PANTHEON
CHAMBERS

Bench Memorandum

Liam Wang, by next friend Davina Wang v Secretary for Justice, Vivian Xu

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The contents of the Bench Memorandum will remain confidential until the conclusion of the Be Engayged Mooting Competition 2023.

The Bench Memorandum was co-authored by Azan Marwah, Barrister and Mediator, Pantheon Chambers and Associate Professor Amy Barrow, Macquarie Law School.

In the event that an addendum is required to this Bench Memorandum, this will be circulated to all Judges engaged in the competition.

1. Purpose of the Bench Memorandum

The Bench Memorandum provides judges with basic factual and legal information to evaluate the written memorials and oral pleadings of participating teams. It should be read in conjunction with the Moot Problem.

The Moot Problem has been designed to present the competitors with a series of legal issues that have both strengths and weaknesses. Teams should be able to construct logical arguments as both Applicant and Respondent. In judging the moot, your principal task is to evaluate the quality of each team's analysis and arguments, knowledge of Hong Kong law regarding discrimination and LGBT+ rights, and advocacy skills. In your role, you are not required to evaluate the merits of the case, and this should not form part of your assessment.

The Bench Memorandum is not meant to be an exhaustive treatise on the legal issues raised by the Moot Problem. Judges should be aware that this document has been condensed in favour of breadth. It does not purport to cover every detail, though we do aim to contextualize the law both within society and within the events of the Problem. In many instances, relevant case law and practice is alluded to, but not discussed in depth. The participants should address cases and principles of law. The practice and legal authorities cited herein are illustrative and not intended to be a comprehensive review of all relevant sources of law. As such, judges should not be surprised when participants present arguments or cite authorities that may not be discussed in this memorandum. This is perfectly appropriate and does not suggest that such arguments are not relevant or credible.

As always, judges are encouraged to engage in their own independent research on the issues or examine the suggested research materials cited below. One of the most rewarding parts of moots for students is being asked questions during oral arguments. This Bench Memorandum provides two tools to help you ask questions:

- Analysis of each aspect of the moot problem; and
- Sample questions are embedded throughout the Bench Memorandum in relation to each aspect of the problem.

2. Summary of Facts

2.1. Overview

The 2023 Moot Problem involves judicial review proceedings at the Court of Final Appeal ("CFA"). The initial judicial review application was made by one of the applicants, Davina Wang, acting as next friend for Liam Wang, against the Secretary for Justice seeking declaratory relief that the terms 'spouse,' 'marriage' and 'married' in the Adoption Ordinance (Cap 290) should be read consistent with Article 25 of the Basic Law and Articles 1 and 22 of BORO. As an interested party, Vivian, the partner of Davina Wang, also argues that a failure to recognize her as the parent of Liam Wang under the Parent and Child Ordinance (Cap 429) is discriminatory on the grounds of her transgender status. As such, this Problem concerns three core issues: (1) whether joint adoption extends to same-sex married couples; (2) the parental status of transgender partners in marriages where fertility services have been obtained; and (3) the rights of children of same-sex married couples/transgender parents.

2.2. Background

Davina is in a long-term partnership with Vivian, whom she met during her undergraduate studies in London, UK. Both Davina and Vivian are Hong Kong permanent residents (with BNO status).

Following the completion of their studies in the UK, Davina and Vivian returned to Hong Kong in 2014. Vivian was employed full-time by a multi-national company and Davina worked part-time as a research assistant.

Vivian was assigned male at birth but identifies as female. In 2014, she underwent gender-affirming surgery at Ruttonjee Hospital, which historically has been the home of such surgeries.[1] Vivian's HKID was reissued with female gender markers shortly thereafter.

In July 2015, Davina was successful in securing a lectureship at the University of Hong Kong, and it was around this time that Davina and Vivian decided that they would like to start a family

[1] See https://www.info.gov.hk/gia/general/201512/09/P201512090358.htm

and have a child together. Due to restrictions on access to reproductive technologies in Hong Kong for unmarried couples, they decided to wait until they could marry.

