Neutral Citation Number: [2019] EWHC 3105 (Fam)

Case No: NE19D00168

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Newcastle Combined Court
Quayside
Newcastle Upon Tyne

Date: 20/11/2019

Before:

THE HONOURABLE MR JUSTICE COBB

- -

Between:

AP	**Applicant**
- and -	
JP	**Respondent**

- -

P v P (Transgender Applicant for Declaration of Valid Marriage)

- -

The Applicant and **the Respondent** were present in person, but unrepresented

Ms Sarah Hannett (instructed by **Mr David Edmonds**, Senior Lawyer, Attorney General & General Private Law Team) provided advice in writing as Advocate to the Court

Hearing dates: 12 November 2019

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Approved Judgment

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

.....

THE HONOURABLE MR JUSTICE COBB

This judgment was delivered in public. 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 parties must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

The Honourable Mr Justice Cobb:

Introduction

1. This is an application for a declaration pursuant to *section 55(1)(a)* of the *Family Law Act 1986* ("*the FLA 1986*"); the declaration sought is that a marriage which was conducted on St Valentine's Day in 2009, between AP and JP, is a valid marriage[1].

2. In 1990, when 34 years of age, the applicant (who I shall refer to as 'AP') underwent gender re-assignment surgery, transitioning from female to male. It follows that he had lived as a male for nearly 19 years at the point when he married JP who is a woman, and who was born a woman. At the time of the marriage in 2009, AP had not obtained a Gender Recognition Certificate (referred to in this judgment as a 'GRC'), and his birth certificate had not been changed; his birth certificate showed him still as a female.

3. In 2017, AP contacted the Department for Work and Pensions ('DWP') raising queries about his pension entitlement. He was advised that his marital status could not be recognised. Despite a letter from AP's general practitioner in 1990 confirming that AP had "now had surgery and other treatment for gender reassignment", he was still legally female and was so at the time he purported to enter into the marriage with JP. AP understood the advice from the DWP to be that if he wished the marriage to be recognised as lawful, he would have to either obtain a declaration of validity or he would need to 're-marry' her, but legally as a man.

4. AP therefore applied to the court to have the 2009 marriage declared lawful:

> "… so that I can continue to remain married to my wife. I do not wish to have my marriage declared void. This would be emotionally very distressing for us both."

Advocate to the Court

5. AP issued his application for a declaration in 2018. Given the evident potential legal complexity of the application, not to mention the public policy considerations, I approached the Senior Lawyer at the Attorney General's office of the Government Legal Team to enquire if the Attorney General wished to intervene. I was advised that the Attorney General saw no role for himself as an intervenor. I followed this up with a further enquiry to establish whether the Government Legal Team would wish to consider the appointment of an Advocate to the Court (in accordance with the 2001 Memorandum: the Attorney General and the Lord Chief Justice Memorandum on

[1] *Section 55* confers a power on the High Court to make a declaratory order regarding marital status, which includes a declaration that the marriage was at its inception a valid marriage.

'Requests for the Appointment of an Advocate to the Court'). This request was accepted, and an Advocate was appointed. In September 2019, Ms Sarah Hannett provided an advice in writing to the court. This advice was forwarded to AP and JP. In light of their observations on her report, she later prepared an addendum (see [71-72] below).

6. I am indebted to Ms Hannett for her written assistance. This judgment draws extensively from her advice.

The law

7. Until 2005, the law made no provision for the legal recognition of gender reassignment in the United Kingdom. A person was treated for all legal purposes as having the gender determined by the application of biological criteria at birth without regard to psychological characteristics or later surgical intervention.

8. Thus, in *Corbett v. Corbett (otherwise Ashley)* [1971] P 83, which concerned the sex of a transgender woman (April Ashley) in the context of the validity of a marriage to Arthur Corbett, Ormrod J held that marriage is essentially a union between a man and a woman, the relationship depended on sex, and not on gender; accordingly the law should adopt the chromosomal, gonadal and genital tests. If all three are congruent, this should determine a person's sex for the purposes of marriage. Any operative intervention should be ignored. The biological sexual constitution of an individual was said to be fixed at birth, at the latest, and could not be changed by medical or surgical means (at 106-107). This was a significant case in that the ruling was used to define the sex of transgender people for many purposes until the introduction of the *Gender Recognition Act 2004* (which ultimately defined the sex of transgender people as whatever is on their birth certificate, until such point as a Gender Recognition Certificate amends the birth certificate.

9. At the time of the decision in *Corbett*, there was no legislative regime governing the validity of marriages entered into by same sex couples. Shortly after the decision in *Corbett*, Parliament passed *section 1(c)* of the *Nullity of Marriage Act 1971*, which was re-enacted by *section 11(c)* of the *Matrimonial Causes Act 1973* ("*the MCA 1973*"). *Section 11(c)* provided as follows:

> "*A marriage celebrated after 31st July 1971 shall be void on the following grounds only, that is so say— …*
> *(c) that the parties are not respectively male and female*…"

This subsection contemplates that a persons' gender cannot alter[2]; this has now been repealed, but is important for an understanding of the chronology.

