposes. She would, for example, be entitled to protection as a woman under the Sex Discrimination Act 1975; and she would be considered to be female for the purposes of section 11(c) of the Matrimonial Causes Act 1973, and so able to contract a valid marriage with a man.

28. Subsection (2) provides amplification of subsection (1), making clear that the recognition is not retrospective, so the certificate does not rewrite the gender history of the transsexual person, and that the new gender applies for the interpretation of enactments, instruments and documents made before as well as after the issue of a certificate.

29. Subsection (3) means that the general proposition is subject to exceptions made by the remainder of the Act and, for the future, by any other enactment or subordinate legislation." [Counsel's emphasis]

84. Paragraph 43 of the Explanatory Notes refers to s 12:

"**Section 12: Parenthood**

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

85. Miss Markham submits that GRA 2004, s 12 is designed to protect the child of a parent who subsequently transitions by providing legal certainty for that child and both of his or her parents regarding their pre-existing familial relationships. GRA 2004, s 12 is therefore to be regarded as entirely retrospective. Miss Markham nevertheless accepted, as is clearly the case, that the wording of s 12 does not indicate whether it is to be only retrospective, or both retrospective and prospective in its operation.

86. Noting that the wording of s 9(2) is, itself, plain that s 9 does not affect anything that occurred before the issue of a GR Certificate, Miss Markham accepted that s 12 does not, on her interpretation, add anything to that which is provided for in s 9.

87. Miss Markham argues that any other statutory interpretation of the GRA 2004 would offend against its stated objectives and would have the undesired effect of leaving the Claimant in limbo between two genders. It is submitted that the Act does not, and cannot, impose an abandoned gender on a status (parenthood) which is established for the first time only after full gender transition which has been confirmed by a GR Certificate.

88. It is TT's case that a birth certificate should reflect the parent's gender at the time of the child's birth regardless of whether this is the gender assigned at birth or the acquired gender. Regarding the first part of this proposition, there is support from two passages in the judgment of Hickinbottom J in *JK* to the effect that a birth certificate must record the situation as at the time of birth:

> **"[88]** Furthermore, as I have indicated, so far as the children are concerned, the Art 8 arguments do not all tend in the same direction: whilst I accept that disclosure that a parent is transsexual may interfere with a child's Art 8 right of privacy, the failure to reflect on a birth certificate the true position at birth with regard to parentage also may interfere with that child's right."
>
> **"[104]** Another principle is that a birth certificate shows the position as at birth, and that cannot be retrospectively changed in the light of later events."

89. More generally, Miss Markham challenges the assertion made on behalf of the Government that a child's gestational parent will always be the 'mother'. It is TT's case that the impact of GRA 2004, s 9 is that that will no longer be so in every case and where, as here, the gestational parent has a pre-birth GR certificate recording an acquired male gender, which is effective 'for all purposes', then the gestational parent will be the 'father'.

90. On behalf of YY, Mr Mylonas supports the interpretation of GRA 2004, ss 9 and 12 put forward by Miss Markham. He invites the court to consider the interpretation that is reasonably to be attributed to Parliament and in so doing made reference to a Home Office Report of the Interdepartmental Working Group on Transsexual People, which preceded the Gender Recognition Bill, together with extracts from Hansard of the Parliamentary debate that preceded the passing of the Act. I have looked at that material. It is undoubtedly supportive in interpreting s 12 as being retrospective, but as that interpretation is clear from the wording of the section and is not in dispute, there is no need to refer directly to the underlying material for that purpose. No direct mention is made either in the Working Group report or in Hansard to the possibility that s 12 may also be prospective. Nothing is to be gained by drawing tracts from this material into

this judgment purely to demonstrate that there is no specific reference, one way or the other, to any prospective effect. The conclusion has to be that this underlying material is simply not of assistance on the point, save to establish that the issue was not specifically addressed.

91. Mr Mylonas understandably draws attention to the fact that the Government had itself previously adhered to the view that s 12 was purely retrospective in its effect. He refers to the evidence of Ms Tighe which demonstrates that it was only in 2016, a decade after the Act had come into force, that the Government recognised that further thought was required on this point. Yet, as Mr Mylonas points out, there is no evidence of what form this further thought process took or the basis that has now led the Government to advocate an alternative interpretation.

92. Mr Mylonas makes the separate point, which is plainly correct, that the wording of s 12 does not say that, for the purposes of determining parenthood, a person is to be treated as retaining their birth assigned gender.

93. Mr Mylonas moves, in reliance on HRA 1998, s 3, to remind the court of the duty to interpret GRA 2004, s 12 in a manner that is compatible with the Convention rights of both TT and YY. HRA 1998, s 3 states:

> "(1) So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.
>
> (2) This section:
>
> (a) Applies to primary legislation and subordinate legislation whenever enacted."

94. It is YY's case that both TT's and YY's Convention rights firmly support the conclusion that TT should be recognised as TT's father, or at least 'parent', rather than his mother. I will turn in due course to consider the arguments under the Convention in more detail.

95. With respect to the interpretation of the GRA 2004, ss 9 and 12, for the RG and the Secretaries of State ['the Government'] Miss Hannett submits that the structure of the group of sections in the GRA 2004 that appear under the title 'Consequences of issue of gender recognition certificate etc' [ss 9 to 21] is established by s 9 itself. Section 9 expressly provides for the general proposition in s 9(1) that, on the issue of a certificate, 'a person's gender becomes for all purposes the acquired gender', to be subject to exceptions. GRA 2004, s 9(2) is one such exception and provides that s 9(1) does not affect things done, or events occurring, before the certificate was issued, and s 9(3) provides that s 9(1) is subject to provision made in the GRA 2004 or any other enactment or any subordinate legislation.

96. The Government's case is that GRA 2004, s 12 is another such exception by providing that 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.' Other exceptions are set out in the sections that then follow (as listed at paragraph 18 above).

97. On this point, Mr Mylonas, who accepts that ss 15, 16 and 20 are exceptions to s 9, asserts that s 12 is not an exception to s 9 because it only deals with a child who has already been born; s 12, on that interpretation, is therefore merely illustrative of the impact of s 9 and not an exception to it. Mr Mylonas explains the presence of s 12 as being important so that it is clear that the act of transition of gender does not alter a person's pre-existing role and responsibility to a child who was born prior to transition. He argues that it would be extraordinary if, in accordance with the Government's case, the provision was intended to be prospective yet for this not to be spelled out expressly in the Act.

98. Mr Jaffey's case on domestic law starts from the assertion that, as a matter of law, the term 'mother' means the person who gave birth to the child and that every child has a mother. In this respect his case is in stark distinction from that presented by Miss Markham which is founded upon the basic assumption that the terms 'mother' and 'father' are gender specific and, where a child's parent was male at the time of the child's birth then, as a male parent, he will be the 'father' and not the 'mother'. On the government's case, the attribution of status is of mother determined by the person's biological role in the process of conception, pregnancy and birth; on TT and YY's case, the attribution of status is determined by reference to a person's gender at the time of the child's birth. In passing, for record, the government's case is that the attribution of status of 'father' is dependent either on their biological role, or their assigned gender at birth in the case of donor conceived children.

99. Where, but for a GR certificate, a person would be regarded in law as the mother or father of a child, Mr Jaffey submits that the provisions of the GRA 2004 do not compel a different conclusion, even where the child is born after the parent has been issued with a GR certificate. The Government's case is that the ordinary meaning of the words in s 12 support the proposition that it applies to children born to a trans-parent both before and after the issue of a GR certificate. S 12 is not expressly confined to children born before the issue of a GR certificate, or to a status of mother or father existing at the time of issue. It is submitted that, had Parliament intended s 12 to be limited in this way, it would have said so expressly (as it did, for example, with respect to welfare benefits by GRA 2004, Schedule 5, Part 2).

100. In common with Miss Markham, Mr Jaffey draws attention to paragraph 43 of the Explanatory Notes to the GRA (see paragraph 84 above) but, in contrast to Miss Markham, he submits that reference in paragraph 43 to a person retaining 'their original status as either father or mother' refers to parental status conferred by a person's birth gender (i.e. father for a person born male and mother for a person born female).

101. Mr Jaffey points to the 'surprising proposition' that could result from the Claimant's case whereby a person could give birth to two children and, where a GR certificate confirming transition from female to male is issued between the time of the two births, the person would be the 'mother' of the first child yet the 'father' of the second born.

Human Fertilisation and Embryology Acts: submissions

102. As between TT and YY, those acting for YY took the lead in making submissions focussed upon the HFEA 1990 and HFEA 2008. Mr Mylonas drew attention to the fact that where, in HFEA 2008, ss 33-47, reference is made to the person who is to carrying, or has carried a child, as a result of artificial processes authorised by the legislation,

that person is always referred to as being a 'woman'. In the circumstances, Mr Mylonas submits that Parliament has failed to provide in legislation for the circumstances of YY's birth. This apparent lacuna in the statutory scheme for the regulation of fertility treatment is not, however, in Mr Mylonas' submission, directly relevant or determinative of TT's status as male or female, whereas the GRA 2004 is.

103. For YY, Mr Mylonas starts from the position of accepting that the circumstances of the present case do not seem to have been in the minds of the legislature at the time of passing the HFEA 2008. At paragraph 9 of his skeleton argument he observes:

> 'Both the HFEA 1990 and 2008 provided expressly for parentage in cases of assisted conception. However, when debating the 2008 Act, the government did not debate issues relating to transgender men at all, let alone the possibility of a transgender man carrying and delivering his own child. It is evident from the provisions of the 2008 Act that no thought was given to the factual circumstances of YY's birth.'

Mr Mylonas therefore submits that, in the absence of any statutory provision governing the circumstances of this case, it is open to the court to fill the lacuna by making a declaration of parentage under FLA 1986, s 55A that TT is YY's parent and specifically his father.

104. Whilst it is explicit in Mr Mylonas' submissions that TT and YY's circumstances fall outside the provisions of the HFEA 1990 and 2008, it is also implicitly accepted that GRA 2004, s 9 does not achieve the status of fatherhood for TT as Miss Markham submits is plainly the case. It is for this reason that YY's case pursues a radically different route to that adopted on behalf of TT and why it is crucial to YY's argument that the court moves first to make a declaration of parentage, with the High Court exercising a discretion which it is said that the court has, but which it is accepted the RG does not have, to hold that either TT is YY's 'father' or 'parent', but not 'mother'. When considering whether to make a declaration under s 55A, Mr Mylonas submits that it is the duty of the court to interpret the provisions of the HFEA 1990 in accordance with TT's Convention rights and to read such legislation as though it refers to the treatment of 'a person', rather than 'a woman'; it being submitted that any alternative reading of the 1990 Act would be direct discrimination on the grounds of gender reassignment and would be prohibited by the Equality Act 2010.

105. Once a declaration has been made, if it is that TT is YY's 'father' then, Mr Mylonas correctly submits, TT may apply for a parental responsibility order for YY by virtue of CA 1989, s 4. In the event that the court were to declare that TT was YY's 'parent', but that he was neither his 'father' nor 'mother', then it is accepted that the current birth registration regime does not afford a mechanism to register TT as 'parent' and, in those circumstances, the court would be obliged to hold the RG's decision to register TT as 'mother' to be unlawful and then to make declarations of incompatibility with respect to the relevant provisions of the HFEA 2008 and BDRA 1953 and the regulations. During the course of submissions, Miss Markham advanced the proposal that the Secretary of State could amend the registration regulations to permit the registration of a person in TT's circumstances as 'parent'; that submission was adopted on behalf of YY. If that outcome were accepted, it would obviate the need to register such a person as 'mother'.

