Neutral Citation Number: [2025] EWCA Civ 167

Case No: CA-2024-000474

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
DIVISIONAL COURT
Lady Justice Elisabeth Laing and Mrs Justice Heather Williams

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25 February 2025

Before :

THE PRESIDENT OF THE KING'S BENCH DIVISION
THE PRESIDENT OF THE FAMILY DIVISION
and
LORD JUSTICE SINGH

- -

Between :

THE KING (on the application of RYAN CASTELLUCCI)	**Appellant**
- and -	
(1) GENDER RECOGNITION PANEL	**Respondents**
(2) MINISTER FOR WOMEN AND EQUALITIES	

- -
- -

Chris Buttler KC and Marlena Valles (instructed by **Leigh Day**) for the **Appellant**
Sir James Eadie KC and Sasha Blackmore (instructed by the **Treasury Solicitor**) for the **2nd Respondent**
The **1st Respondent** did not appear and was not represented

Hearing date: 21 January 2025

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Approved Judgment

This judgment was handed down remotely at 10 a.m. on 25 February 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Singh:

Introduction

1. The first issue in this appeal is whether the Gender Recognition Act 2004 ("GRA") requires the issue of a Gender Recognition Certificate ("GRC") recording an applicant's gender as "non-binary", where that designation has been acquired by the applicant under the law of a different state or territory outside the United Kingdom which is recognised in this jurisdiction under section 2(4) of the GRA. If the answer is No, then a second issue arises: whether that interpretation of the GRA is incompatible with Article 14 of the European Convention on Human Rights ("ECHR"), when read with Article 8 (the right to respect for private life). If that interpretation is incompatible with the ECHR, then a third issue arises, as to the appropriate remedy: whether it is possible to give the GRA a compatible interpretation pursuant to the strong obligation of interpretation in section 3(1) of the Human Rights Act 1998 ("HRA") or whether the Court should grant a declaration of incompatibility under section 4(2).

2. This is an appeal against the order of the Divisional Court (Elisabeth Laing LJ and Heather Williams J) dated 17 January 2024, dismissing a claim for judicial review lodged in the Administrative Court, and dismissing a statutory appeal lodged in the Family Court under section 8(1) of the GRA. The claim for judicial review and the statutory appeal both challenged the decision of the Gender Recognition Panel ("GRP") to refuse to issue a GRC to Ryan Castellucci ("the Appellant"), under section 4(1) of the GRA.

3. The Appellant does not identify as either a man or a woman, but identifies as non-binary and uses the pronouns "they/them" and the title "Mx". Without prejudging the issues on this appeal, I will refer to the Appellant in those terms. Like Lord Reed PSC in *R (Elan-Cane) v Secretary of State for the Home Department* [2021] UKSC 56; [2023] AC 559, at para 2, I will adopt language in this judgment which is "intended to reflect the impartiality which is incumbent on the Court."

4. The Divisional Court gave a careful and comprehensive judgment, which has enabled me to set out much of the background and context by quoting what it said.

Factual background

5. I gratefully adopt the summary of the essential facts of this case by the Divisional Court, at paras 6-11 of the judgment:

> "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 'non-binary'. 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 … . 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 'non-binary', 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 GRC on the basis of your application having changed gender in California, where you were recognised as non-binary. 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 non-binary 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.'"

The proceedings in the High Court

6. The procedural history was complicated and was summarised by the Divisional Court at para 13 of its judgment:

> "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 'non-binary' ('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."

7. As the Divisional Court explained in the following paragraphs, eventually it became unnecessary to address the Part 8 claim. The appeal, which had been commenced in the Family Division, was transferred to the Divisional Court of the King's Bench Division, which also heard the claim for judicial review. The issues also became narrower and were in essence the issues which are now pursued in the appeal to this Court.

8. The Defendant to the judicial review proceedings was the GRP but, as a judicial body, it took the normal course of remaining neutral in the proceedings, and played no active part in them. In substance, it fell to the Minister for Women and Equalities to defend the proceedings and it is the Minister who has appeared before this Court to resist the appeal.

9. At paras 23-55, the Divisional Court helpfully summarised the evidence before it. This included the witness statements of both the Appellant and Anna Thompson, the Deputy Director of the Equality Hub in the Cabinet Office, filed on behalf of the Minister.

