

IN THE SUPREME COURT OF THE UNITED KINGDOM

ON APPEAL FROM HER MAJESTY'S COURT OF APPEAL (CIVIL DIVISION)

(Lady Justice King, Lord Justice Irwin and Lord Justice Henderson)

[2020] EWCA Civ 363

BETWEEN:

THE QUEEN  
(on the application of ELAN-CANE)

Appellant

-and-

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

-and-

FAIR PLAY FOR WOMEN

Potential Intervenor

---

SUPPORTING GROUNDS TO THE  
APPLICATION FOR PERMISSION TO INTERVENE

---

**A. INTRODUCTION**

1. This is an Application for permission to intervene in this Appeal pursuant to Rule 26(1)(c) of the Supreme Court Rules 2009 by Fair Play for Women (“**FPFW**”). FPFW is a campaigning and consultancy group which works to protect the rights of women and girls by raising awareness and providing evidence and analysis for use by policy-makers and Courts.
2. The Supreme Court granted the Appellant leave to appeal on 10 November 2020 and the hearing is listed for 12 and 13 July 2021. FPFW seeks permission to intervene in this Appeal in writing and through brief oral submissions limited to 30 minutes.

**B. FPFW'S EXPERTISE ON MATTERS RELEVANT TO THIS APPEAL**

3. FPFW has no political, ideological or religious affiliation. Its work is focused on understanding when and how gender and sex-based rights conflict in law and policy-

making and promoting appropriate resolution to such conflict. Its aim is to ensure that everyone's needs are fairly balanced, and that women and girls are not forgotten in policy or law making.

4. FPFW endorses the widespread societal norm, enshrined in UK law, that single-sex spaces and opportunities for women and girls are necessary for the safety of, and fairness to, women and girls; and for the dignity and privacy of persons of both sexes.
5. As a consequence of its work, FPFW has an active interest in how sex is defined in law, policy and everyday language. FPFW is particularly concerned about the potential for confusion between 'sex' and 'gender'. As Jeremy Baker J noted in the first instance judgment below (§96), there is a clear and important distinction between these terms. For its part, FPFW considers:
  - a. *Sex* to refer to a person's birth sex, i.e. their biological or natal sex registered at birth, which is objectively determined. It is also accepted that a person can, as a matter of law, change their legal sex by acquiring a Gender Recognition Certificate ("**GRC**"), pursuant to s.9 of the Gender Recognition Act 2004. Importantly, however, sex is binary - it can be either 'Male' or 'Female' - and continues to be recognised as such in UK law.
  - b. *Gender* to be a fluid, extra-legal category: a social construct used widely across the English-speaking world. It refers to a personal feeling or experience, which is subjectively determined. Whilst every person has a sex, not every person has a gender identity. A person's gender identity is not necessarily tied to a person's natal sex, and may refer to:
    - i. *Transgender identity*, where a person innately feels that they are the opposite sex to their birth sex, or;
    - ii. *Non-binary identity*, where a person innately feels that they have no sex and identifies outside of the sex binary altogether.
6. FPFW's basic position is that, in order to secure women's sex-based rights and protections persuasively and intelligibly, UK law and systems of governance must continue to distinguish birth, or legal sex from self-selected *gender identity*. In keeping with this, FPFW

has become a recognised expert voice on crucial importance of retaining 'sex' as an identity marker in contexts where sex differences matter greatly.

7. For example, FPFW has served as a consultant on the sex/ gender distinction in national and international sport policy at meetings held by the International Olympic Committee, World Athletics, World Rugby, England Rugby and UK Sports Councils. FPFW has also provided consultancy services to government departments, including the Department for Culture, Media and Sport and the Ministry of Justice, and other public bodies, such as the Equalities and Human Rights Commission and OfCom.
8. In 2018, FPFW ran a public awareness campaign in response to the Government's public consultation on reform of the Gender Recognition Act ("GRA"). FPFW opposed reform, arguing that a person should not be able to change their legal sex on the basis of self-declaration, but only after a rigorous medical assessment process. In total, eighteen percent of all public responses to the GRA consultation were gathered via the FPFW website. FPFW also submitted written evidence to the Parliamentary Women and Equalities Select Committee on this subject. The strength of FPFW's contribution was such that it was invited to give oral evidence to the Committee on 21 April 2021.
9. As a consequence of its work, FPFW has developed an in-depth knowledge of the sex exceptions in the Equality Act 2010. It supports policy makers to understand when and how to provide single-sex spaces and services. One example of this work is the debate about transgender prison policy, which FPFW has led since October 2017, when it published statistical research findings (since confirmed by the Ministry of Justice) showing the high incidence of sexual offence convictions among the (natal male) female-identified transgender prisoner population.<sup>1</sup> In addition to this research, FPFW launched a national petition calling for policy reform and FPFW representatives made appearances in a variety of national media. This led to a ministerial response and, ultimately, a change of policy.
10. FPFW also has experience of litigation before the domestic Courts in complex matters relating to official approaches to sex and gender identity. FPFW recently provided written evidence to the Divisional Court in *R (FDJ) v Secretary State for Justice*, a judicial review challenge to Ministry of Justice policy which permitted natal male, female-

