EXAMINING THE LEGAL ATTRIBUTION OF TRANSGENDER PARENTHOOD IN ENGLAND AND WALES:

R (Mcconnell) v Registrar General for England and Wales [2020] EWCA CIV 559

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*by Cameron Main**

Abstract

This note comments on the decision of the England and Wales Court of Appeal in R (on the application of McConnell) v Registrar General for England and Wales *[2020] EWCA Civ 559. Freddy McConnell was registered as female at birth but transitioned at age 22 to live as a male. Mr McConnell was issued a certificate on 11 April 2017, confirming his gender as male. On 21 April 2017, Mr McConnell commenced fertility treatment. Upon giving birth to a son, Mr McConnell sought to register the birth of his son with the Registry Office. In a decision in January 2019, he was informed that he would have to be registered as the child's 'mother'. In this judgement, the Court of Appeal rejected McConnell's contention that he should be registered as either the 'father' or 'gestational parent' as a matter of domestic law. Secondarily, it also held that this interpretation was not incompatible with articles 8 and 14 of the European Convention on Human Rights.*

* MA Medical Law Student at King's College London.

1 Introduction

The law's approach in England and Wales to non-traditional parenthood and family systems is much criticised, particularly concerning the assignment of legal parenthood.[1] However, there is also a distinct lack of acceptance for transgender parents, even in excess of those attitudes toward same-sex parents, which have gradually improved.[2] Despite this, many who have changed their gender express a desire to become a parent.[3] Therefore, it would not be surprising for issues to persist in the law which governs transgender parenthood. McCandless and Sheldon have previously noted:

> the questions posed by transgender parenthood serve to illuminate many of the tensions inherent in continuing to map our legal determinations of parenthood to a family model that is unmoored from its traditional underpinnings.[4]

This is the context in which the current case sits. At first glance, this background tells us that this case could present an opportunity to modernise the law through the courts or by observing how the current law addresses these issues. The procedural approach taken by the Court of Appeal to both grounds of appeal highlights the issues with the law's attempt to mould non-traditional parenthood around the already established rules on traditional parenthood, rather than evolve alongside these developments.[5]

2 The facts

Freddy McConnell was registered as a female at birth and transitioned at the age of 22 to live as a male. In January 2017, McConnell was issued a gender recognition certificate which declared him as legally

1 Eg, A Diduck 'If only we can find the appropriate terms to use the issue will be solved: Law, identity and parenthood' (2007) 19 *Child and Family Law Quarterly* at 458; L Smith 'Tangling the web of legal parenthood: Legal responses to the use of known donors in lesbian parenting arrangements' (2013) 33 *Legal Studies* at 355.

2 H von Doussa et al 'Imagining parenthood: The possibilities and experiences of parenthood among transgender people' (2015) 17 *Culture, Health & Sexuality* at 1119; BD Spidsberg 'Vulnerable and strong - lesbian women encountering maternity care' (2007) 60 *Journal of Advanced Nursing* at 478.

3 M Bjorkman & K Malterud 'Lesbian women's experiences with health care: A qualitative study' (2009) 27 *Scandinavian Journal of Primary Health Care* at 238; S Hines 'Intimate transitions: Transgender practices of partnering and parenting' (2006) 40 *Sociology* at 353.

4 J McCandless & S Sheldon 'The Human Fertilisation and Embryology Act (2008) and the tenacity of the sexual family form' (2010) 73 *Modern Law Review* at 202.

5 A Brown 'Trans parenthood and the meaning of "mother", "father" and "parent" — *R (McConnell and YY) v Registrar General for England and Wales* [2020] EWCA Civ 559' (2021) 29 *Medical Law Review* at 167.

male.[6] In April 2017, McConnell successfully underwent fertility treatment, giving birth to a son the next year.[7] Later, McConnell was informed that he was registered on his son's certificate as the 'mother'. Labelling him as such provided the central basis of McConnell's contention. He brought a judicial review application against the decision to name him as the mother. Instead, he wished to be known as either the 'father' or the 'gestational parent'.[8]

At first instance, the President of the High Court's Family Division refused McConnell's application for judicial review, instead declaring that McConnell is the 'mother' of his son.[9] But what questions must be addressed to make such a declaration? On appeal, the first issue before the Court of Appeal was the correct construction of the Gender Recognition Act 2004 (GRA).[10] This statute governs the law on legally changing one's gender. In the first instance, Sir Andrew MacFarlane P identified the evident lack of parliamentary consideration of the novel issue presented in this case.[11] Consequently, the Family Division assumed the courts' rightful place as a secondary lawmaker through the process of legislative interpretation. The President's interpretation of the GRA was that McConnell is the 'mother'. In the alternative, McConnell appealed the compatibility of this finding with the European Convention on Human Rights, specifically those under articles 8 and 14.[12] The President had found the Registrar General's decision constituted a legitimately justified interference with McConnell's rights.[13] In doing so, the court deferred the role of modernising the law to Parliament.[14]