106. For the Government, Mr Jaffey, having acknowledged that the term 'mother' is not defined in BDRA 1953, argues that the position in common law applies which, he submits, is that the woman who gives birth to a child is always regarded as being the mother. The sole authority for this submission is a passage from a judgment of Lord Simon in *The Ampthill Peerage* [1988] AC 547 at 577: '[m]otherhood, although a legal relationship, is based on a fact, being proved demonstrably by parturition'.

107. In response on this point, Mr Mylonas advises caution when attributing weight to the words of Lord Simon in *The Ampthill Peerage* which were plainly obiter and used to set the scene for what Lord Simon went on to say about fatherhood, rather than motherhood. Further, as the authority is now some 40 years old and comes from a time when the concept of a transgender male person giving birth to a child would have been outside the contemplation of anyone, Lord Simon's words should not be afforded any significant weight.

108. Miss Markham, for TT, adopts the submissions made on behalf of YY regarding the HFEA 1990 and 2008. She submits that HFEA 2008, s 33 does not permit of any circumstances where a man may carry a child, when such a situation is both a legal and biological possibility. She does, however, argue that this court has a duty to read down HFEA 1990, s 2 in a manner which is compatible with the ECHR and which accords with the Equality Act 2010, so that the word 'woman' should be read as 'person'.

109. Both Mr Mylonas and Miss Markham rely upon the following extract from the HFEA Code of Practice [January 2019] at paragraph 6.30:

> "The Gender Recognition Act 2004 sets out the circumstances in which a gender recognition certificate (GRC) will be issued and provides trans-people with a formal mechanism by which they can be legally recognised in their acquired gender.
> The centre should be aware that obtaining a GRC does not affect the status of the person as the mother, father or second legal parent of an existing child. What is relevant in determining legal parenthood is the gender identity of the trans-patient at the time of treatment which results in the birth of a child. For example, where a woman has had a child and subsequently transitions to become a trans-man, and obtains a GRC, he remains the mother of his existing child. Where for example a trans-woman uses her sperm in her female partner's treatment, provided she and her partner have met relevant statutory requirements and provided the necessary consents, she will be the second legal parent of the child."

110. In response, on behalf of the Government, Mr Jaffey submitted that a core principle which runs through the HFEA legislation is that the woman who carried the child will always be the mother. He, plainly, refers to HFEA 2008, s 33, but also to s 47 which provides that an egg donor is deemed not to be the mother. He draws support from a judgment 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 who noted that the HFEA 2008 'is drafted in such a way that there can only ever be two 'deemed' parents as a result of assisted conception, and at birth, one of these should always be the woman who carried the child' [paragraph 46] and 'at birth a child always has one mother, who is the woman who bore her' [paragraph 51].

111. Mr Jaffey's central submission is that the effect of the legislative scheme under the HFEA 2008 is that every child has a mother. The mother is the person who gave birth but is not necessarily genetically related to the child; thus, a surrogate mother is recorded as the mother on the child's birth certificate. Equally the fact that a donor egg is used, is irrelevant to the person who carries the child's status as the mother.

112. It is common ground that TT does not come within any of the statutory routes to becoming a 'father' by HFEA 2008, ss 35 and 36.

113. Mr Jaffey draws attention to HFEA 2008, s 48(1) [see paragraph 25] which provides that a person who is to be treated as the mother, father or parent of a child by virtue of that Act is 'to be treated in law as the mother, father or parent (as the case may be) of the child for all purposes'. He submits that these purposes include the registration of birth under the BDRA 1953 and the regulations. In contrast to GRA 2004, s 9, there is no provision for any contrary provision to be made to the status in law established by s 48(1).

Births and Deaths Registration Act: submissions

114. Miss Markham's primary case is that, as a matter of law, TT is YY's 'father' and the registrar has a duty to register him as such on YY's birth certificate. If the primary case fails, Miss Markham submits that the BDRA 1953 makes it plain that the particulars to be prescribed on any form are within the discretion of the RG. BDRA 1953, s 1(1) requires a registrar to register a birth 'by entering in a register … such particulars concerning the birth as may be prescribed…'. BDRA 1953, s 41 defines 'prescribed' as meaning prescribed by regulations made under BDRA 1953, s 39. The terms of BDRA 1953, s 39 provide that it is the RG who may, with the approval of the Minister, by statutory instrument make the relevant regulations prescribing anything which is required to be prescribed. Miss Markham points to occasions when the RG has, from time to time, made changes to the prescribed details that are to be set out in Form 1, in particular when the form was amended following HFEA 2008 to include reference to the second female legal parent.

115. Miss Markham therefore submits that the RG has discretion to make changes to the statutory form, which do not require an Act of Parliament. She submits that it is open to the RG, as a consequence of the present case, to add in a category of parenthood as 'Parent' or 'Gestational Parent' to Form 1.

116. It is not part of TT's case that an individual registrar has any discretion as to which category to assign an individual parent.

117. A further option that Miss Markham submits is open to TT, if this court were to declare that he is YY's 'father', is for TT thereafter to apply for parental responsibility for his son under CA 1989, s 4(1)(c). Once he holds parental responsibility, TT may then apply to register YY's birth pursuant to BDRA 1953, s 10(1)(e), which provides for registration were parents were not married. It is submitted that the registrar would, on the basis of the court's declaration of parentage, register TT as 'father' on the birth certificate and, in accordance with RBDR 1987, reg 4, draw a line through the part of the form requiring details of YY's 'mother'; reg 4 is in the following terms:

> "4. Where during the registration of a birth or death it appears to the registrar that he cannot enter the particulars required in any space on the appropriate form, other than space 17 on Form 1, he shall, subject to any other provision of these Regulations, draw a line in ink though that space before the informant is called upon to certify the entry."

118. For the Government, Mr Jaffey set out what are submitted to be the key points relating to the registration of births:

a) Every birth must be registered and the prescribed particulars must be recorded [BDRA 1953, s 1].

b) The only people who may register a birth are qualified informants, such as the mother, the father (in certain circumstances), the female parent and persons present at the birth or having charge of the child [BDRA 1953, s 1(2)+(3)].

c) Section 2 places an obligation on the mother and father or parent of a child to give the registrar the relevant information to allow registration within 42 days of birth.

d) Section 5 requires the relevant registrar to register the particulars of a birth within 12 months of the birth, free of charge.

e) Section 33 provides for a 'short certificate of birth' which must contain prescribed particulars, but this shall not include any particulars relating to parentage or adoption.

119. Regarding the BDRA 1953 and the 1987 Regulations, the Government's case is that the regime established by the regulations prescribes the information which is to be included on a Birth Certificate. An individual registrar does not have discretion as to the information to be entered, or the category of parental status that is to be attributed to an individual on the statutory form. By the time of the oral hearing, no other party before this court contends to the contrary.

Statutory Scheme: overall submissions

120. At the conclusion of oral argument on behalf of TT and YY, and at the invitation of Mr Jaffey, Miss Markham listed the approach with she and Mr Mylonas invited the court to take with respect to the application for a declaration of incompatibility. The list can be summarised as follows:

i) There is no challenge to the GRA 2004.

ii) The legislation regarding birth registration must be read to give effect to GRA 2004, s 9.

iii) As the Government no longer assert that TT comes within any of the categories described in HFEA 2008, s 33 onwards, there is no need for any reading down or declaration of incompatibility regarding that Act.

iv) In HFEA 1990, s 2 there is a need to read the word 'people' for 'women' in the definition of 'treatment services'.

v) In CA 1989, s 2(2)(a) [see paragraph 33] the word 'mother' should be read as 'person who gave birth'.

If, contrary to the case of TT and YY, the court holds that s 12 is prospective, with the consequence that TT is YY's 'mother' as a matter of law (and therefore the reading down of these provisions would not be undertaken), then a declaration of incompatibility with regard to GRA 2004, s 12 and CA 1989, s 2(2)(a) is sought.

121. Mr Jaffey's Skeleton Argument drew the Government's case together with respect to domestic law thus at paragraph 49:

i) The Claimant carried and gave birth to YY as a result of IUI treatment. He is therefore the mother pursuant to HFEA 2008, s 33. The definition of 'mother' in s 33, with reference to a 'woman', applies to transgender men with GR certificates because of the operation of GRA 2004, s 12. [This position was subsequently withdrawn prior to the oral hearing].

ii) The Claimant does not fall within any of the definitions of 'father' in the HFEA 2008.

iii) Neither does the Claimant fall within the definition of 'parent' in the HFEA 2008 (and as applied by the 1987 regulations), as that term applies only to the female partner of a mother. The Claimant is YY's mother, not the mother's female partner.

iv) Neither, it is being proposed, is there any legal basis for registering the Claimant as 'father/parent'. These two concepts are mutually exclusive under the legislative scheme.

122. Finally, Mr Jaffey submits that the interpretation advanced by TT and YY would have grave adverse policy consequences, summarised as follows:

a) If the Claimant is not a 'woman' for the purposes of the HFEA 1990 and HFEA 2008 then the treatment that he received at the clinic would have been entirely outside the regulatory scheme of the HFEA. It is firmly in the public interest that fertility treatment be regulated.

b) If provision of treatment services is outside the statutory HFEA scheme, then the consequences for the donor of the sperm used may be serious. Sperm donated within the statutory scheme is received on the clear basis that the donor does not become the legal father [HFEA 2008, s 41(1)]. However, if the treatment provided was not 'treatment services' under the HFEA 1990, this protection is lost.

c) If the IUI treatment was outside the HFEA then TT may not be the sole legal parent of YY, as he claims and would wish to be.

d) A person in YY's position would have no 'mother' recorded on his birth certificate and no statutory means of finding out who carried and gave birth to him.

Domestic Law: Conclusion

(1) Preliminary points

123. The task of discerning the approach in domestic law to the issue in this case is not an easy one. The circumstances of TT, and his role, as a male, in the conception and birth of his son YY, are not expressly provided for in either the legislation governing artificial insemination or that for gender recognition. Even though the HFEA 2008 was passed four years after the GRA 2004, the HFEA 2008 retains the basic definitions of 'mother' and 'father' that appeared in the HFEA 1990 and which are expressly tied to either 'a woman' or 'a man', respectively. The additional concept of a second 'parent' that was introduced by the 2008 Act is, as was accepted in submissions, restricted to a second female parent in the specific circumstances of HFEA 2008, ss 42 and 43 and has no application to the facts of this case.

124. A further difficulty in understanding the operation of the domestic scheme arises from the fact that TT was artificially inseminated in a clinic licensed by the HFEA to provide treatment services under the HFEA's 1990 and 2008 when the clinic knew that he was male and, indeed, recorded his gender as male in their records. Licences issued to clinics under the HFEA 1990 are limited to the provision of 'treatment services' as defined in s 2 of that Act and thereby limited to services 'for the purpose of assisting *women* to carry children' (emphasis added). Although the legality of the clinic's actions, and the operation of the HFEA licensing regime in authorising clinics to provide treatment services to both women and men, are outside the precise focus of this case, it is both regrettable and surprising that the Human Fertilisation and Embryology Authority declined the invitation of this court to engage in the proceedings in order to assist the court in understanding the operation of the statutory scheme in so far as it applies, if it does, to the provision of 'treatment services' to males who wish to conceive by artificial insemination in utero of their own eggs.

