FACV Nos. 8 & 9 of 2022
[2023] HKCFA 4

FACV No. 8 of 2022

IN THE COURT OF FINAL APPEAL OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION

FINAL APPEAL NO. 8 OF 2022 (CIVIL)
(ON APPEAL FROM CACV NO. 183 OF 2019)

BETWEEN

Q	**Applicant (Appellant)**
and	
COMMISSIONER OF REGISTRATION	**Respondent**

FACV No. 9 of 2022

IN THE COURT OF FINAL APPEAL OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION

FINAL APPEAL NO. 9 OF 2022 (CIVIL)
(ON APPEAL FROM CACV NO. 184 OF 2019)

BETWEEN

TSE HENRY EDWARD	**Applicant (Appellant)**
and	
COMMISSIONER OF REGISTRATION	**Respondent**

(HEARD TOGETHER)

Before: Chief Justice Cheung, Mr Justice Ribeiro PJ, Mr Justice Fok PJ, Mr Justice Lam PJ and Lord Sumption NPJ

Date of Hearing: 4 January 2023

Date of Judgment: 6 February 2023

JUDGMENT

Chief Justice Cheung:

1. I agree with the joint judgment of Mr Justice Ribeiro PJ and Mr Justice Fok PJ.

Mr Justice Ribeiro PJ and Mr Justice Fok PJ:

A. Introduction

2. Every resident over the age of 11 is required to register for a Hong Kong Identity Card ("HKID card").[1] Failure to produce a HKID card when required to do so by a police officer or member of the Immigration Service is an offence.[2] Production and inspection of ID cards is ubiquitous, not just in dealings with government officials but routinely in a wide variety of everyday transactions as a means of verifying a person's identity. Thus, one may be asked to produce one's ID card when entering a building, applying for a job,

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1 Registration of Persons Ordinance (Cap 177) ("RPO") section 3; Registration of Persons Regulations (Cap 177A) ("RPR") regulation 25(g).

2 RPR 11.

using banking services, signing up for a mobile phone plan or making a medical appointment, just to take a few examples.

3. On its face, the ID card contains the holder's photograph and states the holder's name and date of birth. It also indicates whether the holder is male or female (the "gender marker"), a feature intended to function as an "identifier", helping to verify the identity of the person producing the card as its holder. It should be noted that the gender marker does not signify recognition of the holder's sex as a matter of law.[3] It merely operates as an element of an identification document.

4. The two appellants are female to male ("FtM") transgender persons who were diagnosed as suffering from gender dysphoria, a medical condition involving much distress and discomfort arising out of the discordance they experienced between the (female) sex assigned to them at birth and the (male) gender with which they intrinsically identified. Having undergone a lengthy course of medical and surgical treatment designed to affirm their male gender identity resulting in conforming bodily changes, the gender dysphoria of each of the appellants has been medically certified to have been sufficiently attenuated to enable their social integration and psychological well-being without the need for additional surgical procedures. For medical purposes they may thus be regarded as having transitioned from their assigned female gender to the acquired male gender. In this judgment the appellants are referred to using masculine pronouns and the focus of discussion is on FtM cases, for the most part leaving aside male to female ("MtF") cases for present purposes.

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[3] RPO sections 9 and 7(2)(j); RPR 11A; Tsui Yat (Security Bureau) Affirmation 26 July 2016, §5: "[The gender marker] does not connote any general or formal or legal recognition of the person's sex or gender as such. An HKIC serves the fundamental purpose of identifying the holder as a particular individual, with certain details or particulars put in as identification features of the individual such as the name, date of birth and sex."

5. The appellants applied to the Commissioner of Registration ("the Commissioner") to have the gender markers on their HKID cards amended to reflect their acquired gender. Their evidence is that unamended gender markers cause them to suffer discrimination, humiliation, violation of their dignity and invasion of their privacy resulting from having to reveal to third parties their transgender status when producing their HKID cards.

6. The Commissioner refused their applications on the basis that they had not undergone certain surgical procedures required under published guidelines[4] to qualify them for a change to the gender markers on their ID cards. The appellants consequently brought judicial review proceedings to challenge that decision, contending that the Commissioner's refusal violates their constitutional right to privacy under Article 14 of the Bill of Rights ("BOR 14").[5]

7. Their applications before the Court of First Instance[6] and the Court of Appeal[7] were both dismissed. Leave to appeal to this Court was granted by the Court of Appeal.[8]

B. The diagnosis and treatments for gender dysphoria

8. The medical evidence[9] is to the following effect. While the precise causes of gender dysphoria are not presently known, the consensus is that it is a

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4 See Section E of this judgment.

5 Claims initially made under Article 3 (cruel, inhuman or degrading treatment) and Article 22 (discrimination) of the Bill of Rights as well as under the Sex Discrimination Ordinance (Cap 480) are no longer pursued.

6 Au J [2019] 1 HKLRD 1244; [2019] HKCFI 295.

7 Poon CJHC, Kwan VP and Barma JA [2022] 1 HKLRD 803; [2022] HKCA 172.

8 [2022] HKCA 675.

9 Dr Ho Pui Tat (psychiatrist, "Dr Ho") Affirmation 25 July 2016; Dr Ng Wan Sze Vanessa (endocrinologist, "Dr Ng") Affirmation 26 July 2016; Dr Chiu Tor Wo (plastic surgeon, "Dr Chiu") Affirmations 26 July 2016 and 14 September 2017 giving evidence for the

biological condition and not a lifestyle choice. Dr Winter explains that, "... under all the diagnostic criteria under ICD-10, ICD-11 and DSM-5, the core feature of diagnosis is a misalignment between experienced gender and assigned sex".[10] Gender dysphoria is the discomfort or distress that arises out of and is related to such gender incongruence.

9. The distress and discomfort may be of varying degrees and may result from the incongruence between the individual's gender identity and the birth-assigned gender as recognised by others in social interactions ("social dysphoria"), and/or from the mismatch between the person's gender identity and bodily sex characteristics ("physical dysphoria").

10. Social dysphoria involves distress and discomfort resulting from transgender persons being marked by a social stigma often leading to harassment, abuse and discrimination across many areas of everyday life. Gender markers on identification documents are an important factor in this context.

11. Physical dysphoria involves transgender persons experiencing distress regarding their bodies and a desire to bring about a physical change. In acute cases, if left untreated, this may lead to associated self-harm and suicidal behaviour.

Commissioner. Dr Stephen John Winter (psychologist, "Dr Winter") Affidavit 21 December 2016; Dr Joshua David Safer (endocrinologist, "Dr Safer") Affirmation 22 December 2016; Professor Dr Stanislas Jozef Maria Monstrey (plastic surgeon, "Prof Monstrey") Affirmation 31 December 2016 giving evidence for the appellants. While certain differences of opinion are expressed, those differences are largely immaterial for present purposes.

[10] Dr Winter at §43. To similar effect, Dr Ho at §7. "ICD-10, ICD-11" refer to the 10th and 11th revisions of the International Statistical Classification of Diseases and Related Health Problems issued by the World Health Organisation and "DSM-5" refers to the 5th edition of the Diagnostic and Statistical Manual of Mental Disorders published by the American Psychiatric Association. The editions cited were current at the time the evidence was filed.

12. The clinical condition of gender dysphoria patients will vary and individualised treatments are required. The Hospital Authority has, since about 1980, been providing health care in Hong Kong for persons with gender identity issues.[11] In line with practice elsewhere, cases are approached on a multi-disciplinary basis. As Dr Ho explains,[12] teams comprising psychiatrists, clinical psychologists, surgeons, gynaecologists, physicians, endocrinologists, occupational therapists and medical social workers work collaboratively, with treatments fashioned to meet individual patients' needs.

