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Article:

Johnson, Paul James (2020) "Gender critical" beliefs and the European Convention on Human Rights. *European Human Rights Law Review*. pp. 116-121. ISSN: 1361-1526

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“Gender Critical” Beliefs and the European Convention on Human Rights

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Abstract

An Employment Tribunal in the UK has held that a person who believes that sex is biologically immutable and that it is impossible for a human being to change sex does not qualify for protection under British equality law. To reach this conclusion, the Employment Tribunal relied upon the established jurisprudence of the European Court of Human Rights in respect of the rights and freedoms of transgender people. The judgment of the Employment Tribunal, which is a vital assertion of the underlying principles of equality law in response to “gender critical” beliefs, can be regarded as consistent with the judgment of the High Court of England and Wales in respect of the freedom to express gender critical views.

Introduction

In December 2019, the Employment Tribunal gave its judgment in *Forstater v CGD Europe*,¹ holding that the belief held by the claimant, Maya Forstater—the core of which is that sex is biologically immutable—is not a “philosophical belief” protected by the Equality Act 2010. Because Ms Forstater failed to establish at the preliminary hearing that her belief was protected under the Equality Act 2010 she could not advance her substantive claim that she had suffered discrimination on the basis of her belief when her relationship with her employer came to an end.² The judgment has caused considerable controversy, and several critiques of it have been published online, including by Ms Forstater who has defended her “totally ordinary” belief which, she claims, is shared by “the vast majority of people today if they are willing to be truthful”.³

The level of hostility to the judgment and the critical comments that have been made about the reasoning contained in it may be surprising to some people. This is not least because the judgment appears to reflect the settled jurisprudence of the European Court of Human Rights which, as Employment Judge Tayler set out in his judgment, is central to the case. In my view the judgment is uncontroversial in terms of its reasoning and I would have found it surprising if Judge Tayler had reached a different conclusion. This is because, as I explain below, Ms Forstater’s so-called “gender critical” belief is in direct contradiction with the human rights and fundamental freedoms of transgender people established under the ECHR.⁴

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¹ *Forstater v CGD Europe* [2019] UKET 2200909/2019 (18 December 2019).

² For a procedural history of the case, including the questions considered at the Preliminary Hearing, see *Forstater v CGD Europe* [2019] UKET 2200909/2019 (18 December 2019) at [4]–[7].

³ M. Forstater, “Women’s Liberation 2020: My Speech”, <https://hiyamaya.net/2020/02/02/womens-liberation-2020-my-speech> [Accessed 3 April 2020].

⁴ Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, ETS No.005.

Why is Ms Forstater's belief not protectable?

In Great Britain, the Equality Act 2010 prohibits discrimination and harassment in respect of a number of protected characteristics, including "religion or belief".⁵ "Belief" means "any religious or philosophical belief".⁶ To qualify as a "philosophical belief" under the Equality Act 2010, the belief must satisfy five criteria that were established in *Grainger plc v Nicholson*:

- (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; and
- (v) it must be worthy of respect in a democratic society, not be incompatible with human dignity and not conflict with the fundamental rights of others.⁷

Judge Tayler dealt with *Grainger* (i)-(iii) very briefly and found that Ms Forstater's belief met these criteria.⁸ Some may consider Judge Tayler overly generous in respect of *Grainger* (ii) because, arguably, Ms Forstater's position could be regarded as "opinion or viewpoint" based on the present state of information available about human sex and gender rather than "belief". Judge Tayler spent more time on *Grainger* (iv) but found that, on balance, Ms Forstater's belief did not fail the test of attaining "a certain level of cogency, seriousness, cohesion and importance" even though "there is significant scientific evidence that it is wrong".⁹

The *Grainger* (v) test

Having decided that Ms Forstater's belief met the first four *Grainger* criteria, Judge Tayler turned to *Grainger* (v).