125. Finally, by way of preliminary observation, it is clear that the decision that this court is now being asked to make is one that:

a) is not expressly provided for by Parliament in legislation;

b) has not been directly the subject of any previous decision by a court in England and Wales; and

c) has not been directly the subject of any previous decision of the ECHR.

The issue which has most properly and bravely been raised by the Claimant in this Claim is, at its core, a matter of public policy rather than law. It is an important matter of public interest and a proper cause for public debate. Whilst this judgment will seek to determine the issue by reference to the existing legislation and the extant domestic and ECHR caselaw, as these sources do not themselves directly engage with the central question there would seem to be a pressing need for Government and Parliament to address square-

on the question of the status of a trans-male who has become pregnant and given birth to a child.

(2) Route to decision

126. For three separate reasons, it is necessary to approach the determination of the issue under domestic law from two different starting points: (a) on the basis that the HFEA legislation applies and (b) on the basis that it does not.

127. The first reason for this is that, although, albeit from different perspectives, the parties before the court each submit that the provision of treatment services to TT by the clinic was a lawful activity within the HFEA legislation and that, depending on their position, that legislation, read with the GRA 2004 determines the central question of whether TT is, or is not, YY's 'father', there is, in my view, some doubt that the treatment was lawfully provided under the HFEA regime.

128. The second reason is that, even if treatment services were lawfully provided to TT under the HFEA 1990, it is, as the submissions in this case have demonstrated, it is at least debateable that the provisions of the HFEA 2008 do not provide a definitive answer to the issue.

129. The third reason is that, in another case and on different facts, it would be possible for a trans-man, for example married to a non-trans male, to conceive a child by ordinary sexual intercourse and without any recourse to an HFEA licensed clinic. In determining the basis for the attribution of parental status, whether 'mother' or 'father', regard must therefore be had to the common law, and the impact upon it of the GRA 2004, irrespective of the provisions of the HFEA regime. It would clearly be undesirable for the answer to the attribution of status as 'mother' or 'father' to turn upon the method of conception.

130. In addition, this is a case that may well proceed further, and it may be of value if I set out my reasoning on an alternative basis. I propose, therefore, to address the position at common law first, taking account of the GRA 2004 but not the HFEA 2008, before going on to consider the issue within the context of the 2008 Act.

(3) The position at common law and the impact of the GRA 2004

131. As counsel's researches have revealed, there is a dearth of authority at common law on the definition of a 'mother'. That this is so may be unsurprising for, until recent times, there will have been no doubt that a woman who gives birth to a child is that child's mother. No other means of achieving pregnancy, save through conception by the fertilisation of an ovum by sperm inside a womb, was possible, and a person whose physical make-up was configured to facilitate such conception, and to carry a pregnancy to birth, was always considered to be female. Although the observation by Lord Simon in *The Ampthill Peerage* must be approached with caution and is certainly not definitive as a matter of law, it can only have been seen, at the time 40 years ago, as being a statement of, what was then, the obvious:

> '[m]otherhood, although a legal relationship, is based on a fact, being proved demonstrably by parturition'

132. The advent of IVF treatment and surrogacy generated, for the first time, the prospect of there being a difference between a genetic mother, whose egg had been fertilised outside the womb, and a gestational mother, who, whilst not genetically related to the child, had had an embryo implanted in her womb and who had, in due time, given birth to the resulting child. Scott Baker J, hearing one of the first surrogacy cases [*Re W (Minors) (Surrogacy)* [1991] 1 FLR 385] observed:

> 'Until recently, when the advance of medical science created the possibility of in vitro fertilisation, it was not envisaged that the genetic mother and the carrying mother could be other than one and the same person. The advent of IVF presented the law with a dilemma: whom should the law regard at the mother?'

133. In the absence of any statutory definition of 'mother', the position at common law must be the essential starting point in any analysis. It is necessary to be crystal clear that in stating what the position at common law must be, I am, at this stage, doing no more than looking back to earlier times, prior to the mid-20th century, when conception and pregnancy other than through sexual intercourse was unknown and where gender was primarily determined by genital examination at birth and then maintained for life. In that context, the lack of copious authority on the question does not, given the nature of the issue, indicate that there is any doubt as to the answer. In those times, at common law a person who became pregnant, through the insemination of an egg in their womb, and who subsequently gave birth to a child must have been that child's mother. In this the law was doing no more than reflecting common sense, common experience and the basic facts of life; motherhood was established by the act of giving birth, or 'parturition' to use Lord Simon's phrase, and a person who became pregnant and gave birth was a 'mother'.

134. Further, it is of note that, when determining the issue to which Scott Baker J referred to in *Re W*, Parliament opted for holding that the 'carrying' or gestational mother, and no other, is to be treated as the mother of the child [HFEA 2008, s 33(1)]. The default position established at birth in a surrogacy case is subject to a court subsequently affording parental status to the commissioning parent or parents by the making of a parental order under HFEA 2008, ss 54 and 54A, which provides for the child to be treated in law as the child of the commissioner(s) and no other person.

135. The position at common law, prior to recent legislative changes, is, therefore, that the person who carries a pregnancy and gives birth to a child is that child's 'mother'. The attribution of motherhood is a consequence of the individual's unique role in the biological process of pregnancy and birth.

136. The central issue raised on TT's case is whether the provisions of the GRA 2004, and in particular ss 9 and 12, dislodge the common law position where the person who conceives, carries and gives birth to a child is, at the time of birth, male.

137. Miss Markham's submission is both short and powerful. GRA 2004, s 9(1) is in unequivocal terms and requires that, once a GR certificate has been issued, the relevant individual is to be regarded as having the acquired gender 'for all purposes' and that must, she argues, include determining his status as a parent. It is here that the core assumption in TT's case is deployed, namely that if a parent is male at the time of his child's birth, he must be the 'father' or alternatively recognised as 'parent' in order not

to offend against the gender acquired by way of a GR certificate. This assumption is, in truth, the lynchpin of the Claimant's case, it therefore requires careful consideration.

138. As much of this area of the law is virgin territory, it is not necessarily conclusive to observe that there is no authority for the proposition that a parent who is male is always a 'father' and not a 'mother', but it is nevertheless the case that there is no such authority. Of more significance is the fact that, despite the passage into law of the GRA 2004, Parliament did not take the opportunity to make provision for the attribution of a particular parental status based on gender when passing the HFEA 2008, save to provide for there to be a second female parent in cases to which ss 42 and 43 apply.

139. It is pertinent to ask whether the role of 'mother' is as entirely gender specific as Miss Markham's assumption requires. It is undoubtedly the case that throughout history the role of being a gestational mother has been undertaken by females, but is being female the essential or determining attribute of motherhood? There is a strong case to be made for the role of 'mother' being ascribed to the person, irrespective of gender, who undertakes the carrying of a pregnancy and who gives birth to a child. In that regard, being a 'mother' is to describe a person's role in the biological process of conception, pregnancy and birth; no matter what else a mother may do, this role is surely at the essence of what a 'mother' undertakes with respect to a child to whom they give birth. It is a matter of the role taken in the biological process, rather the person's particular sex or gender.

140. The law has, in recent times, readily recognised mothers, who are to be regarded as male, and fathers, who are to be regarded as female. Long before the GRA 2004, trans-gender parents were accepted in the family courts in their acquired gender.

141. On the facts of *JK*, the transgender woman who was the father of the two children, and who remained registered as 'father' following the court's ruling, was, by a time soon after the second child's birth, to be recognised for all purposes as female. It is accepted in these proceedings that the effect of GRA 2004, s 12 was that JK's GR certificate did not affect her status as 'father' to those children; JK is thus a female father. The same would be true had it been the other way around and a mother had subsequently been granted a GR certificate recognising an acquired male gender, that person would be a male mother.

142. The concept of a male mother is therefore not unknown to the law. Indeed, irrespective of whether GRA 2004, s 12 is prospective, it is clearly retrospective and the effect of s 9 and s 12 on a parent who has, *following* the birth of a child, been issued with a GR certificate is that they will indeed either be a male mother or a female father.

143. Moving on, although Miss Markham submitted that GRA 2004, s 12 was entirely retrospective, she nevertheless accepted that the wording of the section is open and does not prevent it being read as both retrospective and prospective. I accept Mr Mylonas' point on s 12, which is that the provision does not say that, for the purposes of determining parenthood, a person is to be treated as retaining their birth assigned gender, but that does not, of itself, resolve the issue of construction.

144. Further, the position of GRA 2004, s 12 as a discrete provision, sitting below the 'general' provision in s 9, and amongst, with s 9, a group of sections headed 'consequences of issue of gender recognition certificate, etc', supports the view that s

12 in some manner qualifies the general operation of s 9. The provisions in s 9 are plain that they operate prospectively (s 9(1)) following the issue of a GR certificate, but do not affect things done or events occurring before issue (s 9(2)). If s 12 is purely retrospective, it would seem to be entirely otiose in the light of s 9(2) which is explicit in stating that the issue of a GR certificate 'does not affect' previous events. On an entirely retrospective reading of s 12, it adds nothing by saying that the acquisition of gender 'does not affect the status of the person as the father or mother of a child'. This factor, and the entirely open wording of s 12 with respect to its temporal impact, indicate that it is both retrospective and prospective in its effect.

145. The submission that if a GR certificate is effective in determining gender for all purposes other than parenthood, that would allow a situation where an individual could be held in a limbo between two genders, has force only if the attribution of the status of 'mother' or 'father' is seen, as a matter of law, as being entirely gender specific; it is a submission that turns, once again, on the lynchpin assumption at the core of TT's case, namely that a male parent is always a father and vice versa.

146. I therefore reject Miss Markham's central submission which is that, as a result of the GRA 2004, s 9, as TT was legally male at the time of YY's birth he must, as a matter of law, be 'father' rather than 'mother' to his child. The impact of the 2004 Act does not alter the common law position which is based on the biological/gestational process to the effect that a person who carries and gives birth to a child is that child's mother, irrespective of their legal gender at the time of birth.

147. I should stress that the narrow, but obviously important, issue that falls to be determined in this case is TT's legal parenthood status. For all other purposes, be they social, psychological or emotional, TT will be a male parent to his child and therefore his 'father'. That will be the social and psychological reality of their relationship. The consequence of this preliminary conclusion on the domestic law is that there is therefore likely to be a tension between the legal parentage and the social/psychological parentage in transgender cases such as the present. Consideration of this tension, and its consequences in terms of the impact on the human rights of TT and YY fall to be evaluated in the following section of this judgment.

148. It is therefore appropriate not to express a final conclusion on the outcome under domestic law before considering the bespoke provisions of the HFEA legislation and, importantly, the ECHR rights of TT and of YY. Domestic provisions must, so far as it is possible to do so, be given effect in a way which is compatible with Convention rights [HRA 1998, s 3]. I will therefore return to the domestic law once I have considered the respective Convention rights in the later sections of this judgment, but, at this stage, it is possible to express a preliminary view and it is helpful to do so in order to evaluate the application for a declaration of incompatibility in the ECHR section of this judgment and, more immediately, the impact of the HFEA legislation to which I will shortly turn.

