



Queering the Equality Act 2010

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Queering the Equality Act 2010

Non-binary identities: Taylor v Jaguar Land Rover Limited

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Some terminology

Trans An umbrella term to describe people whose gender is not the same as, or does not sit comfortably with, the sex they were assigned at birth. Trans people may identify themselves using one or more of a wide variety of terms, including (but not limited to), transgender, transsexual, gender-queer, gender-fluid, non-binary...

Non-binary An umbrella term for people whose gender identity doesn't fit comfortably with 'man' or 'woman'. Non-binary identities are varied and can include people who identify with some aspects of binary identities, while others reject them entirely.



Rose Taylor

[I]n my case the precise word would be gender fluid. I have no plans for surgical transition... I would say "genderfluid" but this could be part of the transgender journey and not the final destination.

I have a lot of anxiety about the way I dress for work, my hesitation is that being gender fluid, I have been unsure how I should/can express myself at work and to some degree, it will be a learning experience. I think there are false expectations, I should present as a "passing woman" I don't agree that makeup, wig and everything else that entails is right for me and sitting at a desk all day dressed like that would be humiliating and uncomfortable, therefore I intend to present in a mixed mode occasionally. I think the hardest part will be the first day in the office.

Taylor v Jaguar Land Rover Ltd

- Claims for unfair dismissal, direct discrimination, harassment, victimisation.
- Preliminary question: does a non-binary, gender fluid person have the protected characteristic of gender reassignment?

Section 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.

Non-binary recognition

Women and Equality Select Committee Report (2016)

The Government must look into the need to create a legal category for those people with a gender identity outside the binary.

The protected characteristic in respect of trans people under the Equality Act should be amended to that of 'gender identity'.

64.7% of respondents to the 2018 Consultation supported changes to the GRA 2004 to accommodate non-binary individuals.

Taylor v Jaguar Land Rover Ltd

One of the issues the EA10 sought to deal with (and to some degree has) was moving away from medicalising protected characteristics... [I]n terms of gender-reassignment, the intention was to make it clear that a person need not intend to have surgery, or indeed ever have surgery, in order to identify as a different gender to their birth sex... gender reassignment need never be a medical process.

- paragraph 174

Taylor v Jaguar Land Rover Ltd

Parliament intended gender reassignment to be a spectrum moving away from birth sex, and that a person could be at any point on that spectrum. That would be so whether they described themselves as “non-binary” i.e. not at point A or point Z, “gender fluid” i.e. at different places between point A and point Z at different times, or “transitioning” i.e. moving from point A, but not necessarily ending at point Z, where A and Z are biological sex.

- paragraph 178

Taylor v Jaguar Land Rover Ltd

- Harassment: No action taken because Claimant refused to 'name names'.

[W]hat the Respondent could have done was issued a notice to employees highlighting serious concern at the highest level that incidents had been reported of people being subjected to unacceptable harassment due to protected characteristics... this was a means of sending a message that such behaviour... was completely unacceptable and would be taken very seriously... That would have provided comfort and support to the Claimant and, indeed, others in a similar situation.

- paragraph 61

Taylor v Jaguar Land Rover Ltd

- Initially told to use the disabled toilet. Then, whichever toilet she felt comfortable with (male, female or disabled).

[T]his put the onus on the Claimant to decide which toilets to use and to deal with any challenges made by colleagues unhappy with her choice. There were other possibilities, such as designating some sets of toilets on its sites as gender neutral, or possibly putting out a message to inform relevant staff which toilets the Claimant would be using.

- paragraph 65

Taylor v Jaguar Land Rover Ltd

- Claimant became a champion of the LGBT+ cause at work.

[T]he Claimant had been put in the position of being a unique champion for the purpose of demonstrating that diversity and inclusion work could fit with her role as a skilled engineer ... In fact, [the Claimant] did the vast majority of her LGBT+ [work] in her own time. Unfortunately, the Claimant was not supported as an individual, and this was having an impact on her health and wellbeing.

- paragraph 69

Taylor v Jaguar Land Rover Ltd

- Claimant was referred to Occupational Health because of stress, anxiety and distress as a result of harassment.

[This] medicalised the situation and implied the claimant needed treatment but failed to address the reason she was ill... At a subconscious level, the implication is that the victim is at fault, or is the problem, rather than the employer... The ongoing harassment experienced by the Claimant was not seen as a health and safety issue but, properly analysed, it was.

