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IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
THE ADMINISTRATIVE COURT
[2021] EWHC 940 (Admin)

CO/715/2021

Royal Courts of Justice

(Heard remotely via Microsoft Teams)

Tuesday, 9 March 2021

Before:

THE HONOURABLE MR JUSTICE SWIFT

BETWEEN

THE QUEEN

on the application of

FAIR PLAY FOR WOMEN LTD

Claimant

-and-

(1) UK STATISTICS AUTHORITY

(2) MINISTER FOR THE CABINET OFFICE

Defendants

MR J. COPPEL QC, MR T. CROSS & MS N. CUNNINGHAM (instructed by Sinclairs Law)
appeared on behalf of the Claimant.

SIR JAMES EADIE QC, MS C. IVIMY & MR B. TANKEL (instructed by the Government Legal
Department) appeared on behalf of the Defendants.

MS S. HANNETT (instructed by the Government Legal Department) appeared on behalf of the
Second Defendant.

J U D G M E N T

- 1 In this application for judicial review issued on 1 March 2021, the Claimant, Fair Play for Women Ltd. contends that the UK Statistics Authority (commonly also known as the Office for National Statistics or as the ONS) has acted unlawfully when issuing guidance in respect of Question 3 in the Individual Questionnaire that is part of the 2021 Census. That guidance was published on 12 February 2021. Census Day is 21 March 2021.
- 2 I have before me now the Claimant’s application for interim relief. Put shortly, the Claimant’s case in the substantive claim is that one part of the guidance on Question 3 rests on a misunderstanding of the meaning of the legal provisions that give rise to that question. By its application for interim relief, the Claimant seeks an order that would remove that part of the guidance.
- 3 The issues for me are whether there is a serious question to be tried and, if there is, does the balance of convenience favour granting the application for interim relief or refusing the application. It is common ground that the balance of convenience includes consideration of any relevant public interests. There is dispute between the parties on whether, for the Claimant to succeed on the serious question to be tried issue, I must be satisfied that there is a strong *prima facie* case. The ONS relies on the judgment of Henderson LJ in *R(Governing Body of X) v Ofsted* [2020] ELR 526. I do not think the judgment in that case is entirely on point with the issue in this case. Henderson LJ’s judgment was directed to a situation in which an injunction was sought to prevent a public authority publishing a document prepared in exercise of a statutory duty (see his judgment at paragraphs 77 and 78) and the particular reference there to Ofsted’s statutory obligations. More significantly, I do not read his judgment as depending on the application of any particular formulation of the *American Cyanamid* principles, but, instead, on recognition that in a public law case the overall approach, which encompasses both *American Cyanamid* principles, requires the existence of a particularly strong set of circumstances if an application for interim relief is to succeed. In the present case, I have well in mind that time is short between today and Census Day. Any relief that I might grant may be in place for a significant part or even all of that period. In practice, relief granted now may amount to a form of final relief. This being so, I have looked at the merits of the Claimant’s substantive case with particular care.
- 4 I now turn to the merits of the application. Census Question 3 is “What is your sex?” The permitted choice is “Female” or “Male”. The question is in the form prescribed by the Census (England) Regulations 2020. It includes a note that states, “A question about gender identity will follow if you are aged 16 or over”. The guidance for Question 3 issued by the ONS says this,

“Why we ask this question

The answer is key to understanding trends in the population. It helps your local community by allowing charities, organisations and local and central government to understand what services people might need. This information helps monitor equality between groups of people of different sexes in your local area. Your answer will help public bodies to identify discrimination or social exclusion based on sex and work to stop it from happening. The Census first asked this question in 1801. The question is vital for understanding population growth and equality monitoring. Please select either ‘Female’ or ‘Male’. If you are considering how to answer, use the sex recorded on one of your legal documents, such as a birth certificate, gender recognition certificate, or passport. If you are aged 16 or over, there is a later voluntary question on gender identity. This asks if the gender you

identify with is different from your sex registered at birth. If it is different, you can then record your gender identity.”

