



Neutral Citation Number: [2022] EWFC 77

Case No: FD21F00086

**IN THE FAMILY COURT**  
**Sitting at the Royal Courts of Justice**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 07/07/22

**Before:**

**MRS JUSTICE THEIS**

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**Between:**

**X**

**Applicant**

**- and -**

**Y**

**Respondent**

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**Ms Deirdre Fottrell Q.C & Ms Olivia Magennis** (instructed by **Louisa Ghevaert Associates**)  
for the **Applicant**

**Ms Joanne Ecob** (instructed by **JMW Solicitors**) for the **Respondent**

Judgment date: 7<sup>th</sup> July 2022

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**Approved Judgment**

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**MRS JUSTICE THEIS**

This judgment was delivered in private. The judge has given leave for this version of the judgment to be published. The anonymity of the children and members of their family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

**Mrs Justice Theis DBE:**

**Introduction**

1. The court is concerned with an application for a declaration of parentage under s 55A Family Law Act 1986 made by X ('the applicant'). The respondent to the application is y ('the respondent'). This matter was listed for hearing on 20 June 2022. That hearing was vacated as the court agreed with the parties that the application could be determined on the papers without the need for a hearing.
2. A declaration of parentage will be made for the reasons set out below.

**Relevant Background**

3. The context of this application is the applicant's wish to resolve matters relating to her identity.
4. The applicant was born in 1971 and is married with two children. Her mother was 21 years at the time of the applicant's birth and was unmarried. The applicant's mother subsequently married and had two further children with her husband. As a teenager the applicant was informed that her mother's husband was not her biological father.
5. Over the years the applicant asked her mother who her biological father was but was not provided with reliable information.
6. In 2018 the applicant registered with one of the ancestry websites, when some initial results looked positive the applicant engaged the services of a genealogist. With their assistance the applicant was advised the respondent was most likely to be her biological father. This was later confirmed by the applicant's mother that she had a brief relationship with the respondent.
7. The applicant sought to make contact with the respondent, both directly and indirectly. After a number of unsuccessful attempts the applicant was informed via a relation of the respondent that he was '*not interested*'.
8. The applicant instructed a solicitor who wrote to the respondent and after a period of time the respondent replied via solicitors instructed by him. He confirmed he had had a short relationship with the applicant's mother at the relevant time but the letter made it clear the respondent was unwilling to engage in any sort of social relationship with the applicant.
9. In November 2020 the respondent agreed to undertake a DNA test although making it clear there may be some delay due to the Covid restrictions that were in place at the time. The agreement to DNA testing continued in letters sent in December 2020, January and March 2021.
10. On 1 September 2021 the respondent's solicitors confirmed that the respondent was no longer willing to voluntarily have a DNA test but if the applicant applied for a declaration of parentage the respondent would not oppose it.
11. The applicant made the declaration of parentage application on 29<sup>th</sup> November 2021. Statements from both parties were directed on 17<sup>th</sup> December 2021.

12. At the directions hearing on 4 March 2022 the applicant remained hopeful that the respondent would agree to DNA testing. The respondent attended the remote hearing. He reiterated his opposition to DNA testing. The court invited him to reflect on the benefits of certainty that would result from such testing and made a direction for samples to be provided to enable such testing to take place. Since that hearing the respondent's position has not changed.
13. The applicant invites the court to proceed to determine the application on the basis of either the respondent's lack of opposition to the application or the inference to be drawn from the respondent's lack of consent to testing.

### **Relevant Legal Framework**

14. There is no issue between the parties as to the relevant legal framework helpfully set out in the excellent note prepared by Ms Fottrell Q.C. and Ms Magennis on behalf of the applicant.
15. Section 55A of the Family Law Act 1986 provides as follows.

#### **55A Declarations of parentage**

*(1) Subject to the following provisions of this section, any person may apply to the High Court or the family court for a declaration as to whether or not a person named in the application is or was the parent of another person so named.*

*(2) A court shall have jurisdiction to entertain an application under subsection (1) above if, and only if, either of the persons named in it for the purposes of that subsection—*

*(a) is domiciled in England and Wales on the date of the application, or*

*(b) has been habitually resident in England and Wales throughout the period of one year ending with that date, or*

*(c) died before that date and either—*

*(i) was at death domiciled in England and Wales, or*

*(ii) had been habitually resident in England and Wales throughout the period of one year ending with the date of death.*

