Case No: 2018/0033

Neutral Citation Number: [2018] EWHC 2620 (Fam)
IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 8 October 2018

Before :

LORD JUSTICE BAKER

- -

IN THE MATTER OF THE GENDER RECOGNITION ACT

Between :

M JAY	**Appellant**
- and -	
SECRETARY OF STATE FOR JUSTICE	**Respondent**

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Claire McCann (instructed by **Howells Solicitors**) for the **Appellant**
Brendan McGurk (instructed by **Treasury Solicitor**) for the **Respondent**

Hearing dates: 27 June 2018

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Judgment

MR JUSTICE BAKER :

1. The appellant, hereafter referred to as Ms Jay, was born a male, has been married three times and has seven children. For many years, however, Ms Jay has been uncomfortable in the male gender and for the last few years has lived as a woman. She has made a series of applications for formal recognition of her change of gender under the Gender Recognition Act 2004 ("GRA"). All of the applications have been refused by the Gender Recognition Panel. She has now filed a notice of appeal against the third refusal. This reserved judgment sets out my decision on the appeal.

2. Ms Jay has had a number of problems in her life, and has been convicted of a number of criminal offences as a result of which she has spent several years in prison. This judgment does not deal with any of those matters. In addition, the court is of course aware of the wider public debate about gender recognition. That debate is not directly relevant to this appeal which focuses specifically on the panel's decision in this case.

The diagnostic and legal framework

3. Under ICD-10 F 64.0, transsexualism is defined as having three criteria.

    1. The desire to live and be accepted as a member of the opposite sex, usually accompanied by the wish to make his or her body as congruent as possible with the preferred sex with surgery and hormone treatment.

    2. The transsexual identity has been present persistently for at least two years.

    3. The disorder is not a symptom of another mental disorder or a chromosomal abnormality.

4. The GRA was passed in response to the judgment of the European Court of Human Rights in *Goodwin v United Kingdom* (2002) 35 EHRR 18. The claim in *Goodwin* was brought by a transsexual who had been permitted under domestic law to change her name but was unable to change a number of official government records which listed her as male, and as a result she continued to be treated as male for purposes of social security, national insurance, pensions and retirement age. Her claim that this failure to amend her official records constituted a violation of her rights under articles 8 and 12 of ECHR was upheld unanimously by the European Court. At paragraph 77 to 78 of the judgment, the Court stated:

    > "77. … serious interference with private life can arise when the state of domestic law conflicts with an important aspect of personal identity. The stress and alienation arising from a discordance between the position in society assumed by a post-operative transsexual and the status imposed by law which refuses to recognise the change of gender cannot, in the Court's view, be regarded as a minor inconvenience arising from a formality. A conflict between social reality and law arises which places the transsexual in an anomalous position, in which he or she may experience feelings of vulnerability, humiliation and anxiety.
    >
    > 78. In this case, as in many others, the applicant's gender re-assignment was carried out by the National Health Service, which recognises the condition of

gender dysphoria and provides, *inter alia*, re-assignment by surgery, with a view to achieving as one of its principal purposes as close an assimilation as possible to the gender in which the transsexual perceives that he or she properly belongs. The Court is struck by the fact that nonetheless the gender re-assignment which is lawfully provided is not met with full recognition in law, which might be regarded as the final and culminating step in the long and difficult process of transformation which the transsexual has undergone. The coherence of the administrative and legal practices within the domestic system must be regarded as an important factor in the assessment carried out under article 8 of the Convention. Where a State has authorised the treatment and surgery alleviating the condition of a transsexual, financed or assisted in financing the operations and indeed permits the artificial insemination of a woman living with a female to male transsexual, it appears illogical to refuse to recognise the legal implications of the result to which the treatment leads."

5. The Court concluded, at paragraph 90, that

> " … the unsatisfactory situation in which post-operative transsexuals live in an intermediate zone in not quite one gender or the other is no longer sustainable."

6. Following this judgment, and the subsequent declaration of incompatibility made by the House of Lords in *Bellinger v Bellinger (Lord Chancellor intervening)* [2003] 2 AC 467, Parliament passed the GRA in 2004. The following provisions of the Act are relevant to this appeal. Under s.1(1)

> "A person of either gender who is aged at least 18 may make an application for a gender recognition certificate on the basis of -
> (a) living in the other gender, or
> (b) having changed gender under the law of a country or territory outside the United Kingdom"

The application in this case was made under s.1(1)(a) and it is unnecessary to consider the subsequent provisions relating to s.1(1)(b). Under s.1(2):

> "In this Act "the acquired gender", in relation to a person by whom an application under sub-section 1 is or has been made, means -
> (a) in the case of an application under paragraph (a) of that sub-section, the gender in which the person is living…"

7. Under s.1(3):

> "An application under subsection (1) is to be determined by a Gender Recognition Panel."

S.2(1) provides:

> "In the case of an application under section 1(1)(a), the Panel must grant the application if satisfied that the applicant
>
> (a) has or has had gender dysphoria;
>
> (b) has lived in the acquired gender throughout the period of two years ending with the date on which the application is made;

(c) intends to continue to live in the acquired gender until death; and

(d) complies with the requirements imposed by and under section 3."

S.25 defines "gender dysphoria" as meaning "the disorder variously referred to as gender dysphoria, gender identity disorder and transsexualism".

8. S.2(3) provides, so far as relevant to this appeal:

"The Panel must reject an application under s.1(1) if not required by [s.2(1)] … to grant it."

S.4(1) provides:

"If a Gender Recognition Panel grants an application under s.1(1), it must issue a gender recognition certificate to the applicant."

9. S.3 provides, so far as relevant to this appeal:

"(1) An application under s.1(1)(a) must include either:

(a) a report made by a registered medical practitioner practising in the field of gender dysphoria and a report by another registered medical practitioner (who may, but need not, practice in that field), or

(b) a report made by a registered psychologist practising in that field and the report made by a registered medical practitioner (who may, but need not, practice in that field).

(2) But subsection (1) is not complied with unless a report required by that subsection and made by

(a) a registered medical practitioner, or

(b) a registered psychologist

practising in the field of gender dysphoria includes details of the diagnosis of the applicant's gender dysphoria.

(3) And subsection (1) is not complied with in a case where

(a) the applicant has undergone or is undergoing treatment for the purpose of modifying sexual characteristics, or

(b) treatment for that purpose has been prescribed or planned for the applicant

unless at least one of the reports required by that subsection includes details of it.

(4) An application under s.1(1)(a) must also include a statutory declaration by the applicant that the applicant meets the conditions in s.2(1)(b) and (c).

…

(6) Any application under s.1(1) must include

(a) a statutory declaration as to whether or not the applicant is married or has a civil partner,

(b) any other information or evidence required by an order made by the Secretary of State, and

(c) any other information or evidence which the Panel which is to determine the application may require,

and may include any other information or evidence which the applicant wishes to include."

10. S.8 is headed "Appeals etc". The relevant provisions are as follows:

"(1) An applicant to a Gender Recognition Panel under s.1(1) … may appeal to the High Court, family court, or Court of Session on a point of law against a decision by the Panel to reject the application.

(2) An appeal under subsection (1) must be heard in private if applicant so requests.

(3) On such an appeal, the court must

(a) allow the appeal and issue the certificate applied for,

(b) allow the appeal and refer the matter to the same or another Panel for reconsideration, or

(c) dismiss the appeal.

(4) If an application under s.1(1) is rejected, the applicant may not make another application before the end of the period of six months beginning with the date on which it is rejected."

11. Under s.9(1):

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

S.9(2) provides;

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

S.10(1) provides:

> "Where there is a UK birth register entry in relation to a person to whom a full gender recognition certificate is issued, the Secretary of State must send a copy of the certificate to the appropriate Registrar General."

12. Schedule 1 makes provisions about gender recognition panels. Paragraph 4, headed "membership of panels", provides under subparagraph (2) that a panel determining an application under s.1(1)(a) must include at least one legal member and at least one medical member, by which is meant, respectively, a person with a relevant legal qualification and a registered medical practitioner or registered psychologist: see paragraph 1(2). Paragraph 6 of the schedule, headed "procedure", provides *inter alia* under subparagraph (4) that:

> "A panel must determine an application without a hearing unless the panel considers that a hearing is necessary."

Under subparagraph (5):

> "the President [of Gender Recognition Panels] may give directions about the practice and procedure of panels."

13. To date, the only directions given under paragraph 6(5) of Schedule 1 are set out in "President's Guidance No.1 - Evidential requirements for applications under s.1(1)(a) of the Gender Recognition Act 2004". Paragraphs 3 to 5 of the Guidance provide:

> "3. It is the responsibility of the panel to decide whether the applicant has satisfied all of the s.2 requirements by considering the evidence provided in support of each of the four requirements. In the case of s.2(a) [sic – presumably s.2(1)(a)], the panel must therefore examine the medical evidence provided in order to determine whether it is satisfied that the applicant has or has had the diagnosis of gender dysphoria. In order to do so, the panel requires more than a simple statement that such a diagnosis was made. The medical practitioner practising in the field who supplies the report should include details of the process followed and evidence considered over a period of time to make the diagnosis in the applicant's case. Nor is it sufficient to use the broad phrase 'gender reassignment surgery' without indicating what surgery has been carried out. Nor should relevant treatments be omitted, such as hormone therapy. These requirements are particularly pertinent in assisting the panel to be satisfied not only that the applicant has or has had gender dysphoria but also has lived in the acquired gender for at least two years and intends to live in that gender until death.
>
> 4. On the other hand, doctors need not set out every detail which has led them to make the diagnosis. What the panel needs is sufficient detail to satisfy itself that the diagnosis is soundly based and that the treatment received or planned is consistent with and support that diagnosis.
>
> 5. It would be impossible to set out precisely what should be provided in all cases. Each will have its own individual facts and the detail which might be sufficient in one case may be inadequate in another. The panels perform a judicial

function. In the ultimate analysis it is for each panel to determine precisely what is required. At the same time, doctors and applicants need to know in broad terms what is expected of them and what detail is likely to satisfy a panel. The burden upon them of providing the evidence should not be such as to deter applicants from applying in the first place or to deter doctors from supporting them.

6. The detail required should normally be no greater than can be set out in the space provided in the medical report pro forma."

