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(subject to editorial corrections)\*

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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

AS's Application [2016] NIQB 89

IN THE MATTER OF AN APPLICATION BY "AS" FOR JUDICIAL REVIEW

**TREACY J**

**Introduction**

[1] This application concerns the lawfulness of a "certified copy of an entry in marriage registration records" dated 6<sup>th</sup> of March 2014 which relates to the Applicant's marriage. The Applicant was previously in a civil partnership with the bride prior to him obtaining a gender recognition certificate recognising his true identity as a male.

[2] In the portion of the entry entitled 'status' both bridegroom and bride are reported as "civil partnership dissolved". A civil partnership can only be between two people of the same gender. The disclosure of this information on the copy of the entry in the marriage registration records ("marriage certificate") is, it is argued, essentially a disclosure that either the bride or the bridegroom had a previous gender history which was amended by way of a gender recognition certificate. This is because the marriage certificate also discloses that the bridegroom and bride shared the same surname prior to their marriage.

[3] The Applicant argues that the keeping of this information on a public register which is required to be used by the Applicant for a number of public functions is unnecessary and in breach of Article 8 ECHR and/or *ultra vires* and/or irrational.

**Relief Sought**

[4] The Applicant seeks the following relief:

- (a) A declaration that those provisions of the Marriage (Northern Ireland) Order 2003 and the Marriage (Northern Ireland) Regulations 2003 which require the General Register Office (“GRO”) to keep a public record which might reveal the Applicant’s previous gender history is unlawful;
- (b) A declaration that those portions are incompatible with the Applicant’s rights pursuant to Article 8 ECHR;
- (c) An Order of Certiorari quashing the relevant portions;
- (d) An Order of Mandamus compelling the Respondent to put in place such measures as are necessary to prevent the publication of the Applicant’s previous gender history;
- (e) Such further or other necessary or consequential relief;
- (f) Damages
- (g) Costs

**Grounds upon which Relief is Sought**

[5] The relief is sought on the following grounds:

- (a) The maintenance of a public record which reveals or has a tendency to reveal the Applicant’s previous gender history is a breach of the Applicant’s rights pursuant to Article 8 ECHR.
- (b) The provisions of the Marriage (Northern Ireland) Order 2003 and the Marriage (Northern Ireland) Regulations 2003 which require the Applicant to reveal his previous gender history are arbitrary, irrational and fail to take into consideration the provisions and spirit of The Gender Recognition Act 2004.

**Statutory Framework**

**The Marriage (Northern Ireland) Order 2003**

**2. - Interpretation**

...

“prescribed”, except in relation to a fee, means prescribed by regulations

**3. - Notice of intention to marry**

(1) Each of the parties to a marriage intended to be solemnised in Northern Ireland shall give the registrar a notice of intention to marry.

(2) In this Order –

“marriage notice” means notice of intention to marry;

“registrar” means the registrar for the district in which the marriage is to take place

(3) A marriage notice shall be –

(a) In the prescribed form; and

(b) Accompanied by the prescribed fee and such documents and other information as may be prescribed...

#### **4. – Power to require evidence**

(1) A registrar to whom a marriage notice is given may require the person giving the notice to provide him with specified evidence relating to each of the persons to be married.

(2) Such a requirement may be imposed at any time on or after the giving of the marriage notice but before the registrar issues the marriage schedule under Article 7.

(3) In paragraph (1) “specified evidence”, in relation to a person, means such evidence of that person’s –

(a) name and surname;

(b) age;

(c) marital and civil partnership status; and

(d) nationality

As may be specified in guidance issued by the Registrar General

(4) In Paragraph (3)(c), “marital and civil partnership status”, in relation to a person, means whether that person has previously formed a marriage or a civil partnership, and if so, whether that marriage or partnership has ended.

## **7 - Marriage Schedule**

(1) After the registrar receives a marriage notice from both of the parties to an intended marriage, he shall complete a marriage schedule in the prescribed form if he is satisfied that there is no legal impediment to the marriage or the Registrar General has directed him under Article 6(5) to proceed under this article.

## **35. - Searches**

(1) The Registrar General shall provide indexes to marriage registration records in his custody for inspection by the public.

(2) A registrar shall provide indexes to marriage registration records in his custody for inspection by the public.

(3) Any person may, on payment of the prescribed fee, -

(a) search any index mentioned in paragraph (1) or (2); and

(b) require the Registrar General or, as the case may be, the registrar to give him a document in the prescribed form relating to the registration of a marriage.

## **The Marriage Regulations (Northern Ireland) 2003**

### **3. - Marriage Notice**

(1) A marriage notice shall be in the form as set out in schedule 1

...

### **5. - Marriage Notice book**

The prescribed particulars, in relation to a person to be taken from each marriage notice received by the registrar, shall be that person's -

- (a) Surname and name;
- (b) Address;
- (c) Status;
- (d) Date of birth; and
- (e) Date of intended marriage

## **6. - Marriage Schedule**

- (1) A marriage schedule shall be in the form set out in Schedule 2

## **35. - Certified Copies of entries**

The document given under Article 35(3) of the Order -

- (a) Shall be in the form as set out in Schedule 13 where it is being issued from the General Register Office; and
- (b) Shall be in the form as set out in Schedule 14 where it is being issued by a Registrar.

## **Schedule 1**

Marriage Notice - Status options: single, widowed, divorced/marriage annulled, civil partnership dissolution / annulment, surviving civil partner

## **Gender Recognition Act**

### **9. - General**

(1) Where a full gender recognition certificate is issued to a person, the person's gender becomes for all purposes the acquired gender (so that, if the acquired gender is the male gender, the person's sex becomes that of a man and, if it is the female gender, the person's sex becomes that of a woman).

(2) Subsection (1) does not affect things done, or events occurring, before the certificate is issued; but it does operate for the interpretation of enactments passed, and instruments and other documents made, before the certificate is issued (as well as those passed or made afterwards).

(3) Subsection (1) is subject to provision made by this Act or any other enactment or any subordinate legislation.

## **22. - Prohibition on disclosure of information**

(1) It is an offence for a person who has acquired protected information in an official capacity to disclose the information to any other person.

(2) "Protected information" means information which relates to a person who has made an application under section 1(1) and which -

(a) concerns the application or any application by the person under section 5(2), 5A(2) or 6(1), or

(b) if the application under section 1(1) is granted, otherwise concerns the person's gender before it becomes the acquired gender.

...

(5) But it is not an offence under this section to disclose protected information relating to a person if -

...

(j) the disclosure is in accordance with any provision of, or made by virtue of, an enactment other than this section.

## **The Civil Registration Regulations (Northern Ireland) (2012)**

39. Subject to the provisions of regulations 40 to 43, Article 34A(5) of the 1976 Order and section 22 of the Gender Recognition Act 2004 any person may have access to any information contained in a relevant register.

## **United Nations 'Principles and recommendations for a Vital Statistics System'**

13. A vital statistics system is defined as the total process of (a) collecting information by civil registration or enumeration on the frequency of occurrence of specified and defined vital events, as well as relevant

characteristics of the events themselves and of the person or persons concerned, and (b) compiling, processing, analysing, evaluating, presenting and disseminating these data in statistical form. The vital events of interest are: live births, adoptions, legitimations, recognitions, deaths and foetal deaths, and marriages, divorces, separations and annulments of marriage.

14. The main source of vital statistics is records of vital events from civil registration, which involves the continuous gathering of information on all relevant vital events occurring within the boundaries of a country... For the calculation of vital rates, civil registration data are usually complemented by census information, which also has national coverage.

