

ENGLAND AND WALES / JUDGMENT

FZ v MZ

Source: caselaw.nationalarchives.gov.uk · Research copy typeset by Esheria. Not court-issued or certified.

Neutral Citation Number: [2025] EWHC 3338 (Fam) IN THE HIGH COURT OF JUSTICE FAMILY DIVISION Case No: FD24XXXXX FD24PXXXX Royal Courts of Justice Strand, London, WC2A 2LL Date: 18/12/2025 Before : THE HONORABLE MRS JUSTICE LIEVEN

- ----- Between : FZ
- and - MZ Applicant Respondent
- ----- Deirdre Fottrell KC and Andrew Powell (instructed by Louisa Ghevaert Associates) for the Applicant The Respondent appeared in person
- ----- Hearing Date: 15 July 2025 THE HONORABLE MRS JUSTICE LIEVEN Approved Judgment Double-click to enter the short title IN THE HIGH COURT OF JUSTICE KING'S BENCH DIVISION ADMINISTRATIVE COURT Case No: AC-2024-LON-000XXX Before : THE HONORABLE MRS JUSTICE LIEVEN
- ----- Between : FZ
- and - Claimant Y COUNCIL Defendant Deirdre Fottrell KC and Andrew Powell (instructed by Louisa Ghevaert Associates) for Claimant The Defendant did not attend and was not represented The Registrar General as an Interested Party did not attend and was not represented Hearing Date: 15 July 2025 Approved Judgment This judgment was handed down remotely at 11:00am on 18 December 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives. THE HONOURABLE MRS JUSTICE LIEVEN This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the children and members of their family must be strictly preserved. All persons, including representatives of the media, must THE HONORABLE MRS JUSTICE LIEVEN Approved Judgment Double-click to enter the short title ensure that this condition is strictly complied with. Failure to do so will be a contempt of court. Mrs Justice Lieven : THE HONORABLE MRS JUSTICE LIEVEN Approved Judgment Double-click to enter the short title

Introduction

1. This judgment concerns two children, DZ (aged 2 ½) and AZ (aged 1). The legal issues concerning them are different, but the factual background is common and the cases have been listed together. I therefore deal with both children's cases and all the issues in one judgment.
2. The Applicant/Claimant was represented by Ms Deirdre Fottrell KC and Mr Andrew Powell. The Respondent (MZ) was not represented, but her position wholly aligned with that of the Applicant. The Defendant and the Interested Party in the judicial review did not resist the claim and did not appear.
3. Throughout this judgment I will refer to people, whether parties or in referenced caselaw, by the pronoun of their choice, whatever their legal status.
4. The key background facts that lead to the issues in both cases are that the Applicant, FZ ("the Applicant"), is a transgender man with a Gender Recognition Certification (GRC) pursuant to Section 9 of the Gender Recognition Act 2004 (GRA). In 2022 he married MZ ("the Respondent"), who is a natal woman. I will refer to the Applicant and Respondent jointly as "the parents", which reflects the reality of their caring relationship for both children, without making any assumption about the Applicant's legal status in relation to the children, which lies at the heart of the cases. Procedural issues
5. At the conclusion of the hearing on 15 July 2025, I asked Ms Fottrell whether in AZ's case she was relying on the interpretative duty under Section 3 of the Human Rights Act 1998 (HRA), in the event that I concluded that the domestic interpretation of the relevant provisions was against her case. She asked for 7 days to provide a further written note to address this issue, which she subsequently submitted. I also asked if she was seeking a declaration of incompatibility pursuant to Section 4 HRA and I gave her 7 days to make such an application. No application was made.
6. In respect of DZ, the Applicant and Respondent seek the following orders; i. ii. iii. iv. v. A declaration of parentage; A 'live with' child arrangements order (case number FD24X000XXX); A step-parent responsibility order (also case number FD24X000XXX) by applications dated 15 October 2024; A step-parent adoption order by application dated 14 November 2024; The Applicant/Claimant has also issued a claim for judicial review to quash the original birth registration and allow a de novo birth registration (case number AC-2025-LON- 000XXX).
7. In respect of AZ, the Applicant seeks a declaration of parentage pursuant to Section 55A of the Family Law Act 1986 (FLA 1986) that he is the father of AZ, and a child arrangements order that AZ lives with both parents.
8. The Attorney General and the Registrar General declined an invitation from the Court to intervene in these proceedings in an order of Harris J dated 7 November 2024. On 13 February 2025 the Government Legal Department (GLD) confirmed that in respect of the judicial review claim to quash the original birth registration, the Registrar General (named as an Interested Party) "... would not wish to oppose the application for judicial review, since the grounds of review accurately reflect the legal position". The Defendant to the judicial

review claim, Y Council, does THE HONORABLE MRS JUSTICE LIEVEN Approved Judgment Double-click to enter the short title not contest the claim or the relief sought (see Acknowledgment of Service dated 31 March 2025). Neither the Defendant nor the Interested Party attended or were represented at the final hearing on 15 July 2025. The issues 9. In respect of DZ, although the factual and legal situation is somewhat complex, the outcome is, in my view, straightforward, and there is little difficulty in making the orders sought.

10. However, in respect of AZ, a novel and difficult issue arises as to the interplay between the Human Fertilisation and Embryology Act 2008 (HFEA 2008) and the GRA. The issue in AZ's case is whether the Applicant can be registered on the child's birth certificate as AZ's "father". Factual background
11. The Applicant and Respondent met in 2020 and a relationship developed shortly thereafter. The Applicant obtained a GRC recognising him as a man in 2021. The Applicant and Respondent married in 2022. The Respondent gave birth to DZ in 2023, and she is therefore DZ's mother by operation of law. DZ was conceived via artificial insemination following a private arrangement, outside of a licensed clinic for the purposes of the HFEA 2008, using the gametes of a known donor, who I will refer to as XX. He has had notice of the proceedings and has confirmed that he supports the applications made by the Applicant and Respondent. He does not seek to participate or be represented in the proceedings.
12. The parents attended at the local Registry to register DZ's birth. The Applicant told the Registrar that he was a transgender man and presented his GRC, anticipating that it would prevent his registration as the father of DZ. The registrar asked no questions as to the circumstances of DZ's conception. The registrar left the room briefly to consult a colleague. On their return, they registered the child with the Respondent as DZ's mother and the Applicant as the father. The parents did not know at the time that the registration was in error and wrong as a matter of law.
13. Later that year in 2023, the Council wrote to notify them that a mistake had been made during the registration of DZ's birth. The letter stated that "...a mistake was made in completing the registration and we have acted contrary to the legalisation relating to the registration of children conceived via assisted conception. This means that [the Applicant] should not have been included in the registration as [DZ's] father."
14. The parties accept that DZ was conceived in the summer of 2022, before they married at the end of 2022. If a couple are unmarried at the time of conception, and they wish for the man to acquire legal status as the parent, they must comply with the 'agreed fatherhood provisions' in Sections 36 and 37 HFEA 2008, which provide that the conception must have taken place at a licenced clinic, with the relevant notices in respect of parenthood provided to the 'person responsible' at the clinic. That is not the factual scenario in this case.

