

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE

CONSTITUTIONAL AND ADMINISTRATIVE LAW LIST NO 2063 OF 2023

BETWEEN

K (AN INFANT) BY HIS NEXT FRIEND, R Applicant

and

THE SECRETARY FOR JUSTICE Respondent

and

B 1st Interested Party

THE CHIEF EXECUTIVE OF 2nd Interested Party
THE HONG KONG SPECIAL
ADMINISTRATIVE REGION OF THE PEOPLE’S
REPUBLIC OF CHINA

Before: Hon Coleman J in Court
Date of Hearing: 4 and 5 June 2025
Date of Judgment: 9 September 2025

J U D G M E N T

A. Introduction

1. The applicant K is a lucky little boy. Now approaching
four years old, K has two loving and caring parents – R and B
respectively – who are deeply committed to each other (in fact they are

married) and who together meticulously planned his birth and intended upbringing. The three of them form a tight family unit, in arrangements which have already been recognized as plainly in the best interests of K. But only one parent – namely B – is named on K’s birth certificate, and also only B is recognized to have any parental rights over K in law. Despite being a biological parent, R is neither registered nor so recognized. It may be wondered why.

2. Actually, it is easy to explain why. It is because K was born to a female same-sex couple, and (1) Hong Kong birth registration does not permit or cater for registration of both women as K’s parents, and (2) the woman unregistered as a parent on the birth certificate has failed to obtain a declaration of parentage under section 6 of the Parent and Child Ordinance Cap 429 (“PCO”) as might permit K’s birth to be re-registered.

3. This is so, notwithstanding that a declaration has already been obtained that R is a ‘parent at common law’ – a term which I shall need to examine in detail, and in context. That declaration was given by Au Yeung J by her judgment in HCMP 447/2022 dated 12 September 2023, [2023] HKCFI 2233 (“HCMP Judgment”).

4. As a result, and acting by his ‘next friend’, K mounted a judicial review challenge by Form 86 dated 20 November 2023.

5. It is perhaps worth emphasis at the outset that the application is made by K, and not by either of R and B (though one acts as his next friend and the other supports the application). Therefore, at various

points in the analysis, it may be necessary to remember that the application must be viewed from the standpoint of K.

6. On 23 November 2023, I granted to leave to apply for judicial review, on the papers. I later gave directions to bring the matter to a substantive hearing. On 1 March 2024, I gave leave for an Amended Form 86 (“AF86”).

7. Each of K, B and R are referred to by an initial, as a result of anonymity orders granted by me.

8. At the substantive hearing, heard over two days: (1) K was represented by Mr Nigel Kat SC, leading Mr Azan Marwah and Mr Jason Ko of Counsel; (2) the 1st Interested Party, B, was represented by Ms Isabel Tam and Mr Jonathan Ip of Counsel (both acting *pro bono*); and (3) the Respondent and the 2nd Interested Party (together “Government”) were represented by Mr Stewart Wong SC, leading Ms Bonnie YK Cheng of Counsel and Ms Hikki Wong, Acting Assistant Law Officer (Civil).

9. That argument was canvassed in the context identified by Mumby P in *In re P (Legal Parenthood: Written Consents)* [2017] 4 WLR 183 at §14 as follows:

The question of who, in law, is or are the parent(s) of a child born as a result of treatment carried out under this legislation ... is ... a question of the most fundamental gravity and importance. What, after all, to any child, to any parent, never mind to future generations and indeed to society at large, can be more important, emotionally, psychologically, socially and legally, than the answer to the question: Who is my parent? Is this my child?

10. I note the use several times in that quotation of the word “parent”. Indeed, it may be that much of the analysis in this case depends upon whether there is a focus on a child having a “mother” and a “father”, or on a child having a “parent” or “parents”.

11. At the end of the hearing, I reserved my decision. This is my Judgment.

B. Factual Background

12. R is Hong Kong Chinese, and a Hong Kong permanent resident. B is from South Africa, and on 24 February 2022 became a Hong Kong permanent resident by virtue of having worked and lived here for 7 years.

13. In 2015, B first arrived in Hong Kong for work. In around August 2015, she met R. They commenced a romantic relationship in November 2015, and by August 2016 they had moved in together. Ever since, they have “lived together as a couple and a family unit”.

14. In February 2018, B and R became engaged. On 7 February 2019, they entered into a public union in South Africa. On 17 April 2019, they held a second wedding ceremony in South Africa, which was attended by family and friends.

15. The Government has been at pains to emphasize that that marriage is not recognized in Hong Kong. Whilst it is technically correct to regard the marriage entered into between R and B in South Africa as not recognised under Hong Kong law, to say so risks ignoring the fact that since the decision in the *Sham Tsz Kit* case, there has been found to be a constitutional requirement for giving some appropriate

A recognition to same-sex partnerships – and the various potential
B consequences arising from such partnerships, and any end to them,
C including their possible breakdown. Certainly, I do not think it would be
D fair or correct to ignore the marital relationship between R and B
E altogether, or to treat them as if they were not in any relationship at all.
F Their position is at least analogous and comparable to the position of
G opposite-sex married couples in Hong Kong.

16. After the marriage, the couples changed each other's
G surnames in all official documentation (including their passports and
H HKIDs) to share the same family name of "[surname of B]-[surname of
I R]".

17. Both returned to Hong Kong after the ceremony. In around
J 1 July 2019, after R landed a stable job with a steady income, the couple
K started having serious discussions about having children.
L After discounting adoption as a genuine option, they looked into the
M possibility of in-vitro fertilisation ("IVF").

18. On 7 October 2020, the couple consulted a Dr Coetsee of
N Vitalab Fertility Clinic KZN ("Vitalab") in South Africa, and ultimately
O settled upon a medical procedure known as reciprocal in-vitro fertilisation
P ("RIVF"), or reception of oocytes from a partner ("ROPA") in South
Q Africa.

19. For the purposes of this Judgment, I will use the terms
R "RIVF" and "ROPA" interchangeably. Both describe the procedure
S where an egg is extracted from one female partner, which is fertilised
T with sperm from an anonymous male donor to create an embryo, which is
U
V

then transferred to the other female partner's womb to grow and develop and carry to term.

20. As the word "reciprocal" in the term RIVF at least suggests, it entails a common endeavour and an intended shared creation of a child by input of both partners in the relationship or partnership. To my mind, this is not akin to one woman being a mere egg donor, or to the other acting as a mere surrogate.

21. The choice of RIVF was made because it would allow both R and B to participate physically and contribute to the conception of the child, such that (as they put it) he or she would be "biologically connected to both of us" and it would allow the child to be a "reflection of both of us, Chinese and South African". To that end, the couple even chose a sperm donor that was a best match to B "in appearance, so that our child could bear the closest resemblance to both of us as nature would produce".

22. It is also notable that the couple did extensive research on this issue. They did so, for example, by consulting articles such as Nunez et al 'Reproductive Outcomes in Lesbian Couples Undergoing Reception of oocytes from Partner versus Autologous In Vitro Fertilization / Intracytoplasmic Sperm Injection' (2021) 8 (5) LGBT Health 367, and Bodri et al 'Shared motherhood IVF: high delivery rates in a large study of treatments for lesbian couples using partner-donated eggs' (2018) 36 Reproductive Biomedicine Online 130. Both articles suggest that from a clinical perspective, RIVF may be used to "better overcome cases of premature ovarian failure or low oocyte quality in the

woman wishing to carry the pregnancy” and offers a “uniquely safe and highly efficient treatment”.

23. Vitalab required certain declarations from R and B before it would commence any procedure. Both R and B duly made the declarations. One such declaration was that they were presently lawfully married to each other by virtue of civil law/civil union, in a marriage which still subsisted. Another was that they will maintain the child born as a result of artificial insemination as if it were their own.

24. The sceptic might think this declaration may just have been a mere formality. But, I think this declaration is consistent with how the couple (1) had lived together for a long time as a “family”, (2) had made sure they had their finances in order, so the child would want for nothing and have the best possible start to life within their means, and (3) had painstakingly, over the course of 3 months, tried to make sure that their child would bear their image – both genetically and phenotypically. This declaration is also certainly consistent with how R has gone to great lengths to establish her legal parentage over K.

25. The couple then employed the services of a company called Androcyros – a South African sperm bank and laboratory, and professional member of the South African Tissue Bank Association – to provide the donated sperm. It is of particular note that Androcyros’ website expressly states that those who donate sperm to them “renounce their parental rights and obligations during the donation process” when they sign the letters of permission that allow Androcyros to use their sperm for reproductive treatments. Presumably, the couple wished to have assurances on this issue so that the male donor would be effectively

‘out of the picture’ and to prevent later potential conflict between B and R, and the (anonymous) male donor.

26. Conceiving a child through RIVF sounds simple, but it is a difficult process. As B vividly describes, the couple had to take Lucrin injections for the purpose of synchronising their menstrual cycles. R had to take additional medication to stimulate her ovaries. B had to take Estrofem tablets to build the lining of her uterus. R’s eggs were retrieved over the course of 2 days from 11 December 2020 to 12 December 2020, after which a fertilised embryo was transferred into B’s womb.

27. Conceiving a child through RIVF is also expensive. According to R and B, the procedure alone cost around 132,977 South African Rand (the equivalent of about HK\$69,000). As R attests, this was a considerable strain on the couple’s finances.

28. What complicated matters further – which is testament to the couple’s resolve to have a child and start a family – was that the entire process happened during the COVID-19 pandemic. The stress of conceiving – there was no guarantee that conception would be successful on the first try – was compounded by the administrative difficulties caused by the various travel restrictions and quarantine regulations at the time. Indeed, just after the high of receiving news of their positive pregnancy result on 28 December 2020, both experienced the low of separately undergoing 21 days of isolation after returning from South Africa.

29. After carrying the child to term – and through the physical and emotional “struggles” of pregnancy – B gave birth to K. As a result of the RIVF, B can be described as the “gestational mother” and R can be described as the “genetic mother” or “genetic parent” or “biological parent”. A DNA test dated 7 June 2022 confirms that R is the biological parent of K.

30. It is clear from the evidence that R cares deeply for K. In the daytime, she acts as the primary breadwinner for the family. At night, she helps to care for K. She does domestic chores. It is no wonder that B says, “I cannot imagine what I’d do without [R] supporting [K] and myself”.

31. However, the joy of K’s birth was for them marred by the experience of being told by the Birth Registry on 5 October 2021 that R could not be registered as a parent on K’s birth certificate (“Birth Certificate”). On the Birth Certificate, the space for K’s mother is filled with B’s name, and the space reserved for K’s ‘father’ is marked with several asterisks. There is no space for any other “parent”.

32. The HCMP Judgment – for details, see below – was given on 31 August 2023. As stated above, Au-Yeung J declared R to be a ‘parent at common law’. There was no appeal from that judgment by either party.

33. But, on 31 October 2023, the Department of Justice wrote to R and refused the request to re-register K’s birth to include R as K’s parent under the relevant statutes. The reasons for that refusal were given as follows:

Section 12B of the Birth and Deaths Registration Ordinance (Cap. 174) provides, inter alia, that the Registrar of Births and Deaths (“Registrar”) shall authorize the re-registration of a person’s birth where the Registrar receives notification issued pursuant to section 6 of Parent and Child Ordinance (Cap. 429) (“PCO”) of the making of a declaration of parentage in respect of that person whose birth has previously been registered and it appears to the Registrar that the birth of that person should be re-registered. Given the Minor’s application for a declaration of parentage made under section 6 of the PCO was dismissed by the Court in its judgment dated 31 August 2023 and there was no appeal to that decision, there is no legal basis whatsoever for your client’s proposed re-registration of the birth of the Minor. We are instructed to reject your client’s request in this regard.

34. Hence, the current judicial review challenge.

C. Grounds of Review and Relief Sought

35. By his Amended Form 86, K challenges:

- (1) Section 6 and Part V of the PCO, and Form 1 in Schedule 2 of the Births and Deaths Registration Ordinance Cap 174 (“BDRO”) to the extent that they do not provide for the recognition in law of parents at common law of children born through the medical procedure known as RIVF / ROPA (“Provisions”); and
- (2) The Government’s decision not to provide for the registration of parents at common law of children born through RIVF in the information to be recorded in the births register as stated above (“Decision”).

36. As offered during the hearing by way of proposed amendment to the declarations sought in the AF86 (proposed amendments shown by striking-out and underlining), K seeks the following declarations:

- (1) A declaration that section 6 and Part V of the PCO are unconstitutional in that they do not provide for equal treatment of a child or of that child's [second intended] parent at common law where, pursuant to an agreement between that parent and the mother as partners in a publicly-committed same-sex couple, that child is born as a result of the medical treatment known as RIVF in which that second parent's egg has been used in the creation of the embryo, contrary to Articles 14, 19 and 20 (read together with Articles 1 and 22) of the Hong Kong Bill of Rights ("BOR") and Articles 4, 25, and 39 of the Basic Law ("BL").
- (2) A declaration that the Government has a positive obligation to ensure by law that where, pursuant to an agreement between that parent and the mother as partners in a publicly-committed same-sex couple, a child is born as a result of RIVF, the particulars of the child's second parent ~~at common law~~ whose egg is used in the creation of the embryo are included in the registration of that child's birth pursuant to BOR Articles 14, 19, and 20 (read together with Articles 1 and 22), and BL Articles 4, 25, and 39.
- (3) A declaration that the Government is under a positive duty pursuant to BOR Articles 14, 19 and 20 (read together with Articles 1 and 22) and BL Article 39 to amend or re-register K's registration on the Register of Births to record R as his parent.
- (4) A declaration where, pursuant to an agreement between the partners in a publicly-committed same-sex couple, the child is born as a result of the medical treatment known as RIVF that the references to "parent" in section 6 of the PCO are to be read to include ~~the child's parent at common law where the child is born as a result of the medical treatment known~~

as ~~RIVF in which that parent's~~ the partner whose egg has been used in the creation of the embryo.

37. As will be seen below, the proposed amended declarations reflect to some extent points arising in argument as to the situation of a 'parent at common law' where there is a statute dealing with actual or deemed parentage and parent rights. It may, therefore, also be necessary to consider the declarations in the form originally sought.

D. The Provisions of the PCO

38. The material provisions of the PCO – found in Part IV 'Declarations of Status' sections 6 to 8, and Part V 'Determination of Parent where Birth or Pregnancy Results from Medical Treatment' sections 9 to 12 – are as follows:

6. Declarations of parentage, legitimacy or legitimation

(1) Any person may apply to the court for a declaration that—

(a) a person named in the application is or was in law his parent;

(b) he is the legitimate child of his parents; or

(c) he has become, or has not become, a legitimated person.

(2) A court shall only have jurisdiction to entertain an application under this section if, at the date of the application, the applicant—

(a) is domiciled in Hong Kong;

(b) has been habitually resident in Hong Kong throughout the period of 1 year ending with that date; or

(c) has a substantial connection with Hong Kong.

A			A
B	(3)	Where on an application for a declaration under this section the truth of the proposition to be declared is proved to the satisfaction of the court, the court shall make that declaration unless to do so would manifestly be contrary to public policy.	B
C			C
D	(4)	Where a declaration is made on an application under subsection (1)(a) or (b), the Registrar of the court shall notify the Registrar of Births and Deaths, in such manner and within such period as may be prescribed, of the making of that declaration.	D
E			E
F	(5)	Any declaration made under this section shall be binding on the Crown and all other persons.	F
G	(6)	The court, on the dismissal of an application for a declaration under this section, shall not have power to make any declaration for which the application has not been made.	G
H			H
I	(7)	No declaration which may be applied for under this section may be made otherwise than under this section by any court.	I
J			J
K	(8)	No declaration may be made by any court, whether under this section or otherwise, that any person is or was illegitimate.	K
L	7.	Provisions relating to the Secretary for Justice	L
M	(1)	On an application for a declaration under this Part the court may at any stage of the proceedings, of its own motion or on the application of any party to the proceedings, direct that all necessary papers in the matter be sent to the Secretary for Justice.	M
N			N
O	(2)	The Secretary for Justice, whether or not he is sent papers in relation to an application for a declaration under this Part, may—	O
P			P
Q	(a)	intervene in the proceedings on that application in such manner as he thinks necessary or expedient; and	Q
R	(b)	argue before the court any question in relation to the application which the court considers it necessary to have fully argued.	R
S			S
T	(3)	Where any costs are incurred by the Secretary for Justice in connection with any application for a declaration under this Part, the court may make such	T
U			U
V			V

A			A
B		order as it considers just as to the payment of those costs by parties to the proceedings.	B
C	8.	Supplementary provisions as to declarations	C
D	(1)	Any declaration made under this Part, and any application for such a declaration, shall be in the form prescribed by rules under this Ordinance.	D
E	(2)	No proceedings under this Part shall affect any final judgment or decree already pronounced or made by any court of competent jurisdiction.	E
F	(3)	The court hearing an application under this Part may direct that the whole or any part of the proceedings shall be heard in camera, and an application for a direction under this subsection shall be heard in camera unless the court otherwise directs.	F
G			G
H	9.	Meaning of <i>mother</i> where birth or pregnancy results from medical treatment	H
I	(1)	The woman who is carrying or has carried a child as a result of the placing in her of an embryo or of sperm and eggs, and no other woman, is to be regarded as the mother of the child.	I
J	(2)	Subsection (1) does not apply to any child to the extent that the child is regarded by virtue of adoption as not being the child of any person other than the adopter or adopters.	J
K	(3)	Subsection (1) applies whether the woman was in Hong Kong or elsewhere at the time of the placing in her of the embryo or the sperm and eggs.	K
L			L
M	10.	Meaning of <i>father</i> where birth or pregnancy results from medical treatment	M
N	(1)	This section applies in the case of a child who is being or has been carried by a woman as the result of the placing in her of an embryo or of sperm and eggs or her artificial insemination.	N
O	(2)	If—	O
P	(a)	at the time of the placing in her of the embryo or the sperm and eggs or her insemination, the woman was a party to a marriage; and	P
Q			Q
R			R
S			S
T			T
U			U
V			V