---

<sup>1</sup> <https://fairplayforwomen.com/transgender-prisoners/>

identified transgender inmates to be housed within the women's prison estate. FPFW had been involved in liaising with the Ministry of Justice during the development of the new policy and had serious concerns both as to how it had been developed and as to its substantive impact upon the rights, and safety, of natal female prisoners. The judgment of the Court is awaited.

11. In March 2021, FPFW successfully brought a judicial review challenge against the Office for National Statistics (“ONS”), with respect to official guidance produced alongside the 2021 Census: *R (Fair Play for Women Ltd) v UK Statistics Authority* [2021] EWHC 940 (Admin). The guidance in question related to the “*What is your sex?*” question on the Census. FPFW alleged that the guidance gave rise to a risk that respondents would unlawfully answer this question in accordance with their gender or gender identity as opposed to their sex. FPFW submitted that respondents were required to answer according to their legal sex and not their gender or gender identity, there being a separate, voluntary question in the Census concerning gender identity. FPFW provided detailed evidence to the Court which explained the importance of accurate data collection regarding legal sex (which, save in the small number of cases where a Gender Recognition Certificate has been issued, would be the respondent's natal sex). Swift J found FPFW's case to be “*strongly arguable*” and granted permission and interim relief requiring the guidance to be amended. The ONS subsequently conceded the claim so that the amended guidance would remain extant throughout the Census period.

12. FPFW has also campaigned specifically in relation to the particular issues which could be caused by the official recognition of individual, non-binary gender identities, which is the subject of this appeal. On 22 January 2021, FPFW published an article entitled, “*Stonewall's non-binary demands undermine women's protections*” in which it asked:

*If people are allowed to opt out of having a legal sex, how are they to be treated under the protected characteristic of sex in the Equality Act? Would opting out of being legally male confer the right to access women's male-free spaces such as female-only changing rooms and female-only sports?*<sup>2</sup>

13. In summary, for the reasons outlined above FPFW has substantial experience and expertise in the issues to which the current appeal relates, as well as recent experience of

---

<sup>2</sup> <https://fairplayforwomen.com/stonewalls-non-binary-demands-undermine-womens-protections/>

assisting the Courts with matters falling within that expertise. It is therefore well placed to assist the Court in the present appeal.

### **C. SCOPE OF PROPOSED INTERVENTION**

14. As has been recognised in both judgments below, the Court must, in this appeal, determine whether the interference with the Appellant's rights under Article 8 and/or 14 of the European Convention on Human Rights ("ECHR") occasioned by the Respondent's passport policy is justified. It is with respect to the issue of justification that FPFW, being mindful of the need for interveners to 'add value' and not make submissions that merely duplicate those of other parties, considers that it can particularly assist the Court.
15. In particular, FPFW wishes to make submissions on:
  - a. The implications of allowing individuals to select a third, 'non-binary' or 'X' sex category in their passports for the sex-based rights of women, as currently enshrined in law; and
  - b. More broadly, the importance of coherence in the treatment of sex across Government from the perspective of women's sex based rights.
16. As both Jeremy Baker J (§120) and the Court of Appeal (§105) recognised, the relief sought by the Appellant has the potential to render meaningless the binary sex categories 'Male' and 'Female' on passports. It would also raise the question as to the purpose of sex being a required field of entry on other or any official records across the various government departments.
17. FPFW is strongly of the view that in recognising binary sex over gender identity, the passport, one of the few universal, or near universal administrative documents issued in the UK, represents the state's ongoing commitment to binary sex markers as relevant and robust markers of identity. An individual may choose to affirm any number of self-selected gender identities, but these are not objectively determined and do not hold any particular wider social relevance beyond the subjective feelings and preferences of the individual. Gender identity can include, for example, self-selected labels such as 'a-gender', 'third gender', 'queer', 'gender fluid', 'transmasculine', 'non-binary', 'non-gendered', etc.

