



Neutral Citation Number: [2020] EWCA Civ 363

Case No: C4/2018/2086

**IN THE COURT OF APPEAL (CIVIL DIVISION)**  
**ON APPEAL FROM THE HIGH COURT OF JUSTICE**  
**QUEEN'S BENCH DIVISION**  
**ADMINISTRATIVE COURT**  
**Mr Justice Jeremy Baker**  
**[2018] EWHC 1530 (Admin)**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 10/03/2020

**Before:**

**LADY JUSTICE KING**  
**LORD JUSTICE IRWIN**  
and  
**LORD JUSTICE HENDERSON**

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**Between:**

<b>THE QUEEN (ON THE APPLICATION OF ELAN-CANE)</b>	<b><u>Appellant</u></b>
<b>- and -</b>	
<b>THE SECRETARY OF STATE FOR THE HOME DEPARTMENT</b>	<b><u>Respondent</u></b>
<b>- and -</b>	
<b>HUMAN RIGHTS WATCH</b>	<b><u>Intervener</u></b>

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**Kate Gallafent QC, Tom Mountford and Gayatri Sarathy** (instructed by **Clifford Chance**)  
for the **Appellant**

**Sir James Eadie QC and Sarah Hannett** (instructed by **Government Legal Department**) for  
the **Respondent**

**Monica Carss-Frisk QC and Rachel Jones** (instructed by **MacFarlanes LLP**) for the  
**Intervener**

Hearing dates: 3rd-4th December 2019

**Approved Judgment**

## **Lady Justice King:**

1. This is an appeal from an order made by Mr Justice Jeremy Baker on 29 June 2018 whereby he dismissed the Appellant’s claim for judicial review. The Appellant submits that the refusal of the Government to allow the Appellant to apply for or be issued with a passport with an “X” marker in the gender field, indicating gender “unspecified”, is unlawful.
2. The judge held that as a non-gendered person the Appellant’s Article 8 right to respect for private life was engaged. However, he determined that the Government’s policy did not amount to an unlawful breach of that right. The issue before this court is whether the judge was wrong in his conclusion that there is no positive obligation on the Government to allow for an “X” marker in the passport application form.
3. In addition to the submissions made on behalf of the Appellant and the Secretary of State for the Home Department (“the SSHD”), the court has had the benefit of submissions made on behalf of Human Rights Watch as Interveners in the appeal. Their assistance has been invaluable, both in ensuring that the court has a full understanding of the terminology used in relation to the sensitive issues surrounding gender identity, but also in providing the court with a comprehensive picture of the approach taken internationally in relation to passports, and to gender issues generally.
4. For the purposes of this judgment, “transgender people” or “trans-people” refer to people who identify as the opposite gender from that to which they were assigned at birth. Such people may or may not have “transitioned” (that is to say, aligned their body with their gender identity by hormone treatment and/or surgery).
5. “Non-binary” people are those who identify their gender outside the male-female binary. Either included within or sitting alongside this category (which may be a matter of legitimate differences of opinion) are “non-gendered” people who, like the Appellant, identify as having no gender or describe their gender as neutral.

### *Background*

6. The detailed background is to be found in the judge’s judgment; *R (on the application of Christie Elan-Cane) v Secretary of State for the Home Department and Human Rights Watch* [2018] EWHC 1530 (Admin) from which the following summary is largely extracted.
7. The Appellant, who was 60 years of age at the date of the hearing, was born with female physical sexual characteristics and was therefore registered as female at birth. Throughout childhood the Appellant grew increasingly detached from the female gender. This had a profound effect on the Appellant’s emotional and psychological development to the extent that the Appellant decided, and was able to in 1989, at the age of 31, to undergo a bilateral mastectomy. This was followed in 1991 by a total hysterectomy. The second of these two surgical procedures was undertaken by the National Health Service.
8. The Appellant says that these procedures were successful in achieving the desired status of “non-gendered”, which was (the Appellant emphasises) a fact of life and not an alternative lifestyle choice.

9. From 1995 onwards, the Appellant has been in contact with Government Departments to seek to persuade the Government that a passport should be issued to the Appellant without the necessity of making a declaration of being either “male” or “female”. This could be achieved by a third box being added to the passport application form allowing a person to mark that box with an “X” indicating gender “unspecified”. The Appellant was informed that this was not possible because a declaration of gender was a mandatory requirement. In those circumstances, the Appellant applied for, and was issued with, a passport with a declaration of being female.
10. It was not until 2005 with the assistance of the Appellant’s MP, Simon Hughes MP, that the Appellant became aware that the United Nations body responsible for issuing specifications to member countries concerning air travel, the International Civil Aviation Organisation (“ICAO”), permits countries to issue passports with either “M”, “F”, or “X” in the section of the mandatory machine-readable zone dealing with sex. “M” and “F” indicate “male” and “female”, with “X” meaning “unspecified”. When this was raised with the Government Department which was at that time responsible for issuing passports, the Appellant was once again told that declaration of gender was a requirement.
11. In due course, several countries introduced “X” to indicate gender “unspecified” (referred to as an “X” marker’ in this judgment) to their passports, including Australia (2011) and New Zealand (2005).
12. It should be noted in this regard that, although the substantive judicial review was heard in April 2018, this court has, at the invitation of all of the parties, been brought up to date as to subsequent developments. The present position is that 11 countries world-wide allow for “X” markers in their passports. As of 2019, there are only 5 countries within the Council of Europe making such provision.
13. The Appellant continued to press for change over the next few years.
14. On 3 February 2014, Her Majesty’s Passport Office (“HMPO”) published a report containing the results of an “Internal Review of Existing Arrangements and Possible Future Options” in relation to “Gender Marking in Passports” (“the review”). In setting out its current policy at paragraph 1, it records:

“1.4 There is no provision in the passport or on the passport application form for a person to transition from one gender to one gender or to state that they do not identify in either gender. This is in line with UK legislation that recognises only the genders Male and Female.”
15. The review went on to set out the perceived benefits and potential impact of retaining gender details in passports. Referring specifically to the Appellant, the review noted:

“2.6. There have been very little public calls for the ‘X’ provision in the passport. A campaigner is in frequent contact with the Government Equalities Office, ourselves, other ministries and No 10 about recognition of the ability to choose both gender and not to be required to disclose gender. There are no calls for change from gender representative groups or civil

liberties groups. The campaigner has set up a petition seeking a change in the passport gender markings. To date this has attracted 667 signatures.”

16. At section 4, the review set out the legislative issues which it considered might arise for consideration. In particular it acknowledged that as passports are issued at the discretion of the Home Secretary, in the exercise of the royal prerogative, there would be no legislative requirement in domestic law to change the passport to allow an “X” marker. It suggested, however, that what may appear to be “a simple and inclusive change” to passports, could have “wider reaching consequences”. Section 4 goes on to confirm at paragraph 4.5 that there were “no plans across Government to introduce a third gender” and that, whilst HMPO have policies in place to deal with transgender people, they “specifically preclude recognition of a third gender”. Finally, at 4.7 the review said:

“HMPO could introduce recognition of a third gender but it would be in isolation from the rest of government and society. There are likely to be so few applications for such a passport but we would need to avoid issuing a document that was not recognised by other parts of government or wider UK society.”

17. The review sets out various options open to Government of which only two have any relevance to these proceedings, namely: option 1, “do nothing”; and option 5, “adding a third-gender marker “X”. In relation to the first option, the review stated:

“We have discussed gender with international partners and it was raised at the ICAO, Technical Advisory Group meeting in December 2012. ICAO is adopting a similar approach to the UK. That is maintaining a watching brief on this area of work with regular updates and reviews.”

18. In relation to the fifth option, the review stated:

“5.4 The option of having a third category, ‘X’, within the gender field in a passport is already permitted by the International Civil Aviation Organisation (ICAO) standards.”

19. The review then went on to raise eight concerns in respect of the fifth option all but one of which have subsequently been abandoned by the Government as justification for declining to add a third-gender “X” marker on passports. The review estimated that the overall cost of altering the passport application process by adding the “X” marker would be in the region of £2 million.

20. A letter setting out a detailed repudiation of the review was sent to the HMPO on the Appellant’s behalf on 30 June 2015. In responding to this letter the HMPO, whilst accepting that the issues raised by the Appellant may engage Article 8, denied that the lack of provision for “X” gender passports unlawfully interfered with the Appellant’s Article 8 rights. There was, the HMPO said, no positive obligation on the state to provide legal recognition of the many different ways in which individuals may define themselves, and in particular no obligation legally to recognise a non-gendered identity. The letter went on to suggest that there was no European or international consensus in

relation to the issue, and that the United Kingdom was entitled to a wide margin of appreciation. The HMPO indicated that it had carefully considered the issue and would continue to do so in alignment with societal developments.

