Appeal No. UKEAT/0105/20/JOJ

EMPLOYMENT APPEAL TRIBUNAL

ROLLS BUILDING, 7 ROLLS BUILDINGS, FETTER LANE, LONDON, EC4A 1NL

At the Tribunal
on 27 & 28 April 2021
Handed down on 10 June 2021

Before

THE HONOURABLE MR JUSTICE CHOUDHURY (PRESIDENT)

MR C EDWARDS

MRS M V MCARTHUR BA FCIPD

MAYA FORSTATER — APPELLANT

(1) CGD EUROPE
(2) CENTER FOR GLOBAL DEVELOPMENT
(3) MASOOD AHMED — RESPONDENTS

(1) INDEX ON CENSORSHIP
(2) EQUALITY AND HUMAN RIGHTS COMMISSION — INTERVENORS

Transcript of Proceedings

JUDGMENT

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SUMMARY

TOPIC NUMBER 26: RELIGION OR BELIEF DISCRIMINATION

The Claimant holds gender-critical beliefs, which include the belief that sex is immutable and not to be conflated with gender identity. She engaged in debates on social media about gender identity issues, and in doing so made some remarks which some trans gender people found offensive and "transphobic". Some of her colleagues at work complained that they found her comments offensive, and, following an investigation, her visiting fellowship was not renewed. The Claimant complained that she was discriminated against because of her belief. There was a preliminary hearing to determine whether the Claimant's belief was a philosophical belief within the meaning of s.10 of the Equality Act 2010 (EqA). The Tribunal held that the belief, being absolutist in nature and whereby the Claimant would "refer to a person by the sex she considers appropriate even if it violates their dignity and/or creates an intimidating, hostile, degrading or offensive environment", was one that was "not worthy of respect in a democratic society". Accordingly, the Tribunal concluded that the belief did not satisfy the fifth criterion in **Grainger plc v Nicholson** [2010] ICR 360 ("Grainger V"). The Claimant appealed.

Held, **allowing the appeal**, that the Tribunal had erred in its application of Grainger V. A philosophical belief would only be excluded for failing to satisfy Grainger V if it was the kind of belief the expression of which would be akin to Nazism or totalitarianism and thereby liable to be excluded from the protection of rights under Articles 9 and 10 of the **European Convention of Human Rights** (ECHR) by virtue of Article 17 thereof. The Claimant's gender-critical beliefs, which were widely shared, and which did not seek to destroy the rights of trans persons, clearly did not fall into that category. The Claimant's belief, whilst offensive to some, and

notwithstanding its potential to result in the harassment of trans persons in some circumstances, fell within the protection under Article 9(1), ECHR and therefore within s.10, EqA.

However:

a. This judgment does **not** mean that the EAT has expressed any view on the merits of either side of the transgender debate and nothing in it should be regarded as so doing.

b. This judgment does **not** mean that those with gender-critical beliefs can 'misgender' trans persons with impunity. The Claimant, like everyone else, will continue to be subject to the prohibitions on discrimination and harassment that apply to everyone else. Whether or not conduct in a given situation does amount to harassment or discrimination within the meaning of EqA will be for a tribunal to determine in a given case.

c. This judgment does **not** mean that trans persons do not have the protections against discrimination and harassment conferred by the EqA. They do. Although the protected characteristic of gender reassignment under s.7, EqA would be likely to apply only to a proportion of trans persons, there are other protected characteristics that could potentially be relied upon in the face of such conduct.

d. This judgment does **not** mean that employers and service providers will not be able to provide a safe environment for trans persons. Employers would continue to be liable (subject to any defence under s.109(4), EqA) for acts of harassment and discrimination against trans persons committed in the course of employment.

THE HONOURABLE MR JUSTICE CHOUDHURY

Introduction

1. The Claimant holds the belief that biological sex is real, important, immutable and not to be conflated with gender identity. She considers that statements such as "woman means adult human female" or "trans women are male" are statements of neutral fact and are not expressions of antipathy towards trans people or "transphobic". Some of the Claimant's colleagues found the Claimant's statements on Twitter offensive and complained. When her consultancy contract was not renewed, she brought proceedings before the Central London Employment Tribunal ("the Tribunal") on the basis that, amongst other claims, she had been discriminated against because of her belief. After a six-day Preliminary Hearing, the Tribunal concluded that the Claimant's belief, having regard to its "absolutist" nature, whereby she would "refer to a person by the sex she considers appropriate even if it violates their dignity and/or creates an intimidating, hostile, degrading or offensive environment", was one that was "not worthy of respect in a democratic society". Accordingly, the Judge found that the Claimant's belief was not a "philosophical belief" within the meaning of section 10 of the **Equality Act 2010** ("EqA"). The sole issue in this appeal is whether the Tribunal erred in law in reaching that conclusion.

2. The issue is one that has generated strong feelings, with each side making dramatic claims as to the effect of upholding or reversing the Tribunal's judgment. The Claimant suggests that the effect of the Tribunal's conclusion is "Orwellian" in that it requires her to refer to a trans woman as a woman even though she does not believe that to be true; and the Respondents contend that to overturn the Tribunal's conclusion would mean that no trans person would be safe in any workplace from the harassment inherent in being "misgendered", that is to say being referred to by non-preferred pronouns or by a different gender to that in which they are living. Such positions

A are reflective of the debate in wider society about the rights of trans persons, which is often conducted in hyperbolic and intransigent terms. We wish to make clear at the outset that it is not the role of this Employment Appeal Tribunal to express any view as to the merits of either side of that debate (which we shall refer to as the "transgender debate"); its role is simply to determine whether, in reaching the conclusion that it did, the Tribunal erred in law. Our judgment should not therefore be read as providing support for or diminishing the views of either side in that debate.

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3. In taking that approach, we do not in any way seek to ignore or downplay the difficulties faced by trans persons seeking merely to live their lives peacefully in the gender with which they identify, irrespective of their natal sex. The regrettable reality for many trans persons, however, is that something which most take for granted - the sense of self and autonomy in identity – is under constant challenge and attack. As stated in the Equal Treatment Bench Book:

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> **"15. Awareness, knowledge and acceptance of gender-variant people such as those who are transgendered or gender-fluid has greatly increased over the last decade. Unfortunately, however, there remains a certain mistrust of non-conventional gender appearance and behaviour and many people experience social isolation and/or face prejudice, discrimination, harassment and violence in their daily lives – in schools and places of further education, in the workplace, and whilst being customers and service users. Some people experience rejection from families, work colleagues and friends. Some experience job or home loss, financial problems and difficulties in personal relationships.**
>
> **16. Many trans people avoid being open about their gender identity for fear of a negative reaction from others. This applies in all contexts, but particularly when out in public because of safety issues. There is often concern about online privacy, perpetuated by a fear of being 'outed' online and having no control over the content shared.**
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> **17. A survey for the TUC of over 5,000 LGBT employees in the first half of 2017 found that almost half of transgender respondents had experienced bullying or harassment at work and that 30% had had their transgender status disclosed against their will. A 2017 ACAS research paper confirmed that workplace bullying is common and that many staff identified as transgendered experience it on a daily basis. The ACAS report also found that the level of bullying may be higher than other rates of bullying related to, for example, sexual orientation, and that transgender staff may look for another job rather than endure the costs and emotional labour of going to tribunal or court. The limited protection of the Equality Act 2010, which only covers those who are undergoing or have undergone (or who are perceived to be undergoing or to have undergone) gender reassignment, means non-transitioning, non-binary or otherwise gender non-conforming people are particularly vulnerable.**

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18. In a poll of 1,000 employers across a variety of industries in June 2018, one in three employers admitted they were less likely to hire a transgender person and 43% were unsure if they would.
19. Social isolation, social stigma and transphobia can have serious effects on transgendered people's mental and physical health. Research shows that levels of self-harm and suicide ideation among young trans people and trans adults are much higher than for cisgender people (those whose gender identity corresponds to the gender assigned to them at birth).
20. The coronavirus pandemic with its lockdown and periodic restrictions has had a particularly damaging effect on trans people. Research shows a high level of mental ill health, caused by increased discrimination and hate crime, isolation and reduction in peer group support, in some cases being required to stay at home with transphobic families, and reduction in access to specialised medical or advice services."

4. The vulnerability of many trans persons is something we bear very much in mind. This case, however, is not about whether greater protection ought to be afforded to trans persons under the EqA, the Gender Recognition Act 2004 ("GRA") or otherwise; such legislative steps being a matter for Parliament and not for the Court. This appeal is about the much narrower issue of whether the Claimant's belief as to the immutability of sex is one that amounts to a philosophical belief under s.10, EqA. For the reasons we set out below, we have come to the conclusion that it does. That does not mean, however, that those with gender-critical beliefs can indiscriminately and gratuitously refer to trans persons in terms other than they would wish. Such conduct could, depending on the circumstances, amount to harassment of, or discrimination against, a trans person.

5. With those introductory remarks out of the way, we proceed with our judgment, which is structured as follows:

a. Background
b. The Tribunal's Judgment
c. The Legal Framework
d. The Grounds of Appeal
e. Parties' Outline Submissions
f. Discussion and Analysis

g. Conclusion

h. Note on Procedure.

6. The Claimant is represented in this appeal by Mr Ben Cooper QC and Ms Anya Palmer and the Respondents are represented by Ms Jane Russell. Ms Palmer and Ms Russell both appeared below. Permission to intervene was granted to Index on the Censorship ("IoC"), represented by Ms Aileen McColgan QC and Ms Katherine Taunton, and to the Commission for Equality and Human Rights ("the Commission"), represented by Ms Karon Monaghan QC. Ms Monaghan made it very clear that the Commission is not taking a position on any matter of controversy, its submissions being confined (like the decision of the EAT) to whether the Tribunal erred in law. We are grateful to all Counsel for their helpful and illuminating submissions.

Background

7. The Second Respondent is a not-for-profit think tank based in the US which focuses on international development. The First Respondent is a separate but closely linked organisation based in the UK. The Third Respondent is the President of the Second Respondent.

8. The Claimant is a researcher, writer and adviser on sustainable development. She was appointed a visiting fellow of the First Respondent in November 2016. That appointment was renewed in 2017. In that capacity, the Claimant carried out paid consultancy work on specific research projects.

9. The Claimant has an active presence on social media and regularly posts comments relating to the transgender debate. In July 2018, the Government launched a consultation on proposed amendments to the GRA which would have made legal recognition of self-identified gender easier. The Claimant was concerned by the proposed amendments to the GRA, and from around August 2018, she began to express her beliefs about those issues and her views relating to the transgender debate generally on her personal Twitter account. It is not necessary to set out all of the relevant Tweets in detail in this judgment as they are set out in the judgment below. It suffices for present purposes to refer to the following extracts:

a. On 2 September 2018, the Claimant tweeted about the GRA stating:

> **"I share the concerns of @fairplaywomen that radically expanding the legal definition of 'women' so that it can include both males and females makes it a meaningless concept, and will undermine women's rights and protection for vulnerable women and girls…**
> **Some transgender people have cosmetic surgery. But most retain their birth genitals. Everyone's equality and safety should be protected, but women and girls lose out on privacy, safety and fairness if males are allowed into changing rooms, dormitories, prisons, sports teams."**

b. Later that month, the Claimant made a number of comments about Pips/Philip Bunce, who is a senior director at Credit Suisse and describes himself as being "gender fluid" and "non-binary". These included:

> **"Bunce does not 'masquerade as female' he is a man who likes to express himself part of the week by wearing a dress"**
> **"Yes I think that male people are not woman. I don't think being a woman/female is a matter of identity or womanly feelings. It is biology"**
> **"Bunce is a white man who likes to dress in women's clothes".**

c. Also in that month, when challenged about what she had said about Pips Bunce, the Claimant stated in a conversation on Slack (an online communication platform):

> **"You are right on tone. I should be careful and not necessarily antagonistic. But if people find the basic biological truths that "women are adult human females" or "trans-women are male" or offensive, then they will be offended.**
> **Of course in social situations I would treat any trans-woman as an honorary female, and use whatever pronouns etc… I wouldn't try to hurt anyone's feelings but I don't think people should be compelled to play along with literal delusions like "trans-women are women"."**

d. In a letter to Anne Main MP on 30 September 2018, the Claimant invited Ms Main MP not to support the proposed new GRA and said:

> **"Please stand up for the truth that it is not possible for someone who is male to become female. Trans-women are men, and should be respected and protected as men."**

10. In late September or early October 2018, some staff of the Second Respondent (and, later, some staff of the First Respondent) raised concerns about some of the Claimant's tweets, alleging that they were "trans-phobic", "exclusionary or offensive" and were making them feel "uncomfortable". An investigation into the Claimant's conduct followed, the end result of which was that the Claimant was not offered further consultancy work and her visiting fellowship was not renewed. The Claimant lodged proceedings in the Tribunal alleging, amongst other matters, direct discrimination because of her "gender-critical" beliefs and/or harassment related to those beliefs.

11. The Tribunal directed that there be a Preliminary Hearing to determine, amongst other matters, whether the belief relied upon by the Claimant amounts to a philosophical belief within the meaning of s.10, EqA, and whether she was in "employment" within the meaning of s.83(2)(a) EqA. Those issues came before the Tribunal between 13 and 21 November 2019, although, in the event, there was only time to consider the belief issue.

The Tribunal's Judgment

12. In what is (given the length of the hearing) an admirably concise and sensitively written judgment sent to the parties on 18 December 2019, the Tribunal concluded that the "specific belief that the Claimant holds as determined in the reasons, is not a philosophical belief protected by the Equality Act 2010."