The space provided in the medical report pro forma for the doctor to provide details of the gender-related diagnosis is slightly less than one page. Paragraph 9 provides of the guidance, *inter alia*:

"It is not the role of the panel to impose unnecessary or excessive evidential burdens on applicants. However the Act does place on panels the responsibility of ensuring that the requirements of sections 2 and 3 are complied with before an application is granted."

14. Schedule 3 of the GRA provides for the maintenance of a Gender Recognition Register, not open to public inspection, in which an entry is made by the Registrar General who receives a copy of a full gender recognition certificate. The Register makes traceable the connection between that entry and the Birth Register entry and is used to create a new birth certificate that records the acquired name and gender.

15. The procedure to be followed on an appeal under s.8 is set out in paragraphs 5.27 to 5.30 of Practice Direction 30A in the Family Procedure Rules 2010. In passing, I note that in an earlier appeal, *Carpenter v Secretary of State for Justice* [2012] EWHC 4421 (Fam), Holman J raised the question whether such appeals were statutory appeals falling within the provisions of the Practice Direction to Part 52 of the Civil Procedure Rules, but for reasons explained in the judgement it was unnecessary for him to answer the question. Although I did not have full argument on the point, it seems to me that the terms of FPR rule 30 and the Practice Direction 30A are straightforward and should be applied on appeals under the GRA unless and until a higher court rules otherwise.

16. Paragraphs 5.27 to 5.30 of Practice Direction 30A provide as follows:

"5.27 Paragraph 5.28 to 5.30 apply where the appeal is brought under s.8(1) of the [GRA] on a point of law against a decision by the Gender Recognition Panel to reject the application under s.1(1) … of the [GRA]. The appeal is to the High Court or to the family court. However, FPR 5.4 provides that where the family court has jurisdiction to deal with a matter, the proceedings relating to that matter must be started in the family court except where the court otherwise directs, any rule, other enactment, or Practice Direction provides otherwise or proceedings relating to the same parties are already being heard by the High Court. Most appeals under s.8(1) of the [GRA] are therefore likely to be to the family court and be heard by a judge of High Court Judge level sitting in that court ….

5.28 Where the appeal is to the High Court, the appeal notice must be

(a) filed in the PRFD [the Principal Registry of the Family Division], and

(b) served on the Secretary of State [i.e. for Justice] and the President of the Gender Recognition Panels.

5.28A Where the appeal is to the family court the appeal notice must be served on the Secretary of State and the President of the Gender Recognition Panels

5.29 The Secretary of State may appear and be heard in the proceedings on the appeal.

5.30 Where the High Court issues a gender recognition certificate under s.8(3)(a) of the [GRA], the court officer must send a copy of that certificate to the Secretary of State."

17. In passing, I observe that these provisions need some clarification in the light of recent changes. This appeal is, so far as I am aware, the first to be brought under s.8 of the GRA since the changes in appeal procedure introduced in October 2016, under which most private family law appeals from circuit judges are heard in the Family Division of the High Court rather than by the Court of Appeal. As part of those changes, there is now a Family Division Appeals Office (FDAO) and a judge in charge of appeals. At the same time, for various reasons, the PRFD is now a much-diminished entity. It retains only a handful of responsibilities and its judicial and administrative resources have been severely reduced. Nearly all of the family cases which were previously dealt with in the PRFD are now heard in the Central Family Court (albeit in the same building, First Avenue House in High Holborn). In this case, the appeal notice was filed at the PRFD but immediately referred to the FDAO and managed by the staff in that office and by myself as judge in charge of appeals. In future, it seems sensible for all appeals to be managed in this way. As pointed out in para 5.27 of PD30A, FPR rule 5.4(1) provides that, where both the family court and the High Court have jurisdiction to deal with the matter, the proceedings relating to that matter must be started in the family court. Rule 5.4(2)(c) adds, however, that this does not apply where the court otherwise directs. I therefore propose that all such appeals should be referred to the Family Division judge in charge of appeals as soon as possible after they are filed.

18. I also observe that I am unable to see why paragraph 5.30 of the Practice direction refers only to the High Court and not the family court. Manifestly, any court which, on allowing an appeal under s.8, decides to issue a gender recognition certificate under s.8(3)(a) should send it to the Secretary of State.

19. It seems to me that paragraphs 5.27 to 30 of the Practice Direction may need some tidying up. I shall refer this matter to the Family Procedure Rules Committee for consideration.

Summary of facts

20. Ms Jay is now aged 41. She was born and raised as a boy, and as an adult man was married and divorced on three occasions. The first marriage in 1997 was dissolved in August 2001, the second in 2006 was dissolved in September 2009, and the third in

2010 was dissolved in October 2011. There are four children from the first marriage and three from the second.

21. In a statement drafted in 2014, Ms Jay described how she had felt she was the wrong gender from the age of 13. Throughout her adult life she has felt comfortable in women's clothes, although she only dressed in this way in secret. "In my heart I knew it was how I was meant to be in life." In various documents, and in conversations with a number of doctors, she has described her experiences in considerable detail. In 2009, she started taking sex hormones, including oestrogen.

22. In 2011, Ms Jay was convicted of an offence of obtaining explosives with intent to endanger life and was sentenced to eight years in prison. The details of her offence have not been included in the papers put before this court. During her time in prison, she has lived as a woman as far as possible. She has sought medical treatment with the aim of undergoing a vaginoplasty as soon as possible.

23. On 5 September 2012, Ms Jay signed a statutory declaration under the GRA in which she stated: "I have lived full time as a female for 6 years [sic] since I transitioned in 12/2008. I intend to live full time as a female until death". The declaration was witnessed by a High Court judge. In 2013, Ms Jay's passport and driving licence were both renewed in her male birth name. On 6 December 2013, Ms Jay changed her name by deed poll. The name she then took was the female first name by which she was then known and her birth surname. (In 2016, she changed her surname by deed poll to the name she is currently using. I understand that in the last few weeks since the hearing she has changed her first name again.)

24. Meanwhile, Ms Jay was facing a number of problems in prison. She harmed herself on a number of occasions and, in January 2013, she had attempted to hang herself. In March 2014, she was placed on suicide watch. In June 2014, she filed a claim in the Central London County Court against the company that runs the prison and the Ministry of Justice seeking damages for negligence and/or breaches of the Human Rights Act 1998 and/or the Equality Act 2010 following two sexual assaults in prison. In the same month, against a background of other incidents of self-harm, she made an incision into one of her testicles with the intention of removing it. A psychologist's report in September 2014 reported that the main trigger to her risk-taking was her perceived lack of progress in relation to her gender reassignment process, together with feelings of helplessness and being out of control as well as confusion over her identity. The psychologist reported that Ms Jay's emotionally unstable personality traits had contributed to a breakdown in relationships as well as emotional and behavioural impulsivity. Ms Jay found it hard to manage stress and relied on maladaptive coping mechanisms such as self-harming.

25. On 22 May 2014, Ms Jay filed her first application to the Gender Recognition Panel, using the prescribed form. In the application, she identified 12 November 2008 as being the date from which she could provide evidence that she had lived full time in her acquired gender. She enclosed the statutory declaration executed in 2012, a copy of her second decree absolute, and a number of other documents. She did not, however, enclose any medical reports as required under s.3(1). In an accompanying letter, she explained that she had not been able to get anyone to help her, that the prison doctors had told her they were not qualified to prepare the reports and that she had been refused permission to go outside to a gender clinic. On 20 June 2014, a

member of the panel's administrative team acknowledged receipt of the application, stating that "you may wish to provide the further evidence listed below before we submit your application to the panel". The further evidence identified included the two medical reports required under s.3(1) and other suggested documentary evidence dated within two years of the application. In addition, it was pointed out that the statutory declaration submitted by Ms Jay was incomplete in several respects. In response, Ms Jay sent a further letter to the panel, received 7 August 2014, in which she asserted that she was enclosing a report from Dr James Barrett from the London Gender Clinic.

26. On 13 August 2014, the panel issued the following directions:

> 1. In its current form this application must fail. The evidence is to the effect that the applicant has been living in her birth gender for a period of some six years prior to the application. Whilst this has not been through choice, it is the essence of the complaint that she puts forward in her correspondence.
>
> 2. The [GRA] requires a period of two years living in the acquired gender prior to the date of application.
>
> 3. There is no diagnosis of gender dysphoria, which is also a requirement under the [GRA]. Although there is a reference in the correspondence to a letter from Dr James Barrett (who is known to the panel to be practising in the field of gender dysphoria) which is said to be enclosed, it is not.
>
> 4. The applicant has six weeks to send in any comments which may persuade the panel not to dismiss the application at this stage.
>
> 5. This matter will be put before a panel after six weeks from the issue of these directions."

27. On 18 August, Ms Jay replied to the panel enclosing further documents but not, it seems, a medical report as required by s.3. In her letter, Ms Jay again referred to the difficulties she was under as a prisoner. On 1 September 2014, a member of the panel's administrative team wrote suggesting that Ms Jay might wish to apply for an extension of time for providing the necessary documents. On 26 September 2014, Ms Jay replied, enclosing another copy of the statutory declaration, but no medical report. On 22 October 2014, the panel reached the following decision, which was communicated to Ms Jay by letter dated 24 October. Reciting the directions given on 13 August, the panel continued:

> "since then various documents have been supplied, but none deal with the essential legal difficulty, which is that the [GRA] requires a diagnosis of gender dysphoria from a registered medical practitioner, who practices within the field. Accordingly there has been nothing to persuade the panel not to dismiss the application and it is hereby dismissed."

28. On 28 October, Ms Jay wrote to the panel, asserting that she was still awaiting a final report from Dr Barrett, but enclosing an earlier report from him dated 8 July 2014,

although she added that the report contained a number of inaccuracies. The July 2014 report was prepared at the request of solicitors acting for Ms Jay in her claim for damages following assaults in prison. Dr Barrett was asked to consider and discuss the nature of Ms Jay's psychiatric problems, the nature and extent of the problems prior to the assaults, and the extent to which her current problems were the result of pre-existing vulnerabilities or of those assaults. He was also asked the extent to which her transgender status added to any injury caused by the assaults.

