FACV 8 & 9/2022

IN THE COURT OF FINAL APPEAL OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION
FINAL APPEAL NOS 8 AND 9 OF 2022
(ON APPEAL FROM CACV NOS 183 AND 184 OF 2019)

BETWEEN

Q	Applicant (Appellant)

and

COMMISSIONER OF REGISTRATION	Respondent (Respondent)

and

BETWEEN

TSE HENRY EDWARD	Applicant (Appellant)

and

COMMISSIONER OF REGISTRATION	Respondent (Respondent)

CASE FOR THE COMMISSIONER OF REGISTRATION

*Abbreviations in the Appellants' Case ("**AC**") are adopted.*

References to [A/1/2] are references to Record A of the Record, Tab 1 and Page 2

References to [B1/3/4] are references to Record B of the Record, Volume 1, Tab 3 and Page 4

References to {ALOA/5} and [RLOA/6] are references to Consolidated List of Authorities Referred by Appellants Tab 5 and List of Authorities of the Respondent Tab 6 respectively

A. Introduction

1. By leave granted by the Court of Appeal ("**CA**") on 13.05.2022,[1] the Appellants, Q and Tse,[2] appeal against the judgment of the CA of 26.01.2022,[3] whereby the CA dismissed the Appellants' appeals from the judgment of Au J (as he then was) dated 01.02.2019[4] which, in a rolled-up hearing, dismissed[5] the Appellants' respective applications for judicial review of "**the Policy**".[6]

2. The Commissioner invites this Court to reject the appeals for the reasons given by the CA, save that, as explained further below, the Commissioner differs from the CA as to the standard of scrutiny. The Commissioner's case is structured as follows:

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1 [2022] HKCA 675. [A/8/143-146; A/9/147-150]
2 Another applicant, referred to as "R", did not appeal from the Court of First Instance.
3 [2022] HKCA 172; [2022] 1 HKLRD 803 ("**CAJ**"). [A/6/74-137]
4 [2019] HKCFI 295; [2019] 1 HKLRD 1244 ("**CFIJ**"). [A/3/9-67]
5 After granting leave to Q, R and Tse to apply for judicial review.
6 As defined and set out at CAJ [1]. [A/6/75-76]

B. Facts ([3] below);

C. Bases for challenge ([4]-[5] below);

D. Judgments below ([6]-[7] below);

E. Standard of scrutiny ([8] below);

F. Proportionality ([10]-[25] below);

G. Reasonable balance ([26]-[32] below);

H. Conclusion ([33] below).

B. Facts

3. The facts are set out at CAJ [21]-[29]. In summary, both Q and Tse are female-to-male transgender persons ("**FtMTP**"). Neither has undergone full SRS. Q is able to undergo SRS medically,[7] while Tse has not adduced any evidence whether he[8] is able to or not.[9] Both say they have decided not to do so.[10] In the premises, under the Policy, neither is able to change the indication of sex on his HKID from female to male. Neither comes within the exception under the Policy, by which an applicant for change is not required to complete SRS if he/she can prove that he/she cannot undergo it for medical reasons (the "**Exception**").[11]

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7 By a letter dated 19.08.2014 (exhibit "Q-6"), Dr Mak Kai Lok, a psychiatrist, certified Q to be "*psychiatrically fit to proceed to the surgical assessment for female-to-male sex reassignment surgery at this stage*". [B3/57/617-618]

8 References to the Appellants in the masculine are for convenience without prejudice to any of the issues or arguments in this matter.

9 Li Chun Heung's Affidavit [19]-[20]. [B1/15/295-296]

10 Q's Affirmation [20]-[24] [B1/3/71], [35]-[38] [B1/3/73]; Tse's Affirmation [32] [B1/14/283].

11 CAJ [1] [A/6/75-76].

C. Bases for challenge

4. According to the questions for which leave to appeal was granted, the challenges to the Policy are based on two rights: [12]

   4.1 BOR14, [13] namely, whether the Policy amounts to a proportionate interference with the right to privacy thereunder. As stated at AC [5], this is the focus of the Appellants' appeals.

   4.2 BOR3, namely, whether the application of the Policy gives rise to inhuman or degrading treatment or an imminent risk thereof.[14]

   More specifically, the challenges are to a particular aspect of the Policy, namely that, for a change of the sex entry on a HKID to be granted, the person must have completed SRS. In the case of a FtMTP, there must have been (a) the removal of the uterus and ovaries; and (b) the construction

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[12] In the Courts below, a challenge based on alleged indirect discrimination was also made and rejected (CFIJ [105]-[115] [A/3/60-64]; CAJ [120]-[139] [A/6/128-136]). No leave was sought or granted in relation to this ground. Nothing more therefore needs to be said about this aspect.

[13] References to BORx are references to Article x of the BOR.

[14] Despite their respective Forms 86 [B1/1/1-42][B1/2/43-67], in the CA, the Appellants' challenges under BOR3 only referred to "degrading" and "inhuman", but not "cruel", treatment: per their respective Notices of Appeal [3], and their skeleton before the CA [11]-[35].

of a penis or some form of a penis (the "**Challenged Requirements**").[15]

5. However, notwithstanding questions 1, 2 and 4 for which leave to appeal was granted, presumably for the reasons stated at AC [5], the AC does not address BOR3 at all. The entire AC addresses only the issue of whether the Policy, with the Challenged Requirements, satisfies steps 3 and 4 of the proportionality test (steps 1 and 2 not being in issue), and it is therefore on this issue that the Commissioner's Case will focus.

[15] For male-to-female transgender persons, the requirements are (a) the removal of the penis and testes; and (b) the construction of a vagina.

D. Judgments below

6. According to the CFIJ:

6.1 As was accepted by the Commissioner, the right to privacy under BOR14, which is not an absolute right but is subject to the proportionality test, is engaged. In this case, that involves the right to gender identity and to physical integrity. [16]

6.2 The Challenged Requirements pursue the aim of

> "*establishing a fair, clear, consistent, certain, and objective administrative guideline which can be practically applied by registration officers to decide whose applications for change of gender entry on ID cards are to be accepted and whose are not*",

which Au J found to be legitimate and that the Challenged Requirements are rationally connected thereto.[17] There is no appeal from these findings.

6.3 In relation to step 3 of the proportionality test:

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[16] [14]-[15] [A/3/14-16].
[17] [17]-[29] [A/3/16-29].

6.3.1 A narrow margin of discretion should be accorded to the Commissioner given that the right to gender identification and the right to physical integrity are essential fundamental human rights and core values, and the Court should be vigilant in scrutinising whether the Challenged Requirements disproportionately infringe the Appellants' right to privacy.[18]

6.3.2 The Policy encompassing the Challenged Requirements is proportionate in that it is the *only* workable model to achieve the legitimate aim. In particular, what the Appellants advocate are in substance "self-definition" models based on subjective perceptions, and they are unacceptable from a legal (as distinct from a medical) point of view.[19]

6.4 A reasonable balance has been struck by the Policy between the benefits of the Challenged Requirements and the inroads made into the Appellants' rights.[20]

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[18] [32]-[47] [A/3/29-38].
[19] [52]-[76] [A/3/39-49].
[20] [77] [A/3/49].