13. At para 39 of the Judgment, the Tribunal set out the Claimant's evidence as to her belief:

"39. In the Claimant witness statement she stated:

39.1 "I believe that people deserve respect, but ideas do not." Para 5
39.2 "I do not believe it is incompatible to recognise that human beings cannot change sex whilst also protecting the human rights of people who identify as transgender" Para 13
39.3 "I believe that there are only two sexes in human beings (and indeed in all mammals): male and female. This is fundamentally linked to reproductive biology. Males are people with the type of body which, if all things are working, are able to produce male gametes (sperm).
Females have the type of body which, if all things are working, is able to produce female gametes (ova), and gestate a pregnancy." Para 14
39.4 "Women are adult human females. Men are adult human males." Para 15
39.5 "Sex is determined at conception, through the inheritance (or not) of a working copy of a piece of genetic code which comes from the father (generally, apart from in very rare cases, carried on the Y chromosome)." Para 16
39.6 "Some women have conditions which mean that they do not produce ova or cannot conceive or sustain a pregnancy. Similarly, some men are unable to produce viable sperm. These people are still women and men." Para 17
39.7 "I believe that it is impossible to change sex or to lose your sex. Girls grow up to be women. Boys grow up to be men. No change of clothes or hairstyle, no plastic surgery, no accident or illness, no course of hormones, no force of will or social conditioning, no declaration can turn a female person into a male, or a male person into a female." Para 23
39.8 "Losing reproductive organs or hormone levels through illness or surgery does not stop someone being a woman or a man." Para 24
39.9 "A person may declare that they identify as (or even are) a member of the opposite sex (or both, or neither) and ask others to go along with this. This does not change their actual sex." Para 26
39.10 "There are still areas of scientific discovery about the pathways of sexual development, including chromosomal and other "disorders of sexual development" (so called "intersex" conditions), and about the psychological factors underlying transgender identification and gender dysphoria. However I do not believe that any such research will disprove the basic reality that there are two sexes" Para 60
39.11 "Under the Gender Recognition Act 2004, a person may change their legal sex. However this does not give them the right to access services and spaces intended for members of the opposite sex. It is an offence for a person who has acquired information in an official capacity about a person's GRC to disclose that information. However this situation where a person's sex is protected information relates to a minority of cases where a person has a GRC, is successfully "passing" in their new identity and is not open about being trans. In many cases people can identify a person's sex on sight, or they may have known the person before transition, or the person may have made it public information that they are trans. There is no general legal compulsion for people not to believe their own eyes or to forget, or pretend to forget, what they already know, or which is already in the public domain." Para 108
39.12 "In most social situations we treat people according to the sex they appear to be. And even when it is apparent that someone's sex is different from the gender they seek to portray through their clothing, hairstyle, voice and mannerisms, or the name, title and pronoun they ask to be referred to by, it may be polite or kind to pretend not to notice, or to go along with their wish to be referred to in a particular way. But there is no fundamental right to compel people to be polite or kind in every situation." Para 110
39.13 "In particular while it may be disappointing or upsetting to some male people who identify as women to be told that it is not appropriate for them to share female-only services and spaces, avoiding upsetting males is not a reason to compromise women's safety, dignity and ability to control their own boundaries as to who gets to see and touch their bodies."

> **40. I accept that these passages reflect core aspects of the Claimant's belief.**
> **41. When questioned during live evidence the Claimant stated that biological males cannot be women. She considers that if a trans woman says she is a woman that is untrue, even if she has a Gender Recognition Certificate. On the totality of the Claimant's evidence it was clear that she considers there are two sexes, male and female, there is no spectrum in sex and there are no circumstances whatsoever in which a person can change from one sex to another, or to being of neither sex. She would generally seek to be polite to trans persons and would usually seek to respect their choice of pronoun but would not feel bound to; mainly if a trans person who was not assigned female at birth was in a "woman's space", but also more generally. If a person has a Gender Recognition Certificate this would not alter the Claimant's position. The Claimant made it clear that her view is that the words man and woman describe a person's sex and are immutable. A person is either one or the other, there is nothing in between and it is impossible to change form one sex to the other."**

14. At para 77, having considered the legal criteria for determining whether a belief is a philosophical belief, the Tribunal made the following findings as to the Claimant's belief:

> **"77. The core of the Claimant's belief is that sex is biologically immutable. There are only two sexes, male and female. She considers this is a material reality. Men are adult males. Women are adult females. There is no possibility of any sex in between male and female; or that is a person is neither male nor female. It is impossible to change sex. Males are people with the type of body which, if all things are working, are able to produce male gametes (sperm). Females have the type of body which, if all things are working, is able to produce female gametes (ova), and gestate a pregnancy. It is sex that is fundamentally important, rather than "gender", "gender identity" or "gender expression". She will not accept in any circumstances that a trans woman is in reality a woman or that a trans man is a man. That is the belief that the Claimant holds."**

15. We refer in this judgment to that belief as the "gender-critical belief" or "the Claimant's belief". It is necessary to set out the Tribunal's analysis of that belief in full:

> **"82. I accept that the Claimant genuinely holds the view that sex is biological and immutable. For her it is more that an opinion or viewpoint based on the present state of information available. Even though she has come to this belief recently she is fixed in it, and appears to be becoming more so. She is not prepared to consider the possibility that her belief may not be correct. I accept that the belief Claimant goes to substantial aspects of human life and behaviour.**
> **83. I next considered whether the Claimant's core belief that sex is immutable lacks a level of cogency and cohesion. It is avowedly not religious or metaphysical, but is said to be scientific. Her belief is that a man is a person who, if everything is working, can produce sperm and a woman a person who, if everything is working, can produce eggs. This does not sit easily with her view that even if everything is not, in her words, "working", and may never have done so, the person can still only be male or female. The Claimant largely ignores intersex conditions and the fact that biological opinion is increasingly moving away from an absolutist approach to there being genes the presence or absence of which determine specific attributes, to understanding that it is necessary to analyse which genes are present, which are switched on, the extent to which they are switched on and the way in which they interact with other genes. However, I bear in mind that "coherence" mainly requires that the belief can be understood**

and that "not too much should be not expected". A "scientific" belief may not be based on very good science without it being so irrational that it unable to meet the relatively modest threshold of coherence. On balance, I do not consider that the Claimant's belief fails the test of being "attain a certain level of cogency, seriousness, cohesion and importance"; even though there is significant scientific evidence that it is wrong. I also cannot ignore that the Claimant's approach (save in respect of refusing to accept that a Gender Recognition Certificate changes a person's sex for all purposes) is largely that currently adopted by the law, which still treats sex as binary as defined on a birth certificate.

84. However, I consider that the Claimant's view, in its absolutist nature, is incompatible with human dignity and fundamental rights of others. She goes so far as to deny the right of a person with a Gender Recognition Certificate to be the sex to which they have transitioned. I do not accept the Claimant's contention that the Gender Recognition Act produces a mere legal fiction. It provides a right, based on the assessment of the various interrelated convention rights, for a person to transition, in certain circumstances, and thereafter to be treated for all purposes as the being of the sex to which they have transitioned. In Goodwin a fundamental aspect of the reasoning of the ECHR was that a person who has transitioned should not be forced to identify their gender assigned at birth. Such a person should be entitled to live as a person of the sex to which they have transitioned. That was recognised in the Gender Recognition Act which states that the change of sex applies for "all purposes". Therefore, if a person has transitioned from male to female and has a Gender Recognition Certificate that person is legally a woman. That is not something that the Claimant is entitled to ignore.

85. Many trans people are happy to discuss their trans status. Others are not and/or consider it of vital importance not to be misgendered. The Equal Treatment Bench Book notes the TUC survey that refers to people having their transgender status disclosed against their will. The Claimant does not accept that she should avoid the enormous pain that can be caused by misgendering a persons, even if that person has a Gender Recognition Certificate. In her statement she says of people with Gender Recognition Certificates "In many cases people can identify a person's sex on sight, or they may have known the person before transition.... There is no general legal compulsion for people not to believe their own eyes or to forget, or pretend to forget, what they already know, or which is already in the public domain." The Claimant's position is that even if a trans woman has a Gender Recognition Certificate, she cannot honestly describe herself as a woman. That belief is not worthy of respect in a democratic society. It is incompatible with the human rights of others that have been identified and defined by the ECHR and put into effect through the Gender Recognition Act.

86. There is nothing to stop the Claimant campaigning against the proposed revision to the Gender Recognition Act to be based more on self-identification. She is entitled to put forward her opinion that these should be some spaces that are limited to women assigned female at birth where it is a proportionate means of achieving a legitimate aim. However, that does not mean that her absolutist view that sex is immutable is a protected belief for the purposes of the EqA. The Claimant can legitimately put forward her arguments about the importance of some safe spaces that are only be available to women identified female at birth, without insisting on calling trans women men.

87. Human Rights law is developing. People are becoming more understanding of trans rights. It is obvious how important being accorded their preferred pronouns and being able to describe their gender is to many trans people. Calling a trans woman a man is likely to be profoundly distressing. It may be unlawful harassment. Even paying due regard to the qualified right to freedom of expression, people cannot expect to be protected if their core belief involves violating others dignity and/or creating an intimidating, hostile, degrading, humiliating or offensive environment for them.

88. As set out above, I draw a distinction between belief and separate action based on the belief that may constitute harassment. However, if part of the belief necessarily will result in the violation of the dignity of others, that is a component

of the belief, rather than something separate, and will be relevant to determining whether the belief is a protected philosophical belief. While the Claimant will as a matter of courtesy use preferred pronouns she will not as part of her belief ever accept that a trans woman is a woman or a trans man a man, however hurtful it is to others. In her response to the complaint made by her co-workers the Claimant sated "I have been told that it is offensive to say, "transwomen are men" or that women means "adult human female". However since these statements are true I will continue to say them".

89. When in an, admittedly very bitter, dispute with Gregor Murray, who alleged that they had been misgendered by the Claimant, rather than seeking to accommodate Gregor Murrays legitimate wishes she stated: "I had simply forgotten that this man demands to be referred to by the plural pronouns "they" and "them", "Murray also calls it "transphobic" that I recognise a man when I see one. I disagree", "In reality Murray is a man. It is Murray's right to believe that Murray is not a man, but Murray cannot compel others to believe this." And that "I reserve the right to use the pronouns "he" and "him" to refer to male people. While I may choose to use alternative pronouns as a courtesy, no one has the right to compel others to make statements they do not believe."

90. I conclude from this, and the totality of the evidence, that the Claimant is absolutist in her view of sex and it is a core component of her belief that she will refer to a person by the sex she considered appropriate even if it violates their dignity and/or creates an intimidating, hostile, degrading, humiliating or offensive environment. The approach is not worthy of respect in a democratic society.

91. I do not accept that this analysis is undermined by the decision of the Supreme Court in Lee v Ashers that persons should not be compelled to express a message with which they profoundly disagreed unless justification is shown. The Claimant could generally avoid the huge offense caused by calling a trans woman a man without having to refer to her as a woman, as it is often not necessary to refer to a person sex at all. However, where it is, I consider requiring the Claimant to refer to a trans woman as a woman is justified to avoid harassment of that person. Similarly, I do not accept that there is a failure to engage with the importance of the Claimant's qualified right to freedom of expression, as it is legitimate to exclude a belief that necessarily harms the rights of others through refusal to accept the full effect of a Gender Recognition Certificate or causing harassment to trans women by insisting they are men and trans men by insisting they are women. The human rights balancing exercise goes against the Claimant because of the absolutist approach she adopts.

92. In respect of the belief that the Claimant contends she does not hold, that everyone has a gender which may be different to their sex at birth and which effectively trumps sex so that trans men are men and transwomen are women. I consider that this is a good example of why, at least in certain circumstances, one needs to apply the Grainger criteria to the lack of belief, rather than the alternative belief. Believing that a trans woman is a woman does not conflict with the approach of the European Court of Human Rights in Goodwin, or the Gender Recognition Act, or involve harassment. It does not face the same issue of incompatibility with human dignity and fundamental rights of others as the lack of that belief does because that lack of belief necessarily involves the view that trans women are men. The lack of belief fails to meet the Grainger criteria.

93. It is also a slight of hand to suggest that the Claimant merely does not hold the belief that transwomen are women. She positively believes that they are men; and will say so whenever she wishes. Put either as a belief or lack of belief, the view held by the Claimant fails the Grainger criteria and so she does not have the protected characteristic of philosophical belief."

Legal Framework

16. Section 4, EqA identifies the characteristics that are "protected characteristics". These are age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation. Sections 5 to 12, EqA set out the circumstances in which a person "has" a protected characteristic.

17. Section 7 deals with gender reassignment. It provides:

> **"7 Gender reassignment**
> **(1) A person has the protected characteristic of gender reassignment if the person is proposing to undergo, is undergoing or has undergone a process (or part of a process) for the purpose of reassigning the person's sex by changing physiological or other attributes of sex.**
> **(2) A reference to a transsexual person is a reference to a person who has the protected characteristic of gender reassignment.**
> **(3) In relation to the protected characteristic of gender reassignment—**
> **(a) a reference to a person who has a particular protected characteristic is a reference to a transsexual person;**
> **(b) a reference to persons who share a protected characteristic is a reference to transsexual persons."**

18. We acknowledge that the term "transsexual" has fallen into disfavour in recent years, and many consider it offensive. The Equal Treatment Bench Book states as follows at p.243:

> **"Despite its use in current legislation, the term 'transsexual' is dated and some people find it stigmatising. It is preferable to use the term transgender – if it is necessary to the legal proceedings to refer to a person as being transgender at all."**

19. We use the term "transgender" to refer to those persons whose gender identity does not correspond to their sex at birth and who identify with another gender.

20. Section 10, EqA deals with religion or belief. It provides:

> **"10 Religion or belief**
> **(1) Religion means any religion and a reference to religion includes a reference to a lack of religion.**
> **(2) Belief means any religious or philosophical belief and a reference to belief includes a reference to a lack of belief.**
> **(3) In relation to the protected characteristic of religion or belief—**

(a) a reference to a person who has a particular protected characteristic is a reference to a person of a particular religion or belief;
(b) a reference to persons who share a protected characteristic is a reference to persons who are of the same religion or belief."

21. The EAT in **Grainger plc & others v Nicholson** [2010] ICR reviewed the jurisprudence relating to belief in considering the materially similar predecessor provisions (contained in the **Employment Equality (Religion or Belief) Regulations** 2003) and endeavoured to set out the criteria to be applied in determining whether a belief qualifies for protection. At para 24, Burton P held as follows:

"24 I do not doubt at all that there must be some limit placed upon the definition of "philosophical belief" for the purpose of the 2003 Regulations, but before I turn to consider Mr Bowers' suggested such limitations, I shall endeavour to set out the limitations, or criteria, which are to be implied or introduced by reference to the jurisprudence set out above. (i) The belief must be genuinely held. (ii) It must be a belief and not, as in McClintock v Department of Constitutional Affairs [2008] IRLR 29, an opinion or viewpoint based on the present state of information available. (iii) It must be a belief as to a weighty and substantial aspect of human life and behaviour. (iv) It must attain a certain level of cogency, seriousness, cohesion and importance. (v) It must be worthy of respect in a democratic society, be not incompatible with human dignity and not conflict with the fundamental rights of others (para 36 of Campbell v United Kingdom 4 EHRR 293 and para 23 of Williamson's case [2005] 2AC 246)."

22. These five criteria, referred to here as "the Grainger Criteria", have since been applied in several cases and are reflected in the guidance on philosophical belief contained in the Commission's Code of Practice: see 2.59 of the Code. It is not in dispute that these are the appropriate criteria by which to assess whether a belief qualifies for protection under s.10, EqA.

