IN THE EMPLOYMENT APPEAL TRIBUNAL **Appeal No. UKEAT/0105/20/JOJ**

BETWEEN

MAYA FORSTATER

Appellant

and

(1) CGD EUROPE

(2) CENTER FOR GLOBAL DEVELOPMENT

(3) MASOOD AHMED

Respondents

APPELLANT'S SKELETON ARGUMENT

References in the form **[CB/000]** *are to the Core Bundle and* **[SB/000]** *to the Supplementary Bundle.*

The parties are referred to, respectively, as the Claimant and the First, Second and Third Respondents (collectively, the Respondents).

References to the 'Judgment' are to the Judgment and Reasons of the Employment Tribunal sitting at London Central (Employment Judge Tayler, as he then was, sitting alone) ('the Tribunal'), sent to the parties on 18 December 2019 **[CB/3-28]**.

Introduction

1. Is a belief that biological sex is real, important, immutable and not to be conflated with gender identity so beyond the pale that it is *'not worthy of respect in a democratic society"*?

2. Should anyone who holds such a belief be 'required' in all circumstances to suppress its expression for fear of causing hurt or offence to trans people, and instead be 'required' to use the language of sex and gender in a way that is contrary to that belief, on pain of dismissal or discrimination at work for which the law will afford no remedy?

3. The Tribunal's answer to both of those questions was 'yes'[1].

4. Those conclusions are astonishing in view of the fact that the Claimant's beliefs represent an important and widely-shared viewpoint in an on-going political and cultural debate about a significant aspect of human life and behaviour, which was at the material times the subject of specific government consultation in relation to legislative proposals to amend the Gender Recognition Act 2004 ('GRA')[2].

5. In that debate, use of the language of sex and gender is contested: *'even the use of words such as "men" and "women" is difficult'*[3]. Some people believe everybody has a gender identity; that this, and not their anatomy, determines their sex; and that the language of sex and gender should therefore always be used to refer to a person's gender identity. Others, like the Claimant, believe that biological sex and gender identity are different concepts; that the rights of people not to be discriminated against for being transsexual must be respected; but that it is *also* important to be able to talk about biological sex and the ways in which men and women are differently affected by political, societal and cultural choices and policies; and that it is therefore important to be able to use language conventionally to refer to biological sex. There are of course other views as well, but there is no doubt that the Claimant's belief is an important and widely-shared one in that debate[4].

6. Yet the Tribunal held that, because of the risk of offending trans people, both the use of language to refer to biological sex, and the beliefs which that expresses, are unacceptable in a democratic society.

7. The label 'Orwellian' is sometimes applied too glibly, but here it is warranted. The Tribunal's approach is reminiscent of the Ministry of Truth's Newspeak: words themselves are to have their *'undesirable meanings purged out of them'* along with the associated ideas, so that *'a heretical thought… should be literally unthinkable at least so far as thought is dependent upon words'*[5].

8. According to the Tribunal, in the contemporary debate about sex and gender, the only democratically and legally acceptable use of language is one which accords primacy to self-determined gender identity[6]. In order to avoid causing distress or offence, ordinary English words

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[1] As reflected in particular in the Tribunal's reasoning and conclusions at Judgment, §§90-91 **[CB/27-28]**.
[2] See R (Miller) v The College of Policing & another [2020] 4 All ER 31, Admin, §§13-14, 241-250 & 266-267 *per* Julian Knowles J.
[3] R (Miller), §17 *per* Julian Knowles J.
[4] See again R (Miller), §§13-14, 241-250 & 266-267 *per* Julian Knowles J; see also C w/s, §§112-116 **[SB/31-33]**.
[5] See the Appendix to *Nineteen Eighty-Four*: 'The Principles of Newspeak'.
[6] This is the effect of the Tribunal's reasoning and approach in Judgment, §§84-88 & 90-91 **[CB/26-27]**.

that conventionally refer to biological sex are to be purged of those meanings and instead used only to refer to a person's gender identity. The hurt or offence which may be occasioned by failure to do this, in the Tribunal's view, constitutes a violation of 'trans rights' which is unacceptable in a democratic society.

9. As the columnist Janice Turner wrote after receiving the Orwell Prize for journalism in 2020, it is as though *'the specific language of female experience is unsayable'*[7]. As the words are purged of their biological meanings and reserved exclusively for gender identity, so the very idea that biological sex is real and distinguishable from gender identity becomes unexpressable and hence unacceptable. Because of the offence or distress it may cause, it is no longer acceptable to say that 'woman' means adult human female and that a transwoman is therefore not a woman, and consequently the underlying idea itself is, so says the Tribunal, beyond the pale.

10. The implications of the Tribunal's conclusions are profound. The Claimant is far from alone in having faced detriment, discipline or dismissal at work for expressing beliefs of this kind. If the Tribunal is right, then on this important subject of contemporary debate, expressing beliefs such as those held by the Claimant cannot be protected under the Equality Act 2010 ('EqA10'), even though they are undoubtedly serious, cogent beliefs about an important aspect of human life and behaviour. Many people will have to choose between staying out of the debate altogether or risking their jobs, as is described in the article by Janice Turner already mentioned:

> 'Almost every day I hear from *Guardian* journalists, principled, progressive writers, who are terrified of uttering what now counts as WrongSpeak. As the tram-tracks of left-wing discourse have narrowed… suggesting a humane balance must be reached between trans activist demands and women's rights, can result in vicious censure from colleagues, even demands that they are sacked. Questions imply criticism: disagreement is hate-speech.
>
> When journalists cannot address issues for fear of losing their jobs, a void is created in the public sphere. If moderate views are unprintable, they become unspeakable. Cancellation trickles down.
>
> ... [T]he Scottish children's author Gillian Philip, who defended JK Rowling, was sacked. Many others have written to me: feminist authors dumped by agents, who in turn are frightened for their own livelihoods. Female academics endure constant professional defamation, petitions to no-platform them, exclusion from publications, talks on subjects unrelated to gender aggressively picketed or cancelled.

[7] 'The woke left is the new Ministry of Truth', *The Times*, 11 July 2020
https://www.thetimes.co.uk/article/59a66a62-c2e8-11ea-ac82-8308736f5ec7?shareToken=b0b1803f7cb0a297277ee975d5dda9cb

> "I was disinvited from giving lectures on courses I've worked on for years," one says sadly, "including courses I've helped to write".
>
> A corporate lawyer was reported to her chief executive just for following feminist accounts on Twitter; a teacher was shopped to her head by a student intern who'd overheard her criticise the trans child charity Mermaids. A charity worker faced a complaint to her board because she'd "liked" a JK Rowling tweet: "For days, I was utterly terrified for my future. I shouldn't have to live like this because of the views I hold." A copywriter who queried why "woman" must be replaced with "womxn' but not man with "mxn", says speaking out "results in fewer chances to work on projects or limits promotion". These people are denied free speech for utterances that are within the law.'

11. It is not, of course, the task of the EAT in this appeal to decide whether the Claimant's beliefs are right or wrong, or to take sides in the on-going public debate about sex, gender and the law. The points made above about the contested use of language in that debate are not made in order to seek the EAT's endorsement of the Claimant's position but, on the contrary, to show how any attempt to enter into that arena and adjudicate upon the acceptable use of words and the ideas that they articulate has profound implications for the scope of democratic discourse. Courts and tribunals cannot, and should not attempt to, adjudicate upon the terms on which citizens may engage with an issue of contemporary controversy in a way which amounts to endorsement of one side in the debate. But that is, in effect, what the Tribunal did. It wrongly took it upon itself to determine the acceptable use of disputed language by reference to an incorrect standard (the causing of distress or offence), leading it to the astonishing conclusion that widely-held beliefs on one side of an important contemporary democratic debate are unsayable and so unworthy of respect.

12. Where the result is that important and widely-held beliefs about a matter of on-going cultural and political debate are deemed to be unsayable, something has plainly gone very wrong. The Tribunal's fundamental error lies in its descent into the arena and its failure to recognise *'[t]he pluralism indissociable from a democratic society'*[8], in respect of which the state has a *'duty of neutrality and impartiality'*[9].

13. Applying the correct standard, the only possible conclusion is that the Claimant's beliefs, and her use of the language of biological sex in order to articulate those beliefs, *are* within the scope of the pluralism that is fundamental to democratic discourse, and *are* worthy of respect in a democratic society. That is the short answer to this appeal. But given the extent of the Tribunal's

[8] Ibragimov & others v Russia, 1413/08 & 28621/11, 4 February 2019 (unreported), ECtHR, §88.
[9] Ibid., §90.

misconceptions about the proper scope of its role, and the wider implications of this case both for the particular debate about sex, gender and the law, and for the principles applicable to the protected characteristic of religion and belief under the EqA10 more generally, a full and careful analysis of the issues is warranted.

Factual background

14. Since the question of whether the Claimant's belief is a philosophical belief within EqA10, s10, was determined as a preliminary issue, there has been no final determination of the underlying facts (other than those relating to the Claimant's belief itself) (Judgment, §20 **[CB/8]**). Much of the detail is not, in any event, material to the issues in this appeal and it is sufficient to note the following aspects of the Claimant's pleaded case by way of background and context.

15. The First Respondent is a not-for-profit think tank which focuses on international development (Re-Amended Particulars of Claim ('PoC'), §2 **[CB/90]**). It is a subsidiary of the Second Respondent, which is based in the US. The Claimant is a researcher, writer and advisor in sustainable development. She was appointed visiting fellow of the First Respondent in November 2016 (renewed in 2017) and carried out paid work on specific projects (PoC, §§1 & 5-9 **[CB/90-91]**).

16. In July 2018, the government launched a consultation on proposed amendments to the GRA which would have made legal recognition of self-identified gender easier. The consultation document noted *'the need to engage with all perspectives'*, including *'women's groups who we know have expressed some concerns about the implications of our proposals'*[10].

17. The Claimant was concerned by the proposed amendments to the GRA. From around August 2018, prompted in part by the consultation, she began to express her beliefs about those issues and about sex and gender more generally on her personal Twitter account (PoC, §§12-13 **[CB/91]**).

18. It is her case (which will need to be determined in due course but much of which is confirmed by the Amended Grounds of Resistance ('GoR') **[CB/135-139]**) that, because of her beliefs and/or her legitimate and relevant direct expression of them on Twitter and internally (PoC, §§15-17 & 24 **[CB/92, 93]**): *'concerns'* were raised by her colleagues that they considered those statements of her beliefs to be *'exclusionary or offensive'*, which was making them *'feel uncomfortable'*, and *'key personnel'* of the Second Respondent became *'antagonised'* (PoC, §§14, 20 & 23 **[CB/92-**

[10] The nature of the consultation is described in paragraph 13 of the judgment of Julian Knowles J in R (Miller).

93]; GoR §§32-35 **[CB/138-139]**); she was subjected to an investigation without being given adequate opportunity to explain or defend herself (PoC, §§23-45 **[CB/93-96]**); a proposal for her employment, or alternatively consultancy work, on a particular project was withdrawn (PoC, §§18-20, 50, 55, & 62-65 **[CB/92-93, 97, 98, 99-100]**); and the Third Respondent (President of the Second Respondent) decided that her visiting fellowship should not be renewed (PoC, §§58-64 **[CB/98-100]**; GoR, §38 **[CB/139]**). She claims for direct discrimination because of her beliefs and/or harassment related to those beliefs (PoC, §§72-74A **[CB/101-102]**). She also claims for indirect belief and/or sex discrimination and victimisation (PoC, §§75-85A **[CB/102-104]**).

19. It is to be noted that the Respondents do not allege that the Claimant said or did anything that was directed at any particular employee or client of the First or Second Respondents: it is the mere statement of her beliefs that the Respondents considered *'offensive and exclusionary'* such that anything short of complete self-censorship of those beliefs by her was unacceptable to them (GoR, §35 **[CB/139]**). That is the position which the Tribunal effectively endorsed (Judgment, §91 **[CB/27-28]**).

The Claimant's beliefs

20. The Claimant's two witness statements **[SB/4-51]** contain a detailed statement of her beliefs. Although the Tribunal apparently sought to extract *'core aspects'* of the Claimant's belief (Judgment, §40 **[CB/14]**), it did not reject any part of her evidence as untruthful. It also made further findings about the Claimant's *'core'* beliefs (Judgment, §§41 & 77-91 **[CB/14, 24-28]**), again apparently seeking to distinguish between *'core'* and other aspects of her beliefs (Judgment §§78-81 **[CB/25]**). The Tribunal's attempt to draw that distinction is addressed below in respect of the first ground of appeal. For present purposes the important points are that (i) the Tribunal did not reject any part of the evidence in the Claimant's statements, and (ii) those statements, together with the Tribunal's further findings at Judgment, §§41 & 77-91 **[CB/14, 24-28]**, may therefore be taken as a full account of her beliefs.

21. The Claimant will rely on those statements and findings for their full and nuanced meaning and effect and the EAT is asked to read them carefully and in full. By way of highlight only, points of particular importance for this appeal are as follows:

    21.1. The Claimant believes that sex is a material reality that is an immutable biological fact which matters, which should not be conflated with gender or gender identity, and which it

is important to be able to talk about, in particular in the context of women's rights (C w/s, §§11, 14-32 **[SB/6, 6-10]**; Judgment §§41 & 77 **[CB/14, 24]**).

21.2. Despite the ease with which some[11] feel able to label the Claimant and those who share her beliefs as 'bigots' or 'transphobic'[12], those beliefs are not in fact primarily about trans people. Importantly, they do not entail denying that trans people should be protected from discrimination (indeed there are transgender people who share the Claimant's beliefs[13]). The Claimant's belief is that being transgender is a different category of thing from sex, and that both merit protection from discrimination (C w/s, §§13, 20-22, 42-48, 90-92 **[SB/6, 8, 14, 24-25]**; C supp w/s, §§3, 16-17 **[SB/44, 47-48]**).