10. The evidence of the Appellant was summarised as follows by the Divisional Court, at paras 24-31:

> "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 para 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."

11. It is also important to set out the summary of Miss Thompson's evidence, at paras 38-40 of the Divisional Court judgment:

> "38. Miss 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 1978, 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 (SI 1987/2088) prescribe the particulars to be registered, including the child's sex. The legislation does not prescribe how sex is to be decided. Miss Thompson says that registrars rely on the test identified in *Corbett v Corbett (orse Ashley)* [1971] P 83 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. Miss 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 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 for 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."

12. As the Divisional Court summarised at paras 41-46, the Government had given consideration, including through consultations and reports, to the question whether domestic law should be amended to consider introducing a legal category for individuals with a gender identity outside the binary, and the full implications of this. The Government's position remained that no changes were currently needed and more research and consultation would be needed before any changes were contemplated.

13. At para 47, the Divisional Court summarised the evidence of Miss Thompson to the effect that the Government considered the list contained in the Gender Recognition (Approved Countries and Territories) Order 2011 (SI 2011 No 1630) ("the 2011 Order") to be out of date. She explained that the state of California did not recognise non-binary genders at the time of the 2011 Order and did not do so until 2017. Since the Divisional Court proceedings, the state of California has been removed from the relevant list by the Gender Recognition (Approved Countries and Territories and Saving Provision) Order 2024 ("the 2024 Order").

14. At paras 48-51, the Divisional Court summarised the evidence of Miss Thompson relating to the position internationally:

> "48. Miss 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. Miss 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. Miss 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."

15. At paras 52-54, the Divisional Court summarised Miss Thompson's evidence about the consequences that would follow for domestic practice in a number of Government departments should domestic law recognise a non-binary or third gender. The position was summarised as follows, at para 54 of the judgment:

> "54 Having set out these implications, Miss 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 impact 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.'"

16. At para 55, the Divisional Court summarised Miss Thompson's position in relation to the Appellant:

> "In the last section of her statement, Miss 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. Miss 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."

The Gender Recognition Act 2004

17. I will set out here the key provisions in the GRA. Where other provisions are relevant, I will set them out below in the course of addressing particular issues.

18. Section 1 of the GRA ("Applications") provides, so far as relevant:

> "(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 of the country or territory concerned…."

19. Section 2 ("Determination of applications") provides, so far as relevant:

> "…
>
> (2) In the case of an application under section 1(1)(b), the Panel must grant the application if satisfied—
>
> (a) that the country or territory under the law of which the applicant has changed gender is an approved country or territory, and
>
> (b) that the applicant complies with the requirements imposed by and under section 3…."

20. Section 9 ("General" within the heading "Consequences of issue of gender recognition certificate etc.") provides:

> "(1) Where a full gender recognition certificate 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."

Preliminary observations

21. Before I turn to each of the specific issues in this appeal, it is important to note some fundamental points about the context in which they arise. This is a case about a gender status (non-binary) which has been recognised in a foreign state or territory. It is not about whether such a status exists in domestic law.

22. On behalf of the Appellant Mr Chris Buttler KC accepts that the word "gender", when used in the GRA to refer to the domestic law route, means either the male gender or the female gender and nothing else, in other words it is a binary status in domestic law. He also accepts that there is nothing in the ECHR which would compel the UK to change its law so as to recognise non-binary status in domestic law.

23. At the hearing before us Mr Buttler accepted that it follows that, even if this appeal succeeds, there would be many situations in practice where the Appellant would have to be placed into one of the two genders (male or female) which are currently recognised in this jurisdiction. But he submits that that is already something that the authorities have to do. Further, he submits, the impact on the Appellant should not be discounted as having no practical significance, despite that legal reality.

24. In this context he reminded us of the well-known passage in the judgment of Lady Hale DPSC in *R (C) v Secretary of State for Work and Pensions* [2017] UKSC 72; [2017] 1 WLR 4127, at para 1:

> "… Gender dysphoria is something completely different – the overwhelming sense that one has been born into the wrong body, with the wrong anatomy and the wrong physiology. Those of us who, whatever our occasional frustrations with the expectations of society or our own biology, are nevertheless quite secure in the gender identities with which we were born, can scarcely begin to understand how it must be to grow up in the wrong body and then to go through the long and complex process of adapting that body to match the real self. But it does not take much imagination to understand that this is a deeply personal and private matter; that a person who has undergone gender reassignment will need the whole world to recognise and relate to her or to him in the reassigned gender; and will want to keep to an absolute minimum any unwanted disclosure of the history. This is not only because other people can be insensitive and even cruel; the evidence is that transphobic incidents are increasing and that transgender people experience high levels of anxiety about this. It is also because of their deep need to live successfully and peacefully in their reassigned gender, something which non-transgender people can take for granted."