29. In the report, Dr Barrett stated that amongst his various appointments he was lead clinician at the West London Mental Health NHS Trust Gender Identity Clinic, and reported that during his career he had seen at least 5000 people with disorders of gender identity. He noted that Ms Jay had a history of extensive contacts with psychiatric services from her late teens, characterised by deliberate self-harm, and by her attracting a very wide range of diagnoses, usually including one or more of the disorders of personality and some form of mood disorder and very rarely a diagnosis of any form of psychosis. Dr Barrett set out at some length Ms Jay's personal and relationship history and her gender development. He noted from her medical records that there seems to have been no mention of any gender identity disturbance in her psychiatric history until very recently. In the prison medical records, there was a note that she had referred to having been in contact with the clinic run by Dr Barrett, and other clinics in Birmingham and Nottingham. He noted that his clinic had never had any contact with her so far as he knew and cast doubt upon her other assertions as to contacts with other clinics. Having considered her personality problems, Dr Barrett went on to say:

> "Separately, and recently, she reports gender identity problems. Her history, if taken at face value, is reasonably consistent with this diagnosis but the difficulty is that other aspects of that history are rather directly at odds with the documentary records leading me to have doubts about the veracity of her whole history – which would include a reasonably consistent history of gender identity problems. This aspect might be made clearer if a source other than [Ms Jay] could be interviewed …. If collateral collaboration is elicited I would reach an additional diagnosis of some sort of gender identity disorder. Whether the intensity of gender dysphoria caused by that disorder is great enough to merit or require a change of gender role might be explored in the setting of a gender identity clinic; it might be sufficiently intense in a prison but not so outside one and in civilian life, for example. If collateral corroboration is not convincingly elicited I would have grave doubts and wonder whether [Ms Jay]'s somewhat dependent personality had caused her to unwisely latch onto a change of gender role as a seemingly universal solution to both why her life had gone wrong and how it might be rectified."

30. On 18 March 2015, Ms Jay was released from prison on licence. On the following day, she signed a further statutory declaration under the GRA asserting that she had lived full time as a female for six years since she transitioned in December 2008. The declaration was witnessed by a solicitor. Section 5a of the declaration form, which reads "I have not previously been in a marriage or civil partnership" was not deleted. In section 5b, Ms Jay wrote "I hereby declare that my former marriage was dissolved on 18.11.2009". In the course of 2015, a number of utility bills and other official documents were issued to Ms Jay in her female name, including a passport and

driving licence. On 11 June 2015, her GP wrote a letter headed "To Whom It May Concern" stating that Ms Jay was a new patient at the surgery, that the full medical records had not yet been received, but adding:

> "I can confirm that [Ms Jay] has been seen in the Nottingham Centre for Gender Dysphoria this year and [Ms Jay] is living as a female. I believe that female orientation is permanent or very likely to be permanent and formal gender reassignment is taking place."

On the copy of this letter included in the court papers, and presumably submitted at some point to the panel, Ms Jay has written that she left the Nottingham Gender Clinic after this letter "due to their total incompetence".

31. On 20 June 2015, Ms Jay was recalled to prison. On 2 July 2015, she filed her second application to the Gender Recognition Panel. On this application, she identified 18 December 2008 as being the date from which she could provide evidence that she had lived full time in her acquired gender. She identified two doctors to provide the reports required by s.3(1) – her GP and a "gender specialist" called Dr Helen Webberly. She enclosed a copy of the further statutory declaration signed in March 2015. On 11 July 2015, Ms Jay wrote again to the panel complaining that she felt discriminated against and stating that the process was unfair to prisoners who were unable to gather all the information required. On 27 July, her GP submitted a medical report in the pro forma for gender recognition under the GRA. She ticked the box indicating that Ms Jay had been diagnosed with gender dysphoria or a gender-related disorder. She set out information from Ms Jay's medical records.

32. On 5 August 2015, the panel's administrator wrote to Ms Jay stating that the statutory declaration was incomplete because Ms Jay had not completed section 5a. On 3 September, Ms Jay replied, enclosing the GP's report and an amended statutory declaration in which section 5a had been altered so as to read "I have been in a marriage".

33. On 6 October 2015, the panel gave detailed directions with explanatory reasons.

    (1) The panel directed Ms Jay to provide a report from a registered medical practitioner practising in the field of gender dysphoria "giving details of the diagnoses of gender dysphoria for her". In their reasons, the panel reiterated the statutory requirements about medical reports in s.3(1), and noted that Ms Jay had consulted Dr Webberly, who they said was not known to the panel but who, if a specialist, might be able to provide the necessary report. The panel further noted that the GP's report provided details of her current medication, but added that, if there was a change in her treatment or if surgery was proposed or undertaken, Ms Jay should provide a second report confirming details.

    (2) The panel directed Ms Jay to provide a fully completed statutory declaration before a person authorised to administer oaths. The panel said that the declaration provided was incomplete because paragraph 5a stated that she had not been previously in a marriage whereas paragraph 5b stated that her previous marriage had been dissolved in 2009, adding that paragraph 5a should have been deleted and that it would be helpful if

paragraph 5b included the dates of dissolution of all previous marriages. It seems that the panel had not at that stage seen the amended declaration submitted by Ms Jay on 3 September. The panel also stated, however, that Ms Jay should provide the original statutory declaration and not a copy.

(3) The panel directed Ms Jay to provide documents showing that she had lived in her female gender and identity throughout the period of two years from before 2 July 2013 up to the date of application. In its reasons, the panel noted that she had provided a series of documents, in respect of the current application and the first application, to show that she is living in her acquired gender, but observed that many of those documents "show her in her male identity and using her former male name".

(4) The panel directed Ms Jay to provide details of all marriages and evidence that they had been legally brought to an end in the form of the decree absolute.

(5) The panel directed Ms Jay to clarify the address at which she has lived (when not detained in prison) in the period 18 March to 19 June 2015. In its reasons, the panel noted that a number of the documents produced by Ms Jay showed her to have different addresses.

(6) Finally, it was directed that the application would be placed before the same panel on the first available date after one month, adding that Ms Jay could apply, if she wished, for an extension of up to two months to provide the necessary information. Such an extension could be authorised by the administrative team, but any longer adjournment request should be referred to the panel.

34. On the same day as the panel issued these directions, 6 October, Ms Jay signed a third statutory declaration under GRA. On 16 October, she wrote in reply to the directions asserting that she had sent the original report of Dr Webberly and the statutory declaration; stating that she had documents from 2008 to prove she had been living in her acquired gender but had lost them on being recalled to prison; explaining why she had given different addresses on various documents; complaining that she had done all that the panel had asked of her; and asking for an extension if the medical report had been lost. She described the process as being "totally unbearable to do whilst in custody". According to a later medical report, shortly after sending this letter, Ms Jay attempted further surgery on herself, removing part of her testicles and penis.

35. On 4 February 2016, the panel issued further directions with explanatory reasons. It noted that, since the earlier directions of 6 October 2015, a properly completed statutory declaration had been produced. It observed, however, that it was still necessary for Ms Jay to comply with directions 1, 3 and 4. It stated that no report had been received from Dr Webberly; that Ms Jay had referred to her third marriage in 2010 but produced no details; that Dr Barrett, in the July 2014 report sent by Ms Jay after the refusal of her first application, had referred to three marriages; that there was no change of name document dated prior to 6 December 2013; and that Ms Jay needed to show that she was living fully in her female gender from before 5 August 2013. The panel stated that the application would be refused when it was considered again on 16 March 2016 if Ms Jay had not by that date complied with all the

directions of 6 October. Ms Jay replied by letter dated 17 February, stating that, having lost her home, she did not have access to all her documents; that as far as she was concerned she had done all she possibly could to comply with directions 3 and 4, and that she was "fighting through the court" to get back the report from Dr Webberly.

36. Also on 17 February 2016, a medical report was prepared by Prof Srikanth Nimmagadda, a consultant forensic psychiatrist working at a secure hospital unit. It seems that this report was prepared for a separate court case. Subsequently, a redacted copy of the report was sent to the panel by Ms Jay, omitting pages 2 to half way down page 29 on the grounds they were "not relevant" but including page 1 and from half way down page 29 to page 40. The report included the following observations:

> "In my opinion, [Ms Jay] fulfils the criteria for gender dysphoria, i.e. a person has an overpowering wish to live as a member of the gender group opposite to their anatomical sex and seeks to alter their bodily appearance and genitalia. Gender dysphoria is the distress associated with the experience of one's personal gender identity being inconsistent with the phenotype or the gender role typically associated with that phenotype. Those with gender dysphoria have a strong conviction of belonging to the sex opposite to that which they were assigned, usually starting before puberty. I note that in [Ms Jay]'s case, she gave an account of having these beliefs and convictions since an early age but struggled to express this due to a fear of shame and ridicule by others. It appears [Ms Jay] was greatly distressed by her predicament and on various occasions [sic] and this resulted in displayed episodes of low mood and also self-harm attempts. I note that [Ms Jay] has expressed openly her desire to become female, following the death of her father in January 2012. [Ms Jay] has also changed her name and passport and has also sought help in terms of becoming female from a gender dysphoria clinic in Nottingham and subsequently on a private basis from a specialists [sic] with expertise in gender dysphoria.
>
> I note [Ms Jay]'s features of personality disorder have resulted in escalation of her risk behaviours. She has poor ability to cope with feelings of frustration and this led to considerable distress leading to utilising maladaptive coping strategies such as self-harm and suicidal attempts. [Ms Jay]'s gender dysphoria has complicated her presentation. She continues to be considerably distressed as a result of her gender dysphoria and feels very uncomfortable being male. [Ms Jay] is extremely conflicted in her mind as a result of gender dysphoria and this has complicated her presentation including escalating her risks. [Ms Jay] is also distressed there has been lack of progress in terms of treatment of gender dysphoria. She is unhappy in relation to not being prescribed medication i.e. hormone supplements that she has been taking as part of gender reassignment process.
>
> In my opinion, it is likely [Ms Jay]'s features of personality disorder are likely to worsen and would result in more risk behaviours if she does not receive further specialist input in relation to her gender dysphoria …."

Prof Nimmagadda concluded by recommending that consideration be given to transferring Ms Jay to a women's prison for further treatment and management.