10. *Corbett* set the legal tone for more than two decades, until the decision in *Goodwin v. United Kingdom* (2002) BHRC 120; in this case, the European Court of Human Rights ('ECtHR') held that the lack of legal recognition of the acquired gender of transgender people was incompatible with *Article 8* of the *European Convention on Human Rights* ("the *ECHR*") and further, so far as it prevented a trans person from contracting a valid marriage with a person of the same birth gender, it was also

[22] See for instance Lord Rodger in *Bellinger* at [82]

incompatible with *Article 12*. The UK was under a treaty obligation to comply with the ruling. *Article 8* is a significant right (albeit qualified) protecting "the right to respect for [a person's] private and family life, his home and his correspondence"; *Article 12* provides that:

> "Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right."

I return to consider the decision of the ECtHR in *Goodwin* below at [30].

11. After the decision in *Goodwin*, but prior to the introduction of the bill that became the *Gender Recognition Act 2004* ("*the GRA 2004*"), the House of Lords revisited this issue in the significant case of *Bellinger v. Bellinger* [2003] UKHL 21, [2003] 2 AC 467. In particular, the Court considered whether the marriage between Mrs Bellinger (a trans woman) and Mr Bellinger (a non-trans man) complied with the requirement in the *MCA 1973* that a marriage be conducted between a "*male*" and a "*female*". The Court noted the increasing criticism that the decision in *Corbett* had attracted, and that *Corbett* had not been universally followed in overseas jurisdictions: per Lord Nicholls at [13]-[16]:

> "[13] The criteria for designating a person as male or female are complex. It is too 'reductionistic' to have regard only to the three *Corbett* factors of chromosomes, gonads and genitalia. This approach ignores 'the compelling significance of the psychological status of the person as a man or a woman'."

12. The Court noted the effect of the decision in *Goodwin*, and that the Government had undertaken to introduce legislation to address the legal status of trans people: per Lord Nicholls at [20]-[27]. The ordinary meaning of the phrases "*male*" and "*female*" were, however, not capable of including a trans woman such as Mrs Bellinger (see Lord Hope at [56]-[64]; Lord Rodger at [81]-[83]), and the issue could not be solved by the use of the interpretative obligation in *section 3* of the *Human Rights Act 1998* ("*the HRA 1998*"): see Lord Hope at [66]-[69]. Lord Hobhouse at [78] put it this way:

> "This would in my view not be an exercise in interpretation however robust. It would be a legislative exercise of amendment making a legislative choice as to what precise amendment was appropriate."

The House of Lords held that the criteria to be applied to determine when a person could be recognised in a different gender were for Parliament to determine [28]-[49]. The Court made a declaration under *section 4* of the *HRA 1998* that *section 11(c)* of the *MCA 1973* was incompatible with Mrs Bellinger's rights under *Articles 8* and *12* of the *ECHR*.

13. Under *section 1* of the *GRA 2004*[3], a person could apply to a Gender Recognition Panel for a full gender recognition certificate recording a change of his or her birth gender:

> "A person of either gender who is aged at least 18 may make an application for a gender recognition certificate on the basis of—
>
> (a) living in the other gender, or
>
> (b) having changed gender under the law of a country or territory outside the United Kingdom."

The applicant's new gender under the *GRA 2004* was referred to as the "*acquired gender*". *Sections 2* and *3* of the *GRA 2004* deal with the criteria for determining whether a change of gender has occurred. *Section 2* provides that the Gender Recognition Panel is required to grant the application if the applicant has or has had gender dysphoria, has lived in the acquired gender for at least two years up to the date of the application, intends to live in the acquired gender until death and satisfies the evidential requirements laid down by *section 3*[4].

14. *Section 3* requires the panel to be furnished with a report from two medical practitioners or from a medical practitioner and a psychologist. If the panel concludes having regard to the evidence required by section 3 that the criteria in section 2 are satisfied, it must grant the application.

15. By *section 9* of the *GRA 2004*, where a full certificate is issued, the acquired gender thereafter becomes the person's gender for all purposes:

> "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)."

16. The *GRA 2004* made special provision for married applicants whose change of legally recognised gender would otherwise have resulted in them marrying a person of the same gender as themselves, same sex marriage at the time not being lawful. By *section 4(2)* an unmarried applicant who satisfied the criteria for gender recognition in *sections 2* and *3* was entitled to a full GRC, whereas by *section 4(3)* a married applicant who satisfied the same criteria was entitled only to an interim GRC. This does not apply to AP, who was female (as recorded in his birth certificate) at the time of the marriage, and married a female.

17. An interim GRC did not itself effect any change in an applicant's legally recognised gender. It merely entitled a married applicant to have their marriage annulled by a

[3] Which received Royal Assent on 1 July 2004 and came into force on 4 April 2005

[4] The following summary of the *GRA 2004* is taken, for the most part, from the decision of the Supreme Court to make a reference to the CJEU in *MB v. Secretary of State for Work and* Pensions [2017] 1 All ER 338 at [5]-[11].

court (see *sections 12(g)* and *13(2A)* of the *MCA 1973*). Only when this had been done did the applicant become entitled to a full GRC.