...

19. Vital statistics also encompass data on the occurrence of marriages, divorces, annulments and judicial separation. Data on those topics allow the analysis of nuptiality, and in conjunction with information on fertility permit the study of family formation. Because of cultural variations in the degree to which marriage is formalized and the variation in the legally accepted modes of contracting marriage, statistics referring to this aspect of population dynamics are often not truly comparable between countries. In particular, consensual unions are rarely reflected in civil registration data. Nevertheless, as provided by civil registration, information on contracted marriages and the incidence of officially sanctioned marriage dissolution, whatever its form, is useful in allowing an assessment of the social impact that those parts of the family formation process may have on a population.

...

26. Civil registration is the continuous, permanent, compulsory and universal recording of the occurrence and characteristics of events, including vital events, pertaining to the population, as provided by decree or regulation, in accordance with the legal requirements of a country. It therefore provides the ideal source from which to derive data for vital statistics on a regular basis.

27. Civil registration has a dual purpose – administrative and legal on the one hand, and statistical, demographic and epidemiological on the other....

28. For the individual, the civil registration records of birth provide essential legal documentation of identity and civil status, such as name, date, time and place of birth, parents' name and nationality, date of birth or age of parents, ancestry of lineage, sex and nationality (citizenship), on which depend a wide array of individual and family rights and activities, including eligibility for social programmes... Marriage and divorce records provide documentation for such purposes as receipt of alimony allowances, claims for tax benefits, provision and allocation of housing or other benefits related to the marital status of a couple, and changing nationality on the basis of marriage. In addition, records of divorce are important for establishing the right of an individual to remarry and to be released from financial and other obligations incurred by the other party.

...

32. Officially authenticated copies of births, deaths, marriages, divorces, annulments etc. are essential elements for maintaining a population register...

33. Marriage records are used administratively as proof of the formation of a marital bond, and may be needed to initiate family-benefit programmes related to health, housing etc. They also serve to clear administrative files on programmes dependent on single marital status, alimony payments etc. Divorce records serve similar administrative purposes."

## Arguments

### *Attorney General's position paper*

[6] Two elements of the Applicant's claim give rise to a Devolution Notice. Those are:

- (a) A declaration that those provisions of the Marriage (NI) Order 2003 and the Marriage (NI) Regulations 2003 which require the GRO to keep a public record which might reveal the Applicant's previous gender history is unlawful.

- (b) That those provisions are incompatible with the Applicant's Article 8 ECHR rights.

[7] In response to the notice the Attorney General has provided a position paper. The position paper deals only with the following two issues, the balance of issues, in the Attorney General's submission, having been sufficiently explored by the Department. The issues dealt with by the Attorney are:

- (a) Whether the requirement to record the Applicant's status interferes with his right to respect for family and private life under Article 8 ECHR, and
- (b) If there is an interference with the Applicant's rights under Article 8 ECHR, whether such interference is in accordance with law.

*Is there an interference with the Applicant's Article 8 rights?*

[8] The Attorney General, having surveyed the relevant case law makes the following case.

[9] Earlier jurisprudence suggested that, where there could not be a reasonable expectation of privacy or where information was obtained as a result of the Claimant's public activities there could be no interference with a person's private life. More recent jurisprudence has attenuated that position and has held that *'information of a public nature... may become private over the course of time... and the storage and use of personal information that has been gathered from open sources... may involve an infringement of a person's rights under article 8.1 if it amounts to an unjustified interference with his personal privacy. [R(Catt) v Association of Chief Police Officers [2013] 1 WLR 3305].*

[10] These more recent cases held that, in certain circumstances, the collection, retention and processing of personal data by public authorities may breach a person's article 8 rights even where the data originally arose in circumstances in which the person had no reasonable expectation of privacy. The Attorney argues that it is not clear that the facts in the instant case fall within the scope of those decisions.

[11] The Attorney notes that in S v UK (2008) 48 EHRR 1169 the court commented that *'in determining whether the personal information retained by the authorities involves any of the private-life aspects mentioned above, the court will have due regard to the specific context in which the information at issue has been recorded and retained, the nature of the records, the way in which these records are used and processed and the results that may be obtained.'*

[12] The Attorney also refers to R(Wood) v Commissioner of Police of the Metropolis [2009] EWCA Civ 414 in which the claimant found himself being

photographed by police in circumstances in which he did not and could not know the purpose or end use of the photographs. This element of uncertainty led to a finding that the claimant's article 8 rights had been infringed. However, the court noted that in cases *'where the police or other public authority are acting just as the public would expect them to act, it would ordinarily no doubt be artificial and unreal for the courts to find a prima facie breach of article 8.'*

[13] The Attorney argues that, in the Applicant's case, the public element of the recording of the public transaction was not accidental or unwished for, but was, in fact, at the very heart of the transaction and central to its significance. The Attorney notes that a civil partnership is a public transaction, as is its dissolution. For these reasons, the Attorney submits that *'the voluntary entering into by the applicant of a public transaction, and the faithful recording of that transaction, do not seem, without more, to constitute an interference with the right to respect for private life under Article 8 ECHR'*. In this regard the Attorney further relies on *Kinloch v HM Advocate* [2013] 2 AC 93 in which the Supreme Court found that *'measures effected in a public place outside the person's home or private premises will not, without more, be regarded as interfering with his right to respect for his private life. Occasions when a person knowingly or intentionally involves himself in activities which may be recorded or reported in public, in circumstances where he does not have a reasonable expectation of privacy, will fall into that category'*.

***If there is an interference with the Applicant's rights under Article 8 ECHR is such an interference in accordance with law?***

[14] The Attorney argues, based on the provisions of the Marriage (NI) Order 2003 and the Marriage (NI) Regulations 2003 and underscored by the offences created by the Perjury (NI) Order 1979 that there is a clear legislative basis in domestic law for the impugned provisions.

### **Applicant's Arguments**

[15] The Applicant accepts that, strictly, there is a legislative obligation to provide details of marital status upon the marriage certificate. The Applicant also accepts that the GRO is probably exempt from the provisions of Section 22 of the Gender Recognition Act which provides that it is an offence to disclose the fact that an individual has obtained a gender recognition certificate.

[16] The Applicant argues that the issues which need to be considered in this case are firstly, whether the regulations go beyond the power conferred by the 2003 Order and, second, the relationship between the regulations and the prohibition on disclosure of information provided by section 22 of the Gender Recognition Act which the Applicant argues *'informs the view of parliament as to how the privacy aspect of the legislation is to be viewed'*.

[17] The Applicant argues that the provisions of the regulations, if followed to the letter, breach the Applicants article 8 rights for no lawful or justifiable purpose, by

requiring the copy of the marriage records to record the previous civil partnership thereby disclosing the previous gender history of the Applicant.

[18] The Applicant submits that it is at the very least arguable that the existing provisions should be interpreted in a way that is consistent with the registrar's duty of non-disclosure pursuant to section 22 of the Gender Recognition Act and also compatible with the Applicant's article 8 ECHR rights.

[19] The Applicant notes that the attitude of the Registrar is that the relevant provisions ought to have been known to the Applicant upon completion of the marriage notice form. In this regard the Applicant argues that this does not in any way answer the anomaly in the legislation. The Applicant further argues that the regulations should not present a disincentive to a person getting married which would defeat the purpose of the gender recognition legislation.

