

PRESS RELEASE

Challenge to transgender prison policy fails but court recognises vulnerability of female prisoners, the poor recording of data by the government and the understandable concerns raised by the Claimant

The Divisional Court today ruled in **FDJ v Secretary Of State For Justice** that the Ministry of Justice's policies in relation to the placement of high risk transgender women prisoners in the women's prison estate are lawful.

The challenge was brought by a former prisoner, FDJ, who asserted she was sexually assaulted by a transgender woman prisoner with convictions for serious sexual offences. The Claimant argued that the policies indirectly discriminate against non transgender women prisoners and that the government failed to have due regard to the single sex exemptions in the Equality Act, which permit separate services for men and women in particular limited circumstances. This is the first time the High Court has considered the single sex exemptions in the Equality Act.

Lord Justice Holroyd, delivering the lead judgment, accepted there were real concerns as raised by the Claimant, and that "*a substantial proportion of women prisoners have been the victims of sexual abuse and/or domestic violence*". He also accepted the proposition that many would "*suffer fear and acute anxiety if required to share prison accommodation and facilities with a transgender women with male genitalia and convictions for sexual and violent offences against women.*" He further accepted the Claimant's submission that the government policy could increase the risk of Article 3 ECHR mistreatment of women prisoners. However, he stated that the subjective concerns of women prisoners had to be balanced against the rights transgender women in the prison system. He noted that the Defendant's policy recognised the importance of risk management, and that there is a careful case by case assessment of the risks and the ways such risks should be managed and concluded that the policies adopted were "*capable of being operated lawfully....and whilst individual decisions may be subject to challenge, that does not render the policies unlawful*". Ultimately, whilst "*the Claimant's concerns were understandable*", Lord Justice Holroyde accepted the Defendant's argument that there is "*a margin of discretion*" in striking the appropriate balance of competing rights.

The Court accepted that the statistical evidence shows that the proportion of transgender women prisoners who have been convicted of one or more sexual offences is substantially greater than the corresponding proportions of non-transgender men and women prisoners. However the Court highlighted that the government's data collection in respect of transgender prisoners does not provide a full picture because transgender prisoners with a Gender Recognition Certificate are disregarded in government statistics. The Court concluded that this is a matter of '*real importance ... which [the government] needs to have a very high degree of confidence.*'

The Court also recognised that policies directed at transgender women may affect non-transgender women and therefore could discriminate against them, even in the absence of an incident (such as a sexual assault) which gives rise to inhuman or degrading treatment. Therefore policies directed at transgender women, in all contexts, must also consider the impact on non-transgender women.

FDJ, the Claimant, said:

“I am disappointed with today’s judgment, but I am pleased that the Court recognised that women in prison are a vulnerable group and that many women in prison have been victims of domestic and sexual violence.

By bringing this challenge, I did not seek to prevent transwomen in prison from living in dignity, or to exclude all transwomen from women’s prisons. However, I feel that transwomen who have a history of violence and sexual offending against women should not be in a situation where they can put our safety at risk.

I know that many women in HMP Downview, where they have a unit for high risk transwomen, are frightened by the prospect of sharing accommodation and many feel intimidated by those women. They are also scared to report concerns because many prison officers send out the message that any such concerns may be seen as ‘transphobic’.”

Tara Mulcair of Birnberg Peirce, solicitor for the Claimant, said:

“Whilst we are disappointed with today’s judgment, we welcome this clarification in the law. The judgment is clear – policies aimed at transwomen may indirectly discriminate against non-transgender women. Policy makers must therefore have due regard to the impact of these policies on non-transgender women. It is our client’s bravery, in bringing this important and sensitive challenge, which has made this possible.

The judgment has shone a light on the government’s inadequate record keeping in this area and sent a strong message that they must improve their data collection practices in order to properly manage these risks in the future. In addition to the concerns raised in the judgment, it is important to consider that few women report sexual offences even outside prison. Within prison, the problem is amplified because of the additional fear of being disbelieved or suffering repercussions. There is likely to be very significant under-reporting. It is imperative that meaningful research, including exploring the experiences of prisoners and officers on a confidential basis, should be conducted so that a realistic picture of the potential and actual risks are understood.”

The Claimant was represented Birnberg Peirce Ltd instructing Karon Monaghan QC and Jessica Jones (Matrix Chambers) and Julian Norman (Drystone Chambers).

**BIRNBERG PEIRCE
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