Neutral Citation Number: [2018] EWHC 1530 (Admin)

Case No: CO/2704/2017

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22 June 2018

Before:

MR JUSTICE JEREMY BAKER

- -

Between:

R (on the application of Christie Elan-Cane)	**Claimant**
- and -	
Secretary of State for the Home Department	**Defendant**
- and -	
Human Rights Watch	**Intervener**

- -
- -

Miss Kate Gallafent QC and Mr Tom Mountford (instructed by **Clifford Chance**) for the **Claimant**
Sir James Eadie QC and Miss Sarah Hannett (instructed by **Government Legal Department**) for the **Defendant**
Ms Flora Robertson (instructed by MacFarlanes LLP) for the **Intervener**

Hearing dates: 18 and 19 April 2018

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Approved Judgment

Mr Justice Jeremy Baker:

Introduction

1. This case concerns a challenge to the lawfulness of the current policy of Her Majesty's Passport Office to require those who apply for the issue of a passport to declare whether their gender is either male or female, and that a passport will only be issued bearing an "M" (male) or "F" (female) indicator in the sex field, rather than an "X", indicating an unspecified sex.

Background

2. The claimant, who is 60 years of age, was born with female physical sexual characteristics and was therefore registered as female at birth. However, throughout childhood, the claimant grew increasingly detached from the gender which had been assigned at birth. This had a profound effect upon the claimant's emotional and psychological development, to the extent that the claimant decided to undergo 2 surgical procedures: the first in 1989, a bi-lateral mastectomy at the age of 31; the second in 1991, a total hysterectomy at the age of 33. The first of these procedures was paid for privately, whilst the second was undertaken by the National Health Service.

3. These procedures were successful in assisting the claimant to accept a "non-gendered" identity and, as the claimant stated in a 2nd witness statement dated 25 May 2017, the claimant was therefore,

> *"6. ……. finally at peace with myself and with my body……*
>
> *7. …*
>
> *8. My non-gendered body is innate and is a fundamental component of who I am. My non-gendered identity is a fact of my life and is not and never has been an alternative lifestyle choice. As I was able to accept that my identity was neither male nor female, I needed to find terminology that accurately expressed my identity as appropriate cultural references were not present. I self-defined respectively as 'androgynous', 'third sex' and 'third gender' until adopting 'non-gendered' as the most accurate and appropriate definition of my core identity."*

4. In 1995, and given the importance which the claimant attaches to being recognised as non-gendered, the claimant contacted the Government body responsible for issuing passports to enquire as to whether, as a non-gendered individual, it was possible for a passport to be issued without making a declaration of being either male or female. The claimant was informed that this was not possible, as a declaration of gender was a mandatory requirement. In those circumstances the claimant applied for, and was issued with, a passport with a declaration of being female.

5. In 2005, when consideration was being given by the Government to the introduction of a scheme of national identity cards, the claimant, being concerned that the same gender declaration would be required, approached Simon Hughes MP about the issue. As a

result of research carried out on his behalf, the claimant learnt for the first time that the United Nations' body which was responsible for issuing specifications to member countries concerning international air travel, the International Civil Aviation Organisation (ICAO), permitted countries to issue passports with either "M", "F" or "X" in the section of the mandatory machine-readable zone dealing with sex, and that whilst M and F indicated male and female, X indicated "unspecified". However, when Simon Hughes enquired of the Government Department responsible for the issuing of passports about this matter, he received a similar response to that previously received by the claimant.

6. It was in the light of these matters that, as the claimant stated in the 2nd witness statement,

> *"37. 'X' Passports became a key focal point of my campaign for the legal and social recognition of non-gendered identity. 'X' Passports were permitted in accordance with international accepted standards, 'X' Passports could be introduced without the need for complicated reworking of statutory legislation and I could envisage that the 'X' Passport was an achievable provision. The immediate benefit of an 'X' Passport was that the non-gendered passport holder, identifying as neither male nor female, would not be forced to present an identification document that was misrepresentative and furthermore that non-gendered people would not be put in the position where we are forced to deny our identities and make what we feel to be a false declaration as a consequence of a degrading and humiliating application process that forces non-gendered people to declare as either male or female."*

7. On 14 July 2010, the claimant wrote to the Chief Executive of the Identity and Passport Service (IPS), which was the executive agency responsible for issuing passports, raising the issue and requesting a reconsideration of their current policy. The claimant pointed out that both India and Malaysia permitted their citizens to apply for and be issued with a passport with an "X" for unspecified sex in accordance with the ICAO specifications, and stated that the claimant's own research and experience led the claimant to believe that,

> *".....there are potentially hundreds within the United Kingdom and many thousand worldwide in a similar position to the claimant."*

8. The IPS replied on 30 July 2010, stating that,

> *"I am sorry that you found the requirement to state your gender on the passport application form inappropriate and offensive. We recognise that not everyone identifies themselves as male or female as set out on the form. However, our current computer system does not allow for a passport to be issued if the gender field on the application form has not been completed.*

> *Unfortunately, there is little we can do about this at present but we are prepared to listen to the issues and include them as part of any future review of the application form. There are a number of issues that we would have to consider, not least of all the security implications (issuing a passport without a gender) and the potential impact on the individual when travelling overseas if we decide to issue passports without the traditional gender identification. Any potential changes though would have to be discussed through the International Civil Aviation Organisation (ICAO) which sets international standards for travel documents. The current ICAO policy allows for passports to be issued with an 'X' instead of 'M' or 'F'. However, we are not aware at this stage of any country that has adopted this approach.*
>
> *You may wish to know that our current passport policy allows transgender people to apply for passports in their "acquired gender" on production of medical evidence. They do not require a Gender Recognition Certificate. Although the issue of a passport on the basis of medical evidence does not give legal recognition to a transgender person (this will have to be acquired through the Gender Recognition Panel), it at least allows them to travel in their preferred gender."*

9. A subsequent exchange of correspondence ensued between the parties, with the claimant pointing out in a letter dated 31 August 2010, that both New Zealand and Australia permit passports to be applied for and issued with an "X" for unspecified in accordance with the ICAO specifications. The claimant also referred to feeling apprehensive at border control points as the claimant's visual appearance did not match that of the sex designation on the passport.

10. This exchange of correspondence concluded with a letter from the IPS, dated 29 September 2010, which confirmed the current policy but stated that,

> *"We need to give careful consideration to amending the current requirements on the passport as we do not wish to cause additional difficulties for those travelling overseas. As gender impacts on groups of people in different ways we intend to work with the Government Equalities Office and the transgender community to consider how we can move this important issue forward.*
>
> *We will also continue to work with the International Civil Aviation Organisation to discuss how the issue of gender recognition in passports and what the potential is for change. It is possible for a passport to be issued with an 'X' instead of an 'M' for male or 'F' for female. However, we anticipate that the use of an X may raise more questions than answers. We will be investigating other options including the removal of gender identifiers from passports but will need to consider any potential security implications of such a change."*

11. On 9 April 2013, the IPS wrote to Simon Hughes MP, in reply to a letter which he had sent concerning the removal of gender identification on identity records and other official records. The IPS stated that its policy of requiring an applicant for a passport to stipulate their gender, and for it to be shown on the passport, would continue. It acknowledged that a small number of countries allowed the prefix "X" to be used in their passports, but stated that,

> *"The use of 'X' is a matter of choice for those individual countries but we do not consider that currently there is either the ability or the benefits for the British Passport holder to require an 'X' in their passport.*
>
> *UK law recognises only male and female gender. To apply an 'X' would require a change in domestic primary legislation. Consideration would have to be given to the impact on other areas of legislation such as sex discrimination, nationality, adoption, human embryology, immigration, and gender recognition. IPS does not consider that using the passport is the means by which to make a fundamental change to gender recognition in the UK. There are no current plans to change domestic legislation to add or remove the male and female gender.*
>
> *Gender in passports is an important identifier. It is biographic detail for confirming identity and enables the correct gender to be applied to foreign and gender neutral names. It enables appropriate customer interactions and assists in accurate nationality determination (through a 'Mother' and/or a 'Father'). Transgendered persons can use their passports as evidence of their acquired gender and as proof of identity to access gender-specific services.*
>
> *From a security perspective, gender in passports assists in identifying imposters at all stages of the passport application and usage process. Physical checks at borders can be carried out by a person of the appropriate gender without questions being raised about the applicant's gender.*
>
> *IPS remain open to suggestions for change but such a change would be on the basis that it was required by law or that it provided additional benefits to the applicant and that the high standards of public and personal safety achieved by the passport were not diluted. IPS will continue to monitor any relevant changes in domestic and international circumstances in respect of both the use of 'X' and no gender markings in passports."*

12. On 3 February 2014 Her Majesty's Passport Office (HMPO), which took over the role of the IPS and is now part of the Home Office, published a report containing the results of an "Internal Review of Existing Arrangements and Possible Future Options" in relation to "Gender Marking in Passports". It set out its current policy at paragraph 1,

> *"1.1 All applications are required to select either the gender Male or Female on the passport application form, both in paper and online format. Where no gender is selected, the gender shown on the applicant's source documents will be transposed onto the passport application screen.*
>
> *1.2 Before a passport may be issued in an acquired gender, evidence of the transition is required. Evidence may be in the form of a Gender Recognition Certificate (GRC), re-registered birth certificate showing the acquired gender or a letter from the applicant's medical consultant or a General Practitioner confirming that the orientation to the acquired gender is likely to be permanent.*
>
> *1.3 ...*
>
> *1.4 There is no provision in the passport or on the passport application form for a person to transition from one gender to no gender or to state that they do not identify in either gender. This is in line with UK legislation that recognises only the genders Male and Female.*
>
> *1.5 Gender diverse people are therefore instructed to complete the gender on the passport application form in the gender that is shown on their birth or adoption certificate, unless they are in the process of transitioning to one or other recognised gender, when they will be treated as set out above."*

13. The review listed HMPO's assessment of the benefits and potential impact of retaining gender in passports.

> *"Benefits of gender in passports*
>
> *1.6 Gender is used*
>
> *As a biographic detail for confirming identity.*
>
> *To identify the correct gender of foreign names – this is becoming more relevant with the repatriation of applications from overseas.*
>
> *To enable appropriate customer interactions (including respectful address in writing and in conversation and the application of customary and gender-based naming conventions).*
>
> *For accurate nationality determination (through a 'Mother' and/or a 'Father').*

For identifying imposters at all stages of the passport application and usage – for example, a person may have fraudulently tampered with a genuine British passport by substituting the photograph.

For transgendered persons to use their passport as evidence of their acquired gender.

So that physical checks at borders are able to be carried out by a person of the appropriate gender without questions being raised about the applicant's gender.

As proof of identity to access gender-specific services.

Uses of gender in the life of a passport

1.7 Gender is a relevant factor at all stages in the life of a passport. From application, through consideration and then to every time the passport is used by the customer, gender is used as a biographical identifier to help verify the identity of the applicant.

Areas of potential negative impact

1.8 The two groups who may be negatively impacted by our current policy are persons:

transitioning from one recognised gender to another who may not physically present as the gender recorded on their passport to who use one identity for official purposes (for instance at work) and another to travel in.

who are gender diverse, not identifying in one or either gender who object to having either Male or Female shown on their passport."

14. The review went on to note that,

"2.3 We have sought to speak to key stakeholder groups and to relevant parts of Government (section 7). The fact that we are carrying out the work is welcome but there is little in the way of support to make changes that as a matter of routine result in highlighting the status of that person.

2.4….