6.5 As for the challenge based on BOR3, the Appellants' case was that the Challenged Requirements require them to undergo unwanted and involuntary invasive medical surgical procedures, which have the effect of sterilisation, before they can change the sex entry on the HKID.[21]

6.6 The critical issue was whether the Appellants and other transgender persons can be regarded as having given valid and informed consent when they decide to undergo full SRS because they have to do it in order to change the sex entry on their HKIDs.[22]

6.7 In so deciding, such a person can be regarded as having given such consent, as he is fully informed of the health and medical risks, is given all the time he wishes to make a decision, and is given to understand he can decide against undergoing the procedure. Such consent is given freely and voluntarily, and not under duress or undue compulsion.[23] The consent given is not unlike the situation where a person is asked to consider giving consent to undergo an optional but legitimate surgical procedure to eradicate a condition

[21] [81] [A/3/50-51].
[22] [93] [A/3/55].
[23] [94]-[97] [A/3/55-56].

which is not life threatening or does not have medical consequences, but if not removed would cause prejudice or discrimination to that person.[24]

7. In the CAJ:

7.1 The phenomenon of gender dysphoria and its treatments were explained.[25] In particular, while it was accepted that not all persons who have gender dysphoria require or desire or can undergo SRS, by reference to authoritative medical literature and evidence, it was found that:

"*[15] SRS is medically recognized as an effective way to alleviate gender dysphoria …*
[16] In sum, SRS achieves the ultimate objective of treatments provided to transsexuals to alleviate their gender dysphoria by ridding the body of its intensely disliked features and making it accord, as far as possible, with the anatomy craved …
[18]…SRS as reconstructive procedures are considered medically necessary with unquestionable therapeutic results".[26]

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[24] [98]-[103] [A/3/56-60]
[25] [10]-[20] [A/6/80-85].
[26] On this, see materials referred to by the CA, and Dr Chiu Tor Wo's Affirmation [25]-[27] [B1/10/160-161]; Dr Ho Pui Tat's Affirmation [19] [B1/5/91-92]; Dr Stephen John Winter's Affidavit [20] [B1/11/171] and [71] [B1/11/185]; and Whittle et al, *WPATH Clarification on Medical Necessity of Treatment, Sex Reassignment, and Insurance Coverage in the U.S.A.* (2008) (exhibit "CTW-5") [B2/26/336-339]. See also *W v Registrar of Marriages* (2013) 16 HKCFAR 112 [ALOA/5] at [11] and [92] *per* Ma CJ and Ribeiro PJ, and at [200] *per* Bokhary NPJ. In *YY v Turkey* (App No 14793/08, 24 August

7.2 The sex entry on the HKID is only an identifier of the card holder under a binary system of male/female and no more. It is not to be equated with legal recognition of the holder's sex generally.[27] Thus, a change of the sex entry on the HKID does not mean there is a change of the sex of the person as a matter of law, which remains the biological sex at birth notwithstanding the completion of SRS. This is not challenged by the Appellants. Any discussion of a change of sex in these appeals is to be understood in this context.

7.3 It was recognised that the Policy plainly aims (undoubtedly legitimately) to provide a fair, clear, consistent, certain and objective administrative guideline to:

7.3.1 Inform all applicants how to make good their application for a change of the sex entry on the HKID; and

7.3.2 Enable a registration officer to determine the correctness of the applicant's changed sex, as a

2016) [ALOA/6] at [65], it was said that "*transgenderism is recognised internationally as a medical condition which warrants treatment to assist the persons concerned*".

[27] [36]-[37] [A/6/92]. See Tsui Yat's Affirmation [5] [B1/8/121-122].

new particular furnished, so that a replacement HKID may be issued.[28]

This aim (the "**Aim**") is accepted as legitimate by the Appellants.[29]

7.4 There was no dispute that the Policy is rationally connected to achieving the Aim.[30] This remains the Appellants' position.[31]

7.5 Au J was correct to apply the standard of "*no more than necessary*" in scrutinising the Policy, it being axiomatic that when the core values relating to personal or human characteristics in terms of gender identity and physical integrity are engaged, a social policy (assuming the Policy is such a policy) must be subject to the Court's vigilant scrutiny by the more stringent standard.[32]

7.6 The issue was expressed to be whether there is a significantly less intrusive criterion other than full SRS which is equally effective as a clear, definite,

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[28] [46] [A/6/96].
[29] AC [53(1)].
[30] [47] [A/6/97].
[31] AC [53(2)].
[32] [49]-[50] [A/6/97-98].

consistent and objective yardstick to determine if the applicant has achieved clear resemblance to the new sex in terms of biological appearance and characteristics.[33]

7.7 After considering the Appellants' submissions advocating for a criterion of certification by medical professionals that treatments received prior to full SRS have fully alleviated the person's gender dysphoria resulting in a complete transition to the acquired sex,[34] the Court was not satisfied that

> "*any treatment prior to a full SRS, though significantly less intrusive, is equally effective as a criterion in achieving the legitimate aim of the Policy*".[35]

7.8 It was concluded that a reasonable balance had been struck between the general public interests and the inroads into the Appellants' privacy interests.[36]

7.9 As for the challenge under BOR3, it was said to be well-established that to qualify for protection thereunder, the treatment in question must reach a

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33 [57] [A/6/100-101].
34 [59] [A/6/101].
35 [82] [A/6/113].
36 [83]-[87] [A/6/113-114]..

minimum level of severity, which actually means a high level of severity.[37]

7.10 Where a treatment does not denote any contempt or lack of respect for the personality of the person concerned, and does not debase the person, it cannot be regarded as degrading.[38]

7.11 Inhuman and degrading treatment has to be so excessive as to outrage standards of decency, that is, must be grossly disproportionate to what would have been appropriate, and go beyond the inevitable element of suffering or humiliation connected with a given form of legitimate treatment. The concept of proportionality is not used as a justification, but to see if the treatment falls within BOR3 in the first place.[39]

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37 [98] [A/6/117-118]., citing *Re Northern Ireland Human Rights Commission's Application for Judicial Review (reference by the Court of Appeal (Northern Ireland))* [2018] NI 228 [RLOA/26] at [32] *per* Baroness Hale of Richmond; *In re T (A Child)* [2022] AC 723 [RLOA/32] at [176] *per* Lord Stephens; *Ubamaka v Secretary for Security* (2012) 15 HKCFAR 743 [RLOA/33] at [173] *per* Ribeiro PJ; *R (Limbuela) v Secretary of State for the Home Department* [2006] 1 AC 396 [RLOA/28] at [53]-[55] *per* Lord Hope of Craighead.

38 [99] [A/6/119], citing *Albert and Le Compte v Belgium* (1983) 5 EHHR 533 [RLOA/16] at [22]; *Abdulaziz, Cabales and Balkandali v United Kingdom* (1985) 7 EHRR 471 [RLOA/15] at [91].

39 [100] [A/6/119-120], citing *Reyes v R* [2002] 2 AC 235 [RLOA/29] at [30] *per* Lord Bingham of Cornhill; *VC v Slovakia* (2014) 59 EHRR 29 [RLOA/34] at [104]; Nowak, Birk and Monina, *The United Nations Convention Against Torture and Its Optional Protocol: A Commentary* (2nd ed, 2019) [RLOA/36] at 443.

