



Summary of Judgment

K (by his next friend, “R”) (Applicant) v

Secretary for Justice (“SJ”) (Respondent) & “B” (1st Interested Party) &

The Chief Executive of the HKSAR of the People’s Republic of China (“CE”) (2nd Interested Party)

HCAL 2063/2023; [2025] HKCFI 1974

Decision : The challenges under the judicial review are established, with question of actual form of relief and costs to be addressed

Date of Hearing : 4 – 5 June 2025

Date of Judgment/Decision : 9 September 2025

Background

1. This is a judicial review (“JR”) application made on behalf of the child Applicant (“**Applicant**”, “K”) by his gamete mother as his next friend (“**Gamete Mother**”, “R”) challenging the constitutionality of section 6 and Part V of the Parent and Child Ordinance, Cap. 429 (“**PCO**”) and Form 1 in Schedule 2 to the Births and Deaths Registration Ordinance, Cap. 174 (“**BDRO**”) (“**Provisions**”) 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 reciprocal in-vitro fertilization (“**RIVF**”); and the Government’s decision not to provide for the registration of parents at common law of children born through RIVF in the births register kept pursuant to section 4(3) of the BDRO and its subsidiary legislation (“**Decision**”).
2. The Gamete Mother and the gestational mother of the Applicant (“**Birth Mother**”, “B”) entered into a same-sex marriage in South Africa in 2019. They underwent RIVF procedure where a fertilised embryo (using the Gamete Mother’s egg and an anonymous male donor’s sperm) was transferred into the Birth Mother’s uterus for her to carry to term. In 2021, the Birth Mother gave birth to the Applicant in Hong Kong.
3. Under the current legal framework, only the Birth Mother is stated to be the Applicant’s “mother” on his birth certificate. An application was previously made on the Applicant’s behalf for a parental declaration that the Gamete Mother is the “parent” of the Applicant under section 6 of the PCO (“**PCO Application**”). Such application was dismissed by the Court of First Instance (“**CFI**”) on 31 August



2023. However, the CFI made a declaration that the Gamete Mother is a parent of the Applicant at common law (*NF v R* [2023] 5 HKLRD 58, [2023] HKCFI 2233) (“**Common Law Declaration**”). Following the CFI decision in *NF v R*, the Applicant lodged the present JR challenge.

4. Leave to apply for JR was granted on the papers on 23 November 2023 and the substantive hearing was conducted before the Honourable Mr Justice Coleman on 4 and 5 June 2025.

Issues in dispute

5. The issues in dispute were mainly:

- (1) What is the legal effect of the Common Law Declaration granted in the PCO Application in relation to these JR proceedings (the “**PCO Application Issue**”);
- (2) Whether the relevant rights under Articles 14, 19 and 20 of Hong Kong Bill of Rights (“**HKBOR**”) (read together with Articles 1 and 22) and Article 25 of the Basic Law (“**BL**”) are engaged and restricted (the “**Constitutionality Issue**”);
- (3) If the relevant rights under HKBOR and BL are engaged and restricted, whether the Provisions and the Decision are consistent with and satisfy the proportionality analysis (the “**Justification Issue**”); and
- (4) Whether there is discrimination (the “**Discrimination Issue**”).

Department of Justice’s Summary of the Court’s rulings

(Full text of the judgment at:

https://legalref.judiciary.hk/lrs/common/ju/ju_frame.jsp?DIS=172268&currpage=T)

6. The Court ruled in favour of the Applicant on the issues and invited further submissions to address the question of relief with the question of costs reserved. The Court found that:



On the PCO Application Issue:

7. The Court considered that the Common Law Declaration was perhaps something of a consolation prize (para. 88). The making of such a declaration does not itself create any legal state of affairs, but rather confirms its existence (or pre-existence) (para. 89).
8. Whilst R is a 'natural' parent of K, the Court is not convinced that constitutes R a 'parent at common law', if there be such a thing (para. 127). The Common Law Declaration granted in the PCO Application was to no practical effect (for any legal purpose), and was as a result probably simply wrong (para. 130).