15. It follows therefore that common law principles apply, and XX is DZ's legal father, although he does not have parental responsibility for DZ under the Children Act 1989, having not been named on DZ's birth certificate.
16. A stand-alone step-parent parental responsibility order in favour of the Applicant and a joint 'lives with' child arrangements order were made by Harris J on 7 November 2024. Thus, the Applicant and Respondent both share parental responsibility for DZ. THE HONORABLE MRS JUSTICE LIEVEN Approved Judgment Double-click to enter the short title
17. The parties now seek to remedy the birth registration of DZ and to establish the legal parentage of the Applicant via a step-parent adoption order.
18. The position is different for AZ. He was born in 2024. His conception followed the same process as that of DZ. However, the key difference for the purposes of the law is that by the time AZ was conceived in 2023 the parents were married and therefore Section 35 HFEA 2008 was in play. The Statutory Provisions Human Fertilisation and Embryology Act 2008 (HFEA 2008)
19. Section 33(1) states; 33 Meaning of "mother"
 - (1) The woman who is carrying or has carried a child as a result of the placing in her of an embryo or of sperm and eggs, and no other woman, is to be treated as the mother of the child.
20. Where artificial insemination takes place outside of a licenced clinic, the statutory regime under the HFEA 2008 requires the parties to be in a marriage or civil partnership at the time of conception if the other party is to acquire status as a legal parent. Section 35 states; 35 Woman married [to [or civil partner of,] a man] at time of treatment
 - (1) 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 [with a man] [or a civil partnership with a man], and
 - (b) the creation of the embryo carried by her was not brought about with the sperm of the other party to the marriage [or civil partnership].
 - (c) then, subject to section 38(2) to (4), the other party to the marriage [or civil partnership] 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).
21. Section 42 states; 42 Woman in civil partnership [or marriage to a woman] at time of treatment

-
- (1) 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 [with another woman] [or a marriage with another woman], then subject to section 45(2) to (4), 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).
- (2) This section applies whether W was in the United Kingdom or elsewhere at the time mentioned in subsection (1). Gender Recognition Act 2004 (GRA)
22. The two most important provisions for the present case are Sections 9 and 12; 9 General
THE HONORABLE MRS JUSTICE LIEVEN Approved Judgment Double-click to enter the short title
- (1) Where a full gender recognition certificate is issued to a person, the person's gender becomes for all purposes the acquired gender (so that, if the acquired gender is the male gender, the person's sex becomes that of a man and, if it is the female gender, the person's sex becomes that of a woman).
- (2) Subsection (1) does not affect things done, or events occurring, before the certificate is issued; but it does operate for the interpretation of enactments passed, and instruments and other documents made, before the certificate is issued (as well as those passed or made afterwards).
- (3) Subsection (1) is subject to provision made by this Act or any other enactment or any subordinate legislation. 12 Parenthood The fact that a person's gender has become the acquired gender under this Act does not affect the status of the person as the father or mother of a child. (emphasis added)
23. The question of what is meant by “the status of the person as the father or mother of a child” in Section 12 GRA is central to AZ’s case. Section 55A Family Law Act 1986 (FLA 1986)
24. Section 55A(1) states;
- (1) Subject to the following provisions of this section, any person may apply to the High Court or the family court for a declaration as to whether or not a person named in the application is or was the parent of another person so named. DZ’s case Issue 1: Declaration of parentage/non-parentage
25. A declaration of parentage or, in this case, non-parentage, confirms an existing status. With respect to the application for a declaration of parentage, Section 55A FLA 1986 (as amended) allows any person to apply for a declaration as to whether a person is or is not the parent of another person.
26. In Re A & Ors (Human Fertilisation and Embryology Act 2008) [2015] EWHC 2602 (Fam), the then President Sir James Munby restated the principle that; “It is elementary that a declaration cannot be granted by consent or by default. There must be a proper examination

by the court of the relevant facts, assessed in the light of the applicable law, before a judge can be satisfied, as he must be if the relief sought is to be granted, that the claim for the declaration is indeed made out: see, for example, *Wallersteiner v Moir* [1974] 1 WLR 991.” [12] It follows therefore that a trial judge must make a declaration on the evidence before the court.

27. In *Re G* (Declaration of Parentage: Removal of Person Identified as Mother from Birth Certificate) (No 2) [2018] EWHC 3361 (Fam), Sir James Munby P made orders under Section 55A FLA 1986 which he described as a declaration of non-parentage where a genetic but non- gestational mother had been incorrectly recorded as a parent on the child’s birth certificate. This was affirmed by Peter Jackson LJ in *P v Q & F* (Child: Legal Parentage) [2024] EWCA Civ 878; THE HONORABLE MRS JUSTICE LIEVEN Approved Judgment Double-click to enter the short title “Section 55A FLA 1986 empowers the court to make one or more declarations as to whether or not a named person is or was the child’s legal parent. In order to reach a conclusion, the court may have to decide issues both of fact and law, as it did in this case. Its focus is on the relationships identified in the application, but it must reach its conclusion by normal processes of fact-finding and legal analysis, leading to a conclusion that a named person is or is not the legal parent of the child.” [38] (emphasis added)
28. Ms Fottrell accepts that the Applicant is not DZ’s father because: i. ii. the Applicant did not fall within the ambit of Section 35 HFEA 2008 because he and the Respondent were not married at the time of DZ’s conception; and the Applicant did not fall within the ambit of Section 36 HFEA 2008 because the treatment did not take place in a licenced clinic and the agreed fatherhood conditions were not satisfied.
29. Therefore, the case for the declaration of non-parentage is made out. Issue 2: Step-parent adoption
30. The only way the Applicant can secure the legal status of parent to DZ is by way of an adoption order. That order has the effect of extinguishing XX’s legal parenthood and conferring that status on the Applicant, following Section 67 of the Adoption and Children Act 2002 (ACA). The legal parentage of the Respondent is unaffected.
31. The Annex A report was completed on 14 January 2025. It is a wholly positive report in respect of the Applicant and Respondent. It concludes; “...I am able to recommend that an Adoption Order as the sole option in this matter. It would fully confirm and recognise the role that FZ is taking with regard to [DZ]. In addition it would provide confirmation of the parenting partnership he and his wife wish to provide [DZ]. Most importantly, it is the only Order that fully secures legal and emotional permeance for [DZ] and her future.”
32. In compliance with the order of Harris J dated 7 November 2024, CAFCASS have provided a letter to the Court dated 17 February 2025 where they raise no safeguarding concerns and support a final order being made.