2.5 We remain open to suggestions for change but such a change would be on the basis that it was either required by law or that it provided additional benefits to the applicant. Choice is an important factor but we have received feedback that would suggest that enabling that choice may be more detrimental than beneficial.

> *2.6 There have been very little public calls for the 'X' provision in the passport. A campaigner is in frequent contact with the Government Equalities Office, ourselves, other ministries and No 10 about recognition of the ability to choose both gender and not to be required to disclose gender. There are no calls for change from gender representative groups or civil liberties groups. The campaigner has set up a petition seeking a change in the passport gender markings. To date this has attracted 667 signatures."*

15. The review set out the legislative issues which it considered may arise for consideration in the following terms,

> *"4.1 As passports are issued at the discretion of the Home Secretary in the exercise of Royal Prerogative, there is no legislative requirement in domestic law setting out the gender requirement in the UK passport. However, legislation in other areas recognises only the genders Male and Female. Therefore, what may appear to be a simple and inclusive change to passports could have wider reaching consequences.*
>
> *4.2 The Sex Discrimination Act 1975 (as amended in 1986) refers only to 'Woman' and 'Man' and the sexes 'Male' and 'Female'. Similar language is used in the Equality Act 2010. The Gender Recognition Act 2004 refers to Male and Female genders and states that a person of "either gender…. may make an application for a gender recognition certificate of the basis of …. living in the other gender." No provision exists for transitioning to a third gender or for a person to be shown as no gender.*
>
> *4.3 Nationality legislation relies on the concepts of 'Mother' and 'Father'. Under the British Nationality Acts (BNA) 1948 and 1981, the Immigration Act 1971, Human Fertilisation and Embryology Act 2008, and the Adoption and Children Act 2002, nationality is only able to be passed on by a mother or father and in a large amount of cases (especially for those born prior to 1983) can only be taken through the father. An introduction of a third gender would require possible amendments to these Acts to explain how someone of a third gender may be able to gain or pass on nationality, which would be a complex undertaking.*
>
> *4.4 Third parties (including banks) that have a legal obligation to confirm a person's identity and to do so they are legally empowered to take a copy of the personal details in a passport:*
>
> *Under the Immigration, Asylum and Nationality Act 2006 an employer has to verify that a person legally able to work in the UK.*

> *Under the Money Laundering Regulations 2007, certain organisations (banks, insurance companies, accountants, solicitors etc) are required to confirm a person's identity to enable them to become or remain their customer. When completing some financial transactions customers may be asked to provide proof of identity and a copy of their passport may be taken.*
>
> *4.5 At present there are no plans across Government to introduce a third gender. Whilst some parts of government do not rely upon gender as part of their identifier process (e.g. Ministry of Defence on military personnel identity cards), the norm is for gender to form a key part of the personal information gathered in respect of the individual.*
>
> *4.6 The introduction of a third gender would require changes to computer systems, record gathering processes, procedures and policies as well as developing strategies for how public services interact with their customer base. As with HMPO, other parts of government do have policies in place to deal with transgender people but they specifically preclude recognition of a third gender.*
>
> *4.7 HMPO could introduce recognition of a third gender but it would be in isolation from the rest of government and society. There are likely to be so few applications for such a passport but we would need to avoid issuing a document that was not recognised by other government or wider UK society."*

16. The review set out the various options open to Government, namely: option 1, do nothing; option 2, issuing two passports; option 3, removing gender from the visible information on a passport; option 4, removing gender from passports and; option 5, adding a third gender marker "X". In relation to the first option, the review stated,

> *"We have discussed with international partners and it was raised with the ICAO, Technical Advisory Group meeting in December 2012. ICAO is adopting a similar approach to the UK. That is maintaining a watching brief on this area of work with regular updates and reviews."*

Whilst in relation to the fifth option, the review stated,

> *"5.4 The option of having a third category, 'X', within the gender field in a passport is already permitted by the International Civil Aviation Organisation (ICAO) standards. This option raised the following concerns:*
>
> *This marker could single out individuals, specifically at border controls or imply that an individual is of no gender (perhaps incorrectly) and therefore cause offence.*

This marker would need to be added to our current passport application form; however, it may cause some confusion with applicants who may interpret this category wrongly. Applicants may then need to be contacted to confirm they marked 'X' correctly. This could result in increased customer complaints and/or inaccurately issued passports.

Officials at ports of entry may be unable to identify individuals and would therefore involve checks to be made which would further inconvenience and embarrass the individual. Determination of who should complete these checks (i.e. a person of the correct gender) would be frustrated.

There would be a number of system issues in the addition of 'X' as a gender marker to the visible fields and biometric chip on the passport, including fundamental changes to our computer system which would be very costly.

Other customers may request 'X' in their passports or in fact question whether HMPO should be asking what their gender is at all for the purpose of passport issuance and whether this is proportional.

British passport holders with 'X' in their passports may require additional consular assistance e.g. if they are stopped on entry to or exit from a country which does not recognise a third gender or criminalised transgender or gender diverse individuals.

Section 22 of the Gender Recognition Act 2004 protects the privacy rights of transsexual people under Article 8 of the European Convention on Human Rights by criminalising the disclosure of information relating to their gender history by a person who acquired that information in an official capacity. Section 22 sets out a series of exceptions, where disclosure is considered justified, which include where the person in question has given permission for the disclosure. Therefore, in order to be able to add 'X' to a passport, HMPO must have a declaration signed by the applicant that their individual gender situation will be referred to on their passport.

Evidence of gender diversity needed for an applicant to be able to select 'X' as a gender marker would be difficult to produce because the UK has no legal framework for those who do not recognise Male or Female genders. Self-identification would not be appropriate."

17. The review estimated the overall costs of altering the passport application process itself, by adding the "X" gender marker, to be approximately £2 million. Although, this figure would be significantly increased if other legislative changes were introduced.

18. On 5 June 2014, an early day motion was tabled in the House of Commons urging the Government to make "non-gendered-specific X passports available to those UK passport holders who do not identify with a particular gender."

19. On 24 February 2015, the claimant wrote to HMPO enclosing a "Report on the UK Legislative Framework for issuance of X Passports to Non-gendered Individuals" which had been commissioned by the claimant from Clifford Chance LLP. The letter requested HMPO to consider altering the current policy refusing to issue X passports, stating that the claimant would thereby be enabled to,

> *".... gain the social legitimacy, affirmed through the correct documentation, that most people take for granted."*

20. The report suggested that the current policy of HMPO relating to the non-issuing of "X" passports was unlawful, being contrary to the Government's obligations under the Human Rights Act 1998, the Gender Recognition Act 2004 and the Equality Act 2010. In a schedule annexed to the report it listed 6 countries around the world (a seventh, Argentina, was included, but it is acknowledged by the parties that this was an error), which permitted the issuing of "X" passports, these being: New Zealand; Australia; Denmark; Malta; India and; Nepal.

21. As no substantive response was provided to this letter, and in accordance with the pre-action protocol for judicial review, a letter was sent on behalf of the claimant to the defendant dated 30 June 2015. It reiterated much of what had previously been asserted by the claimant or on the claimant's behalf, and notified the defendant of the claimant's intention to challenge the current policy of HMPO that all applicants are required to select either the male or female gender on the passport application and that passports may only be issued with the male or female signifiers on the passport.

22. The letter asserted that HMPO's current policy was unlawful as a breach of the claimant's Article 8 right to respect for private life, and a breach of the claimant's Article 14 right not to be discriminated against. It stated that the claimant sought the option of a passport which reflected the claimant's non-gendered identity and that of others who were third gendered (i.e. persons who consider themselves to be both male and female) and intersex (i.e. individuals having physical characteristics of male and female sex) whose gender is neither exclusively male or female.

23. It was pointed out that although the exact number of non-gendered persons within the UK and worldwide is unknown, the NHS published the following information concerning those with gender dysphoria,

> *"It is not known exactly how many people experience gender dysphoria ... A study carried out in Scotland in 1999 found that around 1 in every 12,500 people may have the condition, although some people believe this is a significant underestimate. A survey of 10,000 people undertaken in 2012 by the Equality and Human Rights Commission found that 1% of the population surveyed was gender variant, to some extent."*

Moreover, the NHS defines gender dysphoria as follows,

> *"Gender dysphoria is a condition where a person experiences discomfort or distress because there is a mismatch between their biological sex and gender identity ... While biological sex and gender identity are the same for most people, this is not the case for everyone. For example, some people may have the anatomy of a man, but identify themselves as a woman, while others may not feel they are definitely either male or female. This mismatch between sex and gender identity can lead to distressing and uncomfortable feelings that are called gender dysphoria. Gender dysphoria is a recognised medical condition, for which treatment is sometimes appropriate. It is not a mental illness. ..."*

24. It was submitted that because eligibility for a gender recognition certificate under the Gender Recognition Act 2004 is not contingent upon any form of gender reassignment surgery, a person's right to define their gender differently from their biological sex is therefore enshrined in English law.

25. Thereafter the letter set out a detailed refutation of the concerns expressed in HMPO's review about the introduction of a system which permitted an applicant for a passport not to specify whether they were male or female by placing an "X" in the gender field.

26. In responding to this letter on 8 September 2015 the defendant, whilst accepting that the issues raised by the claimant may engage Article 8, denied that the lack of provision for "X" gender passports unlawfully interfered with that claimant's Article 8 rights, as there was no positive obligation on the State to provide legal recognition of the many different ways in which individuals may define themselves, and in particular no obligation to legally recognise a non-gendered identity.

27. It suggested that there was no European or international consensus in relation to this issue, and that the United Kingdom was entitled to a wide margin of appreciation. It stated that the defendant had carefully considered this issue and would continue to do so in alignment with societal developments, but that at present the defendant did not consider that any disadvantages suffered by the claimant outweighed the reasons for maintaining the present position.

28. On 14 January 2016 the House of Commons Women and Equalities Committee published a report on Transgender Equality. Although this report, as its title suggested, specifically examined the concerns of transgender people, it was noted in its introduction that trans-identity can include non-gendered people. However, it pointed out that whilst issues relating to non-gendered people featured in the report, it was not possible to undertake an in-depth consideration of all their concerns and observed that there was a need for Government policy to address their specific needs. Likewise, with those who are intersex.

29. The report examined a wide range of statutory provisions and situations in which gender was considered to be an issue and noted that there was a lack of good quality statistical data regarding trans-people in the UK but that current estimates indicated that some 650,000 are "likely to be gender incongruent to some degree".

30. In its conclusions the Committee, considered the Gender Recognition Act 2004, and recommended that the Government should,

> *"look into the need to create a legal category for those people with a gender identity outside that which is binary and the full implications of this."*

31. Included in its other recommendations was the following,

> *"54. There is a need for a greater awareness of trans people's legal right in most contexts to have their name and gender recorded as they wish without precondition. It is commonly assumed that there is such a thing in UK law as a 'legal name', when there is not; and that legal gender must be proved in many situations when this is in fact neither required nor appropriate. (Paragraph 296)*
>
> *55. The Government must take the lead by ensuring public services have clear and appropriate policies regarding the recording of individuals' names and genders. The requirement for trans people to produce a doctor's letter in order to change the gender shown in their passport inappropriately medicalises what should be a simply administrative matter. This requirement must be dropped. (Paragraph 297)*
>
> *56. The UK must follow Australia's lead in introducing an option to record gender as "X" on a passport. If Australia is able to implement such a policy there is no reason why the UK cannot do the same. In the longer term, consideration should be given to the removal of gender from passports. (Paragraph 298)*
>
> *57. The Government should be moving towards 'non-gendering' official records as a general principle and only recording gender where it is a relevant piece of information. Where information on gender is required for monitoring purposes, it should be recorded separately from individual's personal records and only subject to the consent of those concerned. (Paragraph 299)"*

32. The Government provided its response to the Committee's report in July 2016. In relation to the recommendation concerning the Gender Recognition Act 2004, the response stated that it would like to see more evidence on the case for change and would therefore monitor the implementation of alternative gender recognition processes in other jurisdictions in furtherance of the Government's commitment to furthering transgender equality.

