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Case No: Co: 4300/2012

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
Administrative Court

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18/7/2014

Before: The Hon Mr Justice Simon

Between:

The Queen (on the application of C)	**Claimant**
and	
Secretary of State for Work and Pensions	**Defendant**
and	
The Equality and Human Rights Commission	**Intervener**

Ms Claire McCann (instructed by **Bindmans LLP**) for the Claimant
Mr Charles Bourne QC and **Ms Heather Emmerson** (instructed by **the Treasury Solicitor**) for the Defendant
Ms Caoilfhionn Gallagher (instructed by **Sarah Lowe**) for the Intervener

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Hearing dates: 20-21 May 2014

Approved Judgment

Mr Justice Simon:

Introduction

1. This case raises a point which often arises for consideration: the extent to which the State should retain personal information about citizens, and whether its policies or practices for doing so comply with the human rights of those citizens. It arises in the present case in a heightened form because the information relates to the sensitive personal data of those who have had, or are in the process of having, gender reassignment.

2. The relevant facts in relation to the Claimant can be stated shortly. She began her transition from male to female in 2003 and changed her name in January 2004. On 4 April 2005 the Gender Recognition Act 2004 ('GRA 2004') came into force, in March 2006 she was among the first to receive a Gender Recognition Certificate ('GRC')[*], and the issue of her GRC was then notified to the Department of Work and Pensions ('DWP').

3. Like many transgender citizens, the Claimant is in receipt of Jobseeker's Allowance ('JSA') and is required to attend fortnightly appointments at her local Jobcentre Plus ('JCP').

4. It is the Claimant's evidence, supported by witness statements from other transgender customers of the DWP, that the knowledge that the DWP computer systems contain details of their previous gender (the fact of their gender reassignment, their previous name, title and gender) is a source of great distress to them. I will return later to the Claimant's evidence about some of the adverse consequences of the DWP policies and practices, and to how the Defendant has sought to address them.

The Gender Recognition Act 2004

5. Section 1 of the GRA 2004 makes provision for an applicant to apply for a Gender Recognition Certificate (a 'GRC'), and for an application to be considered by a Gender Recognition Panel (a 'GRP'). If the application is successful a GRC must be issued (s.4 of the GRA 2004); and an entry is made on the Gender Recognition Register (the 'GRR', see Schedule 3). The GRR is maintained by the Registrar General. Its purpose is to create a new record from which the Registrar General may produce a birth certificate. It is a closed register and is not open to public inspection. The explanatory leaflet issued by HM Courts and Tribunals Service states that the GRR will not record current address details nor any other information which could be used to locate a transsexual person. Notification of the GRC is automatically sent to the DWP, since the application for a GRC includes a request that, on issue, it is notified directly by the GRP to the DWP so that the change of gender can be recorded on the DWP records.

6. Under the heading 'General', s.9 of the GRA 2004 provides

> (1) Where a full [GRC] is issued to a person, that person's gender becomes for all purposes the acquired gender (so that, if

[*] In view of the number of acronyms I have added an explanatory appendix at the end of this judgment

> 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).
>
> (2) Subsection (1) does not affect things done, or events occurring, before the certificate is issued; but it does operate for the interpretation of enactments passed, and instruments and other documents made, before the certificate is issued (as well as those passed or made afterwards).

7. One of the points debated during the hearing was whether subsection (2) was a broad reservation as to the person's gender status before a GRC was issued (reflected in the expression 'history is history') or whether it was confined to particular features of the previous status (for example, a marriage entered into on the basis of the previous gender).

8. Section 22 contains prohibitions on the disclosure of information.

> (1) It is an offence for a person who has acquired protected information in an official capacity to disclose protected information to any other person.
>
> (2) 'Protected information' means information which relates to a person who has made an application under section 1(1) and which
>
> ...
>
> (b) if the application under section 1(1) is granted, otherwise concerns the person's gender before it becomes the acquired gender.

9. Section 22(3) specifies how a person 'acquires information in an official capacity', so as to include a person who acquires the information 'in connection with the person's function as a member of the civil service', see s.22(3)(a).

10. Section 22(4) states that it is not an offence to disclose information to a person if:

> …
>
> (h) the disclosure is made for the purposes of the social security system or a pension scheme.

11. Schedule 3 of the GRA 2004 provides for the establishment of the GRR, and requires the Registrar General to make alterations to the entry on the register of births so that it accords with the GRC. It also requires that a traceable connection is made between the birth registry entry and the entry in the Gender Recognition Register (§3(1)(c)), but that information in relation to the traceable connection is not to be open to public inspection or search (§3(4)). To this extent there is a statutory basis for the maintenance of a record of gender reassignment.

The Defendant's computerised records and systems

12. The information about the DWP records comes from the Defendant's witnesses and, in particular, from two witness statements of Michael Thompson (a Grade 7 Information Security Manager within the DWP).

13. JSA is a benefit which (subject to various conditions) is payable to those who are not engaged in remunerative work and are actively seeking work. In order to receive this benefit customers are normally required to go into a local JCP every fortnight and show what steps they have taken to find a job. They are also provided with support and assistance from DWP staff in doing so. In some cases the DWP has permitted transgender customers to sign in through a postal service (although the criteria for this require customers to demonstrate restricted mobility), and in other cases (including the Claimant's case) it has put in place particular measures with the aim of ensuring their privacy by the use of private rooms for interviews so as to avoid the risk of others overhearing sensitive information. In other cases the meetings are face-to-face and the conversations may be overheard.

14. In most circumstances the administration of JSA requires a JCP advisor to access two computer systems: the Labour Market System ('LMS') and the Jobseeker's Allowance Payment System ('JSAPS'). Information about steps taken to search for jobs is entered on the former system and payment is authorised through the latter system.

15. The JCP advisor initially logs onto the LMS. In the case of a transgender customer, when the name is entered a 'clerical record' marker appears, indicating that the transaction is to be entered manually and that no transactions should be recorded. All job searches are recorded clerically and held in manual form in the local JCP office rather than on the LMS. These records are stored in a locked and secured cabinet and accessible only with the permission of a DWP manager.

16. The JCP advisor then accesses the JSAPS to release payment. In the case of a transgender customer, when the name is entered the advisor will see on the screen the words, 'E2711. Error: Sensitive account - You are not authorised to view it.' These words are produced automatically because the account has been processed as a 'Special Customer Record' ('SCR'). The reason for this is not revealed on screen, and there are a number of reasons why an account could be marked as 'sensitive'. The fact that the account is marked as sensitive does not identify the Claimant as transgender; although, for reasons which I will come to, it may suggest that this is so.

17. Access to these records requires an authorisation process, using a document (UA16) which is headed, 'Temporary Access to Special Customer Records.' Written authorisation is then required from a DWP manager.

18. Once authorisation has been obtained, access will be provided to the customer's record on JSAPS by the DWP's specialist IT team and will be specific to the individual customer's account. Access is usually made available within one hour. However, there is evidence that it can take considerably longer.

19. Once access has been provided, the advisor will be alerted to the following message 'W22710 Warning: Sensitive account - No other user should view this account.'

20. On entry into the JSAPS system, the front screen displays only current name and gender information. It does not display previous name or gender data. Nor does it record the fact or display the fact that a GRC is held. The authorisation of the payment of benefits will not require the advisor to access or view any historic gender information that may be held on the JSAPS; and in the ordinary course there would be no reason for historic claim information to be accessed by, or come to the attention of, the advisor.

21. Once the payment has been authorised, the JCP official will inform the IT team that this has been done, and further access to the JSAPS is removed either immediately or after four hours by default.