21.3. Equally importantly, it is inherent in the very nature of the Claimant's belief that statements such as 'woman means adult human female' or 'transwomen are male' are (for her) statements of neutral fact not expressions of value judgment, still less of bigotry, transphobia or antipathy towards trans people (C w/s, §§50-51 **[SB/15]**; C supp w/s, §17 **[SB/48]**; see also the same point being accepted by Julian Knowles J in R (Miller), §§266-267 & 280-281). Only if one starts from a position of rejecting the Claimant's belief and embracing the opposing view can such statements conceivably be viewed as inherently prejudiced: in order to reach such a conclusion one first has to reject the idea that such statements are capable of being non-judgmental statements about material facts (not a comment on anyone's perception of their own gender identity). If one takes the Claimant's belief on its own terms, however, they are neutral statements of fact.

21.4. The Claimant believes that, as a biological characteristic which necessarily affects one's experiences and interactions with one's own body, with others and with the physical environment, sex matters and that it is therefore important in many contexts to be able to describe and talk about it (C w/s, §§28-32, 46-48, 61, 65, 67-72, 74, 82, 95-109 **[SB/9-11, 14, 17, 18-19, 20, 22, 26-31]**). And it is right that this does include a belief that it is relevant and important in some circumstances to be able to acknowledge, describe or refer to a particular person's sex, even if that differs from his or her gender identity and even if that may cause that individual to be upset (C w/s, §§29, 48, 93, 110-111, 115-117 **[SB/9-10, 14, 25, 31, 33]**; C supp w/s, §15 **[SB/47]**; Judgment, §§41, 88 & 90 **[CB/14, 27]**). These

[11] Including, in practice, the Tribunal, albeit expressed in less tendentious language.
[12] See C w/s, §§49, 90 & 105 **[SB/15, 24, 29]**; C supp w/s, §§17-20 **[SB/48-50]**; R (Miller), §§243-250, 266-267 & 280.
[13] Kristina Harrison w/s §§17-18 **[SB/56-57]**; C w/s, §91 **[SB/24-25]**.

aspects of the Claimant's belief are not peripheral, secondary or merely explanatory of its importance. The belief that (a) sex is a material reality and (b) it matters to be able to talk about how that material reality is relevant to someone's experience or treatment, are two sides of the same coin: it is because sex is a material reality that it affects people's experiences and treatment; and it is because sex objectively matters for people's experiences and treatment (even if their gender identity differs) that it can be seen to be a material reality. These are inseparable and essential aspects of the Claimant's beliefs.

21.5. However, the fact that it is indeed inherent in the Claimant's belief that it is important in some circumstances to be able to refer to sex as distinct from gender identity, does not mean that it is any part of her belief that trans people should not generally be treated in accordance with their wishes or that she will not generally do so, let alone that transexuals should not be respected or protected from discrimination, or that they should be abused, disparaged or harassed. On the contrary, as the Tribunal accepted, the Claimant will in most social and professional settings use a person's preferred pronouns and avoid drawing attention to their sex if this makes them uncomfortable: her reservation of the right to do otherwise is in circumstances where it is relevant to do so – e.g. where these very issues are being legitimately debated, or in sports or healthcare contexts, or where single sex provision and/or bodily privacy are concerned, or in order to ensure that children or vulnerable women are enabled to speak clearly and without inhibition about their own experiences and perceptions (C w/s, §§29, 47-48, 65, 93 **[SB/9-10, 14, 17-18, 25]**; C supp w/s, §18 **[SB/48]**; Judgment §§39.12-13, 40-41, 88 **[CB/14, 27]**).

Relevant law

ECHR Articles 9 and 10

22. It is useful to begin with the relevant principles under Articles 9 and 10 of the European Convention on Human Rights and Fundamental Freedoms ('ECHR') because:

22.1. As will be seen, the principles developed in the domestic authorities as to the meaning and scope of the protected characteristic of religion and belief under EqA10, s10 are derived from the Article 9 jurisprudence and need to be understood in that context; and

22.2. By virtue of sections 3 and 6 of the Human Rights Act 1998 ('HRA'), the EqA10 must (so far as possible) be read and given effect in a way which is compatible with the Claimant's

Convention rights: although there is no absolute rule that Convention rights should always be considered first, where they are relevant they must nevertheless be fully considered. In this particular case, it is appropriate to start with Articles 9 and 10 because they inform and shape the analysis under the EqA10 (cf Page v NHS Trust Development Authority [2021] EWCA Civ 255, §§37 & 74 *per* Underhill LJ).

Relevant provisions of the ECHR

23. Article 9 contains the right to freedom of thought, conscience and religion. It provides as follows:

> **Article 9**
>
> 1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
>
> 2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

24. Article 2 of the First Protocol, concerning the right to education, is also relevant. It provides that the state shall *'respect the right of parents to ensure… education and teaching in conformity with their own religious and philosophical convictions'*.

25. Article 10 contains the right to freedom of expression. It provides as follows:

> **Article 10**
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> 1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

26. Finally, Article 17 concerns the necessary limits on the scope of Convention rights to prevent the protection of acts which are themselves aimed at destroying those rights:

> **Article 17**
>
> Nothing in this Convention may be interpreted as implying for any state, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.

The foundations of freedom of thought and expression in democratic pluralism

27. The rights protected by Articles 9 and 10 are closely related[14]. Both concern the pluralism of ideas and their expression which is essential to a democratic society[15]. They complement and reinforce each-other: Article 9 protects not only the holding of a belief but also its manifestation and direct expression[16]; and under Article 10 a higher level of protection attaches to the expression of beliefs about important aspects of human life or behaviour that contribute to debate on matters of public interest[17].

28. Accordingly, where both Articles 9 and 10 are engaged but a case falls more naturally under one of them, the right approach is to examine the case under the more directly applicable Article but read in light of the other (see Ibragimov & others v Russia, 1413/08 & 28621/11, 4 February 2019 (unreported), ECtHR, §78[18]). This case falls most naturally to be considered under Article 9, but Article 10 is also engaged. Therefore, the right approach is to consider the case primarily under Article 9, read in light of Article 10 and its associated jurisprudence.

29. As has already been noted, both Articles 9 and 10 protect the pluralism that is essential in a democratic society. This proposition recurs frequently in the case-law as a truism, often with little explanation or elaboration. But since this appeal directly concerns the threshold for a belief to be worthy of respect in a democratic society, it is particularly important to have firmly in mind how and why the foundations of freedom of belief and expression are rooted in, and essential for,

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[14] Ibragimov & others, §78.
[15] Ibid., §§88 & 91; see also Handyside v UK (1979-80) 1 EHRR 737, §49; Metropolitan Church of Bessarabia & others v Moldova (2002) 35 EHRR 13, §114; Vajnai v Hungary (2010) 50 EHRR 44 (2008), §46; Eweida & others v UK (2013) 57 EHRR 8, §79.
[16] Metropolitan Church of Bessarabia, §114; Eweida & others v UK, §§80-82; Ibragimov & others, §89.
[17] Perinçek v Switzerland (2016) 63 EHRR 6, §§197, 230 & 241; Annen v Germany, 3690/10, 26 February 2016 (unreported), §§53 & 64.
[18] Cf also an equivalent approach adopted in relation to claims which engage both Articles 10 and 11, which are similarly closely related: Palomo-Sanchez v Spain [2011] IRLR 934, ECtHR, §§52 & 61.

democratic pluralism. Therefore, before turning to the specific principles to be derived from the authorities, the reasons why freedom of thought and expression is fundamental to democratic society merit restatement.

30. The ultimate philosophical foundations of the right to freedom of thought and expression are, of course, contested amongst philosophers, but for present purposes it is sufficient that the following widely-respected grounds are reflected in the jurisprudence, and may be regarded as underpinning the legal rights protected by Articles 9 and 10. Liberal democracy depends upon the twin pillars of (i) government 'by the people' through participatory processes such as political debates, campaigns and elections, which necessarily require that individuals should be able to inform themselves about and contribute to consideration of the issues to be resolved, the arguments for and against different solutions and the facts underlying those arguments[19]; and (ii) equal respect by the state for each citizen's capacity to develop his or her own identity and conception of the good life, together with state neutrality in respect of differing conceptions[20], because without the ability for citizens to develop, free from coercion, a diversity of beliefs, convictions and worldviews, effective development of and participation in democratic discourse is again compromised[21]:

> 'Where not the person's own character but the traditions or customs of other people are the rule of conduct, there is wanting one of the principal ingredients of human happiness, and quite the chief ingredient of individual and social progress.'[22]

31. Diversity or 'pluralism' of thought, belief and expression is thus foundational for liberal democracy and depends upon individuals' ability freely to develop and express competing or conflicting ideas and beliefs. This has certain implications for the nature and extent of those freedoms.

32. Thought and belief come first. The state must respect individual *'ethical independence'*, which requires that the law must remain neutral as between competing beliefs and should not coerce or restrict belief based on any assumption *'that one conception of how to live, of what makes a successful life, is superior to others'*[23]. Moreover, the boundaries of freedom of belief cannot be

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[19] R v Shayler [2003] 1 AC 247, HL, §21 *per* Lord Bingham.
[20] *Taking Rights Seriously*, R Dworkin (first published 1977), Bloomsbury (2013), Chapter 12: 'What Rights Do We Have?': 'The right to liberties'.
[21] *Law, State and Religion in the New Europe: Debates and Dilemmas*, Zucca & Ungureanu (eds), Cambridge University Press (2012), Chapter 12: 'Rights, religion and the public sphere: the European Court of Human Rights in search of a theory?', Julie Ringelheim.
[22] *On Liberty*, J S Mill (1859), Penguin Classics (1974), Chapter III: 'Of Individuality, as One of the Elements of Well-Being'.
[23] *Religion Without God*, R Dworkin, Harvard University Press (2013), Chapter 3: 'Religious Freedom': 'The New Religious Wars'.

drawn at the point where conflicting beliefs cause hurt or offence: it is human nature that we may find views with which we disagree distressing or offensive – indeed, the more fundamentally important to human life and behaviour the object of disagreement, the more deeply the disagreement is likely to be felt and so the greater the risk of offence. It is, therefore, inherent in the diversity and pluralism of a democratic society that people who hold opposing beliefs that are offensive or upsetting to each other must be able to coexist. In those circumstances, *'the role of the authorities… is not to remove the cause of tension by eliminating pluralism, but to ensure that the competing groups tolerate each other'*[24]. Or, as Baroness Hale put it in R (Williamson) v Secretary of State for Education and Employment [2005] 2 AC 246, HL, at §77:

> 'A free and plural society must expect to tolerate all sorts of views which many, even most, find completely unacceptable.'

33. Similarly, freedom to express our beliefs cannot be restricted to the inoffensive or anodyne. Democratic discourse depends upon the ability to challenge orthodoxy and advance controversial ideas and beliefs. It is a common repressive tool used by those in the ascendancy *'to stigmatize those who hold the contrary opinion as bad and immoral men. To calumny of this sort, those who hold any unpopular opinion are peculiarly exposed.'*[25] To restrict speech on grounds of offence or immorality is therefore particularly liable to inhibit the expression of unpopular, minority or unorthodox views, but in any case the taking of offence by one side does not negate the value of the offensive speech as a contribution to the debate – and may indeed underline it, since *'experience testifies that… offence is given whenever the attack is telling and powerful, and that every opponent who pushes them hard, and whom they find it difficult to answer, appears to them, if he shows any strong feeling on the subject, an intemperate opponent'*[26]. So, whichever side gives the offence, it is *'obvious that law and authority have no business with restraining either'*[27].

34. As Orwell put it, when castigating illiberalism and intolerance of dissent on the political left in the introduction to *Animal Farm* (1945)[28]:

> 'If liberty means anything at all, it means the right to tell people what they do not want to hear… [Today] it is the liberals who fear liberty and the intellectuals who want to do dirt on the intellect…'

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[24] Ibragimov & others, §90; Metropolitan Church of Bessarabia, §116.
[25] *On Liberty*, J S Mill, op. cit., Chapter II: 'On Liberty of Thought and Discussion'.
[26] Ibid.
[27] Ibid.
[28] Cited as a relevant underlying principle by Julian Knowles J in R (Miller), §1.

35. The same sentiment is reflected in the well-known dictum of Sedley LJ in Redmond-Bate v DPP [2000] HRLR 249, QB, §20[29]:

> 'Free speech includes not only the inoffensive but the irritating, the contentious, the eccentric, the heretical, the unwelcome and the provocative provided it does not tend to provoke violence. Freedom only to speak inoffensively is not worth having. What Speaker's Corner (where the law applies as fully as anywhere else) demonstrates is the tolerance which is both extended by the law to opinion of every kind and expected by the law in the conduct of those who disagree, even strongly, with what they hear. From the condemnation of Socrates to the persecution of modern writers and journalists, our world has seen too many examples of State control of unofficial ideas. A central purpose of the European Convention on Human Rights has been to set close limits to any such assumed power.'

36. By way of conclusion on the foundations and extent of freedom of thought, belief and expression, some of the key threads are drawn together by Professor George Letsas of UCL in the following passages from his essay *'Is there a right not to be offended in one's religious beliefs?'*[30]:

> 'It is each person's responsibility to explore and choose both which ethical ideas to pursue and how to pursue them. Just like the atheist is not expected to have found the value in a religious way of life, the believer is not expected to have found the humorous value in religious jokes. It follows, therefore, that the state cannot force people into discovering particular ethical ideas, let alone particular interpretations of those ethical ideas…
>
> Moreover, it makes no difference that offenses may be gratuitous and deliberate, making no contribution not only to a public debate but also to art. Insulting religious doctrines – through burning crosses, writing heretic books, publishing cartoons – is a way of expressing one's *own* conception of the good life that may well have value…
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> So if there is ethical value in expressing oneself in a way that offends others' beliefs, then banning those expressions amounts to prioritizing one valuable ethical ideal over another. It amounts to using collective force in order to force some individuals to abandon one ethically valuable practice… for the reason that others find it objectionable. And such use of collective force cannot be squared with the requirement that the liberal state treat people as free and equal agents, who are responsible for choosing their own ethical ideals.'