18. Whilst such a multiplicity of gender labels undoubtedly reflects intensely personal innate feelings, they cannot assist the state in its systems of administrative governance, since they are subjective, fluctuating and arbitrarily drawn. Attempts to undermine the 'Male'/'Female' sex binary in favour of transcendent principles of individual self-determination risk erasing fundamental markers of sex that have resonance and relevance for the whole society across any number of official policy areas. For example, some advocacy groups have suggested that non-binary persons should be entitled to access women-only spaces, even though they identify neither as a man nor a woman. This would, in FPFW's view, totally undermine the rationale for such spaces.
19. FPFW would wish to contribute to the debate before the Court as to whether current Government policy strikes a "fair balance" between the rights of individuals such as the Appellant and the interests of the wider community. FPFW believes that that debate should consider the significance of official recording of natal or legal sex and of the female/male binary to the rights of women and girls, which have the potential to be undermined by official records, and policies, which are founded on gender identity, particularly when this is not confined to the female/male binary.
20. In FPFW's view, whilst the appeal is, on its face, a challenge to interference with an individual's ECHR rights, it is also an attempt to engineer, through judicial intervention, a radical departure from the *status quo* – in legislation and public policy – that would render immaterial the legally salient differences between women and men. It could also have implications for other legal definitions based on sex, such as sexual orientation.<sup>3</sup> FPFW is keen to ensure that women's concerns as to why sex matters are heard and taken into account before the Court rules on the appeal, with potentially far-reaching consequences.
21. FPFW would also wish to make submissions to the Court on the specific issue of coherence of public policy on the recording of non-binary gender identity. On this issue, FPFW recognises, along with the Respondent and the Court of Appeal (§80), that the wider repercussions of recognising non-binary gender identities in official documents and records must include a holistic and extensive review of the system used by the UK to recognise sex and gender across all areas. Such a review must consider not only

---

<sup>3</sup> See s.12 of the Equality Act 2010

administrative issues of cost or of the limits of existing IT systems. The necessity of what King LJ called (§105) a “*coherent, structured approach across all the areas where the issue of non-binary gender arises*” requires a re-examination of the social relevance of the sex binary for administrative purposes. The introduction of ‘X’-passports would be an important move towards Government abandoning reliance on the sex binary altogether, in favour of an approach regarded by some as more inclusive, but which, in FPFW’s view, has serious implications for the protection of women and girls.

22. FPFW would wish to submit that the sex binary is not the cause of discrimination but is an objective basis for enabling a progressive society to identify sexism and discrimination against women and girls. Indeed, this is a fundamental principle underpinning the Equality Act 2010, which specifically prohibits *sex*-based discrimination and which also specifically protects the provision of single-*sex* services and spaces. As a result of its advocacy and campaigning work, FPFW is particularly well-placed to assist the Court in understanding how these protections operate in practice, how they fit into the broader domestic legal and policy context and how they could be threatened by an *ad hoc* reform of passports in advance of and separate from an holistic consideration of the significance of official recording of sex and of the female/male binary.
23. In order to make the above submissions, FPFW seeks permission to file a concise written Case and to make oral submissions limited to 30 minutes. FPFW understands that Human Rights Watch (“**HRW**”) intervened in favour of the Appellant in the Courts below and may also intervene before this Court. FPFW submits, however, that an additional intervention, offering a contrary perspective to that of HRW, ought not to prejudice the timetable or unduly prolong the hearing.
24. In the event that permission to intervene is granted, FPFW requests that such permission be granted on the basis that it will neither seek nor be required to pay costs, consistent with Rule 46.3 of the Supreme Court Rules 2009 and UKSC PD6.9.6.

**JASON COPPEL QC**

11 KBW

**BEN FULLBROOK**

LANDMARK CHAMBERS

27 April 2021