A			A
B	(b)	the creation of the embryo carried by her was not brought about with the sperm of the other party to the marriage,	B
C		then, subject to subsection (5), the other party to the marriage shall be regarded as the father of the child unless it is shown that he did not consent to the placing in her of the embryo or the sperm and eggs or to her insemination (as the case may be).	C
D			D
E			E
F	(3)	If no man is regarded, by virtue of subsection (2), as the father of the child but—	F
G	(a)	the woman and her male partner together obtained treatment services in the course of which the embryo or the sperm and eggs were placed in the woman or she was artificially inseminated; and	G
H			H
I	(b)	the creation of the embryo carried by her was not brought about with the sperm of that man,	I
J		then, subject to subsection (5), that man shall be regarded as the father of the child.	J
K	(4)	Where a person is regarded as the father of the child by virtue of subsection (2) or (3), no other person is to be regarded as the father of the child.	K
L			L
M	(5)	Subsections (2) and (3) do not apply to—	M
N	(a)	any child who, by virtue of any Ordinance or other rule of law, is regarded as the child of the parties to a marriage; or	N
O	(b)	any child to the extent that the child is regarded by virtue of adoption as not being the child of any person other than the adopter or adopters.	O
P			P
Q	(6)	Where the sperm of a man other than—	Q
R	(a)	the other party to the marriage; or	R
S	(b)	the man referred to in subsection (3), was used, that man is not to be regarded as the father of the child.	S
T			T
U	(7)	For the purposes of the law of succession, where—	U
V	(a)	the sperm of a man was used after his death; or	V

A			A
B	(b)	any embryo was used after the death of the man with whose sperm the embryo was created,	B
C		that man is not to be regarded as the father of the child.	C
D	(8)	The references in subsection (2) to the parties to a marriage at the time there referred to—	D
E	(a)	are to the parties to a marriage subsisting at that time, unless a judicial separation was then in force; but	E
F	(b)	include the parties to a void marriage if either or both of them reasonably believed at that time that the marriage was valid; and for the purposes of this subsection it shall be presumed, unless the contrary is shown, that one of them reasonably believed at that time that the marriage was valid.	F
G			G
H			H
I	(9)	This section applies whether the woman was in Hong Kong or elsewhere at the time of the placing in her of the embryo or the sperm and eggs or her artificial insemination.	I
J			J
K	11.	Effect of sections 9 and 10	K
L	(1)	Where by virtue of section 9 or 10 a person is to be regarded as the mother or father of a child, that person is to be regarded in law as the mother or, as the case may be, father of the child for all purposes.	L
M			M
N	(2)	Where by virtue of section 9 or 10 a person is not to be regarded as the mother or father of a child, that person is to be regarded in law as not being the mother or, as the case may be, father of the child for any purpose.	N
O			O
P	(3)	Where subsection (1) or (2) has effect, references to any relationship between 2 persons in any Ordinance, instrument or document (whenever enacted or made) shall, unless the contrary intention appears, be read accordingly.	P
Q			Q
R	12.	Parental orders in favour of gamete donors	R
S	(1)	The court may make an order providing for a child to be regarded in law as the child of the parties to a marriage (referred to in this section as <i>the husband</i> and <i>the wife</i>) if—	S
T			T
U			U
V			V

A			A
B		(a) the child has been carried by a woman other than the wife as the result of the placing in her of an embryo or sperm and eggs or her artificial insemination;	B
C			C
D		(b) the gametes of the husband or the wife, or both, were used to bring about the creation of the embryo; and	D
E		(c) the conditions in subsections (2) to (7) are satisfied.	E
F	(2)	The husband and the wife must apply for the order within 6 months of the birth of the child or, in the case of a child born before the commencement of this section, within 6 months of such commencement.	F
G			G
H	(3)	At the time of the application and of the making of the order—	H
I		(a) the child's home must be with the husband and the wife or either of them; and	I
J		(b) the husband or wife, or both of them, must—	J
K		(i) be domiciled in Hong Kong;	K
L		(ii) have been habitually resident in Hong Kong throughout the immediately preceding period of 1 year; or	L
M		(iii) have a substantial connection with Hong Kong.	M
N	(4)	At the time of the making of the order both the husband and the wife must have attained the age of 18 years.	N
O	(5)	The court must be satisfied that both the father of the child (including a person who is the father by virtue of section 10), where he is not the husband, and the woman who carried the child have freely, and with full understanding of what is involved, agreed unconditionally to the making of the order.	O
P			P
Q			Q
R	(6)	Subsection (5) does not require the agreement of a person who cannot be found or is incapable of giving agreement and the agreement of the woman who carried the child is ineffective for the purposes of that subsection if given by her less than 6 weeks after the child's birth.	R
S			S
T			T
U			U
V			V

(7) The court must be satisfied that no money or other benefit (other than for expenses reasonably incurred) has been given or received by the husband or the wife for or in consideration of—

(a) the making of the order;

(b) any agreement required by subsection (5);

(c) the handing over of the child to the husband and the wife; or

(d) the making of any arrangements with a view to the making of the order,

unless authorized or subsequently approved by the court.

(8) Subsection (1)(a) applies whether the woman was in Hong Kong or elsewhere at the time of the placing in her of the embryo or the sperm and eggs or her artificial insemination.

(9) Where an order is made under subsection (1), the Registrar of the court shall notify the Registrar of Births and Deaths, in such manner as may be prescribed, of the making of that order.

39. Though I can turn to the HCMP Judgment for other purposes (see below), it is helpful to follow broadly the analysis of those provisions – and in particular section 6 – given by Au Yeung J in that decision (§§41-53, 80-84), with most of her references to authority omitted.

40. Section 6 was implemented to introduce a new and separate procedure to enable a person to apply to the Court for a declaration as to his parentage when in the past a finding of paternity could only be made incidental to other proceedings such as custody or maintenance. Under section 6(1), an applicant is the child. He can apply as an adult or as a minor through his next-friend. The definition of “parent” is the bone of contention in this case.

41. The words “in law” were added to section 6(1)(a) at the Committee Stage. According to the ‘Official Record of Proceedings of the Legislative Council’ (10 March 1993), as explained by Mrs Miriam Lau, a member of the *ad hoc* group set up to study the relevant Bill:

Clause 6(1)(a) is amended to add ‘in law’ after the word ‘was’. This seeks to make clear that the clause is concerned with the legal parent of the child. As the law only recognizes one father and one mother of a child, the amendment would avoid any misinterpretation that a person can apply to the court under this clause to declare another person to be his father or mother if he has already got a legally recognized father or mother.

42. If sections 6(1) and (2) are satisfied, the Court must grant a declaration of parentage although the Court retains a discretion as to the wording of the declaration. But it can be noted that section 6 does not define a “parent”. Rather, sections 9 and 10 address who are the “mother” and “father”.

43. Section 9 addresses the common law dilemma when the genetic mother and gestational mother were no longer one and the same person. It confers *legal* parental status on the gestational mother as opposed to the genetic mother. In the United Kingdom, this preference for gestational mothers was reached by drawing an analogy with sperm donations, which should be dealt with by severing completely all links between the donor and the child. Hong Kong duly adopted the same approach in PCO.

44. Section 10 is to define who in law is the father of a child. The intention is to prevent the child from being “fatherless”, disadvantaged by having only one parent named in his/her birth certificate.

45. Section 11 provides the effect that, once section 9 or 10 regards a person as the mother or father of a child, that would apply for all purposes and to all Ordinances that refer to the relationship of mother and child, or father and child.

46. Section 12 is to introduce a new procedure to enable the commissioning parents in a surrogacy arrangement to apply to court for an order that the child born of the surrogacy is to be *treated in law* as the child of the commissioning (i.e. non-carrying) parents. Otherwise, the surrogate mother and her husband would be treated in law as the child's parents. That would run counter to the intention of the commissioning couple in entering into the surrogacy arrangement. The advantage of a section 12 order is that it is specifically designed for the circumstances of surrogacy and can proceed swiftly, in the best interest of the child and the other parties to the surrogacy.

47. Viewed in this light, the overarching aim of section 12 (though not Part V as a whole) is to give a child's commissioning parents a means of bringing the child's legal parentage in line with their intended social parentage or, what might be termed the "reality of the surrogacy arrangement".

48. It is settled that a declaratory judgment is a final relief. It is a formal statement by a Court pronouncing upon the existence or non-existence of a legal state of affairs and what the rights of the parties are. The effect of a declaration is not to create, confer or alter rights but merely indicate what they have always been. But the Court in dealing with an application for declaration should proceed with caution and require cogent proof to its satisfaction of the proposition to be declared.

49. There is a material distinction between a “declaration of parentage” under section 6 and a “parental order” under section 12. A declaration of parentage is a confirmation as to who factually “is or was” in law a parent of the child even before a section 6 application is made. Therefore, the Court must make the declaration upon being satisfied with evidence, unless it is contrary to public policy. On the other hand, a parental order confers parentage in a surrogacy situation on those who are “to be regarded” as parents of a child, at the same time displacing the parents under sections 9(1), 10(2) and (3), upon making the order. This is an order that the Court may make upon application: section 12(1). Because of its nature in conferring and displacing parental status, a parental order can truly be said to be “transformative” for the child, the commissioning parents and the surrogate mother. It is an order having drastic effect on the person declared to be a parent in that massive consequential rights, duties and obligations can follow from a parental order.

50. Both a declaration of parentage and a parental order share the similarity that each gives to the child (and the subject parent) a legal status for life, defining whose child he/she is and the family to which the child belongs. A guardianship order (which lasts only until the child reaches 18) and an adoption order (which does not recognize the genetic link between the child and the parent) are no substitute for any of them.

51. I can address any further matters arising from the provisions of the PCO below.

E. The Provisions of the BDRO

52. Section 7 of the BDRO provides:

7. Duty of parent or occupier to register birth

The father of every child born alive in Hong Kong, or, in case of death, illness, absence, or inability of the father, the mother of such child, or in the case of the death, illness, absence, or inability of the father and mother, the occupier of the house in which such child has been born, or any person present at the birth, must, within 42 days after the day of such birth, give information to a registrar according to the best of his or her knowledge and belief, of the several particulars required to be registered, and must sign and submit to the registrar a register form completed with the information so given.

53. The relevant form is Form 1 in the Second Schedule to the BDRO. That form is as follows:

Register form of births 出生登記表格

年 月 日, Births in the district of , Hong Kong.
區出生登記。

Registration No. 登記編號	
When and where born 出生日期及地點	
Name, if any 名字 (如有的話)	
Sex 性別	
Surname and name of father 父親姓名	
Maiden surname and name of mother 母親婚前姓氏及名字	
Signature, description and residence of informant 申報人簽署、身分及住址	
When registered 登記日期	
Signature of registrar 登記官員簽署	
Name, if added after registration of birth 名字	

(如在出生登記後加上)	
Status of permanent resident of the Hong Kong Special Administrative Region under the Immigration Ordinance (Cap. 115) (Established/Not established) 《入境條例》(第 115 章) 下的香港特別行政區永久性居民身分 (確定/未確定)	

54. Hence, by section 7, either a “father” or a “mother” is required to sign and submit to the Registrar the Form 1. Those two categories of “parent” track the two categories of “parent” under section 6(1) of the PCO. The Form 1 as completed is essentially mirrored in the eventual birth certificate issued by reference to those particulars provided in it.

55. However, it may also be noted that section 29(2)(d) of the BDRO empowers the Chief Executive to amend Form 1 at any time, by order published in the Gazette.

56. By way of analogy, it may also serve to look at sections 12, 12A, 12B, and 12C of the BDRO, which provide:

12. Registration of father of illegitimate child

(1) Notwithstanding sections 7 to 10, in the case of an illegitimate child—

(a) no person shall, as father of the child, be required to give information concerning the birth of the child; and

(b) there shall not be registered in the register the name of any person as father of the child, except in the circumstances provided in subsection (2).

(2) The circumstances referred to in subsection (1)(b) are—

A			A
B	(a)	at the joint request of the mother and the person stating himself to be the father of the child; or	B
C	(b)	at the request of the mother on production of—	C
D	(i)	a declaration made by the mother stating that that person is the father of the child; and	D
E	(ii)	a statutory declaration made by that person stating himself to be the father of the child; or	E
F	(c)	at the request of that person on production of—	F
G	(i)	a declaration by that person stating himself to be the father of the child; and	G
H	(ii)	a statutory declaration made by the mother stating that that person is the father of the child; or	H
I	(d)	at the request of the mother or that person on production of—	I
J	(i)	a certified copy of a relevant order; and	J
K	(ii)	if the child has attained the age of 16 years, the written consent of the child to the registration of that person as his father.	K
L			L
M	(3)	In this section and in section 12A, relevant order (有關命令), in relation to a request under subsection (2)(d) that the name of any person be entered in the register as father of a child, means any of the following orders, namely—	M
N			N
O	(a)	a declaration of a court under Part IV of the Parent and Child Ordinance (Cap. 429) that the person is or was the father of the child;	O
P			P
Q	(b)	an order of a court under the Guardianship of Minors Ordinance (Cap. 13)—	Q
R	(i)	under section 3(1)(d) granting that person any right or authority in relation to the child;	R
S			S
T	(ii)	under section 10(1) granting that person custody of or access to the child; or	T
U			U
V			V

A			A
B		(iii) under section 10(2) requiring that person to make any lump sum or periodical payment in respect of the minor.	B
C		(c) ...	C
D	(4)	An order of a court under section 5 of the Affiliation Proceedings Ordinance (Cap. 183) adjudging a person to be the putative father of a child which has effect immediately before 27 June 1997 shall continue to be treated as a relevant order under subsection (3) as if section 5 of that Ordinance had not been repealed.	D
E			E
F		12A. Re-registration of father of illegitimate child	F
G		Where there has been registered under this Ordinance the birth of an illegitimate child, but no person has been registered as the father of the child, the Registrar shall re-register the birth so as to show a person as the father—	G
H			H
I		(a) at the joint request of the mother and that person; or	I
J		(b) at the request of the mother on production of—	J
K		(i) a declaration made by the mother stating that that person is the father of the child; and	K
L		(ii) a statutory declaration made by that person stating himself to be the father of the child; or	L
M			M
N		(c) at the request of that person on production of—	N
O		(i) a declaration by that person stating himself to be the father of the child; and	O
P		(ii) a statutory declaration made by the mother stating that that person is the father of the child; or	P
Q		(d) at the request of the mother or that person on production of—	Q
R		(i) a certified copy of a relevant order; and	R
S		(ii) if the child has attained the age of 16 years, the written consent of the child to the registration of that person as the father.	S
T			T
U			U
V			V

12B. Re-registration after declaration of parentage or legitimacy

Where –

(a) the Registrar receives notification issued pursuant to section 6 of the Parent and Child Ordinance (Cap. 429) of the making of a declaration of—

(i) parentage; or

(ii) legitimacy,

in respect of a person whose birth has previously been registered; and

(b) it appears to him that the birth of that person should be re-registered,

he shall authorize the re-registration of that person's birth.

12C. Re-registration after parental order in favour of gamete donors

Where the Registrar receives notification issued pursuant to section 12 of the Parent and Child Ordinance (Cap. 429) of an order under that section providing for a child to be treated in law as the child of the parties to a marriage, in respect of a child whose birth has previously been registered, he shall authorize the re-registration of that child's birth.

57. It might be noted that under these various provisions, in broad terms, the father of an illegitimate child (i.e. a child born to unmarried parents) can be registered as the father on the birth certificate: (1) upon a joint request of himself and the mother; (2) if he can demonstrate himself to be genetically linked to the child by joint matching declarations of himself and the mother; (3) if he has a court order demonstrating that he has satisfied the court that he is the father; or (4) if he obtains a declaration of parentage under the PCO.

58. It might also be noted that in none of those scenarios does it appear necessary for the father or mother to demonstrate suitability for registration as a parent.

59. It might further be noted that in this case – albeit that they are a same-sex couple, such they are regarded in Hong Kong as not being married – B and R: (1) have made a joint request for the registration; (2) have demonstrated that R is genetically linked to the child and can make matching declarations to that effect; and (3) have obtained a court order demonstrating that the court is satisfied as to (at least) the necessary genetic link.

F. B's Stance

60. In support of K's application, B has sought to highlight, amongst other things, the detrimental effect suffered by her as a result of what she says is the discriminatory statutory provision under the PCO and the BDRO against those in a family unit that arises as a result of RIVF. She refers to the class of families where the child is born out of female same-sex couple/partners who have used RIVF to give birth to a child.

61. But she has also emphasised that this case does not involve, and is not about:

- (1) any surrogate, any gestational donor and any surrogacy arrangement;
- (2) any egg donor;
- (3) a situation where the gamete donor and the gestational mother are not in a family unit; and

- (4) automatic conferral of all automatic parental rights and obligations.

62. By way of overview, Ms Tam for B has also sought to point out what is said to be the absurdity arising from comparative cases. If a heterosexual gestational mother (in a comparable position to B) gives birth to a child “as a result of the placing in her an embryo or of sperm and eggs or her artificial insemination” – i.e. medical treatment of the sort envisaged by the PCO – then:

(1) If the sperm is provided by her husband or male partner, the husband or male partner would be regarded as the child’s father (irrespective of the marriage status). In those circumstances, neither sections 10(2) or (3) of the PCO apply, and it is possible to include such a person in the child’s birth certificate. The gestational mother, unlike B, would not appear as the only parent of the family unit.