7.12 Full SRS is internationally recognised as a legitimate and, where applicable, necessary medical treatment, very often publicly funded, to cure gender dysphoria, and its requirement under the Policy is a proportionate measure to achieve the Aim. The inroads to the Appellants' rights are justified. It cannot be argued that full SRS in the context of the Policy involves any humiliation or debasement of the personality or shows contempt or lack of respect for the dignity of the Appellants, or reaches the very high-level threshold required for it to be sufficiently severe to fall within BOR3, even when the Appellants do not wish to undergo it. There is no degrading or inhuman treatment.[40]

7.13 Once it is recognised that the Policy is justified as a matter of law, the dilemma which the Appellants have to face if they do not opt for full SRS, cannot legally amount to coercion or illegitimate pressure, depriving them of their free will to make a conscious decision whether to go through it for the purposes of an application to change the sex entry on their HKIDs. Thus, in the event that they opt to undergo full SRS in

[40] [103]-[104] [A/6/121-122].

light of the Policy, this will be on the basis of real consent.[41]

[41] [106]-[107] [A/6/123].

E. Standard of scrutiny

8. It is the Commissioner's case that, apart from the standard of scrutiny to be applied, the Courts below were entirely correct in their analyses of the issues, and in their rejection of the Appellants' submissions. The Commissioner adopts their reasons in their entirety, which are sufficient to dispose of these appeals. Before making further submissions in support of the Judgments below, the Commissioner deals with the question of the standard of scrutiny to be applied.

9. The Commissioner emphasises his primary case is that whatever standard of scrutiny is adopted, i.e. whether it is at the "*manifestly without reasonable foundation*" end or the "*no more than necessary*" end of the spectrum,[42] the Policy and the Challenged Requirements pass the proportionality test, as has been held in the Courts below, which adopt the more stringent standard. The submissions below will proceed on the basis that the standard of scrutiny is at the more stringent end of the spectrum, because if the Policy passes the test on this basis then *a*

[42] Which are of course not two independent concepts but positions on a continuous spectrum: *Hysan Development Co Ltd v Town Planning Board* (2016) 19 HKCFAR 372 [ALOA/15] at [122] *per* Ribeiro PJ. The necessity test is one of reasonable necessity, not strict necessity: *ibid* at [83] and [87]-[88].

fortiori it passes a less stringent scrutiny. We submit, however, that the Courts below were wrong in adopting the more stringent standard and this Court, for future guidance, is invited to clarify what is the correct approach in deciding where at the spectrum the standard should be set in given circumstances. The Commissioner submits as follows:

9.1 The submissions at AC [54]-[56] that a stringent standard should be adopted whenever core values and personal characteristics are involved represent a mechanical and inflexible approach, which has no sufficient regard to the actual circumstances of these appeals, and ought to be avoided. As Ma CJ said in *Kwok Cheuk Kin v Secretary for Constitutional and Mainland Affairs*:[43]

> "*the difference in approach of the courts at the third stage varies depending on the particular circumstances of any given case and this is critical to bear in mind when looking at the impugned measure to see whether: (a) the stricter test of the measure being 'no more than necessary' to deal with its legitimate aim; or (b) the test of the measure merely being 'manifestly without reasonable foundation', ought to be applied. One should not of*

[43] (2017) 20 HKCFAR 353 [RLOA/21] at [37].

course be preoccupied with labels and instead adopt a flexible, though principled and structured, approach".

9.2 More recently, Lord Reed has observed:

"*It is therefore important to avoid a mechanical approach to these matters, based simply on the categorisation of the ground of the difference in treatment. A more flexible approach will give appropriate respect to the assessment of democratically accountable institutions, but will also take appropriate account of such other factors as may be relevant*".[44]

9.3 The right to privacy is not absolute but subject to lawful restrictions that satisfy the four-stage proportionality test.[45] It does not necessarily encompass every aspect of a person's life that he/she may wish to keep private and respect for an individual's privacy will be narrower when it is brought into contact with public life or in conflict with other protected interests, as is the case here.[46] It is a case of balancing the interests of individuals against those of the public. In cases where the state is required to strike a fair balance between public and

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[44] *R (SC) v Secretary of State for Work and Pensions* [2022] AC 223 [RLOA/9] at [159].

[45] *Kwok Wing Hang v Chief Executive in Council* [2020] HKCFA 42; (2020) 23 HKCFAR 518 [RLOA/22] at [100]-[101].

[46] *Democratic Party v Secretary for Justice* [2007] 2 HKLRD 804 [ALOA/14] at [59] and [64]-[65] *per* Hartmann J (as he then was).

private interests or human rights, or where there is a lack of consensus as to how best to protect the right concerned in a given situation, the margin of discretion accorded should be wider.[47]

9.4 As to the private right or interests of the individuals in this case, the degree of interference here is limited, which is a factor speaking in favour of a wider margin of discretion.[48] Contrary to Au J and the CA,[49] the interference with the Appellants' right to privacy does not strike at the heart of any core value or fundamental right.[50] The Policy does not destroy the very essence of the right. It is not the Appellants' case that their right to privacy is compromised to the extent that they cannot live at all as transgender persons in Hong Kong, but only that they cannot "fully" enjoy their right to privacy as they would wish to.[51]

9.5 Further, the question here is not about gender recognition generally and as a matter of law, but about the limited aspect of the sex entry on the HKIDs: see

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47 *Hamalainen v Finland* (2014) 37 BHRC 55 [RLOA/6] at [67]; *R (Elan-Cane) v Secretary of State for the Home Department* [2022] 2 WLR 133 [RLOA/7] at [62] *per* Lord Reed.
48 *Hysan* [ALOA/15] at [107].
49 CFIJ [46] [A/3/38]; CAJ [50] [A/6/97-98].
50 *Cf Fok Chun Wa v Hospital Authority* (2012) 15 HKCFAR 409 [ALOA/16] at [77] *per* Ma CJ.
51 Q's Form 86 [118] [B1/1/38]; AC [71(2)].