21. On 14 January 2016, the House of Commons Women and Equality Committee published a report on “Transgender Equality”. Amongst many recommendations made was the following:

“56. The UK must follow Australia’s lead in introducing an option to record gender as “X” on a passport. If Australia is able to implement such a policy there is no reason why the UK cannot do the same. In the longer term, consideration should be given to the removal of gender from passports.”
22. On 3 October 2016, HMPO confirmed that it continued to rely upon all the points originally identified in the review. It reiterated that UK law “currently only recognises male and female genders”, that specification of gender is necessary for “identity purposes”, and that to introduce “X” gender marking “in isolation from the rest of government would be the wrong approach”. Any change, HMPO said, “must be considered across Government, ensuring the wider impact has been properly considered, to make sure that there is an aligned, consistent approach underpinned by legislation.”
23. As part of the Government’s response to the Women and Equalities Committee’s report in July 2016, the Government said that:

“The removal of any gender marking on the face of the passport is not currently an option under standards issued by the International Civil Aviation Organisation (ICAO). However, we have agreed with the ICAO Technical Advisory Group that the UK will conduct a survey with member states on gender and passport markings. The Group has agreed that the findings from the survey will formally be referred for action and next steps to one of the operational sub groups, the Implementation and Capacity Building Working Group (ICBWG). The aim is to report the findings from the survey by December 2016 to the ICBWG...”
24. On 13 January 2017, HMPO accordingly wrote to 170 states of the UN for this purpose and a draft report was produced. On 9 October 2017, HMPO followed up the draft report with a questionnaire, this time sent to 165 UN member states. The questionnaire was designed to investigate the use and acceptance of “X” markers on passports by different countries. As of 18 December 2017, 20 responses had been received. No further action has been taken on this piece of work.
25. In January 2017, the Government conducted an internal review on the wider issue of the necessity, or otherwise, of gender markers in official documents generally. The court was told that, whilst work was intended to continue as comprehensive information from various Departments was sought, there was delay because of current pressures (engendered largely by Brexit) on all Government Departments.

26. In October 2017 the Government Equalities Office (GEO), through the Foreign and Commonwealth Office, sought information from a number of countries in relation to the issue of the legal recognition of a third gender and its inclusion on identity documents, specifically in order to inform its approach in these proceedings.
27. In July 2018 the Government launched a consultation on amendments to the Gender Recognition Act 2004 (“GRA 2004”), which included the question: “Do you think there need to be changes to the GRA 2004 to accommodate individuals who identify as non-binary?”. That consultation closed in October 2018 and the analysis shows that most respondents (64.7%) thought that such changes needed to be made.
28. No further action has been taken on this piece of work because the Government were, and remain, of the view that the addition of the “X” marker should not be dealt with in isolation, but rather needs to be part of a co-ordinated approach across Government with regard to non-binary gender identity.
29. Turning back to July 2017, the Government at that stage launched a national survey of LGBT+ people which closed in October 2017. This resulted in 108,000 responses being received. Following receipt of those responses, on 3 July 2018 the GEO launched an LGBT action plan which stated in respect of non-binary people:

“We will improve our understanding of issues facing non-binary people. The Government Equalities Office will launch a Call for Evidence on the issues faced by non-binary people, building on the findings from the national LGBT survey.”
30. To this end, in August 2019 the GEO appointed an external research body, the National Institute of Economic and Social Research, to undertake the review. The court has been informed that the first stage, the stakeholder engagement stage, has started. The second stage, an external public call for evidence, has not yet been commenced. Mr Oliver Entwistle, the Deputy Director of Operations and LGBT policy, informed the court in a witness statement dated 5 November 2019 that the delay was due to the identity of the Minister for Women and Equalities changing “several times in recent months”. Mr Entwistle indicated that the call for evidence will be run by the National Institute for Social Research, and the contractor was ready to commence work immediately after the General Election which was due to take place on 12 December 2019.
31. Both the Appellant and the SSHD seek to rely on this stuttering progress in support of their submissions. The Appellant submits that for decades the ICAO has approved the use of “X” markers on passports; that no legislation is required in order to provide an “X” classification, which would simply mean “unspecified”; and the cost in government expenditure terms is modest at £2 million. The Appellant further submits that the history of the reviews and consideration of this issue since the Appellant’s first approach in 1995 amounts to ineffectual procrastination and, in any event, is addressing the wrong issue, namely general recognition of non-binary gender rather than the discrete issue of passports. The time has come, argues the Appellant, when the Government should be compelled to act rather than be permitted to launch a tardy and largely irrelevant review.
32. The SSHD submits that the breadth and the nature of the work done, particularly in relation to the GRA 2004, in the national survey of LGBT+ people, and in the GEO’s

most recent call for evidence on non-binary identity, not only demonstrates the Government's commitment to addressing these issues but also demonstrates the importance of them being considered in a coherent and wide-ranging manner rather than the carving out, as a discrete issue, of the position in relation only to passports.

*The Proceedings*

33. On 2 June 2017, the Appellant filed a claim for judicial review. The decision that the Appellant sought to review was what was described as the 'continuing policy' of HMPO, that is to say that an applicant for a passport must declare their gender as being either "male" or "female" and the refusal of HMPO to issue a passport bearing an unspecified "X" marker on the face of the passport, notwithstanding that this is permitted by the relevant ICAO Standards and is available in a number of other jurisdictions. Permission was granted on 11 October 2017, and in due course Human Rights Watch was granted permission to intervene.
34. On 22 June 2018, Jeremy Baker J handed down his judgment dismissing the claim for judicial review. He held that the Appellant's non-gender identity falls within the scope of the right to respect for private life protected by Article 8 ECHR, and the Appellant's Article 8 right was therefore engaged. However, the Government's continuing policy did not amount to an unlawful breach of that right and there was therefore no positive obligation on the Government to provide an "X" marker on passports. For the reasons set out later in this judgment, I agree with the conclusions of the judge.
35. Permission to appeal was given to argue four grounds of appeal that relate to each of the four areas considered by the judge, namely: Article 8; Article 8 together with Article 14; irrelevant considerations; and irrationality. Whilst each party has made brief submissions in relation to the latter three topics, the reality is that the case turns on the judge's findings in relation to Article 8. I therefore propose to set out only the Appellant's detailed Grounds of Appeal in relation to Article 8:

"1. The learned Judge erred in:

- a. Finding that there was no positive obligation under Article 8 to provide X passports to persons who do not identify, or identify exclusively, as either male or female, or alternatively that there was justification for the negative interference created by the refusal to provide X passports. In particular:
  - i. Misconstruing the breadth of the UK's margin of appreciation/ the Government's discretionary area of judgment.
  - ii. Failing to recognise the existence of an international trend in support of the provision of X passports.

- iii. Identifying as a legitimate aim in this case and/ or paying excessive regard/ giving excessive weight to the aim of an “administratively coherent system of gender recognition across all government area and legislation”.
  - iv. Identifying as a relevant factor and / or paying excessive regard/ giving excessive weight to the Respondent’s argument that it wished to conclude a review which it described as ongoing.
  - v. Taking into account and/ or giving undue weight to the Appellant’s aim to achieve broader change than that sought by the claim.
  - vi. Giving no or no sufficient weight for the purposes of justification to the nature of the measure sought (an X for unspecified indicator in the gender/ sex field of a passport), the lack of any necessary follow-on consequences for other areas of law and policy and the lack of any consequential impact upon coherence of the treatment of gender across Government.
  - vii. Failing to scrutinise adequately or at all the justifications relied upon by the Government in respect of ensuring security and combating identity theft and fraud and ensuring security at borders...”
36. The SSHD has, in addition, been given permission to appeal on two grounds: (i) that the judge was wrong in finding that the Appellant’s Article 8 rights were engaged; and (ii) the judge was in error in relation to the costs order he made.

*Route to decision:*

37. The issue for the court is whether, in order to respect the Appellant’s rights under Article 8 and to avoid discrimination under Article 14, there is a positive and specific obligation on the state to introduce the option of an “X” marker in a passport.
38. Given the multiplicity of submissions made across numerous different aspects of the case, it is in my view helpful first to establish some sort of ‘route’ which, all being well, will lead to a principled answer to the issue before the court.
39. Whilst there is some inevitable blurring around the edges, it seems to me that it is possible to identify the following potential framework:

- i) In considering Article 8 in relation to respect for family and private life, the court must first examine whether there existed a relationship, or state of affairs, amounting to private or family life within the meaning of Article 8 of the Convention.
- ii) Having determined that Article 8 is engaged, although the object of Article 8 is essentially that of protecting the individual against arbitrary interference, the next stage is to consider whether there is, on the facts of the case, not only the primary negative obligation inherent in Article 8, but also a positive obligation ingrained in an effective respect for private or family life.
- iii) In considering whether there is a positive obligation, and if so how it should be given effect, the state enjoys a certain margin of appreciation. It may be that the margin of appreciation alters in its breadth, for example it may be narrower at the stage of determining whether there is or is not a positive obligation and wider as to how that positive obligation should be implemented.
- iv) In considering whether there is such a positive obligation on the state, regard must be had to the fair balance struck between the competing interests.
- v) In determining whether there has been an interference with a Convention right, the domestic court will consider what test would be applied by the European Court of Human Rights (ECtHR). However, it is for the domestic court to decide whether the proposed justification for the alleged interference has been made out by the state.

#### *Engagement of Article 8*

40. An important aspect of this case is the engagement of Article 8. Much of the argument that was developed on other points in the appeal would be redundant if Article 8 was not engaged by the facts here.
41. The SSHD submits that the judge was in error “by asking and answering the separate question of whether Article 8 protects a right to identify in an identity other than male or female”. In Ground 1 of the cross-appeal the point is expressed as follows:

“The Judge erred in law by finding that Article 8 of the European Convention on Human Rights protects a right to identify in a gender other than male or female [107]-[108]. In particular:

(i) There is no decision of the European Court of Human Rights (“ECtHR”) holding that Article 8 protects the right to identify as non-gendered (as opposed to identify as trans);

(ii) The decision results in an interpretation of Article 8 that finds no support in the ECtHR jurisprudence; and

(iii) The decision is contrary to the mirror principle, namely that section 2(1) of the Human Rights Act 1998 requires the “*national courts to keep pace with the Strasbourg jurisprudence as it evolves over time: no more,*

*but certainly no less”, see R (on the application of Ullah) v Special Adjudicator [2004] 2 AC 323, at [20] per Lord Bingham.”*

42. Picking up a sentence from the Appellant’s second witness statement (“the idea of rejecting gender is hugely controversial in our society”), the judge began by observing that a literal reading of the language might lead the reader to conclude that the Appellant “is not concerned with gender identification at all”: see the judgment at [107]. However, the judge rejected that notion, saying:

“...my understanding of what is intended to be conveyed by the use of this phrase is that the claimant is seeking to identify outside the binary concept of gender, rather than entirely rejecting the concept of gender altogether. Furthermore, not only does the current NHS definition of gender dysphoria recognise situations outside the accepted concept of transgenderism, (and the claimant’s hysterectomy was undertaken by the NHS), but it is clear from Kate O’Neil’s evidence that the GEO recognises that an individual’s gender identity includes,

*‘ ...male, female, both, neither or fluid.’*

That being the case, in my judgment, the claimant’s identification is one relating to gender and I consider that it is one encompassed within the expression “gender identification” in *Van Kück*.”