- paragraph 50

Intersectional re-imagining

Firstly, telling a transitioning person to use the disabled toilets is, at the very least, potentially offensive to them because it suggests that their protected characteristic equates to a disability.

Secondly, disabled toilets are for disabled people to use and should not be used by other people.

- paragraph 23

Intersectional re-imagining

- Medicalisation of the Claimant's mental health

The Claimant said that she thought she would try going to Occupational Health, but it was “scary” because... other people who had been to Occupational Health had lost their jobs.

This... turned the Claimant into a set of symptoms to be treated...

- Disability? Reasonable adjustments?

Queering the Equality Act 2010

Digital identities: R(C) v Secretary of State for Work and Pensions

[2017] UKSC 72 [2017] 1 WLR 4127

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Facts

- C is a woman who holds a Gender Recognition Certificate (GRC), she was one of the first to receive one in the UK.
- She had become unemployed in June 2010 following being let go from her managerial role and had been on Job Seeker's Allowance (JSA) ever since.
- To claim her JSA she had to attend Jobcentre Plus in person every two weeks
- Jobcentre IT systems retained information relating to her GRC
- There was a special customer records policy (SCR policy) which was used for customers who required extra protection for their privacy. Access was limited in time and specific purposes.

Facts

- From the SCR staff members could readily infer the probably reason for restricted access
- She had experienced a number of distressing incidents at the Jobcentre which indicate that DWP policies do not effectively protect the privacy of her status but rather tend to draw attention to it.
- C was concerned about how her “history” was recorded by the DWP and the effect that this can have on her interactions with its officials

Grounds of claim

- C argued that the retention policy and SCR policy:
 - Breached her Article 8 ECHR rights
 - Breached her Article 14 ECHR rights in conjunction with Article 8 ECHR
 - Directly and/or indirectly discriminatory under Equality Act 2010

High Court

- Simon J held:
 - Retention policy lacked clarity and precision and not readily accessible – not “in accordance with the law” under Article 8.
 - Did hold that it was justified as a proportionate means of achieving the legitimate aims of fraud detection and pension calculation
 - Rejected the discrimination claims under Article 14 and Equality Act 2010

Court of Appeal

- Prior to Court of Appeal case, DWP modified its policies:
 - Retention policy was made clarified
 - Reference to the gender recognition field on the database was masked (nothing visible to front line users)
 - But other facts from which such an inference could be drawn remained

Court of Appeal

- Elias LJ (with whom Patten and Black LJJ agreed):
 - Article 8 engaged but proportionate
 - Article 14 and Equality Act 2010 discrimination dismissed – in particular, indirect discrimination justified for same reasons as under Article 8
 - New argument also rejected: s.9 GRA 2004: where a GRC is issued “*the person’s gender becomes for all purposes the acquired gender*”

Supreme Court

- Grounds of challenge:
 - Inconsistent with GRA 2004
 - Incompatibility with Articles 3, 8 and 14 ECHR
 - Infringement of ss.13, 19 and 26 Equality Act 2010

Supreme Court reasoning

- “We lead women’s lives: we have no choice” (Rt Hon Beverley McLachlin, Chief Justice of Canada)
- Discusses gender dysphoria
 - *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*

Supreme Court reasoning

- Acknowledges that disclosure is still possible (§7) and that the error message pop up and requirement of access infers what the probable reason is (§12, §14):
 - *“the adviser... may well be able to ‘put two and two together’”*.
- There is harm: late payment could be up to 3 days (§14)
- Acknowledges that on several occasions there was reference to *“her transgender status”* (§15)
- She had transferred to a different office to protect her privacy and dignity and, indeed, physical safety

Supreme Court reasoning

- Lady Hale repeated the phrase “rewrite history” (§22) – bound by (*J v C* [2007] Fam 1)
- Acknowledged (§31):
 - *This is not a minor interference. On the contrary, it is a very serious matter. It goes to the heart of how the appellant, and others in her situation, relate to the world and the world relates to them*

Supreme Court reasoning

- DWP argued that the legitimate aims under Article 8/justification for indirect discrimination (§32):
 - The need to retain the information for the purpose of calculating entitlement to state retirement pension.
 - To identify and detect fraud.