23. The Tribunal in the present case found that the Claimant's belief only failed to satisfy the fifth Grainger Criterion, referred to here as "Grainger V". It is that criterion, namely that the belief must be "worthy of respect in a democratic society, be not incompatible with human dignity and not conflict with the fundamental rights of others", that is the focus of this appeal.

24. Section 11, EqA deals with sex. It provides:

"11 Sex
In relation to the protected characteristic of sex—

(a) a reference to a person who has a particular protected characteristic is a reference to a man or to a woman;
(b) a reference to persons who share a protected characteristic is a reference to persons of the same sex."

25. It is, in most cases, necessary for a person to fall within one or more of sections 5 to 12, EqA before any protection may arise under other parts of EqA. Thus, under s.13, EqA for example, "A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others." In general, in a claim under the EqA, the first stage will be to identify whether a person has the protected characteristic being claimed. Some characteristics, e.g. age and race are universal: every person has those protected characteristics, and the analysis can quickly move to whether or not the relevant cause of action under the EqA is established. In the case of some other characteristics, e.g. disability or belief, it may be disputed that the person's condition or belief actually satisfies s.6 or s.10, EqA respectively. In such cases, there may be a preliminary issue (which may or may not be decided at preliminary hearing) as to whether the claimant has the relevant protected characteristic. In determining that issue, the Tribunal will generally not be required to consider whether any cause of action under EqA is established.

26. Given the requirement under s.3 of the **Human Rights Act** 1998 to read and give effect to statutory provisions in a way which is compatible with the rights conferred by the **European Convention on Human Rights** ("ECHR"), it is necessary to consider the following Articles of the ECHR which are relevant to the present appeal.

"ARTICLE 8
Right to respect for private and family life
1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

ARTICLE 9

Freedom of thought, conscience and religion
1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

ARTICLE 10
Freedom of expression
1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

27. Article 17, ECHR, which prohibits the abuse of Convention rights, is also important in this context. It provides:

"ARTICLE 17
Prohibition of abuse of rights
Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention."

Grounds of Appeal

28. Whilst permission was granted on the sift to pursue six distinct grounds of appeal, the essential challenge to the Judgment is that the Tribunal erred in its approach to Grainger V, and that had it approached that criterion correctly, the inevitable conclusion would be that the Claimant's belief was protected. Neither Mr Cooper nor Ms Russell sought in their oral submissions to address the six grounds individually; instead, they sought respectively to attack or defend the Judgment on more general principles. We shall therefore approach our judgment in the appeal in the same way.

Submissions

Outline of the Claimant's Submissions

29. Mr Cooper submitted that the Claimant's beliefs do not deny the rights or status of trans persons, that her gender-critical beliefs are widely shared in society including, as the evidence before the Tribunal showed, by some trans persons. Her beliefs are similar to those of the claimant in **R (Miller) v College of Policing** [2020] 3 All ER 31 (Admin), whose beliefs were summarised at para 19 of Julian Knowles J's judgment as follows:

> **"19 In his first witness statement the Claimant says that over the years he has worked alongside many members of the lesbian, gay, bisexual and transgender (LGBT) community, and that prior to this case he had never been the subject of any complaints about transphobia. In [12], [17] and [18] he writes:**
> **"...**
> **17. I believe that trans women are men who have chosen to identify as women. I believe such persons have the right to present and perform in any way they choose, provided that such choices do not infringe upon the rights of women. I do not believe that presentation and performance equate to literally changing sex; I believe that conflating sex (a biological classification) with self-identified gender (a social construct) poses a risk to women's sex-based rights; I believe such concerns warrant vigorous discussion which is why I actively engage in the debate. The position I take is accurately described as gender critical.**
> **…"**

30. As Julian Knowles J found at para 250 of Miller, there is vigorous ongoing debate about trans rights:

> **"250. I take the following points from this evidence. First, there is a vigorous ongoing debate about trans rights. Professor Stock's evidence shows that some involved in the debate are readily willing to label those with different viewpoints as 'transphobic' or as displaying 'hatred' when they are not. It is clear that there are those on one side of the debate who simply will not tolerate different views, even when they are expressed by legitimate scholars whose views are not grounded in hatred, bigotry, prejudice or hostility, but are based on legitimately different value judgments, reasoning and analysis, and form part of mainstream academic research.**

31. Mr Cooper submits that it is clear from these passages in **Miller** that the Claimant's views cannot be regarded as inherently transphobic. Furthermore, whilst it is inherent in the Claimant's beliefs that she will *in some circumstances* refer to a trans woman as a man (or a trans man as a woman), she would not generally do so, or do so where it was not relevant to the context. Her

complaint is that the Tribunal's judgment disregards this context and instead requires the Claimant to refrain from referring to what the Claimant considers to be a trans person's sex in any circumstances. That, submits Mr Cooper, has the effect that the Claimant must subordinate her language to reflect views that she does not hold, and is tantamount to state mandated - the Tribunal being the representative of the State in this context – adherence to a view she does not actually hold.

32. Mr Cooper submits that, although, as held by the House of Lords in in **R (Williamson) V Secretary of State for Education and Employment** [2005] 2 AC 246, it is not for the Court to inquire into the validity of a belief, the Tribunal did just that, including by taking the view that the Claimant's beliefs were not supported by scientific evidence. What it ought to have done, submits Mr Cooper, is to consider whether the Claimant's belief was of the kind that would make Article 17, ECHR relevant. Had the Tribunal taken that approach, it could only have concluded that the belief was worthy of respect in a democratic society. Not only is it worthy of respect, but it is also one that is consistent with the common law under which sex is regarded as binary and fixed at birth for the purposes of all legal provisions which make a distinction between men and women: see **Corbett v Corbett** [1971] P 83, **Chief Constable of West Yorkshire v A** (No.2) [2005] 1 AC 51 HL at [30]. The coming into force of s.9, GRA, under which a person with a Gender Recognition Certificate ("GRC") "becomes for all purposes" the acquired gender, does not, as the Tribunal appears to have found, require the Claimant to disregard what she considers to be a material reality, namely that sex is immutable.

33. Mr Cooper submits that the Tribunal went astray in engaging in a balancing of the Claimant's rights against those of others; at this stage of the analysis the only question was whether the belief was protected under s.10, EqA, read compatibly with Articles 9 and 10 of ECHR. By focusing on the way in which the Claimant manifested her belief in certain

circumstances, the Tribunal was wrongly considering matters that would only become relevant at a later stage of the analysis in determining whether there was any cause of action and/or whether the Respondents' actions in restricting the manifestation of the Claimant's belief were justified.

Outline of the Intervenors' submissions

34. Ms Monaghan QC adopted Mr Cooper's submissions on the law and submitted that if the Tribunal had taken the correct approach, it would have been bound to conclude that the belief was protected. Like Mr Cooper, Ms Monaghan submitted that the Tribunal erred in considering manifestation of the beliefs at this preliminary stage, where the only question was whether the belief amounted to a philosophical belief and was therefore protected. The suggestion in my judgment in **Gray v Mulberry Co (Design) Ltd** [2019] ICR 175, (EAT) that in considering the Grainger Criteria, the focus should be on manifestation, is one that should be reconsidered. Where the Tribunal considered manifestation, it was wrong to do so and acted prematurely.

35. It was further submitted that although many might disagree with the proposition that sex is binary and that gender identity is a social construct, that is what the law of the land currently states: **Corbett v Corbett**; **Elan-Cane v Secretary of State for the Home Department** [2018] 1 WLR 5119. Even the operation of the GRA recognises that sex is immutable: see e.g. Sch 3, paragraph 24 to the EqA which provides that even where a person has a GRC, another person may lawfully refuse to validate a marriage if they hold a religious belief that sex is immutable.

36. Ms McColgan QC for IoC similarly agreed with Mr Cooper's submissions on the law. She concurred that the proper approach was to consider whether the very high threshold for invoking Article 17, ECHR had been crossed. Conversely, the Tribunal should have approached

Grainger V on the basis that the requirement to establish that a belief is worthy of respect in a democratic society presents a very low barrier, such that only the most extreme beliefs would be excluded. The barrier is especially low in cases where the belief engages a matter of ongoing political and/or public debate. IoC considered that the Tribunal gave little if any weight to the Claimant's Article 10, ECHR right to the freedom of expression. In any event, like Mr Cooper, she submits that the Tribunal erred in engaging in a balancing exercise between competing rights at this stage, where the only question is whether the belief falls within s.10, EqA.

Outline of the Respondents' submissions

37. Ms Russell submitted that the Claimant and Interveners had sought to present to the EAT a sanitised version of the Claimant's belief. In fact, she submits, a core component of that belief is to cause trans people enormous pain by misgendering them. This goes beyond causing mere offence; the belief is rooted in giving insult and slander, as shown by the Claimant's conduct towards people like Pips Bunce who have complex gender identities. The Tribunal took the Claimant's belief on its own terms and found that part of it – namely, her commitment to referring to a person by the sex she considers appropriate - was likely to give rise to harassment and create a hostile environment for others. Such conduct is not separable from her belief; it is "baked into" it. The Tribunal was correct to say that such a belief did not satisfy Grainger V.

38. Ms Russell further submits that the essential question for the Tribunal was whether the belief was protected under s.10, EqA and thus whether it was compatible with Grainger V. That analysis is not reducible to a consideration only of Articles 9 and 10, ECHR. In any event, the Claimant's contention that Grainger V should be reduced to a consideration of whether the belief is of a kind to engage the high threshold of Article 17, ECHR, is based on a misreading of **Campbell and Cosans v UK**. In that case, the European Court of Human Rights ("ECtHR")

said no more than that Article 17 was one of the factors to be taken into account, and it is clear from a proper reading of that case that other beliefs, not crossing the Article 17 threshold, could also be not worthy of respect in a democratic society. Were that not the case, then only a belief in Nazism or totalitarianism could fail Grainger V.

39. The Tribunal did not err in undertaking a balancing exercise between the Claimant's rights and the rights of others. Misgendering trans persons necessarily amounted to harassment and a violation of their Article 8 rights to "personal development and to physical and moral security", which can no longer be regarded as a matter of controversy: see **Goodwin v UK** [2002] IRLR 664 at para 90; Campbell and Cosans v UK (Application no.35968/97) at para 56 and **AP, Garçon and Niçot v France** (Application nos.79885/12, 52471/13 and 52596/13) at para 92. The Tribunal was not requiring the Claimant to refrain from expressing her beliefs, but merely to stop harassing trans persons by misgendering them. In reaching the conclusions that it did, the Tribunal achieved a fair balance between competing rights. The Supreme Court's decision in **Lee v Ashers Baking Co Ltd** [2020] AC 413, in which it was held that it was not unlawfully discriminatory for a bakery to refuse to supply a cake iced with the message "Support Gay Marriage" because of the belief of the owners that gay marriage is inconsistent with Biblical teaching, does not assist the Claimant, because the Claimant's objection is to trans persons and not merely to a message or a viewpoint with which she did not agree.

40. Whilst the Claimant's actions might not amount to the gravest forms of hate speech, it was within the lower category of hate speech identified by the ECtHR in **Lilliendahl v Iceland** (Application no. 29297/18), and which includes "serious, severely hurtful and prejudicial" comments that can justifiably be restricted by the State: **Lilliendahl** at para 45. The decision in **Miller** is not an answer in the present case because that was decided in the very different context of determining whether the police acted correctly in approaching Mr Miller's comments on the

basis that a criminal offence might have been committed. In any event, there was no suggestion of Mr Miller actively misgendering anyone whereas the Claimant has made it clear that she would do so.

41. Ms Russell also disagreed that the law of the land was that sex is immutable. **Corbett**, decided in 1971, was of its time and should no longer be considered good law. In any case, Parliament has decreed, by enacting s.9, GRA, that sex is not immutable and that a person does, upon obtaining a GRC, become 'for all purposes' a person of the acquired gender.

42. Finally, it was submitted that if the appeal is allowed, it would mean that no trans person would be safe from harassment in the workplace by a person holding gender-critical belief, and that no employer or service provided could take action against such a person to maintain a safe space for trans persons. It would also create a two-tier system with natal women having greater rights and protection that that afforded to trans women. That, submits Ms Russell, cannot be right.

Discussion

43. We begin by identifying the Claimant's belief.

What is the Claimant's belief?

44. Bean LJ in **Gray v Mulberry Co (Design) Ltd** [2020] ICR 715 (CA) held that:

> **"26. Precision in pleading is not equally important in every case heard by employment tribunals, but in our view it is essential, before considering whether a belief amounts to a "philosophical belief" protected under sections 4 and 10(2) of the 2010 Act, to define exactly what the belief is. In this case, as already noted the belief relied on is "the statutory human or moral right to own the copyright**

> **and moral rights of her own creative works and output, except when that creative work or output is produced on behalf of an employer"."**

45. In that case, the belief relied upon was capable of being summed up in a single sentence. Most religious or philosophical beliefs will not be capable of such pithy encapsulation. Indeed, any belief that affects a number of aspects of a person's life and how they live it is likely to comprise a diffuse and diverse range of concepts and principles that would defy precise or concise definition. The Claimant's belief is a case in point. It was described across two detailed witness statements running to almost 50 pages. That evidence was supplemented by oral evidence which was subject to cross-examination. The Tribunal did not reject any part of that evidence. However, that did not mean that the Tribunal was obliged to set out the entirety of the Claimant's written and oral evidence in its reasons in order to satisfy the requirement to "define exactly" what the belief is. The standard of exactitude cannot mean, in our judgment, setting out a detailed treatise of a claimed philosophical belief in every case. A precise definition of those aspects of the belief that are relevant to the claims in question would, in our judgment, suffice. In this regard, we do not consider it incorrect for a tribunal to seek to identify the "core" elements of a belief in order to determine whether it falls within s.10, EqA. There may be aspects of a belief that are peripheral or merely practical instances of its main tenets, which need not form part of the definition of the belief that falls to be tested against the Grainger Criteria.