During a period of sabbatical from their jobs in 2017, Davina and Vivian married in in the UK, where same-sex marriage is recognized (see Marriage (Same-Sex Couples) Act 2013, United Kingdom).

Following their marriage, they started IVF treatment in London using donor sperm and Davina's own eggs. After several rounds, Davina conceived, and they decided to return to Hong Kong to resume their jobs.

Davina gave birth to a son, Liam, at Queen Mary Hospital in January 2019. Following the birth of their son, they were told that Vivian would not be able to be recorded as Liam's parent on the birth certificate. The Hospital authority suggested that the couple needed to discuss their circumstances with the Immigration Department.

When Vivian and Davina went to register the birth of their son with the Births and Deaths General Register Office in Queensway, they were informed that only Davina's name could be formally recorded as Liam's parent. Following this distressing incident, Davina developed a depressive disorder leading to her resignation from the University of Hong Kong.

In May 2019, Vivian and Davina explored the possibility of step-parent adoption by Vivian of Liam with Adoption Unit of the Social Welfare Department, however they were informed that this option was only available to married couples, as recognized under Hong Kong law, and would not be applicable given that Vivian and Davina had married in the United Kingdom.

2.3.Judicial Review Proceedings

In June 2019, Davina (acting as next friend for her son, Liam Wang) applied for and was granted leave by the High Court of the Hong Kong Special Administrative Region Court of First Instance to bring judicial review proceedings against the Secretary for Justice. In applying for judicial review, Davina sought declaratory relief that consistent with Article 25 of the Basic Law and Articles 1 and 22 of the Hong Kong Bill of Rights Ordinance (Cap 383) ("BORO"), the terms 'married,' 'marriage,' and 'spouse' in the Adoption Ordinance (Cap 290) should be

construed so as to include parties to a same-sex marriage performed overseas.

The full hearing of the judicial review proceedings was heard at the Court of First Instance in March 2020. The Respondent, the Secretary for Justice, argued that the constitutional protection afforded by Article 37 of the Basic Law on the right to raise a family is *lex specialis*, and extends to heterosexual couples only. The Secretary for Justice argued that limiting joint adoption to heterosexual, married couples was justified and proportionate on the basis that this protected traditional families. Further, the Secretary for Justice argued that the children's protection would be better served through adoption by parents in lawful marriages.

Davina's partner, Vivian, as an interested party represented separately, argued that under s.10(3) of the Parent and Child Ordinance (Cap 429) ("PCO") she should be recognized as the 'father' of Liam, on the basis that failure to recognize her as Liam's parent was discriminatory on the grounds of her transgender status and contrary to legislative intent.

At the Court of First Instance, Madam Justice Chew held in favour of Liam and Davina, granting the declaratory relief sought. In her judgment, Chew J suggested that a blanket ban on second-parent adoption by same-sex couples was disproportionate and contrary to the best interests of the child. However, Chew J rejected Vivian's argument, on the basis that for legal purposes, Vivian was now recognised as a 'woman.'

At the Court of First Instance, the Secretary for Justice was granted leave to the Court of Appeal, whereupon Vivian filed a Respondent's notice, challenging the decision of Chew J. Both were dismissed by the Court of Appeal, however, leave to appeal to the Court of Final Appeal was granted given the questions of great and general public importance raised by the case.

Questions of Great and General Public Importance

(1) Should the words 'spouse' (and the associated terms 'married' and 'marriage') be interpreted within the Adoption Ordinance (Cap 290) to include a party to a same-sex marriage performed abroad?

(2) Should section 10(3) of the Parent and Child Ordinance (Cap 429) be interpreted to include the transgender female partner of a woman who together with her obtained fertility treatment services?

3. Analysis of the Moot Problem

The moot problem is divided into two halves – the two questions before the Court of Final Appeal. The ***first question*** considers the status of same-sex marriages in the context of adoption, and whether discrimination in adoption can be justified (which the CFA has suggested before is unlikely) or alternatively whether the *lex specialis* rule is sufficient to obviate the need for justification (as suggested by the Court of Appeal in more recent cases). The ***second question*** is concerned with the gender status of transgender people in the context of parenting and founding a family. In previous cases, the CFA has reiterated the constitutional rights that require recognition of assumed genders, but in the context of medically assisted reproduction, such recognition appears to cause discrimination against those persons if their change in gender renders their marriages homosexual rather than heterosexual.