25. I accept all of that and would not wish to play down the personal and psychological impact of current law on the Appellant but, at the end of the day, the Court must apply the law impartially and nothing else.

The first issue: interpretation of the GRA

26. The Appellant's first ground of appeal is that the Divisional Court erred in finding that, on an ordinary construction of the GRA, the Appellant was not permitted to obtain a GRC recording their foreign-acquired gender as non-binary.

27. Under this ground of appeal, Mr Buttler's first main submission is that, as a matter of ordinary language, the Appellant clearly falls within the words of section 1(2)(b) of the GRA: "the gender to which the person has changed under the law of the country or territory concerned". Mr Buttler submits that it is clear that, under the law of the state of California, the Appellant *has* changed gender to non-binary. Indeed, that is the Appellant's only gender as a matter of the law of California.

28. Mr Buttler also submits that, insofar as there might be public policy concerns about the appropriateness of giving effect to the law of a foreign country or territory, the control mechanism which Parliament has created is to confer power on the Secretary of State to designate foreign countries or territories only where it is thought appropriate to do so. Furthermore, Parliament has provided that an order made under that delegated power must be approved by an affirmative resolution by both Houses of Parliament. At the time of the present case, the relevant order was the 2011 Order, which had been approved by a resolution of each House of Parliament. This included the state of California in a schedule. Although, since 9 April 2024, the state of California has been removed from the schedule in the 2024 Order, it is clear from the saving provision (Article 4 of that Order) that this change in the law does not apply to applications which had not been determined before the date that the Order came into force. Accordingly, it is the 2011 Order that was and remains applicable to this case.

29. Mr Buttler submits that giving effect to the law of a foreign country or territory in this way respects the principle of international comity and no doubt gives effect to the underlying rationale that there should be legal certainty and stability in relations between people, for example when they cross frontiers.

30. Mr Buttler relies for his approach to interpretation on the decision in *R v Wimbledon Justices, ex parte Derwent* [1953] 1 QB 380, at 384, where Lord Goddard CJ said that: "the court … cannot add words to a statute or read words into it which are not there". Similarly, in *R v Oakes* [1959] 2 QB 350, at 354, Lord Parker CJ said that: "Where the literal reading of a statute … produces an intelligible result, clearly there is no ground for reading in words or changing words according to what may be the supposed intention of Parliament".

31. Mr Buttler submits that there was no proper basis for the Divisional Court to read in words "to male or female" into section 2(2)(a) of the GRA. He submits that there is nothing absurd about that literal reading of the statute. Parliament simply did what it has done in a number of other contexts: it provided for the recognition of a foreign-acquired status that cannot be acquired under domestic law, for example a polygamous marriage or a civil partnership which is within prohibited degrees of relationship in domestic law, for example under the law of Hawaii.

32. I do not accept that it is appropriate to adopt a literal approach to the interpretation of the GRA, even if it did assist Mr Buttler, which Sir James Eadie KC disputes on behalf of the Respondent. The modern approach to statutory interpretation has been

authoritatively settled by the Supreme Court in a number of recent decisions, for example in *R (O) v Secretary of State for the Home Department* [2022] UKSC 3; [2023] AC 255, at paras 29-31 (Lord Hodge DPSC). As Lord Hodge said there:

> "Words and passages in a statute derive their meaning from their context. A phrase or passage must be read in the context of the section as a whole and in the wider context of a relevant group of sections. Other provisions in a statute and statute as a whole may provide the relevant context."

See also *R (Paccar Inc) v Competition Appeal Tribunal* [2023] UKSC 28; [2023] 1 WLR 2594, at para 40-44 (Lord Sales JSC). As Lord Sales said at para 41, "there are numerous authoritative statements in modern case law which emphasise the central importance in interpreting any legislation of identifying its purpose."