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Supreme Court reasoning

- DWP argued that the legitimate aims under Article 8/justification for indirect discrimination (§32):
 - The need to retain the information for the purpose of calculating entitlement to state retirement pension.
 - To identify and detect fraud.
- Further, there was a lot of consideration of the computer systems (we've seen that looked at in the context of UC)

Reimagining

- Limits
- Reasoning
- Identities and digital rights

Queer Court

I was just a lonely girl In the eyes of my inner child
But I could be anything I want
And no matter where I go
You'll always be here in my heart
Here in my heart, here in my heart
I don't even have to explain
Just leave me alone now
I can't be held down
I can't be held down
Immaterial – SOPHIE



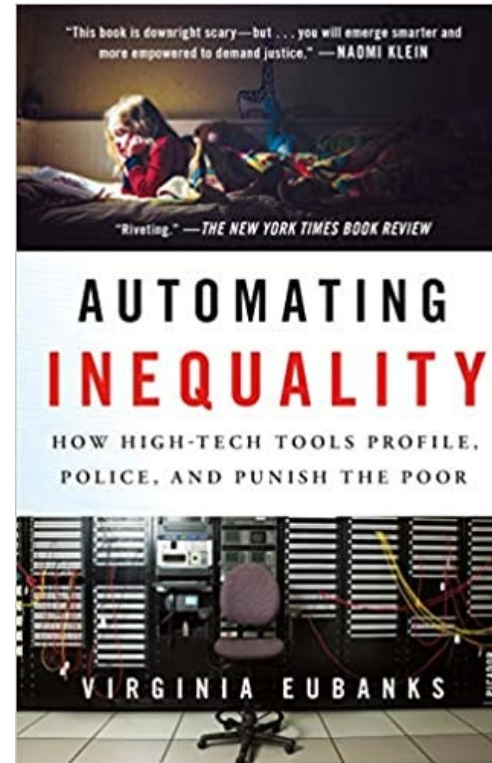
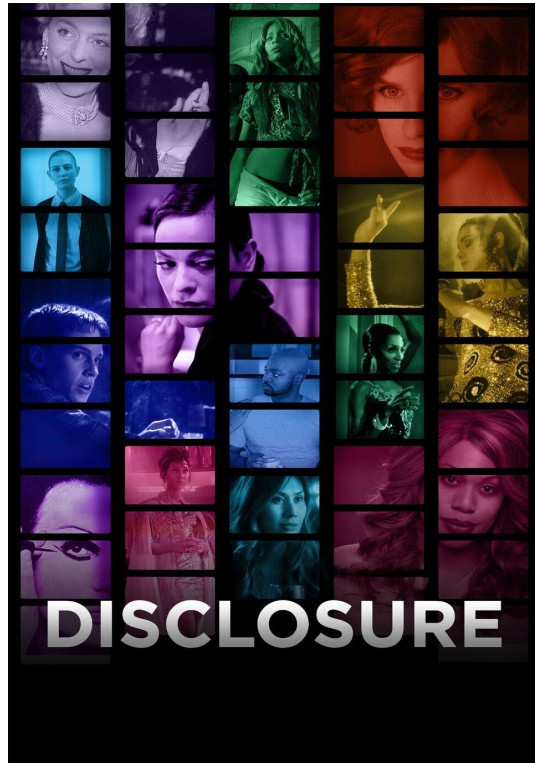
Queer Court

- C is a woman seeking to access JSA.
- The State got it wrong.
- What do we do about the State's error?
- How do we centralise her autonomy?
- Are there limits to this?

Queer Court

- Erase the concept of “rewriting history”
- Can discrimination and indirect discrimination under Equality Act 2010 hold this?
- Legitimate aims?
 - Pension age
 - Fraud

Recommended further reading/watching



**LGBTQ+ RIGHTS IN THE UK:
*IS THE EQUALITY ACT 2010
KEEPING UP
WITH THE EUROPEAN CONVENTION
ON HUMAN RIGHTS?***

**KEY STRASBOURG SOGI CASES
2015 TO (JAN) 2021**

**Jonathan Cooper
Doughty Street Chambers**

FREE SPEECH/PRIVACY

- *Mladina d.d. Ljubljana v Slovenia*, freedom of expression protected by Article 10 of the Convention protects the right to express criticism of homophobia and to be highly critical of homophobes.
- *Kaos GL v Turkey*, the seizure of copies of a magazine promoting LGBT rights in Turkey breached Article 10 of the Convention.
- *Rubio Dosamantes v Spain*, finding that Spanish authorities had failed in their positive obligation to protect the applicant - a pop singer who is famous in Spain - from remarks made on television about her sexual orientation.
- **But**, the Court held in *Sousa Goucha v Portugal* that a homophobic joke did not violate the Convention.