- 5 The Claimant takes issue with the sentence that begins “If you are considering how to answer”. The Claimant’s case is that, although the guidance is correct when pointing people in the direction of documents such as a birth certificate or a gender recognition certificate, that record a person’s sex as recognised by law, the guidance is wrong to the extent that it refers to a passport. It is wrong because the sex recorded on a passport will not necessarily be the person’s sex recognised by law. There is no dispute before me that it is correct that the sex recorded on a passport can be a product of self-identification. The Claimant’s concern is not limited to passports. The guidance refers to “legal documents”. This may, says the Claimant, direct a person to some other official document (other than a passport), which records a person’s sex on the basis of self-identification.
- 6 I am satisfied that the Claimant does have a strongly-arguable case on this issue. The Census Act 1920 is the source of legal authority for the Census. By section 1 of the 1920 Act, the particulars (i.e. information that may be requested) is to be prescribed by order, save that what is prescribed may not extend outside the matters listed in the Schedule to the 1920 Act. Paragraph 1 of the Schedule states “Names, sex, age” as permitted particulars. Paragraph 5C of the Schedule states, “Gender identity” as a permitted particular. Paragraph 5C was added by amendment with effect from 8 October 2019 by the Census (Return Particulars and Removal of Penalties) Act 2019.
- 7 The relevant Order is the Census (England and Wales) Order 2020. The 2020 Order set the Census date (see article 3) and, by article 6 and Schedule 2, set the particulars to be requested in the census returns. The particulars are divided into various categories, one of which is demographic particulars. Those particulars include, at paragraph 8 of Schedule 2, “Date of birth and sex” and at paragraph 26, “Whether the person describes their gender as being the same as the person’s sex registered at birth (and if not stating the gender identity that they ascribe to themselves)”. The 2020 Regulations then prescribe the form of the Census Questionnaire (see regulation 5(1) of and Schedule 2 to the 2020 Regulations). On the paper version of the questionnaire, the question I have referred to as “Question 3” is question 3 in the individual question section. Question 27 in the same section reads as follows, “Is the gender you identify with the same as your sex registered at birth?” The available answers are “Yes” or “No, write in gender”, with space left for the answer to be completed. There is a note underneath Question 27 that reads, “This question is voluntary”. This note reflects section 8(1A) of the 2020 Act, another provision added by amendment by the 2019 Act.
- 8 Taking these matters together, I consider that there is a strongly-arguable case that the Schedule to the 1920 Act, as amended, makes a clear distinction between particulars about a person’s sex and particulars about a person’s gender identity. That distinction is stated again in Schedule 2 to the 2020 Order, which repeats at paragraph 3, that the census should seek particulars about a person’s sex and, at paragraph 26, that it should request particulars on how the person describes their gender and whether that is the same as the sex registered at the time the person was born. Each matter is then formulated in the census questions prescribed by the 2020 Regulations.
- 9 The distinction in the legislation is entirely consistent with the objectives of the 2019 Act which followed the December 2018 White Paper “Help Shape our Future”. The White Paper identified gender identity as one of the proposed new topics for the 2021 Census. I have considered the passage at paragraphs 3.34 to 3.45. This passage supports the distinction I would draw as a matter of construction of the 1920 Act as amended in 2019, and of the 2020 Order. It also supports the conclusion that the intent of the new paragraph 5C gender identity

provision is to capture information about a person's perception of their gender identity, which would not be captured by particulars relating to sex under paragraph 1 of the Schedule to the 1920 Act.