(2) If the mother is married, her husband would be regarded as the “father” of the child even if he did not provide the sperm, unless it is shown that he did not consent to the treatment: see section 10(2). Again, the gestational mother, unlike B, would not appear as the only parent of the family unit.

(3) If she is not married, her male partner would be regarded as the “father” of the child even if he did not provide the sperm, if they obtained the treatment services together: see section 10(3). Again, the gestational mother, unlike B, would not appear as the only parent of the family unit.

63. Ms Tam also points to the circumstances where, if a heterosexual mother conceives, carries and gives birth to a baby naturally, the genetic father will always be regarded as the “father” and could be so

registered. Again, the gestational mother, unlike B, would not appear as the only parent of the family unit.

64. Ms Tam emphasises the Government’s own stance that birth certificate records ought not to be liable to mislead and deceive. Yet, Ms Tam says, the current birth certificate which presents B as the only parent in the family unit notwithstanding the declaration made by Au Yeung J is liable to mislead and deceive. Ms Tam submits that the birth certificate is the most vital official identification document commonly required for official personal identification (at least for children under 11 years of age who are not required to hold an identity card). That document is routinely required to show not just the identity of the child, but the identity of those persons who can be expected to have rights and authority in relation to that child. An omission of a person’s name indicates to the outside world that such person is not a parent in the family unit, and is likely unable to demonstrate or prove parental status to schools, hospitals, clinics and the like.

65. She points to what she describes as the “eloquent explanation” – with which I agree – of the rationale for being able to demonstrate parentage by referring to a birth certificate, as provided in the Australian case of *AA v Registrar of Births Deaths and Marriages* [2011] NSWDC 100 at §22, where HHJ Walmsley SC (in the context of parenting presumptions in relation to same-sex couples and the need to ensure both parents can be noted on the child’s birth certificate) quoted what was said by the Minister for Justice in moving amendments to the Status of Children Act 1996:

This is an important measure, as it will enable both parents of a child conceived as a result of a fertilisation procedure provided to those in the lesbian same-sex *de facto* relationship to hold

themselves out as the child's parents in circumstances where the evidence of the parent-child relationship is demanded by our state's public institutions, such as hospitals and schools. It will also enable same-sex parents to engage other authorities, such as sporting registration bodies, so often encountered by parents in the course of bringing up children.

66. Ms Tam also points to the fact that it has been recognised that the birth certificate itself is a form of manifestation and establishment of a person's identity: see 'Nowak's CCPR Commentary' 3rd ed (2019) at Chapter 17 §18.

G The Government's Stance

67. The Government's stance is evident from the affirmation of Cheng Kin Ying Jeanne, filed for these proceedings. She holds the post of Principal Assistant Secretary for Labour and Welfare (Children) of the Labour and Welfare Bureau of the Government. Her duties include overseeing welfare policies on children and the promotion of children rights under the purview of the Labour and Welfare Bureau.

68. As to the Birth Register, Ms Cheng states in her evidence that:

(1) The purposes of establishing birth registration records in Hong Kong under the BDRO are:

(a) to enable the Registrar of Births and Deaths to keep all birth registration records in Hong Kong in order to fulfil his statutory obligations under the BDRO and related subsidiary legislation; and

(b) to verify the identity, age, family relationship, etc of the person concerned legitimately, or for other lawful purposes prescribed, authorised or permitted by law.

A		A
B	(2) While naturally one aspect of this purpose is to evidence	B
C	biological ties between parent and child, the legislature	C
D	(via the PCO and the BDRO) has also taken into account the	D
E	need to promote other important purposes, the primary one	E
F	in the past been to ensure the legitimacy of children, as well	F
G	as now to recognise those who is a matter of policy ought to	G
H	be regarded as the parents as a matter of law of a child born	H
I	using medical treatment.	I
J	(3) Birth registration serves as a permanent, official and legal	J
K	record of a child's existence.	K
L	(4) It is a record of, and should only state, what the law accepts	L
M	and regards as the true legal parents of the child upon birth	M
N	in question.	N
O	(5) If the register records the egg/sperm donors who are	O
P	(for legitimate reasons) not regarded as a legal parent of a	P
Q	child so that that parent would not have any parental rights	Q
R	or obligations, such a record would be liable to mislead and	R
S	deceive.	S
T	(6) There is therefore no room for inconsistency and uncertainty	T
U	about whom should be recorded on the Birth Register as	U
V	legal parents.	V
	(7) Limiting registration to only legal parents (under the PCO) is	
	necessary to further the purpose of prompt and accurate	
	recording.	
	(8) The particulars in the Birth Register serve the wider public	
	interest by recording only, and provide proof of who is/are,	
	the legal parent(s) and the relevant statute but no other	
	"parent(s)", even when such proof is required.	

- (9) As such, there is clear and substantial public interest in maintaining a birth register properly recording only parents who are regarded as such by the law.

69. With respect, I am not sure that this evidence as regards the Births Register says very much more than simply why the register is important and that the register must properly record legal parentage. Of itself, that may not be controversial – and indeed both Mr Kat and Ms Tam made references to this evidence to rely upon it themselves. But it does not really address the question at issue in these proceedings, namely which persons should properly be regarded in law as parents. Simply pointing to the PCO obviously does not answer the controversial question in these proceedings as to whether the PCO should be read differently from the way it is currently read by the Government, or should otherwise be regarded as unconstitutional.

70. In her evidence on the central issue, Ms Cheng states:

- (1) This application for judicial review (“JR”) is essentially seeking to redefine the legal framework regarding parent and children in Hong Kong society.
- (2) In particular, the redefinition is that as a matter of law a child may have two mothers or “female parents”, each having automatic parental rights and obligations irrespective of the actual circumstances of the case and the relationship between the parties amongst themselves and their respective relationship with the child.
- (3) By seeking automatic and formal recognition of a parent and child relationship of RIVF children by their female gamete parent under the PCO, the JR is in effect asking for

A			A
B		automatic conferral of all parental rights and obligations to	B
C		a female gamete parent at the same time as the gestational	C
D		mother.	D
E	(4)	On a balanced view, this may not necessarily or invariably	E
F		be in the best interests of the child involved.	F
G	(5)	Even where the gamete donor and gestational mother are in a	G
H		same-sex family unit, and in light of the ever-changing	H
I		developments concerning reproductive technology and	I
J		different circumstances (including potential separation) of	J
K		such a family unit, if both are automatically recognised, what	K
L		is in the best interests of one child in such a family unit with	L
M		specific circumstances may not be in the best interests of	M
N		another child in such a family unit in different circumstances,	N
O		including if and when the relationship between the two	O
P		“mothers” breaks down.	P
Q	(6)	The potential problems would be greater if the gamete donor	Q
R		and gestational mother are not even in such a family unit.	R
S	(7)	There is therefore a legitimate need to preserve flexibility to	S
T		cater for what would be in the best interests of the child in	T
U		different (and possibly) changing circumstances where	U
V		conferral, and possible withdrawal or curtailment, of parental	V
		rights and obligations in each case can be determined upon	
		an examination of its own facts and the individuals involved.	
	(8)	Further, the relief sought entails a complete overhaul of the	
		meaning of, and the relationship between, parent and	
		children in Hong Kong society under the current legal	
		framework governed by the PCO.	
	(9)	Besides the PCO, there are many inter-linked pieces of	
		legislation and fundamental systems underlying and weaving	
		together the very social fabric of Hong Kong that would be	

affected if the legal meanings of “parent”, “father” and “mother” are differently construed and/or the basic notion that a child cannot have more than one legal “father” and one legal “mother” and no other “parent” is altered..

(10) Those concepts of “parent”, “father”, and “mother” are deeply entrenched and associated with the definitions as provided under the PCO.

(11) As a consistent policy across the board, each child is considered to have not more than one male and one female parent as a matter of law in Hong Kong.

(12) But there are sufficient protections of children’s rights and well-being in various facets of their daily lives under the existing legal framework and administrative measures.

(13) In particular, the current system allows the Court to decide on a case-by-case basis whether to grant a guardianship order to so as to confer parental rights and impose parental obligations on the genetic mother, and the Court has powers to make orders in the best interests of the child if the gestational and genetic mothers were to separate from each other or have disputes on matters affecting the welfare of the child.

(14) Thus, not to automatically recognise parentage of the genetic mother at the same time as the gestational mother, or more generally two female parents, serves the legitimate aim of preserving the greatest flexibility in what can and should be done in the best interests of a child born out of RIVF technology at all stages of the Child’s life when he or she is a minor, according to the actual circumstances including when the gestational mother and genetic mother are in a stable relationship and when they are not.

A		A
B	(15) This can be achieved by the making, variation or revocation	B
C	of a guardianship order vis-a-vis the genetic mother by the	C
D	Court on a case-by-case basis.	D
E	(16) The Government should enjoy a wide margin of discretion	E
F	regarding the ethically sensitive subject at stake and the	F
G	absence of a consensus on the question of establishing the	G
H	maternal affiliation for the genetic mother, in addition to the	H
I	gestational mother.	I
J	(17) The best interests of the child are paramount, and flexibility	J
K	is of marked importance when facing a same-sex couple on	K
L	the breakdown of the relationship.	L
M	(18) Admitting dual motherhood could cause serious implications	M
N	and compromise the flexibility on how to approach issues	N
O	concerning a child's custody, and the Court should retain a	O
P	discretion to make the most appropriate order in the	P
Q	circumstances for the best interests of the children involved.	Q
R	(19) Further, guardianship does not create a legal fiction as to the	R
S	Child's parentage.	S
T		T
U		U
V		V

71. Mr Wong's summary of the Government's position was that if and insofar as any constitutional rights relied upon are engaged and infringed (which is not accepted), the current legal regime that in a RIVF situation only the gestational mother is recognised in law as a parent for all purposes, with the attendant legal rights and obligations, and that the genetic mother is not recognised in law as a parent or additional mother for any purpose, so that her legal rights and obligations as a parent at common law are taken away by the PCO, satisfies the four-stage proportionality test, in that it preserves the necessary flexibility under the

Hong Kong legal framework to cater for what would be in the best interests of the child involved on a case-by-case basis.

H. The HCMP Judgment

72. It is convenient next to consider the HCMP Judgment, and the consequences of it. This is because several issues arising for consideration in this judicial review might be impacted by what the learned Judge did or did not decide – and what is the proper effect of its result.

73. By originating summons filed on 21 April 2022, acting by his next friend B, K sought a declaration that R be declared K’s “parent”. As it was put in the HCMP Judgment (§1), the application called for interpretation of section 6 of the PCO as to whether R is a “parent”. Alternatively, it called for exercise of the Court’s power under its inherent *parens patriae* jurisdiction.

74. After setting out the background to K’s birth, the Judge referenced (§12) an International Social Investigation Report dated 21 November 2022 (“ISIR”) as supportive of B, R and K forming a happy and healthy family, stating:

- (1) Being in such a family is in the best interests of K. The family’s home is conducive to his upbringing. K is interacting with everyone within the family, which has given him a sense of stability. The family also has a good relationship and friendly communication with the extended family members. K has been taken care of holistically.

(2) As between B and R, they have attended to the minor and have shared roles. They support each other with daily chores and ensure that K is taken care of.

(3) R is financially supporting the family and her salary is enough for their daily living.

75. The Judge also referenced (§13) a South African legal opinion dated 13 December 2022 confirming certain facts as a matter South African law. First, both B and R are recognized under South African law as the parents of K with automatic parental responsibilities and rights in relation to K without the requirement for further application to the South African courts. Secondly, the anonymous sperm donor acquires no status, parental responsibilities or parental rights under South African law.

76. In her recitation of the parties' respective cases, the Judge noted (§14) that K did not seek to have R declared to be a second "mother" or a "father", but a "parent". She also noted (§19) that the parties' positions were common in that the case was not about same-sex marriage or partnership, and that there was no dispute that a "family" exists among B, R and K and with the extended families of B and R. She specifically noted that nobody considered that it would be against K's best interests to grant the declaration sought by the application.

77. Having identified the issues falling for determination, the Judge rejected K's suggestion that one of the issues should be whether section 6 of the PCO is to be given a remedial construction, if it is found to derogate from constitutional rights in a disproportionate and unjustified manner. This was because the "only matter sought" was the declaration

A that R was K's parent. The Judge noted that if K wished the
B Government to provide justification on section 6 of the PCO, the judicial
C review channel was more appropriate. For this and other reasons,
D she agreed (§26) that the application could and should be determined on
E ordinary principles of statutory interpretation alone, without getting
F enmeshed in the wide-ranging and complex constitutional issues as had
been raised in submissions. Therefore (§27), she disregarded the
arguments on justification and proportionality.

G 78. The Judge dealt (§§29-33) with general principles on
H statutory interpretation, before noting (§34) that the provisions of
I the PCO are derived from the provisions of the Family Law Act 1986 of
J England and Wales and the Human Fertilisation and Embryology
K Act 1990 of the United Kingdom, such that their legislative context and
English case-law might be referred to where relevant.

L 79. The Judge noted (§35) that the PCO was enacted with the
M best interests of children in mind, but also pointed out that it is not as if
N the "best interest principle" trumps all. She considered the various
statutory provisions.

O 80. But the Judge also found (§37) that the proceedings raised
P the question of great and general public importance because they did not
Q affect K alone, but an entire class of children similarly born – as she put it
R – out of female same-sex couples/partners in a committed relationship
S who intended to be co-parents, used RIVF or other medical treatment to
T give birth to a child and do become the social or psychological parents of
U that child.
V

81. She noted (§§60-61) that the PCO shares the same structure as the UK Acts mentioned, so that accordingly a person is in law a parent where statute defines him or her to be so. That said, courts should keep an open mind on the definition of “parent” as societal norm and medical technology may change to enable people who could not be parents in the past now become able. She agreed (§62) with the submission made to her that the words “in law his parent” allow the Court to track (and not fossilise) the concept of “parent” as recognised under prevailing common law. Further, applying section 6 in the light of the common law norms then prevailing is in line with the essential purpose of section 6, namely to afford equal protection to all children without discrimination on the grounds of their birth or the marital status of their parents.

82. By reference to Part V of the PCO, the Judge thought (§§95-96) that in the context of medical treatment, R and B are no different from a commissioning mother (genetic mother) giving her eggs to the surrogate mother (gestational mother) as contemplated by section 12(1)(a). Where the PCO is technology neutral, RIVF is therefore not a medical technology unforeseen by the Legislature but the same genus of facts as those to which the expressed policy has been formulated. But, she expressed (§98) the view that the material difference between the two women involved in the birth of a child in Part V on the one hand and the two women using RIVF on the other is the intention. In respect of the former pair, the intention is to exclude one woman. For RIVF, there is no intention to exclude either woman.

83. The Judge considered (§110) that, at common law, there is no legal impediment to recognising the genetic link of a woman. Indeed, genetic link is also central to many of the legal rights based on blood

lineage evidence by various enactments. But, she thought (§111) that whether genetic link in itself will give a person the legal status of a mother (or father) under the PCO is a policy decision. She held (§113) that R cannot rely on her genetic link with K *alone* – Au Yeung J’s emphasis – to get parental recognition.

84. Ultimately, the Judge held (§119) that, properly read, R could not be a “parent” under section 6 of the PCO. Primarily, this was because under sections 9 to 11 of the PCO, a person had to be a “father” (父) or a “mother” (母) before he or she could be declared as a “parent”. Further, under sections 9(1) and 11 of the PCO, the gestational mother – but not the genetic mother, like R – was to be regarded as the mother “for all purposes”. As such, it was impossible to grant a declaration under section 6 of the PCO – otherwise, it would give provisions within the PCO meanings that it could not bear.

85. Nevertheless, the Judge plainly had several misgivings about this interpretation (§§120-133).

(1) She held that her interpretation of “parent” – to which she was bound to come– violated the statutory intent behind the PCO: it did not provide “equality at law for all children”, protect them against discrimination irrespective of their parents’ marital status, or give effect to BOR 20 (which enshrines a minor’s entitlement to protection irrespective of birth) and BOR 22 (which enshrines equal protection of the law without any discrimination on the ground of birth or other status).

(2) She held that K was discriminated on the basis of birth, because the only reason he does not have a parent

“genetically linked to him” is because R is another female, and because of B and R’s sexual orientation. However, she stopped short of examining any justification for K’s differential treatment.

(3) She held it was patently “absurd” – even without taking into account the “best interests principle” or any constitutional right – that the legislature would rather presume a man who did not provide the sperm to be the father of a child born within wedlock, “than to accept someone who is genetically linked to the child and psychologically and socially his parent to be the parent”.

(4) Part V of the PCO plainly intended to exclude the ovum (or sperm) donor from being a parent of a child because “practically, being anonymous, the donor(s) is not expected to ever come into contact with the family”. But that policy reason simply does not apply to B and R, who intended to become co-parents.

(5) There was also no “third competing parent – the sperm donor” that would complicate matters.

(6) No one would be prejudiced by the making of the declaration that R would be the parent. In fact, acknowledging the genetic link and reality of R’s social and psychological parentage is plainly to affirm the facts and makes congruent K’s legal parentage with the intention and reality of the RIVF.

(7) Indeed, the Judge felt compelled to ask this: if persons who are not genetically linked to the children may be considered for a care and shared residence order, “how much stronger is the fact of parentage in R who has been willing and in fact able to parent K?”.

86. The Judge also observed (§137) that acknowledging the genetic link and reality of R’s social and psychological parentage would plainly affirm the facts and make congruent K’s legal parentage with the intention and reality of the RIVF.

