Neutral Citation Number: [2021] EWHC 1623 (Admin)
Case No: CO/4116/2020

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL
Thursday, 6 May 2021

B e f o r e :

MR JUSTICE HENSHAW

Between:
THE QUEEN
on the application of
AUTHENTIC EQUITY ALLIANCE C.I.C. **Claimant**

- and –

COMMISSION FOR EQUALITY AND HUMAN RIGHTS **Defendant**

MR J. HYAM QC and MS. N. CUNNINGHAM (instructed by Russell-Cooke Solicitors) appeared on behalf of the Claimant.
MR D. SQUIRES QC (instructed by Commission for Equality and Human Rights) appeared on behalf of the Defendant.

HTML VERSION OF JUDGMENT APPROVED

MR JUSTICE HENSHAW:

1. This an application for permission to apply for judicial review, which Goose J directed should be adjourned to an oral hearing. Having considered the papers and heard oral submissions today from Mr Hyam QC for the claimant, and Mr Squires QC for the defendant, I have concluded that permission should be refused. I now briefly set out my reasons.

2. The proposed challenge relates to four paragraphs of the defendant's Code of Practice on "*Services Public Functions and Associations*". The Code came into force on 6 April 2011 following an extensive pre-consultation,

consultation and post-consultation process, and having been laid before Parliament in October 2010.

3. The general tenor of the challenged paragraphs, though I shall touch on some of the detail shortly, is that service providers who treat men and women differently should treat transsexual people according to their acquired gender unless the exclusion or different treatment of transsexual people is a proportionate means of achieving a legitimate aim.

4. The claimant argues that its proposed claim is founded not on shades of language in the Code of Practice, but on what it says are fundamental misstatements of law in the guidance set out in the relevant paragraphs.

5. The claimant has put forward a number of iterations of the alleged misstatement of the law, none of which is, in my judgment, arguable.

6. First, the claimant's Grounds put forward the argument that if a separate or single-sex service (which together I will refer to as an "*SSS*") can be justified under Equality Act 2010 Schedule 3 paras. 26-27, then everyone of the opposite sex can lawfully be excluded or treated differently, regardless of any transgender protected characteristic, unless the affected person has a gender recognition certificate ("*GRC*") under the Gender Recognition Act 2004. Those provisions of Schedule 3 (paras. 26 and 27) set out the circumstances in which discrimination on the grounds of sex can be justified, whereas Schedule 3, para. 28 sets out the circumstances in which gender reassignment discrimination can be justified.

7. The basis for these contentions in the claimant's grounds is its point that under s.3 of the Equality Act 2010, which deals with direct gender reassignment discrimination, the relevant comparator for a transsexual woman, being a biological man (or "*birth male*") without a GRC, is a non-transsexual birth male. Thus Schedule 3 para. 29 would be relevant to a transsexual woman without a GRC only if, by reason of her gender reassignment, she had been treated differently from a non-transsexual male. As a result, on the claimant's original case, a transsexual woman without a GRC could be excluded from an SSS provided to birth women regardless of whether that exclusion pursued any legitimate aim or was proportionate.

8. That argument did not, however, address the indirect discrimination provision in s.19 of the Act. Here the key question is whether a provision criterion or practice ("*PCP*") places those with the protected characteristic of gender reassignment at a particular disadvantage compared to others to whom the PCP is applied. It is not difficult to see how an exclusion, or different treatment, of transsexual woman in relation to an SSS provided to birth women may create such a disadvantage and thus require justification under s.19(2)(d) and Schedule 3, para. 28 of the Act.

9. The claimant's first proposition is, accordingly, unarguable.

10. Secondly, the claimant in its Reply to the defendant's Summary Grounds put forward a different series of alleged legal defects in the defendant's approach, focusing on indirect discrimination.

11. The claimant argued that any indirect discrimination argument wrongly assumed that the entire pool of persons with the protected characteristic, i.e. transsexual persons, would suffer detriment irrespective of their individual circumstances. Taking up the illustrative example used in the defendant's Summary Grounds, the claimant made the point that some transsexual women might not be distressed by having to use a male only toilet. However, the defendant's example makes no such assumption, nor does it need to. To take an analogy, a paradigm example of indirect sex discrimination is a full-time working requirement making no allowance for persons which child care responsibilities. It could not realistically be suggested that as some women with childcare commitments are nevertheless happy to work full-time, a full-time working requirement cannot amount to indirect discrimination against women. The Supreme Court case of *Essop & Ors v Home Office [2107] UKSC 27 para. 27* , citing that and other examples, confirms that the question is whether a higher proportion of the protected group is put at a disadvantage by the PCP.