*The Applicant's response to the arguments contained in the affidavit sworn by Laura McPolin on behalf of the respondent*

[20] Listed below are the justifications for the policy as contended for in the abovementioned affidavit and the Applicants response.

[21] First, it is argued that *'the inclusion of the status in the solemn declaration is important to concentrate minds and ensure legal compliance'*.

[22] The Applicant does not take issue with this.

[23] Second, *'it is vital to set out in a public notice the names of parties and the date of the marriage in advance of a marriage'*.

[24] The Applicant does not take issue with this.

[25] Third, *'Recording of marital status "provides a convenient and readily accessible form of confirmation that, prior to marriage, the required checks have been undertaken to ensure that the parties were free to enter into the marriage'*.

[26] The Applicant acknowledges this but argues that this is unnecessary as, having made these checks, the marriage itself is confirmation of that fact. The Applicant notes that he does *not* argue that the marital status provisions should be removed in their entirety, but that it is unnecessary to record his status as "civil partnership dissolved."

[27] Fourth, *'the likelihood of misidentification is less if more material is recorded and that use has been made of the register by the Historical Enquiries Team'*

[28] Again the Applicant notes that he does not say that the marital status provisions require to be removed in their entirety but that it is unnecessary to record

his status as 'civil partnership dissolved. Furthermore there is no reason why a system could not be in place whereby properly authorised bodies could not have access to material beyond that which is stored on the public register.

[29] Fifth, *'the recording of status can assist people who are trying to trace their families'*.

[30] The Applicant submits, again, that the marital status provisions need not be removed in their entirety. Use of the word "single" rather than "civil partnership dissolved" in the particular factual circumstances of this case and similar ones would be sufficient. This is a very small fraction of the persons whose details are recorded. Thirdly, a person with a previous gender history may also want to prevent family members becoming aware of that fact. If it is prompted by a need to establish the medical history of the birth family then this would be a proper purpose for an authorised body to receive further information but not a reason for the information to be contained on a public register for everybody to see.

[31] Sixth, *'the recording of status can also assist in the tracing of persons for inheritance or genealogical purposes. The Respondent argues that the balance lies in favour of the current approach to registration.'*

[32] Again the Applicant does not say that the marital status provisions require to be removed in their entirety but that it is unnecessary to record his status as "civil partnership dissolved". Furthermore, there is no reason why a system could not be in place whereby properly authorised bodies could not have access to material beyond that which is stored on the public register.

[33] Seventh, *'it provides a reliable source of statistics for research into legal, social or demographic problems'*

[34] Again, the Applicant does not say that the marital status provisions require to be removed in their entirety but that it is unnecessary to record his status as "civil partnership dissolved". Furthermore there is no reason why a system could not be in place whereby properly authorised bodies could not have access to material beyond that which is stored on the public register.

[35] Eighth, *'it would have been inappropriate to record the Applicant's status as 'single' as the "Applicant's civil partnership is voidable, rather than void". This would have a detrimental impact on statistical comparisons and that Section 9 of The Gender Recognition Act 2004 shows that the issuing of a full Gender Recognition Certificate does not "wipe the slate clean".'*

[36] The Applicant argues that the difference between void and voidable is semantic and ought not, on a proper interpretation of the statute and regulations, operate to prevent the protection of the Applicant's right to privacy. Where the Department believes that it would "be inappropriate to interpret the word "single" as "not currently married or in a civil partnership" that is precisely the description

which is appropriate. There is no inconsistent definition of the term “single” in the Regulations or Statute. Such an interpretation would permit the Applicant to protect his privacy. Furthermore, the United Nations Statistics Division defines “single” as “never married”. This definition would apply to the Applicant who was not married but in a civil partnership. Simply recording the Applicant’s status as “single” would allow the minimum interference with the current registration system and still be consistent with the definition of the term, and would maintain the consistency of the record keeping and the protection of the Applicant’s right to privacy.

[37] While Section 9 of the Gender Recognition Act 2004 states at sub-paragraph (2) that a Gender Recognition Certificate “does not affect things done, or events occurring, before the Certificate is issued”, it goes on to say “but it does operate for the interpretation of enactments passed, and instruments and other documents made, before the Certificate is issued (as well as those passed or made afterwards)”. In fact it is quite clear from this section that a combination of this section and section 22 (which prohibits the disclosure of information relating to a person’s previous gender history) that the recording of the material on the marriage certificate is contrary to the provision of the Act.

[38] Ninth, *‘Regulation 40 of the Civil Registration Regulations (Northern Ireland) 2012 duly provides for access to information in a relevant register upon payment of the prescribed fee’*

[39] The paragraph then goes on to state that such provisions are subject to Regulation 49 whereby the right of access is expressly subject to Section 22 of the 2004 Act. This is the prohibition on disclosure of material relating to a previous gender history. Inconsistently with that provision, access to the index is not restricted and the Respondent concedes that *‘that information in itself may not disclose the previous status of the search subject; however, once that information has been obtained, a copy of the relevant marriage certificate can be requested and the certificate will contain information on status’*. In addition, information on status may be obtained from the marriage notice which, as stated above, is open to the public. But again the Applicant does not make the case that there should not be open access to the material in the register. He simply makes the case that there should not be open access to material which reveals his previous gender history.

[40] Tenth, *‘it would be possible to extract certain information from an individual’s record and to store that information in another place. However, there would have to be some way of linking the information back to the individual and there is a risk that the link between the various records could be lost. There is also the risk that such redaction “would immediately identify those persons as having undergone gender reassignment” and “could in fact draw greater attention to their gender history.’*

[41] The Applicant concedes that it would be possible to extract from a record. The risk of loss of information expressed by the Respondent appears to be fanciful, particularly in the age of electronic registration and access and cross-referencing.

Redaction does not necessarily mean gender reassignment. There are many reasons why a register for reasons of privacy could or should be redacted. In any event such redaction would be preferable to the public and obvious recording of a previous gender history. Moreover, the simple use of the term “single” would obviate all of these perceived difficulties.

### *Other Arguments*

[42] The Applicant argues that there is no question that the obligation imposed by the Respondent to record the Applicant’s marital status on the public record as “civil partnership dissolved” is a breach of his right to privacy. It is therefore for the Respondent to demonstrate that such interference is necessary. The Applicant submits that this involves a balancing exercise of the public interest argued by the Respondent in its Affidavit. It is the Applicant’s case that none of the public interest arguments specifically relate to the very defined and limited circumstances of the Applicant’s personal information and that any perceived interest arguments in favour of the Respondent’s position are surmountable and/or so minimal that they cannot outweigh the Applicant’s right to privacy.

[43] The Applicant further argues that the recording of the Applicant’s and his wife’s marital status, not only impacts on his personal right to privacy and right to family life but it also has wider implications for his wife’s privacy and right to family life and their relationship.

[44] The Applicant argues that the legislative provisions which require that the Applicant’s status be recorded as ‘civil partnership dissolved’ are irrational and arbitrary. He further argues that those provisions are *ultra vires* the powers given under the Marriage (NI) Order 2003 in that they go beyond what is necessary and/or required by the statute. The detailed reasons underpinning these arguments are set out in the Applicant’s response to the Respondent’s arguments in favour of the provisions which are set out above.