87. The Judge pointed out (§147) that she had found K to be discriminated and that the legislative intent which invoked BOR 20 and 22 has been violated. But finding there to be additional breaches of constitutional rights would not change the outcome of the case. She further held (§§156-157) that the *parens patriae* jurisdiction could not be invoked to declare a person as a “parent” when the PCO could not do so. Further, there was no reason to invoke that jurisdiction where K already has a mother, B, to take care of him, and where R had taken out a summons for guardianship of K.

88. Against this background, Au Yeung J held R to be a ‘parent at common law’. I can address what that might mean in a different section of this Judgment, below. But, with respect, and though it was obviously not put this way, it is tolerably clear that the declaration made was perhaps something of a consolation prize. As the Judge put it (§§146 and 160-161 respectively):

146. Doing the best I can, I can only hold R to be a “parent at common law”.

and

160. It has been proved that B and R are married under South African Law and are in a committed relationship. They intended to be co-parents and used RIVF to give birth to K. They have co-parented K.

161. In the above analyses, I have referred to R as a genetic parent to show how she is related to K. However, it is rather disrespectful to state that she is a “genetic parent”

in ordinary life. I cannot imagine K introducing her to others in that manner. The Court cannot make a declaration under section 6(3) because R does not fall within the statutory scheme. Doing the best I can, I make a declaration that R is a parent of K at common law under the “any other relief” limb of the originating summons.

89. Though there has been some dispute as to what is the effect of the HCMP Judgment, it is common ground between the parties to the current application that such a declaration is a formal statement by a Court pronouncing upon the existence or non-existence of a legal state of affairs. In other words, the making of such a declaration does not itself create any legal state of affairs, but rather confirms its existence (or pre-existence).

90. It is also common ground that such a declaration must be given effect, on the basis that it would not have been granted if it would not serve any practical purpose: see, for example, Zamir & Woolf, ‘The Declaratory Judgment’ 4th ed at §§1-02 and 4-99.

91. I shall return below to the question which certainly arises in this case as to whether the declaration made actually served any practical purpose.

I. Dispute as to What Au Yeung J Decided

92. Though I think it may end up being a ‘red herring’, I can address the dispute between Mr Kat and Mr Wong as to how and why the Judge declared R to be a ‘parent at common law’.

93. Mr Wong argued that the Judge did so by sole virtue of R’s genetic link to K. Mr Kat contended otherwise, that the Judge made the

A declaration not just because of the genetic link but also because (1) K and B were in a ‘partnership’, and (2) both intended that each of them should be a parent to K. Also taken into account were the best interests of K.

94. In another context, the dispute might have importance. If a parent at common law stood for nothing but a genetic parent, then perhaps anonymous sperm donors could come to Court and be declared “parents” of children they had never met before, giving them the status, rights and responsibilities of being such a parent. The question also might go to the practicality of granting declarations, perhaps in the context of the operation of the PCO. Indeed, if the only requirement for establishing parentage at common law were to show a genetic link between parent and child, there would no need to trouble any judge to give the declaration, and it would suffice to wave a DNA report demonstrating that link.

95. It is in this context that Mr Kat sought to limit the applicability of the declarations pursued in these proceedings. He suggested in both written and oral submissions that it is inherent in the meaning of RIVF that it is limited to ‘partners’. He also referred to how Vitalab required K and B to declare themselves to be in a subsisting marriage and/or civil union.

96. It may be true that RIVF is conventionally used by couples who are in a committed relationship (as the literature referenced above tends to show). But, as Mr Wong rightly pointed out, that may not always be true. Indeed, I am not sure ‘partnership’ is a sensible qualification. It just begs the question of who a ‘partner’ might be, and

what level of ‘partnership’ suffices to bring a person within the scope of the declarations sought.

97. What I think Mr Kat is really suggesting is that the Judge did consider R’s social and psychological parentage in addition to her genetic parentage, and considered whether declaring R to be K’s parent at common law was in the latter’s best interests, before making the declaration. There, the Court’s evaluation is the necessary safeguard.

98. At first blush, Mr Wong seems to have a point. As the Judge stated in the HCMP Judgment (§75), a genetic parent is “in principle” a common law parent. She also thought (§161) a declaration that R is a “parent at common law” to be more appropriate because she did not like the possibility that R would tell others that she was a “genetic parent” or that K would introduce her as such. Reference can also be made to Baroness Hale’s brief but illuminating exposition on “social and psychological parents”, and in particular that a common law parent could be a social parent (see below). Logically, that means a person could qualify as a “common law parent” even without any consideration of social or psychological parentage. This might be thought to strengthen the view that a common law parent means nothing more than a genetic parent.

99. But I think a distinction must be drawn between who is “in principle” a common law parent, and what Au Yeung J seems to have decided a person must show before the Court actually grants a declaration that he or she is a common law parent. I am ultimately convinced that the Judge only declared R to be a parent at common law after considering

that (1) R was K's social and psychological parent, as both R and B had intended and/or (2) it was in K's best interests for her to do so.

100. First, parts of the Judge's reasoning would be superfluous if that were not the case. If the relevant question was simply whether R was genetically linked to K, the Judge would not have had to (1) mention the ISIR, or the South African legal opinion at the start of the HCMP Proceedings or (2) recognise R's "social and psychological parentage" before granting the declaration. There would also have been little reason to state (§160) that B and R had "proved" that they are willing to co-parent K, and that they were in a committed relationship. Nor would there have been any need to allude to the fact that there was no competing "third" parent. I also think it plain that K's best interests were factored in. Indeed, as I intimated during the hearing, all that would be required is a DNA test if the relevant question was no more than whether a genetic link between R and K existed. But the DNA Test was no more than a (figurative) footnote in the HCMP Judgment.

101. Second, it was not disputed between the parties that parents at common law are given an impressive array of rights under common law (see below). It is unlikely that the Judge bestowed these significant rights on R simply because she was the "genetic" mother, particularly when it would imply other genetic parents – such as anonymous sperm donors – would be entitled to these weighty rights and obligations.

102. Third, as the Government acknowledges, a declaration of legal status brings with it "legal as well as practical consequences" associated with a status: see *Bellinger v Bellinger* (Lord Chancellor

intervening) [2003] 2 AC 467 at §28; *In re G (Adoption: Unmarried Couple)* [2009] AC 173 at §7. As already stated above, a declaration also “formally” pronounces upon a “legal relationship”: see ‘Zamir & Woolf, *Declaratory Judgment*’ 4th ed at §1-02. Thus, a declaration is consequential and potentially transformative. Indeed, whether or not it was actually effective in that way, I think the declaration here was intended by Au Yeung J to be in some way transformative. Again, in the way it was expressed and reasoned, I do not think the Judge would have granted such a declaration upon the simple proof that R was genetically linked to K.

103. Fourth, more fundamentally, it will often be in the best interests of the child to be “maintained, wherever possible, with the parent who give it life”. There is a “strong supposition” to that effect. As the *Re G* case shows (see below), the fact of genetics or gestation are proxies for the proposition that as a starting point, the common law confers parenthood on these persons because it is likely to be in the best interests of that child. The Judge – being an experienced family lawyer and judge – would have understood that. That explains why she continued to evaluate and remind herself of other facts which confirmed her understanding that granting R parentage would be in K’s best interests.

104. Fifth, I also bear in mind the quite sensible line of thought that it is usually in the best interests of a child that, even in instances of relationship breakdown, both parents are able to continue to play an equal role in making important decisions in respect of the child: see, for example, *C v S (Wardship; GMO)* [2017] HKFLR 562 at §§42-43. The position would seem to be all the more so that the best interests of a

child are likely served if he or she has two parents when there is (currently) no prospect of relationship breakdown.

105. Having decided why Au Yeung J decided it right to make the declaration as to K being a parent at common law, it is helpful to see what that might mean.

J. Parent at Common Law

106. For the purposes of the HCMP Judgment, Au Yeung J considered (§§63-69) a number of decisions as to the meaning of parentage at common law.

107. The Judge eventually landed on *Re G (Children) (Residence: Same-sex partner)* [2006] 1 WLR 2305, which provides – in her words – the most updated definition of a common law parent. Reference to that case is indeed useful, but I am not so sure that the case was really concerned with the definition of a common law parent. Instead, I think the case was focused upon the appropriate way to approach the paramount question of the welfare of the child. Though previous cases had referred to various ‘parental rights’, Baroness Hale apparently endorsed the view that the term ‘parental right’ is not used in any proprietary sense, but rather as describing the right of every child, as part of its general welfare, to have the ties of nature maintained, wherever possible, with the parents who gave it life.

108. At §30, Baroness Hale identified that the Children Act 1989 brought together the UK Government’s proposals in relation to childcare law and the Law Commission’s recommendations in relation to the

A private law. She referred to a passage from a Law Commission working
B paper in which it was said:

C We conclude, therefore, that the welfare of each child and the
D family should continue to be the paramount consideration
E whenever their custody or upbringing is in question between
F private individuals. The welfare test itself is well able to
G encompass any special contribution which natural parents can
H make to the emotional needs of their child, in particular to his
sense of identity and self-esteem, as well as the added
commitment which knowledge of their parenthood may bring.
We have already said that the indications are that the priority
given to the welfare of the child needs to be strengthened rather
than undermined. We could not contemplate making any
recommendation which might have the effect of weakening the
protection given to children under the present law.

I 109. In passing, it can be noted that passage emphasises the
J special contribution which natural parents can make to the emotional
K needs of a child, in particular to his or her sense of identity and
L self-esteem, and the added commitment brought from knowledge of their
parenthood.

M 110. Baroness Hale agreed with that statement by the Law
N Commission and held that the statutory position is plain: the welfare of
O the child is the paramount consideration. Therefore, there is no question
P of a parental right, where the welfare test itself is well able to encompass
Q any special contribution which natural parents can make to the emotional
R needs of their child, and the claims and wishes of parents can be capable
S of ministering to the total welfare of the child in a special way. At §31,
T she stated that did not mean the fact of parentage is irrelevant, and
U endorsed the view expressed in an Australian authority that the fact of
V parenthood is to be regarded as an important and significant factor in
considering which proposals better advance the welfare of the child.
There is no presumption in favour of the natural parent, nor does the

position in favour of the natural parent act as the commencement of the Court's decision process.

111. Baroness Hale then explained that there were three types of "natural" parents, where a natural parent is not necessarily a biological parent, and where there is a difference between natural and legal parents. At §§32-37, it was stated:

32. So what is the significance of the fact of parenthood? It is worthwhile picking apart what we mean by 'natural parent' in this context. There is a difference between natural and legal parents. Thus, the father of a child born to unmarried parents was not legally a 'parent' until the Family Law Reform Act 1987 [equivalent to section 5(1)(b) of PCO] but he was always a natural parent. The anonymous donor who donates his sperm or her egg under the terms of the Human Fertilisation and Embryology Act 1990 is the natural progenitor of the child but not his legal parent: see the 1990 Act, sections 27 and 28 [equivalent to sections 9(1) and 10 of PCO]. The husband or unmarried partner of a mother who gives birth as a result of donor insemination in a licensed clinic in this country is for virtually all purposes a legal parent, but may not be any kind of natural parent: see the 1990 Act, section 28. To be the legal parent of a child gives a person legal standing to bring and defend proceedings about the child and makes the child a member of that person's family, but it does not necessarily tell us much about the importance of that person to the child's welfare.

33. There are at least three ways in which a person may be or become a natural parent of a child, each of which may be a very significant factor in the child's welfare, depending upon the circumstances of the particular case. The first is genetic parenthood: the provision of the gametes which produce the child. This can be of deep significance on many levels. For the parent, perhaps particularly for a father, the knowledge that this is 'his' child can bring a very special sense of love for and commitment to that child which will be of great benefit to the child ... For the child, he reaps the benefit not only of that love and commitment, but also of knowing his own origins and lineage, which is an important component in finding an individual sense of self as one grows up. The knowledge of that genetic link may

A			A
B		also be an important (although certainly not an essential)	B
C		component in the love and commitment felt by the	C
D		wider family, perhaps especially grandparents, from	D
E		which the child has so much to gain.	E
F	34.	The second is gestational parenthood: the conceiving	F
G		and bearing of the child. The mother who bears the	G
H		child is legally the child's mother, whereas the mother	H
I		who provided the egg is not: [the] 1990 Act, s[ection]	I
J		27 [ie s.27 of the Human Fertilisation and Embryology	J
K		Act 1990, the UK equivalent of section 9 PCO].	K
L		While this may be partly for reasons of certainty and	L
M		convenience, it also recognises a deeper truth: that the	M
N		process of carrying a child and giving him birth (which	N
O		may well be followed by breast-feeding for some	O
P		months) brings with it, in the vast majority of cases, a	P
Q		very special relationship between mother and child,	Q
R		a relationship which is different from any other.	R
S	35.	The third is social and psychological parenthood: the	S
T		relationship which develops through the child	T
U		demanding and the parent providing for the child's	U
V		needs, initially at the most basic level of feeding,	V
		nurturing, comforting and loving, and later at the more	
		sophisticated level of guiding, socialising, educating	
		and protecting. The phrase 'psychological parent'	
		gained most currency from the influential work of	
		Goldstein, Freud and Solnit, Beyond the Best Interests	
		of the Child (1973), who defined it thus:	
		'A psychological parent is one who, on a continuous,	
		day-to-day basis, through interaction, companionship,	
		interplay, and mutuality, fulfils the child's psychological	
		needs for a parent, as well as the child's physical needs.	
		The psychological parent may be a biological, adoptive,	
		foster or common law parent.'	
	36.	Of course, in the great majority of cases, the natural	
		mother combines all three ... The natural father	
		combines genetic and psychological parenthood ...	
	37.	But there are also parents who are neither genetic nor	
		gestational, but who have become the psychological	
		parents of the child and thus have an important	
		contribution to make to their welfare. Adoptive	
		parents are the most obvious example, but there are	
		many others ...	

112. In the HCMP Judgment, Au Yeung J expressed the thought (§73-77) that: (1) these three categories were the most “natural” candidates to be termed “parents” in a contest for care and shared residence order; (2) but that was unlike the case before her where, under PCO, the Court was concerned with who the *legal* parents are; and (3) nevertheless, applying *Re G*, there would be no dispute that R is a category 1 and 3 parent (i.e. genetic and social and psychological).

113. As I say, though useful, I am not sure that authority really defines who is a parent at common law. It does, however, identify the situations in which a person might be regarded as a “natural” parent, which either is not or may not be the same as a legal parent.

114. Rather – and keeping in mind the correct approach to ‘parental rights’ when considering the best interests or welfare of a child – I think it better to think in terms of the different rights which may arise either from the common law or from statute. This point is of importance when I deal with what seems to me to be a conundrum arising in this case (see the relevant section of this Judgment, below).

115. Pertinently, at the hearing of the present case, it was not disputed between the parties that parents at common law are given an impressive array of rights under common law: see ‘The Law Reform Commission of Hong Kong: Report on the Guardianship of Children’ (January 2022) at §1.5; and ‘The Law Reform Commission of Hong Kong: Report on Child Custody and Access’ (2005) at §2.10.

116. The array of rights and authorities arising at common law includes (1) the right to live with the child and control the child’s

day-to-day upbringing, (2) the right to decide on the child's education and religion, (3) the right to inflict moderate punishment, (4) the right to administer the child's property, (5) the right to act for the child in legal proceedings, (6) the right to consent to medical treatment, and (7) certain rights to enter into contracts on behalf of the child's rights. It is not to be forgotten, of course, with rights come concomitant obligations.

117. But the idea that being a parent at common law gives rise to those rights is what seems to me to lead to an obvious conundrum.

K. The Conundrum

118. Both Mr Kat – as supported by Ms Tam – and Mr Wong argue the case placing reliance upon Au Yeung J's declaration that R is a 'parent at common law'. In broad terms:

(1) Mr Kat submits that the declaration was the express judicial and legal recognition of the obvious genetic, social and psychological realities of K and his family life, which (a) should lead to the re-registration on the Birth Certificate, and (b) identify the provisions of the PCO as being plainly unconstitutional.

(2) Mr Wong submits that the declaration recognises the fact that there is a genetic link between R and K, so that (a) R's status as a parent of K under common law is based (only) on that fact, such that K's factual and social identity as R's child and as part of the family unit is clear and there is no need for R to be named on the Birth Certificate, and (b) in any event the provisions of the PCO are not unconstitutional.

119. If I tried to put it more bluntly:

A		A
B	(1) Mr Kat asks, now that R has been recognised as a parent at	B
C	common law, why the rights inherent in such a finding	C
	cannot be recognised on the Birth Certificate and in a	
D	declaration of parental rights.	D
E	(2) Mr Wong asks, now that R can say that she has been	E
F	recognised as a parent at common law, why she or K need	F
G	anything else to establish the accepted fact of parenthood	G
	and why, if further legal powers are required, they cannot be	
	sought in guardianship.	
H	120. In other words, Mr Kat argues that the whole point of being	H
I	recognised and declared as a parent at common law is to give recognition	I
J	to the consequential rights (and obligations) that such a parent has.	J
K	However, Mr Wong argues that the declaration only reflects a matter of	K
L	fact i.e. genetic link, and has nothing to do with the legal rights or	L
	obligations of a parent. This difference of reading is presumably why	
M	no party thought it necessary to appeal from the HCMP Judgment.	M
N	121. As pointed out above, Mr Wong's summary submission was	N
	or expressly included that:	
O	(1) Only the gestational mother – here B – is recognised in law	O
P	as a parent for all purposes, with the attendant legal rights	P
	and obligations.	
Q	(2) The genetic mother – here R – is not recognised in law as	Q
R	a parent or additional mother for any purpose, so that her	R
S	legal rights and obligations as a parent at common law are	S
	taken away by the PCO.	
T	122. Hence the conundrum – and the question which I kept	T
U	posing during oral argument at the hearing: How can a person be a parent	U
V		V

A at common law, if there is a statute which states that person is not a parent
B at all, and another person is the only parent in law for all purposes?

