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Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 17/01/2024

**Before :**

**LADY JUSTICE ELISABETH LAING AND MRS JUSTICE HEATHER WILLIAMS**

**IN THE HIGH COURT OF JUSTICE**

Case No: AC-2022-LON-003286

CO/4347/2022

**KING'S BENCH DIVISION**  
**DIVISIONAL COURT**

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**Between :**

**THE KING**  
**(on the application of RYAN CASTELLUCCI)**  
**- and -**  
**(1) GENDER RECOGNITION PANEL**

**Claimant**

**Defendant**

**(2) MINISTER FOR WOMEN AND EQUALITIES**

**Interested**  
**Party**

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**IN THE HIGH COURT OF JUSTICE**

Case No: FA-2012-000311

**FAMILY DIVISION**

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**Between :**

**RYAN CASTELLUCCI**  
**- and -**  
**(1) MINISTER FOR WOMEN AND EQUALITIES**  
**(2) GENDER RECOGNITION PANEL**

**Appellant**

**Respondents**

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**KING'S BENCH DIVISION**

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**Between :**

**RYAN CASTELLUCCI**

**Claimant**

**- and -**

**(1) MINISTER FOR WOMEN AND EQUALITIES**

**(2) GENDER RECOGNITION PANEL**

**-  
Defendants**

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**Chris Buttler KC and Marlana Valles** (instructed by **Leigh Day**) for the **Claimant**  
**Sir James Eadie KC and Sasha Blackmore** (instructed by **Government Legal Department**)  
for the **Interested Party**

Hearing date: 1 November 2023

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**Approved Judgment**

This judgment was handed down remotely at 10.30am on 17 January 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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**LADY JUSTICE ELISABETH LAING AND MRS JUSTICE HEATHER WILLIAMS**

## **LADY JUSTICE ELISABETH LAING AND MRS JUSTICE HEATHER WILLIAMS:**

### **Introduction**

1. This case 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 Gender Recognition Panels (“GRP”). The Claimant was born male. We will refer to the Claimant as “they”. 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. This is our judgment in the legal proceedings brought by the Claimant to challenge the GRP’s position. 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 (“the ECHR”) 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 us 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. The Claimant was represented by Mr Buttler KC and by Ms Valles. Sir James Eadie KC and Ms Blackmore represented the Minister for Women and Equalities (“the Minister”), who intervened in the proceedings. The GRP has taken no part in them. We thank counsel for their written and oral submissions, which were excellent.
5. For the reasons given in this judgment, we have decided that whenever the GRA refers to “gender” it refers to a binary concept; that is, to male, or to female gender. The GRP, accordingly, had and has no power to issue a GRC to the Claimant which says that they are “non-binary”. As we explain, the critical question on the Article 14 claim is justification, and we have decided that any difference in treatment is amply justified. For reasons which are similar to those which support our construction of the GRA, we have decided that it is not “possible” to read the GRA as the Claimant would wish us to. Finally, as we have decided that as there is no breach of Article 14, we have no power to make a declaration of incompatibility.

### **The facts**

6. The Claimant was born in the State of California in the United States of America. In December 2019 they moved to the United Kingdom on a Tier 1 “Global Talent” visa to work as a cyber security expert.

7. The Claimant's sex was listed as "male" on their original Certificate of Live Birth issued by the State of California. However, the Claimant does not identify as either male or female. They have been diagnosed with gender dysphoria and have had different medical treatments, including hormone treatment and genital surgery. On 23 June 2021 the Claimant was recognised as non-binary by the State of California and, in accordance with the law of the State of California, their Certificate of Live Birth was amended to change their sex to "nonbinary". There is no indication on the document that it is not the original certificate or that the Claimant's sex was previously registered as male. On 12 April 2022 the Claimant was issued with an American passport which lists their sex as "X". The Claimant uses "Mx" as their preferred title.
8. The State of California is on the list of Approved Countries and Territories (see paragraph 76, below). After obtaining legal recognition of their non-binary status in the State of California, the Claimant sought to have their gender recognised as non-binary in the United Kingdom through a GRC. They completed a statutory declaration, witnessed by a notary public, on 21 February 2022, stating that they had transitioned in November 2019; they had lived as non-binary throughout the period of two years before the date of the statutory declaration; they intended to live in that gender until their death; they were ordinarily resident in England and Wales; and they were not currently married or in a civil partnership. In April 2023 the Claimant submitted the declaration with an application for a GRC to the GRP, using the appropriate prescribed form, T453.
9. On 23 August 2022 the Claimant received a response from the GRP indicating that under the GRA: "a person can only transition from either a Male to become a Female or from Female to Male. The gender Mx is not yet legally recognised in the "UK" and that accordingly, the certificate would be printed with "the new gender being the opposite gender to the one you were born into, which is female". The Claimant was asked whether they were happy for their gender to be recorded as "Female" on the GRC. The Claimant replied on 9 September 2022 saying that their gender was "Nonbinary", as recognised by their birth certificate issued in the State of California, and that this should be printed on the GRC. The Claimant explained that they would not be happy to be certified as "Female", as this was not their gender.
10. On 9 September 2022 an Administrative Officer wrote to the Claimant saying that the GRP President, Judge Gray, had reviewed the query and "asked us to explain that the UK system is a binary system", that GRCs "are only able to certify either male, female or 'not specified'" and that no other alternative was possible. The Claimant then asked for confirmation that a designation of "not specified" on a GRC would have the meaning of "a gender which cannot be classified as 'female' or 'male'".
11. The President of the GRP replied by letter dated 25 October 2022 saying:

"The situation is that I granted a Gender Recognition Certificate on the basis of your application having changed gender in California, where you were recognised as nonbinary. California is on the list of those countries/states which are recognised by the UK in the context of applications from abroad. In my legal judgment, that meant that I was able to

grant your application, despite the fact that the UK does not itself operate a system which recognises a non-binary category.

You have had the position regarding the UK categorisation explained to you. You ask, however, whether “not specified” when printed on a GRC has a meaning to the effect of “a gender which cannot be classified as ‘female’ or ‘male’”. The answer to that is probably no, but I preface that remark with the observation that I am not able to give you legal advice. My answer is given because as the UK does not recognise a nonbinary category I can think of no reason why there would be such a meaning.

I would ask that you make a decision as to your position regarding the certificate without further queries of the GRP Team as neither they nor I are in a position to take the matter further.”

12. The Claimant then began proceedings, as we describe below.

### **Procedural history**

13. Following pre-action correspondence, on 15 November 2022 the Claimant issued three sets of proceedings: (1) an appeal in the Family Division, under section 8 of the GRA, against the GRP’s decision, in the 25 October 2022 letter, refusing to grant a GRC specifying their acquired gender as non-binary (“the Appeal”); (2) an application in the Administrative Court for judicial review of the 25 October 2022 decision (“the JR”); and (3) a Part 8 Claim in the King’s Bench Division seeking a declaration that “not specified” on a GRC issued to the Claimant under the Overseas Recognition Route meant the same as “nonbinary” (“the Part 8 Claim”). The remedy sought in the Appeal was an order granting the Claimant a GRC recording their gender as non-binary. In the JR the Claimant sought an order quashing the GRP’s decision and/or an order granting them a GRC specifying their gender as non-binary and/or a mandatory order requiring the GRP to provide a GRC to that effect. Declaratory relief was also sought, including a declaration of incompatibility under the HRA, and damages under the HRA.
14. A letter to the court dated 24 March 2023 indicated that the GRP, as a judicial body, was neutral, and did not intend to take part in the proceedings.
15. By an order dated 16 November 2022, Mostyn J directed that the three proceedings be heard together and that all three were to be listed for a directions hearing before him (as a judge of the Family Division nominated to sit in the Administrative Court). All later orders were made in all three proceedings.
16. On 20 January 2023 Mostyn J made an order on the Claimant’s application to preserve the confidentiality of their age, address and telephone number. He directed that any non-party seeking access to a copy of the Claim Form or of the Claimant’s First Witness Statement dated 15 November 2022 (“Castellucci 1”), should only be permitted to obtain a version from which those details had been redacted. By an order dated 26 January 2023, the Claimant was given permission to amend their Claim

Form in the judicial review proceedings to add a new ground alleging infringement of their rights protected by Article 8 of the ECHR.

17. The Claimant filed a document dated 25 January 2023 entitled “Amended Consolidated Skeleton Argument, Details of Claim, and Statement of Facts and Grounds” (“the Consolidated Grounds”). They described five grounds of challenge.
  - i) The GRP breached its statutory duty to issue a GRC in terms which record the Claimant’s acquired gender as non-binary (“Ground 1”);
  - ii) The GRP breached its statutory duty and/or frustrated the purpose of the GRA, by deciding to issue a GRC of uncertain legal effect (“Ground 2”);
  - iii) In so acting, the GRP unjustifiably treated the Claimant differently from a person whose acquired gender under the law of the State of California law is male or female, contrary to Article 14 ECHR and section 6(1) of the HRA (“Ground 3”);
  - iv) In so acting, the GRP infringed the Claimant’s right to respect for their private life, contrary to Article 8 ECHR and section 6(1) of the HRA (“Ground 4”); and/or
  - v) It would be ultra vires for the GRP, as it suggested, to issue the Claimant with a GRC that stated their gender as female (“Ground 5”).
18. After a directions hearing on 4 April 2023, by an order of the same date, Mostyn J gave the Claimant retrospective permission to issue the Appeal in the Family Division (rather than in the Family Court); and granted the request of the Minister to be substituted for the Secretary of State for Justice as (1) the First Respondent to the Appeal; (2) as the Interested Party in the JR; and (3) as the First Defendant in the Part 8 Claim. The Judge also directed that the Part 8 Claim be stayed until further order and made a timetable for the provision of a supplement to the Consolidated Grounds addressing the basis on which the Claimant was eligible to apply for a GRC pursuant to section 1(1) of the GRA, and for the Minister to file and serve her Acknowledgement of Service and Summary Grounds of Resistance. He indicated that after these steps he would decide the applications for permission to appeal and for permission to apply for judicial review, and give directions on the papers.
19. By an order sealed on 12 May 2023, Mostyn J granted permission on Grounds 3 and 4, refused permission on Ground 5, and adjourned Grounds 1 and 2 to a “rolled-up” hearing with the substantive hearing of Grounds 3 and 4. A “rolled-up” hearing is a hearing of the application for permission to apply for judicial review, with the substantive judicial review to follow if permission is granted. He gave the Claimant liberty to apply to lift the stay of the Part 8 claim within 14 days of service of the order, if they intended to pursue that Claim. No such application was made and, accordingly, as the parties confirmed at the hearing, we do not need to address the Part 8 Claim. The Judge also directed that the claims were to be listed for a one-day hearing before a Divisional Court of the King’s Bench Division, which was to include a Judge of the Family Division with authorisation to sit in the Administrative Court. By a later order dated 30 October 2023, the President of the King’s Bench Division deleted the requirement for the Divisional Court to include a Judge of the Family

Division. The parties indicated at the hearing that they did not consider that there was any obstacle to our hearing the Appeal and the JR. After the hearing they helpfully provided the draft of an order transferring the Appeal to the Divisional Court of the King's Bench Division, which we have approved. We are accordingly satisfied that we can decide both the Appeal and the JR.