13. The "treatment pathway" generally adopted involves an initial assessment by psychiatrists and clinical psychologists and, upon confirmation of a diagnosis of gender dysphoria, a 12-month period of "real life experience", ie, living life as a member of the experienced gender with support and guidance from mental health professionals. If the real life experience is deemed successful and if the patient is assessed to be psychiatrically ready for hormonal treatment, he is referred to an endocrinologist to start treatment.

14. In FtM cases, testosterone is prescribed and the therapy can be expected to produce marked bodily changes involving the development of male characteristics. As Dr Ng explains, during the first three months there is normally: "... cessation of menses, increased libido, increased facial and body hair, increased oiliness of skin, increased muscle and redistribution of fat mass." After a year, "changes including deepening of voice and clitoromegaly [enlargement of the clitoris] are expected to occur, and some individuals may experience male pattern hair loss."[13]

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[11] *W v Registrar of Marriages* (2013) 16 HKCFAR 112 at §15.

[12] Dr Ho at §15.

[13] Dr Ng at §7.

15. If the patient is assessed to have used the hormones continuously and responsibly for 12 months and if surgical treatment is desired, the psychiatrist may refer the patient to the surgical team for assessment.

16. A range of surgical procedures may be considered. As Dr Safer explains, the treatment involves "changing outward appearance to match gender identity to the extent required by the transperson", the goal being "to ensure that they have successfully transitioned their appearance to align with their gender identity."[14]

17. Prof Monstrey points out that "[the] first (and, arguably, most important) surgery performed in FTM is the creation of a male chest by means of subcutaneous mastectomy [removal of the breasts] which allows the patient to live more easily in the preferred male gender role (ie external physical appearance in day-to-day social settings)..."[15] The evidence shows that "a significant number of transgender persons find that hormones, and/or breast surgery, are sufficiently effective to physically alter their body so as to alleviate their feelings of discomfort or distress about their body (their physical dysphoria)."[16] As Dr Winter observes: "It is only when the bodily dysphoria results in distress which cannot be resolved by less intrusive methods will a clinician assess and recommend more intrusive surgical options as they are medically necessary."[17]

18. Those options may involve, as the ultimate surgical intervention, full sex reassignment surgery ("SRS"), ie, genital surgery for transgender men which "comprises hysterectomy (removal of the uterus), oophorectomy

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[14] Dr Safer at §§19 and 21.

[15] Prof Monstrey at §35.

[16] Dr Winter at §56.

[17] *Ibid* at §57.

(removal of the ovaries), vaginectomy (removal of the vagina), and phallus construction. Phallus construction may be by way of phalloplasty or metoidioplasty. Phalloplasty is a particularly complicated set of procedures aimed at creating a realistic phallus, with best results not only allowing urination while standing, but also the enjoyment of sexual sensation, and erectile function (through insertion of a prosthesis). Metoidioplasty is a somewhat easier surgical procedure involving the unhooking of the hood covering the clitoris, the latter enlarged through testosterone hormone therapy. Both types of surgery may also involve construction of a scrotal sac containing testicular prostheses."[18] This is major surgery and full SRS generally takes place in stages and carries certain post-operative risks and possible urologic complications.[19]

19. The foregoing medical evidence provides indispensable background for discussion of the issues arising on these appeals. It must however be borne in mind that the Court is presently concerned with a judicial review challenge to the Commissioner's refusal to change a gender marker on an identification document and not with determining the sex of each of the appellants (in the light of their treatment and medically certified transition) as a matter of law.

20. The medical witnesses provide valuable explanations of the diagnosis and treatment for gender dysphoria, but with a different orientation. Thus, Dr Chiu evidently regards successful treatment as in some sense measurable by reference to completion of "change of sex", stating: "From the point of view of the patients' own desires and well-being, change of sex may be considered completed when the patients' own dysphoria is attenuated enough

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[18] *Ibid* at §69.

[19] Prof Monstrey at §§69 and 73.

for their social integration and psychological well-being ..."[20] Similarly, Dr Winter states: "... there is a consensus among contemporary transgender healthcare providers that a transgender person's change of sex is complete when their gender dysphoria is reduced to such an extent that enables them to live and be accepted as a member of their experienced gender."[21]

21. A discussion of the criteria which should be applied for determining whether individuals should be regarded in law as having changed their sex may be of great relevance in the context of considering a potential gender recognition scheme or otherwise determining whether a transgender person qualifies as a member of his preferred sex for other legal purposes. But such issues do not arise on these appeals.

22. The Commissioner's policy which is pivotally in issue involves his insistence upon full SRS before a transgender individual is permitted an amendment to the ID card gender marker ("the Policy"). The foregoing medical evidence is of great importance in the discussion of its constitutionality. It provides an essential appreciation of the nature and clinical implications of the Policy and locates full SRS at the most invasive end of the spectrum of treatments for gender dysphoria.

C. The circumstances of Q and Tse

C.1 Q

23. The appellant Q was born in Hong Kong in 1992. Q's sex at birth was registered as "female" and, when aged 11, Q was issued with a HKID card which stated the holder's gender as "female". Q had a desire to be male from an early age, understood about gender dysphoria from the age of 16 and identified

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[20] Dr Chiu Affirmation 26 July 2016 at §30.

[21] Dr Winter at §60.

as transgendered at the age of 19. He has lived as a male since he went abroad in 2011 to study, initially in the UK and later in Canada.

24. In August 2012, Q was assessed for gender dysphoria by Dr Mak Kai Lok at the Prince of Wales Hospital and was prescribed testosterone pills which he took daily. After returning to the UK in 2013, he continued to receive psychiatric treatment under Dr Richard James Curtis and to live as a male. He continued to receive testosterone injections. In March 2014, Dr Curtis confirmed to the UK Passport Office that Q was under his care for the treatment of female to male transsexualism and that this change was likely to be permanent. Q was issued with a new passport in 2014 showing his gender as male.

25. Having been issued with an adult HKID card as a permanent resident of Hong Kong in 2010 in his birth name in Chinese and English (with a feminine English forename), he changed his name by Deed Poll in 2013 adopting a masculine forename. On his application to the Commissioner to amend the registered particulars on his HKID card, Q was issued with a replacement HKID card in July 2013 in which his photograph was updated and his English forename was changed to a masculine forename as per the Deed Poll.

26. In August 2014, Q again consulted Dr Mak, who certified that Q had masculine features, had adapted well in a male role socially and psychologically and was psychiatrically fit to proceed to surgical assessment for female to male sex reassignment surgery.

27. In addition to receiving continuous testosterone treatment, as a result of which he is medically sterile and does not menstruate, Q underwent an irreversible mastectomy in August 2015 to remove all breast tissue. However, he has made an informed decision not to undergo further sex reassignment

surgery including a hysterectomy, to remove the uterus, and an oophorectomy, to remove the ovaries, because of the health risks involved and possible pain and complications. His evidence confirms that, post-mastectomy, he is comfortable with his body as it now is and does not feel any psychological need to undergo medical sterilisation or reconstructive organ surgery to feel comfortable with his male identity.

28. Q has formed new relationships with friends who accept him as male and, save for members of his family, all his friends and acquaintances know him only as male.

C.2 Tse

29. The appellant Tse was born in Hong Kong in 1991. Like Q, Tse's sex at birth was registered as "female" and, when aged 11, Tse was issued with an HKID card which stated the holder's sex as "female". Tse completed the HKCEE and GCSE at a well-known all girls school in Hong Kong in 2008 and then completed secondary school at a co-educational school in the UK before matriculating at the University of Warwick in 2011, graduating in 2015.

30. Tse had gender dysphoria from a young age and identified as male, despite attempts by his family to force him to act and dress as a girl. After moving to study in the UK, Tse was referred by his general practitioner to a psychologist and psychiatrist at a gender identity clinic in London. Tse was assessed by Dr Penny Lenihan, a consultant psychologist, to have a history of gender dysphoria, with a presentation consistent with likely transsexualism, in April 2012. This assessment was confirmed in September 2012 by Dr Stuart Lorimer, a consultant psychiatrist. Tse was referred to an endocrinologist who further referred him to a general practitioner to prescribe androgen hormone treatment, which he took for two years from 2012 to 2014. This caused

physical changes including growing an Adam's apple and facial hair and developing a more muscular physique.