C 123. Indeed, where the enactment of the PCO long preceded the
D birth of K and the making of the declaration by Au Yeung J, it is difficult
E to see how it can be said that R's legal rights and obligations as a parent
F at common law were "taken away by the PCO". Surely the effect of the
G PCO is that no such rights or obligations could ever have been held in the
H first place. That would seem to me logically to mean that either
(1) the declaration as to parentage at common law was simply empty, or
more likely (2) the making of such a declaration was in truth precluded.

I 124. It might be thought the primary purpose of the PCO is
J exactly to identify the parent in law for all purposes with, as Mr Wong put
K it, the attendant legal rights and obligations. That is why it is based
L upon the concept of and intended to cater for the best interests of the child.
M Obviously, the identification of the parent in law for all purposes is not
some empty shell or mere label. The identification is necessary and
appropriate because of the consequences which flow from it.

N 125. Indeed, it must be right that third parties dealing with
O "parents" are less interested in whether any particular parent might have
P been labelled a "legal parent/parent in law" than whether that particular
Q person has the relevant right and authority to deal with the third party in
R the material respect. The same point can obviously be made in relation
to the use of a birth certificate.

S 126. If, as Mr Wong put it, sections 9 and 11 of the PCO
T exclude R as being in law a parent for any purpose, it would seem to be
U
V

impossible for R to be declared to be a parent at common law. The common law is part of the law, though it is also often the case that the common law is overridden when a statute is enacted on the same topic. In this case, I would think the PCO was intended to have the effect of identifying a person's legal parentage, to the exclusion of the common law as might otherwise suggest another person as having the rights and authority which might flow from being a parent if the common law applies – in large part precisely to avoid any conflict or contest as to which person has the attendant rights and obligations which travel with being a parent.

127. So it seems to me that whilst R is obviously a “natural” parent, as recognized by Au Yeung J, I am not convinced that constitutes her a ‘parent at common law’, if there be such a thing. A ‘parent at common law’ is probably only shorthand for a person with common law rights, and perhaps a better description might be a ‘person with common law parental rights and authority’.

128. Anyway, I think the real purpose of looking to the common law at all is to seek to identify if anyone has any rights and if so what rights a particular person might have as parent. But if a person has no common law rights as parent, because those rights are abrogated/taken away by a statute, I do not think it can properly be stated that the person is a ‘parent at common law’. The person might be described in myriad other ways – natural parent, genetic parent, social or psychological parent, gestational parent – but if that person has no common law rights, it seems to be utterly pointless to describe him or her as a parent at common law.

129. I also do not think that Mr Kat is correct that R has the parental rights and obligations provided by the common law “regulated in part by statute”, where the particular statute makes it clear that the parental rights do not rest with R, but in fact and in law rest with someone else.

130. Therefore, and with some diffidence to an experienced family law judge, I respectfully disagree with Au Yeung J in so far as she appears to have looked at it from the angle of the person rather than the rights. Having found, on the basis of her interpretation of the PCO, that R could not bring herself within it – with the result that R could not establish any parental rights or obligations that flow from the PCO, when someone else could – I think that might have ended the analysis. In effect, a declaration was granted that did not really deal with a legal relationship at all, or at least not one with “legal consequences”. I fully understand the judicial inclination to mark in some way the genetic link and reality of R’s social and psychological parentage and so plainly to affirm the facts and make congruent K’s parentage with the intention and reality of the RIVF. However, in short, it is my view that the declaration granted in the HCMP Judgment was certainly to no practical effect (for any legal purpose), and was as a result probably simply wrong.

131. Hence, again with respect, I do not think there is much to be gained by any of the parties to these proceedings in seeking to place reliance on the declaration of parentage at common law. But the obvious consequence is that (1) Mr Wong cannot take the benefit of the declaration as somehow negating the need for the external establishment or corroboration or presentation of R’s position as a true parent of K, and (2) that may make it even more apparent that there is at least some

unfairness, and interference with K's various rights. On the other hand, it also means that the declarations as originally sought by Mr Kat in these proceedings – tied to the reference to parent at common law – would have no purpose or practical benefit.

132. However, the question of any potential relief can be addressed after considering the underlying merits of the judicial review challenge.

133. As an alternative approach, I can also cover the ground should it be thought that the declaration of parentage at common law had any actual legal or practical effect – in the circumstances where both sides have sought to place reliance on the existence of that declaration.

L. Approach to Constitutional Challenges

134. The general approach to constitutional challenges is well-established: see, for example, *Infinger v Hong Kong Housing Authority* (2024) 27 HKCFAR 498 at §§18-19. The approach involves five stages:

- (1) The Court identifies the constitutional right relied on and the impugned measure.
- (2) The Court then asks whether and on what grounds the impugned measure is said to encroach upon and thus to engage the right.
- (3) If there is such encroachment and the ground is that the encroachment excessively and unjustifiably infringes that right, the Court undertakes the *Hysan* four-step proportionality test to determine if this is indeed the case.

A		A
B	(4) If the impugned measure fails to satisfy the <i>Hysan</i> test,	B
C	the Court proceeds to consider whether any remedial order	C
D	should be made to preserve the validity of the impugned	D
E	measure in whole or in part.	E
F	(5) If no such remedial possibilities exist, the Court declares the	F
G	impugned measure unconstitutional and invalid.	G
H	135. Essentially the same approach applies to challenges based on	H
I	the constitutional rights to equality and non-discrimination. That is:	I
J	(1) The Court must first identify the rule or policy subject to	J
K	challenge and determine whether the rights to equality and	K
L	non-discrimination are engaged.	L
M	(2) Those rights are engaged if the Court is satisfied that the	M
N	differential treatment exists in relation to a person in a	N
O	comparable position.	O
P	(3) If the Court concludes in the affirmative, it will proceed to	P
Q	examine the justification advanced by the rule/policy-maker	Q
R	to sustain the differential treatment.	R
S	(4) This justification is scrutinised involving the <i>Hysan</i> four-step	S
T	test.	T
U	(5) Where the rule or policy cannot be so justified, the Court	U
V	will consider if it can nevertheless be preserved by a	V
	remedial interpretation.	
	(6) If not, the Court will strike it down as being unconstitutional	
	and invalid.	
	136. The four steps in the <i>Hysan</i> proportionality analysis are also	
	well known. It involves:	

- (1) identifying a legitimate aim;
- (2) establishing a rational connection between the challenged measure and its aim;
- (3) reviewing whether the measure is proportionate – where the Court will first ascertain the proper standard for review upon a spectrum ranging from the more stringent “no more than reasonably necessary” to the lesser “manifestly without reasonable foundations” test; and
- (4) verifying that a reasonable balance is struck between the societal benefits of the measure and the inroads made into the rights of the affected individuals.

137. I apply those settled principles below.

M. The Constitutional Rights Said to be Engaged

M.1 Relevant Provisions

138. As alluded to above, K relies on three sets of rights: (1) BOR 14 and BOR 19 (“Privacy / Family Right”), (2) BOR 20(2) (“Children’s Right”), and (3) BOR 20(1) and BL 25 (“Equality Right”).

139. The relevant provisions are:

- (1) Under the BOR:

Article 14: Protection of privacy, family, home, correspondence, honour and reputation

- (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.

A			A
B		Article 19: Rights in respect of marriage and family	B
C	(1)	The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.	C
D	(2)	The right of men and women of marriageable age to marry and to found a family shall be recognised.	D
E	(3)	No marriage shall be entered into without the free and full consent of the intending spouses.	E
F	(4)	Spouses shall have equal rights and responsibilities as to marriage, during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children.	F
G			G
H		Article 20: Rights of children	H
I	(1)	Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.	I
J			J
K	(2)	Every child shall be registered immediately after birth and shall have a name.	K
L			L
M		Article 22: Equality before and equal protection of law	M
N		All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.	N
O			O
P	(2)	Under the BL, BL 25 provides that “All Hong Kong residents shall be equal before the law”.	P
Q			Q
R		<i>M.2 BOR 14</i>	R
S	140.	In <i>Sham Tsz Kit v Secretary for Justice</i> (2023) 26 HKCFAR 385 at §§139-141, the Court of Final Appeal (“CFA”) decided	S
T		that BOR14 – irrespective of whether the matter is analysed from the perspective of “private life” or “family life” – includes a “right to	T
U			U
V			V

establish and develop relationships with others” (taken from *Oliari v Italy* (2017) 65 EHRR 26 at §103).

141. In this regard, it is not disputed between the parties that the term “family” or “family life” includes *de facto* family life, which is not confined to families based on marriage: see also *X, Y and Z v United Kingdom* (1997) 24 EHRR 143 at §§31-32. That is why the European Court of Human Rights (“ECtHR”) has pronounced that in assessing whether “family life” has been affected under BOR14, biological and social reality is to prevail over legal presumption: see *Kroon v the Netherlands* (1995) 19 EHRR 263 at §40.

142. It is also well-established that “family life” includes the “relations in general between parents and child”: see *Balaguer Santacana v Spain* (Comm No. 417/1990, 29.7.1994) at §10.2. That is why, when a cohabiting but unmarried couple bore a child, the ECtHR held that from the point of conception, there was a bond that amounted to “family life” between the child and his parents: see *Keegan v Ireland* (1994) 18 EHRR 342, §§44-45.

143. Reference can also be made to *FH v WB* [2019] 5 HKC 99 at §96, where Au Yeung J accepted the submissions that:

- (1) The term ‘family’ should be interpreted broadly. It does not refer solely to the family home during marriage or cohabitation, but also to the relations in general between parents and a child.
- (2) The existence of family life is a question of fact depending on the existence in practice of close personal ties, such as

life together, economic ties and a regular and intense relationship.

(3) Family life existed between two parents and their children even though the parents had never married, did not cohabit and lived in separate houses.

(4) The government has positive duties to adopt legislative, administrative or other measures to protect the family.

(5) Respect to family life includes a positive obligation which requires the government to ensure that *de facto* relationships are recognised and protected by law.

144. That particular case related to an application for a parental order made out of time under the PCO. At §97, Au Yeung J emphasised that, once the existence of family life is established as a matter of fact, the Court must protect that life. Therefore, she thought that to refuse to grant a parental order merely because the application was made out of time would be an unlawful interference with the family life of not only the child but also the commissioning parents. Indeed, she said that to have such fundamental rights extinguished six months after a child was born out of surrogacy is absurd.

145. In *Sham Tsz Kit*, the CFA also accepted at §142 that as a matter of lived experience, BOR 14 may require the Government to provide a framework conferring legal recognition on those relationships for the purposes of meeting “basic social requirements, and to provide them a sense of legitimacy”, so as to dispel any sense that they belong to an “inferior class of persons whose relationship is undeserving of recognition”.

146. Thus, the Court accordingly held at §§142-145 that the absence of a legal framework for the recognition of relationships for same-sex couples in Hong Kong constituted a hindrance of, or an interference with, their BOR 14 rights.

147. It seems to me that the ambit of BOR 14 on this aspect is relatively straightforward. A child has a right to establish and develop a relationship with his parents, including his parent in fact (or, if applicable, his parent at common law). If legal recognition of his relationship with his parent is required for him to meet “basic social requirements” or dispel any notion that he is inferior because his relationship is not recognised, its absence would identify and constitute an interference with his BOR 14 rights.

148. Mr Wong tries to narrow the ambit of this first aspect of BOR 14. He contends that BOR 14 is engaged only if there is a complete absence of a system of legal recognition for that relationship. Here, he says, parental recognition could be provided by a guardianship order under section 3 of the Guardianship of Minors Ordinance Cap 13 (“GMO”). That section deals with ‘General principles’, and amongst other things emphasises that in relation to the custody or upbringing of a minor, in any proceedings before any Court the Court shall regard the best interests of the minor as the first and paramount consideration. It also specifically relates to the rights and authority as the law might allow to a mother or father, depending on context (where the GMO defines “parent” as meaning “father or mother”).

149. Mr Wong also submits that the common law can provide necessary legal recognition. He cites *D v France* (App no. 11288/18,

16 July 2020) in support, but I do not think that supports his argument. In that case, the applicants were a heterosexual couple who bore a daughter in Ukraine via a gestational surrogacy arrangement in 2012. The French authorities refused to enter into the French register the full details of the Ukrainian birth certificate, which registered the couple as father and mother without any mention of the woman who had given birth to the child. Only the legal father-child relationship was recorded. For the mother, the French authorities held that this could be established via adoption. The Fifth Section of the ECtHR held that the French authorities' refusal to register the foreign birth certificate (insofar as it concerned the mother) constituted an interference with the child's right to privacy: see §41. It reached that conclusion without considering the availability of adoption. But there was no suggestion that French adoption would not provide all the "parental rights and obligations" on the adoptive parent.

150. Further, the argument does not sit well with *Sham Tsz Kit*. There, the CFA stressed that legal recognition may arise from the need to dispel any notion that he or she is a second-class citizen. Thus, the fact that K might have recourse to another framework of legal recognition of his relationship with R – such as the guardianship regime – does not remove the sense of inferiority he might have from being denied access to the clearly more conventional framework for the recognition of legal parent-child relationships – the PCO. In that regard, I think Mr Kat and Ms Tam are right to emphasise that what is at stake is plainly K's "dignity": see *Q & Tse Henry Edward v Commissioner of Registration* (2023) 26 HKCFAR 25 at §§42-46. Reference can also be made to §92, where it was recognised that when an authority might be triggered to ask numerous questions and perhaps have doubt as to a person's standing,

A that might lead to embarrassment, humiliation, violation of dignity and
B invasion of privacy.

C 151. I can return later to the question as to whether a guardianship
D order is sufficient in both recognising and protecting a “parent-child”
E relationship, as matters of form, substance, and practical reality. But, in
F any event, BOR 14 has the further crucial aspect of protecting an
G individual’s personal identity as a human being, which includes the
H “identity of one’s parents” and the fact of biological parentage: see
Odievre v France (2004) 38 EHRR 43 at §29; and *Mennesson v France*
(App no. 65192/11, 26 June 2014) at §§96-100.

I 152. The *Mennesson* case involved a husband and wife who were
J unable to have a child of their own because the wife is infertile. After
K a number of unsuccessful attempts to conceive a child using IVF with
L their own gametes, the husband and wife decided to undergo IVF using
M the gametes of the husband and an egg from a donor, with a view to
N implanting the fertilised embryos in the uterus of another woman.
O Accordingly, they went to California, where the process is legal, and
P entered into a gestational surrogacy agreement. In due course,
Q the Californian court ruled that the husband would be the “genetic father”
R and the wife the “legal mother” of any child to whom the surrogate
S mother gave birth within the following four months. The judgment
T specified the particulars that were to be entered in the birth certificate and
U stated that the husband and wife should be recorded as the father and
V mother. Twins were born, and their birth certificates were drawn up in
accordance with those terms. But the French Authorities refused to have
the particulars of the birth certificates entered in the French register.
At §§96-99, ECtHR observed and stated, amongst other things, that:

A		A
B	(1) Respect for private life requires that everyone should be able	B
C	to establish details of their identity as individual human	C
D	beings, which includes the legal parent-child relationship.	D
E	(2) That is an essential aspect of the identity of individuals.	E
F	(3) As the law then stood, the twins were in a position of legal	F
G	uncertainty.	G
H	(4) Whilst it is true that a legal parent-child relationship with the	H
I	husband and wife is acknowledged by the French courts	I
J	in so far as it has been established under Californian law,	J
K	the refusal to grant any effect to the US judgment and to	K
L	record the details of the birth certificates accordingly shows	L
M	that the relationship is not recognised under the French legal	M
N	system.	N
O	(5) In other words, although aware that the children have been	O
P	identified in another country as the children of the husband	P
Q	and wife, France nevertheless denies them that status under	Q
R	French law.	R
S	(6) That is a contradiction of the nature undermining the	S
T	children's identity within French society.	T
U	(7) Whilst the father is the biological father and French, the	U
V	twins face a worrying uncertainty as to the possibility of	V
	obtaining recognition of French nationality, which may have	
	negative repercussions on the definition of their personal	
	identity.	
	(8) The fact that the twins are not identified under French law as	
	the children of the husband and wife also has consequences	
	for that inheritance rights.	
	(9) The Court can accept that France may wish to deter its	
	nationals from going abroad to take advantage of methods of	

assisted reproduction that are prohibited on its own territory, but the effects of non-recognition in French law of the legal parent-child relationship between the children thus conceived and the intended parents are not limited to the parents alone.

(10) They also affect the children themselves, whose right to respect for their private life – which implies that everyone must be able to establish the substance of his or her identity, including the legal parent-child relationship – is substantially affected.

(11) Accordingly, a serious question arises as to the compatibility of that situation with the children's best interests, respectful which must guide any decision in their regard.

153. In its conclusion at §100, the Court stated that the analysis takes on a special dimension where, as in that case (and as in the case of K here), one of the intended parents is also the child's biological parent. Having regard to the importance of biological parentage as a component of identity, it cannot be said to be in the interests of the child to deprive him or her of a legal relationship of this nature where the biological reality of that relationship has been established and the child and parent concerned demand full recognition thereof.

154. It seems to me to be plain that K's BOR 14 rights are engaged.

M.3 BOR 19

155. Mr Wong submits that the ambit of BOR 19(1), relied upon by Mr Kat, is limited to the married family, or a family of a heterosexual

couple who have a right to marry each other in Hong Kong. This is on the basis that:

- (1) BOR 19(1) must be construed together with, and in the context of, BOR 19(2).
- (2) BOR 19(2) protects the right of men and women of marriageable age to marry and found a family.
- (3) Marriage is limited to heterosexual couples in Hong Kong.
- (4) The right to found a family is part of the composite right of men and women of marriageable age to marry, and is thus limited to heterosexual couples.
- (5) Accordingly, the family that is referred to in BOR 19(1) must be a family founded by a heterosexual couple.