- 10 I do not consider any of the arguments advanced by the ONS is sufficiently persuasive, and certainly not decisive. The first is that "sex", as used in the Schedule to the 1920 Act and Schedule 2 to the 2020 Order, is to be read as referring to any of biological sex, sex recognised by law, a person's self-identified sex and indeed, any answer as to the person's sex recorded in any document issued by the State. Thus, it is submitted that in context, sex is an "umbrella term" for any or all of these matters. This approach to paragraph 1 of the Schedule to the 1920 Act does not sit comfortably with paragraph 5C of that Schedule. When considered by reference to paragraphs 3 and 26 of Schedule 2 to the 2020 Order, the submission is less comfortable still. It is not a good fit with the language used. It detracts from the meaning of paragraph 5C of the Schedule to the 1920 Act and paragraph 26 of Schedule 2 to the 2020 Order and it is a submission that is at odds with the objective of the amendment made to the 1920 Act, when paragraph 5C was added, as identified in the December 2018 White Paper.
- 11 Sir James Eadie QC, for the ONS, relies on the Explanatory Notes to the 2019 Act. However, although paragraphs 26 and 27 of those Notes suggest that questions about gender identity could always have been asked under paragraph 6 of the Schedule to the 1920 Act (a catch-all provision), they do not suggest that paragraph 1 of the Schedule could be used for that purpose. To this extent, the Explanatory Notes weigh against his submission rather than in favour of it. Sir James' submission that it could because of, as he put it, the umbrella nature of the word "sex" in this context, only serves to distort the 1920 Act, as amended. Not only would the addition of paragraph 5C into the Schedule be redundant, section 8(1A), inserted to exclude persons from criminal penalty if they chose not to answer questions about gender identity, would fail to serve its purpose, since on this analysis, such questions would not necessarily fall within the scope of paragraph 5C, but would be within the scope of paragraph 1 and as such, at least possibly, within the scope of the penalty regime under section 8 of the Act. Nor do I see that any specific purpose would be served by the ONS submission on what "sex" means in this context. That approach would mean that the particulars sought by Question 3 and Question 27 would, or at least might, overlap.
- 12 Next, I should deal briefly with a number of submissions set out in the ONS Summary Grounds of Defence. One is that, if paragraph 8 of Schedule 2 to the 2020 Order was not intended to include information about gender identity, it would have been formulated differently, for example, "What sex is recorded on your birth certificate or GRC?" This submission is artificial. The fact that a provision worded differently might have a meaning that was beyond debate would no doubt make my task easier, but I am satisfied that the Order in the terms that it is made, has a meaning that is tolerably clear. This is for the reasons I have already set out.
- 13 The next submission in the Summary Grounds is that there is no reason to assume that paragraphs 3 and 26 cover ground that is entirely separate. It points to the possibility that particulars about a person's religion (see paragraph 18 of Schedule 2) might overlap with particulars about a person's ethnic group (see paragraph 17 of Schedule 2). So far as concerns these paragraphs this may be so, but I do not consider this is of much if any significance for the purposes of considering the meaning of "sex", as used in paragraph 8 of Schedule 2.
- 14 Next, the ONS submits that the amendment to the Schedule to the 1920 Act, which added paragraph 5C, was to clarify the scope of the power to ask questions on these matters under the Act rather than to expand its scope. I do not consider that significant weight attaches to this point. As I have explained, it is at odds with the White Paper and it fails to take account

of other amendments made to the 2020 Act at the same time: for example, the amendment to section 8 to which I have already referred.