CAJ [68], and [7.2] above. The reasoning of Lord Reed in *Elan-Cane*, dealing with whether a notation of "X", rather than male or female, on the applicant's passport, should be allowed, is also instructive in the context of the HKID:

"*notwithstanding the centrality of a non-gendered identification to the appellant's private life, it is difficult to accept that a particularly important facet of the appellant's existence or identity is at stake in the present proceedings. That is because it is only the designation of the appellant's gender in a passport which is in issue*". [52]

As the learned President said:

"*Regardless of the outcome of these proceedings, the appellant will continue to be treated as female for legal purposes. These proceedings are concerned solely with HMPO's current policy relating to the issuing of passports. The interest at stake in these proceedings, as far as the appellant is concerned, is therefore the appellant's interest in obtaining an 'X' passport*". [53]

9.6 On the other hand, the impact on the public of a change of the sex entry on the HKID for someone who has not completed full SRS is an important matter to

[52] At [57] [RLOA/7].
[53] At [36] [RLOA/7].

be weighed in the balance: see generally the affirmation of Wong Him Yu, who explains how, if a change of sex entry on the HKID is allowed for a transgender person not having undergone full SRS, practical implications and difficulties would arise across many areas of society, such as in handling emergency response, law enforcement, provision of social care, healthcare and leisure services, recruitment and education, and how government officers in the provision of public services and members of the public would be affected. The question of the sex of an individual, based on which many areas of life in society are ordered, and which impacts directly on other members of the public, is not a purely private matter for the individual. As Lord Nicholls of Birkenhead said in *Bellinger v Bellinger (Lord Chancellor intervening)*:[54]

"*In this country, as elsewhere, classification of a person as male or female has long conferred a legal status. It confers a legal status, in that legal as well as practical consequences follow from the recognition of a person as male or female. The legal*

[54] [2003] 2 AC 467 [ALOA/18] at [28]. See also the consultation paper ("**IWG Paper**") published in June 2017 by the Interdepartmental Working Group on Gender Recognition ("**IWG**") [RLOA/13] at [6.41]-[6.45]. Although Lord Nicholls was talking about legal recognition of gender, which as noted above is not in issue here, his observations apply by analogy to the practical effect of enabling the sex entry on HKIDs to be changed without full SRS.

consequences affect many areas of life, from marriage and family law to gender-specific crime and competitive sport. It is not surprising, therefore, that society through its laws decides what objective biological criteria should be applied when categorising a person as male or female. Individuals cannot choose for themselves whether they wish to be known or treated as male or female. Self-definition is not acceptable. That would make nonsense of the underlying biological basis of the distinction".

9.7 As for the significance of the alleged interference with the physical integrity of the individual, the findings of the Courts below were that any such interference is with the full informed consent of the individual who chooses to undergo SRS, and does not amount to inhuman or degrading treatment.[55] SRS is therefore entirely legitimate. As noted above, despite leave having been granted for the Appellants to pursue questions 1, 2 and 4, no challenge is made to those findings in the AC, and the Appellants must therefore be taken to have abandoned any reliance on BOR3. In the circumstances, the fact that SRS affects the physical integrity of an individual is not a factor which supports a narrow margin.

[55] See CFIJ [93]-[103] [A/3/55-60]; CAJ [103]-[119] [A/6/121-128]. For this reason, the reasoning of the ECtHR in *AP v France* (App No 79885/12, 6 April 2017) [ALOA/7] at [122]-[123], that a narrow margin should be accorded where the matter relates to physical integrity, is inapplicable.

9.8 Where the originator of the impugned measure is better placed to assess the appropriate means to advance the legitimate aim espoused, a wider margin of discretion should be accorded. This approach has applied in cases involving implementation of the legislature's or executive's political, social or economic policies but the principle is not confined to such cases.[56] The same applies where the matter raises sensitive moral and ethical issues.[57] The question of gender identity, even in the more limited context of an entry on HKIDs rather than general legal recognition, because of its impact on the public, is a matter of social policy making, as well as being morally and ethically sensitive, and a wide margin should be accorded.[58] In *Elan-Cane*, Lord Reed said:[59]

"*the question in this case raises sensitive moral and ethical issues, especially in so far as it impinges on the broader question of gender determination on the basis of an individual's feelings or choice, regardless of biological sex and physiology…*".

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[56] *Hysan* [ALOA/15] at [139]. See also *Fok Chun Wa* [ALOA/16] at [75]-[77].

[57] *SC* [RLOA 9] at [158]-[161].

[58] *Elan-Cane* [RLOA/7] at [58] and [61]. The ECtHR in *AP* also recognised that the issue of gender identity raises sensitive moral and ethical issues: see [122]. In *Goodwin v United Kingdom* (2002) 35 EHRR 18 [RLOA/19], concerning the right of a post-operative transgender person's right to marry in the acquired sex, the ECtHR accorded contracting states a wide margin of appreciation to deal with practical problems created by the legal recognition of post-operative gender status: see [85].

[59] At [61] [RLOA/7].

9.9 That the Court, as compared to the other two branches of government, is ill-equipped to deal with the question of gender identity is demonstrated by the fact that in *W*,[60] Ma CJ and Ribeiro PJ recognised that the balance to be struck between the rights of transgender persons and the rights of others who may be affected by recognition of the sex change is an area where legislative intervention would be highly beneficial and one in which the Court should refrain from any line-drawing of its own. There are many disadvantages in the Court undertaking the line-drawing.[61] The problems facing transgender persons who have not received any or full SRS involve complicated legal, medical, social, moral and ethical issues, carrying wide-ranging policy implications.

9.10 In *R (McConnell) v Registrar General for England and Wales (AIRE Centre intervening)*, [62] concerning whether a FtMTP who gave birth, after being

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[60] At [128] and [138] [ALOA/5]. See also *Bellinger* [ALOA/18] at [43]-[45]. That the question of gender recognition should be left to the executive and/or the legislature is also supported by *Re Alex (hormonal treatment for gender dysphoria)* (2004) 31 Fam LR 503 [ALOA/23] at [234] and [240] *per* Nicholson CJ (see CFIJ [71]-[74] [A/3/46-49]), and by *"Michael" v Registrar-General of Births, Deaths and Marriages* (2008) 27 FRNZ 58 [ALOA/21] at [107] *per* Judge Fitzgerald (see CFIJ [68]-[70][A/3/45-46]).

[61] *Ibid* [ALOA/5] at [130]-[137].

[62] [2021] Fam 77 [RLOA/8] at [61] *per* Lord Burnett of Maldon CJ, King and Singh LJJ. Permission to appeal to the Supreme Court of the United Kingdom was refused on 16 November 2020.

recognised in law as a male "*for all purposes*", should be registered as the mother of the child, the Court of Appeal of England and Wales also said that the context there was

"*one in which difficult and sensitive social, ethical and political questions arise*".

The Court found that the recognition of a person as the mother of a child has many legal consequences,[63] and accorded a wide margin of discretion to the legislature because *inter alia* of its relative institutional competence and democratic legitimacy in dealing with areas of difficult or controversial social policy.[64] All of these factors in favour of a wide margin of discretion apply in these appeals.

9.11 The Court of Appeal in *McConnell* also found the reasoning of a German decision on similar facts, which accorded a wide margin of discretion to the State, to be compelling.[65]

9.12 The Government has set up the IWG to consider the question of gender recognition generally, and a

[63] At [63]-[71] [RLOA/8].
[64] At [81]-[82] [RLOA/8].
[65] At [73]-[78] [RLOA/8].

consultation paper was published.[66] In light of this, we submit that the Court should not intervene pending the IWG's consideration of this sensitive issue and should accord a wide margin to the Government as to the Policy pending the final conclusions to be reached by the IWG and any follow-up actions as a result.

[66] CAJ [36] [A/6/92]. See generally Tsui at [36]-[38] [B1/8/137-140], and the IWG Paper [RLOA/13].