156. I accept that the various provisions as be read together and in context. But I reject Mr Wong's offered interpretation. As I read it, the purpose of BOR 19(2) is simply to preclude the state from imposing disproportionate restrictions on heterosexual persons' right to marry and found a family. These rights have been described as "strong".

157. However, I do not think that BOR 19(2) prevents same-sex couples from founding their own family – though it may be that if there are significant restrictions imposed on same-sex couples from marrying and founding a family, they may not be able to rely on the provision to declare those restrictions unconstitutional. In any event, where as a matter of reality it is plain that same-sex couples can and do create families, it is entirely unclear why such a family should not be entitled to protection under BOR 19(1), not least when such a family is already entitled to "protection by society and the state" under BOR 14.

158. I think this interpretation is also supported by BOR 19(3) and (4). Those provisions seem to me to emphasise the real thrust of BOR 19 as a whole, namely to preserve the rights – and the equality of rights and responsibilities – to parties to a marriage, when the marriage is intended, extent or upon its dissolution. But the requirement that provision should be made for the necessary protection of any children cannot seriously be taken to preclude the need to protect children of parents who have not entered into a heterosexual marriage.

159. Further, I do not think the jurisprudence cited by Mr Wong – including *Rees v United Kingdom* (1987) 9 EHRR 56, *Kozak v Poland* (2010) 51 EHRR 56 and *Emonet v Switzerland* (2009) 49 EHRR 11 – take matters much further. The ECHR – in particular, Article 12 – does not have the equivalent of BOR 19(1) in its text, and BOR 19(1) is the constitutional provision relied upon by K which falls to be interpreted.

160. I accept that K's BOR 19 rights exist and are engaged.

M.4 BOR 20

161. The proper ambit of BOR 20(2) was also subject to debate. In his submissions, Mr Kat contends that BOR 20(2) entitled K to register his birth particulars including the identity of his parents. Mr Wong contends otherwise, on the basis that the only requirement is for the child to be registered immediately after birth and to have a name.

162. I note that, on its face, BOR 20(2) does not require the State to register the details of a child's genetic mother. There also seems to be some force in Mr Wong's criticism of the citation of irrelevant cases which do not actually determine the ambit of BOR 20(2). For example:

(1) *Re P (Parentage: Blood Tests)* [2010] 4 HKLRD 497 and *Jäggi v Switzerland* (2008) 47 EHRR 30 only deal with compelling the state to provide the “truth about his or her parentage”. The first case concerned an infant born in Beijing in June 2006 who applied for a DNA test under section 13 of the PCO so to establish his genetic link with X, such that he could inherit part of X’s estate as his natural illegitimate son under the Intestates Estates Ordinance Cap 79. The second authority concerned a Swiss international who was prohibited from conducting a DNA test on the remains of his putative biological father. Neither authority concerned the question of registration of a child’s birth particulars – certainly not those relating to the genetic parent.

(2) The reliance on *CCPR General Comment No. 17* (1989) is also misplaced. Indeed, the Office of the High Commissioner for Human Rights opined that Article 24(2) of the ICCPR – the material equivalent of BOR 20(2) – aimed to “reduce the danger of abduction” or the “sale or traffic of children” – issues that are plainly not in play here.

(3) The *FH v WB* case concerned whether the Court had the power to extend time for parents to make a parental order under section 12 of the PCO. It did not concern registration of particulars in a birth certificate. It is thus unclear how the citation of *Au-Yeung J* at §100 – namely, that a “child born out of surrogacy is as much entitled to his identity and status in a family as a child born naturally” – would help determine the ambit of BOR 20(2).

163. I think it can be accepted – as commented upon in *Nowak’s CCPR Commentary* 3rd ed at p.694 – that the right of each new-born child

A to immediate registration of his or her name in a State register of births is
B closely related to the right of every person to his or her own identity,
C which follows from the protection of privacy, and the right to recognition
D as a person before the law. It is only by registration that the existence of
E a new-born child is legally recognised. I note the commentary also
F identifies that State parties have positive obligations to establish an
G appropriate legal framework and to provide services of registration, as
H well as the negative obligation to respect the rights and duties of parents
I to provide direction and guidance in the exercise by the child of these
J rights, namely to choose a proper first family name and to provide the
K required documents from registration. However, I do not think those
L matters identify any specific requirement for the registration of genetic
M parents. Indeed, it seems to me that this question is essentially wrapped
N up in the question as to the proper requirement of the PCO, and the
O constitutional challenge to it.

L 164. Nevertheless, it seems to me that BOR 20(1) is probably
M engaged.

N *M.5 BOR 22*

O 165. The same is true of BOR 22, though I doubt it separately
P adds substantially to the analysis in the circumstances of the current case.

Q 166. I also accept Mr Kat's submission that BOR 25 and BOR 22
R not only condition individual rights but are themselves free-standing
S rights and not dependent on the Court first finding that some other
T constitutional right is engaged.

N. *Infringement of the Rights Engaged*

167. It is convenient to look first at the circumstances of the Birth Certificate. On the assumption that the declaration that R is a parent at common law has some practical effect and legal value – and based as it was upon the idea that R is not only a genetic parent, but a social and psychological parent, where it is in the best interests of K that she be recognised as a parent, with any attendant legal rights and authority regarding K – it is nevertheless impossible to register R as K’s parent. That seems to me to be a clear interference with the rights engaged. In essence, without a birth certificate which accurately records R as K’s parent in any form, he is unlikely to be able to meet the basic social requirements if and when they arise.

168. The fact is that K is a minor. Most of his decisions will have to be made through his parents. In order for those decisions to be made, public and private institutions alike would likely ask for proof of parental status before they accept the validity of the decisions, particularly when they are of real importance such as in the context of health and education. As Ms Tam identified, the Birth Certificate is a vital official identification document, to which one might expect public and private administrators to have due regard. When they do, they will not find R named as a parent, but see that K currently has only one parent, namely B.

169. No doubt prudent administrators will be cautious, and takes steps to deal only with a parent who can be readily ascertained to have the appropriate legal rights. The absence of R from the Birth Certificate will at least likely cause real doubt as to whether she is a parent within the family unit, with any right to give instructions or take decisions as

regard K. It is not difficult to think that administrators will, acting sensibly, wait for B. Increasingly, as K becomes older, he will likely become cognisant of such a situation. Even if resolved in some way, it can be seen that he will have experience some inconvenience, embarrassment, and potential harm to his dignity. This is the sense of inferiority which could be caused by the lack of a legal recognition framework, of the sort referred to by the CFA in the *Sham Tsz Kit* case. On other occasions, any delay in decision-making could perhaps have irreversible prejudicial consequences for K. Some decisions cannot wait, the most obvious being as regards urgent medical treatment.

170. I do not think the answer is to suggest that K (or R) can or should carry around with them the HCMP Judgment or Order. Indeed, that makes of course further confusion and potential delay. Further, K is still in the formative years where he is developing his own belief system and sense of worth, which can be readily impacted by administrative and practical hurdles caused by the entries (and absence of entries) on his Birth Certificate.

171. Nor is it a sufficient answer for the Government to say that the Birth Certificate is unnecessary in everyday life, but only needs to be used on a few occasions. This misses the point. It is not the regularity of interference which matters, but the fact of interference – here likely to be on significant occasions. In short, the indifference arises due to the lack of framework of recognition.

172. Further, it can be said that K's privacy and family rights are interfered with because his personal identity – undoubtedly including the parent-child relationship in fact and law (and, if applicable, at common

law) has not been accurately manifested on the Birth Certificate. In essence, the Birth Certificate which indicates that K as one, and only one, parent is not accurate.

173. Leaving aside the declaration that R is a parent at common law, it is the Government's own case that the effect of sections 9 and 11 of the PCO is to take away from R any parental rights (if they would otherwise have arisen as a result of the common law, or on any other basis). Consequently, K would lose other rights, entitlements and protections, such as the right to be maintained by R under section 10 of the GMO and sections 3(1)(v) and (vi) of the Inheritance (Provision for Family and Dependents Ordinance Cap 481. Those are also interferences with K's privacy and family rights.

174. I have already explained above, why do not think that the Government's position that sections 9 and 11 of the PCO do not affect R's status as a parent of K at common law as declared by the Judge holds any water. If R has no common law rights, she has no status as a parent at common law. I do not accept M Wong's attempt to divorce status from legal rights in this context.

175. Nor is it an answer to the interference with the rights engaged to suggest that there is no impediment to R being represented, or held out as, a mother or parent of K in everyday life. Mr Wong seeks to emphasise that K's family relations with R are preserved and not interfered with, and he says the fact that K can be accepted, and is in fact accepted, as part of his family and could (for example) worship the ancestors of R, does not depend on recognition in law or registration. Mr Wong points to, for example, an Advisory Opinion dated

10 April 2019 requested by the French Court of Cassation, which opined that the child's right to respect for private life does not require such recognition to take the form of entry in the register of births and another means, such as adoption of the child by the intended mother, may be used. Nevertheless, Mr Wong accepts in the context of RIVF that adoption is not an option, but he says the factual parent-child relationship based on genetic link is established and the establishment of legal parental rights and obligations can be achieved by means of a guardianship order if (and he emphasises the word "if") it is in the best interests of the child. Mr Wong also says that K does not need a birth certificate to establish the truth about his parentage, and the genetic or biological link with R.

176. Mr Wong emphasises that the PCO cannot be read in isolation but as part of the Hong Kong legal system, which also includes the Court's inherent jurisdiction to appoint a guardian for the child, which provides an adequate legal framework for the protection of and support for all children born out of RIVF vis-a-vis the genetic mother, in that such legal obligations can be provided by way of a guardianship order if the best interests of the child so require. The Hong Kong legal system as a whole, he says, provide sufficient protection for children born out of the RIVF procedure.

177. On the other hand, it has also previously been found that the fact that a party in the same-sex union may be required to apply to the domestic court for rights or protections arising from the basic needs of a couple can itself constitute a hindrance to respect their private and family life.

178. On the other hand, Mr Wong says that it is not suggested by the Government that a guardianship order would provide for the identity of R as a parent of K. That, he says, comes from the status arising from the fact of the genetic link and the *de facto* familial relationship, which the PCO does not take away.

179. Mr Wong suggests the recognition of a person as a parent of a child involves the following: (1) there are able to live together, and to care for each other, and to acknowledge each other, as a family; (2) they can act vis-a-vis, and represent to, the outside world, factually and socially, as parent and child. Mr Wong says K and R are able to do those things. Mr Wong also says that legal identity – as distinct from or on top of factual and social identity – is relevant only to the extent where there are rights and obligations between the parent and the child. But this can be achieved by a guardianship order as between the genetic mother and the RIVF child.

180. Leaving aside the question as to whether R should really have to show that giving her legal parental rights and obligations is in the best interests of K, as it happens she has done so: see the HCMP Judgment. Further, Au Yeung J found that it is unrealistic to think that K will introduce R as his “genetic parent” – or even “social and psychological parent” – in real life. But even if he did, that would not cut any ice with someone concerned to establish R’s legal rights and authority to deal with K’s interests, or to deal on his behalf.

181. In any event, this is all a follow up source of confusion, embarrassment and stress arising from the fact that the parent-child relationship is neither shown on the Birth Certificate not recognised under

A the PCO and the law. It is also not difficult to envisage possible and
B growing resentment of the situation, which may impact the relationship
C with K's parents in future. In this context, Mr Kat referred to *R (Fawad*
D *Ahmadi and Zia Ahmadi)* [2005] EWCA Civ 1721 at §18, where it was
E stated that there is ample authority for the proposition that the obligations
F require a State not only to refrain from interference with existing life, but
G also from inhibiting the development of a real family life in the future.
H This is a further answer to Mr Wong's submission that the Provisions and
I the Decision do not currently substantially impede K's everyday
J interactions with his family or with third parties.

I 182. Nor is it an answer to suggest that there is no full
J interference. The fact that K's privacy and family rights are not
K interfered with in certain facets or aspects of his life does not mean that
L there is no interference at all, nor make less significant – let alone cure –
M such interference with those rights as does exist.

M 183. I have also already referred to the *Mennesson* case, which
N emphasised the serious restriction on the identity and the right to respect
O for private life where children conceived through surrogacy arrangements
P were refused the grant of legal recognition to their relationships with their
Q parents. This was all the more so where there was in reality a biological
R relationship between the parent and child, of which both were demanding
S full recognition. In K's case, there is not only the biological reality but
T the social and psychological reality and at least the recognition that it is in
U K's best interests for R to be publicly recognised as, and declared to be,
V his parent.

184. I am satisfied that there is encroachment on or infringement of the rights engaged.

O. Hysan Analysis

O.1 Legitimate Aim and Rational Connection

185. I have set out above the Government's evidence, which seeks to identify any relevant legitimate aim and rational connection between that aim and the impugned measures.

186. In their respective submissions, Mr Kat and Ms Tam sought to parse Ms Cheng's evidence to elicit the stated legitimate aims and or justification for the Government's stance. Mr Kat suggested that the arguments appeared to be:

(1) an 'automatic conferral argument', where it was suggested that K is in effect asking for automatic conferral of all parental rights and obligations to a female gametes parent at the same time as the gestational mother, which Ms Cheng suggested may not necessarily or invariably be in the best interest of the child involved;

(2) a 'flexibility argument', where it is said there is a legitimate need to preserve flexibility to cater for what is in the best interest of a child in different and possibly changing circumstances;

(3) a 'no social consensus argument', where the introduction of 'dual motherhood' may not be accepted by Hong Kong society in general;

(4) a 'consistency argument', where there are many interlinked pieces of legislation and fundamental systems underlying

and weaving together the very social fabric of Hong Kong, with a consequent need to ensure consistent policy across the board;

(5) the ‘other options/guardianship argument’, where there is said to be sufficient protection of the child’s rights and interests in existing law, such as in obtaining guardianship orders and the ability to make a will; and

(6) the ‘policy argument’, where it is said that the Government should enjoy a wide margin of discretion to formulate its “policy choice” in matters concerning the parent and child relationship.

187. Ms Tam identifies overlapping but differently formulated points of argument apparently raised on behalf of the Government, being:

(1) the ‘family unit aim’, where the Government is concerned about the redefinition of the legal framework, to introduce the novel concept of dual motherhood, and to alter the basic notion that a child cannot have more than one legal “father” and one legal “mother” and no other “parent”;

(2) the ‘flexibility aim’, where it is said that the ability of same-sex couples to seek a guardianship order on a case-by-case basis serves the legitimate aim of preserving the greatest flexibility and what can and should be done in the best interest of a child born from RIVF technology, at all stages of the child’s life when he or she is a minor according to actual circumstances; and

(3) the ‘consistency and certainty aim’, where it is said by the Government that there is no room for inconsistency and uncertainty about who should be regarded on the birth

register as legal parents, so that limiting registration to only legal parents under the PCO is necessary.

188. As to those various points, the following things can be said. Further, I keep in mind that Mr Wong cautions about consideration of rights in the abstract. For example, he says that the authorities require: (1) legal existence and personality, which K has; (2) a name, which K has; (3) the entitlement to knowledge of real parentage, here the role of R and B, which K has; (4) the ability to live as a family, factually and socially, which K has; (5) proof of the relationship, which K has from the DNA Report; and (6) the rights to care and protection from the parent, which K has available from our within an existing legal framework (i.e. guardianship).

189. First, I reject Mr Kat's suggestion that the Government has wrongly conflated parental rights and obligations with status. I accept that in some circumstances it may be right that the notion of a status does not necessarily carry with it certain equal rights and obligations. However, as I have sought to explain above, it seems to me that the whole purpose of identifying who is a legal parent in this context is primarily to identify who has the legal parental rights and obligations as a parent (and, at least implicitly, who does not).

190. It is surely a principle of law that parental rights or powers of control of the person and property of a child exist primarily to enable the parent to discharge his or her duty of maintenance, protection, and education until the child reaches an age as to be able to look after himself and make his own decisions. Though I recognise that the status of

parent lasts beyond a child's minority, I do not see designation – deemed or otherwise – as a legal parent as merely an empty meaningless label.

191. I also accept that a person's legal standing as a legal parent and child may not necessarily tell much about the importance at any given time of that person to the child's welfare. But I do think it identifies (and is meant to identify) that the legal parent has the rights and obligations relating to the child's welfare. On the other hand, I see no particular criticism which can be levelled if the effect of identifying a legal parent is to grant that parent, automatically, the legal rights and authority applicable to that status.

192. But, if the declaration that R is a parent at common law has any legal effect, then it means that there was no automatic conferral of parental rights and obligations. Rather, by reference to the evidence from international social welfare office, a legal opinion from South Africa, and other evidence contained in several affirmations, Au Yeung J accepted that R (together with B) is in a stable and committed relationship, focused on and well able to care for K. She found K to be not just a genetic parent, but also a real, social and psychological parent. In essence, it might be said that R was "vetted" as to whether she should have parental rights and authority over K, and it was found – resoundingly so – that she should.