It is worth reflecting on where *Grainger* (v) comes from. Like the other *Grainger* criteria, *Grainger* (v) arises from the requirement of the Human Rights Act 1998 that "[s]o far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights".¹⁰ This obviously includes art.9 ECHR (freedom of thought, conscience and religion), which provides an absolute right to freedom of belief and a qualified right to freedom to manifest belief. As such, *Grainger* (v) embodies the jurisprudence of the European Court of Human Rights on the protection of "belief" by art.9 ECHR and "philosophical convictions" by art.2 of Protocol No.1 ECHR (right to education), which is:

"Having regard to the Convention as a whole, including Article 17 [prohibition of abuse of rights], the expression 'philosophical convictions' ['convictions' being akin to the term 'beliefs'] denotes ... such convictions as are worthy of respect in a 'democratic society' ... and are not incompatible with human dignity; in addition, they must not conflict with the fundamental right[s] [of others] ..."¹¹

⁵ Equality Act 2010 s.4.

⁶ Equality Act 2010 s.10(2). "Belief" includes "lack of belief". Judge Tayler reached the same conclusion in relation to both, holding that Ms Forstater's view, put either as a belief or lack of belief, fails the *Grainger* criteria (discussed below) and therefore she does not have the protected characteristic of philosophical belief.

⁷ *Grainger Plc v Nicholson* [2009] UKEAT 0219_09_0311 (3 November 2009) at [24]; *Forstater v CGD Europe* [2019] UKET 2200909/2019 (18 December 2019) at [50].

⁸ *Forstater v CGD Europe* [2019] UKET 2200909/2019 (18 December 2019) at [82].

⁹ *Forstater v CGD Europe* [2019] UKET 2200909/2019 (18 December 2019) at [83].

¹⁰ Human Rights Act 1998 s.3(1).

¹¹ *Campbell v United Kingdom* (1982) 4 E.H.R.R. 293 at [36].

Grainger (v) also reflects the view of the UK courts that, to gain protection under the ECHR, “a belief must satisfy some modest, objective minimum requirements”, one of which is that a “belief must be consistent with basic standards of human dignity or integrity”.¹²

Applying Grainger (v)

Judge Tayler stated that Ms Forstater’s belief did not meet the test set out in Grainger (v) because “its absolutist nature” made it “incompatible with human dignity and fundamental rights of others”.¹³ A key foundation for Judge Tayler reaching this view was the jurisprudence of the European Court of Human Rights in Goodwin v United Kingdom.¹⁴ Judge Tayler stated:

“In Goodwin a fundamental aspect of the reasoning of the ECHR was that a person who has transitioned should not be forced to identify their gender assigned at birth. Such a person should be entitled to live as a person of the sex to which they have transitioned. That was recognised in the Gender Recognition Act which states that the change of sex applies for ‘all purposes’. Therefore, if a person has transitioned from male to female and has a Gender Recognition Certificate that person is legally a woman.”¹⁵

This is in contradiction with Ms Forstater’s belief that a person with a Gender Recognition Certificate is not the sex to which they have transitioned and that the Gender Recognition Act 2004 produces a “mere legal fiction”.¹⁶ However, Judge Tayler stated that the right the Gender Recognition Act 2004 gives rise to—the right of a person to transition sex, in certain circumstances, and thereafter to be treated for all purposes as being of the sex to which they have transitioned¹⁷—is “not something that [Ms Forstater] is entitled to ignore”.¹⁸ Judge Tayler concluded that, because Ms Forstater will “not accept that she should avoid the enormous pain that can be caused by misgendering a [person], even if that person has a Gender Recognition Certificate”, and considers that a trans woman who has a Gender Recognition Certificate “cannot honestly describe herself as a woman”, her belief is “not worthy of respect in a democratic society” as it is “incompatible with the human rights of others that have been identified and defined by the ECHR and put into effect through the Gender Recognition Act”.¹⁹

In short, because Ms Forstater is “absolutist in her view of sex and it is a core component of her belief that she will refer to a person by the sex she considered appropriate even if it violates their dignity and/or creates an intimidating, hostile, degrading, humiliating or offensive environment”,²⁰ Judge Tayler was bound to deny her belief protection under the Equality Act 2010 in order to meet the requirement of the Human Rights Act 1998 that domestic law be read and given effect in a way which is compatible with the ECHR.