149. My preliminary conclusions in the context of domestic law are therefore as follows:

a) 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';

b) The status of being a 'mother' arises from the role that a person has undertaken in the biological process of conception, pregnancy and birth;

c) Being a 'mother' or a '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;

d) GRA 2004, s 12 may be both retrospective and prospective. If that is so then the status of a person as the father or mother of a child is not affected by the acquisition of gender under the Act, even where the relevant birth has taken place after the issue of a GR certificate.

(4) Does the HFEA legislation alter the outcome under domestic law in this case?

(a) Treatment services

150. A preliminary question, which is not determinative of the issues before the court, but which has been raised is whether the IUI treatment provided by the clinic to TT was capable of being licensed by the HFEA; in other words, was the treatment given within the terms of the law.

151. 'Treatment services', as defined by HFEA 1990, s 2, 'means medical, surgical or obstetric services provided to the public or a section of the public for the purpose of assisting women to carry children'.

152. By HFEA 1990, s 11 the Human Fertilisation and Embryology Authority may grant licences for the provision of 'treatment services'.

153. HFEA 1990, s 3 sets out various activities which are governed by the 1990 Act and, in particular, those activities which are prohibited except in pursuance of a licence granted under the Act by the HFEA and s 3(2)(b) expressly provides that 'no person shall place in a woman … any gametes other than permitted eggs or permitted sperm' (as defined by s 3ZA).

154. It is a criminal offence to undertake the creation of an embryo except in pursuance of a licence. HFEA 1990, s 41(1)(a) provides, amongst other matters, that 'a person who contravenes s 3(2) … of this Act … is guilty of an offence and liable on conviction on indictment to imprisonment for a term not exceeding ten years or a fine or both'.

155. If at the time that he received treatment services at the clinic TT had been a woman (which by virtue of the GR certificate he was not) then the placing into his womb of gametes, in the form of permitted sperm, would have been lawful under the terms of the clinic's licence, assuming any other licence conditions had been complied with. It must, however, be at least questionable whether the provision of treatment services to a man is within the range of activities that the HFEA is permitted to authorise by licence.

156. The Government's case before this court is that the treatment services provided to TT by the clinic were <u>not</u> outside the HFEA scheme and that TT was therefore a 'woman'

for the purposes of the HFEA legislation. They so argue on the basis that to hold otherwise would have grave adverse policy consequences, which are said to be:

a) The treatment would be outside the regulatory scheme where it is firmly within the public interest for fertility treatment to be fully regulated; and

b) The consequences for the donor of the sperm used may be serious. Sperm is donated on the basis that the donor does not become the legal father [HFEA 2008, s 41(1)], but if the services leading to conception are outside the scheme of the Act then that protection is lost and the number of potential donors may correspondingly reduce if this became known.

157. Mr Jaffey, further, rejected the case advanced for YY and TT that the word 'woman' in the HFEA legislation should be read as 'person'. He submitted the term 'woman' in the Act has a precise meaning which, if loosened, would cause insuperable problems elsewhere in the HFEA.

158. Mr Jaffey in oral submissions argued that the HFEA legislation had to be read together with the Equality Act 2010 on the following basis. Firstly, it is right that the licensed clinic should record and treat TT as a man, but GRA 2004, s 12 treats him as a woman in respect of matters connected with parenthood and as physiologically capable of giving birth. Secondly, it would be unlawful under the EA 2010 for a licensed clinic to refuse to treat TT on grounds of gender reassignment. Thirdly, it would also be discriminatory for TT to be able to access treatment under the HFEA legislation, but for the treatment received to be unlawful. In short, his submission was that there cannot be a lacuna: trans men must be able to access treatment under the HFEA legislation, and that treatment must be regulated.

159. These issues are not for determination in the present claim. I have taken time to rehearse them because it would appear that there is at least ambiguity over them and, in particular, the interrelation between the Equality Act and the HFEA and the extent to which treatment of a male person as a 'woman' is, or is not, within the statutory scheme entrusted to the Human Fertilisation and Embryology Authority by Parliament. I anticipate that these are matters that will now be considered closely by the Authority and by ministers.

(b) Does HFEA determine parental status if TT's treatment was lawfully within HFEA scheme?

160. If, as the Government submit is the case, the HFEA legislation can be read so that TT is to be regarded as a 'woman' for the purposes of accessing 'treatment services' under the statutory scheme, or if, as TT and YY submit, the legislation must be read down so that the gender neutral words 'person' or 'people' are used in place of 'woman' or 'women' in that legislation, it is necessary to consider whether the substantive provisions of the 2008 Act determine the question of whether TT is a 'mother', 'father' or 'parent' with respect to YY.

161. On this point, the Government's case is straightforward. Mr Jaffey submits that if TT is to be regarded as a 'woman' for the purposes of the HFEA, then it follows that, where, following successful IUI treatment, he has given birth to a child he is to be regarded as that child's mother as would be the outcome in every other case under the legislation.

162. The case for TT and YY is now more narrowly put. Although Miss Markham and Mr Mylonas do not submit that the treatment services provided to TT were provided unlawfully, they do not argue that TT's circumstances come within any of the provisions of HFEA 2008 so as to establish him as YY's 'father', as opposed to 'mother'. The only reading down suggested is of the word 'people' for 'women' in HFEA 1990, s 2 in order to widen the definition of 'treatment services' so that an individual who donates sperm for use in such services is protected from being identified as the child's father under HFEA 2008, s 41 if the sperm is used to inseminate a male person as opposed to a 'woman'.

163. It is therefore possible to take this aspect of the case shortly.

164. HFEA 2008, s 33, which defines the meaning of 'mother', does so in order to deal with circumstances where 'an embryo' or 'sperm and eggs' are placed into the womb of the person who then goes on to carry the pregnancy to the birth of a child. Section 33 does not include artificial insemination and does not therefore encompass the circumstances of this case.

165. Although not relevant to the circumstances of TT and YY, it is, of course, possible that a trans-gender male might undergo a process of treatment in which an embryo, or sperm and eggs, are placed in their womb. In such a case the definition of 'mother' in s 33 would be directly engaged and it is hard to contemplate any conclusion other than that, as a matter of statutory interpretation, that person would be the child's 'mother' irrespective of the male gender that they had acquired even if that were recognised formally by a GR certificate. In my view, therefore, s 33 is not wholly irrelevant to the issue before this court as, in terms of statutory construction, it is difficult to envisage that Parliament would have intended the binary alternative outcome in the present case, namely that the person who has carried the pregnancy is not the 'mother', where the only distinction between the two scenarios relates to the specific process of assisted reproduction has been deployed in each case.

166. HFEA 2008, ss 35 to 47 deal with the determination of the status of individuals who may be either the 'father' or second female parent. It is accepted that none of these provisions apply to TT with respect to YY and they are therefore not of direct relevance to the issue in this case. In addition, s 34, which applies where a child is being, or has been carried, 'by a woman' as a result of, amongst other methods, of artificial insemination, does not therefore apply to a man.

167. It is for these shortly stated reasons that it is agreed that HFEA 2008, ss 33 to 47 do not apply to the present case so as to provide a statutory answer to the question of TT's status as YY's parent.

168. It must, therefore, follow that nothing in the HFEA legislation expressly alters the common law position and if (which remains to be determined finally) TT is to be regarded as YY's mother at common law that will remain the case.

169. It is now necessary to consider the human rights of TT and of YY that are engaged by the facts of this case under the ECHR in order to consider, firstly, whether as a result of analysis through the prism of the ECHR the common law position and/or the reading of the HFEA legislation must now be interpreted in a different manner or, secondly, if the result of analysis under the domestic law is that TT is YY's 'mother', whether this

is incompatible with the rights of either or both of them under the ECHR and, if so, whether that is sufficiently so to justify this court granting a declaration of incompatibility under HRA 1998, s 4.

[2] Rights under the European Convention on Human Rights

170. The 'Convention rights' identified by HRA 1998, s 1 are rights established under the ECHR which are incorporated into UK domestic law to the extent that HRA 1998, s 3 requires that, 'so far as it is possible to do so', primary and secondary legislation much be read and given effect in a way which is compatible with the Convention rights.

171. The ECHR and the HRA 1998 are of direct relevance in these proceedings in two distinct ways. Firstly, by HRA 1998, s 3, this court must strive to interpret the domestic legislation relating to TT's parentage with respect to YY in a manner which is compatible with the Convention rights. Secondly, if that is not possible, then the court is invited to consider making a declaration of incompatibility under HRA 1998, s 4 on the basis that one or more provisions of primary legislation is incompatible with a Convention right.

172. It is therefore necessary to consider the facts of the present case in relation to the ECHR and the jurisprudence of the ECtHR before reaching a firm conclusion on the claim under domestic law. Further, if the conclusion under domestic law appears to be incompatible with the Convention rights of TT and/or YY, it will be necessary to consider whether the court should go on to make a declaration of incompatibility.

173. Those acting for TT and YY each gratefully acknowledged and adopted the submissions of the AIRE Centre, which provide a comprehensive analysis of the issues in the context of the ECHR and the HRA 1998. I too am most grateful to the AIRE Centre and those acting pro bono on the Centre's instructions for the invaluable assistance that they have provided to the court.

174. In summary the AIRE Centre's submission is that, if the Government's construction of domestic law is held to be correct, then the current legislative framework for the registration of children born within transgender families fails to accord the rights of children sufficient importance and respect. It is submitted that there is a profound incongruence between the domestic law and the child's familial reality which has the potential to have a harmful impact on the children of transgender parents through the state's inability to recognise the child's parent appropriately.

175. The AIRE Centre submissions start from consideration of the standards of The United Nations Convention on the Rights of the Child ("UNCRC"), before looking at the wider international context and, finally, the ECHR.

(a) UNCRC

176. The UNCRC, which was ratified by the United Kingdom in December 1991, has not been incorporated into UK domestic law. Decisions of the UK Supreme Court have, however, made it clear that, where the ECHR, Art 8 rights of children are involved, then Art 8 must be interpreted in a manner that is in harmony with the general principles of international law, including obligations imposed on the state by international conventions. The approach to be taken was described by Baroness Hale JSC in *ZH*

(Tanzania) v Secretary of State for the Home Department [2011] UKSC 4 at paragraphs 21 to 23:

> "*The UNCRC and the best interests of the child*
>
> 21. It is not difficult to understand why the Strasbourg Court has become more sensitive to the welfare of the children who are innocent victims of their parents' choices. For example, in *Neulinger v Switzerland* (2010) 28 BHRC 706, para 131, the Court observed that "the Convention cannot be interpreted in a vacuum but must be interpreted in harmony with the general principles of international law. Account should be taken . . . of 'any relevant rules of international law applicable in the relations between the parties' and in particular the rules concerning the international protection of human rights". The Court went on to note, at para 135, that "there is currently a broad consensus – including in international law – in support of the idea that in all decisions concerning children, their best interests must be paramount".
>
> 22. The Court had earlier, in paras 49 to 56, collected references in support of this proposition from several international human rights instruments: from the second principle of the United Nations Declaration on the Rights of the Child 1959; from article 3(1) of the Convention on the Rights of the Child 1989 (UNCRC); from articles 5(b) and 16(d) of the Convention on the Elimination of All Forms of Discrimination against Women 1979; from General Comments 17 and 19 of the Human Rights Committee in relation to the International Covenant on Civil and Political Rights 1966; and from article 24 of the European Union's Charter of Fundamental Rights. All of these refer to the best interests of the child, variously describing these as "paramount", or "primordial", or "a primary consideration". To a United Kingdom lawyer, however, these do not mean the same thing.
>
> 23. For our purposes the most relevant national and international obligation of the United Kingdom is contained in article 3(1) of the UNCRC:
>
> > "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."
>
> This is a binding obligation in international law, and the spirit, if not the precise language, has also been translated into our national law. Section 11 of the Children Act 2004 places a duty upon a wide range of public bodies to carry out their functions having regard to the need to safeguard and promote the welfare of children. The immigration authorities were at first excused from this duty, because the United Kingdom had entered a general reservation to the UNCRC concerning immigration matters. But that reservation was lifted in 2008 and, as a result, section 55 of the Borders, Citizenship and Immigration Act 2009 now provides that, in relation among other things to immigration, asylum or nationality, the Secretary of State must make arrangements for ensuring that those functions "are discharged having regard to the need to safeguard and promote the welfare of children who are in the United Kingdom"."