193. I agree that the flexibility argument does not identify a legitimate aim. There is also great force in Mr Kat's submission that the categorical denial of legal parental status to persons such as R – who has even been declared to be a parent of common law, with whatever that entails – is the antithesis of flexibility. I note Mr Wong's argument that

A the flexibility point has been misunderstood, and the flexibility is as to
B the circumstances when a person should be granted parental rights.
C But, it seems to me that to proceed on the basis at the first stage,
D irrespective of the actual circumstances of the case and the relationship
E between the parties who are parents, and their respective relationship with
F the child, demonstrate rigidity not flexibility. I also see great force in
G the rhetorical question posed as to why there should be flexibility in
H recognising same-sex couples as parents but not heterosexual couples.
I For sure, heterosexual parents have no monopoly on good parenting, and
J it is as a matter of generality difficult to understand why same-sex parents
K should somehow prove that their parenting is in the best interests of the
L child, when the vast majority of heterosexual parents do not have to jump
M any such hurdle.

N 194. I agree that the social consensus argument does not amount
O to a legitimate aim. It has been rightly consistently rejected in previous
P cases, including *Leung Chun Kwong v Secretary for Civil Service* (2019)
Q 22 HKCFAR 127 at §§56-57. The very application of the adoption of
R consensus by a Court required to adjudicate on fundamental rights begs
S important questions of legitimacy. Resort to the will of the majority
T cannot dictate the decisions of a Court whose role is to interpret universal
U and indivisible human rights, especially minority rights. The prevailing
V views of the community, even if they can be confidently gauged in the
first place, and even taking into account that the legislative body might be
said to present a majority view, are unlikely relevant to a consideration of
rational connection or justification.

195. Nor is the consistency argument a legitimate aim where
fundamental rights and core values are engaged. A desire for

consistency does not obviate the need to subject the statutory provision for the Government's stance in any particular case to constitutional scrutiny.

196. There is a further issue arising out of the claimed need for consistency. It will almost always be possible to identify that if a change is made to one part of a regime, that will or may create inconsistencies with other parts of that regime. But that seems to me to identify the need in circumstances such as the present for there to be a comprehensive review of the entire regime, and for changes to be made to the entire regime in a way which provides for consistency across it. I think it is unattractive to rely on the lack of consistency which arises from focus on one aspect of the overall position, when that lack of consistency might readily be met by widening the area of focus so as to cover the overall position.

197. As to the other options/guardianship argument, I accept that in numerous previous decisions the Courts have made it clear that neither guardianship, wardship nor adoption can provide the recognition central to the Child's identity and to the parental relationship. Recognition on the birth register and a parental order share the similarity that each gives to the child (as well as the subject parent) a legal status for life – and (subject to judicial intervention) the relevant attendant rights and obligations. But, a guardianship order lasts only until the child is 18, and an adoption order does not recognise the genetic link.

198. I also agree that the policy argument is at least circular, and the fact that a matter may involve a policy choice cannot of itself provide

A the necessary legitimate aim or justification for an unconstitutional
B measure.

C 199. I can add something on the idea of ‘dual motherhood’ or
D ‘split motherhood’. But before I do so, reference can be made back to
E the *Re G* case, where Baroness Hale emphasised the importance of
F genetic parenthood. As she pointed out, this can be of deep significance
G on many levels. Whilst she focused on a father, and the knowledge that
H this is ‘his’ child which can bring a very special sense of love for and
I commitment to that child which will be of great benefit to the child, I see
no reason why that is of any less importance to a mother, or any less
benefit to a child if the mother knows that this is ‘her’ child.

J 200. Indeed, as Baroness Hale also pointed out, such a child reaps
K the benefit not only of that special sense of love and commitment, but
L also of knowing his own origins and lineage, which is an important
M component in finding an individual sense of self as the child grows up.
N The knowledge of the genetic link is also an important component in the
O love and commitment felt by the wider family. These points seem to me
P to be absolutely manifest in the situation as regards R and K, and with B
and their wider families – as was also expressly recognised in the HCMP
Judgment.

Q 201. On the matter of – the supposed problem of – ‘split
R motherhood’ or ‘dual motherhood’, I think this is something of a red
S herring. The withholding of parental rights and obligations from R, and
T the resultant impact on K, is not what caused any split or dual
U motherhood – which occurred when the RIVF led to a child being
V conceived using the egg of one parent but brought to term by gestation in

A the other parent. So, at least the conferral of parental rights and
B obligations has nothing to do with the inception of split motherhood.

C 202. I also think this again focuses on “mother” rather than
D “parent” – when it is ordinarily recognised that there can be enormous
E potential benefit from there being split or dual parenthood. Though not
F in every case, the ability of parents to split their duties and
G responsibilities towards their child, and the existence of two parents
H who can provide for, care for and nurture the child, is likely to be seen as
I a substantial tangible benefit for the best interests of that child. It has
J often been said that parental stereotypes have no place today: see, for a
K fairly early example, *H v H* (unreported, CACV 42/2002, 6 September 2002)
at §13. It is also well-settled that the sexual orientation of a parent does
not necessarily have an adverse impact on the child’s interest: see, for a
recent example, *B v B (Adoption)* [2025] 1 HKLRD 241 at §36.

L 203. Hence, if the right idea or concept is one of ‘split
M parenthood’, or ‘dual parenthood’, that would unlikely be seen as
N a problem or an issue giving rise to any real concern.

O 204. In this case, K does not ask that R be declared his “mother”
P – whether as a second mother, or in place of his “mother”. He wants the
Q ability to seek a declaration that R be declared his “parent” in law. It
R may also be noted that Au Yeung J did not give a declaration that R is a
‘mother at common law’, and instead focused on the status and rights of a
parent.

S 205. This leads on to another point, where the focus of the
T argument on behalf of the Government requires concentration upon the
U
V

idea of there being only one “mother”, who is the gestational mother/parent, with all the importance that that relationship entails. But, I doubt that it could be seriously argued that the importance of the relationship generated as a result of a mother carrying a child to term is in any way diminished by the existence of another parent (usually a father). Of course it is possible to point out that a “father” is different from a “mother”, and they have different roles both in the creation of the child and in the nature of their relationship with the child after birth. Nevertheless, there is clearly room for both – without adversely impacting or diminishing the role of either, and without necessarily adversely impacting the best interests of the child. This is not a zero-sum game.

206. Therefore, it seems to me that there need not be any issue or concern if the second parent is another woman. The gestational mother remains that, and the particular special relationship between her and the child is unaffected by the existence of another parent. But the other parent, genetically connected to the child, has a different – probably complimentary – special relationship with the child. This is what I think was recognised by Baroness Hale in the passages to which I have made reference above. This is what R has with K, and what K has with R.

207. In this regard, Mr Wong referred to the case of *RF v Germany* (App no. 46808/16, 12 November 2024). In that case, the ECtHR recorded Germany’s submissions that the authorities enjoyed a wide margin of appreciation, where the rights at issue concerned sensitive moral and ethical questions such as the legal status of same-sex couples, the legality of egg donation, and the dissociation between biological and legal motherhood, where there is no European consensus

on those matters. Where states in principle recognise the existence of a second legal mother, such recognition is not based on genetic motherhood, but rather on other factors relating to the relationship between the woman seeking recognition and the birth mother.

208. At §§85-95, the court made the following observations and statements:

(1) A State may, without infringing the provisions of the Convention, enact legislation on matters that significantly affect private life without requiring case-by-case balancing of competing interests, and may instead lay down a general rule designed to promote legal certainty.

(2) Such an approach may be especially necessary in situations involving medically assisted reproduction, where several individuals may potentially claim parental rights over a child, and where it is not possible for the legislature to foresee all eventual scenarios.

(3) The refusal to recognise the genetic link between parent and child could legitimately extend to the specific situation of the applicants in the case.

(4) However, the mere fact that the law is in principle compatible with the requirements of the Convention does not exempt it from scrutiny as to the concrete effects it produces in an individual case, including where the law imposes a general and absolute prohibition.

(5) It is therefore necessary to assess the consequences of the refusal to recognise the genetic link, where the child should not, as a general rule, have to bear the consequences of

A			A
B		actions for which they national authority places blame or responsibility on the parent(s).	B
C	(6)	The best interests of the child must always prevail when the situation of a child is at stake.	C
D	(7)	The exclusive attribution of the status of legal mother to the gestational mother serves not only a general deterrent purpose with respect to prospective parents: it also aims to ensure the unequivocal and immediate attribution of the child to a legal mother and to protect the child's welfare in the event of a conflict between two individuals both claiming to be the child's mother.	D
E			E
F			F
G			G
H			H
I	(8)	The claimed legislative objective of avoiding split motherhood may be of little relevance depending on the circumstances.	I
J			J
K	(9)	The genetic parent was able legally to adopt the child, and in fact availed herself of that possibility. That process enabled the authorities to carry out an individual assessment of the child's best interests and to respond appropriately in view of the potential for conflict between the applicants.	K
L			L
M			M
N	(10)	In cases concerning the lack of recognition under domestic law of a parent-child relationship lawfully established abroad between children born through surrogacy and their intended parents, an effective mechanism must be available to allow for the recognition of that relationship.	N
O			O
P			P
Q	(11)	An adoption procedure may satisfy that requirement, provided that its conditions are appropriate and it enables a prompt decision, in order to prevent the child from being left for an extended period in legal uncertainty as to that relationship.	Q
R			R
S			S
T			T
U			U
V			V

(12) That conclusion applies equally where the child was conceived using the gametes of both intended parents (intended father and intended mother).

(13) Those conclusions are equally applicable where the parents use the medically assisted reproduction technique prohibited in the respondent State, but legal in another country, and where the child's birth is governed by the domestic law of the respondent State.

209. He also referred to the case of *SH v Austria* (2011) 52 EHRR 6. In that case, the German Government made third-party submissions (§53). It suggested that biologically, only women were capable of carrying a child to term. Splitting motherhood into a genetic and biological mother would result in two women having a part in the creation of a child. This would be an absolute novelty in nature and in the history of mankind. In legal, historical and cultural terms, the unambiguousness of motherhood represented a fundamental and basic social consensus and for this reason alone, was considered indispensable by German legislators.

210. The suggestion was even that split motherhood and "the resulting ambiguousness" of the mother's identity might jeopardise the development of the child's personality and lead to considerable problems in his or her discovery of identity, so that it was contrary to the child's welfare. With respect, while of course some people might have that belief, I doubt that there is real empirical evidence to support it and there is certainly room for doubting it or not agreeing with it. I repeat my comments above. In any event, of course in the circumstances of the

particular case relating to K, Au Yeung J has already found to the contrary.

211. Further, the response of the ECtHR to those and other submissions (§81) was first to recognise the aim of maintaining legal certainty in the field of family law by keeping a long-standing principle as one of its basic features to have merit. Nevertheless, unusual family relations in a broad sense are well known to the legal orders of the contracting States. Family relations which do not follow the typical parent-child relationship based on a direct biological link, are nothing new and have already existed in the past, since the institution of adoption, which creates a family relationship between persons which is not based on descent but on contract, for the purpose of supplementing or replacing biological family relations. From this matter of common knowledge the Court concluded that there are no insurmountable obstacles to bringing family relations which would result from the successful use of the artificial procreation techniques at issue into the general framework of family law and other related fields of law.

212. This seems to me to recognise that there are bound to be advances in technology and in society, which expand the nature of family relations. Indeed, it also seems to me that what may have been regarded as “unusual” in 2011 is increasingly less unusual as time passes, and will continue to be so. At some point, it seems to me that it should be recognised that this is a nettle which must be comprehensively grasped.

213. Ultimately, I agree that whether there is a legitimate aim and whether it is rationally connected must be addressed through the lens of what is in the best interests of the child. I accept, as did Au Yeung J

(at HCMP Judgment §35), that the PCO was enacted with the best interests of the child in mind. Mr Wong says the PCO regime, of not automatically recognising law the parentage of, and thereby conferring parental rights on, the genetic mother – but leaving the Court to have inherent jurisdiction to make appropriate orders on a case-by-case basis – also serves the important and legitimate aim of preserving the greatest flexibility in what can and should be done in the best interests of a child born through RIVF at all stages of the child’s life as a minor. Mr Wong seeks to analyse the matter by reference to (1) the point of conferral of parentage and parental rights and (2) when circumstances necessitate the variation or revocation of parental rights and obligations (notably when the relationship between the gestational and genetic mothers might break down).

214. On conferral, Mr Wong submits that to recognise automatically the parent and child relationship in law between the genetic mother and the RIVF-born child, irrespective of the actual circumstances, may not necessarily or invariably be in the best interests of the child in every case. He refers to the situation of dual or split motherhood, but I have already addressed that. But he also refers to the potentially varying degrees of commitment and stability in the relationships involved. Mr Wong accepts that, in this particular case, R and B appeared to be in a committed and stable relationship (to the extent of entering into a marriage overseas), but says that is no answer where the challenge made in these proceedings is systemic in nature and, if successful, has impact far beyond the immediate case.

215. Mr Wong points to the existing legal regime in Hong Kong where an unmarried father does not automatically acquire rights and

A authority over the illegitimate child, and shall only have such rights and
B authority, if any, as may have been ordered by the Court on an application
C brought by the father: see section 3(1)(c)-(d) of the GMO. Hence,
D the flexibility to cater for the best interests of the child in terms of who
E has parental rights is also preserved for the unmarried father, when his
relationship with the mother may be of infinite variety.

F 216. I think that is at first blush a strong point. But on closer
G look its strength is somewhat tempered by the fact that the GMO is
H concerned with the rights of “parents”, as defined in the GMO as being
I “father or mother”. Further, the rights and authority which might be
J granted to the father of an illegitimate child under section 3(1)(d) are the
K same as the law would allow him as father if the minor were legitimate.
L In other words, they are clearly the rights of a father as a parent, not
M merely the rights of a guardian (who for these purposes is not regarded as
N a parent).

O 217. Indeed, it is common ground that any application that
P R might make for guardianship rights would require the invocation of the
Q inherent jurisdiction of the Court, as there is no statutory route by which
R those rights could be granted – whether under the GMO or otherwise.
S Mr Wong may be right to say that there would unlikely be difficulties for
T a guardianship order to be made in most cases of a stable same-sex family,
U but that does not seem to me to be the same thing as being recognised as
V a “parent” – and probably would not be perceived by a child such as K or
a parent such as R as being the same thing either.

218. I also think it is important to keep firmly in mind that an
application made under section 6(1)(a) of the PCO does itself not require

A it to be demonstrated that the person named in the application should be
B declared as in law the child's parent because it is in the best interests of
C the child for that declaration to be made. All that needs to be
D demonstrated is the relevant factual link – in essence, the genetic link.
E On the basis that the PCO is itself intended to further the best interests of
F the child, it would seem that the underlying assumption (with which
G I agree) is that the child's ability to apply to the court for a declaration
H that a particular person named in the application is or was in law his
parent is itself in that child's best interests. It is difficult to see why that
should be different depending on whether the genetic link is between
a man and the child or a woman and the child.

I 219. Mr Wong then contends that there is no established
J mechanism to deal with the issues concerning the child's custody and
K care, finances, or his mothers' rights and obligations if the relationship
breaks down.

L 220. I accept that this is a matter that may be of real concern. If
M the parental rights of a parent at common law – assuming for present
N purposes that there are any such rights which arise – cannot be varied or
O revoked, it might be asked how the Court would effectively protect the
P child against such a parent at any time when the child's best interests
require it.

Q 221. Ms Tam has directed my attention to a series of provisions,
R including sections 3(1)(c)(ii), 8(e), 8E, and 10 of the GMO, and
S sections 34 and 34E and 35 of the Protection of Children and Juveniles
T Ordinance (Cap 213) ("PCJO"). She says that these provide
U mechanisms to deal with the exceptional circumstance where it may not
V

be in the best interests of a particular parent to acquire or retain parental rights and responsibilities.

222. Mr Wong, however, contends that all of them are inapplicable in the present situation. I agree.

(1) Sections 34 and 34E of the PCJO apply when the child appears to be “in need of care or protection”. Under section 34(2), for the purposes of the PCJO, a child must be assaulted, ill-treated, neglected, or sexually abused, or his welfare has been, is being, or is likely to be neglected or avoidably impaired, or is beyond control (to the extent harm may be caused to himself or others) before he is in need of care or protection.

(2) Section 35 of the PCJO enshrines the power of the Director of Social Welfare to protect children and juveniles from moral or physical danger.

(3) Section 3(1)(c)(ii) of the GMO applies to “fathers” where the minor is “illegitimate”.

(4) Section 8(e) applies only to a guardian appointed under section 6 of the GMO.

(5) Section 8E of the GMO relates to the removal of a guardian, not a parent.

(6) Section 10 of the GMO allows the court to make orders for custody and maintenance in relation to “parents of a minor”. But parent is defined to be “father” or “mother” in section 2(1) of the GMO. And as the HCMP Judgment, R is not a “mother” or a “father”.

223. However, Mr Wong also fairly draws attention to the possibility of the Court utilising its inherent jurisdiction to revoke parental rights and obligations. However, he also emphasised that it is not a free-for-all. In particular, he says, it cannot be invoked if there is no “unintentional gap in the law”. In that regard, he cited *Re Z (Minor) (Declaration of Non-Parentage)* [2023] 2 HKLRD 772 at §§65-77. It is useful to see in what circumstances the Court can intervene by invoking its inherent jurisdiction.

(1) In that case, Z, a minor, made an application through his next friend, his mother, for a declaration that Y, who was named on Z’s birth certificate as his father, was not his father. The question was whether the Court had jurisdiction to make such an order (§1).

(2) It was accepted by the learned judge that section 6 of the PCO did not confer a power on the Court to grant a declaration of non-parentage (§48).

(3) The Court thus had to turn to inherent jurisdiction (§§49ff).

(4) It was accepted that although there were extensive limitations on the Court’s inherent jurisdiction, the Court could use it “in order to fill a gap or to avoid injustice” (§51), citing *In re F (Mental Patient: Sterilisation)* [1990] 2 AC 1, at 13).

(5) The question was whether a gap existed in the legislation.