22. The procedure for dealing with SCRs implements the 'Special Customer Record Policy' (the 'SCR Policy'), which is intended to limit access by DWP employees, as well as the DWP's service providers, sub-contractors and certain other parties (given access on a confined basis), to sensitive information. In the case of transgender customers this is information relating to their gender history. However, the SCR Policy is also designed to protect the privacy of other categories of customers whose records also call for particular protection. These include those who identify themselves as transsexual or transgender persons who have not yet obtained a GRC, victims of domestic violence, those who may be vulnerable to arranged marriages, vulnerable witnesses within a witness protection scheme, those who are subject to the provisions of the Forfeiture Acts, and a further special category contained on a list prepared by the Cabinet Office requiring additional provision for privacy or security.

23. Where a claim for JSA is first made after a change of gender there will be no record of any historic gender information on the JSAPS. Where a claim for JSA has been made under a previous name or title and a JSA claim remains live, historic data about a person's previous name or gender may be retained in relation to historic claims. However, this will not be displayed when the JSAPS account is accessed unless a specific search for historic claims data is made which would occur only in rare circumstances. In some circumstances, as in the case of the Claimant's records, previous name or gender data is not displayed at all because older data, including historic claims data (which might include previous name and title), is displaced by newer data or is removed by the DWP in the course of 'rebuilding' a claim (for example, where some IT fault has occurred).

24. The Customer Information System ('CIS') is a centralised database used by the DWP to record information relating to each of the DWP's customers and all adults and children who have a National Insurance number. It currently holds more than 100 million records, is updated more than a million times each day as a consequence of receiving information from interfacing systems, and generates over one million updates per day to other interfacing systems. It provides data for benefit-specific computer systems, which include the JSAPS.

25. Among the large number of data fields on the CIS for an individual customer three are relevant for present purposes: 'Sex' and 'Gender Recognition Held', and 'Name History Summary.'

26. In the case of transgender customers, the 'Sex' field will record the current sex, and the 'Gender Recognition Held' field is marked, 'Y'. This will indicate to the reader

that the customer has been issued with a Gender Recognition Certificate recording a change of sex.

27. When a GRC is issued, the record is amended to record the new gender and the date on which a person's gender has been changed; and the 'Gender Recognition Details' are amended to record the date of the GRC, the date the DWP was notified of the GRC and the reason why the record of gender has been changed (in such a case, as a result of a GRC, in another case such a change could be the result of a clerical error in the original input which requires correction).

28. The SCR Policy applies to all parts of the DWP where data on relevant customers is handled, stored, processed and transmitted, either clerically or electronically. It also applies to the DWP's service providers and sub-contractors. Although this means that the SCR Policy applies to the CIS, JSAPS and LMS, access to the CIS is not required for the routine issue of benefit payments, and front-line staff do not need to access the CIS routinely. However they will need to access the CIS in order to up-date certain information, such as address or contact details.

29. Under the SCR Policy the notification of a GRC from the Registrar General results in an automatic SCR marking, and the CIS is then amended to record the fact that a GRC has been issued and the date of notification. In addition the gender and name data are updated in accordance with the GRC. The only people authorised to update gender recognition data following the issue of a GRC are a small team within Her Majesty's Revenue and Customs. This team is involved because the HMRC tax office at Ty Glas looks after all those whose tax affairs are properly regarded as particularly sensitive. A SCR status may be permanent or temporary, and requests by individuals to have their records marked as a SCR are considered on a case by case basis. A customer whose records are marked as a SCR can request that this marker is removed, and such request will be complied with. It follows that a transsexual or transgender customer can opt-out of the SCR Policy at any time by a request in writing.

30. SCR markings are designed to provide additional protection to those already provided by the normal security controls within the DWP's IT systems. In summary, the SCR Policy restricts access to the information held on the relevant customer's account by controlling: (1) those who can access the account, (2) the circumstances in which the account can be accessed and (3) the time for which the account is accessed.

31. The SCR policy is intended to ensure that there is an audit trail which will show who has access to a particular record, for what purpose and when. In addition to the criminal sanctions for the disclosure of information (see s.22 of the GRA 2004), there are specific policies and procedures which apply under the SCR Policy; and the Defendant has adopted policies relating to the standards of behaviour of staff in respect of confidential information. These are headed, 'Standards of Behaviour' and 'Standards of Behaviour Policy'. Breach of these policies may result in disciplinary action.

32. In the present claim the Claimant contends that the SCR Policy has two objectionable consequences.

33. First, although it is intended to prevent the identification of personal and sensitive information about customers' transgender status, it has the opposite effect. It

effectively identifies the transgender status of the customer since, although there are other categories of customers who are subject to the SCR Policy, a significant proportion of them are transgender customers. I have attached at the end of this Judgment a short Confidential Appendix which gives the details.

34. Second, the application of the SCR Policy is slow, and results in delays while authorisation is sought and obtained. Apart from the inconvenience of waiting while the system is operated, there is evidence of delays of up to three days in getting authorisation to make the JSAPS payment. Further, those to whose accounts the SCR Policy is applied are unable to access any services online and have difficulty in accessing services by telephone. This is due to the requirement that the DWP employee whom they have contacted will need to terminate the telephone call in order to obtain authorisation to access their account. The customer will usually receive a telephone call from the DWP some hours later, but sometimes during the following few days.

35. The policy of visibly retaining the gender change data on the CIS (gender reassignment, previous name and previous title) in the case of individuals who have a GRC is described as the Defendant's 'Retention Policy'. Historic claims data are retained only whilst a claim is live, and are destroyed after a claim has been dormant for 14 months. The reason for the period of 14 months is that it corresponds with the maximum review and appeal time limits which apply in the First-tier Tribunal (Social Entitlement Chamber). Information about all customers, including the previous name and gender and the fact of a GRC, is retained for a period of 50 years after the customer's death.

36. The Defendant's policy of visibly noting the existence of a GRC (date of issue and notification to the DWP on the CIS is described as the 'GRC Noting Policy'.

37. Each of the SCR Policy (as it applies to the LMS, the JSAPs and the CIS), the Retention Policy and the GRC Noting Policy is challenged in these proceedings.

The evidence of how the system operates for transgender customers

38. In her evidence the Claimant has accepted that the SCR Policy is applied to her records in an attempt to protect her privacy and in particular her previous name and gender, and the fact of her gender reassignment (see her 1st witness statement §17). However, she says that the fact of the highly sensitive information being stored on the DWP's computer system is 'a source of great distress and concern' to her. The evidence gives her experience of how the SCR Policy operates at a personal level. She has drawn attention to four particular problems as a result of the operation of the SCR Policy. First, the need to get authorisation to access her records when she attends can cause delays in the payment of benefits. Secondly, it is difficult to get assistance over the telephone. This is because the authorisation process applies to telephone enquiries. Thirdly, she is treated differently from other customers and this different treatment raises suspicion among staff and other customers. She has, for example, been asked why her account was marked as 'sensitive' by DWP staff. Fourthly, she has overheard reference being made to her transsexual status.

> This has happened in open plan offices in the presence of other customers, with no regard to my privacy or dignity, and I fear

> the source of this information must be my employment advisors.

39. In viewing this evidence it is important to bear in mind three points. First, the best-directed policies designed for the purpose of avoiding harm cannot prevent harm caused by the malice or gross insensitivity of individuals. This is best overcome by training, vigilance, and the activation of disciplinary measures. Secondly, the Claimant and other transgender customers are likely to be particularly sensitive to any careless error or misspeaking which might not be noticed by other customers: for example, the use of the wrong gender when reading a name, Ms for Mr, an assumption as to gender in the case of a gender-neutral forename. Thirdly, the Claimant has readily acknowledged that she has also had some positive experiences with individual members of staff.