3 The Court of Appeal judgment

In comparison to the President's judgment, the Court of Appeal's decision was restricted in its focus. The President's judgement spanned over sixty pages, whereas the Court of Appeal only considered the two issues that had been appealed. This judgement is split into two major sections for each ground of appeal.

6 *R (on the application of McConnell) v Registrar General for England and Wales* [2020] EWCA Civ 559; Gender recognition certificates are obtained under the Gender Recognition Act 2004, s 4.
7 *McConnell* (n 6) para 8.
8 McConnell (n 6) para 10.
9 *R (on the application of TT) v Registrar General for England and Wales* [2019] EWHC 2384 (Fam) [279].
10 *McConnell* (n 6)24.
11 *R (on the application of TT)* (n 9) 90.
12 *McConnell* (n 6) para 24.
13 *R (on the application of TT)* (n 9) para 281.
14 *McConnell* (n 6) 81.

3.1 Interpretation of the GRA

Whilst there was much discussion by the President as to the meaning of the word, 'mother', the Court of Appeal found the 'critical issue' to be statutory interpretation.[15] Section 9(1) of the GRA states that if a person has a gender recognition certificate, 'the person's gender becomes for all purposes the acquired gender'.[16] This would seemingly extend to whether Freddy McConnell should be called, 'mother' or 'father'. However, section 12 GRA provides that where someone becomes an acquired gender, the 'status of that person as the father or the mother of a child' is not affected.[17] It was uncontested that the latter section had a retrospective effect, but the question before the Court of Appeal was whether it also had a prospective effect. Crucially, if the section were only to have a retrospective effect, then it would not influence situations such as McConnell's, where the gender recognition certificate is received before someone becomes a parent. Conversely, if the court were to find a 'prospective effect' interpretation, McConnell-type situations would be caught within the scope of section 12. The Court of Appeal accepted the argument made by the Registrar General, that section 12 should be interpreted to cover both retrospective and prospective effects.[18]

The Court of Appeal found that this was the ordinary meaning of section 12.[19] The court supplemented this with three arguments. First, the alternative interpretation, that section 12 should only have retrospective effect, 'would render otiose the provisions of section 9(2).[20] Section 9(2) provides that section 9(1) 'does not affect things done, or events occurring, before the certificate is issued'. Second, section 12 is similar to 'the wording in other sections of the GRA which marks out exceptions to the general effect of a certificate under section 9(1).'[21] The court illustrated this point by reference to section 16.[22] Third, retrospective effect, where Parliament has intended it in the GRA, was made 'clear through express language', such as in section 15.[23]

Having laid out the reasons for favouring the Respondent's interpretation of Section 12, the court went on to reject the Appellant's use of explanatory notes. It was argued that section 12 should be given only a retrospective interpretation because the

15 *McConnell* (n 6) para 28.
16 GRA 2004, s 9(1).
17 GRA 2004, s 12.
18 *McConnell* (n 6) para 29.
19 *McConnell* (n 6) para 30.
20 GRA 2004, s 9(2); *McConnell* (n 6) para 31.
21 *McConnell* (n 6) para 32.
22 As above; GRA 2004, s 16.
23 *McConnell* (n 6) para 33; GRA 2004, s 15.

Explanatory Notes to section 12 read that where a person is regarded as being of the acquired gender, 'the person will retain their original status as either the mother or father of a child. The continuity of parental rights and responsibility is thus ensured.'[24] Yet, the Court did not go into detail about whether they found the content of the Notes to be persuasive because they found that they were not an admissible aid to the construction of the GRA, in this case.[25] In defence of this, The Court argued that the 'Notes could not alter the true interpretation of the statute. Our task is to construe what Parliament has enacted, not what the Explanatory Notes say it enacted'.[26]

> Lastly, the court addressed the appellant's submission that the statute should be interpreted 'in line with contemporary moral and social norms'.[27] It cited Lord Bingham's explanation of this principle:

If Parliament, however, long ago, passed an Act applicable to dogs, it could not properly be interpreted to apply to cats; but it could properly be held to apply to animals which were not considered as dogs when the Act was passed but are so regarded now. [28] To this, the court responded that it finds it 'difficult to see how that principle of statutory construction assists in resolving the issue' of whether section 12 should have a prospective effect.[29] Nevertheless, the court noted that the President's judgement had used such a contemporary interpretation by construing 'mother' to be 'the person who gives birth to a child rather than a gender-specific word like "woman"'.[30] Yet, the Court of Appeal said that this did not extend to the word, 'mother', being construed as the word, 'father' because this 'would offend against the principle as enunciated by Lord Bingham that the word "dog" cannot be construed to mean "cat".' Additionally, the court found that to use a new term such as 'gestational parent', 'would not be an exercise in interpretation at all but would amount to judicial legislation'.[31]

3.2 The Court's assessment of the human rights claim

The court next considered the appellant's alternative claim, that this interpretation violated his Convention rights, specifically article 8 and article 14.[32] The court first considered article 8 because an infringement of article 14 can only occur in conjunction with a

24 Explanatory Notes to the Gender Recognition Act 2004 para 43.
25 *McConnell* (n 6) para 37.
26 As above.
27 *McConnell* (n 6) para 34.
28 *R (on the application of Quintavalle) v Secretary of State for Health* [2003] UKHL 13 [9].
29 *McConnell* (n 6) para 35.
30 As above.
31 As above.
32 *McConnell* (n 6) para 44; European Convention on Human Rights, Arts 8, 14.

corresponding infringement of article 8.[33] The court briefly analysed the interference with article 8, explaining that it persisted for two reasons. First, the 'state requiring a trans person to declare in a formal document that their gender is not their current gender, but the gender assigned at birth' goes against 'a person's sense of their own identity'. Second, this interference results from the incongruence between the appellant's legal relationship with his son, one of mother and son, and the corresponding social relationship, one of father and son.

As both parties and the court agreed that there was an interference with article 8, the determinative issue before the court was whether this interference was justified under article 8(2).[34] The court found that the interference was justified because it was both in pursuance of a 'legitimate aim' and was proportionate to that aim.[35] The court briefly addressed the legitimate aim, claiming it to be 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.'[36] In contrast, the court accorded more space to the question of whether that aim was justifiable, applying the well-recognised Bank Mellatt questions to this issue.[37] The first two questions were not contended by either party, so the court decided to focus on the third and fourth questions. These ask (i) Are there less intrusive means available? And (ii) Is a fair balance achieved between individual and community rights?[38] Rather than addressing these questions directly, the court emphasised 'certain fundamental features of this case'.[39]

First, this case sits in a difficult and sensitive context.[40] Second, many pieces of legislation may be affected by adopting an alternative interpretation of the word, 'mother'.[41] Other pieces of legislation using this word include the Human Fertilisation and Embryology Act 2008 and the Children Act 1989, which uses the word, 'mother', no less than 45 times.[42] Third, the court felt it prudent to note that there is no decision from the Strasbourg Court on this issue which supports the Appellant's interpretation.[43] With no authoritative judgement to refer to, the court instead discussed a German case that has a very similar factual nexus to the present case.[44] The German Federal High

33 European Convention on Human Rights, art 8.
34 *McConnell* (n 6) para 56.
35 *McConnell* (n 6) paras 58, 61-82.
36 *McConnell* (n 6) para 58.
37 *McConnell* (n 6) para 59; *Bank Mellatt v HM Treasury (No 2)* [2012] UKSC 39.
38 As above.
39 *McConnell* (n 6) para 61.
40 *McConnell* (n 6) para 62.
41 *McConnell* (n 6) para 63.
42 *McConnell* (n 6) paras 64-65.
43 *McConnell* (n 6) para 72.
44 *McConnell* (n 6) para 73.

Court found the interference with article 8 to be within the wide margin of appreciation. The court noted that it 'cannot exclude the possibility that the Strasbourg Court may disagree with the courts in Germany, but it found 'that their reasoning is compelling.'[45] Fourth, there is no consensus across Europe on the issue of this case.[46] This is meaningful in that it allows the court to afford a 'margin of judgement' to Parliament on the matter of proportionality.[47] The court supports this margin on the bases that the courts have a lower 'relative institutional competence' than Parliament and that the latter enjoy a democratic legitimacy that the courts do not.[48]

For the above reasons, the Court of Appeal found that 'there is no incompatibility between sections 9 and 12 of the GRA, on their natural interpretation, and convention rights.'[49] Because of this, the Appellant's article 14 argument was also rejected. The court dismissed the appeal on both grounds.

