on the persons concerned". The Court of Appeal stated that this was also true of England and Wales. However, the widespread concerns about unregistered religious marriages and the current review of weddings law by the Law Commission, suggest that the law is far from clear, accessible, straightforward and burden-free.

The Court of Appeal has removed a flawed solution to the unregistered religious marriages issue but it is clear that the problem still remains. There is a need to provide redress for those who are in unregistered religious marriages either where this is unwitting on the part of one or both of the parties or where this is not agreed by one of the parties (such as in this case where the husband promised that they would comply with marriage registration laws at a later date). In the event of relationship breakdown, those who are in unregistered religious marriages are left either to resolve the dispute themselves or to use a religious form of authority such as a Sharia Council. This is inadequate. The Marriage Act 1949 (Amendment) Bill, a Private Members Bill currently before Parliament, seeks to deal with the issue by making it an offence to purport to solemnise an unregistered religious marriage. This, however, assumes that the issue lies with celebrants, is unlikely to stop the practice, and would fail to provide a remedy for those in unregistered marriages when a relationship breaks down. A preferable solution would be to deal with this in the context of cohabitation law reform. The Court of Appeal decision confirms that parties in unregistered religious marriages will continue to have the same legal status as cohabiting couples. England and Wales currently has no legislative provision that specifically provides cohabitants with financial relief in the event of the ending of a relationship that has generated economic disadvantage. Remedying this would mitigate the problem of unregistered religious marriages meaning that there would be no need for the well-meaning but flawed judicial creativity which the Court of Appeal has now rightly rejected.

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TRAVELING BEYOND THE BINARY: NO RIGHT TO UNSPECIFIED PASSPORTS UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS

In recent years, transgender (trans) and non-binary rights have become a topic of heated public conversation in the UK. From reforms to the Gender Recognition Act 2004 (GRA) to single-sex spaces, and from the medical treatment of trans youth to women-only sports, the appropriate contours of gender identity protections in this jurisdiction are a growing source of social, political and legal debate. In *R. (on the application of Elan-Cane)*

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v Secretary of State for the Home Department; Human Rights Watch intervening ([2020] EWCA Civ 363), the Court of Appeal confirmed an earlier judgment of Baker J. in the High Court that Article 8 of the ECHR does not currently require the UK government to issue passports with an "unspecified" ("X") gender option.

The appellant, Christie Elan-Cane, identifies as "non-gendered" (at [7]–[8]). Since 1995, she had unsuccessfully sought to obtain a passport without "male" or "female" identity markers – an option currently permitted by the International Civil Aviation Organisation. In June 2017, Elan-Cane issued judicial review proceedings against Her Majesty's Passport Office (HMPO) claiming, inter alia, that the failure to acknowledge her unspecified identity was incompatible with the UK's obligations under the ECHR. At first instance, Baker J. ([2018] EWHC 1530 (Admin)) held that, although the HMPO policy engaged the appellant's Article 8 rights, there was no unlawful breach. At least at the present time, the question of whether and how to legally recognise non-binary genders remained within the Government's margin of appreciation (at [103]–[131]). There was also no violation of Article 14 of the ECHR.

The Court of Appeal confirmed Baker J.'s analysis and dismissed Elan-Cane's appeal. In her main judgment for the court, with which both Irwin and Henderson L.JJ. agreed, King L.J. observed that gender identification, including a "non-gendered" identity, falls within (and is "central" to (at [46])) the notion of private life (at [45]–[48]). As such, HMPO's "continuing policy" (at [33]) did engage the appellant's rights under Article 8. However, King L.J. agreed with Baker J. that such provision does not yet place positive obligations upon the UK to acknowledge alternative gender classifications. Refusing to validate Elan-Cane's non-gendered identity undoubtedly impaired her personal interest in appropriate identification – although this was qualified as the appellant was seeking a passport rather than a Gender Recognition Certificate (at [55]–[59]). However, there was no consensus on non-binary identities among European nations (at [74]–[84]) and, given the complex issues involved, the UK Government was entitled to consider unspecified passports within a broader review of the legal regulation of gender (at [60]–[72]). As such, and considering the wide margin of appreciation enjoyed by the Government, there was no unlawful breach of Article 8 (at [102]–[109]) or Article 14 (at [114]–[117]).

Despite its relatively short length, the Court of Appeal's decision in *Elan-Cane* is notable for its concise exploration of the evolving European case law on gender identity rights. Much of King L.J.'s reasoning is beyond critique – particularly her frank acknowledgement that "there is, as yet, nothing approaching a consensus in relation" to non-binary rights in the Council of Europe (at [84]). Yet, there are also aspects of the judgment which require further consideration, particularly the discussion of *coherence* and *medicalisation*.

An important consideration in the Article 8 analysis was the extent to which issuing gender-unspecified passports would create incoherence and inconsistency within the broader legal system (at [60]–[73]). The Court of Appeal was persuaded that, if the Government was going to introduce alternative identity options, it was entitled to wait for a wider review of the relationship between gender and law. In many respects, this is a rational conclusion for the Court of Appeal to reach. As calls to expand the Gender Recognition Act 2004 grow louder, a common critique of non-binary reforms is the potential futility of legally acknowledging additional categories when the laws of England and Wales, Scotland and Northern Ireland remain grounded in a binary framework of gender.