18. Shortly after the *GRA 2004* was passed, Parliament passed the *Civil Partnership Act 2004* ("*the CPA 2004*")[5]. The *CPA 2004* provided for the legal recognition of same-sex partnerships upon registration. A civil partnership had substantially the same legal consequences as a marriage. Once the *CPA 2004* had come into force, a married person to whom an interim gender recognition certificate had been issued could, after obtaining the annulment of the marriage, enter into a civil partnership with his or her former spouse (*section 5* of the *GRA 2004*; *section 1* of the *CPA 2004*).

19. In *Wilkinson v. Kitzinger (No 2)* [2007] 1 FLR 295 Sir Mark Potter P held that the *ECHR* did not require domestic law to recognise the parties' same sex marriage, contracted lawfully in Canada, as anything other than a civil partnership. The President held that this was not a breach of *Article 12* of the *ECHR* [60-67]. The President also held that it was not a breach of *Article 8* of the *ECHR* [68-88] as the failure to recognise a marriage was not an interference with the right to respect for private or family life in *Article 8(1)*. This conclusion has now to be seen in the context of the fact that Strasbourg case law has since made it clear that the recognition of same sex relationships does interfere with *Article 8(1)*. The better analysis now is that a failure to recognise a same sex marriage does interfere with *Article 8(1)*, but that it is likely to be justified and proportionate.

20. The President also held that there was no breach of *Article 14* of the *ECHR* taken with *Article 8* of the *ECHR* on the basis that the recognition of same sex relationships was not in the ambit of *Article 8* [107]:

> "… the European Convention has yet to recognise a childless same-sex relationship as constituting family life. However, even if that were not so, the withholding of recognition of the relationship between the petitioner and first respondent does not impair the love, trust, mutual dependence and unconstrained social intercourse which are the essence of family life and the matter falls outside the ambit of Arts 8 and 14 combined."

21. The Court of Appeal in *R (Steinfeld and Keidan) v. Secretary of State for Education* [2017] 3 WLR 1237 held that this conclusion was no longer good law, see Arden LJ (as she then was) at [60]-[73] (and this aspect of the Court of Appeal's decision, whilst not the subject of an appeal in *R (Steinfeld and Keidan) v. Secretary of State for International Development* [2018] 3 WLR 415, was approved by the Supreme Court at [18] and [19] "it is … accepted that access to civil partnerships falls within the ambit of *article 8*" per Baroness Hale).

22. Finally, in *Kitzinger*, the President held that the issue was in the ambit of *Article 12* [110], that a same sex couple and an opposite sex couple were in an analogous position [115], but that the distinction drawn was justified and proportionate [116]-[123].

[5] Which received Royal Assent on 18 November 2004 and came into force on 5 December 2005

23. In *Steinfeld* the Supreme Court held that allowing same sex couples to enter into a civil partnership, whilst denying that option to opposite sex couples, breached *Article 14* taken with *Article 8* of the *ECHR*. The Supreme Court drew a distinction with Strasbourg cases in which civil partnerships had been created for same sex couples only, as this "was the product of evolving societal acceptance of the need to provide some legal recognition of same sex partnerships" [36]. In *Steinfeld*, however, the inequality between same sex and opposite sex couples was the creature of Parliament, as the *MSSCA 2013* generated an inequality "where none had previously existed" [36]:

> "The redressing by the legislature of an imbalance which it has come to recognise is one thing; the creation of inequality quite another. To be allowed time to reflect on what should be done when one is considering how to deal with an evolving societal attitude is reasonable and understandable. But to create a situation of inequality and then ask for the indulgence of time - in this case several years - as to how that inequality is to be cured is, to say the least, less obviously deserving of a margin of discretion." (Lady Hale)

24. The *MSSCA 2013* brought an important development in relation to same-sex marriage. The statute came into full force on 10 December 2014. *Section 1(1)* provides that "*[m]arriage of same sex couples is lawful*". *Schedule 5* of the *MSSCA 2013* amended *section 4* of the *GRA 2004* so as to provide that a Gender Recognition Panel must issue a full GRC to a married applicant if the applicant's spouse consents.

25. By *section 17* and *schedule 7* of the *MSSCA 2013* (paragraph 27), *section 11(c)* of the *MCA 1973* was repealed. *Section 11* of the *MCA 1973* therefore now provides (reproduced in full):

> "A marriage celebrated after 31st July 1971, other than a marriage to which section 12A applies, shall be void on the following grounds only, that is to say—
> (a) that it is not a valid marriage under the provisions of the Marriage Acts 1949 to 1986 (that is to say where—
> (i) the parties are within the prohibited degrees of relationship;
> (ii) either party is under the age of sixteen; or
> (iii) the parties have intermarried in disregard of certain requirements as to the formation of marriage);
> (b) that at the time of the marriage either party was already lawfully married [or a civil partner];
> (c) ….
> (d) in the case of a polygamous marriage entered into outside England and Wales, that either party was at the time of the marriage domiciled in England and Wales.
>
> For the purposes of paragraph (d) of this subsection a marriage is not polygamous if at its inception neither party has any spouse additional to the other." (emphasis added)"

26. The reference in *section 11(a)(iii)* to having "*intermarried*" is to *section 49* of the *Marriage Act 1949* ("the *MA 1949*"). That provides that a marriage shall be void if any persons knowingly and wilfully intermarry under the provisions of *Part III* of the *MA 1949* without one of the criteria that following being met. The only criterion that appears to be of potential relevance is the following: "*without having given due notice of marriage to the superintendent registrar*" (paragraph (a)).