33. Lord Sales cited with approval what had been said by Lord Bingham of Cornhill in *R (Quintavalle) v Secretary of State for Health* [2003] UKHL 13; [2003] 2 AC 687, at para 8:

> "Every statute other than a pure consolidating statute is, after all, enacted to make some change, or address some problem, or remove some blemish, or effect some improvement in the national life. The court's task, within the permissible bounds of interpretation, is to give effect to Parliament's purpose. So 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."

34. Mr Buttler's second main submission is that the word "gender" is used in different senses in different parts of the GRA, including different parts of section 1. He submits that, while the domestic law route in the GRA recognises only two genders (male and female), there is no reason why "gender" in the context of the foreign law route has to be restricted to those two genders.

35. In support of that submission, he relies on the decision of the Supreme Court in *Assange v Swedish Prosecution Authority* [2012] UKSC 22; [2012] 2 AC 471, in particular at para 55 in the judgment of Lord Phillips PSC, where it was recognised that, when considering the meaning of a word or phrase that is used more than once in the same instrument, one starts with a presumption that it bears the same meaning wherever it appears, but that this is not an irrebuttable presumption. It depends upon the nature of the word or phrase in question and the contexts in which it appears in the instrument.

36. For his part Sir James Eadie does not quarrel with the general principle but does submit that, in the present context, the word "gender" should be treated in accordance with the normal presumption that it bears the same meaning wherever it appears in the GRA.

37. In the present context I can see no reason not to apply the general presumption that when the same word is used in legislation, particularly in the same section, it was intended by Parliament to have the same meaning. In any event, that is the interpretation which I would give to the use of the word "gender" in the GRA, in particular in section 1, for the following reasons.

38. First, the opening words of section 1(1) ("A person of either gender …") govern not only the domestic law route for applying for a gender recognition certificate but also the foreign law route: see para (b). The use of the word "either" is a strong indicator that Parliament used the word "gender" in a binary sense, that is either male or female.

39. Secondly, the phrase "the acquired gender", which is defined in section 1(2) (see the interpretation provision in section 25(1)) applies to both a domestic law case under para (a) and to a foreign law case under para (b). It is highly unlikely, in my view, that Parliament intended to use the word "gender" in different senses in the same subsection.

40. Thirdly, and most importantly, the terms of section 9(1) of the GRA are inconsistent with the interpretation advanced by Mr Buttler. This provides that:

> "Where a full gender recognition certificate 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)."

41. It is significant that the words in parentheses in that subsection do not say something like "for example" or "so that, for example". I accept Sir James Eadie's submission that the clear meaning and effect of section 9(1) is that the words in parentheses explain what the legal *consequence* of the first part of that subsection is: the words in parentheses are not merely illustrative.

42. The provision in section 9(1) is a fundamental feature of the GRA. This is the primary means by which Parliament has given effect to the judgment of the European Court of Human Rights in *Goodwin v United Kingdom* (2002) 35 EHRR 18 and the declaration of incompatibility made by the House of Lords in *Bellinger v Bellinger* [2003] UKHL 21; [2003] 2 AC 467. This provision was necessary in order to remedy the breach of the ECHR which existed in the law before the GRA was introduced in 2004. I do not accept Mr Buttler's suggestion that section 9(1) merely creates a mandatory relevant consideration, which a public authority must take into account. Section 9(1) creates a legal status where a certificate has been issued and has the effect that, as a matter of law, a person's gender becomes "for all purposes" the acquired gender. True it is that this is "subject to" provisions made either in the GRA itself or in any other enactment or any subordinate legislation: see section 9(3). But, unless one of those statutory exceptions applies, the general position is as set out in section 9(1). It is clear that, in using the words "the acquired gender" in section 9(1), Parliament had in mind the binary concept of either the male gender or the female gender.

43. Mr Buttler's third main submission is that the GRA should be regarded as a "speaking Act", in other words that, even if non-binary status was not what Parliament had in mind when it enacted the GRA in 2004, it should now be interpreted in such a way that that concept can be regarded as falling within its terms.