177. In any event, the jurisprudence of the ECtHR has consistently imported the core principles of the UNCRC as it has developed and expanded the right to private and family life under ECHR, Art 8.

178. Article 3(1) of the UNCRC establishes the central principle:

> "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."

The Supreme Court has held (*HH v Deputy Prosecutor of the Italian Republic, Genoa; F-K v Polish Judicial Authority* [2012] UKSC 25, at paragraph 155) that when a child's ECHR, Art 8 rights are engaged, they must be looked at 'through the prism' of UNCRC, Art 3(1), so that Art 8 must be 'interpreted in such a way that [children's] best interests are a primary consideration, although not always the only primary consideration and not necessarily the paramount consideration' (Baroness Hale SCJ at paragraph 33 of *HH*).

179. UNCRC, Art 2 is also relevant to the issues in the present proceedings:

> "1. States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.
>
> 2. States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians or family members."

180. In addition to the substantive provisions of the UNCRC, the UNCRC Committee issues 'General Comments' ['GC'] which provide interpretation and analysis of specific UNCRC Articles. Of relevance to the present proceedings, GC14 on the right of the child to have his best interests taken into account states, at paragraph 6:

> "6. The Committee underlines that the child's best interests is a threefold concept:
>
> (a) A substantive right: The right of the child to have his or her best interests assessed and taken as a primary consideration when different interests are being considered in order to reach a decision on the issue at stake, and the guarantee that this right will be implemented whenever a decision is to be made concerning a child, a group of identified or unidentified children or children in general. Article 3, paragraph 1, creates an intrinsic obligation for States, is directly applicable (self-executing) and can be invoked before a court.
>
> (b) A fundamental, interpretative legal principle: If a legal provision is open to more than one interpretation, the interpretation which most effectively serves the child's best interests should be chosen. The rights enshrined in the Convention and its Optional Protocols provide the framework for interpretation.

> (c) A rule of procedure: Whenever a decision is to be made that will affect a specific child, an identified group of children or children in general, the decision-making process must include an evaluation of the possible impact (positive or negative) of the decision on the child or children concerned. Assessing and determining the best interests of the child require procedural guarantees. Furthermore, the justification of a decision must show that the right has been explicitly taken into account. In this regard, States parties shall explain how the right has been respected in the decision, that is, what has been considered to be in the child's best interests; what criteria it is based on; and how the child's interests have been weighed against other considerations, be they broad issues of policy or individual cases."

181. GC14 at paragraph 14 states that the obligations on States Parties include:

> "(a) The obligation to ensure that the child's best interests are *appropriately integrated and consistently applied* in every action taken by a public institution, especially in all implementation measures, administrative and judicial proceedings which directly or indirectly impact on children;
>
> (b) The obligation to ensure that all judicial and administrative decisions as well as policies and legislation concerning children demonstrate that the child's best interests have been a primary consideration. This includes describing how the best interests have been examined and assessed, and what weight has been ascribed to them in the decision.
>
> (c) The obligation to ensure that the interests of the child have been assessed and taken as a primary consideration in decisions and actions taken by the private sector, including those providing services, or any other private entity or institution making decisions that concern or impact on a child."

182. These, and other provisions of the UNCRC, plainly emphasise the obligation on signatory states, and those taking judicial and other decisions within such states, to regard the child's best interests as a primary consideration.

(b) Wider international context

183. With respect to the wider international context, the AIRE Centre drew attention to two recent developments:

a) Resolution 2239 (2018) on *Private and Family Life: achieving equality regardless of sexual orientation* passed by the Parliamentary Assembly of the Council of Europe on 10th October 2018 ['the PACE Resolution'];

b) Hague Conference on Private International Law Project on Parentage and Surrogacy ['the Hague Conference'].

184. The PACE Resolution focuses upon achieving equality with regard to ECHR, Art 8 regardless of sexual orientation and avoiding discrimination for individuals and those in 'rainbow families' and, in particular, at paragraph 4.6, it calls on Council of Europe member States to:

> "… provide for transgender parents' gender identity to be correctly recorded on their children's birth certificates, and ensure that persons who use legal gender markers other than male or female are able to have their partnerships and their relationships with their children recognised without discrimination."

185. The primary focus of the Hague Conference is upon the possibility of establishing an international instrument which would ensure that a public document (typically, a birth certificate or an act of acknowledgment of parentage) recording a child's parentage, issued by one State, would be accepted by all Contracting States. Although interesting, the work of the Hague Conference is not of direct relevance to the present proceedings.

(c) ECHR

186. The principal Articles of the ECHR that are of relevance in the present case are Arts 8 and 14:

> **Article 8: right to respect for private and family life**
>
> 1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.
>
> **Article 14: prohibition of discrimination**
>
> The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

187. In its submissions, the AIRE Centre is clear that 'the ECtHR has not yet been required to rule upon the precise question arising in this case, namely whether Article 8 on its own and/or taken with Article 14 is infringed where a legally recognised trans-man is required to be entered as "mother" on his child's birth certificate'. The AIRE Centre's submissions have therefore been, of necessity, based upon suggested closely comparable situations which have come before the ECtHR.

188. In *AP, Garcon and Nicot v France (App Nos 79885/12, 52471/13 and 52596/13)*, the ECtHR considered applications from three French citizens challenging various preconditions that had been placed upon applications that they had made for recognition of their respective acquired genders. The ECtHR at paragraphs 121 to 125, in the context of the application of the margin of appreciation, noted that there had been movement amongst and across a number of member states during the previous decade away from requiring sterilisation or irreversible surgical procedures prior to recognising a person's acquired gender. It is of note that, relying upon *Van K ck v. Germany, no. 35968/97* at paragraph 75, the court stated (at paragraph 123) that 'the right to gender

identity and personal development is a fundamental aspect of the right to respect for private life'.

189. The AIRE Centre has helpfully drawn attention to the application in *YP v Russia (Application No: 8650/12)*. YP, who was born female, gave birth to a son and was registered as the child's mother on the birth certificate. The boy's father was registered as 'father'. Subsequently YP went through medical and legal gender transition. He was issued with a birth certificate and passport in his new male name and showing his gender as 'male'. YP lodged an action requesting the Russian courts to recognise him as his child's father with consequent corrections to official records and the child's birth certificate. The Russian courts refused YP's application. YP's application to the ECtHR was, on 23 February 2017, communicated to the parties and awaits further progress before the court in Strasbourg.

190. In *Mennesson v France (Application No: 65192/11)*, the ECtHR considered a surrogacy case where the French authorities had refused to register a married couple as the parents of twins born to a surrogate mother following implantation in her of an embryo created from the male applicant's sperm and a donor egg. In the course of its judgment, the ECtHR, which held that the Art 8 rights of the two children had been violated, stated at paragraph 99:

> "… the children themselves, whose right to respect for their private life – which implies that everyone must be able to establish the substance of his or her identity, including the legal parent-child relationship – is substantially affected. Accordingly, a serious question arises as to the compatibility of that situation with the children's best interests, respect for which must guide any decision in their regard."

191. In the present case, the Government accepts that the requirement for a trans-man, who has given birth to a child, to be named as 'mother' on the child's birth certificate, interferes with both the Claimant's and the child's Art 8 rights. The issue, under Art 8, is therefore whether that interference is in accordance with the law, pursues a legitimate aim and is proportionate or otherwise strikes a fair balance. In its submissions, the AIRE Centre did not take issue with the Government's case on whether the measures are in accordance with the law or pursue a legitimate aim; the focus of their submissions was therefore on proportionality and fair balance.

192. The AIRE Centre's written submissions focused upon the impact upon and the consequences for a child arising from the different birth registration options.

193. The AIRE Centre stressed the importance to a child of understanding who their parents are. It is, in part, important to understand their lineage generally, and more particularly for medical purposes. In this latter regard, the point is made that some medical conditions only pass through the maternal line (for example mitochondrial disorders) and it may, therefore, be important for children to know the identity of their biological maternal parent. It is suggested that a person biologically of the female sex, but who later transitioned but retained their ability to reproduce, might pass a genetic condition on to a child, but, if the full history of transition were not disclosed, where the child may be in ignorance of their true biological identity.

194. In terms of assessing the 'best interests' of a child in these circumstances, the AIRE Centre, correctly in my view, submitted that 'a balance must be struck between the

parent's individual right to privacy and the child's right to know about their biological identity'.

195. In France the law apparently acknowledges an ancient tradition under which a mother may abandon her child at birth with the result that, even if the individual mother is identified, the child would be denied information about her. In *Odièvre v France (Application No 42326/98)*, the ECtHR held that the French system did not violate a child's Art 8 rights in this respect. But, as the AIRE Centre points out, subsequent case law (for example *Jaggi v Switzerland* (2008) 47 EHRR 30) demonstrates the court giving more weight to the right to know one's origins.

196. More recently, in *Mennesson v France*, the court observed that the right to respect for private life requires that every person is able to establish details of their identity as a human being, including the identity of their parents: 'an essential aspect of an individual's identity is at stake as regards the identity of their parents' [paragraph 96].

197. In the context of the present proceedings the decision in *Godelli v Italy (Application No 33783/09)* is not without interest. In a way that is similar to the approach of the law in France seen in *Odièvre v France*, the law in Italy allows a mother, who has given up her child for adoption, to opt for full anonymity. Where, as was the case in *Godelli*, the adopted child applies for information in order to identify their maternal line the approach of the Italian law is to adopt a blanket policy of refusal in a manner which will always uphold the anonymity of the mother. Whilst the central question before the ECtHR in *Godelli* related to the margin of appreciation and the absence of any attempt under Italian law to balance the interests of the adopted person against those of the mother, the observations of the court are of some relevance in identifying an approach to providing information to a child as to their parentage. At paragraph 47 the court considered the positive obligations upon a state in the sphere of private life and relationships between individuals:

> "47. The Court reiterates that although the object of Article 8 is essentially that of protecting the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective respect for private life. These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves (see *X and Y v the Netherlands*, 26 March 1985, § 23, Series A no. 91). The boundaries between the State's positive and negative obligations under Article 8 do not lend themselves to precise definition. The applicable principles are nonetheless similar. In particular, in both instances regard must be had to the fair balance which has to be struck between the competing interests, and in both contexts the State enjoys a certain margin of appreciation."

