Case No: CO/13977/2012

Neutral Citation Number: [2015] EWHC 990 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT IN BIRMINGHAM

Birmingham Civil Justice Centre
Priory Courts, 33 Bull Street
Birmingham

Date: 20/04/2015

Before:

MR JUSTICE HICKINBOTTOM

- -

Between:

THE QUEEN
on the application of JK

Claimant

- and -

THE REGISTRAR GENERAL FOR
ENGLAND AND WALES

Defendant

- and -

(1) THE SECRETARY OF STATE FOR
THE HOME DEPARTMENT
(2) KK
(3) AK & PK (by the Official Solicitor as
their Litigation Friend)

Interested Parties

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- -

Dan Squires (instructed by **Public Law Solicitors**) for the **Claimant**
Ben Jaffey (instructed by **the Treasury Solicitor**) for the **Defendant**
and the **First Interested Party**
The Second Interested Party neither appearing nor being represented
David Wolfe QC (instructed by **Maxwell Gillott**) for the **Third Interested Parties**

Hearing date: 11 December 2014
Further written submissions: 29 December 2014 - 2 February 2015

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Judgment

Mr Justice Hickinbottom:

Introduction

1. This claim gives rise to important issues concerning the rights of transgender women, and their families, in particular the right to keep private the fact that they are transgender.

2. The Claimant, JK, is a transgender woman (male to female transsexual); and I shall throughout this judgment refer to her by the female pronoun. She has two naturally conceived children from her marriage to the Second Interested Party, KK, namely the Third Interested Parties, AK and PK. In this claim, she challenges the requirement that she be recorded as "father" in the children's birth certificates, and the refusal of the Defendant ("the Registrar General") to show her, by way of initial inclusion or amendment, as "parent" or "father/parent" on those birth certificates.

3. Before me, Dan Squires has appeared for the Claimant, David Wolfe QC for AK and PK (who, being minors, appear by way of the Official Solicitor as their litigation friend), and Ben Jaffey for the Registrar General and the Secretary of State. I thank them at the outset for their particularly helpful contributions.

The Factual Background

4. The Claimant was born male, her birth certificate recording her name as CK (a male forename) and her sex as male. On 1 August 2007, she married KK. In early 2012, KK gave birth to a naturally conceived daughter, AK. The Claimant was the biological father; and, on AK's birth certificate, she was identified as the father, in the name CK.

5. However, by this time, the Claimant felt the desire to live as a woman; and, in April 2012, she was referred by her doctor to Nottingham Gender Clinic, where her first appointment was booked for 19 June 2012. In the meantime, on 10 June 2012, by deed poll, she changed her name to JK (a female forename), absolutely and entirely renouncing her former name of CK and the use of her former title "Mr" in favour of "Mrs". From that date, she has lived as a woman.

6. At the clinic, she was assessed and diagnosed with gender identity disorder and concomitant gender dysphoria. In October 2012, she started a course of feminising hormone treatment, which is on-going. The treatment pathway requires two years living as a female before consideration is given for referral for gender reassignment surgery. She is now on a waiting list for that surgery.

7. However, before the Claimant started feminising hormone therapy, KK fell pregnant a second time, again conceiving naturally by the Claimant.

8. On 15 September 2012, the Claimant wrote to the relevant local registrar for births asking whether, either immediately or at a time when the Claimant had been granted a Gender Recognition Certificate ("GRC"):

i) AK's birth could be re-registered, with the new registration showing the Claimant's new name of JK, and with her identified as "parent" rather than as "father"; and

ii) the registration of the second child, when born, could show that name and description.

9. Correspondence ensued between the relevant Superintendent Registrar and the Claimant, in which, by 24 November 2012, the Registrar had made clear that the law, as it stood, required the Claimant to be registered in both cases as the child's father; and in any event, in respect of AK, there was no power to re-register or amend the register as JK wished.

10. This claim was issued, protectively, on 27 December 2012; but, by an order on 2 January 2013, it was stayed pending the birth and registration of the Claimant's second child. The same order granted the Claimant and her children anonymity.

11. The Claimant's second child, PK, was born in Spring 2013. On 18 June 2013, the Claimant and her wife attended the Register Office, where they met the Superintendent Registrar. The Claimant said that she was the biological father of the baby, but that she wished to be registered as his "parent" or, if that were not possible, as "father/parent"; but the Registrar confirmed that that was not legally possible, informing the Claimant and her wife, in appropriate lay terms, of the relevant legal provisions. The Claimant rejected the Registrar's suggestion that her former name of CK was entered on the certificate as a previous name – which would have linked the birth certificate with that of AK – because she did not think using that name was appropriate in view of her transition and the declarations in her deed poll. The Registrar therefore completed the form showing KK as "mother" and the Claimant, in her name JK, as "father".

12. The Claimant's evidence as to what the Registrar said about birth certificates was as follows (paragraph 14 of her first statement dated 28 June 2013):

> "The Registrar then completed the details and printed a copy of the birth certificate for us to check and [KK] signed it. The Registrar then explained that we would be given a free copy of the short birth certificate but she said that it was only useful for child benefit and banks, and that most places would only take a full birth certificate. She said we would need a full birth certificate for 'passports, driving licences, and most other things really' so that they recommend that we should buy at least one full birth certificate. We agreed and bought two copies. She printed the birth certificates and showed us the short one which she said was 'pretty useless, increasingly useless really'".

13. On 2 July 2013, the Claimant served amended grounds in this claim, reflecting the birth and registration of PK; and seeking to add AK and PK as additional Claimants. On 5 August 2013, I directed that the Claim Form and Summary Grounds of Resistance be served on the Official Solicitor, with a request that he act for AK and PK as their interests, it seemed to me, were not necessarily the same as those of the

Claimant. The Official Solicitor kindly agreed to act; and, on 20 December 2013, Stewart J joined AK and PK as Interested Parties, and gave the Claimant permission to proceed. On 19 May 2014, Andrews J gave the parties permission to instruct as a joint expert Professor Richard Green (a psychiatrist specialising in transgender and sexual identity), particularly upon how the issues in this claim might affect the interests of AK and PK.

14. The Registrar General's Summary Grounds raised another issue, namely whether the claim was premature prior to the Claimant obtaining a GRC. Following correspondence, it was agreed between the parties that the claim be stayed until the Claimant obtained an Interim GRC (see paragraph 59 below); and, once that were obtained, the Claimant be treated as if she had obtained a Full GRC. The hearing date was consequently fixed for 11 December 2014. In the event, the Interim GRC was issued on 29 September 2014.

15. I will deal with the details of the grounds of challenge in due course; but, briefly, the Claimant contends that the requirement to show her as "father" on the birth certificate of each of her children is a breach of the right of her and her children to respect for private life under article 8 of the European Convention on Human Rights ("the ECHR"), and discrimination on the basis of her transgender characteristic under article 14 read with article 8. The Claimant also sought to amend AK's birth certificate to name her (the Claimant) as JK rather than her previous (male) name of CK. In paragraph 21 of her first statement, the Claimant supported her claim with the following evidence:

> "I am… of course very concerned by the embarrassment and distress that will be caused by the disclosure of my transgender status through the production of the birth certificate. I have explained that I intend to apply for a [GRC] and once I obtain one I will be recognised as legally female for all legal purposes. In those circumstances to have my previous gender revealed will be a very serious invasion of my privacy and will cause me great embarrassment and distress…".

Similarly, in her application for anonymity in this claim, it was said that "disclosure of these matters would cause harm and distress to the Claimant and her family, and would defeat the purpose of this litigation which is to keep these matters private".

16. The Official Solicitor on behalf of AK and PK supported the claim, on the basis that it would be in the children's best interests if their birth certificates did not reveal that the Claimant was transgender.

17. I heard the substantive application on 11 December 2014, and reserved judgment. However, shortly after the hearing, it came to the attention of the Treasury Solicitor acting on behalf of the Registrar General that the Claimant had, according to a letter sent by the Treasury Solicitor to the Claimant's solicitors dated 19 December 2014, "freely and publicly" disclosed all of the information that she seeks to protect in this claim in the form of her public Twitter and Facebook accounts, and the fact that she had been listed by a national newspaper as a transgender activist. Each of these broadcast the fact that the Claimant is transsexual and has children, her Twitter page saying (for example) that she is: "… Mum of two. Trans…". The newspaper listing

also said that she leads a voluntary organisation dealing with issues affecting those who are transgender.

18. The Treasury Solicitor notified both the court and the Claimant's solicitors of this new evidence. In her response, the Claimant declined to give oral evidence. However, in written evidence and submissions, she says:

    i) The Twitter and Facebook accounts were intended to be private, and restricted to transgender individuals to whom she wished to offer support through her organisation. She was unaware that her Facebook page was public; and she said that she had now made private that page and her Twitter account (which she had intended to lock down in 2015 in any event). She was not instrumental in the newspaper listing.

    ii) She accepts that, at this stage of her transition, she is recognisable as a man in transition towards being a woman. However, once her treatment is complete, the fact that she was once a man will not be readily discernible. At that stage, she intended to withdraw from any form of activity that disclosed she was transsexual. In seeking to have her children's birth certificates changed, it is the privacy of her and her children at that stage that she wishes to protect.

19. To enable her to maintain her marriage with KK as a same sex marriage, the Claimant made an application for a Full GRC on 10 December 2014, the day on which the relevant amendments to the GRA 2004 came into effect. As I understand it, that application is still with the Gender Recognition Panel.

Legal Framework

The European Convention on Human Rights

20. The Claimant's primary claim is that the Registrar General's requirement that she be included on her children's birth certificates as "father" rather than "parent" or "father/parent" is in breach of article 8 of the ECHR, i.e. a breach of her right – and that of her children – to respect for private life. By virtue of section 6 of the Human Rights Act 1998, it is unlawful for a public authority in the United Kingdom to act in a way that is incompatible with a Convention right.

21. The rights and freedoms bestowed by the ECHR were first spelled out in the Universal Declaration of Rights, declared by the United Nations General Assembly on 10 December 1948, in the aftermath of the Second World War, which set out a series of norms of State behaviour. Respect for human dignity is a value inherent in the Declaration, the very first recital of which recognises "the inherent dignity… of all members of the human family…". Article 1 declares that: "All human beings are born… equal in dignity…".