31. Tse changed his name by Deed Poll in the UK in August 2012 to his current male name. The UK Passport Office accepted his application for a new passport, which was issued to him in his new name and with a male gender marker. In the summer of 2013, Tse changed his name in Hong Kong by Deed Poll.

32. Tse was issued an adult HKID card as a permanent resident of Hong Kong in his birth names in Chinese and English (with a female English forename) in 2009. In July 2013, on his application to the Commissioner to amend the registered particulars on his HKID card, Tse was issued with a replacement HKID card in which his photograph was updated and his names in Chinese and English changed (that in English being changed to Henry Edward Tse in accordance with the change effected by Deed Poll).

33. On returning to the UK, Tse underwent a bilateral mastectomy to remove both breasts, since the breasts he had developed were a cause of discomfort and embarrassment. He interrupted his androgen hormone treatment in order that his eggs could be harvested for possible use by a future female spouse and has since then resumed hormone treatment which he intends to continue indefinitely.

34. In July 2016, after living as a male for four years, Tse was issued in the UK with a Gender Recognition Certificate as a male. By a letter dated 16 November 2016, Tse's treating physician, Dr Malik Saoudi, confirmed his opinion that further medical surgery was not necessary to treat his gender dysphoria.

D. Appellants' application to amend their HKID cards

35. Regulation 18(1)(a) of the RPR places a duty on holders to make a report to a registration officer whenever ID card particulars previously submitted "have become incorrect". Failure to do so without reasonable excuse is an offence.[22]

36. In the light of the medical treatment that they had each received, the appellants applied to the Commissioner to alter the gender markers on their respective ID cards. Their applications were made under RPR 14 which empowers a registration officer to issue a replacement ID card with such alterations "only ... after the production of such evidence, under oath or otherwise as he may require; and after such investigation as he may consider necessary." Both applications were refused.

37. Regulation 18 is evidently intended to buttress the function of HKID cards as a means of verifying the holder's identity. If particulars on the document have become incorrect, that function is obviously compromised so that corrective alterations should be made. The amendment process is not mechanistic, but requires the registration officer to assess the evidence in support of the proposed alteration and to pursue any further investigations considered necessary. This bears on the Commissioner's guidelines and the objective of having "bright line" criteria discussed below.

E. The Commissioner's Guidelines

38. In refusing the appellants' application, the Commissioner applied the Policy contained in guidelines issued on 5 April 2012 ("the Guidelines") which relevantly provide as follows:

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[22] RPR 19(1)(a).

"Generally speaking, persons who have received different forms of treatments by professional psychiatrists and clinical psychologists, including psychotherapy, hormonal treatment and real-life experience of the chosen gender role for a period of time may be recommended for sex re-assignment surgery (SRS).

Persons who have undergone the above treatments and have completed SRS should follow the below procedures and submit application together with the relevant supporting documents to reflect their change of sex on their identity cards:

(a) produce a medical proof which should indicate that the following criteria for the completion of SRS are met:

(i) for sex change from female to male

- removal of the uterus and ovaries; and
- construction of a penis or some form of a penis;

(ii) for sex change from male to female

- removal of the penis and testes; and
- construction of a vagina;

(b) In general, the medical proof should be produced by the doctor who performed the SRS in accordance with the criteria as set out above;

(c) If the SRS was performed outside Hong Kong, the medical proof should carry the doctor's medical qualification, place where the medical qualification is obtained and other contact information of the doctor;

(d) Where there are difficulties in obtaining the relevant medical proof from the doctor who performed the SRS outside Hong Kong, the applicant may request a Hong Kong registered doctor to give an assessment on the SRS that has been undergone; ...

(f) Upon receipt of the relevant documents, consideration will be given to whether to allow amendment of the personal particular sought by an applicant having regard to the particular circumstances of the case."

39. The Guidelines therefore make it a condition that a FtM transgender applicant seeking an amendment to the ID card gender marker must have "completed SRS", that is, he must have undergone surgery effecting removal of the uterus and ovaries and construction of "a penis or some form of a penis". In other words, he must have had a hysterectomy and surgical genital reconstruction to qualify for alteration of the gender marker. As we have seen, such surgical procedures are at the most invasive end of the treatment spectrum

for gender dysphoria and, as the medical evidence shows, a full SRS is not medically required by many transgender persons (including the appellants) whose gender dysphoria has been effectively treated, and who are successfully living in their acquired gender.

F. The challenge by way of judicial review and BOR 14

40. In the case of a constitutional challenge alleging a violation of a constitutional right or freedom, it is first necessary to identify whether a constitutional right is engaged. The next question is to ask whether the impugned provision or conduct amounts to an encroachment on such right, being an interference with, or restriction of, that right. If so, unless the constitutional right is absolute, a proportionality assessment must then be undertaken to determine whether such interference with the right can be justified.[23]

41. The appellants' applications for judicial review challenges the Policy insofar as it lays down the aforesaid condition for changing the gender marker on the basis that it is an unlawful interference with their constitutional rights under BOR 14 which provides:

> "(1) No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
>
> (2) Everyone has the right to the protection of the law against such interference or attacks."

42. BOR 14 is in the same terms as Article 17 of the International Covenant on Civil and Political Rights ("ICCPR"). By virtue of Article 39 of the Basic Law, the rights and freedoms in the ICCPR as applied to Hong Kong

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[23] *Catholic Diocese of Hong Kong v Secretary for Justice* (2011) 14 HKCFAR 754 at §65.

and incorporated via the BOR are protected and given constitutional effect.[24] The rights under BOR 14 are not absolute and may be restricted as prescribed by law.

43. In the present case, there is no dispute between the parties that the rights protected under BOR 14 include the right to gender identity and the right to physical integrity. This was accepted by the Court of Appeal,[25] which rightly observed that gender identity is one of the most crucial identities of a person since it concerns who people are and what sort of people they identify with, directs their personal development and behaviour, governs their relationships and interaction with others and underpins most of their societal arrangements.[26]

44. In so holding, the Court of Appeal were correctly adopting an interpretation of the concept of privacy under BOR 14 consistent with the materially equivalent concept of respect for private life in Article 8 of the European Convention on Human Rights ("ECHR" and "ECHR 8").[27] In this context, the ECtHR has held that "... 'private life' is a broad term not susceptible to exhaustive definition. It includes not only a person's physical and psychological integrity ..., but can sometimes also embrace aspects of an individual's physical and social identity .... Elements such as gender identification, names, sexual orientation and sexual life fall within the personal sphere protected by [ECHR 8] ... [It] also protects the right to personal development and the right to establish and develop relationships." Accordingly, the ECtHR has held:

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[24] *Comilang Milagros Tecson v Director of Immigration* (2019) 22 HKCFAR 59 at §§24-25.

[25] CA at §30.

[26] *Ibid* at §31, citing the European Court of Human Rights ("ECtHR") in *YY v Turkey*, Application No. 14793/08, Judgment dated 10 March 2015.

[27] See, in this context, *ZN v Secretary for Justice* [2019] HKCFA 53; (2020) 23 HKCFAR 15 at §60.

> "... that, as the very essence of the Convention is respect for human dignity and human freedom, the right of transgender persons to personal development and to physical and moral security is guaranteed."[28]

45. In *AP, Garçon and Nicot v France*,[29] the ECtHR re-stated the above propositions and concluded that:

> "The right to respect for private life under [ECHR 8] applies fully to gender identity, as a component of personal identity. This holds true for all individuals."[30]

46. BOR 14 is clearly engaged in the present case. Privacy is a concept inherently linked to a person's dignity. The Policy concerns the appellants' eligibility for an altered ID card gender marker which reflects their acquired gender to enable them to conduct their lives and affairs consistently with their experienced gender. The refusal to allow an amendment to the gender marker involves, as the evidence discloses, humiliation, distress and loss of dignity in routine activities involving the inspection of their HKID cards. Furthermore, the Policy's condition that they undergo full SRS requires them to make a choice between accepting frequent infringements of their BOR14 rights to privacy when using unamended ID cards and undergoing major invasive and medically unnecessary surgery.