33. Its response to the recommendations of the Committee contained within paragraphs 54 – 57 of its conclusions included the following,

> *"We understand that it can be very distressing for some transgender people when faced with putting their birth sex on a form. To tackle this, we will carry out an internal review of gender markers in official documents to find ways to reduce unnecessary demands for such markers, while ensuring*

necessary data is collected to tackle sex discrimination and inequality, and for identity purposes.

…

The passport is a unique and important document. HM Passport Office (HMPO) is required to obtain only that information from applicants and third parties which is relevant and necessary to consider a passport application. Gender is gathered at the point of application to assist in the determination of identity. The showing of a gender marking on the passport accords with standards set by the International Civil Aviation Organisation. Gender is one of a number of identifiers that enables HMPO to be satisfied with the identity of a person before a passport is issued. It also assists border and law enforcement agencies and helps the passport holder when accessing or seeking access to services or being at the end of receiving interventions that may be gender specific.

Significant changes have been made in the technology used to identify the holder of travel documents. For example, e-travel documents use facial recognition technology and other biometric identification methods. This provides an opportunity to look beyond the biodata displayed on travel documents, including gender, to confirm an identity.

At present, a person is required to produce a doctor's letter before they can change the gender shown in their passport. As Karen Bradley indicated when appearing before the Committee, HMPO will extend the range of supporting documentation that can be used by an applicant to demonstrate use of their gender of choice in their daily life. This will mirror the approach adopted for passport applicants who wish to change their name.

…

Currently, UK law only recognises male and female genders, and to introduce a third category denoted by an 'X' in the passport would require a change in primary legislation. Before such legislation could be introduced, we would need to consider the impact that such a change would have on the personal safety and wellbeing of the individual, as well as wider issues including public protection, and combating identity theft and fraud. We would not see the passport as being used in the UK to recognise a third gender marking in isolation from other areas of government.

The removal of any gender marking on the face of the passport is not currently an option under standards issued by the International Civil Aviation Organisation (ICAO). However, we have agreed with the ICAO Technical Advisory Group that the

> *UK will conduct a survey with member states on gender and passport markings. The Group has agreed that the findings from the survey will formally be referred for action and next steps to one of the operational sub groups, the Implementation and Capacity Building Working Group (ICBWG). The aim is to report the findings from the survey by December 2016 to the ICBWG. We maintain the need for gender to be gathered at the point of application and included in the passport chip to assist law enforcement and border agencies."*

34. Upon reviewing the Government's response, those instructed on behalf of the claimant wrote to HMPO on 8 August 2016 submitting that the introduction of "X" passports would neither require legislation nor would it introduce a third category beyond male and female, as passports are issued in exercise of the Royal Prerogative and "X" would only indicate that the passport holder's gender is unspecified, in accordance with ICAO standards. It reiterated that whether legislation not relating to passports requires amendment is outside the ambit of the claimant's challenge to the current practice of HMPO and does not justify interference with the claimant's rights affected by that policy.

35. The letter went on to note that the Government's response appeared to rely upon a narrower set of reasons for maintaining HMPO's present policy than that contained in its internal review and requested HMPO to clarify that the only points relied upon were those contained in the Government's response.

36. HMPO replied to this enquiry on 3 October 2016 confirming that it relied upon all of the points contained in its internal review. Moreover, although it acknowledged that passports were issued by the Home Secretary in exercise of the Royal Prerogative, such that,

> *"... there is no legislative requirement in domestic law setting out the gender requirement in the UK passport. However, as stated in the Government's response to the Transgender Equality Report, UK law currently only recognises male and female genders.*
>
> *ICAO allows for an "X" in the sex field of the biographical page of the passport to signify that a person is of unspecified gender. HM Passport Office requires applicants to specify their gender during the passport application process for identity purposes and only accepts male or female genders in line with current legislation. Whilst the passport is a travel document, it is also used in practice in the UK by the public and service providers to assert and verify identities. The security of the passport is therefore important in protecting people's identities and general security. HM Passport Office is cognisant of this and therefore would need to make sure any change to the passport does not adversely affect the wider interests of HM Government or the UK public. To introduce "X" gender marking in isolation form the rest of government would be the wrong approach. Any change must be considered across Government, ensuring the*

wider impact has been properly considered, to make sure that there is an aligned, consistent approach underpinned by legislation."

Judicial Review: grounds of support and resistance
Grounds of support

37. In the detailed statement of grounds, the claimant submits that the current policy of HMPO, which requires an applicant for a passport to declare their gender as being either male or female, and the issuing of a passport reflecting only that designation, is unlawful as being:

    i. a breach of the claimant's Article 8 right to respect for the claimant's private life;

    ii. a breach of the claimant's right under Article 14 not to be discriminated against;

    iii. irrational, and;

    iv. a failure to take into account relevant considerations, whilst wrongly taking into account irrelevant considerations.

38. It is submitted that an individual's gender identity is an aspect of their private life and therefore falls within the scope of Article 8.

39. It is pointed out that the claimant is one of a group of individuals who consider themselves to be non-gendered and it is submitted that due to the importance of this aspect of their private life the Government is under a positive obligation to ensure that the claimant's non-gendered identity is respected.

40. It is submitted that the defendant has failed to ensure due respect for the claimant's non-gendered identity by requiring the claimant to declare being either male or female when applying for a passport, and only issuing a passport with a designation of male or female in the sex field.

41. It is pointed out that the issuing of passports is undertaken by the Home Office in the exercise of the Royal Prerogative and there is no legislative requirement in relation to the form in which gender is required either to be declared by an applicant or to be recorded on a passport.

42. Furthermore, since 1 March 1947 the UK has been a contracting Member State of the Convention on International Civil Aviation (the Chicago Convention). Under Article 37 of the Chicago Convention each Member State undertakes to collaborate in securing the highest practicable degree of uniformity in practices in relation, *inter alia,* to airways and auxiliary services in order to facilitate air navigation and to this end the ICAO, which is a UN specialised agency established to manage the administration of the Convention, is required to adopt and amend international standards and recommended practices and procedures dealing with, *inter alia*, customs and immigration procedures.

43. The ICAO's current standard for "Machine Readable Travel Documents" (7th edition, 2005) provides minimum requirements for machine readable passports which includes, as one of the mandatory requirements, information as to the sex of the holder in the following terms,

> *"Specifications: Sex of the holder, to be specified by the uses of the single initial commonly used in the language of the State where the document is issued and, if translation into English, French or Spanish is necessary, followed by an oblique and the capital letter F for female, M for male, or X for unspecified."*

44. It is pointed out that, in addition to providing for a male or female designation, a number of countries have adopted the use of the "X" designation on their passports. Moreover, some countries have recognised a third gender which encompasses those who do not identify as being exclusively either male or female. For example, the Scottish Government has announced the recognition of gender identities other than male or female in forthcoming legal reform. Therefore, it is submitted that there is a growing European and international trend to recognise the gender identity of those individuals, who include those who identify themselves as non-gendered.

45. It is pointed out that although the number of individuals who identify themselves as being non-gendered is unknown, various studies indicate that it is not a numerically insignificant group, and that gender dysphoria is a recognised medical condition, which includes those who do not feel that they are definitively either male or female.

46. It is not only pointed out that no legislative amendment is required to effect a change of policy, but that the Women and Equalities Committee recommended such a change. It is submitted that identity checks either by customs or private institutions are undertaken either by electronic facial/iris recognition or by photographic comparison. Moreover, that the costs involved in changing the policy are likely to be relatively modest and, in any event, given the importance of the issue, would not justify refusing such a change. It is submitted that there is no requirement for the defendant to consider any wider implications of a change in HMPO's policy upon other aspects of government regulation which is affected by gender, as there would be no such implications due to the fact that the "X" marker on a passport would only indicate that the gender is unspecified, rather than indicating a third gender. In any event there is no justification for any further delay in considering these matters.

47. It is submitted that there is no evidence of any increased risk to the holders of passports at customs controls, and therefore no risk of increased use of consular resources. Moreover, it is submitted that there is no justifiable reason why an individual should not be entitled to choose for themselves that they do not wish to specify their gender on their passports, and there is no need for any declaration under the Gender Recognition Act 2004 that the individual's gender would not be referred to on their passports.

48. In these circumstances it is submitted that there can be no justification for the continuation of HMPO's current policy which amounts to an unlawful interference with the right to respect for the claimant's non-gendered identity.

49. As such there is also unlawful discrimination under Article 14 between the claimant and those who identify as being male or female.

50. Moreover, it is submitted that HMPO's current policy is irrational and is the product of a determination which failed to take into account relevant considerations, whilst taking into account irrelevant ones.

Grounds of resistance

51. In the summary grounds for resisting the claim, although the defendant acknowledges that an individual's gender identity is an aspect of their private life, it is submitted that the UK is entitled to a margin of appreciation in relation to this issue and there is no positive obligation to recognise a gender other than male or female.

52. In the event that such a positive obligation arises, then it is submitted that the current policy of HMPO does not amount to unlawful interference with the claimant's Article 8 right, because the interference is justified by the legitimate aims of needing to maintain an administratively coherent system of gender recognition, maintaining security and combatting identity theft and fraud, ensuring security at national borders, and ensuring the personal safety of the passport holder.

53. Moreover, the interference is proportionate. In this regard it is submitted that the interference is modest in nature, there are a relatively small number of individuals who are affected, and there would be significant costs and administrative difficulties involved in such a change, especially because of the need to maintain a coherent system of gender recognition across other government areas which would be affected by such a change. It is submitted that the recognition of a third category of gender is a potentially controversial area of social policy, and the court is not in any position to provide guidance as to what pre-conditions (if any) should exist before an individual could be recognised as being non-gendered.

54. It is submitted that domestic law only recognises two genders, either male or female, as reflected in primary legislation including the Equality Act 2010, the Civil Partnership Act 2004, pensions legislation and the requirement to enter a child's sex on their birth certificate. The concept of parenthood, being either a father or mother, is used in the Human Fertilisation and Embryology Act 2008 and the Birth and Deaths Registration Act 1953. Moreover, that gender is used in a variety of ways in the exercise of Government and non-governmental functions including the allocation of prisoners within the prison establishment, children attending single-sex schools and sporting activities. To this end, although the Gender Recognition Act 2004 enables an individual to change from male to female or vice versa, it does not recognise an individual who identifies as non-gendered.

55. It is submitted that there is no decision of the European Court of Human Rights (ECtHR) which establishes a positive obligation to recognise a gender other than male or female, and none which would require the defendant to permit individuals to declare their gender as being unspecified on their passport application. Furthermore, there is no consensus either amongst the Council of Europe members or internationally, to permit passports to be issued with an "X" in the sex field.

56. It is recognised that this is an issue which requires to be kept under review and it is submitted that the defendant is doing so in line with the undertaking provided in response to the report by the Women and Equalities Committee, by conducting an

internal review to reduce unnecessary collection of gender markers and conducting a survey with ICAO members on gender markings in passports.