33. In accordance with the provisions in Section 44 ACA, the Applicant gave notice to Y Council of his intention to apply for a step-parent adoption order in March 2024. By a letter dated 21 March 2024, the Adoption Agency acknowledged receipt of the Applicant's letter. The Respondent mother's consent to the step-parent adoption order was recorded on 9 July 2025, witnessed by the CAFCASS officer.
34. The Applicant satisfies the 'adoption preliminaries' in Sections 42, 49, and 52 ACA, which are relevant to this application; i. Section 42(3): "If the applicant or one of the applicants is the partner of a parent of the child, the condition is that the child must have had his home with the applicant or, as the case may be, applicants, at all times during the period of six months preceding the application." DZ has had her home with both the Applicant and the Respondent since birth. ii. Section 49(3): the Applicant has "been habitually resident in a part of the British Islands for a period of not less than one year ending with the date of the application". THE HONORABLE MRS JUSTICE LIEVEN Approved Judgment Double-click to enter the short title It is axiomatic that habitual residence is a question of fact and that the Court is obliged to take "a global analysis of all the relevant circumstances" to identify the applicant's habitual residence (per Moylan LJ in *Re M (Children) (Habitual Residence: 1980 Hague Child Abduction Convention)* [2020] EWCA Civ 1105). The Applicant has lived in this jurisdiction since birth and is plainly fully integrated into daily life in England (e.g. he lives and works here, and receives healthcare here). iii. iv. Section 49(4): "the person to be adopted has not attained the age of 18 years on the date of the application." This is satisfied in light of DZ's age. Section 52 on parental consent: The Respondent is DZ's legal mother. She has provided her consent to DZ's adoption. A 'parent' under Section 52(6) ACA is defined as anyone with parental responsibility. Therefore, the donor, XX, does not need to give consent.
35. *Re P (Step-parent adoption)* [2014] EWCA Civ 1174 is the leading authority in respect of step-parent adoptions. All the criteria referred to in that case are met.
36. More recently, in *Re H (Surrogacy: Step parent adoption)* [2023] EWFC 214, Theis J made a step-parent adoption order following a surrogacy arrangement where a step-parent adoption order was considered to carry greater welfare benefits for the child over a parental order.
37. For all these reasons I have no hesitation in making the step-parent adoption order sought.
Issue 3: Judicial Review claim
38. The legal effect of a declaration of non-parentage is to remove the Applicant's name from DZ's birth certificate. However, the initial registration remains on the register of births and deaths and is simply struck through manually. The lasting 'mark' makes it known that an error occurred in respect of DZ's birth registration and, in particular, potentially exposes the Applicant's status as a transgender man, if someone were to check the Register. The Applicant seeks to remedy this by way of a quashing order so that the erroneous registration is expunged from the record.

39. In making this claim, the Applicant seeks to restore himself to the position he would have been in had the error not been made. This was first considered by Sir James Munby P in *Re K (Human Fertilisation and Embryology Act 2008)* [2017] EWHC 50 (Fam), who made it plain that there was no statutory power to register a birth afresh. Similarly in *Osborne v Arnold* [2022] EWHC 1982 (Admin) and EWHC 1983 (Fam), MacDonald J, endorsing Munby P in *Re K*, observed that if a party sought a fresh registration of a birth, the remedy is judicial review “...where the Registrar General has no statutory power to register afresh, if such a course of action is sought judicial review lies to quash the registration of birth if there has been an error of law on the part of the Registrar.” [29]
40. *Osborne v Arnold* also confirms that in order for a new birth registration to take place (rather than a re-registration), the existing birth registration would need to be quashed. This can only be achieved by judicial review.
41. The principal benefit of pursuing a quashing order is that a new registration, further to the quashing of the existing one, would show no markings on the birth certificate. As MacDonald J observed in *Osborne v Arnold*: “Within this context and as I noted during the hearing, whilst having a superficially bureaucratic character, administrative steps such as the registration of a birth are THE HONORABLE MRS JUSTICE LIEVEN Approved Judgment Double-click to enter the short title absolutely fundamental to an individual's identity (both as a unique and separate individual and as a recognised member of society), legal status and familial relationships. Within this context, Art 7 of the United Nations Convention on the Rights of the Child stipulates that a child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, a right to know and be cared for by his or her parents. Within this context, the seemingly mundane administrative act of correctly registering a birth carries with it enormous significance for child and parents. It is a decisively important step both in ensuring legal proof of identity and civil status and as the foundation on which a personal identity is built. It is vital that it the process is undertaken correctly.” [38]
42. On 17 December 2024, the Court granted permission to the Applicant/Claimant to bring a judicial review claim out of time.
43. The Defendant local authority, and the Interested Party, the Registrar General, do not oppose the claim, as recorded in the acknowledgment of service dated 31 March 2025, and the e-mail dated 13 February 2025 from the GLD on behalf of the Registrar General which, inter alia, observed; “I have taken instructions from the office to the Registrar General ... to the effect that he would not wish to oppose the application for judicial review, since the grounds of review accurately reflect the legal position. Further, it is agreed that the birth registration entry for [DZ] is inaccurate, and the Registrar General does not have the power to authorise or action a fresh registration. The local registration service, the Defendant in these proceedings, can only issue a new registration if the Court were to quash the original registration.”

44. I therefore accept that the judicial review should be allowed and the original birth certificate be quashed. AZ's case
45. In AZ's case the Applicant seeks a declaration of parentage under Section 55A FLA 1986 that he is the father of AZ, and a child arrangements order that AZ lives with him and the Respondent. The latter order is not contentious. However, the former application raises difficult and highly contentious issues. The question is whether the Applicant, a transgender man with a GRC who is married to the mother (the Respondent), can be registered as AZ's father. This raises the interaction between Section 12 GRA and Section 35 HFEA 2008, set out at paragraphs [20] and
- [22] above.
46. By Section 35(1) HFEA 2008, where a woman (the Respondent) is married to "a man" at the time of the conception then he can be registered as "the father". The issue, in summary, is that under Section 9(1) GRA a person with a GRC is for all purposes the acquired gender, here male. However, Section 9(3) makes Section 9(1) subject to the other provisions in the Act. Section 12 states that the fact that the person's gender has become the acquired gender "does not affect the status of the person as the father or mother of a child". It is the extent of this exclusion or exemption which is central to this case.
47. Ms Fottrell submits that the proper interpretation of the statutory provisions is that the Applicant can be registered as AZ's father. Further, she submits that if the Court does not accept that this is the proper domestic interpretation of the provisions, then I should apply the principle that the statutory provisions should be read compatibly with Article 8 of the European Convention on Human Rights (ECHR) and, if necessary, the statutory interpretative duty in Section 3 HRA should be applied to reach an ECHR compatible outcome. In her Skeleton Argument for the hearing, Ms Fottrell focused on domestic caselaw and did not refer to Section 3 HRA. However, I THE HONORABLE MRS JUSTICE LIEVEN Approved Judgment Double-click to enter the short title allowed her a period of time to put in further written submissions on Section 3 in the light of the oral submissions.
48. On my analysis three issues arise. Firstly, what is the proper interpretation of the relevant statutory provisions. Secondly, if that interpretation leads to the conclusion that the Applicant cannot be registered as the father, does that create a breach of Article 8. Thirdly, if there is a breach of the Applicant's Article 8 rights, does the interpretative duty under Section 3 HRA mean that I can read the provisions to allow the Applicant to be registered as the father. The caselaw
49. Although there is no caselaw directly determinative of the issue here, Ms Fottrell referred to three domestic cases which she said were particularly relevant to whether a transgender man can be registered as the father of a child under the HFEA 2008, and the interrelationship between the HFEA 2008 and the GRA.