[45] The Applicant argues that the Respondent failed to take into account a relevant consideration, namely the provisions of sections 9 and 22 of the Gender Recognition Act 2004. Those provisions provide that material relating to a person’s previous gender history should not be disclosed

[46] The Applicant contends that it is possible to interpret the existing provisions in a convention compliant way by simply recording the Applicant’s status as “single”. The refusal of the Respondent to permit such recording is inconsistent with a convention compliant approach. Indeed such an interpretation is consistent with the definition of “single” as defined by UNSAD. Moreover it is not consistent with the definition of “single” as defined by UNSAD. Moreover it is not inconsistent or contrary to any other statutory definition of the term. The UNSAD definition of

“single” as “never married” can be used in Northern Ireland in this context until at least such time as marriage between persons of the same sex is permitted.

### *Applicant's response to the Attorney General's submissions*

[47] Whilst it is accepted that there is a public interest in accurately recording personal information in the marriage notice, it is not accepted that such information needs to be recorded in such a manner that it is generally available to the public.

[48] It is further accepted that marriage is a public ceremony and that there should be no expectation of privacy when entering into it. However, it is submitted that this does not require the public recording and dissemination of all the information given preliminary to the marriage.

[49] The Attorney General states that any interference is in accordance with the law. No issue is taken with this on behalf of the Applicant provided that the regulations are lawful and not *ultra vires*, irrational or made without taking into account a material consideration. The argument then turns circle. In any event, whether it is in accordance with the law or not, it is not necessary which is also a limb of the test.

[50] The case law on privacy supports a greater approach to the protection of privacy. To suggest that the Applicant's gender history is not private and not deserving of protection runs completely counter to the provisions of the Gender Recognition Act 2004 and the development of privacy case law.

### *Respondent's Arguments*

[51] The Respondent argues that the recording of the Applicant's previous marital status does not constitute an interference with his article 8 rights. In the alternative the Respondent argues that, should the court find that there has been such an interference, any such interference is in accordance with the law, pursues a legitimate aim and is proportionate. Finally the Respondent denies that the impugned provisions are arbitrary, irrational or *ultra vires* or that they are inconsistent with the Gender Recognition Act 2004.

### *There has been no interference with the Applicant's article 8 rights*

[52] The Respondent argues that the information recorded does not, of itself, reveal the Applicant's gender history. It submits that, in order to make any conclusion about the Applicant's gender history an elaborate process of deduction would need to be undertaken. The Respondent contends that the significance of the impugned entries on the marriage certificate could only be understood by a person well versed in the law and in particular the intricacies surrounding gender recognition law, civil partnership law and marriage law. Further, the Respondent

submits that, at the outcome of the process of deduction the informed person would have to take a further deductive leap to establish that the parties, because of the shared name, were in a civil partnership with each other prior to marriage and did not simply coincidentally share a common name. Finally, having concluded that the parties had been in a civil partnership with one another, it would be impossible without more for a person examining the document to know which partner had a previous gender history. In conclusion the Respondent submits that the height of the inference that could be reached at the end of this process would be that one or other of the partners had a previous gender. Therefore, it is the Respondent's case that the right to privacy of an individual could not be interfered with through this process.

[53] The Respondent further argues that, even if the Court finds that the information recorded does reveal the Applicant's previous gender history, the recording of the Applicant's previous marital status does not constitute an interference with his article 8 rights in any event. This argument is advanced on the basis that the legal significance of the public nature of the civil partnership process means that the Applicant will be unable to establish that the Article 8 right to privacy has been subject to any interference. The various authorities cited by the Respondent to support this proposition are discussed below. In sum, the Respondent contends that the Applicant who willingly engaged in a public ceremony of marriage following upon a public ceremony of civil partnership could have no reasonable expectation of privacy in respect of the registration of it. It further submits that the accurate registration of the accurate empirical facts of a public event for a statutory purpose cannot constitute an interference with article 8.

*Any interference is in accordance with the law, pursues a legitimate aim and is proportionate*

(i) *in accordance with the law*

[54] The Respondent submits that the impugned recording of the relevant information is wholly in accordance with the law and is indeed required by the law. It notes that the Applicant accepts that '*Strictly... there is a legislative obligation to provide details of marital status upon [the marriage certificate]*'.

[55] The Respondent argues that the Regulations do not go beyond the power of the 2003 Order and in fact properly compliment it, as was clearly the intention of the legislature. The Respondent draws on the following sections of the legislation to exemplify this claim: the definitions of 'prescribed' and 'regulations' at article 2 of the Order, the proposed prescription of forms by regulation at articles 3(3), the keeping of a record of prescribed particulars at article 4(1), the prescription of regulations covering searches at article 35 and 36, and the preamble to the Regulations referencing in each case the relevant articles of the Order.

[56] The Respondent further argues that the relationship between the Gender Recognition Act and the Regulations is also clear. It points out that while section 22

of the GRA prohibits the disclosure of certain information, there is a saver at section 22(4)(j) which states that *'it is not an offence under this section to disclose protected information relating to a person if - ... the disclosure is in accordance with any provision of, or made by virtue of, an enactment other than this section'*. In this regard the Respondent concludes that the GRA clearly envisages and accepts that the disclosure of protected information relating to a person will be acceptable if disclosed further to the provisions of, or made by virtue of, any other enactment. There is therefore no tension between the terms of the Act and the terms of the Order.

(ii) *Legitimate aim and proportionality*

[57] The Respondent relies on the following assertions in Laura McPolin's affidavit evidence to substantiate its claim that the impugned provisions pursue a legitimate aim and are proportionate:

- “(a) The Department considers that it is right that the parties to a proposed marriage should, at the outset, be required to declare their status. The marriage notice is intended to assist the registrar in determining whether there are any legal impediments to the marriage and the Department believes the inclusion of status in the solemn declaration will help to concentrate minds and ensure compliance with the legal requirements in respect of the marriage.
- (b) The Registrar must place on public display a notice which sets out the names of the parties to intended marriages and the date on which the marriage will take place. Article 4(5) of the 2003 Order states that any person who claims that he may have reason to object to an intended marriage may inspect any entry relating to the marriage in the marriage notice book without charge. The Department considers that the public display and the open access requirements are vitally important and that they can help to identify possible legal impediments (e.g. an existing marriage).
- (c) The marriage certificate is a certified copy of the entry into the marriage register... The Department believes that the recording of the status in the register provides a convenient and readily accessible form of confirmation that, prior to the marriage, the required checks have been

undertaken to ensure that the parties were free to enter into the marriage.

- (d) The more information that is held in official records with regard to an individual the less likely is that that individual will be misidentified and the easier it is to prevent identity fraud or the creation of a new identity for ulterior motives. Accurate identification is essential to ensure that benefits or entitlements are appropriately conferred. The information which is held in the GRO records can be cross-referred to the information which is held by other bodies and organisations. It is more likely that you will be able to identify the right individual if you can track that individual's personal history and identify any previous names. Most often searches will start with the birth records, but a search of the marriage records can establish whether a person has married or re-married and acquired a new name or indeed whether an individual's parent re-married and, in so doing, introduced a new name. The Historic Enquiries Team used the GRO records to identify persons who were relevant to its investigators. The Department believes that the accurate recording of detailed information, including information in relation to status, helped with that process.
  
- (e) The recording of status can assist people who are trying to trace their birth families. Adoptees are entitled to receive a copy of their original birth certificate when they reach the age of 18 and adoption organisations can search the GRO records to assist with the identification of the birth parents or siblings. A mother may have married on a number of occasions and may have had other children, who would be the adoptee's half siblings. Having a record of a parent's marital status can help the researcher to determine whether the search should be expanded to include second, or even third, families. The tracing process may, on occasion, be prompted by a need to establish the medical history of the birth family. The Department believes that, if the status heading were to be removed from the marriage register, it would be much more difficult to build up an

accurate and complete picture of a birth family. The legislature has allowed for the tracing of a birth family and the Department considers that a reliable and readily accessible registration record can assist the process.