37. On 15 March 2016, the panel refused Ms Jay's second application for a gender recognition certificate. It asserted that Ms Jay had been unable to comply with the directions given on 6 October 2015 and February 2016 in respect of an appropriate diagnosis of gender dysphoria, living in her acquired gender from before 2 July 2013, and evidence of previous marriages being brought to an end. The panel recorded that Ms Jay had produced eight pages of a 34-page report from Prof Nimmagadda, but stated that the panel could only consider the report if it was complete and could not rely on Ms Jay's assertion that the rest of the report was not relevant to the application. Furthermore, the panel stated that, although the Professor had asserted that in his opinion Ms Jay fulfilled the criteria for gender dysphoria, he did not give details of how the diagnosis was made, nor had he shown that he is practising in the field of gender dysphoria. The panel added that a new application for a certificate could not be made for six months from the date of the decision.

38. On 25 May 2016, Ms Jay was released from prison again on licence. On 4 July 2016, she completed a third application to the panel. This was initially returned as it had been filed within six months of the previous decision, and she resubmitted it on 20 September 2016. In the intervening weeks, Ms Jay changed her surname by deed poll as set out above and also obtained a new passport in that name.

39. On 5 September 2016, a report on Ms Jay was sent to the panel by Dr Vickie Pasterski, a gender identity specialist in the following terms:

> "**Transsexualism**: A desire to live and be accepted as a member of the sex opposite of that which was assigned at birth. This is usually accompanied by a sense of discomfort with, or inappropriateness of, one's anatomic sex and a wish to have hormonal treatment and/or surgery to make one's body as congruous as possible with the experienced gender identity, i.e. as male or female.
>
> **Diagnostic Guidelines**: For the diagnosis to be made, the cross-sex gender identity should have been present persistently for at least two years, and must not be a symptom of mental illness such as psychosis.
>
> **[Ms Jay]**: [Ms Jay] is a 39-year-old natal male who has lived in the female gender role since 2013. In this time, she has lived continuously and in all contexts as female, has undertaken laser hair removal, breast augmentation, feminising hormone therapy and feminising body sculpting procedures. Furthermore, to my knowledge, [Ms Jay] has never been diagnosed with disqualifying psychiatric illness.
>
> With respect to identification, [Ms Jay] changed her name by statutory declaration in the UK on 5 September 2012 and followed with the changes in identification on all relevant documentation including bank accounts/statements, utility accounts, UK driving licence and UK passport. She now wishes to obtain a gender recognition certificate to complete the process of gender change in the UK.
>
> After specialist assessment by me carried out over three sessions on 24.6.16, 19.7.16 and 25.8.16, I can confirm that [Ms Jay] continues to live successfully in the female gender role and should do so for the foreseeable future."

40. On the same date, Dr Pasterski sent another letter to Ms Jay's GP, Dr Thornhill. This letter was notably more detailed than the report sent to the panel. It summarised Ms Jay's background, education, employment history, relationships, social support, and medical psychiatric and counselling history. It set out in some detail her gender history, noting that she has a long history of cross-gender ideation, giving examples of her behaviour as a child and young person, noting the steps she has taken towards a physical gender change since her mid-teens, and observing that, "practically speaking, M has transitioned to the female social gender role full-time". In her letter to the GP, Dr Pasterski recorded this impression:

> "My impression is that [Ms Jay] is a gender dysphoric individual with a long history of cross-gender ideation. [Ms Jay] presented as relatively stable, reported no contributory psychiatric history and gave a detailed account of herself. [Ms Jay] presents with male to female transsexualism according to ICD 10 F 64.0 criteria.
>
> [M Jay] presented to me in female role, was dressed appropriately and had a remarkably feminine appearance and demeanour. Her mood was euthymic and she showed no outward signs of atypical anxiety, agitation or aggression. The history of self-harm and depressed mood notwithstanding, there was no current suicidal ideation or perceived risk to the self or others. Thought processes and speech appeared normal. [M Jay] appeared to have a reasonable degree of insight and showed recent improvements in social and occupational functioning."

Dr Pasterski recommended that Ms Jay was a good candidate for continued clinical management of feminising hormone therapy according to clinical and good practice guidelines.

41. Although this letter was addressed to Dr Thornhill and not the panel, I was told, and accept, that it was sent to the panel who must, therefore, have had it available when it reached its ultimate decision.

42. On 20 September, the panel's administrator wrote to Ms Jay acknowledging receipt of the application and stating that she may wish to provide further evidence before the application was submitted to the panel. Specifically, it was asserted that the statutory declaration submitted with the application would not be accepted by the panel "because it should be dated as near to your application as possible, as it should reflect your current situation". A blank form of the statutory declaration was enclosed for Ms Jay to complete. In addition, the administrator advised that a copy of Ms Jay's decrees absolute would be required for her first and third marriages. Ms Jay was requested to provide this information by 18 October 2016.

43. On 27 September, Ms Jay signed another statutory declaration (the fourth), witnessed by a solicitor. On 4 October, she was examined by an endocrinologist, Dr King, who subsequently wrote a report to her GP recommending hormone treatment on the NHS. In that report, he referred to Ms Jay's self-orchidectomy. On 12 October, the panel gave directions indicating that it would issue a decision within one month, adding that it would take additional time to consider the application "as it is necessary to read this application with the two previous applications which have been refused." Meanwhile, Ms Jay continued to receive correspondence from a number of agencies in her current female name (e.g. HMRC, the local authority, the water company etc.)

44. On 17 November 2016, the panel issued further directions with explanatory reasons. Ms Jay was directed:

> (1) to provide a letter from Dr Pasterski indicating what documents she saw for the purposes of her assessment;
>
> (2) confirm the dates when she was detained in prison together with her addresses since her release;
>
> (3) provide details of the dates between which she worked full-time and the dates between which she was in receipt of employment and support allowance;
>
> (4) indicate whether Dr Pasterski was given details of the period during which she was imprisoned;
>
> (5) produce copies of up-to-date utility bills for her current home;
>
> (6) provide a brief report from her current GP giving details of treatment she has undergone for the change of sexual characteristics and any surgery.

Ms Jay was informed that the application would be placed before the same panel on the first available date after one month. In its reasons, the panel noted that Dr Pasterski's report did not refer to the period during which she had been detained in prison, and said that it would like to be satisfied that she had been given full details of Ms Jay's circumstances in the years leading up to the present application. The panel noted that two previous applications have been refused and also referred to the report from Dr Barrett who had, it was said, declined to give a diagnosis of gender dysphoria. The panel also noted that the documents produced by Ms Jay related primarily to 2014 and 2015 and said it would be helpful to see more recent documents such as utility bills. The panel observed from Dr Pasterski's report that Ms Jay had changed GP. She was therefore asked to clarify the reason for the change, and to provide an updated report from her current GP as to treatment, given that the report from her previous GP was made over a year previously.

45. In response, Ms Jay returned a copy of the directions with hand written comments, including that she was unable to afford a further letter from Dr Pasterski, adding that she was in any event away until January 2017, and that some of the information requested by the panel had nothing to do with her gender (for example, details of the dates when she had been working and when she had received benefit). She added:

> "You keep altering directions after directions making things old. I'm sick to death of this ridiculous process. Do you have any idea what all this keep denial of my right to be recognised by law is doing to me? It's one thing after another. I have a gender specialist Vickie Pasterski. I have an endocrinologist Dr King. I have a GP. What the hell more do you want I've been female all my life I've been out fully since 2008 !! Why are you constantly messing me around for !!!"

46. On 30 November 2016, Ms Jay's current GP, Dr Thornhill, wrote a letter setting out details of her current treatment, including recording that the surgery had agreed to prescribe hormones on the NHS to support her gender reassignment process. On 14

December 2016, a member of the panel's administrative team wrote to Ms Jay acknowledging receipt of further evidence, presumably the GP's letter.

47. On 16 February 2017, the panel issued further directions requiring Ms Jay to (a) comply with the directions of 17 November 2016, (b) provide her present residential address, and (c) explain handwritten amendments in Dr King's letter dated 5 October 2016. In its reasons for these directions, the panel observed that Ms Jay had refused to comply with the majority of 17 November 2016 directions and stated that her reasons for failing to comply did not justify her refusal. They stated that her reluctance to provide information

> "may be taken by the panel as [Ms Jay] having something to hide. The panel may draw adverse inferences about the circumstances of [Ms Jay] to the extent that she refused to comply with directions, unless you can show valid reasons for being unable to comply."

The panel added that there was confusion and uncertainty about the periods Ms Jay had been in prison, in work and where she had lived. It was observed that Dr Pasterski had now returned to this country and that Ms Jay should now be able to obtain the supplemental information requested from the doctor. The panel stated:

> "The panel finds that it cannot entirely rely on all the evidence of [Ms Jay], which places doubt in the panel's mind about what can and cannot be accepted. Evidence has been produced with deletions and editing which has not been explained. There have been a number of inconsistencies in her evidence which have not been adequately explained. The evidence she has provided has often been vague and unclear. The panel has at times found [Ms Jay] evasive in her response to directions …."

Ms Jay was warned in the directions that the application would be put before the same panel on the first available date after one month and that her application might be refused if she had not complied with the directions by that time.

48. Ms Jay replied to these directions in an undated letter, vociferously complaining about the panel's conduct, describing it as "pathetic" and "a total disgrace", objecting strongly to the assertion that she had something to hide, and asserting inter alia that she had complied with relevant directions, that her address had nothing to do with her application, and that she had made amendments to Dr King's letter to avoid confusion. In supplemental notes, she provided further information about her addresses and the time she had been in custody. At one point in the letter she stated:

> "I wish to have contact details of your legal team please so I can send them a letter of claim and let a judge see how your requests are relevant. If it's not granted this time. Please destroy all my applications as I will not be carrying on with any [sic]."

This prompted the panel to write on 16 March 2017, asking her to make it clear if she was withdrawing her application. On 6 April 2017, Ms Jay re-sent her earlier letter adding that, when she requested that her applications be destroyed, she meant that "if you don't grant it this time then forget it and destroy all paperwork". On 18 May 2017, the panel issued further directions re-issuing the directions of 17 November

2016, stating that the application would be placed before the same panel after one month and that it was likely to be refused if the directions had not been complied with.

49. The papers before me include a memo of a telephone call between a member of the panel's administrative team and Ms Jay on 26 June 2017, in the course of which Ms Jay had said she did want to continue with her case and did not want to withdraw, that she "can't work out how to get what the panel wants", that she did not have enough money for another medical report, that she had answered all the panel's other questions, and that she had made amendments to Dr King's letter because he had put in the wrong dose of one of her hormones. The panel did not receive any further written responses to its directions.