44. Both parties before us drew our attention to the well-known statement of principle by Lord Wilberforce in *Royal College of Nursing of the United Kingdom v Department of Health and Social Security* [1981] AC 800, at 822:

> "In interpreting an Act of Parliament it is proper, and indeed 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. Leaving aside cases of omission by inadvertence, this being not such a case, when a new state of affairs, or a fresh set of facts bearing on policy, 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 upon 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 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 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 the answer is not to be found in the terms of the Act itself.
>
> In my opinion this Act should be construed with caution. It is dealing with a controversial subject involving moral and social judgments on which opinions strongly differ. It is, if ever an Act was, one for interpreting in the spirit that only that which Parliament has authorised on a fair reading of the relevant sections should be held to be within it. The new (post-1967) method of medical induction is clearly not just a fresh species or example of something already authorised. The Act is not for 'purposive' or 'liberal' or 'equitable' construction. This is a case where the courts must hold that anything beyond the legislature's fairly expressed authority should be left for Parliament's fresh consideration."

45. I bear in mind that Lord Wilberforce was in the dissenting minority in that case but also bear in mind that the first paragraph of the above passage was described by Lord Bingham as "authoritative" in *Quintavalle*, at para 10.

46. I do not accept Mr Buttler's submission. This is not a context in which the "speaking Act" doctrine can properly be applied.

47. The legislative background to the GRA was set out as follows by the Divisional Court, at paras 66-70. No issue has been taken with that summary, which I also consider to be accurate. The Divisional Court said:

> "66. The applicant in *Goodwin v 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* [2002] Fam 150 (see the next paragraph) had been decided by the Court of Appeal (see *Goodwin*, paras 52-53).
>
> 68. The appellant in *Bellinger v Bellinger* [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 of Birkenhead and Lord Hope of Craighead 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 Buttler rightly accepted that the GRA was enacted as a response to *Goodwin* and to *Bellinger v Bellinger*."

48. Furthermore, as Mr Buttler accepts, the concept of "gender" in the GRA, when referred to in the context of the domestic law route, is confined to two genders. Mr Buttler submits that, nevertheless, when used in the context of the foreign law route, the concept of "gender" includes the possibility of a non-binary status. If Mr Buttler were correct, the effect would be that, silently and by a sidewind, Parliament introduced what would otherwise be a fundamental change to the law. It could easily have done so expressly and, in my view, one would have expected it to do so, especially given the sensitive and potentially controversial nature of that change: see the evidence of Miss Thompson, which I have summarised above.

49. That is not to say that Parliament could not introduce the concept of non-binary gender into the foreign law route or even the domestic law route, no doubt after appropriate public consultation and consideration of advice from authoritative bodies such as the Law Commission. That is not, however, what Parliament has done in the

GRA. And it has not done so even in the case of foreign countries or territories under whose law such a non-binary concept is recognised.

The relevance of EU law

50. I should address one argument advanced on behalf of the Appellant, which does not appear to have been advanced in the Divisional Court and was not the subject of oral submissions before this Court although it was set out in the Appellant's skeleton argument.

51. Mr Buttler indirectly invokes European Union ("EU") law by way of analogy. He draws attention to section 21 of the GRA, which at one time provided that:

> "(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 enforceable Community rights."

52. After the UK left the EU the GRA was amended, so that section 21(6) stated that:

> "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."

53. The reference to "retained EU law" has, after the end of 2023, now been changed to "assimilated law": see section 5(1) of the Retained EU Law (Revocation and Reform) Act 2023.

54. Mr Buttler submits that, if an EU national had obtained recognition of a gender other than male or female in a Member State (for example Germany, which we were informed recognises a concept of "diverse" gender) and had then moved to another Member State in exercise of their free movement rights, the host Member State would be obliged to recognise that foreign-acquired gender. Mr Buttler also submits that Parliament did not caveat section 21(6) of the GRA to suggest that it was only applicable in cases where a person exercising an EU right had obtained a binary gender recognition certificate.

55. There are several difficulties in the way of this line of argument. First, the present case does not concern EU law or its residual effect in domestic law as "assimilated" law.

56. Secondly, Mr Buttler was not able to draw the Court's attention to any decision of the Court of Justice of the European Union which would support his submission. The decisions which he did cite did not concern the concept of non-binary gender. For example Case-4/23 *Mirin* ECLI:EU:C:2024:845 concerned a binary gender certificate. The claimant was a Romanian national born in Romania and registered female at birth. The claimant moved to the UK and obtained a GRC through the domestic route under section 1(1)(a) of the GRA, changing legal gender to male in 2020. In 2021 the claimant requested the Romanian authorities to register this change in legal gender but the Romanian authorities rejected that request on the ground that under Romanian law a person must initiate new judicial proceedings in Romania to seek authorisation of the gender identity change. The Court of Justice found that this was a breach of the right to free movement, contrary to Article 20 and Article 21 of the Treaty on the Functioning of the European Union.