- (f) The recording of status can also assist in the tracing of persons for inheritance or genealogical purposes. The Department believes that it is right that, if a person dies intestate, every effort should be made to ensure that the estate is appropriately distributed. The use of registration records for that purpose, including records relating to status, is well established and the Department believes that the balance lies in favour of the current approach to registration.
  
- (g) The marriage registration system is intended to record events which have important legal consequences for the parties to the marriage, third parties and the State. It also provides a reliable source of statistics for research into legal, social or demographic problems. In the UK the information which is collected on the registration of marriages, deaths and stillbirths is still used in the production of national statistics, as well as in medical and social research. Statistics on births and deaths are essential in documenting the changes which have occurred in national and local populations. They feed directly into mid-year population estimates and projections that are used directly by central and local Government for planning services and allocating resources. The information on status can also be used to determine the allocation of resources. For example, with regard to the provision of housing, the State will have to determine the number of households for which it must provide. If a couple divorce or end a civil partnership, it is likely that they will form two new households. By tracking the status of couples the State can estimate the likely demand on housing. The Department believes that it is right to record an individual's status, through time as that record might be required for a range of official purposes (e.g. state pension entitlement) or even to allow him or her, or indeed his or her

spouse/partner, to provide evidence of acquired rights (e.g. if a couple were in a civil partnership and a marriage, but then divorced, one or other party may wish to argue that the partnership should be taken into account for the purpose of determining the level of financial provision).

- (h) In this instance, it would have been inappropriate to record the Applicant's status as "single" on either their marriage notice or the marriage schedule because the issuing of an interim gender recognition certificate rendered the Applicant's civil partnership voidable, rather than void. Moreover, in registration terms the word "single" is used to describe a person who has never married or entered into a civil partnership. The Department believes that it would be inappropriate to interpret the word "single" as 'not currently married or in a civil partnership', as that would have a detrimental impact on statistical comparisons (i.e. that you would not be comparing like with like). In this regard it is worth noting that section 9 of the Gender Recognition Act 2004... shows that the issuing of a full gender recognition certificate does not "wipe the slate clean" in terms of things done or events occurring prior to the issuing of the certificate.
  
- (i) The United Nations Statistics Division ("UNSD") is the primary agency responsible, at an international level, for collecting official statistics on family formation. In accordance with its mandate, the UNSD provides official statistics on marriage, divorce and population by marital status to other international agencies and organisations. Data on marriage and divorce are also made available to Member States, for international comparisons, as well as to scholars and academics, non-governmental organisations and the public at large. Data is collected from the national statistical offices of over 200 countries and areas on an annual basis through the Demographic Yearbook data collection system. The UNSD calculates selected indicators and rates, such as the crude marriage and divorce rates or mean age at marriage, and disseminates these indicators along

with official country data on marriage, divorce, annulment, etc. through the Demographic Yearbook. The Department believes that the recording of information on status is in keeping with the approach in other jurisdictions and this is reflected in the fact that the UNSD has produced a guide for national governments with regard to establishing and maintaining reliable civil registration systems for events throughout the lifetime of individuals.

- (j) In England and Wales the GRA 2004 has been amended to allow a party to a marriage or civil partnership to remain in that relationship after a full gender recognition certificate has been issued, if the other party is content for him or her to do so. However, in Northern Ireland, the 2004 Act is as originally enacted and a full gender recognition certificate will only issue if the Applicant has annulled his or her marriage or civil partnership. The Applicant has acquired a new gender and, in the process, has had to annul a civil partnership. As stated above, it would be inappropriate for the marriage certificate to record his status as “single” at the point of his subsequent marriage because, in registration terms, “single” means never having married or entered into a civil partnership. The UNSD’s guide provides technical guidance on standards, concepts, definitions and classifications for civil registration and vital statistics. It defines “single” as “never married” and accordingly the Department believes that its approach with regard to the use of that term is in accordance with international standards.
  
- (k) When developing policy or procedures, the Department must take account of a range of rights and interests. The Department believes that, overall, the balance lies in favour of open access to public records because such access can help to secure democratic accountability and enhance the level of public confidence/trust. It may also prevent the commissioning of crimes (e.g. bigamy), and thereby protect an important social institution, or help to maintain the integrity of the

records by allowing for the identification and correction of errors.

- (l) In theory, it would be possible to extract certain information from an individual's record and to store that information in another place. However, there would have to be some way of linking the information back to the individual and there is a risk that the link between the various records could be lost. Moreover, if the information is only removed from the records of persons who have undergone gender reassignment, the lack of, or redaction of, such a record in those cases would immediately identify those persons as having undergone gender reassignment. Such redaction or omission would not only identify those individuals but could in fact draw greater attention to their gender history. It could therefore ultimately be counterproductive."

[58] The Respondent notes that the approach is in keeping with the approach in Great Britain.

[59] The Respondent summarizes the legitimate aims pursued by the impugned provisions as including:

- (a) upholding the law (identifying legal impediments to marriage)
- (b) protecting the integrity of marriage (by providing confirmation of the validity of marriages)
- (c) preventing crime (bigamy, identity fraud)
- (d) facilitating confirmation of status or identification of individuals necessary for various socio-economic purposes (benefits entitlement, inheritance purposes)
- (e) facilitating the identification of relatives (for genealogical purposes, medical purposes ((engaging article 2 issues), family purposes ((article 8 issues)) etc.)
- (f) providing a reliable source of statistics for research into legal, social or demographic problems
- (g) documenting changes in national and local populations
- (h) use for central and local government for planning services and allocating resources (including housing and pension rights)

[60] The Respondent additionally submits that the publication from the United Nations Statistics Division (UNSD), which recommends certain information to be recorded in relation to marriages, including previous marital status, confirms that the system generally, and the impugned provisions specifically, pursue a legitimate aim and are necessary.

[61] The Respondent notes that the Applicant accepts the Respondent's view that parties to a proposed marriage should from the outset be required to declare their status to assist *inter alia* in determining whether there are any legal impediments to the marriage. In relation to the Applicant's assertion that the recording of status in the register as a means of confirming that the required checks have been undertaken is *'unnecessary since the registrar will have made these checks and the marriage itself is confirmation of that'*, the Respondent replies that *'to say that the bare fact that a thing has been done is evidence that it has been done properly and in accordance with proper procedures is a threadbare argument. Confirmation that the parties to a marriage were able to lawfully enter into that marriage is a vital prerequisite to marriage... It is therefore also important that a proper record is kept to demonstrate that the checks have been made.'*

[62] The Respondent notes that the Applicant accepts the necessity of maintaining a public and accessible register of marriage details. The Respondent further notes the Applicant's two contentions in this regard as follows a) that his previous marital status should be recorded as "single" rather than "civil partnership dissolved" and/or b) that a system should be put in place whereby only authorised bodies could access his marital status.

[63] In relation to the first contention above, the Respondent submits that to interpret "single" as applying to someone who has not been married but has been in a civil partnership would be to wilfully ignore the status of someone in a civil partnership as no longer being single. It observes that people enter into civil partnership in order to change their status from single and notes that, in any event, there is nothing irrational about not including amongst those who are considered single, those previously subject to a civil partnership. There is nothing irrational about recording as single only those who have never been married or in a civil partnership. It submits that the only accurate way in which to record the Applicant's status was the way in which it was and is recorded. Finally it submits that recording the Applicant's status as "single" would be inaccurate, misleading and would introduce unreliability into the records system and as such is not a viable option.