[29] And see to similar effect Handyside, §49.
[30] Chapter 10 of *Law, State and Religion in the New Europe*, op. cit.

Key principles

37. The following key principles, which are built upon and informed by the foundations outlined above, may be derived from the case law:

37.1. The state's obligation to secure the protection of the rights guaranteed by Articles 9 and 10 encompasses not only a duty not to interfere with those rights, but also a positive obligation in certain cases to protect against interference by private persons. In particular, the state's positive obligation is engaged where a private employer dismisses or discriminates against an employee for exercising the rights protected by Articles 9 and 10 (Palomo-Sanchez & others v Spain [2011] IRLR 944, ECtHR, §§59-62; Redfearn v UK [2013] IRLR 51, ECtHR, §§42-43; Eweida & others v UK (2013) 57 EHRR 8, §§83-84).

37.2. Protection under Article 9 for one's internal thoughts and beliefs (the *'forum internum'*) is absolute and unqualified: the state has no business whatsoever controlling or restricting what people privately think or believe and *'[e]veryone… is entitled to hold whatever beliefs he wishes'* (R (Williamson) v Secretary of State for Education and Employment [2005] 2 AC 246, HL, §23 *per* Lord Nicholls; §76 *per* Baroness Hale; and see also: Eweida & others v UK, §80; Page, §42 *per* Underhill LJ).

37.3. Article 9 also encompasses freedom to express and manifest one's belief. This does not include every act that happens to be motivated or influenced by the belief, but does include both (i) direct statements or expressions of the belief; and (ii) manifestation of the belief through acts of worship, teaching, practice or observance which are *'intimately linked'* to the belief (Arrowsmith v UK (1981) 3 EHRR 218, §§70-71; Van den Dungen v Netherlands, 22828/93, 22 February 1995 (unreported), §1; Metropolitan Church of Bessarabia, §114; Eweida & others v UK, §82). Moreover, even where an act or expression that is motivated or influenced by the belief does not strictly fall within the scope of Article 9, it may nevertheless be protected by Article 10 (see e.g. Arrowsmith, §78; Van den Dungen, §2).

37.4. The right to express and manifest one's beliefs under both Articles 9 and 10 also encompasses a right not to be obliged to express or manifest beliefs that one does not hold (Lee v Ashers Baking Co Ltd & others [2020] AC 413, SC, §§50-52 *per* Baroness Hale).

37.5. Unlike the unqualified right privately to hold any belief, the right to express and manifest one's belief (including the right not to be obliged to manifest a belief one does not hold) is not absolute. There are two distinct ways in which the scope of that right is limited and it is important to distinguish between them because, as will be seen, one of the ways in which the Tribunal erred was by failing to do so.

37.6. The **first** way in which the right to express or manifest a belief is limited is by what may be described as 'threshold criteria' that need to be met in order to qualify for protection at all. In the case of the right to express or manifest a belief under Article 9, the threshold criteria are that the belief (i) should relate to matters that are more than merely trivial and which possess a sufficient degree of seriousness and importance; (ii) should attain a basic level of cogency and coherence in the sense of being intelligible and capable of being understood; and (iii) should be worthy of respect in a democratic society and not incompatible with basic standards of human dignity (Campbell and Cosans v UK (1982) 4 EHRR 293, §36; R (Williamson), §§22-23 *per* Lord Nicholls; §64 *per* Lord Walker; §76 *per* Baroness Hale). Overall, these criteria must be understood and applied as no more than *'modest threshold requirements'* which *'should not be set at a level which would deprive minority beliefs of the protection they are intended to have under the Convention'* (R (Williamson) [2003] QB 1300, CA, §258 *per* Arden LJ; HL, §§23-24 *per* Lord Nicholls).

37.7. The last of those criteria – that the belief should be worthy of respect in a democratic society and not incompatible with basic standards of human dignity – derives from the judgment of the European Court of Human Rights ('ECtHR') in Campbell and Cosans, which concerned Article 2 of the First Protocol, though it is clear that the same threshold criteria apply both to that provision and Article 9 (Campbell and Cosans, §36; R (Williamson), §24 *per* Lord Nicholls; §76 *per* Baroness Hale). That judgment makes it clear (at §36) that the criterion corresponds with the threshold set by Article 17 for excluding actions that are themselves aimed at destroying the rights protected by the ECHR. A point which merits emphasis here is that this threshold applies equally to Article 10 (R (Miller) v The College of Policing [2020] 4 All ER 31, Admin, §226 *per* Julian Knowles J): if a belief is 'not worthy of respect in a democratic society' then any statement, expression or manifestation of that belief will fall wholly outside the protection of both Articles 9 and 10.

37.8. The ECtHR has repeatedly emphasised that the general purpose of Article 17 is *'to prevent totalitarian groups from exploiting in their own interests the principles enunciated by the Convention'* and that it is therefore only applicable *'on an exceptional basis and in extreme cases'* where something equivalent to *'Nazi-like politics'* is at issue: it applies to the *'gravest forms of "hate speech"'* which seek *'to stir up hatred or violence'* or are *'aimed at the destruction of the rights and freedoms laid down in [the Convention]'* (Vajnai v Hungary (2010) 50 EHRR 44 (2008), §§21-26; Ibragimov & others, §§62-63; Lilliendahl v Iceland, 29297/18, 12 May 2020 (unreported), §§24-26; and see also *Belief vs. Action in Ladele, Ngole and Forstater*, R Wintemute, ILJ 50(1) 104, March 2021 at 113-115). It is to be emphasised that the *'destruction'* of another Convention right is a quite different concept from *interference* with another Convention right, which may, upon balancing the competing rights, justify imposing some restriction (as discussed further below). At this preliminary stage, Article 17 and the test for whether a belief is so beyond the pale that it is not worthy of respect in a democratic society impose a *'high threshold'* that will not be crossed even where the actions in question are *'highly prejudicial'* but fall short of promoting totalitarianism or its equivalent: the protection of Articles 9 and 10 is therefore not wholly denied even to *'"less grave" forms of "hate speech"'* which *'promote intolerance and detestation'* of specific groups (e.g. strongly expressed views that gay people are sinful and 'deviant') (Lilliendahl, §§26 & 34-38).

37.9. The threshold criteria apply equally to religious and non-religious beliefs (R (Williamson), HL, §§75-76 *per* Baroness Hale). In assessing whether those criteria are met, the court or tribunal must take the individual's beliefs as it finds them and not seek to rationalise them for itself: it is *'emphatically… not for the court to embark on an inquiry into the asserted belief and judge its "validity" by some objective standard'* (R (Williamson), §22 *per* Lord Nicholls). Beyond those exceptional and extreme cases which fall within Article 17, courts and tribunals have no business assessing the 'legitimacy' of beliefs or the way they are expressed, or judging between competing beliefs or moralities. That is so even where the beliefs and/or the way they are expressed may be viewed as offensive or unacceptable by a majority of people: democratic pluralism requires that minority beliefs and those which are challenging, disturbing or offensive are protected just as much as those which are mainstream, orthodox or anodyne. Courts and tribunals must adopt a position of neutrality as between competing conceptions of human life and behaviour (Metropolitan Church of Bessarabia, §§116-117; R (Williamson), CA, §§257-8 *per* Arden LJ; HL, §22 *per* Lord

Nicholls, §§76-77 *per* Baroness Hale; Eweida & others v UK, §81; Ibragimov & others, §90).

37.10. The **second** way in which the right to express or manifest a belief is limited is that restrictions that are prescribed by law may be justified if they are necessary in a democratic society to meet one of the objectives identified in Articles 9(2) and/or 10(2). Restrictions of this kind do not involve entirely excluding the belief or its manifestation or expression from protection, but instead require an *'intense focus'* on the particular circumstances in which the actual manifestation or expression of the belief takes place, in order to assess whether the specific restriction is proportionate, having regard to the relative importance of the legitimate aim(s) pursued and the value of the expression or manifestation of belief in light of the particular manner and context of its expression (Vajnai, §53; Trimingham v Associated Newspapers Ltd [2012] 4 All ER 717, QB, §55 *per* Tugendhat J; Perinçek v Switzerland (2016) 63 EHRR 6, §§207-8; Dulgheriu & another v London Borough of Ealing [2020] 1 WLR 609, CA, §91 *per* Sir Terence Etherton MR, King & Nicola Davis LJJ; R (Miller), §§240 & 275 *per* Julian Knowles J; Page v NHSTDA, §§59 & 101 *per* Underhill LJ).

37.11. The over-arching test to be applied at this stage of the analysis is the well-known four-part[31] test summarised in Bank Mellat v HM Treasury (No 2) [2014] AC 700, SC, by Lord Sumption at §20 and Lord Reed at §126: the court or tribunal must conduct *'an exacting analysis of the factual case advanced in defence of the [restrictive] measure'* in order to determine: (i) whether its objective is sufficiently important to justify the limitation of a fundamental right; (ii) whether it is rationally connected to the objective; (iii) whether a less intrusive measure could have been used; and (iv) whether, having regard to these matters and to the severity of the consequences, a fair balance has been struck between the rights of the individual and the interests of the community.

37.12. Whereas, at the international level, the ECtHR affords member states a 'margin of appreciation' in the application of this test, that doctrine has *'no application'* when domestic courts and tribunals give effect to Convention rights in domestic law pursuant to the HRA: constitutional principles concerning the separation of powers may mean that, when assessing a legislative measure or decision of an elected official, courts and tribunals

[31] The authorities recognise that the four elements of the test, whilst logically separate, inevitably overlap because the same facts are likely to be relevant to more than one of them.

will defer, on democratic grounds, to the considered opinion of the elected body or person and allow that body or person a *'measure of latitude'*, but otherwise *'a national court must confront the interference with a Convention right and decide whether the justification claimed for it has been made out'* (R (Steinfeld & another) v Secretary of State for International Development [2020] AC 1, SC, §§27-30 *per* Lord Kerr). In a case, such as the present, in which the Tribunal is required to give effect to the UK's positive obligations to protect the Claimant's rights under Articles 9 and 10 against the actions of a private employer, no question of democratic deference arises: once this stage of the analysis is reached, the Tribunal must therefore *'confront the interference'* and determine itself whether the restrictive effect of the employer's actions is justified, applying the requisite *'intense focus'* to the particular circumstances.

37.13. Although each case will turn on its facts, the jurisprudence at both ECtHR and domestic levels has established certain parameters and principles. For the purposes of this case, the following five (non-exhaustive) propositions are of particular relevance:

(a) Since Articles 9 and 10 together protect not only ideas and statements that are inoffensive or a matter of indifference but also those that *'offend, shock or disturb'*, it will be difficult to justify any restriction on an expression or manifestation of belief that is *merely* offensive, disturbing or shocking to others (Handyside v UK (1979-80) 1 EHRR 737, §49*;* Redmond-Bate v DPP [2000] HRLR 349, QB, §20 *per* Sedley LJ; Livingstone v The Adjudication Panel for England [2006] HRLR 45, Admin, §35 *per* Collins J; Vajnai, §46). Again, where conflicting beliefs and their expression/manifestation are a source of tension and cause hurt or offence to their respective adherents, the role of the authorities (including courts and tribunals) is to remain neutral and *'not to remove the cause of the tensions by doing away with pluralism, but to ensure that groups opposed to one another tolerate each other'* (Metropolitan Church of Bessarabia, §116; Ibragimov & others, §90).

(b) Moreover, where the particular expression or manifestation contributes to debate on a question of political and/or public interest, there will be *'little scope'* for restricting it: *'heightened protection'* and a higher threshold of tolerance are required for ideas that contribute to such debates, since it is *'in the nature of political speech to be controversial and often virulent'* or *'intransigent'* (Vajnai, §§47, 51 & 57; Perinçek,

§§197, 230-231 & 239-241; Annen v Germany, 3690/10, 26 February 2016 (unreported), §§53 & 64; R (Miller), §§252, 276 & 286 *per* Julian Knowles J):

> '… [A] legal system which applies restrictions on human rights in order to satisfy the dictates of public feeling – real or imaginary – cannot be regarded as meeting the pressing social needs recognised in a democratic society, since that society must remain reasonable in its judgment. To hold otherwise would mean that freedom of speech and opinion is subjected to a heckler's veto.' (Vajnai, §57)

(c) It will, therefore, be particularly difficult, in a case involving the expression or manifestation of a belief that contributes to debate on a political or other matter of public interest, to justify any restriction based on a *'legal rule formulated in general terms'*: in such a case, the need to examine the justification for any restriction by reference to the specific context of the particular expression or manifestation becomes even more important (Perinçek, §275; Ibragimov & others, §98; R (Ngole) v University of Sheffield [2019] EWCA Civ 1127; [2019] All ER (D) 20 (Jul), §§5(1) & 123-129 *per* Irwin & Haddon-Cave LJJ & Sir Jack Beatson).

(d) Generally, in such a case, a restriction is likely to be justified only if the specific expression or manifestation, fairly construed and examined in its immediate or wider context, could be seen as either (i) a direct or indirect call for violence or as justification of violence, or (ii) an attack on a particular person or group which expresses such *'deep-seated and irrational hatred'* and/or such *'intolerance and detestation'* that it may be regarded as a form of *'hate speech'* (Perinçek, §§204-8; Ibragimov & others, §94; R (Ngole), §129 *per* Irwin & Haddon-Cave LJJ & Sir Jack Beatson; R (Miller), §226 *per* Julian Knowles J; Lilliendahl, §§35-39).