47. The constitutional right under BOR14 being clearly engaged and the Policy constituting an encroachment upon these rights, it falls to be determined whether the Policy can be justified as satisfying the test of proportionality, the burden being on the Commissioner to provide such justification.[31]

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28 *YY v Turkey*, Application No. 14793/08, Judgment dated 10 March 2015 at §§56-60.

29 Application Nos 79885/12, 52471/13 and 52596/13, Judgment dated 6 April 2017.

30 *Ibid* at §95.

31 *Secretary for Justice v Yau Yuk Lung* (2007) 10 HKCFAR 335 at §21; *Fok Chun Wa v Hospital Authority* (2012) 15 HKCFAR 409 at §§56 and 60.

48. The established proportionality assessment in Hong Kong involves a structured four-step inquiry which asks: (1) whether the encroachment pursues a legitimate aim; (2) whether such encroachment is rationally connected with achieving that aim; (3) whether the encroachment represents a proportionate means of achieving that aim; and (4) whether a reasonable balance has been struck between the societal benefits of the impugned measure and the individual's constitutionally protected right or freedom.[32]

G. Legitimate aim and rational connection

49. The aim of the Policy, as formulated by the Commissioner, is "to establish a fair, clear, consistent, certain and objective administrative guideline to decide when a change of the sex entry on the identity card is to be accepted". That aim was held by the Judge to be legitimate,[33] a holding endorsed by the Court of Appeal[34] and not disputed by the appellants. It was also accepted by the appellants that the Guidelines setting out the Policy were rationally connected to that legitimate aim.[35]

50. It is of course generally desirable and legitimate that clear guidelines should be drawn up to give direction to those administering a policy and to inform those affected by it. And (leaving aside the word "fair" and subject to our comments on the Policy's exemption) the requirement for certification of completion of SRS is clear enough to suggest a rational connection.

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[32] *Hysan Development Co Ltd v Town Planning Board* (2016) 19 HKCFAR 372 at §§134-135.

[33] Au J at §§17 and 28.

[34] CA at §§6(1) and 46.

[35] Appellants' Case ("AC") §53.

51. However, the case is not resolved simply by considering whether the Policy requirements are clear and thus conducive to administrative certainty. The focus in the Courts below has rightly been on the content of the Policy itself – ie, the full SRS condition for amending the gender marker – and as to whether its incursion into constitutional privacy rights can be justified as proportionate.

H. The margin of discretion

52. In a proportionality analysis, the margin of discretion available to the decision maker is sometimes a matter of debate. Where a wide margin of discretion is called for, the "manifestly without reasonable foundation" threshold may be appropriate. In cases where a narrow margin of appreciation is available, the correct test may be one of "reasonable necessity".[36] But as previously recognised, these two tests are not wholly independent concepts but instead points on a continuous "reasonableness" spectrum by which the court determines the intensity of judicial scrutiny.[37]

53. In the Court of First Instance, Au J rejected the Commissioner's submission that the proportionality of the Policy should be examined on the "manifestly without reasonable foundation" standard of scrutiny. He held that even though the issue in question also concerns public and social interests, since the right to gender identity and physical integrity are essential fundamental human rights and core values, the court should accord a narrow margin of discretion to the Commissioner and approach the question of proportionality on the "no more than reasonably necessary" standard of scrutiny.[38]

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[36] *Hysan Development Co Ltd v Town Planning Board* (2016) 19 HKCFAR 372 at §106.

[37] *Ibid* at §119-122.

[38] Au J at §§46-47.

54. The Court of Appeal agreed, dismissing the Commissioner's respondent's notice contending that Au J had erred and arguing instead for a "manifestly without reasonable foundation" standard. The Court of Appeal held that the Policy engaged "core values relating to personal or human characteristics in terms of gender identity and physical integrity" so that it must be subject to the court's vigilant scrutiny by the more stringent standard.[39]

55. In doing so, both Au J and the Court of Appeal applied the approach laid down by the Court in *Fok Chun Wa v Hospital Authority*,[40] a case concerning the allocation of public funds and limited financial resources in the context of the provision of subsidised obstetric services in public hospitals. There, a distinction was drawn between "core-values relating to personal or human characteristics (such as race, colour, gender, sexual orientation, religion, politics, or social origin)" which "involve the respect and dignity that society accords to a human being" and are "fundamental societal values", where the more stringent standard would apply, and a question of general, social or economic policy, where more leeway would be permitted.[41] The Courts below in this case accepted that the Policy engaged such core values and therefore required that the proportionality analysis be conducted on the "no more than reasonably necessary" basis.[42]

56. Before this Court, the Commissioner renewed his submission that the appropriate standard of review was not the more stringent standard, inviting the Court to clarify, for future reference, the correct approach in deciding where on the spectrum the standard should be set.

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39 CA at §§49-50.

40 (2012) 15 HKCFAR 409.

41 *Ibid* at §§77-78.

42 Respondent's Case at §§8-9.

57. The Policy concerns the question of gender identity and as such it clearly addresses matters relating to personal or human characteristics, or what were referred to as "core values". It was the submission of Ms Carss-Frisk KC, for the Commissioner,[43] however, that it was wrong to apply the stringent standard whenever such values or characteristics are involved since this would be to apply a mechanical and inflexible approach. Instead, she submitted, a more flexible approach was called for.[44] Since the right to privacy was not absolute, respect for an individual's privacy should give way when brought into contact with public life or in conflict with other protected interests[45] as was the case here. The impact on the public of a change of gender marker on a HKID card for someone who had not completed full SRS was an important matter involving social policy making and was morally and ethically sensitive, hence a wide margin of discretion should be accorded the Commissioner.

58. We do not accept this contention and conclude that the Courts below were correct in applying the "no more than reasonably necessary" standard of scrutiny.

59. As the Court held in *Hysan*, factors relevant to choosing the basis for assessing an impugned provision include the significance and extent of interference with the right in question[46] and the identity of the decision-maker as well as the measure's content and features relevant to the margin of discretion.[47] As already stated, the Policy concerns the expression of an individual's gender identity on a HKID card and a requirement to undergo

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[43] Appearing with Mr Stewart Wong SC and Ms Bonnie Y.K. Cheng.

[44] *Kwok Cheuk Kin v Secretary for Constitutional and Mainland Affairs* (2017) 20 HKCFAR 353 at §37; *R (SC) v Secretary of State for Work and Pensions* [2022] AC 223 at §195.

[45] *Democratic Party v Secretary for Justice* [2007] 2 HKLRD 804 at §§59, 64-65.

[46] (2016) 19 HKCFAR 372 at §§105-107, 108-113.

[47] *Ibid* at §§114-118.

extensive surgical intervention as a condition of a change of gender marker. These are clearly core values which engage a narrower standard of scrutiny.

60. The Commissioner contended that a wider margin of discretion is appropriate because of the lack of consensus in different jurisdictions and the involvement of sensitive moral and ethical issues.[48] However, it is important to recognise the distinguishing features in the authorities relied upon by the Commissioner in support of his contention.

61. The present case is not one where the issue of a person's sexual status for all legal purposes is involved. The challenge to the Policy concerns merely the correction of a gender marker on an identification document which does not affect legal status. The issues in these appeals do not engage the need to have regard to any relevant consensus across different jurisdictions. Nor do they give rise to complications about the relationship of inter-linked legislation across different contexts as would arguably be the case if the appeal concerned the question of gender recognition generally,[49] to which was addressed in the consultation paper of the Inter-departmental Working Group on Gender Recognition ("IWG").[50]

62. Accordingly, it is appropriate to conduct Step Three of the proportionality analysis applying the standard of scrutiny of "no more than reasonably necessary".