20. The Minister filed Detailed Grounds of Resistance dated 26 June 2023 and a witness statement from Anna Thompson, the Deputy Director of the Equality Hub in the Cabinet Office, dated 26 June 2023 (“Thompson 1”). The GRP filed a short statement from the President of the GRP, Judge Gray, also dated 26 June 2023 (“Gray 1”).
21. By an application notice dated 16 April 2023, the Claimant applied for permission to rely in reply on (1) a report prepared by Dr H. Eli Joubert, a consultant clinical psychologist dated 15 March 2023 (“Joubert 1”); and (2) a witness statement made by Professor Pieter Cannoot, an assistant professor of Law and Diversity at Ghent University, dated 16 August 2023 (“Cannoot 1”). The Claimant proposed that the application was dealt with at the substantive hearing. The Minister opposed both aspects of the application. We indicated at the start of the hearing that we would read the evidence *de bene esse*, hear submissions about it, and decide whether it was admissible in our reserved judgment.
22. In his skeleton argument for the hearing, dated 11 October 2023, Mr Buttler KC indicated that only two issues were now pursued. The first is whether “on an ordinary construction” the GRA permits “the recognition of a foreign-acquired gender that could not otherwise be obtained under English law” (in effect, Ground 1). The second is an allegation of a breach of the Claimant’s rights protected by Article 14 (Ground 3). As Mr Buttler acknowledged, the first issue is subject to a permission threshold. We also indicated at the start of the hearing that we would hear full argument on both issues and decide in our reserved judgment whether or not to grant permission in respect of Ground 1.

### **The evidence**

23. We now summarise the witness statements relied on by the parties (in so far as we have not already done so, and to the extent that they are relevant to the issues we have to decide).

#### **Castellucci 1**

24. The Claimant describes feeling no attachment to either masculinity or to femininity as they grew up, but not having the words to describe the way that they felt. In 2014 the Claimant married a woman. At that stage they took steps to pass as a man in the way they dressed and cut their hair. In 2016 the Claimant disclosed their gender status to their then wife. They were divorced in June 2018.
25. The Claimant says that they increasingly thought about their gender identity and gender presentation, reaching a point where they decided to take active steps to ensure that their body aligned with how they understood themselves to be. They changed the way that they dressed and then in January 2020 began laser hair removal. As we mentioned earlier, the Claimant had moved to London in December 2019, to join their

partner, who had accepted a job in London. The couple plan to settle in England for the long term.

26. The Claimant came out at work, re-introducing themselves as a non-binary employee. Their GP referred them to the Gender Identity Clinic. In the light of the waiting list, the Claimant arranged appointments with private doctors. Dr Vickie Pasterski diagnosed the Claimant as having gender dysphoria. The second doctor provided a prescription for Hormone Replacement Therapy (which the Claimant has continued to take, adding, after their surgery, a low dose of testosterone and progesterone).
27. The Claimant learnt of a surgical procedure known as penile preservation vaginoplasty, which enables the preservation of the penis while also creating a fully functional vagina. In June 2022 they had a consultation with a surgeon who was based in San Francisco and could do this operation. A date 14 months later was set for the surgery. The surgery was then done in two stages. On 13 September 2022 Dr Pasterski wrote a letter saying that the Claimant's gender is non-binary, that they have been living openly as non-binary since June 2020, that they have received appropriate medical care to transition from their birth gender to non-binary, and that these changes are likely to be permanent.
28. The Claimant explains that they decided not to change their name, as "Ryan" is a unisex name in the United States and they have patents and academic publications in their name. They describe the process of changing their official documents in the United States. First they obtained an "X" gender marker on their Washington State driver's licence. We have already explained that they later obtained a new birth certificate and passport (see paragraph 7, above).
29. The Claimant describes their attempts to have their gender recorded as non-binary in UK documents. After receiving their updated birth certificate from the State of California, the Claimant filed "change of circumstances" papers asking for a new Biometric Residence Permit ("BRP"). The United Kingdom Government website indicates that a change of gender is one of the circumstances which requires an application for a new BRP. Accordingly, the Claimant was anxious to regularise the position, but they were told that no new BRP could be issued on the basis of the birth certificate issued by the State of California. It was agreed to wait for their updated US passport. When they received it, they had an exchange of correspondence with UK Visas & Immigration ("UKVI"). In short, UKVI indicated that the Claimant had to choose either a male or a female gender. The Claimant asked them to accept "*anything other than 'M/male'*". The new BRP lists their gender as "F" (for female).
30. The Claimant says that they have been permitted to use "Mx" as their title for their application for a provisional driving licence, and that although they were told that their non-binary gender could not be accommodated, their gender is denoted by a number and is not included on the licence card. The Claimant also refers to difficulties when they had to have a background security check in relation to a new job. The form they had to complete only provided two options for gender and was accompanied by a warning that providing false information was a criminal offence. They manually entered "X", but the company doing the background check changed this to "female" without asking the Claimant.



31. The Claimant describes these experiences as an “ordeal”. They explain that they worry about possible difficulties if they apply for British citizenship, as they plan to do. They explain that it is very upsetting not to know how their gender would be recorded on their death certificate and to be in a situation of uncertainty in the United Kingdom, when their US documents clearly reflect their gender as non-binary. They feel that they are being treated less favourably than if they were a transgender woman in two ways. First, their true, legally acquired gender is not recognised in the United Kingdom, and they are required to opt for an incorrect binary gender identifier, whereas a transgender woman, whose acquired gender had been recognised under the law of the State of California, would have no difficulty in obtaining a GRC in their female gender. Secondly, as a result of the uncertainties described, the Claimant does not know what gender the United Kingdom thinks that they are.

Letter of 14 April 2023 and Gray 1

32. Before turning to Judge Gray’s witness statement, we refer to the letter to the court dated 14 April 2023 sent by the Government Legal Department on behalf of the GRP. The letter explains that no GRC has been issued to the Claimant. An internal document dated 27 July 2022 is enclosed, indicating that a Full GRC is granted as the statutory criteria are satisfied by legal recognition in the State of California, USA. The letter goes on to explain that although the GRP had formed the view that the Claimant should receive a GRC, the Panel had not decided what gender the GRC would attribute to the Claimant; and as the Claimant did not reply to the request in the letter of 25 October 2023, the GRC had “neither issued a GRC nor decided to accede to Ryan’s application specifically inasmuch as it sought a GRC stating that they are ‘non-binary’”. The letter also says that the phrase “not specified” has no particular connection with the work of the GRP. The Panel’s computer system is shared with various tribunals and it was simply an option that could be used, for example, when an individual’s details were being registered on the system and their correct prefix is not known; it did not “refer to an identity which a person might regard as a gender”.
33. In her witness statement, Judge Gray says that as the Claimant did not reply to her letter dated 25 October 2023, nothing further was done to issue a GRC. She did not decide to issue a GRC recording “not specified” and did not mean to suggest in the 9 September 2022 email that “not specified” was an expression purporting to record a positive description of a gender. She confirms the contents of the 14 April 2023 letter.

Thompson 1

34. Ms Thompson explains that the Equality Hub is responsible for the Government’s equality priorities and legislation, including legislative and policy responsibility for the Equality Act 2010 (“the 2010 Act”) and legislation related to lesbian, gay, bisexual and transgender (“LGBT”) people, including the GRA. She is the lead on domestic LGBT Policy and Equality Hub Communications. The LGBT team also has a coordinating and/or advisory role with respect to legislation and policies owned by other Government departments that may impact LGBT people.
35. Ms Thompson says that a GRC allows an applicant to update their birth or adoption certificate, if it was registered in the United Kingdom; to get married or form a civil partnership in their acquired gender in the United Kingdom; to update their marriage or civil partnership certificate, if it was registered in the United Kingdom; and to have

their acquired gender on a United Kingdom death certificate when they die. A GRC is not needed to get a passport, driving licence, or other documents in a person's acquired gender.