F. Proportionality

F1. Introduction

10. As the Courts below acknowledged, the questions raised under BOR14 relate to steps 3 and 4 of the proportionality test. There is no dispute that BOR14 is engaged in this case.[67] As the CA observed, after adopting the "*no more than necessary*" standard of scrutiny:

> "*the court is searching for a criterion which is significantly less intrusive than a full SRS but equally effective as a clear, definite, consistent and objective yardstick to determine if the applicant has achieved clear resemblance to the new sex in terms of biological appearance and characteristics*".[68]

11. The Appellants advocate, essentially by reference to models in certain overseas jurisdictions, a scheme or policy under which the assessment of when a change of sex is considered complete (so that a change on a HKID can be allowed) is to be made by specified doctors or a panel of specialists: AC [80]. For the reasons stated in the Courts

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[67] *Cf* AC [44(1)] and [45]-[51]. These submissions are not necessarily accepted, but there is no utility in discussing them here.

[68] CAJ [57] [A/6/100-101], following *Hysan* [ALOA/15] at [136].

below [69] and herein, this approach is unacceptably uncertain.

12. The Commissioner repeats [9.7] above. The analysis of the issues under BOR14 must proceed on the basis that the Challenged Requirements are not inhuman or degrading and do not infringe BOR3, and that where a transgender person elects to undergo full SRS that is always with his/her full informed consent, even if the (or a) motive is to comply with the Challenged Requirements. That is, SRS is a wholly legitimate form of medical treatment. Insofar as the Appellants maintain that full SRS is invasive and medically unnecessary, or that it involves treatment to which they do not fully consent (*cf* e.g. AC [4], [71] and [90]), that must be considered in light of the now unchallenged findings of the Courts below that consent is valid and that BOR3 is not engaged. Any submissions that the Policy involves an unjustified interference with the right to physical integrity must be rejected for this reason, and those set out below.[70]

[69] CFIJ [60]-[63] [A/3/41-43]; CAJ [52] [A/6/98] and [69] [A/6/107].

[70] It is difficult to understand what AC [5] means by referring to a breach of BOR14. "*informed by [BOR3] considerations*", when there is no attempt made at all to show a breach of BOR3.

F2. The ECtHR jurisprudence

13. The Appellants rely primarily on *AP* in support of their appeals under BOR14: AC [57]-[67]. Such reliance is misplaced in the context of this case:

13.1 The criticism of the CA in expressing caution in relying on *inter alia* ECtHR jurisprudence is misplaced (*cf* AC [72]). Such caution is directly supported by what Fok PJ said in *ZN v Secretary for Justice.*[71] Local societal circumstances are relevant to the issues of proportionality and justification. [72] The principal consideration must be the circumstances of Hong Kong as the local culture and social conditions are not the same as those overseas.[73]

13.2 The passages from *AP* cited extensively in the AC relate primarily to the question of the engagement of, and interference with, the right to privacy, which is not in issue here. What the judgment did not deal with, as it was not raised there, is the specific justification and matters of public interest raised by

[71] [2019] HKCFA 53; (2020) 23 HKCFAR 15 [RLOA/12] at [60].
[72] *Leung Chun Kwong v Secretary for Civil Service* [2019] HKCFA 19; (2019) 22 HKCFAR 127 [RLOA/24] at [61].
[73] *W* [ALOA/5] at [114] and [187]; *Lendore v Attorney-General of Trinidad and Tobago* [2017] 1 WLR 3369 [RLOA/23] at [60] *per* Lord Hughes.

the Commissioner here by reference to the Aim: CFIJ [67(2)]. The question of inalienability of civil status as raised by the Government by way of justification in *AP* is clearly different from the Aim. It goes to the status of the civil register recording a person's sex, and refers to the principle under French law that "*the decision to amend a birth certificate could not be a matter for the individual's choice alone*",[74] whereas here the Aim is specifically to provide a fair, clear, consistent, certain and objective guideline to *enable change*: *cf* AC [72(3)].

13.3 As regards the discussion by the majority of the ECtHR of the right to physical integrity,[75] that has to be considered in light of the Appellants' abandonment of their case under BOR3 and the unchallenged conclusions of the Courts below in this regard: see [9.7] and [12] above.

13.4 Insofar as the majority of the ECtHR in *AP* referred to statements emanating from various European and international bodies, that was in the context of the question of the margin of appreciation or discretion.[76] In any event, there is no proper legal basis for reliance

[74] *AP* [ALOA/7] [105].
[75] AC [62]-[66].
[76] See [124]-[125] [ALOA/7] and *cf* AC [60]-[61].

by the Appellants on those statements. Those materials are aspirational in nature and aim at the prevention of rights violations or the promotion of good practice, rather than representing judicial adjudication on the interpretation of rights provisions in the specific circumstances of a case.[77] What Fok PJ said in *ZN* [78] in relation to the Concluding Observations of the United Nations Human Rights Committee ("**HRC**") applies with equal force to the views of the bodies referred to in *AP*:

"*The status of Concluding Observations of the HRC is ill-defined. They have no binding status and, although deserving of respect given the eminence of their authors, a distinction is to be drawn between pronouncements by the HRC on issues of violation of the ICCPR and where they otherwise purport to interpret treaty provisions, on the one hand, and where they provide general advice on strategies for enhanced implementation of a treaty and when they opine on matters extraneous to the actual treaty obligations of a State Party, on the other.*"

13.5 The Commissioner also relies on CFIJ [67] and CAJ [111]-[112] as to the distinguishing features of *AP* which are not applicable in these appeals.

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[77] CFIJ [116]-[120] [A/3/64-65]; *R (AB) v Secretary of State for Justice* [2022] AC 487 [RLOA/27] at [61]-[67] *per* Lord Reed; Dissenting Opinion of Judge Ranzoni in *AP* [ALOA/7] at [15].

[78] At [70] [RLOA/12].

14. Similar observations can be made in respect of the case of *X and Y v Romania*,[79] where no attempt was made by the State to justify the measure based on public interest,[80] unlike in the present case where this is the core issue. See CAJ [79] and *cf* AC [68]-[70]. Insofar as *X and Y* deals with the right to physical integrity, the observations at [9.7], [12] and [13.3] above apply.

F3. Overseas models and self-definition: uncertainty and practical impact

15. The Appellants' references to overseas models which lay down a test or criterion short of full SRS (AC [77]-[79] and [85]) do not assist:

    15.1 Such references are of limited relevance in the specific context of Hong Kong and the issues in these appeals. Those models relate to gender recognition generally as a matter of law,[81] and not, as in the present appeals,

[79] App Nos 2145/16 and 20607/16 (19 January 2021) [ALOA/10], referred to at AC [68]-[70].
[80] See [128] and [164] [ALOA/10].
[81] CAJ [67(2)] [A/6/105]. According to Annex A to the IWG Paper [RLOA/13], the effect of all the schemes considered is to recognise a change of gender for all legal purposes, except for India (unclear), Latvia (unclear but SRS required), Singapore (for limited purposes but SRS required), and Bolivia, New Zealand and Norway (all legal purposes with some exceptions). Insofar as AC [77] seeks to suggest that some of those jurisdictions deal with the sex entry on identity documents *only*, but not as a matter of law, this is not supported by the evidence.

only to the sex entry on identity cards when the legal sex remains unchanged.