[64] In relation to the second contention above, the Respondent notes that such a system would create an unnecessary risk of information loss and further that the lack of accessibility to that information in the Applicant's case would immediately flag his status as someone with a previous gender history. In response to the Applicant's submission that there may be many reasons for the redaction of such information and that such redaction would be preferable to the public and obvious

recording of a previous gender history, the Respondent submits that *'there are no other reasons why the information would be redacted'*.

[65] The Respondent thus submits that it is necessary in pursuit of the various legitimate aims identified that the impugned record be maintained and remain public and that there is no lesser interference that meets the aims pursued. Therefore, any interference with the Applicant's article 8 rights is proportionate.

[66] The Respondent, on the basis of the arguments outlined above, therefore concludes that the impugned provisions are not arbitrary, irrational or *ultra vires*.

### ***Supplementary Submissions***

[67] The Court directed further submissions on the following cases:

- (a) R(JK) v The Registrar General [2015] EWHC 990 (Admin). In this case, the Claimant, a transgender woman, naturally conceived children from her marriage. She contended that the requirement to show her as the father on the birth certificate of her children was a breach of her and her children to respect for private life under Article 8 ECHR and was discrimination on the basis of her transgender characteristic under Article 14 read with Article 8.
- (b) JR38. This case considered the reasonable expectation of privacy.

### **R(JK) v The Registrar General [2015] EWHC 990 (Admin)**

#### **Applicants Submission**

[68] In this case, the Claimant, a transgender woman, naturally conceived children from her marriage. She contended that the requirement to show her as the father on the birth certificate of her children was a breach of her and her children to respect for private life under Article 8 ECHR and was discrimination on the basis of her transgender characteristic under Article 14 read with Article 8.

[69] Hickinbottom J considered the registration requirements in England and Wales. He further considered the exemptions made to those requirements made by the Human Fertilisation and Embryology Act 2008:

- (a) Where a child is born as a result of assisted reproduction;
- (b) Surrogacy and;
- (c) Adoption

[70] The claimant had submitted that the schemes adopted in the above three circumstances were relevant in relation to the claimant's case as similar

considerations apply. The Claimant submitted that a similar scheme could and should be in place for transgender parents.

[71] The judge accepted that gender identity is *'an integral and important part of an individual's fundamental identity, and thus of that individual's private life'*. He referred to various international documents which outline what the state's obligations in relation to the recognition of acquired gender are. He concluded that Article 8 was engaged.

[72] Hickinbottom J then considered whether the interference is material. He considered that the occasions on which the birth certificate will require to be disclosed are rare but that "...given the importance granted by Strasbourg to the recognition of chosen gender as part of an individual's identity, for the purposes of this claim, I shall assume that the interference with article 8 rights inherent in the registration scheme as a result of the requirement that people in the position of the claimant be registered as "father" on their children's birth certificates is material".

[73] Ultimately the judge found that the *'the scheme adopted by the United Kingdom government, which requires the birth certificate of a child biologically fathered by a person who later changes gender to female to list that person on the certificate as 'father', falls within the margin of appreciation allowed to the State in respecting the article 8 rights of the Claimant and her children; and thus to be justified under article 8(2)'*

[74] The Applicant argues that the most important consideration taken into account by Hickinbottom J was the rights and interests of third parties (notably the partner and children of the Claimant). He found that, in relation to that claimant's child, who was at the time under 18, that to show the Claimant as otherwise than the child's father *'is seriously to infringe [the child's] right to have her fundamental identity respected.'*

[75] The Applicant argues that the matter is put narrowly and in the context of how the decision might affect the rights of third parties. It is submitted that there are no such third party considerations in the instant case.

[76] The Applicant further submits that the JK judgment shows the obligation upon the state to ensure that any public documents do reflect a person's gender recognition status and that a careful consideration of any competing rights is required.

### ***Respondent's Arguments***

[77] The Respondent notes that Hickinbottom J acknowledged in his judgment that in enacting the GRA, the United Kingdom enacted certain provisions within that scheme to protect the rights and interests of others. In this regard the judge noted:

*'Gender recognition is not retrospective, in the sense that, although section 9(1) provides that, after a Full GRC has been issued to a person, the person's gender "becomes for all purposes the acquired gender", section 9(2) expressly provides that that "does not affect things done, or events occurring, before the certificate is issued". To this extent, the principle that a transsexual should be able to keep private his or her gender reassignment bows to the principle that history should not be rewritten'*

[78] In relation to Hickinbottom J's assumption that the Claimant's article 8 rights were engaged, the Respondent draws a distinction between JK and the instant case. In JK the assumed interference arose because the Applicant was required to present documents which described her as the father of her two children. This presentation would obviously and unambiguously indicate that the Applicant had previously been a male. In contrast the Respondent argues that in this case the documents do not, on their face, reveal the fact that the Applicant previously had a different gender. In this regard the Respondent maintains that the registration process impugned does not constitute an interference with the Applicant's article 8 rights.

[79] The Respondent argues that the decision and reasoning in AK, i.e. that the scheme operated in that case in relation to transgendered parents, is equally applicable in this case.

**JR38**  
***Applicant***

[80] This case considered whether, in relation to the publication of images taken of a young person engaged in acts of public disorder, there was a reasonable expectation of privacy and therefore whether article 8 could be engaged.

[81] The Applicant notes that the Court adopted a 'reasonable expectation of privacy' test for the activation of article 8, however it notes that that test is an objective one and must be contextualised and that, in JR38 it was the criminal nature of the Applicant's activities that was the deciding factor.

[82] The Applicant further argues that in the JK case there was no suggestion that article 8 was not engaged. It submits that it is clear from the passages in that judgment that not only is article 8 engaged but that there is a positive duty on the state to ensure that a person's gender recognition certificate also reflected in other public documents. Therefore the interaction with the public was a consideration which would not take the issue out of the sphere of Article 8. On the contrary it is in this most public sphere that the Applicant is entitled to have his dignity and autonomy respected.

***Respondent***

[83] The Respondent notes that this Court is bound by the majority decision in JR38 which is to the effect that, in a case where Article 8 engagement is in dispute the Court must apply an objective test asking whether or not the individual in question had a reasonable expectation of privacy in all the circumstances of the case. In this regard the Respondent submits that the Applicant who willingly engaged in a public ceremony of marriage following upon a public ceremony of civil partnership could have no reasonable expectation of privacy in respect of the registration of it.

[84] The Respondent further argues that the accurate registration of the accurate empirical facts of those public events was also entirely foreseeable and could give rise to no specific expectation of privacy. The Registrar is not seeking to publicise those details or to disseminate them in any way to the world at large. The Applicant had nothing more than a reasonable expectation that a publicly accessible record would be created and in the Respondent's submission, consistent with JR38, such an expectation cannot engage Article 8 rights.

## **Discussion**

### *Has there been a breach of article 8?*

[85] The Applicant complains about the public recording of his 'status', meaning his formal relationship status immediately before his marriage, on marriage registration records. His status, and that of his wife's is recorded as 'civil partnership dissolved'. Civil partnerships may only take place between same sex couples. Marriages may only take place between couples with opposite sexes. Therefore, the recording of 'civil partnership dissolved' on both partners marriage record, coupled with the fact that both parties shared the same unusual surname before the marriage tend to suggest, it is argued, that one or other of the parties to the marriage has a previous gender history.