22. That is reflected in the Convention. It is well-recognised that respect for human dignity and freedom is "the very essence of the Convention" (Pretty v United Kingdom (2002) 35 EHRR 1 at [65]), the Convention translating that value into various specific rights of individuals, such as article 2 (which guarantees the right to life), article 3 (which prohibits torture, and inhuman and degrading treatment), and article 4 (which prohibits slavery). Those rights are particularly precious: they

enshrine the most fundamental values of a democratic society and, as such, they are absolute rights and effectively non-derogable. However, the value of human dignity also finds important expression in relative rights, i.e. rights which can be the proper subject of interference by the State on lawful and necessary grounds.

23. Article 8 is one such right. It provides:

> "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."

A breach of article 8 is thus proved where an individual can show an interference with his or her right to respect for private and family life, unless the State can show that such interference was in accordance with the law and necessary in a democratic society with reference to one of the considerations set out in article 8(2).

24. In respect of article 8, the following are also noteworthy:

i) The Convention guarantees "respect for private… life". It does not guarantee absolute privacy although, along with human dignity, privacy is of course an important aspect of the right.

ii) The Convention is a living instrument, which must be interpreted in the light of current conditions, because the norms for State behaviour will change over time (see, e.g., Tyrer v UK (1978) 2 EHRR 1 at [31]). Human rights standards are the subject of evolution and betterment. In Selmouni v France (1999) 29 EHRR 403 (at [101]), the Strasbourg court referred to "the increasingly high standard being required in the area of the protection of human rights and fundamental liberties….".

iii) The fact that the Convention sets international norms does not of course prevent a State from providing more generous rights to those living within its jurisdiction, as a matter of its own domestic law.

iv) However, it is vital that such national standards should not be confused or elided with Convention standards; because purporting to interpret Convention rights more generously than the European Court of Human Rights ("the ECtHR") would undermine the whole international nature of the Convention. As Lord Bingham put it in R (Ullah) v Special Adjudicator [2004] UKHL 26 (at [20]):

> "...it is of course open to Member States to provide for rights more generous than those guaranteed by the Convention, but such provision should not be the product

> of interpretation of the Convention by national courts, since the meaning of the Convention should be uniform throughout the States party to it. The duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less."

The danger of doing otherwise was stressed by Lord Brown in R (Al-Skeini) v Secretary of State for Defence [2007] UKHL 26. In holding that the House of Lords should not construe article 2 of the Convention (the right to life) "any further than the Strasbourg jurisprudence clearly shows it to reach", of the passage of Lord Bingham in Ullah which I have quoted, he said (at [106]):

> "I would respectfully suggest that last sentence could as well have ended: 'no less, but certainly no more'. There seems to me, indeed, a greater danger in the national court construing the Convention too generously in favour of an applicant than in construing it too narrowly. In the former event the mistake will necessarily stand: the Member State cannot itself go to Strasbourg to have it corrected...".

v) However, in Rabone v Pennine Care NHS Trust [2012] UKSC 2 at [112], Lord Brown (with whom Lord Walker agreed) nevertheless suggested that, where the domestic court is content to decide a Convention challenge against a public authority because it believes such a conclusion to flow naturally from existing Strasbourg case law (albeit that it could be regarded as carrying the case law a step further), then the domestic court need not await a specific Strasbourg decision in point: it can and should take that step. In other words, domestic courts should apply well-settled principles of the ECtHR to new factual circumstances, as and when they arise.

vi) Article 8 imposes an obligation on the State not to interfere directly with the right to respect for family and private life. However, it is also capable of imposing a positive duty on the State to introduce and operate a legislative or administrative scheme to protect that right. Where a State has such an obligation, however, it has a margin of appreciation as the scope and terms of the scheme. That margin may be restricted where an important facet of an individual's existence or identity is at stake, but:

> "Where, however, there is no consensus within the Member States of the Council of Europe, either as to the relative importance of the interest at stake or as to the best means of protecting it, particularly where the case raises sensitive moral or ethical issues, the margin will be wider… There will also usually be a wide margin if the State is required to strike a balance between competing private and public interests or Convention rights." (Hämäläinen v Finland (16 July 2014) (Application No 37359/09) ("Hämäläinen") at [67], a case to which I shall return).

25. Mr Squires submitted that article 8 is clearly engaged in this case. However, as a fall-back position, he submitted that this case without doubt fell within the ambit of article 8 for the purposes of article 14 of the ECHR. Article 14 does not provide for a free-standing right, but does provide that the other rights and freedoms recognised in the Convention must be secured without discrimination, in the following terms:

> "The enjoyment of the rights and freedoms recognised in the [ECHR] 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."

He submitted that being transsexual is an "other status" for these purposes, as appears from cases such as Goodwin v United Kingdom (2002) 35 EHRR 18 ("Goodwin") (see paragraphs 51-52 below) but made expressly clear from PV v Spain (11 April 2011) (Application No 35159/09) in which the ECtHR said explicitly (at [30]):

> "… [The Court] considers that transsexuality is a concept that is undoubtedly covered by article 14 of the Convention."

Therefore, even if I am unpersuaded that article 8 is engaged, Mr Squires submitted that the Registrar General must nevertheless justify the discrimination against the Claimant on the grounds of her transsexuality inherent in requiring her to be listed as "father" on her children's birth certificates.

Registration of Births

26. The Registrar General for England and Wales is an office created by the Births and Deaths Registration Act 1856. It is now a corporate sole statutory office, to which appointment is made by the Crown under the Registration Services Act 1953 as amended. With her own office (the General Register Office) and local authorities which employ superintendent registrars (who serve districts) and registrars (who serve sub-districts) to deliver the service to the public locally, the Registrar General is responsible for administering the statutory provisions relating to the registration of births, deaths, marriages and civil partnerships in England and Wales, including those within the Births and Deaths Registration Act 1953 ("the 1953 Act").

27. Section 1(1) of the 1953 Act provides that:

> "… [T]he birth of every child born in England or Wales shall be registered by the registrar of births and deaths for the sub-district in which the child was born by entering in a register kept for that sub-district such particulars concerning the birth as may be prescribed…".

28. Otherwise, the following provisions of the 1953 Act are relevant to this claim:

    i) The relevant registrar is required to register particulars of a birth received from a qualified informant within 12 months of the birth, free of charge (section 5).

ii) The only people qualified to register a birth are listed in section 1(2), to include the father and mother of the child, the occupier of the house in which the child was born, a person present at the birth and any person having charge of the child. Generally, there is an obligation upon the father and mother of the child to give the registrar the relevant information to allow registration, within 42 days of the birth (section 2).

iii) No alterations to the register are permitted, except as allowed under the 1953 Act which are in practice restricted to (a) the correction of clerical errors and (b) corrections of fact or substance by way of margin entry, without any alteration to the original entry (section 29). In addition, section 10A permits re-registration of a birth where the child's parents are neither married nor in a civil partnership and there is no other person recorded as "father" or "parent" on the birth certificate, to show a person as "father" on production of specified evidence of fatherhood. Section 14 permits re-registration upon a child becoming legitimated by the marriage or civil partnership of their parents, and section 14A permits re-registration after a declaration of parentage.

iv) As I have indicated, section 1(1) provides that the particulars to be registered are to be prescribed by regulations; but section 33 of the 1953 Act provides for a "short certificate of birth" which must contain particulars also to be prescribed provided that that prescription "shall not include any particulars relating to parentage or adoption" contained in the register (section 33). Thus, short certificates do not include any particulars of parentage.

29. The relevant particulars of birth to be registered are prescribed by the Registration of Births and Death Regulations 1987 (SI 1987 No 2088) ("the 1987 Regulations"), made under section 39 of the 1953 Act. Regulation 7 provides that:

> "(1) The particulars concerning a live-birth required to be registered pursuant to section 1(1) of the [1953] Act shall… be those required in spaces 1 to 13 of form 1 and that form shall be the prescribed form for registration of live-births for the purpose of section 5 of the Act…
>
> (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. The prescribed forms are found in schedule 2 to the Regulations. Originally, that had sections for details of "child", "father", "mother" and "informant"; although, following the Human Fertilisation and Embryology Act 2008 ("the HFEA 2008"), the section heading "father" was replaced with "father/parent" (see paragraph 50(v) below). The "child" is, of course, the person whose birth is being registered. The "informant" is the qualified person who has the power or obligation to provide the particulars under section 1(2) and 2. I shall return to "mother", "father" and "parent" (see paragraphs 49-50 below).

31. At the time of the enactment of the 1953 Act, there was a general presumption that social motherhood and fatherhood (i.e. those who in practice acted as mother and father to a child) would reflect biological motherhood and fatherhood. However,

since then, social relationships have become more complex. The law recognises this; and particular legislative provisions have been made with regard to the legal status and registration of a child and concerned adults in a number of situations, including (i) where a child is born as a result of assisted reproduction (see paragraphs 32-41 below), (ii) surrogacy (paragraphs 42-44) and (iii) adoption (paragraphs 45-46).

Assisted Reproduction

32. The HFEA 2008 makes provision for children born by assisted reproduction, i.e. following the placing inside a woman of an embryo, sperm and eggs or following artificial insemination. Part 2 deals with "Parenthood in cases involving Assisted Reproduction".

33. The position with regard to the mother is straightforward, "mother" being effectively defined in section 33. Section 33(1) provides that where a woman carries a child, irrespective of whether she became pregnant as a result of the placing in her of an embryo or sperm and eggs donated by another woman, she ("and no other woman") is to be treated as the "mother" of the child.

34. The position with regard to any other parent is more complicated. Sections 35-47 deal with "Meaning of 'father'", making provision in relation to the "father" of a child who was born to a woman ("W") as a result of "placing in her of an embryo or of sperm and eggs or her artificial insemination" (section 34(1)).

35. Section 35(1) applies where W is married. It states:

> "If –
>
> > (a) at the time of the placing in her of the embryo or of the sperm and eggs or of her artificial insemination, W was a party to a marriage, and
> >
> > (b) the creation of the embryo carried by her was not brought about with the sperm of the other party to the marriage,
>
> then... the other party to the marriage is to be treated as the father of the child unless it is shown that he did not consent to the placing in her of the embryo or the sperm and eggs or to her artificial insemination (as the case may be)."