4 Comment

This article will comment on each ground of appeal in turn. It will start with the court's approach to interpreting the provisions of the GRA. Then, it will analyse the court's justification of that interpretation, considering the human rights challenge proposed by the Appellant.

4.1 Interpretation of the GRA

The Court of Appeal rightly begins its analysis of statutory interpretation by examining the 'ordinary meaning' of section 12.[50] The court describes the interpretation of section 12 of the GRA as unambiguous and ordinary, yet this analysis will show that the matter is not so straightforward.[51] The tense chosen by Parliament demonstrates this. Section 12 reads: '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'.[52] One may reasonably view the italicised words as crucial because they show that whilst the person's gender is currently changing, at least legally, their 'status' as a 'father' or a 'mother', has already been gained. It is, therefore, not unreasonable to read only a retrospective effect into

45 *McConnell* (n 6) para 78.
46 *McConnell* (n 6) para 79.
47 *McConnell* (n 6) para 80.
48 *McConnell* (n 6) paras 81-82.
49 *McConnell* (n 6) para 88.
50 *McConnell* (n 6) para 30; L Norbury & D Bailey *Bennion on Statutory Interpretation* (2017) at 680.
51 *McConnell* (n 6) para s 30, 38.
52 GRA, s 12 (emphasis added).

this provision as here, the status of fatherhood or motherhood has already been gained before the gender recognition certificate. At the very least, Welstead is correct in saying that 'the wording of section 12 of the GRA 2004 is open to the interpretation that it is prospective as well as retrospective.'[53] So, the interpretation of prospective effect is by no means ordinary and straightforward, as the Court of Appeal suggested.

Despite this, there is support for the Court of Appeal's supplementary arguments that the Appellant's interpretation would be inconsistent with other provisions in the GRA. Brown suggests there would certainly be an incongruence between Sections 12 and 9(2), if the Appellant's interpretation was accepted by the Court of Appeal.[54] On this view, one of these provisions would have to concede a lack of meaning for the other to have any. However, section 9(2), simply put, precludes the operation of Section 9(1) where a transgender person becomes a parent before receiving a gender recognition certificate. In contrast to what was argued by the Court of Appeal and Brown, this appears to cover the same ground as the retrospective effect of Section 12. Yet, both the Appellant and the Respondent agreed that retrospective effect should be included in an interpretation of Section 12. It is this basic, retrospective effect of section 12 that appears 'to render otiose' Section 9(2), rather than the additional prospective effect that the Appellant opposed. The court found that the Appellant's attempts to restrict section 12 to solely retrospective effect, but this is a mischaracterisation. As Brown has pointed out, it is more logical to say that Section 12 becomes meaningless, rather than section 9, if it were to have no prospective effect.[55] This is primarily because it is the meaning of section 12, not section 9, that is in dispute. Although this may seem to be no more than semantics, this exposes the crucial difference between the two parties' proposed interpretations. From the discussion above, it can be seen that if the Appellant's proposed interpretation results in no meaning for section 12, then it must follow that the Respondent's submission only includes prospective effect. Yet, this is at odds with what both parties and the courts have agreed, which is that section 12 does have a retrospective effect. In short, the court's finding that the Appellant's submission conflicts with section 9(2) is questionable.

The analysis of the GRA so far has been based on the literal and golden rules of statutory interpretation. The theoretical assumption behind these rules is that Parliament is 'rational, reasonable and

53 M Welstead 'Biology matters: Is this person my mother or my father?' [2019] 49 *Family Law* at 1416.
54 Brown (n 5) 166.
55 Brown (n 5) 166.

informed' and pursues a 'clear purpose in a coherent and principled manner'.[56] For this reason, there is a fundamental principle of statutory construction which presumes that every word in a piece of legislation will impact its meaning.[57] Acting on this basis, the Court of Appeal may be reasonable in supporting the Respondent's interpretation of section 12 by referring to the wording used in other areas of the GRA. On one reading, this similarly presumes that Parliament intended only retrospective effect where it has explicitly chosen to do so, such as in section 15. However, on another reading, this may use reasoning which is abstracted from this fundamental principle. It assumes that Parliament intended to create a dual retrospective and prospective effect by omitting to explicitly opt for one or the other, or both. This type of omission-based inference provides a weaker basis for an argument than the simple claim that section 15 has only a retrospective effect. This is especially the case where Parliament has not considered the issue at all, such as the application of McConnell-type situations to sections 9 and 12. In his first instance judgement, the President explicitly notes that this issue was not contemplated by Parliament in their discussions about the GRA.[58] Although it may go against strict adherence to a principled conception of Parliament, it seems that, in reality, Parliament's omission was not a purposeful attempt to include prospective effect. As a result, it is, at a minimum, unclear whether section 12 should be given a prospective effect or not. Further, this analysis tends towards the suggestion that a prospective effect should not be applied.