57. The other principal authority on which Mr Buttler relied, C-490/20 *VMA v Stolichna Obshtina, Rayon "Pancharevo"* [2022] 2 CMLR 22, did not concern a change of gender at all. It concerned a same-sex couple who gave birth to their child in Spain and were both listed as the parents in Spanish law. When they moved to Bulgaria they were refused a birth certificate for their child on the ground that Bulgarian law did not recognise same-sex marriages. The Court of Justice held that Bulgaria was obliged under EU law to issue a birth certificate recording that both women were the parents.

58. I am not persuaded by the suggested analogy with other contexts, such as the rights of a same-sex couple exercising free movement rights. In the light of the absence of international consensus, even within the Council of Europe or the European Union, about non-binary status, it must be a matter of pure speculation what the Court of Justice might say if such a case does arise in the future.

59. Thirdly, even if Mr Buttler's argument about the effect of EU law were well-founded, it is at least arguable that it would only require an exception to be made to the general position where a case falls within the scope of EU law: see, by way of analogy, *Imperial Chemical Industries plc v Colmer (HM Inspector of Taxes) (No 2)* [1999] 1 WLR 2035, at 2041 (Lord Nolan). The present case does not fall within the scope of EU law because the Appellant is from the US.

60. I should also mention in this context an argument which Mr Buttler did advance at the hearing before this Court. He drew attention to the Malta Gender Identity, Gender Expression and Sex Characteristics Act 2015 (chapter 540). In particular, he relied on Article 9. Article 9(1) provides that:

> "A final decision about a person's gender identity which has been determined by a competent foreign court of responsible authority acting in accordance with the law of that country shall be recognised in Malta by virtue of a public deed of recognition …"

Article 9(4) provides:

> "Gender markers, not recognised by this Act, but recognised by a competent foreign court or responsible authority acting in

> accordance with the law of that country shall be recognised in Malta."

61. In my view, this does not advance Mr Buttler's arguments at all. To the contrary, it might be said to provide an example of the kind of legislation which one would expect to see in this jurisdiction if effect is to be given to a concept like non-binary status, where it is recognised by a responsible authority in a foreign jurisdiction (here California) but not recognised by domestic law. The Maltese legislature was clearly alive to that possibility and has expressly provided for it even in circumstances where a gender marker is not recognised by the Maltese Act itself: that simply illustrates the fundamental point made by Sir James Eadie on behalf of the Respondent, that the issue is one for the UK Parliament to consider, and to change the law if that is thought to be desirable. It certainly does not assist Mr Buttler in the submission he makes as to the correct interpretation of the current law in this country.

62. For the above reasons I would reject Ground 1 in this appeal.

<u>The second issue: Article 14 of the ECHR</u>

63. The Appellant's second ground of appeal is that the Divisional Court erred in concluding that there were weighty reasons that proportionately justified the difference in treatment between a foreign-acquired non-binary gender compared to those with a foreign-acquired binary gender for the purposes of Article 14 of the ECHR.

64. There is no dispute about the relevant principles which arise under Article 14. They are as set out by Lady Hale PSC in *Re McLaughlin* [2018] UKSC 48; [2018] 1 WLR 4250, at para 15:

> "As is now well known, this raises four questions, although these are not rigidly compartmentalised:
>
> (1) Do the circumstances 'fall within the ambit' of one or more of the Convention rights?
>
> (2) Has there been a difference of treatment between two persons who are in an analogous situation?
>
> (3) Is that difference of treatment on the ground of one of the characteristics listed or 'other status'?
>
> (4) Is there an objective justification for that difference in treatment?"

65. It is also common ground that, in addressing the fourth of those questions, which raises the issue of proportionality, there are a further four questions to be asked, as

summarised by the Court of Appeal in *R (McConnell) v Registrar General for England and Wales* [2020] EWCA Civ 559; [2021] Fam 77, at para 59:

> "(i) Is there a sufficiently important objective which the measure pursues?
>
> (ii) Is there a rational connection between the means chosen and that objective?
>
> (iii) Are there less intrusive means available?
>
> (iv) Is there a fair balance struck between the rights of the individual and the general interests of the community?"