[86] In Wood v Commissioner of Police for the Metropolis [2009] EWCA Civ 414 Laws LJ said:

"19. ... the content of the phrase "private and family life" is very broad indeed. Looking only at the words of the Article, one might have supposed that the essence of the right was the protection of close personal relationships. While that remains a core instance, and perhaps the paradigm case of the right, the jurisprudence has accepted many other facets; so many that any attempt to encapsulate the right's scope in a single idea can only be undertaken at a level of considerable abstraction. But it is an endeavour worth pursuing, since we need if possible to be armed at least with a sense of direction when it comes to disputed cases at the margin.

20. The phrase “physical and psychological integrity” of a person (Von Hannover para 50, Marper para 66) is with respect helpful. So is the person’s “physical and social identity” (Marper paragraph 66 and other references there given). These expressions reflect what seems to me to be the central value protected by the right. I would describe it as the personal autonomy of every individual. I claim no originality for this description. In *Murray v Big Pictures (UK) Ltd* [2008] EWCA Civ 446 Sir Anthony Clarke MR, giving the judgment of the court, referred at paragraph 31 to Lord Hoffman’s emphasis, at paragraph 51 of *Campbell v MGN Ltd* [2004] 2 AC 457, upon the fact that “the law now focusses upon the protection of human autonomy and dignity - ‘the right to control the dissemination of information about one’s private life and the right to the esteem and respect of other people’”.

21. The notion of the personal autonomy of every individual matches with the presumption of liberty enjoyed in a free polity: a presumption which consists in the principle that every interference with the freedom of the individual stands in need of objective justification. Applied to the myriad instances recognised in the Article 8 jurisprudence, this presumption means that, subject to the qualifications I shall shortly describe, an individual’s personal autonomy makes him – should make him – master of all those facts about his own identity, such as his name, health, sexuality, ethnicity, his own image... and also of the “zone of interaction”... between himself and others. He is the presumed owner of these aspects of his own self; his control of them can only be loosened, abrogated, if the State shows an objective justification for doing so.

22. This cluster of values, summarised as the personal autonomy of every individual and taking concrete form as a presumption against interference with the individual’s liberty, is a defining characteristic of a free society. We therefore need to preserve it even in little cases. At the same time it is important that this core right protected by Article 8, however protean, should not be read so widely that its claims become unreal and unreasonable. For this purpose I think there are three safeguards, or qualifications. First, the alleged threat or assault to the individual’s personal autonomy must (if Article 8 is to be engaged) attain “a certain level of

seriousness". Secondly, the touchstone for Article 8(1)'s engagement is whether the claimant enjoys on the facts "a reasonable expectation of privacy"... Absent such an expectation, there is no relevant interference with personal autonomy. Thirdly, the breadth of Article 8(1) may in many instances be greatly curtailed by the scope of the justifications available to the State pursuant to Article 8(2)."

[87] This exposition by Laws LJ conveniently encompasses the issues at stake in the instant case. There can be no doubt that the potential revelation of the Applicant's previous gender identity engages '*the right to control the dissemination of information about one's private life*', or that the Applicant is entitled to be master of that fact about himself. There can be no doubt that his control of that aspect of himself '*can only be loosened, abrogated, if the State shows an objective justification for doing so*'.

[88] However, in order to be entitled to a remedy for a breach of article 8 the facts of the case must meet the three identified safeguards or qualifications.

#### *Sufficient level of seriousness*

[89] The question of whether the threat to the Applicant's control over the dissemination of his personal information reaches the requisite level of seriousness is fact sensitive.

#### *Facts tending to lessen the level of seriousness*

[90] While the record is a public record, it is likely to be required only rarely, and then primarily for formal, administrative purposes in which it will most likely be used as a formal proof of the marriage and the details of the parties' status at the marriage date are unlikely to occupy the administrator's attention.

[91] The information is not conclusive proof of a previous gender history, it only tends to reveal such a history. That is, the third party looking at the record would have to understand that civil partnerships are only available to same sex couples. Having so understood that third party would have two possible interpretations available to them. First that both the parties were in same sex relationships with different parties prior to their marriage to one another (that is, the Applicant was in a civil partnership with another male and that his wife was in a civil partnership with another female). Second, and probably more likely given that they shared the same unusual surname at the date of their marriage, that one or other of the parties to the marriage had a previous gender history. If they did arrive at the second conclusion they could only confirm which member of the couple had a previous gender history by reference to some other source.

#### *Factors tending to increase the level of seriousness*

[92] Once the person considering the document has arrived at the conclusion that the Applicant (or his partner) have a previous gender history, the loss of control of the dissemination of that information is complete.

[93] Northern Ireland is a small place. The types of bodies that are likely to require marriage certificates are likely to be public bodies and financial institutions (as is borne out by the Applicant's affidavit) with a large staff. The level of understanding required to interpret the impugned entry in the record is no greater than having the knowledge that a civil partnership can only be entered into by two persons of the same sex and that a marriage can only be entered into by two persons with opposite sex. The information itself may contain an inherent motivation to draw conclusions from the impugned entry first because there is a certain salacious quality about information about a person's sexual or gender identity and second because transgenderism is a divisive concept about which some people have strong opinions.

#### *Conclusion in relation to the level of seriousness*

[94] On balance, while the risk of the Applicant's gender history being revealed by the impugned entry in the marriage record is small, the effect of any revelation would mean the complete defeat of the Applicant's right to control his personal information. Additionally, the smallness of Northern Ireland, the relatively low knowledge level required to interpret the impugned entry and the fact that the salacious and, for some, the morally outrageous quality of the information may provide a motivation to not only draw conclusions but to communicate those conclusions, and the risk of discrimination to transgender persons upon the dissemination of the information also contribute to convincing me that I cannot safely conclude that the admittedly small risk is not serious.

#### *Reasonable expectation of privacy*

[95] The Court accepts that its task in this regard is to apply an objective test, asking whether or not the Applicant had a reasonable expectation of privacy in all the circumstances.

[96] The case law canvassed by the Respondents and the Attorney General relates to circumstances in which data was originally collected in circumstances where there was no expectation of privacy. In most of these cases the public nature of the occasion or incident during which the data was collected led to a finding that there had been no breach of article 8 at all. In *R(Wood) v Commissioner of Police for the Metropolis* [2009] EWCA Civ 414, breach of article 8 was found where, despite the public nature of the occasion on which the data was collected, the uncertainty as to why the police were taking the photographs and as to what use they would be put was found to be a sufficient intrusion to constitute a breach of article 8.

[97] The personal data in relation to which protection was sought in each of those cases was the patent information that arose directly from the public transaction, for example a photograph of a person at a particular place (*R(Catt) v Association of Chief Police Officers* [2013] 1 WLR 3305; *R(Wood) v Commissioner of Police for the Metropolis* [2009] EWCA Civ 414; JR38 [2015] UKSC 42), or police surveillance data relating to a person's movement on a particular day (*Kinloch v HM Advocate* [2013] 2 AC 93). It was the collection, storage and processing of that patent information, that information that was created instantaneously in the moment of the public transaction, which the various applicants sought to protect. In relation to this type of data it is generally the case that, where patent information arises from a public transaction in which there can be no reasonable expectation of privacy, the lawful recording of that information will not, without more, breach article 8.

[98] In this case the facts that the Applicant entered a civil partnership and later dissolved that civil partnership are patent facts arising from *earlier* public transactions in relation to which he could have no reasonable expectation of privacy at the time those events occurred and were duly recorded.