In other words, generally, the "father" will be the husband of the "mother".

36. Where W is not married, section 36 makes provision for a man who did not provide the sperm to be treated as the "father" of the child, where "agreed fatherhood conditions" set out in section 37 are met, in essence that the man and mother formally consented to the man being the "father". Where a person is to be treated as the father under section 35 or section 36, "no other person is to be treated as the father of the child" (section 38(1)).

37. Sections 42-47 make provision for a woman to be the "parent" of a child who is born as a result of the placing in W of an embryo or of sperm and eggs or her artificial insemination.

38. Section 42(1) applies where W is in a civil partnership (or, since the Marriage (Same Sex Couples) Act 2013, a marriage with another woman) at the material time:

> "If at the time of the placing in her of the embryo or the sperm and eggs or of her artificial insemination, W was a party to a civil partnership or a marriage with another woman, then… the other party to the civil partnership or marriage is to be treated as a parent of the child unless it is shown that she did not consent to the placing in W of the embryo or the sperm and eggs or to her artificial insemination (as the case may be)."

39. Sections 43-44 apply where W is not in a civil partnership or marriage with another woman, and makes provision parallel with sections 36-37, so that another woman may be "parent" of the child if "agreed female parenthood conditions" are met (again, in essence, there is mutual consent).

40. The birth certificate of a child born through assisted reproduction will record the person determined by the HFEA 2008 to be the child's "father" or "parent". That person, most likely, will have no biological connection with the child.

41. In respect of a child born by way of assisted reproduction, it is then left to the parent to inform the child, at the appropriate time, about the child's biological background. However, separate statutory provisions enable such children to request information about their biological parentage. Section 31ZA of the Human Fertilisation and Embryology Act 1990 ("the HFEA 1990") as amended by the HFEA 2008, and the Human Fertilisation and Embryology Authority (Disclosure of Donor Information) Regulations 2004 (SI 2004 No 1511) made under that Act, provide that, where a child is born by assisted reproduction, the child can request information identifying their biological parents when they attain the age of 18.

Surrogacy

42. Part 2 of the HFEA 2008 also makes provision in relation to children born by way of surrogacy arrangements.

43. By sections 54-55 (and regulation 2 of and Schedule 1 of the Human Fertilisation and Embryology (Parental Orders) Regulations 2010 (SI 2010 No 985) ("the HFER 2010") made under section 55, read with section 46 of the Adoption and Children Act 2002 ("the ACA 2002")), where a child is born through a surrogacy arrangement using the gamete of at least one "commissioning parent", the commissioning parents may, if the woman who carried the child consents, apply for a "Parental Order" under which the commissioning parents become the "parents" of the child, and any parental responsibility of other individuals is extinguished.

44. Eric Powell is the Head of Civil Registration Policy at the General Register Officer. As he explains in paragraphs 24-26 of his statement dated 12 September 2014, in accordance with the HFER 2010 read with Schedule 1 to the ACA 2002, once a

Parental Order is made, details of the commissioning parents are recorded in the Parental Order Register. The Registrar General must ensure that the there is a link between the Parental Order Register and the child's original birth certificate (which shows the child's birth mother); but that the link is not open to the public for general inspection or search. A certificate from the Parental Order Register will then be issued for the child. It is identical to a long-form birth certificate save that both commissioning parents are recorded under the heading "parent". The certificate states that it is a true copy of the Parental Order Register, so it is clear from the face of the document that the child was the subject of surrogacy arrangements – although (i) it does not of course identify the child's biological mother or father, nor is there any publicly available link to the original birth certificate which does; and (ii) the short form certificate is in the same form as any other short form birth certificate (see paragraph 26 of Mr Powell's statement), so that, from a short form certificate, it is not apparent that a child was the subject of surrogacy arrangements. Upon reaching the age of 18, like a child born by assisted reproduction, a child subject to the Parental Order is entitled to obtain information about his or her biological parentage.

Adoption

45. Similar provisions – set out in the ACA 2002 – apply to adoption.

46. The Registrar General is required to maintain an Adopted Children Register (section 77) from which there is a traceable (but not publicly open) link to an adopted child's original birth certificate which is openly marked with a side-note, "Adopted" (section 79). Certificates for the child are produced from the Adopted Children Register, again in the same form as a long-form birth certificate, and recording those adopting as "parent(s)". As with surrogacy, the certificate is open, in the sense that it states that it is a true copy of the Adopted Child Register; so that it is clear, from the face of the document, that the child was the subject of adoption – although, as with a child the subject of surrogacy arrangements, (i) the long certificate does not identify the child's biological mother or father, nor is there any publicly available link to the original birth certificate which does; and (ii) the short form certificate is in the same form as any other short form birth certificate (see paragraph 28 of Mr Powell's statement), so that, from a short form certificate, it is not apparent that a child was the subject of adoption. As with surrogacy, provision is made for adopted children, once they reach the age of 18, to obtain information about their biological parentage (section 60 of the ACA 2002).

The Relevance of the Assisted Reproduction/Surrogacy/Adoption Schemes

47. Mr Squires for the Claimant submits that the schemes adopted in circumstances of assisted reproduction, surrogacy arrangements and adoption are relevant because, in short, where a child has a transgender parent similar considerations (including article 8 rights of privacy) apply and a similar scheme could and should be in place, there being no justification for the Government's failure to do so.

48. He put the point thus (paragraphs 67-68 of his skeleton argument):

> "67. The law thus recognises that where the social/legal relationship between parents and children is not a straightforward reflection of biology, the children's birth or

other similar identification certificates should accord with the way in which the family presents itself to the world i.e. recording social/legal parenthood not biological. No doubt that is because there would be an interference with the rights of privacy of children and their parents if birth and other certificates revealed details of biological parenthood in such circumstances. The certificates thus do not, for example, reveal that the sperm by which a child was conceived was not that of the man who is in legal and social terms the child's "father". Those are matters that are regarded as private, and mechanisms are thus created to ensure that they are not revealed on birth certificates. That is not only because it is regarded as inappropriate for such information to be revealed to third parties, but because children themselves, if they happen to see their own birth certificate or discover their contents, should not be confronted by the fact that the person they consider their father was not their biological father before they are ready to understand what that means. It is left to parents to provide that information at an appropriate time and in an appropriate manner. There are, in addition, mechanisms that have been created by which a child who has reached 18 can, in a private process and if they so wish, obtain information about their biological parentage…. [C]hildren conceived by artificial reproduction are able to request details of the identity of biological parents when they reach the age of 18, and the same is true of children who are adopted or born by surrogacy arrangements.

68. There is no reason why a similar process cannot apply to those in the position of the Claimant and her children. If the Claimant was recorded as "parent" on the children's birth certificate that will properly reflect their social and legal relationship. It will also prevent anyone seeing the certificates being able to tell that the Claimant has an acquired gender. The same would apply if the Claimant was recorded as "father/parent". If there is then a concern about her children not being told of their biological parentage, there is no reason why they should not be treated like those born by artificial reproduction or pursuant to surrogacy arrangements or those who are adopted. In the first place it would be left to the parents to decide when and how to inform their children of details of their biological parentage, and not for it to be revealed at the wrong time and in an inappropriate manner because the family has had to provide a birth certificate at a nursery, bank or at passport control. There is, furthermore, no reason why, for the relatively small number of individuals in the position of the Claimant and her children, there cannot be put in place mechanisms by which children, when they reach the age of 18, can find out the identity of their biological father."

"Mother", "father" and "parent"

49. Before I turn to the relevant law relating to gender recognition, as the Claimant seeks to be referred to as "parent" or "father/parent" on her children's birth certificates, it would be helpful briefly to return to definitions, and to summarise the current position in the context of birth registration.

50. "Mother" and "father" are not generally defined in the 1953 Act or 1987 Regulations, although it is rightly common ground before me that the terms as used in this statutory context generally mean the natural or biological mother and father respectively. I consider that is clear from a fair reading of the relevant provisions in their true context, and in particular:

i) By section 41 of the 1953 Act (inserted by paragraph 13(6) of schedule 3 to the Children Act 1975):

> "'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."

In other words, where the child is adopted, the biological mother and father remain the child's "mother" and "father"; and any adoptive parent is not the child's "mother" or "father". That is, of course, in line with the ACA 2002 (see paragraph 46 above).

ii) So far as "mother" is concerned, absent any statutory definition, the position at common law applies, i.e. the woman who carries and gives birth to a child (the biological mother) is the mother of that child. As Lord Simon said in The Ampthill Peerage Case [1977] AC 547 at page 577:

> "Motherhood, although also a legal relationship, is based on a fact, being proved demonstrably by parturition".

As I have already described, this definition is carried into the HFEA 2008, which provides that "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" (section 33(1): see paragraph 33 above)). It is also consistent with the position under a Parental Order obtained by applicant "commissioning parents" under surrogacy arrangements, where the child is treated as a matter of law as the child of the applicants; but any female commissioning parent does not become "mother", applicants being registered as "parents" (see paragraph 44 above).

iii) Similarly, although the position where there has been fertility treatment is more complicated (see paragraphs 34-36 above), the father of a child is generally a reference to the biological father. It is clear from (e.g.) section 10 of the 1953 Act ("Registration of father where parents not married…") that

"father" is used in the Act to mean "biological father", the sperm of whom created the relevant embryo.

iv) "Parent" did not feature as a concept in the original 1953 Act and 1987 Regulations. However, following enactment of the HFEA 2008, regulation 2 of the 1987 Regulations was amended to include the following definition:

> "'other parent' means a woman who is a parent by virtue of section 42 or 43 of the [HFEA 2008]".

Mr Powell explains (paragraphs 19-20 of his statement):

> "19. In the context of birth registrations, the term 'parent' is only used to describe a second female parent by virtue of section 42 or 43 of the [HFEA 2008]. A woman is regarded as a 'parent' of a child where:
>
> (a) she was the spouse or civil partner of a woman receiving fertility treatment which resulted in the birth of a child, unless it is shown that she did not consent to the treatment (section 42 HFEA 2008, see also section 49 and 50 for definitions of marriage and civil partnership for these purposes);
>
> (b) she had a parenthood agreement with a woman receiving fertility treatment under the HFEA, and no husband is to be regarded as the father and no spouse of civil partner is to be regarded as the second female partner (sections 43-45 HFEA 2008, see also section 46 which provides for a parent to be treated as such after her death).
>
> 20. Section 47 of the [HFEA 2008] provides that a woman is not to be treated as a parent of the child whom she is not carrying and has not carried, unless she falls within section 42 or 43 (or 46(4) which relates to a second female parent who dies before the child's birth), or she adopts the child. Section 48 says that where by virtue of section 47 (amongst other provisions), 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."