27. The reference to "*due notice*" is to the requirements contained in *section 27* of the *MA 1949*. By *subsection (1)*, where a marriage is intended to be solemnized on the authority of certificates of a superintendent registrar, notice of marriage in the prescribed form shall be given. By subsection (3), a notice of marriage shall state a person's name and surname, but there is no requirement to record the person's sex.

28. I turn next to consider the case law of the ECtHR concerning both the recognition of trans issues, and same sex marriage. The two lines of case law, to a large extent, overlap and therefore the cases are dealt with in chronological order.

29. *Goodwin* followed a series of cases in which the ECtHR had concluded that, given the wide margin of appreciation in this area, a failure to provide legal recognition to trans people did not breach *Articles 8* or *12* of the *ECHR* (see, for example, *Rees v. United Kingdom* (1986) 9 EHRR 56 and S*heffield and Horsham v. United Kingdom* (1998) 27 EHRR 163).

30. In *Goodwin* the applicant, a post-operative trans woman, claimed that the UK had a positive obligation under *Article 8* of the *ECHR* to ensure the right to respect for her private life, and in particular, to legal recognition for her gender reassignment [71]. Further, the applicant claimed that there had been a breach of Article 12 in refusing to allow her to marry in her acquired gender [95].

31. The ECtHR stated:

> "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." [93]

Thus, respect for the applicant's private life required her to be recognised in her acquired gender; but how that was to be implemented fell within the UK's margin of appreciation.

32. The ECtHR also found a violation of *Article 12*. The ECtHR stated [103]:

> "While it is for the contracting state to determine inter alia the conditions under which a person claiming legal recognition as a transsexual establishes that gender re-assignment has been properly effected or under which past marriages cease to be valid and the formalities applicable to future marriages (including, for example, the information to be furnished to intended spouses), the court finds no justification for barring the transsexual from enjoying the right to marry under any circumstances."

33. In *Parry v. United Kingdom* (App No. 42971/05) the applicant was married and had children. The husband had undergone gender reassignment surgery and remained with her spouse as a married couple. Following the *GRA 2004*, the husband was unable to obtain a GRC without dissolving her marriage (see [17] above). The applicants complained this was a breach of *Articles 8* and/or *12* of the *ECHR*. The Court declared this to be inadmissible. The applicants were required to dissolve their marriage as same-sex marriage was not permitted under English law. The United Kingdom had not failed to give legal recognition to gender-reassignment, and the applicants could continue their relationship through a civil partnership which carried almost all of the same legal rights and responsibilities.

34. Subsequent cases establish the obligation under *Article 8* of the *ECHR* for Council of Europe countries to establish a system recognising and protecting the relationships of same sex couples: see, for example, *Oliari v. Italy* (2017) 65 EHRR 26, [172]-[185]. The ECtHR has been clear, however, that the *ECHR* obligations do not extend to requiring member states to permit same sex couples from marrying: see (in respect of *Article 12*, and *Article 8* taken with *Article 14*) *Schalk & Kopf v. Austria* (2011) 53 EHRR 20 at [108], *Chapin and Carpentier v. France* (App. No. 40183/07; judgment in French only) at [39] and (in respect of *Article 14* taken in conjunction with *Article 12*) *Oliari* at [192].

35. Similarly, in *Hämäläinen v. Finland* (2014) 47 EHRR 55 the Grand Chamber of the ECtHR held that there was no requirement on a member state to provide same-sex marriage for a trans person who had previously been in an opposite sex marriage. The case concerned a requirement that upon obtaining recognition in his or her acquired gender, a trans person was required to convert a subsisting marriage into a registered partnership (with similar legal rights and responsibilities to marriage) or obtain a divorce. The ECtHR noted that gender identity was "a particularly important facet of an individual's existence or identity" for the purposes of *Article 8* [67].

36. Council of Europe countries enjoy a wide margin of appreciation in implementing the obligations under *Article 8* (see *Hämäläinen v. Finland* at [65]-[68]) and, in particular, as to the rules laid down to achieve that recognition: *Hämäläinen v. Finland* at [75]:

> "In the absence of a European consensus and taking into account that the case at stake undoubtedly raises sensitive moral or ethical issues, the Court considers that the margin of appreciation to be afforded to the respondent State must still be a wide one…. This margin must in principle extend both to the State's decision whether or not to enact legislation concerning legal recognition of the new gender of post-operative transsexuals and, having intervened, to the rules it lays down in order to achieve a balance between the competing public and private interests."