(e) Finally, in the particular context of the state's positive obligation to protect the rights guaranteed by Articles 9 and 10 by preventing private employers from dismissing or disciplining employees for expressing or manifesting their beliefs, such action by a private employer will be regarded as representing a *'very severe measure'*. It will not, therefore, generally be justified by the mere expression or manifestation of beliefs on social media or elsewhere, but will generally only be justified where the employee's beliefs lead him or her to act in a way that actually discriminates against the employer's customers or other employees, or that has some other clear impact on the actual performance, safety or effectiveness of his or her work (Vogt v Germany

(1996) 21 EHRR 205, §§60-61; Redfearn, §§45-47 & 56-57; Smith v Trafford Housing Trust [2013] IRLR 86, Ch, §§82-85 *per* Briggs J; Eweida & others, §§94-95, 99, 102-106 & 107-109; Ngole §§129-130 & 134-136 *per* Irwin & Haddon-Cave LJJ & Sir Jack Beatson; Page v NHSTDA, §§54-55, 59-62 & 78 *per* Underhill LJ; and see generally *Belief vs. Action in Ladele, Ngole and Forstater*, R Wintemute, op. cit.).

Religion/belief discrimination under the EqA10

38. The framework of the EqA10 obviously differs from that which applies in respect of ECHR, Articles 9 and 10 but, as has already been noted, the former must be construed (so far as possible) consistently with the latter, and the relevant protections must be intended to be co-extensive (Page v NHSTDA, §§37 & 67 *per* Underhill LJ). The Court of Appeal in Page provides some indication of how the two frameworks fit together in order to achieve the necessary consistency. It is submitted that the interrelationship, which is important for the issues in this appeal, is as follows.

39. First, whether a particular belief is protected under the EqA10 at all depends on whether it falls within the definition of the protected characteristic of 'religion or belief' in s10, which provides as follows:

> **10. Religion or belief**
>
> (1) Religion means any religion and a reference to religion includes a reference to a lack of religion.
>
> (2) Belief means any religious or philosophical belief and a reference to belief includes a reference to a lack of belief.
>
> (3) In relation to the protected characteristic of religion or belief –
>
> (a) a reference to a person who has a particular protected characteristic is a reference to a person of a particular religion or belief;
>
> (b) a reference to persons who share a protected characteristic is a reference to persons who are of the same religion or belief.

40. To fall within s10, a belief must therefore be a *'religious or philosophical belief'*. In order to determine the meaning and limits of that definition, in Grainger plc & others v Nicholson [2010] ICR 360, EAT, Burton J reviewed the domestic cases concerning s10 as well as the jurisprudence

relating to ECHR, Article 9 and Article 2 of the First Protocol – including in particular Campbell and Cosans and R (Williamson) – and extracted the following criteria (at §24):

(i) The belief must be genuinely held.

(ii) It must be a belief and not an opinion or viewpoint based on the present state of information available.

(iii) It must be a belief as to a weighty and substantial aspect of human life and behaviour.

(iv) It must attain a certain level of cogency, seriousness, cohesion and importance.

(v) It must be worthy of respect in a democratic society, be not incompatible with human dignity and not conflict with the fundamental rights of others.

41. These criteria should, of course, be treated as guidance to be understood and applied in light of the underlying and developing jurisprudence, and not as statute (Gray v Mulberry Co (Design) Ltd [2019] ICR 175, EAT, §20 *per* Choudhury J).

42. It will be apparent that criteria (iii), (iv) and (v) correspond with the 'threshold criteria' that constitute the **first** type of limitation on the right to express or manifest a belief under Article 9, considered at sub-paragraphs 37.6-37.9 above. They should, therefore, be understood and applied consistently with the jurisprudence applicable to those threshold criteria. This is confirmed in Harron v Chief Constable of Dorset Police [2016] IRLR 481, EAT, §§32-35 *per* Langstaff J, in which it is also emphasised (consistently with the ECHR jurisprudence) that the bar must not be set too high (and see also Gray, §§27-28 *per* Choudhury J).

43. At this stage of the analysis under the EqA10, the question is whether the particular belief meets the threshold criteria in general, not whether some specific expression or manifestation of that belief is protected. This is a necessary consequence of the structure of the EqA10, which is built around the concept of 'protected characteristics', being characteristics which a person possesses that are important to his or her identity and/or ethical autonomy, rather than things that he or she does.

44. This is also inherent in the language of s10 itself. The definition is focused on the nature (*'religious or philosophical'*) of the belief in general and does not depend on any particular expression or manifestation of that belief. Similarly, under subsection 10(3), a person has the protected

characteristic of religion or belief if she is *'of'* that religion or belief, not because she does anything in respect of it.

45. This does not mean that the ways in which a claimant expresses or manifests the belief are irrelevant at this stage of the analysis under the EqA10. The threshold criteria have been developed in the Article 9 jurisprudence in respect of the (qualified) right to express or manifest a belief, rather than the absolute right to hold any belief[32]. Therefore, it is right that their application under the EqA10, s10, should take account of the ways in which the claimant expresses or manifests the belief in question (see Gray, §§29-31 *per* Choudhury J). But care is needed to ensure that they are taken into account for the purposes of the correct test under the EqA10, s10 – i.e. whether the belief meets the threshold criteria in general, rather than whether a particular expression or manifestation is protected.

46. Thus, for example, evidence that the ways in which a claimant manifests his or her belief are generally inconsistent or incoherent may be relevant to an assessment of whether in general it attains the requisite (low) level of cogency and cohesion (cf Gray, §§28 & 34 *per* Choudhury J). Similarly, evidence that the ways in which the claimant actually expresses or manifests his or her belief always reach the threshold of being not worthy of respect in a democratic society may support a conclusion that the nature of the belief is such that any expression or manifestation of it will inevitably reach that (high) threshold. The important point is that, at this stage of the analysis, under EqA10, s10, such evidence of manifestation or expression must be used for the purpose of assessing whether the belief meets the threshold criteria in general.

[32] There are no threshold criteria which apply to the absolute right to hold any belief under Article 9 (see sub-paragraph 37.2 above). This absolute right is not, therefore, directly replicated in the EqA10 as interpreted in Grainger because any belief must fall within s10 in order to be protected. In practice, however, this is unlikely to matter because, in reality, any claim under the EqA10 is likely (at least in the overwhelming majority of cases) to relate to a belief that has been expressed or manifested in some way. An employer will not know about an entirely internal, un-expressed belief in order to directly discriminate against or harass an employee because of that belief. Similarly, any claim for indirect religion/belief discrimination will, in practice, depend on there being *some* interaction between the manifestation or expression of the belief and the employer's actions or policies. It is, however, conceivable that there may be cases in which it might be necessary to grapple with whether and how EqA10, s10 could be applied so as to protect the absolute right to hold any belief, even one which falls foul of the Grainger criteria. For example, the point might perhaps arise in a case involving direct discrimination based on pure association or perception and not on any actual expression or manifestation of the belief; or with the increasing power of data analysis using artificial intelligence to 'read minds' the point may become more important, particularly as regards the provision of goods and services. Nevertheless, the Claimant's position is that the issue does not arise in this case and for the purposes of this appeal she does not, therefore, seek to challenge the applicability of the Grainger criteria, having regard in particular to their authoritative status at EAT level. However, should this matter proceed further on appeal, the Claimant reserves the right to challenge the correctness of the fifth Grainger criterion should the point become material.

47. Within the structure of the EqA10, protection for particular expressions and manifestations of a belief, and the limits of that protection, then fall to be addressed by reference to the elements of liability under the various causes of action, as follows:

47.1. In a claim for **direct discrimination** under EqA10, s13, as Underhill LJ explains in Page v NHSTDA (at §§68-75), a distinction may be drawn that is analogous to that drawn in victimisation and unlawful detriment claims[33] between (i) action taken by the employer because of the belief and/or its (protected) expression or manifestation[34], and (ii) action taken because of the particular way in which the belief is expressed or manifested which justifies that action and is therefore properly *'separable'* from the belief. Although by a different route, applying that distinction is capable of replicating the scope of protection under ECHR, Articles 9 and 10 – and is therefore an approach that must be adopted pursuant to HRA, ss3 and 6. Thus, where the employer does the act in question because of the direct expression of the belief and/or some manifestation that is intimately linked with it, in circumstances where the interference is not justified under Article 9 (read in light of Article 10), then the expression/manifestation will be treated as not properly 'separable' from the belief and the employer's act will constitute unlawful direct discrimination. Conversely, any of the following will mean that the expression/manifestation is properly 'separable' and so an act done because of that particular expression/manifestation will not constitute unlawful direct discrimination:

(a) If the expression/manifestation is neither a direct expression of the belief (a description that is to be understood broadly in light of Article 10[35]) nor a manifestation that is *'intimately linked'* to the belief, then it will be both outside the protection of Article 9

[33] See Page v Lord Chancellor & another [2021] EWCA Civ 254, §§54-57 *per* Underhill LJ; Morris v Metrolink Ratp Dev Ltd [2019] ICR 90, CA, §§14-21 *per* Underhill LJ.

[34] At §74, Underhill LJ equates this protection with the *'absolute right to hold a religious or other belief'*, but that cannot be quite right because (a) it is clear from the way in which he articulates the distinction in §68 that in fact the category of non-separable acts includes protected manifestations of the belief; and (b) as noted in footnote 32 above, the absolute right to hold any belief is not subject to any threshold criteria at all, whereas the structure of the EqA10 clearly requires a belief to fall within s10 before any protection can attach. Therefore, the distinction which is drawn by Underhill in the passage at §§68-73 of his judgment in Page v NHSTDA is better understood as one between, on the one hand, the belief and/or any expression/manifestation that is protected under Article 9 and, on the other, those expressions/manifestations which are not protected for one or more of the reasons identified here.

[35] See sub-paragraph 37.3 above and cf Page v NHSTDA, §§50-51 *per* Underhill LJ. In light of the state's positive obligation to secure the protection of rights under both Articles 9 and 10, it may be appropriate to adopt a more inclusive approach under the EqA10 in this regard than that which is applied by the ECtHR in respect of Article 9 alone. Precisely how those parameters are to be drawn does not, however, arise for determination in this appeal – at least on the Claimant's case, since on her case this stage of the analysis has not yet been reached.

(read in light of Article 10) and 'separable' for the purposes of a direct discrimination claim under EqA10, s13 (see sub-paragraph 37.3 above)[36];

(b) If the particular expression/manifestation fails to meet the threshold criteria for protection under Articles 9 and 10 (even though, *ex hypothesi*, the belief does meet those criteria in general), then it will be both outside the protection of Articles 9 and 10 and 'separable' for the purposes of a direct discrimination claim under EqA10, s13; and

(c) Similarly, if in the particular circumstances the employer's action represents a justified restriction on the particular expression/manifestation, then it will not constitute a breach of Articles 9 and/or 10 and the particular expression/manifestation will again be properly 'separable' for the purposes of a direct discrimination claim under EqA10, s13. It is, therefore, at *this* stage of the analysis under EqA10 that the **second** set of limits under ECHR, Articles 9(2) and 10(2) becomes relevant. This is inherent in the very nature of those limits, since they necessarily require an *'intense focus'* on the particular circumstances (see sub-paragraph 37.10 above) and so can only be applied by reference to both the particular expression/manifestation and the particular restriction resulting from the employer's actions. The principles set out in sub-paragraphs 37.10-37.13 above will apply at this stage for the purposes of assessing whether the employer's action constitutes a justified restriction on the particular expression/manifestation.

47.2. In a claim for **harassment** related to religion/belief under EqA10, s26, a similar approach will apply: where action is taken in response to something that is properly separable from the belief in one of the senses described above, then it will not be 'related to' the belief[37] (and depending on the circumstances that may also mean that the action cannot be regarded, objectively, as having the proscribed effect).

47.3. Finally, in a claim for **indirect discrimination** under EqA10, s19:

[36] To the extent that §§31-33 & 41 of the judgment of Choudhury J in Gray might suggest that the question of whether a particular manifestation is sufficiently linked to the belief is one that arises under EqA10, s10, rather than when considering the elements of liability under the relevant cause of action, it is respectfully submitted that in light of the judgment of Underhill LJ in Page v NHSTDA and for the reasons set out in the foregoing analysis, that proposition ought now to be reconsidered. The underlying point made in those paragraphs remains a good one – namely that something which is neither a direct expression of the belief nor a manifestation that is *'intimately linked'* to it, but which is merely motivated by the belief, will not be protected. But in light of Page v NHSTDA and the analysis set out above, the stage within the framework of the EqA10 at which the point becomes relevant is at this stage (when the applying the elements of the particular cause of action) rather than under s10.

[37] That test must now be regarded as essentially the same (at least in most cases) as the 'because of' test that applies in respect of direct discrimination: Unite the Union v Nailard [2019] ICR 28, CA, §§91-93 *per* Underhill LJ.

(a) Where the particular disadvantage for the purposes of subsection 19(2)(b) is said to arise from the interaction between the relevant PCP and some action motivated or influenced by the belief that, on proper analysis, does not constitute either direct expression of the belief or a manifestation that is *'intimately linked'* with it (see sub-paragraphs 37.3 and 47.1 above), then it will be both outside the protection of Article 9, and will not be regarded as putting persons who share that belief generally at a particular disadvantage for the purposes of that subsection; and

(b) In any event, the test for justification of a restriction under ECHR, Articles 9 and 10 (as set out in sub-paragraphs 37.10-37.13 above) is easily replicated in the test for justification under subsection 19(2)(d). Again, therefore, it is at this stage of the analysis that the **second** set of limits under ECHR, Articles 9 and 10 is relevant.

48. Overall, therefore, although by a different route which reflects the different structure and concepts of the EqA10 compared with ECHR, Articles 9 and 10, the approach set out above provides a coherent basis for interpreting and applying the EqA10 in a way that achieves the requisite consistency.