The above contradictions arise from the legal fictions created by the statutory regimes governing adoption and medically assisted reproduction. This moot requires the participants to educate themselves in these complex schemes and consider the justifications for discrimination against LGBT people in this context.

3.1. Adoption Ordinance, 'spouse', 'married' and 'marriage'

Question 1 almost entirely mirrors the questions that arose in ***Leung Chun Kwong v Secretary for the Civil Service & Anor*** [2019] HKCFA 19, (2019) 22 HKCFAR 127, [2019] 4 HKC 281 (which was concerned with interpretation of marriage under the Inland Revenue Ordinance) and the subsequent line of cases. Here the context is the interpretation of 'spouse,' 'married' and 'marriage' in adoption.

Adoption is wholly governed by a single Ordinance in Hong Kong, the Adoption Ordinance (Cap 290).

There are two forms of application for local adoption in Hong Kong: sole and joint: see s.4 of the Adoption Ordinance (Cap 290), which allows for applications for adoption by a sole applicant or "*applicants who apply jointly as* ***2 spouses***".[2]

[2] See also s.5(2) of the Adoption Ordinance (Cap 290), which refers to "*2 spouses*" applying jointly.

As to sole applicants, the restrictions on such applications are set out in s.5(1). They can be broadly categorised into two groups: (i) step-parent applications under s.5(1)(c) and (ii) non-step-parent applications under see s.5(1)(a), (b) or (d).

As to the requirements of sole applicant adoptions by a step-parent, see s.5(1)(c). The applicant must be "*a person who is **married** to a parent of the infant*". Therefore, whether Vivian applies as a sole applicant or jointly with Davina, she must show she is married to Davina. This begs the question in this case as to whether Vivian's marriage to Davina is recognized in Hong Kong for the purposes of adoption.

The most obvious problem for interpretation is that the terms 'spouse,' 'married' and 'marriage' are not specifically defined in s.2 (on Interpretation). Neither are marriage, spouse, husband and wife defined in the Interpretation and General Clauses Ordinance (Cap 1). Mooters may, therefore, consider whether the general law assists.

Most of the case law suggests that the common law definition of marriage is the same as the 'Christian' definition, i.e. "*the voluntary union for life of one man and one woman to the exclusion of all others*": see ***W v Registrar of Marriage*** (2013) 16 HKCFAR 112 at §§29, 63. However, other forms of marriage (e.g. polygamous marriages) are recognized for particular purposes depending upon context (e.g. taxation). Furthermore, marriage in Hong Kong is subject to the Marriage Ordinance (Cap 181).

Under the Marriage Ordinance, s.40, marriages performed in Hong Kong (at least since 1971) must comply with the common law definition (i.e. Christian marriages or the civil equivalent). If they are not, they are treated as void for purposes of the general law: see s.4 of the Marriage Reform Ordinance (Cap 178) and s.20 of the Matrimonial Causes Ordinance (Cap 179) – although, note that these sections do not apply to foreign marriages and the latter Ordinance only applies in applications for divorce. In this moot, the marriage is a foreign marriage.

Recognition of foreign marriages, for the purposes the general law, is a matter for private

international law (likewise in relation to the law of divorce[3]) unless there is a statutory definition (see e.g. s.2 of the Inland Revenue Ordinance, Cap 112). The basic common law rule for recognition of foreign marriage is that the marriage must be formally and essentially valid.[4] Formal validity means that the marriage was performed in accordance with the law where it was celebrated (the *lex loci celebrationis*). Essential validity means that the parties had capacity and did consent to the marriage in accordance with the applicable law of their domicile (the *lex domicilii*). Capacity to marry is generally governed by the legal system of the domicile of the party concerned. Once this has been determined, the applicable law of that domicile must be applied. In this regard, the forum courts only apply substantive foreign law, not the procedural laws of the foreign jurisdiction. In respect of procedural law, the forum follows its own laws (the *lex fori*). Nor should the courts apply any foreign laws which are against the distinctive public policy of the forum (see *Regazzoni v KC Sethia* (1944) Ltd [1958] AC 301, [1957] 3 All ER 286 (HL)). See the discussion of these issues in general in *Wilkinson v Kitzinger* [2007] 1 FLR 295 at §§11 to 16.