"Parent", when used on any long-form certificate taken from the Adopted Children Register, may also refer to a man who is an adoptive father (see paragraph 46 above); but, as it openly declares on its face, such a certificate is not drawn from particulars on the Births Register.

v) Schedule 2 to the 1987 Regulations was duly amended, the heading "father" being replaced with "father/parent". However, for birth registration/certificate purposes, as I have described, "father" and "parent" are mutually exclusive

terms – "parent" being restricted to a second female who is to be treated as a parent of the child by virtue of the HFEA 2008. As a result, it is the practice for the relevant registrar to delete either the word "father" or the word "parent" from the heading of the box when the birth certificate is produced, the term left being dependent upon whether the individual named is the child's "father" or "parent" in terms of the scheme.

Gender Recognition

51. The starting point for consideration of the relevant gender recognition legislation is Goodwin. Under domestic law, it had been established that biological criteria – based on chromosomal, gonadal and genital tests – determined gender at birth (Corbett v Corbett [1971] PR 83; R v Tan [1983] QB 1053). The applicant in Goodwin was a post-operative male to female transsexual, who claimed that her rights under (amongst others) articles 8 and 14 of the ECHR were violated because, although under domestic law she was able to change her name to a female forename, she was unable to change a number of official government records which listed her as male. Thus, for example, she was treated as a male for the purposes of social security, national insurance, pensions and retirement age. Further, she alleged that this information could be available to other persons, such as her employers, enabling her to be identified as transsexual. She contended that the failure to amend her official records was a failure of the State properly to recognise her chosen gender as part of her essential identity, and thus constituted a violation of her article 8 and 14 rights.

52. In finding a breach of the applicant's article 8 rights, under the heading "Striking a balance in the present case", the Grand Chamber of the ECtHR said (at [90]-[93]):

> "90. … [T]he 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 a human beings. 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 is not quite one gender or the other is no longer sustainable. …
>
> 91. The Court does not underestimate the difficulties posed or the important repercussions which any major change in the system will inevitably have, not only in the field of birth registration, but also in the areas of access to records, family law, affiliation, inheritance, criminal justice, employment, social security and insurance. However, as is made clear by the report of the Interdepartmental Working Group, these problems are far from insuperable, to the extent that the Working Group

> felt able to propose as one of the options full legal recognition of the new gender, subject to certain criteria and procedures…. No concrete or substantial hardship or detriment to the public interest has indeed been demonstrated as likely to flow from the change to the status of transsexuals and, as regards other possible consequences, the Court considers that society may reasonably be expected to tolerate a certain inconvenience to enable individuals to live in dignity and worth in accordance with the sexual identity chosen by them at great personal cost.
>
> …
>
> 93. Having regard to the above considerations, the Court finds that the respondent Government can no longer claim that the matter falls within their margin of appreciation, save as regards the appropriate means of achieving recognition of the right protected under the Convention. Since there are no significant factors of public interest to weight against the interest of the individual applicant in obtaining legal recognition of her gender reassignment, it reaches the conclusion that the fair balance that is inherent in the Convention now tilts decisively in favour of the applicant. There has, accordingly, been a failure to respect her right to private life in breach of article 8 of the Convention."

The Court found that, on the facts of the case, no separate issue arose under article 14 (see [108]).

53. Judgment in Goodwin was delivered by the ECtHR on 11 July 2002. On 13 December 2002, the United Kingdom Government announced an intention to bring forward legislation to provide transsexual people with legal recognition of their acquired gender. A draft Bill was published on 11 July 2003, which in due course became the Gender Recognition Act 2004 ("the GRA 2004").

54. Section 1 of the GRA 2004 provides:

> "(1) A person of either gender who is aged at least 18 may make an application for a [GRC] on the basis of
>
> (a) living in the other gender...
>
> (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…
>
> (3) An application under subsection (1) is to be determined by a Gender Recognition Panel."

Gender Recognition Panels are established by section 1(4) of and Schedule 1 to the GRA 2004.

55. By section 2(1), in an application under section 1(1):

> "… the Panel must grant the application if satisfied that an 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.

Section 3 requires evidence from various healthcare professionals to be provided. It is to be noted that, subject to satisfaction of the conditions, section 2 is in mandatory terms; in other words, the applicant is entitled to a GRC if he or she satisfies the statutory conditions.

56. Section 9 and following are headed, "Consequences of issue of [GRC] etc". so far as relevant to this claim, they provide:

> "9 **General**
>
> (1) Where a full [GRC] 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) Sub-section (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) ….
>
> 10 **Registration**
>
> (1) Where there is a UK Birth Register entry in relation to a person to whom a full [GRC] is issued, the Secretary of State must send a copy of the certificate to the appropriate Registrar General.
>
> …

12 **Parenthood**

The fact that a person's gender has become the acquired gender under this Act does not affect the status of the person as the father or mother of a child.

…

15 **Succession etc**

The fact that a person's gender has become the acquired gender under this Act does not affect the disposal or devolution of property under a Will or other instrument made before the appointed day.

16 **Peerages etc**

The fact that a person's gender has become the acquired gender under this Act –

(a) does not affect the descent of any peerage or dignity or title of honour, and

(b) does not affect the devolution of any property limited (expressly or not) by a Will or other instrument to devolve (as nearly as the law permits) along with any peerage or dignity or title of honour unless an intention that it should do so is expressed in the Will or other instrument."

57. Having received a GRC pursuant to section 10, the Registrar General must make an entry in the Gender Recognition Register containing prescribed information (Schedule 3 of the GRA 2004). That information is essentially the same as the information on a birth certificate (see Gender Recognition Register Regulations 2005 (SI 2005 No 912)). The entry is then used to create a new birth certificate which is indistinguishable from the individual's original birth certificate save that it records the name and gender as being that which the individual has acquired following the Gender Recognition process and not that recorded at the time of their birth. Neither the full certificate, nor any short certificate, may disclose the fact that the entry is contained in the Gender Recognition Register (paragraphs 5(4) and 6 of Schedule 3 to the GRA 2004).

58. Section 22 of the GRA 2004 provides:

"(1) It is an offence for a person who has acquired protected information in an official capacity to disclose the information to any other person.

(2) 'Protected information' means information which relates to a person who has made an application under section 1(1) and which—

(a) concerns that application or any application by the person under section 5(2), 5A(2) or 6(1), or

(b) if the application under section 1(1) is granted, otherwise concerns the person's gender before it becomes the acquired gender

(3) A person acquires protected information in an official capacity if the person acquires it—

(a) in connection with the person's functions as a member of the civil service, a constable or the holder of any other public office or in connection with the functions of a local or public authority or of a voluntary organisation,

(b) as an employer, or prospective employer, of the person to whom the information relates or as a person employed by such an employer or prospective employer, or

(c) in the course of, or otherwise in connection with, the conduct of business or the supply of professional services."

The width of the category "person… in an official capacity", for the purposes of the prohibition of disclosure of information concerning a gender change in section 22(3), is to be noted: it includes, not just public servants, but those who receive the information (e.g.) in the course of employing the individual, or providing him or her with business or professional services.

59. Prior to the recognition of same-sex marriage, those who wished to obtain a Full GRC were required to terminate their marriage. Those who were not married were granted a Full GRC (section 4 of the GRA 2004). If the individual was married, he or she was granted an Interim GRC which would only be converted into a Full GRC if the marriage was dissolved or annulled (section 5). The Marriage (Same-Sex Couple) Act 2013 now permits same-sex couples to marry. From 10 December 2014, it also amended the GRA 2004 to permit couples to remain married notwithstanding that a Full GRC had been granted to one of them. Now, a Full GRC will be granted to a person who is married provided that the spouse consents (section 4A of the GRA 2004, inserted by section 4 of the Marriage (Same Sex Couples) Act 2013). It was under that provision that, on 10 December 2014 and with KK's consent, JK made an application for the Full GRC (see paragraph 19 above).

GRA 2004: Discussion

60. In respect of the GRA 2004, the following are worthy of note.

61. Given its wide margin of appreciation in respect of ensuring that the right to privacy is properly respected in a sensitive moral and ethical area (see paragraph 23 above),

the United Kingdom Government could no doubt have responded to Goodwin in a variety of ways.

62. In considering its response, the United Kingdom Government had to take into account the fact that the realignment of gender, whilst being of obvious importance to the relevant individual and his or her identity, is also capable of severely affecting the rights and interests of others, including any spouse/partner and children. Not all treat the gender transition of a spouse, partner or parent with the equanimity of KK in this case. Any scheme to give effect to the rights of a transsexual person to have his or her new gender recognised had to balance those rights with the rights and interests of other individuals affected, as well as the public interest in having coherent and fair administrative practices which are regarded by Strasbourg as "an important factor in the assessment carried out under article 8" (Hämäläinen at [66]).

63. In the event, the United Kingdom Government gave a transsexual person the right to have his or her new gender recognised, subject only to satisfying the criteria in section 2(1) of the GRA 2004, i.e. that the applicant (i) has, or has had, gender dysphoria, (ii) has lived in the acquired gender throughout the preceding two years and (iii) intends to live in the acquired gender until death (see paragraph 55 above). The Act gave no one – no matter how concerned they were, and no matter how much their rights and interests might be affected by the recognition of that change in gender – a veto, or even an opportunity to make representations to (e.g.) the Gender Recognition Panel before a GRC is issued. Recognition of a changed gender was thus placed entirely in the hands and choice of the individual transsexual person. No one suggests that, in creating such a scheme, the Government strayed outside its wide margin of appreciation in giving effect to the right of transsexual people to have their new gender recognised.