The Claimant's challenge to the policies

40. The Claimant's case is that the three policies are unlawful: first, because they constitute violations of the Claimant's rights under articles 8 and 14 of the European Convention on Human Rights ('ECHR'); secondly, because they directly and/or indirectly discriminate against the Claimant by reason of her gender reassignment contrary to ss.13, 19 and 29 of the Equality Act 2010 (the 'EA 2010'), thirdly, because the Defendant has failed to comply with his public sector equality duty, as set out in s.149 of the EA 2010; and fourthly, because the SCR Policy is irrational. Some of these points overlap and consideration of one issue may inform a judgment on another.

Article 8

41. Article 8 of the ECHR provides:

> (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.

42. The Defendant accepts that the Retention Policy and the GRC Noting Policy engage the Claimant's rights under article 8, and must therefore be justified under article 8(2), but submits that the SCR Policy does not engage Article 8 since it is designed and operates to protect the Claimant's privacy.

43. Ms McCann's response was that, if the GRC Noting Policy and the Retention Policy are flawed and the impugned information should not be on the computer systems, it does not assist the Defendant to argue that a policy designed to limit the effect of the flawed policies is unobjectionable.

44. It is clear that the 'private life' of a person under article 8(1) covers the physical and psychological integrity of a person as well as their social identity. The protection of human autonomy and dignity is an important aspect of protection of rights under article 8(1), and extends to the right to control the dissemination of information about an individual's private life, see Lord Hoffman in *Campbell v. MGN Ltd* [2004] 2 AC 457. The essence of the protection afforded by Article 8(1) was described by Laws LJ in *Wood v. Commissioner of Police for the Metropolis* [2010] 1 WLR 123.

> [21] The notion of the personal autonomy of every individual marches with the presumption of liberty enjoyed in a free polity: a presumption which consists in the principle that every interference with the freedom of the individual stands in need of objective justification. Applied to the myriad instances recognised in the Article 8 jurisprudence, this presumption means that, subject to the qualifications I shall shortly describe, an individual's personal autonomy makes him - should make him - master of all those facts about his own identity, such as his name, health, sexuality, ethnicity, his own image, of which the cases speak; and also of the 'zone of interaction' (the *Von Hannover* case 40 EHRR 1, §50) between himself and others. He is the presumed owner of these aspects of his own self; his control of them can only be loosened, abrogated, if the State shows an objective justification for doing so.
>
> [22] This cluster of values, summarised as the personal autonomy of every individual and taking concrete form as a presumption against interference with the individual's liberty, is a defining characteristic of a free society. We therefore need to preserve it even in little cases. At the same time it is important that this core right protected by article 8, however protean, should not be read so widely that its claims become unreal and unreasonable. For this purpose I think there are three safeguards, or qualifications. First, the alleged threat or assault to the individual's personnel autonomy must (if article 8 is to be engaged) attain 'a certain level of seriousness'. Secondly, the touchstone for article 8(1)'s engagement is whether the claimant enjoys 'a reasonable expectation of privacy' (in any of the senses privacy is accepted in the cases). Absent such an expectation, there is no relevant interference with personal autonomy. Thirdly, the breadth of article 8(1) may in many instances be greatly curtailed by the scope of the justifications available to the state pursuant to article 8(2).

45. Both sides relied on this statement of the law, and they were right to do so. Although Laws LJ was in the minority in relation to the application of article 8(2) to the case, Dyson LJ specifically agreed with his analysis of the article 8(1) issue, see Dyson LJ at [64].

46. It is clear from the passages cited above that consideration of article 8(1) and 8(2) in isolation is unlikely to be productive. As Laws LJ expressed it at [27]:

> The overall point to be made is that while the application of 8(1) and that of 8(2) are logically separate, and the second arises only if the first is fulfilled, there is a symbiosis: article 8(1) is generously applied, but justifications properly available under 8(2), not least given the margin of discretion which the decision-maker is likely to enjoy, may sometimes cuts its application close to the quick.

The Retention Policy and the GRC Noting Policy

47. With this approach in mind it is convenient to turn to the cases on the application of article 8.

48. The earliest case relied on is the decision of the ECtHR in *Rotaru v. Romania* (App. No. 28341/95). The facts were very far from the present case, but the Court reiterated at [43] that the storing of information relating to an individual's private life in a secret register comes within the scope of article 8(1). This includes historic information which was once publicly available but which has been systematically collected and stored by a public authority.

49. The case of *Goodwin v. United Kingdom* (2002) 35 EHRR 18 is closer to the facts of the present case, since it affected the rights of a transsexual. The specific complaint was that the public authorities had failed to amend their records so that she continued to be treated as a male for the purposes of social security payments, national insurance and pensions, and that this information was available to others identifying her as a male. The Court unanimously held that there had been an infringement of Ms Goodwin's article 8 rights.

50. At [74] of *Goodwin* the Court made the broad but important point that the ECHR was to be interpreted and applied in a manner which rendered rights 'practical and effective, not theoretical and illusory', before continuing:

> [76] The Court observes that the applicant, registered at birth as male, has undergone gender reassignment surgery and lives in society as a female. Nonetheless, the applicant remains, for legal purposes, a male. This has had, and continues to have, effects on the applicant's life where sex is of legal relevance and distinctions are made between men and women, as *inter alia*, in the area of pensions and retirement age. For example, the applicant must continue to pay national insurance contributions until the age of 65 due to her legal status as male. However as she is employed in her gender identity as a female, she has had to obtain an exemption certificate which allows the payments from her employer to stop whilst she continues to make such payments herself. Though the Government submitted that this made due allowance for the difficulties of her position, the Court would note that she nonetheless has to make use of a special procedure that might in itself call attention to her status.

> [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. 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.
>
> [78] In this case, as in many others, the applicant's gender re-assignment was carried out by the National Health Service, which recognises the condition of gender dysphoria and provides, *inter alia*, re-assignment by surgery, with a view to achieving as one of its principal purposes as close an assimilation as possible to the gender in which the transsexual perceives that he or she properly belongs. The Court is struck by the fact that nonetheless the gender re-assignment which is lawfully provided is not met with full recognition in law, which might be regarded as the final and culminating step in the long and difficult process of transformation which the transsexual has undergone. The coherence of the administrative and legal practices within the domestic system must be regarded as an important factor in the assessment carried out in Article 8 of the Convention.

51. The ECtHR concluded.

> [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. In the twenty first 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 issue involved. In short, the unsatisfactory situation in which post-operative transsexuals live in an intermediate zone in 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*.

52. For the Claimant, Ms McCann draws particular attention to two points. First, the observation in [76] about the possible consequence of adopting special processes for transsexuals being that it may draw attention to their status; and secondly, to the

further point in [78] that one of the factors relevant to the article 8 assessment will be the coherence of the administrative and legal practices. For the Defendant, Mr Bourne QC is entitled to point out that this was one of the cases, the other being *Bellinger v. Bellinger* [2003] 2 All ER 593, which led directly to the passing of the GRA 2004, and the recognition that this gave to the rights of transsexuals (see §§6 and 7 of the Explanatory Notes to the GRA 2004, and *Timbrell v. Secretary of State for Work and Pensions* [2010] EWCA Civ 701 at [20]).

53. In *J v. C* [2006] EWCA Civ 551, although the Court of Appeal was considering the application of the Family Reform Act 1987 and the Children Act 1989, members of the Court made observations about the effect of the GRA 2004. At [48] Richards LJ rejected an argument that the failure to accord the claimant the status of a parent violated his article 8 right to personal autonomy as described in the *Goodwin* case.

