



15 December 2021

PRESS SUMMARY

R (on the application of Elan-Cane) (Appellant) v Secretary of State for the Home Department (Respondent)

[2021] UKSC 56

On appeal from [2020] EWCA Civ 363

JUSTICES: Lord Reed (President), Lord Lloyd-Jones, Lady Arden, Lord Sales, Lady Rose

BACKGROUND TO THE APPEAL

Her Majesty's Passport Office ("**HMPO**") is an agency of the Home Office which deals with the issuing of passports and related matters. It is HMPO's policy that an applicant for a passport must state on the application form whether their gender is male or female. If no gender is stated, the gender shown on the applicant's supporting documents is selected. The passport is issued recording the passport-holder's gender as male ("M") or female ("F"). People who are transgender (which for this purpose is defined to mean people who have acquired a gender, either male or female, which is different from the one recorded at birth) can obtain passports showing their acquired gender, on the production of a gender recognition certificate, a re-registered birth certificate, or a doctor's letter.

The appellant was born female but identifies as non-gendered. In 1995, the appellant contacted the UK Passport Authority, a predecessor of HMPO, to inquire whether it was possible for a passport to be issued without making a declaration of being male or female. The appellant was informed that it was not. The appellant accordingly applied for, and was issued with, a passport in which the gender was recorded as female. The appellant made similar inquiries in 2005 and in correspondence between 2010 and 2016, with similar results.

In 2014, HMPO completed an internal review of gender marking in passports. It noted that there had been very few requests for a non-gendered ("X") marking, other than from the appellant, and that UK legislation, including discrimination and equality legislation, is based on the categorisation of all individuals as either male or female. It stated that recognising a third gender would put HMPO "in isolation from the rest of government and society" and would result in administrative costs of about £2m being incurred. The Government repeated these points when it considered the issue in 2016.

The appellant argues that the policy operated by HMPO contravenes the right to respect for private life which is guaranteed by article 8 of the European Convention on Human Rights ("**the Convention**"), either taken on its own or read together with the prohibition on discrimination in article 14. The High Court and the Court of Appeal rejected that argument. The appellant now appeals to the Supreme Court.

JUDGMENT

The Supreme Court unanimously dismisses the appeal. Lord Reed gives the sole judgment, with which the other Justices agree.

REASONS FOR THE JUDGMENT

The central question is whether HMPO’s policy breaches the UK’s obligations under the Convention. There is no judgment of the European Court of Human Rights (“**the European Court**”) which establishes an obligation to recognise a gender category other than male or female, and none which would require the Secretary of State to issue passports without any indication of gender. In fact, there does not appear to have been any case before the European Court concerned with the application of the Convention to individuals who identify as non-gendered [30].

Applying the principles established in the case law of the European Court, there has been no violation of the appellant’s Convention rights. The degree of prejudice to the appellant which is attributable to the unavailability of an “X” passport does not appear to be as serious as that suffered by the applicants before the European Court in the cases on which counsel for the appellant relied [42]. The appellant’s interest in being issued with an “X” passport is outweighed by considerations relating to the public interest put forward by the Secretary of State, including the importance of maintaining a coherent approach across government to the question of whether, and if so in what circumstances, any gender categories beyond male and female should be recognised. It is clear that this is a matter in which states would be afforded a high degree of latitude by the European Court, having regard to the absence of any consensus amongst the states which are parties to the Convention, the complexity and sensitivity of the issue, and the need for a balance to be struck between competing private and public interests [62].

Counsel for the appellant argued that, even if the European Court would conclude that there was no violation of the Convention, the domestic courts should nevertheless decide that the Secretary of State was obliged under the Human Rights Act to issue the appellant with an “X” passport, and that her failure to do so was a breach of the appellant’s Convention rights. Reliance was placed on comments made in the case of *In re G (Adoption: Unmarried Couples)* [2008] UKHL 38 in that regard [68]. The Supreme Court decides that those comments are not binding [72]-[73], are inconsistent with a large body of authority at the highest level [94] and should be disapproved [108].

The question of whether an applicant’s rights under the Convention have been violated is a question which the European Court answers for itself [80]. When the European Court decides that there has been no violation of the Convention, because the relevant state has acted within the “margin of appreciation” afforded to it, it does not cede the function of interpreting the Convention to the states which are parties to the Convention, nor does it give their domestic courts the function of deciding whether the issue should be determined by the legislature, executive or the courts [83], [85]. States can of course create rights going beyond those protected by the Convention, but their power to do so exists independently of the Convention and is subject to their own established constitutional principles. Under those principles, as they apply in the United Kingdom, law-making is generally the function of the legislature [82], [85]. If the Human Rights Act were to be interpreted as giving judges the right to find breaches of Convention rights even where the European Court would hold that United Kingdom law was in conformity with the Convention, there would be a substantial expansion of the constitutional powers of the judiciary at the expense of Parliament [90]. Parliament is unlikely to have intended to effect such an encroachment upon parliamentary sovereignty when it enacted the Human Rights Act [108]. The appellant’s alternative argument is therefore dismissed [109].

References in square brackets are to paragraphs in the judgment

NOTE

This summary is provided to assist 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:

<http://supremecourt.uk/decided-cases/index.html>