64. In formulating the scheme, the Government had to consider the extent to which (and manner in which) the privacy and other interests of transsexual people were to be protected. Therefore, in supporting and enforcing those interests:

    i) Following registration in the Gender Recognition Register, a certificate of the information from that register (rather than the Births Register) will be provided; and that certificate will not disclose that the information is held on the Gender Recognition Register rather than on the Births Register (see paragraph 57 above).

    ii) Where a person has acquired "protected information" (i.e. information relating to a gender recognition application) in an official capacity, it is a criminal offence for that person to disclose that information to any person (section 22(1) of the GRA 2004). A person acquires such information "in an official capacity" if he obtains it (e.g.) as a civil servant, in connection with the functions of any local or public authority, as an employer or prospective employer, or in the conduct of any business or in the supply of any professional services (section 22(3)). On the other hand, where information is received in any other capacity, the GRA 2004 does not prevent any disclosure, although publication and use of such information will of course be subject to the general law in relation to (e.g.) discrimination under the Equality Act 2010.

65. However, in creating such a scheme, the United Kingdom Government was entitled – indeed, at least to an extent, bound – to take steps within the scheme to protect the rights and interests of others. Therefore, for example:

i) Gender recognition is not retrospective, in the sense that, although section 9(1) provides that, after a Full GRC has been issued to a person, the person's gender "becomes for all purposes the acquired gender", section 9(2) expressly provides that that "does not affect things done, or events occurring, before the certificate is issued". To this extent, the principle that a transsexual should be able to keep private his or her gender reassignment bows to the principle that history should not be rewritten.

ii) A change in gender does not affect the disposal of property or descent of a peerage, dignity or honour (sections 15 and 16). Therefore, in respect of peerages etc which pass through male primogeniture, if a first child were female and obtained a GRC, he would not then take precedence over other male heirs; although if a first male son were to obtain a GRC and become a woman, she would still inherit the title even in the face of other male heirs.

iii) Section 12 provides 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". In other words, where an individual is a mother or a father (with the responsibilities which that entails), that does not change by virtue of a change of gender under the GRA 2004. It is therefore inherent in the GRA 2004 that, following a gender change, a "mother" may be a man and a "father" may be a woman.

Ground 1: Breach of Article 8 of the ECHR

Introduction

66. Mr Squires submits that the full birth certificates of the Claimant's children will readily reveal to anyone who sees them that she (the Claimant) is transsexual. In the case of PK, it lists her as "father", but with the name JK (a female forename). In the case of AK, it lists her as "father", but with the name CK, a male forename in circumstances in which JK is, now, not male. Requiring the Claimant and/or her children to reveal that she has an acquired gender constitutes a significant interference with her and their article 8 rights, which the Registrar General is required to justify: she must show that the requirement to list her as "father" is "in accordance with the law" and is proportionate to the legitimate aim or aims she seeks to pursue.

67. First, Mr Squires submits, for the Registrar General to insist that JK is listed as "father" is not "in accordance with the law"; because, under the current domestic regime, she has a discretion whether or not to record the Claimant as "father", "parent" or "father/parent", and there is no indication in the legal regime as to how that discretion is to be exercised. In this case, the registrar erred in law in not exercising that discretion. In any event, more broadly, the selection of the term by the registrar in a particular case is the subject of an entirely open discretion, and is therefore legally arbitrary.

68. Second, the requirement to list her as "father" and the refusal to list her as "parent" or "father/parent" is disproportionate. The Registrar General does not pray in aid administrative difficulty or cost. Mr Squires submitted that she cannot rely on any general public interest in birth certificates reflecting historical fact, because that argument was rejected in Goodwin. The only substantial justification she does rely on is that recording the Claimant as "father" on her children's birth certificates is necessary because the children have a right to know their biological parentage. However, whilst Mr Squires accepted that, as a matter of law and as recorded in a birth certificate, unless a Parental Order extinguishes motherhood as part of surrogacy arrangements, a child's "mother" is always the person who carries and gives birth to the child, he submitted that the position with regard to "father" and "parent" is different. Someone recorded as "father" may not have any biological connection to the child, e.g. where a man is either the husband of a woman who received fertility treatment, or where a man other than a husband consents to being "father" of the child. There are several circumstances in which a man or a woman might be "parent" of a child on a birth certificate, as a result of assisted reproduction or surrogacy arrangements. There is no reason why a person in the position of the Claimant in this case should not be treated similarly, and referred to on the certificate as "parent". Arrangements could be put in place to mirror those in place for children who are the subject of surrogacy arrangements or adoption whereby they can, at an appropriate age, obtain information about their biological parentage.

69. Although to an extent overlapping, it is convenient to treat these submissions as raising the following questions:

i) Is article 8 engaged? Does a requirement for a person in the position of the Claimant (or the children of such a person) to reveal that the person has an acquired gender constitute an interference with her (and their) article 8 rights?

ii) If so, does the particular complaint in this case constitute a material interference with article 8? Does the requirement for a person in the position of the Claimant to list herself on the birth certificates of her children materially interfere with her and her children's article 8 rights?

iii) If so, is the interference justified? Is it in accordance with the law? If so, is it proportionate to the legitimate aims sought to be pursued?

I will deal with these questions in turn.

70. Although the question of whether the human rights of a specific individual have been breached in particular circumstances is quintessentially fact-sensitive, Mr Squires' primary attack was on the requirement of the scheme that people in the situation of the Claimant (i.e. male to female transsexual people who father, or who have fathered, children) are listed as "father" on the birth certificates of their children. He submitted that, irrespective of the facts of the Claimant's particular case, this gave rise to a general issue with regard to the scheme adopted by the Government. In those circumstances, although it will be necessary to consider the facts of the Claimant's case to a certain extent (if only because the position with regard to each of her children is different), for the purposes of this judgment I shall assume that the Claimant has not compromised any right to privacy she may have had by publishing the fact that she is transsexual and has children, in the manner that she has (see

paragraphs 16-17 above). So far as I am able, I shall deal with the issue, as it has been put, on the basis of a challenge to the scheme.

Is Article 8 Engaged?

71. It is now uncontroversial that gender identity is an integral and important part of an individual's fundamental identity, and thus of that individual's private life.

72. I was, for example, referred to Principle 3 of the Yogyakarta Principles of Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity (agreed at a meeting of human rights experts held in Yogyakarta on 6-9 November 2006), which reads as follows:

> "Everyone has the right to recognition everywhere as a person before the law. Persons of diverse sexual orientations and gender identities shall enjoy legal capacity in all aspects of life. Each person's self-defined sexual orientation and gender identity is integral to their personality and is one of the most basic aspects of self-determination, dignity and freedom."[1]

73. That normative right is reflected in the Strasbourg jurisprudence. As I have already described (paragraph 51 above), in Goodwin the Grand Chamber said (at [90]):

> "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."

Thus, States are required to recognise the change of gender undergone by transsexual people, in accordance with their positive obligation under article 8 (Hämäläinen at [68]).

74. It is a key part of that State obligation to ensure that documentation and certification is reissued to them in their acquired gender. Following an extensive survey of international and national guidance, in April 2014 the Ontario Human Rights Commission published a document, Policy on Preventing Discrimination because of Gender Identity and Gender Expression, in which it concluded that as a general principle transsexual people should be able to have their name and sex designation "changed on identity documents and other records" that would otherwise reveal their change of gender identity". Principle 3 of the Yogyakarta Principles states that, to uphold the right I have described above (paragraph 72), States are (amongst other things) required to:

> "…

[1] For much of the international material to which I refer, I am indebted to the comparative research analysis of legislation and other relevant documents relating to the status of transsexual people in Council of Europe Member States and common law jurisdictions conducted by Colm O'Cinneide, a Reader in Human Rights Law in the Faculty of Laws, University College, London, provided in this claim in the form of a statement dated 8 September 2014. Mr O'Cinneide was instructed by the Defendant, but the other parties did not contest the results of his research or suggest that the research was in any way deficient.

> B. take all necessary legislative, administrative and other measures to fully respect and legally recognise each person's self-defined gender identity;
>
> C. take all necessary legislative, administrative and other measures to ensure that procedures exist whereby all state-issued identity papers which indicate a person's gender/sex – including birth certificates, passports, electoral records and other documents – reflect the person's profound self-defined gender identity;
>
> D. ensure that such procedures are efficient, fair and non-discriminatory, and respect the dignity and privacy of the person concerned;
>
> E. ensure that changes to identity documents will be recognised in all contexts where the identification or disaggregation of persons by gender is required by law or policy…".

75. That is reflected in international standards set out in, for example, Recommendation 2010/5 of the Council of Europe's Committee of Ministers on measures to combat discrimination on grounds of sexual orientation or gender identity, which provides (at paragraph 21):

> "Member States should take appropriate measures to guarantee the full legal recognition of a person's gender reassignment in all areas of life, in particular by making possible the change of name and gender in official documents in a quick, transparent and accessible way; Member States should also ensure, where appropriate, the corresponding recognition and changes by non-state actors with respect to key documents, such as educational or work certificates."

76. It is also reflected in the Strasbourg authorities. For example, in Hämäläinen at [68], the Grand Chamber said:

> "… [T]he Court has held that States are required, in accordance with their positive obligation under article 8, to recognize the change of gender undergone by post-operative transsexuals through, inter alia, the possibility to amend the data relating to their civil status, and the ensuing consequences".

77. In my view, in requiring a transsexual to disclose her previous gender by not allowing a change to official documents to show the individual's chosen gender, article 8 is engaged. It affects her article 8 right to a private life; and potentially affects the article 8 rights of her children to keep private the fact their father is transsexual – although the position with regard to such children is complicated by the fact that the identity of their father at the time of their conception and birth may also be regarded as an element of their own fundamental identity.

Is there a material interference with article 8?

78. Does the requirement for a person in the position of the Claimant to list herself on the birth certificates of her children materially interfere with her and their article 8 rights? In my view, this is a far more difficult question.

79. First, there was an evidential dispute as to the extent that the listing of the Claimant as "father" would ever be disclosed. It only appears on full, long form birth certificates. The dispute therefore concerns how often it might be necessary for the Claimant and/or her children to disclose such certificates.

