

Gender identities: a two-tier system?

Elan-Cane: has the Supreme Court created an imbalance in rights protection between binary & non-binary genders?

Jack Castle & Oscar Davies examine the ruling

IN BRIEF

► *Elan-Cane* is contrary to domestic and international developments, which are moving towards legal recognition of non-binary gender identities.

In *R (on the application of Elan-Cane) v Secretary of State for the Home Department* [2021] UKSC 56, [2021] All ER (D) 53 (Dec), the Supreme Court found there was no positive obligation on the state to provide the option of an 'X' gender category on passports.

The claimant, Christie Elan-Cane, is non-gendered; 'non-gendered' being one of the gender identities that are neither male nor female. Although common ground that this gender identity engaged Art 8 of the European Convention on Human Rights, the amount of 'respect' due to that aspect of private life did not outweigh other factors, in particular the interest in a coherent state-wide administrative approach. However, the court's reasoning differentiates between, on the one hand, binary male- and female-gendered people (whether cis- or trans-), and on the other, those who are not male or female, such as non-gendered and non-binary persons. This may have created a two-tier approach to rights protections.

Sex, gender & Art 8

In what is becoming common usage, 'gender' refers to identity, distinguished from 'sex' which evokes anatomy/biology. The Supreme Court introduced the terms as such: 'The term "gender" is used in this context to describe an individual's feelings or choice of sexual

identity, in distinction to the concept of "sex", associated with the idea of biological differences which are generally binary and immutable' (at [3]).

Yet, as the court noted, 'there is no legislation in the United Kingdom which recognises a non-gendered category of individuals. On the contrary, legislation across the statute book assumes that all individuals can be categorised as belonging to one of two sexes or genders (terms which have been used interchangeably) [...] albeit not necessarily the gender recorded at birth' (at [52]).

Most reported cases on sex and gender identity issues relate to people transitioning from male to female or vice versa. *Elan-Cane* is solely about recognition of further forms of gender identity: is a state in breach of Art 8 if it fails to provide an option (here, 'X') on passports for a gender identity other than male/female?

The Court of Appeal held that Art 8 was engaged, calling it 'obvious, and indeed beyond argument' (at [46], [2020] EWCA Civ 363, [2020] All ER (D) 62 (Mar)). This point was not taken in the Supreme Court. The court however noted that the 'respect' that must be had for private and family life under Art 8 is less clear-cut in the jurisprudence of the European Court regarding positive (rather than negative) obligations, as in *Elan-Cane*, are concerned. Citing *Hamalainen v Finland* (2014) 37 BHRC 55, the court said that while a variety of practices are followed in contracting states, relevant factors include 'the importance of the interest at stake and whether "fundamental values" or "essential

aspects" of private life are in issue 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' (at [34]).

The court then considered cases on 'the impact on an applicant of a discordance between the social reality and the law', in particular *B v France* [1992] ECHR 13343/87. B's birth sex was male, and 'lived as a woman and had a female appearance'. The European Commission on Human Rights found 'the applicant indisputably suffers particularly trying ordeals in her daily life because of the discrepancy between her appearance and the entries concerning both gender and forename on the documents relating to her' (quoted in *Elan-Cane* at [40]), and the European Court of Human Rights agreed.

The claimant in *Elan-Cane* argued the same analysis applied to non-gendered people: it is a similar breach of Art 8 for a non-gendered identity to not be recognised as for an individual's male/female gender identity not to be recognised.

The Supreme Court's approach to *Elan-Cane*

The Supreme Court held that the purpose of providing male/female gender on passports 'is not to inform [HM Passport Office] as to the applicants' feelings about their sexual identity, and the applicants are not being forced to lie about those feelings.' The passport application form 'is concerned with the applicants' gender as a biographical detail... It is therefore the gender recognised for legal purposes and recorded in those documents which is relevant. The gender recorded on the passport can also be used for the other purposes mentioned in paras 10-11 above [verifying identity, enabling officials to deal with them in ways appropriate to gender, such as correct pronouns and searches]: purposes which are associated with the passport-holder's appearance and physiology rather than their innermost thoughts' (at [39]).

The court's conclusion was primarily that the need for a cohesive legal and administrative system based on two genders was sufficient to outweigh the need to recognise Elan-Cane's gender identity, and that any change to that scheme was a matter for Parliament. It considered there was a balance between competing private and public interests, such that a wide margin of appreciation is appropriate (at [55]–[62]).

However, the court also distinguished the position in *Elan-Cane* from *B v France*, and in doing so potentially opened a gap in rights protections. It said: 'perhaps most importantly, there is not the obvious

discrepancy between the appellant's physical appearance and the "F" marker in the appellant's passport that there was between the feminine appearance of the applicant in *B v France* and her male identity papers' (at [41]). In so doing, the court differentiated the level of harm caused by misgendering people of the male/female genders (whether they are cis- or trans-) from the lesser harm caused by not recognising the gender identity of non-binary/non-gendered persons.

But it is unclear why the harm caused would be any less severe. The claimant was successful in *B v France*, and the same argument is relevant to Elan-Cane; the sincerely-held gender identities of both claimants were not recognised by the state, meaning they could only prove identity and use services requiring such proof by using a gender which is no longer theirs. For both there was a 'discordance between the social reality and the law'.