50. In *R (on the application of JK) v The Secretary of State for the Home Department & Anor* [2015] EWHC 990 (Admin), Hickinbottom J (as he then was) was concerned with an application in respect of a transgender woman (“JK”) who was the biological father of the child and had acquired a new gender after the child was born. JK sought to be registered as the child’s mother. This was in contrast to *McConnell*, which I refer to below, where the parent had acquired their new gender under a GRC before treatment and thus before the child was born. In JK, the claim for judicial review failed and the judge found that the claimant could not be registered as the mother.
51. *R (on the application of McConnell) v The Registrar General for England and Wales* [2020] EWCA Civ 559 was an appeal (Lord Burnett CJ, King and Singh LJJ) from Sir Andrew McFarlane (P (*R (on the application of TT) v The Registrar General for England and Wales* [2019] EWHC 2384 (Fam))). I will refer to these judgments as “*McConnell*”. The case concerned a transgender man who held a GRC at the time of treatment undertaken at a UK licensed clinic. Using anonymous donor sperm and his eggs, he subsequently gave birth to the child. He was therefore both the gestational and birth mother. By his claim for judicial review, he sought, inter alia, to challenge the Registrar’s decision to register him as the “mother” of the child, rather than as the child’s father or parent. Both Courts upheld the decision of the Registrar that the Claimant should be registered as the “mother”. Both Courts considered the interrelationship between Section 9 and Section 12 GRA and I will refer below to some parts of the judgments relevant to the overall approach and to the statutory scheme.
52. On a straightforward level *McConnell* would appear to be contrary to the Applicant’s case, because the Court of Appeal refused to order that Mr McConnell be registered as the child’s father, despite the fact that he had a GRC. However, Ms Fottrell seeks to distinguish *McConnell* on two bases. Firstly, the ratio of *McConnell* turned on the claimant’s role as the biological mother (both in terms of his eggs and the fact that he gave birth to the child), which led to the conclusion that he should not be registered as the “father”. Secondly, *McConnell* did not concern a situation where the claimant was married to the birth mother, and therefore Section 35 HFEA 2008 was not in issue in that case.
53. Before the Court of Appeal there were two arguments. Firstly, whether Section 12 GRA was retrospective only or whether it could have prospective effect. Mr McConnell argued that the fact that he gave birth to the child after he had acquired the GRC meant that he should be treated as a man and should be registered as the father. The Court of Appeal rejected this argument on the basis of the statutory interpretation of Section 12, holding that the provision was both retrospective and prospective in effect, see [30] – [43]. This issue does not arise in the present case. THE HONORABLE MRS JUSTICE LIEVEN Approved Judgment
- Double-click to enter the short title

54. The second issue was whether the domestic law requirement that Mr McConnell should be registered as the mother was a breach of his Article 8 rights and was therefore incompatible with his ECHR rights. The Court found that there was an interference with Mr McConnell's rights under Article 8(1), see [56]. However, the Court found, applying the Bank Mellat test, that the interference was in accordance with law, pursued a legitimate aim, and was proportionate.
55. In its reasoning, the Court considered matters which are relevant to the present case, including: the rights of children and the maintenance of a clear and coherent scheme for registration [58]; the approach to proportionality in this area of difficult social, ethical and political questions [51]; and the need to create a coherent framework [63]. However, the Court did also consider the issue that does not arise in the present case, namely the very specific and unique position of a birth or gestational mother. The most important paragraphs for the purposes of this case are set out below, but the entire judgment of both the PFD and the Court of Appeal are relevant; "[54] On that interpretation (which the High Court accepted and which we also would accept on the natural interpretation of the legislation) the general effect of s 9(1) of the GRA is displaced to the extent that an exception to it applies. For present purposes the relevant exception is contained in s 12. It follows that, although for most purposes a person must be regarded in law as being of their acquired gender after the certificate has been issued, where an exception applies, they are still to be treated as having their gender at birth. For that reason, in our view, it is not possible simply to say that Parliament has 'de-coupled' the concept of 'mother' from gender, as Mr Jaffey suggested at the hearing before us. This appears to be how the Authority has interpreted the effect of the judgment of the High Court in the present case by amending its code of practice in December 2019 to reflect this point: see para 6.30. ...
- [58] The second question is whether there is a legitimate aim for the interference. There clearly is. It consists of the protection of the rights of others, including any children who are born to a transgender person, and the maintenance of a clear and coherent scheme of registration of births. It is important in this context to bear in mind that this is a question to be addressed at a general level. It does not turn on the facts of this or any other particular case. The question is not whether it would be in the best interests of YY to have the person who gave birth to him described as his mother on the long-form birth certificate. The question is whether the rights of children generally include the right to know who gave birth to them and what the persons' status was.
- [62] First, the context is one in which difficult and sensitive social, ethical and political questions arise.
- [65] Furthermore, as Mr Jaffey submitted, it cannot simply be a question of this court substituting a word such as 'parent' for the word 'mother'. This is because the word 'parent' has a distinct meaning which has been given to it by Parliament in other legislation. This has been the product of considered legislative change, over several decades, in various statutes, including the HFEA 1990 and the HFEA 2008. The legal position under the HFEA

2008 was succinctly summarised by Helen Mountfield QC (sitting as a deputy High Court judge) in *R (on the application of K, a child, by her litigation friend MT) v Secretary of State for the Home Dept* [2018] EWHC 1834 (Admin), [2018] 1 WLR 6000 (at para [51]): THE HONORABLE MRS JUSTICE LIEVEN Approved Judgment Double-click to enter the short title ‘... under the 2008 Act, at birth a child always has one mother, who is the woman who bore her; may also have a female or male co-parent; may never have more than one male parent; and may not have more than two parents by birth.’ ...

- [79] Fourthly, and related to the third point, there is no European consensus in the Council of Europe on the issue which arises in the present appeal. The evidence suggests that some states have taken the step of reforming their law so as to achieve what in effect the Applicants seek to achieve. In a majority of jurisdictions, however, where legislation or case law exists, a person who gives birth to a child, irrespective of their legal gender, has to be registered as that child’s ‘mother’: see the report of Peter Dunne, a lecturer in law at the University of Bristol, dated 3 August 2018, at para 88. ...
- [80] That point is relevant to what the Strasbourg Court describes as the ‘margin of appreciation’ to be afforded to the Contracting States in the application of the Convention. The concept of a margin of appreciation is not directly relevant when courts in this country apply to the HRA. This is because it is a concept of international law and not domestic law, governing the relationship between an international court and Contracting States. Nevertheless, it is well established that there is an analogous concept which does apply in domestic law under the HRA, which has been variously described as a ‘discretionary area of judgment’, a ‘margin of discretion’ or in other ways, for example to refer to the appropriate weight which is to be given to the judgment of the executive or legislature depending upon the context: see eg *R v DPP, ex p Kebeline*, *R v DPP, ex p Rechachi* [1999] 4 All ER 801 at 844, [2000] 2 AC 326 at 381 (Lord Hope of Craighead); and *A v Secretary of State for the Home Dept*, *X v Secretary of State for the Home Dept* [2004] UKHL 56, [2005] 3 All ER 169, [2005] 2 AC 68 (at para [39]) (Lord Bingham of Cornhill). For convenience we will refer here to the ‘margin of judgment’. ...
- [87] Strictly speaking the grounds of appeal before this Court did not raise art 14 of the Convention, which confers the right to equality in the enjoyment of the other Convention rights. Nevertheless, we heard short submissions about it from the AIRE Centre. We can deal with this argument briefly. Like the President, at paras [274]-[277] of his judgment, we consider that art 14 raises no separate issue in the circumstances of this case. Any difference of treatment which is contained in the relevant legislation is objectively justified for the reasons we have already set out in relation to art 8.”