198. At paragraph 50, in describing the balance to be struck, the court emphasised the importance of a child's right to know its origins:

> 50. The Court notes that the expression "everyone" in Article 8 of the Convention applies to both the child and the mother. On the one hand, the child has a right to know its origins, that right being derived from the notion of private life (see paragraph 47 above). The child's vital interest in its personal development is also

> widely recognised in the general scheme of the Convention (see, among many other authorities, *Johansen v Norway*, 7 August 1996, § 78, *Reports of Judgments and Decisions* 1996-III; *Mikulić*, cited above, § 64; or *Kutzner v Germany*, no. 46544/99, § 66, ECHR 2002-I). On the other hand, a woman's interest in remaining anonymous in order to protect her health by giving birth in appropriate medical conditions cannot be denied.

199. Again, at paragraph 52, the court emphasised the importance of a person's right to know their identity:

> 52. The Court reiterates that the choice of the means calculated to secure compliance with Article 8 in the sphere of the relations of individuals between themselves is in principle a matter that falls within the Contracting States' margin of appreciation. In this connection, there are different ways of ensuring respect for private life, and the nature of the State's obligation will depend on the particular aspect of private life that is at issue (see *Odièvre*, cited above, § 46). The extent of the State's margin of appreciation depends not only on the right or rights concerned but also, as regards each right, on the very nature of the interest concerned. The Court considers that the right to an identity, which includes the right to know one's parentage, is an integral part of the notion of private life. In such cases, particularly rigorous scrutiny is called for when weighing up the competing interests.

200. The outcome of *Godelli*, in which the court held by 6 votes to 1 that there had been a violation of Art 8, turned upon the blanket approach under Italian law and the state's failure to take any account of the rights of the applicant by conducting any balancing exercise.

201. Of course, identifying the right of the child to know details of their identity begs the question of what those details might be in a trans-gender case. Must they, as the government assert, reflect the biological relationship and identify the parent who carried the child as 'mother', or must they, as those acting for TT and YY claim, respect the social and familial reality with respect to that parent's sex and gender by requiring that they be registered as the child's 'father'.

202. Part of the submissions made on behalf of the AIRE Centre relate to children born in marriages between a recognised trans-gender man and another person. In that context two assertions are made regarding domestic law:

a) Where a trans-gender man is married to a non-trans woman, and the non-trans woman gives birth, the trans-gender man will be presumed under common law to be the father and will go on the child's birth certificate as such; and

b) A trans-gender man married to a non-trans woman who consents to his wife receiving treatment through a licensed clinic will be registered on the child's birth certificate as the child's father (HFEA 2008, s 35) and this would be the case even where the trans-man had had his eggs used in the treatment.

203. On the basis of these two assertions, the AIRE Centre observes that, if they are correct, then the child will have a birth certificate reflecting his legal and social (though not

biological) reality. If such an individual, the submission proceeds, who is registered as 'father' in relation to these two scenarios, went on to conceive and give birth to a child then, on the Government's case he would be the 'mother' to that later child, albeit born during the same marriage as the first two children. It is submitted that this is neither consistent nor child-focussed.

204. The AIRE Centre also points to a further (it is argued) lack of coherence if both partners in a marriage are trans-gender. If they conceive a child through the ordinary means of reproduction, the trans-man would, on the Government's case, be the mother, and the trans-woman would be the father, thereby producing an outcome which is at total odds with the lived-out reality of the family unit.

205. Separately, the AIRE Centre submits that if a trans-man who had given birth to a child were required to be registered as the child's mother this may generate difficulties for the man or the child when travelling abroad. An adult travelling alone with a child may be asked for evidence of his relationship with the child. If the child's birth certificate were to show the adult as 'mother' whereas the adult's passport gives his gender as 'male' this may, it is said, give rise to confusion or suspicion.

206. The AIRE Centre concluded its written submissions by pointing out that in other related areas of the law (for example adoption, surrogacy or fertility treatment) the outcome of such processes produces a difference between the legally recognised parent (eg the adopter) and the biological reality (the natural parent). In such cases the State has regulated and ordered the domestic law to achieve this result. It is submitted that there would need to be compelling reasons to justify not making similar arrangements where a trans-man has given birth in the circumstances of the present case.

207. For TT, Miss Markham submits that an approach to parenthood which is contrary to a person's acquired gender is not only discriminatory, incongruent and a breach of ECHR law (when considering the principles set out in *Goodwin v United Kingdom* (2002) 35 EHRR 18 – see below), it further identifies a clear lack of a congruent approach to the treatment of transgender persons in fundamental aspects of their primary rights, not least the right to become a parent.

208. The case of *Goodwin* is plainly important in any consideration of trans-gender in the context of the ECHR. In *Goodwin* the Grand Chamber of the ECtHR held that the UK had acted in breach of Art 8 (and in other respects) in failing to recognise the acquired gender of a trans-gender woman in law. The decision in *Goodwin* led, in due course, to the GRA 2004. At paragraph 90 of its judgment, the court described the essential approach to trans-gender under the Convention:

> "90. Nonetheless, the very essence of the Convention is respect for human dignity and human freedom. Under Article 8 of the Convention in particular, where the notion of personal autonomy is an important principle underlying the interpretation of its guarantees, protection is given to the personal sphere of each individual, including the right to establish details of their identity as individual human beings (see, *inter alia*, *Pretty v. the United Kingdom*, no. 2346/02, judgment of 29 April 2002, § 62, and *Mikulić v. Croatia,* no. 53176/99, judgment of 7 February 2002, § 53). In the twenty first century the right of transsexuals to personal development and to physical and moral security in the full sense enjoyed by others in society cannot be regarded as a matter of controversy requiring the lapse of time to cast

clearer light on the issues involved. In short, the unsatisfactory situation in which post-operative transsexuals live in an intermediate zone as not quite one gender or the other is no longer sustainable."

209. Miss Markham submits that for TT to be regarded as male for all purposes save parenthood, and to be in law a female parent, is to place him precisely in the intermediate zone identified by the ECHR, as being neither wholly one gender nor another. Such an individual would have to choose either to have a family, and therefore enter a state of legal limbo in relation to gender or abandon the prospect of parenthood in order to retain their acquired gender for all purposes. Such a choice places a trans-gender person in an impossible dilemma.

210. On behalf of TT it is submitted that the basis of recent ECtHR caselaw on trans-gender is that there should be full recognition of the acquired gender for all purposes, without exception and, on the basis of the *Goodwin* decision, there will be a strict and narrow margin of appreciation allowed for any state which seeks to establish an exception. It is submitted that the registration of the person who has carried a child and given birth as 'father' does not raise sensitive or moral issues, and does not provide a basis for an exception to the principle of recognition for all purposes.

211. The Claimant submits that, irrespective of the limited number of occasions when YY's full birth certificate may be required to be produced, there is more generally an adverse impact generated by the potential for disclosure which includes:

a) The current scheme of registration as 'mother' is a clear deterrent and cause for anxiety to trans-men when planning a pregnancy and may itself lead to heightened gender dysphoria;

b) Registering as 'mother' means that a trans-man's transition is no longer confidential;

c) For a man to have to declare himself as 'mother' is a deeply distressing, subjectively traumatic and procedurally taxing requirement.

Thus, it is submitted that whilst the chances of unwanted disclosure may be small (which is not accepted), the impact of there being the potential for disclosure is significant and, for many, acts as an insurmountable deterrent to founding a family life in their acquired gender.

212. Miss Markham challenged the submission of the Government, which was in turn upheld by Hickinbottom J in *JK* (paragraph 123(i)), that the impact of any interference with TT's Art 8 rights will be 'small'. She submits that the only route by which TT can establish himself as a male parent of his own child under current UK domestic law is for him to adopt YY. Such a step would be, it is argued, wholly inappropriate and disproportionate.

213. Drawing her submissions together, Miss Markham referred to the terms 'mother' and 'father' as going to the very heart of the nature of gender dysphoria. 'Mother' is a gendered term. If there is no clarity in relation to how a transgender person is seen after the grant of a GR certificate, the value of the GRA 2004, s 9 is fundamentally called into question. The current registration scheme is not fit for purpose when dealing with

trans-gender parents who have a GR certificate. It is not for the Claimant or the court to determine how this failure should be remedied; it is a matter for Parliament.

214. On behalf of YY, Mr Mylonas rightly places emphasis on the need to treat the interests of the child as a primary consideration. He prays in aid the UNCRC, ECHR and domestic case law to which reference has already been made.

215. As a starting point, Mr Mylonas submits that the Government has produced no evidence that registering TT as YY's father would not be in the child's best interests. Insofar as it is said that YY has a right to know the identity of the person who gave birth to him, it is submitted that it is inconceivable that YY will not know this information on the facts of this case.

216. In terms of YY's best interests, Mr Mylonas invites the court to make an evidence-based assessment of the impact on YY, and on children generally, as demonstrated by:

a) The opinion of YY's litigation friend, who is an experienced former CAFCASS High Court Team guardian;

b) The evidence of TT as YY's parent;

c) The expert evidence of Sally Hines; and

d) Evidence from Government sources as to the extent of trans-phobia, harassment and abuse.

217. The opinion of Clare Brooks (which is set out at paragraphs 59 and 60 above), which was given at a preliminary stage prior to the hearing, was that it was overwhelmingly in YY's best interests for TT to be registered as his father or his parent.

218. TT's evidence in terms of YY's welfare, in addition to his principled belief that registration as 'father' is the only tenable outcome, includes acceptance that registration as 'mother' would 'cause me unimaginable emotional trauma' and that this, despite his best endeavours, would impact on YY. In addition, YY would face unnecessary anxiety and stress if his full birth certificate were to be produced at border controls or the benefit support or student loan applications.

219. Based on a review of available research, Professor Sally Hines identified the negative impact on a parent's psychological ease and parental security, together with the potential for deep psychological distress to the parent by no longer being able to maintain a fully masculine identity. Prof Hines concluded by stating her opinion:

> "In my professional opinion social stigmatisation of children of trans parents could be exacerbated if gender markers of parents do not conform with their gendered name, presentation or parenting role"

220. In addition, those acting for YY have collated extracts from committee reports, and Government responses, action plans and material from the Council of Europe, all of which amply demonstrates the benefit generally of moving away from gender specific terms and markers, together with the need to act against transphobia and hate crime.

221. YY's case, however, is not based upon the registrar having a discretion or that the issue falls to be decided on a case by case basis. The submission is that for all children in such circumstances it will be in the best interests of the child for their male parent to be registered as 'father' rather than 'mother'.

222. Prior to the court or YY' representatives having knowledge of TT's involvement in the documentary film, it was submitted on YY's part that risks arose if TT were 'outed' by having to produce YY's birth certificate. In the light of TT's actions in publicising his circumstances, that submission is no longer sustainable.

223. Mr Mylonas aligns YY's case alongside that of TT by submitting that insistence on labelling TT as YY's mother fundamentally undermines the State's recognition of TT's gender change and places TT in precisely the 'intermediate zone' that the ECtHR identified in *Goodwin*. It is said that if the Government's decision prevails, TT will be regarded as a woman for the purposes of his relationship with YY, and for the purposes of receipt of fertility treatment, but as a man for all other purposes.

224. It is further submitted that there is a separate need to consider YY's identity rights and any potential breach of those rights. If TT is registered as YY's mother, TT's transgender state will be immediately revealed because the birth certificate will conflict with the lived/social reality of the relationship between parent and child.