The court arrives at its conclusion by not adequately considering the social reality of Elan-Cane's gender. Its reasoning appears to be as follows: in law, only male and female genders exist. Elan-Cane's legal gender is female. In appearance and physiology there is no 'obvious discrepancy' between this legal gender and social reality, despite Elan-Cane's 'innermost thoughts' being non-gendered. As such, there is no discord. Legal gender sets the parameters for what can be socially real: 'female' is the yardstick that appearance and physiology—social reality—may diverge from.

It does not consider Elan-Cane's social reality could be that of a non-gendered person. Although not reasoned, the court assumes 'social reality' as mentioned in *Hamalainen* is synonymous with 'appearance and physiology', and that only male/female gender identities are 'social realities'. It also seems to have assumed other gender identities are (merely) self-conceptions, and not social realities or even 'biographical detail'—they are 'feelings' and 'innermost thoughts'.

This is a false dichotomy. It does not follow that non-gendered or non-binary gender identities are exclusively thoughts or self-images and not social realities. Self-conceptions may be or inform social facts, and not all characteristics protected by Art 8 are apparent in physical appearance. Gender identity may be appearance, innermost thoughts, or both, and be no less socially real for that. It is certainly a 'biographical detail'. This is particularly so for Elan-Cane, who has undergone extensive surgery to remove female sex organs—surgery the Supreme Court did not consider gender reassignment surgery (at [44]) despite it being undertaken to correct 'psychological distress resulting from identifying as non-gendered while

possessing a woman's reproductive physiology' (at [45]). Even in appearance and physiology, Elan-Cane is non-gendered.

In effect, the court begged the question: it failed to recognise the social existence of non-gendered identities in its reasoning, categorised Elan-Cane as resembling female, then said the gender in the passport was a tolerably accurate description of the facts as it saw them. If the court had considered non-gendered identities to be as 'real' as the male and female genders, its conclusion may have been different.

Ramifications of the Supreme Court's approach

By its approach the Supreme Court has, perhaps inadvertently, created a two-tier system of rights protections—binary male and female people above, and non-gendered/non-binary people below—effectively rendering the latter second-class citizens. Despite Art 8 applying to all gender identities, the court may have opened a difference in rights protections between certain of them.

Wider implications

The court's seeming creation of a two-tier system is at odds with recent developments, both domestically and internationally, which call for wider recognition of and protection for non-binary identities.

Domestically, an employment tribunal has recently held that non-binary and gender-fluid gender identities are part of the protected characteristic of gender reassignment (*Taylor v Jaguar Land Rover Limited* Case No 1304471/2018). It relied on extracts from Hansard and in particular remarks on the Equality Bill from the then solicitor general, who said in Parliament that gender reassignment (s 7, Equality Act 2010 (EqA 2010)) 'concerns a personal move away from one's birth sex, into a state of one's choice [...] There are lots of ways in which that can be manifested—for instance, by making their intention known. Even if they do not take a single further step, they will be protected straight away. Alternatively, a person might start to dress, or behave, like someone who is changing their gender or is living in an identity of the opposite sex. That too, would mean they were protected. If an employer is notified of that proposal, they will have a clear obligation not to discriminate against them' (quoted at [177]).

The employment tribunal then held: 'it was very clear that Parliament intended gender reassignment to be a spectrum moving away from birth sex, and that a person could be at any point on that spectrum. That would be so, whether they described themselves as "non-binary" ie not at point A or point Z, "gender fluid" ie at

different places between point A and point Z at different times, or "transitioning" ie moving from point A, but not necessarily ending at point Z, where A and Z are biological sex.' (at [178]).

The approach of the Supreme Court to Art 8 in *Elan-Cane* is therefore at odds with EqA 2010 and *Taylor* in differentiating between the protections afforded non-binary people and those afforded binary (trans) people. Whereas Elan-Cane could be protected by EqA 2010, because of an intention to move away from the sex assigned at birth, the court put undue emphasis on Elan-Cane's somatic appearance and resemblance to one of the binary genders.

There are signs that the Supreme Court has passed the question to a legislature which may be moving in the direction of *Taylor*. The report for the Reform of the Gender Recognition Act by the House of Commons Women and Equalities Committee of 15 December 2021 recommended that the government clarify what the barriers are preventing it from allowing non-binary people to be legally recognised within 12 weeks of its publication. It also stated the Equality and Human Rights Commission should undertake research in this area so that proposals to allow for legal recognition of non-binary people can be brought forward to Parliament (para 226 of the report).

More broadly, the *Equal Treatment Bench Book* (December 2021, revision of February 2021 edition) stresses the importance of judges treating different trans gender identities equally: 'the broader meaning of "trans" or "transgender" can be used to encompass a wide range of gender identities [...] "non-binary" "a-gender" [...] "genderqueer" [...] "gender fluid" [...] It should go without saying that all people deserve to be treated fairly, and with respect for their private life and personal dignity, irrespective of their gender or gender history' (at paras 7 and 9, p332).

Internationally, as the Supreme Court recognised, there are at least 12 countries which recognise 'X' on passports in one way or another, including New Zealand (2005), Australia (2011) and Canada (2017). Though not mentioned in the judgment, the US also issued its first gender-neutral 'X' passport in 2021. In light of a general movement towards widening protections for non-binary/gendered identities, the Supreme Court's inadvertent differentiation between the rights of binary people and non-binary people seems misplaced.

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