43. The judge went on to conclude at [108] that he was satisfied that the Appellant’s Article 8 rights were engaged: “...so that the claimant’s right to respect for private life will include a right to respect for the claimant’s identification as non-gendered”. He rejected the submission that such a conclusion ran counter to the “mirror” principle laid down by Lord Bingham in *R (Ullah) v Special Adjudicator [2004] 2 AC 323*, in which it was said that English law should not advance beyond European law, but rather should “keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less.”
44. In *Kopf and Liberda v Austria [2012] 1 FLR 1199* at [37] and [38], the Strasbourg court was concerned as to whether there was a positive obligation in relation to the interests of a foster carer and a foster child. The court at [34] decided that the first step was to determine whether Article 8 was engaged. Having found that it was, the court went on to consider whether there was a positive obligation on the state, having regard to the fair balance exercise and the margin of appreciation.
45. In my judgment, the SSHD’s submissions and Ground 1 of the cross-appeal are ill-founded. The fact that the ECtHR has not as yet been confronted with a case in which it was required to analyse non-binary gender in Convention terms cannot remove from the English court the need to do so. The domestic court must do so by applying the law consistently with Strasbourg jurisprudence but that is a different question. Here is a factual situation different from that which arises often in previous Strasbourg case-law. There can be no breach of the “mirror principle” in grappling with these facts.

46. Moreover, in my judgment it is obvious and indeed beyond argument that the facts of this case concern the Appellant's private life and engage Article 8. There can be little more central to a citizen's private life than gender, whatever that gender may or may not be. No-one has suggested (nor could they) that the Appellant has no right to live as a non-binary, or more particularly as a non-gendered, person. Indeed, a gender identity chosen as it has been here, achieved or realised through successive episodes of major surgery and lived through decades of scepticism, indifference and sometimes hostility must be taken to be absolutely central to the person's private life. It is the distinguishing feature of this Appellant's private life.
47. It must be remembered that Article 8 protects the citizen's private (or family) life; gender is relevant as one of the most important aspects of private life. In the absence of any prohibition (and there is none), the Appellant's gender identification undoubtedly engages Article 8. The question then becomes: what, if any, positive obligation is placed on the state to protect that aspect of the Appellant's private life? That provides the jumping-off point for the main points in this case.
48. For those reasons, I would dismiss Ground 1 of the cross-appeal and move on to consider whether there is a positive obligation on the state in this matter.

#### *Positive Obligation*

49. The submissions of the parties to the appeal have, to a significant extent, centred on three cases heard by the ECtHR in a period spanning 28 years, each relating in some form or another to the legal recognition of a transgender person. They are: *Rees v United Kingdom* (App No 9532/81) (1987) 9 E.H.R.R 56 ("*Rees*"); *Goodwin v United Kingdom* (App No 28957/95) (2002) 35 E.H.R.R 18 ("*Goodwin*"); and *Hämäläinen v Finland* (App No 37359/09) 37 B.H.R.C 55 ("*Hämäläinen*").
50. *Rees* was the first of a series of cases before the ECtHR which considered the rights of trans-people to have their birth certificate amended to show their gender identity rather than the sex in which they were registered at birth. The Court found that the UK was not in breach of Article 8 in refusing to permit such an amendment. In doing so, the Court took into account that the proposed change would be likely to lead to far reaching legislative changes, and further that there was little uniformity of approach within the Contracting States. The UK, the Court said, was therefore entitled to a wide margin of appreciation.
51. In *Goodwin* the question again arose as to whether the state, by its failure to grant legal recognition to her gender reassignment, had failed to comply with a positive obligation to ensure the right of the applicant (a post-operative male to female transsexual) to respect for her private life. The ECtHR said:

“72. The Court recalls that the notion of “respect” as understood in Article 8 is not clear cut, especially as far as the positive obligations inherent in that concept are concerned: having regard to the diversity of practices followed and the situations obtaining in the Contracting States, the notion's requirements will vary considerably from case to case and the margin of appreciation to be accorded to the authorities may be wider than that applied in other areas under the Convention. In determining whether or not

a positive obligation exists, regard must also be had to the fair balance that has to be struck between the general interest of the community and the interests of the individual, the search for which balance is inherent in the whole of the Convention.”

This theme was picked up by the Grand Chamber in *Hämäläinen*, the leading European and most recent case on the issue of positive obligations concerning gender identity.

52. The Grand Chamber considered at [65-68] the general principles which would be applicable when assessing a state’s positive obligation, as follows:

*“3. General principles applicable to assessing a State’s positive obligations*

65. The principles applicable to assessing a State’s positive and negative obligations under the Convention are similar. Regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole, the aims in the second paragraph of Article 8 being of a certain relevance (see *Gaskin v. the United Kingdom*, 7 July 1989, § 42, Series A no. 160, and *Roche*, cited above, § 157).

66. The notion of “respect” is not clear cut, especially as far as positive obligations are concerned: having regard to the diversity of the practices followed and the situations obtaining in the Contracting States, the notion’s requirements will vary considerably from case to case (see *Christine Goodwin v. the United Kingdom [GC]*, no. [28957/95](#), § 72, ECHR 2002-VI). Nonetheless, certain factors have been considered relevant for the assessment of the content of those positive obligations on States. Some of them relate to the applicant. They concern the importance of the interest at stake and whether “fundamental values” or “essential aspects” of private life are in issue (see *X and Y v. the Netherlands*, cited above, § 27, and *Gaskin*, cited above, § 49), or the impact on an applicant of a discordance between the social reality and the law, the coherence of the administrative and legal practices within the domestic system being regarded as an important factor in the assessment carried out under Article 8 (see *B. v. France*, 25 March 1992, § 63, Series A no. 232-C, and *Christine Goodwin*, cited above, §§ 77-78). Other factors relate to the impact of the alleged positive obligation at stake on the State concerned. The question here is whether the alleged obligation is narrow and precise or broad and indeterminate (see *Botta v. Italy*, 24 February 1998, § 35, Reports 1998-I), or about the extent of any burden the obligation would impose on the State (see *Rees v. the United Kingdom*, 17 October 1986, §§ 43-44, Series A no. 106, and *Christine Goodwin*, cited above, §§ 86-88).

67. In implementing their positive obligations under Article 8, the States enjoy a certain margin of appreciation. A number of

factors must be taken into account when determining the breadth of that margin. Where a particularly important facet of an individual's existence or identity is at stake, the margin allowed to the State will be restricted (see, for example, *X and Y v. the Netherlands*, cited above, §§ 24 and 27, and *Christine Goodwin*, cited above, § 90; see also *Pretty v. the United Kingdom*, no. [2346/02](#), § 71, ECHR 2002-III). Where, however, there is no consensus within the member States of the Council of Europe, either as to the relative importance of the interest at stake or as to the best means of protecting it, particularly where the case raises sensitive moral or ethical issues, the margin will be wider (see *X, Y and Z v. the United Kingdom*, 22 April 1997, § 44, Reports 1997-II; *Fretté v. France*, no. [36515/97](#), § 41, ECHR 2002-I; and *Christine Goodwin*, cited above, § 85). There will also usually be a wide margin of appreciation if the State is required to strike a balance between competing private and public interests or Convention rights (see *Fretté*, cited above, § 42; *Odièvre*, cited above, §§ 44-49; *Evans v. the United Kingdom [GC]*, no. [6339/05](#), § 77, ECHR 2007-I; *Dickson v. the United Kingdom [GC]*, no. [44362/04](#), § 78, ECHR 2007-V; and *S.H. and Others v. Austria [GC]*, no. [57813/00](#), § 94, ECHR 2011)."

53. A positive obligation can therefore refer to a requirement to accord status or recognition to a particular group (such as trans-people), creating an obligation of the type described as "broad and indeterminate" in *Hämäläinen* at [66]. Alternatively, it may refer to something specific, identified in *Hämäläinen* as "narrow and precise", such as altering a birth certificate or the introduction of an "X" marker.
54. The parties have streamlined the approach to positive obligation and fair balance taken from the European jurisprudence and extracted from *Hämäläinen*. There are three key factors:
  - i) Factors which relate to the identity in question (the individual);
  - ii) Factors which concern the state and its systems (coherence);
  - iii) The position in other states in the Council of Europe (consensus).

### *Identity*

55. The judge at [102] and [113] considered first the interests of the Appellant, reiterating 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". The judge therefore recognised that the Appellant has a justifiably strong personal interest in gaining full legal recognition as being a non-gendered individual. The judge at [113] highlighted that the "target of these proceedings" was limited to the current policy of HMPO in relation to the issuing of passports, in other words a "narrow and precise" obligation. The judge went on to say:

“115...I am satisfied that the claimant has a justifiably strong personal interest in gaining full legal recognition as being non-gendered, the denial of which I can understand may well cause the claimant and others in the claimant’s situation strong negative emotions, I am less convinced that such strong emotions are justified by the current HMPO policy of not permitting the claimant to enter “X” in gender/sex field on the passport. I of course take into account the fact that passports may be used for identification purposes outside their use as a travel document. However, so too are birth certificates, which would not be affected by a change to the challenged policy, and which are likely to be considered of more fundamental importance upon the issue of sex and gender...”