80. Mr Jaffey relied upon evidence collated by Mr Powell, which is set out in Exhibit EP3 to his statement. That evidence suggests that full certificates are rarely required. The DVLA accept short-form certificates, and never require full certificates. Schools are prohibited from asking for a full birth certificate in relation to admissions (paragraphs 2.4-2.5 of the School Admissions Code). The Department for Work and Pensions do not require a full certificate, unless they are investigating fraud. From the evidence collated by Mr Powell, it seems that generally local authorities (and, specifically, the local authority for the area in which JK lives) do not require a full certificate for the purposes of (e.g.) housing benefit and council tax benefit. For marriage and employment purposes, a passport is acceptable proof of identity. A passport is also sufficient proof of identity for banking purposes, except for some Junior ISAs. A full birth certificate is required for a first passport application, because it is necessary to prove British citizenship in respect of which the identity of a person's mother and father are likely to be crucial. There is no national guidance for health care. For private nurseries (which are not covered by the Schools Admissions Code), the required documentation is a matter for the individual institution.

81. Thus, Mr Jaffey submitted, the production of a full birth certificate is very rarely required, because usually an alternative document will be adequate. Where a full certificate is sought, a person in the position of the Claimant can offer an alternative. Where an alternative is not acceptable (e.g. on an application for a first passport), the person has the protection of section 22 of the GRA 2004 which makes it a criminal offence for any person to disclose information about a gender change that he has received "in an official capacity", which is widely defined (see paragraph 58 above); and, even where section 22 may not apply, the individual has the protection of the general law against discrimination on grounds of her transsexual characteristic.

82. The Claimant's response is four-fold.

83. First, Mr Squires submitted that, where a full certificate is specifically requested, for a person in the Claimant's position to offer an alternative document may risk "outing" her as a transsexual, a point made by the ECtHR in I v United Kingdom (11 July 2002) (Application No 25680/94) at [56]. It is therefore not reasonable to expect a person to offer such an alternative in those circumstances. For that limited category of case, I accept that submission.

84. Second, Mr Squires relied on evidence from the Claimant and KK themselves, and from various national and international papers and research studies, to the effect that the disclosure of information revealing that a person is transsexual puts that person at risk of discrimination, harassment, abuse and even violence. In respect of their

personal experiences, in her statement dated 1 July 2013, KK says that she has been told by people that her children are "better off dead" than being brought up by the Claimant and her, leading to concerns about their safety; and she was told by an NHS doctor that "it is not really fair on the child putting them into that sort of home situation". These comments were made, not because of the children's birth certificates or any other document – because, at the time, the Claimant accepts that she was overtly a person in transition from male to female – but, submitted Mr Squires, those incidents reflect the behaviour the Claimant and her children might expect in the future, when she is entirely female in appearance, but her transsexual characteristic is revealed by disclosure of the birth certificates. That is reinforced by the general literature regarding general behaviour towards transsexual people. For example, the Ontario paper referred to above (paragraph 73), stated that people who are transgender:

> "… are one of the most disadvantaged groups in society. Trans people routinely experience discrimination, harassment and even violence because their gender identity or gender expression is different from their birth-assigned sex."

Any future disclosure of the Claimant's transsexuality through required disclosure of her children's full birth certificates is therefore likely to lead to significant distress and harm to the Claimant and her children

85. Third, the Claimant does not accept that the situations in which it will be necessary to produce the children's full birth certificates will be rare. As I have indicated, she says that, when she registered PK, the Registrar indicated that short-form certificates were rarely acceptable (see paragraph 12 above). In relation to AK, she says (paragraph 16 of her First Statement) that she has in fact already had to disclose her full certificate (i) to the local authority in reporting the birth as a change of circumstances for housing benefit purposes, and on an application for a council house (despite Mr Powell's collated evidence suggesting that full certificates are not required by that authority); and (ii) when she opened a Junior ISA for AK. The full certificates will, she says, be needed whenever she has to show parental responsibility for a child, e.g. in relation to parental consent for a medical procedure. The Claimant also says (although without providing any substantiating evidence) that: "It is also commonplace for nurseries to require full birth certificates when they admit children" (paragraph 16 of her First Statement). The Claimant is particularly concerned that people to whom PK's full certificate is shown may consider the certificate a fraud, because it shows her (the Claimant) as father but with an overtly female forename.

86. Fourth, the Claimant relies upon the need to produce a full birth certificate for various purposes abroad, e.g. (i) for a child to enter South Africa, from 1 June 2015; (ii) for a foreigner who wishes to work in France (a measure introduced by the French authorities to prevent social security fraud); and (iii) for an immigration visa to the USA.

87. On the basis of this evidence, I accept that, from time-to-time, the Claimant and her children are likely to be required to produce the children's full birth certificate. However, the number of occasions when such production will be required will be relatively rare; and, almost exclusively, the production will be to people who receive the information "in an official capacity" for the purposes of section 22. It is, of

course, a criminal offence for those people to disclose that the Claimant is transsexual; but, although the Claimant says she fears disclosure in any event, it seems to me almost inconceivable that people acting in an official capacity at, e.g., the Passport Office would disclose such information. The number of occasions when the Claimant and/or her children will be required to produce a full birth certificate of one of the children in the United Kingdom to someone other than to a person in an official capacity (given the broad scope of such persons as statutorily defined) will be very rare indeed. With regard to foreign countries, the requirements they impose on visitors is a matter for their own domestic law. Whether the Claimant or her children will have to disclose the birth certificate of one of the children abroad is dependent upon if and when the children travel abroad, and the purpose of any such trip. I accept that there is a risk that, at some stage, they may have to do so. But, in that event:

i) the United Kingdom Government is not responsible for the domestic laws of other countries, nor for any discrimination against the Claimant and/or her children that might result from such laws; and

ii) from the examples given by the Claimant, there is no reason to consider that, in practice, the Claimant or her children would be the subject of discrimination or harassment as a result of disclosure of the Claimant's transsexuality to the authorities of other States: for example, as Mr Jaffey pointed out, the authorities in France are the subject of the same article 8 obligations as are the United Kingdom authorities, and there is no evidence that the French authorities would other than comply with their obligations in that regard; and the Constitution of South Africa prohibits discrimination on the grounds that a person is transsexual (National Coalition of Gay and Lesbian Equality v Minister of Justice [1998] ZACC 15 at [21]).

88. Furthermore, as I have indicated, so far as the children are concerned, the article 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 article 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. Which element of a child's article 8 right is the stronger will depend upon the circumstances of the particular case. I return to this issue below.

89. Therefore, whilst I accept that the requirement for a person in the position of the Claimant to list herself on the birth certificates of her children interferes with her and their article 8 rights – both conceptually and, to a limited extent, in practice – I consider Mr Jaffey's submission that, in all the circumstances, the interference is not material, to be very forceful. However, given the importance granted by Strasbourg to the recognition of chosen gender as part of an individual's identity, for the purposes of this claim, I shall assume that the interference with article 8 rights inherent in the registration scheme as a result of the requirement that people in the position of the Claimant be registered as "father" on their children's birth certificates is material.

Is the interference justified?

90. That leads me to the final issue, namely, whether the Registrar General is able to justify such interference.

91. Mr Squires relied upon two sub-grounds. First, he submitted that the interference is not "in accordance with the law". In particular, he referred to Gillan and Quinton v United Kingdom (2010) 50 EHRR 45 at [76], in which the ECtHR said that these words, "in accordance with the law":

> "… require the impugned measure to have some basis in domestic law and to be compatible with the rule of law, which is expressly mentioned in the preamble to the Convention and inherent in the object and purpose of article 8. The law must thus be adequately accessible and foreseeable, that is, formulated with sufficient precision to enable the individual – if need be with appropriate advice – to regulate his conduct."

92. Mr Squires submitted that there is nothing in the primary legislation that requires someone in the position of the Claimant to be registered a "father". The particulars to be set out in the birth certificate are described in subordinate legislation, i.e. the 1987 Regulations (see paragraphs 29 and following above); and, by reference to the relevant form, these require the registration of "father/parent". Although it is the practice of the Registrar General and local registrars to delete one of the two words, there is nothing in the Regulations compelling him to do so. The relevant registrar therefore has a discretion whether to delete one of the two terms on the form/register. There is no indication as to how that discretion should be exercised. That open discretion makes arbitrary the decision of the registrar, to delete "parent" and leave "father" when confronted with someone in the position of the Claimant.

93. I can deal with that submission shortly. In my view, it has no force. The relevant form is an integral part of the system of regulation of registration of births. Mr Squires conceded, rightly, that section 29 of the 1953 Act prevents the Registrar General from changing AK's birth certificate, as the Claimant wishes it to be changed. In any event, more generally, as I have described (see paragraph 50 above), in that system, when used in a birth certificate, "father" and "parent" are mutually exclusive terms. "Parent" is restricted to a second female who is to be treated as a parent of the child by virtue of the HFEA 2008. Other than in the context of surrogacy, "father" is generally used to describe the biological father of the child. The Claimant accepts, as she must, that she is the biological father of both children. It is these definitions which drive form and practice, so far as birth certificates are concerned. Far from there being an open discretion which renders choice arbitrary, the scheme of the 1953 Act and the 1987 Regulations does not give the registrar a discretion as to whether to leave "father/parent", or to delete one or the other terms: dependent upon the scheme definition into which the individual falls, it requires the deletion of one or the other. In the case of a person in the position of the Claimant, it clearly requires the registrar to delete "parent" and leave "father". Indeed, that is the essence of the Claimant's primary complaint.

94. Second, Mr Squires submitted that, having established an interference with the article 8 rights of the Claimant and her children, the Registrar General must justify that interference by showing that the requirement that someone on the position of the Claimant be recorded as "father" on the children's birth certificates is in proportionate pursuit of a legitimate aim.

95. The most recent learning on the appropriate approach to the question of whether an impugned measure is proportionate, is found in Bank Mellat v Her Majesty's Treasury (No 2) [2013] UKSC 39; and in particular in the judgment of Lord Sumption JSC, with whom the majority agreed. At [20], he (in my respectful view, perceptively and importantly) emphasised that "the requirements of rationality and proportionality, as applied to decisions engaging human rights of applicants, inevitably overlap". After referring to the relevant authorities, he continued:

> "[The effect of these authorities] can be sufficiently summarised for present purposes by saying that the question [of whether an impugned measure is proportionate] depends on an exacting analysis of the factual case advanced in defence of the measure, in order to determine (i) whether its objective is sufficiently important to justify the limitation of a fundamental right; (ii) whether it is rationally connected to the objective; (iii) whether a less intrusive measure could have been used; and (iv) whether, having regard to these matters and to the severity of the consequences, a fair balance has been struck between the rights of the individual and the interests of the community. These four requirements are logically separate, but in practice they inevitably overlap because the same facts are likely to be relevant to more than one of them."