Because the use of the literal and golden rules does not leave a clear picture of Section 12, the next step is to identify the mischief that Section 12 targets. This leads us to view the Explanatory Notes to the GRA differently than in the Court of Appeal, which found section 12's interpretation to be clear.[59] Explanatory notes 'may be used to understand the background to and context of the Act and the mischief at which it is aimed.'[60] Yet, the Court of Appeal only gave a brief consideration of the Notes, which said that the purpose of section 12 is 'the continuity of parental rights and responsibilities', by ensuring a person will 'retain their original status as either mother or father of a child.'[61] The court's judgement is somewhat surprising, in its claim that the Notes are not inconsistent with the Respondent's interpretation of section 12. Although the Notes do not explicitly suggest that there should be no prospective effect, they strongly imply that retrospective effect is all that was aimed at by Parliament

56 Norbury & Bailey (n 50) 408.
57 Norbury & Bailey (n 50) 662.
58 *R (on the application of TT)* (n 9) para 90.
59 Explanatory Notes (n 24).
60 *R (on the application of Kaitey) v Secretary of State for the Home Department* [2021] EWCA Civ 1875 [109].
61 Explanatory Notes (n 24) para 43 (emphasis added).

in enacting section 12. It seems likely that the court was reluctant to accord any weight to the Explanatory Notes because it had already been convinced by its analysis of the actual text of the legislation itself. This explains the court's comment that, even if the Notes were inconsistent with the court's interpretation of section 12, they 'could not alter the true interpretation of the statute.'[62] Whilst, arguably, the text was not sufficiently unambiguous to render the Explanatory Notes inadmissible, the court's approach is understandable in that the perceived ordinary meaning is, under the rules of construction, more authoritative than explanatory notes. However, the Appellant finds himself blocked by the procedure of the legal process from what is a more just outcome for him; the notes do strongly suggest Parliament only intended to create a retrospective effect.

This reluctance also persists in the court's rejection of the 'always speaking' doctrine.[63] Not only did the court refuse to use the doctrine, but it went as far as to say that it could not see how the doctrine would assist in construing the statute as only retrospective effect or also prospective effect.[64] In my view, the contemporary social norm that the Appellant's submission referred to is that it is more respectful for a transgender person to be described as, and addressed by, the gender they identify with, regardless of their legal or biological status.[65] Later in their judgement, the Court of Appeal itself describes this social norm in its consideration of the human rights appeal. It says that 'as a matter of social life, their relationship is that of father and son', referring to the Appellant and his child. If the interpretation of the GRA were to follow this social norm, then it may be accepted that McConnell and others in his situation will be legally recognised as fathers to their children, or at least not as mothers. This controversial reluctance is especially so considering that it is based on the strength of conviction behind the ordinary meaning of the words identified at the beginning of the court's interpretative analysis. This is because, as pointed out above, the ordinary meaning of section 12 is unclear.

Oddly, having found that the doctrine is not relevant to the interpretation of section 12 of the GRA, the court affirmed the first instance judgement's usage of the doctrine.[66] There is a conflict apparent in the two statements that the court makes in doing so. On one hand, the court found the doctrine to be outright irrelevant. Yet, on the other, the court endorses its use. Additionally, the intention behind outlining the limits to this rule that 'cats' may not be

62 *McConnell* (n 6) para 37.
63 *Owens v Owens* [2018] UKSC 41; *R (Quintavalle) v Secretary of State for Health* [2003] UKHL 13.
64 *McConnell* (n 6) para 35.
65 For example, EL Green et al 'Glossary of transgender terms' *The New York Times* (New York) 21 October 2018 at 53.
66 McConnell (n 6) para 35.

interpreted as 'dogs' is not simply to say that the two are different. Of course, they do represent different things. However, the purpose of the 'always speaking' doctrine is to recognise where, over time, one word can now be considered to mean something else. Consequently, the purpose of the limit to this doctrine is to illustrate that 'cats' will never be recognised as 'dogs' and vice versa. Yet, as a matter of social life, mothers can become fathers, and fathers can become mothers. Furthermore, the GRA itself recognises that changing one's gender is a legally recognised concept. Arguably, the court is too hasty to throw out this submission. The court's endorsement of the word, 'mother', being gender-neutral rather than one attached to being a female may directly not lend itself to McConnell being labelled as a 'father'. However, there may be more force behind the request to be called a 'gestational parent', on this basis.