[99] The recording of the Applicant's status as 'civil partnership dissolved' on the marriage registration record *is not a patent fact arising from the public transaction of the marriage*. It is recorded only as part of the process by which the registrar confirms that there are no impediments to marriage. It is however a statutory requirement that the status of a person to a proposed marriage be recorded. On the other hand, the Applicant's change of gender is a private fact in relation to which the Applicant had a very reasonable expectation of privacy.

[100] It is the judgment of this court that the Applicant had a reasonable expectation of privacy in relation to the latent fact of his previous gender history. The issue then is, does the public recording of his status tend to reveal the impugned latent fact to such an extent as to constitute an interference with article 8 and if so is any such interference justifiable.

### ***Legitimate aim***

[101] It seems to me that each of the aims sought to achieved are legitimate

### ***Proportionality***

[102] Lord Dyson in *R(Wood) v Commissioner of Police of the Metropolis* [2010] gave the following useful description of the proportionality assessment that is required:

"82. The phrase "necessary in a democratic society" has been considered and applied by the ECtHR on many occasions. In *Marper* at [101] the court said:

“An interference will be considered “necessary in a democratic society” for a legitimate aim if it answers a ‘pressing social need’ and, in particular, if it is proportionate to the legitimate aim pursued and if the reasons adduced by the national authorities to justify it are “relevant and sufficient”.

83. In deciding whether the interference is necessary, the court must have regard to the nature of the Convention right in issue, its importance for the individual, the nature of the interference and the object pursued by the interference...

84. ... the Court is required to carry out a careful exercise of weighting the legitimate aim to be pursued, the importance of the right which is the subject of the interference and the extent of the interference. Thus an interference whose object is to protect the community from the danger of terrorism is more readily justified as proportionate than an interference whose object is to protect the community from the risk of low level crime and disorder.”

[103] The right which is the subject of the interference, the right to ‘control the dissemination of information about one’s private life’, is a fundamental right. It is fundamental to the ‘*physical and psychological integrity*’ of a person. It is fundamental to a person’s ‘*physical and social identity*’. It ‘*is a defining characteristic of a free society*’. It is against this right that the legitimate aims, and the extent of the interference into the right caused by the pursuit of it, must be weighed. To this end, the aims articulated by the Department are considered in turn below.

#### ***Aims pursued and proportionality***

[104] The first aim relied upon by the Department is that ‘*the marriage notice is intended to assist the registrar in determining whether there are any legal impediments to the marriage and the Department believes the inclusion of status in the solemn declaration will help to concentrate minds and ensure compliance with the legal requirements in respect of the marriage*’.

[105] It is clear that the Applicant’s complaint is in relation to the *publication* of the information, not the requirement that the status information be provided at all. This aim is therefore irrelevant to the alleged interference with the Applicant’s article 8 rights.

[106] The second aim relied upon is that *'The Registrar must place on public display a notice which sets out the names of the parties to the intended marriages and the date on which the marriage will take place. Article 4(5) of the 2003 Order states that any person who claims that he may have reason to object to an intended marriage may inspect any entry relating to the marriage in the marriage notice book without charge. The Department considers that the public display and open access requirements are vitally important and that they can help to identify possible legal impediments (e.g. an existing marriage).*

[107] The Departments claim is that the public display and open access to the status field is essential because it can help to identify possible legal impediments. It is important to note that the public display only displays the names of the parties and the date of the ceremony. Once a potential objector has come forward he or she is then entitled to inspect any entry in the marriage notice book, including the status entry. Preventing unlawful marriages is an important aim. The occasions on which an objector will require to inspect the status entry in the marriage notice book in order to confirm their objection will be rare. There are less intrusive means by which the legitimate aim may be achieved (for example by making access to the status entry by an objector subject to application). When weighed against the right to control over the dissemination of personal information and the extent of the interference created by the creation of a public record which is capable of revealing previous gender history, the interference cannot be justified as necessary and proportionate in the pursuit of the legitimate aim.

[108] The third aim relied upon is that *'the recording of status in the register provides a convenient and readily accessible form of confirmation that, prior to the marriage, the required checks have been undertaken to ensure that the parties were free to enter the marriage'*.

[109] Convenience cannot outweigh the interference with the fundamental right of the Applicant.

[110] The fourth aim relied upon is that *'the more information held in official records with regard to an individual the less likely it is that that individual will be misidentified and the easier it is to prevent identity fraud or the creation of a new identity for ulterior motives. Accurate identification is essential to ensure that benefits or entitlements are appropriately conferred. The information which is held in the GRO records can be cross-referred to the information which is held by other bodies and organisations.'*

[111] No issue is taking with the holding of status information, the issue relates to the accessibility by any member of the public to that information. The creation of a public record in relation to the information held is unnecessary to achieve the stated aim.

[112] The fifth aim relied upon is that:

*“The recording of status can assist people who are trying to trace their birth families... Having a record of a parent’s marital status can help the researcher to determine whether the search should be expanded to include second, or even third families.... The Department believes that, if the status heading were to be removed from the marriage register, it would be much more difficult to build up an accurate and complete picture of a birth family. The legislature has allowed for the tracing of a birth family and the Department considers that a reliable and readily accessible registration record can assist the process.”*

[113] The public aspect of the status field is unnecessary to achieve this aim. The stated aim could be achieved by methods which are less intrusive, for example by making access to the status entry by an adoptee subject to application.

[114] The sixth aim relied upon is that *‘The recording of status can also assist in the tracing of person for inheritance or genealogical purposes’*.

[115] The same considerations as above apply.

[116] The seventh aim relied upon is that:

*“the marriage registration system is intended to record events which have important legal consequences for the parties to the marriage, third parties and the state. It also provides a reliable source of statistics for research into legal, social or demographic problems.”*

[117] No issue is taken with the recording of events or with the use of those records for statistical purposes. What is at issue is the creation of a public record of a fact that tends to reveal the previous gender history of the Applicant. The aims of the Department can be achieved without the creation of such a public record.

[118] The eighth aim relied upon is that while the extraction of information from a person’s record with that information stored at another place, *‘there is a risk that the link between the... records would be lost’*.

[119] A potential risk of data loss cannot be said to outweigh the interference with article 8 rights.

### ***Conclusion and further issues***

[120] The creation of a public record which contains information which creates a small but significant risk that the Applicant’s previous gender history may be revealed is not necessary or proportionate to any of the legitimate aims pursued by

the Department. Therefore there is no justification for the breach of the Applicant's article 8 rights.

[121] The approaches to the recording of the status information suggested by the Applicant however create problems of their own. First, recording the Applicant's previous status as 'single', while formally in line with UNSD's definition of 'single', is misleading and would undermine the status of person's currently in a civil partnership who would not consider themselves to be single. Second, removing the entry only from persons in the Applicant's situation may in fact be more revealing than the current mandatory status recording.

[122] While it is not the function of the court to design solutions to administrative problems, it may be useful to consider the options that are available to the Department to achieve the legitimate aims stated without causing any breach of article 8. It seems that the aims sought by the department may be achieved in several ways including making access to the status entry available only upon application in all cases, allowing couples to elect whether the status entry is to be recorded publicly or privately, or conflating certain statuses, into, for example 'divorced or civil partnership dissolved/annulled' or 'widowed/surviving civil partner'.

### **Conclusion**

[123] For the above reasons I would grant the first of the reliefs sought.