66. As Mr Buttler submits, the Divisional Court accepted that the treatment of the Appellant fell within the ambit of Article 8, the difference in treatment is on the ground of a relevant status, and there was differential treatment. Accordingly, the critical issue in the present case is whether there is objective justification for the difference in treatment.

67. Further, Mr Buttler asks us to bear in mind that the Divisional Court assumed in the Appellant's favour that "very weighty reasons" are required to justify the difference in treatment of which the Appellant complains. He reminds us that there is no Respondent's Notice to put these matters back in issue.

68. The reason why Mr Buttler formulates the comparator group as he does is that he recognises, as he must, that he cannot properly complain about the difference in treatment as between a *domestic* law case and a *foreign* law case. He accepts in the context of these proceedings that he is precluded from making such an argument. This is relevant not only because he has withdrawn his argument under Article 8 but because, under Article 14, he does not and cannot argue that the failure of domestic law to recognise a non-binary gender is incompatible with the ECHR. That difference in treatment is not therefore one which the UK is required to justify as being proportionate under Article 14. Rather Mr Buttler complains that the interpretation given to the GRA by the Divisional Court, if upheld by this Court, gives rise to a disproportionate and unjustified discrimination as between two persons who have changed gender under the law of a foreign country or territory. If they acquire a binary status (male or female), the GRA will lead to that status being recognised and given effect in the UK as well. In contrast, if (like this Appellant) they have acquired a non-binary status, that will not be given effect in the UK.

69. In my judgment, this argument fails for the same reason as the fundamental argument would founder if Mr Buttler did complain about the difference in treatment as between a domestic law case and a foreign law case. This is because he still in effect requires domestic law to recognise a non-binary status (albeit one acquired in another country or territory), something which it is not otherwise required to do under the ECHR.

70. Furthermore, I agree with the Divisional Court that, even if the decision in *Elan-Kane* is not strictly binding in this context, it provides powerful authority against the submissions made by Mr Buttler. The two aspects of the justification which weighed with the Supreme Court in that case which would be equally applicable to the present context are, first, the coherence of the legal and administrative system in the UK; and, secondly, the cost which would be incurred by the state in having to change the current system. I therefore turn to the decision in *Elan-Cane* in more detail.

71. The claimant in that case challenged the policy of the Passport Office to require applicants for UK passports to state their gender as either male or female and to issue passports bearing a male or female indicator in the "sex" field. The claimant, who had been born with female physical sexual characteristics but identified as having no gender, wished to have an "X" marker in their passport. The claim was brought under both Article 8 of the ECHR and Article 14. The judgment was given by Lord Reed PSC, with whom the other members of the Supreme Court agreed.

72. At paras 30-33 of his judgment, Lord Reed said that the question under Article 8 should be analysed as being whether there is a positive obligation upon the Secretary of State to provide the appellant with an "X" passport in order to secure the appellant's right to respect for private life. He said that there had been no judgment of the European Court of Human Rights which established such a positive obligation but that the European Court had generally analysed cases concerned with gender identity "from the perspective of whether the respondent state has failed to comply with its positive obligation to secure to the persons concerned their right to respect for private life under Article 8", citing, for example, the Grand Chamber judgment in *Hämäläinen v Finland* (2014) 37 BHRC 55, at paras 64-67.

73. At paras 52-54, Lord Reed said the following:

> "52. As was explained in evidence, there is no legislation in the United Kingdom which recognises a non-gendered category of individuals. On the contrary, legislation across the statute book assumes that all individuals can be categorised as belonging to one of two sexes or genders (terms which have been used interchangeably). Some rights differ according to whether a person is a man or a woman: for example, rights of succession to hereditary titles. There are criminal offences that can only be committed against persons of a particular gender: for example, female genital mutilation. There is a raft of legislation which assumes that only a woman can give birth to, or be the mother of, a child, including legislation relating to maternity rights and benefits, health provision and fertility treatment, and nationality. The legislation governing the registration of births requires the sex of children to be recorded. Legislation relating to marriage and civil partnership (including legislation permitting same sex marriages) assumes that everyone is either a man or a woman. **The Gender Recognition Act 2004, enacted following the judgment of the European court in *Goodwin v United Kingdom*, likewise assumes that all individuals belong to one of two genders, albeit not necessarily the gender recorded at birth**. Equality