- 15 Further, the ONS submits that reading paragraph 1 of the Schedule to the 1920 Act and paragraph 8 of Schedule 2 to the 2020 Order as references only to a person's sex, as recognised by law, risks a breach of ECHR article 8, because to ask such a question is intrusive of the right protected by article 8(1). I doubt there would be any breach of article 8(1) rights, but, if there were, it would be justified. The question would be posed in pursuit of legitimate objectives (see, for example, those at paragraph 7 of the witness statement made in these proceedings on behalf of the ONS by Mr Ian Bell) and any interference would be justified on the fair balance principle, in particular, given the careful and confidential way in which census information is used.
- 16 The ONS' final argument on the substantive merits of the claim was to the effect that the meaning of the word "sex", as used in the 1920 Act and the 2020 Order, is a matter of evaluation for the ONS. This was not a point pursued by Sir James in his oral submissions. I consider that he was right not to do so. There is nothing in either the Act or the Order that supports this submission or such a conclusion. The Act, at section 2, permits the ONS to undertake a census in accordance with the provisions of the Act and any Order made under it, but the particulars that may be requested are those prescribed by the Act or in an Order. As prescribed, those particulars do not state that the ONS is the arbiter of what the particulars mean, rather the matter is one of construction of the Act and the Order and, ultimately, the responsibility of the court. For this reason, the evidence that I have read relating to the particular expertise and statutory responsibilities of the ONS leads nowhere that is relevant for the purposes of this application.
- 17 Returning to the guidance issued by the ONS, the significance of the points that I have made is this. I do not doubt that the ONS has the power to publish guidance on the Census Questionnaire. It has the power to do that because it is something expedient for the purposes of its own functions under the 1920 Act. However, if guidance is given on how to answer Census questions, the guidance must match the proper meaning of the particulars permitted under the 1920 Act and the 2020 Order. In this case, I am satisfied that the Claimant has a strongly-arguable case on the proper meaning of "sex", as used in paragraph 1 of the Schedule to the 1920 Act and paragraph 8 of Schedule 2 to the 2020 Order. That is to say that those references are to a person's sex as recognised by law and not the sex with which the person self-identifies. In fact, I am satisfied that the Claimant is much more likely than not to succeed on this point, for the reasons I have given. The consequence of this is that I am in the same way satisfied that, to the extent that the ONS' guidance suggests that Question 3 of the individual questions in the Census can be answered other than by reference to the information recorded either on a birth certificate or in a GRC, that guidance is wrong. It does not match the question being asked.
- 18 I now consider the balance of convenience. The issue here is which of the options available to the court offers the smaller risk of prejudice if it turns out to be wrong. I must consider prejudice that may arise if I wrongly grant interim relief and weigh that against prejudice that may arise if I refuse interim relief and that turns out to be the wrong decision.
- 19 First, I must identify the interim relief that might be necessary to meet the strong arguable case I have described. The draft order prepared by the Claimant sought removal of the sentence "If you are considering how to answer, use the sex recorded on one of your legal documents, such as a birth certificate, gender recognition certificate, or passport". The removal of the entire sentence seems to me to be unnecessary. The arguable case that I have identified, that there is a mismatch between the effect in law of the material provisions of the

1920 Act, the 2020 Order and the 2020 Regulations, only concerns the extent to which guidance suggests that documents other than those which record a person's legally-recognised sex might help a person answer Question 3. This does not require removal of the whole sentence, simply removal of reference to documents that do not record a person's legally-recognised sex. So far as concerns the guidance as presently published, the words "or passport" should be removed. My view is that an appropriate order is one that requires the sentence to read, "If you are considering how to answer, use the sex recorded on your birth certificate or gender recognition certificate".