56. There are two linked cases of the European Court of Human Rights (ECtHR) which are relevant to the issues in this case: OH and GH v Germany [2023] ECHR 205 and AH and Others v Germany [2023] ECHR 396. These are the cases which were pending in Strasbourg at the time of McConnell, and the German Federal Court decision is referred to by the Court of Appeal at [71] – [77].
57. In OH, the applicant was a natal female and later obtained legal recognition of gender change to male. He gave birth to the second applicant (“the child”), conceived using donor sperm. The child’s birth certificate recorded the applicant as the “mother”. The case was therefore factually very similar to McConnell.
58. In the case of AH and Others, the first applicant was a natal male who obtained legal recognition of gender change to female. The second applicant was her partner, who gave birth to the third applicant (“the child”). The child had been conceived by using the first applicant’s sperm and therefore the first applicant was the child’s biological father. The first applicant was recorded as the child’s father on the birth certificate. Both applicants sought to be registered as the child’s THE HONORABLE MRS JUSTICE LIEVEN Approved Judgment Double-click to enter the short title mothers. The domestic courts and civil registration authorities refused, notwithstanding the gender changes recognised by the courts before the children were conceived.
59. The facts of AH are different from the present case, but much of what the ECtHR said is of relevance, particularly at [114]; “114. The Court then observes that there is no consensus among the European States on how to indicate in the civil registers concerning a child that one of the persons having the status of parent is transgender. As is apparent from the data published by the organisation Transgender Europe (see paragraph 69 above), only five States have provided for the possibility of including in those registers a reference to the recognised sex, whereas the majority of States continue to designate the person who has given birth to a child as the mother of the child and to allow the person who has contributed to the fertilisation by his sperm to recognise his paternity in respect of the child. of the child. This lack of consensus reflects the fact that parenthood of a person who has changed gender raises delicate ethical questions, and confirms that States should in principle be granted a wide margin of appreciation.
115. Finally, the Court notes that the German authorities were called upon to balance a number of private and public interests against a number of divergent rights: first, the applicants' rights; secondly, the applicant's fundamental rights and interests, that is to say, his right to know his parentage and his interest in being stably connected to his parents; rights and interests which, according to the considerations set out by the Federal Court of Justice in its landmark decision of 6 September 2017, to which that high court referred extensively in its decision in the present case (see paragraphs 49-58 above), were not to be found where the applicants saw them (Mandet, cited above, §§ 57 and 59); and finally, the public interest lies in the coherence of the legal order and in the accuracy and completeness of civil status registers, which have particular probative value. That fact also militates in favour of the

existence of a wide margin of discretion.

116. Therefore, in the light of all those circumstances, the Court considers that the German authorities had a wide margin of discretion in the present case.”
60. The Court went on to balance the interference, the wide margin of appreciation, and the practical implications of the decision on the applicant, and concluded at [132]; “Therefore, having regard, first, to the fact that parent-child relationship between the first applicant and the applicant was not called into question per se and to the limited number of situations which may lead, when the applicant’s birth certificate is presented, to the disclosure of the first applicant’s transgender identity, if she were entered as the applicant’s father in the register of births, and, on the other hand, to the wide margin of appreciation enjoyed by the respondent State (see paragraph 116 above), the Court considers that the German courts have struck a fair balance between the applicants’ rights, the applicant’s interests, considerations relating to the child’s welfare and the public interests.”
61. In *For Women Scotland Ltd v The Scottish Ministers* [2025] UKSC 16, the Supreme Court considered the correct interpretation of the Equality Act 2010 (EA 2010) as it applies to give statutory protection to individuals at risk of suffering unlawful discrimination. The Supreme Court decision is of limited direct relevance to the present case because it concerned the relationship between Section 9 GRA and the terms of the EA 2010. It did not address Section 12 GRA or the terms of the HFEA 2008. The domestic law interpretation THE HONORABLE MRS JUSTICE LIEVEN Approved Judgment Double-click to enter the short title
62. Ms Fottrell submits that the Applicant can be registered as the father pursuant to Section 35 HFEA 2008 because he was married to the mother at the time of conception. She relies on the statutory scheme under the HFEA 2008 and the particular status that Section 35 accords to the husband/civil partner of the mother, but who is not himself the biological father. She points out correctly that this provision mirrors the long-standing position at common law that the husband of a woman who gives birth can be lawfully registered as the father, whether or not he is the biological father. Therefore, the fact that the Applicant is not the biological father of the child does not prevent him from being registered in English law as the father.
63. AZ’s biological father, XX, has given his consent to the Applicant being registered as the father. In terms of the statutory scheme, XX is not named on the birth certificate, and there is no legal requirement that he should be. Therefore, naming the Applicant on the birth certificate (on the basis of his marriage to the mother) does not conflict with the statutory scheme or undermine any rights that the child would otherwise have to know his biological parentage.
64. Ms Fottrell distinguishes McConnell on the basis of the fact that Mr McConnell gave birth to the child, and as a matter of biological reality was therefore the child’s mother. This was central to the Court of Appeal, and the President’s, reasoning in their decisions. Therefore, the justification of the child’s right to biological certainty as to their parentage, and the need

to maintain a coherent and consistent statutory scheme, was very clear. She submits that the same reasoning applies in OH and AH and Others, where in both cases the applicants were seeking to reverse the biological reality of the child's parentage, by reason of their legally recognised transgender status. She refers to Dunne and Browne in the Cambridge Law Journal (2024 p. 490), who describe this as "... in contexts where legal parenthood is determined by gendered biological contributions to reproduction: legal motherhood due to gestation and legal fatherhood due to a genetic contribution".

65. However, in the present case, the Applicant has no biological link to the child and seeks to be registered as the father on the basis of his marriage to the mother. Therefore, the concern that lay at the heart of the Courts' concerns in McConnell, to retain what might be described as the biological reality of parenthood, does not apply here.
66. She further submits that if the Applicant cannot be registered as the father under Section 35, then the statutory scheme in the HFEA 2008 loses coherence. The Applicant cannot be registered as a second female parent under Section 42 because he is not married to the mother (the Second Respondent) as being a woman. If the Applicant cannot be registered as a parent under any provision, which would be the result of the Court rejecting his application, then that is a clear breach of his Article 8 rights.
67. In terms of a domestic question of statutory construction based simply on the words of the two statutes, in my view, the Applicant's case must fail. The Supreme Court considered the approach to statutory interpretation in *R (Project for the Registration of Children as British Citizens) v Secretary of State for the Home Department* [2022] 2 WLR 343. Lord Hodge said at [29]; "29. The courts in conducting statutory interpretation are "seeking the meaning of the words which Parliament used": *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1975] AC 591, 613 per Lord Reid of Drem. More recently, Lord Nicholls of Birkenhead stated: "Statutory interpretation is an exercise which requires the court to identify the meaning borne by the words in question in the particular context." (*R v Secretary of State for the Environment, Transport and the Regions, Ex p Spath Holme Ltd* [2001] AC 349, 396). THE HONORABLE MRS JUSTICE LIEVEN Approved Judgment Double-click to enter the short title Words and passages in a statute derive their meaning from their context. A phrase or passage must be read in the context of the section as a whole and in the wider context of a relevant group of sections. Other provisions in a statute and the statute as a whole may provide the relevant context. They are the words which Parliament has chosen to enact as an expression of the purpose of the legislation and are therefore the primary source by which meaning is ascertained. There is an important constitutional reason for having regard primarily to the statutory context as Lord Nicholls explained in *Spath Holme*, 397: "Citizens, with the assistance of their advisers, are intended to be able to understand parliamentary enactments, so that they can regulate their conduct accordingly. They should be able to rely upon what they read in an Act of Parliament.""