Summary of the correct approach to religion/belief discrimination under the EqA10

49. In summary:

49.1. In order to assess whether a belief falls within EqA10, s10 by reference to the Grainger criteria, then for the purposes of criteria (iii), (iv) and (v):

(a) Those criteria correspond to the threshold criteria for protection under ECHR, Article 9, and must be understood and applied consistently with those threshold criteria and the associated jurisprudence, as set out in sub-paragraphs 37.6-37.9 above;

(b) The question is whether the belief meets those criteria in general, having regard to the nature of the belief itself and the way in which the claimant generally expresses and/or manifests it;

(c) In relation to the particular criterion of whether the belief is worthy of respect in a democratic society (criterion (v)), the threshold is exceptionally high, equating to the promotion of totalitarianism or its equivalent (as set out in sub-paragraphs 37.7-37.8

above), and the question is whether any expression or manifestation of that belief would inevitably reach that threshold;

(d) It is not relevant at this stage to consider the extent to which any particular expression/manifestation of the belief may involve some lesser interference with the rights of others, or to engage in any balancing exercise between the claimant's right to manifest/express the belief and the rights of others: that exercise only becomes relevant in the context of assessing whether the particular actions of the employer about which complaint is made constitute a justified restriction on the particular manifestation/expression in question.

49.2. If the belief meets the threshold criteria for protection and falls within EqA10, s10, then whether the particular actions of the employer constitute a justified restriction on the particular manifestation/expression of the belief for the purposes of ECHR, Articles 9 and 10 will be relevant when determining whether the elements of liability are established in respect of the relevant cause(s) of action. In particular:

(a) If the restriction is justified for the purposes of Articles 9 and 10, then the particular expression/manifestation will be properly 'separable' from the belief, such that action by the employer because of that expression/manifestation will not constitute direct discrimination or harassment under EqA10, ss13 and 26, and justification will also be established for the purposes of any indirect discrimination claim under s19(2)(d);

(b) Conversely, if the restriction is not justified for the purposes of Articles 9 and 10, then the particular expression/manifestation will not be properly 'separable' from the belief and action taken by the employer because of it will constitute unlawful direct discrimination and/or harassment, and similarly any PCP which places the claimant and others of the same belief at a particular disadvantage will not be justified and will constitute unlawful indirect discrimination; and

(c) In conducting any balancing exercise for those purposes, it is essential to apply an *'intense focus'* to the particular circumstances concerning the actual manifestation/expression, the actual interference and the relevant context, and to afford the requisite 'strong' protection and high degree of tolerance to the expression/manifestation of beliefs on matters of political or other public interest, in accordance with the principles set out in sub-paragraphs 37.10-37.13 above.

Sex, gender and the law

50. It will be apparent that, if the principles set out above are right, the law as to sex and gender actually has little part to play in this appeal, since the point in issue does not engage any balancing of rights and, on any view, whether the Claimant agrees or disagrees with the current law is not the test. Nevertheless, since it featured prominently in the Tribunal's decision and since the points may be relevant if the EAT were to take a different view of the principles considered above, a summary of the main aspects of the law relating to sex and gender is necessary.

51. The Claimant relies on the summary set out below as supporting three key propositions. They are:

    51.1. The definition and treatment of sex and gender under the law raises difficult questions that are not capable of easy resolution and which are generally matters for democratic decision-making informed by the full range of belief and opinion in society, rather than determination by the courts: this is quintessentially an area in which strong protection for a plurality of beliefs is required.

    51.2. As it happens, the Claimant's belief is in fact on all fours with English law, in that in English law (i) sex is a biological characteristic fixed at birth; and (ii) gender identity is an important aspect of a person's identity that is worthy of protection, but this is different from sex such that its recognition in law requires careful definition and has limits, in particular in order to accommodate the rights of others (see also generally in support of this proposition: *The Forstater Employment Tribunal judgment: a critical appraisal in light of Miller*, UK Labour Law Blog, 19 February 2020, K Monaghan).

    51.3. The law does not require private individuals always to address or refer to trans people (either generally or those with a Gender Recognition Certificate) in accordance with their gender identity, and not doing so will not, by itself, constitute harassment, discrimination or any other form of unlawful conduct – let alone 'hate speech' in the sense used in the ECtHR jurisprudence (see sub-paragraphs 37.8 and 37.13(d) above; and Lilliendahl, §§33-36).

52. There are two areas to consider: (1) the relationship between sex and gender reassignment as a matter of legal definition and recognition, including the meaning and effect of the GRA; and (2) the law relating to the treatment of trans people by private individuals and the circumstances in which such treatment may be unlawful.

53. As to the relationship between sex and gender as a matter of legal definition and recognition, the law is, in summary, as follows:

53.1. The underlying position at common law is that sex is biological and is fixed at birth based on chromosomal and physical characteristics; whereas transsexual gender identity is a different category of thing (Corbett v Corbett [1971] P 83, 104D-G, 106B-D & 107A *per* Ormrod J; Bellinger v Bellinger [2003] 2 AC 467, HL, §§11-12 & 36-37 *per* Lord Nicholls, §§56-57 & 62 *per* Lord Hope; Chief Constable of West Yorkshire Police v A (No 2) [2005] 1 AC 51, HL, §3 *per* Lord Bingham, §19 *per* Lord Rodger, §30 *per* Baroness Hale).

53.2. At the same time, gender identity is central to any individual's identity and private life under ECHR, Article 8 and a person may suffer acute distress if their gender identity is not legally recognised (Goodwin v UK [2002] IRLR 664, ECtHR, §§72 & 90; Bellinger, §§34-35 *per* Lord Nicholls; R (Elan-Cane) v Secretary of State for the Home Department [2020] QB 929, CA, §§46-47 *per* King LJ[38]; §123 per Irwin LJ; R (McConnell) v Registrar General for England and Wales [2020] 3 WLR 683, CA, §55 *per* Lord Burnett CJ, King & Singh LJJ).

53.3. Nevertheless, whilst gender reassignment treatment and surgery may give someone many of the physical characteristics of the opposite sex, medical science *'is unable, in its present state to complete the process. It cannot turn a man into a woman or turn a woman into a man'* (Bellinger, §57 *per* Lord Hope). Thus, biological sex characteristics remain a material reality which affect how a person is perceived by and interacts with others and society at large, such that the relationship between gender identity and biological sex for the purposes of legal definition and recognition requires a careful balancing of relevant interests: *'[s]elf definition is not acceptable'* (Bellinger, §§28-32 *per* Lord Nicholls; Elan-Cane, §§49-54, 70-71 & 105-107 *per* King LJ; McConnell, §§55-58 *per* Lord Burnett CJ, King & Singh LJJ).

53.4. In particular,

(a) the conditions under which a person claiming legal recognition of their gender identity may establish that identity; and

(b) the precise purposes for which any such legal recognition may apply, and its limits

[38] There is an outstanding appeal to the Supreme Court in Elan-Cane.

raise difficult questions which require resolution through democratic, not litigation, processes: these are *'not easy questions'* which plumb *'deep waters'* (Bellinger, §§28-49 *per* Lord Nicholls, §§74 & 76 *per* Lord Hobhouse; Goodwin, §103; KB v NHS Pensions Agency & another [2004] ICR 781, CJEU, §35; Elan-Cane, §§105-107 *per* King LJ; R (Miller), §17 *per* Julian Knowles J; McConnell, §§46-7, 58, 62 & 81 *per* Lord Burnett CJ, King & Singh LJJ).

53.5. Thus, the extent to which there is a positive obligation under Article 8 to provide for recognition of gender identity is limited to legal recognition for the gender identity of transexuals with a formal diagnosis of gender identity disorder (Goodwin, §§82, 90-93 & 100; Bellinger, §23 *per* Lord Nicholls; A.P., Garçon and Niçot v France, Nos. 79885/12 & others, 6 April 2017 (unreported), ECtHR, §§138-144 & 149-154; Elan-Cane, §105-107 *per* King LJ; McConnell, §46 *per* Lord Burnett CJ, King & Singh LJJ).

53.6. It is against that legal background that the GRA falls to be interpreted. The 'mischief' which it was intended to remedy was the absence of formal legal recognition for post-operative transexuals, which the ECtHR in Goodwin held to be a breach of Article 8. In fact, the GRA goes further and provides (in a way that remains consistent with the current position following A.P., Garçon and Niçot v France) legal recognition for the *'acquired gender'* of anyone who obtains a Gender Recognition Certificate ('GRC'), which does not require surgery. Section 9 then provides that where a GRC is issued to a person, *'the person's gender becomes for all purposes the acquired gender'*, although pursuant to subsection 9(3) this is subject to any exceptions under the GRA or any other enactment or subordinate legislation. The effect of section 9 has been described in the authorities as follows (with emphasis added):

> 'Once recognised, the reassigned gender is valid for all **legal** purposes **unless specific exception is made**.' (CC of West Yorkshire v A, §42 *per* Baroness Hale)

> '…although for most purposes a person must be regarded **in law** as being of their acquired gender after the certificate has been issued, **where an exception applies, they are still to be treated as having their gender at birth**.' (McConnell, §54 *per* Lord Burnett CJ, King & Singh LJJ)

53.7. Those authoritative statements thus support the conclusion that section 9 is a deeming provision which applies for legal purposes, subject to exceptions: it modifies the underlying

position at common law so that, for legal purposes, unless an exception applies, the sex of a person with a GRC is deemed to be their acquired gender. The significance of the word *'becomes'* is not that it alters facts but that it denotes a change in legal status (see R (C) v Secretary of State for Work and Pensions [2017] 1 WLR 4127, SC, §§23-25 *per* Baroness Hale). Section 9 does not in fact alter biological sex, nor does it bite on the minds, thoughts, perceptions or conduct of private citizens (save insofar as their conduct concerns the treatment of someone with a GRC for some legal purpose for which sex is material). Nor indeed could it do so: it cannot *'eliminate… the memories of family and friends who knew the person in another life'*[39]; equally, it cannot eliminate the perceptions of other people who experience the person as they physically are, which may include physical characteristics of their biological sex that have not been or cannot be fully altered. Quite apart from (a) the impossibility of law changing material fact and (b) the inherent impropriety and improbability of Parliament seeking through legislation to control its citizens' thoughts, perceptions and mundane personal interactions, that interpretation is also consistent with (c) the limited nature of the 'mischief' that the GRA was intended to remedy, as identified above. If there were any ambiguity about that (which there is not), the point is put to rest by ministerial statements in Parliamentary debates directly addressing the issue, which make clear that the deeming provision in GRA, s9 is intended to apply for legal purposes, not to coerce the thoughts or behaviour of private citizens[40].

53.8. In short, therefore, the position in English law is that sex is a biological characteristic fixed at birth; gender identity is something different, although the sex of a person with a GRC is deemed for most (but not all) legal purposes to be their acquired gender; and a person's biological sex nevertheless remains a material reality which is relevant to how they are perceived by and interact with others and society at large, such that for some legal purposes it continues to be the correct legal classification even for someone with a GRC, and remains so generally for anyone without a GRC.

54. As to the law relating to the treatment of trans people by private individuals:

54.1. There are no specific legal rules governing how private citizens may talk about, refer to, describe or address trans people generally. The EqA10 prohibits discrimination and

[39] R (C), §24 *per* Baroness Hale.
[40] *Hansard*, House of Lords, 29 January 2004, col. 406-411, in particular col. 410-411 *per* Lord Filkin, then the Parliamentary Under-Secretary of State in the Department for Constitutional Affairs.

harassment as defined in certain contexts (work, the provision of goods and services, etc). Also, of course, the general civil and criminal law regulating treatment of others applies equally to the treatment of trans people. Most pertinently for present purposes, sections 2 and 3 of the Protection from Harassment Act 1997 ('PHA') make it both a tort and a crime to pursue a course of conduct which amounts to harassment of another, and which the harasser knows or ought to know does so; section 1(1) of the Malicious Communications Act 1988 ('MCA') makes it an offence to send to another person a letter, communication or article of any description which conveys a message that is (amongst other things) indecent or grossly offensive; and section 127 of the Communications Act 2003 ('CA03') makes it an offence (amongst other things) to send a message via a public electronic communications network that is grossly offensive or of an indecent, obscene or menacing character, or by persistent use of such a network to cause annoyance, inconvenience or needless anxiety. But, for reasons which follow, neither the EqA10 (in the particular circumstances in which it applies) nor the law in general (including in particular PHA, MCA or CA03) requires, or prohibits, any particular use of the language of sex and gender to talk about, refer to, describe or address trans people in all circumstances: everything depends on the precise content, manner and context of any particular statement.

54.2. The position under the EqA10, in those contexts where it applies, is as follows:

(a) Sex and gender reassignment are different protected characteristics. A person's protected characteristic of sex is defined as being a 'man' or a 'woman' (s11), which are further defined as being, respectively, a male or female of any age (s212(1)). In accordance with the general law discussed above, therefore, a person's protected characteristic of sex is determined by his or her biological sex fixed at birth, with the exception of someone who has a GRC, whose protected characteristic of sex will, pursuant to GRA, s9, be his or her acquired gender (save where an exception applies). Sex discrimination does not encompass discrimination against trans people generally, although it will cover discrimination against someone with a GRC where he or she is treated less favourably because of sex than a member of the sex to which he or she used to belong (see P v S and another [1996] ICR 795, ECJ, §§17-22 as explained by Baroness Hale in CC of West Yorkshire v A, at §§56-63).

(b) The protected characteristic of gender reassignment is defined in s7: a person has that characteristic if that 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'. That definition is neither limited to people with a GRC, nor as broad as self-identified 'gender identity'. It is focused on the *'process'* of gender reassignment, the typical stages of which are described by Lord Nicholls in Bellinger (§§7-9). The definition encompasses people at all stages of that process, including those proposing to undergo gender reassignment who have not yet commenced the process. Consequently, it is difficult to draw *'the line marking transition to the other [gender]'* and discrimination law must take account of the difficulties and sensitivities involved not only for the person undergoing gender reassignment but also their colleagues and employer, such that *'it does not follow that all [persons with the protected characteristic of gender reassignment] are entitled immediately to be treated as members of the sex to which they aspire'* (Croft v Royal Mail Group plc [2003] ICR 1425, CA, §§22 & 39 *per* Pill LJ).