50. On 8 August 2017, the panel refused Ms Jay's third application for a gender recognition certificate. In its reasons, the panel stated inter alia:

> "The main reason was that the panel could not be confident about the evidence provided by Dr Pasterski was reliable [sic]. She appeared not to be aware of significant features about [Ms Jay's] circumstances and recent background. Some of those matters might have influenced the assessment made by Dr Pasterski. The doctor needed to know those circumstances to decide whether the findings of her report … were sound and she stood by them. This is particularly relevant in this case because, in respect of the previous application, Dr Barrett from the Charing Cross Hospital had declined to give a diagnoses [sic] of gender dysphoria and both previous applications had been refused.
>
> Since the directions of 17 November 2016, the only written communication from [Ms Jay] has been a letter dated 6 April 2017 in which she indicates that she was unwilling to comply with the panel's directions.
>
> The panel seeks to respect the privacy and rights of [Ms Jay], as with all applicants. However sufficient evidence has to be produced to satisfy the panel that the requirements of the [GRA] are met. The uncertainty in this case about the reliability of the medical evidence meant that the panel had to ask for further clarification.
>
> The aim of the panel is to assist anyone who is entitled to a gender recognition certificate to achieve that aim to be legally recognised in their acquired gender. Granting directions on six occasions was intended to assist and support [Ms Jay] in her aim of achieving a gender recognition certificate. The evidence provided in respect of the two previous applications could not be ignored when considering the present application, because of the questions raised about a diagnosis of gender dysphoria in respect of the previous applications."

51. I am told that Ms Jay wrote in response to the panel's decision on several occasions, but copies of those letters have not been produced. On 10 November 2017, she was recalled to prison whilst on licence again and at the time of the hearing before me was still in custody. On 20 January 2018, she wrote from prison referring to four previous letters and stating that she wished to appeal against the refusal of her certificate. That letter was sent to the PRFD and forwarded to me. I asked for further information from the panel. On 20 April, I gave directions in the appeal, listing it for an oral hearing on

27 June, directing service of the papers on the Secretary of State, and making provision for the filing of skeleton arguments.

52. Meanwhile, Ms Jay had been referred again by her GP to the Porterbrook Gender Identity Clinic in Sheffield where she was assessed on 4 May 2018 by Dr Madelina Cosmulescu. In a full report to the GP dated 11 May, Dr Cosmulescu set out in some detail Ms Jay's background, including her history of gender identity issues, and expressly referred to her sentence of imprisonment. She noted that her current mental state was more stable, describing her as very insightful into her current condition and willing to engage with the assessment process. She concluded that Ms Jay does reach the diagnostic criteria for both gender dysphoria and transsexualism. In a separate letter of the same date, Dr Cosmulescu set out a detailed hormonal treatment programme for Ms Jay.

53. At the hearing on 27 June, Ms Jay was represented by Ms Claire McCann, the Secretary of State by Mr Brendan McGurk. At the conclusion of the hearing, I gave directions for further written submissions to be filed on a point which had emerged during the course of the argument, and reserved judgment. Supplemental written submissions were duly filed

Grounds of appeal

54. In her clear and comprehensive written submissions, Ms McCann put forward three grounds of appeal.

55. The first ground is that the panel had failed properly to apply the statutory criteria under ss.1 to 3 of the GRA. It appears that the panel made a decision by reference to whether or not Ms Jay had complied with earlier directions, rather than by a proper consideration and application of the statutory criteria. Moreover, and in any event, by the time of the panel's refusal decision on 8 August 2017, Ms Jay had materially complied with the panel's directions.

56. The second ground of appeal is that, in reaching its decision, the panel had regard to irrelevant and/or incorrect factors. Ms McCann identified three particular such factors. First, the panel relied on its conclusion that Dr Pasterski was "not aware of significant features" about Ms Jay's circumstances and recent background, leading it to doubt the reliability of the medical evidence. The features identified by the panel as being matters of which the doctor was unaware were, in particular, the fact that Ms Jay had been in prison and the periods of her employment. In fact, Dr Pasterski was aware of both of those matters. Secondly, the panel relied on its conclusion that Dr Barrett had declined to give a diagnosis of gender dysphoria in an earlier report provided to the panel in relation to the first application. It is contended on behalf of the appellant that the panel ought not to have relied on this report, given that it dated back to July 2014, over three years prior to the decision in August 2017, and furthermore that Dr Barrett had not been instructed for the purposes of an application for a gender recognition certificate, nor indeed to consider a diagnosis of gender dysphoria, but rather in respect of a potential claim for damages. Thirdly, the panel had wrongly asserted in giving its reasons for refusing the application that since its directions of 17 November 2016, the only written communication from Ms Jay had been a letter dated 6 April 2017.

57. The third ground of appeal is that the process which Ms Jay has been required to adhere to by the panel from the date of her first application in May 2014 to its final decision on 8 August 2017 has violated Ms Jay's right to respect for private life under article 8 of ECHR and/or has interfered with such right in a discriminatory manner by reference to her status as a prisoner, contrary to article 14.

58. If the appeal is successful on all or any of the grounds, Ms Jay asks this court to issue the gender recognition certificate, as permitted by s.8(3)(a). In the alternative, she asked the court to allow her appeal and refer the matter to another panel for reconsideration, pursuant to s.8(3)(b).

59. At the start of the hearing, Mr McGurk stated that the Secretary of State was neutral as to the merits of the appeal but submitted that, in the event the court concluded that the appeal should be allowed, the appropriate course would be to remit the matter to the same or another panel. He suggested that, given the concession on behalf of the appellant that there had been material rather than full compliance with the panel's directions, this court might be nervous about granting a certificate itself without allowing the panel, or another panel, to reconsider the application. At that point, therefore, it seemed that the Secretary of State's role at the hearing would be limited. In the event, however, Mr McGurk did make some submissions as to the merits as the hearing proceeded and in addition, at my request, addressed at some length in further written submissions a supplemental point which arose in the course of the hearing.

Ground (1) - failure properly to apply the statutory criteria under s.1 – 3 GRA

60. A central feature of all of the submissions advanced on Ms Jay's behalf by Ms McCann is that the GRA is a statue designed to facilitate gender recognition. To that end, the statutory regime is permissive rather than restrictive. If the applicant satisfies the statutory criteria in s.2(1), the panel must issue a certificate. This is reflected in statistics produced by Ms McCann demonstrating that fewer than 5% of applications to the panel are refused.

61. Ms McCann submitted that the evidential requirements in s.3 are ancillary to the statutory criteria in s.2. The evidence required must be probative of, and assist with the determination of, the application for a gender recognition certificate under s.2(1). In other words, the evidence must help with the questions of whether the applicant (a) has gender dysphoria, (b) has lived in the acquired gender throughout the period two years ending with the date of the application, (c) intends to continue to live in the acquired gender until death, and (d) otherwise complies with the evidential requirements under s.3. Any directions made by the panel in relation to such evidential requirements must not be elevated to a status which tends either to (a) sideline or undermine the statutory criteria for determining whether the applicant is entitled to a certificate, and/or (b) frustrate the process by which the applicant seeks to secure legal recognition for their "acquired" gender. Ms McCann acknowledged that s.3(6)(c), which obliges the applicant to include "any other information or evidence which the panel which is to determine the application may require", is drafted in broad terms, but she submitted that, given that the purpose of the GRA was to address the finding of the European Court in *Goodwin,* it should be interpreted restrictively as meaning information which the panel requires to facilitate the application. She added that the terms of the President's Guidance No.1 are consistent with such an interpretation.

62. In this case, as described in the summary of facts above, initial directions were given in respect of the third application on 17 November 2016, and thereafter further directions were given on several other occasions in which the panel complained about Ms Jay's failure to comply with the original directions. In its refusal decision of 8 August 2017, the panel asserted (without giving full explanation) that the statutory criteria for granting a certificate had not been met, and then stated that Ms Jay had been advised that her application "would be refused" if the earlier directions were not complied with. In addition, the panel wrongly asserted that Ms Jay had only sent one further written communication after the directions of 17 November.

63. Ms McCann submitted that, in fact, Ms Jay had substantially complied with the panel's directions of 17 November. In directions 2 and 3, the panel had asked for the dates of her detention in prison, her employment history and her present residential address. Ms Jay had supplied that information in her undated letter sent in response to the directions issued on 16 February 2017. In direction 4, the panel had wanted to be satisfied that Dr Pasterski had been made aware of Ms Jay's detention in prison. Ms Jay had subsequently confirmed in writing that the doctor had been given those details. Ms Jay had also provided copies of up-to-date utility bills and a brief report from Dr Thornhill giving details of her treatment, as required by directions 5 and 6. The only direction which Ms Jay had not complied with was direction 1, which required her to provide a letter from Dr Pasterski indicating what documents she saw for the purposes of her assessment. In her response to the directions, Ms Jay had stated that she was unable to afford another letter from the doctor, who was in any event in the United States until January 2017. In its directions dated 16 February 2017, the panel had stated that it was presumed that Dr Pasterski had now returned and could be contacted by Ms Jay. The panel did not address the question as to cost, nor did it consider whether the substantial compliance by Ms Jay with the other directions obviated the need for a further letter from Dr Pasterski.

64. Ms McCann submitted that the panel was diverted by its focus on the issue of Ms Jay's perceived reluctance to comply with its directions and failed properly to demonstrate how, or indeed consider whether, the statutory criteria had been satisfied. Its overemphasis on the issue of compliance with directions frustrated the statutory process by which the applicant was entitled to secure legal recognition of her acquired gender. In particular, the panel had evidence from four medical practitioners supporting the diagnosis of gender dysphoria – Dr Pasterski, Dr King, Dr Thornhill and Prof Nimmagadda – but failed to explain why they concluded that evidence was insufficient to satisfy the statutory criteria.