46. The Tribunal in this case summarised the passages in the Claimant's evidence as to her belief at para 39 of the Judgment (see para 13 above), and accepted (at para 40) that "these passages reflect core aspects of the Claimant's belief". It did not consider that the specific tweets that caused concern "represent the core" of that belief: para 76. It then went on at para 77 to define the Claimant's core belief as follows:

> **"77. The core of the Claimant's belief is that sex is biologically immutable. There are only two sexes, male and female. She considers this is a material reality. Men are adult males. Women are adult females. There is no possibility of any sex in between male and female; or that is a person is neither male nor female. It is impossible to change sex. Males are people with the type of body which, if all**

> **things are working, are able to produce male gametes (sperm). Females have the type of body which, if all things are working, is able to produce female gametes (ova), and gestate a pregnancy. It is sex that is fundamentally important, rather than "gender", "gender identity" or "gender expression". She will not accept in any circumstances that a trans woman is in reality a woman or that a trans man is a man. That is the belief that the Claimant holds."**

47. The concluding sentence of that passage might be interpreted as meaning that what precedes it is a summary of the entirety of the Claimant's "core beliefs". However, it would appear from subsequent paragraphs in the Judgment, that the Tribunal also considered it to be part of the Claimant's belief that she will refer to a person by the sex she considered appropriate even if it violates their dignity and/or creates an intimidating, hostile, degrading, humiliating or offensive environment: see para 90. Mr Cooper takes issue with that aspect of the Tribunal's judgment, which he submits mischaracterises the Claimant's belief and is inconsistent with the Tribunal's earlier acceptance of the Claimant's evidence. The Tribunal accepted the Claimant's evidence that "she would generally seek to be polite to trans persons and would usually seek to respect their choice of pronoun but would not feel bound to; mainly if a trans person who was not assigned female at birth was in a "woman's space", but also more generally". Mr Cooper also drew our attention to passages in the Claimant's statement that in accordance with her belief she considers "it is relevant and important in some circumstances to be able to acknowledge, describe or refer to a particular person's sex, even if that differs from his or her gender identity and even if that may cause that individual to be upset." However, as she also said in her statement, that "does not mean that it is any part of her belief that trans people should not generally be treated in accordance with their wishes or that she will not generally do so, let alone that [trans persons] should not be respected or protected from discrimination, or that they should be abused, disparaged or harassed".

48. Ms Russell submitted that Mr Cooper was seeking to sanitise the Tribunal's clear findings as to the nature of the Claimant's belief and that in the absence of a perversity appeal, those findings cannot be disturbed.

49. We do not agree with Ms Russell that Mr Cooper was seeking to sanitise the Tribunal's findings as to belief. We note that the Tribunal did not reject any of the Claimant's evidence and expressly included reference, at para 41, to the fact that the Claimant would 'generally' seek to be polite to trans persons and would 'usually' seek to respect their choice of pronoun. It also referred, at para 30, to the Claimant's evidence that she "would of course respect anyone's self-definition of their gender identity in any social and professional context"; and had "no desire or intention to be rude to people". In the light of those findings, it would be wrong, in our view to read the Tribunal's finding at para 90, as if it meant that the Claimant would in every circumstance seek to "misgender" trans persons, or cause them pain and thereby create a hostile etc. environment. That interpretation would be wholly inconsistent with what the Tribunal actually found to be the case. A person who "generally" and "usually" acts in a certain way, cannot simultaneously always or invariably act in the opposite way. On a proper reading of the Tribunal's findings, it seems to us that the most that can be said is that the Claimant will *sometimes* refuse to use preferred pronouns if she considered it relevant to do so, e.g. in a discussion about a trans woman being in what the Claimant considered to be a women-only space.

50. We proceed on the basis that the Claimant's belief is as summarised by the Tribunal at para 77 of the Judgment, read with the passages at paras 39 to 41.

51. The Claimant's gender-critical belief is not unique to her; it is a belief shared by others who consider that it is important to have an open debate about issues concerning sex and gender identity. To understand the nature of that debate, the Court in **Miller** considered the evidence of the gender-critical academic, Professor Kathleen Stock:

"241. It is very important to recognise that the Claimant was not tweeting in a vacuum. He was contributing to an ongoing debate that is complex and multi-faceted. In order to understand the contours of that debate I have been assisted by the first witness statement of Professor Kathleen Stock, Professor of Philosophy at Sussex University. She researches and teaches the philosophy of fiction and feminist philosophy. Her intellectual pedigree is impeccable. She writes:

"4, In my work, among other things I argue that there's nothing wrong, either theoretically, linguistically, empirically, or politically, with the once-familiar idea that a woman is, definitionally, an adult human female. I also argue that the subjective notion of 'gender identity' is ill-conceived intrinsically, and a fortiori as a potential object of law or policy. In light of these and other views, I am intellectually 'gender-critical'; that is, critical of the influential societal role of sex-based stereotypes, generally, including the role of stereotypes in informing the dogmatic and, in my view, false assertion that – quite literally – 'trans women are women'. I am clear throughout my work that trans people are deserving of all human rights and dignity."

242. Professor Stock co-runs an informal network of around 100 gender-critical academics working in UK and overseas universities. Members of the network come from a wide variety of different disciplines including sociology, philosophy, law, psychology and medicine. She says that many members of the network 'research on the many rich theoretical and practical questions raised by current major social changes in the UK around sex and gender'.

243. Professor Stock then describes the 'hostile climate' facing gender-critical academics working in UK universities. She says that any research which threatens to produce conclusions or outcomes that influential trans-advocacy organisations would judge to be politically inexpedient, faces significant obstacles. These, broadly, are impediments to the generation of research and to its publication. She also explains how gender critical academics face constant student protests which hinder their work.

244. At [17] she says:

"As also indicative, since I began writing and speaking on gender-critical matters: the Sussex University Student Union Executive has put out a statement about me on their website, accusing me of 'transphobia' and 'hatred'; I've had my office door defaced twice with stickers saying that 'TERFS' are 'not welcome here' …"

245. I understand that 'TERF' is an acronym for 'trans-exclusionary radical feminist'. It is used to describe feminists who express ideas that other feminists consider transphobic, such as the claim that trans women are not women, opposition to transgender rights and exclusion of trans women from women's spaces and organisations. It can be a pejorative term.

246. She concludes at [22]:

"… there are also unfair obstacles to getting gender-critical research articles into academic publications, and in achieving grant funding. These stem from a dogmatic belief, widespread amongst those academics most likely to be asked to referee a project about sex or gender (e.g. those already established in Gender Studies; those in feminist philosophy) that trans women are literally women, that trans men are literally men, and that any dissent on this point must automatically be transphobic …"

247. Also in evidence is a statement from Jodie Ginsberg, the CEO of Index on Censorship. Index on Censorship is a non-profit organisation that campaigns for and defends free expression worldwide. It publishes work by censored writers and artists, promote debate, and monitor threats to free speech. She deals with a number of topics, including the Government Consultation on the GRA 2004. She explains at [10]-[11]:

"10. The proposed reforms to the Gender Recognition Act involve removing the gender recognition procedures described above and replacing them with a simple self-identification process (self-ID). Self-ID means the transitioner does not have to undergo medical or other assessment procedures.

11. Many in the UK are concerned that the proposed reforms for self-ID will erase 'sex' as protected characteristic in the Equality Act 2010 by conflating 'sex' and 'gender'. There are concerns that single sex spaces with important protective functions (women's prisons or women's refuse shelters for victims of domestic violence or rape) will be undermined. The UK government has said it does not plan to amend the existing protections in the Equality Act; however, this is not convincing to those who see self-ID in any form as fundamentally incompatible with legal protection for women and girls."

248. She goes on to address gender criticism and Twitter and explains that there is on-going concern that Twitter is stifling legitimate debate on this topic by its terms of service which apparently treat gender critical comment as hate speech. She then gives a number of examples where the police have taken action because of things people have posted on Twitter about transgender issues.

249. She concludes at [27]-[29]:

"27. Index is concerned by the apparent growing number of cases in which police are contacting individuals about online speech that is not illegal and sometimes asking for posts to be removed. This is creating confusion among the wider population about what is and is not legal speech, and - more significantly – further suppressing debate on an issue of public interest, given that the government invited comment on this issue as part of its review of the Gender Recognition Act.

28. The confusion of the public (and police) around what is, and what is not, illegal speech may be responsible for artificially inflating statistics on transgender hate crime … Police actions against those espousing lawful, gender critical views – including the recording of such views where reported as 'hate incidents' – create a hostile environment in which gender critical voices are silenced. This is at a time when the country is debating the limits and meaning of 'gender' as a legal category.

29. It has been reported that the hostile environment in which this debate is being conducted is preventing even members of parliament from expressing their opinions openly. The journalist James Kirkup said in a 2018 report for The Spectator: "I know MPs, in more than one party, who privately say they will not talk about this issue in public for fear of the responses that are likely to follow. The debate is currently conducted in terms that are not conducive to – and sometimes actively hostile to – free expression. As a result, it is very unlikely to lead to good and socially sustainable policy."

250. I take the following points from this evidence. First, there is a vigorous ongoing debate about trans rights. Professor Stock's evidence shows that some involved in the debate are readily willing to label those with different viewpoints as 'transphobic' or as displaying 'hatred' when they are not. It is clear that there are those on one side of the debate who simply will not tolerate different views, even when they are expressed by legitimate scholars whose views are not grounded in hatred, bigotry, prejudice or hostility, but are based on legitimately

different value judgments, reasoning and analysis, and form part of mainstream academic research.

251. The Claimant's tweets were, for the most part, either opaque, profane, or unsophisticated. That does not rob them of the protection of Article 10(1). I am quite clear that they were expressions of opinion on a topic of current controversy, namely gender recognition. Unsubtle though they were, the Claimant expressed views which are congruent with the views of a number of respected academics who hold gender-critical views and do so for profound socio-philosophical reasons. This conclusion is reinforced by Ms Ginsberg's evidence, which shows that many other people hold concerns similar to those held by the Claimant."

52. As already stated above, it is not for the EAT to express any view as to merits of the transgender debate, but it is relevant to note, and it was not in dispute before us, that the Claimant's belief is shared by many others, including some trans persons. We were referred to the statement of Kristina Harrison, a trans woman who professes to hold gender-critical beliefs. That evidence was before the Tribunal and is referred to at para 16 of the Judgment.

What approach should the Tribunal take in determining whether the Claimant's belief was a "philosophical belief" within the meaning of s.10, EqA?

53. Having identified the belief in question, the next task of the Tribunal was to determine whether that belief amounted to a philosophical belief within the meaning of s.10, EqA. Given that domestic statutory provisions are to be read and understood conformably with the ECHR, it is appropriate to consider the effect of Articles 9 and 10, ECHR first, as that is likely to inform the analysis of s.10, EqA. We note, however, that there is no rule that the analysis should always follow this sequence: see **Page v NHS Trust Development Authority** [2021] EWCA Civ 255 at para 37.

54. Articles 9 and 10 are set out above. The rights protected by these articles have been described by the ECtHR as "closely linked" and the approach to be taken is to consider the case law in relation to the most directly applicable right, interpreted where appropriate in light of the

A other: see **Ibragimov v Russia** 1413/08 & 28621/11, 4 February 2019 at para 78. It is not in dispute that the most directly applicable right here is the Article 9 right to freedom of belief.

55. We were referred to numerous authorities emphasising the high importance attached by
B the ECtHR to diversity or pluralism of thought, belief and expression and their foundational role in a liberal democracy. It is not necessary, in our view, to lengthen this judgment by setting out all of them. It is sufficient for present purposes to remind ourselves of the following principles:

C

a. Freedom of expression is one of the essential foundations of democratic society:

> **"The Court's supervisory functions oblige it to pay the utmost attention to the principles characterising a ' democratic society '. Freedom of expression constitutes one of the essential foundations of such a society. one of the basic conditions for its progress and for the development of every man. Subject to Article 10 (2), it is applicable not only to ' information ' or ' ideas ' that are**
> D **favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no ' democratic society '. This means. amongst other things, that every ' formality ', ' condition ', ' restriction ' or ' penalty ' imposed in this sphere must be proportionate to the legitimate aim pursued." Handyside v UK (1979-80) 1 EHRR 737 at para 49.**

E

b. The paramount guiding principle in assessing any belief is that it is not for the Court to inquire into its validity:

> **"22. It is necessary first to clarify the court's role in identifying a religious belief calling for protection under article 9. When the genuineness of a claimant's professed belief is an issue in the proceedings the court will inquire into and**
> F **decide this issue as a question of fact. This is a limited inquiry. The court is concerned to ensure an assertion of religious belief is made in good faith: "neither fictitious, nor capricious, and that it is not an artifice", to adopt the felicitous phrase of Iacobucci J in the decision of the Supreme Court of Canada in *Syndicat Northcrest v Amselem (2004) 241 DLR (4th) 1* , 27, para 52. <u>But, emphatically, it is not for the court to embark on an inquiry into the asserted belief and judge its "validity" by some objective standard such as the source material upon which the claimant founds his belief or the orthodox teaching of</u>**
> G **<u>the religion in question or the extent to which the claimant's belief conforms to or differs from the views of others professing the same religion.</u> Freedom of religion protects the subjective belief of an individual. As Iaccobucci J also noted, at p 28, para 54, religious belief is intensely personal and can easily vary from one individual to another. <u>Each individual is at liberty to hold his own religious beliefs, however irrational or inconsistent they may seem to some, however surprising.</u> The European Court of Human Rights has rightly noted that**
> H **"in principle, the right to freedom of religion as understood in the Convention rules out any appreciation by the state of the legitimacy of religious beliefs or of the manner in which these are expressed":**
> ***Metropolitan Church of Bessarabia v Moldova (2001) 35 EHRR 306* , 335, para 117. The relevance of objective factors such as source material is, at most, that they may throw light on whether the professed belief is genuinely held.**

> **23. Everyone, therefore, is entitled to hold whatever beliefs he wishes. But when questions of "manifestation" arise, as they usually do in this type of case, a belief must satisfy some modest, objective minimum requirements. These threshold requirements are implicit in article 9 of the European Convention and comparable guarantees in other human rights instruments. The belief must be consistent with basic standards of human dignity or integrity. Manifestation of a religious belief, for instance, which involved subjecting others to torture or inhuman punishment would not qualify for protection. The belief must relate to matters more than merely trivial. It must possess an adequate degree of seriousness and importance. As has been said, it must be a belief on a fundamental problem. With religious belief this requisite is readily satisfied. The belief must also be coherent in the sense of being intelligible and capable of being understood. But, again, too much should not be demanded in this regard. Typically, religion involves belief in the supernatural. It is not always susceptible to lucid exposition or, still less, rational justification. The language used is often the language of allegory, symbol and metaphor. Depending on the subject matter, individuals cannot always be expected to express themselves with cogency or precision. Nor are an individual's beliefs fixed and static. The beliefs of every individual are prone to change over his lifetime. Overall, these threshold requirements should not be set at a level which would deprive minority beliefs of the protection they are intended to have under the Convention: see Arden LJ *[2003] QB 1300* , 1371, para 258:** per Lord Nicholls in **R (Williamson) V Secretary of State for Education and Employment [2005] 2 AC 246." (Emphasis added)**

c. The freedom to hold whatever belief one likes goes hand-in-hand with the State remaining neutral as between competing beliefs, refraining from expressing any judgment as to whether a particular belief is more acceptable than another, and ensuring that groups opposed to one another tolerate each other: **Metropolitan Church of Bessarabia v Moldova** (2002) 35 EHRR 13 at paras 115 and 116.

d. A belief that has the protection of Article 9 is one that only needs to satisfy very modest threshold requirements. As stated by Lord Nicholls in **R (Williamson)**, those threshold requirements "should not be set at a level which would deprive minority beliefs of the protection they are intended to have under the Convention." In other words, the bar should not be set too high: see **Harron v Chief Constable of Dorset Police** [2016] IRLR 481 (EAT), per Langstaff P at para 34 and **Gray v Mulberry** at para 27.