68. The focus of statutory interpretation must, in the first instance, be on the words of the statute read in their context, and then on the apparent Parliamentary intent, in part demonstrated by the statutory scheme.
69. To fall within Section 35 HFEA 2008 the Applicant has to be “a man” within the meaning of the provision, which allows a man who is party to a marriage with a woman to be treated as the father. The Applicant’s case rests on the fact of his GRC, which recognises him as a man. It is because he is legally recognised as a man that he can rely on Section 35 HFEA 2008.
70. By Section 9(1) GRA the effect of the GRC is that the person’s gender becomes the acquired gender for all purposes. However, that is subject to Section 9(3), which makes Section 9(1) subject to any other provision in the Act. Section 12 GRA says that the fact that someone has an acquired gender (i.e. has a GRC) “does not affect the status of the person as the father or mother of a child”. The issue for the purpose of statutory construction therefore becomes whether the provisions of the HFEA 2008, and in particular Section 35, concern the Applicant’s “status as the father”.
71. The complication is that for the purposes of the marriage the Applicant did enter it as a man, because the GRC had effect for that purpose. Ms Fottrell’s argument is that it therefore continues to have effect for the purpose of Section 35 HFEA 2008. However, in my view, that is to ignore the words and effect of Section 12 GRA, which is clear in its terms. Section 35 is clearly concerned with the Applicant’s status as AZ’s father. The very purpose of Part 2 of the HFEA 2008 and the provisions in Sections 35-48 is to confer the status of parenthood on various categories of person, whether the individual in question should be treated as mother, father, or other parent. I note that Part 2 is headed “Parenthood in cases involving assisted reproduction”.
72. It therefore follows that the fact that the Applicant has become a man pursuant to Section 9 GRA for the purposes of his marriage to the Respondent does not affect whether or not he can acquire the status of “father” under the parenthood provisions of Section 35 HFEA 2008. That is the effect of Section 12 GRA.
73. I appreciate that the basis of the Applicant’s application is as the husband of the mother, but under Section 35 he has to be “a man” in order to achieve the status of father. Therefore, although it could be said that the legal effect of the GRC is at the earlier stage of the marriage, the Applicant’s case still rests on the existence of the GRC in order to be registered as the father. Therefore, in my view, the Applicant cannot rely on the GRC for the purposes of Section 35 because of the effect of Section 12 GRA. I return to this analysis in more detail below under the consideration of the HRA issues at [95] onwards.
74. It is of some relevance that the HFEA 2008 postdates the GRA 2004. In the GRA, Parliament made a clear decision, as set out in Section 12, that the acquisition of a GRC would not affect the status of parenthood. Four years later, in the HFEA 2008, Parliament set out a very detailed THE HONORABLE MRS JUSTICE LIEVEN Approved Judgment Double-click to enter the short title scheme dealing with the acquisition of parenthood in various different

scenarios. However, Parliament made no amendment to Section 12 GRA in the HFEA 2008, even though they were expressly dealing with issues concerning the acquisition of the status of parenthood.

75. This analysis accords with that of the Court of Appeal, and Sir Andrew McFarlane, in *McConnell*. *McConnell* concerned a transgender man who was the birth mother of the child, which is not the case here. Therefore, the issue that I have characterised above as being the maintenance of “biological reality” does not arise in the present case, so parts of the reasoning of the President and the Court of Appeal do not apply. However, the basic proposition that the effect of Section 12 GRA was to prevent a transgender man relying on the GRC to be registered as the father applies to the present case, albeit the Court did not consider Section 35 HFEA 2008.
76. Therefore, on a pure domestic law interpretation, my conclusion is that the Applicant cannot be registered as the father. The Human Rights Act 1998 analysis
77. The next issue is the effect of Article 8 ECHR and the HRA on the above analysis. If the conclusion I have reached above, that the Applicant cannot be registered as AZ’s father, breaches the Applicant’s Convention rights, then the Court has to consider whether the interpretative duty under Section 3 HRA can be used to avoid such a breach.
78. Article 8 of the ECHR states;
 - (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.
79. The first question under Article 8(1) is whether the conclusion that the Applicant cannot be registered as AZ’s father interferes with his Article 8 rights. If there is an interference, I will then follow the structure set out in *McConnell* by the Court of Appeal at [57] – [59]: The first question under Article 8(2) is whether the interference is “in accordance with law” [57]; The second question is whether there is a legitimate aim for the interference [58]; The third question is whether the interference complies with the principle of proportionality as set out in *Bank Mellat* [59].
80. The importance of respecting the rights of transgender people and making lawful provision for them was clearly established in *Goodwin v United Kingdom* [2002] EHRR 447. Further, the right to respect for family life includes the entitlement of a child to be legally recognised as a child of their parent. *Marckx v Belgium* (application no. 6833/74) (1979) 2 EHRR 330, concerned a case about a child born to an unmarried mother who was required to go through a legal process of maternal affiliation to establish her own legal parentage. The

ECtHR ruled that it was the court's responsibility to "guarantee not rights that are theoretical and illusory but rights that are practical and effective" [31] and went on to say at [40] that; "The court recognises that support and encouragement of the traditional family is in itself legitimate or even praiseworthy. However, in the achievement of this end recourse must not be had to measures whose object or result is, as in the present case, to prejudice the "illegitimate" family; the members of the "illegitimate" family enjoy the guarantees of THE HONORABLE MRS JUSTICE LIEVEN Approved Judgment Double-click to enter the short title Article 8 (art. 8) on an equal footing with the members of the traditional family." (emphasis added)

81. In McConnell, the respondents conceded that there was an interference with the appellants' Article 8 rights, see [52], and the Court of Appeal explained at [53] – [56] why they agreed with that concession.
82. For essentially the same reasons I accept that there is an interference here. The Applicant acts, and has since before AZ's birth, acted as AZ's parent and indeed his father. He and the Respondent live together as husband and wife and act, in terms of their parenting (rather than biological) relationship, as father and mother to the children. They present as such both to AZ and the outside world. An inability to register as AZ's father interferes in respect of the Applicant's family life because the State does not acknowledge the Applicant's relationship to AZ through the medium of the birth certificate. It also interferes with the Applicant's private life because it does not acknowledge his status as father to AZ.
83. AZ himself is not a party to the proceedings, but I will proceed on the basis that there is also an interference with his private and family life. As I have explained above, the practical reality of AZ's life is that the Applicant acts as his father and is married to his mother. I therefore accept that the inability to register the Applicant as AZ's father interferes both with AZ's right to family life and his private life.
84. I turn next to Article 8(2) and whether the interference is justified. The starting point under Article 8(2) is whether the provision or decision is "in accordance with law". The provisions here are in primary legislation and are accessible, clear and proportionate, so there can be no doubt that that requirement is met.
85. The second question is whether there is a legitimate aim for the interference, see McConnell at [58], set out above.
86. The issue of whether this is a legitimate aim is closely related to the third question of whether the measure is proportionate. The requirements of proportionality in the human rights context are now well established, see the decision of the Supreme Court in *Bank Mellat v HM Treasury (No 2)*

[2014] AC 700 (at [20] (Lord Sumption JSC) and [74] (Lord Reed JSC)). There are four questions to be asked:

- (i) Is there a sufficiently important objective which the measure pursues? (ii) Is there a rational connection between the means chosen and that objective? (iii) Are there less intrusive means available? (iv) Is there a fair balance struck between the rights of the individual and the general interests of the community?
87. In approaching the question of legitimate aim and proportionality under Article 8(2) it is important, as the Court of Appeal said in *McConnell* at [61] – [62], to emphasise some of the fundamental features of this case. Firstly, the context is “one in which difficult and sensitive social, ethical and political questions arise”, see *McConnell* at [62]. Secondly, it is an area in which there is very little consensus, whether domestically or across the Council of Europe States, see *AH and Others* at [114], as set out above. The degree of lack of consensus is well known, see *McConnell* at [79] and the scope of the arguments in *For Women Scotland*. Thirdly, there was a clear decision by Parliament in Section 12 GRA, both to exclude issues of the status of parenthood from the provisions of the GRA in 2004, and not to revisit that decision in the HFEA in 2008, when issues of how parenthood could be acquired were considered in great detail for the purposes of that legislation. THE HONORABLE MRS JUSTICE LIEVEN Approved Judgment Double-click to enter the short title
88. Ms Fottrell submits that the legitimate aim relied upon in *McConnell* at [58] does not apply in the present case. The Applicant did not give birth to the child so by recording the Applicant as the father there is no denial or changing of a biological relationship.
89. Further, she submits that the HFEA 2008 expressly contemplates that the biological father of a child may be unknown, for example with an anonymous sperm donor or where the mother says that she does not know who the father is. The position of the Applicant is therefore entirely different from that of the person who gave birth to the child, who has that undoubted biological connection, and therefore should always be registered as the mother. The right under the statutory scheme is for the child to know who their mother is, not necessarily who their father is.
90. The HFEA 2008, and indeed HFEA 1990, specifically contemplate that for children conceived by sperm donation the importance of them knowing their biological father is obviated. Further, a woman could have an embryo placed into her uterus, where she has no biological connection with the embryo, but she would still be named as the child’s mother. So, it is plain that the scheme under the HFEA 2008 is not simply focused on the biological and genetic reality, but expressly allows people to be registered as the parent, whether father or mother, in a variety of different situations.
91. Ms Fottrell submits that the public interest in having a clear and coherent scheme of registration is therefore not undermined if the Applicant is named on AZ’s birth certificate. To do so accords with the statutory scheme, because at the time that AZ was conceived his parents were married and each consented to the Respondent’s fertility treatment. Ms Fottrell therefore submits that the public interest in having a “clear and coherent scheme of registration” is entirely consistent with having the Applicant named as the father by reason

of his marriage to the mother. Marriage accords a particular status under the HFEA 2008 and the common law. That is contemplated in the HFEA 2008 and is what is achieved by the application.

92. Further, she submits that in terms of any public interest or legitimate aim in the right of the child to know their biological origin (and here the Applicant is not the biological father), that is obviated by the fact that if the Applicant were named as the “second parent” on the birth certificate that would not accord with his status as the mother’s husband.
93. The Applicant is and will be for all other purposes the child’s father, socially, psychologically and emotionally. Therefore, from the child’s perspective, his Article 8 rights are respected if this day- to-day reality is reflected in the birth certificate.
94. I start with the question of whether there is a legitimate aim for the interference. I accept that the effect of the exclusion in Section 12 GRA is different in the present case from that in McConnell, and that the issue is less straightforward. This is for two reasons: first, the biological fact that Mr McConnell was the child’s birth mother and the Applicant is not; second, the fact that the Applicant is married to the mother as a man. The right alluded to in the last sentence of [58] in McConnell, the right of a child “to know who gave birth to them”, therefore does not arise here.
95. However, the aim or purpose of Section 12 GRA is broader than merely to protect the biological fact of the mother having given birth to the child, and therefore being registered as the mother, and not father, of the child. The purpose of Section 12 GRA is expressly to exclude the status of parenthood, whether as mother or father, from the legal effect of having obtained a GRC pursuant to Section 9. The language is not limited to particular issues within that status, such as the biological reality of having given birth or having a biological connection to the child. Section 12 applies to the “status of the person as father or mother”, without limitation. The Parliamentary intent, and thus the objective of the legislation, was to carve out this legal area (the status of parenthood) from the effect of the creation or legal acceptance of an “acquired gender”, as allowed for in Section 9 GRA. The maintenance of a “clear and coherent scheme of registration of THE HONORABLE MRS JUSTICE LIEVEN Approved Judgment Double-click to enter the short title births”, per McConnell at [58], is one part of what Section 12 is achieving; but it is, in my view, doing more than that. It is aiming to remove the acquisition of rights under Section 9 GRA from determinations for the acquisition of parenthood, whether through biological reality or the legal effect of marriage.
96. The question of whether that aim is “legitimate” is one fraught with issues of social policy, ethical judgements, and morality. It is clear from both McConnell and AH and Others that this is an area of social policy where there is a wide margin of appreciation accorded to the legislature, both on a European and domestic level. Ms Fottrell referred to For Women Scotland, a case which has received a very large amount of public comment. However, the judgment of the Supreme Court is entirely concerned with the statutory interpretation of the Equality Act 2010 and the meaning of “woman” within that Act. The scope of Section 9(3)

GRA was in issue, but not with regard to the scope of the express exclusion of parenthood in Section 12. The HFEA 2008 was not in issue at all. Therefore, that case is, perhaps surprisingly, of little relevance to the issue in the present case, save that it shows how sensitive and controversial these issues are.

97. As I have said above, the aim being pursued in Section 12 GRA is to stop the extension of the legal effect of a GRC to the status of parenthood. Therefore, biological sex, rather than acquired sex or gender, remains determinative for the status of parenthood. Although there may well be strongly divergent views as to whether this aim is “legitimate”, it is, in my view, capable of being such.
98. I turn then to the proportionality questions set out at [20] of *Bank Mellat*. On the facts of this case, the issues under the four questions are very closely inter-linked, and all ultimately come back to whether the maintenance of the biological sex of the individual, for the purposes of registering parenthood, is sufficiently important to justify the interference under Article 8(1). That is, in my view, ultimately a policy question which I consider to be more institutionally appropriate for Parliament than the Court for the reasons I now set out. In considering this question I have had regard to the decision of the Supreme Court in *R (Nicklinson) v Ministry of Justice* [2014] 3 WLR 200, and in particular the speeches of Lord Neuberger and Lord Mance. That case concerned the law on assisted dying, and therefore the factual context was entirely different. However, the Supreme Court was determining, inter alia, whether to find a breach of Article 8 ECHR in relation to an issue that was both highly controversial, with no clear consensus, and which raised very difficult social and ethical issues (albeit very different ones from the present case). Therefore, the approach taken by the Supreme Court is, to that extent, of some relevance to the approach in the present case.
99. Lord Neuberger, who was in the majority on this issue, did not support making a declaration of incompatibility under the HRA, saying at [116]; “... the question ... raises a difficult, controversial and sensitive issue, with oral and religious dimensions, which undoubtedly justifies a relatively cautious approach from the courts...”. I fully appreciate that Lord Neuberger was considering a declaration of incompatibility at this stage of the judgment, and not whether there was a breach of Article 8 (he went on to find that there was no breach), but the need for a cautious approach when considering such difficult and contentious ethical issues does, in my view, have some application.
100. Lord Mance at [166] – [170] considered the role of “institutional competence” in determining the proportionality balance under the ECHR and referred to Lord Reed’s speech in *Bank Mellat*. At [166] Lord Mance said; “It is in my view a mistake to approach proportionality as a test under the Human Rights Act which is insensitive to considerations of institutional competence and legitimacy. The qualifying objectives reflected in article 8.2 of the Convention can engage responsibilities normally attaching in the first instance to other branches of the state, whether the executive THE HONORABLE MRS JUSTICE LIEVEN Approved Judgment Double-click to enter the short title or the legislature. When

considering whether a particular measure is necessary and all the more when considering whether it is justified on a balancing of competing and often incommensurate interests, courts should recognise that there can still be wisdom and relevance in the factors mentioned in the preceding two paragraphs. This is all the more so when the court is considering the scope of the Convention rights, as enacted domestically, in a situation, like the present, which the European Court of Human Rights has held to fall within the United Kingdom's international margin of appreciation."