65. As for the second criterion in s.2(1)(b), Ms McCann submitted that, by August 2017, the panel had a wealth of evidence of Ms Jay's ability to demonstrate that she had lived in the acquired gender for over two years prior to the application and in fact going back to 2013. By way of example, she draws attention to the deed poll executed in December 2013, a legal aid certificate granted in May 2014, correspondence from HMRC dated the same month, prisoner account statements, court documents, correspondence from the probation service, utility bills, her passport, driving licence, her cheque-book, and other miscellaneous correspondence. With regard to the third criterion in s.2(1)(c), the panel was provided with the statutory declaration executed in September 2016 which complied fully with its requirements. In addition, the panel was aware of Ms Jay's treatment and therapy history and also her attempts at surgery,

summarising Dr King's report, which were plainly consistent with an irreversible wish to eradicate the features of her old gender. Ms McCann submitted that the panel failed to stand back to consider whether in all the circumstances the statutory criteria under s.2(1) were satisfied.

Ground (2) - irrelevant and/or incorrect factors

66. Ms McCann's submissions under the second ground focus on two sets of factors, the first concerning Dr Pasterski, the second Dr Barrett.

67. With regard to Dr Pasterski, Ms McCann noted that the panel had concluded that she "appeared not to be aware of significant features about Ms Jay's circumstances and recent background", which led the panel to doubt the reliability of her report. Ms McCann submits that the panel failed to set out in its decision or its reasons what precisely it considered those "significant features" to be, nor how they might be relevant to whether or not the report was reliable. Ms McCann inferred from earlier directions that the material issue for the panel about the report was whether or not Dr Pasterski was aware of Ms Jay's detention in prison, and her current and past employment history. But the panel failed to record that Ms Jay had subsequently confirmed that she had told Dr Pasterski about the period she had been in prison, as set out in her handwritten responses to the directions. Furthermore, although there is no reference to Ms Jay's employment history in Dr Pasterski's report addressed to the panel, it is considered in her letter addressed to M's GP Dr Thornhill dated the same day which was also supplied to the panel.

68. As a result, Ms McCann submitted that the panel had regard to an irrelevant and/or incorrect consideration in concluding that the doctor was unaware of Ms Jay's recent circumstances. She submitted that this vitiates its refusal decision, particularly having regard to Dr Pasterski's diagnosis of gender dysphoria which was consistent with other evidence, including the letter from Ms Jay's GP and the report from Prof Nimmagadda.

69. With regard to Dr Barrett, Ms McCann submitted that, in attaching significant weight to his report, the panel had regard to an irrelevant factor and/or that it was irrational and/or perverse for the panel to place emphasis on the report, for the following reasons. First, his report was prepared in July 2014 in connection with an earlier application and, by the time of the panel's decision on the third application, it was plainly stale. Secondly, his report was not obtained for the purpose of a diagnosis of gender dysphoria but, rather, for the potential claim for psychiatric injury following assaults in prison. Thirdly, Ms McCann submits that Dr Barrett did not in fact decline to make a diagnosis of gender dysphoria. He was not requested to make such a diagnosis. Furthermore, a close analysis of his report (as illustrated by the passage quoted above) shows that, in fact, he made a conditional diagnosis of gender dysphoria, contingent on "collateral corroboration". Ms McCann submitted that the doubts identified by Dr Barrett in his report three years prior to the August 2017 refusal decision had been dispelled by the subsequent evidence of other clinicians who reached a clear diagnosis of gender dysphoria, as result of which Ms Jay has received extensive clinical treatment.

70. In addition, under ground (2), Ms McCann relied on the panel's erroneous assertion that Ms Jay had only provided one written communication after the directions of 17

November 2016, the letter dated 6 April 2017. In fact, as Mr McGurk accepted during the hearing, there had been two further written communications from Ms Jay to the panel, each incorporating a number of other documents.

Ground (3) - violastion of articles 8 and/or 14 ECHR

71. In support of the third ground of appeal, Ms McCann first cited the well-known passage in the decision of the European Court of Human Rights in *Van Kück v Germany* (2003) 37 EHRR 51 at paragraphs 69 to 70:

> "69. As the Court has had previous occasion to remark, the concept of 'private life' is a broad term not susceptible to exhaustive definition. It covers the physical and psychological integrity of a person. It can sometimes embrace aspects of an individual's physical and social identity. Elements such as, for example, gender identification, name and sexual orientation and sexual life fall within the personal sphere protected by article 8. Article 8 also protects the right to personal development and the right to establish and develop relationships with other human beings and the outside world. Likewise, the Court has held that though no previous case has established as such any right to self-determination as being contained in article 8, the notion of personal autonomy is an important principle underlying the interpretation of its guarantees. Moreover, the very essence of the Convention being respect for human dignity and human freedom, protection is given to the right of transsexuals to personal development and to physical and moral security.
>
> 70. The Court further reiterates that while the essential object of article 8 is to protect the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference: in addition to this negative undertaking, there may be positive obligations inherent in an effective respect for private or family life…."

72. In addition, Ms McCann cited the observation of Laws LJ in *R(Wood) v Commissioner of Police for the Metropolis* [2009] EWCA Civ 414 [2010] 1 WLR 123 at paragraph 21-22:

> "21. The notion of the personal autonomy of every individual marches with the presumption of liberty enjoyed in a free polity: a presumption which consists in the principle that every interference with the freedom of the individual stands in need of objective justification. Applied to the myriad instances recognised in the article 8 jurisprudence, this presumption means that, subject to the qualifications I shall shortly describe, an individual's personal autonomy makes him – should make him – master of all those facts about his own identity, such as his name, health, sexuality, ethnicity, his own image, of which the cases speak; and also of the 'zone of interaction' (the *Von Hannover* case 40 EHRR 1, para 50) between himself and others. He is the presumed owner of these aspects of his own self; his control of them can only be loosened, abrogated, if the state shows an objective justification for doing so.
>
> 22. This cluster of values, summarised as the personal autonomy of every individual and taking concrete form as a presumption against interference with the individual's liberty, is a defining characteristic of a free society. We therefore

need to preserve it even in little cases. At the same time it is important that this core right protected by article 8, however protean, should not be read so widely that its claims become unreal and unreasonable. For this purpose I think there are three safeguards, or qualifications. First, the alleged threat or assault to the individual's personal autonomy must (if article 8 is to be engaged) attain 'a certain level of seriousness'. Secondly, the touchstone for article 8(1)'s engagement is whether the claimant enjoys on the facts a 'reasonable expectation of privacy' (in any of the senses of privacy accepted in the cases). Absent such an expectation, there is no relevant interference with personal autonomy. Thirdly, the breadth of article 8(1) may in many instances be greatly curtailed by the scope of the justifications available to the state pursuant to article 8(2)…."

73. Relying on these observations, and other authorities, Ms McCann submits that the State is under a positive duty to adopt measures that secure a trans person's right to have relationships with others and develop as an individual without restraint or interference. She submits that, where a person's gender identity is not recognised or is undermined, that constitutes a very grave interference with her article 8 rights, because, in the words of Baroness Hale of Richmond in *R (C) v Secretary of State for Work and Pensions* [2017] UKSC 72, [2017] 1 WLR 4127 at paragraph 31:

> "it goes to the heart of how [she], and others in her situation, relate to the world and the world relates to them."

74. It is for the court to determine whether or not the article 8 rights have been breached, whether the public authority's interference with the exercise of the rights is, in the words of article 8(2), in accordance with the law and necessary in a democratic society. The four questions to be addressed, as identified by Lord Bingham of Cornhill in *Huang v Secretary of State for the Home Department* [2007] UKHL 11, [2007] 2 AC 167, and reiterated by Lord Wilson in *R (Aguilar Quila) and Anor v Secretary of State for the Home Department (AIRE Centre and others intervening)* [2011] UKSC 45 [2012] 1 AC 621, are:

(1) Is there an objective which is sufficiently important to justify limiting a fundamental right?

(2) Are the measures which have been designed to meet the objective rationally connected to it?

(3) Are they no more than are necessary to accomplish that objective?

(4) Do they strike a fair balance between the rights of the individual and the interests of the community?

75. Article 14 of ECHR provides:

> "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

76. Ms McCann submitted that being a convicted prisoner is a "status" for the purposes of article 14, and that the article required not merely that like cases are treated alike but also that unlike cases may need to be treated differently so that material differences should be reflected in policy or procedures requiring more favourable treatment of those whose circumstances justify a departure from the general rule: *Thlimmenos v Greece* (2000) 31 EHRR 411.

77. It was contended on behalf of Ms Jay that the evidential requirements under s.3 of GRA and the process adopted by the panel, including requirements imposed by the panel under s.3(6)(c) and any case management directions made by the panel, must not be so exacting or onerous as to lead to an unjustified intrusion into an applicant's right to respect for private life under article 8 and/or any discriminatory interference with the enjoyment of that right contrary to articles 8 and 14. Ms McCann submitted that the documents filed by Ms Jay in the course of her three applications demonstrate that she was finding it extremely difficult to comply with the directions, in large part because she was detained in prison. Furthermore, the panel's emphasis on the need for compliance with its directions meant that the process by which Ms Jay sought legal recognition for her acquired gender has been frustrated. The administrative and judicial regime for conferring legal recognition was made especially difficult for her, as a result of her detention in prison. It follows that she was discriminated against, on the grounds of her status as a prisoner, in her enjoyment of her article 8 rights. The consequence of the panel's refusal of her application has been that Ms Jay has been forced to continue to live in the intermediate zone identified by the European Court in *Goodwin* at paragraph 90 (supra).

78. Ms McCann submitted that the issue for this court is whether breach of Ms Jay's article 8 rights caused by the refusal decision was justified, applying the four questions identified in the *Aguilar Quila* case.

