

‘Seahorse’ – Birth parent appeal rejected

Y1KBW Newsletter | 12.05.2020 | [Tadhgh Barwell](#) [O’Connor](#) [Leonie James](#)

The Court of Appeal found that a transgender man, Alfred McConnell, was not entitled to be registered as ‘father’, ‘parent’, or ‘gestational parent’ on the birth certificate of his son to whom he had given birth when legally recognised as male. Requiring Mr Alfred McConnell to be registered as ‘mother’ did not violate his or his son’s human rights under Articles 8 or 14 of the European Convention on Human Rights (“ECHR”).

Factual Background

Mr Alfred McConnell was registered as female at birth before transitioning and being registered male. In September 2016, he paused his testosterone hormone therapy to undergo fertility treatment at a clinic registered under the Human Fertilisation and Embryology Act 1990. His gender was registered as ‘male’ during this treatment.

In January 2017, Mr Alfred McConnell applied for a gender recognition certificate under the Gender Recognition Act 2004 (“GRA”) confirming his gender as male. This certificate was issued on 11 April 2017. The certificate’s effect, per section 9 of the GRA, is that the person’s gender becomes for all purposes the acquired gender but does not retrospectively affect anything before the certificate was issued. In relation to parenthood, section 12 of the GRA denotes:

“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 April 2017, Mr Alfred McConnell underwent IVF treatment and became pregnant. His son, YY, was born in January 2018. On 22 January 2018, he was informed by the Registry Office that he must be registered as YY’s mother on the birth certificate, although he could use his current (male) name.

Mr Alfred McConnell issued a claim for judicial review of the Registrar General's decision on 3 April 2018 for:

1. a declaration that as a matter of domestic law he was to be regarded and registered as YY's 'father' or otherwise 'parent' or 'gestational parent'; or
2. in the alternative, if domestic law required him to be registered as 'mother', a declaration of incompatibility under section 4 of the Human Rights Act 1998 ("HRA") of this requirement with his and/or YY's rights under ECHR Articles 8 and 14.

YY also issued an application for a declaration that Mr Alfred McConnell is YY's 'father' under section 55A of the Family Law Act 1986.

High Court Judgment

The President dismissed Mr Alfred McConnell's application for judicial review and found no violation of Articles 8 and 14 on the basis that:

1. the role of 'mother' now relates to the biological process of conception, pregnancy, and birth;
2. neither the role of 'mother' nor of 'father' are now necessarily gender specific; and
3. section 12 of the GRA is both retrospective and prospective such that the status of a person as 'mother' or 'father' is unaffected by the acquisition of gender under the GRA.

This Appeal

Mr Alfred McConnell and YY (the "Appellants") appealed the High Court's decision.

The Court briefly addressed two preliminary matters:

1. if Registry Offices had previously been inconsistent on the points raised in this appeal, this was in error; and
2. any queries relating to whether the fertility treatment given to Mr Alfred McConnell

could have been lawfully given to a man need not be resolved to deal with the issues in this case.

Whether the Registrar General (the “Respondent”) was correct to require Mr Alfred McConnell to be registered as YY’s ‘mother’ turned on whether section 12 of the GRA is retrospective only, or also prospective, in its effect.

The Court of Appeal agreed with the High Court that section 12 of the GRA was both retrospective and prospective in effect as:

1. this accorded with the ordinary meaning of the words; and
2. parliament had chosen not to use express language limiting it to retrospective effect only, despite doing so for other provisions of the GRA.

The issuance of the Gender Recognition Certificate confirming Mr Alfred McConnell’s gender as male, prior to him giving birth, did not therefore affect his status as the ‘mother’ of YY.

The Court then considered whether this interpretation of the GRA was incompatible with ECHR rights. In doing so, the Court reviewed the ECHR jurisprudence that led to the enactment of the GRA.

Article 8

The Respondent accepted an interference with the Appellants’ Article 8 rights. The Court noted that this was a lesser interference than that raised in *Goodwin v UK* and that the interference was justified under Article 8(2) ECHR as:

1. it pursued a legitimate aim of maintaining a clear birth registration scheme and, thus, realising the rights of children to know who gave birth to them and what that person’s status was;
2. it was proportionate, given the importance of the objectives pursued;

3. the word ‘mother’ has a distinct meaning from ‘parent’; only the mother of a child has automatic parental responsibility from birth. In adoption and surrogacy, the ‘mother’ is the person who gives birth to the child, unless and until a court order ends that legal relationship;
4. there is as yet no ECHR jurisprudence in support of the Appellant’s position; and
5. parliament has a margin of judgement with which the courts should be slow to interfere if a decision rests more properly with Parliament, which has the necessary expertise and legitimacy.

UN Convention on the Rights of the Child (“UN CRC”)

The court briefly considered the UN CRC, which has not yet been incorporated into domestic law but to which domestic courts will have regard when interpreting Article 8 of the ECHR. It was sufficient for the UN CRC that Parliament did take the best interests of children into account as a primary consideration when drafting the relevant legislation. It does not matter that others may have taken a different view as to what constituted best interests; Parliament did consider it and was entitled to reach its own view.

Article 14

The court did not find that Article 14 needed to be treated differently to Article 8 and the arguments could be applied to both.

Conclusion

There was no violation of Articles 8 or 14 by section 9 or 12 of the GRA and requiring Mr Alfred McConnell to be registered as YY’s mother did not violate his or YY’s ECHR rights.

Further clarity is needed as “it is not possible simple to say that Parliament has “de-coupled” the concept of “mother” from gender.” [§54]

Mr Alfred McConnell is now reported to be planning an application for permission to appeal to the Supreme Court.



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