ACPNS LEGAL CASE REPORTS SERIES

This series compiles short summaries of significant cases involving charitable, philanthropic, nonprofit and social enterprise organisations in Australia and overseas.

Fair Play for Women Ltd against The Registrar General for Scotland and The Scottish Ministers [2022] ScotCS CSIH 7

Second Division, Inner House, Court of Session, Clerk LJ, Lord Malcolm & Lord Boyd of Duncansby, 24 February 2022

An appeal of a judicial review by a nonprofit advocacy group concerning the Scottish Census question about sex/gender.

Key words: Gender, Scotland, Appeal, Census, Sex, Gender Identity, Statutory Interpretation

1. Fair Play For Women Limited (FPFW) is a not-for-profit organisation that campaigns and consults on matters concerning the rights of women and girls in the United Kingdom.

2. A national census is to be held in Scotland on 22 March 2022. National censuses have been held in Scotland every ten years and require respondents to provide particulars as to their sex, by answering the question "What is your sex?". There is a choice of one or other of binary "Female" or "Male" options.

3. The guidance provided by National Records of Scotland provided:

> How do I answer this question?
> If you are transgender the answer you give can be different from what is on your birth certificate. You do not need a Gender Recognition Certificate (GRC).
> If you are non-binary or you are not sure how to answer, you could use the sex registered on your official documents, such as your passport.
> A voluntary question about trans status or history will follow if you are aged 16 or over. You can respond as non-binary in that question.

4. FPFW argued in the primary Court that the guidance is illegal, and requested a judicial review. FPFW's contention was that the guidance authorises or approves unlawful conduct in that it suggests that a respondent could properly answer the sex question in the census by stating that his or her sex is other than that stated in that respondent's birth certificate or GRC. FPFW applied to have the guidance reduced, and for the Court to declare that the guidance has no legal validity.

5. The Registrar General for Scotland and the Scottish Ministers resisted the application and maintained that the guidance is entirely legal and should not be reduced.

6. The primary Court gave the Equality Network, a charity working for lesbian, gay, bisexual, transgender and intersex equality and human rights in Scotland, the opportunity to intervene in the proceedings, and it did so by way of written submissions. It supported the proposition that the guidance is legal.

7. The primary Court phrased the question to be decided as (at [8]):

> …whether, absent possession of a GRC, a … person not sure how to answer the sex question would be acting lawfully by answering the question other than by reference to the sex recorded on that person's birth certificate.

8. All parties agreed that if the guidance permitted, sanctioned, approved or authorised unlawful conduct by those consulting it, the Court could intervene.

9. The primary Court noted that facilities were available for important documents such as driving licences or passports to be issued by reference to a person's lived sex, which would be difficult to reconcile with any general legal rule that a person's sex can only be considered to be that recorded on a birth certificate. As the primary Court could not identify such a general rule from the case law authorities, it could not conclude that the guidance permitted, authorised, sanctioned or approved unlawful conduct.

10. Further, a person registered female at birth, and never having had cause for concern at that registration, may well be answering falsely if she ticked "Male". However, it was not to the primary Court obvious that a person registered female at birth, without a GRC, but who has come to live to all practical intents and purposes as a male, perhaps with a greater or lesser degree of pharmaceutical or surgical intervention, would be providing a false answer by ticking the "Male" box.

11. The primary Court dismissed the application.

12. The Appeal Court rejected the argument that "sex" as a particular which is required to be stated in a census return, can only mean sex as recorded on a birth certificate or GRC. This rested on the proposition that by the statutory construction of the provision, there was a default definition of sex which involved the adoption of a binary biological categorisation of male and female.

13. The Appeal Court noted that:

    - There is no universal legal definition of the word 'sex';
    - There are some contexts in which a rigid definition based on biological sex must be adopted;
    - However, in many circumstances, the words "sex" and "gender" have been used synonymously and interchangeably;
    - There was force in the submission that the century old legislation should be treated "as an instrument which is always speaking" (at [23]), and while in 1920 gender and sex would probably have been

understood by most people in rather more simplistic terms than nowadays, it was clear that in popular usage they have become intertwined.

14. The appeal was refused.

IMPLICATIONS

Previously the courts in England and Wales (R (on the application of Fair Play for Women Ltd v UK Statistics Authority and Anr [2021] EWHC 940 (Admin)) held that there was "a strongly-arguable case" that there was a clear distinction in the legislation between particulars about a person's sex and particulars about a person's gender identity. The former related to the sex recognised by law, not as perceived by the individual respondent. The Court indicated that it would be appropriate for the guidance to refer only to birth certificates or GRCs. The UK Statistics Authority agreed to publish its guidance in that form, and subsequently the Court issued a consent order declaring that "sex" in the Schedule to the 1920 Act and the subordinate legislation in England and Wales meant sex as recorded on a birth certificate or GRC.

In the case under consideration, the Appeal Court distinguished that case as it was a decision made only on the basis of the existence of a *prima facie* case, and the matter was disposed of by concession.

The principle of statutory interpretation of legislation "as an instrument which is always speaking" has been adopted in Australia. The approach of the courts used to be summed up in the rule *contemporanea exposition est optima et fortissimo* that acts were to be construed in accordance with their natural meaning as at the date of enactment.

Legislation is now assumed to be drafted with the intention that the text is to be regarded as ambulatory, embracing future changes in the subject matter. So a statutory reference to a 'machine made copy' would include a hard copy of an email message.[1] Further, the term 'mining' as used in the Income Tax Assessment Act 1936 included a style of mining industrial salt which was not known at the time the Act was passed,[2] but would the definition now be extended to include crypto-currency 'mining'?[3]

[1] Re Treneski and Comcare [2004] AATA 98.
[2] Imperial Chemical Industries of Australia and New Zealand Ltd v FCT (19720 46 ALJR 35.
[3] The competitive process that verifies and adds new transactions to the blockchain for a cryptocurrency that uses the proof-of-work method. The miner that wins the competition is rewarded with some amount of the currency and/or transaction fees. The bitcoin reward that miners receive is an incentive that motivates people to assist in the primary purpose of mining: to legitimise and monitor Bitcoin transactions, ensuring their validity. Because many users all over the world share these responsibilities, Bitcoin is a "decentralised" cryptocurrency, or one that does not rely on any central authority like a central bank or government to oversee its regulation.

VIEW THE CASE

This case may be viewed at https://www.bailii.org/cgi-bin/format.cgi?doc=/scot/cases/ScotCS/2022/2022_CSIH_7.html

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