> The violations of the Convention identified in the *Goodwin* case were rectified by the enactment of [the GRA 2004]. Mr J has duly obtained a recognition certificate pursuant to that Act. He therefore now has the male gender for all relevant purposes and can marry as a man. None of that, however, can rewrite history, even leaving aside the more technical questions of retroactivity of the Human Rights Act 1998. Mr J did not have the male gender, and could not sensibly be treated as having had the male gender, at the time he went through the marriage ceremony with Mrs C or at any time prior to the marriage being declared void. To give effect to the undoubted fact that he did not have the male gender at the relevant time cannot possibly involve a lack of respect for his male gender as subsequently acquired.

54. This passage was relied on by Mr Bourne to support his submission that 'history was history' and the fact that the Claimant once had the male gender was something which could not be, and was not, nullified by the provisions of the GRA 2004. I accept this point as far as it goes. However, history is made up of facts, some of which are recorded and others which are not (usually for good reason). It seems to me that the relevant enquiry is not so much whether the Claimant once had the male gender, but whether this is a significant fact which should be recorded and continue to be recorded on the DWP computer systems.

55. In *S and Marper v. United Kingdom* (2009) 48 EHRR 50, the ECtHR was concerned with the retention of the claimants' DNA samples and fingerprints, and the refusal of the authorities to destroy them. In the case of S, the material was taken when he was 11 in relation to an alleged offence of which he was acquitted. In the case of Marper, the charge was one of harassment 10 years previously which had not come to trial. The Court held unanimously that, in each case, the retention amounted to a breach of article 8 and it was unnecessary to consider the separate complaint under article 14.

56. The Court made clear (at [66] and 84]) that 'private life' was a broad term which was not susceptible to exhaustive definition, but included gender identification, name and sexual orientation. The Court accepted that the claimants' concern about the future use of the private information without their consent was legitimate, and was relevant to whether there had been an interference with their article 8 rights. The Court also

noted (at [66]) that it was not always possible to predict how DNA material might be used with advances in science.

57. Having considered two of the qualifying principles which arise under article 8(2) ('in accordance with the law' and 'legitimate aim') the Court went on to consider the issue of 'necessary in a democratic society' and observed (at [102]) that the margin of appreciation,

> ... will tend to be narrower where the right at stake is crucial to the individual's effective enjoyment of intimate or key rights. Where a particularly important facet of an individual's existence or identity is at stake, the margin allowed by the State will be restricted.

58. On the question of whether the retention of the material was proportionate and struck a fair balance between the competing public and private interests, the Court expressed itself at [119].

> In this respect the Court is struck by the blanket and indiscriminate nature of the power of retention in England and Wales. The material may be retained irrespective of the nature or gravity of the offence with which the individual was originally suspected or of the age of the suspected offender ... the retention is not time limited; the material is retained indefinitely whatever the nature of the seriousness of the offence of which the person was suspected.

59. Ms McCann draws a comparison with the Retention Policy and the GRC Noting Policy which, she submits, are indiscriminate in effect and retain material long after there is any practical need for it. She also relies on the decision of the Supreme Court in *R (GC) v. Commissioner of Police for the Metropolis* [2011] 1 WLR 1230 where the reasoning of the ECtHR in the *S and Marper* case was accepted and the policy of the indefinite retention of the claimant's finger prints and DNA samples was declared to be unlawful as being incompatible with article 8.

60. In *R (L) v. Commissioner of Police of the Metropolis* [2010] 1 AC, the Supreme Court was concerned with the an Enhanced Criminal Record Certificate produced by the defendant which showed that the claimant's son had been placed on the child protection register due to her apparent inability to care for him. This resulted in her dismissal from employment in a school. On a claim for Judicial Review of the Defendant's decision to disclose the information, Lord Hope DPSC (at [27]) referred to the line of ECtHR cases which suggested that information about a person's convictions, which were systematically collected and stored in central records, and were available for disclosure long after the events which were recorded, would tend, as time passed and everyone other than the person concerned had forgotten, to become part of that person's private life which must be respected.

61. It is with these broad principles in mind that I turn to the Defendant's defence, bearing in mind that he bears the burden of proving the justification for the interference with the Claimant's article 8 rights, see for example *R (Catt) v. Commissioner of Police of the Metropolis* [2013] EWCA Civ 192 at [44].

Article 8(2): Justification

62. The Defendant has articulated a number of reasons why it is necessary to continue to hold information associated with the Claimant's previous gender, and thus maintain the GRC Noting Policy and the Retention Policy.

63. The first reason is that the gender history of DWP customers is required in order for the Defendant to calculate state pension. This is because the State Pension age (the 'SPa') currently varies by gender for individuals born before 6 December 1953, and will continue to do so until 6 March 2019, at which point the SPa will be the same for both sexes: 65.

64. The position is as follows. For customers born before 6 December 1953, the issue of a GRC affects the SPa (see §§ 1 and 7-13 of Schedule 5 to the GRA 2004). State pension calculation for this class of customers is based on national insurance contributions during the 'working life' of the person, which is determined by the birth gender of the person; and the date from which the State Pension will be payable is determined by reference to the current gender of the person. It follows that the Defendant needs to hold gender recognition data in respect of customers born before 6 December 1953 in respect of female to male transsexuals whose change of gender occurred before 6 March 2019 and after they have reached SPa in their birth gender but before they have reached the SPa in their acquired gender, and male to female transsexuals whose change of gender occurs before 6 March 2019 and before they have reached the SPa in their birth gender, but after they reach SPa in their acquired gender. The Defendant needs to hold gender recognition data in respect of these individuals for the purpose of checking that their claims are correct, and for the general maintenance of their claims for State Pension. Furthermore the evidence from the DWP is that, in relation to those who reach their SPa before 6 March 2019, the DWP will continue to need to hold information about their gender change for the purposes of checking claims and for the maintenance of claims. This is because those in these groups will only be between 64 and 65, and their life expectancy will continue for a further period of between 23-26 years on average.

65. There is in addition the further complication that some of the IT systems were designed and built before the GRA 2004 came into force, and the amendments which have to be made to pension calculations require a manual override of the automated processes. Consequently, once the pension entitlement is determined, it will still be necessary for the date of the GRC to be known if the case is reviewed in future.

66. Ms McCann accepted these points, but argued that the DWP had nevertheless adopted an impermissible and disproportionate approach to them.

67. In my view, and subject to the question of legality and proportionality, the first reason advanced by the Defendant constitutes a legitimate justification for interference with Article 8 rights.

68. The second reason advanced for the retention of gender change data, including previous names and title, is that it reduces the risk of identities being stolen and of fraud by maintaining an audit trail in relation to individuals who have made claims for benefits, and provides verification of accounts.

69. This point is supported by the evidence of Stephen James, a Team Fraud Investigator in the Central Criminal Investigation Service within the DWP, that retaining records of the previous name and gender of a person with a GRC helps to prevent identity theft. For example, a fraudulent benefit claim can be made by acquiring the original birth certificate of a person who has changed their name and (with other evidence) using it as evidence of identity in order to obtain a national insurance number allocated to the person's original name. It is therefore the considered view of the Central Criminal Investigation Service within the DWP that the retention of information about a previous gender and name of a person holding a GRC is necessary to prevent fraudulent attempts to claim benefits using that person's previous identity. This view is (at least partially) supported by evidence about two linked cases in 2012 in which there were fraudulent claims based on false identities connected with GRCs, and where one party (who had been issued with a GRC) sought to adopt the original identity of another person in possession of a GRC.

70. It was conceded on behalf the Claimant that gender change data may be needed for the detection and/or investigation of fraud; but Ms McCann argued that the proper balancing of interests was best achieved by masking the GRC information. I will consider this point later in the Judgment.

71. Subject to logically subsequent points I accept the Defendant's argument that the reduction of the risk of fraud is a factor which can properly be relied on in justification for these policies, and that the arguments were properly evidenced.

72. The third reason relied on in support of the legitimate aim of these policies is that the information is needed by the Defendant in order to plan and develop government policy, and to forecast potential changes in demographics and resources.