56. The particular threshold requirement that is relevant for present purposes is that encapsulated in Grainger V, namely that the belief must be "worthy of respect in a democratic

society, not incompatible with human dignity and not conflict with the fundamental rights of others."

57. The question is what standard should the Court apply in determining whether a particular belief falls foul of that threshold requirement, bearing in mind that the bar is not to be set too high. It is clear from the passage in **Grainger** cited at para 21 above, that Burton P derived Grainger V from certain passages in two earlier decisions: the first is paragraph 36 of the decision of the ECtHR in **Campbell and Cosans v United Kingdom 4** EHRR 293. In that case, the issue was whether an objection to the use of corporal punishment in schools (when it was still permitted) amounted to a "philosophical conviction" within the meaning of Article 2 of the First Protocol to the European Convention on Human Rights (A2P1). A2P1 provides:

> **"No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions."**

58. In accepting that the applicants' views on corporal punishment did amount to philosophical convictions, the ECtHR said as follows at para 36 of its judgment:

> **"…Having regard to the Convention as a whole, including Article 17, the expression ' philosophical convictions ' in the present context denotes, in the Court's opinion, such convictions as are worthy of respect in a ' democratic society ' and are not incompatible with human dignity; in addition, they must not conflict with the fundamental right of the child to education, the whole of Article 2 being dominated by its first sentence. The applicants' views relate to a weighty and substantial aspect of human life and behaviour, namely the integrity of the person, the propriety or otherwise of the infliction of corporal punishment and the exclusion of the distress which the risk of such punishment entails. They are views which satisfy each of the various criteria listed above; it is this that distinguishes them from opinions that might be held on other methods of discipline or on discipline in general." (Emphasis added)**

59. The ECtHR's reference to Article 17, ECHR, is instructive. Article 17, ECHR, prohibits the use of the ECHR to destroy the rights of others. It becomes relevant where a State, group or person seeks to rely on Convention rights in a way that blatantly violates the rights and values protected by the Convention. One cannot, for example, rely on the right to freedom of expression to espouse hatred, violence or a totalitarian ideology that is wholly incompatible with the

principles of democracy: see the ECtHR's Guide on Article 17 of ECHR at para 26. The level at which Article 17 becomes relevant is clearly (and necessarily) a high one. The fundamental freedoms and rights conferred by the Convention would be seriously diminished if Article 17, and the effective denial of a Convention right, could be too readily invoked: see **Vajnai v Hungary** (2010) 50 EHRR 44 at paras 21 to 26. Thus, when the ECtHR refers to Article 17 (as it did in **Campbell and Cosans v UK** in considering whether a philosophical conviction is worthy of respect in a democratic society and not in conflict with the fundamental rights of others, it would have had in mind that it is only a conviction that e.g. challenges the very notion of democracy that would not command such respect. To maintain the plurality that is the hallmark of a functioning democracy, the range of beliefs and convictions that must be tolerated is very broad. It is not enough that a belief or a statement has the potential to "offend, shock or disturb" (see **Vajnai** at para 46) a section (or even most) of society that it should be deprived of protection under Articles 9 (freedom of thought conscience and belief) or Article 10 (freedom of expression). The stipulation that the conviction or belief must not be in conflict with the fundamental rights of others must also be viewed with regard to Article 17. The conflict between rights in this context of satisfying threshold requirements is not merely that which would arise in any case where the exercise of one right might have an impact on the ECHR rights of another; in order for a conviction or belief to satisfy threshold requirements to qualify for protection, it need only be established that it does not have the effect of destroying the rights of others.

60. The second passage to which Burton P referred was paragraph 23 of **Williamson**, where Lord Nicholls of Birkenhead said as follows:

> **"23. Everyone, therefore, is entitled to hold whatever beliefs he wishes. But when questions of "manifestation" arise, as they usually do in this type of case, a belief must satisfy some modest, objective minimum requirements. These threshold requirements are implicit in article 9 of the European Convention and comparable guarantees in other human rights instruments. The belief must be consistent with basic standards of human dignity or integrity. Manifestation of a religious belief, for instance, which involved subjecting others to torture or inhuman punishment would not qualify for protection. The belief must relate to matters more than merely trivial. It must possess an adequate degree of**

> **seriousness and importance. As has been said, it must be a belief on a fundamental problem. With religious belief this requisite is readily satisfied. The belief must also be coherent in the sense of being intelligible and capable of being understood. But, again, too much should not be demanded in this regard. Typically, religion involves belief in the supernatural. It is not always susceptible to lucid exposition or, still less, rational justification. The language used is often the language of allegory, symbol and metaphor. Depending on the subject matter, individuals cannot always be expected to express themselves with cogency or precision. Nor are an individual's beliefs fixed and static. The beliefs of every individual are prone to change over his lifetime. Overall, these threshold requirements should not be set at a level which would deprive minority beliefs of the protection they are intended to have under the Convention: see Arden LJ *[2003] QB 1300* , 1371, para 258." (Emphasis added)**

61. The reference there to a belief involving "torture or inhuman punishment" is consistent with the principle that only the gravest violations of Convention principles should be denied protection. Such violations go far beyond what might be regarded as potentially justifiable interference with a right: they seek to destroy such rights.

62. The two passages on which Burton P relied in formulating Grainger V clearly establish the extremely grave threat to Convention principles that would have to exist in order for a belief not to satisfy that criterion. We do not accept Ms Russell's submission that the Claimant has misconstrued these passages in pursuit of her submission that Article 17 provides the appropriate standard against which Grainger V is to be assessed. Far from being merely one of the factors to be taken into account, it appears to us that Article 17 was mentioned because that is the benchmark against which the belief is to be assessed; only if the belief involves a very grave violation of the rights of others, tantamount to the destruction of those rights, would it be one that was not worthy of respect in a democratic society. We do not consider that the ECtHR would have referred to Article 17, or the House of Lords to "torture and punishment", if a belief involving some lesser violation of others' rights - not sufficiently grave to engage Article 17 - was also capable of being not worthy of such respect.

63. Two recent decisions of the ECtHR provide further illustration of the kinds of views that must be espoused before Article 17 would apply so as to deprive a person of the protection under Article 10 of the Convention. The first is **Ibragimov**. In that case, publications by Muslim groups were banned by the State on the grounds that they were extremist and sought to incite religious discord. In response to an application to the ECtHR that rights under Article 10 (freedom of expression) had been infringed, the State contended that the Article 10 protection should be removed from the applicants by the operation of Article 17. The ECtHR rejected that contention stating:

> **"62. The Court reiterates that, as recently confirmed by the Court, Article 17 is only applicable on an exceptional basis and in extreme cases. Its effect is to negate the exercise of the Convention right that the applicant seeks to vindicate in the proceedings before the Court. In cases concerning Article 10 of the Convention, it should only be resorted to if it is immediately clear that the impugned statements sought to deflect this Article from its real purpose by employing the right to freedom of expression for ends clearly contrary to the values of the Convention (see Perinçek v. Switzerland [GC], no. 27510/08, § 114, ECHR 2015 (extracts)).**
> **63. Since the decisive point under Article 17 – whether the text in question sought to stir up hatred, violence or intolerance, and whether by publishing it the applicant attempted to rely on the Convention to engage in an activity or perform acts aimed at the destruction of the rights and freedoms laid down in it – overlaps with the question whether the interference with the applicant's rights to freedom of expression and freedom of religion was "necessary in a democratic society", the Court finds that the question whether Article 17 is to be applied must be joined to the merits of the applicant's complaints under Articles 9 and 10 of the Convention (see Perinçek, cited above, § 115).**
> **…**
>
> **123. Having regard to the above considerations and its case-law on the subject, the Court finds that the domestic courts did not apply standards which were in conformity with the principles embodied in Article 10 and did not provide "relevant and sufficient" reasons for the interference. In particular, it is unable to discern any element in the domestic courts' analysis which would allow it to conclude that the book in question incited violence, religious hatred or intolerance, that the context in which it had been published was marked by heightened tensions or special social or historical background in Russia or that its circulation had led or could lead to harmful consequences. The Court concludes that it was not necessary, in a democratic society, to ban the book in question.**
> **124. The Court therefore rejects the Government's preliminary objection under Article 17 and finds that there has been a violation of Article 10 of the Convention." (Emphasis added)**

64. **In Lilliendahl**, the applicant had been convicted under Iceland's General Penal Code for making derogatory remarks about homosexuals during a radio broadcast debating a local council proposal to strengthen education in schools on LGBT issues. The applicant had referred to

homosexuals as "sexual deviants" and used other highly offensive terminology. On the applicant's claim that his Article 10 (freedom of expression) rights had been infringed, the ECtHR considered whether the application should be dismissed pursuant to Article 17. It held:

> **"25. The decisive point under Article 17 is whether the applicant's statements sought to stir up hatred or violence and whether, by making them, he attempted to rely on the Convention to engage in an activity or perform acts aimed at the destruction of the rights and freedoms laid down in it (Perinçek v. Switzerland [GC], no. 27510/08, §§ 113-115, 15 October 2015). If applicable, Article 17's effect is to negate the exercise of the Convention right that the applicant seeks to vindicate in the proceedings before the Court. As the Court held in Perinçek, Article 17 is only applicable on an exceptional basis and in extreme cases. In cases concerning Article 10 of the Convention, it should only be resorted to if it is immediately clear that the impugned statements sought to deflect this Article from its real purpose by employing the right to freedom of expression for ends clearly contrary to the values of the Convention (ibid., § 114).**
>
> **26. The Court finds that the applicant's statement cannot be said to reach the high threshold for applicability of Article 17 as set out in the above-mentioned judgment in Perinçek (ibid.). Although the comments were highly prejudicial, as discussed further below, it is not immediately clear that they aimed at inciting violence and hatred or destroying the rights and freedoms protected by the Convention (compare Witzsch v. Germany (no. 1) (dec.), no. 41448/98, 20 April 1999; Schimanek v. Austria (dec.), no. 32307/96, 1 February 2000; Garaudy v. France (dec.), no. 65831/01, ECHR 2003-IX; Norwood v. the United Kingdom (dec.), no. 23131/03, 16 November 2004; Witzsch v. Germany (no. 2) (dec.), no. 7485/03, 13 December 2005; and Molnar v. Romania (dec.), no. 16637/06, 23 October 2012). The applicant is thus not barred from invoking his freedom of expression in this instance. What remains to be decided is whether his conviction complied with Article 10 of the Convention." (Emphasis added)**

65. The ECtHR went on to describe the two categories of "hate speech" considered by the Court's case-law under Article 10:

> **"33. 'Hate speech', as this concept has been construed in the Court's case-law, falls into two categories. As discussed above, the Supreme Court held that although the term 'hate speech' was not used in Article 233 (a) of the General Penal Code, it was clear from the provision's preparatory works and the international legal instruments by which it was inspired that the concept of 'hate speech' was simultaneously a synonym for the sort of expression which the provision penalized and a threshold for the severity which such expression had to reach in order to fall under the provision (see paragraph 13 above).**
>
> **34. The first category of the Court's case-law on 'hate speech' is comprised of the gravest forms of 'hate speech', which the Court has considered to fall under Article 17 and thus excluded entirely from the protection of Article 10 (see paragraphs 25-26 above and the cases cited therein). As explained above, the Court does not consider the applicant's comments to fall into this category (see paragraph 26 above).**
>
> **35. The second category is comprised of 'less grave' forms of 'hate speech' which the Court has not considered to fall entirely outside the protection of Article 10, but which it has considered permissible for the Contracting States to restrict (see, inter alia, Féret v. Belgium, no. 15615/07, §§ 54-92, 16 July 2009; Vejdeland and Others v. Sweden, cited above, §§ 47-60; Delfi AS v. Estonia, cited above, §§ 153 and 159; and Beizaras and Levickas v. Lithuania, cited above, § 125). In the last-mentioned case, the Court found a violation of Article 14 taken in conjunction**

with Article 8, and of Article 13, on account of the authorities' refusal to prosecute authors of serious homophobic comments on Facebook, including undisguised calls for violence. In Delfi AS, the Court found no breach of Article 10 as regards the domestic courts' imposition of liability on the applicant company, notably due to the insufficiency of the measures taken by the applicant company to remove without delay after publication comments on its news portal amounting to hate speech and speech inciting violence and to ensure a realistic prospect of the authors of such comments being held liable.

36. Into this second category, the Court has not only put speech which explicitly calls for violence or other criminal acts, but has held that attacks on persons committed by insulting, holding up to ridicule or slandering specific groups of the population can be sufficient for allowing the authorities to favour combating prejudicial speech within the context of permitted restrictions on freedom of expression (see Beizaras and Levickas v. Lithuania, cited above, § 125; Vejdeland and Others v. Sweden, cited above, § 55, and Féret v. Belgium, cited above, § 73). In cases concerning speech which does not call for violence or other criminal acts, but which the Court has nevertheless considered to constitute 'hate speech', that conclusion has been based on an assessment of the content of the expression and the manner of its delivery.

37. Thus, for example, in Féret, the Court found no violation of Article 10 of the Convention in respect of the conviction of the applicant, chairman of the political party "Front National", for publicly inciting discrimination or hatred. The Court considered it significant that the applicant's racist statements had been made by him in his capacity as a politician during a political campaign, where they were bound to be received by a wide audience and have more impact than if they had been made by a member of the general public (Féret v. Belgium, cited above, § 75). Similarly, in Vejdeland and Others, the Court found no violation of Article 10 in respect of the applicants' conviction for distributing leaflets considered by the courts to be offensive to homosexual persons. It emphasized that the leaflets had been distributed in schools, left in the lockers of young people at an impressionable and sensitive age (Vejdeland and Others v. Sweden, cited above, § 56).