56. Ms Gallafent submits that the Appellant has gone through a great deal both physically and psychologically in order to achieve non-gendered status, and it is unacceptable to be obliged to mischaracterise gender if the Appellant is to obtain a passport. As already indicated, I accept that the issue before the court goes to gender identity, an issue now widely accepted as being of central importance and at the heart of a person’s Article 8 private life rights or, as it was put in *Van Kück v Germany* (App No 35968/97) (2003) 37 EHRR 973 (“*Van Kück*”), “the most intimate aspect of one’s identity”.
57. Sir James Eadie, on behalf of the SSHD, whilst acknowledging the strength of the Appellant’s feelings, points out that, so far as the Appellant is concerned, there is no disadvantage in relation to employment, pension or the ability to enter into a civil partnership as a consequence of being unable to utilise a passport with an “X” marker. Sir James further submits that the limited nature of the application made by the Appellant, namely to be permitted to have gender as “unspecified” on a passport, is not comparable to that of the trans person in *Goodwin*. In that case, the claim in order to change their gender on their birth certificate went to the heart of their personal identity; it was in relation to the whole of their life to date and affected all aspects of their life both legal and social.
58. Whilst not in any way undermining the importance of the issue to the Appellant, Sir James pointed out that the “X” marker indicating “unspecified gender” does not afford the Appellant any official recognition of being non-gendered. Whilst that is undoubtedly the case, such an observation, in my judgment, fails to take into account the opposite side of the coin; namely, that the requirement to elect for one or the other of the straight binary choices presently found on UK passports, namely “male” or “female”, requires the Appellant to elect a gender to which the Appellant does not belong.
59. In my judgment, (to borrow the words used in *Hämäläinen* at [66]) the judge’s careful assessment at [115] of his judgment of the “impact on [the] applicant of a discordance between the social reality and the law” cannot be criticised. He was entitled to approach the fair balance exercise against the backdrop of that assessment whilst having in mind the limited nature or ‘target’ of the Appellant’s complaint.

60. As recorded by the judge, it was (and remains) the Appellant's case that:

“117....such a change to the current HMPO policy would not necessitate consideration of wider societal concerns, not only in relation to security, but in particular in relation to the Government's legitimate aim of maintaining an administratively coherent system of gender recognition across all government areas and legislation.”

61. This was a matter, the judge said, of “fundamental importance”.

62. On the SSHD's part, it is submitted that the current policy should not be considered in isolation, but as a part of a more fundamental review. This has been central to the case put forward by the SSHD, both at first instance and on appeal. I therefore set out in full the judge's findings in relation to this important aspect of the case:

“119. Although it is not always achieved, it is clearly of benefit to good governance that important issues of policy are reflected across all government departments and areas of legislation. In this regard, gender identity and recognition are clearly of fundamental importance. Moreover, I do not consider that it is a sufficient answer to this being a relevant consideration, to suggest that permitting a passport holder not to specify their sex/gender would have no impact on any other policy or legislative considerations.

120. If there is no requirement for an individual to specify their gender on their passport application, it begs the question as to the utility of requesting the information in the first place, which in turn raises the question as to the purpose of gender being a required field of entry on other or any official records across the various government departments.

121. Given the importance of the issues surrounding gender identification that have been raised in this case, it seems to me that the defendant is entitled to say that a change to the current HMPO policy ought not to be considered in isolation, but the Government should be able to consider it as part of a more fundamental review of policy in relation to these issues across government. This may not have been the position if the stage had been reached either that the Government had completed its review process (or there had been unjustifiable delay in the process) or that a consensus had been reached on the issue across other Member States and/or that there was a sufficiently significant international trend. However, in my judgment none of these situations arise in this case.”

63. The judge noted the criticisms made by the Appellant in relation to the Government's response to both the internal review and the Women and Equalities Committee report, before concluding at [124] that the manner in which the issue had been dealt with by the Government to date cannot be described “in the woeful terms in which the Government's delays were in *Bellinger*” (a reference to *Bellinger v Bellinger* [2003] 2 AC 467). The judge held that more important was the fact that it was clear from the witness statements filed that the Government was collating and collecting research material with a view to undertaking a comprehensive review of the issues both surrounding and raised directly by the Appellant.

64. Sir James submitted that the judge had correctly analysed the importance of coherence. The state, he submits, is entitled to the view that if a change is to be made it should be made coherently across the board or, if not, at least when the issues have been properly considered.
65. In support of his coherence argument, Sir James submitted that if the appeal was allowed and it was held that there was a positive obligation to provide an “X” marker, it would have an impact which would extend beyond the merely domestic. Further, he said it must be recognised that if the court held that there was a positive obligation on the state to provide an “X” marker, it would be creating a “target” that gives rise to a difference in treatment potentially interfering with Article 14 (discrimination) and which removes any justification for the interference with Article 8 rights in other (non-passport) contexts. For example, he submitted, if passports are fundamental to identity, then why not birth certificates? It is essential to look at all aspects upon which the change might impact. It is not, it is submitted on behalf of the SSHD, about the binary choice.
66. The SSHD maintains that a coherent approach is required across Government, and that it is highly problematic and undesirable for one branch of Government (HMPO) to institute what amounts to a type of recognition of non-binary identification through an unspecified “X” box when no other Government Department does so.
67. Ms Gallafent, for her part, argues that the passport issue not only can, but should, be considered in isolation. All that the Appellant seeks, she submits, is to have gender as “unspecified” on the passport. This, she tells the court, is “cheap and easy”: a cost limited to £2 million. The change can be implemented by HMPO under the Crown Prerogative without the necessity of legislation. It is thereafter, she submits, a matter entirely for the Government what they choose to do in respect of the wider issue of the recognition of non-binary and intersex people. The SSHD has had years to decide on a course of action and the recent call for evidence is too little and too late.
68. Ms Gallafent pointed out that many trans-people do not currently apply for the relevant certificate under the GRA 2004 (a “Gender Recognition Certificate”), which would allow them to change their gender on their birth certificate. As a consequence, she says, inconsistent gender identification is already a feature for people with gender identification issues and therefore any inconsistency that would arise as between various official documents, due to there being an “X” marker, would not create any administrative difficulty.
69. In my view, the fact that this inconsistency is happening (apparently as a consequence of the perceived difficulties in complying with the requirements for obtaining a Gender Certificate) only serves to underline the SSHD’s submission of the importance of obtaining a coherent approach to the whole sensitive issue of gender recognition; a course which has been embarked upon but, understandably, given the way in which other matters have dominated the Government’s focus for some time, has not proceeded apace.
70. In my judgment, the reality is that, whilst this case is limited to passports, the driver for change is the broad notion of respect for gender identity. I accept, as did the judge, that the passport issue cannot reasonably be considered in isolation.

71. I would respectfully agree with the judge at [120] that if there is no requirement for an individual to specify their gender on their passport application, it “begs the question as to the utility of requesting gender information” at all. This in turn raises the question as to the purpose of requesting gender information across all official records. The work now embarked upon by the Government will address these questions as part of their wider consideration of gender identity issues, and in my judgment this work strongly supports the judge’s finding that the Government was entitled to take the view that it was inappropriate to consider the issue of passports in isolation.
72. The SSHD relies, in addition to her principal argument on coherence, on matters which go to issues of security. That is to say, in relation to combating identity fraud and theft and the need for security at borders.
73. In my judgment, issues of security do not affect the fair balance in circumstances where the ICAO has, for many years, been content for passports to carry an “X” marker. Additionally, people from countries that already have such provision have been entering the UK for many years without there being any security issues articulated before us. Any marginal value in combating fraud and theft does not have any impact on the important aspect of gender identity.

#### *Consensus*

74. During the course of oral submissions there was considerable discussion as to when a “trend” becomes a “consensus” amongst the Member States of the Council of Europe, whether it matters and what impact it should have on the issue before the court.
75. A prime example in this regard is the developments that occurred in relation to the recognition of the status of transsexuals within Europe, between 1986 when *Rees* was considered, and 2002 when *Goodwin* was before the ECtHR.
76. When the matter was before the court in *Rees*, the court said at [37] that:

“It would therefore be true to say that there is at present little common ground between the Contracting States in this area and that, generally speaking, the law appears to be in a transitional stage. Accordingly, this is an area in which the Contracting Parties enjoy a wide margin of appreciation.”
77. The ECtHR held that there was no positive obligation on the state to permit the alteration of the birth certificate of a trans-person to reflect their new gender.
78. In *Goodwin*, the ECtHR (referring to *Rees*) whilst acknowledging the importance of precedent said at [74] that: “A failure by the Court to maintain a dynamic and evolutive approach would indeed risk rendering it a bar to reform or improvement”. It was for this reason that, although almost identical facts were before the court in *Goodwin* as had been in *Rees*, the ECtHR said:

“75. The Court proposes therefore to look at the situation within and outside the Contracting State to assess “in the light of present-day conditions” what is now the appropriate interpretation and application of the Convention.”

79. Things had moved on significantly in the intervening period. As was recorded in *Goodwin* at [55], a study conducted by Liberty in 1998 had found:

“.....that over the previous decade there had been an unmistakable trend in the member States of the Council of Europe towards giving full legal recognition to gender re-assignment. In particular, it noted that out of thirty seven countries analysed only four (including the United Kingdom) did not permit a change to be made to a person's birth certificate in one form or another to reflect the re-assigned sex of that person. In cases where gender re-assignment was legal and publicly funded, only the United Kingdom and Ireland did not give full legal recognition to the new gender identity.”