*(3) Except in a case falling within subsection (4) below, the court shall refuse to hear an application under subsection (1) above unless it considers that the applicant has a sufficient personal interest in the determination of the application (but this is subject to section 27 of the Child Support Act 1991 ).*

*(4) The excepted cases are where the declaration sought is as to whether or not—*

*(a) the applicant is the parent of a named person;*

*(b) a named person is the parent of the applicant; or*

*(c) a named person is the other parent of a named child of the applicant.*

*(5) Where an application under subsection (1) above is made and one of the persons named in it for the purposes of that subsection is a child, the court may refuse to hear the application if it considers that the determination of the application would not be in the best interests of the child.*

*(6) Where a court refuses to hear an application under subsection (1) above it may order that the applicant may not apply again for the same declaration without leave of the court.*

*(7) Where a declaration is made by a court on an application under subsection (1) above, the prescribed officer of the court shall notify the Registrar General, in such a manner and within such period as may be prescribed, of the making of that declaration.*

16. Section **58 FLA 1986** contains the ‘general provisions as to the making and effect of declarations’ and provides as follows:

*(1) Where on an application ... for a declaration under this Part the truth of the proposition to be declared is proved to the satisfaction of the court, the court shall make that declaration unless to do so would manifestly be contrary to public policy.*

*(2) Any declaration made under this Part shall be binding on Her Majesty and all other persons.*

*(3) ...*

17. Rule 8.20 of the Family Procedure Rules 2010 (‘FPR’) provides that respondents to an application for a declaration of parentage are:

*(i) The person whose parentage is in issue except where that person is a child; and*

*(ii) Any person who is or is alleged to be the parent of the person whose parentage is in issue, except where that person is the applicant or is a child.*

18. Part III of the Family Law Reform Act 1969 (‘FLRA’) provides a structured regime within which the Court can direct the use of scientific tests for the purpose of determining parentage in the course of civil proceedings. In its original form, this was by means of blood testing to provide evidence of the probability of paternity, however the Family Law Reform Act 1987 updated the legislation to take account of the advances in DNA science.

19. Section 20 FLRA provides as follows:

*Power of court to require use of blood tests.*

*(1) In any civil proceedings in which the parentage of any person falls to be determined, the court may, either of its own motion or on an application by any party to the proceedings, give a direction—*

- a. *for the use of scientific tests to ascertain whether such tests show that a party to the proceedings is or is not the father or mother of that person; and*
- b. *for the taking, within a period specified in the direction, of bodily samples from all or any of the following, namely, that person, any party who is alleged to be the father or mother of that person and any other party to the proceedings;*

20. Section 21 FLRA limits the court's powers in the following way:

*Consents, etc., required for taking of bodily sample.*

*(1) Subject to the provisions of subsections (3) and (4) of this section, a bodily sample which is required to be taken from any person for the purpose of giving effect to a direction under section 20 of this Act shall not be taken from that person except with his consent.*

21. Section 23 FLRA sets out the consequences for failure to comply with a direction under section 20:

*Failure to comply with direction for taking blood tests.*

- (1) Where a court gives a direction under section 20 of this Act and any person fails to take any step required of him for the purpose of giving effect to the direction, the court may draw such inferences, if any, from that fact as appear proper in the circumstances.*
- (2) ...*
- (3) Where any person named in a direction under section 20 of this Act fails to consent to the taking of a blood sample from himself, he shall be deemed for the purposes of this section to have failed to take a step required of him for the purpose of giving effect to the direction.*

22. Re-registration of a birth is allowed under the Births and Deaths Registration Act 1953 in limited circumstances. Section 29 permits the correction of errors of fact or substance. Section 10A permits re-registration of a birth where the child's parents are neither married nor in a civil partnership and there is no other person recorded as 'father' or 'parent' on the birth certificate, to show a person as 'father' on production of specified evidence of fatherhood. Section 14 permits re-registration upon a child becoming legitimated by the marriage or civil partnership of their parents, and section 14A permits re-registration after a declaration of parentage.

23. The Registration of Births and Deaths Regulations 1987 provides the mechanism by which re-registration can be achieved. Every form of re-registration involves an amendment to the original birth certificate without erasing the original entry. The amendment either takes the form of additional words included on the certificate or a note in the margin.