38. In the present case, the Court sees no reason to disagree with the Supreme Court's assessment that the applicant's comments were "serious, severely hurtful and prejudicial". As reasoned by the Supreme Court, the use of the terms kynvilla (sexual deviation) and kynvillingar (sexual deviants) to describe homosexual persons, especially when coupled with the clear expression of disgust, render the applicant's comments ones which promote intolerance and detestation of homosexual persons.

39. The Court has already found (see paragraph 26 above) that the comments in question did not constitute a manifestation of the gravest form of 'hate speech' thus falling outside the scope of protection of Article 10 of the Convention by virtue of Article 17. However, the Court considers it clear that the comments in issue, viewed on their face and in substance, fell under the second category of 'hate speech' (see paragraphs 35-36 above) falling to be examined under Article 10 of the Convention. The manner of delivery of the comments does not alter this conclusion, although it is true that the comments, which were made publicly, were expressed by the applicant as a member of the general public not expressing himself from a prominent platform likely to reach a wide audience. Moreover, viewing the severity of the comments, as correctly assessed by the Supreme Court, it does not detract from the Court's finding above that the comments were not directed, in particular, at vulnerable groups or persons (compare and contrast Vejdeland).

40. The Court finally notes that this conclusion, whilst relevant, is not, as such, conclusive for its assessment whether the applicant's conviction fulfilled the requirements of lawfulness, legitimate aim and necessity in a democratic society as required by Article 10 § 2 of the Convention." (Emphasis added)

66. It is clear from these judgments that, in assessing whether a person's rights under Article 9 or Article 10 have been infringed, there is a preliminary question as to whether the person qualifies for protection at all, or, to use the ECtHR's terminology, as to whether the person "fall[s] outside the scope of protection of Article 10 of the Convention by virtue of Article 17": **Lilliendahl** at para 39. Where the expression amounts to the "gravest form of hate speech" then the protection would not apply, as Article 17 would operate to deprive the person of the protection that they seek to invoke. However, if the expression does not fall into that first category, then the question is whether the steps taken by the State to restrict such expression are justified within the meaning of Article 10(2). Thus even comments which are "serious, severely hurtful and prejudicial", or which promote intolerance and detestation of homosexuals would not fall outside the scope of Article 10 altogether. However, that does not mean that the individual making such comments has free rein to make them in any circumstance at all. The individual's freedom to express their views is limited to the extent provided for by Article 10(2) and it will then be for the Court to assess whether any limitation imposed by the State is justified.

67. In many Article 9 cases, that two-stage analysis will not arise because it will be obvious that the religion or belief is one which falls within scope of the protection afforded by that Article, and the analysis will move swiftly to whether there was an interference with the right and, if so, whether that was justified. However, where it does arise, it is important to bear in mind the extremely limited circumstances in which a belief would be considered so beyond the pale that it does not qualify for protection at all.

68. Of course, the architecture of the EqA does not precisely follow the structure of the ECHR. Section 10, EqA focuses on whether a person has the protected characteristic of belief. In determining whether a person falls within s.10, EqA, the Tribunal is essentially undertaking the 'first stage' analysis described above in relation to ECHR. That is to say, the Tribunal is

considering only whether the person falls within the scope of the relevant protection at all. At this stage, therefore, in order to ensure that s.10, EqA is applied compatibly with Article 9, ECHR, the question will be whether the belief meets the "modest threshold requirements" as established by the case law, and as encapsulated in the Grainger Criteria. In relation to Grainger V, that means that only those beliefs whose characteristics are such that they would fall outside the scope of Article 9, ECHR by virtue of Article 17 would fail to satisfy that criterion.

69. We do not accept Ms Russell's submission that taking that approach is to reduce the analysis under s.10 EqA only to a consideration of Articles 9 and 10, ECHR. It is the approach that is required having regard to the obligation under s.3, HRA to read and give effect to s.10, EqA compatibly with the Convention. In any event, it was not suggested that there were any residual or additional threshold conditions under s.10, EqA that would require a different approach to be taken. Instead, reliance is placed on Grainger V alone. However, Grainger V is, as we have seen, itself derived from case law concerned with Convention rights. Accordingly, it is correct, in our judgment, to apply s.10, EqA with Article 17, ECHR in mind.

70. Ms Russell's further objection to any approach based on Article 17 is that it would mean only beliefs akin to Nazism or espousing totalitarianism would fail to qualify for protection. However, it is clear from Convention case law that that is as it should be; a person is free in a democratic society to hold any belief they wish, subject only to "some modest, objective minimum requirements": per Lord Nicholls in **Williamson**. It is only in extreme cases involving the gravest violation of other Convention rights that the belief would fail to qualify for protection at all.

71. Ms Russell referred us to **Palomo Sánchez v Spain** [2011] IRLR 934, in which the ECtHR considered whether there had been a breach of Article 10 (and Article 11 (freedom of

association)) in circumstances where employees, who were on the executive of the relevant trade union, had been dismissed for publishing a newsletter containing a highly offensive cartoon depicting a manager and two co-workers in compromising positions. The Spanish courts dismissed their complaints based on a violation of the right to freedom of expression, considering the restriction of that right in the particular employment context concerned to be justified. The ECtHR held that the Spanish courts were required to balance the applicants' right to freedom of expression "against the right to honour and dignity" of the three impugned colleagues, and had, in the particular employment context concerned, reached decisions that did not amount to a violation of Article 10. We were not assisted by this case (a) because it was not concerned with Article 17 and the ouster of Article 10 protection; and (b) it appeared to us to be a straightforward application of Article 10(2) and the circumstances in which an interference with the right to freedom of expression may be justified. It did not, in our view, establish that qualification for protection under Article 9 or 10 would not be afforded to an individual in any case where their actions might impinge upon the "honour and dignity" of others.

The Relevance of Manifestation

72. Although Article 9(2) refers to the right to the freedom of thought, conscience and religion, it also refers to the freedom to manifest that religion or belief "in worship, teaching, practice and observance". Furthermore, it is the freedom to manifest religion or belief that is subject only to the limitations described in Article 9(2). Section 10, EqA makes no mention of manifestation. To what extent then, is manifestation relevant in applying s.10, EqA? Mr Cooper submits that manifestation may be taken into account but only for the purposes of determining whether the threshold requirements are met in general, rather than whether a particular expression or manifestation is protected.

73. In **Gray** (EAT), at paras 29 to 30, I said as follows in relation to the application of the Grainger Criteria and manifestation:

> **"29 However, it is important to remember that in an application of the Grainger criteria, and the fourth Grainger criterion in particular, the focus should be on the manifestation of the belief. As Lord Nicholls stated in Williamson, at para 23:**
>
> > **"Everyone, therefore, is entitled to hold whatever beliefs he wishes. But when questions of "manifestation" arise, as they usually do in this type of case, a belief must satisfy some modest, objective minimum requirements."**
>
> **30 Lord Walker of Gestingthorpe, at para 64 of Williamson, agreed with Lord Nicholls that a focus on manifestation was necessary "in order to prevent article 9 becoming unmanageably diffuse and unpredictable in its operation"" (see para 62):**
>
> > **"I am therefore in respectful agreement with Lord Nicholls that, at any rate by the time that the court has reached the stage of considering the *manifestation* of a belief, it must have regard to the implicit (and not over-demanding) threshold requirements of seriousness, coherence and consistency with human dignity which Lord Nicholls mentions." (Emphasis in original)"**

74. Although the Court of Appeal upheld the judgment in **Gray** (EAT), it did so on the basis that there was no causal link between the claimed belief and the detriment relied upon. The Court of Appeal went on to say:

> **"30 It is unnecessary in these circumstances for us to consider whether Choudhury J was right to require the focus to be on manifestation when determining whether there is a protected belief by reference to the Grainger criteria. Our judgment is not to be taken as endorsing this approach".**

75. Ms Monaghan submits that, although the Court of Appeal in **Gray** (CA) did not expressly overrule it, this aspect of my judgment in **Gray** (EAT) was wrong. She submits that manifestation is not a useful touchstone for determining whether a belief meets the Grainger Criteria, not least because a single belief may be manifested by different people in different ways, or may not be manifested at all. Furthermore, manifestation would be meaningless in relation to a lack of belief (which is also protected) since there would usually be no belief to manifest. Ms Monaghan submits that where, in **R (Williamson)**, Lord Nicholls and Lord Walker referred to a focus on manifestation being necessary, this meant no more than that the Court or Tribunal would probably

not be troubled with having to determine whether a belief met the threshold requirements unless and until manifestation becomes an issue.

76. Ms Russell submits that whether or not **Gray** (EAT) was wrong in this regard does not take the Claimant's appeal any further since the Tribunal considered that the manifestation in question was not separable from the belief itself.

77. We agree with Ms Monaghan that I was wrong to read the remarks of Lord Nicholls and Lord Walker in **R (Williamson)** as meaning that, at the stage of applying the Grainger Criteria, the *focus* should be on manifestation. Manifestation is not irrelevant: the belief may only come to the employer's attention because of some outward manifestation. The Claimant's tweets in this case are an example. Had she not sent those tweets or expressed her beliefs in any discernible way, then the issues giving rise to this appeal would not have arisen at all. Moreover, as I said in **Gray** (EAT) the manner in which a person manifests their belief might, in some cases, be relevant in determining whether the belief has the requisite degree of cogency or cohesion to satisfy Grainger IV. However, we accept Ms Monaghan's and Mr Cooper's submission that at this preliminary stage of assessing whether the belief even qualifies for protection, manifestation can be no more than a part of the analysis (assuming that there is any manifestation at all) and should be considered only in determining whether the belief meets the threshold requirements in general. It is also right to note that an approach that places the focus on manifestation might lead the Tribunal to consider whether a particular expression or mode of expression of the belief is protected, rather than concentrating on the belief in general and assessing whether it meets the Grainger Criteria.

78. That approach follows from the language of s.10, EqA which, as we have said, is concerned only with whether a person *has* the protected characteristic by being *of* the religion or belief in question, and not with whether a person *does* anything pursuant to that religion or belief.

79. In our judgment, it is important that in applying Grainger V, Tribunals bear in mind that it is only those beliefs that would be an affront to Convention principles in a manner akin to that of pursuing totalitarianism, or advocating Nazism, or espousing violence and hatred in the gravest of forms, that should be capable of being not worthy of respect in a democratic society. Beliefs that are offensive, shocking or even disturbing to others, and which fall into the less grave forms of hate speech would not be excluded from the protection. However, the manifestation of such beliefs may, depending on circumstances, justifiably be restricted under Article 9(2) or Article 10(2) as the case may be.

Did the Tribunal err in its approach?

80. The Tribunal was tasked with considering whether the Claimant's belief fell within s.10, EqA. In terms of Article 9 and Article 10 rights, the issue was simply whether the Claimant fell within the scope of the protection afforded by those Articles.

81. It was not the Tribunal's task to engage in any evaluation of the Claimant's beliefs by any objective standard. Instead, it was to assess that belief on its own terms.

82. In applying Grainger V, it was incumbent upon the Tribunal to bear in mind that only those beliefs or acts of expression that would fall to be excluded from protection by virtue of Article 17, ECHR would fall outside the scope of s.10, EqA. Thus, the Tribunal would, in order to exclude the protection, have to be satisfied that the belief in question or its expression gave

rise to the gravest form of hate speech, was inciting violence, or was as antithetical to Convention principles as Nazism or totalitarianism.

83. The Tribunal's application of the Grainger Criteria appears to commence at paras 79. There, the Tribunal states that:

> **"Many concerns that the Claimant has, such as ensuring protection of vulnerable women, do not, in fact, rest on holding a belief that biological sex is immutable."**

84. Similarly, at para 81, the Tribunal states that:

> **"Many of the illustrations the Claimant relies on do not, in fact, rely on the belief that men can never become women; but on the analysis that there may be limited circumstances in which it is relevant that a person is a trans woman or trans man, such as when ensuring appropriate medical care is provided, which takes proper account of trans status."**

85. The Tribunal appears here to be straying into an evaluation of the Claimant's belief. In our judgment, it is irrelevant in determining whether a belief qualifies for protection that some of its tenets are considered by the Tribunal to be unfounded, or that it might be possible for the Claimant's concerns to be allayed without adhering to or manifesting her belief. By expressing the view that it did and by proposing steps that the Claimant could take so as not to manifest her belief in a certain way, the Tribunal, was, it seems to us, implicitly making a value judgment based on its own view as to the legitimacy of the belief. In doing so, the Tribunal could be said to have failed to remain neutral and/or failed to abide by the cardinal principle that everyone is entitled to believe whatever they wish, subject only to a few modest, minimum requirements.

86. At para 82, the Tribunal comments that the Claimant is "not prepared to consider the possibility that her belief may not be correct". That too seems to us to be an irrelevant consideration. A person who is dogmatic in their belief, even in the face of overwhelming evidence tending to undermine it, is no less entitled to protection for their belief than a person

whose belief has the support, say, of the majority of the scientific community. Qualification for protection cannot depend on the quality of open-mindedness or a willingness to accept rational, but opposing, views. As stated in **Bessarabia**, the State (here represented by the Tribunal) must remain neutral; its role is "not to remove the cause of tensions by doing away with pluralism, but to ensure that groups opposed to one another tolerate each other." Even though this aspect of the Tribunal's judgment was concerned with Grainger III (i.e. whether the belief is as to a weighty and substantial aspect of human life and behaviour) on which the Claimant succeeded, the error in the Tribunal's approach is apparent.

87. We see this error of approach again at para 83, where the Tribunal considers whether the belief satisfies Grainger IV (by attaining a certain level of cogency, seriousness, cohesion and importance). Although, once again, the Tribunal finds in the Claimant's favour, it does so having expressed doubts as to the scientific basis for the Claimant's belief. The Tribunal refers to "the fact that biological opinion is increasingly moving away from an absolutist approach [to gender]…", despite there being little in the way of expert evidence about that issue and really little more than an article in the New York Times referred to at para 44 in support. It is irrelevant that the Tribunal might consider the scientific foundations of the Claimant's belief to be weak. The belief is to be assessed on its own terms against the very modest threshold requirements established by the case law. The requirement that a belief must attain a certain level of cogency or cohesion should not lead a Tribunal, using the tools of logic or science, to challenge the basis for a belief; were that not so then many might consider that no religious belief satisfies Grainger IV.