If both Davina and Vivian were domiciled in Hong Kong at the time of their marriage, it is arguable that neither had capacity to enter into a same-sex marriage in the United Kingdom. If they were both domiciled in England at the time of their marriage, then it is arguable that their marriage was lawful and would be recognized under the common law rules of private international law. For the rules on the acquisition of domicile, see the Domicile Ordinance (Cap 596). To acquire a domicile abroad (section 5) (subject to the question of lawfulness and disability that does not arise here), an adult must be present there and intend to make that place their home there for an indefinite period.

The applicant (through his next friend, Davina) has argued that these terms should be construed to include parties to a same-sex marriage performed overseas – essentially, seeking an updated and broader definition, given the advent of same-sex marriage in many foreign jurisdictions since the turn of the 21st Century (beginning with the Netherlands in 2001 and Belgium in 2004).

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[3] See s.20A of the Matrimonial Causes Ordinance (Cap 179).
[4] See *Suen Toi Lee v Yau Yee Ping* (2001) 4 HKCFAR 474, [2002] 1 HKLRD 197, per Bokhary PJ at §40.

To avoid the above issues, mooters may suggest (or it may be suggested) that Vivian could apply as a 'non-step-parent'. However, non-step-parent applications are automatically extinguishing of all rights of the birthparents – whereas a step-parent application will only extinguish the rights of the non-spouse parent (see s.13(1)(a) of the Ordinance).

As to joint applications by spouses, these are not generally considered desirable where one of the applicant's is a natural parent. This would effectively terminate the natural parentage and replace it with the legal fiction of adoptive parentage, which is not generally in the interests of the child: see s.13(1)(a) of the Ordinance; *FH v WB* [2019] HKCFI 1748, [2019] 5 HKC 99 at §37; *Osborne v Arnold* [2023] 1 FLR 549 at §§27-28, 32; and the LegCo Brief to the Adoption (Amendment) Bill 2003, §§16-17. Furthermore, a joint application would still require the recognition of the marriage between the joint applicants, i.e. as "2 spouses".

Therefore, both sole and joint applications, whether under ss.5(1)(c) or 5(2)(a), require the court to determine whether or not the applicant is married to the mother or father of the child, and therefore if it is a same-sex marriage whether such marriage is recognized for the purposes of the Ordinance.

If the term 'spouse' were construed so as to include parties to a same-sex marriage performed overseas (**see 3.2 below on Equality**), this would recognise Davina and Vivian's relationship for the purposes of making an adoption order subject to the restrictions set out in s.5 of the Adoption Ordinance (Cap 290).

Suggested questions for mooters:

- ***What is the statutory definition of "marriage" and "spouse" under the Adoption Ordinance?***
- ***What is the common law meaning of "marriage" or "spouse"?***
- ***The Netherlands introduced same-sex marriage in 2001, Belgium in 2003. Section 4 of the Adoption Ordinance was replaced in 2004. Is there any reference to the meaning of "marriage" or "spouse" or the status of same-sex marriages under the Ordinance in the admissible legislative materials?***
- ***Where were Davina and Vivian domiciled at the time of their marriage?***
- ***Is the marriage of Davina and Vivian a marriage that can be recognised under the***

common law rules for validity of foreign marriages?

- ***Is the marriage between Davina and Vivian a lawful marriage?***

3.2.Equality & *Lex Specialis*

The question of whether the terms 'spouse,' 'marriage' and 'married' in the Adoption Ordinance (Cap 290) may be construed to include parties to a same-sex marriage performed overseas raises the fundamental issue of equality.