24. Issues relating to identity in the context of declarations of parentage have been considered in a number of cases. *In the matter of HFEA 2008 (Cases A, B, C, D, E, F,*

*G and H Declaration of Parentage*) [2015] EWHC 2602 (Fam) Sir James Munby observed at paragraph 3,

*“What, after all, to any child, to any parent, never mind to future generations and indeed to society at large, can be more important, emotionally, psychologically, socially and legally, than the answer to the question: Who is my parent? Is this my child?”*

25. More recently in *H v R* [2021] EWHC 1943 (Fam) MacDonald J identified the key elements of such applications derived from the authorities as follows:

[48] *“Within the foregoing statutory context, the following further principles are articulated within the authorities with respect to the granting of declarations under s. 55A of the Family Law Act 1986:*

- i. *The question of parentage is a question that concerns more than just the individuals involved in a specific case. Issues of status, such as parentage, can be expected to be approached with some formality in circumstances where they concern not only the individual but also the public generally which has an interest in the status of an individual being spelled out accurately and in clear terms and recorded in properly maintained records (per Re S (A Child) (Declaration of Parentage) [2012] All ER (D) 140 at [24]).*
- ii. *The terms of s 58(2) of the 1986 Act make clear the importance and the solemnity of declarations of parentage made under s 55A(1) of the Act (per Re F (Paternity Registration) [2013] 2 FLR 1036).*
- iii. *An application pursuant to s 55A of the Family Law Act 1986 will be dismissed where it amounts to an abusive collateral attack on an earlier judgment (per Dunkley v Dunkley and Another [2018] 2 FLR 258 at [22] to [24]).*
- iv. *A declaration of parentage under s 55A(1) of the Family Law Act 1986, once made, is there for all time and its implementation cannot be deferred (per Re F (Paternity Registration) [2013] 2 FLR 1036 at [20] to [23])...”*

26. The issue of inferences was considered by the Court of Appeal in the case of *Re H* [1996] 2 FLR 65 where Ward LJ reviewed the evolution of the law in relation to scientific testing and inferences, and concluded as follows [pp76-77]:

*“It seems to me that a refusal to comply after the solemnity of the court’s decision is more eloquent testimony of an attempt at hiding a truth than intransigent objection made as a forensic tactic. Science has now advanced. The whole truth can now be known. As Waite LJ said in Re A (A Minor) (Paternity: Refusal of Blood Test) [1994] 2 FLR 463, 473B:*

*‘Against that background of law and scientific advance, it seems to me to follow, both in justice and in common sense, that if a mother makes a claim against one of the possible fathers, and he chooses to exercise his right not to submit to be tested, the inference that he is*

*the father of the child should be virtually inescapable. He would certainly have to advance very clear and cogent reasons for this refusal to be tested – reasons which it would be just and fair and reasonable for him to be allowed to maintain.'*

*Although that was a case of a refusal being made after a direction had been given, I, like Wall J, 'see no intellectual difference between the two situations'. Common sense seems to me to dictate that if the truth can be established with certainty, a refusal to produce the certainty justifies some inference that the refusal is made to hide the truth, even if the inference is not as strong as when the court's direction is flouted."*

27. *Re H (ibid)* makes it clear interpretation of the FLRA permits the Court to draw an inference from the Respondent's failure to consent to DNA testing, and that such inference will be compelling when the Court's direction to provide such samples is not complied with.

28. Section 55A needs to be interpreted through the prism of Article 8 of the ECHR. The right to respect for private and family life are both engaged. Article 8 provides:

*'Everyone has the right to respect for his private and family life, his home and his correspondence. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.'*

29. Section 3 Human Rights Act ("HRA") 1998 states as follows:

*"(1) So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights'*

30. Through the way the right to identity has been developed in the ECHR decisions and those in this jurisdiction it is recognised as a fundamental element of the right to respect for private life under Article 8(1) (*Mikulić v Croatia* [2002] (application 53176/99)). In that case the Court found a clear violation of Article 8 in circumstances where a child could not legally establish her paternity recognising that knowing who her legal father was '*information necessary to uncovering the truth about an important aspect of their personal identity*'. The facts of that case has some resonance with the circumstances in this case. The violation of the child's rights occurred because the domestic court was unable to require a putative father to take a DNA test and the law prevented the court from drawing inferences. This resulted in the child being trapped in a legal limbo where the proceedings continued without resolution of the question of her identity. This led to a violation of both Article 8 in respect of her private life and Article 6 in respect of the right to fair trial.