57. In these circumstances it is submitted that there is no positive obligation upon the UK to recognise a gender other than male or female and, in any event, any interference with the claimant's Article 8 rights is justified as being in accordance with law, necessary and proportionate.

58. As such, it is submitted that there is no breach of Article 14, and that in any event the claimant's identification as being non-gendered is not a protected status.

59. Moreover, it is submitted that HMPO's policy is rational, and based upon relevant rather than irrelevant considerations.

Claimant's response

60. In a response to the summary grounds of resistance the claimant submits that the claim is limited to challenging the current policy of HMPO in not permitting a passport to be applied for and issued with the claimant's gender being unspecified and does not amount to a claim for recognition of a third gender. Therefore, there is no justification for any wider consideration of the impact of such a change across other governmental areas.

61. Moreover, the ICAO already permit passports to be issued with "X" in the sex field, such that there is no need for any further surveys to be carried out relating to the removal of gender markers on either passports or other official documentation.

Procedural issues

62. The application for permission for judicial review was refused on paper by Warby J but granted on renewal by Gilbart J on 12 October 2017.

63. An application by Human Rights Watch, a non-governmental human rights organisation, to intervene in support of the claimant's challenge to the current HMPO policy by way of written submissions was granted by consent at the commencement of the hearing for judicial review. Consequently, I have read and taken into account those written submissions dated 12 March 2018, which assist with an understanding of gender issues, particularly within their international context, together with third party evidence, namely a joint witness statement by Dr Julia Ehrt and Zhan Chiam dated 31 January 2018.

Evidence

Claimant's evidence

64. The claimant has provided three witness statements, two of which are dated 25 May 2017 and the third is dated 30 January 2018, much of which has already been encapsulated within the background section of this judgment.

65. In both the 1st and 2nd witness statements it is pointed out that because of the claimant's decision not to identify as a female, the claimant is not able either to marry or enter into a civil partnership, such that the claimant does not have automatic rights of inheritance.

66. In the 2nd witness statement the claimant recognised that,

> *"The idea of rejecting gender is hugely controversial in our society."*

67. The claimant stated that in 2008 a website request for individuals to get in touch with the claimant if they would opt for a non-gender specific passport generated approximately 120 responses. The statement went on to relate the very significant employment difficulties which flowed from public disclosure of the claimant's non-gendered identity and concluded that,

> *"39. From the point of disclosure I have had to deny my identity every time I need to apply for an essential item of documentation. The passport is such a significant document that it is impossible to function in many areas of life without one. It would obviously make travel outside the United Kingdom impossible if I were to surrender my right to hold a passport. It is with the greatest reluctance that I continue to hold a passport that is not an accurate representation of my identity. I maintain a passport in order that I am not to sacrifice my fundamental right to travel outside the UK and lose access to a number of other benefits associated with the passport such as access to certain financial services or being able to register with a new GP. I hold a drivers licence that has a gendered reference encoded in the number because I cannot give up my right to drive."*

68. It is pointed out that in March 2016 the Scottish First Minister announced the recognition of gender identities other than male or female in forthcoming legal reform. Moreover, not only do the Yogyakarta Principles, formulated by a distinguished group of international human rights experts, include provision for "a multiplicity of gender markers", but in November 2017 in Opinion Consultiva OC-24/17 the Inter-American Court of Human Rights considered that the ability to correct references to gender in identity documents to accord with a person's self-perceived gender identity was a right protected by the American Convention on Human Rights.

Defendant's evidence

69. On behalf of the defendant Kate O'Neil, the Deputy Director of the Social Policy and Equality Division in the Government Equalities Office (GEO), has provided two witness statements dated 14 December 2017 and 20 March 2018. Timothy Woodhouse, the Acting Head of the Illegal Migration, Identity Security and Enforcement Unit of the Border, Immigration and Citizenship Policy and Strategy Unit at the Home Office, has also provided a witness statement dated 18 December 2017.

70. Kate O'Neil explains that the GEO is responsible for delivering the Government's equality strategy and legislation, which now includes dealing with issues connected with sexual and gender identities. She states that the GEO recognises that sex and gender are two different characteristics, the former being biologically determined, whilst the latter is a social construct, such that,

> *"One's gender identity is one's innate sense of gender – which could be male, female, both, neither or fluid."*

However, she recognises that the approach adopted by the GEO is not reflected in legislation, which does not define the terms sex and gender, and often uses the terms interchangeably. Moreover, no UK legislation currently contemplates a gender other than being either male or female.

71. Thereafter in her 1st witness statement Kate O'Neil explains that despite the adoption in 2007/08 of a policy to draft legislation in a gender-neutral way, there remains a significant number of statutes which assume the existence of only two genders, some of which make specific provision for one of those genders, including those relied upon in the defendant's written submissions, together with the Interpretation Act 1976 and the Female Genital Mutilation Act 2003. Furthermore, there are a number of services provided either directly or indirectly by Government which are organised in a manner which recognises only two genders, including prisons, probation, hospitals, schools and rape crisis and domestic abuse centres. She sets out between paragraphs 59 – 89 some of the work which would be required to be completed by Government in the event that a third gender category was officially recognised in the UK.

72. Kate O'Neil recognises that there has been little consideration thus far by either Government or Parliament of particular policy measures directed towards non-binary individuals. The most significant being HMPO's internal review of gender markings on passports in 2014 and the report and response to the Women and Equalities Committee in 2016. Moreover, save for a number of early day motions which were not debated, the only other legislative proposal concerning the issue of gender identity was an unsuccessful proposed amendment to the Equality Act 2010.

73. She explains that in October 2017 the GEO, through the Foreign and Commonwealth Office, sought information from a number of countries in relation to the issue of the legal recognition of a third gender and as to its inclusion on identity documents, including passports. The responses are set out between paragraphs 41 to 55 of her 1st witness statement.

74. In relation to the Council of Europe countries, the following responded that they neither permitted "X" markings on their passports nor recognised a third gender: Ireland, Portugal, Greece, Norway, Sweden, Belgium and Switzerland. However, the following made some provision: Malta did not recognise a third gender but permitted "X" to be included on official documents, including passports indicating an unqualified gender and available to all; Denmark did not recognise a third gender but permitted "X" to be included on their passports standing for unspecified and not requiring any medical evidence; Germany now permitted "X" to be included on birth certificates for babies whose biological sex is unclear, subject to later clarification if required. "X" can also be used on passports by an individual with an "X" birth certificate but not by anyone else. A survey carried out in 2017 found that the recognition of a third gender would require the amendment of over a thousand pieces of legislation. Moreover, in November 2017 a decision by the First Senate of the German Constitutional Court held that it was unlawful not to permit an intersex individual to correct their birth certificate by deleting the previous female entry and replacing it with "inter/diverse"; France did not respond to the survey but in May 2017 the French Cour de Cassation held that the refusal of a

request by an intersex person registered male at birth to amend the birth certificate to neutral was not unlawful; although Portugal does not recognise a third gender at present, there is a proposal for legislation to be introduced to enable gender self-determination, which may lead to such recognition.

75. In relation to the international situation, the following responded that they neither permitted "X" markings on their passports nor recognised a third gender: Thailand, Argentina, the USA and Colombia. However, the following made some provision: Nepal has recognised a third gender for a number of years, it is self-defined and able to be used on official documentation; Australia permits "X" on its passports to indicate "indeterminate/intersex/unspecified" and covers those who identify in a gender other than that assigned at birth, including a third gender which is not exclusively male or female, which is required to be supported by a statement from a medical practitioner or psychologist; India currently has legislation being considered to recognise a third gender as being "transgender"; since 2015 New Zealand has permitted "X" on their passports for those who sign a statutory declaration that they wish their gender to be recorded in this manner; Canadians will soon have the option of declaring their gender as "X" unspecified on their passports, to reflect those who do not identify as being either male or female. Some Canadian states have recently permitted this on other official documentation; Pakistan permits "X" on their passports for individuals who are transgender.

76. Finally, Kate O'Neil sets out the work currently being undertaken by the GEO in relation to these issues. Firstly, the Government launched a national survey of LGBT+ people which closed in October 2017 in which 7,411 people out of a total of 108,098 responses identified as non-binary. It is understood that this is the largest sample of non-binary people in the UK and she states that the findings of the survey are anticipated to be the primary factor determining GEO policy towards non-binary people for the foreseeable future. Secondly, in response to the Women and Equalities Committee's report, the Government is undertaking an internal review of gender markers in official documentation. Thirdly, the Government is developing a consultation on amendments to the Gender Recognition Act 2004. Although this will not include proposals to introduce legal recognition for non-binary persons, the Scottish Government launched a consultation in November 2017 which includes such a proposal which will need to be considered in relation to its impact within the rest of the UK.

77. In her 2nd witness statement, Kate O'Neil sets out the preliminary findings from the national survey of LGBT+ people. The survey included an open text question which invited the respondents' views on whatever issue they wanted to raise. IPSOS MORI informed her that whilst a large number of responses stressed their desire for legal recognition of their non-binary gender identity, only a small number of respondents brought up the issue of "X" gender markers in passports, albeit these considered that gender neutral identifiers in official identification would greatly increase their quality of life. The survey found that when asked how satisfied in general terms the respondents were with life nowadays, the average non-binary respondent scored 5.48 out of 10, whereas the average trans respondent scored 5.29. Kate O'Neil stresses that these are only preliminary findings, and that the Government has not reached any conclusions on whether any change in current policy is necessary, but that the GEO anticipates that the full results of the survey will be a valuable source of information for directing Government policy towards non-binary people for the foreseeable future.

78. Kate O'Neil also states that there has been a change in ministerial personnel at the Home Office, and that the previous indication, that the review of the Gender Recognition Act 2004 would not include proposals to introduce legal recognition for non-binary persons, was the policy of the previous ministers, and the new ministerial team has not formulated their own view as to whether such a proposal will be included within the forthcoming review. However, the indication from wide ranging engagement by the GEO with LGBT and other trans-specific organisations had indicated that these groups have consistently voiced their support for non-binary issues to be included in the consultation, preferably in the form of full legal recognition of a non-binary gender in England and Wales.

79. She indicates that since the previous witness statement, research had discovered that although Holland allows for "X" on birth certificates where a child is born with ambiguous sex characteristics, it does not have any provision for adults to change a male or female gender marker on any documentation to "X".

80. In his witness statement, Timothy Woodhouse acknowledges that the issuing of passports in the UK is at the discretion of the defendant in exercise of the Royal Prerogative. However, as a machine-readable travel document, it is required to be produced in accordance with the internationally agreed standards provided for by the ICAO. He indicates that both New Zealand in 2012 and the UK in 2016 have raised within the ICAO the need for gender to be a required field on machine-readable travel documents. The ICAO agreed with New Zealand that the costs involved outweighed the potential benefits of removing gender from these documents. The UK undertook to provide a report to the ICAO, and a draft report completed by the defendant in 2017, but not as yet submitted to the ICAO, which was based upon a review of 21 responses from a number of fellow member states concluded that although the inaccurate representation of sex/gender causes concern for many who identify as transgender, intersex and non-binary, and that biometric identification made the need for gender identification of limited value in its own right, the effectiveness of border security practices around the world would be reduced if sex/gender markings were removed. It recommended that the ICAO carry out a wider consultation with member states.

81. On 9 October 2017 HMPO followed up the draft report with a questionnaire sent to 165 UN member states designed to investigate the use and acceptance of "X" markers on passports by different countries. Timothy Woodhouse states that the responses to this questionnaire will inform a full review on the issue as to the likely international support for a change to the use of such markers.