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[48] *Hamalainen v Finland* (2014) 37 BHRC 55, Application No. 37359/09, Judgment dated 16 July 2014 at §67; *R (McConnell) v Registrar General for England and Wales (AIRE Centre intervening)* [2021] Fam 77 at §§81-82; *R (Elan-Cane) v Secretary of State for the Home Department* [2022] 2 WLR 133 at §62.

[49] Cf *R (McConnell) v Registrar General for England and Wales (AIRE Centre intervening)* [2021] Fam 77 at §§62 and 82.

[50] Dated June 2017.

I. Is the Policy no more than reasonably necessary?

I.1 The Commissioner's three justifications

63. As the Court of Appeal noted,[51] the Commissioner puts forward three main reasons why the Policy, drawing the line at full SRS, is justified. First, he argues that "a full SRS is the only workable, objective and verifiable criterion to enable a registration officer to determine the application".[52] Secondly, he submits that practical administrative problems due to incongruence between the external physical appearance of the holder and the gender marker would arise if some other line was drawn.[53] And thirdly, he argues that "hormonal and psychiatric treatments that precede full SRS are not absolutely irreversible", giving rise to a risk that a "FtM pre-operative transgender person, whose sex entry on the identity card has been changed to male, stops hormonal treatment, recovers fertility, becomes pregnant, and gives birth".[54]

I.2 Choice of an invasive surgical intervention as the criterion

64. Before proceeding with an analysis of those justifications, a striking feature of the Policy may be noted. As observed above, the function and purpose of the gender marker in HKID cards is to help verify the identity of the holder. It does not signify recognition of the holder's sexual status as a matter of law. Thus, it would have been rational to adopt a policy accepting an amendment to that marker if its verification function is impaired because of an incongruence between the holder's appearance and the contents of the ID card, as is likely to occur in the case of a transgender person. Indeed, such amendments are prescribed by RPR 18(1)(a) whenever the ID card particulars

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[51] CA at §51.

[52] *Ibid* at §52.

[53] *Ibid* at §53.

[54] *Ibid* at §54.

previously submitted "have become incorrect". RPR 14 empowers the registration officer to decide whether there should be a change after examining the evidence and after such investigation as he may consider necessary.

65. However, the Commissioner has taken an entirely different approach. The Policy adopts as the criterion for alteration of the gender marker, completion of surgery to remove the uterus and ovaries and to construct "a penis or some form of a penis". As previously noted, this makes amendment conditional on undergoing the most invasive surgical intervention in the range of treatments for gender dysphoria – treatment which may be medically unnecessary for many transgender persons (including the appellants). Such a criterion might logically be put forward (although increasingly rejected in many jurisdictions[55]) when debating the appropriate basis for recognising a person's change of sex for all legal purposes. But that is not in issue in the present case. As the evidence indicates, some transgender persons feel pressured to undergo such surgery just to get a replacement ID card in order to avoid the frequent experience of discrimination, humiliation, violation of their dignity and invasion of their privacy.

66. Such pressure is objectionable in principle. As the Strasbourg Court pointed out in *AP, Garçon and Nicot v France*: "...medical treatment must always be administered in the best interests of the individual and adjusted to her/his specific needs and situation".[56] It should not be prescribed merely to promote administrative convenience or clarity. The Court added: "Medical treatment cannot be considered to be the subject of genuine consent when the fact of not submitting to it deprives the person concerned of the full exercise of his or her right to gender identity and personal development, which, as

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[55] As listed (as at June 2017) in the IWG Consultation Paper at §§6.55-6.57.

[56] Application Nos 79885/12, 52471/13 and 52596/13, 6 April 2017 at §73 citing the Commissioner for Human Rights of the Council of Europe.

previously stated, is a fundamental aspect of the right to respect for private life..."[57]

67. Accordingly, in our view, the adoption of such a criterion weighs significantly against the Policy in assessing its proportionality.

I.3 Is full SRS the only workable, objective and verifiable criterion?

68. The Commissioner elaborates upon his proposition that "a full SRS is the only workable, objective and verifiable criterion"[58] making two points, namely:

(a) That "[anything] less than that may amount to self-declaration which cannot be accepted"; and

(b) That the decision would otherwise "... be left to the judgment of individual medical practitioners involved in different applications to certify if the change of sex had been completed" giving rise to "... certificates based on varying standards, [resulting] in arbitrariness, inconsistency in treatment and unfairness."[59]

69. As to the first point, it is, with respect, quite untenable to suggest that a line drawn at requiring full SRS is the sole workable line and that the only alternative would involve self-declaration.

70. The Guidelines operate by laying down what must be medically certified. They presently require certification of full SRS. However, as is acknowledged in the Commissioner's own evidence and as noted by the Court

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[57] *Ibid* at §130.

[58] CA at §52; see Tsui Yat (Security Bureau) Affirmation 26 July 2016, §28.

[59] *Ibid.*

of Appeal,[60] an exception exists permitting certification of different medical reasons and consideration of applications by the registration officer on a case-by-case basis. Thus, after setting out the Guidelines, a Sub-Divisional Instruction dated 3 April 2012,[61] states:

> "In regard to individual cases with justifiable medical reasons that the SRS cannot be completed, the case officer (IO) may require the applicant to provide further information on a case-by-case basis. The authority for approving these applications rest with SIO while for applications to be refused, they should be referred to CIO for decision."

71. There is also the evidence of Tsui Yat, Assistant Secretary for Security,[62] who traces the genesis of the Guidelines to a lunch meeting discussion on 25 February 2011.[63] The "Brief note" of that discussion records agreement as to the "new criteria" for accepting "change of sex on HKIC" later reflected in the Guidelines. However, while FtM cases generally require proof of both a hysterectomy and "some form of male genital reconstruction", it was agreed that the second requirement admits of possible discretionary exceptions:

> "If the applicant have removed all the original sex organs without reconstruction of opposite sex organs due to special reasons (eg health reasons), case will be considered exceptionally with expert advices from competent authorities."

72. These exceptions show that requiring full SRS is not the only line that can be drawn for deciding whether alterations to gender markers should be made. Other criteria, short of requiring full SRS, are plainly workable. As the exceptions also demonstrate (and as RPR 14 acknowledges), such decisions need not be made mechanistically, applying some one-size-fits-all criterion, but can be approached on a case-by-case basis. The administrative burden is not

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60 CA at §1.

61 Extract of Registration of Persons Sub-Divisional Instruction No 1/2012, §5.

62 Affirmation 26 July 2016.

63 Attended by three doctors and four civil servants.

great since the evidence suggests that there are likely to be relatively few applications from transgender persons.[64]

73. The abovementioned conclusion is supported by evidence which shows that in numerous other jurisdictions, criteria short of full SRS are regularly applied in deciding whether gender markers on identification documents should be changed. Such criteria are also applied, with more far-reaching implications, in determining whether a transgender person should be recognised to have changed his or her sex for all legal purposes. Referring to the IWG Consultation Paper, examples of different policies which do not require full SRS adopted in other jurisdictions (as at June 2017) are given in the Appellants' Case[65] as follows:

> "(1) The Australian States, the Canadian States, Belgium, Bolivia, Croatia, Ecuador, Estonia, France, Iceland, Italy, Netherlands, Norway, Germany, Portugal, Spain, Sweden, Ukraine, United Kingdom, around half of the United States of America, Uruguay, and Vietnam require a declaration plus medical evidence to be submitted to a Court or to the relevant government department or administrative authority without the need for SRS.
>
> (2) Finland and Poland require a declaration, and medical evidence of sterilisation through hormone treatment but not SRS.
>
> (3) Courts in Austria, Colombia, Greece, Hungary, Luxembourg, Romania, South Korea, Switzerland and Taiwan have ruled that applications to amend identity documents can be made to either to the courts or to the relevant administrative authority without need for proof of SRS."