Christine Goodwin and the ECHR

Judge Tayler’s conclusions on Grainger (v) will seem uncontroversial to many who know the Goodwin case, which concerned a “post-operative male to female transsexual” who was born in 1937 and underwent gender reassignment surgery in 1990 but, for legal purposes, was still regarded as male (she could not,

¹² R. v Secretary of State for Education and Employment (Respondents) Ex p. Williamson (Appellant) [2005] UKHL 15 at [23]. This was in the context of a consideration of the “manifestation” of belief and the protections available under art.9 ECHR and art.2 of Protocol No.1 ECHR.

¹³ Forstater v CGD Europe [2019] UKET 2200909/2019 (18 December 2019) at [84].

¹⁴ Goodwin v United Kingdom (2002) 35 E.H.R.R. 18.

¹⁵ Forstater v CGD Europe [2019] UKET 2200909/2019 (18 December 2019) at [84].

¹⁶ Forstater v CGD Europe [2019] UKET 2200909/2019 (18 December 2019) at [84].

¹⁷ Gender Recognition Act 2004 s.9(1). This is subject to certain exceptions, not directly relevant here.

¹⁸ Forstater v CGD Europe [2019] UKET 2200909/2019 (18 December 2019) at [84].

¹⁹ Forstater v CGD Europe [2019] UKET 2200909/2019 (18 December 2019) at [85].

²⁰ Forstater v CGD Europe [2019] UKET 2200909/2019 (18 December 2019) at [90].

for example, change her birth certificate).²¹ Lack of legal recognition as female caused, as Ms Goodwin put it, “numerous discriminatory and humiliating experiences in her everyday life”.²² For example, from 1990 to 1992, she was abused at work and did not receive proper protection from discrimination.

At the heart of the European Court of Human Rights’ approach to considering whether the way Ms Goodwin was being treated amounted to a violation of the ECHR was the principle that the very essence of the ECHR is respect for human dignity and human freedom.²³ In this respect, in relation to art.8 ECHR (right to respect for private and family life), for which the notion of personal autonomy is an important underlying principle, the European Court of Human Rights made clear that “protection is given to the personal sphere of each individual, including the right to establish details of their identity as individual human beings”.²⁴ The Court went on to state:

“In the twenty first century the right of transsexuals to personal development and to physical and moral security in the full sense enjoyed by others in society cannot be regarded as a matter of controversy requiring the lapse of time to cast clearer light on the issues involved.”²⁵

The Court further stated that “society may reasonably be expected to tolerate a certain inconvenience to enable individuals to live in dignity and worth in accordance with the sexual identity chosen by them at great personal cost”.²⁶ In essence, then, the Court concluded that art.8 ECHR placed a positive obligation on the UK to enable Ms Goodwin to obtain legal recognition of her changed sex and, as a consequence, to “live in dignity and worth” as a woman.²⁷

In *Forstater*, Judge Tayler made clear that Ms Forstater cannot have her belief protected under the Equality Act 2010 because it “involves violating others’ dignity and/or creating an intimidating, hostile, degrading, humiliating or offensive environment for them”.²⁸ To protect a belief that has this effect would be in contradiction with the principles established in *Goodwin* and with the legislation it gave rise to, whereby a person with a Gender Recognition Certificate has their acquired gender and sex recognised “for all purposes”.²⁹ As such, Judge Tayler hardly reached a controversial conclusion because to protect Ms Forstater’s belief would be to protect the essence of a belief that led to the problems experienced by Ms Goodwin and, as such, would be in conflict with the human rights of people like Ms Goodwin to “live in dignity and worth”. Those, such as Karon Monaghan, who think that Judge Tayler “got it wrong” and that his judgment is “surprising” and “bold”, fail to appreciate the extent of the human rights of trans people that have been established under the ECHR and the requirement that Judge Tayler was under to read and give effect to the Equality Act 2010 in a way that is compatible with those rights.³⁰

What about freedom of expression?