80. The court in *Goodwin* differentiated between, on the one hand, consensus in relation to the legal recognition of transgender people by Member States (that is to say the identification of a positive obligation) and on the other, at [85], the lack of a common approach or consensus as to how to “address the repercussions which the legal recognition of a change of sex may entail for other areas of the law”, namely the putting into effect of such an obligation. So far as the latter was concerned, the ECtHR said:

“85....In accordance with the principle of subsidiarity, it is indeed primarily for the Contracting States to decide on the measures necessary to secure Convention rights within their jurisdiction and, in resolving within their domestic legal systems the practical problems created by the legal recognition of post-operative gender status, the Contracting States must enjoy a wide margin of appreciation. The Court accordingly attaches less importance to the lack of evidence of a common European approach to the resolution of the legal and practical problems posed, than to the clear and uncontested evidence of a continuing international trend in favour not only of increased social acceptance of transsexuals but of legal recognition of the new sexual identity of post-operative transsexuals.”

81. Whilst the emphasis in such cases must always be on countries within the Council of Europe, and at the date of this appeal only five countries permit the use of “X” markers, the judge sensibly considered such evidence as there was in relation to the position in both Member States and countries outside the Council of Europe, before concluding:

“128....I do not consider that this is a body of evidence which can as yet properly be described as a trend which would be sufficient to significantly affect the Government’s margin of appreciation in this area..”

82. In *Schalk and Kopf v Austria* (App.No. 30141/04) (2011) 53 EHRR 20, the ECtHR, when considering at [104] whether the state should have provided the applicants with alternative means for the formation of a legal partnership earlier than they in fact did, approached the issue of consensus in this way:

“105. The Court cannot but note that there is an emerging European consensus towards legal recognition of same-sex couples. Moreover, this tendency has developed rapidly over the past decade. Nevertheless, there is not yet a majority of States providing for legal recognition of same-sex couples. The area in question must therefore still be regarded as one of evolving rights with no established consensus, where States must also enjoy a margin of appreciation in the timing of the introduction of legislative changes...”

83. Sir James submits convincingly that this is precisely the situation in relation to the issue, both as to “X” on passports and the legal recognition of non-binary people. This in itself must, he submits, afford the state a wide margin of appreciation, even before the sensitive moral and ethical issues which are raised in this regard are put into the equation.
84. Looking at the totality of approach to gender identity issues world-wide and the information made available to the court, it seems to me that, whilst the direction of travel, or “trend”, is undoubtedly moving towards the recognition of the status of non-binary people, there is, as yet, nothing approaching a consensus in relation to either the broad and indeterminate issue of the recognition of non-binary people, or the narrow and precise issue of the use of “X” markers on passports which is before this court.

#### *Margin of Appreciation*

85. The judge approached the issue of the margin of appreciation in the following way:

“112. ...the pre-eminent consideration is the striking of a fair balance between the competing interests of the individual and the community as a whole. However, in making these assessments the state’s margin of appreciation is a relevant consideration, albeit the significance of it will depend upon the circumstances of the particular case. In some cases, the margin may be restricted, whereas in others it may be wide, this being dependent upon factors such as the importance of the issue to the individual’s private life, and the extent of any consensus within the other Member States, particularly in relation to controversial ethical or moral issues.”

86. The judge took the view that the Appellant’s strength of feeling in relation to the limited issue that had been challenged had some relevance when considering the nature and extent of the margin of appreciation to which the Government was entitled. He held however, that it was also relevant that there was no consensus amongst Member States, or at least no trend of sufficient strength, to affect the matter. In those circumstances, the judge concluded at [129] that, in relation to the issue raised by the Appellant, “the margin of appreciation to which the Government is presently entitled is still relatively wide”.

87. The judge went on:

“130. In this context, I am of the view that the Government is entitled to consider the issue raised in these proceedings further, and in the light of the recent and current research which is being undertaken, in order to provide what Kate O’Neil states will be governmental policy towards non-binary people for the foreseeable future. This will no doubt include not only further consideration of the specific issue raised in these proceedings but will properly address the important, and as the claimant expressly acknowledges, the controversial issue as to the issue of the recognition and proper treatment of those who do not identify within the binary concept of gender. It seems to me that these matters, together with the Government’s justifiable concerns about security are legitimate aims, in that it is in the interests of society and good governance for these matters to be the product of appropriate research and careful evaluation. Moreover, that in the interim HMPO’s current policy in relation to the issuing of passports is a proportionate means of achieving the aim of providing a coherent and consistent policy towards those who identify outside the binary concept of gender across all governmental departments and legislation.”

88. Both the Appellant and SSHD agree that the margin of appreciation applies at both stages: at the identification of a positive obligation (if there is one), whether it is broad or narrow; and, thereafter, at the stage when the form or manner in which that recognition is to be implemented domestically is under consideration. They do not, however, agree as to its width and its application to the present case.

89. Ms Gallafent submitted that the judge had “misconstrued the breadth of the UK’s margin of appreciation of the Government’s discretionary area of judgment”. This is an error, she says, which led to the judge’s assessment of the fair balance being flawed.

90. In support of her submission that the margin is restricted in relation to the recognition of a positive obligation, where a “particularly important facet of an individual’s existence or identity is at stake”, Ms Gallafent relies on the judgment of the Fifth Section of the ECtHR in *A.P., Garçon and Nicot v France* (2017) (App.No. 79885/12, 52471/13 and 52596/13) (“*A. P. Garçon*”) at [121], and *S V v Italy* (2018) (App. No. 55216/08) at [62], a First Section judgment. In my judgment, neither of these cases is of assistance to the court in the present case. Not only must they be subject to the Grand Chamber’s judgment in *Hämäläinen*, but they each related to very different cases. Whilst the margin of appreciation was said to be narrow in *A.P., Garçon* where a particular facet of existence or identity is at stake, on the facts of that case the state in question had declined to recognise the gender of a trans person, despite their having undergone highly invasive surgery, in one case sterilisation and in another surgical gender reassignment.

91. The importance of consensus in relation to the breadth of the margin of appreciation is demonstrated with the utmost clarity, Sir James submits, by comparing *Rees*, where

there was no consensus and no positive obligation, and *Goodwin*, by which time there was an overwhelming consensus leading to a positive obligation with only a residual margin as to implementation as a consequence of that undeniable consensus.

92. The ECtHR did, however, give a timely reminder to the UK in *Rees* saying:

“47. However, the Court is conscious of the seriousness of the problems affecting these persons and the distress they suffer. The Convention has always to be interpreted and applied in the light of current circumstances (see, *mutatis mutandis*, amongst others, the Dudgeon judgment of 22 October 1981, Series A no. 45, pp. 23-24, paragraph 60). The need for appropriate legal measures should therefore be kept under review having regard particularly to scientific and societal developments.”

93. So it was then that the matter came before the court again 15 years later in *Goodwin* by which time there had been no notable progress by the UK, notwithstanding (as noted at [55]) an “unmistakable trend” in Council of Europe countries.

94. What is demonstrated by *Goodwin* is that, in the early development of some ethical or moral issue in relation to which there is no consensus, the state in question is likely to enjoy a wide margin of appreciation despite the importance of the issue to the individual. However, the time will come when the state’s position will no longer be tenable and the fair balance will require the legal recognition of the positive obligation in question. In *Goodwin*, the ECtHR held, in finding there to be a positive obligation to ensure the right of the transgender applicant to respect for her private life by legal recognition of her gender reassignment, that the Government could no longer claim that the issue of legal recognition was within the margin of appreciation:

“93. Having regard to the above considerations, the Court finds that the respondent Government can no longer claim that the matter falls within their margin of appreciation, *save as regards the appropriate means of achieving recognition of the right protected under the Convention*. Since there are no significant factors of public interest to weigh against the interest of this individual applicant in obtaining legal recognition of her gender re-assignment, it reaches the conclusion that the fair balance that is inherent in the Convention now tilts decisively in favour of the applicant. There has, accordingly, been a failure to respect her right to private life in breach of Article 8 of the Convention.”

(My emphasis)

95. The ECtHR had accepted at [85] that the state retained a margin of appreciation so as to “[achieve] recognition of the right protected under the Convention”. It noted the lack of a common European approach as to how to address the repercussions which the legal recognition of a change of sex may entail for other areas of law:

“85....While this would appear to remain the case, the lack of such a common approach among forty-three Contracting States with widely diverse legal systems and traditions is hardly

surprising. In accordance with the principle of subsidiarity, it is indeed primarily for the Contracting States to decide on the measures necessary to secure Convention rights within their jurisdiction and, in resolving within their domestic legal systems the practical problems created by the legal recognition of post-operative gender status, the Contracting States must enjoy a wide margin of appreciation. The Court accordingly attaches less importance to the lack of evidence of a common European approach to the resolution of the legal and practical problems posed, than to the clear and uncontested evidence of a continuing international trend in favour [...] of legal recognition of the new sexual identity of post-operative transsexuals. ”

96. *Goodwin*, therefore, seemed to establish that the margin of appreciation can both vary over time as society evolves and consensus hardens, but also can be wider or narrower at different stages of the process; that is to say, identification of a positive obligation and the subsequent domestic implementation of that obligation.

97. In *Hämäläinen*, the Grand Chamber concluded from the data available that there did not exist any European consensus. In those circumstances, the Grand Chamber held:

“75. In the absence of a European consensus and taking into account that the case at stake undoubtedly raises sensitive moral or ethical issues, the Court considers that the margin of appreciation to be afforded to the respondent State must still be a wide one (see *X, Y and Z v. the United Kingdom* [...] § 44). This margin must in principle extend both to the State’s decision whether or not to enact legislation concerning legal recognition of the new gender of post-operative transsexuals and, having intervened, to the rules it lays down in order to achieve a balance between the competing public and private interests.”