12. The claimant also suggested in its reply that there is rarely a binary choice between a male only and a female only facility. For example, there are often gender-neutral toilets as well as male and female toilets. However,

that is beside the point. There may often not be gender-neutral facilities, and even if there are then that goes to justification. The defendant in its Code of Practice is seeking to give concise and generally applicable advice. The claimant's point in its Reply accordingly shows no arguable error of law.

13. Thirdly, in its skeleton argument and oral submissions, the claimant advances the argument that if a PCP treating men and women differently is justifiable under the sex discrimination exceptions in Schedule 3, paras. 26 to 27 of the Act, then it will also be justifiable under s.19(2)(d) and, if necessary, Schedule 3 para. 28 of the Act. That, the claimant says, will be the position as a matter of law in relation to persons with no GRC, and as a matter of almost inevitable practice in relation to persons who do have a GRC.

14. That is in my view an untenable view of the legislation. Schedule 3 paras. 26 to 27 are applied to determine whether a PCP can, in the particular context of sex discrimination, be justified when applied as against birth men in general or, as the case may be, birth women in general. If the claimant were correct Schedule 3 would be framed entirely differently. The fact is that paras. 26 and 27 of Schedule 3 relate expressly and solely to sex discrimination and, conversely, para. 28 applies to gender reassignment discrimination in general.

15. The claimant submits that if a difference of treatment can be justified vis-a-vis birth men in general, then it is inconceivable that it cannot equally be justified vis-à-vis birth men who are transsexual women. On that approach, though, the Equality Act's gender reassignment provisions would in substance provide no protection at all, in the context of an SSS, to transexual persons without a GRC. The claimant points out that what has to be justified under s.19(2)(d) is the PCP in general. So if vis-à-vis men in general it is a proportionate means of achieving a legitimate end, then the same must apply vis-à-vis birth males who are transexual women. Thus, the claimant's approach would place transsexual women without a GRC in the same position for these purposes as all other birth males. That is clearly incompatible with the tenor of the Act, which plainly sets out distinct provisions in s.19 (as applied to gender reassignment) and in Schedule 3 para. 29, which apply to the protected characteristic of gender reassignment: over and above, and separately from, those in paras. 26 and 27 of Schedule 3 relating to sex discrimination.

16. In deciding whether a PCP is a proportionate way of achieving a legitimate end, it is inevitable that regard must be had to its impact on persons with the protected characteristic in question. It is clearly wrong to assume, as a matter of law, or as a matter of obvious practice, that the answer will necessarily be the same whether one assesses a PCP as applied to birth males in general or whether one assesses it as applied vis-à-vis birth males who are transsexual women.

17. As a facet of this argument, the claimant points out that s.19(2)(d) uses the word "*it*" to refer to the PCP as a whole, by contrast with the words "*the conduct in question*" in Schedule 3 para. 28. However, this choice of words in Schedule 3 para. 28 is obviously explicable simply as a portmanteau term to refer to the various types of matter listed in para. 28(2). In my view, the claimant's argument is an obvious absurdity because it would construe s.19 in such a way that Schedule 3 para. 28 could never apply to a transexual woman lacking a GRC who complained of indirect discrimination vis-à-vis birth women.

18. In so far as the claimant's point may, alternatively, be merely that in its view the fair balance is almost always struck by treating transsexual persons in the same way as other persons of their birth sex, then it is not arguably an error of law for the defendant not to share that view. It is simply a matter of opinion. That would not, in any event, be a matter which the court could contemplate seeking to resolve in the abstract.

19. I turn now to the portion of the claimant's case that challenges particular aspects of the language used in the relevant paragraphs of the Code of Practice.

20. The first concerns para.13.57 of the Code. The first sentence of this paragraph, indicating that providers of an SSS should treat transsexual people according to the gender role in which they present, must obviously be read along with the immediately ensuing text, starting with the word "*however*", which correctly sets out the circumstances in which the Act permits differential treatment.

21. As to para. 13.58 (and the four paragraphs as a whole), the Code does not, as the claimant suggests, make any

suggestion of 'automatic' entitlement to access an SSS pertaining to a person's acquired gender. The text and the example show that exclusion is permissible if it would be a proportionate way of achieving a legitimate aim: for instance, in the example given, the preservation of all users' privacy and decency.

22. As to para. 13.59, the statement that strong reasons are required to treat differently transsexual persons who are visually and practically indistinguishable from non-transsexual persons of their acquired gender, is an opinion as to the application of the test – the test having already been set out correctly in the Code – which in my judgment the defendant is entitled to put forward in the context of general and practical guidance.