36. Ms Thompson's view is that the effect of a full GRC is to change a person's protected characteristic of "sex" for the purposes of section 11 of the 2010 Act. A transgender person who does not have a GRC is the sex recorded on their birth certificate for the purposes of the Act. "Gender reassignment" is a separate protected characteristic under the 2010 Act.
37. Ms Thompson refers to the voluntary question on gender identity which was included in the 2021 Census. The results were published on 6 January 2023. Of those who answered the question, 0.5% of the adult population in England and Wales, or 262,000 people, reported that the gender they identify with was not the same as their sex registered at birth. Of this overall figure, 30,000 people identified as non-binary. 118,000 people gave no further information about their gender identity.
38. Ms Thompson says that even when gender-neutral language is used, legislation across the statute book assumes the existence of only two sexes and/or genders and in some cases makes sex- or gender-specific provision. The Interpretation Act 1976, for example, provides that (unless the contrary intention appears) reference to the masculine include the feminine and vice versa. She says that there are currently no examples in UK legislation of a gender other than male or female.
39. The Births and Deaths Registration Act 1953 requires the birth of every child born in England and Wales to be registered. Regulation 7(1) and form 1 of Schedule 1 to the Registration of Births and Deaths Regulations 1987 prescribe the particulars to be registered, including the child's sex. The legislation does not prescribe how sex is to be decided. Ms Thompson says that registrars rely on the test identified in *Corbett v Corbett* [1970] 2 WLR 1306 for deciding whether the parties to a marriage are male or female; that is to say a person's sex should be determined by the application of a chromosomal, gonadal and genital tests, where these are congruent, ignoring any operative intervention. She says that all children, even those who have variations in sex characteristics, are described as either a male or a female at birth.
40. Ms Thompson notes that entitlements or rights may differ depending upon a person's sex, for example in relation to pensionable age; and that there are criminal offences that can only be committed against persons of a particular sex, such as the offence in section 1 of the Female Genital Mutilation Act 2003. She notes that legislation assumes that only a woman will give birth to, or be the mother of a child, including legislation relating to maternity rights. Sex is also an important factor in the provision of a wide variety of public sector services: the prison estate is exclusively split into male and female accommodation; hospitals may have single sex wards; and local authorities may fund rape crisis centres and domestic abuse refuges that offer their services to females only. She says that in so far as some Government services recognise that some people may prefer not to be referred to as either male or female: "This tends to be the exception rather than the rule and in no circumstance amounts to legal recognition". By way of example, the Department of Work and Pensions ("the DWP") uses the title "Mx" if individuals ask for it, but this does not affect their entitlement to sex-specific benefits.

41. Ms Thompson summarises Government consultations and reports on this issue in recent years. The 14 January 2016 report into Transgender Equality by the Women and Equalities Select Committee (“WESC”) recommended that the United Kingdom introduce an option to record an individual’s gender as “X” on a passport and that the Government should consider a legal category for individuals with a gender identity “outside the binary and the full implications of this”.
42. The Government’s response, published in July 2016, was that it would keep these issues under consideration, but “would like to see more evidence on the case for change and the implications of...extending legal recognition to non-binary gender identities. We will therefore monitor the implementation of alternative gender recognition processes in other jurisdictions and we will analyse the evidence placed before the Committee to inform our work”.
43. In July 2018 the Government consulted on reforming the GRA. The consultation covered many topics. It included a specific question on non-binary legal gender recognition. The question on this topic was described as a request for “your initial views on non-binary recognition” (as it relates to the GRA). A majority of responses (64.7 %) thought that changes needed to be made to the GRA to include people who identified as non-binary. The Government response to the GRA consultation was published in September 2020. Ms Thompson says that as part of the consultation, the Government engaged extensively with representative organisations, including transgender and women’s organisations. The Government concluded that the current provisions in the GRA were effective and that it did not propose to make changes to recognise non-binary people. The Government’s response noted that “there were complex practical consequences for other areas of the law, service provisions and public life if provision were to be made for non-binary gender recognition in the GRA”.
44. The WESC then produced a review entitled “Reform of the Gender Recognition Act”, published in December 2021. The report expressed disappointment that the Government had not accepted the case for legal recognition of non-binary people through the GRA. The Government’s response, published on 24 March 2022, was that it still considered that no such changes to the GRA were needed. As part of its successful defence in *R (Elan-Cane) v Secretary of State for the Home Department* [2021] UKSC 56; [2023] AC 559 (see paragraphs 88-95, below) the Government had reviewed evidence on the value and purpose of sex and gender identifiers on official documentation; it had also done a short “scoping exercise” with policy officials in a number of departments to look at how sex and gender markers are used, and at the possible impact of using an X-marker.
45. Ms Thompson describes an internal review by her team. It identified a number of issues about X-markers, including technical and digital changes, issues of data quality and potential security risks. She says that given these risks, departments expressed reservations over any changes being implemented too quickly and said that “lots more internal work would be required”.
46. Ms Thompson says that the Government’s current position is the same as that described in the responses to the consultation and to the WESC; no changes are

currently needed to the GRA to include a third or non-binary gender and that more research and consultation would be needed before any changes were contemplated.

47. Ms Thompson indicates that the Minister notified the House of Commons on 9 January 2023 that the Government recognises that the list contained in The Gender Recognition (Approved Countries and Territories) Order 2011 (“the 2011 Order”) is out of date. When she made her witness statement, the aim was to lay a Statutory Instrument updating the 2011 Order in July 2023, subject to Parliamentary time being available. She explains that the State of California did not recognise non-binary genders until 2017, some years after it was included in the 2011 Order. We note that, since the hearing, such an order has been published in draft.
48. Ms Thompson also emphasises the absence of an international consensus in relation to the recognition of a gender other than male and female. She says that the Government’s position is in line with that of other countries across the world and that only a small number of countries legally recognise non-binary genders. She summarises the evidence as showing:
- “...that there is not a consensus to recognise non-binary or third genders across countries either in the Council of Europe or internationally. It is our understanding that a number of countries continue only to explore these complex issues. The UK is in line with other countries across the world in continuing to explore and develop understanding in this area.”
49. Ms Thompson says that of the 46 Member States of the Council of Europe, only four currently legally recognise non-binary genders to some extent. They are:
- i) Denmark: where non-binary gender recognition is available on passports;
  - ii) Iceland: where the Law on Gender Identity has provided for recognition based on self-determination since 2019;
  - iii) Malta: where legal gender recognition has been based on self-determination since 2015. Gender markers with an “X” option were made possible in 2017 on passports and other identification documents;
  - iv) Spain: where some Autonomous Communities have approved regulations for the modification of names and gender markers in administrative documents to include “X” markers. These changes do not affect the national Civil Registry records. However, a 2023 Bill would, if implemented, introduce self-identification across Spain.
50. Ms Thompson adds that Austria, Germany and The Netherlands provide legal recognition for people with variations in sex characteristics and/or intersex conditions.
51. Outside the Council of Europe, the majority of the 193 UN-recognised countries and states do not currently recognise non-binary gender in law. There are only 11 countries that do so: Argentina, Australia, Bangladesh, Brazil, Canada (although there is variation between the provinces and territories), Chile, India, Nepal, New Zealand, Pakistan and some states in the United States of America. There is significant

variation. There are also two countries, Kenya and Morocco, which recognise third genders for people with variations in sex characteristics and/or intersex conditions.

52. Ms Thompson also gives “an indication of the complexity and far reaching impact” that allowing legal recognition of a non-binary gender “might have”. She emphasises that it is not a definitive list. She says that the Government’s position is that it is “not possible to make changes regarding legal recognition of non-binary genders in a binary system in isolation given those wide-ranging impacts”. We will summarise briefly the examples that she gives in relation to a number of Government departments:

- i) The Ministry of Justice: there would be implications for long-established principles governing family law, in particular the acquisition and exercise of parental responsibility for children, and the concepts of “mother” and “father”. Criminal offences which can only be committed against or by persons of particular sexes would need to be considered; for example rape in section 1 of the Sexual Offences Act 2003; and many Prison and Probation Service Instructions and Prison and Probation Service Orders, which refer to different approaches towards male and female offenders, including in relation to accommodation, searching, categorisation, adjudications and sex-specific treatment programmes. There would also be significant costs in amending data systems, forms and guidance, and in training staff.
- ii) HM Revenue and Customs (“HMRC”): changes would primarily be operational, and would be very expensive, as HMRC runs one of the largest and most complicated IT systems in Europe.
- iii) The Home Office: some internal work has been done in relation to the changes and the costs which would be entailed by the introduction of an X-marker on passports. The processing, storage and searching of data in a range of different systems would need to be changed. In 2020 a provisional estimate for the costs for this work was between £1.5 – 2 million. Nationality legislation may need to be amended, as some provisions refer to citizenship being acquired through a “father or mother”, rather than through a “parent”; for example, the British Nationality Act 1981. Policies with a gendered focus, including the Violence Against Women and Girls Strategy would need to be reviewed. Recognising a third gender would also affect all stages of the asylum process.
- iv) The Department for Health and Social Care: the provision of services will be affected in situations when patients and/or staff expect that only people of a particular sex will be treated, such as same-sex wards in hospitals. Additionally, statutes will need to be reviewed, including the Human Fertilisation and Embryology Act 2008, in which there are many references to “man”, “woman”, “mother”, “father” etc. There would also be implications for recording data and ensuring that there are appropriate data systems.
- v) The DWP: there are different pension ages for men and for women in pensions legislation. There would therefore be implications for pensions. There are also differences in the ways rules apply to women who are or were married to men, compared with men who are or were married to women, and to civil partners of either sex. Specific provision would be needed in respect of legally

recognised third gender or non-binary persons who were legally married or in a civil partnership, in order to avoid creating new differences of treatment when state pensions are derived or inherited. There are currently sex differences in the accrual of survivor's benefits pursuant to the Social Security Act 1975 and the Social Security Act 1986, so there would also be an impact on private pensions.