73. I am doubtful about the cogency of this reason. There is no evidence of gender information having been used for this purpose to date and, although I bear in mind the responsibility of Government to have data available in order to inform policy from time to time, I would have expected evidence to show how accumulated private and sensitive information would be used. The court should be astute to distinguish between the retention of such data for the purpose of developing and analysing policy and such purposes being relied on *ex post facto* to justify what cannot otherwise be justified. Once imagined, the figure of a dragon sitting on its hoard of gold is not easily dispelled.

Legality

74. It is common ground that in order for the interference with private rights to be justified it must be in accordance with the law. The Defendant relies on the terms of the Social Security Administration Act 1992 (the 'SSAA 1992'). Section 7B contains broad powers in relation to the use of social security information.

> (1) A relevant authority may use for a relevant purpose any social security information which it holds.
>
> ...

> (3) A relevant purpose is anything done in relation to a claim which is made or which could be made for a specified benefit if it is done for the purpose of -
>
> (a) identifying persons who may be entitled to such benefit;
>
> (b) encouraging or assisting a person to make such a claim;
>
> (c) advising a person in relation to such a claim.
>
> (4) Social security information means -
>
> (a) information relating to social security, child support or war pensions;
>
> (b) evidence obtained in connection with a claim for or an award of a specified benefit.

75. Mr Bourne also relied on what he described as 'the Government's Common law power to do what is necessary to govern', including holding information about citizens, subject to the limiting provisions of article 8 and the Data Protection Act 1998. It is not necessary to address this proposition or whether the judgment of Hale LJ in *R v. Secretary of State for Health, ex p. C* [2000] HRLR 400 at p.404-406 supports such a broad proposition since, in the present case, the express powers set out in s.7B of the SSAA 1992 establish a statutory basis for holding and using the gender recognition information.

76. Moreover, it is not the statutory basis of the Defendant's powers which the Claimant challenges, but two specific policies which affect her. Ms McCann's argument focussed on the lack of accessibility, clarity and precision of the GRC Noting Policy and, in particular, the Retention Policy. Mr Bourne's response was to argue that these were not really policies, but practices adopted by the DWP; and, since the contents were not something which affected the substantive or procedural rights of the Claimant, they need not be published.

77. I do not accept the Defendant's argument on this point. It is in effect an argument that 'practices' adopted by the DWP in relation to transgender customers do not need to be accessible, clear or precise. As Lord Bingham made clear in *R (Gillan) v. Commissioner of Police of the Metropolis* [2006] 2 AC 307 at [34]

> The lawfulness requirement in the Convention addresses supremely important features of the rule of law. The exercise of power by public officials, as it affects members of the public, must be governed by clear and publicly accessible rules of law. The public must not be vulnerable to interference by public officials acting on any personal whim, caprice, malice, predilection or purpose other than that for which the power was conferred. This is what, in this context, is meant by arbitrariness, which is the antithesis of legality. This is the test which any interference with or derogation from a Convention right must meet if a violation is to be avoided.

78. The reason why Mr Bourne made the submission he did was that the Defendant has had difficulty in identifying any coherent set of rules, 'practices' or policies. Although the claim was issued in April 2012 and was preceded by a considerable amount of pre-action correspondence, the main document from which the Retention Policy is derived was only provided in July 2012. This document, dated May 2006, is headed 'Gender Recognition: New System Development Requirements', and contains the following at p.13:

> Q. How long will Gender Recognition history be held on CIS?
>
> A. Personal data at CIS, which includes sex and Gender change specific data, will be kept for 50 years after the person dies. This is in line with the Departmental Data Retention Requirement. This document is owned by [Technology Office] and is available on their web site.

79. A complete version of the Departmental Data Retention Requirement ('DDRR') was not made available until the second day of the hearing (the previous version being incomplete in a material respect).

80. In my view the GRC Noting Policy and the Retention Policy are not readily accessible, clear and precise. Furthermore, although I am not dealing at this stage with the SCR Policy, I note that this too is not publicly available and was not sent to the Claimant until the early part of 2014. However, there the failure is more understandable since its publication might defeat the legitimate aims it was trying to achieve.

Proportionality

81. Ms McCann accepted that it was necessary to retain the gender history of some customers in order to calculate their pension. However, she submitted that the interference was disproportionate in its effect, since the category affected (those born before 6 December 1953) was only a third of the transgender customers whose records were affected and, in any event, did not include the Claimant. Furthermore this category would become a decreasing proportion over the next few years; and would become an immaterial category for those with a GRC issued after 6 March 2019.

82. Although there will be a reduction in the number of those whose gender history is relevant for the purposes of calculating their pension, without going into the figures, I am satisfied that it is a sufficient number to make the policies proportionate. Nevertheless, on 6 March 2019 this will become a closed category, and thereafter the numbers will reduce. It seems to me that a proportionate policy would take this into account.

83. Ms McCann had a further argument that when considering the proportionality issue it is necessary to consider whether the Defendant's stated aims could be met by less intrusive ways of retaining and storing the GRC data. She relied on a short passage from the judgment of Moore-Bick J in *R (Catt)* (see above) at [24],

> In such cases it is therefore necessary for the court to pay careful attention to the nature of the information in question, the circumstances under which it can be obtained, the ways in which it can be processed and by whom, the period for which it can be retained (together with any arrangements for interim review) and the arrangements for its destruction.

84. There is evidence that it is possible to remove the gender recognition data from the CIS at a cost. If it is a stand-alone operation, the cost would be approximately £712,500, and if it is done in conjunction with another change would be approximately £234,000. The cost of 'masking' or concealing gender change data has also been considered: £367,000 (on a stand-alone basis) and £104,000 (if done with another change).

85. Ms McCann submitted that the Defendant's argument that the costs of the exercise rendered it disproportionate to require the abandonment of the Retention and GRC Noting Policies was insufficient. She argued that the CIS would have to be amended in time for the equalisation of the SPa in March 2019, that the Defendant has already engaged in a number of changes to the CIS since the coming into force of GRA 2004, and that the aim of avoiding costs cannot be used as a justification for the continuation of a policy which is a breach of article 8 rights and is discriminatory.

86. The relevance of costs in a case under articles 8 and 14 was considered by David Elvin QC (sitting as Deputy High Court Judge) in *R (on the application of B) v. Secretary of State for Justice* [2009] EWHC 2220 (Admin). The issue was the treatment of a pre-operative transgender woman who had been held in HMP Manchester throughout a lengthy sentence for serious offences. Following a gender reassignment and the issue of a GRC she challenged her continued detention in a Vulnerable Prisoner's Unit in a male prison. Her challenge was based on the claim that the Gender Identity Clinic would not approve gender reassignment surgery until she had spent time living 'in role' within a female prison. The decision to detain her within the male prison estate was quashed and her continued detention in a male prison was declared to be unlawful.

87. The Deputy Judge held at [53] that article 8(1) was engaged since the interference with her rights was significant and personal, going to the heart of her identity; and at [57] that there was insufficient justification under article 8(2). At [58] the Deputy Judge considered the question of resources which had been relied on by the Secretary of State for Justice.

> Whilst, as I have noted, considerations of risk and resources needed to manage risk (here arising from the need to segregate) fall within the relatively generous margin of appreciation, where the decision places a significant restriction on a prisoner's personal autonomy then the Court should scrutinise carefully the basis upon which resources are said to justify such a significant infringement of personal freedom.

88. The deployment of what are likely to be limited resources is plainly a matter for Government and not for the Courts, but the case demonstrates that an infraction of rights under article 8 (or what might be a discriminatory policy) cannot be justified

solely by the cost of putting it right. Nevertheless, it seems to me that the question of cost may be a relevant consideration.