82. In the balance of his witness statement Timothy Woodhouse, after indicating that the defendant no longer relied upon the need to ensure the personal safety of the passport holder as a reason for the continuation of the current HMPO policy, explains the issues surrounding two of the other reasons relied upon, namely the need to ensure security and to combat identity theft and fraud, and the need to ensure security at borders. In relation to the former of these he explains that the gender marker is an integral and additional piece of information used to verify the identity of the passport holder. Although biometric identification is used at some customs borders, this is not universal and in any event the passport is often used as evidence of identification otherwise than at border controls. In relation to the latter reason, he explains that not only would significant costs be entailed by alteration of the passport application forms, in the region of £2million, but far greater expense would be involved in the event that it was

considered appropriate, as is the defendant's case, that any such change in the current HMPO policy would need to be reflected in a change in overall policy in relation to the recognition of a third gender across other governmental areas.

Third party evidence

83. The joint witness statement dated 31 January 2018 provided in support of the claimant's case from Dr Julia Ehrt, Executive Director of Transgender Europe, and Zhan Chiam, Gender Identity and Gender Expression Senior Programme Officer of the International Lesbian, Gay, Bisexual, Trans and Intersex Association, states that according to an estimation by the World Psychiatric Association, which was likely to be an underestimate, 0.5% of people worldwide (amounting to over 27.5 million individuals) "identify with a gender identity other than the gender assigned at birth." It pointed out that Resolution 2048 (2015) of the Council of Europe's Parliamentary Assembly has welcomed "the emergence of a right to gender identity … which gives every individual the right to recognition of their gender identity and the right to be treated and identified according to it" and asked member states to "consider including a third gender option in identity documents for those who seek it."

84. The witness statement included details of those countries which, *inter alia*, already provided for the use of "X" markings in the sex field of passports. It also set out the findings from a survey carried out by the Scottish Trans Alliance which indicated that 64% of the 895 non-binary respondents welcomed an option for a gender marker besides male or female.

Review of authorities

85. In *X and Y v The Netherlands* [1985] 8 EHRR 235, the European Court of Human Rights (ECtHR) held that the concept of "private life" under Article 8 covers the physical and moral integrity of the person, including his or her sexual life and,

> *"… that although the object of Article 8 is essentially that of protecting 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 primarily negative undertaking, there may be positive obligations inherent in an effective respect for private or family life."*

86. In *Rees v UK* [1986] 9 EHRR 556, the first of a series of cases before the ECtHR concerning the rights of transsexuals to have their birth certificates amended to show their gender identity rather than the sex in which they were registered at birth, it was found that the UK was not in breach of Article 8 in refusing to permit such an amendment. In reaching this conclusion the court took into account not only that this change would be likely to result in more far reaching legislative amendment, but that as there was little uniformity of approach to the issue within the Contracting States, the UK was entitled to a wide margin of appreciation.

> *"35. The Court has already held on a number of occasions that, although the essential object of Article 8 is to protect the individual against arbitrary interference by the public authorities, there may in addition be positive obligations*

inherent in an effective respect for private life, albeit subject to the State's margin of appreciation. In the present case it is the existence and scope of such 'positive' obligations which have to be determined. The mere refusal to alter the register of births or to issue birth certificates whose contents and nature differ from those of the birth register cannot be considered as interferences.

36. The Commission and the applicant submitted that the applicant has been socially accepted as a man and that, consistently with this, the change in his sexual identity should be given full legal recognition by the United Kingdom. It was only with regard to the choice of the necessary measures that there could be any room for a margin of appreciation, or for any balancing with countervailing public interests. The Government, on the other hand, maintained that the whole matter depended on the balance that had to be struck between the competing interests of the individual and of society as a whole.

37. As the Court pointed out in its above mentioned ABDULAZIZ, CABALES AND BALKANDALI judgment the notion of 'respect' is not clear-cut, especially as far as those positive obligations are concerned: having regard to the diversity of the practices followed and the situations obtaining in the Contracting States, the notion's requirements will vary considerably from case to case. These observations are particularly relevant here. Several States have, through legislation or by means of legal interpretation or by administrative practice, given transsexuals the option of changing their personal status to fit their newly-gained identity. They have, however, made this option subject to conditions of varying strictness and retained a number of express reservations (for example, as to previously incurred obligations). In other States, such an option does not – or does not yet – exist. It would therefore be true to say that there is at present little common ground between the Contracting States in this area and that, generally speaking, the law appears to be in a transitional stage. Accordingly, this is an area in which the Contracting Parties enjoy a wide margin of appreciation. In determining whether or not a positive obligation exists, regard must be had to the fair balance that has to be struck between the general interest of the community and the interests of the individual, the search for which balance is inherent in the whole of the Convention. In striking this balance the aims mentioned in the second paragraph of Article 8 may be of a certain relevance, although this provision refers in terms only to 'interferences' with the right protected by the first paragraph-in other words is concerned with the negative obligations flowing therefrom."

The court found that having regard to the wide margin of appreciation to which the UK was entitled, the positive obligations which it owed to transsexuals did not extend

to a requirement to permit such individuals to amend their birth certificates in accordance with their present gender identity, and that accordingly there was no breach of Article 8. However, the court went on to state,

> *"47. That being so, it must for the time being be left to the respondent State to determine to what extent it can meet the remaining demands of transsexuals. However, the Court is conscious of the seriousness of the problems affecting these persons and the distress they suffer. The Convention has always to be interpreted and applied in the light of current circumstances. The need for appropriate legal measures should therefore be kept under review having regard particularly to scientific and societal developments."*

87. In *Cossey v UK* [1991] 13 EHRR 622 the ECtHR maintained its position, as it did again in *B v France* [1992] 16 EHRR 1 in which a transsexual, born male but who had gender reassignment treatment and lived as a woman, challenged the refusal by the State to permit her to change her civil status. In both of these cases the court noted that there had been no noteworthy scientific developments in the area of transsexualism, the essential nature of which remained uncertain, and there was no sufficiently broad consensus among Member States on how to deal with a range of complex legal matters resulting from a change of sex.

88. This view was again maintained in *Sheffield and Horsham v UK* [1998] 27 EHRR 163 in which claims under Article 8 by two transsexuals challenging the UK's failure to recognise for legal purposes generally their post-operative gender failed, despite the fact that the applicants had presented evidence of further medical research into the field of transgenderism, whilst the amicus had provided evidence of further recognition of the issue among Member States.

89. By the time this issue returned to the ECtHR in *Goodwin v UK* [2002] 35 EHRR 447, the Court of Appeal in *Bellinger v Bellinger* [2001] EWCA Civ 1140 had held that a transsexual female, registered as a male at birth, was not entitled to a declaration that her marriage to a man was valid under section 11(c) of the Matrimonial Causes Act 1973. However, in the course of their judgments both the President of the Family Division and Thorpe LJ had noted that despite the Government having commissioned and received an internal report on the problems experienced by transsexuals, with particular reference to birth certificates, in 2000, nothing had been done to take the matter forward.

90. This factor was noted by the ECtHR in *Goodwin*, by which time there was evidence that only 4 of the 37 Member States did not permit a change to be made to a person's birth certificate, and over half of the Member States permitted post-operative transsexuals to marry a person of the sex opposite to their acquired gender. Moreover, internationally, 6 other countries gave statutory recognition of gender reassignment, as did all but 2 of the States in the US.

91. The applicant in *Goodwin,* who was a post-operative male to female transsexual, alleged that the Government had breached her, *inter alia*, Article 8 rights due to its failure to amend her official records, including her birth certificate. The court noted the approach which it had taken to this issue in previous cases and stated,

> *"74. While the Court is not formally bound to follow its previous judgments, it is in the interests of legal certainty, foreseeability and equality before the law that it should not depart, without good reason, from precedents laid down in previous cases. However, since the Convention is first and foremost a system for the protection of human rights, the Court must have regard to the changing conditions within the respondent State and within Contracting States generally and respond, for example, to any evolving convergence as to the standards to be achieved. It is of crucial importance that the Convention is interpreted and applied in a manner which renders its rights practical and effective, not theoretical and illusory. A failure by the Court to maintain a dynamic and evolutive approach would indeed risk rendering it a bar to reform or improvement. In the present context the Court has, on several occasions since 1986, signalled its consciousness of the serious problems facing transsexuals and stressed the importance of keeping the need for appropriate legal measures in this area under review."*

92. The court had regard to the evidential changes since its previous decisions, noting a continuing international trend in favour of legal recognition of the new sexual identity of post-operative transsexuals. It stated that whilst the difficulties faced by the applicant were not as great as those faced by the applicant in *B v France*,

> *"90 Nonetheless, the very essence of the Convention is respect for human dignity and human freedom. Under Article 8 of the Convention in particular, where the notion of personal autonomy is an important principle underlying the interpretation of its guarantees, protection is given to the personal sphere of each individual, including the right to establish details of their identity as individual human beings. In the twenty first century the right of transsexuals to personal development and to physical and moral security in the full sense enjoyed by others in society cannot be regarded as a matter of controversy requiring the lapse of time to cast clearer light on the issues involved. In short, the unsatisfactory situation in which post-operative transsexuals live in an intermediate zone is not quite one gender or the other is no longer sustainable. Domestic recognition of this evaluation may be found in the report of the Interdepartmental Working Group and the Court of Appeal's judgment of BELLINGER v. BELLINGER."*

93. Accordingly, the court held that,

> *"93 Having regard to the above considerations, the Court finds that the respondent Government can no longer claim that the matter falls within their margin of appreciation, save as regards the appropriate means of achieving recognition of the right protected under the Convention. Since there are no significant factors of public interest to weigh against the interest of this individual applicant in obtaining legal recognition of her gender*

> *re-assignment, it reaches the conclusion that the fair balance that is inherent in the Convention now tilts decisively in favour of the applicant. There has, accordingly, been a failure to respect her right to private life in breach of Article 8 of the Convention."*

94. Although *Van Kück v Germany* [2003] 37 EHRR 973 again involved the Article 8 rights of an applicant within the binary definition of gender, on this occasion transitioning from male to female, the court described the concept of "private life" in broad terms,

> *"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 Art.8. Article 8 also protects a 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 Art.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."*

95. More recently in *Hamalainen v Finland* [2014] 37 BHRC 55 the ECtHR when considering an alleged breach of Article 8, where a local registry office had refused an application by a male to female transsexual to confirm her female status, provided a summary of the general principles applicable to assessing a state's positive obligations between paragraphs 65 - 68,

> *"1. The principles applicable to assessing a State's positive and negative obligations under the Convention are similar. Regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole, the aims in the second paragraph of Article 8 being of a certain relevance (see Gaskin v. the United Kingdom, 7 July 1989, § 42, Series A no. 160; and Roche v. the United Kingdom [GC], cited above, § 157).*
>
> *2. The notion of "respect" is not clear cut especially as far as positive obligations are concerned: having regard to the diversity of the practices followed and the situations obtaining in the Contracting States, the notion's requirements will vary considerably from case to case (see Christine Goodwin v. the United Kingdom [GC], no. 28957/95, § 72, ECHR 2002-VI). Nonetheless, certain factors have been considered relevant for*

the assessment of the content of those positive obligations on States. Some of them relate to the applicant. They concern the importance of the interest at stake and whether "fundamental values" or "essential aspects" of private life are in issue (see X and Y v. the Netherlands, cited above, § 27; and Gaskin v. the United Kingdom, cited above, § 49) or the impact on an applicant of a discordance between the social reality and the law, the coherence of the administrative and legal practices within the domestic system being regarded as an important factor in the assessment carried out under Article 8 (see B. v. France, 25 March 1992, § 63, Series A no. 232-C; and Christine Goodwin v. the United Kingdom [GC], cited above, §§ 77-78). Other factors relate to the impact of the alleged positive obligation at stake on the State concerned. The question here is whether the alleged obligation is narrow and precise or broad and indeterminate (see Botta v. Italy, 24 February 1998, § 35, Reports 1998-I) or about the extent of any burden the obligation would impose on the State (see Rees v. the United Kingdom, 17 October 1986, §§ 43-44, Series A no. 106; and Christine Goodwin v. the United Kingdom [GC], cited above, §§ 86-88).