Judge Tayler made clear that Ms Forstater is free to campaign and put forward her views on the issues that concern her. However, even giving “full regard” to Ms Forstater’s right to freedom of expression

²¹ *Goodwin v United Kingdom* (2002) 35 E.H.R.R. 18 at [12]–[19].

²² *Goodwin v United Kingdom* (2002) 35 E.H.R.R. 18 at [60].

²³ *Goodwin v United Kingdom* (2002) 35 E.H.R.R. 18 at [90].

²⁴ *Goodwin v United Kingdom* (2002) 35 E.H.R.R. 18 at [90]. The Court of Appeal of England and Wales has recently affirmed that “[t]here can be little more central to a citizen’s private life than gender, whatever that gender may or may not be”, that “a gender identity chosen . . . , achieved or realised through successive episodes of major surgery and lived through decades of scepticism, indifference and sometimes hostility must be taken to be absolutely central to the person’s private life”, and that “gender identity” is “an issue now widely accepted as being of central importance and at the heart of a person’s Article 8 private life rights”, *R. (on the application of Elan-Cane) v Secretary of State for the Home Department* [2020] EWCA Civ 363 at [46] and [56].

²⁵ *Goodwin v United Kingdom* (2002) 35 E.H.R.R. 18 at [90].

²⁶ *Goodwin v United Kingdom* (2002) 35 E.H.R.R. 18 at [91].

²⁷ The European Court of Human Rights found a violation of art.8 ECHR, and art.12 ECHR (right to marry).

²⁸ *Forstater v CGD Europe* [2019] UKET 2200909/2019 (18 December 2019) at [87].

²⁹ Gender Recognition Act 2004 s.9(1).

³⁰ K. Monaghan, “The *Forstater* Employment Tribunal judgment: a critical appraisal in light of *Miller*”, UK Labour Law Blog, <https://wordpress.com/view/uklabourlawblog.com> [Accessed 3 April 2020].

under art.10 ECHR,³¹ Judge Tayler concluded that it was “legitimate to exclude a belief” from the protection of the Equality Act 2010 “that necessarily harms the rights of others through refusal to accept the full effect of a Gender Recognition Certificate or causing harassment to trans women by insisting they are men and trans men by insisting they are women”.³²

The recent judgment of the High Court of England and Wales in *Miller v College of Policing and Chief Constable of Humberside*³³ may lead some to consider that Judge Tayler’s conclusion is unsafe. It is certainly the case that *Miller* raises some important questions in respect of the right to freedom of expression of “gender critical” beliefs, since the High Court held that Humberside police had acted disproportionately in their response to a complaint about Mr Miller’s expression of such views on social media and, as a consequence, violated his right to freedom of expression under art.10 ECHR.

However, although the High Court recognised that Mr Miller’s “right to speak on transgender issues”³⁴ was protected under art.10 ECHR, this does not mean that Mr Miller’s views would necessarily qualify for protection as a philosophical belief under the Equality Act 2010. Although the judgments in *Forstater* and *Miller* may create some “tensions” that will surely be worked out as the law develops, their approaches are not fundamentally incompatible. It is perfectly reasonable to accept that a person may have the right to freedom of expression on a subject but, for the specific purposes of anti-discrimination law, the belief that underpins that expression is not protectable.