(c) Thus, for the purposes of the test for direct discrimination (s13), the correct comparators for a person with the protected characteristic of gender reassignment are employees (whether male or female) who do not have that characteristic (Croft, §74 *per* Jonathan Parker LJ) and assessment of whether the treatment complained of is less favourable and/or is because of that protected characteristic must take account of all the relevant circumstances and sensitivities, including the stage of the process that the person has reached and the (reasonable) perceptions of their colleagues (Croft, §§46-52 *per* Pill LJ, §§75-76 *per* Jonathan Parker LJ). Moreover, there is an important distinction between merely expressing (or refusing to express) a belief that *'has something to do with'* gender reassignment and treating somebody less favourably because of gender reassignment: the former will not constitute direct discrimination merely because the belief expressed (or the refusal) is distressing, upsetting or offensive to those with that characteristic and/or those who take a different view (Lee v Ashers Baking Co, §§22, 25 & 33-34 *per* Baroness Hale). This is the mirror of the points made in paragraphs 37.13(e) and 47.1(c) above and illustrates how the domestic legislation operates coherently. It also reflects consistency with the ECHR, under which the result likewise will not differ depending on whether the particular circumstances are considered through the prism of Articles 9 and 10 on the one hand or Article 8 on the other (Perinçek, §198(i)).

(d) Similar considerations also apply in respect of the test for whether treatment is *'related to'* the protected characteristic of gender reassignment for the purposes of harassment under s26. That test also encompasses an objective element to determine whether the treatment has the proscribed effect (Pemberton v Inwood [2018] ICR 1291, CA, §§73-75 *per* Asplin LJ, §§88-89 *per* Underhill LJ). In applying that objective element of the test, therefore, regard must be had to the need to protect freedom of belief and expression under ECHR, Articles 9 and 10 (see *mutatis mutandis* Scottow v CPS [2020] EWHC 3421 (Admin), §24(vii)-(viii) *per* Bean LJ & Warby J, approving dicta of Nicklin J). Likewise, the test for indirect discrimination expressly encompasses the justification test (s19(2)(d)), pursuant to which the rights protected by Articles 9 and 10 must again be taken into account.

(e) In short, therefore, all of the potentially relevant causes of action under the EqA10 require careful and detailed consideration of the particular circumstances, including the rights and sensitivities of others. Thus, no doubt, deliberately addressing a colleague with the protected characteristic of gender reassignment using pronouns that do not correspond to their reassigned gender in circumstances where there is no good reason to do so would constitute direct discrimination and/or harassment. But to do so accidentally to a colleague someone has known for years as their biological sex and/or who still presents with many physiological characteristics of that sex would be unlikely to be unlawful conduct under the EqA10. Similarly, it will not constitute unlawful conduct under the EqA10 to express beliefs in a discussion about sex and gender in terms which are appropriate to the particular context (even assuming that it takes place in circumstances covered by that Act), even if expressing those beliefs involves describing people with the protected characteristic of gender reassignment in a way which they or others find distressing or offensive. Circumstances will vary infinitely and context is all.

(f) Finally, the EqA10 also contains exceptions from both the sex discrimination and gender reassignment discrimination provisions for (i) the provision of separate sex and single sex services (Sched. 3, Part 7, paras 26-28); (ii) genuine occupational requirements (Sched. 9, para 1); (iii) the provision of communal accommodation and associated benefits, facilities and services (Sched. 23, para 3); and (iv) sport where *'the physical strength, stamina or physique of average persons of one sex would put them at*

a disadvantage compared with average persons of the other sex' (s195). The examples given in the explanatory notes show that, in addition to the self-explanatory exception for sport, these exceptions are intended to cover such matters as the provision of group counselling for female victims for sexual assault where the organisers *'do not allow transsexual people to attend as they judge that the clients who attend the group session are unlikely to do so if a male-to-female transsexual person was also there'* (explanatory notes, §740); or circumstances where a *'counsellor working with victims of rape might have to be a woman and not a transsexual person, even if she has a Gender Recognition Certificate, in order to avoid causing them further distress'* (explanatory notes, §789). All of these exceptions again reflect recognition by Parliament and the law that, whilst a person's own perception and experience of their gender identity is very important and worthy of respect, biological sex nevertheless remains a material reality (even for people with a GRC) which can affect how other people perceive and experience a trans person, and the perceptions and experiences of those other people are also legitimate and worthy of respect. In certain circumstances, therefore, the material reality of a person's biological sex (to spell it out: physiological characteristics which have not been or cannot be successfully altered) may be more important to the relevant setting than their gender identity and may justify discriminating – in particular, to protect the rights of women.

54.3. Turning to the position under the general law, including the PHA, MCA and CA03 in particular, in determining any allegation of unlawful conduct under those provisions (or generally) regard must again be paid to the need to protect Article 10 rights and to the requirement for restrictions to be subject to the *'ultimate balancing test'* by reference to the particular circumstances (Scottow v CPS, §§24(vii)-(viii) (approving dicta of Nicklin J), 33, 35 & 45 *per* Bean LJ & Warby J). In particular, communications on public social media, such as Twitter, which engage in dialogue with others who have by choice engaged via that medium will merit strong protection, even if they do not contribute to a 'proper debate' of public interest but all the more so if they do: those who engage via such media are expected to be *'robust and tolerant'* of criticism and attack, even if it is couched in personal and offensive terms (Scottow v CPS, §§25(2), 29 & 43-47 *per* Bean LJ & Warby J; R (Miller), §§11, 251-2, 268-271 *per* Julian Knowles J). In particular, the law does not generally require people who do not agree that trans people 'are' literally the sex which corresponds to their gender identity nevertheless to refer to them as such in contributions to discussion about sex

and gender; on the contrary, there is strong protection for the expression of beliefs like the Claimant's, even if they involve referring to trans people in general, or to a particular trans person, according to their biological sex; even if those contributions are *'opaque, profane, or unsophisticated'*; and even if they are distressing or offensive to some people (R (Miller)[41], §§13-14, 19-20, 23-57, 241-252, 264-268, 271 & 276-287 *per* Julian Knowles J; Scottow v CPS, §§43-47 *per* Bean LJ & Warby J).

55. There are two final points to note so far as the law relating to sex and gender is concerned. First, the *Equal Treatment Bench Book* (February 2018, revised September 2019[42]), to which the Tribunal referred in its Judgment, is guidance about the conduct of judicial proceedings. It explicitly *'does not express the law'* (Introduction, §2), still less is it authority as to the threshold for what beliefs and/or their expression are 'worthy of respect in a democratic society' (as opposed to what conduct is appropriate in the particular context of judicial proceedings). Moreover, the *Bench Book* was not referred to in the course of argument or evidence before the Tribunal and the parties were not given any opportunity to make submissions in respect of any reliance that may be placed on it. Therefore, insofar as the Tribunal relied on the *Bench Book* to guide the conduct of proceedings and/or its own use of language in its Judgment, that is unobjectionable, but insofar as it relied on it to inform its assessment of the substantive issues (as it appears to have done, for instance, at Judgment §85 **[CB/26]**), that was improper and an error of law.

56. Second, the 'Yogyakarta Principles' to which reference is made in the Respondents' Answer (§§38 & 41 **[CB/46-47]**) are not part of international (still less domestic) law. They are a set of aspirations first drawn up in Yogyakarta, Indonesia, in 2006 by representatives from a group of non-governmental organisations from 25 countries who wished to promote a particular view of 'trans rights'. They were supplemented in 2017 by a similar group of representatives of non-governmental organisations. They have not been adopted by the UN or any other international governmental organisation to which the UK is party (or indeed, so far as we are aware, by any international governmental organisation of any kind), nor have they been ratified or adopted by the UK itself. They have no status as an instrument of international law and no standing in domestic

[41] Miller is subject to an outstanding appeal to the Court of Appeal, which was heard on 9-10 March 2021. However, that is an appeal by the Claimant in that case in respect of the dismissal of his application for judicial review of the College of Policing's Hate Crime Operational Guidance; there was no appeal or cross-appeal in respect of the conclusion that the particular acts of Humberside Police amounted to an unjustified interference with the Claimant's Article 10 rights, or therefore of the proposition that the Tweets for which he was spoken to by the police attracted the strong protection of Article 10.

[42] https://www.judiciary.uk/wp-content/uploads/2018/02/ETBB-February-2018-edition-September-2019-revision.pdf There is now a new edition, but this was the version in force at the time of the hearing before and judgment of the Tribunal.

law whatsoever: to a limited extent they do reflect international law but insofar as they do it is the international law that matters, not what the Yogyakarta principles say; insofar as they go further, at most they are one piece of evidence of the variety of international views on the social and legal questions concerning sex and gender on which there is no international consensus (see the first instance judgment in R (Elan-Cane [2018] 1 WLR 5118, §§127-128 *per* Jeremy Baker J).

Submissions on the specific grounds of appeal

57. The Tribunal found that all of the Grainger criteria other than criterion (v) were satisfied (Judgment, §§82-83 **[CB/25-26]**). There is no cross-appeal against its conclusions on the other criteria (Respondent's Answer, §5 **[CB/40]**). Therefore, the only issues in this appeal are whether the Tribunal erred in respect of criterion (v) and, if so, whether it is clear that on application of the correct test the Claimant's beliefs are worthy of respect in a democratic society and so protected pursuant to EqA10, s10.

58. In the final analysis, the judgment of Julian Knowles J in R (Miller) provides the complete answer in this appeal. The Claimant's beliefs are on all fours with those in issue in Miller (§§19, 240-250, 265-266 & 280 *per* Julian Knowles J). As already noted[43], the fifth Grainger criterion applies equally as a threshold criterion for any protection under both Articles 9 and 10, as well as under EqA10, s10. Therefore, if the Tribunal were right in this case, the expressions of those beliefs in Miller would not have attracted any protection under Article 10. Not only is there no hint that those views and their expression fall short of the (low) threshold for being worthy of respect in a democratic society, but the judgment of Julian Knowles J also gives ringing emphasis to the 'strong' protection required for such views as an important and respectable perspective in the on-going contemporary debate about sex and gender, even if they are expressed in a way that is *'opaque, profane, or unsophisticated'* (§§251-252, 276, 280-281 & 286 *per* Julian Knowles J; see also *The Forstater Employment Tribunal judgment: a critical appraisal in light of Miller*, K Monaghan, op. cit.).

59. The Claimant's beliefs and the ways in which she has expressed them do not even fall into that category. They are thoughtful and carefully expressed. But, as in Miller, it would not matter if they were not: even if they were profane or provocative, they would not only easily meet the (low)

[43] Paragraph 37.7 above.

threshold of being worthy of respect in a democratic society, but would require 'strong' protection as important contributions to a matter of contemporary political and cultural debate.

60. That conclusion is further reinforced by the recent decision of the Sixth Circuit of the US Court of Appeals in Meriwether v Hartop & others, 20-3289, 26 March 2021, which reflects the application of many of the same principles that underpin the domestic and ECtHR jurisprudence about the importance of pluralism in a democratic society and, like Miller, endorses the need for strong protection for beliefs like the Claimant's[44] because they concern *'a struggle over the social control of language in a crucial debate about the nature and foundation, or indeed real existence, of the sexes'*, in which *'[p]ronouns can and do convey a powerful message implicating a sensitive topic of public concern'* (§II.B.1). In particular, the Sixth Circuit particularly emphasises (consistently with Lee v Ashers Baking Co in the domestic jurisprudence) the heightened degree of protection required where, as here, the issue is whether the plaintiff should be required to *'affirmatively change his speech to recognize a person's transgender identity'*, and thus involves *'potentially compelled speech on a matter of public concern'*, because *'when speech is compelled… additional damage is done'* (§§II.B.2, III.A.3). The Sixth Circuit also emphasises, again consistently with the domestic and ECtHR jurisprudence, that protection of trans people from discrimination (or indeed the protection of those with any other protected characteristic from discrimination) does not require protection from mere offence caused by exercise of the right to freedom of thought and expression: the *'public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers'* (§II.B.2).

61. In short, when the courts of two major democracies, the UK and US, have not only recognised that the expression of a belief such as the Claimant's is protected, but that it requires particularly strong protection because it contributes to a crucial debate about an important contemporary issue of political and cultural interest, it is simply impossible to say that those beliefs are 'not worthy of respect in a democratic society'.

62. That short answer underpins the analysis in respect of the specific grounds of appeal, as follows.

***Ground 1: impermissible assessment of validity / substitution (NoA, §5.1* [CB/30-32])**

63. This core ground of appeal is that the Tribunal simply went completely wrong. It adopted fundamentally the wrong approach; applied completely the wrong test; as a result went hopelessly

[44] In Meriwether the beliefs had a religious foundation, but on the issue of sex and gender were fundamentally the same.

wrong in its analysis; and ultimately reached demonstrably the wrong conclusion. The ways in which it did so were as follows:

63.1. The Tribunal went wrong from the outset of its analysis beginning at Judgment, §77 **[CB/24]** by failing to consider the Claimant's belief on its own terms and instead embarking on an enquiry into its legitimacy, which involved the Tribunal engaging in its own attempt to dissect and rationalise the Claimant's belief, of the kind which is strongly deprecated in the authorities (see paragraph 37.9 above). Firstly, this erroneous approach is apparent in §83 **[CB/25-26]**. Although that paragraph addresses another Grainger criterion (the cogency of the Claimant's belief), in it the Tribunal indulges in its own assessment of whether the belief is scientifically right or *'wrong'* (with apparent reference back to the material considered at §§43-45 **[CB/15-16]**). That is not the right question, which is simply whether the belief is intelligible and capable of being understood (see paragraph 37.6 above). Thus the Tribunal should not have engaged in that exercise at all: not only had it not heard expert scientific evidence which would equip it to determine what is a strongly contested area of scientific enquiry[45] (nor indeed are courts or tribunals in general equipped to pronounce upon such matters[46]), but more importantly it is analogous to enquiring into the scriptural foundations for, say, a belief in the indivisibility of the Trinity. The Tribunal's remarks in §83 are therefore both symptomatic of the fundamentally wrong approach that it adopted and revealing of its general mindset: instead of adopting the position of neutrality required of the state, the Tribunal judged the Claimant's beliefs to be *'wrong'* and aligned itself with the opposing view.