3. In implementing their positive obligation under Article 8 the States enjoy a certain margin of appreciation. A number of factors must be taken into account when determining the breadth of that margin. Where a particularly important facet of an individual's existence or identity is at stake, the margin allowed to the State will be restricted (see, for example, X and Y v. the Netherlands, cited above, §§ 24 and 27; Christine Goodwin v. the United Kingdom [GC], cited above, § 90; see also Pretty v. the United Kingdom, no. 2346/02, § 71, ECHR 2002-III). Where, however, there is no consensus within the member States of the Council of Europe, either as to the relative importance of the interest at stake or as to the best means of protecting it, particularly where the case raises sensitive moral or ethical issues, the margin will be wider (see X, Y and Z v. the United Kingdom, 22 April 1997, § 44, Reports 1997-II; Fretté v. France, no. 36515/97, § 41, ECHR 2002-I; and Christine Goodwin v. the United Kingdom [GC], cited above, § 85). There will also usually be a wide margin if the State is required to strike a balance between competing private and public interests or Convention rights (see Fretté v. France, cited above, § 42; Odièvre v. France [GC], cited above, §§ 44-49; Evans v. the United Kingdom [GC], no. 6339/05, § 77, ECHR 2007-I; Dickson v. the United Kingdom [GC], no. 44362/04, § 78, ECHR 2007-V; and S.H. and Others v. Austria [GC], no. 57813/00, § 94, ECHR 2011).

> *4. The Court has already examined several cases relating to the lack of legal recognition of gender reassignment surgery (see, for example, Christine Goodwin v. the United Kingdom [GC], cited above; Van Kück v. Germany, no. 35968/97, ECHR 2003-VII; Grant v. the United Kingdom, cited above; and L. v. Lithuania, cited above, § 56). Whilst affording a certain margin of appreciation to States in this field, it has held that States are required, in accordance with their positive obligation under Article 8, to recognize the change of gender undergone by post-operative transsexuals through, inter alia, the possibility to amend the data relating to their civil status, and the ensuing consequences (see, for example, Christine Goodwin v. the United Kingdom [GC], cited above, §§ 71-93; and Grant v. the United Kingdom, cited above, §§ 39-44).”*

Discussion

96. Over the years science’s understanding of the intertwined issues of sex and gender has become broader and more sophisticated; a snap-shot of which is evident from the development of medical and other evidence upon which courts have reached their decisions in cases such as *Corbett v Corbett* [1971] P 83, *W v W* [2001] Fam 111 and *Bellinger v Bellinger* [2001] 1 FLR 389. Although at one time the terms “sex” and “gender” were used interchangeably, (and confusingly still are on occasions), due to an increased understanding of the importance of psychological factors, (albeit these may be due to differences in the brain’s anatomy), sex is now more properly understood to refer to an individual’s physical characteristics, including chromosomal, gonadal and genital features, whereas gender is used to refer to the individual’s self-perception.

97. The established concepts of both sex and gender are based upon a binary differentiation between male and female. Certainly, as the defendant points out, this is the basis for current UK legislation relating to gender, hence the effect of a recognition certificate under the Gender Recognition Act 2004 enables the individual to acquire for all purposes either the male or female gender.

98. Of course, the notion of an individual not conforming exclusively to one or other of the binary categories of male or female is of ancient lineage, going back at least to the Greeks and the figure of Hermaphroditus; albeit this was based upon incongruency between the individual’s physical sexual characteristics, which is now normally referred to as “intersex”. More recently however, since the recognition of the importance of psychological factors influencing gender, it has become clear that there may also be incongruency between an individual’s physical characteristics and their psychological ones.

99. The most common and certainly well-known form of this latter type of incongruency has become known as transsexuality or transgenderism, where the individual’s physical sexual characteristics oppose that of their psychological ones; for which medical assistance has been available for some time, and in respect of which there is now the ability to obtain full legal recognition under the Gender Recognition Act 2004. Although this has largely resolved the legal difficulties faced by this group, it is still based upon the binary concept of gender, with the individual becoming recognised as

being either male or female, usually in accordance with their psychological gender identity.

100. However, what has not been resolved are the legal and social difficulties faced by another group or groups of individuals, namely those who, whatever their physical characteristics may be, psychologically consider themselves either both male and female, (either at one and the same time or fluctuating at different times), or, like the claimant, do not consider themselves either male or female. The former group may be considered to be "bi-gendered", whereas the latter group, and certainly the claimant, considers themselves to be "non-gendered".

101. It would appear that the interests of this latter group have not received the attention by society or government which has been attracted by transsexuals. There may be many reasons for this, not least the fact that time and resources have been focused upon dealing with the interests of transsexuals, who are more numerous, have well developed interest groups and whose situation fits within the binary concept of gender. Whilst in contrast, the interests of the smaller number of non-gendered individuals have until recently become somewhat marginalised and whose most vocal protagonist appears to be the claimant.

102. Nevertheless, although it may be more difficult for those within the binary gendered community to fully empathise with the psychological difficulties faced by those who identify as being non-gendered, it is apparent from the evidence of the claimant, that an individual's non-gendered identity is likely to be as important and integral a component of their personal and social identity, as being either male or female is to the vast majority of society.

Article 8

103. It is against this background that various questions arise for consideration in this case, including whether the Article 8 rights of those who, like the claimant, identify as being non-gendered, are engaged so as to require respect for that identity? If so whether that gives rise to a positive obligation on the part of the UK Government to ensure that their non-gendered identity is respected and, if so, what is the scope of that obligation? Further, whether the current HMPO policy is in accordance with any such obligation or amounts to breach of it?

104. Article 8 of the European Convention on Human Rights (ECHR) is in the following terms,

> *"1. Everyone has the right to respect for his private and family life, his home and his correspondence.*
>
> *2.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."*

105. Although the ECtHR does not appear to have dealt with a case involving the potential Article 8 rights of an individual who identifies as non-gendered, as opposed to being transgendered, the court in *Van Kück* described the concept of "private life" in broad terms, which specifically included,

> *"Elements such as, for example, gender identification ..."*

106. Despite *Van Kück* being a case dealing with an applicant within the binary concept of gender, namely an individual transitioning from male to female, there is nothing in the words used in the judgment to suggest that the term "gender identification" was referable only to and limited to the gender identification of a transsexual, as opposed to gender identification in general.

107. I note that at one point in the claimant's 2nd witness statement, the claimant refers to,

> *"The idea of rejecting gender is hugely controversial in our society."*

Taken literally, this phrase might be considered to reflect the notion that the claimant is not concerned with gender identification at all, and that the claimant's identification does not fall within the concept of private life as considered in *Van Kück*. However, although the idea to which the claimant refers may be "hugely controversial", my understanding of what is intended to be conveyed by the use of this phrase is that the claimant is seeking to identify outside the binary concept of gender, rather than entirely rejecting the concept of gender altogether. Furthermore, not only does the current NHS definition of gender dysphoria recognise situations outside the accepted concept of transgenderism, (and the claimant's hysterectomy was undertaken by the NHS), but it is clear from Kate O'Neil's evidence that the GEO recognises that an individual's gender identity includes,

> *" ... male, female, both, neither or fluid."*

That being the case, in my judgment, the claimant's identification is one relating to gender and I consider that it is one encompassed within the expression "gender identification" in *Van Kück*.

108. In those circumstances I am satisfied that the claimant's Article 8 rights are engaged in this case so that the claimant's right to respect for private life will include a right to respect for the claimant's identification as non-gendered. In reaching this conclusion it does not seem to me that it, (as opposed to the question of the recognition of a positive obligation to respect the claimant's non-gendered identity), offends what was described by the parties in this case as the *Ullah* principle, (to the extent that this remains an appropriate one for the courts to follow in view of the observations by Lord Kerr in *D v Commissioner of Police for the Metropolis* [2018] 2 WLR 895 at paragraphs 77 – 79), namely the approach indicated by Lord Bingham in *R (Ullah) v Special Adjudicator* [2004] 2AC 323, where at paragraph 20 he set out the court's duty under section 2(1) of the Human Rights Act 1998 to take into account any relevant Strasbourg case law in the following terms,

> *"20 In determining the present question, the House is required by section 2(1) of the Human Rights Act 1998 to take into*

> *account any relevant Strasbourg case law. While such case law is not strictly binding, it has been held that courts should, in the absence of some special circumstances, follow any clear and constant jurisprudence of the Strasbourg court: R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions [2003] 2 AC 295 , para 26. This reflects the fact that the Convention is an international instrument, the correct interpretation of which can be authoritatively expounded only by the Strasbourg court. From this it follows that a national court subject to a duty such as that imposed by section 2 should not without strong reason dilute or weaken the effect of the Strasbourg case law. It is indeed unlawful under section 6 of the 1998 Act for a public authority, including a court, to act in a way which is incompatible with a Convention right. It is of course open to member states to provide for rights more generous than those guaranteed by the Convention, but such provision should not be the product of interpretation of the Convention by national courts, since the meaning of the Convention should be uniform throughout the states party to it. The duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less."*

109. In relation to the second of these questions, namely whether this right gives rise to a positive obligation on the part of the UK Government to ensure that the claimant's non-gendered identity is respected and, if so, the scope of that obligation, an issue appeared to arise between the parties during the hearing as to the stage at which any margin of appreciation to which the Government is entitled may be taken into account. The defendant contended that it should be taken into account when considering whether a positive obligation existed in the first place, whereas the claimant appeared to submit that it should only be taken into account when assessing the scope of that obligation, namely the choice of necessary measures which may be required to fulfil that obligation.

110. If one looks at the way in which the ECtHR summarises the general principles applicable to assessing a state's positive obligations in *Hamalainen*, between paragraphs 65 – 68, it is possible to read this as suggesting that the margin of appreciation is a matter referable only to the extent rather than the existence of the obligation, and indeed going to the issue of implementation. However, if one goes back to *Rees*, between paragraphs 35 – 37, the court discussed both the existence and the scope of the state's positive obligation and appeared to suggest that the margin of appreciation is of relevance in relation to both of those issues.

111. Whether this matter is still a live issue between the parties is perhaps a moot point, as the claimant's post-hearing note states in terms at paragraph 15 that,

> *"There is no distinct stage where the margin of appreciation is applied in a positive obligation case because the factors going to margin of appreciation in a negative interference analysis are already in the mix in a positive obligation analysis in the Court identifying the fair balance to be struck."*

112. It seems to me that this view better reflects the manner in which the question, both of the existence and scope of any positive obligation is required to be approached, namely that the pre-eminent consideration is the striking of a fair balance between the competing interests of the individual and the community as a whole. However, in making these assessments the state's margin of appreciation is a relevant consideration, albeit the significance of it will depend upon the circumstances of the particular case. In some cases, the margin may be restricted, whereas in others it may be wide, this being dependent upon factors such as the importance of the issue to the individual's private life, and the extent of any consensus within the other Member States, particularly in relation to controversial ethical or moral issues.