(6) The Secretary for Justice, who intervened in the proceedings, contended that there was no “unintended gap in the statutory provisions and that it was the legislative intent not to provide the Court with the power to grant a declaration of non-paternity” (§67).

- (7) Bebe Chu J went through a series of law reform studies in England that substantially influenced section 56 of the Family Law Act 1986 (“1986 Act”), which in turn shaped the PCO in Hong Kong, including the Report on Illegitimacy dated 20 December 1982 (“1982 Report”). She noted that members of the Report had proposed that a man should be entitled to an order recording a finding that he was not the father of a particular child in any case where the finding in effect involved the overturning a presumption of paternity. The members then went on to say that they were “not now inclined to make any recommendation on this point”. The judge pointed out that the reason for this was because there seemed to be “another procedure available” under section 29(3) of the Births and Deaths Registration Act 1953 (“BDRA”) which would serve a very similar purpose (§§67-69).
- (8) The Judge further noted that there was no discussion on the advantages and disadvantages as to whether there should or should not be a power to grant a declaration of parentage in the Hong Kong Law Reform Commission’s report on “Illegitimacy” dated October 1991 (“HK 1981 Report”) (§74).
- (9) The Secretary for Justice argued that given the PCO was modelled according to section 56 of the 1986 Act, which was based on the 1982 Report, then it was the intention of the Law Reform Commission in Hong Kong not to introduce the power to grant a declaration of non-paternity, particularly when section 29(3) of the BDRA was very similar to section 27 of the BDRO (§§69, 75).
- (10) But the Judge rejected this argument. This was because (1) there was no explanation or discussion in the HK 1981

Report as to whether there should be a power to declare non-paternity, (2) there was no specific reference to the 1982 Report, and (3) in England, a provision was added to allow courts to make declarations of non-parentage in the form of section 55A of the 1986 Act (§76).

(11) So the Judge concluded there was a gap in the existing statutory scheme in Hong Kong. There was no “conscious decision” on the part of the legislators not to grant the Court the power to make non-parentage declarations, for public policy reasons or otherwise (§77).

224. Hence, it seems the Court’s inherent jurisdiction can be invoked to exercise a certain power, (1) even if the relevant legislation does not provide for it, (2) if there was no “conscious decision” on the part of the legislators not to provide for it.

225. On the basis that the declaration that R is a ‘parent at common law’ has any real legal effect or benefit, then it can be said that: (1) just because the PCO does not provide for a power to revoke the rights and obligations of a ‘parent at common law’ is no bar, (2) just because the PCO precludes two female parents under the PCO did not stop the Judge from declaring R to be a ‘parent at common law’, and given the novelty of the HCMP Judgment which was not appealed, of course the legislators did not consider whether the Court had the power to revoke the rights and obligations of a ‘parent at common law’. Indeed, if section 10 of the GMO provides that the Court could freely make orders in relation to the custody or maintenance of a minor *vis-à-vis* a “father” or a “mother”, and the GMO never contemplated that a person could be declared to be a ‘parent at common law’ in the relevant sense,

there would seem to be an “unintentional gap” – created by the HCMP Judgment – to be filled.

226. If the declaration as to common law parentage actually created no legal rights or benefit and was given in circumstances where there were no pre-existing legal rights or benefit which might be declared extant (as I think to be the case), the position would be different. In that situation, it would simply be necessary for the appropriate change to be reflected in other appropriate changes, as would then provide the express power to deal with matters. Indeed, this harks back to a point I touched on earlier, namely that of consistency or inconsistency. I do not think it fair for the Government to seek to rely on the view that it may be unclear or uncertain whether the Court may exercise a jurisdiction to vary or take away substantive parental legal rights if granted to persons such as R. The Government is in the position to remove any lack of clarity or certainty, and should promote the consistency necessary for that purpose. In any event, if a person is entitled to be recognised as a parent under a constitutionally compliant PCO, it is difficult to imagine that the Court would not have the jurisdiction to regulate that person’s parental rights in any given set of circumstances.

227. Further, may be thought that the concern about the absence of the ability to make orders in relation to the child vis-a-vis the parent are precisely the circumstances as would indicate why there should be prior legal recognition of the parent-child relationship.

228. It is my conclusion that the Provisions and the Decision do not pursue a legitimate aim and/or there is not the necessary rational connection.

229. On the basis that there has been a declaration of a person as a ‘parent at common law’, it does not seem legitimate to aim to take away (or prevent arising) the status and attendant rights and obligations of that person – or to require a different but similar exercise to be carried out so as to establish those rights under the guardianship regime. On this scenario, the parental status relied upon by R has been judicially declared, and there is force in Ms Tam’s submission that the claimed legitimate aim of maintaining a birth register recording only parents who are recorded as such by the law itself creates the inconsistency and uncertainty where R and persons in her class are regarded and have been declared parents in accordance with law (the common law), but whose name is not recorded on a birth certificate and whose parental status is denied.

230. On the basis that any declaration of parentage has no legal effect or benefit, it can be noted that there is no law preventing the recognition of “fathers” on a child’s birth registration and birth certificate, even if that father has no – or does not in fact take up – parental rights and responsibilities towards that child. Where fathers are routinely added to birth certificates and may be granted parental orders of factual genetic connection with the child – not least where there is consensus at the time between father and mother – then it is difficult to see a legitimate aim or a rational connection in the blanket preclusion of children born using RIVF and their genetically connected parent. The use of RIVF in itself means that the gestational mother will certainly not have a genetic connection to the child, and that another woman will have that genetic connection. I agree that there is no reason why the purported flexibility ought to exist for a female genetic parent, but not a male genetic parent.

O.2 Proportionality

231. The first question is to identify the appropriate margin of appreciation. This question was hotly contested at the hearing. My conclusion is that the appropriate point on the spectrum in this case is closer to the “no more than reasonably necessary” standard than the “manifestly without reasonable foundation” standard. That is for the following reasons:

- (1) “Core values” are often referred to as the suspect for prohibited grounds identified in BOR 22. Those grounds include “birth or other status”, which seems to me plainly to include the child of, and the circumstances of the birth of the child to, female same-sex parents.
- (2) In *QT v Director of Immigration* (2018) 21 HKCFAR 324, at §§106-108, it was recognised that discrimination on any of those grounds is regarded as especially pernicious, because they relate to individual personal characteristics which the individual cannot change.
- (3) To put it by way of obvious example in this case, K did not choose the circumstances of his birth, nor the identity and sexual orientation of his parents.
- (4) Accordingly, where a person is subjected to differential treatment on any of the suspect grounds, the margin of discretion is much narrowed and the Court will subject the impugned measure to particularly severe scrutiny.
- (5) Of course, that does not mean that the measure can never pass muster, but it will require the government to provide very weighty reasons or particularly convincing weighty reasons to justify the challenged difference in treatment applying the standard of reasonable necessity.

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- (6) In this case, a minor’s Privacy/Family and Children’s Rights are engaged.
- (7) The Provisions and Decision seriously interfere with those rights. In particular, sections 9 and 11 of the PCO significantly impede K – who is only a child – from representing his relationship with R to the outside world.
- (8) I appreciate that the *Sham Tsz Kit* case at §187 suggests that 187 that procreative rights are not “core” rights, but that is not the situation applicable in this case.
- (9) Even if the State is normally afforded a wide margin of appreciation in principle in certain fields, such as medically assisted procreation and its techniques or consequences, its margin will “normally” be restricted if the impugned measure within that field interferes with a particularly important facet of the applicant’s identity: see *Mennesson* at §§77 and 80.

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232. Nevertheless, I would reach the same conclusion on the proportionality balance even if the appropriate margin in the case is closer to that of the “manifestly without reasonable foundation” end of the spectrum. There is a disproportionate interference.

233. I have already found that there is no legitimate aim, or rational connection. Further, looking at matters of balance, I do not think that the guardianship regime is a sufficient effective alternative mechanism from a practical or social perspective.

234. As a matter of practice and perception, there is a real difference between an order that states are genetic mother is a “guardian” and a birth certificate that states had to be a “parent”. To many persons,

A the difference will be apparent but not fully understood, itself the cause of
B potential unnecessary confusion and embarrassment. Further, it is easy
C to see that a person might think that if a person was really parent that
D would be reflected on the birth certificate, rightly often described as the
E “vital official documentation”, particularly in the context of an infant and
F the family’s dealings with governmental authorities, schools and other
G organisations.

G 235. From the legal point of view, there are also problems.
H Under the GMO, appointment as guardian is limited to certain
I circumstances which are inapplicable to the present circumstances.
J However, the potential invocation of the Court’s inherent jurisdiction for
K the grant of guardianship rights and authority may not sufficiently cure
L the problem of the factual difference and difference in perception.
M Firstly, a guardianship order does not alter the particulars of the child’s
N birth certificate, leaving a fundamental gap in identity and what the
O certificate conveys about the family unit. Secondly, the guardianship
P order does not recognise the genetic link between the parent and child
Q (here R and K), which link has been recognised by high authority to be of
R potentially extreme importance. Thirdly, it remains unclear whether the
S rights of a guardian appointed under the Court’s inherent jurisdiction
T would effectively be those same “parental rights and authority” as would
U be held by a parent.

Q 236. Lastly, the short point to be made that a parent is a parent.
R

S 237. I also accept the force in Ms Tam’s submission that in the
T absence of any possibility for registration of birth with particulars of
U a parent at common law (if R is really such a thing) of a child born using
V

RIVE, then there is no practical and effective as opposed to theoretical and illusory protection by way of administrative legal recognition of the relationship between parent and child and as a family.

238. I also accept that if one gets to the fourth step of the *Hysan* analysis, a reasonable balance is not struck between the societal benefits of the measure and the inroads made into the rights of the affected individuals.

239. In conclusion, I think that the constitutional challenge is made good. This triggers the possibility of the grant of relief, to which question I shall return.

P. Discrimination

240. Mr Kat and Ms Tam argued that K (and R) have been subjected to all three categories of discrimination, being, as described in *QT v Director of Immigration* (2018) 21 HKCFAR 324, at §33:

- (1) Direct discrimination: This category involves the complaint that like is not being treated as like in that the complainant is receiving treatment which is unfavourable when compared with treatment given to persons in relevantly similar situations.
- (2) Thlimmenos discrimination: This category involves the complainant disadvantageously receiving the same treatment as persons in significantly different situations.
- (3) Indirect discrimination: This category involves application of an ostensibly neutral criterion which operates to the significant prejudice of a particular group.

241. As to all three, though they are sometimes objections about wrongly receiving different treatment and sometimes about wrongly being treated the same, they are for convenience usually referred to as a complaint of disadvantage from the difference in treatment or differential treatment.

242. For a consideration of allegations of discrimination, it is of course necessary to identify the appropriate comparator. Mr Wong is obviously correct when he identifies the two-stage approach in a discrimination challenge, where the first stage is for the person complaining to identify the comparators, and the Court to answer the question whether those persons are in comparable positions. This is often a difficult exercise, as it is in this case.

243. In the HCMP Judgment, and although Au Yeung J expressed opinion on but did not definitively deal with the question of discrimination, she noted (§124) that the applicants had put forth at least 14 different comparators, which she found unnecessary to set out. However, she summed up the comparison in the following way:

Put simply, B and R are not regarded as married under Hong Kong law. If R were a male, whether he was married to B or not, I would have been recognised as a parent. Whilst it was the choice of B and R that K should be ‘fatherless’, K is still discriminated as to his birth in the sense that, unlike other children, he does not have a co-parent, genetically linked to him, because R is another female and because of the sexual orientation of B and R.

244. In his submissions, Mr Kat relied on that summary and offered two further comparators to K and his family:

- (1) The child of heterosexual couple, consisting of a male whose gametes are used in the IVF of a female and whose marriage

is void in Hong Kong at common law (Child X). Just as R is genetically connected to K, the male is genetically connected to Child X. However, Child X may obtain a declaration under section 6 of the PCO and thus have the male registered as his father on his birth, but K may not.

- (2) The child of a heterosexual couple, consisting of a male whose gametes were not used in the IVF of a female whose marriage to him is void in Hong Kong at common law (Child Y). This male has no genetic or biological connection to Child Y at all but is otherwise exactly comparable to R safe for sex. Despite having no genetic or biological connection to Child Y, by sections 10(2) and (3) of the PCO, Hong Kong law recognises the male as Child Y's father. Unlike K, Child Y may obtain a parental order under section 6(1) in respect of the male, who will be registered as his father in his birth certificate, whether or not the male is married to the mother.

245. Hence, Mr Kat submits, in each of the scenarios, the PCO treats K differently from Child X and Child Y to his disadvantage, on the prohibited ground of his birth (being a child born to a single-sex couple). He says that this amounts to all three categories of discrimination:

- (1) Direct discrimination: Whilst Child X, Child Y and K are all conceived by IVF, X and Y enjoy legal recognition of their parents but K does not.
- (2) Thlimmenos discrimination: On registration of birth, K is treated as if he was the illegitimate child of an unmarried single woman who has obtained IVF services without a partner or co-parent, despite him being the intended child of R and B who are in a committed long-term partnership

evidenced by their overseas marriage and all three being a settled family unit.

- (3) Indirect discrimination: K is denied legal recognition of his to parents by the application of an ostensibly neutral criterion which operates to the significant prejudice of a particular group, namely the PCO requirement that a parent may only be a “mother” or a “father” in a heterosexual couple. This is a criterion that K can never meet as the child of a homosexual couple.

246. In my summary of B’s stance (above) I have already referred to the various comparators offered by Ms Tam and I do not think they need to be repeated again at this point. However, where Ms Tam focused on the unfairness suffered by B, I also do not think I need to deal with that because this application must be looked at from the point of view of K.

247. In essence, Mr Wong says that there are no appropriate comparators. This is because, he says, K is seeking to register a “third parent” (i.e. an additional mother with a wholly different relationship with that with the gestational mother).

248. There is some force in Mr Kat’s submission that this is incorrect (at least in the present scenario) because an anonymous sperm donor is disentitled by section 10(6) of the PCO to claim parentage as he is neither a “the other party to the marriage” under section 10(2) of the PCO, or a “male partner” under section 10(3) of the PCO. So this is really a “two-parent” situation (“Two-Parent Situation”).

249. But as Mr Wong rightly points out, what if the man donating the sperm in an RIVF procedure is a male “sex” partner of one of the women in the process? What if the man donating the sperm is a close friend or companion of one of the women? Both are not utterly fanciful suggestions. Both might conceivably fall within the statutory definition of “partner” (男性伴侶) under section 10(3) of the PCO. Those cases would be in the territory of a “three-parent” situation (“Three-Parent Situation”). If the gestational mother (under section 9 of the PCO) and the male partner (under section 10(3) of the PCO) are recognised as “parents” under sections 11 and 6 of the PCO, then the child – if he wishes to register his genetic mother’s details – would be in effect asking for a recognition of a third parent. That would seem to identify a non-comparable situation.

250. Further, it can be seen that it would matter because of the terms of the challenge. K seeks a declaration that the Provisions are unconstitutional as it provides unequal treatment of a child or of that child’s parent at common law, irrespective of whether the case may be a Three-Parent Situation, or a Two-Parent Situation.

251. But, if K’s systemic challenge is limited to the Two-Parent Situation, I would have had no hesitation in holding that the Provision and Decision were unconstitutional vis-à-vis the Equality Right. On that basis:

(1) The critical question from a child’s perspective must be why he cannot register two parents who are in committed relationships – one gestational, one genetic – like other children.

(2) The answer must be either (a) that the genetic parent that he is trying to register is a woman, and the genetic parent that

the other party is trying to register is a man, or (b) that he was born out of RIVF (and the couple that is trying to parent him are a same-sex couple), and the other was conceived naturally because the other child's parents are a heterosexual couple.

- (3) On that basis, if both children are trying to register two parents only, then they are comparable and sufficiently analogous but are treated differently on the basis of the circumstances of their birth.

252. In this context, I also accept Mr Kat's submission that it would be a mis-characterisation of K's application to say that it concerns all children born through the RIVF procedure irrespective of the marital status of, or the nature of the relationship between, the gestational mother and the genetic mother. I accept that the challenge made – and the relief sought – is drawn more narrowly than that. That can be taken into account at various stages, including by reference to the grant and precise detail of any relief.

253. As to justification, care must be taken to avoid a circular argument, where for example reliance on the status of marriage as justification for the differential treatment is objectionable as being circular in that it relies on the very ground for that differential treatment as its justification. But, in any event, for the reasons given in the proportionality analysis above, I do not think justification has been made out.

Q. Result and Relief

254. In the circumstances, though I have found a proper basis for the grant of relief, likely in the form of various declarations, I think it appropriate to hear further argument as to what the precise form of that relief should be.

255. This is in part because of the late proposed amendment to the form of relief and declarations sought in the AF86, upon which Mr Wong had little time to take any instructions or to give it mature thought. Further, the amendments were apparently proposed to cater for the possibility – arising from exchanges between Bench and Bar during the hearing – that I might not be prepared to proceed on the basis that the declaration granted to R that she is a ‘parent at common law’ was on a sound basis.

256. The parties are invited to agree an appropriate timetable to address the question of relief.

257. I also reserve the question of costs until the completion of that exercise.

R. Postscript

258. There may be room for debate as to the intention of King Canute when he sat on a throne by the seashore and commanded the incoming tide to halt and not to wet his feet and robes. Some think it a sign of his hubris, that he was so arrogant that he thought he might stop nature. Others think it a sign of his humility, that he was demonstrating to his fawning courtiers that he was not omnipotent and the futility of

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259. King Canute was not an ostrich. But if he was, he would not have buried his head in the sand on that beach.

(Russell Coleman)
Judge of the Court of First Instance
High Court

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