- vi) The Department for Business and Trade: there could be a question about the entitlement of those with a legally recognised non-binary or third gender to maternity leave, paternity leave, maternity and paternity pay, the right to time off work for ante-natal appointments and so forth.
  - vii) The Department for Education: guidance for schools and colleges in relation to gender-questioning children is being considered. There will be a public consultation on the draft guidance. It is accepted that the issues in the present claim are unlikely to affect the sector directly as GRCs are only available for those who are over 18 years old.
  - viii) The Department of Levelling Up, Housing and Communities: it is likely that housing and services related to domestic and/or sexual violence will be affected. There are also likely to be practical issue for local housing authorities and others. They will need to update forms, documents and data systems.
  - ix) Equality Hub: there are many references to “male” and “female” in the 2010 Act and significant changes may be needed if the law recognises a third or non-binary gender and thereby alters the careful balance struck in the Act. She gives specific examples. We have already referred to the definition of the protected characteristic of “sex” in section 11 of the 2010 Act. Sections 17 and 18 address discrimination against pregnant women and refer only to women. Paragraph 27 of Schedule 3 enables the provision of a service for one sex only, so long as listed conditions are satisfied. This permits, for example, domestic violence refuges to refuse entry to men. In addition, the Marriage (Same Sex Couples) Act 2013, the Civil Partnership Act 2004 and other marriage law statutes would need to be amended to include people who are neither male nor female.
53. Ms Thompson also deals with the position of the General Register Office. She says that civil registration in England and Wales reflects the position that every person is legally male or female; and that associated sex-specific terms are used in several enactments. These would also need to be considered.
54. Having set out these implications, Ms Thompson summarises the position as follows:
- “102. ...Should the Government provide for legal recognition of a non-binary/third gender, there would be a need for extensive changes to legislation and service provision across Government, demonstrating that it is not possible to be dealt with in isolation. Our scoping exercise with Departments recognised that sex and gender identifiers are intrinsic to systems that departments use to function and provide services to the public, and that any changes to this would be wide-

reaching. While Departments recognised the importance of being better equipped to accommodate people who do not identify as either exclusively male or female, they were cautious about any changes coming in quickly, especially given the implications for security, safeguarding and wider impacts across training, staffing, resources etc. Any changes would also require public consultation and a full legislative process through Parliament.

103. Further, any introduction of legal recognition of a non-binary/third gender would raise difficult moral questions that would need to be dealt with by Parliament. For example, how should marriage law accommodate non-binary individuals, should they have access to women only refuges, should they be treated as mothers, fathers or something else and should they be accommodated in a male or female prison...Parliament would also need to consider the devolution implications and the potential for different sexes and genders to exist legally in different parts of the UK. These questions would require careful and detailed thought, as well as consultation, a legislative process and a strong evidence base, all of which are lacking.

104. The impacts would also vary depending on how a non-binary gender is defined. There are a number of conceivable ways in which it could be...

105. Recognising a non-binary/third gender via an overseas application for a GRC would therefore be administratively unworkable. Further, if the Claimant were to be issued with a GRC recording them as non-binary at this time, they are likely to face considerable issues and frustrations because, as demonstrated above, UK policy, legislation and public service systems are all binary and not set out to be able to recognise or cater for any type of third gender. Instead the Government needs to take a considered approach that takes account of all of these issues in the round. Any changes should be considered through the proper processes, including consultation with the public and determined by Parliament, and any decision on an issue with such broad implications cannot be considered in isolation.”

55. In the last section of her statement, Ms Thompson addresses the impact on the Claimant; she does not agree that the inconveniences that they described “caused them significant detriment such as to be disproportionate when weighed against the effective operation of the UK system”. She accepts that the Claimant’s experiences would have been distressing, but she notes that they were ultimately able to obtain a binary gender marker on their BRP in accordance with their preference between “M” and “F” (albeit that was not what they sought); that the Claimant was able to obtain a driver's licence with their preferred title and there is no gender marker explicitly on

the driving licence card; and that the background check was completed successfully. Ms Thompson explains that it would not be possible for the Claimant to obtain British citizenship with a non-binary marker, because the law does not recognise a non-binary gender. She acknowledges that this would cause the Claimant concern. She says that the Claimant is likely to be able to use their non-binary US identity documents for many day-to-day matters, should they wish to do so.

## **Application to adduce further evidence**

### Joubert 1

56. For the purposes of his report, Dr Joubert had two remote meetings with the Claimant which lasted about 60 minutes. He has never met them in person. He also reviewed their medical records. He recounts the Claimant's history of gender dysphoria, which we have already summarised.
57. Dr Joubert reports that the Claimant told him that lack of legal recognition of their non-binary gender in the United Kingdom and in the official documents which have registered them as female have caused them "significant distress and affected their overall sense of wellbeing". Dr Joubert considers that: "The distress they experience is clinically significant and evident when speaking with Ryan". He also notes that the Claimant says that the lack of recognition of their non-binary gender leaves them feeling invalidated and implies they are not worthy of respect. The Claimant has been prescribed anti-anxiety medication in the past, but is not sure whether they have a formal diagnosis of anxiety or any other psychiatric diagnosis. Although there was some history of mental health difficulties when they were younger, Dr Joubert concludes that this does not better account for the clinically significant distress they are experiencing from not being able to have their gender identity legally recognised in government systems in the United Kingdom. Apart from when they are "misgendered", which causes "significant distress", the Claimant "impresses as being stable in their mental health". He concludes that the Claimant's distress is: "significant, impacting on their general sense of well-being, their mental health and sense of being respected by the society they chose to, and have a legal right to, be part of". In turn, this has "implications for low mood and increased irritability". He also concludes that the Claimant was not dishonest or manipulative in the information that they provided.
58. Dr Joubert also says the following in his report:

"63.3 ...It forces an individual to choose between honouring themselves / acting in a manner which amounts to breaking the law or rejecting themselves / acting in a manner which complies with the law. No individual should be put in such a bind as it might be considered cruel and inhumane. That is what is expected of Ryan.



65. Mx Castellucci's request is not for anything extraordinary but rather that their legal gender (under Californian law) is, so far as possible, recognized in the UK where they live.

66. I would invite those with the authority to change all UK government systems recording the gender of those living within the UK to include a category reflecting people with a non-binary gender identity...

67. Not doing so amounts to cruel and inhumane treatment...

68. There is no obvious risk or other reason why this should not be done."

59. The Claimant submits that Dr Joubert's evidence is primarily relevant to Ground 3 and that it responds to the statements in Thompson 1 as to the relatively modest level of adverse impact that the Claimant has experienced.
60. It seems from his qualifications and experience that Dr Joubert is an expert in his field. CPR 35.1 provides that expert evidence shall be restricted to that which is reasonably required to resolve the proceedings. It cannot be adduced without the court's permission (CPR 35.4(1)). Expert evidence is rarely admitted in applications for judicial review, because such cases are usually mainly about legal issues: see, for example, *R (Law Society) v Lord Chancellor* [2018] EWHC 2094 (Admin); [2019] 1 WLR 1649. His evidence is potentially relevant to the impact on the Claimant of the difference in treatment of which they complain and its weight against the factors relied on by the Minister. Dr Joubert's report helps the court to understand the nature of that impact, although, as he acknowledges in paragraph 69 of his report, he has only known the Claimant for a short time and has only met them on-line. Those limitations affect the weight which we can give that evidence. We are satisfied that the majority of the report is admissible, subject to our assessment of the points we make in the next paragraph.
61. Under the heading "Statement of Compliance". Dr Joubert claims to "understand" his "duty as an independent professional witness to the Court". He adds that "I have complied with that duty and continue to do so". A fundamental part of an expert's duty to be independent is not to act as an advocate for the party who instructs him: see paragraphs 81-82 of the *Ikarian Reefer* [1993] 2 Lloyd's Report 68 (Comm Ct), approved in *Kennedy v Cordia Services LLP* [2016] UKSC 6; [2016] 1 WLR 597 at paragraphs 52-53. The passages we have quoted in paragraph 58, above, show that Dr Joubert has fundamentally failed, either to understand what that duty is, or, if he has understood it, to comply with it. He has both expressed opinions which are outside his own area of expertise and has acted as an advocate, arguing, indeed, for changes in the law which are more sweeping than the recognition which the Claimant seeks in these proceedings. Accordingly, while we give the Claimant permission to rely on the majority of Dr Joubert's report, we decline to admit paragraphs 63.3 and 65-68. We have, of course, considered whether this overstepping of the expert's role by Dr Joubert should lead us to refuse to admit the whole report. With considerable hesitation, we have decided not to do that, as the report does include relevant material

about the psychological impact of the official non-recognition of the Claimant's non-binary gender, and of the occasions when they are "misgendered". However, that hesitation, and the limitations we refer to in paragraph 60, above, affect the weight which we give to the parts of the report which we admit. We give them some, but not significant, weight.

#### Cannoot 1

62. Professor Cannoot is an academic who has written widely on LGBTQI+ rights and various aspects of the law of persons, including the legal recognition of the non-binary gender. In his oral submissions, Sir James Eadie KC indicated that he took no point on whether Professor Cannoot's statement should have been advanced as expert evidence, rather than as evidence from a witness of fact.
63. The statement describes the positions taken by some states and countries to the legal recognition of genders other than male or female. Professor Cannoot focuses on the position in the State of California, Belgium, Germany, Malta, the Netherlands and New Zealand. As well as describing the legislative provisions, Professor Cannoot refers to discussions he has had with legal experts in some of the jurisdictions about how the system works, or is likely to work, in practice.
64. The Claimant submits that this evidence is relevant to the effect of Overseas Recognition and to rebutting the contention in Thompson 1 that it would be unworkable for the United Kingdom to take this step. The Minister objects to this evidence because it is selective and does not give a full review of the relevant material. In any event, it does not overcome the central point that countries have not approached recognition of a non-binary legal gender in the same way.
65. We do not consider that this evidence helps us. It is not suggested that it is relevant to Ground 1. As it shows that there is no international consensus, just as Ms Thompson explains, it does not further the Article 14 claim, either. Professor Cannoot does not disagree. Instead, he highlights a few countries which, in different ways, recognise a third gender in law. That is not in dispute. In the circumstances, having considered it, we do not consider that Cannoot 1 adds anything to the issues in this case.

