

A NEW LEGAL PRECEDENT ON GENDER IDENTITY AND LGBTI+ RIGHTS

R (on the application of Christie Elan-Cane) and Secretary of State for the Home Department [2018] EWHC 1530 (Admin)

The Administrative Court handed down its judgment in the judicial review case on non-gender specific passports brought by Clifford Chance (on a *pro bono* basis) on behalf of Christie Elan-Cane. Despite dismissing the case, the Court set an important legal precedent and a milestone in civil rights litigation on gender identity and LGBTI+ rights. For the first time in the UK, the Courts have recognised that the European Convention on Human Rights (Article 8) guarantees a right to respect for non-gendered identity.

THE CHALLENGE

HM Passport Office (HMPO) passport policy requires that either an "M" or "F" gender marker appear on every UK passport. The applicant in this case, Christie Elan-Cane, does not identify as either male or female. Christie identifies as non-gendered. The lack of a non-gender specific passport option ("X" passports) impacts on Christie's ability to obtain and use a passport on equal terms with persons who identify, and are identified, solely in terms of male or female.

The impact of HMPO's refusal to provide for X passports affects not only Christie and others who identify as non-gendered, but a broad section of the public who identify outside the binary concepts of male and female. This includes intersex people, transgendered people (whose outward appearance may not conform to their gender identity), individuals who identify as gender-variant, and others who do not identify exclusively as male or female.

The case challenged HMPO's policy and sought that passport applicants in the UK be given the option to have the marker "X", meaning "unspecified", in the gender field on UK passports.

X passports are allowed by the International Civil Aviation Organisation (ICAO) standards for passports. The UK is a member of ICAO, a UN agency. Several countries around the world, including Australia, Canada, Denmark, India, Nepal, New Zealand, Malta and Pakistan already issue X passports to their citizens who request them.

Christie first applied for an X passport in 1995 and has determinedly campaigned for legal recognition of non-gendered identity in the UK. Clifford

Key issues

- The UK Courts have recognised that the European Convention on Human Rights (Article 8) guarantees a right to respect for non-gendered identity.
- This finding marks the first time the UK Courts have recognised that Article 8 guarantees a right to respect for those who identify outside the binary concepts of male and female, and is a crucial step in the legal recognition of those who do not identify exclusively as male or female.
- In practical terms this finding means the UK Government, in taking policy decisions, must take into account the rights of individuals who identify outside the binary concepts of male and female, thus setting an important legal precedent and marking a milestone in civil rights litigation on gender identity and LGBTI+ rights.

Chance has been assisting Christie on a *pro bono* basis since 2013. Christie's judicial review application was commenced in June 2017.

The case challenged HMPO's policy as being (1) in breach of the European Convention on Human Rights (ECHR) on two grounds: being contrary to Christie's right to respect for private life (Article 8), and contrary to Christie's right not to be discriminated against on the basis of gender/gender identity (Articles 8 and 14), and (2) unlawful under common law grounds.

HMPO resisted the challenge, *inter alia*, on the basis (1) of the perceived need for a coherent approach to gender to be taken across the UK Government, (2) that there is no interference with Christie's right to respect for private life (Article 8), or if the policy constitutes interference, it is justified for reasons of security and administration. In arguing that the policy does not interfere with Christie's right to respect for private life, HMPO pointed out that there had been no decision of the European Court of Human Rights that had found that Article 8 protects non-gendered or non-binary status.

THE JUDGMENT

The Court held that the policy was not unlawful. The Court found, however, that, contrary to HMPO's arguments, the right to respect for private life under Article 8 of the ECHR *does* include a right to respect for a person's identification as non-gendered. This finding marks the first time the UK Courts have recognised that Article 8 ECHR guarantees a right to respect for those who identify outside the binary concepts of male and female. This in itself is a crucial first step in the legal recognition of those who, like Christie, do not identify exclusively as male or female.

In practical terms it means the Government, in taking policy decisions, must take into account the rights of those individuals, thus setting an important legal precedent and marking a milestone in civil rights litigation on gender identity and LGBTI+ rights.

The Court recognised that the importance of gender identity extends beyond individuals who identify exclusively as either male or female, stating that:

"an individual's non-gendered identity is likely to be as important and integral a component of their personal and social identity as being either male or female is to the vast majority of society. Therefore, I readily accept that the claimant has a justifiably strong personal interest in gaining full legal recognition as being a non-gendered individual" (judgment, paragraph 112)

Although the Court found that Christie's Article 8 rights were engaged, it also found that there was a sufficiently wide margin of appreciation available to HMPO that the refusal to issue X passports was not in breach of Article 8. In particular, the Court found that the Government was entitled to complete its current review of the use of gender markers in official documents. However, it noted that the Government is required to undertake this review "*without any undue delay*." The Court noted that it may have reached a different conclusion had the Government completed its review process. The Court further stressed that:

"it will be necessary for the Government to consider to what extent if any, in an age of increasing social and legal awareness and acceptance of the importance of issues relating to diversity and equality, the recording of an individual's sex and/or gender in official and other documentation is justified"; and that "it will also be necessary to consider the extent to which other identities both within and beyond the binary concept of gender are to

be recognised, and if so, whether they are to be self-determined or are to be objectively evidenced' (judgment, paragraphs 149-150).

These findings mean the Government will no longer be able to delay its review and must give anxious and expeditious consideration to this area of policy and the human rights of non-gendered, intersex, trans, non-binary and other persons who do not identify, or identify exclusively as either male or female.

The Court's decision that the right to respect for private life under Article 8 of the ECHR includes a right to respect for a person's identification as non-gendered marks a significant development in the law in this area and is a helpful step towards full legal recognition of non-gendered persons.

ACCESS TO JUSTICE

Access to justice is central to Clifford Chance's Responsible Business strategy, and the firm is proud to have worked alongside Christie's Non-Gendered campaign for many years as it strives to attain recognition for individuals who do not identify as either male or female. Gender identity is a fundamental part of an individual's intimate, personal identity, and X passports are a crucial step in the protection of the human rights of this group of individuals, who otherwise face an unacceptable choice between forgoing a passport, and making a false declaration, and using a passport which misrepresents their essential and deeply held personal identity.

Clifford Chance is considering with Christie the possibility of seeking leave to appeal the judgment.

Christie was represented by partner Narind Singh, senior associate Eraldo d'Atri, associate Anne Collins, and trainee solicitor Jemima Roe from Clifford Chance, and Kate Gallafent QC and Tom Mountford from Blackstone Chambers. Human Rights Watch intervened in the case in support of Christie's claim, represented *pro bono* by Flora Robertson from Blackstone Chambers and Macfarlanes.

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