Conclusion on Article 8: the GRC Noting Policy and Retention policy

89. For the reasons set out above, I have reached the following conclusions:

(1) The interference with the Claimant's private life from the application of the GRC Noting Policy and the Retention Policy presently meets the test of necessity.

(2) Although these policies have a proper legal foundation, they lack clarity and precision, and are not readily accessible.

(3) The policies will need to be kept under review, since their primary justification will reduce over time, although they would still provide some protection against fraudulent claims.

(4) Just as the justification for maintaining the policies will reduce, so the argument that the costs of making the changes are too high will carry less weight.

(5) While this case is not concerned with the wider question as to what personal information is required to be retained, a policy that requires classes of information (which includes sex, personal name, address and - rather strangely - preferred language type) to be kept for 50 years and 1 day after the death of a customer, would require rather more evidence to justify it than is presently available to the Court. The business reason given in each case is, 'to provide a tracing facility'. Why this is necessary for a period of 50 years after death is not explained. The argument that 'history is history' is to say no more than 'facts are facts', and so they are; but a fact may be a fact without it being necessarily a relevant fact which needs to be recorded for 50 years, or indeed beyond any point at which it ceases to be a relevant fact.

The Data Protection Act 1998

90. Although it was not the primary way in which she advanced her case I must deal with an additional argument advanced by Ms McCann based on the provisions of the Data Protection Act 1998 ('DPA 1998'). In my judgment the argument does not materially assist the Claimant. First, the enforcement of the statutory obligations falls within the authority of the Information Commissioner's Office ('the ICO'). It appears that the ICO has considered a complaint by one of the Claimant's witnesses (HW) and dismissed it. If the Claimant has a complaint it is for breach of statutory duty under s.4 of the DPA 1998 and can be enforced by an alternative remedy to a claim for Judicial Review. Secondly, to the extent that the complaints about breaches of the provisions of the DPA 1998 are made good on the basis that the information is retained too long, the argument is the same as arises under article 8.

91. Section 2 of the DPA 1998 defines 'sensitive personal data' as including information about an individual's sexual life. This is acknowledged by the Defendant as including the Claimant's transsexual status. By virtue of s.4 of the DPA 1998 the Defendant is under a duty to comply with the Data Protection Principles ('DPP') set out in schedule 1, Part 1 of the DPA 1998 in respect of any 'processing' of data in relation to a 'data subject'. Processing for these purposes includes noting and storing such data (see s.1

of the DPA 1998). The Defendant accepts that in processing data he must comply with the DPP as set out in schedule 1. The First DPP requires that the Defendant processes the data (1) fairly, (2) lawfully, (3) in accordance with at least one of the conditions in schedule 2 and (4) in accordance with at least one of the conditions in schedule 3. The conditions in schedule 2 and schedule 3 expressly include that 'the processing is necessary for the exercise of any functions of a Minister or government department'. The Second DPP requires the Defendant to obtain personal data only for specific lawful purposes and not to process personal data in any manner incompatible with that purpose. There is no issue that the Claimant's sensitive personal data was originally (and with her consent) obtained for the lawful purpose of identifying her, processing her claims for benefit and giving effect to her rights under s.9 of the GRA 2004. It continues to be held and processed for such purposes. The Third DPP requires the sensitive personal data should be adequate, relevant and not excessive in relation to the purposes for which they are processed. The Fifth DPP requires that the sensitive personal information should not be kept longer than is necessary for those purposes. It is only in relation the Fifth DPP that the Claimant's argument makes significant headway, and on this point I have already held in favour of the Claimant.

The SCR Policy

92. To the extent that the GRC Noting Policy and the Retention Policy are justified, it was common ground that it was necessary to have a policy to minimise the interference in the Claimant's right to respect for her private life as a result of the application of those policies.

93. Although I am doubtful whether the SCR Policy constitutes an interference with the Claimant's article 8 rights, since it is a policy specifically designed to protect privacy through imposing strict controls on the circumstances in which private information relating to gender change can be accessed by DWP staff, I am prepared to assume that it does so. It follows that the question arises whether the Defendant can show that it is necessary to achieve a legitimate aim and is proportionate in its effect.

94. The argument between the parties focused on whether it constituted a proportionate interference with private life. The Claimant impugned the SCR policy not for its intent, but for its effect. It was argued that, although it is designed to protect the private life of transgender customers and to protect them from the dissemination of highly personal information about them, it has the opposite result of drawing attention to them and singling them out.

95. The real contest was as to the effectiveness of the policy; and I am satisfied by evidence that the application of the policy can give rise to difficulties. It is unclear how widespread these difficulties are and how much they are due to the way in which the policy is operated rather than the policy itself. That said, it seems clear that there are two systemic problems: the need for authorisation and the resulting delay. The Defendant's argument that transgender customers can opt-out of the SCR policy is not a satisfactory answer.

96. I have reached the conclusion that the SCR Policy is over-elaborate and tends to have the effect it wishes to avoid: drawing attention to transgender customers. Although, I am not presently persuaded that it would be right to make any order based on this conclusion, not least because the SCR Policy is also intended to protect the DWP

staff. The need for the retention of the information will reduce in time and, as it does so, the need to justify its retention will increase. There will come a time when the need for incurring the costs of masking the information (in conjunction with other changes to the system) will have to be reconsidered.

Article 14

97. Article 14 provides:

> The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

98. The Claimant's case under article 14 is that the Retention Policy and the GRC Noting Policy both directly discriminate against the Claimant by operating so as to breach her privacy because they cause sensitive personal data to be visibly noted on her CIS record when sensitive personal data of non-transsexual customers is not visibly noted in this way; and the SCR Policy also discriminates against her because she is subject to a regime which brings the adverse consequences identified above.

99. The Claimant also argues that all three policies indirectly discriminate against her because they have a disproportionate impact on her by reason of her transsexual status, and the policies fail to treat the Claimant differently to other SCR customers despite the fact that her situation as a transsexual is significantly different from those other customers.

100. It is argued that in these respects, the Defendant cannot provide a reasonable and objective justification for the discrimination.

101. In my view the Defendant is right that article 14 does not add much to the Claimant's claim. If there is an unjustified interference with the Claimant's article 8 rights, then she has a claim under article 8. If she can prove direct discrimination on a prohibited ground, she has a claim under the EA 2010 which, unlike article 14, does not permit a defence of justification; and if she can prove indirect discrimination on a prohibited ground, where the 2010 Act allows justification, the qualified right under article 14 also adds nothing.

102. Since the Defendant denies that any of the policies are discriminatory but contends in the alternative that any discriminatory impact can be justified, the argument does not extend beyond those relied on to resist the claims of a breach of Article 8 or of the EA 2010.

The Equality Act 2010

103. The Claimant claims that the policies are also unlawful because they directly or indirectly discriminate against her by reason of her gender reassignment and there is no sufficient justification for the prima facie indirect discrimination.

104. Section 7(1) of the EA 2010 provides:

> 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.

105. The EA 2010 further provides:

> 13. Direct Discrimination
>
> (1) 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.
>
> …
>
> 19. Indirect Discrimination
>
> (1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.
>
> (2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if -
>
> (a) A applies, or would apply, it to persons with whom B does not share the characteristic,
>
> (b) It puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,
>
> (c) It puts, or would put, B at that disadvantage, and
>
> (d) A cannot show it to be a proportionate means of achieving a legitimate aim.

106. Section 29 of the EA 2010 reads:

> (1) A person (a "service-provider") concerned with the provision of a service to the public or a section of the public (for payment or not) must not discriminate against a person requiring the service by not providing the person with the service.
>
> (2) A service-provider (A) must not, in providing the service, discriminate against a person (B) -
>
> (a) as to the terms on which A provides the service to B;

> (b) by terminating the provision of the service to B;
>
> (c) by subjecting B to any other detriment.
>
> (3) A service-provider must not, in relation to the provision of the service, harass -
>
> (a) a person requiring the service, or
>
> (b) a person to whom the service-provider provides the service.
>
> ...
>
> (6) A person must not, in the exercise of a public function that is not the provision of a service to the public or a section of the public, do anything that constitutes discrimination, harassment or victimisation."