79. With regard to the first question – whether there is an objective which is sufficiently important to justify limiting a fundamental right – it is accepted on behalf of the appellant that the statutory purpose of ensuring that applications for gender recognition certificates are granted only to genuine applicants is a legitimate objective. It is submitted, however, that the panel's decision fails the three remaining criteria identified in the *Aguilar Quila* case

80. First, it is submitted that the measures adopted by the panel were not rationally connected to the legitimate objective because the process was overly formulaic and frustrated the purpose of the statutory regime, which is to create a readily accessible means for people in Ms Jay's position to acquire gender recognition. Secondly, it is submitted that the measures taken by the panel, and in particular, excessive emphasis on the panel's directions, and the overreliance on Dr Barratt's "stale" medical report, were manifestly more than necessary to accomplish its legitimate objective. As set out above, it is Ms McCann's central submission that the statutory regime is permissive, rather than restrictive. In this context, Ms McCann submitted that, before dismissing Ms Jay's third application in circumstances where it apparently had concerns about her credibility, the panel ought to have considered whether holding a hearing under Schedule 1 paragraph 6 of the GRA was necessary in order to determine the application. Thirdly, it is argued on behalf of Ms Jay that the process adopted by the panel and its refusal decision did not strike a fair balance between her rights under article 8 to recognition in law of her acquired gender and the interests of the

community. Given that she was in detention for much of the period during which her application was under consideration, and as a result, as she made clear to the panel on a number of occasions, had difficulty in complying with the requirements imposed under s.3 and in particular the additional requirements imposed by the panel under s.3(6)(c), it is contended that the panel should have recognised that its obligations under article 14 to consider whether unlike cases need to be treated differently should have led to a more flexible approach and its adherence to an inflexible approach had the effect that Ms Jay's ability to enjoy her right to respect private life was curtailed in a discriminatory way because of her status as a prisoner.

81. Ms McCann therefore submits that the panel's refusal decision was disproportionate, did not meet a pressing social need, and was therefore an unjustified and unlawful infringement of Ms Jay's article 8 rights.

82. As set out above, Mr McGurk at the start of the hearing stated that the Secretary of State was neutral as to the merits of the appeal. In the course of his oral submissions, however, he made a number of points which, if accepted, would lead the court to dismiss the appeal. By way of general submissions, he emphasised that all four of the criteria under s.2(1) have to be satisfied before a certificate can be issued; that the purpose of s.3(6)(c) is to enable the panel to obtain further information to assist in deciding whether the criteria in s.2(1)(a) to (c) are satisfied; that it is for the panel to decide what information it requires; and that the panel is a specialist body including a registered medical practitioner and thus fully equipped to evaluate the evidence requirements. On the specific facts of this case, he informed the court that the Secretary of State does not accept that the reports of Dr King and Dr Thornhill provided any effective support to Dr Pasterski; that the panel was fully entitled to require to see the full report of Prof Nimmagadda before considering his diagnosis of gender dysphoria; and that the panel was entitled to conclude that Dr Pasterski did not address the concerns raised by Dr Barratt. He further contended that the panel was entitled to take into account its concerns about the evidence supplied by Ms Jay, including that documents had been altered and that she had failed to identify the information supplied to Dr Pasterski.

The supplemental issue

83. In the course of Mr McGurk's submissions, a further issue arose relating to the subsequent report prepared by Dr Cosmulescu of the Porterbrook Clinic. This issue was distilled into the following question: is the power vested in this court by s.8(3)(a) of the GRA sufficient to enable it to allow an appeal and issue a certificate in circumstances where the court concludes (a) either there has been an error of law in that the panel required additional evidence unnecessarily under s.3(6)(c) and/or the panel was wrong in concluding that the appellant had not supplied that information; and (b) it is not possible for the court to say, on the basis of the evidence before the panel, that the s.2(1)(a) to (c) criteria were satisfied; but (c) the court is satisfied that subsequent evidence established that those criteria are satisfied? To address this question, counsel were directed to file supplemental written submissions which were in due course provided by Mr McGurk on 11 July and by Ms McCann on 23 July, although not in fact received by this court until 2 August.

84. In his submissions, Mr McGurk asserted that the third part of the question raised an important point of principle not previously determined, namely whether the appellate

court, when allowing an appeal from a panel, can take into account evidence, in particular medical evidence, that was only acquired after the panel reached its decision, in order to determine whether the criteria under s.2(1) are satisfied and that a certificate should be issued under s.8(3)(a). The right of an applicant for a certificate to appeal a panel's decision refusing the application is conferred under s.8. This is a statutory right of appeal so that the scope of the jurisdiction conferred on the appellate court is determined exclusively by the statute conferring the right. An appeal can only be made on a point of law (including a finding of fact that was so erroneous that no reasonable panel could have reached that decision) but does not otherwise confer a right on an applicant to challenge findings of fact made by the panel. It would only be if the right of appeal conferred was a full merits appeal that the applicant could ask the court to consider the matter afresh and on all the facts. For this court to exercise a full *de novo* merits-based jurisdiction on all the facts would be unilaterally to broaden the scope of the appeal jurisdiction beyond that which Parliament intended.

85. Mr McGurk submits that the circumstances in which this court may issue the certificate applied for when allowing an appeal is confined to those cases where, but for the identified error of law, a certificate would have been granted. If the error of law made by the panel is one where it cannot be said that, but for that error, a certificate would inevitably have been issued, Mr McGurk submits that this court must, when allowing the appeal, refer the matter back to the same or another panel for reconsideration as provided for by s.8(3)(b).

86. Mr McGurk submits that the circumstances in which new evidence can be adduced at the appellate stage, either under the Civil Procedure Rules or the Family Procedure Rules, are limited to those established in *Ladd v Marshall* [1954] I WLR 1489, namely where (i) such evidence could not have been obtained with reasonable diligence for use at trial; (ii) the evidence in question would probably have had an important influence on the outcome of the case, and (iii) the evidence is apparently credible. Mr McGurk submits that the difficulty facing Ms Jay is her ability to satisfy the first condition. Although the Porterbrook report was not available in August 2017, Ms Jay was given the opportunity to provide something akin to that evidence, namely the supplemental letter from Dr Pasterski. He submits that, if she was not prepared to produce such a letter, it is difficult for her now to contend that the new evidence satisfies the first *Ladd v Marshall* condition. Furthermore, it is submitted on behalf of the Secretary of State that there are two other matters that constrain the application of *Ladd v Marshall* in the present appeal. First, the court's jurisdiction is constrained by virtue of the fact that it is only dealing with an appeal on a point of law. Secondly, and in the Secretary of State's opinion more fundamentally, it is submitted that the terms of s.8(4) have very considerable bearing on the proper approach to after-acquired evidence. Under that subsection, the applicant is constrained from making a further application for a certificate until six months after the date on which the previous application was rejected. It is submitted that this provision encapsulates a distinction between this case and "ordinary appeals" from decisions of a lower court which are, subject to appeal, final. In this case, the doctrine of *res judicata* does not apply so that it was open to Ms Jay to have filed a fresh application at any point after 8 February 2018 and in doing so could have relied upon the new Porterbrook evidence. It is submitted that the scheme of the GRA envisages that new evidence will be considered on a fresh application by the panel, particularly so where evidence raises medical issues or otherwise engages the panel's expertise as a specialist panel best suited to

determine whether the evidence is sufficient to demonstrate that the applicant has gender dysphoria.

87. In summary, the Secretary of State contends that, in cases that satisfy conditions (a) and (b) within the supplemental question posed, the court should either dismiss the appeal (because the error of law was immaterial) or if, notwithstanding that the error of law was not material to the outcome, the court considers that the error affords it remedial jurisdiction within s.8, the court should nevertheless not have regard to the new evidence in order to determine whether the criteria under s.2(1) are satisfied such as to justify the grant of certificate. In cases such as the present appeal where the new evidence is medical evidence which bears on the reasons why the panel was not previously satisfied that the criteria were met, the only appropriate remedy is for the court to remit the matter to a newly constituted panel pursuant to s.8(3)(b).

88. In reply, Ms McCann accepts that an appeal under s.8 does not confer a full merits-based jurisdiction, but contends that, on the question of disposal, the court's powers are not as circumscribed as suggested on behalf of the Secretary of State. She submits that his submissions wrongly conflate the merits issue and the disposal issue. If the Court concludes that the panel's refusal to grant the certificate was obviously wrong, the court can and should consider the evidence, including any new evidence which meets the *Ladd v Marshall* criteria and/or which it is otherwise in the interests of justice to have regard to (including where this is reasonably necessary to safeguard the appellant's fundamental rights and freedoms), and issue the certificate itself. She reminds the court that its jurisdiction under s.8 is, at its very core, concerned with the question of whether the panel has lawfully refused an individual their right to legal recognition of their gender identity. She therefore submits that this court's disposal jurisdiction must necessarily recognise that it has its own duty (as a public body) to safeguard a person's rights under ECHR. Moreover, she submits that this court should be slow to remit the matter back to the panel for reconsideration and should not be timorous in deciding itself to issue a certificate, because any further delay in granting a certificate, where the statutory criteria under s.2(1) are satisfied, constitute a continuing and severe interference with the individual's rights under article 8.

89. Ms McCann submits that the *Ladd v Marshall* criteria are satisfied. The letters from the Porterbrook Clinic were only sent on 11 May 2018 so could not, with reasonable diligence, have been obtained at the time of the panel's determination of her application for a certificate. At that point, she was still awaiting her appointment. The evidence from the clinic would plainly have had an important influence on the panel's determination because it more than demonstrates that Ms Jay satisfies the statutory criteria under s.2(1). Furthermore, the evidence is manifestly credible.

90. In addition, however, Ms McCann contends that, under s.8(3)(a), this court has a discretion to consider whether or not to grant a certificate afresh and, in doing so, is permitted to have regard to additional evidence which was not before the lower court, not just by application of the principles in *Ladd v Marshall*, but also where it would be in the interests of justice to do so, particularly where a person's fundamental rights and freedoms under ECHR are at stake. Not to have regard to the evidence would be contrary to the interests of justice and would permit a continuing, discriminatory and unjustified interference with Ms Jay's article 8 and/or article 14 rights.

91. Ms McCann further submits that the terms of s.8 specifically empower this court, when disposing of an appeal, to step into the panel's shoes and issue a certificate. She contends it is patently wrong for the Secretary of State to assert that the GRA reserves to the panel the task of considering whether the conditions in s.2(1) are satisfied. Such a narrow construction would be contrary to the obligation on the court under s.3 of the Human Rights Act 1998 to read and give effect to legislation in a way which is compatible with Convention rights, since it would oblige this court to disregard compelling evidence which satisfy the statutory criteria and remit the matter to the panel for reconsideration. To take this course would only serve to obstruct and delay the process of conferring legal recognition on an individual's gender identity, which is neither in the interests of justice, nor compatible with article 8. Ms McCann takes issue with the point emphasised by Mr McGurk as to the specialist nature of the panel. As pointed out by the Court of Session in *HW v The Gender Recognition Panel* [2008] CSIH 26, the panel is not tasked with deciding whether it would have diagnosed an individual with gender dysphoria but with reviewing whether the diagnosis given by the clinician was soundly based. Ms McCann submits that it follows that the medical member of the panel is there to ensure that the meaning and import of sometimes complex medical terminology and analysis is properly understood, not to decide the question of diagnosis afresh. She accepts that, if this court considers that it does not understand the evidence of the Porterbrook Clinic so that it cannot be satisfied that the diagnosis of gender dysphoria is soundly-based, the matter would have to be remitted. She contends, however, that the evidence from the clinic is clear and unassailable so that this court can and ought to have regard to it when allowing this appeal and therefore proceed to issue the certificate.