Unfortunately, for the Appellant, adding the term 'gestational parent', was found to be a step too far away from the courts' proper constitutional role. In making this finding, the Court of Appeal accepted that the constitutional arrangement of the courts and Parliament prevents them from doing what is fair and just, or even assessing that matter properly. Whilst there are strong arguments for maintaining a rigorous division of constitutional power, the courts are nonetheless secondary lawmakers. Furthermore, in the Appellant's situation which was found to not be in Parliament's consideration during the debate of the GRA, there is a strong justification for engaging this secondary lawmaker function. This case's result highlights some of the issues underlying the rules of statutory construction. Even though some support the court's approach as a mechanistic application of these, the result here is that the court cannot supplement the GRA where Parliament failed to consider those such as McConnell.[67] In this light, the outcome, in this case, can be seen as an unaddressed injustice against McConnell.[68]

Whether one agrees with the interpretation of the GRA, persistent issues remain in this area of law. If the court's interpretation is incorrect, that presents a problem in itself. Alternatively, if the interpretation is viewed as the 'correct' one, this brings into play an important comment from Fenton-Glynn, that this case 'lays bare the gendered, heteronormative conception of the family currently in operation under English law'.[69] This is especially clear by the fact that the court felt it could not substantially alter the meaning of 'mother' or 'father' because of how deeply ingrained the use of these words is

67 Brown (n 5) 166-7.
68 The court in accepted that their interpretation interfered with the Appellant's article 8 rights: *McConnell* (n 6) [53].
69 C Fenton-Glynn 'Deconstructing parenthood: What makes a "mother"?' (2020) 79 *The Cambridge Law Journal* at 36.

in English law.[70] There are growing calls for the concept of family to be adapted to reflect the social reality more accurately, including that there are many transgender parents.[71] This would replace the current approach, through which new forms of parenthood are assessed by reference to how to fit within a traditional family relationship.[72] Unfortunately, the court does not aid the modernisation of the law in this regard, not only in how it interprets the GRA but also in the language it uses. The use of the words, 'cats' and 'dogs', seems to be, at best, an unwise choice, especially as the court describes the case as 'one in which difficult and sensitive social, ethical and political issues arise'.[73]

4.2 The human rights claim

The court's approach to human rights was similarly overridden by broad, top-level factors. For this issue, this meant that a discrete proportionality analysis never materialised in the court's judgement. The court's analysis of proportionality is a short one whereby it avoided engaging with the Bank Mellatt questions, directly and in a narrow sense.[74] The court pays little to no consideration to weighing up the interference with the Appellant's rights against the aim that the statutory scheme pursues.[75] In place of such a narrow analysis, the court accorded a much heavier weight to broad overarching principles, which it said were fundamentally informative to the question of proportionality.[76] Despite these broader principles not directly engaging with the question of proportionality, it is submitted that the court's view of them as 'fundamental' meant they formed the basis of a strong presumption in their favour. For example, the courts said that 'the courts should be slow to occupy what should be Parliament's role'.[77] This presumption is notable in two respects. Firstly, it meant that the court felt that only a short consideration of the human rights appeal was required. Secondly, and arguably most importantly, this has the consequence of giving a strong authority to these fundamental features and their use across human rights law in England and Wales. Although these features chronologically follow

70 *McConnell* (n 6) paras 64-72.
71 For example, Fenton-Glynn (n 69); McGuiness & Alghrani 'Gender and parenthood: The case for realignment' (2008) 16 *Medical Law Review* at 279; McCandless & Sheldon (n 4); T Callus 'A new parenthood paradigm for twenty-first century family law in England and Wales?' (2012) 32 *Legal Studies* at 368.
72 J McCandless 'Transgender parenting and the law', 6 January 2012 https://blogs.lse.ac.uk/politicsandpolicy/parenthood-laws-family/.
73 *McConnell* (n 6) para 62.
74 *Bank Mellatt* (n 37).
75 *McConnell* (n 6). The narrow analysis was considered from para 52-59, whereas the broad analysis took place from para 60-86.
76 *McConnell* (n 6) para 61.
77 *McConnell* (n 6) para 82.

the legitimate aim in the court's judgement, because the court considers them so fundamental, they will be considered first here.