#### **The legislative background to the GRA**

66. The applicant in *Goodwin United Kingdom* (2002) 35 EHRR 18 was a post-operative male to female transsexual. She was able to change her name, but could not change various official records which described her as male. She claimed that this was a breach of her rights protected by Articles 8, 12, 13 and 14 of the ECHR. The European Court of Human Rights ("the ECtHR") held that Articles 8 and 12 had been violated, and did not consider the Article 14 claim. The ECtHR analysed the claim as a claim that the United Kingdom had breached a positive obligation to respect the applicant's private life by not giving legal recognition to her gender reassignment.
67. The ECtHR had previously held that the United Kingdom had not interfered with the private life of transsexuals by refusing to change the register of births, or to issue birth certificates differing from any original registration. It decided to consider the question again to see "in the light of present-day conditions" what the appropriate current interpretation and application of the ECHR was. At that stage, *Bellinger v Bellinger*

(see the next paragraph) had been decided by the Court of Appeal ([2002] EWCA Civ 1140; [2002] 2 WLR 411, paragraphs 52-53).

68. The appellant in *Bellinger v Bellinger* [2003] UKHL 21; [2003] 2 AC 467 was born and registered at birth as male. She had gender reassignment treatment and surgery. In 1981, she had a marriage ceremony with a man. She petitioned for a declaration that the marriage had been and was valid. The judge and the Court of Appeal dismissed the petition on the grounds that the words “male” and “female” in section 11(c) of the Matrimonial Causes Act 1973 (“the MCA”) were to be understood by reference to biological criteria, and the appellant was male by reference to those criteria. She appealed and also asked for a declaration that section 11(c) of the MCA was incompatible with Articles 8 and 12 of the ECHR. The House of Lords held that “male” and “female” were to be given their ordinary meaning, and referred to a person’s biological sex at birth. A person born in one sex could not later become a person of the opposite sex. English law did not recognise a marriage between two people who were of the same biological sex at birth. Any other conclusion would amount to a significant change in the law and would create anomalies and uncertainties because of a lack of objective criteria by which gender reassignment surgery could be assessed. Such a change would interfere with the traditional concept of marriage and give rise to sensitive and complex issues, so that it could only be made by Parliament. The House of Lords made a declaration that section 11(c) of the MCA was incompatible with the appellant’s Article 8 and Article 12 rights.
69. Lord Nicholls and Lord Hope gave the leading speeches, with which the other members of the House agreed. The focus of all the speeches was the situation of the appellant, and of others like her, who felt that their biological sex at birth did not match their feelings about their sex. The members of the Appellate Committee used the word “transsexual” to describe such people. The Appellate Committee also recognised that if, and to what extent, the position of transsexual people was to be recognised by changes in legislation was complicated and sensitive, that it should not be done piecemeal, and that it was a matter for Parliament.
70. In *Goodwin*, therefore, the ECtHR held that the United Kingdom’s failure to change official records describing her as a woman was a breach by the United Kingdom of the international obligations imposed by Articles 8 and 12 of the ECHR. In *Bellinger v Bellinger*, the House of Lords declared that section 11(c) of the MCA, which relied on a distinction between male and female, was incompatible with Articles 8 and 10. The making of that declaration triggered the power conferred by section 10(2) of the HRA 1998 to make an order remedying the incompatibility. In the event, that power was not exercised. Instead, Parliament enacted the GRA. Mr Butler rightly accepted that the GRA was enacted as a response to *Goodwin* and to *Bellinger v Bellinger*.

## **The GRA**

71. The long title of the GRA describes it as “An Act to make provision for and in connection with change of gender”. It is divided into three groups of sections, “Applications for a gender recognition certificate” (sections 1-8), “Consequences of issue of gender recognition certificate etc” (sections 9-21) and “Supplementary” (sections 23-28), and six Schedules. The provisions which are most relevant to this

appeal are sections 1, 2, 3, 4, 8 and 9. We will also refer in general terms to other provisions in the second group of sections and to section 25, the interpretation section.

72. Section 1 provides:

“Applications

(1) A person of either gender who is aged at least 18 may make an application for a gender recognition certificate on the basis of –

(a) living in the other gender, or

(b) having changed gender under the law of a country or territory outside the United Kingdom.

(2) In this Act, “the acquired gender”, in relation to a person by whom an application under subsection (1) is or has been made, means –

(a) in the case of an application under paragraph (a) of that subsection, the gender in which the person is living, or

(b) in the case of an application under paragraph (b) of that subsection, the gender to which the person has changed under the law or territory concerned”.

73. Section 25 further provides that, in the GRA, the “the acquired gender” is to be construed in accordance with section 1(2). Section 1(3) provides that an application under section 1(1) is to be decided by the GRP. Section 1(4) gives effect to Schedule 1, which makes further provision about the GRP.

74. Section 2 is headed “Determination of applications”. The GRP must reject an application if it is not required to grant it by section 2(1) or by section 2(2) (section 2(3)). This case is not concerned with the relationship between an application for a GRC and the marital or civil partnership status of the applicant, so it is not necessary to refer to the section 2(3A)-(3C).

75. Section 2(1) requires the GRP to grant an application made under section 1(1)(a) if it is satisfied of four things. We will refer to this as “a domestic application”. The first thing is that the applicant must have or have had “gender dysphoria”. That term is defined in section 25 as “the disorder variously referred to as gender dysphoria, gender identity disorder and transsexualism”. The other requirements are that the applicant has lived in the acquired gender for all of the two years immediately before the date of the application, that the applicant intends to live in the acquired gender until death, and that the applicant must comply with the requirements listed in section 3.

76. The GRP must grant an application under section 1(1)(b) if two conditions are met. We will refer to this as “a foreign application”. It must be satisfied, first, that the

country or territory under the law of which the applicant has changed gender is an approved country or territory. It must also be satisfied that the applicant complies with the requirements in section 3. Section 2(4) defines “approved country or territory” in the GRA as “a country or territory prescribed by order made by the Secretary of State after consulting the Scottish Ministers and the Department of Finance and Personnel in Northern Ireland”. Section 25 provides that, in the GRA, “approved country or territory” has the meaning given by section 2(4).

77. Section 24(2) provides that the power to make an order under the GRA is exercisable by statutory instrument. No order prescribing an approved country or territory may be made unless a draft of the statutory instrument containing the order has been laid before, and approved by, a resolution of each House of Parliament (section 24(3)).
78. Section 3 is headed “Evidence”. A domestic application and a foreign application must each include a statutory declaration as to whether the applicant is married or is a civil partner (section 3(6)). This case is not concerned with the relationship between an application for a GRC and the marital or civil partnership status of the applicant, so it is not necessary to refer to the section 3(6A)-(6H).
79. The requirements for a domestic application are listed in section 3(1)-(4) and (6). The relevant requirements are that the application must include a report by each of two medical practitioners, at least one of whom is “practising in the field of gender dysphoria” or a report by a registered psychologist who practises in that field, and a report by a medical practitioner (who may, but is not required to, practise in that field). In either case, the report must include details of the applicant’s diagnosis of gender dysphoria. If the applicant has had, or is having, treatment to modify sexual characteristics or such treatment has been prescribed or planned, at least one of the reports must include details of that treatment. The applicant must also make a statutory declaration that the second and third requirements listed in paragraph 75, above, are met.
80. A foreign application must “include evidence that the applicant has changed gender under the law of an approved country or territory” (section 3(5)).
81. Section 7 stipulates how an application for a GRC must be made. If the GRP grants an application under section 1(1), it must issue a GRC to the applicant (section 4(1)). If the GRP rejects an application for a GRC, section 8(1) gives the applicant a right of appeal on a point of law to the High Court, or to the family court. On such an appeal, the court must allow the appeal and issue the GRC, allow the appeal and remit it to the same or to another GRP for reconsideration, or dismiss the appeal (section 8(2)).
82. Section 9 is headed “General”. It provides:
  - “(1) Where a full [GRC] is issued to a person, the person’s gender becomes for all purposes the acquired gender (so that, if the acquired gender is the male gender, the person’s sex becomes that of a man and, if it is the female gender, the person’s sex becomes that of a woman).
  - (2) Subsection (1) does not affect things done, or events occurring, before the certificate is issued; but it does operate for

the interpretation of enactments passed, and instruments and other documents made, before the certificate is issued (as well as those passed or made afterwards).

(3) Subsection (1) is subject to provision made by this Act or any other enactment or any subordinate legislation.”

83. Sections 10-20 make further provision about the consequences of a GRC. They include consequences for the entry in the UK birth register of a successful applicant (section 10), for marriage and civil partnership (sections 11-11D), parenthood (section 12), discrimination law (section 14), the law of succession (section 15), peerages and related matters (section 16), trustees and personal representatives (section 17), and the disposition or devolution of property under a will or other instrument (section 18).

84. Section 20 is headed “Gender-specific offences”. It provides:

“(1) Where (apart from this section) a relevant gender-specific offence could be committed or attempted only if the gender of the person to whom a full [GRC] has been issued were not the acquired gender, the fact that the person’s gender has become the acquired gender does not prevent the offence being committed or attempted.

(2) An offence is “a relevant gender-specific offence” if-

(a) either or both the conditions in subsection (3) are satisfied, and

(b) the commission of the offence involves the accused engaging in sexual activity.

(3) The conditions are-

(a) that the offence may only be committed by a person of a particular gender, and

(b) the offence may be committed only on, or in relation to, a person of a particular gender,

and the references to a particular gender include a gender identified by reference to the gender of the other person involved.”

85. Section 21 is headed “Foreign gender change and marriage”. It provides:

“(1) A person’s gender is not to be regarded as having changed by reason only that it has changed under the law of a country or territory outside the United Kingdom.

(6) Nothing in this section prevents the exercise of any right which forms part of retained EU law by virtue of section 3 or 4 of the European Union (Withdrawal) Act 2018.”