225. In response to the Government's submission that the current domestic law, as it is said to be, maintains a coherent scheme, Mr Mylonas argues that the contrary is the case and that the present scheme is completely incoherent with a mismatch between the purported effect of the GRA 2004 and the position of TT having to register as YY's 'mother' despite being legally male 'for all purposes'.

226. For the Government, Mr Jaffey submits that the Claimant's HRA 1998 claim raises complex issues of public policy concerning how best to protect the rights of trans-persons and their families in legislation and, as such, a wide margin of appreciation should be applied so as to afford considerable respect to the decisions made by the legislature. He submits that the current scheme aims to navigate a sensible course through a difficult area of social policy in which the interests of different individuals and groups must be regarded.

227. It is accepted that the current legislative scheme interferes with the rights of TT and YY under Art 8 and justification for such interference is therefore required. It is submitted that the interference is justified by:

    i) The need to have an administratively coherent and certain scheme for the registration of births; and

    ii) The need for the rights and interests of others to be respected and balanced, notably, but not exclusively, the right of the child to know the identity of the person who carried him or her.

228. It is submitted that the interference is proportionate, particularly having regard to measures within the legislation and administrative scheme to maintain confidentiality and also having regard to the lack of workable alternatives.

229. The Government rely upon the expert evidence of Mr Peter Dunne who has concluded that in almost all countries within the Council of Europe a trans-man who gives birth to a child will be registered as the child's 'mother'. The small number of European states, and the small number of states in the US or Canada who take a contrary position, fall well short of establishing a European or international consensus.

230. A fair balance must be struck between competing private and public interests and the ECHR jurisprudence indicates that in such circumstances a cautious approach will be adopted with a wide margin of appreciation.

231. Mr Jaffey argues that a further reason for caution is that there is currently no ECtHR case establishing that a state is indeed required to register a trans-man as 'father' when he has given birth to a child. The finding in *Goodwin* requires to be read in the context that it applied narrowly to 'fully achieved and post-operative transsexuals', who would, by definition, not be capable of conceiving a child. House of Lords and UK Supreme Court authority has held that HRA 1998, s 2(1) requires the 'national courts to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less' (*R (Ullah) v Special Adjudicator* [2004] 2 AC 323 at para 20).

232. At paragraph 72(v) of their skeleton argument, the baseline of the Government position is succinctly recorded:

> "Parliament has decided that it is in the public interest (and the interests of all children) for there to be a record of the person who carried and gave birth to the child. That person is the mother, recorded in the birth certificate. As a result of the GRA 2004, that person may be male or female in law for most purposes. The mother may or may not be genetically related to the child.'

233. Mr Jaffey submits that the baseline position is justified, in ECHR terms, on the basis that any interference with Art 8 pursues the following legitimate aims:

a) Having an administratively coherent and certain system for the registration of birth; and

b) Respecting the rights and interests of others, notably any partner and the children of the person living in an acquired gender, including the right to know the identity of his mother.

234. With respect to (a), Mr Jaffey submits that requiring the identity of the person who gives birth to be recorded on all birth certificates leads to coherence and consistency. It ensures that the identity of the 'mother' will always be clear, which is a matter of considerable importance to many people.

235. With respect to (b), there is a fundamental right of a person to know and understand of the truth as to their very identity, whatever that truth may be.

236. On the Government's case any interference with the rights of either TT or YY is modest. Reliance is placed on a finding to like effect made by Hickinbottom J in *JK*. The occasions when a full birth certificate is required are minimal. The short form certificate does not include details of a person's parents.

237. Mr Jaffey submits that the interests of third parties outweigh the interference with TT's or YY's rights under Art 8. Firstly, the interference is counterbalanced by the fact that if TT was shown as 'father' or 'parent' on YY's birth certificate, it would result in a situation in which YY would not have a mother and have no statutorily guaranteed method of discovering the identity of the person who carried and gave birth to him (a right that was recognised by the ECtHR in *Godelli v Italy*).

238. Further, with respect to third parties, the right of a trans-parent to register a birth in their acquired gender may conflict with the rights of another parent. In addition, to accord the claimant the status of 'father' on the birth certificate simply generates ambiguity and incoherence with respect to YY's parentage where no 'mother' is recorded. Each of the various strategies put forward on behalf of TT to accommodate his position, simply generate potential for confusion and incoherence.

239. Mr Jaffey prays in aid the observations of Hickinbottom J at paragraph 109 in *JK* to the effect that the importance of respecting the integrity of an individual's acquired gender falls to be balanced against the importance of the identification of the person who gave birth to the child:

> "109. Sexual identity and the choice of gender represent important elements of an individual's fundamental identity. However, parentage is also a vital element in that identity. Mr Squires conceded that the identity of a person's mother fell into such a category – accepting that that justified (or may justify) a requirement that a person's biological mother be identified on a birth certificate – but he submitted that the position with regard to a person's father was different, with the registration scheme for the United Kingdom reflecting that fact by being less prescriptive in requiring the identification of a person's biological father in such a certificate. Of course, the position of a biological mother and a biological father are not identical – a mother carrying and delivering the child, and the father not – but I cannot agree with the proposition, insofar as Mr Squires suggested it, that the identity of a person's biological father is not an important element of his or her fundamental identity. It clearly is."

240. With respect to Art 14, Mr Jaffey accepts that trans-status is a protected status for the purposes of Art 14 (*R (C) v Secretary of State for Work and Pensions* [2017] UKSC 72 at para 39) and that being the child of a trans-parent constitutes an 'other status' under Art 14.

241. TT claims that he has been treated differently to those in the following cohorts:

a) A transgender male married to a woman, who would be recognised as the father on a birth certificate ['cohort 1'];

b) A second female parent (whether trans-or not) would be deemed a parent if registering the birth of her child whilst married to or in a civil partnership with another woman ['cohort 2'];

c) A couple (regardless of gender or sexual orientation) who undertake surrogacy would be issued with a birth certificate recording 'parents' ['cohort 3']; and

d) A woman in a same-sex relationship who can be registered as a 'parent' ['cohort 4'].

242. The Government does not accept that cohorts 1 and 2 establish any relevant difference in treatment as GRA 2004, s 12 requires all trans-parents to be treated as if they remained in their birth gender for the purposes of parenthood. A parental order in a surrogacy case (cohort 3) does record the commissioning parents as 'parents', it is submitted, however, that this is not the same as a birth certificate; the birth mother in a surrogacy case is always recorded as the mother on the child's birth certificate. The difference between this case and cohort 4 is that TT gave birth to YY, whereas the female partner of a mother does not give birth.

243. In a separate point, Mr Jaffey submitted that a registration scheme must be consistent, clear and certain; a registration scheme cannot be founded upon the determination of the best interests of each individual child or otherwise afford discretion to the registrar. In the context of a legislative registration scheme, it was submitted that it is difficult to discern what different approach reference to the best interests of the child under UNCRC, Art 3 might generate.

244. In summary the Government's submissions in relation to TT's and YY's ECHR claims are:

i) It is accepted that the decision to insist upon registration of TT as YY's 'mother' is an interference with the Art 8 rights of parent and child;

ii) There is a proper, legitimate aim and purpose in having a consistent, clear and certain registration scheme for the registration of births;

iii) It is both right and necessary for that scheme to record with respect to the birth of every child the identity of the person who bore the child and for that person to be registered as 'mother';

iv) In assessing the extent of the interference:

a) The impact on TT and YY will in reality be small;

b) There is a potential countervailing impact on the rights of others;

c) A child needs to know the identity of the person who gave birth to them;

d) All other suggested options also have the potential for disclosure of the parent's transgender status.

The Government therefore submits that the admitted interference is in accordance with the law, and is necessary, proportionate and fair.

Human Rights Claim: Conclusion

245. It is helpful to make several preliminary observations at this stage.

246. Firstly, the need to analyse the circumstances of this Claim through the prism of the ECHR and the HRA 1998 has generated substantial and wide-ranging submissions from

each party. That this is so may be a consequence of the fact that there is no decision of the ECtHR, or indeed any other relevant decision, that bears directly on the issue that is presently before the court. Whilst all the submissions that have been made have been of assistance, they have plainly demonstrated that there is no clear authority on the issue, one way or the other. It is, therefore, necessary for this court to conduct its own analysis based on first principles, informed, insofar as this is possible, by the tangential or illustrative authority to which reference has been made.

247. Secondly, the parties' submissions have also, in part, been expanded to include reference to a range of different factual situations, with the attribution of parenthood and gender falling, it is said, one way or the other. That this is a complicated and developing area of human and legal understanding, which raises difficult questions of social policy, is all too clear. I have not, however, thought it either helpful or necessary to analyse each of these proffered examples to a conclusion. It may well be that tricky issues are generated by factual circumstances which are different from those currently before the court, but it is not the function of this judgment to resolve them. The focus of these proceedings is solely upon the attribution or not of the status of 'mother' to a male parent who has carried and given birth to a child.

248. Thirdly, although the parties have variously made reference to the 'margin of appreciation' and submitted that it might either be wide or narrow, such considerations are not for a domestic court to determine (*R (Steinfeld and Keidan) v Secretary of State for International Development* [2018] UKSC 32; [2018] 3 WLR 415 at paragraph 28). This court must undertake its own analysis. But in the present case it does so, as I have already observed, in the knowledge that there is currently no direct ECtHR authority on the points in issue.

249. Fourthly and finally in terms of preliminary observations, although TT is, and will be, the subject of significant publicity as a result of the documentary film and associated media coverage, that factor can only be of marginal weight in the overall human rights evaluation. Given the issues involved, which turn upon the lawfulness of the statutory scheme for birth registration, a high-level analysis is required which will have general validity (subject of course to potential exceptions), rather than one that turns to a nicety upon the particular facts of each case.

250. TT and YY's primary claims under the ECHR are that to require TT to be registered as YY's 'mother' is a breach of the rights that each of them has to respect for their private and family life under Art 8(1). The Government concedes that if domestic law does, as they submit, require such registration then that outcome would interfere with the Art 8 rights of both parent and child. That concession is well made. The psychological and social reality for TT and YY is and will be that TT is YY's male parent, his father. To require that TT be registered as 'mother' is plainly wholly contrary to TT's view of himself, his gender and his role in his child's life, and this, as he grows up, is also entirely likely to be the case for YY also.

251. TT regards the term 'mother' as being gender specific. His argument before this court in favour of 'father' is also gender specific. Whilst, for the reasons that I have given so far in evaluating the domestic law, my preliminary conclusion <u>as a matter of law</u> is that the term 'mother' is free-standing and separate from consideration of legal gender, thus in law there can be male mothers and female fathers, I fully accept that this is not TT's perspective and is unlikely to be the perspective of others who, like TT, suffer from

gender dysphoria. Whether or not there has been a breach of Art 8 must be assessed regarding the particular characteristics of the individual in focus, and in that regard to require him to be registered as 'mother' is rightly seen by him as a frontal assault on the integrity of his acquired male gender. The requirement to register would, I accept, adversely impact upon TT's human dignity and his human freedom.

252. Separately, irrespective of how often this may happen, if an event occurs where YY's full birth certificate must be produced, this is very likely to be an occasion of exquisite embarrassment and confusion for both parent and child. More than that, even if such an occasion never arises, the fact that it might arise is a legitimate cause for significant anxiety and distress on the part of TT, and probably YY when he is older, to the extent that this on its own is an interference with their right to respect for private and family life.

