



“The Court orders that no one shall publish or reveal the names/former names or addresses/former addresses of the Appellant or her lay witnesses or those of the Intervener (excluding James Morton) who are involved in these proceedings or publish or reveal any information which would be likely to lead to the identification of them in connection with these proceedings.”

1 November 2017

PRESS SUMMARY

R (on the application of C) (Appellant) v Secretary of State for Work and Pensions (Respondent) [2017] UKSC 72
On appeal from [2016] EWCA Civ 47

JUSTICES: Lady Hale, Lord Kerr, Lord Wilson, Lord Carnwath, Lord Hughes

BACKGROUND TO THE APPEAL

The issue in this appeal is whether certain policies adopted by the Department of Work and Pensions (DWP) in the administration of the welfare benefits system are, when applied to people with a reassigned gender, in breach of the Gender Recognition Act 2004 (‘the GRA’), the Human Rights Act 1998 (‘the HRA’) or the Equality Act 2010 (‘the EA’).

The appellant C has undergone gender reassignment from male to female. She was issued with a gender recognition certificate (GRC) in 2006. Since June 2010 she has been unemployed, apart from a period in 2015-16. In order to receive Jobseekers Allowance (JSA) she has to attend a Jobcentre Plus (JCP) office in person every two weeks.

The DWP uses a centralised database, the Customer Information System (CIS), to record information about each of its customers, including his or her current sex, the fact that he or she was previously recorded as having a different sex (if applicable), his or her current name and title, and his or her former names and titles (if applicable), the fact that a person has a GRC and its date, and the reason for a change of recorded sex being gender reassignment (if this is the case). These data are held for the life of the individual concerned and for 50 years and a day thereafter (‘the Retention policy’). This is because gender at birth at present remains relevant to the calculation of state pension entitlement, and in order to detect fraud. The fact of a GRC and the reason for a change of recorded sex being gender reassignment is no longer visible to front-line staff, but any previous name, title or gender is visible.

Access to an individual’s CIS record is not required for the routine issue of benefit payments, but it will be required, for example, to make routine changes, such as a change of address. However, the DWP also has a Special Customer Records policy (‘the SCR policy’) which applies to certain categories of customer who require extra protection for their privacy and is routinely applied to transgender customers unless they ask otherwise. This requires specific authorisation for access. This has the effect that there are delays in accessing the account to authorise payment and it alerts the front-line staff to the probable reason for the restricted access. C has suffered distressing incidents at JCP offices when her transgender status has been openly referred to.

After exploring possible alterations with the DWP, C issued proceedings in 2012. The High Court made a declaration that the Retention Policy was in breach of the right to respect for private life protected by article 8 of the European Convention on Human Rights (ECHR) as it was not sufficiently

clear and accessible to be ‘in accordance with the law’. It has now been clarified. Her appeal to the Court of Appeal against the dismissal of her other claims was dismissed.

JUDGMENT

The Supreme Court unanimously dismisses the appeal. The Retention and SCR policies are not unlawful under the GRA, the HRA or the EA. Lady Hale gives the only substantive judgment.

REASONS FOR THE JUDGMENT

Lawfulness under the GRA

S 9 GRA provides that where a GRC is issued a person’s gender ‘becomes for all purposes’ the acquired gender. It does not rewrite history or require the previous state of affairs to be expunged from official records, but other sections offer additional protection against inappropriate official disclosure of that prior history [23-25]. The Retention and SCR policies are not therefore inconsistent with or prohibited by any provision of the GRA [26].

Lawfulness under the HRA

The Retention and SCR policies do constitute a very serious interference with the rights of transgender people to respect for their private life protected by article 8 ECHR [31]. The justifications relied on by the DWP – the need to retain information for the time being for the purposes of calculating state pension rights, and to identify and detect fraud – are legitimate [34] and rationally connected with the policies [35]. The question is whether the policies are proportionate. In carrying out the balancing exercise it is relevant that front line staff will only rarely have to access the CIS, that the DWP has been engaging with C over many years to try to understand and cater for her concerns, that it is no simple matter to modify existing computer systems designed to cater for vast numbers of customers, which interact with one another in complex ways, and that it is not possible to make further adjustments to the CIS without inordinate expense. It is not for the courts to administer the benefits system [36].

The Retention policy is therefore a proportionate means of achieving its legitimate aims [37]. The SCR policy cannot be considered in isolation from it. It has the legitimate aim of protecting the privacy of those customers who need and want it. The problems associated with it are inevitable if access to the CIS is to be restricted. It too is justified [38].

Lawfulness under the EA

There is no direct discrimination on the ground of gender reassignment [43]. The details of all customers who change their names and titles are recorded on the CIS [42]. Transgender customers who need and want it are treated differently under the SCR policy [41]. They are not treated less favourably as a result of their transgender status.

The claim of indirect discrimination also fails. The court accepts that gender reassignment changes one’s identity at a much deeper level than name changes for other reasons. However the SCR policy is a proportionate means of achieving a legitimate aim for the purposes of s 19(2)(d) EA and for the same reasons any discrimination is justified for the purposes of article 14 of the ECHR [44].

References in square brackets are to paragraphs in the judgment

NOTE

This summary is provided to assist in understanding the Court’s decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at:

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