96. In that case (which concerned very different subject matter from this, namely an Order in Council prohibiting all financial dealings with the claimant bank on grounds of national security), the only issue that concerned the court was (iii), i.e. whether the measure was disproportionate because a less intrusive measure could have been used without jeopardising the national security objectives. As we shall see, in respect of proportionality, that is the essential issue in this claim too.

97. Lord Reed JSC dissented on the application of the relevant test, but Lord Sumption made clear (at [20]) that there was nothing in his formulation of the concept of proportionality with which he disagreed and Lord Reed's analysis of the proportionality test appears to have gained unanimous approval (see [20] per Lord Hope DPSC, [132] per Lord Neuberger PSC, [166] per Lord Dyson MR, [197] and [202] per Lord Carnwath JSC). Lord Reed emphasised that an assessment of proportionality inevitably involves a value judgment at the stage at which a balance has to be struck between the importance of the objective pursued and the value of the right intruded upon, which has inherent within it a margin of appreciation which varies according to the nature of the right at stake and the context in which the interference occurs (see [71]). In relation to the question of whether a less intrusive measure could have been adopted without unacceptably compromising the achievement of the legitimate objective of the State, he said this (at [75]):

> "In relation to [this criterion], Dickson CJ made clear in R v Edwards Books and Art Limited [1986] 2 SCR 713 at pages 781-2 that the limitation of the protected right must be one that 'it was reasonable for the legislature to impose', and that the courts were 'not called on to substitute judicial opinions for legislative ones as to the place at which to draw the precise line'. This approach is unavoidable, if there is to be any real

> prospect of a limitation on rights being justified: as Blackmun J once observed, a judge would be unimaginative indeed if he could not come up with something a little less drastic or a little less restrictive in almost any situation, and thereby enable himself to vote to strike legislation down (Illinois State Board of Elections v Socialist Workers Party (1979) 440 US 173 at pages 188-9); especially, one might add, if he is unaware of the relevant practicalities and indifferent to considerations of cost. To allow the legislature a margin of appreciation is also essential if a federal system such as that of Canada, or a devolved system such as that of the United Kingdom, is to work, since a strict application of a 'least restrictive means' test would allow only one legislative response to an objective that involved limiting a protected right."

98. Mr Jaffey relied upon two main planks for his justification argument, namely the legitimate aims of:

    i) having an administratively coherent system for the registration of births; and

    ii) respecting the rights and interests of other people, notably those of the partner and children of the person living in an acquired gender, including (but not restricted to) the right of a child to know – and have properly recognised – the identity of his or her biological father.

99. These objectives are, clearly, so important as potentially to justify a limitation on the rights of people in the position of the Claimant and her children; and the requirement that, where she is the father of the relevant child, a person in the Claimant's position are listed in the full birth certificate as "father" is, clearly, rationally connected to these objectives. The real issue is whether (as Mr Squires contends, and Mr Jaffey denies) a less intrusive measure could have been used, e.g. a scheme mirroring those used in respect of a child born as a result of surrogacy arrangements or an adopted child, who have a parallel certificate which conceals the true position with regard to their birth parentage.

100. Having considered all of the evidence and submissions with particular care, I have concluded that the scheme adopted by the United Kingdom Government, which requires the birth certificate of a child biologically fathered by a person who later changes gender to female to list that person on the certificate as "father", falls within the margin of appreciation allowed the State in respecting the article 8 rights of the Claimant and her children; and thus to be justified under article 8(2). In coming to that conclusion, I have particular taken into account the following.

101. In carrying out the exercise of balancing the harm to an individual's right to respect for private life on the one hand, and the rights and interests of others (including the public interest) on the other, the public interest in having coherent administrative systems is capable of being an important consideration (see, e.g., Goodwin at [78]; and Hämäläinen at [66]).

102. Whilst allowing for necessary exceptions etc, the scheme for registration of births in England and Wales – by which I intend to include the relevant provisions of the GRA

2004 – works to certain principles and policies, chosen by the legislature, which demand considerable respect.

103. One principle is that the State will recognise, by way of a GRC, a change of gender when the three criteria within section 2(1) of the GRA 2004, i.e. that the applicant (i) has, or has had, gender dysphoria, (ii) has lived in the acquired gender throughout the preceding two years and (iii) intends to live in the acquired gender until death (see paragraph 55 above). This is an extremely powerful, personal right which others (including a partner or children) cannot veto, or even seek to prevent by (e.g.) representations to an adjudicating panel.

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. Thus, if a child is the subject of surrogacy arrangements or adoption, their birth certificate remains substantively unaltered: a completely new document is created from a different register showing the post-surrogacy or post-adoption position, which does not pretend to be a record of the circumstances as at birth.

105. However, to make the recognition of a change of gender effective, section 10 of and Schedule 3 to the GRA 2004, and the Gender Recognition Register Regulations 2005, require the Registrar General to keep a parallel register for transsexuals, from which a certificate can be obtained which is indistinguishable from the individual's original birth certificate save that it records the name and gender as being that which the individual has acquired following the gender reassignment process and not that recorded at the time of their birth. Therefore, uniquely, a transsexual may obtain a document which appears to be an original birth certificate, showing his/her new name and gender as if it they were the name and gender from birth. To that extent, the principle of recognising an individual's right to respect for a change of gender trumps the principles that history cannot be rewritten and that the substance of a birth certificate cannot be changed. In respect of birth certificates, the position of transgender individuals is unique, because (e.g.) adopted children can produce a full certificate which does not disclose their parentage, but which does disclose the fact that they are adopted.

106. The scheme further protects the privacy of a person who has changed gender by (e.g.) protecting an individual from the disclosure of any information regarding his/her gender reassignment by any person given that information in an official capacity (section 22 of the GRA 2004).

107. These elements of protection in the scheme reflect the point made in Goodwin (at [91], quoted in paragraph 52 above) that, where there is no contrary public interest or private rights, the legitimate interest of a person who has changed gender in having the new gender recognised, including having control over the information that their gender has changed, is overwhelming; and the scheme gives it strong protection.

108. However, where the rights and interests of third parties (notably of partners and children of the person having undergone a change of gender) are involved, these are material considerations which the scheme is required to take into account. By section 9(2), the general rule in section 9(1) (that, after a full GRC has been issued, the person's gender becomes for all purposes the acquired gender) "does not affect things done, or events occurring, before the certificate is issued…". Therefore, where a man

changes gender, an earlier marriage to a woman does not retrospectively become a same-sex marriage; and children that person has fathered remain fathered by that person (the particular point at issue in Hämäläinen). Furthermore, section 12 of the GRA 2004 specifically deals with that status of the person whose gender has changed as father or mother of a child: that status is not affected. Mr Squires submitted that section 12 merely ensured that the person's responsibilities as a *parent* were not diminished or otherwise changed: but, whilst the section does ensure that, it expressly relates to the *status* of the person as mother or father being unaltered. The point is in any event an empty one in this case, because the Claimant readily and properly accepts that, at the time of the birth registrations, she was the father of AK and PK – and will remain so.

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.

110. In respect of AK (and others in her position), her birth certificate sets out the position as at her birth. Her father is correctly identified as the Claimant, then named CK and living as a man. For the Claimant to be given the unilateral right to change that certificate to show her as JK, and not as AK's father, is seriously to infringe AK's right to have her fundamental identity respected. It is noteworthy that the only jurisdiction in which an amendment to the birth certificate of a child of a transsexual person (Portugal), only permits such an amendment if the child is over 18 years of age and consents (see paragraph 116 below). That reflects the impact of such an amendment upon the child's identity, and the need to protect that other person's rights and interests.

111. The position of PK (and others in his position) is perhaps less stark, because the face of his birth certificate reveals that his father has adopted a female name and thus has – probably, but not certainly – changed gender to a woman. I say "not certainly" because (i) in some cultures – I accept not the Claimant's culture – it is not abnormal for a male living as a man to adopt an apparently female name; and (ii) the requirement of section 2 of the GRA 2004 that a GRC will not be granted before the relevant person has lived in the adopted gender for two years reflects the fact that those who suffer from gender dysphoria may ultimately decide not to live in a gender different from that in which they were born.

112. Article 3 of the United Nations Convention on the Rights of the Child, and cases such as ZH (Tanzania) v Secretary of State for the Home Department [2011] UKSC 4 HH v Deputy Prosecutor of the Italian Republic, Genoa; F-K v Polish Judicial Authority [2012] UKSC 25, require the best interests of the children to be "a primary

consideration" in any proportionality assessment under article 8. In the case before me, having considered the evidence of the parties and that of Professor Green, the Official Solicitor has concluded that "the outcomes sought in relation to AK and PK by the Claimant are in their interests and so (on behalf of AK and PK) he supports the Claimant and (without adding to them) the arguments she makes" (paragraph 11(1) of Mr Wolfe's skeleton argument). The Official Solicitor emphasises that he has come to that view having considered the particular circumstances of these two children. His conclusion (that the relief sought by the Claimant would be in the children's best interests) is clearly influenced by the evidence of Professor Green. However, that evidence makes clear that, with regard to the relief the Claimant seeks, there are pros and cons for the children: the relief sought would be in the children's interests in that it would reduce the risks of stress resulting from the disclosure of the Claimant's transsexuality, but it would increase the risks inherent in their birth certificates showing no father and suggestive of two female parents from birth. Whilst Professor Green (and, in his turn, the Official Solicitor) concludes that the risks of the former are the greater (and thus the latter is in the best interests of the children), even in this case the balancing exercise in respect of the children's interests is not clear cut.