63.2. The Tribunal's flawed approach is further apparent in §78 **[CB/25]**. There, it again fails to consider the Claimant's beliefs on their own terms but seeks to draw a distinction between *'core'* and other aspects of the Claimant's beliefs and then to disregard aspects of those beliefs based on its own rationalisation of them. There is no such distinction in principle or authority: EqA10, s10 and Article 9 protect any set of intelligible beliefs about one or more important aspects of human life or behaviour that are worthy of respect in a democratic

[45] The small selection of scientific literature that was in the bundle to illustrate the contested points (for the very purpose of showing that there are competing scientific, as well as philosophical, political and cultural, views: see e.g. C w/s, §§101, 125, 134 **[SB/28, 35, 37]**; Kristina Harrison w/s, §§25-26 **[SB/59-60])** plainly did not provide the Tribunal with a full expert survey of the competing scientific views and the Tribunal could not possibly have thought that it did. (If it did think so, then that itself would be perverse.) It is therefore astonishing that the Tribunal felt itself qualified or equipped to pronounce (even *obiter*) on the scientific rightness or wrongness of the Claimant's belief.

[46] See e.g. Bell & another v The Tavistock and Portman NHS Foundation Trust [2021] PTSR 593, QB, §§75-77 *per* Dame Victoria Sharp P, Lewis LJ & Lieven J.

society; they do not distinguish between *'core'* and other parts of any such beliefs, nor do they protect only the former. Any set of beliefs will inevitably have various components: a belief that sex outside marriage is morally wrong may be built upon a belief that the Bible reveals God's word and may be intertwined with a belief that engaging in extra-marital sex consequently places one's eternal soul at risk. Following the Tribunal's approach, it might be said that the risk to one's soul is a reason why the belief about extra-marital sex is important not the *'core'* of that belief; or even that the belief about extra-marital sex is itself a consequence of the *'core'* belief about the truth of the Bible. But such attempts at semantic deconstruction are again wholly the wrong approach: the correct approach is to take the Claimant's beliefs on their own terms. As the exposition at paragraph 21.4 above shows, her actual beliefs, on their own terms, comprise an integrated set of beliefs about the nature of sex as a material reality and its importance for how people experience and interact with the world. Indeed, there is an inconsistency between the Tribunal's dismissal of some aspects of those beliefs as not being part of her *'core'* belief (at §78 **[CB/25]**) and its contrary conclusion (at §88 **[CB/27]**) that her belief that it is sometimes important to be able to refer to a trans person by their sex rather than their gender identity is a *'component'* of her belief: the latter is an aspect of the Claimant's beliefs about the importance of biological sex which is in precisely the same category as those the Tribunal dismisses as not part of her *'core'* beliefs in §78.

63.3. The absurdity and impropriety of the Tribunal's approach is particularly apparent at §§79-81 **[CB/25]** & 86 **[CB/26-27]**, in which the Tribunal says, in effect, that some aspects of the Claimant's beliefs could be rationalised in a different way which the Tribunal considers more acceptable. But that is like saying that one can arrive at a non-religious philosophical justification for the belief that extra-marital sex is morally wrong based the moral good of maintaining social and familial relationships, and that therefore the fact that for the particular individual in question that belief is in turn founded on a belief in God and the truth of the Bible is unimportant and irrelevant because they can still argue against extra-marital sex on different grounds and without having to refer to their actual underlying belief. The Tribunal is saying, in effect, that if one aspect of someone's beliefs could be explained or rationalised on grounds that are different from those in which that individual actually believes, then that aspect is not to be regarded as part of that individual's beliefs – and moreover that that is unimportant because the individual can still talk about that aspect, just without explaining his or her actual rationale. That approach by the Tribunal is fundamentally contrary to the

principles of individual ethical autonomy that underpin EqA10, s10 and Article 9 (see paragraphs 30-32 above). It is surprising and worrying that the Tribunal saw it as its role to dissect beliefs in this way and to dictate what is or is not an acceptable basis for a belief, and it shows just how far off the rails the Tribunal went.

63.4. The Tribunal ought, then, to have started with the Claimant's beliefs on their own terms – including all aspects of those beliefs (in particular those summarised in paragraph 21 above) – and then asked itself the question: are these beliefs which are within the plurality of beliefs that people can (and do) legitimately hold and express in a democratic society, applying the (very high) threshold for disqualification under ECHR Article 17 (as explained in paragraph 37.8 above)? It failed to articulate that question anywhere, and in particular failed to identify the requisite threshold for disqualification as being totalitarianism or its equivalent. Moreover, its reasoning shows that it wholly failed to apply the correct threshold or to recognise the importance of a plurality of beliefs in a democratic society. Most notably, although there was evidence before it that most people share the Claimant's beliefs (C w/s, §§112-113, 130 **[SB/31-32, 36]**); that they are shared and articulated by mainstream journalists (C w/s, §§114-116 **[SB/33]**); that they are also shared by some trans people (C w/s, §§13, 91 **[SB/6, 24-25]**; Kristina Harrison w/s, §§17-21 **[SB/56-59]**); and that they were at the material time directly relevant to a government consultation in respect of proposed amendments to the GRA (C w/s, §§7-8 **[SB/5]**), in its dispositive reasoning on the fifth Grainger criterion the Tribunal makes no reference to any of this (other than erroneously to suggest that it is not important for the Claimant to be able to articulate her actual reasons for contributing to the debate, as discussed above).

63.5. Instead of recognising, on that basis, that the Claimant's beliefs constitute an important viewpoint on a significant issue of contemporary democratic debate and therefore plainly are worthy of respect in a democratic society, the Tribunal itself wrongly adopted one particular viewpoint from within that debate – to the effect that sex is indistinguishable from expressions of gender identity, that there is a spectrum in sex and that a person can change from one sex to another, or to being of neither sex (Judgment, §41 **[CB14]**), and that it is unacceptable in any circumstances to refer to someone other than in accordance with the gender (or lack thereof) with which they identify: this is apparent in particular in its reasoning at Judgment, §§84-88 **[CB/26-27]**. The Tribunal thereby further erred by abandoning the position of neutrality required of it as an organ of the state and instead

descended into the arena to adjudicate between competing viewpoints on an issue of democratic controversy (see paragraph 32 above).

63.6. There are two particular ways in which the Tribunal's improper descent into the arena is apparent. First, it applied as a key criterion in determining the validity of the Claimant's belief a requirement that it must not be *'absolutist'* as regards sex. It is clear that the Tribunal uses this term to mean not accepting that sex may be altered to accord with gender identity (Judgment, §§84-86, 90-91 **[CB/26, 27]**). But that reasoning is really just another way of the Tribunal saying that it does not agree with the Claimant's belief: a belief that sex is a binary biological fact that is different from gender identity is necessarily 'absolutist' in the sense that the term is used by the Tribunal and so rejecting it on that basis necessarily involves the Tribunal positively endorsing the (contrary) view that sex is not a binary biological fact different from gender identity. The Tribunal has, therefore, demonstrably entered the arena and taken sides.

63.7. Moreover, the *'non-absolutist'* criterion adopted by the Tribunal is simply not a relevant criterion. Plenty of beliefs which no one would begin to suggest are not worthy of respect in a democratic society are *'absolutist'* in the sense used by the Tribunal – i.e. involving a categorical view on a binary question. Pacifism, for example, entails an 'absolutist' refusal to accept or engage in physical violence of any kind in any circumstances. Deism and atheism are two sides of a binary, absolutist divide: no one suggests that agnosticism is the only democratically acceptable viewpoint. The list could go on. Further, as the authorities make clear, the threshold for protection is most certainly not intransigence or absolutism in the sense used by the Tribunal (see paragraphs 37.8-37.9 & 37.13(b) above). This criterion is therefore completely the wrong test and threshold.

63.8. Moreover, on the Tribunal's own findings the Claimant is not in fact 'absolutist' in her actual treatment of trans people: see paragraph 21.4 above. This is the second aspect of the Tribunal's reasoning from which it is particularly apparent that it wrongly descended into the arena. Despite its findings which recognise the context-dependent consequences of the Claimant's beliefs for how she will actually treat and refer to trans people (see paragraphs 21.4 above), the Tribunal concludes at §§90-91 **[CB/27]** that her beliefs will nevertheless *'necessarily'* harm the rights of trans people. It is therefore inherent in the Tribunal's reasoning and conclusion that it has positively accepted the view of those who disagree with the Claimant. It has itself adopted the view that sex is not distinguishable from gender

identity and that people should therefore always be treated in a way that aligns with their gender identity. Indeed, as noted in paragraph 21.3 above, it is only if one starts from the premise that the Claimant's beliefs are wrong, and fails to consider those beliefs on their own terms, that one can fail to see that referring to someone's biological sex as distinct from their gender identity may be a neutral statement, not a harmful pejorative act.

63.9. In short, therefore, it is clear the Tribunal has itself positively adopted the opposing viewpoint to that of the Claimant's, and from that position has derived wholly the wrong criteria for assessing whether her belief is worthy of respect in a democratic society. Ultimately, this has led to the Tribunal itself taking a position that is, in the true sense, 'absolutist', in that it treats a single viewpoint as the only acceptable one and allows no scope for dissent or disagreement. The Tribunal's comments in §§86 **[CB/26]** and 90 **[CB/27]** in particular genuinely do reach Orwellian heights: the Tribunal explicitly says that the Claimant is 'required' in all circumstances to subordinate her beliefs to a use of language which expresses the opposing viewpoint and can therefore participate in the political debate about the impact of proposed amendments to the GRA only if she does not articulate the beliefs which actually underpin her contributions.

64. The Tribunal's approach, test, analysis and conclusion are all, therefore, fundamentally flawed. Far from applying the correct threshold based on the pluralism that is essential in a democratic society, its approach and conclusions are fundamentally anti-democratic. Applying the correct approach and threshold, the only possible conclusion is that the Claimant's beliefs easily pass the threshold (and indeed their expression qualifies for 'strong' protection under Article 10). This is clear from Miller (see paragraph 58 above) and Meriwether (see paragraph 60 above). It is also apparent from even the most cursory consideration of the authorities, which clearly show that even beliefs whose expression (unlike the Claimant's) does inherently involve passing moral judgment on the protected characteristics of others or otherwise interfering with the rights of others are worthy of respect in a democratic society so as to fall within the protection of Article 9 (and consequently EqA10, s10) (though of course their expression/manifestation may be restricted in particular circumstances if the test for justification is met). Thus a belief in the use of mild corporal punishment (Williamson), a belief that gay sex is immoral or 'deviant' (Ngole, Lilliendahl), a belief that gay marriage is wrong (Smith v Trafford Housing Trust, Lee v Ashers Baking Co), and denial of the Armenian genocide (Perinçek) are all worthy of respect in a democratic society. But on the Tribunal's view, the Claimant's views are so uniquely offensive that they are not, even though

(unlike some of those other beliefs) they do not involve any moral condemnation of trans people. The Tribunal's conclusion is plainly and unarguably wrong.

Ground 2: elision of manifestation and belief (NoA, §5.2* [CB/32]*)

65. In §§88-91 **[CB/27-28]**, the Tribunal wrongly elides presumed manifestations of the Claimant's belief with the correct issue before it as to whether that belief in general meets the requisite threshold (see paragraphs 43-46 above). On the Tribunal's own findings, the Claimant would not inevitably address or refer to trans people according to their sex (§§39.12-13, 40-41, 88 **[CB/14, 27]**). Therefore, even if (contrary to the Claimant's case) something is not worthy of respect in a democratic society if it causes distress amounting to harassment as envisaged by the Tribunal in §§88-91, it would obviously depend on the particular circumstances whether that threshold were crossed in any particular instance (see paragraph 54 above). Consequently, the Tribunal erred in eliding the (presumed) effects of the Claimant's manifestation of her belief – which is an issue for later in these proceedings (see paragraphs 37.10-37.13 & 47 above) – with the question of whether her belief was in general worthy of respect in a democratic society.

Ground 3: inadequate regard to ECHR, Articles 9 & 10 (NoA, §5.3* [CB/32-34]*)

66. The Tribunal failed to interpret and apply EqA10, s10 consistently with the Claimant's rights under ECHR, Articles 9 and 10:

    66.1. It failed to identify and apply the proper threshold pursuant to Article 17 in accordance with the principles set out in paragraphs 37.8 and 42 above.

    66.2. On the contrary, it refers dismissively on two occasions to the Claimant's *'qualified convention right of freedom of expression'* (Judgment, §§75 & 87 **[CB/24, 27]**) and in its dispositive reasoning makes no mention of the Claimant's rights under Article 9 at all, without any attempt whatsoever to articulate or define the test that it was applying as to the relevant threshold for a belief to be worthy of respect in a democratic society – let alone the correct test in that regard. Consequently, the Tribunal wholly fails to recognise that the issue before it was not whether the Claimant's 'qualified' rights should be restricted, but whether her beliefs (and/or their expression) are protected at all. It is clear that the Tribunal failed to appreciate this because it refers in §91 to the *'human rights balancing exercise'* **[CB/27-28]**; whereas the question of whether a belief is disqualified pursuant to Article 17 (and

consequently EqA10, s10) as being 'not worthy of respect in a democratic society' is a prior question, with a (much) higher threshold which does not engage any 'balancing exercise'.

66.3. As a result, it is apparent that the Tribunal applied wholly the wrong threshold: in addition to the points already made about the criterion of *'non-absolutism'* which it adopted, it is also apparent from its repeated references in §§87-91 **[CB/27-28]** to *'distress'* and to *'harassment'* as defined under EqA10, s26, that the Tribunal applied a threshold based on possible distress and offence, not whether the Claimant's beliefs are equivalent to Nazi or other totalitarian philosophy.