23. As to para. 13.60, the statement as to the restrictive interpretation of the exceptions where discrimination is permitted is in my view legally correct. The statement that a denial of service to transsexual persons should occur only exceptionally is an expression of opinion as to the application of the legal test which the defendant is again entitled to make. I read that language as relating to denial of service altogether, and it does not seem to me that the possibility that it might be construed in a different way comes close to amounting to an error of law such as might justify permission to apply for judicial review. Similarly, the statement that a service provider can have a policy, but should apply it on a case-by-case basis, is in my view correct. There may be exceptional circumstances in which an application of an otherwise reasonable policy would not be proportionate. The defendant's example of an urgent approach to an otherwise empty women's hostel in a middle-of-the-night emergency may be an example. Whether or not that is a good example, it is clearly possible that particular circumstances can arise where proportionality requires an exception to be made.

24. The materials before the court do not provide evidence that the phraseology used here has given rise to difficulties of application. It may be the case that it would be beneficial for additional guidance to be given in particular areas, but that is not a matter which renders any aspect of the Code arguably unlawful.

25. Viewing the matter generally, I recognise the concerns that women and girls, and those who help protect their interests, have about the application of the gender reassignment provisions in particular contexts. However, it is in my view clear beyond argument that Parliament has chosen, in the 2010 Act, to place transsexual persons in a different position from the generality of persons of their birth sex. What effect that has in particular circumstances will depend upon the application of the provisions in the Act, including the Schedule 3, para. 28 justification exception, to those circumstances. I do not accept the claimant's contention that the Code makes clear errors of law in the way in which it sets the position out. On the contrary, I consider the claimant's construction of the Act itself to be clearly wrong in law for the reasons I have summarised.

26. As to the detailed language used, the Code aims to give practical and generic guidance, applicable to whole range of situations, in four paragraphs. For the reasons I have given, I do not consider there to be any arguable error of law in the way the defendant has framed those paragraphs, which clearly highlight the point that the Schedule 3 exception can apply and requires a balance to be struck between the various interests at stake. The claimant has shown no arguable reason to believe that the summary provided in the Code is liable to mislead, or has misled, service providers about their responsibilities under the Act in such a way as to place women or girls at risk, or at all.

27. In addition, I would in any event have doubts about whether this case would provide an appropriate vehicle for the court to decide questions as to how the Code should be applied in individual circumstances or, hence, to determine the claimant's contention that a PCP justifiable vis-à-vis birth males in general will always or must always be justifiable vis-à-vis transsexual women without a GRC. Issues of that kind are much better resolved in proceedings arising from an actual application of the law or Code, so that the full implications of the arguments raised can be considered and all relevant interests represented and taken into account.

28. For all these reasons I do not consider the claimant's case to be arguable and refuse permission to proceed on that ground.

29. For completeness, I also comment briefly on the history of delay. The Code came into force in April 2011. There was room for debate about whether or not the claimant is a person affected by the legislation so as to be entitled to bring a challenge within three months of being affected by it (see *R (Badmus & Ors) v SSHD [2020] EWCA*

Civ 657 para. 63); or whether this is an abstract challenge that needed to be brought within three months of the Code being made. The defendant is willing to accept, for the purpose of these proceedings at least, that the claimant should be entitled to claim promptly and in any event within three months of it being made clear that the defendant is not amending the Code in the way requested. The defendant says that point occurred on 23 March 2020, when the defendant replied to the claimant's letter of 17 February 2020, making clear that, whilst it would update some terminology in its guidance, it considered that the Code itself reflected the law.

30. The claimant submits that that is not the case, or at least that an extension should be granted, because it sensibly engaged in further correspondence with the defendant. The claimant wrote letters on 26 March and 7 April 2020 reiterating its position. These resulted in a reply from the defendant on 3 July 2020 repeating the defendant's own position. In my view, that letter (at least) made it unequivocally clear that the defendant did not accept the claimant's contentions. It was then followed by the claimant's pre-action letter of 26 August 2020 and the defendant's response of 23 September 2020. The proceedings were filed on 17 November 2020, and so were more than three months after all of the defendant's responses other than the pre-action response.

31. Had I been persuaded that the Code contained some clear illegality, or that evidence showed that service providers were acting unlawfully in reliance on it, then I might have been persuaded to take a different view, mindful of the comments of Ouseley J in *R (British Bankers Association) v Financial Service Authority [2011] EWHC 999 (Admin) para. 187* . As it is, however, I have not reached that conclusion. It is well-established that pre-action correspondence does not defer the time limit for applying, nor necessarily justify an extension of time. The proceedings here were begun almost nine months after the defendant's 23 March 2020 rejection of the claimant's position as regards the Code, and well over three months after the defendant's further letter of 3 July 2020. I would therefore also refuse permission on the grounds of delay and decline to grant an extension of time.