98. In considering the overall balance to be struck, the recognition of a positive obligation must not be elided with the form or manner in which that recognition is to be implemented. In *Hämäläinen*, it was uncontroversial that legal recognition had to be given to the trans person’s acquired gender. The issue was whether the positive obligation in Article 8 extended to requiring the state to allow the married trans person to remain married to their (now) same sex spouse, notwithstanding that domestic law did not recognise same-sex marriage.

99. As set out at paragraph 55 above, the Grand Chamber considered, first, at [66], those factors relevant for the assessment of the content of a positive obligation, and then at [67] the implementation of such a positive obligation (*set out again for convenience*):

“67. In implementing their positive obligation under Article 8 the States enjoy a certain margin of appreciation. A number of factors must be taken into account when determining the breadth of that margin. Where a particularly important facet of an individual’s existence or identity is at stake, the margin allowed

to the State will be restricted ... Where, however, there is no consensus within the member States of the Council of Europe, either as to the relative importance of the interest at stake or as to the best means of protecting it, particularly where the case raises sensitive moral or ethical issues, the margin will be wider ... There will also usually be a wide margin if the State is required to strike a balance between competing private and public interests or Convention rights ....”

*(Citations removed for ease of reading)*

100. On a fair reading of [67] it would seem that the Grand Chamber took the view that, at the implementation stage, where there is no consensus either as to the importance of the interest or how to protect it, the state will have a wider margin of appreciation when striking the balance between private and public interests or Convention rights, notwithstanding that an issue of an individual’s identity is at stake.
101. In my judgment, it matters not how a future court may choose to interpret paragraph [67] as, in the present case, taking into account the matters outlined above, particularly in relation to consensus and identity, the judge was right in determining that the margin of appreciation in this case is “relatively wide”.

*Conclusion as to fair balance*

102. The judge, having concluded that the Appellant’s Article 8 right to respect for private life did not encompass a positive obligation on the part of the State to permit the Appellant to apply for and be issued with a passport with an “X” marker, said that the question of fair balance “remained the core of the analysis”.
103. In approaching a consideration of fair balance, I put back into the equation my observations as to the impact on the Appellant, including the limited impact on the Article 8 rights overall, by the denial of the availability of an “X” marker on a passport application form.
104. Ms Gallafent submits that the issue of coherence has no part in a consideration of the fair balance, and this case is not, she emphasises, about the wider non-binary issues. The Government, she submits, are responding in effect to the wrong case. There may be ample justification for the approach of the Government with its emphasis on the need for a coherent approach if the court were considering the overall broader picture in respect of the recognition of non-binary people. There is, she says, no such justification in relation to the straightforward, narrow and inexpensive addition of an “X” marker to the passport.
105. Attractive as Ms Gallafent’s argument is at first blush, as I indicated at [71] above, in my judgment she cannot succeed in her attempt to limit the issue in such a way. The issue of coherence is a relevant factor when considering the fair balance in the circumstances of this case, for the following reasons:
  - i) If an “X” marker is to be added, a decision will need to be made as to who will be entitled to utilise the new box. Issues such as whether anyone can utilise the box or whether it is to be just non-binary people will need to be considered. If

it is only to be available for those identifying as non-binary, the question then arises as to what proof, if any, is to be provided by a non-binary person. For example, is it to be a medical report or will self-report be sufficient? Such matters will require consultation and will have a direct impact on non-binary issues generally.

- ii) These considerations will inevitably feed into a discussion as to whether there should be any gender boxes on passports at all, and what purpose such gender identification serves at all in days of routine technological identification. Such a debate must inevitably be part of the global issue of the use of gender on official documents generally and cannot, in my judgment, realistically be ring-fenced in relation only to passports.
- iii) As was recognised by Ms Gallafent, the result she seeks, namely a finding that the Government has a positive obligation to provide an “X” marker forthwith, will inevitably lead to further applications on an Article 14 and/ or justification platform. Whilst clearly not a basis upon which to dismiss the application, it does serve to underline the fact that, in reality, the “X” marker is but part of a far bigger picture. This does, as the Government contends, require a coherent, structured approach across all the areas where the issue of non-binary gender arises.

106. I agree with the judge’s analysis at [130] that the Government is entitled to consider the issues raised further. This will, he said:

“130. ...no doubt include not only further consideration of the specific issue raised in these proceedings but will properly address the important, and as the claimant expressly acknowledges, the controversial issue as to the issue of the recognition and proper treatment of those who do not identify within the binary concept of gender. It seems to me that these matters, together with the Government’s justifiable concerns about security are legitimate aims, in that it is in the interests of society and good governance for these matters to be the product of appropriate research and careful evaluation. Moreover, that in the interim HMPO’s current policy in relation to the issuing of passports is a proportionate means of achieving the aim of providing a coherent and consistent policy towards those who identify outside the binary concept of gender across all governmental departments and legislation.”

107. I therefore agree with the judge at [131] that the current policy of HMPO not to permit the Appellant to apply for and be issued with a passport with an “X” marker, does not at present amount to an unlawful breach of the Appellant’s Article 8 private life rights.

108. If, as here, Article 8 is engaged, there is a respectable argument that we are approaching a time when the consensus within the Council of Europe’s Member States will be such that there will be a positive obligation on the State to recognise the position of non-binary including intersex individuals if and when that time comes. It follows that when the time comes, notwithstanding that there is a wide margin of appreciation as to how

such a positive obligation is effected, the State will then have to take steps towards implementing that obligation.

109. The history of the various reviews and reports set out in the judge’s judgment demonstrates that, as at the time of the trial, nothing concrete had yet been achieved, notwithstanding the Government’s appropriate expressions of concern and obviously good intentions. The Government has put before the court details of, amongst other things, their plan to call for evidence. They would however do well to have in mind that, whilst there is as yet no consensus, there is an undoubted momentum within Europe in relation to just how the status of non-binary people is to be recognised. The time may come when the importance of these issues and the Article 8 rights of non-binary people will mean that the fair balance has shifted and that, as in *Goodwin*, the margin of appreciation as to recognition of a positive obligation will be exhausted.

#### *Position in the Domestic Courts*

110. How then does my view translate to domestic law? The Supreme Court has recently considered the role of the margin of appreciation in relation to domestic law in two cases.

111. In *Re McLaughlin* [2018] UKSC 48:

“34. Strictly speaking, the margin of appreciation has no application in domestic law. Nevertheless, when considering whether a measure does fall within the margin, it is necessary to consider what test would be applied in Strasbourg...”

112. In *R (Steinfeld and another) v Secretary of State for International Development* [2018] UKSC 32:

“28. ...In the first place, the approach of the ECtHR to the question of what margin of appreciation member states should be accorded is not mirrored by the exercise which a national court is required to carry out in deciding whether an interference with a Convention right is justified. As Lady Hale said *In re G (Adoption: Unmarried Couple)* [2009] 1 AC 173, para 118:

“... it is clear that the doctrine of the ‘margin of appreciation’ as applied in Strasbourg has no application in domestic law. The Strasbourg court will allow a certain freedom of action to member states, which may mean that the same case will be answered differently in different states (or even in different legal systems within the same state). This is particularly so when dealing with questions of justification, whether for interference in one of the qualified rights, or for a difference in treatment under article 14. National authorities are better able than Strasbourg to assess what restrictions are necessary in the democratic societies they serve. So to that extent the judgment must be one for the national authorities.”

29. It follows that a national court must confront the interference with a Convention right and decide whether the justification claimed for it has been made out. It cannot avoid that obligation by reference to a margin of appreciation to be allowed the government or Parliament, (at least not in the sense that the expression has been used by ECtHR)...”

113. Where it has been held that there is an interference with an Article 8 (or Article 14) right, the domestic courts “must confront the interference with a Convention right and decide whether the justification claimed for it has been made out”. Whilst here the Appellant’s Article 8 rights have been engaged, there has been no interference with the Appellant’s Article 8 right to respect for private life. In any event in my judgment even if there had been such interference, the SSHD has, in my view, successfully made out her claim of justification and the position of the SSHD would have represented a limited and proportionate interference with those Article 8 rights.

*Article 14.*

114. When briefly considering Article 14, the judge’s comparator at [134] was that transsexuals who identify within a binary concept of gender are able to “declare and be issued with a passport in the gender in which they identify”, whereas the Appellant is not. Ms Gallafent submits that the judge is in error in having chosen this as the appropriate comparator. The comparator should properly be, she submits, that persons whose gender identity is congruent with their biological sex and a trans person whose gender identity is opposite to their biological sex can all obtain a passport that accurately reflects their gender identity. As a non-gendered person, the Appellant cannot.
115. In my judgment, the comparator put forward by Ms Gallafent is the more appropriate comparator on the facts of this case. However, in my view it matters not to the judge’s ultimate conclusion that the outcome would be the same as that under Article 8 which, as recognised in *Van Kück* and *Goodwin*, amounted to the same complaint.
116. The courts have on a number of occasions considered arguments based on Article 8 together with Article 14, where Article 8 has been the primary argument. In *Goodwin*:
- “108. The Court considers that the lack of legal recognition of the change of gender of a post-operative transsexual lies at the heart of the applicant's complaints under Article 14 of the Convention. These issues have been examined under Article 8 and resulted in the finding of a violation of that provision. In the circumstances, the Court considers that no separate issue arises under Article 14 of the Convention and makes no separate finding.”
117. The court again concluded in *Van Kück*, that the applicant’s complaint of discrimination on the grounds of her trans-sexuality amounted in effect to the same complaint, “albeit seen from a different angle, that the Court has already considered in relation to Article 6 § 1 and, more particularly, Article 8 of the Convention” [91]. The judge took the same approach, finding, having reached the conclusions he had in relation to the existence and scope of any positive obligations owed to the Appellant under Article 8, that the question as to whether the difference in treatment was

objectively justified would result in the same answer. Consequently, the current policy of HMPO in relation to the issuing of “X” marked passports did not amount to unlawful discrimination under Article 14.