Art. 25 of the Basic Law stipulates that:

> *All Hong Kong residents shall be equal before the law.*

Art. 1 of BORO stipulates:

> *1(1). The rights recognized in this Bill of Rights shall be enjoyed without distinction of any kind, such as race, colour,* ***sex****, language, religion, political or other opinion, national or social origin, property, birth or* ***other status****.*
> *1(2). Men and women shall have an equal right to the enjoyment of all civil and political rights set forth in this Bill of Rights. [cf. ICCPR Art. 2 & 3].*

Art. 22, of BORO stipulates:

> *All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour,* ***sex****, language, religion, political or other opinion, national or social origin, property, birth or* ***other status****. [cf. ICCPR Art. 26].*

Article 22 of the BORO codifies ICCPR, art. 26 into Hong Kong's domestic law. In *Toonen v Australia*, a 1991 case concerning privacy and the criminalisation of consensual sex between gay men in Tasmania, Australia, the Human Rights Committee explained that the reference to 'sex' in art. 2(1) and art. 26 of the ICCPR included 'sexual orientation.' In accordance with international human rights jurisprudence, the scope of art. 22 of BORO prohibits discrimination and guarantees to all persons equal and effective protection against discrimination including on the ground of sexual orientation.

Art. 25 of the Basic Law and art. 22 of BORO protect the right to equality. The case of ***Secretary for Justice v Yau Yuk Lung Zigo*** [2007] HKCFA 50; [2007] 3 HKLRD 903; (2007) 10 HKCFAR 335; [2007] 3 HKC 545 determined that 'other status' includes discrimination on the grounds of sexual orientation. However, the Court of Final Appeal did not explore whether sexual orientation can be recognised as implicit within the grounds of 'sex'. It is important to note that the court ruled that differential treatment on the grounds of sexual orientation must be subjected to higher levels of scrutiny. Accordingly, any differential treatment on the ground of sexual orientation must be subjected to a high level of scrutiny by the court. See also ***Leung Chun Kwong v Secretary for the Civil Service & Anor*** [2019] HKCFA 19, (2019) 22 HKCFAR 127, [2019] 4 HKC 281 and ***QT***. The question of whether differential treatment is justified regarding constitutionally protected rights, is ordinarily evaluated by the courts using a four-step proportionality test:

> *(i) does the differential treatment pursue a legitimate aim; (ii) is the differential treatment rationally connected to that legitimate aim; (iii) is the differential treatment no more than necessary to accomplish the legitimate aim; and (iv) has a reasonable balance been struck between the societal benefits arising from the application of differential treatment and the interference with the individual's equality rights (QT at [86]-[87]).*

The case law on use of equality rights to require the recognition of same-sex marriages is split, and subject to continuing dispute before the Courts. Most of the previous cases concern recognition of foreign same-sex marriages in specific limited areas of law calling for justification: e.g. tax and civil service terms of service in ***Leung Chun Kwong v Secretary for the Civil Service & Anor*** [2019] HKCFA 19, (2019) 22 HKCFAR 127, [2019] 4 HKC 281; and immigration in ***Director of Immigration v QT*** [2018] HKCFA 28, (2018) 21 HKCFAR 324, [2018] 4 HKC 403. In the latter judgment at §56, the Court of Final Appeal noted that differential treatment for same-sex couples in adoption had been held to be unjustified by the European Court of Human Rights in ***X v Austria*** (2013) 57 EHRR 14. At §67 of ***QT***, the Court of Final Appeal appeared to agree with this line of jurisprudence and expressed doubt that a blanket ban on same-sex couples adopting could be justified. By contrast, there are more recent cases (discussed below) unsuccessfully seeking general recognition of same-sex marriage, where the Court of Appeal has rejected the need for any justification.

The Respondent in the case, the Secretary for Justice has argued that Article 37 of the Basic Law is ***lex specialis*** and extends to heterosexual couples only – a line of argument not pursued in ***Leung Chun Kwong*** and ***QT***. It was argued that this limitation is justified and proportionate as it serves to protect traditional families, and that children would be better protected through their adoption by parents in a lawful marriage.