15.2 It follows that, while HKIDs are of significance both for individuals who use them in everyday life and for operators and frontline staff of various Government departments and other organisations which use them as an indication of the sex of the holder,[82] they may nevertheless not (as distinct from the position in other jurisdictions) reflect the holder's legal sex. Nor, if the Challenged Requirements were not in place, would HKIDs necessarily reflect the physical attributes of the holder, thereby introducing the difficulties referred to at CAJ [53].

15.3 Further, as the CA noted,[83] most of the schemes in other jurisdictions to which the Appellants refer are legislative in nature or backed by legislation. As recognised in *W* the question of general recognition of a change of gender is best dealt with by the legislature which is better equipped to address the social, moral and ethical issues which may arise than the judiciary.[84]

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[82] As set out at CFIJ [24] [A/3/20-25]. See also CAJ [53] [A/6/99].
[83] CAJ [67(1)] [A/6/105].
[84] *W* [ALOA/5] at [130]-[138].

15.4 The Commissioner also notes that at AC [77], the Appellants do not mention that there are jurisdictions which still require full SRS,[85] notably including Mainland China, where one can say the cultural traditions are the closest, if not identical, to those of Hong Kong; far more so than, say, those referred to at AC [77(1)].

15.5 As for the reference at AC [77] to the "*further evidence produced by the Appellants in the courts below*" the Appellants have not identified what this further evidence is.[86]

15.6 The Appellants refer to those models which do not require full SRS to contend, in effect, that they work, posing the question why they should not equally work and be adopted in Hong Kong. But there is no evidence that the particular problems which the Commissioner is concerned about, if the Challenged Requirements are not in place, and which the Courts below acknowledged,[87] have been addressed by those models in the specific context of an everyday identity document, on which the sex entry may differ from the

[85] CAJ [67(3)] [A/6/105-106].
[86] Such evidence is not found in the Equal Opportunities Commission response to the IWG Paper [RLOA/13].
[87] CFIJ [54]-[76] [A/3/39-49]; CAJ [55]-[82] [A/6/99-113].

holder's legal sex. Nor have the Appellants themselves sought to address these difficulties.

15.7 As stated by Ma CJ in *Fok Chun Wa*,[88] when a line is drawn the Court can legitimately take into account the clarity of the line and the administrative convenience of implementing a policy or scheme thereunder. The Commissioner is entitled to take the view that any line other than full SRS, including a system where the criterion for change is certification by medical practitioners, whether individually or as a panel (AC [80]-[81]), is unclear, uncertain and unworkable in the context of Hong Kong. The problem with the certification system suggested by the Appellants is that, from a *medical* point of view, without a full SRS requirement, ultimately the standard adopted is most likely that the change of gender is completed when the individual feels that this has occurred, which will be different for each individual.[89] This is self-definition.

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[88] At [73] [ALOA/16].

[89] As the Appellants put before Au J, "*In relation to this, different transgender persons may achieve that status at different stages and with different treatments. Some may need the assistance of complete SRS to achieve it but some may not. Some may only need to have hormonal treatment and/or real life experience. Some may even not require any forms of treatment if he or she does not have any social or physical dysphoria. Thus, it is emphasized by all the medical experts in the present cases that all the various forms and options of medical and surgical treatments (including SRS) are only there to assist and alleviate the transgender person's distress or discomfort caused by the physical incongruence between his or her chosen gender and the assigned gender. If the transgendered person does not require any or some of those forms of treatment as he or*

Indeed, in his Affidavit on behalf of the Appellants,[90] Dr Winter says that the individual is the best judge of when the change of sex is completed.[91]

15.8 While the Commissioner does not accept there is a consensus amongst medical practitioners as to when a change of sex is considered complete as alleged by Dr Winter, [92] his evidence supports the view that a certification system is ultimately one of self-definition,[93] if not self-certification.[94] To say that the gender transformation is completed when the individual has done all that he/she desires[95] is to say there is no objective criterion at all. As Lord Nicholls said in *Bellinger*,[96] this is unacceptable from a legal point of view.

15.9 Tsui's Affirmation [28]-[30] explains the concerns around a lack of any objective criterion under a medical certification system as follows:

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she does not experience any discomfort or distress because of the incongruence, he or she does not have to undergo those treatments" (CFIJ [18(3)] [A/3/17-18]).

90 At [60], quoted at AC [38].

91 Dr Joshua David Safer in effect makes the same points at [54]-[60] of his Affirmation, where the standard suggested is that the individual "*has had appropriate clinical treatment for gender transition*", which in effect means self-definition. [B1/12/213-215]

92 See Chiu [30] [B1/10/162] and Ho [16] [B1/5/89-90].

93 CFIJ [63] [A/3/43].

94 CAJ [69] [A/6/107].

95 As admitted at AC [81(3)].

96 At [28] [ALOA/18].

"*… if registration officers simply accept the medical certificate as proof of a sex change, or completion of SRS, without question, there would be different standards for different applicants depending on how 'liberal' the certifying practitioner is, resulting in arbitrariness, inconsistency in treatment and unfairness. The matter cannot therefore be simply left to the individual judgment of the practitioner concerned.*

…

Even amongst the medical professionals, apart from completion of full SRS, there was no consensus as to when a change of sex (short of full SRS) can or should be recognised, and certainly no criteria for any recognition other than completion of full SRS could be set out and applied by non-medical professionals such as frontline registration officers.

…

The bright line, drawn at full SRS as defined in the Policy, and completion of which is an objective and verifiable fact, is the only possible and workable objective criterion for consideration of amendment applications, i.e. the only possible and workable bright line is adopted".

15.10 As explained by Dr Ho, there is a spectrum of treatments for transgender persons from full SRS at one end to non-surgical treatment at the other, and some may even do nothing medically.[97] This was also

[97] See Ho [6] [B1/5/83-84] and [16] [B1/5/89-90]. See also *Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People* (7th ed, 2011) published by WPATH ("**WPATH Standards of Care**") [RLOA/14] at 9, and Winter [53] [B1/11/181], as to the various treatment options. See also *"Michael"* [ALOA/21] at [30]-[32]. Some individuals may choose just a change in gender expression and role. See

vividly described by Lord Nicholls in *Bellinger*.[98] It very much depends on the individual patient how much or how little surgical treatment is pursued (or none at all) in order for them to feel their dysphoria is attenuated enough for their own social integration and psychological well-being. However, from a surgical point of view, the Challenged Requirements represent a reasonable, generally accepted and objective set of criteria for the purpose of deciding when a change of gender is completed.[99] Dr Chiu is of the opinion that it may not be possible to devise another objective line which would be generally accepted by most medical professionals to delineate the completion of a change of gender from a surgical point of view.[100] Nor have the Appellants or their experts suggested any other possible objective line, or that the Challenged Requirements pose any

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also Winter [66]-[68] [B1/11/184-185] as to non-medical treatments. Even though the Appellants' experts express some disagreement with Dr Ho, it is not in dispute that there is a range of treatments (medical and non-medical) and the extent to which each individual undergoes such treatments is different: see Safer [18]-[22] [B1/12/204-205] , [29] [B1/12/207] and [67(2)] [B1/12/216], Dr Stanislas Jozef Maria Monstrey's Affirmation [81] [B1/13/259], [87]-[92] [B1/13/261-262] and [100]-[101] [B1/13/265], and Winter [25] [B1/11/173], [28] [B1/11/173], [30] [B1/11/174], [43] [B1/11/179], [72] [B1/11/185-186] and [77]-[78] [B1/11/187]. See also Chiu [9]-[10] [B1/10/155-156] and [18]-[24] [B1/10/158-160].