113. In so far as the interests of the claimant are concerned, as I have already observed, an individual's non-gendered identity is likely to be as important and integral a component of their personal and social identity as being either male or female is to the vast majority of society. Therefore, I readily accept that the claimant has a justifiably strong personal interest in gaining full legal recognition as being a non-gendered individual. However, although I have no doubt that this is the target at which the claimant ultimately and understandably seeks to take aim, this is not the target which has been selected by the claimant in these proceedings. The target of these proceedings being limited to the current policy of HMPO relating to the issuing of passports.

114. It is easy to understand the claimant's forensic choice of target, in that it facilitates a number of the submissions made on the claimant's behalf. Firstly, that because passports are issued under the Royal Prerogative, there is no need for any legislative change to put into effect the claimant's desire to be able both to apply for and be granted a passport indicating "X" for unspecified in the gender/sex field. Secondly, instead, this would only require a change of policy, and that any such policy change would be in accordance with the UK Government's obligations under the Chicago Convention due to the ICAO's current standard for machine readable travel documents. Thirdly, that because "X" would merely indicate that the claimant's gender was unspecified, there would be no wider societal concerns to take into account which would otherwise arise if the claimant was seeking full legal recognition as being a non-gendered individual.

115. Although these submissions have considerable force, it seems to me that there are a number of other factors which fall to be considered in the context of this case. Firstly, although as I have already mentioned, I am satisfied that the claimant has a justifiably strong personal interest in gaining full legal recognition as being non-gendered, the denial of which I can understand may well cause the claimant and others in the claimant's situation strong negative emotions, I am less convinced that such strong emotions are justified by the current HMPO policy of not permitting the claimant to enter "X" in gender/sex field on the passport. I of course take into account the fact that passports may be used for identification purposes outside their use as a travel document. However, so too are birth certificates, which would not be affected by a change to the challenged policy, and which are likely to be considered of more fundamental importance upon the issue of sex and gender. Moreover, it would appear from paragraph 1.1 of HMPO's internal review published in 2014, that it is not strictly necessary for an applicant to make a false declaration of their gender, because in the absence of an applicant selecting one of the two gender options, the gender shown on the applicant's source documents will be transposed onto the passport application screen.

116. It also seems to me that it is of relevance that when the ECtHR has been asked to consider the Article 8 rights of transsexuals in cases leading up to and including *Goodwin*, the identity documents which have been in issue either were or included birth certificates, which were clearly considered to be of fundamental importance in recording and establishing the applicant's gender identity. Hence the strength of the justifiable concerns expressed by the various applicants in seeking to rectify those documents.

117. Secondly, and of more fundamental importance is the correctness of the last of the claimant's submissions that such a change to the current HMPO policy would not necessitate consideration of wider societal concerns, not only in relation to security, but in particular in relation to the Government's legitimate aim of maintaining an administratively coherent system of gender recognition across all government areas and legislation.

118. In regard to the issues surrounding security, it is apparent that there is an increasing use of electronic identification technology at airports including facial and iris recognition. However, it is by no means universal and for that matter not always either operable or failsafe. Therefore, although the photographic image on a passport may well be used in the main for purposes of human identification, I accept that sex is an additional marker of identification. Moreover, I also accept that it is a piece of biographic information which is used as an additional security check both when applying for, and when using the passport as a mean of identification.

119. Although it is not always achieved, it is clearly of benefit to good governance that important issues of policy are reflected across all government departments and areas of legislation. In this regard, gender identity and recognition are clearly of fundamental importance. Moreover, I do not consider that it is a sufficient answer to this being a relevant consideration, to suggest that permitting a passport holder not to specify their sex/gender would have no impact on any other policy or legislative considerations.

120. If there is no requirement for an individual to specify their gender on their passport application, it begs the question as to the utility of requesting the information in the first place, which in turn raises the question as to the purpose of gender being a required field of entry on other or any official records across the various government departments.

121. Given the importance of the issues surrounding gender identification that have been raised in this case, it seems to me that the defendant is entitled to say that a change to the current HMPO policy ought not to be considered in isolation, but the Government should be able to consider it as part of a more fundamental review of policy in relation to these issues across government. This may not have been the position if the stage had been reached either that the Government had completed its review process (or there had been unjustifiable delay in the process) or that a consensus had been reached on the issue across other Member States and/or that there was a sufficiently significant international trend. However, in my judgment none of these situations arise in this case.

122. Undoubtedly, like many matters raised with the Government one would have preferred to see swifter progress on this issue, and I note that this has been a focal point of the claimant's campaign since 2010. However, not only did HMPO carry out an internal review in 2014 but responded to the issue being raised by the Women and Equalities

Committee report in 2016, which itself recognised that not only had it not considered all of the concerns relating to non-gendered people but there was a lack of good quality statistical research regarding trans-people in the UK, including the numbers involved which until very recently has failed to differentiate between transgendered individuals and those who identify outside the binary concept of gender.

123. There are of course criticisms which can be made of some of the reasoning in both the report and the response, and the extent of the issues which they covered. For example, in the report no consideration appears to have been given to whether the UK should maintain its recognition of a purely binary identification of gender. The report also fails to properly differentiate between the interests of those who are transgender, as opposed to the interests of those like the claimant who identify as being non-gendered, which for understandable reasons are not necessarily congruent in relation to the issues surrounding gender markings on passports. Moreover, the response mistakenly appears to suggest that to allow "X" to be placed in the sex field of the passport would necessarily entail introducing a third gender with consequential legislative changes.

124. However, I do not consider that the manner in which this issue has been dealt with to date by the Government can be described in the woeful terms in which the Government's delays were in *Bellinger*. Moreover, and most importantly, it is clear from the witness statements of both Kate O'Neil and Timothy Woodhouse, that the Government is currently collecting and collating research material with a view to undertaking a comprehensive review of the issues both surrounding and those raised directly by the claimant in this case.

125. Although the full results from the survey carried out by the GEO which closed in October 2017 have not yet been evaluated, the 7,411 responses appear to represent the largest sample of non-binary individuals in the UK. Interestingly, according to IPSOS MORI, when answering an open textured question about the issues they wished to raise, whereas there was a large number of responses indicating a desire for legal recognition of their non-gender identity, there was only a small number of responses raising the issue of "X" gender markers in their passports; albeit this latter group indicated that their introduction would significantly enhance their quality of life. Moreover, despite the enactment of the Gender Recognition Act 2004, the levels of satisfaction with the quality of life of transsexuals and those who identified as non-gendered compared closely with one another.

126. However, as Kate O'Neil stressed in her 2nd witness statement, these are only preliminary findings and once the full results are known it will be at that stage that the GEO will be in a position to carry out a comprehensive review in order to consider whether, and to what extent, it will be necessary to alter the current policy towards those identifying their gender as non-binary, including of course the particular issue raised by the claimant as to the current policy of HMPO in relation to "X" marked passports.

127. In relation to the results to date from the various surveys which have been carried out in order to seek the views of other states, both Member States and those outside the Council of Europe, there appears to have been a modest increase in those who permit "X" markers on their passports, including Germany, Pakistan and Canada; albeit like some of the other states who were earlier identified as permitting this practice, there is some variation in qualification for this category. It is also of relevance that in October 2017 the First Senate of the German Constitutional Court held that it was unlawful not

to permit an intersex adult to replace their assigned gender with that of "inter/diverse." Albeit this approach does not appear to have been reflected in France. There is also evidence that California has recognised the rights of non-gendered individuals, and there is the evidence of the views of the authors of the Yogyakarta principles and the opinion of the Inter-American Court of Human Rights. Moreover, a recent decision by the Limburg District Court (C/03/232248 FA RK 17-687) dated 28 May 2018, held that it was incompatible with an individual's Article 8 rights not to permit a non-gendered adult to retrospectively have their birth certificate altered so as to read "sex could not be established."

128. All that being said, this does not represent a consensus by Member States to recognise the gender identity of those who do not identify as being exclusively either male or female. Moreover, although more Member and non-Member States have afforded such recognition, and there is the evidence from the international bodies to which I have referred, I do not consider that this is a body of evidence which can as yet properly be described as a trend which would be sufficient to significantly affect the Government's margin of appreciation in this area.

129. I have already set out my views upon the issue of the claimant's strength of feeling in relation to the more limited issue which is sought to be challenged in this case, namely the current policy of HMPO. It seems to me that this has some relevance when considering the nature and extent of the margin of appreciation to which the Government is entitled in this case. It is also of relevance that there is no consensus among the Member States, nor in my judgment a trend among them or internationally of sufficient strength to significantly affect the matter. In these circumstances, I am of the opinion that in relation to the issue raised by the claimant, the margin of appreciation to which the Government is presently entitled is still relatively wide.

130. In this context, I am of the view that the Government is entitled to consider the issue raised in these proceedings further, and in the light of the recent and current research which is being undertaken, in order to provide what Kate O'Neil states will be governmental policy towards non-binary people for the foreseeable future. This will no doubt include not only further consideration of the specific issue raised in these proceedings but will properly address the important, and as the claimant expressly acknowledges, the controversial issue as to the issue of the recognition and proper treatment of those who do not identify within the binary concept of gender. It seems to me that these matters, together with the Government's justifiable concerns about security are legitimate aims, in that it is in the interests of society and good governance for these matters to be the product of appropriate research and careful evaluation. Moreover, that in the interim HMPO's current policy in relation to the issuing of passports is a proportionate means of achieving the aim of providing a coherent and consistent policy towards those who identify outside the binary concept of gender across all governmental departments and legislation.

131. The effect of the various factors which I have had to weigh in the balance in this case leads me to the conclusion that at present the claimant's Article 8 right to respect for the claimant's personal life do not encompass a positive obligation on the part of the Government to permit the claimant to apply for and be issued with a passport with an "X" marker in the gender/sex field signifying that the claimant's gender is unspecified. Indeed, even if this issue were to be looked at through the lens of negative interference, the question of fair balance remains at the core of the analysis, and the factors which

have to be considered are the same. Therefore, in my judgment through whichever lens this question arises, the answer is the same, that the current policy of HMPO not to permit the claimant to apply for or be issued with a passport with "X" in the gender/sex field does not amount to an unlawful breach of the claimant's Article 8 rights to respect for the claimant's private life.