- 20 I have considered the balance of convenience on this basis. The balance of convenience favours a grant of relief to the extent that I have just described. The ONS submissions against interim relief are to the following effect. First, that an absence of guidance might increase the risk that Question 3 will be answered on the basis of self-identification. Given the relief that I have described, there will not be an absence of guidance. The sentence that remains will reflect the proper meaning of the question. In any event, the note on the Census Form against Question 3, which points respondents in the direction of Question 27, is itself a clear indication that Question 3 is not directed to any issue of self-identification.
- 21 Secondly, the ONS submits that, if the guidance is changed, it will need to inform and to retrain the staff and volunteers involved in administering the Census. It is said that such training will be "very difficult". Whilst staff and volunteers will certainly need to be told, I do not agree that any training required would be likely to be difficult, let alone "very difficult". The point is short and self-contained and will be encapsulated in the sentence I have described, namely, to look at documents that record the person's legally-recognised sex. Since the guidance is published only on the ONS website - it is not in paper form - the change can be implemented effectively. No previous version of the guidance published by the ONS need remain in circulation.
- 22 Thirdly, the ONS submits that, while the guidance is likely to be considered by only a small number of respondents (apparently in 2011 only 11,000 out of 23 million households responding had accessed the relevant page on the Census website) a disproportionate number of those who do look at the website may be transgender and that a change in the guidance may make them less likely to complete the Census. Even if the ONS assumption that a disproportionate number of people having resort to the guidance will be transgender is correct (and I see no obvious reason why it is), I do not follow the logic of the remainder of the submission. Given the note on the Census Form itself, against Question 3, any person looking at the form will likely realise that Question 3 is not a question about gender identity. I do not consider that guidance varied in accordance with the Order I have suggested ought, logically, to affect the enthusiasm for answering Question 3 in any way at all.
- 23 Fourthly, the ONS submits that no order that I could make would affect the guidance published in Northern Ireland, which is in the same form as the guidance in England and Wales. The Census in Northern Ireland is not organised by the ONS but by the Northern Ireland Statistics and Research Agency. This submission correctly recognises the geographic limit of the court's jurisdiction in this case, but I cannot see that any weight attaches to this. Whatever a public body beyond the jurisdiction of this court may do, in exercise of functions, that are also beyond this court's jurisdiction, seems to me to be a matter entirely apart from anything that bears upon what should be the outcome of this application.
- 24 Overall, therefore, I am satisfied that the risk of prejudice arising from a decision to grant interim relief, which turns out to be wrong, is not at all compelling. I do not attach significant weight to it. By contrast, I do see the force in the points made as to the prejudice that may arise in the event that I fail to grant interim relief when I should have done, because the

guidance in its present form risks misleading respondents and, to that extent, may inhibit the collection of data concerning a person's legal sex. There does not seem to be any dispute but that this is an important demographic variable and that information about it should be collected.

- 25 Finally, the ONS raises two points which it says tell against the grant of interim relief. The first is that it expects that up to a fifth of UK households may have completed the Census as early as 12 March 2021, a number of days before Census day. I find this submission surprising. The instruction given to those required to complete the Census is "all households should complete the Census on Sunday, 21 March 2021 or as soon as possible after." But be that as it may, I do not consider that the existence of a chance that people may complete or may already have completed the Census in breach of this instruction is a reason against granting interim relief. Even if what the ONS expects in this regard comes to pass, a significant and clear majority of households are still to complete the Census.
- 26 The second point is that, if the Claimant's argument about the meaning of the 1920 Act and the 2020 Order is correct, it would be possible to reverse engineer data that ought to have been provided in response to Question 3 by reference to information provided in response to Question 27. The extent to which such an exercise may be possible must be somewhat speculative as Question 27 is a voluntary question and, depending on the answer given, the process of working back to establish the person's legal sex may be difficult. One example given to me by Mr Coppel QC, who appears for the Claimant, was that a person might record their self-identified sex as "trans". But, in any event, what the ONS suggests seems to me to be like an exercise where a cart tries to pull a horse. I can see little benefit in a state of affairs which requires such a task to be performed. Given the views that I have formed on the strength of the Claimant's case as to the correct construction of the 1920 Act and the 2020 Order, this suggestion of reverse engineering is not a satisfactory solution.
- 27 For all these reasons, the Claimant's application for interim relief is granted. As will have been clear from what I have said already, I propose an order to the effect that the present sentence in the guidance that the Claimant has questioned in these proceedings should be reformulated to read "If you are considering how to answer, use the sex recorded on your birth certificate or gender recognition certificate".
- 28 It also follows from the reasons I have given, that I grant permission to apply for judicial review.
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This transcript has been approved by the Judge.