Article 37 of the Basic Law states:

> *The freedom of marriage of Hong Kong residents and their right to raise a family freely shall be protected by law.*

In ***W v Registrar of Marriages*** [2013] HKCFA 39; [2013] 3 HKLRD 90; (2013) 16 HKCFAR 112, the constitutionality of the Marriage Ordinance and Matrimonial Clauses Ordinance were challenged on the basis that they impaired W's right to marry under Article 37 of the Basic Law. The Court of Final Appeal determined that the denial of W, a transgender female's right to marry her male partner "*denied…the right to marry at all*" at [119]. Accordingly, to preserve that right, the Court declared that the meaning of the words "woman" and "female" in the definition of marriage would be interpreted to include a post-operative male-to-female transsexual person whose gender has been certified by an appropriate medical authority to have changed as a result of sex reassignment surgery. The applicant, W, sought to enter marriage with her male partner, therefore the court did not include same-sex marriage within its interpretation of Article 37 of the Basic Law.

In ***MK v Government of the Hong Kong SAR*** [2019] HKCFI 2518; [2019] 5 HKLRD 259; [2019] 6 HKC 92, the High Court ruled against the extension of the right to marry to same-sex relationships – relying on Art. 37 as a *lex specialis*, limiting the right to marry to opposite-sex couples. In the follow up case of ***Sham Tsz Kit v Secretary for Justice*** [2022] HKCA 1247; [2022] 6 HKC 391; [2022] 4 HKLRD 368, the Court of Appeal confirmed that rejection and the suggestion that there should be general recognition foreign same-sex marriages and civil partnerships. The latter judgment is on appeal to the Court of Final Appeal, dealing with the legal issues raised in both of these cases.

Suggested questions for mooters:

- ***What is the rational connection between the protection of traditional families and the restriction of step-parent adoption to opposite-sex couples?***
- ***In limiting step-parent adoption, is the differential treatment on the basis of sexual orientation justified and proportionate?***
- ***What does the "right to raise a family" in Article 37 of the Basic Law refer to?***
- ***Does Article 37 of the Basic Law confer the right to raise a family to heterosexual couples only?***
- ***What is the test for lex specialis?***
- ***Is Article 37 of the Basic Law lex specialis?***

3.3.Vivian's parental status

Question 2 mixes two issues: the gender status of a transwoman in the context of a marriage to a woman, and whether it is justifiable to confer parental status to a male partner of a mothers, but not to the female partner of a mother.

Part 5 of the Parent and Child Ordinance (Cap 429), concerns the determination of parentage where birth results from medical treatment. It introduces a non-exhaustive series of legal fictions that confer motherhood and fatherhood that supplant the common law presumptions in the context of birth as a result of IVF and artificial insemination. Section 9 of the Ordinance effectively replaces the common law rule that motherhood is evidenced from parturition and genetic motherhood, and simply confers motherhood when evidence by parturition (i.e. the act of carrying the child).

However, the rules created for fatherhood are far more complex. Under the common law rules, the father of the child is the person whose sperm is used to create the embryo. Section 10 of the Parent and Child Ordinance (Cap 429) allows the common law rules to remain for IVF/artificial insemination cases *save* where the mother is married and "*the sperm of the other party to the marriage*" was not used to create the embryo or where the mother is unmarried but obtains treatment services with her male partner.

Under section 10(2), if the mother is married, and the sperm used was not that of the other party to the marriage, "*then, subject to subsection (5), the other party to the marriage shall be*

regarded as the father of the child unless it is shown that he did not consent to the placing in her of the embryo or the sperm and eggs or to her insemination (as the case may be)." Section 10(5) concerns adoption and a carveout for other rules of law.

Under section 10(3), if the mother is unmarried but obtains treatment with her male partner, and the sperm used was not that of the male partner, "*then, subject to subsection (5), that man shall be regarded as the father of the child.*" Section 10(5) concerns adoption and a carveout for other rules of law.