Article 14

132. Article 14 of the ECHR seeks to prohibit discrimination in the following terms,

> *"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."*

133. The courts approach to the proper consideration of Article 14 was set out by Baroness Hale in *Ghaidan v Godin-Mendoza* [2004] 2 AC 557, at paragraphs 133 – 134,

> "*133 It is common ground that five questions arise in an article 14 inquiry, based on the approach of Brooke LJ in Wandsworth London Borough Council v Michalak [2003] 1 WLR 617 , 625, para 20, as amplified in R (Carson) v Secretary of State for Work and Pensions [2002] 3 All ER 994 , 1010, para 52; [2003] 3 All ER 577 . The original four questions were: (i) Do the facts fall within the ambit of one or more of the Convention rights? (ii) Was there a difference in treatment in respect of that right between the complainant and others put forward for comparison? (iii) Were those others in an analogous situation? (iv) Was the difference in treatment objectively justifiable? i e, did it have a legitimate aim and bear a reasonable relationship of proportionality to that aim?*
>
> *134 The additional question is whether the difference in treatment is based on one or more of the grounds proscribed—whether expressly or by inference—in article 14. The appellant argued that that question should be asked after question (iv), the respondent that it should be asked after question (ii). In my view, the Michalak questions are a useful tool of analysis but there is a considerable overlap between them: in particular between whether the situations to be compared were truly analogous, whether the difference in treatment was based on a proscribed ground and whether it had an objective justification. If the situations were not truly analogous it may be easier to conclude that the difference was based on something other than a proscribed ground. The reasons why their situations are analogous but their treatment different will be relevant to whether the treatment is objectively justified. A rigidly formulaic approach is to be avoided."*

134. I have already found that the facts of this case, namely the claimant's non-gendered identification, are likely to be considered to fall within the ambit of Article 8. In relation to the second of those questions, it could be argued that there is a difference in treatment in respect of that right between on the one hand, the complainant, and on the other hand, others put forward for comparison who may considered to be in an analogous position, such as those including transsexuals who identify within the binary concept of gender, in that the latter group are able to declare and be issued with a passport in the gender in which they identify, whereas the claimant is unable to do so. However, once again due to the claimant having chosen to challenge the current HMPO policy which is limited to the complaint concerning the lack of "X" markers in the gender/sex field, it is arguable that there is an equality of treatment between the two groups, as neither the claimant nor those who identify within the binary concept of gender are able either to apply for or have a passport issued to them which does not specify their gender.

135. However, I do not regard it to be particularly useful to consider this issue any further, in view of the conclusions which I have reached in relation to the question of the existence and scope of any positive obligations presently owed to the claimant under Article 8. It seems to me that having reached those conclusions, it is inevitable that in determining the issues relevant to the fourth of the questions which fall to be determined in relation to Article 14, namely is the difference in treatment objectively justifiable? i e, did it have a legitimate aim and bear a reasonable relationship of proportionality to that aim, the answer will be that any such difference in treatment is objectively justifiable for the same reasons, and consequently the current policy of the HMPO in relation to the issuing of "X" marked passports does not amount to unlawful discrimination under Article 14.

Irrationality

136. As the claimant acknowledges in the skeleton argument, the factors relied upon for submitting that the maintenance of the current HMPO policy is irrational are the same as those relied upon in relation to the challenges to the policy under Articles 8 and 14. In these circumstances, and for the same reasons which I have already provided under Article 8, I am satisfied that the policy is both rational and proportionate.

Relevant and irrelevant considerations

137. There is clear authority that decisions in a public law context must be based upon such factors which are relevant to the issue in question, whilst not being based upon irrelevant ones (*R v Parliamentary Commissioner for Administration ex p. Balchin* [1998] 1 PLR 1 and *R v Secretary of State for Trade and Industry ex p. Lornrho Plc* [1989] 1 WLR 525). The remedy for which is that the decision must be quashed and if necessary the decision taken again on proper grounds.

138. In the present case it is submitted that HMPO's determination to continue its present policy in relation to passports not only failed to take into account relevant factors, but also took into account irrelevant ones.

139. In relation to the former it is submitted that HMPO failed to take into account the engagement of the claimant's Article 8 rights, the distress caused to the claimant in having to make a false declaration of the claimant's gender identity, and the fact that the UK already permits those in possession "X" marked passports, such as those from

Australia etc. to enter the UK and has not identified any difficulty in the use of such passports.

140. In relation to the latter it is submitted that HMPO wrongly took into account a number of factors including the erroneous belief that to permit passports to be applied for and granted with an "X" for unspecified in the gender/sex field would require legislative change or changes to other areas of law and policy, the erroneous belief that European law did not permit the issue of "X" passports, the erroneous belief that that identity checks would be hindered by the use of "X" passports, the reliance upon the cost of any change in the current HMPO policy, the erroneous belief that self-identification of gender is inappropriate, the erroneous belief that "X" passports may lead holders to experience increased problems at borders, the erroneous belief that the holders of such passports may require increased consular assistance, the erroneous belief that such passports could cause confusion and the erroneous belief that the Gender Recognition Act 2004 may require signed declarations for such passports,.

141. The defendant submits that all of the matters which the claimant has identified as not having been considered were taken into account by HMPO. It is pointed out each of these factors were ones which the claimant relied upon in relation to Article 8 and that they add nothing to the submissions made under that head. In relation to the matters which the claimant has identified as being erroneous considerations which should not have been taken into account by the defendant, with the exception of the last 4 of these factors which are no longer relied upon, it is denied that these factors are mistaken and should not have been taken into account. Moreover, in relation to those factors which are no longer relied upon, it is submitted that any past reliance upon them would not affect the validity of what is a continuing policy which is based upon the other factors identified by the defendant.

142. In relation to this latter point the claimant concedes that what is being challenged is a continuing policy but submits that its continuation must have been based upon a relevant reasoned decision which is susceptible to judicial review. The difficulty with this argument is seeking to identify the date of the relevant decision, and I note that the claimant does not seek to identify it with any precision, but merely refers back to previous correspondence, reports and witness statements. Although it may be difficult to discern any such determination with precision, I consider that there is merit in this aspect of the claimant's argument, in that although the challenge is to HMPO's current policy which the defendant continues to justify, it is necessary for that justification to be based upon evidence rather than legal submission, albeit on instructions. On the other hand, in the light of the manner in which the claimant has relied upon both the historical evidence relating to correspondence and reports together with the most witness statements, I am satisfied that not only will the evidence include the more historical items, but will also include a consideration of the witness statements in order to seek to discern the most recent rationale for the current HMPO policy.

143. In relation to the submission that HMPO has failed to take into account the factors set out in paragraph 139, I do not consider that there is any evidence that these were not ones taken into account by HMPO. Indeed, not only does the correspondence show that HMPO and its predecessor had the claimant's strength of feeling upon this issue well in mind, but it is clear from Kate O'Neil's 1st witness statement that HMPO was aware that the UK already permitted "X" marked passport holders, such as those from Australia, to enter the UK.

144. In relation to those matters which the claimant submits HMPO wrongfully took into account, I accept the submission made on behalf of the defendant that with the exception of those factors which are no longer relied upon, there is nothing which HMPO erroneously took into account. The 2014 internal review by HMPO at paragraph 4.1 made it clear that there was no legislative change required to permit applicants not to specify their sex/gender on their passports. Furthermore, although other legislative change may or may not be required if the current HMPO policy was altered, as I consider that the Government was entitled to consider any alteration in the light of its wider implications across government as a whole, it seems to me that the other factors of which the claimant is critical are ones which HMPO was entitled to take into account as potential issues to be considered during the course of the review.

145. The claimant's criticism of HMPO's reliance upon a misunderstanding of EU law arises from the witness statement of Timothy Woodhouse at paragraph 16, where he suggests that the defendant is required to issue documentation with only a male or female sex designation. Although it is acknowledged by the defendant that this aspect of his statement is incorrect, it is pointed out that this refers to another form of documentation rather than to passports. The claimant acknowledges this but not only suggests that it is implicit in the wording of the paragraph that HMPO believed that this equally applied to passports, but in any event, was a matter which was wrongfully taken into account when continuing to support the current policy.

146. It is clear that the reference to documentation in paragraph 16 was to documentation other than passports, and I do not consider that it is implicit from the use of the word "again" that this was necessarily a reference to passports as opposed to other documentation. Furthermore, although it is clear, as the defendant acknowledges, that Timothy Woodhouse had misunderstood the position, it is apparent from the remaining part of his witness statement, in particular from paragraph 25 onward, that HMPO's determination to continue with its current policy in relation to passports was based upon the matters set out in those paragraphs, rather than his misunderstanding in relation to other documentation or indeed the latter four factors set out above at paragraph 149.

147. Somewhat belatedly in the claimant's post-hearing submissions the claimant has referred to the case of *R (on the application of National Association of Health Food Stores & another) v Department of Health* [2005] EWCA Crim 154, and in particular Sedley LJ's observations at paragraph 37, as to the inappropriateness of imputing the knowledge of civil servants to that of their minister. It is submitted that by analogy the defendant is unable to seek to rely upon the witness statement of Timothy Woodhouse in order to cure HMPO's previous reliance upon matters which it has now abandoned. However, it seems to me that the difficulty with this submission is that the factual situation faced by the court in *National Association of Health Food Stores*, was significantly different to that in the present case. In the former case it was acknowledged that the Minister who provided the authorisation for the imposition of regulations prohibiting certain medicinal products did so in ignorance of particularly significant information as to the views of a leading psychopharmacological expert as to their safety. In the present case the challenge by the claimant is to the continuation of the current policy of HMPO, and I have already noted that the claimant has not sought to identify any particular decision and refers back not only to previous correspondence and reports, but also the witness statements relied upon by the defendant. Furthermore, the factors which the defendant has stated it no longer relies upon pale into comparative

insignificance when compared with the type of information of which the minister was denied in the previous case. Indeed, even if I had been persuaded otherwise, despite the understandable reluctance which has been shown by courts to refuse to grant relief under section 31(2A) of the Senior Courts Act 1981, (*R (Williams v Powys County Council* [2017] EWCA Civ. 427 and R (*Public and Commercial Services Union and Others) v Minister for the Cabinet Office* [2017] EWHC 1787 (Admin)) I consider that this would have been one of those comparatively rare cases in which such a refusal would have been justified.

148. However, I am of the view that not only is the defendant entitled to rely upon the witness statement of Timothy Woodhouse, but that the current policy is, for the reasons I have provided, justified, *inter alia*, on the basis set out in that statement.

Conclusion

149. I have no doubt that the claimant will be disappointed about the conclusions which I have reached in this case, and in particular that relating to the claimant's Article 8 rights.

150. However, I would stress that this latter conclusion, in particular, is one which I have reached upon the basis of the evidence currently before me and as the ECtHR have pointed out on more than one occasion, the rights afforded to individuals under the ECHR are ones which have to be interpreted in the light of changing conditions and in a dynamic and evolutionary manner. Therefore, not only may the situation amongst the Member and other States alter, but in particular in the present case the claimant will be entitled to scrutinise with care the results of the Government's current review, which will be required to be undertaken without any undue delay.

151. I have no doubt that the Government will have well in mind the range of factors which will be required to be considered in the course of that review, which one trusts are now better understood than they may have been at an earlier point in the history of the Government's consideration of them. In particular, a full understanding by all governmental departments, not just the GEO, will be required as to the clear distinction between the concepts of sex and gender. It will be necessary for the Government to consider to what extent if any, in an age of increasing social and legal awareness and acceptance of the importance of issues relating to diversity and equality, the recording of an individual's sex and/or gender in official and other documentation is justified. The range and nature of the documentation which may be affected will be required to be understood, including whether its purpose is to record historical or current information. It will also be necessary to consider the extent to which other identities both within and beyond the binary concept of gender are to be recognised, and if so, whether they are to be self-determined or are to be objectively evidenced. Undoubtedly this will also require a comprehensive and detailed understanding of the full extent of legislation in which individuals' rights and responsibilities are affected by and may be dependent upon sex and/or gender.

152. The outcome of any such review is of course entirely one for the Government. However, it will no doubt have well in mind that the type of factors which ultimately determine the legality of any policy are dynamic and that although at present I am not satisfied, for the reasons which I have set out, that the current policy of HMPO is unlawful, part of the reasoning for this is that the comprehensive review has not been completed. It seems to me that once the review has occurred, then depending upon its outcome and

whether and to what extent the identification of those who consider themselves to be non-gendered is legally recognised, the strength of the focused challenge in the present case may be required to be reassessed, in order to determine whether the current policy of the HMPO in relation to the issuing of "X" marked passports continues to be justified.