37. It concluded that there was no violation of *Article 8* as it was not disproportionate to require the conversion of a marriage into a registered partnership as a pre-requisite for the legal recognition of acquired gender [76]-[87]. No separate issue arose under *Article 12* [96]-[97], and there was no violation of *Article 14* [107]-[112] ("On the one hand, the Court has held repeatedly that differences based on gender or sexual

orientation require particularly serious reasons by way of justification… On the other hand, a wide margin is usually allowed to the State under the Convention when it comes to general measures of economic or social strategy for example" [109]).

38. Council of Europe member states also have a wide margin of appreciation as to the timing of legislative measures to afford recognition to same sex couples. Thus, in *Courten v. United Kingdom* (App. No. 4479/06) and in *Karner v. Austria* (2004) 38 EHRR 24 the ECtHR held that the member state could not be criticised for failing to introduce legislation protecting same sex couples sooner.

39. Most recently in *AP, Garçon and Nicot v. France* (App. Nos. 79885/12, 52471/13 and 52596/13) the ECtHR held that the requirement in French law for the person to undergo an operation likely to lead to sterility before recognising assigned gender in law constituted a breach of the applicants' rights under *Article 8* of the *ECHR* [130]-[135].

40. The applicants also complained about the requirement for individuals to prove the existence of a gender identity disorder. The ECtHR noted that a psychiatric diagnosis featured among the prerequisites for legal recognition of acquired gender in the vast majority of member states of the Council of Europe that permit such recognition [139]. As such, member states retained a wide discretion in deciding whether to lay down such a requirement [140] and it did not constitute a breach of *Article 8* [143]-[144]. Similarly, member states were entitled to require a medical examination prior to recognising acquired gender [149]-[154].

41. The approach to *Article 8* of the *ECHR* in cases involving the recognition of the legal status of trans people, or same sex marriage, has been clearly set out in the case law above. For instance, in *AP, Garçon and Nicot v. France* (above), the court observed that:

> "The Court has stressed on numerous occasions that the concept of "private life" is a broad term not susceptible to exhaustive definition. It includes not only a person's physical and psychological integrity, but can sometimes also embrace aspects of an individual's physical and social identity. Elements such as gender identity or identification, names, sexual orientation and sexual life fall within the personal sphere protected by Article 8 of the Convention (see, in particular, Van Kück v. Germany, no. 35968/97, § 69, ECHR 2003-VII; Schlumpf v. Switzerland, no. 29002/06, § 77, 8 January 2009; and Y.Y. v. Turkey, cited above, § 56, and the references cited therein) …. the right of transgender persons to personal development and to physical and moral security is guaranteed by Article 8." [92] and [93]

42. *Article 14* has been subject to less attention by the ECtHR; *Article 14* reads as follows:

> "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any

> ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status." (emphasis by underlining added)

43. Trans status is an "other status" for the purposes of *Article 14*: see *In Re A (Children) (Contact: Ultra-Orthodox Judaism: Transgender Parent)* [2018] 4 WLR 60 (CA) at [102], citing *PV v. Spain* (App No. 35159/09). *Article 14* does not enshrine a freestanding right to freedom from discrimination. It prohibits discrimination in the enjoyment of the rights in the *ECHR*. It is now well settled, therefore, that, to have recourse to *Article 14*, the discrimination complained of must "come within the ambit" of another Convention right. There is, however, no requirement that the other Convention right be breached.

44. In *Wandsworth London BC v. Michalak* [2003] 1 WLR 617 (CA) Brooke LJ suggested that in an *Article 14* case, the Court should ask the following four questions [20]: (i) do the facts fall within the ambit of one or more of the Convention rights; (ii) was there a difference in treatment in respect of that right between the complainant and others put forward for comparison; (iii) were those others in an analogous situation; and (iv) was the difference in treatment objectively justifiable? In other words, did it have a legitimate aim and bear a reasonable relationship of proportionality to that aim?

45. In *Ghaidan v Godin-Mendoza* [2004] 2 AC 557, Baroness Hale approved the *Michalak* approach but reflected the need for an additional (i.e. a fifth) question: whether the difference in treatment is based on one or more of the grounds proscribed—whether expressly or by inference—in *Article 14*. Baroness Hale also said that the *Michalak* approach was subject to the important caveat that a "rigidly formulaic approach is to be avoided" (see [134]).

46. The key principles in respect of justification were summarised by Lord Kerr in *Steinfeld* (see for reference [21] above) as follows at [20] of the judgment. The following are emphasised: (i) the burden of proving justification is on the respondent; (ii) it is not the scheme as a whole which must be justified but its discriminatory effect; and (iii) where a difference in treatment is based on sexual orientation, a court must apply "strict scrutiny" to the assessment of any asserted justification, and "particularly convincing and weighty reasons to justify" it are required. None of the case law applies the test of "strict scrutiny" to trans status, but the point appears not yet to have been considered (whilst it was raised before the Court of Appeal in *In Re A (Children)*, the point does not feature in the judgment).

47. At the time of writing this judgment, the UK remain part of the European Union. Ms Hannett therefore drew my attention to two decisions of the Court of Justice of the European Union ("CJEU") upon which, if legally represented, AP and JP may have wished to make submissions.