86. As originally enacted, section 21(2)-(6) provided:

“(2) Accordingly, a person is not to be regarded as being married by reason of having entered into a foreign post-recognition marriage.

(3) But if a full gender recognition certificate is issued to a person who has entered into a foreign post-recognition marriage, after the issue of the certificate the marriage is no longer to be regarded as being void on the ground that (at the time when it was entered into) the parties to it were not respectively male and female.

(4) However, subsection (3) does not apply to a foreign post-recognition marriage if a party to it has entered into a later (valid) marriage before the issue of the full gender recognition certificate.

(5) For the purposes of this section a person has entered into a foreign post-recognition marriage if (and only if)—

(a) the person has entered into a marriage in accordance with the law of a country or territory outside the United Kingdom,

(b) before the marriage was entered into the person had changed gender under the law of that or any other country or territory outside the United Kingdom,

(c) the other party to the marriage was not of the gender to which the person had changed under the law of that country or territory, and

(d) by virtue of subsection (1) the person’s gender was not regarded as having changed under the law of any part of the United Kingdom.

(6) Nothing in this section prevents the exercise of any enforceable Community right.”

87. Section 23(1) gives the Secretary of State a power by order to modify primary and secondary legislation “in relation to...persons whose gender has become the acquired gender under this Act, or...any description of such persons”, after consultation with “persons likely to be affected by” any order (section 23(5)).

### **Elan-Cane v Secretary of State for the Home Department**

88. The appellant in *R (Elan-Cane) v Secretary of State for the Home Department* [2021] UKSC 56; [2023] AC 559 was born female but identified as having no gender. The appellant challenged the policy of Her Majesty’s Passport Office to require applicants for passports to say whether they were male or female and only to issue passports

which said “male” or “female” in the box marked “sex”. The appellant applied for judicial review of the policy. The Administrative Court dismissed the application and the Court of Appeal dismissed the appeal from that decision.

89. The main issue on the appeal was whether Article 8, on its own, or read with Article 14, imposed an obligation on the state, when it issued a passport, to respect the private life of a person who identified as non-gendered by including an “X” marker on their passport rather than “male” or “female” markers. In paragraph 30, the Supreme Court noted that there was no judgment of the ECtHR which establishes a positive obligation to recognise a gender category other than male or female. In the light of the case law about transgender people, it was not in dispute that the appellant’s “identification as non-gendered is an aspect of private life within the meaning of article 8”. The Supreme Court also noted that the ECtHR had tended to ask in such cases whether there was a positive obligation, rather than assuming an interference with Article 8 and considering whether that was justified. The Supreme Court referred in that regard to the judgment of the Grand Chamber in *Hämäläinen v Finland* (2014) 37 BHRC 55, and the judgments of the Chamber in *AP, Garçon and Nicot v France* (Application Nos 79885/12, 52471/13 and 52596/13), 6 April 2017, paragraphs 99-100, *X v Former Yugoslav Republic of Macedonia* (Application No 29683/16), 17 January 2019, paragraphs 63-65, and *Fedotova v Russia* (2021) 74 EHRR 28, paragraphs 44-47.
90. In paragraph 36, the Supreme Court noted that whether the appellant should be legally recognised as a non-gendered person was not an issue in the case; it simply concerned the marker in a passport, and the appellant would continue to be treated as female for legal purposes. The only interest at stake, therefore, was the appellant’s interest in getting an “X” passport.
91. The Supreme Court considered the difficulties which the appellant had experienced in paragraphs 38-41, and concluded, in paragraph 42, that the “degree of prejudice” which could be attributed to the lack of an “X” passport was not comparable with that suffered by the applicants in the cases on which the appellant relied. In paragraphs 46-61, it considered, as against those difficulties, three aspects of the burden which would be imposed on the state by an obligation to issue “X” passports: concerning security, the likely costs of administration and the need for coherent legal and administrative practices in the domestic system, including the GRA, “enacted following the judgment of [the ECtHR] in *Goodwin v United Kingdom*, [which] likewise assumes that all individuals belong to one of two genders, albeit not necessarily the gender recorded at birth” (paragraph 52).
92. There is a binary approach to gender both in legislation and in the way that many public services are provided (paragraph 53). That all meant that the questions whether other gender categories than male and female should be recognised, and if so, how, “raise complex issues with wide implications”. The courts below had been right to treat the need for legal and administrative coherence as “an important factor” (paragraph 54).
93. The margin of appreciation is particularly significant in relation to positive obligations. A court should be cautious before imposing such obligations, for the reasons given in paragraph 55. Two factors were relevant to that margin: whether a



particularly important facet of an individual's existence or identity is at stake, and whether there is a consensus among contracting states, either as to the relative importance of the interest which is at stake, or about the best way of protecting it, particularly "where the case raises sensitive moral or ethical issues" (paragraph 56). In this case, all that was at issue was the marker in a passport. For the reasons given earlier, it was "difficult to accept that a particularly important facet of the appellant's existence or identity is at stake in the present proceedings" (paragraph 57), and there was no relevant international consensus (paragraphs 58 and 59). The case also involved sensitive moral or ethical issues, "especially in so far as it impinges on the broader question of gender determination on the basis of an individual's feelings or choice, regardless of biological sex and physiology, and unconfined by the categories of male and female" (paragraph 61).

94. The courts below had been right to consider that the appellant's interests were outweighed by the public interest arguments (paragraph 62). The ECtHR had not gone that far and the Supreme Court could not be confident that the ECtHR would go any further than it had already gone (paragraph 63).
95. The Supreme Court considered the appellant's Article 14 argument in paragraphs 64-66. It held, for reasons similar to its reasons for dismissing the Article 8 claim, that the policy did not discriminate against the appellant contrary to Article 14 read with Article 8. It did not explain its reasoning other than by commenting that the Article 14 complaint was essentially the same as the Article 8 complaint, "albeit viewed from a different perspective", and that for the reasons it had already given (in paragraphs 45 and 50-54), the government's aims "including the objective of maintaining a coherent approach to issues of gender across law and administration" were legitimate. Further, there was a wide margin of appreciation, for the reasons given in paragraphs 56-61.

### **An outline of the Claimant's arguments**

96. Mr Buttler accepted that it is clear from section 1(1) of the GRA that, for the purposes of a domestic application, the scheme is that "gender" is binary. An application can only be made by a person of the female or male gender, and neither could apply to be registered as non-binary. Nor is the United Kingdom subject to any positive obligation, imposed by Article 8, to permit such a change to be made. Under the law of the United Kingdom, he accepted, everyone either has one or other of only two genders, as section 1(1)(a) makes clear. In his oral submissions he said that the word "either" is "apt, because everyone in the United Kingdom has a male or female gender". In the United Kingdom "the other gender" in section 1(1)(a) must mean "male" or "female".
97. The position is different in section 1(1)(b). It does not refer to "the other gender" but to the fact that the applicant has "changed gender" under the relevant foreign law. "Either gender" in this context is not a restriction, but a description. It must refer to the applicant's gender before the change of gender under foreign law. It cannot mean their acquired gender. That would make section 1(1)(b) redundant, when its evident purpose is to recognise changes of gender under foreign law. This language creates no problem in the case of the Claimant, whose gender at birth was male. The Claimant's acquired gender is defined by the law of the State of California, not by the law of the

United Kingdom. “Gender” is not defined in the GRA. That gender, therefore, need not be either male or female.

98. On a proper construction of the GRA, therefore, in such a case, “gender” means “gender as changed under the law of the approved country or territory”. That could mean, and in this case, does mean, that that “gender” might be a gender not recognised under the law of England and Wales. There were two consequences. First, a person who would not qualify for a GRC by making a domestic application case could nevertheless qualify by making a foreign application. Second, even though non-binary is not a category recognised by the law of England and Wales, a person who makes a foreign application is entitled to a GRC describing them as “non-binary” if that is a category recognised by the relevant foreign law.
99. The word “gender” in the GRA gets its meaning from the particular setting in which it is used. It means a binary gender when a domestic application is made. In the case of a foreign application, it means the gender to which the applicant has changed under the law of the approved country or territory. The meaning does not oscillate, but is contextual. It was not necessary to argue that Parliament must have known, when the GRA was enacted, that a consequence of section 1 could be that a person could be granted a GRC for a status which would not be recognised by the law of England and Wales. The position, rather, was that Parliament had simply decided to respect changes made under foreign law, “warts and all”.
100. The passage in brackets in section 9(1) is simply an illustration of the effect of a full GRC. That passage could not affect the meaning of “the acquired gender”, a phrase which is defined in section 25. Parliament could have said expressly that a GRC only has effect on a binary basis, but had chosen not to.
101. If that construction had undesirable consequences, the remedy was to remove the country or territory in question from any order made pursuant to section 2(4). If necessary, the Secretary of State could choose which parts of the law of a country or territory to approve. The Secretary of State could choose to “level up” or to “level down”. The approval of changes made under foreign law was not required by *Bellinger v Bellinger*. It was a “bolt-on”. The only question, asked by section 2(2), is “What is the Claimant’s acquired gender”. The answer is “Non-binary”.
102. Section 9 did not affect the construction argument. The apparently strong rule in section 9(1) was tempered by the qualification made by section 9(3). Nothing in section 9 makes it unlawful to treat a non-binary person as a man or a woman, as the case may be. In fields not governed by express statutory provisions, the exercise of their relevant functions by public authorities would simply be regulated by public law.
103. The Claimant had pleaded, but abandoned, an Article 8 claim. So the Claimant did not contend that Article 8 imposes a positive obligation on Parliament to recognise non-binary gender. But if the Claimant’s submissions about the construction of the GRA were rejected, then the GRA results in discrimination, contrary to Article 14, between an individual who has changed his or her gender to the other gender under the law of the State of California and those, such as the Claimant, who have changed their gender to non-binary. Once Parliament has chosen to recognise some foreign changes of gender, it must do so without discrimination. That is a “bread and butter” application of Article 14. *Elan-Cane* should be distinguished. The appellant in that

case relied on self-identification, whereas the Claimant relies on the recognition of non-binary gender under the law of the State of California, and relies on a more focussed and fairer comparator; the Claimant and the comparator were clearly in analogous situations and they were treated differently on the grounds of their status.

