

BEFORE:

LADY JUSTICE ELISABETH LAING and MRS JUSTICE HEATHER WILLIAMS

IN THE HIGH COURT OF JUSTICE

AC-2022-LON-003286 / CO/4347/2022

KING'S BENCH DIVISION

ADMINISTRATIVE COURT

BETWEEN:

THE KING

(on the application of RYAN CASTELLUCCI)

Claimant

-and-

(1) GENDER RECOGNITION PANEL

Defendant

(2) MINISTER FOR WOMEN AND EQUALITIES

Interested

Party

IN THE HIGH COURT OF JUSTICE

FA-2022-000311

FAMILY DIVISION

RYAN CASTELLUCCI

Appellant

-and-

(1) MINISTER FOR WOMEN AND EQUALITIES

Respondents

(2) GENDER RECOGNITION PANEL

BETWEEN

RYAN CASTELLUCCI

Claimant

-and-

(1) MINISTER FOR WOMEN AND EQUALITIES

Defendants

(2) GENDER RECOGNITION PANEL

PRESS SUMMARY

NOTE: This summary is provided to help in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at:

<https://www.judiciary.uk> and <https://www.nationalarchives.gov.uk/>.

1. This judgment of the Divisional Court is about the meaning and effect of the Gender Recognition Act 2004 (“the GRA”). The GRA governs the issue of gender recognition certificates (“GRCs”) by the Gender Recognition Panel (“GRP”). The Claimant was born male. The Claimant is referred to as “they” in the judgment. Their “gender” has been recognised under the law of the State of California as “non-binary”. They would also like to have a GRC which says that their gender is “non-binary”. They applied to the GRP for such a GRC. It is not the practice of the GRP to issue such a GRC, and it did not issue one to the Claimant. The Claimant challenged the GRP’s position in these proceedings. At the hearing, the Claimant relied on two arguments.

2. They said, first, that the GRP has misinterpreted the GRA. The effect of the GRA, when properly understood, is that the GRP is obliged to issue them with a GRC which describes their gender as non-binary because their change of gender from male to non-binary has been recognised by the State of California.
3. They also argued that, if this construction of the GRA is wrong, the GRA discriminates against them contrary to Article 14 of the European Convention on Human Rights on the grounds of their status as a non-binary person. They further argued, if that is right, that it is ‘possible’ to read the GRA, and it therefore must be read, in accordance with section 3 of the Human Rights Act 1998 (“the HRA”), so as to oblige the GRP to issue the GRC which they would prefer. If it is not possible to read the GRA in that way, they asked the Court to exercise the power to make a declaration, under section 4(2) of the HRA, that the GRC is incompatible with their Article 14 rights.
4. This case raised, first, a pure question of law which depends on the correct interpretation of the GRA. For the reasons given in its judgment, the Divisional Court decided that whenever the GRA refers to “gender” it refers to a binary concept; that is, to male, or to female gender. A close examination of the GRA’s provisions and the context in which it was enacted by Parliament both clearly point in this same direction. As the Claimant accepted, it is clear that a domestic application for a GRC can only be granted to people who are born male or female and who apply for a GRC to change their “gender” to the opposite gender. The Divisional Court concluded that the word “gender” has the same meaning throughout the GRA and that it does not mean different things in different provisions of the Act, as the Claimant suggested. The GRP, accordingly, had and has no power to issue a GRC to the Claimant which says that they are “non-binary”.

5. The second issue was the Claimant's Article 14 claim. As the judgment explains, the critical question on the Article 14 claim is justification. The Divisional Court decided that any difference in treatment is amply justified. In so concluding, the Divisional Court relied upon similar reasons to those given by the Supreme Court in the earlier case of *R (Elan-Cane) v Secretary of State for the Home Department* [2021] UKSC 56; [2023] AC 559; two of the public interests relied on by the Secretary of State in that case, the need for legislative and administrative coherence, and the administrative costs of change, are also relevant in this case. They are supported by the Minister's detailed evidence in this case. The Court balanced those factors against the Claimant's interest in having the gender which has been recognised in the State of California recognised in the United Kingdom, and as against the psychological effect of non-recognition. The Court concluded that the balance clearly came down on the Minister's side. In deciding whether or not to legislate for a different outcome, and if so, how, the United Kingdom has a wide margin of appreciation and the Court noted the lack of international consensus on this issue, which is pre-eminently a question for Parliament to consider. The Court therefore, concluded that there are very weighty reasons for the difference in treatment of which the Claimant complains, and that any difference in treatment is therefore amply justified.
6. For reasons which are similar to those which support the Court's construction of the GRA, the Court also decided that it is not "possible" to read the GRA as the Claimant seeks. Finally, as there is no breach of Article 14, the Court has no power to make a declaration of incompatibility.