98 At [40] [ALOA/18].

99 See Chiu [30] [B1/10/162]. The criticism of this paragraph by Dr Monstrey (at his Affirmation [83] [B1/13/260]) is wholly unjustified, and the paraphrasing of [30] by him is entirely incorrect.

100 See also Ho [16] [B1/5/89-90], where he says there is no general consensus amongst the medical profession in terms of *explicit criteria* as to when a person's change of gender is completed.

uncertainty. In these circumstances, we submit the Policy is neither manifestly without reasonable foundation nor more than is reasonably necessary.[101] As the CA found, a medical certification model will give rise to ambiguity as to when an applicant has achieved sufficiently clear resemblance to the new sex in terms of biological appearance and characteristics: "*it will not be a clear, definite and consistent yardstick to achieve the legitimate aim of the Policy as effectively as a full SRS*".[102]

15.11 In *W*, in the context of deciding who qualifies as a "woman" or a "man" for the purpose of marriage, although Ma CJ and Ribeiro PJ ultimately refrained from any judicial line-drawing of their own, they recognised[103] that if a line is to be drawn, it can be drawn at some point in the gender reassignment process[104] for marking the stage at which sex change is

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[101] While Dr Monstrey cannot agree that "*the criteria of removing original genital organs [and] reconstructive surgery represents a set of surgeries for the purpose of deciding when a sex change is completed*" (his Affirmation [82] [B1/13/259]), he is not saying these criteria are not certain or objective. Certainly he does not offer any alternative set of objective criteria for completion of sex change.

[102] CAJ [69] [A/6/107].

[103] At [130] [ALOA/5].

[104] See Ho [16] [B1/5/89-90] which summarises the sex reassignment process.

recognised. [105] It was further said [106] to be understandable to draw the line at the point where surgery is performed as the preceding hormonal and psychiatric treatments are generally reversible while SRS is not.[107]

15.12 The CA rightly accepted the Commissioner's case as to the need for an objective line as follows:

> *"First, because of the considerable differences in medical opinions as to when a person may be regarded and hence certified as fully transitioned to the acquired gender, after consulting the relevant medical professionals, it was decided that a full SRS is the only workable, objective and verifiable criterion to enable a registration officer to determine the application. Anything less than that may amount to self-declaration which cannot be accepted. Or it will be left to the judgment of individual medical practitioners involved in different applications to certify if the change of sex had been completed. If the registration officers were to accept such certificates based on varying standards, it would result in arbitrariness, inconsistency in treatment and unfairness. Moreover, the registration officers are simply not in a position to determine if the standard adopted by the certifying medical practitioner should be accepted, or whether such*

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[105] See also what Lord Nicholls said in *Bellinger* [ALOA/18] at [42]. The difficulty of drawing a line short of surgery was also alluded to by Bokhary NPJ in *W* [ALOA/5] at [202].

[106] At [131] [ALOA/5].

[107] On reversibility, see section F5 below.

certificate should be accepted as proof that the previously registered sex of the applicant had become incorrect".[108]

16. The Appellants have not addressed the difficulties the CA referred to, which the overseas models relied on by the Appellants would be likely to bring in the context of an identity card system such as the one in Hong Kong (*cf* AC [80]-[81] and [85(1)]). The caution which needs to be exercised when considering whether to apply or follow overseas jurisprudence on general gender recognition (and, *a fortiori*, legislative or legislative-backed schemes based essentially on different social and cultural conditions and traditions), must be firmly borne in mind.

17. In terms of evidence of medical views, far from there being no evidence that different medical practitioners have different standards or criteria (so that some are necessarily more "liberal" than others) as to when a transition from one sex to another is completed *medically* (*cf* AC [81(4)]), the Appellants themselves cite Dr Ho at AC [81(5)] who provides precisely such evidence. Dr Winter's evidence (also cited *ibid*) suggests that the test ultimately turns on what the individual wants, which differs from individual to

[108] CAJ [52] [A/6/98]. See also [69] [A/6/107].

individual, and thus this test itself is subjective, arbitrary and uncertain.

18. There is equally no basis to assert that the practical difficulties that will ensue if the Challenged Requirements are not in place, accepted by the Courts below,[109] will rarely occur (*cf* AC [85(2)]). The practical problems identified by Wong give rise to valid and serious concerns and would remain on the certification system now advocated by the Appellants. In contrast, the requirement of full SRS, with the removal of the original sex organs and construction of the sex organs of the opposite (desired) sex, ensures congruence between the full physical attributes and appearance of the individual with the sex entry on the HKID, thereby avoiding those difficulties. What the Appellants fail to address, but which the Courts below have correctly taken into account, is the particularly acute problems posed by incongruence between the anatomical attributes of a person (including the sex organs) and the indication of sex on the HKID (if the HKID of a pre-SRS individual has been changed to indicate the desired sex) in situations where such attributes may have to be fully exposed, and where persons affected (including other members of the public) may well be in a particularly

[109] CFIJ [55] [A/3/40]; CAJ [72] [A/6/108].

sensitive and vulnerable situation (e.g. in hospitals, care homes or prisons). Indeed, such problems may arise in relation to, e.g., the use of toilets, changing rooms, and other sex-segregated facilities.

F4. Exception

19. The Appellants also rely heavily on the Exception: AC [82]. This does not assist them. It is not the case that where the Exception applies, the problems which the Policy seeks to address do not arise. The correct analysis is that, as a proper exercise of his margin of discretion, it is open to the Commissioner to decide, on an exceptional basis, to alleviate the effect of the Policy on those falling within the Exception *notwithstanding* the problems which the Policy seeks to avoid. The Commissioner is also entitled to consider that the number of transgender persons falling within the Exception is bound to be considerably smaller than the number of such persons who could satisfy the Challenged Requirements. It is therefore not disproportionate for the Commissioner to require the fulfilment of the requirements of the Policy by those who do not fall within the Exception. The fact that a limited class of transgender individuals may in particular circumstances not need to undergo full SRS does not

undermine the Commissioner's position as to the generality of cases; the existence of the Exception, if anything, underlines the proportionality of the Policy. This was correctly accepted by the CA.[110]

F5. Reversibility

20. The problem of reversibility where no full SRS is carried out has been accepted as a real and serious problem by this Court[111] and the CA.[112] The Appellants' answer is, again, to point to overseas models: see AC [88(1)-(2)].