Yet, in her judgment, King L.J., drawing upon the earlier analysis of Baker J., appears to give insufficient weight to the substantive differences between issuing "X" passports (the subject matter of the appeal) and providing formal recognition to non-gendered identities (which Christie Elan-Cane was not seeking). Although her opinion acknowledges Elan-Cane's limited request (at [67]–[68]), the decision does not meaningfully explore how that limitation might affect the Government's "coherence" justifications.

It is at least arguable that issuing "X" passports would not create unworkable incoherence. Unlike birth certificates, the passport is not a core identity document. An unspecified passport does not create an unspecified legal gender (at [57]–[58]). In the absence of a Gender Recognition Certificate, trans and non-binary individuals (even those with an "X" passport) would retain their birth-assigned legal gender and, subject to the requirements of the Equality Act 2010, government departments could engage with such individuals on the basis of that birth-assigned gender. Indeed, there is nothing to suggest that the HMPO, even if required to issue Elan-Cane with an unspecified passport, could not in other ways (e.g. internal records, etc.) have continued to treat the appellant as having her legal, female gender.

It is these key differences between birth certificates and passports (i.e. the foundational nature of the former but not the latter) which have allowed jurisdictions, such as Australia (at [11]), to provide "X" gender passports without impermissibly compromising the coherence of their legal systems. It is notable that, although King L.J. observed such differences in qualifying the impact which the current HMPO policy would have upon Elan-Cane's personal interest in obtaining an unspecified passport (at [55]–[59]), they feature less prominently in her review of the Government's coherence arguments.

Another important aspect of the *Elan-Cane* appeal is the extent to which it highlights the complex medico-legal questions which trans and non-binary identities are increasingly requiring courts in England and Wales to confront. The Court of Appeal's decision is notable for the extent to

which it positions medical interventions as an implicit source of legitimisation. Although King L.J. acknowledges that some trans and non-binary individuals do not physically transition (at [4]), both she and Irwin L.J. (and even the appellant's counsel (at [56])), cite Elan-Cane's prior surgeries as evidence of the importance, seriousness and centrality of her non-gendered identity (at [46], [123]).

Linking the centrality of gender to medical treatments has been a constant feature of judicial exploration in this area (e.g. *Goodwin v United Kingdom* (Application no. 28957/95) (2002) 35 E.H.R.R. 18; Case C-13/94, *P v S and Cornwall* Case [1996] E.C.R. I-2143). References to surgery, hormones and diagnoses are still commonplace in the case law (*AP, Garçon and Nicot v France* ((Application nos. 79885/12, 52471/13 and 52596/13), Judgment of 6 April 2017). Yet, such foregrounding of physical transition is problematic and seems to run contrary to the spirit of potential UK and Scottish Government reforms (UK Government Equalities Office, *Reform of the Gender Recognition Act – Government Consultation* (London 2018), at [51]–[71]; Gender Recognition (Scotland) Reform Bill).

It overlooks the extent to which many trans and non-binary individuals, for a multiplicity of reasons, cannot access gender affirmative care. The fact that other non-binary persons will not undergo the same surgical procedures as Elan-Cane is not indicative that gender (or being non-gendered) is less central in their lives, nor that they should have reduced protection through Article 8. One must remember that, under both the Gender Recognition Act 2004 and section 7 of the Equality Act 2010, individuals can apply for a Gender Recognition Certificate and enjoy "gender reassignment" protection irrespective of whether they have physically altered their bodies.

Having emphasised medical interventions while considering the centrality of gender to private life, it is perhaps ironic that the Court of Appeal then failed to assess how providing such treatment altered the UK's recognition obligations under Article 8. In the landmark case, *Goodwin v United Kingdom* ((Application no. 28957/95) (2002) 35 E.H.R.R. 18), the European Court of Human Rights – when assessing the compatibility of UK law with Article 8 – suggested that it was "illogical" to facilitate Christine Goodwin's physical transition through the National Health Service but subsequently refuse to recognise "the legal implications of the result" (at [78]). Similar considerations apply in the *Elan-Cane* appeal. The National Health Service had performed a total hysterectomy, helping the appellant to "achiev[e] the desired status of 'non-gendered'" (at [8]). However, the UK Government now refuses to issue passport documents which are congruent with her internal and physical experience of gender.

Thinking more widely, *Elan-Cane* is the latest example in a growing number of cases which illustrate how UK law is struggling to accommodate the dramatic improvements in the medical options for trans and non-binary populations. In the recent judgment, *R. (Alfred McConnell) v The Registrar*

General for England and Wales and others ([2020] EWCA Civ 559), the Court of Appeal confirmed that a trans man, who gave birth to his own son, had to be registered as a "mother" even though he had already obtained a male Gender Recognition Certificate. In the forthcoming judicial review, *R(ota) Mrs. A, and Sue Evans v Tavistock and Portman NHS Foundation Trust*, a Divisional Court will consider the extent to which adolescents under the age of 18 years can provide consent for puberty blockers and cross-sex hormones. Although both cases immediately concern the rights of trans and non-binary populations, they each have the potential to significantly impact broader areas of UK law, particularly the concepts of "motherhood" and "*Gillick* competence" in English family law.

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