107. The effect of these provisions is that the Defendant must not, in providing a public service to the Claimant, subject her to any detriment where in doing so (i) he treats her, because of her protected characteristic of gender reassignment, less favourably than he treats or would treat another person who does not have that characteristic ('direct discrimination'), or (ii) he applies a provision, criterion or practice to her which he applies to persons without that characteristic, but which puts her at a particular disadvantage when compared with persons without that characteristic and he cannot show it to be a proportionate means of achieving a legitimate aim ('indirect discrimination').

Direct discrimination

108. Ms McCann submitted that the Claimant was subjected to direct discrimination because she is less favourably treated than the Defendant's non-transgender customers: (a) her sensitive personal data (gender change data) is visibly noted on her CIS record, whilst the sensitive personal data of non-transgender customers is not visibly noted in this way; and (b) in attempting to secure her article 8 rights, the DWP automatically applies its SCR policy which brings about adverse consequences, since the circumstances relating to the Defendant's non-transgender customers who are also subject to the SCR policy are materially different from the circumstances of the Claimant (and other transgender customers).

109. Mr Bourne submitted that this argument has the potentially unsatisfactory consequence that a policy which is justified under article 8(2) and whose discriminatory effect does not infringe Article 14, nevertheless constitutes direct discrimination, which cannot be justified.

110. In my judgment the Claimant's argument fails as a matter of analysis. The DWP does not have a policy or practice of noting the sensitive personal data of any particular individual. It collects and retains data which is relevant to the identity of claimants for the purposes of the payment of benefits and pensions. The information about the fact of a GRC is retained because, for the reasons already outlined (the calculation of State Pensions and the avoidance of identity fraud), it is necessary. It is part of the identity

data which the DWP holds for all individuals as to the fact of whether they are, or are not, the holders of a GRC. The DWP systems retain this data and make the same enquiry of every record.

111. What the Claimant has failed to show is that the DWP treats the Claimant differently and unfavourably because of her transgender status, rather than as an incident of her transgender status. For this reason the real argument is whether there is indirect discrimination.

112. Nor am I persuaded that the operation of the policy brings about adverse consequences which are materially different to the Defendant's non-transgender customers who are also subject to the SCR policy. There is no evidence to support that conclusion. The evidence about adverse consequences relates to the Claimant and other (but not all) transgender customers.

Indirect Discrimination

113. Ms McCann's argument based on indirect discrimination is that (a) the Retention Policy, GRC Noting Policy and SCR Policy constitute a provision, criterion or practice ('PCP'), see s.19(1) of the EA 2010, which places the Claimant and other transgender customers at a 'particular disadvantage' as compared with the Defendant's non-transgender customers; and (b) the Defendant cannot discharge the burden of proving that these policies constitute a proportionate means of achieving a legitimate aim.

114. Despite my conclusion on direct discrimination, I am prepared to assume for the purposes of this particular argument that transgender customers do suffer a particular disadvantage compared to other customers from the operation of the Defendant's policies. On this basis it is for the Defendant to show that the policies are a proportionate means of achieving a legitimate aim. He relies on the arguments raised under Articles 8 and 14.

115. For the reasons set out above, those arguments are not a complete answer to the claim made under Articles 8 and 14.

The Public Sector Equality Duty

116. Since 5 April 2011, the Defendant has been subject to the Public Sector Equality Duty ('PSED') contained in s.149 of the EA 2010, which replaced s.76A of the Sex Discrimination Act 1975.

117. S.149(1) of the EA 2010 provides.

> (1) A Public authority must, in the exercise of its functions, have due regard to the need to
>
> > (a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;

> (b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it.
>
> ...
>
> (3) Having due regard to the need to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to -
>
> > (a) remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic;
> >
> > (b) take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it…

118. The following 4 general principles apply in the present case.

(1) The question in every case is whether the decision-maker has 'in substance' had 'due regard', see Dyson LJ in *R (Baker) v. Secretary of State for Communities and Local Government* [2008] EWCA Civ 141 [37]. Although this is not a 'tick-box' exercise, the Courts must ensure that they do not attempt to 'micro-manage' the exercise, see *R (Greenwich Law Centre) v. Greenwich London Borough Council* [2012] EWCA Civ, Elias LJ at [29-30].

(2) The observance of this duty is fact-sensitive and involves 'sufficient consideration', see *R (Bailey) v. Brent London Borough Council* [2012] LGR 530, Pill LJ at [83] and Davis LJ at [94]. In an often-cited passage Davis LL pointed out at [102] that public authorities,

> ... cannot be expected to speculate on or to investigate or to explore [equality] matters *ad infinitum*; nor can they be expected to apply, indeed they are to be discouraged from applying, the degree of forensic analysis for the purpose of an EIA and of consideration of their duties under s 149 which a QC might deploy in court (see Davis LJ in *Bailey* at [102])

(3) The duty must be fulfilled before and at the time that the relevant policy is being considered, the duty has to be integrated within the public functions of the authority and the duty is continuing and non-delegable.

(4) The approach of a court of review when considering an alleged breach of the PSED is to identify the proper ambit of what was required to be considered (the potential impact of the decision on the equality objectives and the desirability of promoting them) and decide whether sufficient consideration has been given to those matters (proper and conscientious focus on the statutory criteria). The Court should not accept invitations to make its own judgement (questions of the weight to be given to particular factors which inform the decision are for the decision-maker) nor be

beguiled into a close forensic examination of all the matters which might have informed the decision of the Public Authority, see for example the cases already cited and *R (Brown) v. Secretary of State for Work and Pensions* [2008] EWHC (Admin) CA Civ 3158 Aikens and Scott Baker LJJ at [90-96] (in the context of the Disability Discrimination Act 1995) and *R (Hurley and Moore) v. Secretary of State for Business Innovation and Skills* [2012] EWHC 201 (Admin) Elias LJ at [77-78].

119. In §§73-74 of the Detailed Grounds (dated 31 May 2012) the Claimant's arguments on this aspect of the case were put as follows:

> 73 ... The public body must assess the risk and extent of any adverse impact and the ways in which such risk may be eliminated. Therefore in order to give effect to his statutory duty under the EA 2010, the Defendant would need to demonstrate that he has understood the potential impact of his policies and decisions on his transsexual customers and that he has identified potential mitigating steps to reduce or remove any adverse impacts.
>
> 74. It is apparent that no regard has been had to the fact that the Retention, GRC Noting and SCR Policies unlawfully discriminate against the Claimant and transsexuals as a group. The operation of these policies in relation to the Defendant's transsexual customers impedes their ability to participate effectively in public life as job seekers and probably also impedes their ability to secure employment. The failure to have 'due regard' is evinced by the absence of any equality impact assessment in respect of [the Policies]. Consequently, the policies have never been assessed for possible discriminatory impact or for their significance to the duties of advancing equality of opportunity and fostering good relations between transsexuals and non-transsexuals.

120. For the reasons set out above, this passage tends to overstate the Defendant's duty and the effect of any breach; but at this stage it is convenient to concentrate on the argument that in order to give effect to his duties under s.149 of the EA 2010, the Defendant would need to demonstrate that he has understood the potential impact of the policies on his transsexual customers and has identified potential mitigating steps to reduce or remove any adverse impacts.

121. Mr Bourne has accepted this challenge on behalf of the Defendant, and submitted that the evidence shows that the Defendant has fully understood the potential impact of the policies on transsexual customers and has taken appropriate steps to respond.