104. The premise of the Secretary of State's arguments about justification was that the Claimant's argument involved "a broad social issue with big consequences". That depended, in turn, on accepting that a non-binary GRC would compel public authorities to change their systems and would require extensive knock-on changes to a range of legislation. It would not. That means that arguments based on systemic coherence fall way. It also means that the margin of appreciation is narrow, as, on the Claimant's case, this is a paradigm of discrimination based on suspect grounds, that is, on the Claimant's non-binary gender. The effect of section 9(3) was that a GRC would yield to any contrary provision in primary or subordinate legislation. The effect of section 9(1) was that it might have consequences for the practices and policies of public authorities, but those would not necessarily be far-reaching.
105. It is "possible", pursuant to section 3 of the HRA, to read the GRA so as to require the GRP to grant the Claimant's application. It would not go against the grain of the GRA to read section 1(1) and section 2(2) as requiring the GRP to grant a foreign application to a person whose acquired gender is non-binary, because Parliament has specifically permitted that consequence. The fact that it went against the grain of the domestic scheme is irrelevant. If a section 3 reading is not possible, the court should make a declaration of incompatibility under section 4 of the HRA.

## **Discussion**

### Preliminary points

106. Mr Buttler relied, in support of his construction argument, on cases in which Parliament has legislated to give effect in the United Kingdom to a status with an extra-territorial aspect which, were it not for that extra-territorial aspect, would not be recognised, or would be invalid or unlawful in the United Kingdom, such as polygamous marriages and marriages within the prohibited degrees of affinity. This argument shows that Parliament may well choose to take such a step, but it does not help the Claimant. The examples are all cases in which Parliament has adverted to the status in question and made express provision for it. If Mr Buttler's construction argument is right, this is not a case in which Parliament has made express and advertent provision; rather, it is a case which it is doubtful Parliament had in mind when the GRA was enacted, and if the Claimant's argument is right, it is a case which has a latent consequence, which comes from the language Parliament used in the GRA.
107. Mr Buttler submitted more than once that provision for foreign applications was not required by *Goodwin* or by *Bellinger v Bellinger*. That proposition is accurate, but we do not consider that the position is as simple as that. The House of Lords in *Bellinger v Bellinger* held that the recognition of a change in status for transsexual people, which Article 8 required the United Kingdom to make, had potentially wide ramifications and was therefore a matter for Parliament. That reasoning is relevant to this point. One of the potential ramifications which Parliament would have to consider in any such legislation would be whether or not to provide for the recognition of changes of

gender under foreign law, and, if so, in what way to recognise them. If Parliament had recognised domestic changes but had not recognised changes under foreign law, the consequence might have been a further Article 14 claim. But it does not follow from Parliament's choice to recognise foreign changes of gender without imposing the requirements of section 2(1) on that recognition, that Parliament was doing anything other than choosing to recognise changes of gender of a kind which would be recognised under section 2(1) of the GRA.

108. Mr Buttler helpfully drew our attention to *R (Quintavalle) v Secretary of State for Health* [2003] UKHL 13; [2003] AC 687 in support of an “always speaking” interpretation of the GRA. That is, that the word “gender” should be interpreted so as to accommodate any changes in its meaning since the GRA was enacted. In that case, the House of Lords held that it was permissible to interpret the definition of “embryo” in the Human Embryology and Fertilisation Act 1990, which was enacted to regulate the in vitro fertilisation of human embryos, so as to include an embryo produced by a different method, nuclear replacement. It gave the legislation a purposive construction in a context in which technology was developing quickly, and it was apparent that Parliament wanted to regulate all related activity so as to protect live human embryos created outside the human body.
109. Lord Bingham said, in paragraph 8, that “The basic task of the court is to ascertain and give effect to the true meaning of what Parliament has said in the enactment to be construed”. That did not entail an over-literal approach which ignored Parliament's overall purpose in enacting the legislation. The purpose of most statutes is to change the law in some way, and the court must give effect to that purpose. “The controversial provisions should be read in the context of the statute as a whole, and the statute as a whole should be read in the historical context of the situation which led to its enactment”.
110. He added (paragraph 9) that there was no inconsistency between the rule that statutory language keeps its original meaning and the rule that a statute is always speaking. If, however long ago, Parliament passed a law which applied to dogs, it could never apply to cats, but it could properly be held to apply to animals which were not regarded as dogs when the Act was passed, but which are regarded as dogs now.
111. Sir James Eadie referred us to a citation, in paragraph 10 of Lord Bingham's speech, from p 822 of the speech of Lord Wilberforce in *Royal College of Nursing of the United Kingdom v Department of Health and Social Security* [1981] AC 800.

“In interpreting an Act of Parliament it is... necessary to have regard to the state of affairs existing and known by Parliament to be existing, at the time. It is a fair presumption that Parliament's policy or intention is directed to that state of affairs...when a new set of facts comes into existence, the courts have to consider whether they fall within the parliamentary intention. They may be held to do so if they fall within the same genus of facts as those to which the expressed policy has been formulated. They may also be held to do so if there can be detected a clear purpose in the legislation which can only be fulfilled if the extension is made. How liberally

these principles may be applied must depend on the nature of the enactment, and the strictness or otherwise of the words in which it has been expressed. The courts should be less willing to extend expressed meanings if it is clear that the Act in question was designed to be restrictive or circumscribed in its operation rather than liberal or permissive. They will be much less willing to do so where the subject matter is different in kind or dimension from that for which the legislation was passed. In any event, there is one course which the courts in this country cannot take, under the law of this country; they cannot fill gaps; they cannot by asking the question ‘What would Parliament have done in this current case - not being one in contemplation - if the facts had been before it?’ attempt themselves to supply the answer, if that answer is not to be found in the terms of the Act itself”.

112. Both the parties referred to the explanatory notes for the GRA. We do not consider that it is necessary to take them into account, as, in our view, the language of the GRA is clear. We asked the parties during the hearing whether section 21 was relevant to the issues in this case. We gathered from their answers that the interpretation of section 21(6) was potentially difficult and controversial. Neither side was in a position to make detailed submissions about it. We therefore say little about the effect of section 21(6). We do not consider that it contributes to the argument here. Even if its effect is, or was, as we understood Mr Buttler to submit, and Sir James Eadie not to accept, that the United Kingdom would be compelled to recognise a “change of gender” to a “non-binary gender”, that would be as a result of the former supremacy of EU law over the law of the United Kingdom, and whatever choice has been made, since Brexit, to retain that effect in the United Kingdom.

#### What does the GRA mean?

113. We start with the legislative context. It is agreed that the GRA was enacted to correct the breaches of the ECHR and of the HRA which were identified in *Goodwin* and in *Bellinger v Bellinger*. Those breaches concerned the non-recognition of a change of gender by a post-operative transsexual and the inability of a post-operative transsexual to contract a valid marriage with a person whose sex was the same as the appellant’s natal sex. The purpose of the GRA is plainly to right those wrongs. Those wrongs arise against the background of a binary concept of biological sex which those transsexuals sought to modify, because their feelings about their own sex were not congruent with their biological sex, and they believed that their “true sex” was different from their natal sex. We accept that Parliament went further than was required by those two decisions. The GRA requires a diagnosis of past or current gender dysphoria (section 2(1)(a)). Parliament has not, however, imposed a requirement that an applicant for a GRC should have had any treatment, let alone surgery, for that gender dysphoria (see section 3(3) of the GRA). Parliament may have been prescient in that respect, because some later decisions of the ECtHR suggest that such a requirement may, itself, be a breach of Article 8. The Supreme Court mentioned those decisions in *Elan-Cane* (see paragraph 89, above).

114. The first point is that, having regard to the agreed legislative context and evident purpose, we do not consider it likely that when Parliament enacted the GRA it intended to do anything other than to deal with the legal status of people who had gender dysphoria, that is, a sense that their sex at birth was not congruent with their feelings about their “true sex”, by creating a procedure by which they could change their legal status for most, but not for all, purposes. The premise of that provision is a binary concept of gender. There is very little, if anything, to suggest that Parliament might have imagined that in years to come, some people might feel that they were neither male nor female, but that they had some other gender altogether. Parliament was providing, rather, for changes in legal status against a binary concept of “gender”. To adapt Lord Bingham’s analogy in *Quintavalle*, “gender” in the GRA refers only to “male” and “female”. It does not include non-binary gender. The idea that “gender” is binary is a fundamental feature of the background to the enactment of the GRA. Parliament did not have “non-binary gender” in mind when the GRA was enacted.
115. That consideration is powerful, but it is not decisive, of course, because the crucial question is what the GRA means. That consideration is nevertheless consistent, in several ways, with the words of the GRA. As Mr Buttler had to accept, 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. He also had to accept that the word “gender” has to be interpreted, in the case of a foreign application, as including, not only the concept of binary gender, but also a concept of non-binary gender.
116. On a general level, we reject Mr Buttler’s submission that “gender” can mean different things in the domestic and foreign provisions of the GRA, particularly in provisions in the same section and same subsection. We cannot think of a statute in which a concept which is as central as “gender” is in the GRA, is used in two totally different meanings in the same section, subsection and sentence. Yet that is the effect of his submission about the meaning of section 1(1)(b). We reject his submission that “having changed gender” in section 1(1)(b) can mean anything other than “having changed gender to the other gender”. The draftsman has, with elegant economy, decided not to add the pleonastic phrase “to the other gender” to section 1(1)(b). But section 1(1) is one sentence. It should be read as a whole, and not artificially atomised. If it is read as whole, it is clear that the premise of section 1(1) is that “gender” is a binary concept. Similar reasoning applies to his submission that the word “gender” in the defined phrase “the acquired gender” has different meanings in section 1(2)(a) and 1(2)(b). An implication of this argument is that a change of gender to “non-binary” in an approved country or territory is the “change” of gender referred to in section 1(1)(b) and in 2(2)(b). We consider that that implication is answered by the terms of section 21(1). The fact that a “change” has been recognised in an approved country or territory is not, of itself such a change, unless it is change from male to female, or vice versa.
117. Parliament cannot have intended that the word “gender” could mean different things in, to take just a few glaring examples, adjacent provisions in section 1; that is, section 1(1)(a) and 1(1)(b), section 1(2)(a) and 1(2)(b), and section 2(1) and 2(2)(b). Mr Buttler’s ingenious argument completely undermines that fundamental feature. It turns clear distinction into a protean muddle.

