

MEDIA SUMMARY

The Queen (on the Application of Elan-Cane) (Appellant) v Secretary of State for the Home Department (Respondent) and Human Rights Watch (Intervener) [2020] EWCA Civ 363

On appeal from: [2018] EWHC 1530 (Admin)

JUDGES: Lady Justice King, Lord Justice Irwin and Lord Justice Henderson

Numbers in square brackets are references to paragraphs in the judgment

The issue

The Appellant identifies as having no gender (“non-gendered”). The central issue in the appeal is whether the Secretary of State for the Home Department (“SSHD”) breached the Appellant’s Article 8 right to private life by failing to provide an “unspecified” gender option on applications for a UK passport. The SSHD first argued that the Appellant’s Article 8 rights were not engaged. The minister also argued that in any event a coherent approach to those who identify as non-gendered is required across all government departments, and in respect of broader issues, and that there is no legal obligation on government to alter passport applications in isolation from the rest of government documentation and processes.

The factual background

The Appellant was registered as female at birth. By the age of 33 the Appellant had undergone extensive surgery as part of personal development as a “non-gendered” person. For a number of years the Appellant has campaigned for passports to have no reference to gender, or alternatively, to have a third (unspecified) gender section in addition to male and female.

The Appellant relied upon the fact that the International Civil Aviation Organisation (ICAO) – the United Nation’s body responsible for issuing specifications to member states concerning national air travel – permits countries to issue passports with “X” for unspecified, in the mandatory section dealing with gender.

On 14 January 2016, the House of Commons Women and Equality Committee published a report on “Transgender Equality”. This included a recommendation that the UK follow Australia’s lead in introducing the “X” marker in passports. Between January 2017 and October 2018, Her Majesty’s Passport Office (“HMPO”) drafted reports and conducted an internal review on the wider issues surrounding gender markers in official documents. On 3 July 2018, the Government Equalities Office (“GEO”) announced a call for evidence on the wider issues faced by non-binary people, and in August 2019 they appointed the National Institute of Economic and Social Research to undertake the review. The public call for evidence had not taken place by the first instance hearing in this case in December 2019.

On 2 June 2017, the Appellant filed a claim for judicial review of the ‘continuing policy’ of HMPO to allow only “male” or “female” as the gender options available in passport applications. Permission was granted on 11 October 2017. Human Rights Watch was later granted permission to intervene.

The judgment below

The issue was tried by Mr Justice Jeremy Baker who dismissed the Appellant's claim for judicial review. The Judge considered the effect of Articles 8 and 14 of the European Convention on Human Rights ("the Convention"). He found that both Articles were engaged. However, he decided that there had been no breach of the Appellant's Article 8 right to respect for private life, because there is no positive obligation on the Government to provide the "X" marker in passports. It was within the government's 'margin of appreciation', the legal phrase meaning discretion as to how to implement or enforce rights, to decide not to do so, at least at present. There was no interference in the Appellant's Article 14 (discrimination) rights for the same reason.

The appeal

Permission to appeal was given to argue four Grounds of appeal, but the case substantially turned on the Judge's findings in relation to the Appellant's Article 8 right.

The decision on the Appeal

The Court of Appeal unanimously dismisses the appeal and upholds the order of Mr Justice Jeremy Baker. The court finds that the Appellant's non-gender identification engages Article 8, as there can be little more central to a citizen's private life than gender [47-48]. In this case however, the passport issue cannot reasonably be considered in isolation, given that the driver for change is the notion of respect for gender identity across the board [71]. The court finds that there was no positive obligation on the state to provide an "X" marker in order to ensure the right of the Appellant to respect for private life. Therefore, the current policy of HMPO does not amount to an unlawful breach of the Appellant's Article 8 private life rights [108].

Reasons for the decision

The appeal predominantly focused on Article 8 (private life) and in particular [36, 40]:

- (i) whether the Appellant's Article 8 right to private life was engaged in this case;
- (ii) whether the state had a positive obligation under Article 8 to provide "X" markers on passport applications;

As to issue (i), the court finds that it is beyond argument that this case concerns the Appellant's private life and that, contrary to the SSHD's submissions, Article 8 is engaged [41-49].

As to issue (ii), three key factors taken from European jurisprudence [55] were considered in relation to whether there is a positive obligation; the breadth of the state's margin of appreciation; and the fair balance exercise to be conducted. These factors were:

- (i) Factors which relate to the individual [56-60];
- (ii) Factors which concern the coherency of the state and its systems [61-74];
- (iii) The position in other states and whether there is consensus in the Council of Europe [75-85].

The court accepts that the issue goes to gender identity [59, 60] and is an issue central to a person's Article 8 private life. The Judge, however, was right in deciding that the state had a 'relatively wide' margin of appreciation when striking the balance between private and public interests or Convention rights, notwithstanding that an issue of an individual's identity is at stake [102].

The court finds that the "X" marker is one part of a bigger picture that requires a coherent, structured approach across all the areas where the issue of non-binary gender arises, particularly given the discussions as to whether there should be any gender boxes on passports (or indeed other official documents) at all [70, 106].

There is not yet any consensus across Council of Europe states in relation to either the broad issue of the recognition of non-binary people, or the narrow issue of the use of "X" markers on passports, although there is momentum within Europe in relation to how the status of non-binary people is to be recognised and the time may come when the fair balance has shifted.

In relation to the alleged discrimination under Articles 8 and 14, the court found that the question of whether the difference in treatment was objectively justified would result in the same answer as that in relation to Article 8 private life, and that the current policy in relation to the issuing of "X" marked passports does not, therefore, amount to unlawful discrimination under Article 14 [118].

In respect of the public law grounds, the court found that Mr Justice Jeremy Baker was entitled to reach the same conclusion. [119-121].

Lord Justice Henderson addresses and dismisses the SSHD's cross-appeal on costs and finds that the judge made no error of law by applying a reduction of 33% to the capped, rather than the higher actual costs of the SSHD, when calculating the amount of costs to be paid by the Appellant to the SSHD on the dismissal of the Appellant's claim for judicial review [128-153].

NOTE:

This summary is provided to assist in understanding the Court of Appeal's decision. It does not form part of the reasons for the decision. The full judgment of the Court of Appeal is the only authoritative document. The full judgment of the Court of Appeal and a copy of this media summary are available at www.judiciary.uk