Conclusion

92. I have considerable sympathy for the panel faced with the task of assessing this case which was by no means straightforward. The process of assessing Ms Jay's application was hampered by the fact that she was representing herself, plainly struggled at times to understand the panel's concerns, and on many occasions expressed herself in confusing and intemperate terms. These are problems which many courts and tribunals face when dealing with litigants in person and this court fully understands the difficulties which the panel faced.

93. Nevertheless, I have reached the clear conclusion that there is considerable force in Ms McCann's first two grounds of appeal. I agree with Ms McCann's central submission that the GRA is a statue designed to facilitate gender recognition, that the statutory regime is permissive rather than restrictive, and that the evidential requirements are ancillary to the statutory criteria and any directions made by the panel must not be elevated to a status which sideline or undermine the statutory criteria or frustrate the process. I agree with her submission that the panel became overly focused on Ms Jay's failure to comply fully with its directions issued on 17 November 2016 and, when it came to conduct its final analysis on 8 August 2017, failed to stand back and consider all the material that Ms Jay had provided in order to determine whether the statutory criteria under s.2(1) were satisfied. It is correct that Ms Jay failed to comply with the first direction of 17 November 2016 in that she did not provide a letter from Dr Pasterski indicating what documents she saw for the purposes of her assessment. But Ms Jay did comply with the other directions given by the panel. When it came to consider its decision on 8 August, the panel was under a

duty to have regard to all the evidence and assess whether, notwithstanding Ms Jay's failure to comply with the first direction, the statutory criteria were satisfied. I accept Ms McCann's submission that the panel did not consider whether the substantial compliance by Ms Jay with the other directions obviated the need for a further letter from Dr Pasterski. It is possible that the panel was unaware that Ms Jay had indeed complied with the rest of the directions given on 17 November. The fact that the panel wrongly asserted in its reasons for refusing the application that only one written communication had been received from Ms Jay since the directions were given on 17 November 2016 indicates that the panel was either unaware of, or overlooked, the two other communications provided by Ms Jay which included information submitted in response to those directions. I have some sympathy with the panel on this issue because on at least two occasions the written communications from Ms Jay consisted of returned copies of documents from the panel on which Ms Jay had written comments, sometimes using intemperate language. Nonetheless, the information provided by Ms Jay in those documents was plainly material to her application and ought to have been considered by the panel.

94. The two reports provided by Dr Pasterski, taken together, provided a considerable amount of detail about Ms Jay and a full explanation about the basis of the diagnosis of gender dysphoria. I note that this was considerably more information than could have been accommodated on the relevant page on the pro forma application as suggested in paragraph 6 of the President's Guidance No.1. Notwithstanding this, the panel was not satisfied that the reports were sufficient to establish the statutory criteria. They asserted that the doctor "appeared not to be aware of significant features about Ms Jay's circumstances and recent background." I accept Ms McCann's submission that the panel failed to set out in its decision or its reasons what precisely it considered those "significant features" to be, nor how they might be relevant to whether or not the report was reliable. It is true that Dr Pasterski did not refer to the fact that Ms Jay had been in prison. So far as I can see, this is the only significant feature of Ms Jay's circumstances and recent background not referred to in Dr Pasterski's report. The panel asserted in its reasons that Dr Pasterski "needed to know those circumstances to decide whether the findings of her report were sound and she stood by them". But the panel did not ask Dr Pasterski directly to confirm whether she knew about the details of Ms Jay's imprisonment. Instead, in its directions of 17 November, the panel asked Ms Jay to confirm that she had told Dr Pasterski of the periods when she had been in prison. Ms Jay subsequently replied confirming that she had given this information. The panel did not check this point with Dr Pasterski, but instead concluded that she "appeared not to be aware" of it, notwithstanding Ms Jay's assertion that she was.

95. The panel evidently held some concerns as to whether Ms Jay's accounts were truthful, witness the reference to "Ms Jay having something to hide" and to the possibility of drawing adverse inferences from her failure to comply with directions. Given that the purpose of the GRA is to facilitate recognition, however, and the evident difficulties that Ms Jay was having complying with directions, in part as a result of her status as a prisoner, it seems to me that the panel ought not to have refused her application without directing a hearing at which Ms Jay could have been given the opportunity to address the panel's concerns and the possible inconsistencies or shortcomings in her evidence. As set out above, Schedule 1 paragraph 6(5) provides that "the panel must determine an application without a hearing unless the

panel considers that a hearing is necessary". It follows, however, that a panel must always consider whether or not a hearing is necessary, in particular where issues of credibility may be relevant to its decision. There is nothing to suggest the panel considered the possibility of convening a hearing in this case.

96. In reaching its decision, the panel plainly attached significant weight to Dr Barrett's report from July 2014. In doing so, it is unclear whether the panel took into account the fact that the report was over three years old, that it had not been prepared for an application for a gender recognition certificate but for other litigation, and that Ms Jay had asserted that it contained inaccuracies. Moreover, so far as I am aware, the panel gave no indication that it would be taking Dr Barrett's 2014 report into account in determining Ms Jay's third application until it referred to the report in its reasons for refusing the application on 8 August 2017. If the panel had been intending to take that report into account, it should have alerted Ms Jay before doing so and given her an opportunity to address the issues arising from the report in information or evidence filed in connection with her application. If the panel was going to draw on Dr Barrett's 2014 report to question the reliability of Dr Pasterski's 2016 report, it should have drawn his report specifically to Dr Pasterski's attention and asked for her comments.

97. For these reasons, drawn substantially from Ms McCann's first and second grounds of appeal, I am therefore satisfied that the process by which the panel reached its decision to refuse Ms Jay's third application on 8 August 2017 was deficient and that the appeal must be allowed. In the circumstances, I concluded it is unnecessary to proceed to consider the third ground of appeal based on the alleged breach of articles 8 and 14 of ECHR. This issue was not fully argued by the Secretary of State and in this extremely sensitive area it seems to me to be unwise, as well as unnecessary, for this court to embark on a lengthy analysis of the alleged breaches of human rights. I have set out Ms McCann's submissions on this issue at some length so that her argument is recorded, which may be of some assistance should the matter arise in a subsequent case.

98. Having decided to allow the appeal, the remaining question is whether I should proceed to issue the gender recognition certificate myself or remit the matter to be considered by another panel.

99. In my judgement, even on the basis of the evidence before the panel, the criteria under s.2(1) were satisfied to the extent required for a certificate to be issued. In the alternative, if I am wrong about that, it is necessary to consider the supplemental issue identified above.

100. In doing so, I first address the question whether I should admit at this stage the subsequent reports produced by Dr Cosmulescu of the Porterbrook Clinic. Applying the *Ladd v Marshall* criteria, it seems to me that the reports are plainly admissible. At the time of the refusal decision in August 2017, the reports did not exist. As Dr Thornhill noted in her report dated November 2016, Ms Jay had been referred to the Porterbrook Clinic and was awaiting a review appointment. She was not seen by the clinic for many months, long after the refusal decision. I reject Mr McGurk's submission that Ms Jay had the opportunity to provide something akin to that evidence, namely the supplemental letter from Dr Pasterski requested by the panel and that, if she was not prepared to produce such a letter, it is difficult for her now to

contend that the new evidence satisfies the first *Ladd v Marshall* condition. The supplemental information from Dr Pasterski requested by the panel was completely different from the report which is now produced by the Porterbrook Clinic. I also reject Mr McGurk's submission that the application of the *Ladd v Marshall* criteria is constrained by the fact that under s.8 the appeal is confined to a point of law. I agree with Ms McCann's submission that this conflates the merits issue with the disposal issue. As for his third objection – that the scheme of the GRA envisages a further application to the panel – it would of course be open to M to apply to the panel for a fourth time. But in my judgement, to conclude that this court is therefore constrained from taking fresh medical evidence into account in determining whether to grant a certificate would be to impose an unduly restrictive limit on the powers of the court on appeal. The purpose of the GRA is to provide a means of facilitating gender recognition. It would be wholly inappropriate to impose unnecessary procedural hurdles which would risk extending the period in which Ms Jay is compelled, in the words of the European Court in *Goodwin*, to "live in an intermediate zone in not quite one gender or the other". Under s.2(1), the panel must grant the application for certificate if satisfied that the statutory criteria are met. There is no residual discretion. In my judgement, any court hearing an appeal from a panel's decision is under the same obligation.

101. Having considered all the evidence put before the panel, and the report as now provided by the Porterbrook Clinic, I am satisfied that Ms Jay has gender dysphoria, has lived in her acquired gender throughout the period of two years ending with the date on which the third application was made, and intends to continue to live in the acquired gender until death. So far as the first criterion is concerned, I do not consider that the fact that I am sitting alone without assistance from medical member of the panel prevents me from concluding, based on all the evidence, that Ms Jay has gender dysphoria. This court is well used to assessing medical evidence. The reports provided by Dr Pasterski and Dr Cosmulescu of the Porterbrook Clinic, taken together, provide much more detail than anticipated by the President's Guidance No.1 and amply demonstrate that the first criterion in s.2(1)(a) is satisfied. The various documents listed by Ms McCann in her submissions, together with the other information provided by Ms Jay, are plainly sufficient to establish that she has lived in the acquired gender for two years prior to her application. The medical reports, including the latest reports of Dr Cosmulescu, establish that she intends to continue to live in the acquired gender for the rest of her life. Insofar as Ms Jay failed to comply with one of the requirements imposed by the panel in the directions given on 17 November 2016, I conclude that that requirement is rendered otiose by the report now produced by the Porterbrook Clinic.

102. In the circumstances, the criteria under s.2(1) are manifestly satisfied, and were satisfied at the date of the panel's decision. I shall therefore allow the appeal and issue the gender recognition certificate.