118. We recognise that the word “gender” is not defined in the GRA. That does not help the Claimant. The reason it is not defined is that when the GRA was enacted, and in the context of the wrongs which the GRA was specifically intended to right, there was no need for any definition. It went without saying that “gender” referred to a binary concept: “male” or “female”. Very many provisions of the GRA show this: for example, section 1(1)(a), section 9, section 11, which enacts Schedule 4 (see in particular, paragraph 7), section 12, section 13, which enacts Schedule 5 (see, in particular, paragraphs 3(1), (4), 6(a) and (b), 6A(3)(a), (5) and (6), 6B, 7,(2) and (3), 8(2),(3) and (4), 9(2) and (3), 14(3) and (5), 15(3) and (5)) and section 20 (see further, paragraph 120, below).
119. We turn to section 9. Section 9(1) is a pivotal provision of the GRA. It declares the general consequences of the issue of a full GRC to a person. Those general consequences are subject to the specific provision made in section 9(3) and in later sections. We reject the submission that the passage in brackets is simply an illustration of the effect of a full GRC. That submission prompts the rhetorical question, “What other legal consequences does a GRC have?” Section 9(1) is a statement of the legal effect of a GRC, full stop. The whole purpose of the GRA, and of the creation of the GRC is that, subject to stated exceptions, the effect of a GRC is to change the legal status of a person who has a full GRC from their natal sex to their “acquired gender”, which is deemed to be the sex which is opposite from their natal sex. We asked the parties for written submissions, after the hearing, on the decision of the Inner House of the Court of Session in paragraph 37 of *For Women Scotland v Scottish Ministers* [2023] CSIH 37; 2023 SLT 1216. We are grateful for those submissions, but we do not think that this decision helps us with the issue in this case. We also asked counsel whether it was significant that section 9(1) is the only provision of the GRA which uses the word “sex”. We did not receive any help on this question and say no more about it.
120. We will also say something about section 20. It applies only to offences which involve sexual activity (section 20(2)(b)). A “gender-specific offence” means an offence which can only be committed if the perpetrator is a particular “gender”, and/or if the victim is a particular “gender” (section 20(3)). Section 20(1) cuts down section 9(1) by ensuring that the issue of a full GRC does not prevent the commission, or attempted commission, of such an offence. It seems to us, again, that the premise of section 20 is that there are only two “genders” (see the Sexual Offences Act 2003, *passim*).
121. In summary, in this case, contextual and linguistic factors point in the same direction. The word “gender” has the same meaning throughout the GRA. It follows from this conclusion that we reject the first of the arguments on which the Claimant relied at the hearing, which was, in effect, Ground 1 in the JR. We accept, nevertheless, that this ground was arguable, so give permission to apply for judicial review of the decision of the GRP not to issue the Claimant with the GRC they would have preferred. It also follows that, while we give permission to appeal, we must also dismiss the section 8 appeal. We accept the argument that the GRP had no power to issue such a GRC.
122. We should make clear that, in reaching this conclusion, we have not treated the observation about the GRA in paragraph 52 of *Elan-Cane* as a binding decision on this point, despite Sir James Eadie’s encouragement that we should. We think it

unlikely that in order to decide the issues in that case, it was necessary for the Supreme Court to consider the detailed construction arguments about the GRA which we have considered. We therefore accept Mr Buttler's submission that this observation is obiter, and have decided the construction issue for ourselves.

#### Article 14

123. Article 14 of the Convention provides:

“Prohibition of discrimination

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.”

124. A claim based on Article 14 requires the court to decide four questions. (i) Do the circumstances “fall within the ambit” of another Convention right? (ii) Is there a difference in treatment between the Claimant and another person whose situation is, in relevant respects, analogous? (iii) Is the difference in treatment on the grounds of the Claimant's status? (iv) Is the difference in treatment objectively justified? (*In re McLaughlin* [2018] UKSC 48; [2018] 1 WLR 4250, paragraph 15, to which Mr Buttler drew our attention).
125. The first aspect of the Article 14 claim seems to be agreed. The Minister does not apparently dispute that non-binary gender is a status. The Minister does dispute, in the light of the decision in *Elan-Cane*, that the treatment in this case is within the ambit of Article 8, because there is no positive obligation to recognise non-binary status. The Minister argues that, as there is no viable Article 8 claim here, while in many cases there is a difference between breach and ambit, this case cannot fall within the ambit of Article 8. The Minister did not contest, with any great conviction, that the Claimant is in an analogous situation to that of their chosen comparator, but did argue, largely for all the reasons given in *Elan-Cane*, that any difference in treatment is amply justified.
126. Although it was common ground in *Elan-Cane* (paragraph 30) that the appellant's identification as non-gendered was an aspect of private life within the meaning of Article 8, and the Supreme Court, therefore, did not decide that point, it is clear to us that the concession on this point by the Secretary of State in that case was rightly made. The apparent suggestion in this case that the fact that Article 8 does not impose a positive obligation to recognise non-binary gender entails the conclusion that the Claimant's complaint is not within the ambit of Article 8, confuses one stage in the Article 8 analysis with a stage in the Article 14 analysis with a different purpose. We therefore reject the Minister's argument in this case that the Claimant's complaint does not fall within the ambit of Article 8.
127. We turn straight to justification, for the reason given in the fifth sentence of paragraph 125, above. The Secretary of State “recognised” the points made in the Claimant's statement, but submitted that they were not a serious inconvenience, and that several factors mitigated those effects, as in *Elan-Cane*. There is no obvious discrepancy



between the Claimant's physical appearance and their recognised gender. They are free to, and do, use a first name of their choice, which in the United States, is a name used by people of both sexes. They have a passport with a gender-neutral marker which they can use for a wide range of purposes, such as identification. Their driving licence also has a gender-neutral marker. In the United Kingdom it is not often necessary to provide identification documents. The Claimant says that they do not know their gender "as a matter of UK law"; but it is clear that they are "male" for that purpose. The Secretary of State also submitted that this impact falls far short of the impact in *Goodwin*, or, indeed, in *Elan-Cane*, because in *Elan-Cane*, the appellant could get no official documents which reflected their non-binary gender, whereas the Claimant has two such documents.

128. We do not necessarily accept Mr Buttler's submission that non-binary gender is a suspect category, precisely because the ECtHR has not decided in any case that there is a positive obligation on contracting states to recognise a non-binary gender. The reasons why include that this is a sensitive political and moral issue on which there is no international consensus. We do accept, however, that the refusal of a non-binary GRC has a somewhat greater impact on the Claimant than did the refusal of the "X" marker in *Elan-Cane*, as it is a decision with legal consequences. Moreover, after much hesitation, we have decided to accept the evidence from Dr Joubert about the psychological impact of this refusal (with the qualification as to its weight which we have indicated at paragraph 61, above). In those circumstances, we will assume, in the Claimant's favour, without deciding this point, that very weighty reasons are required to justify the difference of treatment of which they complain.
129. The Claimant submitted that what had to be justified was the fact that the GRA did not permit the recognition of non-binary gender acquired under foreign law. This was a narrow point, and did not raise the wider issues which were considered in *Elan-Cane*. We accept Sir James Eadie's submission that it is not possible to separate a foreign case from the wider issues. A system which held that it is justified not to recognise non-binary gender in a domestic case, but that it is not justified to fail to recognise a non-binary gender recognised under foreign law would be incoherent. It would raise all sorts of difficulties, including the potential for Article 14 claims from non-binary people whose non-binary gender, as we have held, is not recognised by the GRA. Those and similar points explain why the Supreme Court was able to deal shortly with the Article 14 claim in *Elan-Cane* after it had rejected the Article 8 claim. The fact that there is no Article 8 claim in the present case is highly relevant to any consideration of an argument under Article 14.
130. We appreciate that the issues in *Elan-Cane* were not the same as the issues in this case. We are not strictly bound, therefore, by the Supreme Court's reasoning about justification. We nevertheless consider, for reasons which are similar to those given by the Supreme Court, that 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 explained in detail in the Minister's evidence in this case. They are to be balanced 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. Our view is that the balance clearly comes down on the Minister's side. We also accept that in deciding whether or not to legislate for a different

outcome, and if so, how, the United Kingdom has a wide margin of appreciation, also for the reasons given by the Supreme Court. Those include the sensitivity of the issue, and the lack of international consensus. This is pre-eminently a question which it is for Parliament to consider. We conclude, therefore, 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.

131. It follows that there is no breach of Article 14, and that the remedies under section 3(1) and 4 of the HRA are not available. It is not necessary to say more, but we add that, if, contrary to our view, the GRA does discriminate against the Claimant, it would, in the light of our view about the construction of the GRA, go against the grain of the GRA to interpret the word “gender” as including non-binary gender. A fundamental legislative assumption of the GRA is that gender is binary.

### **Conclusion**

132. For those reasons, although we consider that Ground 1 is arguable, and therefore give permission to apply for judicial review on Ground 1, we dismiss it. We also dismiss the Article 14 ground, and, having given permission to appeal, we dismiss the section 8 appeal.