An interesting 'fundamental feature' that the court refers to is the lack of any Strasbourg jurisprudence on this novel area.[78] What is noteworthy is the court's response of substituting a non-authoritative German Federal High Court's decision in place of a judgment from the European Court of Human Rights.[79] However, the Court of Appeal does rightly note that it 'cannot exclude the possibility that the Strasbourg court may disagree with the courts in Germany.'[80] Yet, visually, the court takes the German decision as entirely authoritative. It uses the decision to support its argument and takes no action to account for the possibility the European court will disagree with this decision. Apart from mentioning the possibility, the court gives very short shrift to this materialising. Instead, it simply adopts the reasoning of the German court, with little analysis of it. Whilst a Strasbourg disagreement may be unlikely, because of the commonality of a wide margin of appreciation in such situations, the German decision, properly regarded, does not carry any weight in England and Wales.[81] It is surprising to see this decision used in the court's favour as, for the rest of the judgement, the court has rigorously avoided what are admittedly challenging questions around gender and parenthood by applying the law in a mechanistic and procedural fashion.

Another notable 'fundamental feature' was the role of the constitutional arrangement between Parliament and the courts.[82] Although it is not cited, the margin of judgement given by the court follows the important Nicklinson judgement in placing a high level of importance on the deference given to Parliament.[83] In that case, a majority of Supreme Court judges were sympathetic to the argument that whether or not something is a proportionate interference with Convention rights, broader principles may preclude a declaration of incompatibility from being made.[84] In both Nicklinson and this Court of Appeal judgement, the courts appear to be set against a declaration of incompatibility from the start, for fear of stepping on the toes of Parliament. In essence, the Court of Appeal held that because of the relative institutional competence and the lack of democratic legitimacy held by the courts, it should be extremely

78 *McConnell* (n 6) para 72.
79 German Federal High Court, Decision XII ZB 660/14 (2017).
80 *McConnell* (n 6) para 78.
81 Y Shany 'All roads lead to Strasbourg?: Application of the margin of appreciation doctrine by the European Court of Human Rights and the UN Human Rights Committee' (2017) 9 *Journal of International Dispute Settlement* at 181.
82 *McConnell* (n 6) para 81.
83 *R (on the application of Nicklinson and another) v Ministry of Justice* [2014] UKSC 38 [63], [297].
84 *Nicklinson* (n 83).

cautious when considering declarations of incompatibility. This seems to go against the very function of section 4 of the Human Rights Act 1998.[85] Through this statute, Parliament deemed the courts to be the appropriate institution to provide a check on that which may not be compatible with Convention rights. In response, the courts have paradoxically decided that they know better than this Parliamentary decision and should instead pay ultimate deference to Parliament. Importantly, the result of a declaration of incompatibility is not that a piece of legislation will become invalid. Instead, this declaration simply refers the matter back to Parliament, which then retains its sovereignty by making the final decision on how to address the matter. Instead of improperly taking such an issue from Parliament, a declaration refers it to Parliament.[86] Dissenting in Nicklinson itself, Lord Kerr explained this:

> What the courts do in making a declaration of incompatibility is to remit the issue to Parliament for a political decision, informed by the court's view of the law. The remission of the issue to Parliament does not invoke the court's making a moral choice which is properly within the province of the democratically elected legislature'. It is this fact that renders so much of the judicial agonising about whether assisted dying is an issue for the courts or Parliament misguided and unnecessary[87]

However, because of the context created by the majority in Nicklinson, this agonising persists in McConnell as well. Whilst, in contrast to the German case, Nicklinson is an authoritative judgement, this still serves to provide substantial injustice to the Appellant, as there is an unjustifiable reluctance to find a declaration of incompatibility.

In addition to demonstrating the significance of a broad proportionality analysis, this judgment illustrated the relative lack of consideration required in a narrow proportionality analysis. An important part of this shortness was the discussion of the legitimate aim. The court identified the aim to be the protection of the rights of children of trans parents and the maintenance of a clear and coherent scheme of birth registration.[88] It was viewed as unproblematic that this was a legitimate aim and was not considered at length.[89] One issue with this, however, is that the court did not articulate precisely what the aim is. The court does not detail how enforcing the prospective effect of section 12 of the GRA will protect the rights of

85 Under s 4, a court has the power to declare legislation incompatible with a Convention right.

86 E Wicks 'The Supreme Court Judgment in Nicklinson: One step forward on assisted dying; two steps back on human rights: A commentary on the Supreme Court judgment in *R (Nicklinson) v Ministry of Justice*; *R (AM) v Director of Public Prosecutions* [2014] UKSC 38 (2014) 23' *Medical Law Review* at 153.

87 *Nicklinson* (n 83) para 344.