MARRIAGE AND FAMILIES

- In *Hämäläinen v Finland*, the Grand Chamber held that Finland, in requiring a transexual person to transform an opposite-sex marriage into a same-sex civil partnership in order to obtain full recognition of their gender, did not violate any aspect of the Convention.
- In *Oliari and Others v Italy*, in which the Court found, for the first time, that the inability of same-sex couples to gain some form of legal recognition of their relationships other than marriage, in a country which only offers marriage to different-sex couples, amounts to a violation of the Convention.
- in *Vallianatos and Others v Greece* - in which the Grand Chamber of the Court found that making 'civil unions' available to different-sex couples but not to same-sex couples amounted to a violation of the Convention. Some form of legal recognition of same sex couples (other than marriage) may be in violation of positive obligations under Article 8 of the Convention.

MARRIAGE AND FAMILIES

- In *Chapin and Charpentier v France*, the Court restated that denying a same-sex couple access to marriage does not violate the Convention.
- On the benefits that go with marriage, the Court held, in *Aldeguer Tomás v Spain*, that a surviving same-sex partner who was denied access to survivor's pension was not discriminated against. But, in *Taddeucci and McCall v Italy*, the Court held that Italy had violated the Convention by refusing a residence permit to a same-sex partner.
- And in *Ratzenböck and Seydl v Austria* the Court held that denying a different-sex couple the opportunity to enter into a registered partnership (a legal institution exclusively reserved for same-sex couples) does not amount to a violation of the Convention.

MARRIAGE AND FAMILIES

- In *Orlandi and Others v Italy* Italy violated the Convention by refusing to give some legal recognition to same-sex couples married abroad.
- In *Honner v France* the Court held that the refusal to award contact rights to the applicant in respect of the child which had been born to her former partner in Belgium using assisted reproductive techniques, while the two women were a couple, did not violate the Convention.

HATE AND PRIDE

- In *Identoba and Others v Georgia*. In a historic judgment, the Court recognised, for the first time, that violent and abusive treatment of individuals assembling in public to peacefully demonstrate about issues relating to sexual orientation amounts to a violation of Article 3 of the European Convention on Human Rights.
- In *Kostadinov v Bulgaria*, the Court upheld a complaint about the role of police in maintaining public order during a "gay pride" event.
- It also held in *M.C. and A.C. v Romania* that the failure of police to take into account discriminatory motives when investigating a homophobic attack amounted to a violation of Article 3 (procedural limb) taken in conjunction with Article 14 of the Convention.
- In *Lashmankin and Others v Russia* about refusals to allow them to hold a number of "gay pride" and other events.

HATE AND PRIDE

- In *Bayev and Others v Russia* the Court held that "homosexual propaganda" laws in the Russian Federation violate the Convention.
- In *Beizaras and Levickas v Lithuania*, the Court held unanimously that there had been a violation of the Convention in respect of the State's failure to protect individuals from homophobic hate speech. The judgment is important because it explicitly addresses "hateful comments", including undisguised calls for violence, made by private individuals against the gay community via social media.
- In *Alekseyev and Others v Russia* which concerned 77 applications made to the Court between November 2015 and June 2018 that primarily related to the Russian authorities' ban on holding LGBT public assemblies. The Court found violations, but declared applications by Nikolay Alekseyev inadmissible as an abuse of the right of individual application.

HATE AND PRIDE

- In *Carl Jóhann Lilliendahl v Iceland*, the Court unanimously declared the application, by a 74-year-old man concerning a conviction in Iceland for anti-gay expression, inadmissible. The most striking aspect of the Court's decision was the clarification it contained regarding its approach to considering the expression of "hatred" against people on the grounds of sexual orientation.
- In *Aghdgomelashvili and Japaridze v Georgia* the Court found violations of Article 3 and Article 14. The case concerned discriminatory ill-treatment by the police on the grounds of sexual orientation and gender identity, and the absence of an effective domestic investigation of this ill-treatment.

HATE AND PRIDE

- In *Sozayev and Others v Russia* a violation of Article 11 was found. The case concerned the arrest and conviction of five applicants, in 2013, after they participated in a public assembly in front of the State Duma in Moscow in response to the legislative ban on the "promotion of non-traditional sexual relations among minors". In finding violations of the Convention the judgment addressed restrictions on the right to freedom of peaceful assembly generally, and the right to peacefully assemble to object to homophobic and transphobic laws.
- See also *Berkman v Russia*. The case concerned the failure of police officers to ensure that an LGBTI event disrupted by counter-demonstrators proceeded peacefully, and the unlawful arrest of the applicant at the event.
- In *Sabalić v Croatia* the Court found a violation of Article 3 and Article 14 where the police and the Croatian authorities failed to investigate appropriately a homophobic act of violence.