48. First, following a reference by the Supreme Court in *MB v. Secretary of State for Work and Pensions* [2017] 1 All ER 338, the CJEU handed down its judgment on 28 June 2016 [2019] ICR 115. The case concerned a trans woman who obtained an interim GRC, but did not obtain a full GRC as to do so would have required the annulment of her marriage. Under the legislation applicable at the time, a woman was

eligible for a state retirement pension at the age of 60, whereas a man was not eligible until the age of 65. MB applied for a pension at the age of 60. Her application was refused on the ground that, absent a full GRC, the law did not recognise her change of gender and accordingly she was not entitled to a pension until the pensionable age for men.

49. MB appealed to the First-tier Tribunal (and then to the Upper Tribunal, Court of Appeal and Supreme Court) on the ground that the refusal was unlawful as it was contrary to the principle of equal treatment in *article 4(1)* of Council Directive 79/7/EEC ("the Directive"). The Supreme Court stayed the appeal and referred to the CJEU for preliminary ruling the question of whether *article 4(1)*, read in conjunction with *article 7(1)(a)*, which gave member states the right to determine pensionable age, precluded the imposition of a requirement that, in addition to satisfying the physical, social and psychological criteria for recognising a change in gender, a person who changed gender had also to be unmarried to qualify for a state retirement pension.

50. The CJEU noted that the case concerned only the conditions for entitlement for a state retirement pension and not, more generally, whether the legal recognition of a change of gender may be conditional on the annulment of the marriage entered into before that change of gender [27]. The Directive, which implements the principle of non-discrimination on grounds of sex as regards social security, applies to discrimination arising from gender reassignment [35]. Domestic law treated a person who had changed gender less favourably than one who had not, as the latter could receive a state pension from the pensionable age for persons of that gender regardless of their marital status [36]-[46].

51. The Supreme Court has yet to reconsider the case in the light of the CJEU's judgment.

52. Second, in Case C-673/16, *Coman v. Romania* (5 June 2018) held that the word "spouse" in Directive 2004/38 (which grants the spouse of an EU citizen an automatic right to residence), included a same sex spouse. The CJEU stated, however, that member states were free to decide whether to allow marriage for persons of the same sex [37], but that a member state must recognise the marriage of a Union citizen concluded in another member state pursuant to the laws of that state [39]. To find otherwise, would have interfered with the right of free movement [40].

Application of the law to the facts

53. As I mentioned at the outset of this judgment ([2] above), AP does not have a GRC issued under the *GRA 2004*. As such, he must be treated in law as being of his birth gender which is female. This follows from the decisions in *Corbett* and *Bellinger*.

54. I am conscious that AP and JP might have argued, first, that the failure by the court to recognise AP in his acquired gender constitutes an interference with his rights under *Article 8* of the *ECHR*. Pursuant to *section 6* of the *HRA 1998*, the Court must act compatibly with the parties' rights under the *ECHR* (see, by way of example, *In Re A (Children) (Contact: Ultra-Orthodox Judaism: Transgender Parent)* [2018] 4 WLR 60 (CA) at [99]).

55. Whilst it is likely to constitute an interference with *Article 8* for AP not to be recognised as male, significantly, such an interference is likely to be justified by the

need for a coherent administrative system for the recognition of a change in gender: see, for example, *R (JK) v. Registrar General* [2016] 1 All ER 354 per Hickinbottom J (as he then was) at [99], and *Hämäläinen* (above) at [66].

56. Further, such an interference is likely to be justified, given that at the time of AP's marriage to JP (and indeed for some time before the marriage), AP could have applied to change his gender using the mechanism in the *GRA 2004*. As noted above, in *Goodwin* and, more recently, in *Hämäläinen*, the ECtHR has stated that whilst member states are required to have a system allowing for the legal recognition of the acquired gender of trans people, the form that system takes is within the margin of appreciation granted to member states. In short, that a state lays down formal requirements, by way of an application and certification process before recognising acquired gender, is unlikely to amount to a breach of *Article 8*. Indeed, as recently as 2017, in *AP, Garçon and Nicot v. France* (see [39] above) the ECtHR held that *Article 8* permitted a member state to require a diagnosis of gender dysphoria and a medical examination prior to recognising a trans person's assigned gender.

57. The Advocate to the Court considered whether the parties may have raised an argument under *Article 14* of the *ECHR*, particularly as recognition of a trans person's assigned gender in law falls within the ambit of *Article 8*. The only relevant difference in treatment between AP and a trans person who obtained a GRC (and who, therefore, can be recognised in law as their acquired gender) is that a trans person who holds a GRC is either not analogous to AP (as their situations are materially different) or, alternatively, the difference in treatment is likely to be justified and proportionate for the same reasons that arise in respect of *Article 8* of the *ECHR*.

58. It was suggested that AP and JP might argue, second, that the decision of the CJEU in *MB* requires a domestic court to recognise the acquired gender of a trans person, even where that person has not obtained a GRC under the *GRA 2004*. It was submitted by Ms Hannett, and I agree, that this argument would not have merit. In general, the legal recognition of gender is a matter which falls within the competence of member states. *MB* is authority for the proposition that, in matters within the scope of EU law (such as social security), a trans person (whether he or she has been recognised in his or her acquired gender) cannot have an eligibility requirement imposed which a non-trans person would not (in *MB*, the requirement to have annulled her marriage) [47]. *MB* does not provide support for the proposition that the failure to recognise the acquired gender of a trans person who has not complied with the relevant administrative requirements is unlawful under EU law.