122. The evidence shows that at the time the Bill which was to become the GRA 2004 was being prepared, the Defendant established the Gender Recognition Project. One of the key objectives of this was to recognise and ensure the right to privacy of individuals with an acquired gender and to ensure their cases were dealt with securely and sensitively. The Gender Recognition Project considered what changes might need to be made to the Defendant's IT systems, and reported to the Department of Constitutional Affairs Project Board and Gender Recognition Checkpoint Group, both

of which included representations from Gender Trust and Press for Change. The result was that representatives of the gender change community influenced the processes put in place following the passing of the GRA 2004 into law. Both organisations were also involved in the pilot testing of the new processes in order that transsexual customers could provide feedback on the Defendant's new processes.

123. The Defendant recognised that members of the transsexual and transgender community are a group who may be at greater risk of verbal or physical threats due to their personal circumstances, and it was for this reason that an SCR marker was placed on their records as well as others who also faced threats or whose personal circumstances were particularly sensitive. When the SCR Policy was revised in November 2012 consideration was given as to how this might affect persons with protected characteristics. An Equality Impact Assessment ('EIA') was undertaken in relation to the revised guidance. This assessment specifically recognised that SCR status had the result that front-line DWP staff did not have immediate access to the individual's records, and that this might have an impact on customer service, but noted that 'wherever possible, steps are taken to minimise this impact by preparing for regular/planned engagement with customers'. The view was expressed that it was 'not ideal but strikes a reasonable balance between offering additional protection to especially sensitive customer records and customer service'. There was also recognition that the effects of the SCR Policy affected other categories of customers: 'this adverse impact on customer service applies equally to all records that attract SCR status - regardless of the grouping in which an individual sits.'

124. The evidence of Terry Mann (who works in the Service Integration Division of the DWP) is that the Department also conducted reviews of its proposals in the light of legal developments relating to transgender customers. Between March 2012 and March 2013 the Defendant's Equality Centre of Expertise, Equality Group and Operational Excellence Directorate implemented the '[Benefit] Claimant Service Project' whose purpose was to consider and improve staff awareness in relation to transgender customers and to consider revisions to the Diversity and Equality Guidance issued to staff. Transgender claimants were treated as being a particular priority. One of the results of this project was to develop a strategy for improving staff behaviour when dealing with transgender claimants; and it resulted in a lengthy revised guidance for staff relating to transgender customers and issues (the 'DWP intranet guidance for staff relating to transgender customers and issues'), staff training and regular updates on the staff intranet, an evaluation plan to assess whether staff awareness and behaviour have improved to be conducted over a 12 month period and guidance for dealing with complaints relating to discrimination, harassment and victimisation.

125. Following the bringing of this claim, the Defendant applied for a stay of the claim in order to consider further the points raised by the Claimant and potential options for change. The stay was granted on 11 July 2012. A review was undertaken by a working group comprising technical, policy, systems and data retention experts, the Equality Centre of Expertise and the Department's Equality Group and representatives of HMRC. It explored the potential for changes across three areas: (i) staff awareness, culture and behaviour towards customers, (ii) the SCR Policy and (iii) the Data Retention Policy. The review acknowledged that the Defendant had a duty to promote equality of opportunity under the EA 2010 and set out the steps taken

to promote this (in the form of an awareness campaign and revised guidance to staff). The conclusion noted that improving staff behaviour was the key to ensuring that the retention of data which identifies a person as transgender does not have a negative impact on transgender customers. The Defendant reviewed the SCR Policy and explained that customers would continue to have the choice of whether to have their records characterised as SCR. The DWP had also considered whether it was possible to delete historic gender data that might identify a customer as transgender, but concluded that this would be difficult and costly and contrary to the system design which, for security and audit reasons, did not have the facility to overwrite historic data.

126. In accordance with its PSEDs, the DWP conducts EIAs where policies have potential equalities impact. An EIA was carried out in March 2011 in relation to the delivery of on-line services which considered the impact of the policy on transgender individuals; and a further EIA was carried out in November 2012 in relation to the SCR Policy. The latter specifically considered (i) why transgender customers were offered the protection of the SCR, (ii) the optional nature of this protection, (iii) the potential for impact on customer service arising from the SCR policy and (iv) the need for a balance between offering additional protection to SCRs and customers service. It noted that the adverse impact on customer service applies equally to all records that attract SCR status regardless of the reason for its application.

127. Finally, the evidence from the second witness statement of Terry Mann shows that the Defendant has engaged and continues to engage in a number of projects and programmes to promote on-going compliance with the PSED namely by having regard to the need to eliminate discrimination against transgender customers. These activities include an employee feedback exercise in relation to the Defendant's transgender guidance and information, and liaising with Press for Change and the Gender Identity Research and Education Society for feedback and information.

128. In my view this evidence clearly demonstrates that:

(1) the Defendant has had due regard to the need to eliminate discrimination, harassment and victimisation of transgender customers;

(2) this duty was discharged before and at the time that the relevant policies were being considered, was integrated within the public functions of the DWP and continues to be discharged.

129. In the light of the above I have concluded that the Claimant has failed to show a breach of s.149 of the EA 2010 by a considerable margin. These findings are also relevant to the issue of relief.

Irrationality

130. This way of putting the case was advanced in written submissions; but was not advanced with great vigour in Ms McCann's oral submissions. To the extent that the argument under Articles 8 and 14 fails, it is difficult to see how the irrationality argument could succeed, particularly in the light of the evidence about the Defendant's historic approach to addressing the issues which are acknowledged to

arise in relation to the policies. To the extent that the argument succeeds it is unnecessary to advance the argument on the grounds of irrationality.

Conclusion

131. It was agreed that arguments about relief should await my decision on the issues of principle.

Appendix of Terms and Acronyms

'CIS': the Defendant's Customer Information System, see [24] of the Judgment.

'DCA': Department of Constitutional Affairs.
'DDRR': Departmental Data Retention Requirement
'DPA 1998': the Data Protection Act 1998
'DPP': Data Protection Principles as set out in Schedule 1 of DPA 1998
'DWP': Department of Work and Pensions

'EA 2010': the Equality Act 2010.
'EIA': Equality Impact Assessment.

'GRA 2004': The Gender Recognition Act 2004
'GRC': Gender Recognition Certificate issued pursuant to the GRA 2004
'GRC Noting Policy': The Defendant's policy of noting the existence a GRC (date of issue and notification to the Department of Work and Pensions) on the CIS (see [36] of the Judgment).
'GRP': Gender Recognition Panel.
'GRR': Gender Recognition Register.

'ICO': Information Commissioner's Office

'JCP': Jobcentre Plus
'JSA': Jobseeker's allowance
'JSAPS': Jobseeker's Allowance Payment System

'LMS': the Labour Market System, used to record searches for jobs.

'PCP': Provision, criterion or practice, see s.19(1) of the EA 2010,
'PSED': Public Sector Equality Duty, as set out in s.149 of the EA 2010 (see [117] of the Judgment).

'Retention Policy': the Defendant's policy of retaining gender change data (gender reassignment, previous name and previous title) on the CIS and JSAPS for customers who have a GRC. (see [35] of the Judgment)

'SCR': 'Special Customer Records'
'SCR Policy': the Defendant's policy of automatically processing records of transgender customers as 'Special Customer Records' and applying a 'sensitive account' marker to them (see [22] of the Judgment).
'SPa': State Pension age
'SSAA 1992': The Social Security Administration Act 1992

Transgender and Transsexual: I was informed from the Bar that these terms are used interchangeably, although a relevant distinction can be drawn between those (pre-op) who have not received surgical intervention and those (post-op) who have. The Claimant prefers the description 'Trans'.