ASYLUM AND IMMIGRATION

- In *Pajić v Croatia* the Court upheld a complaint about sexual orientation discrimination in immigration law.
- In *A.N. v France*, the Court once again rejected an application by a gay asylum seeker, thus continuing its established approach in respect of complaints by gay men and lesbians about Council of Europe States that seek to return them to States outside of Europe that criminalise homosexual acts.
- In *O.M. v Hungary*, the Court held that the conditions of detention to which a gay asylum seeker was subjected amounted to a violation of the Convention.

ASYLUM AND IMMIGRATION

- Finally, in *B and C v Switzerland*, which concerned the case of a gay man (in a same-sex relationship) challenging his deportation to a country (The Gambia) where he would be at risk of ill-treatment because of his sexual orientation, the Court held that returning an applicant to a non-European state where they would be at risk of ill-treatment on the grounds of their sexual orientation amounted to a violation of Article 3 (prohibition of torture) of the Convention.

A LONG AND WINDING ROAD: ARE WE THERE YET?

*The European Court of Human Rights
and the Recognition of
(Trans)gender Identity*

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- For many years, the European Court of Human Rights (the Court) applied the margin of appreciation and would not accept that a refusal to provide transgender people with legal recognition of their sex amounted to a violation of the ECHR (*Rees v UK, Cossey v UK; X, Y, Z v UK; Sheffield and Horsham v UK*).
- However, progressively the Court evolved its jurisprudence to require states to legally recognise the sex of a 'post-operative transsexual' (*B v France*).
- The Court has been sympathetic to what it regards as 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' (*Goodwin v UK*).
- If a state does not give legal recognition to the gender identity of a post-operative transsexual then this, because it creates a 'conflict between social reality and law ... which places the transsexual in an anomalous position, in which he or she may experience feelings of vulnerability, humiliation and anxiety' (*Goodwin v UK*).

- If a state does not give legal recognition to the gender identity of a post-operative transsexual then this, because it creates a 'conflict between social reality and law ... which places the transsexual in an anomalous position, in which he or she may experience feelings of vulnerability, humiliation and anxiety' (*Goodwin v UK*).
- The Court has more recently evolved its jurisprudence to find that making recognition of the identity of transgender persons conditional on undergoing an operation or treatment entailing sterilisation (or which would most probably produce that effect) against their wishes amounts to a violation of Article 8 ECHR (*A.P., Garçon and Nicot v France*).

- To require two trans men to undergo surgery before recognising their gender violated the ECHR (*X & Y v Romania*).
- The Court has held “The domestic courts had presented the applicants, who did not wish to undergo gender reassignment surgery, with an impossible dilemma ... Either they had to undergo the surgery against their better judgment – and thus forego full exercise of their right to respect for their physical integrity – or they had to forego recognition of their gender identity, which also came within the scope of the right to respect for private life.” The ECHR argued that the men were put in a situation of being “vulnerable, anxious and humiliated” (*X & Y v Romania*).
- Moreover, the inability to obtain a change of forename over a long period, on the grounds that gender reassignment surgery had not been completed, was found to amount to a violation of Article 8 ECHR (*S.V. v Italy*).

- The Court has been clear that Article 8 ECHR requires member states to provide “quick, transparent and accessible procedures” for changing on birth certificates the registered sex of transgender people’ (*X. v The Former Yugoslav Republic of Macedonia*; *Y.T. v Bulgaria*; *Rana v Hungary*)
- The Court has established that a state must legislate to enable transgender individuals to undergo full gender reassignment surgery (*L. v Lithuania*).
- Failure to legally regulate such surgery is recognised to leave a transgender person in a situation of distressing uncertainty in respect of their private life and the recognition of their “true identity” that amounts to a violation of Article 8 ECHR (*L v Lithuania*).

- Moreover, the Court has established that denying an individual access to gender reassignment surgery on the basis that they are not permanently unable to procreate amounts to a violation of Article 8 ECHR (*Y.Y. v Turkey*).
- The Court has also found violations of the ECHR in respect of the refusal of health insurers to pay for gender reassignment surgery on the basis of mechanically applying a two-year waiting period (*Schlumpf v Switzerland*).
- In respect of the refusal of domestic courts to order a private insurance company to reimburse the costs of gender re-assignment surgery, this also violates the ECHR (*Van Kück v Germany*).



QUESTIONS?



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