59. In summary, therefore, neither the *ECHR* nor EU law requires the Court to reach a conclusion different to that reached in *Corbett* and *Bellinger*.

60. As noted above, both now and at the time of the marriage in 2009, AP must be treated by the Court as being legally a woman. As such, the marriage entered into between AP and JP was contracted in law between two women.

61. At the time the marriage was contracted, *section 11(c)* of the *MCA 1973* provided that such a marriage was void. The effect of a void marriage was described by Lord Greene MR in *De Reneville v. De Reneville* [1948] P 100 (CA) as:

> "… one that will be regarded by every court in any case in which the existence of the marriage is in issue as never having taken place and can be so treated by both parties to it without the necessity of a decree annulling it." (at 111)

62. AP and JP might argue, first, that the implementation of the *MSSCA 2013* affects that conclusion. There would be a number of difficulties with that argument. The marriage was void at its inception by operation of the *MCA 1973*. The *MSSCA 2013* does not say in express terms that it has any retrospective effect, and in the absence of such express provision, the Court must presume that the *MSSCA 2013* operates prospectively only (see, for example, *Bennion on Statutory Interpretation* (2019) at [5.12]). Further, absent express provision, an act passed after the contracting of a void marriage could not change the status of that marriage.

63. AP and JP might argue, second, that a decision by the Court not to declare their marriage valid constitutes a breach of their rights under *Articles 8, 12* or *14* (taken with either *Article 8* or *12*) of the *ECHR*. But if the analysis of the *MSSCA 2013* above is correct, the Court does not have a discretion to recognise the marriage.

64. AP and JP might argue, third, that the Government breached their rights under *Articles 8, 12* and/or *Article 14* (taken with *Articles 8* or *12*) of the *ECHR* by not permitting them to marry as a same sex couple in 2009. Those arguments would derive no support from the ECtHR authorities. The *ECHR* does not require the recognition of same sex marriage now; it did not require it in 2009.

65. The case law above makes clear:

    i) A failure to recognise same-sex marriage does not breach *Article 8* or *12* of the *ECHR*: see *Schalk & Kopf v. Austria*, *Chapin and Carpentier* and *Hämäläinen.*

    ii) A failure to recognise same-sex marriage is likely to be in the ambit of *Articles 8* (*Steinfeld*) and *Article 12* (*Kitzinger*) for the purposes of *Article 14* of the *ECHR*, but is likely to be justified and proportionate.

66. The following three factors reinforce the proposition that the facts of this case do not give rise to a breach of AP and JP's *ECHR* rights:

    i) In 2009 AP and JP could have entered into a civil partnership under the *CPA 2004*, thus obtaining legal recognition of their relationship (notwithstanding that AP did not have a GRC);

    ii) Alternatively, to the extent that AP and JP wished (understandably) to marry as an opposite sex couple, they could have done so if AP obtained a GRC;

    iii) AP and JP could now marry (either under the *MSSCA 2013* or, on the acquisition of a GRC by AP, as an opposite sex couple).

67. In short, it cannot be maintained that during the material time, the United Kingdom failed to provide a legal mechanism for the recognition of the relationship of AP and JP.

68. JP and AP might argue, fourth, that the refusal of the Court to recognise their marriage constitutes a breach of EU law. As noted above, the CJEU's judgment in *Coman* (see [52] above) is limited in its application to free movement only, and the CJEU stated in terms that its decision did not impinge on the competence of member states to determine whether or not to permit same sex marriage.

Response to the advice

69. The advice of Ms Hannett, which I have found extremely helpful when considering the issues in this case, was served on AP and JP in mid-September. Some two weeks later, the parties raised some queries about it. Specifically, they wished the Advocate to consider the following:

    i) At the time of the gender reassignment in 1990 it was not possible to obtain a GRC;

    ii) AP was never informed at any time before his marriage to JP that any other documentation was necessary to prove his gender.

    iii) Although AP has never been in possession of a GRC, he nonetheless had the 1990 GP letter, and that this "document is certainly an official one, having been produced in my doctor's surgery, on headed paper, and signed by my doctor at the time";

    iv) AP has been recognised as male for the purposes of the issuing of a passport; this was achieved by reference to the GP's letter of 1990 ("If H. M. Government has recognised me as male for one purpose, I cannot see an argument for the inconsistency of its failure to recognise me as male for another purpose").

70. AP concluded his observation by adding:

> "I am therefore left in the position that the document provided by the Doctor who treated me during my reassignment and knew me well and which I contest is a legitimate certificate of gender recognition is being ignored whilst I am expected to produce a certificate which I cannot produce since I am not able to complete the application form due to the ambiguity of my position. This would be the 'unfairness' of which I would complain."