*Public Law: Relevant and Irrelevant considerations*

118. Whilst not abandoning these two public law grounds of appeal, Ms Gallafent understandably did not in any way place them to the forefront of her appeal. For his part, Sir James asserts that the factors relied on in respect of the rationality argument are the same as those relied on under the Human Rights claims and therefore add nothing to the overall appeal.
119. In a nutshell, Ms Gallafent identifies a number of matters of error, or matters which were at various stages taken into account, which have now been abandoned. Sir James submits that these need to be considered in the light of a continuing and evolving policy. The judge considered the Appellant’s submissions, including submissions post-hearing, with care and for the reasons he gave was entitled to conclude that the current policy was justified.
120. In my judgment, the judge was entitled to reach the conclusions he did in relation to these essentially peripheral public law issues.

*Conclusion*

121. I would, if their Lordships agree, dismiss the appeal and the cross appeal on Ground 1, for the reasons given.
122. I have had the advantage also of reading the judgment of Henderson LJ in relation to the cross-appeal on costs and I agree also the cross-appeal should be dismissed.

**Lord Justice Irwin:**

123. I agree with King LJ and with her reasoning. I too would dismiss the appeal. In particular, I would wish to underscore her remarks in paragraphs 47 to 49, and 56. It is a completely untenable proposition that gender identification does not engage Article 8, because the identification concerned is non-binary, or non-gendered. There can be little that is more central to private life than the gender of an individual, and few circumstances where gender is more important than in relation to people who have altered their gender identification, in whatever direction or to whatever destination. That must be obviously so where the process has involved extensive surgery. Article 8 is concerned with private life, not any particular sex or gender. If and insofar as this argument has affected the thinking of the government, it is to be hoped that this analysis may lead to a reconsideration of their approach.
124. I have also had the advantage of reading the judgment of Henderson LJ in relation to the cross-appeal on costs and I agree also the cross-appeal should be dismissed.

**Lord Justice Henderson:**

125. I too agree that the Appellant’s appeal should be dismissed for the reasons given by King LJ. I also agree with the judgment of Irwin LJ.

126. In the remainder of this judgment I deal with the SSHD's cross-appeal on costs.

## **The SSHD's cross-appeal on costs**

### *Introduction*

127. By Ground 2 of the cross-appeal, the SSHD contends that the judge erred in law in the costs order which he made, by applying a reduction of 33% to the *capped* rather than the much higher *actual* costs of the SSHD, when calculating the amount of costs to be paid by the Appellant to the SSHD on the dismissal of the Appellant's claim for judicial review. Since the parties had agreed a mutual costs cap of £3,000, the effect of the judge's order was to reduce the amount payable by the Appellant to the SSHD from £3,000 to £2,000. If, however, the reduction had been applied to the total amount of costs reasonably incurred by the SSHD in the proceedings, the resulting figure would still have greatly exceeded £3,000, so (the argument runs) it was wrong in law for the judge to reduce the costs recoverable from the Appellant to less than the capped sum of £3,000.
128. On the figures in the present case, the amount at stake on this issue is only £1,000. But the question is of potentially wider significance in all cases where a costs capping order has been made in connection with public interest judicial review proceedings by the High Court or the Court of Appeal under sections 88 to 90 of the Criminal Justice and Courts Act 2015 ("the 2015 Act"), or (as here) the parties have agreed to a costs capping order in lieu of an order under those sections. Since the irrecoverable costs of the SSHD in such cases are in effect funded by the taxpayer, the SSHD understandably wishes the question of principle to be tested. Permission to appeal was granted by Bean LJ on 20 December 2018.
129. There is no challenge to the reduction of 33% itself, which reflected the Appellant's partial success in establishing that Article 8 was engaged, even though the claim for judicial review was dismissed.
130. This part of the appeal was well argued on behalf of the Appellant by junior counsel, Mr Mountford. Oral submissions for the SSHD on this, as the other, issues were presented to us by Sir James Eadie.

### *The statutory background*

131. So far as material, sections 88 and 89 of the 2015 Act provide as follows:

#### **"88. Capping of costs**

(1) A costs capping order may not be made by the High Court or the Court of Appeal in connection with judicial review proceedings except in accordance with this section and sections 89 and 90.

(2) A “*costs capping order*” is an order limiting or removing the liability of a party to judicial review proceedings to pay another party’s costs in connection with any stage of the proceedings.

(3) The court may make a costs capping order only if leave to apply for judicial review has been granted.

(4) The court may make a costs capping order only on an application for such an order made by the applicant for judicial review in accordance with rules of court.

(5) Rules of court may, in particular, specify information that must be contained in the application, including –

(a) information about the source, nature and extent of financial resources available, or likely to be available, to the applicant to meet liabilities arising in connection with the application,

...

(6) The court may make a costs capping order only if it is satisfied that –

(a) the proceedings are public interest proceedings,

(b) in the absence of the order, the applicant for judicial review would withdraw the application for judicial review or cease to participate in the proceedings, and

(c) it would be reasonable for the applicant for judicial review to do so.

(7) The proceedings are “public interest proceedings” only if –

(a) an issue that is the subject of the proceedings is of general public importance,

(b) the public interest requires the issue to be resolved, and

(c) the proceedings are likely to provide an appropriate means of resolving it.

...

## **89. Capping of costs: orders and their terms**

(1) The matters to which the court must have regard when considering whether to make a costs capping order in connection with judicial review proceedings, and what the terms of such an order should be, include –

(a) the financial resources of the parties to the proceedings, including the financial resources of any person who provides, or may provide, financial support to the parties;

(b) the extent to which the applicant for the order is likely to benefit if relief is granted to the applicant for judicial review;

(c) the extent to which any person who has provided, or may provide, the applicant with financial support is likely to benefit if relief is granted to the applicant for judicial review;

(d) whether legal representatives for the applicant for the order are acting free of charge;

(e) whether the applicant for the order is an appropriate person to represent the interests of other persons or the public interest generally.

(2) A costs capping order that limits or removes the liability of the applicant for judicial review to pay the costs of another party to the proceedings if relief is not granted to the applicant for judicial review must also limit or remove the liability of the other party to pay the applicant's costs if it is.

...”

132. The relevant rules of court are contained in CPR 46.16 to 46.19 and 46PD paragraphs 10.1 and 10.2.

#### *Facts*

133. The Appellant applied for a costs capping order together with the application for permission to apply for judicial review: see paragraphs 87 to 90 of the Detailed Statement of Grounds.

134. The parties then agreed the terms of a consent order, which was made by Gilbert J on 12 October 2017 (“the Consent Order”). So far as material, the Consent Order recited their agreement “that, instead of a cost capping order, the recovery of costs should be limited for both parties prior to and following the grant of permission”, and their agreement “to limit costs so that neither party may recover costs of more than the amount set out in this Order following proceedings before the High Court”; it was then ordered by consent that:

“1. The Claimant’s application for a costs capping order at paragraphs 87-90 of the Detailed Statement of Grounds is dismissed on withdrawal;

2. Costs will follow the event, however, in any order for costs:

(a) the Claimant may not recover more than £3,000 from the Defendant;

(b) the Defendant may not recover more than £3,000 from the Claimant.”

135. The parties therefore agreed that the same cap of £3,000 should apply whichever party was successful, but there was no statutory requirement for the figure to be the same. By virtue of section 89(2), the only requirement was that the order “must also limit or remove the liability of the other party to pay the applicant’s costs” if relief is granted to the applicant.
136. Following the handing down of his judgment on 22 June 2018, the judge dealt with the question of costs on the basis of written submissions. By his order dated 8 August 2018, he ordered the Appellant to pay the SSHD’s costs “limited to the sum of £2,000” at the rate of £100 per month beginning on 2 October 2018. In the reasons for his order, he explained why, with one exception, he did not consider that any of the matters raised by the Appellant should result in any reduction in the agreed figure of costs payable under the cap pursuant to paragraph 2 of the Consent Order. He continued:
- “14. The one exception is the determination that the claimant’s Article 8 rights do encompass the recognition of the claimant’s non-gendered identity, which was a fundamental part of the claimant’s application for judicial review. In the absence of an agreed limit on costs I consider that the claimant’s success in relation to this issue would have been likely to have resulted in a reduction in the claimant’s liability to pay the defendant’s costs, and I see no good reason why it should not be reflected in a pro-rata deduction from the agreed sum.
15. In my judgment this should be reflected by a 33% reduction, resulting in an order that the claimant pay the defendant’s costs limited to £2,000, which it is not disputed will be payable at the rate of £100 per month.”
137. As I have said, the SSHD does not challenge the 33% reduction. The issue is whether the judge erred in law by applying the reduction to the capped sum of £3,000 rather than to the entirety of the SSHD’s costs.

### *Submissions*

138. On behalf of the SSHD, Sir James Eadie submits that the policy aims of the costs capping provisions in the 2015 Act are:
- (a) to determine whether a case is a public interest case at the outset of proceedings;
- (b) to fix the parties’ respective liabilities for costs at the outset of proceedings, which must include, when the order is made, consideration of the applicant’s financial position;
- (c) to allow an applicant, from the outset, to know where the applicant stands in respect of future liability to costs, so that the applicant can decide whether to proceed with the claim; and

(d) to include some measure of fairness to a defendant in requiring a reciprocal cap (although not necessarily of the same amount) to be placed on the adverse costs that may be recovered by a successful claimant.