101. At [168] Lord Mance set out the following passage from *Bank Mellat*; "168. Lord Reed JSC's observations, worth study in their entirety, included the following: "71. 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. The principle does not however entitle the courts simply to substitute their own assessment for that of the decision-maker. As I have noted, the intensity of review under EU law and the Convention varies according to the nature of the right at stake and the context in which the interference occurs. Those are not however the only relevant factors. One important factor in relation to the Convention is that the Strasbourg court recognises that it may be less well placed than a national court to decide whether an appropriate balance has been struck in the particular national context. For that reason, in the Convention case law the principle of proportionality is indissolubly linked to the concept of the margin of appreciation. That concept does not apply in the same way at the national level, where the degree of restraint practised by courts in applying the principle of proportionality, and the extent to which they will respect the judgment of the primary decision maker, will depend on the context, and will in part reflect national traditions and institutional culture. For these reasons, the approach adopted to proportionality at the national level cannot simply mirror that of the Strasbourg court." "74. The judgment of Dickson CJ in [*R v Oakes* [1986] 1 SCR 103] provides the clearest and most influential judicial analysis of proportionality within the common law tradition of legal reasoning. Its attraction as a heuristic tool is that, by breaking down an assessment of proportionality into distinct elements, it can clarify different aspects of such an assessment, and make value judgments more explicit. *343 The approach adopted in *Oakes* can be summarised by saying that it is necessary to determine (1) whether the objective of the measure is sufficiently important to justify the limitation of a protected right, (2) whether the measure is rationally connected to the objective, (3) whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective, and (4) whether, balancing the severity of the measure's effects on the rights of the persons to whom it applies against the importance of the objective, to the extent that the measure will contribute to its achievement, the former outweighs the latter. The first three of these are the criteria listed by Lord Clyde in [*de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69], and the fourth reflects the additional observation made in [*Huang v Secretary of State for the Home Department* [2007] 2 AC 167]. I have formulated the fourth criterion in greater detail than Lord Sumption JSC, but there is no difference of substance. In essence, the question at step

four is whether the impact of the rights infringement is disproportionate to the likely benefit of the impugned measure. THE HONORABLE MRS JUSTICE LIEVEN Approved Judgment Double-click to enter the short title “75. In relation to the third of these criteria, Dickson CJ made clear in *R v Edwards Books and Art Ltd* [1986] 2 SCR 713 , 781–782 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 upon to substitute judicial opinions for legislative ones as to the place at which to draw a 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 , 188–189); 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. “76. In relation to the fourth criterion, there is a meaningful distinction to be drawn (as was explained by McLachlin CJ in *Alberta v Hutterian Brethren of Wilson Colony* [2009] 2 SCR 567 , para 76) between the question whether a particular objective is in principle sufficiently important to justify limiting a particular right (step one), and the question whether, having determined that no less drastic means of achieving the objective are available, the impact of the rights infringement is disproportionate to the likely benefits of the impugned measure (step four).” 102. I have quoted these passages at length because, in my view, they have considerable resonance in the present case. As I have explained at [94] above, I accept Ms Fottrell’s submissions that the position in this case is much more nuanced than that in *McConnell*, both because the Applicant has no biological or genetic connection to the child, so there is no reversal of the biological reality; and also because a person can be registered as a father under the HFEA 2008 when they have no biological connection to the child. It therefore can be argued that the “fiction” if the Applicant was registered as the father would be no greater than if he were to be a natal man married to the mother.

103. However, his legal ability to be so registered turns not simply on the fact of the marriage, but also on his status as a man, given to him under the GRA. There plainly is a rational connection between the exclusion in Section 12 GRA and the overall effect of the Applicant not being able to be registered as AZ’s father. If the aim of Section 12 GRA is, as I have explained, to exclude all matters concerning the status of parenthood from the effects of holding a GRC, then there is a rational connection between that aim and the interpretation I have given to Section 35 HFEA

2008. The interpretation that prevents the Applicant from being registered as the father meets the aim that I have accepted. Therefore question (ii) of the Bank Mellat test is met. 104. In terms of question (iii) of the Bank Mellat test, this is not a situation where a less intrusive means is available. Either the Applicant can be named on the birth certificate or not. Even if he could be named as the second parent, this would not mitigate what he says is the breach of his rights, because it would make apparent that he was a transgender man.
105. Finally, in determining whether a fair balance is struck under question (iv) of the Bank Mellat test, it is appropriate to consider at this point the impact of the inability to register as AZ's father. THE HONORABLE MRS JUSTICE LIEVEN Approved Judgment Double-click to enter the short title In terms of the practical care of AZ, and his parenting, that issue can be largely, if not wholly, overcome. I will make an order that AZ lives with the Applicant and the Respondent, and the child arrangements order made by Harris J on 7 November 2024 means that the parents share parental responsibility for AZ. If the Applicant and Respondent so wish, they can pursue a step- parent adoption, as has been the case with DZ, and that would give the Applicant the same rights as the father registered on the birth certificate. The practical issues of status and parenting can therefore be overcome.
106. However, I accept that the Applicant's status as AZ's father will not be reflected in the birth certificate and, as set out by McDonald J in *Osbourne v Arnold*, that is an important part of AZ and the Applicant's identity and their familial relationship. This is an important issue in deciding whether there is a "fair balance" between the rights of the Applicant and AZ, and those of the general interest. 107. I also accept that if FZ cannot be named as the father, he is put at a disadvantage as a transgender man because he cannot be named as the second parent under Section 42 HFEA 2008, not having been married as a woman. It therefore follows that there is, or may be, a lacuna or inconsistency in the statutory scheme. 108. It is at this point that I refer back to institutional competence and whether in this very difficult area the balance struck by the legislature is one that is open to it. In the area of ethical and moral judgments it seems to me, for the same reasons given by Lord Mance in *Nicklinson*, that it is appropriate for the Court to defer to the considered judgment of Parliament in the GRA and the HFEA 2008, rather than for a judge to impose their determination of the fair balance of interests.
109. For all these reasons, I conclude that there is no breach of Article 8 in the conclusion that the Applicant cannot be named as the father on AZ's birth certificate. Although Article 14 (discrimination) was not argued before me by Ms Fottrell, I apply the same analysis as the Court of Appeal in *McConnell* at [87]. No additional issue would be raised by Article 14, because the issues of justification would remain the same.

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://caselaw.nationalarchives.gov.uk/ewhc/fam/2025/3338>

CASE PAGE <https://chat.esheria.ai/case-law/england-and-wales/fz-v-mz-2025>

Prepared on 24 October 2026 · Esheria