71. The Advocate to the Court, Ms Hannett, considered these points and, in turn, filed and served an addendum advice.

72. In this further written advice, she responded to these points as follows:

    i) The 1990 letter from the general practitioner is not the equivalent in law of a GRC. The *GRA 2004* contains a process by which an application for a GRC must be made and determined. It also sets out conditions which must be met. AP may meet the criteria contained in the *GRA 2004*, but this is a matter that only the Gender Recognition Panel has the jurisdiction to determine;

ii) Second, it is true that at the time of AP's transition, there was no legal mechanism by which he could be recognised in his assigned gender. Indeed, this was precisely the complaint that gave rise to the decision of the ECtHR in *Goodwin v. United Kingdom* (2002) BHRC 120. That has not, however, been the position since 4 April 2005 when the *GRA 2004* came into force;

iii) Third, so far as understood, there is no evidence before the Court as to the process by which a passport may be obtained by a trans person, who does not hold a GRC, in his or her assigned gender. But it should be noted that the issuing of a passport is done under the Royal Prerogative and as such, there are no legislative requirements as to the manner in which a person's sex is described (although the current policy is that a person must identify themselves as either male or female): see *R (Elan-Cane) v. Secretary of State for the Home Department* [2018] 1 WLR 5119 per Jeremy Baker J at [114]. In *Goodwin*, and therefore at a time prior to the coming into force of the *GRA 2004*, Ms Goodwin had a birth certificate and passport showing her chosen names and acquired gender [65]. Similarly, in *MB v. Secretary of State for Work and Pensions* [2017] 1 All ER 338 (Opinion of the Advocate General at [86]) and in *Jay v. Secretary of State for Justice* [2019] 1 FLR 811 at [38] the claimant had a passport issued in their acquired gender despite not having a GRC. It follows, that holding a passport recording an acquired gender, does not (absent a GRC) mean that the person is recognised in law in the acquired gender.

iv) Fourth, whilst unfortunate that AP was unaware of the need to obtain a GRC prior to his marriage to JP, his lack of awareness of the legal position does not alter the position in law.

v) Fifth, as for the argument that AP may not obtain a GRC given the confusion caused by his marriage to JP, if it is right that the marriage between AP and JP is void, then AP may obtain a GRC as an unmarried person. If AP requires clarification that his marriage to JP is void, he may (subject to what I say at [75] below) apply for a decree of nullity.

Conclusion

73. Having analysed the law as it has been helpfully rehearsed and presented to the court by Ms Hannett, and having applied it to these particular facts, I have reached the following conclusions:

i) In the absence of a GRC, under domestic law, AP's legal sex is and always has been female;

ii) As such, domestic law regards the marriage entered into by AP and JP in 2009 as having been contracted by two legal women;

iii) At the relevant time, a marriage between two persons of the same sex was void at its inception and the Court does not have the power to make the declaration sought under the *FLA 1986*;

iv) The coming into force of the *MSSCA 2013* did not alter that position, as it does not have retrospective effect;

v) The position in domestic law is not altered by anything in the jurisprudence of the ECtHR or the CJEU.

I am conscious that this outcome will be very distressing to AP and JP.

74. *Section 55* of the *FLA 1986* does not confer a power to make a declaration that a marriage was void at its inception (see *section 58(5)(a)*): in such cases the court may issue a decree of nullity (see *section 58(6)*). Whilst a decree of nullity is declaratory only, and cannot effect any change in the parties' status, there may be some advantages in these parties obtaining a decree: (i) it provides the parties with certainty, (ii) it is a judgment *in rem*, so that no-one may subsequently allege that the marriage is valid, and (iii) it empowers the court to make certain ancillary orders. It will be open to the parties now to apply for an order declaring their marriage a nullity; AP and JP have indicated at the hearing before me their intention to do so.

75. There is a potential impediment to this route. Having found that the marriage entered into between AP and JP is indeed void, if (as appears likely), AP and JP wish to apply for a decree of nullity, *section 11* now (as amended by the *MSSCA 2013*) does not appear to empower the court to issue such a decree. Neither the *MCA 1973*, nor the *MSSCA 2013*, makes transitional provision for same sex couples who married prior to its implementation[6].

76. If the outline analysis in [73] above is correct, this may raise issues under *Articles 8* and/or *Article 14* of the *ECHR*. If so, then the Court will need to consider whether *section 11* of the *MCA 1973* can be read compatibility with the *ECHR* pursuant to *section 3* of the *HRA 1998* and, if not, whether a declaration of incompatibility needs to be issued under *section 4* of the *HRA 1998*.

77. If that situation arises, I will be likely to invite further submissions from the Advocate to the Court and give notice to the relevant Secretary of State pursuant to *section 5* of the *HRA 1998*, and *rule 29.5* and *Practice Direction 29A* of the *Family Procedure Rules 2010*.

78. That is my judgment.

[6] The Advocate to the Court has given consideration to whether the marriage between AP and JP might be void on another ground in order that their marriage is caught by *section 11*, namely that under *section 11(a)(iii)* they intermarried in disregard of certain requirements as to the formation of marriage. None of the requirements listed in *section 49* of the *MA 1949* appear to be relevant in the instant case, but this may be an issue that requires further consideration should the parties wish to apply for a decree of nullity.