Marriage is not defined in the Ordinance. However, s.10(8) specifically provides:

> *The references in subsection (2) to the parties to a marriage at the time there referred to—*
>
> *(a) are to the parties to a marriage subsisting at that time, unless a judicial separation was then in force; but*
>
> *(b) include the parties to a void marriage if either or both of them reasonably believed at that time that the marriage was valid; and for the purposes of this subsection it shall be presumed, unless the contrary is shown, that one of them reasonably believed at that time that the marriage was valid.*

As such, the definition of marriage here would appear to encompass marriages that are void under Hong Kong law (see s.20A of the Matrimonial Causes Ordinance (Cap 179)) for reasons such as the gender of the parties. However, applying this rule to transwomen would effectively result in them being regarded as 'father' despite their assumed gender.

The Court of Final Appeal affirmed the right of transgender persons who have undergone gender affirming surgery to marry in their assumed gender: see ***W v Registrar of Marriage*** (2013) 16 HKCFAR 112. The question is whether the assumption of gender for one purpose applies for another legal purpose.

This question arose in the case of ***R (on the application of TT) v The Registrar General for***

England and Wales [2019] EWHC 2384 (Fam)[5], where the President of the Family Division (England & Wales) ruled that a transgender man who has given birth to a child should be recorded on the child's birth certificate as "mother". The court held:

> *"… there is a material difference between a person's gender and their status as a parent. Being a 'mother', whilst hitherto always associated with being female, is the status afforded to a person who undergoes the physical and biological process of carrying a pregnancy and giving birth. It is now medically and legally possible for an individual, whose gender is recognised in law as male, to become pregnant and give birth to their child. Whilst that person's gender is 'male', their parental status, which derives from their biological role in giving birth, is that of 'mother'."*

The present case invites the Court to consider that logic, i.e. the distinction between the status of marriage and parenthood, albeit in the context of fatherhood by legal fiction rather than motherhood by parturition. Here, Vivian was not physically or genetically involved in the birth of the applicant. Her relationship with the child is purely social (possibly economic). Her role is no different from male partners and spouses, and indeed she may be regarded biologically as a male person who can no longer father children – no different from other fathers who require assistance of medical treatment and donated sperm to raise children with their female partners.

Here, the first issue is whether Vivian and Davina are in a marriage, or alternatively (but not argued below) whether Vivian can be regarded as Davina's 'male partner'. The latter argument was not argued below for the obvious reason that if Vivian is regarded as a male, then their marriage is heterosexual and there is no issue of parentage. The second issue is, if Vivian and Davina are 'married' (even if in a void marriage), whether Vivian can be a 'father' despite her transition to female status. The third issue is whether it is justifiable to discriminate against transwomen (and their children) in the status of parentage.

Here, Chew J rejected Vivian's argument that she should be recognized as the father of the child on the basis that for legal purposes, Vivian is now recognized as a woman. Based on the

[5] See also the decision rejecting an appeal from that judgment in: ***R (McConnell) v Registrar General for England and Wales (AIRE Centre intervening)*** [2020] 2 FLR 366, [2021] Fam 77, [2020] 3 FCR 387, [2020] 3 WLR 683, [2020] HRLR 13, (2020) 173 BMLR 1, [2020] EWCA Civ 559, [2020] 2 All ER 813, [2020] WLR(D) 254.

facts of the case, Vivian underwent gender affirming surgery in 2014, and her HKID card was subsequently reissued with female gender markers. Further detail about the procedures undertaken to affirm Vivian's gender are not provided in the facts of the case but given that the reissuance of Vivian's HKID card occurred in 2014 prior to the ***Q, Tse Henry Edward v Commissioner of Registration*** [2023] HKCFA 4 case, the policy in relation to changing gender markers was applied strictly to only those individuals who had completed sex reassignment surgery. In ***Q v Tse Henry Edward v Commissioner of Registration***, the Court held that it was a breach of privacy under BORO to require that transgender individuals undergo surgery to remove their ovaries and uterus and create an artificial penis to change gender markers on their HKID card.

Judges may ask about the legitimate aim and proportionality test, and whether there is any justification for differential treatment for transwomen (as compared with men) as discussed in the Equality section above.