113. Furthermore, Professor Green considers informing the children of their biological parentage at an appropriate stage to be crucial. If the Claimant's claim were successful, it would not be apparent from their birth certificates that the children had ever had other than two female parents. The Claimant and KK have said that they will undertake to inform the children at an appropriate stage – and, if anything prevent them from doing so, to ensure that their own parents inform them – but, whatever mechanics are put in place in an individual case, there is a risk that the children will in the event be denied the important information. Furthermore, whatever view is now taken of the children's best interests, Professor Green properly recognises the risk that the children will take a different view as to what is in their own interests when they are old enough to come to such an informed decision.

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.

115. Whilst, if the current scheme is in breach of article 8, the Claimant is of course not bound to propose a scheme that would be compliant, in circumstances in which Mr Squires submits that the United Kingdom Government failed to adopt a measure less intrusive of her article 8 rights, Mr Jaffey properly pointed out the innumerable

difficulties with the suggestion made on behalf of the Claimant that the birth certificates of her children should reflect her new gender and hide her former gender.

i) Mr Squires did not propose that a mother who underwent a female to male change should have the ability to change the birth certificates of children to which she had given birth to delete the reference to "mother". As I understood his submissions, he accepted that that would be a step too far in breaching the child's rights; but, in any event, Mr Jaffey pointed out the practical difficulties of concealing motherhood in those circumstances (see paragraph 28(f) of his skeleton argument). If the change of gender of a mother who is the subject of a female to male change is not to be protected by a change in the birth certificates of children, then the protection of a change of gender of a father is, at least, less compelling.

ii) As I understood Mr Squires' submissions, it is the Claimant's case that article 8 entitles her to require the registration (or re-registration/amendment) or her children's birth certificates to show her as "parent". That would mean a person in her position could override the wishes of any partner, or adult or Gillick-competent children. On the other hand, if there were no absolute entitlement, there would have to be a mechanism for determining the issue. That would be contrary to the general principle of the gender recognition scheme that it is to be procedurally non-adversarial. Given that gender reassignment is an emotional matter, not only for the individual who wishes to change gender but also for her family (and thus potentially highly controversial), the Government is entitled to consider that there is a substantial public interest in ensuring that the scheme is, so far as possible, non-adversarial.

I accept Mr Jaffey's submission: Mr Squires was unable to put forward a scheme that allowed for the change to the birth certificates of children of fathers in the position of the Claimant that, from a birth registration and certification point of view, would work in practice.

116. For those reasons, before considering the Strasbourg jurisprudence, whilst I accept that the recognition of chosen gender is an important element in an individual's identity, there appears to me to be very considerable force in the Registrar General's case that interference with that right – in the form of requiring the birth certificates of children of a male to female transsexual person, which that person has biologically fathered, to show that person as the children's father – is justified on the grounds she puts forward.

117. In considering this issue, does Europe offer any assistance? It is clear from the helpful evidence of Mr O'Cinneide that (as he puts it), "it is possible to identify a broad 'direction of travel', whereby many European and common law states are moving towards granting earlier and wider recognition of a change of gender identity…" (paragraph 14 of his statement). However, it is equally clear that "there has been little discussion of the issue of whether it should be possible to amend the birth certificates of children of transsexuals to reflect their change of gender identity" (paragraph 15). None of the international declarations or judgments of the ECtHR make any explicit reference to this issue: it is (says Mr O'Cinneide) largely absent from academic discussions or law reform proposals, and almost no national laws

address the question. Mr O'Cinneide has managed to find only one country which allows amendment to the birth certificate of the child of an individual who has undergone a gender change: domestic legislation in Portugal (Lei no 7/2011: Cria o procedimento de mudanca de sexo e de nome propria no resisto civil e procede a decoma setima alteracao ao Codigo do Registo Civil) permits a child's birth certificate to be amended, but only if the child is over 18 years of age and consents. Mr O'Cinneide has also identified two domestic court cases:

i) A Swiss administrative court issued a new birth certificate to a child of a female-to-male transsexual, to show the new adopted (male) name of the applicant, but still showing him as the child's mother.

ii) In the first instance Irish case of Foy v An t-Ard Chláraitheoir [2008] IEHC 470, which concerned the lack of any mechanism in Ireland for the recognition of gender change (unsurprisingly found to be in breach of article 8), it was conceded without debate that the legal recognition of the new gender identity would not require any amendment or alteration of the birth certificates of the children.

Despite his diligent resources, he has been unable to find anything further in the domestic law of any other country.

118. Of the recent Strasbourg authorities to which I was referred, two concerned male-to-female transsexual applicants, who were married but who could not remain married and have their new gender fully recognised by the national authorities.

119. The first case was Parry v United Kingdom (28 November 2006) (Application No 42971/05), a pre-Marriage (Same-Sex Couple) Act 2013 case. The court found the application manifestly unfounded and therefore inadmissible, because the United Kingdom legislature had deliberately made no provision for the small number of transsexual people who were in subsisting marriages who wished to remain married after their gender change, who could not do so because of the prohibition of same-sex marriages in the United Kingdom. In respect of the United Kingdom's alleged failure to comply with its positive obligation to give proper effect to the right to have gender reassignment recognised, the court said:

> "In this context, the notion of 'respect' as understood in article 8 is not clear cut, especially as far as the positive obligations inherent in that concept are concerned: having regard to the diversity of practices followed and the situations obtaining in the Contracting States, the notion's requirements will vary considerably from case to case and the margin of appreciation to be accorded to the authorities may be wider than that applied in other areas under the Convention"

120. The second case was Hämäläinen. I have already quoted one reference from [67] of that judgment in that case concerning the width of the margin of appreciation in cases involving the positive obligation under article 8 (see paragraph 23(vi) above). At [75], the judgment re-emphasised the point:

> "In the absence of a European consensus and taking into account that the case at stake undoubtedly raises sensitive moral and ethical issues, the Court considers that the margin of appreciation to be afforded the respondent State must still be a wide one… There will usually be a wide margin if the State is required to strike a balance between competing private and public interests or Convention rights…".

121. These two cases concerned different aspects of the right for transsexual people to have their chosen gender recognised by the State – notably in the context of the public interest in maintaining marriage as an institution – but, in both, the ECtHR emphasised the wide margin of appreciation granted to States in respect of their positive obligation to ensure changed gender is properly recognised.

122. Thus, it is apparent that, in respect of how the gender of transsexual people is recognised, Member States have a substantial margin of discretion; and it is apparent that there is no clear line of authority from Strasbourg – nor any principle deriving from ECtHR cases, international papers, domestic cases or elsewhere – that article 8 requires the birth certificates of the children of those who change their gender to be amended to show the new name and gender of that individual, and/or to change the listed status of that person from "father" or "mother" as the original certificate showed to some other designation, such as "parent", to ensure that the fact of their gender reassignment was not apparent from their children's birth certificates.

123. Therefore, in summary:

i) Whilst gender is an important element of an individual's fundamental identity, in practice, after a father had changed gender, the statutory scheme contains a number of checks and balances (such as section 22 of the GRA 2004); the room for disclosure of the fact of the individual's gender change by requiring her to be shown as "father" on her children's birth certificates is limited; and the interference with her article 8 rights will be small.

ii) The interference with the article 8 rights of the relevant children will also be small; and will be counterbalanced, at least to an extent, by the fact that, if their birth certificates were altered to show their father as "parent" (or, if it were possible, "father/parent") that itself would interfere with the child's article 8 right to have his or her fundamental identity recognised. In some cases, such alteration may be adverse to the best interests of the relevant children.

iii) If the person who changes gender has an entitlement to change his or her children's birth certificates, that may override the rights of the children and others (such as another parent). If there is no absolute entitlement, that will provoke disputes that will be contrary to the public interest in gender change being a non-adversarial process.

iv) The ability to change a child's birth certificate would be contrary to the coherence of the birth registration scheme, and in particular the principle that a birth certificate shows the relevant details of a child as at his or her birth, and those details cannot be changed. The Claimant has put forward no practical

proposal for a scheme in which a father in the position of the Claimant could change her children's birth certificates to delete the fact that she was (and is) the child's father; and none readily suggests itself.

v) Therefore, if the scheme allowed amendment to birth certificates in the circumstances suggested by the Claimant, that would result in substantial interference with the rights and interests of others (including any other parent, and the children themselves) and the public interest, that would have to be set against the (small) interference with the article 8 rights I have described.

vi) There is no settled line of Strasbourg authority or principle that demands that a father who changes gender to female should be able to change the birth certificates of children to reflect that fact. There is no country in Europe or elsewhere that enables a person to make such a change as the Claimant seeks. In those circumstances, the margin of appreciation in the State in producing a scheme that properly reflects the choice of transsexual people to live in a different gender is relatively wide.

124. In those circumstances, in my judgment, the birth registration scheme as it stands – with the requirement about which the Claimant complains (namely that the birth certificates of children of a father who changes gender are required to show that person as their father) – is well within the margin of appreciation of the State in recognising the changed gender of an individual in the position of the Claimant. The State is thus entitled to conclude (as the United Kingdom Government has in respect of its current scheme) that the interference with the article 8 rights inherent in the scheme by virtue of this requirement is 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; and no less a restriction is compatible with the legitimate of protecting those other rights and interests. Therefore, insofar as the scheme interferes with the article 8 rights of such an individual and/or her children, that interference is justified.

125. Ground 1 consequently fails.

Ground 2: Breach of Article 14 of the ECHR

126. As I have indicated, I consider that this case falls within the ambit of article 8, and I accept that transsexualism is a notion or characteristic covered by article 14 as falling within "other status".

127. However, Mr Squires did not suggest that an article 14 claim could succeed where article 8 has been found to be engaged but any interference with article 8 rights is found to be justified. This is a case in which, in the event, the article 14 claim does not add anything of substance to the article 8 claim. Discrimination under article 14 is, in my judgment, justified for the same reasons as those set out above in relation to article 8.

128. Ground 2 also thus fails

Conclusion

129. For those reasons, in requiring a man who changes gender to female to be listed as "father" on the full birth certificate of a child in respect of whom they are the biological father, I do not consider the birth registration scheme to be in breach of article 8 or 14 of the ECHR. The United Kingdom Government is entitled to act in accordance with such a scheme; but, for the avoidance of doubt, I should make clear that nor do I consider the application of the scheme to the facts of this specific case to show any breach of those provisions of the ECHR.

130. This claim therefore fails, and I dismiss it.