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[64] Dr Ho affirms (at §15) that in 2013-14, 121 individuals received services under Psychiatric SOPCs [Specialist Out-Patient Clinics], 12 of whom underwent SRS; Dr Ng states (Affirmation at §1) that she took care of about 60 patients in the first 7 months of 2016; and Dr Chiu (Affirmation §1) deposes in 2016 to having treated 20 patients since 2014. Citing a government Press Release dated 9 December 2015, the IWG reported as follows: "The HA [Hospital Authority] estimated that around 30 new cases with gender identity disorder or gender dysphoria would be referred for psychiatric assessment per year, and that around one in 10 of these would require assessment for SRS. According to the HA, the number of gender identity disorder/gender dysphoria patients who underwent partial or full SRS in each of the five years from 2010/11 to 2014/15 is, respectively, 4, 2, 6, 12 and 16."

[65] At §77.

74. An illustration of a scheme of certification which does not require SRS can be found in the United Kingdom's Gender Recognition Act 2004. This provides for a Gender Recognition Panel comprising legal and medical members reviewing specified medical evidence and granting a Gender Recognition Certificate if satisfied that the applicant is over the age of 18 and (a) has or has had gender dysphoria, (b) has lived in the acquired gender throughout the period of two years ending with the date on which the application is made, (c) intends to continue to live in the acquired gender until death, and (d) complies with the evidential requirements imposed by the Act.

75. The IWG Consultation Paper[66] records that since 2006/2007 the number of applicants for Gender Recognition Certificates has been steady, comprising approximately 300 cases per annum in the UK. As the appellants also point out, there is no evidence that such a model has caused administrative difficulty in the aforementioned jurisdictions, "far less difficulties of a sufficient degree to lead any of those countries to amend their legislation or policies to require SRS".[67]

76. It should incidentally be noted that the appellants have made it clear that they are not suggesting that the Policy should be replaced by a scheme of self-certification. Such a possibility is not an issue under consideration by the Court. Both appellants have submitted certificates from specialist medical practitioners both in Hong Kong and the United Kingdom, providing detailed accounts of their psychiatric, real life experience, hormonal and surgical treatments short of SRS. They have been medically certified as having effectively transitioned to living lives in their acquired gender without the need for further surgery. They are not advocating self-certification.

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[66] At §3.86.

[67] AC at §77.

77. The Commissioner's second point seeks to justify the full SRS Policy on the basis that drawing a different line might involve having to deal with medical certificates based on varying and inconsistent standards. We do not consider that a point of any substance.

78. The possibility of questionable certification arises whatever the Policy may require to be medically certified. The Guidelines set out in Section E of this judgment cater for this in relation to certification of completion of full SRS. They could obviously make similar provision in respect of such other certification as may be required. Thus, the present Guidelines provide that the medical proof should normally be produced by the doctor who performed the SRS and if the operation was done outside Hong Kong, certification "should carry the doctor's medical qualification, place where the medical qualification is obtained and other contact information of the doctor". The Guidelines go on to state that where there are difficulties in obtaining the proof from the doctor who performed the SRS outside Hong Kong, "the applicant may request a Hong Kong registered doctor to give an assessment on the SRS that has been undergone". [68] Plainly, if the line were to be differently drawn, the Commissioner could stipulate what constitutes acceptable certification and could in case of doubt, for instance, require endorsement by government doctors after their own examination of the applicant.

I.4 Practical administrative problems as justification for the Policy

79. The second main justification of the Policy offered by the Commissioner involves administrative problems thought likely to arise if a line short of full SRS were to be drawn. The argument, as summarised by the Court of Appeal, runs as follows:

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[68] Guidelines §§(b)-(d).

> "The sex entry on identity cards are used by law enforcement agencies, operators and frontline staff of various organizations and service providers, including government departments, as an indicator of the gender of the holder in many aspects of everyday life. Such aspects range from law enforcement, emergency responses, publicly funded social and residential services, social hygiene services, in-patient services in hospitals, access to sex-specific public toilets, sports, and enrolment in single-sex schools. The requirement of full SRS is necessary to avoid the practical difficulties which would be caused if the external physical appearance of the holder is incongruent with the sex entry thereon."[69] (footnote omitted)

Elaboration is provided by Wong Him Yu, Government Counsel, who elicited the views of various government bureaux.[70]

80. With respect, for the reasons given below, the argument is very much over-stated and unconvincing as a justification for insisting on full SRS.

I.4a Unreal examples

81. First, we are bound to say that several of the instances of purported practical problems relied on by the Commissioner are highly contrived and have no realistic bearing on the issues at hand.

82. Thus, under the heading "Emergency Responses" the deponent[71] postulates a "chemical, biological, radiological and nuclear attack" and envisages officers assisting victims of the same sex and the use of decontaminating water spray facilities which require victims to strip off their clothes in sexually segregated locations. The suggestion is that confusion as to the victim's sex or gender "may bring embarrassment to the subject as well as the officers and other patients/victims and even complaints of misconduct of a sexual nature against various persons concerned". It is fanciful that in such dire circumstances, the niceties of sexual modesty would have any bearing on the urgent emergency responses required. It is in any event hard to imagine that

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69 CA at §53.

70 Affirmation 26 July 2016 at §§5-22.

71 *Ibid* at §7.

victims would first be asked to produce their ID cards before being given emergency assistance. Even in less far-fetched cases involving, for instance, ambulance service officers responding to a serious accident, the argument is unconvincing. No one would expect ambulance men to refuse urgent assistance to a badly injured female victim and to wait for a female officer to arrive. In such urgent situations any incongruence between the victim's apparent sex and the ID card gender marker is rendered insignificant.

83. Another instance relied on by the Commissioner involves single-sex schools. The deponent reports that the system "for allocation of students to Primary 1 and Secondary 1 respectively is sex-specific" and asserts:

> "... if there is incongruence between the sex identified on the HKIC and the external physical attributes of the person concerned, it will bring confusion to the allocation systems and hence grave embarrassment to teachers and students who are young in age and particularly sensitive to gender differences, specifically the physical attributes."[72]

84. That suggestion loses touch with the present issues. Children allocated Primary 1 and Secondary 1 school places are aged about 6 and 12 respectively. Children under the age of 11 are exempt from registering for a HKID card. Moreover, as Dr Ho states, SRS will not be performed on anyone under the age of 18 and it is "... very uncommon that [transgender patients can] go through all stages of assessment for SRS before the age of 21".[73] Accordingly, whatever other problems candidates for Primary 1 and Secondary 1 school places may pose, such problems do not include issues arising out of incongruence between a transgender person's appearance and the gender marker and the Policy requiring full SRS.

85. Another questionable example involves recruitment for the disciplined services. The deponent states: "While the sex of an applicant is not

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[72] *Ibid* at §22.

[73] Dr Ho at §4(c)(ii).

a relevant consideration for recruitment in civilian grades, certain disciplined service grades set different physique requirements for male and female candidates." It is suggested that practical difficulties "including the fairness of the physical recruitment examinations" might arise "if there is incongruence between the [gender marker] and the external physical attributes" of the applicant.[74] The logic is not easy to follow. While a candidate's ID card would no doubt be inspected (with possible external incongruence difficulties, as discussed below), any special physique or fitness requirements would surely be subject to physical tests rather than mere reliance on the gender marker before a decision on recruitment is taken. It is hard to see how any of this justifies the Policy.

I.4b External incongruence

86. Another unsatisfactory aspect of the Commissioner's "practical problem" justification of the Policy involves a somewhat unfocussed approach to "incongruence". He asserts that the requirement of full SRS should be adhered to in order to avoid practical problems which otherwise arise due to an incongruence between the physical appearance of the transgender person and the ID card gender marker. However, this assertion fails to distinguish between what may be called "external incongruence" and any incongruence arising out of a FtM man's retention of female genital organs and his lack of a surgical male genital reconstruction.