88. It is at para 84 that the Tribunal commences its analysis of the Claimant's belief by reference to Grainger V, and in respect of which the Tribunal found against the Claimant. The Tribunal considers that "the Claimant's view, in its absolutist nature, is incompatible with human

dignity and fundamental rights of others". It is not entirely clear from the Tribunal's judgment what is meant when it describes the Claimant's belief as "absolutist". If it meant "absolutist" in the sense that the Claimant has an unshakeable conviction that she is right that sex is immutable and that anyone who disagrees with her is wrong, then any person professing to hold a belief (whether religious or philosophical) with which others profoundly disagree or which others do not share could be said to be absolutist. However, as we have said already, the firmness with which one clings to a view (even one that others might consider offensive or irrational) is not a reason to deny that person the protection under s.10, EqA. If that were not so, then the more fervently held the belief, the less likely it is to qualify for protection. "Absolutism" in that sense cannot therefore be a valid criterion for determining whether or not a belief falls to be protected under s.10, EqA.

89. The other way in which the description "absolutist" appears to have been used is in relation to the Tribunal's finding at para 90 that "it is a core component of [the Claimant's] belief that she will refer to a person by the sex she considered appropriate even if it violates their dignity and/or creates an intimidating, hostile, degrading, humiliating or offensive environment." Insofar as the Tribunal is here suggesting that the Claimant would always, indiscriminately and gratuitously, "misgender" trans men and women, then that is, as we have said, inconsistent with the Tribunal's own earlier findings that the Claimant would "generally seek to be polite to trans persons and would usually seek to respect their choice of pronoun but would not feel bound to; mainly if a trans person who was not assigned female at birth was in a "woman's space" but also more generally." The evidence that we were taken to and which was before the Tribunal supported the Claimant's case that she would usually use preferred pronouns but reserved the right not to do so where she considered that to be relevant. The only evidence of "misgendering" appears to have been in relation to an incident described at para 89 of the Judgment and concerning Gregor Murray. The Claimant explains that her use of the male pronoun when

A referring to Gregor Murray instead of the preferred "they" and "them" was unintentional. There is nothing to suggest that the Tribunal rejected that evidence.

B 90. Reading the Tribunal's judgment as a whole, as we must, we do not read the Tribunal's conclusions at para 90 as meaning that the Claimant would always, indiscriminately and gratuitously use the wrong or non-preferred pronouns when referring to or communicating with trans persons. On a proper reading of the Judgment, the Tribunal was stating that the Claimant C would not use preferred pronouns whenever she considered it appropriate not to do so. That must mean that she would not use them where she considered it to be relevant. If that is correct, then the description "absolutist" would appear to be something of a misnomer as her position was D more nuanced and context dependent.

91. The Tribunal also relies, at paras 84, 85, 86 and 91 on the Claimant's refusal to E acknowledge the full effect of a GRC as evidence of the absolutist nature of her views, the Tribunal being of the view that the Claimant is not entitled to ignore the fact that a trans woman with a GRC is "legally a woman". The question is whether the Tribunal was correct to consider that the existence of a GRC means that the Claimant is not entitled in any circumstances to refer F to a trans woman holding such a certificate as a man.

92. The GRA was enacted following the decision of the ECtHR in **Goodwin**, in which the G Court considered whether the absence of any legal recognition of the acquired gender of those who had undergone gender reassignment surgery amounted to a violation of Article 8 (right to private and family life), ECHR. In holding that there was a violation of Article 8, the ECtHR held as follows:

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> **"77. It must also be recognised that serious interference with private life can arise where the state of domestic law conflicts with an important aspect of personal identity (see, mutatis mutandis, Dudgeon v the United Kingdom judgment of 22 October 1981, Series A no.45, paragraph 41). The stress and alienation arising**

> **from a discordance between the position in society assumed by a post-operative transsexual and the status imposed by law which =refuses to recognise the change of gender cannot, in the Court's view, be regarded as a minor inconvenience arising from a formality. A conflict between social reality and law arises which places the transsexual in an anomalous position, in which he or she may experience feelings of vulnerability, humiliation and anxiety.**
>
> **…**
> **90. Nonetheless, the very essence of the Convention is respect for human dignity and human freedom. Under Article 8 of the Convention in particular, where the notion of personal autonomy is an important principle underlying the interpretation of its guarantees, protection is given to the personal sphere of each individual, including the right to establish details of their identity as individual human beings (see, inter alia, Pretty v the United Kingdom, no.2346/02, judgment of 29 April 2002, paragraph 62, and Mikulic v Croatia, no.53176/99, judgment of 7 February 2002, paragraph 53, both to be published in ECHR 2002). In the 21st century the right of transsexuals to personal development and to physical and moral security in the full sense enjoyed by others in society cannot be regarded as a matter of controversy requiring the lapse of time to cast clearer light on the issues involved. In short, the unsatisfactory situation in which post-operative transsexuals live in an intermediate zone as not quite one gender or the other is no longer sustainable. Domestic recognition of this evaluation may be found in the report of the Interdepartmental Working Group and the Court of Appeal's judgment of Bellinger v Bellinger (see paragraphs 50, 52–53)." (Emphasis added)**

93. The ECtHR thus considered that it was an important aspect of their Article 8 rights that trans persons who had undergone gender reassignment surgery should be entitled to *legal* recognition of the acquired gender. The GRA was enacted to address the shortcomings in the law identified in **Goodwin**. Section 9, GRA so far as relevant provides:

> **"9 General**
> **(1) Where a full gender recognition certificate is issued to a person, the person's gender becomes for all purposes the acquired gender (so that, if the acquired gender is the male gender, the person's sex becomes that of a man and, if it is the female gender, the person's sex becomes that of a woman).**
> **…" (Emphasis added)**

94. The GRA provides for certain exceptions where, as a matter of law, a person's gender is not the acquired gender. For example, section 12 provides that the fact that a person's gender has become the acquired gender does not affect the status of that person as the father or mother of a child. Whilst the GRA makes it an offence to disclose information acquired in an official capacity as to a person's gender before it became the acquired gender (s.22, GRA), there is nothing in the Act that requires a person acting in any private capacity to refer to a person's

acquired gender or to refrain from referring to a person's gender before it became the acquired gender.

95. The GRA was considered by the House of Lords when it was still the Gender Recognition Bill in **Chief Constable of Yorkshire Police v A**. Baroness Hale referred to the Bill as follows:

> **"42. The Gender Recognition Bill is currently before Parliament. This lays down a comprehensive scheme for recognising the reassigned gender of a trans person in defined circumstances. There are wider than the postoperative conditions with which the domestic and European case law has been concerned. Once recognised, the reassigned gender is valid for all legal purposes unless specific exception is made. It will no longer be a genuine occupational qualification that the job may entail the carrying out even of intimate searches. In policy terms, therefore, the view has been taken that trans people properly belong to the gender in which they live." (Emphasis added)**

96. More recently, in **R (McConnell) v Registrar General for England and Wales (AIRE Centre intervening)** [2020] 3 WLR 683, the Court of Appeal stated that:

> **54 On that interpretation (which the High Court accepted and which we also would accept on the natural interpretation of the legislation) the general effect of section 9(1) of the GRA is displaced to the extent that an exception to it applies. For present purposes the relevant exception is contained in section 12. It follows that, although for most purposes a person must be regarded in law as being of their acquired gender after the certificate has been issued, where an exception applies, they are still to be treated as having their gender at birth. ..."**

97. Although s. 9, GRA refers to a person becoming "for all purposes" the acquired gender, it is clear from these references in decisions of the House of Lords and the Court of Appeal, that this means for all "legal purposes". That the effect of s.9, GRA is not to erase memories of a person's gender before the acquired gender or to impose recognition of the acquired gender in private, non-legal contexts is confirmed by the comments of Baroness Hale in **R (C) v Secretary of State for Work and Pensions** [2017] 1 WLR 4127 (SC). The issue in that case was whether the DWP had breached the GRA by keeping records of a trans person's gender before the acquired gender and operating a special customer records policy for customers seeking extra privacy, which had the effect of alerting front-line staff to the possibility that a customer had a GRC.

Baroness Hale begins her judgment with a powerful account of the traumas faced by trans persons and the importance to them of being acknowledged in their acquired gender:

> **"1 "We lead women's lives: we have no choice". Thus has the Chief Justice of Canada, the Rt Hon Beverley McLachlin, summed up the basic truth that women and men do indeed lead different lives. How much of this is down to unquestionable biological differences, how much to social conditioning, and how much to other people's views of what it means to be a woman or a man, is all debatable and the accepted wisdom is perpetually changing. But what does not change is the importance, even the centrality, of gender in any individual's sense of self. Over the centuries many people, but particularly women, have bitterly resented and fought against the roles which society has assigned to their gender. Genuine equality between the sexes is still a work in progress. But that does not mean that such women or men have not felt entirely confident that they are indeed a woman or a man. Gender dysphoria is something completely different - the overwhelming sense that one has been born into the wrong body, with the wrong anatomy and the wrong physiology. Those of us who, whatever our occasional frustrations with the expectations of society or our own biology, are nevertheless quite secure in the gender identities with which we were born, can scarcely begin to understand how it must be to grow up in the wrong body and then to go through the long and complex process of adapting that body to match the real self. But it does not take much imagination to understand that this is a deeply personal and private matter; that a person who has undergone gender reassignment will need the whole world to recognise and relate to her or to him in the reassigned gender; and will want to keep to an absolute minimum any unwanted disclosure of the history. This is not only because other people can be insensitive and even cruel; the evidence is that transphobic incidents are increasing and that transgender people experience high levels of anxiety about this. It is also because of their deep need to live successfully and peacefully in their reassigned gender, something which non-transgender people can take for granted."**

98. Baroness Hale went on to acknowledge, however, that the GRA does not erase history:

> **"22 The appellant accepts that section 9 "does not rewrite history". Thus, in J v C [2007] Fam 1 the issue of a full GRC in the male gender to a person who was previously female did not retrospectively validate his prior marriage to another female (at a time when the law did not provide for same sex marriages), with the result that he did not become the father of a child born to the other female as a result of artificial insemination by donor ("AID") (as would otherwise have been the case under section 27 of the Family Law Reform Act 1987, which provided that the husband of a woman who gives birth as a result of AID was to be treated for all purposes as the father of the child). But she argues that section 9(1) does require her now to be treated for all purposes as a woman and this includes how she is treated by the DWP for the purpose of claiming and receiving JSA. Section 22(1) is not an exception to the general principle in section 9(1). Rather it is an additional protection. It does not follow from the fact that no offence is committed under section 22 that a policy which is in breach of section 9(1) is lawful.**
>
> **23 The problem with this argument is that section 9(1) clearly contemplates a change in the state of affairs: before the issue of the GRC a person was of one gender and after the issue of the GRC that person "becomes" a person of another gender. The sections which follow section 9 are designed, in their different ways, to cater for the effect of that change. Thus, for example, section 12 provides that the acquisition of a new gender does not affect that person's status as the father or mother of a child; section 15 provides that it does not affect the disposal or devolution of property under a will or other instrument made before the**

> **appointed day (thus section 9 will apply to dispositions made after that date); section 16 provides that the acquisition of a new gender does not affect the descent of any peerage or dignity or title of honour or property limited to descend with it (unless a contrary intention is expressed in the will or instrument).**
> **24 <u>There is nothing in section 9 to require that the previous state of affairs be expunged from the records of officialdom. Nor could it eliminate it from the memories of family and friends who knew the person in another life.</u> Rather, sections 10 and 22 provide additional protection against inappropriate official disclosure of that prior history." (Emphasis added)**

99. The effect of a GRC, whilst broad as a matter of law, does not mean that a person who, like the Claimant, continues to believe that a trans woman with a GRC is still a man, is necessarily in breach of the GRA by doing so; the GRA does not compel a person to believe something that they do not, any more than the recognition by the State of Civil Partnerships can compel some persons of faith to believe that a marriage between anyone other than a man and a woman is acceptable. That is not to say, of course, that the Claimant can, as a result of her belief, disregard the GRC; clearly, she cannot do so in circumstances where the acquired gender is legally relevant, e.g. in a claim of sex discrimination or harassment. Referring to a trans person by their pre-GRC gender in any of the settings in which the EqA applies could amount to harassment related to one or more protected characteristics[1]; whether or not it does will depend, as in any claim of harassment, on a careful assessment of all relevant factors, including whether the conduct was unwanted, the perception of the trans person concerned and whether it is reasonable for the impugned conduct to have the effect of creating an intimidating, hostile, degrading, humiliating or offensive environment for the trans person. A simple example of a situation where referring to a trans person by their pre-GRC gender would probably not amount to harassment is where the trans person in question is happy to discuss their trans status or is sympathetic to or shares the Claimant's gender-critical belief. The Tribunal itself acknowledged that "Many trans people are happy to discuss their trans status", and had before it the uncontested evidence of Kristina

[1] A trans person could potentially bring a claim for harassment related to gender reassignment (where the definition under s.7(2) is satisfied), sex (see e.g. **P v S and Cornwall County Council** [1996] ICR 795 at paras 17 to 22), disability based on the conditions of Gender Dysphoria or Gender Identity Disorder (see EHRC Code at para 2.28), or even a philosophical belief that gender identity is paramount and that a trans woman is woman.

Harrison, a gender-critical trans woman, who, presumably, would not have felt harassed by being referred to as a man in some circumstances. It is difficult, therefore, to understand the Tribunal's conclusion that the Claimant's belief "necessarily harms the rights of others through her refusal to accept the full effect of a GRC…". Not only is this conclusion predicated on the incorrect assumption that the Claimant would always misgender trans persons, irrespective of the circumstances, and that the full effect of a GRC goes beyond legal purposes, but it also fails to recognise that whether there is harassment in a given situation is a highly fact-sensitive question.

100. Some beliefs, for example a belief that all non-white people should be forcibly deported for the good of the nation, are such that any manifestation of them would be highly likely to espouse hatred and incitement to violence. In such cases, it would be open to the Tribunal to say that the belief fails to satisfy Grainger V. However, the rationale for doing so would be that it is the kind of case to which Article 17 might be applied because of the inevitability that the rights of others would be destroyed. The Claimant's belief is not comparable.

101. At para 91, the Tribunal states:

> **"The Claimant could generally avoid the huge offense caused by calling a trans woman a man without having to refer to her as a woman, as it is often not necessary to refer to a person's sex at all. However, where it is, I consider requiring the Claimant to refer to a trans woman as a woman is justified to avoid harassment of that person. Similarly, I do not accept that there is a failure to engage with the importance of the Claimant's qualified right to freedom of expression, as it is legitimate to exclude a belief that necessarily harms the rights of others through refusal to accept the full effect of a Gender Recognition Certificate or causing harassment to trans women by insisting they are men and trans men by insisting they are women. The human rights balancing exercise goes against the Claimant because of the absolutist approach she adopts."**

102. In our judgment, the Tribunal fell into error in two respects here. First, the Tribunal's only task at this preliminary stage was to determine if the Claimant's belief fell within s.10, EqA. That analysis was confined, in Convention terms, to the first stage of determining whether the

belief qualified for protection under Article 9, ECHR at all. There is no balancing exercise between competing rights at this first stage, because it is only a belief that involves in effect the destruction of the rights of others that would fail to qualify. The balancing exercise only arises under the second stage of the analysis under Article 9(2) (or Article 10(2)) in determining whether any restriction on the exercise of the right is justified. That exercise is context specific.