88 *McConnell* (n 6) para 58.

89 As above.

children. Perhaps, the Court of Appeal was referring to the first instance analysis, where it was suggested that the legitimate aim specifically protected the interest of a child in knowing the identity of their mother.[90] At first instance, the President found that if no mother was described on the birth certificate, then there would be 'no statutorily guaranteed method of discovering the identity of the person who gave birth to [them]'.[91] This may, ostensibly, seem to be a legitimate concern. However, trans men may have children through natural means (rather than assisted reproduction, as was the case here). In such a case, the child's right to know their mother will be irrelevant. It is not entirely clear, therefore, why this right provides a barrier between these transgender men and the legal attribution of fatherhood, as this is not a right that exists outside of assisted reproduction.

Similarly, the second legitimate aim seems equally dubious. It is not immediately obvious how the registration scheme would become unclear if transgender men were to be labelled as gestational parents. In addition, the register may yet become more coherent if it accurately reflects social reality. The Court of Appeal itself, when describing the interference with article 8, suggested that it is problematic for the state to describe a relationship as mother and son, when, 'as a matter of social life, their relationship is that of father and son.'[92] Although the court included this in its analysis of the interference, it did not recognise the same point's relevance to its consideration of a legitimate aim. This is a clear example of using an old set of terms to describe a modern situation. The supposed legitimate aim tries to retain the use of a singular word, 'mother', to mean a female parent and 'father', to mean a male parent. This system was devised without knowledge of the idea that in modern society, this correspondence may not always persist. McGuinness and Alghrani summed the point well:

> [By] forcing definitions to stretch, so that males are acting as 'mothers' and females as 'fathers' we are tacitly accepting that enforced definitions of gender roles are more important than an acknowledgement of the reality of these situations.[93]

It is challengeable to claim that the coherence of the registration scheme is a legitimate reason to interfere with article 8 rights, let alone a proportionate interference.

90 *R (on the application of TT)* (n 9) para 237.
91 As above; *Godelli v Italy* (2012) EHRR 33783/09 at 12.
92 *McConnell* (n 6) para 55.
93 McGuiness & Alghrani (n 71) 279.

5 Conclusion

In both grounds of appeal, the appellant's attempts to demonstrate injustice were drowned out by wider concerns. On behalf of statutory interpretation, this wider concern was the procedural barrier presented by maintaining systematic application of the rules of statutory interpretation. Those who are sceptical of this judgement may believe that the Court of Appeal used this systematic application as a shield against the requirement to consider the impact of the legislation on the lived experience of transgender parents. In a technical sense, this presents no legal issue, as the well-established role of the courts is simply to interpret what Parliament has written, not to remake the law. In doing so, Parliament is assumed to have considered all potential issues and addressed them coherently.[94] Concerning the human rights appeal, the current context around this area of law and the relationship between Parliament and the courts renders it extremely challenging to succeed, even when, on a narrow reading, there is an unjustified interference with Convention rights. In this way, the second half of the judgement is also procedural, but in a looser, less technical manner.

This article has attempted to show two problems with proceeding in such a procedural manner. Firstly, as is shown by the present case, a rigorous application of the rules can expose flaws in that system. Despite the issue of construction being considered for 25 paragraphs, it was the pivotal point was the identification of the ordinary meaning of section 12 to include prospective effect. From that moment onwards, the court displayed a reluctance to accept the Appellant's submissions. For this reason, it strongly rejected the Appellant's use of the 'always speaking' doctrine and the explanatory notes in an incredibly quick fashion. The court admitted that it could not see how the former was relevant and held the latter to be inadmissible. Similarly, the broad analysis of the human rights claim led to questionable use of German jurisprudence and, in my view, a misreading of the Human Rights Act 1998, by overly concentrating on paying due deference to Parliament. Secondly, if the court's interpretation can be successfully defended, that interpretation serves to highlight issues in this legal system. This focus on broad-level analysis diverted the attention of the court away from an examination of whether the interference was just. There was no direct consideration of whether the legitimate aim was important enough to outweigh the interference with McConnell's Convention rights. In turn, the Court of Appeal missed the opportunity to ask Parliament to 're-imagine a model of parenthood fit for the 21st

94 Norbury & Bailey (n 50) 408; *Inland Revenue Commissioners v Hinchy* [1960] AC 748.

century', one which adopts a wholesale acceptance of non-traditional families.[95] Instead, the law determinedly attempts to conform those like McConnell into more traditional categories, retaining the issues highlighted by the construction of the GRA.

95 Fenton-Glynn (n 69) 37.