21. Apart from the submissions above, however, as to why reliance on overseas models in these appeals is misplaced, which apply equally here, the potential scenario of a FtMTP holding a male HKID but giving birth to a child (conceived with another man) raises further sensitive social, moral and ethical issues beyond simply gender identity, whether generally or in the more limited context of HKIDs. There would, e.g., be issues of the child having, *prima facie* (as shown by the HKIDs) if not legally, parents of the same sex, as well as the relationship between the two parents *inter se* being *prima facie* of a same-sex nature (although the

[110] CAJ [71] [A/6/107-108].
[111] *W* [ALOA/5] at [131].
[112] CAJ [56] [A/6/100] and [70] [A/6/107].

parents may actually be validly married as legally they remain of different sexes). In such a scenario, while the parents are in fact a validly married couple in Hong Kong, *prima facie* (by reference to their HKIDs), they are of the same sex, and under present Hong Kong law a same-sex marriage is not recognised legally.[113] The validity of their marriage may thus be called into question, and this may well affect the child's welfare and well-being. Further, the child may wonder, why it is that the person who actually gave birth to him/her is a "man", and therefore, *prima facie*, the "father". Or is it that to protect the child from knowing that the person who gave birth to him/her is a "man", he/she is not to be told who that person is and the gender status of that person? As stated recently in *McConnell*:[114]

"*The question is whether the rights of children generally include the right to know who gave birth to them and what that person's status was*".

22. *McConnell* was a real-life example of the problems that can arise if a FtMTP is recognised as a male without undergoing full SRS, when his fertility is maintained or recoverable. In

[113] *Sham Tsz Kit v Secretary for Justice* [2022] HKCA 1247; [2022] 4 HKLRD 368 [RLOA/30]. Leave to appeal to this Court was granted on 10 November 2022: see [2022] HKCA 1690 [RLOA/31]. Such a couple cannot get married in Hong Kong even under *W* [ALOA/5] as the transgender partner has not completed full SRS.

[114] At [58] [RLOA/8].

that case, a FtMTP did not undergo full SRS. He was granted a gender recognition certificate under the Gender Recognition Act 2004 ("**GRA**") certifying him to be male. He then underwent artificial insemination and gave birth. While s.9 of the GRA provides that he was to be considered a male "*for all purposes*", that is in fact subject to the exception in s.12 regarding parenthood.[115] The Court of Appeal held that s.12 is retrospective as well as prospective in nature and thus the person who gave birth, despite being a male, is to be registered as the mother of the child (notwithstanding the fact that the person is a male "*for all purposes*").[116] This is hardly a satisfactory state of affairs, arising from the fact that a FtMTP (without full SRS) does not lose (or may recover) fertility and gives birth after a change of sex. Even if this unsatisfactory state of affairs is considered to be the optimal compromise in all the circumstances, that can only be achieved by comprehensive legislation, after all the social, moral and ethical implications have been considered by the executive and the legislature.

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[115] Section 12 states: "*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*". [RLOA/2]

[116] At [28]-[39] [RLOA/8].

23. These are issues which may be dealt with by legislation in the relevant overseas jurisdictions, with the legislature having made the difficult decision on the social, moral and ethical issues arising. Similarly, in Hong Kong, the balancing of the competing interests ought, as submitted above, to be left to the executive and/or the legislature. It is a question of striking a proper and reasonable balance between the different interests at stake, and not proceeding on the basis that primacy must be given to the rights of the individual (*cf* AC [81(2)]). The Courts below correctly accepted that, absent legislative intervention, the Commissioner was entitled to strike the requisite balance as he did in the Policy.

24. It is submitted that the GRA simply does not deal with the question of reversibility adequately or satisfactorily: see [22] above and *cf* AC [88(3)], presuming as it does that a FtMTP who retains or recovers fertility and gives birth continues to live as a man until death, while having to be registered, and recognised, as the mother whenever the child is concerned.

25. Nor is the suggestion of a requirement of hormonal treatment an answer (*cf* AC [88(4)]). The evidence is clear:

if hormonal treatment stops, fertility can be recovered.[117] Thus, the Appellants are constrained to suggest that hormonal treatment has to be continued. But it is unclear how that would work, and whether it would mean, e.g., that if the sex entry on the HKID has been changed, and the individual stops hormonal treatment, the sex entry would have to change back.

[117] CFIJ [56-[58] [A/3/40-41]; CAJ [54] [A/6/99]. See Affirmation of Dr Ng Wan Sze Vanessa at [9] [B1/9/147-148]. Dr Safer says that while some changes brought about by hormonal treatment are not reversible, he agrees that "*Other elements of hormone treatment like suppression of menses and perhaps ovulation may be reversible with fertility restored if testosterone is discontinued*" ([37] of his Affirmation [B1/12/234]). He cannot rule out the possibility of recovery of fertility and while he says he has not personally come across a patient having conceived "*while on testosterone therapy*" ([39] [B1/12/235]), he does not refer to the position where the therapy has stopped. See also pp 50-51 of the WPATH Standards of Care [RLOA/14]: "*If an individual has not had complete sex reassignment surgery, it may be possible to stop hormones long enough for natal hormones to recover, allowing the production of mature gametes …*". Indeed, Dr Safer opines that fertility remains an underappreciated priority for many transgender persons, and maintenance of fertility may be a reason for maintaining anatomy such as uterus and ovaries for a transgender man: see [53] of his Affirmation [B1/12/241]. If so, to recognise a pre-operative FtMTP for HKID purposes would certainly create problems of such "males" giving birth.

G. Reasonable balance

26. As to step 4 in the proportionality test, as explained by Ribeiro PJ in *Hysan*,[118] where a measure passes steps 1-3, step 4 is unlikely to change the result. This is not one of those rare cases where it does, because the exercise under step 3 in these appeals involves a balance of the private interests of the Appellants against the public interests, whatever the standard of scrutiny adopted. If the Policy passes step 3, this means that a reasonable balance has been struck.

27. The Commissioner also refers to and relies on the analysis of step 4 at CAJ [84]-[86].

28. In this exercise, the Commissioner repeats his submission concerning the limited nature of the encroachment on the Appellants' right to gender identity as compared to the impact on the public interest of a change of sex entry on their HKIDs in circumstances where they have not completed full SRS ([9.5] above). The Commissioner also points to the abandonment of the challenge under BOR3 and the findings of the Courts below that consent to SRS will be fully informed and valid, and will not involve any

[118] At [78] [ALOA/15].

inhuman or degrading treatment. These are important factors in considering whether the Policy falls within the Commissioner's margin of discretion.

29. AC [92(1)] repeat the earlier submissions which ought to be rejected for the reasons given above.

30. While the regularity of occasions on which the Appellants need to show their HKIDs indicates the significance of the HKID for them, it also reinforces the concerns about the impact on the public of incongruence between physical appearance and the sex entry on the HKID (*cf* AC [92(2)]).

31. The Appellants do not seem to dispute the CA's observation that, leaving aside the issue concerning their HKIDs, they can continue to live in their acquired sex comfortably:[119] AC [92(4)]. This is important, as it indicates the limited extent of the interference caused by the Challenged Requirements in the Appellants' rights.

32. We submit that the findings in the Courts below that the Challenged Requirements strike a reasonable balance between the Appellants' rights and the public interests should be upheld.

[119] CAJ [85] [A/6/114].

H. Conclusion

33. For the above reasons, the appeals should be dismissed with costs.

Dated the 15th day of November, 2022.
Dated the 12th day of December, 2022

MONICA CARSS-FRISK, K.C.

STEWART WONG, S.C.

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