31. The ECHR jurisprudence established in *Marckx v Belgium* (application No. 6833/74) where the European Court identified within Article 8 a positive obligation that courts must ensure protection of the rights in a manner which is ‘*real and effective*’ rather than ‘*theoretical and illusory*’. In *Marckx* itself the positive obligation required the domestic Court to provide a mechanism whereby a child was immediately and automatically the legal child from birth of a single mother in circumstances where Belgian law required the mother to undergo a court process of maternal affiliation, that gave rise to a breach of Article 8(1).
32. The entitlement of the applicant to establish her identity is a fundamental and important element of her right to respect for private life. At the time of her birth, the public record, the birth certificate and the register of births, did not include accurate information as to the applicant’s birth father. It is that fact which the applicant seeks to correct by this application.

### **Submissions**

33. The applicant invites the court to consider the different ways she sets out her case in support of the court making a declaration of parentage.
34. First, her written evidence which sets out a reasoned evidential foundation as to her paternity. Second, the applicant’s account is given support by the respondent’s non-opposition to the making of the declaration of paternity and not taking any issue with the factual account the applicant has provided. Third, the respondent’s refusal to comply with the court’s direction that he provide samples for the purpose of paternity testing which justifies the drawing of an inference that he is the applicant’s father, that he knows that this is so, and he does not wish to confirm the truth by providing those samples.

### **Discussion and decision**

35. These applications raise fundamental issues relating to identity; this case is no exception.
36. The applicant’s statement provides a compelling account of how important this issue is to her, which relate to the core of her identity. As powerfully articulated by Sir James Munby in *In the matter of HFEA 2008 etc (ibid)* questions such as ‘*Who is my parent? Is this my child?*’ are important emotionally, psychologically, socially and legally to any individual, as well as to future generations.
37. In her statement the applicant describes the importance for her, and her family, in being able to establish who her biological father is. She describes in some detail the impact on her of not knowing, the steps she has taken to seek to establish who it is (as summarised above) and what she has done to seek to avoid having to make this application. She states ‘*I still want to know if [the respondent] is definitely my biological father and have my birth certificate changed to reflect that he is. This is important to me from an identity perspective, as I want to hopefully fill in a big gap in my life history and answer a question I have been asking myself for the past thirty-five years.*’



38. In his two statements the respondent outlines his position in relation to this application. From his perspective the respondent considers he has been harassed by the applicant and the steps she has taken, whether knowingly or not, caused a great deal of distress to him, his wife and his wider family. In his statements he expresses his concern that to actively engage in these proceedings or consent to the order will provide false encouragement to the applicant to seek to pursue a relationship with him. It is submitted on his behalf that those fears were not allayed by the content of the documents submitted on the applicant's behalf. In response to the written submissions made on behalf of the applicant the respondent's solicitor stated '*...our client having chosen not to engage in DNA testing does not actively seek to oppose an order being [made] and is resigned to the fact that the adverse inferences will be drawn but cannot consent to the same for the reasons [given]...The respondent sincerely hopes that the applicant will now be able to move on with her life and respect his decision not to have a relationship with her.*'
39. Any determination regarding this application has to be undertaken within the relevant statutory framework of section 55A FLA 1986. There are clearly strongly held views by both the applicant and the respondent about this application.
40. The evidence establishes the respondent's domicile of origin is here and that remains the position.
41. The evidence provided in the applicant's statements, which is not disputed by the respondent, sets out that the respondent and the applicant's mother had a relationship at the relevant time, in the summer of 1970. That is established by the applicant's own enquiries through the ancestry website, is supported by what the applicant reports her mother confirmed to her and is not disputed by the respondent. In addition, the respondent has not complied with the direction made pursuant to section 20 FLRA for samples to be provided for the purpose of DNA testing. The respondent's refusal is not due to any dispute about the underlying facts relied upon by the applicant to establish paternity but due to his concerns that by doing so would only have, as he describes in his second statement, '*fuelled the applicant's desire to pursue a relationship with me*'.
42. In *Re H (ibid)* Ward LJ described the consequences of refusing to comply with a direction for samples to be provided to undertake DNA testing as "*Common sense seems to me to dictate that if the truth can be established with certainty, a refusal to produce the certainty justifies some inference that the refusal is made to hide the truth, even if the inference is not as strong as when the court's direction is flouted.*"
43. When considering the evidence as a whole, including the inference that can and should be drawn from the respondent's refusal to comply with the direction is to hide the truth, and the respondent's lack of opposition to the order being made I am satisfied that it is more likely than not that the respondent is the applicant's biological father. There is no suggestion that to grant the application is manifestly contrary to public policy. Consequently, the declaration of parentage will be made.