Suggested questions for mooters:

- ***Does section 10(8) of the Parent and Child Ordinance (Cap 429) apply to the marriage between Davina and Vivian?***
- ***If Vivian is for legal purposes recognized as a woman in law, is it appropriate for her to seek recognition as the child's 'father'?***
- ***Is it appropriate to construe the wording 'father' to include recognition of a transgender female partner as the child's parent?***
- ***Based on the wording of s.10(3) should the wording be interpreted to include the transgender female partner of a woman who has obtained fertility treatment?***
- ***If the wording is construed in such a way to include recognition of a transgender female partner as the child's parent, would this in effect legally sanction same-sex marriage?***
- ***Does the matter of where the child was conceived (i.e. overseas in the United Kingdom) have any bearing on the application of the Parent and Child Ordinance (Cap 429)?***

3.4.The rights of the child, family rights

The facts in the present case also raise issues of the rights of the child and under HKBOR Articles 19(1), and 20(1).

The Convention on the Rights of the Child was extended to Hong Kong in 1994 by the government of the United Kingdom, the then colonial British Government in Hong Kong. The Ordinance has not been directly incorporated into Hong Kong law, therefore it is not possible to for the courts to force the Hong Kong SAR Government to comply with the treaty. However, mooters may consider what amounts to the best interests of the child and how this principle ought to be construed. Relevant to this principle is Article 3(1) of the Convention on the Rights of the Child, which specifies that:

> *In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.*

HKBOR Article 19(1) provides that:

> *"The family is the natural and fundamental group unit of society and is entitled to protection by society and the State."*

HKBOR Article 20(1) provides that:

> *"Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State."*

There is considerable and diverse case law on the meaning of 'family' in international human rights law. In ***Emonet v Switzerland*** (2009) 49 EHRR 11 (No. 39051/03, 13 December 2007) at §82, the European Court of Human Rights appeared to reject attempts to define "family" as being confined to apparently traditional family forms, holding that "*it is not for the national authorities to take the place of those concerned in reaching a decision as to the form of communal life they wish to adopt. As it pointed out earlier, the concept of "family" under [ECHR 8] is not confined to marriage-based relationships and can encompass other "family" ties.*" See also ***Keegan v Ireland*** (1994) 18 EHRR 342 at 360-361.

Later, in ***Keegan***, the court explains at §50:

> *50. According to the principles set out by the Court in its caselaw, where the existence of a family tie with a child has been established, the State must act in a manner calculated to enable that tie to be developed and legal safeguards must be created that render possible as from the moment of birth the child's integration in his family. In this context reference may be made to the principle laid down in Article 7 of the United Nations Convention on the Rights of the Child of 20 November 1989 that a child has, as far as possible, the right to be cared for by his or her parents. It is, moreover, appropriate to recall that the mutual enjoyment by parent and child of each other's company constitutes a fundamental element of family life even when the relationship between the parents has broken down."*

Similarly, in his leading text on the ICCPR, Manfred Nowak opined that the term "*family*" as the "*natural and fundamental group unit of society*" in BOR 19 (and ICCPR 23) "*must be understood broadly*" reflecting the "*biological and social reality*". Later, he explains that the "*entitlement*" of the family to "*protection by society and the State*" in BOR 19 and ICCPR 23 means the state is "*thus obliged to provide for the existence of the family in their legal systems ... and to vest it with certain rights and duties. For instance, the legal system must contain provisions regulating the relationship between parents and children.*"

To these concerns might be added the right of the child not to be discriminated against in his parentage. The child here, Liam, would if the Secretary's argument is accepted, only have one parent – whereas the children of non-trans parents would have two.

Suggested questions for mooters:

- ***Are Vivian and Davina in a family with Liam?***
- ***What does the right to protection of the family require in relation to the recognition of Liam's parentage?***
- ***Would a failure to recognize Vivian and Davina as spouses under the Adoption Ordinance (Cap 290) amount to discrimination on the ground of 'birth' under art. 1 of BORO?***

- ***Would a failure to recognize Vivian as the transgender female partner of Liam's mother, and Liam's parent, under the Parent and Child Ordinance (Cap 429) amount to discrimination on the ground of 'birth' under art. 1 of BORO?***
- ***Is there any evidence to suggest that it would not be in the child's best interests to be adopted by their mother, and mother's transgender female partner?***

END