87. The incongruence which regularly exposes transgender persons to violation of their dignity and invasion of their privacy most commonly involves the discordance between their outward appearance (rather than the appearance of their genital area) and the unamended gender marker, when their ID cards are produced for inspection. This is what we call "external incongruence". A FtM

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[74] Wong Him Yu Affirmation at §21.

person who has undergone hormonal treatment and is living as a male will generally present himself and be regarded by others as a male. He may have facial hair, an Adam's apple, a deeper voice and a male physique with increased muscle and redistributed fat, as well as a male hairstyle, clothing and demeanour, giving rise to possible external incongruence due to an unaltered gender marker. If a gender marker amendment had been made so that his external appearance was in line with his gender marker, such incongruence and any associated problems would be far less likely to arise, if at all. It is misplaced to suggest that "practical problems" involving external incongruence are somehow avoided by adhering to the full SRS Policy and refusing alterations to the gender marker on that basis.

88. As Lord Pannick KC pointed out, it is only rarely that exposure of a person's genital area is required. Indeed, as the appellants have pointed out in their evidence, they go to great lengths to avoid being placed in that position as a matter of everyday experience.

89. In the great majority of cases of possible external incongruence, leaving the gender marker unamended produces greater confusion or embarrassment. For example, if a transgender man who had not had full SRS but whose external appearance was in every respect male was to enter a women's public lavatory, the reaction of the women using the facility would almost certainly be one of consternation. It would be of little relevance for them to be told that he had entered because his gender marker stated that he was female and that he was using the women's lavatory (he believed) to avoid being prosecuted.[75] Yet the Commissioner's evidence suggests that lawful use of such

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[75] Section 7 of the Public Conveniences (Conduct and Behaviour) Regulation, Cap 132BL, provides that no male or female person shall enter any part of the public convenience which is allocated for the use of the persons of the opposite sex.

public conveniences should be in accordance with the gender marker's designation:

> "According to FHB [Food and Health Bureau], should the situation so warrant, the [lavatory] attendant may report the case to the Police for assistance and inspection of the subject's HKIC. If the HKIC sex entry cannot be reliably referred to in ascertaining the actual physical sex of a subject, there would be practical difficulties in enforcing the law when there is incongruence between the sex identified on the HKIC and the external physical attributes of the person concerned, as well as grave embarrassment for, and even complaints of misconduct of a sexual nature by or against, other users of the facility."[76]

90. The implication that the gender marker establishes the holder's "actual sex" as a matter of law is unsound. The construction and application of the Regulations governing conduct in public conveniences are not issues arising on the present appeals. Nevertheless, in practical terms, it seems clear that in the aforesaid example, if, instead of entering the women's lavatory, the transgender person, appearing in all external respects to be a man, walked into the men's facility, no one would have raised an eyebrow. After much experience of living in his acquired gender, he could be relied on to deal with his own transgender needs in a sensible and discreet way, such as by using a cubicle to ensure privacy.

91. Similar considerations would arise in connection with the various sex-appropriate accommodation or residential arrangements referred to by the Commissioner by way of justification. Thus, for instance, external incongruence would be far more likely to raise concerns if a transgender man with a male appearance was admitted to a female hospital ward because his gender marker said "female" than if he was admitted to a male ward. It is true that he might well receive a medical examination in the male ward which would reveal that he retained female genitalia and lacked any surgically reconstructed

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[76] Wong Him Yu Affirmation 26 July 2016, §19.

male organs. However, in practical terms such an examination is unlikely to concern other men in the ward as it is likely to be conducted in privacy behind screens, and one would expect his attending doctors and nurses to understand and accommodate his transgender status. One might add that in a situation where consent is given to receiving such medical care, privacy rights are likely to that extent to have been waived. This also applies to the Commissioner's example of "practical problems" relating to a transgender person's attendance at a Social Hygiene Clinic providing treatment for sexually transmitted diseases.

92. To take a final example of possible problems due to external incongruence being exacerbated by unamended gender markers, one may consider police officers making routine ID checks. If a transgender person whose external appearance is male were to produce an ID card which stated that he was female, this might cause the officer to ask numerous questions and perhaps to doubt whether he was the lawful holder of the document, leading to the embarrassment, humiliation, violation of dignity and invasion of privacy complained of in this appeal. In such a case, the unamended gender marker's function as an identifier would be deficient. The officer, in conducting the stop and search operation, might properly be interested in checking whether there was any outstanding warrant for the holder's arrest or whether he was an illegal immigrant, and so forth. But the officer would have no legitimate interest in delving into the holder's transgender history. If, on the other hand, the gender marker had been amended to correspond to the holder's external appearance, the external incongruence issue would not arise without compromising the ability of the officer to carry out his lawful duties.

I.4c Problems that do not bear on gender markers

93. Nothing in the foregoing discussion is meant to deny that there are many areas of society where genuine and difficult issues concerning the

appropriate treatment of transgender persons arise. However, it is frequently the case that amendment of the ID card gender marker and the Policy demanding full SRS as a condition of amendment are irrelevant to resolving such difficulties. Instead, the problems call for appropriate social arrangements to be made and measures devised to accommodate both the legitimate needs of transgender persons and the needs of other members of the public. It therefore does not follow that pointing to the existence of such issues provides a justification for the Policy's interference with the constitutional rights engaged.

94. To take one example, it is undeniable that difficult problems may arise as to whether a transgender person sentenced to imprisonment should be incarcerated in a male or female prison. Since intrusive and intimate bodily searches are likely to be required, should such searches be conducted by male or female prison officers? Would a male or female prison be more appropriate, taking into account the need to protect the transgender inmate or other inmates from possible sexual abuse? These are real problems, but their existence does not bear on the Policy's justification.

95. A factual illustration may be found in *Navarro Luigi Recasa v Commissioner of Correctional Services*[77] which involved a MtF transgender person who had undergone hormonal treatment and breast augmentation surgery and had acquired a female external appearance with a feminine physique, although her male genitalia remained intact. She was convicted of trafficking in a dangerous drug and sentenced to 20 months' imprisonment. She was held in a male prison but, because of her female appearance and the risk of sexual harassment, she was housed in the prison's Vulnerable Prisoners Unit. The decision to do so, involving a pragmatic protective measure, was upheld by the

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[77] [2018] 4 HKLRD 38 (Au J). The case proceeded on grounds other than BOR 14 and so is not referred to here for its legal content and we do not express any view on the correctness or otherwise of the learned Judge's decision.

Court. However, her complaint about the practice of male prison officers conducting strip or cavity searches, which the Judge regarded as involving a discretionary decision by the prison authorities, failed on the facts. Plainly, it would have made little difference to those problems whether her ID card gender marker stated that she was male or female. The same difficult issues which arose out of her transgender status and her sentence of imprisonment would have had to be faced.

96. Similar considerations apply to the Commissioner's reference to fairness in sport. There are undoubtedly controversial issues regarding fairness in the classification of transgender athletes who compete in sport. They are issues addressed by various international sporting organisations but their resolution has little to do with the ID card gender marker of the person concerned.

I.5 Reversibility

97. The Commissioner's third main justification of the Policy is that the treatment received by transgender persons is "not absolutely irreversible", so that there is a risk that a "FtM pre-operative transgender person, whose sex entry on the identity card has been changed to male, stops hormonal treatment, recovers fertility, becomes pregnant, and gives birth".[78] The argument is therefore that the Policy justifiably requires irreversible removal of the female reproductive organs to exclude the possibility of a post-transition pregnancy.