253. Moving on, the requirement for registration as 'mother' is, on the Government's case, made 'in accordance with the law', namely the BDRA 1953 coupled with the GRA 2004 and pursues one of the legitimate societal aims identified by the government, namely of establishing a coherent registration system. There is, rightly, no challenge to these assertions.

254. The focus of consideration therefore moves to whether insistence on registration as 'mother' is 'necessary', that is to say, is it proportionate to a pressing social need and does it strike a fair balance between the needs of society and the rights of others set against the admitted interference with TT's and YY's Art 8 rights?

255. The starting point in measuring proportionality is to evaluate the importance of the rights that are the subject of interference. I have already summarised in headline terms the different respects in which interference arises in this case and in doing so I have attempted to calibrate the degree of infringement from the perspective of TT and YY. Regard must also be had to the view of the ECtHR which is that 'the right to gender identity and personal development is a fundamental aspect of the right to respect for private life' (*Van K ck*). In approaching the issue of proportionality, a weight of a high order must therefore attach to these rights for both TT and YY, such as to require clear and substantial grounds before it could be said that any interference is justified and proportionate.

256. In assessing proportionality with respect to YY's Art 8 rights, the position is more complicated as there are other aspects of Art 8 which may themselves, in part, pull in the other direction and point towards justification. Firstly, there is the right of a child 'to establish the substance of his or her identity' (*Mennesson*). A core element of that right must normally include the right to know who gave birth to them. As a derivative of that general right, is the need identified by the AIRE Centre for a child to be able to trace their maternal relatives for medical, if for no other, reason.

257. Secondly, the developing case law of the ECtHR also indicates that, not only is a child's right to know their origins acknowledged, but it is also growing in importance when set against the rights of a mother who may be insistent on remaining anonymous (*Jaggi v Switzerland* and, more particularly, *Godelli v Italy*).

258. Thirdly, in the present case the outcome sought by TT means that YY will not have, and will never have had, a 'mother' as a matter of law, he will only have a father.

Although there is no extant ECtHR authority on this point, this outcome, which, at present, would mark YY out from all other children under UK law, must be seen as a detriment and contrary to a child's best interests.

259. Looking at the child's best interests more generally, the evidence produced on 'best interests' supports an outcome other than registration as 'mother', but that evidence is not, with the exception of the opinion of Clare Brooks, couched in strong or compelling terms. That that is the case is not surprising given the balanced way in which, by the close of the hearing, the various relevant factors fell for evaluation. For example, whilst the need for the child's documentation to reflect the lived reality of TT being on a day to day basis in all ways his father points against registration as 'mother', the need for every child to know with certainty who gave birth to them and that they have a 'mother' draws the balancing scales in the opposite direction.

260. Clare Brooks evaluation, whilst valuable and important, is partial in the sense that she has only been able to consider some of the relevant factors. The needs of children and society, on the Government's case, for every child to have recorded the identity of the person who carried and gave birth to them is not considered and the term 'mother' is not analysed as it has been during this hearing, so that Ms Brooks, who gave her opinion well before the hearing, dismisses the term as 'archaic' in relation to a transgender family. The issues in this case are, with respect, far more nuanced and complicated than that.

261. The best interests of the child must be a primary consideration in the overall ECHR evaluation. Rightly, it is not argued that YY is in any special category that would make his circumstances in this regard different from the general cohort of children born to a trans-gender male. The issue must be looked at, therefore, in general, high level and non-case specific terms. Further, as no party now suggests that the registrar has a discretion on a case by case basis, the approach to 'best interests' in this evaluation must be based on matters of principle rather than factual, case-specific, detail.

262. Further, when considering 'best interests' the fact that the court is considering the scheme as a whole affects the extent to which it is possible to determine the best interests of children in general. I respectfully agree with the approach taken on this point by Hickinbottom J in *JK* at paragraph 114:

> "114. In any event, this claim does not concern only AK and PK. Following *Goodwin*, the United Kingdom Government was effectively obliged to construct a scheme whereby the rights of transsexual people were properly respected. Indeed, as I have explained (paragraph 70 above), the Claimant's challenge is to the scheme as a scheme. Simply because, in a particular case, the interests of the particular children would possibly be better served if their birth certificates were amended to show their father as "parent" rather than "father" does not make the scheme unlawful. As a scheme, it must cater for a wide variety of circumstances. It is clear that, in some cases, it will be regarded as in the relevant children's interests to have a birth certificate that reflects their biological parentage. Given the evidence that in most cases of gender change, unlike the case of the Claimant and KK, relationships between the relevant transsexual person and his or per spouse/partner are fatally disrupted, that is likely to apply to many (if not most) cases. A scheme that may assist the interests of some children, may be substantially damaging or harmful to the interests of others."

263. In establishing the scheme of registration, and in holding by GRA 2004, s 12 that the fact that a person's gender has become the acquired gender following the issue of a GR certificate 'does not affect the status of the person as the father or mother of a child', Parliament has made a social and political judgment as to how the competing interests should be accommodated. In doing so, it has afforded priority to the need for clarity as to parental status. There are, as I have recorded, sound child-focussed reasons in favour of striking the balance in that way. The fact that it is possible to identify other factors which might, in particular cases, be to the detriment of a child, does not mean that the outcome promoted by Parliament is not in the best interests of children or that their best interests have not been a primary consideration in striking the policy balance as it has been struck.

264. Further, in the context of 'best interests', each of the alternative options put forward will present some difficulties for a child. For example, registration of a male parent as 'gestational parent' invites the conclusion that the parent is trans-gender and registration as 'father' leaves the child without a 'mother'.

265. The principal justification put forward by the Government is the need for an administratively coherent and certain scheme for the registration of births in which the person who carried and gave birth to a child is consistently and invariably recorded as 'mother'. Although submissions were made by the other parties and the AIRE Centre by reference to other factual circumstances, which were said to generate confusing and inconsistent outcomes, there was in fact a consistency between each of these examples as each was predicated on the assumption that the person who gives birth is to be registered as the mother. It is this single element, namely recording the identity of the person who gives birth, which is at the centre of the coherent and certain scheme promoted by the Government's submissions.

266. The human existence is marked by birth at the first moment of life, and death at the last. The importance of a modern society having a reliable and consistent system of registration of each of these two events is clear. In terms of birth registration, the 'birth' is the event that is subject of record and a 'birth' occurs when a baby is born to the parent who has carried him or her during pregnancy. The aim of the UK birth registration scheme, as the Government argue is the case, in requiring the identity of the person who gave birth to a child to be recorded as such is, therefore, entirely legitimate and of a high order of importance in the context of social policy. It is of note that in almost all the countries within the Council of Europe a trans-man who gives birth will be registered as the 'mother' [Peter Dunne E53-75].

267. The issue at the centre of the case is the Government's insistence that the person who gives birth to a child should be registered as the 'mother'. It is this title, rather than the need to register his role in the birth, to which TT and others in a similar situation take extreme exception because of the gender specific nature of the term as they see it to be.

268. If the registration scheme were to record the identity of the person who carried and gave birth to a child as the 'gestational parent' or some similar gender-neutral phrase, then, as I understand TT's and YY's case, there would be no issue.

269. On the above analysis, the ECHR aspect of this claim turns on the same point as that which lies at the centre of the case in domestic law, namely whether the term 'mother' is exclusively female or whether it is a free-standing term which, in the context of a

birth applies to the person who carries a pregnancy and gives birth to a child, irrespective of their legal gender.

270. In the context of domestic law my conclusion at paragraph 149 on that central point was that the latter is the case. There is no ground to support a different interpretation of the term 'mother' in the context of the evaluation of proportionality under the ECHR.

271. It follows that the requirement that the person who gives birth to a child is registered on the occasion of every birth is fully justified. Such a requirement must be the essential element in a coherent and certain scheme of birth registration if the scheme is to have integrity. The importance to society in general in having a such a scheme is plainly of a high order.

272. Although, for the reasons that I have already given, I accept that from the perspective of TT, and to a lesser degree YY, the degree of interference in their Art 8 rights is substantial, I also accept the Government case (in line with the judgment of Hickinbottom J in *JK*) that the number of occasions when a full birth certificate may be produced and TT's status as YY's mother, and therefore the fact that he is trans-gender, would be disclosed, will be small. The adverse impact upon TT, significant though it will be were it to occur, is very substantially outweighed by the interests of third parties and society at large in the operation of a coherent registration scheme which reliably and consistently records the person who gives birth on every occasion as 'mother'.

273. It follows, that I conclude that, despite the admitted interference with the Art 8 rights of TT and YY, such interference is justified as being in accordance with the law, for a legitimate purpose and otherwise necessary, proportionate and fair.

274. In the context of Art 14, a registration scheme that requires each and every person who gives birth to be registered as the child's mother does not discriminate between or against any one group or another. Examples were given in submissions of other same sex or transgender parents who are registered in specific ways, but none of those examples related to the registration of the person who has given birth. It is that feature, and the need to register that crucial piece of information, that marks registration of the 'mother' out from other categories of parental relationship.

275. The case under Art 14 is, in reality, an assertion that the GRA 2004 should have made an exception from the universal requirement to register as 'mother' for trans-gender males following the grant of a GR certificate and that, by stipulating that a GR certificate does not affect the status of a parent as 'mother', s 12 is discriminating against TT and those in like circumstances. Looked at in that way, the claim is untenable in terms of Art 14.

276. If, contrary to my conclusion on this point, there has been a difference in treatment on the grounds of trans-gender, any such difference would be justified for the reasons that I have already set out with respect to the Art 8 claims.

277. It follows that I do not find that there is a breach of Art 14.

278. In the light of the conclusions to which I have come, the application for a declaration of incompatibility fails.

Conclusion

279. The principal conclusion at the centre of this extensive judgment can be shortly stated. It is that there is a material difference between a person's gender and their status as a parent. Being a 'mother', whilst hitherto always associated with being female, is the status afforded to a person who undergoes the physical and biological process of carrying a pregnancy and giving birth. It is now medically and legally possible for an individual, whose gender is recognised in law as male, to become pregnant and give birth to their child. Whilst that person's gender is 'male', their parental status, which derives from their biological role in giving birth, is that of 'mother'.

280. At paragraph 149, I set out my preliminary conclusions with respect to domestic law, these can now be firmly stated as:

a) 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';

b) The status of being a 'mother' arises from the role that a person has undertaken in the biological process of conception, pregnancy and birth;

c) Being a 'mother' or a '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;

d) GRA 2004, s 12 is both retrospective and prospective. The status of a person as the father or mother of a child is not affected by the acquisition of gender under the Act, even where the relevant birth has taken place after the issue of a GR certificate.

281. At paragraph 273 I have concluded that the impact of the UK legislative scheme on TT and YY, whilst interfering with the right to respect that they each have in relation to private and family life, is justified in ECHR terms with the consequence that there is no breach of Art 8 in relation to either parent or child. I have also concluded that there is no separate breach under Art 14 in either case.

282. It follows that the preliminary conclusion with respect to domestic law now stands as my final determination, with the consequence that in law TT is YY's 'mother' for the purposes of the registration of YY's birth under the BDRA 1953.

283. The Claimant's application for judicial review, for which I formally give leave, has therefore failed and must be dismissed.

284. A Declaration of Parentage under Family Law Act 1986, s 55A will be issued confirming that TT is YY's mother.

285. As YY's mother, TT will automatically have parental responsibility for his son under CA 1989, s 2(2)(a).

***