103. The second error was in imposing a requirement on the Claimant to refer to a trans woman as a woman to avoid harassment. In the absence of any reference to specific circumstances in which harassment might arise, this is, in effect, a blanket restriction on the Claimant's right to freedom of expression insofar as they relate to her beliefs. However, that right applies to the expression of views that might "offend, shock or disturb". The extent to which the State can impose restrictions on the exercise of that right is determined by the factors set out in Article 10(2), i.e. restrictions that are "prescribed by law and are necessary in a democratic society … for the protection of the reputation or rights of others…" It seems that the Tribunal's justification for this blanket restriction was that the Claimant's belief "necessarily harms the rights of others". As discussed above, that is not correct: whilst the Claimant's belief, and her expression of them by refusing to refer to a trans person by their preferred pronoun, or by refusing to accept that a person is of the acquired gender stated on a GRC, could amount to unlawful harassment in some circumstances, it would not always have that effect: see para 99 above. In our judgment, it is not open to the Tribunal to impose in effect a blanket restriction on a person not to express those views irrespective of those circumstances.

104. That does not mean that in the absence of such a restriction the Claimant could go about indiscriminately "misgendering" trans persons with impunity. She cannot. The Claimant is subject to same prohibitions on discrimination, victimisation and harassment under the EqA as the rest of society. Should it be found that her misgendering on a particular occasion, because of

its gratuitous nature or otherwise, amounted to harassment of a trans person (or of anyone else for that matter), then she could be liable for such conduct under the EqA. The fact that the act of misgendering was a manifestation of a belief falling with s.10, EqA would not operate automatically to shield her from such liability. The Tribunal correctly acknowledged, at para 87 of the Judgment, that calling a trans woman a man "may" be unlawful harassment. However, it erred in concluding that that possibility deprived her of the right to do so in any situation.

105. At paras 58, 92 and 93 of the Judgment, the Tribunal analysed the position from the perspective of a "lack of belief" within the meaning of s.10(2), EqA. The Tribunal considered that the Grainger Criteria are to be applied to the lack of philosophical belief just as they would to a belief. At para 58, the Tribunal said as follows:

> **"While the position is reasonably clear for religion and lack of religion – as they are specifically provided for in section 10(1) EqA, I consider the position is less clear for lack of belief. Section 10(2) provides that "reference to belief includes a reference to a lack of belief". On that basis if one replaces the word "belief" with "lack of belief", sub-section 2 could be considered to protect any "religious or philosophical lack of belief" – i.e. the lack of belief must be religious or philosophical, rather than the protection applying to anyone who does not hold a particular religious or philosophical belief. On that analysis the Granger Criteria are to be applied to the lack of belief. I consider this is a more logical analysis, at least in some cases. A person might well hold a religious or philosophical belief that murder is wrong. It would be surprising if not holding that belief was also protected, so, in effect, believing there is nothing wrong with murder is a protected characteristic. On my suggested analysis such a lack of belief in murder being wrong would not comply with the Granger Criteria and so would not be protected. Similarly, atheism would be protected because it is a philosophical lack of belief that corresponds with the Granger Criteria rather than merely because atheist are not adherents of the large number of protected religions."**

106. In our judgment, the flaw in this analysis is that it assumes that the lack of belief necessarily denotes holding a positive view that is opposed to the belief in question. However, a lack of belief under s.10, EqA is merely the *absence* of belief: see **Grainger** at para 31. A lack of belief may arise from simply not having any view on the issue at all, either because of indifference, indecision or otherwise. It would also include a person who has some views on the issue but would not claim to have a developed philosophical belief to that effect. Thus, in the

example postulated by the Tribunal of a person having a belief that murder is wrong, the protection conferred on those who lack that belief would not mean that persons who positively believed that murder was not wrong would be protected under EqA. Those who held a positive belief to that effect would be deemed to have a belief, not a lack of belief. Those who had a lack of belief that murder is wrong would include those who had never given the matter any thought and those who think that there might be some situations in which murder is acceptable. That lack of belief is protected under s.10(2), EqA irrespective of whether the Grainger Criteria could be applied to it. Indeed, it is difficult to see how the Grainger Criteria could be applied to a person who held no view on an issue at all.

107. The Claimant had also put her claim in her ET1 on the alternative basis of a lack of belief. The belief that she did not subscribe to was described by the Tribunal as follows at para 92 of the Judgment:

> **"...everyone has a gender which may be different to their sex at birth and which effectively trumps sex so that trans men are men and transwomen are women"**

108. We refer to this as the "gender identity belief". The Claimant accepted that the gender identity belief was a philosophical belief qualifying for protection under s.10, EqA. However, instead of treating the Claimant's lack of the gender identity belief as also qualifying for protection, the Tribunal treated the Claimant's lack of that belief as necessarily equating to a positive belief that trans women are men (which the Tribunal considered to be a belief not worthy of protection). In our judgment, that approach was wrong. The fact that the Claimant did not share the gender identity belief is enough in itself to qualify for protection. If a person, A, is treated less favourably by her employer, B, because of A's failure to profess support for B's gender identity belief then that could amount to unlawful discrimination because of a lack of belief.

109. There was no "sleight of hand" here as suggested by the Tribunal in putting the claim on the basis of a lack of belief. That is a valid course open to putative claimants and its efficacy should not be undermined by treating any lack of belief as necessarily amounting to a positive opposing belief.

Does the Claimant's belief fall within s.10 EqA?

110. On a proper application of Grainger V, as analysed above, it seems to us that the only possible conclusion is that the Claimant's belief does fall within s.10, EqA.

111. Most fundamentally, the Claimant's belief does not get anywhere near to approaching the kind of belief akin to Nazism or totalitarianism that would warrant the application of Article 17. That is reason enough on its own to find that Grainger V is satisfied. The Claimant's belief might well be considered offensive and abhorrent to some, but the accepted evidence before the Tribunal was that she believed that it is not "incompatible to recognise that human beings cannot change sex whilst also protecting the human rights of people who identify as transgender": see para 39.2 of the Judgment. That is not, on any view, a statement of a belief that seeks to destroy the rights of trans persons. It is a belief that might in some circumstances cause offence to trans persons, but the potential for offence cannot be a reason to exclude a belief from protection altogether.

112. In the present case, there are two further factors which, upon analysis, are wholly at odds with the view that the belief is not one worthy of respect in a democratic society.

113. First, there is the evidence that the gender-critical belief is not unique to the Claimant, but is widely shared, including amongst respected academics. The popularity of a belief does not

A necessarily insulate it from being one that gravely undermines the rights of others; history is replete with instances where large swathes of society have succumbed to philosophies that seek to destroy the rights of others. However, a widely shared belief demands particular care before it can be condemned as being not worthy of respect in a democratic society.

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114. Second, the Claimant's belief that sex is immutable and binary is, as the Tribunal itself correctly concluded, consistent with the law: see para 83. The leading case is still **Corbett v Corbett** [1971] P 83 at 104D-G, 106B0D and 107A per Ormrod J. Its effect was considered by the House of Lords in **Chief Constable of West Yorkshire Police v A** (No.2) [2005] 1 AC 51:

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> **"3. The advice given to the chief constable on English domestic law, summarised in (1) above, was correct. Such was the effect of *Corbett v Corbett (orse Ashley) [1971] P 83* . That case, it is true, concerned the capacity of a male-to-female transsexual to marry. But the Court of Appeal (Criminal Division) applied the same rule to gender-specific criminal offences in *R v Tan [1983] QB 1053* . Both decisions have been heavily criticised, and other jurisdictions have adopted other rules. But there was nothing in English domestic law to suggest that a person could be male for one purpose and female for another, and there was no rule other than that laid down in *Corbett* and *R v Tan* ." (per Lord Bingham)**

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> **"19. In March 1998 the chief constable had been advised that, even though she had successfully undergone all the usual treatment, including surgery, in law Ms A's sex was still male. In my view that advice on the domestic law of the United Kingdom was, and remains, correct: Bellinger v Bellinger (Lord Chancellor intervening) [2003] 2 AC 467 , especially at p 480, para 45 per Lord Nicholls of Birkenhead. Section 54(9) of the Police and Criminal Evidence Act 1984 ("PACE") provides: "The constable carrying out a search shall be of the same sex as the person searched." Parliament's laudable aim is to afford protection to the dignity and privacy of those being searched in a situation where they may well be peculiarly vulnerable. While her application to join the force was pending, Ms A herself very properly drew attention to the possible problem posed by this provision. On the basis of the legal advice given to him, the chief constable considered that, because of section 54(9), Ms A could not lawfully search female suspects. And, in practice, she could not search male suspects. Nor could the chief constable arrange for Ms A not to have to carry out searches without it becoming known why he was doing so. Since he understood that she was not willing for this to happen, the chief constable decided that he could not accept her application to join the force." (Per Lord Rodger)**

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> **"30. In the well known case of *Corbett v Corbett (orse Ashley)* [1971] P 83 , Ormrod J held that, for the purpose of the law of capacity to marry, the sex of a person was fixed at birth. Accordingly a purported marriage in 1963 between a man and a male to female trans person was void ab initio. Shortly after this, the Nullity of Marriage Act 1971 provided that a marriage taking place after 31 July 1971 is void on the ground "that the parties are not respectively male and female". This was later consolidated as section 11(c) of the Matrimonial Causes Act 1973 . The same approach was adopted by the Court of Appeal in R v Tan [1983] QB 1053 for the gender specific offences in the Sexual Offences Acts. The court considered that "both common sense and the desirability of certainty and consistency" demanded that the Corbett decision should apply in both contexts.**

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> **Since then, it has been assumed that a person's gender is fixed at birth for the purpose of all legal provisions which make a distinction between men and women. Corbett was followed without challenge in S-T (formerly J) v J [1998] Fam 103 . (per Baroness Hale)"**

115. Where a belief or a major tenet of it appears to be in accordance with the law of the land, then it is all the more jarring that it should be declared as one not worthy of respect in a democratic society. Ms Russell sought to persuade us that the decision in **Corbett** is outdated and should not be followed, particularly in light of the GRA under which a person who obtains a GRC does "become for all purposes" the acquired gender. We cannot see any real basis on which this appeal tribunal could disregard **Corbett** especially given that the House of Lords' comments in **Chief Constable of Yorkshire v A** were made having regard to the Gender Recognition Bill: see para 42 of **Chief Constable of Yorkshire v A**. Society has, of course, moved on considerably since 1971, and, as stated in the Equal Treatment Bench Book, "awareness, knowledge and acceptance of transgender people has greatly increased over the last decade". However, the position under the common law as to the immutability of sex remains the same; and it would be a matter for Parliament, not a court or tribunal considering whether a belief is protected under s.10, EqA, to declare otherwise.

116. Just as the legal recognition of Civil Partnerships does not negate the right of a person to believe that marriage should only apply to heterosexual couples, becoming the acquired gender "for all purposes" within the meaning of GRA does not negate a person's right to believe, like the Claimant, that as a matter of biology a trans person is still their natal sex. Both beliefs may well be profoundly offensive and even distressing to many others, but they are beliefs that are and must be tolerated in a pluralist society.

Conclusion

117. For these reasons, and notwithstanding Ms Russell's powerful submissions to the contrary, it is our judgment that the Tribunal erred in law. In relation to the preliminary issue of whether the Claimant's belief falls within s.10, EqA, we substitute a finding that it does. The matter will now be remitted to a freshly constituted Tribunal to determine whether the treatment about which the Claimant complains was because of or related to that belief.

118. We acknowledge that some trans persons will be disappointed by this judgment. Ms Russell submitted that it would create a "two-tier" system between natal women and trans women, with some trans women fearing that it will give licence to people seeking to harass them. We do not agree that that is the effect of deciding that the Claimant's belief is a philosophical belief within the meaning of s.10, EqA. We take this opportunity to reiterate, once more, what this judgment does not mean:

a. This judgment does not mean that the EAT has expressed any view on the merits of either side of the transgender debate and nothing in it should be regarded as so doing.
b. This judgment does not mean that those with gender-critical beliefs can 'misgender' trans persons with impunity. The Claimant, like everyone else, will continue to be subject to the prohibitions on discrimination and harassment under the EqA. Whether or not conduct in a given situation does amount to harassment or discrimination within the meaning of EqA will be for a tribunal to determine in a given case.
c. This judgment does not mean that trans persons do not have the protections against discrimination and harassment conferred by the EqA. They do. Although the protected characteristic of gender reassignment under s.7, EqA would be likely to apply only to a proportion of trans persons, there are other protected characteristics that could potentially be relied upon in the face of such conduct: see footnote 1.

d. This judgment does not mean that employers and service providers will not be able to provide a safe environment for trans persons. Employers would be liable (subject to any defence under s.109(4), EqA) for acts of harassment and discrimination against trans persons committed in the course of employment.

Note on Procedure

119. Finally, we note that the Preliminary Hearing below took some six days to conclude with the Tribunal being presented with hundreds of pages of evidence as to the nature of the Claimant's belief and on the transgender debate more generally. It is perhaps unsurprising in these circumstances that the Tribunal was effectively drawn into an adjudication of the merits and validity of the Claimant's belief, rather than limiting itself to a determination of the question whether the belief fell within s.10, EqA. In our view, that question should not ordinarily take up more than a day of the Tribunal's time. Beliefs which appear trivial or flippant (i.e. not satisfying Grainger III or IV) for example ought to be capable of being dealt with fairly quickly. Given that Grainger V has now been clarified as being apt only to exclude the most extreme beliefs akin to Nazism or totalitarianism or which incite hatred or violence, very few beliefs will fall at that hurdle, and, once again, it should not take long to determine whether a belief falls into that category. It seems to us that it would only be in very rare cases that it would be necessary for there to be a hearing of several days' length to determine that preliminary issue. In most cases, the real issue will be whether there was discrimination because of the belief in question. Where it appears to the Tribunal that the analysis of any preliminary issue in this context is likely to take longer than a day or so, the better approach might be to consider whether all issues, including liability, should be determined together.