98. Dr Safer acknowledges that the concern expressed by the Commissioner cannot be ruled out but states that "such occurrences would be truly exceptional", adding "... in my years of practice, I have never personally come across a patient who under proper care and guidance of a qualified

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[78] CA at §54.

endocrinologist, and conscientious with medication has conceived while on testosterone therapy at the recommended levels".[79]

99. The exceptional rarity of such a pregnancy is unsurprising. This is because in the great majority of cases, a FtM transgender person's commitment to achieving a permanent transition to the male gender is plain and obvious, even if full SRS is not performed. The lengthy treatment pathway undertaken has been described. And as Dr Safer points out, elements of FtM hormonal treatment including facial hair growth, lowered vocal pitch and changed larynx and midline structures, are irreversible. A bilateral mastectomy is also obviously irreversible. Thus, as pointed out in *W v Registrar of Marriages*,[80] transgender persons who have undergone such a course of treatment have shown themselves "willing to endure such a long and painful ordeal to acquire a body which conforms as far as possible with their self-perception and to struggle for social recognition". Such persons are highly unlikely to decide to revert to their assigned gender, much less to do so with a view to becoming pregnant.

100. What such an exceptional course may have to involve is illustrated by *R (McConnell) v Registrar General for England and Wales (AIRE Centre intervening)*,[81] an extremely unusual case. The applicant, Mr McConnell, had been registered as female at birth and, when 22 years of age, transitioned to live in the male gender, undergoing hormonal treatment and a double mastectomy, but not full SRS. He obtained a Gender Recognition Certificate confirming that

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[79] Dr Safer, Affirmation at §§36 and 39. He also casts doubt on an article referred to by Dr Ng regarding a survey of transgender men who became pregnant as having "inherent weaknesses" pointing out (at §38) that: "It is a simple survey conducted without any use of objective hormonal baseline level screening to confirm that the participants of the survey were able to ovulate and conceive while on testosterone therapy."

[80] (2013) 16 HKCFAR 112 at §102.

[81] [2021] Fam 77.

he was male, having declared that he "intend[ed] to continue to live in the acquired gender until death". However, he then suspended testosterone treatment and commenced fertility treatment intending to fertilise an egg in his womb. He subsequently underwent intrauterine insemination during which donor sperm was placed inside his uterus. The process was successful and he became pregnant, carrying the pregnancy to full-term and giving birth to a son. He brought legal proceedings to challenge the Registrar's decision to register him as the child's "mother", contending that he had a right to be registered as the boy's "father" or, if not, as his "parent". His application failed for reasons that do not require discussion here.

101. What the *McConnell* case illustrates is how an extremely elaborate and medically-assisted course of action had to be followed for a transitioned FtM person to achieve pregnancy. Indeed, in claiming to be registered as the child's "father", Mr McConnell appears to have wanted it both ways: to affirm his transition to the male gender and thus to be called "father" while having his eggs fertilised and giving birth to a child. Such cases must obviously be extremely rare. There is no evidence of there having been such a case in Hong Kong.

102. In our view, it would be wholly disproportionate to regard the risk of a rare and exceptional post-transition FtM pregnancy as a justification for the Policy, thereby requiring all FtM transgender persons to have full SRS as a necessary condition for acquiring a change to their HKID card gender markers.

I.6 Conclusion as to reasonable necessity

103. For the reasons developed above, we are unable to accept any of the three reasons advanced by the Commissioner by way of justification for the Policy. We do not accept that it represents the only workable, objective and verifiable criterion for altering the gender marker. Nor do we accept that the

Policy's full SRS criterion is justified by a need to avoid the alleged practical problems discussed above. And as we have just stated, the exceedingly small risk of post-transition reversibility leading to pregnancy cannot justify adherence to the Policy. Moreover, as pointed out in Section I.2 above, it is objectionable in principle to adopt as the criterion for amending a gender marker, a requirement of undergoing a highly invasive surgical intervention which may be medically unnecessary.

104. The Commissioner has failed to demonstrate that the Policy on which his decision to refuse the appellants' application for an amendment to their gender markers is based, is no more than reasonably necessary to accommodate his legitimate concerns and to justify interference with the appellants' BOR 14 rights. It is therefore our view, respectfully differing from the Courts below, that the Policy fails the test of reasonable necessity and is disproportionate.

J. Step Four: striking a reasonable balance

105. Since the Policy and the Commissioner's decision have failed the proportionality test, it is strictly unnecessary to go on to consider the fourth step of the proportionality analysis. However, as was noted in *Hysan*,[82] the four requirements inevitably overlap because the same facts are likely to be relevant to more than one of them.

106. If it had been necessary to proceed to Step Four and to ask "whether a reasonable balance has been struck between the societal benefits of the encroachment and the inroads made into the constitutionally protected rights of the individual, asking in particular whether pursuit of the societal interest

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[82] *Hysan Development Co Ltd v Town Planning Board* (2016) 19 HKCFAR 372 at §62, citing Lord Sumption JSC in *Bank Mellat v Her Majesty's Treasury (No 2)* [2014] AC 700 at §20.

results in an unacceptably harsh burden on the individual"[83] we would have answered "No" to first part of that question and "Yes" to its second part.

107. The foregoing analysis leads to the conclusion that the societal benefits of the Policy are in many respects illusory and are at best relatively slim. The Policy's consequence is to place persons like the appellants in the dilemma of having to choose whether to suffer regular violations of their privacy rights or to undergo highly invasive and medically unnecessary surgery, infringing their right to bodily integrity. Clearly this does not reflect a reasonable balance. The Policy imposes an unacceptably harsh burden on the individuals concerned.

K. Conclusion and disposition

108. For the foregoing reasons, we would allow the appeals. We would hold that each of the appellants is entitled to an Order quashing the Commissioner's decision refusing their applications for alteration of the gender markers on their HKID cards.

109. We would also grant a Declaration that the aforesaid decisions and the underlying Policy requiring FtM transgender persons to undergo full SRS as set out in the Guidelines as a necessary condition for altering the gender markers on their HKID cards, violate the appellants' BOR 14 rights and are unconstitutional.

110. As Lord Pannick KC acknowledged, it is not for the Court to re-write the Commissioner's Policy. As indicated above, there are various models and approaches that might be considered for re-formulating the Policy in a manner consistent with the rights protected under BOR 14.

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[83] *Ibid* at §135.

111. We would also make an Order *nisi* that the costs of these appeals and of the proceedings below be paid by the respondent to the appellants with liberty to the parties, if so advised, to lodge written submissions as to costs within 14 days of the date of this judgment.

Mr Justice Lam PJ:

112. I agree with the joint judgment of Mr Justice Ribeiro PJ and Mr Justice Fok PJ.

Lord Sumption NPJ:

113. I agree with the joint judgment of Mr Justice Ribeiro PJ and Mr Justice Fok PJ.

Chief Justice Cheung:

114. The Court unanimously allows the appeals and quashes the Commissioner's decisions refusing the appellants' respective applications for alteration of the gender markers on their Hong Kong Identity Cards.

115. We grant a Declaration that the aforesaid decisions and the underlying Policy requiring Female to Male transgender persons to undergo full Sex Reassignment Surgery as set out in the Guidelines as a necessary condition for altering gender markers on Hong Kong Identity Cards, violate the appellants' rights under Article 14 of the Bill of Rights and are unconstitutional.

116. We make an Order *nisi* that the costs of these appeals and the proceedings below be paid by the respondent to the appellants with liberty to the parties, if so advised, to lodge written submissions as to costs within 14 days of the date of this judgment.

(Andrew Cheung)	(R A V Ribeiro)	(Joseph Fok)
Chief Justice	Permanent Judge	Permanent Judge

(M H Lam)	(Lord Sumption)
Permanent Judge	Non-Permanent Judge

Lord Pannick KC, Mr Hectar Pun SC and Mr Earl Deng, instructed by Haldanes, assigned by the Director of Legal Aid, for the Applicants (Appellants)

Ms Monica Carss-Frisk KC, Mr Stewart Wong SC and Ms Bonnie Y.K. Cheng, instructed by the Department of Justice, for the Respondent