> legislation protects people from discrimination if it arises from their being a man or a woman.
>
> 53. A binary approach to gender also forms the basis of the provision of a wide variety of public services. The prison estate, for example, is divided into male and female prisons. Hospitals have wards where patients can only be of a single sex. Local authorities may fund rape crisis centres or domestic abuse refuges which o›er their services only to women. Many schools only admit pupils of a particular sex. Much of this is underpinned by, or permitted by, legislation.
>
> 54. Against this background, it is apparent that the questions whether other gendered categories should be recognised beyond male and female, including a non-gendered category, and if so, on what basis such recognition should be given, raise complex issues with wide implications. Counsel for the appellant argued that the courts below had erred in treating the coherent treatment of individuals in the appellant's position as a significant consideration. On the contrary, the courts were right to conclude that the need for a legally and administratively coherent system for the recognition of gender was an important factor." (Emphasis added)

74. Turning to the concept of the margin of appreciation, one of the factors which Lord Reed emphasised, in particular at paras 58-60 was the absence of any international consensus, in the Council of Europe and elsewhere. At para 58, he emphasised that:

> "… courts, including the European court, are expert in adjudication. They do not, on the other hand, possess the capacity, the resources, or the democratic credentials to be well-suited to social policy-making. When adjudication by the European court requires it to consider questions of social policy, it accordingly finds guidance in a consensus on the part of the contracting states, and is cautious before embarking on such policy-making in the absence of a consensus."

75. At paras 64-67, Lord Reed more briefly rejected the appellant's argument based on Article 14 in that case, essentially for the same reasons as he had rejected the argument under Article 8.

76. Returning to the present case, it is important to bear in mind the following considerations when assessing the issue of proportionality under Article 14 of the ECHR.

77. First, as the evidence of Miss Thompson makes clear, there is no general consensus, either in the Council of Europe or more generally around the world, in favour of recognising non-binary status.

78. Furthermore, this is an area of social policy which is highly sensitive and potentially controversial, thereby being better suited to resolution in Parliament rather than in the courts. This is not only for reasons of democratic legitimacy but also for reasons of institutional competence: see *McConnell*, in particular at paras 81-82.

79. Thirdly, as Lord Reed said in *Elan-Cane*, at para 63, it has long been recognised both by the House of Lords and by the Supreme Court that, although it is open to domestic courts to develop the law in relation to Convention rights beyond the limits of the Strasbourg case law, on the basis of the principles established in that law, they should not go further than they can be confident that the European Court would go.

80. This brings me back to the fundamental reason why I would reject Mr Buttler's submission that the GRA, on the above interpretation, is incompatible with Article 14 of the ECHR. The consequence of his submission would be to require the UK to recognise a non-binary status in domestic law (albeit only in cases coming through the foreign law route) in circumstances in which it is not otherwise required to do so by the ECHR. Recognising that non-binary status in domestic law would have the consequences for other parts of the legal and administrative system to which the Supreme Court drew attention in *Elan-Cane* and which Miss Thompson sets out in her evidence in these proceedings. It would also have cost implications. Accordingly, the Respondent has shown that there is an objective justification for the difference in treatment about which Mr Buttler complains and the principle of proportionality is satisfied.

81. For those reasons, like the Divisional Court, I have reached the conclusion that the GRA is not incompatible with Article 14 of the ECHR.

The third issue: remedy

82. If, contrary to the conclusions to which I have come, there were any incompatibility between the GRA with the ECHR, the question would arise as to how this Court can and should remedy that incompatibility. I do not accept that this Court could give the GRA an interpretation of the kind which the Appellant would require, even pursuant to the strong obligation in section 3(1) of the HRA. This would go "against the grain" of the GRA and would be inconsistent with "a fundamental feature" of it: see *Ghaidan v Godin-Mendoza* [2004] UKHL 30; [2004] 2 AC 557, for example at para 33 (Lord Nicholls).

83. The only remedy that would then be available would be a declaration of incompatibility under section 4(2) of the HRA. That issue does not, however, arise, because neither section 3 nor section 4 can have any role to play in circumstances where there is no incompatibility with the Convention rights on the interpretation which this Court would otherwise give to legislation.

Conclusion

84. For the reasons I have given, which are essentially the same as those of the Divisional Court, I would dismiss this appeal.

Sir Andrew McFarlane PFD:

85. I agree.

Dame Victoria Sharp PKBD:

86. I also agree.