66.4. Having failed to identify the correct threshold, its approach then leads it to a conclusion which in practice destroys the very essence of the Claimant's rights under Articles 9 and 10: it holds, in effect, that in no circumstances can the Claimant articulate her beliefs but must in all circumstances be 'required' to express herself in terms which reflect the opposite beliefs (Judgment, §§86 & 91 **[CB/26-28]**). That conclusion fails to recognise the distinction drawn in Lee v Ashers Baking Co between declining to express a belief that has something to do with a protected characteristic (in the present case, gender identity) and treating somebody adversely because of their gender identity (see paragraph 54.2 above), and more importantly it wholly fails to place any value on the Claimant's right not to be required to manifest a belief that she does not hold (see paragraph 37.4 above), let alone the strong protection required for expressing a belief that is an important viewpoint in a contemporary political debate (see paragraph 58 above; and see also Meriwether as discussed in paragraph 60 above). In saying that the Claimant cannot in any circumstances express her belief and must in all circumstances use language in a way that directly contradicts her belief, or face discipline or dismissal at work for which there will be no remedy[47], the Tribunal wholly abrogates the state's positive obligations under Articles 9 and 10 (see paragraphs 37.1 & 37.13(e) above).

Ground 4: incorrect approach to balancing competing rights (NoA, §5.4* [CB/34-35]*)

67. Moreover, even if (contrary to the Claimant's case under Ground 3 above) the issue before the Tribunal did engage the question of justification and the associated 'balancing exercise' under Articles 9(2) and 10(2), the Tribunal still failed to apply the correct approach:

[47] This case of course arises under the EqA10.

67.1. Whereas that exercise requires an *'intense focus'* on particular circumstances (see paragraph 37.10 above), the full extent of its reasoning on the 'balancing exercise' is the single sentence at the end of §91 **[CB/28]**. The Tribunal effectively treats it as axiomatic that 'harm' to the rights of trans people justifies restricting the Claimant's rights under Articles 9 and 10 to the extent that they are afforded no protection whatsoever against discipline and dismissal at work. It does not identify or apply the four-part Bank Mellat test see paragraph 37.11 above). Indeed, it does not actually examine the competing rights at all, let alone with the requisite *'intense focus'*.

67.2. In particular, in its dismissive references to her *'qualified'* Article 10 rights, the Tribunal wholly fails to recognise, articulate or give effect to the 'strong' protection required for the Claimant's beliefs as an important viewpoint in a contemporary political and cultural debate (see paragraphs 37.13(b) & 58 above).

67.3. On the other side of the 'balance' the Tribunal fails to recognise, articulate or give effect to the principle that the expression of a belief should not be restricted solely because it may be disturbing, offensive or distressing to others but only if it rises to the level of *'hate speech'* (see paragraphs 32 & 37.13(a) & 37.13(d) above): on the contrary, the Tribunal applies a threshold based on 'distress' and 'hurt' such as might be relevant to the test for harassment under EqA10, s26 (see generally its repeated use of terms to that effect: §§87-91 **[CB/27-28]**). The general definition of harassment applicable to the particular and limited circumstances in which the EqA10 applies is not the test for *'hate speech'* for the purposes of Articles 9 and 10: indeed, the latter would require the general definition of harassment under s26 to be 'read down' in any particular instance involving the expression of beliefs which required 'strong' protection under Articles 9 and 10, subject to the requisite *'intense focus'* on the particular circumstances (see paragraphs 54.2(d) and 54.3 above).

67.4. Moreover, even in applying that (incorrect) threshold, the Tribunal fails to recognise, articulate or give effect to the principle that whether any particular expression constitutes harassment under the EqA10 (or indeed unlawful conduct more generally) is dependent on all the circumstances, such that there is no general rule that addressing, referring to or describing a trans person by reference to their sex will always and inevitably constitute harassment or other unlawful treatment (see generally paragraph 54 above).

67.5. Indeed, even if (contrary to the Claimant's case) it were relevant to consider specific instances of the Claimant expressing or manifesting her belief, the Tribunal did not in fact find that the Claimant had ever actually harassed or caused serious distress to any individual trans person: the only specific instance referred to in its dispositive reasoning was the Claimant's response to a complaint about her to the Scout Association by Gregor Murray, which the Tribunal acknowledged was in the context of *'an, admittedly very bitter, dispute'* (Judgment, §89 **[CB/27]**). If and to the extent that it matters, the Tribunal is invited to consider (a) the Claimant's explanation that her initial use of the male pronoun in a tweet relating to Gregor Murray was inadvertent (in respect of which Murray's appearance in the photographs at **[SB/149 & 157]** is relevant[48]); and (b) the complaint by Gregor Murray and the Claimant's response in full **[SB/163-178]**. This is a paradigm of the proposition that the detailed context and circumstances matter: all of the points the Claimant makes and all of the language she uses are relevant and appropriate to the circumstances. Indeed, the Tribunal does not find otherwise at §89. The same applies to all of the other specific examples of tweets and other communications that were before the Tribunal: to the extent that it may be relevant and necessary, the particular instances will be addressed in oral submissions. But the important point is that, even if the particular examples were relevant, the Tribunal does not actually make any finding that the Claimant's conduct amounted to harassment or other unlawful conduct in any of them – or indeed any findings about their actual effects on anyone (trans or otherwise) at all.

67.6. Ultimately, therefore, without even having identified one instance of the Claimant actually doing anything that amounted to harassment of, or even caused serious distress to, a trans person from amongst all of the examples upon which the Respondents sought to rely, the Tribunal applied what amounted to a legal rule formulated in general terms 'requiring' the Claimant in all circumstances to refrain from expressing her beliefs and to express the contrary beliefs on pain of discrimination at work or dismissal for which the law will afford no remedy, contrary to the principle set out at paragraph 37.13(d) above and in breach of the state's positive obligations (as set out in paragraphs 37.1 & 37.13(d) above).

[48] This is a paradigm example of how and why subjective gender identity does not and cannot negate how other people may perceive and experience a person because of their objective physical characteristics.

Ground 5: incorrect reliance on the Gender Recognition Act 2004 (NoA, §5.5* [CB/35-36]*)

68. The Tribunal erred in the reliance it placed on its conclusion that the Claimant's beliefs involve *'denying'* the rights of trans people under the GRA (§§84-85 & 91 **[CB/26, 27-28]**). In the first place, whether or not a belief involves agreeing or disagreeing with the rights that people do or do not have under the current law is plainly not the test: if it were, then a belief that gay marriage is wrong would not be worthy of respect in a democratic society, but it is (Lee v Ashers Baking Co; Ngole).

69. But in any case, the Tribunal's interpretation of the GRA, s9 – to the effect that the right of someone with a GRC to *'be'* their acquired gender is more than a legal deeming provision and creates a legally compelled reality that overrides and bites on the perceptions and conduct of private citizens in their private, day-to-day interactions (Judgment §§84-85 **[CB/26]**) – is wrong and has profoundly anti-democratic implications (see paragraphs 53.6-53.7 above).

70. Indeed, when the Tribunal's interpretation of the GRA is taken together with (a) the tone of regret which is apparent where it notes that the Claimant's belief that sex is a binary biological characteristic is actually the law (with the sole exception of those with a GRC) (Judgment, §83 **[CB/26]**), (b) its implied criticism of what it describes as the *'outmoded terminology'* of the GRA (Judgment, §60 **[CB/19]**); and (c) its reference to human rights law *'developing'* in respect of *'trans rights'* (Judgment, §87 **[CB/27]**), it is difficult to escape the conclusion that the Tribunal regrets that the law has not moved further towards self-identification and that its approach to this case has been coloured by a view of 'trans rights' based upon acceptance of the proposition advanced by those on the other side of the debate from the Claimant – i.e. that a person's gender identity *is* (literally) their sex, regardless of biology, and that therefore to refer to a trans person by their biological sex in any circumstances is tantamount to harassment.

71. That is, of course, a belief that is as worthy of respect as the Claimant's, but it is emphatically not the law, and the Tribunal's role was to maintain the state's neutrality in the debate between those with opposing beliefs, not to take sides. Instead, although in (slightly) more moderate terms than the Twitter trolls who brand the Claimant and those who share her beliefs 'TERFs', 'bigots' and 'transphobes', the Tribunal has engaged in precisely the *'calumny'* derided by JS Mill (paragraph 33 above) and deprecated by Julian Knowles J (Miller, §250). It has aligned itself with one side in the debate; based on that, has tarred any expression of the Claimant's views as offensive; and whether through a failure of understanding or imagination has failed to appreciate that taken on

their own terms, the Claimant's statements about biological sex are simply expressions of neutral fact (see paragraph 21.3 above).

72. In fact, as noted in paragraph 53 above, although this is not the relevant test, the Claimant's beliefs are actually on all fours with English law. It is all the more remarkable, then, that the Tribunal should have found them to be not worthy of respect in a democratic society. As K Monaghan notes in *The Forstater Employment Tribunal judgment: a critical appraisal in light of Miller* (op. cit.):

> 'It is somewhat surprising – and bold – for an ET to conclude that a "view" held by the senior courts and reflected in judgments spanning 40 years [is] not worthy of respect in a democratic society, not compatible with human dignity and conflict[s] with the fundamental rights of others.'

Ground 6: incorrect approach to protection for lack of belief (NoA, §5.6* [CB/36]*)

73. Lack of belief under EqA10, s10 is the absence of belief, not the existence of a positive opposing belief (Grainger, §31 *per* Burton J). Thus the category of those who lack belief X will include not only those who hold the opposing belief Y, but also those who are undecided as between X and Y and those who have never thought about the issue. Lack of belief in X does not depend upon positively holding belief Y. So, to take belief in the existence of a god as an example, the category of people who lack that belief will include not only atheists but also agnostics and those who simply do not care: the thing that unites them, that gives them the relevant protected characteristic of lack of belief, is not their positive beliefs (which are disparate), but the absence of a belief in any god. It is impossible to apply the Grainger criteria to an absence of belief, to a vacuum, which is by definition incoherent, insubstantial and incapable of being positively held. The Tribunal was therefore wrong to conclude that those criteria apply to lack of belief (Judgment, §58 **[CB/19]**).

74. This does not, as the Tribunal appears to think based on its example of a lack of belief that murder is wrong, mean that protection is given by the back door to positive beliefs that are not worthy of respect in a democratic society. In that example, the category of people who lack the belief will include people who have never thought about the morality of murder, and people who are not prepared to sign up to an absolute belief that murder is wrong because they are unsure (without feeling able positively to commit) whether there might not be circumstances where murder is not wrong, as well as those who hold the unacceptable belief that there is never anything wrong with murder (which would indeed fall foul of the fifth Grainger criterion because it is tantamount to advocating violence). If any of those people is discriminated against simply because they will not toe the majority line and positively endorse the view that murder is wrong, that will be unlawful;

but if, in the case of someone with the unacceptable opposing belief, the treatment in question is because of their positive unacceptable belief and not simply because they will not endorse the majority view, then that positive belief will not be protected and the treatment will not be unlawful. Therefore, it does not follow that *'in effect, believing there is nothing wrong with murder is a protected characteristic'* (Judgment, §58 **[CB/19]**).

75. In this case, there seems to be no dispute that gender identity beliefs themselves meet the Grainger criteria. It follows that, since the Claimant does not hold those beliefs, that lack of belief is a protected characteristic. That does not mean that, if the Tribunal is right that her positive gender critical beliefs are not worthy of respect in a democratic society, they will get protection by *'sleight of hand'*: the Tribunal's error in §§92-93 **[CB/28]** is again wrongly to assume that lack of belief in gender identity theory necessarily entails the opposite view, that it *'necessarily involves the view that trans women are men'*. There may be many people (and the evidence before the Tribunal suggested there indeed are many people[49]) who are not convinced of either position, or who have not thought much about the relationship between sex and gender at all, but who would not be prepared positively to endorse the view that trans women are literally women. The effect of the Tribunal's conclusions on lack of belief in §§92-93 is again, in effect, to say to anyone who is not prepared positively to endorse the dogma of gender identity theory that trans women are literally women, that they can be discriminated against at work with impunity for not doing so – even if they would equally decline positively to endorse the Claimant's views. In effect, the Tribunal's conclusion provides state endorsement for employers to force their employees positively to endorse the dogma of gender identity theory.

76. There may be an issue in due course, in this case, as to whether the treatment about which the Claimant complains was because of her lack of gender identity beliefs or because of her positive gender critical beliefs, and if (contrary to Grounds 1-5 above) the latter is not a protected belief then if the treatment was because of the latter not the former, the claim would then fail. But she is in any event entitled to pursue her claim based on her lack of gender identity beliefs and for that issue to be determined.

Conclusion

77. Protection from discrimination is most important for those with unpopular or minority characteristics who are otherwise vulnerable to mistreatment or suppression at work. The protected

[49] C w/s, §§112, 130 **[SB/31-32, 36]**.

characteristic of religion and belief assumes a particular significance in the context of contemporary culture: the current prevalence of 'cancel culture' from all parts of the political spectrum makes robust protection for those who hold and express beliefs that are unpopular or currently out-of-favour especially important. Without it, such people face discipline or dismissal simply because their employers disagree with, or do not wish to be associated with, beliefs which dissent from prevailing orthodoxy – or at least from that which prevails in the section of society which shouts loudest on Twitter or otherwise carries most influence with the employer. It is unfortunate that, where it ought most to have recognised the importance of the protection afforded by the Equality Act 2010 (read in light of ECHR, Articles 9 and 10), the Tribunal departed from its proper role as neutral guarantor, on behalf of the state, of mutual tolerance for conflicting beliefs and instead descended into the arena and sought to arbitrate between those beliefs.

78. For all the reasons set out above, the EAT is invited to allow the appeal; substitute a finding that the belief held by the Claimant (alternatively her lack of belief) is a philosophical belief protected by the Equality Act 2010; and remit the case to the Tribunal to determine liability in accordance with the principles set out in paragraphs 37.10-37.13, 47 and 49.2 above.

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