On the Constitutionality Issue:

9. The Court found the rights under BOR 14, BOR 19 were engaged and restricted, and the rights under BOR 20 and 22 were probably engaged and restricted.
10. The Court found that the ambit of BOR 14 is relatively straightforward. A child has a right to establish and develop a relationship with his parents, including his parent in fact or 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 (para. 147).
11. 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 under the PCO (para. 150).
12. The Court rejected the Government's arguments that the ambit of BOR 19(1) is limited to the married family, or a family of a heterosexual couple who have a right to marry each other in Hong Kong (para. 159).
13. While the Court accepted that, on its face, BOR 20 does not require the State to register the details of a child's genetic mother, the Court considered that the question is essentially wrapped up in the question as to the proper requirement



of the PCO, and the constitutional challenge to it, and found that BOR 20 is probably engaged (paras. 161-164). Same goes for BOR 22 (para. 165).

14. The Court held that as 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. The birth certificate is a vital official identification document, to which one might expect public and private administrators to have due regard (para. 168).
15. 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. As K becomes older, he will likely become cognisant of such a situation, it can be seen that he will have experience some inconvenience, embarrassment, and potential harm to his dignity (para. 169).
16. The Court rejected the Government's arguments that the birth certificate is unnecessary in everyday life as it is not the regularity of interference which matters, but the fact of interference and likely to be on significant occasions (para. 171). The Court considered that there is encroachment on or infringement of the rights engaged.

On the Justification Issue:

17. The Court found that the flexibility argument does not identify a legitimate aim. The categorical denial of legal parental status to persons such as R is the antithesis of flexibility (para. 193). The Court also rejected the social consensus, consistency and policy arguments (paras. 194-195, 198).
18. The Court considered that neither guardianship, wardship nor adoption can provide the recognition central to the Child's identity and to the parental relationship (para. 197). The Court rejected the argument that the guardianship regime is a sufficient effective alternative mechanism from a practical or social perspective as a guardianship order does not alter the particulars of the child's birth certificate and does not recognise the genetic link between the parent and child. It also remains unclear whether the rights of a guardian appointed under the Court's inherent jurisdiction would effectively be those rights and obligations as would be held by a parent (paras. 233-236).



19. 'Split motherhood' or 'dual motherhood' does not arise as K does not ask that R be declared his 'mother', whether as a second mother, or in place of his 'mother'. He seeks a declaration that R be declared his 'parent' in law (paras. 199-204). The Court recognized that there are bound to be advances in technology and in society, which expand the nature of family relations (para. 212).
20. 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 (para. 213). While the Court accepted that there is no established mechanism to deal with the issues concerning the child's custody and care, finances, or his mothers' rights and obligations if the relationship breaks down, the Court found that the Government is in the position to remove any lack of clarity or certainty, and should promote the consistency necessary for that purpose (paras. 214-228).
21. It was found that the Provisions and the Decision do not pursue a legitimate aim and/or there is not the necessary rational connection (para. 228).
22. Further, the Court held that the appropriate margin of appreciation is closer to the "no more than reasonably necessary" standard than the "manifestly without reasonable foundation" standard (para. 231).
23. The Court held that a reasonable balance is not struck between the societal benefits of the measure and the inroads made into the rights of the affected individuals and the constitutional challenge is made good (para. 238).

On the Discrimination Issue:

24. The Court examined the various comparators put forward by the parties. While it opined that if K's systemic challenge is limited to the two-parent situation, the court would hold that the Provision and Decision were unconstitutional vis-à-vis the equality right, K now 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. The Court accepted that the challenge made and the relief sought is drawn more narrowly than that, and that can be taken into account at various stages, including by reference to the grant and precise detail of any relief (paras. 240-253).



25. The Court found a proper basis for the grant of relief and considered it appropriate to hear further argument as to what the precise form of the relief should be. The parties are invited to agree an appropriate timetable to address the question of relief and the question of costs is reserved until the completion of that exercise (paras. 254-257).

Civil Division

Department of Justice

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