139. Against that background, Sir James submits that any reduction to an award of costs made pursuant to CPR Part 44 must be applied to the total amount of costs claimed, and not to the capped amount. The general rule under CPR Part 44, reflected in the consent order itself, is that costs follow the event: see rule 44.2(2)(a). The court has a discretion to make a different order, and in deciding what order (if any) to make about costs, the court will have regard to all the circumstances, including “whether a party has succeeded on part of its case, even if that party has not been wholly successful”: rule 44.2(4)(b). Rule 44.2(6) then gives examples of alternative orders that a court may make, including an order that the unsuccessful party pay a proportion of another party’s costs: see paragraph (a). It is apparent, says Sir James, from the structure of rule 44.2 that the starting point is the costs incurred by the successful party, from which deductions may be made as the court considers appropriate.
140. Sir James goes on to submit that the only function of the cap is to set the maximum amount that a claimant for judicial review must pay if unsuccessful. The cap obviously does not preclude the successful party from incurring reasonable costs that exceed the cap, and if application of the normal principles set out in rule 44.2 would in principle entitle the successful party to recover an amount of costs that exceeds the cap, there can be no rational basis for preventing the successful party from recovering those costs up to the ceiling set by the cap. To do so would lead, in effect, to a lower cap being imposed than was agreed between the parties. Nor would this deprive the discretion conferred on the court by rule 44.2 of any practical effect, for example when a percentage reduction is ordered of the successful party’s recoverable costs. The cap in the present case was set at a very low level, but if, for example, the amount of the cap were £20,000, and the defendant had incurred costs of £20,000 or less, the claimant would still receive the full benefit of any discount applied.
141. In oral argument, Sir James referred us to the recent decision of this court in Campaign to Protect Rural England (Kent Branch) v Secretary of State for Communities and Local Government and Others [2019] EWCA Civ 1230 (“the CPRE case”). One of the main issues in the CPRE case concerned the proper application of the so-called Aarhus cap on costs in environmental cases, in circumstances where the case failed at the first hurdle (because permission to apply for statutory review of the relevant Local Plan was refused) and where there was more than one defendant or interested party: see the judgment of Coulson LJ (with whom Hamblen and David Richards LJJ agreed) at [1]. In the CPRE case itself, the total liability of the unsuccessful claimant to other parties was capped at £10,000. The relevant rules of court are contained in CPR Part 45, at rules 45.41 to 45.45.
142. In the section of his judgment dealing with this issue, Coulson LJ began by rejecting the basic submission that, because the claim had failed at the permission stage, rather than after a substantive hearing, the costs should be subject to a lower cap than the £10,000 stated in the CPR: see [49]. Coulson LJ continued:

“50. The starting point must be the absence of any express sub-caps or lower limits for particular stages of environmental litigation. The CPR provides for no lower cap on the costs that a

successful or interested party might to be able to recover following success at the permission stage. On the contrary, the Aarhus cap is global. It is applied to the costs that have been incurred by the successful defendant or interested party, at whatever stage the costs assessment is being done.

51. In a single defendant case, if that defendant succeeds in persuading the court... that permission should be refused, then that defendant is entitled to recover its reasonable and proportionate costs up to the amount of the cap. No different rules will apply to cases with more than one successful defendant or interested party. And there is no reason to limit the recovery (of either single defendants or multiple parties) by means of a further arbitrary cap at a lower level than the stated £10,000. Provided the costs being assessed are reasonable and proportionate then, other than in the imposition of the cap itself at the end of the exercise, it makes no difference for cost assessment purposes whether the case is one to which the cap applies or not. Putting the point another way, the cap does not justify a further reduction in the costs of successful defendants or interested parties below that which is assessed as being reasonable and proportionate.

52. Secondly, many of Mr Westaway's submissions were based on the false premise that the £10,000 was in some way referable to the total costs of an environmental claim, assuming it failed only after a substantial hearing. That is patently not so. The £10,000 is an arbitrary cap designed to bring claimants in environmental claims the benefits noted above. It has nothing to do with the average costs of civil litigation, much less the costs incurred in the making of an environmental claim, which can be notoriously high. It is therefore wrong in principle to assume that the £10,000 Aarhus cap must be preferable to the costs of a claim that went all the way through to trial.

53. Thirdly, Mr Westaway's submission that, if this is the correct analysis, it will have a chilling effect, is incorrect. The principle is that the costs of these claims should "not be prohibitively expensive", not that they involve no costs risk at all. The Aarhus cap offers a major advantage to claimants which is not available to any other group of civil litigants. It allows them costs certainty from the outset, and the ability to pursue litigation in the knowledge that, if they lose, their liability will not be a penny more than the cap."

Sir James relies in particular on the principles stated by Coulson LJ in [51], and submits that the practical effect of the judge's order in the present case is to introduce a further arbitrary cap at a lower level than the £3,000 agreed between the parties.

143. On behalf of the Appellant, Mr Mountford submits that there is nothing in the Consent Order which removes or modifies the broad discretion on costs conferred on the judge

by CPR rule 44.2. He emphasises the breadth of that discretion, including the power of the court to order a percentage reduction in the costs recovered by a successful party. This much is not disputed by the SSHD, although I note in passing that the parties' express agreement in paragraph 2 of the Consent Order that "[c]osts will follow the event" must at least reinforce the general rule contained in CPR 44.2(2)(a). Mr Mountford then submits that the statutory regime of costs capping orders reflects a clear policy of promoting access to justice in public interest proceedings, and self-evidently envisages that parties to such proceedings will often not be fully compensated for their reasonable legal costs in bringing or defending them. In cases of the present type, the public policy limitation on recoverable costs is built into the statutory regime, and must apply likewise to an order agreed between the parties in lieu of a costs capping order under the 2015 Act. The wide discretion on costs under CPR rule 44.2 must therefore be applied in the context of those public policy considerations, and the SSHD is wrong to submit that the first stage must always be to apply the normal Part 44 costs regime without reference to the cap.

144. Mr Mountford next submits that the ability of the court to reduce the capped amount by reference to partial success or unreasonable conduct (or for any other relevant reason) is entirely consistent with the imposition of a maximum limit on the liability. If the argument for the SSHD were correct, a respondent could in practice be assured of receiving the full amount of the costs cap if it succeeded, even if the other party were successful on a number of issues in dispute. In practical terms, the court's discretion would nearly always be rendered nugatory, and the example given by the SSHD, which envisages costs incurred being less than the cap, is unrealistic.
145. Furthermore, says Mr Mountford, there are strong policy reasons against the SSHD's approach. First, it would remove the incentive for a respondent to conduct litigation in a reasonable and proportionate manner, including by making appropriate concessions. Secondly, where a costs cap has been ordered or agreed, the applicant for judicial review (who is likely to have limited financial resources to meet any liabilities) would never in practice see the benefit of a reduction in the respondent's costs, even if successful on part of the case. Thirdly, application of the normal Part 44 machinery, in order to ascertain the full amount of recoverable costs to which a percentage reduction should be applied, would often involve a disproportionate burden on the court and the parties (who may well, as in the present case, have *pro bono* representation).
146. As for the CPRE case, Mr Mountford submits that, while any cap on costs is in a sense arbitrary, that case specifically concerns environmental claims and the Aarhus cap, and it has no more general application to public interest cases of the present type.
147. If all these principles are borne in mind, says Mr Mountford, it can be seen that the judge was fully entitled to exercise his discretion as he did, and there is no error of law or principle which would entitle this court to interfere.

### *Discussion*

148. I have not found this an easy question, but on balance I prefer the submissions of Mr Mountford. In my view, he is right to emphasise the underlying public policy which underpins the costs capping regime in the 2015 Act of promoting access to justice in judicial review proceedings which satisfy the test of being "public interest proceedings" within the meaning of section 88. If that test is satisfied, both sides will know from an

early stage what their maximum exposure to costs will be, but they will also know that the costs which they actually incur in pursuing or defending the litigation are likely, to a greater or lesser extent, to prove irrecoverable. That is the price which has to be paid, in the wider public interest, so that justice can be obtained in important cases of this character.

149. It does not follow, however, that the court must approach the making of its order for costs at the conclusion of such proceedings as though the cap did not exist, until it is applied at the end of the process to whatever resulting figure is yielded by application of the normal principles set out in Rule 44.2. A mechanical approach of that nature would not in my judgment sit well with the underlying public policy which is engaged, and it may also lead to one or more of the undesirable consequences to which Mr Mountford has drawn attention. In my view, he is right to submit that the relevant considerations of public policy should inform the whole of the exercise of judicial discretion on costs at the conclusion of such cases, and there is no reason of law or principle why the judge should not, in an appropriate case, apply a percentage reduction to the amount of the capped costs rather than the uncapped costs.
150. Naturally, a judge should think carefully before adopting such a course, bearing in mind that the party in question will usually have incurred substantial irrecoverable costs in excess of the cap. But the question arises in a context where both sides have known, from an early stage, that their costs will be capped, and it could be an invitation to lax practice or unreasonable litigation conduct if the successful party were free to proceed in the knowledge that, in practice, it could always count on receiving the full amount of the capped costs even if there were factors which would justify a substantial reduction of its uncapped costs.
151. I also agree with Mr Mountford that the issues under consideration in the CPRE case are too far removed from the present context to provide any helpful guidance.
152. The judge below dealt with the matter very shortly, which is hardly surprising since only £1,000 was at stake. But he was, in my view, entitled to adopt the approach which he did, and more importantly he made no error of law (which is the only ground upon which his decision is challenged).

For these reasons, I would dismiss Ground 2 of the cross-appeal.