An example of a similar tension in law is the protection of freedom of expression concerning certain aspects of sexual orientation that is afforded by the Public Order Act 1986,³⁵ and the lack of protection available for certain beliefs about sexual orientation under the Equality Act 2010.³⁶ The result of this is that a person can, for example, freely express the view that same-sex marriage is wrong, or that same-sex sexual acts are wrong and that people should refrain from them, without fear of being prosecuted for the offence of hatred on the grounds of sexual orientation,³⁷ but may not qualify for these views to be protected as a belief under equality law. This tension between freedom of expression and protection of belief is similar to the tension in play between *Forstater* and *Miller* that will need to be explicitly worked out, either by the courts or the UK Parliament.

In approaching any tension between *Forstater* and *Miller* it should be remembered that “opinions” and “ideas” that are protected by art.10 ECHR are not always synonymous with a “belief” that is protected by art.9 ECHR.³⁸

Conclusion: fair balance

Human rights law is a mechanism for achieving a fair balance in circumstances where the claimed rights of one individual clash with the rights of others. Ms *Forstater* does not accept that, as she puts it, her “bleeding obvious” belief that human beings “cannot change sex” is “incompatible with treating people with respect”.³⁹ Judge Tayler considered that Ms *Forstater*’s “absolutist” view of sex is a “core component of her belief that she will refer to a person by the sex she considered appropriate even if it violates their dignity”.⁴⁰ Because Ms *Forstater*’s belief “necessarily harms the rights of others”,⁴¹ the human rights balancing exercise that Judge Tayler performed went against her.

³¹ *Forstater v CGD Europe* [2019] UKET 2200909/2019 (18 December 2019) at [75].

³² *Forstater v CGD Europe* [2019] UKET 2200909/2019 (18 December 2019) at [91].

³³ *Miller v College of Policing and Chief Constable of Humberside* [2020] EWHC 225 (Admin).

³⁴ *Miller v College of Policing and Chief Constable of Humberside* [2020] EWHC 225 (Admin) at [286].

³⁵ Public Order Act 1986 s.29JA.

³⁶ *Eweida v United Kingdom* (2013) 57 E.H.R.R. 8.

³⁷ Public Order Act 1986 s.29B.

³⁸ *Campbell v United Kingdom* (1982) 4 E.H.R.R. 293 at [36].

³⁹ M. *Forstater*, “Women’s Liberation 2020: My Speech”, <https://hiyamaya.net/2020/02/02/womens-liberation-2020-my-speech> [Accessed 28 February 2020].

⁴⁰ *Forstater v CGD Europe* [2019] UKET 2200909/2019 (18 December 2019) at [90].

⁴¹ *Forstater v CGD Europe* [2019] UKET 2200909/2019 (18 December 2019) at [91].

Judge Tayler's conclusion seems reasonable and persuasive in the context of the jurisprudence of the European Court of Human Rights, which has established that the ECHR provides trans people with protection so that they can live in dignity and worth. According protection to Ms Forstater's absolutist belief would have been contrary to that jurisprudence. As such, protecting Ms Forstater's belief would have violated the established principle that a belief cannot qualify for protection under the ECHR if it is incompatible with human dignity and in conflict with the fundamental rights of others.

The dispute over human dignity in Forstater will not end here. Ms Forstater asserts that she is "[s]tanding up for women's rights"⁴² and concerned about women's "dignity",⁴³ and she and others sympathetic to her cause will likely continue to claim that equality law should protect those who hold gender critical beliefs. In my view, equality law should not protect those who hold such beliefs because, like Judge Tayler, I do not think that people can expect to be protected if their beliefs involve violating the dignity of transgender people. Bayard Rustin once said that "[w]hen an individual is protesting society's refusal to acknowledge his dignity as a human being, his very act of protest confers dignity on him".⁴⁴ In my view, those with gender critical beliefs are protesting society's willingness to acknowledge the dignity of transgender people and, as such, equality law should not confer dignity on their protests.

Justice Albie Sachs once wisely said that "a society can cohere only if all its participants accept that certain basic norms and standards are binding" and people "cannot claim an automatic right to be exempted by their beliefs from the laws of the land".⁴⁵ The law of the UK is that a person can transition from male to female, or vice versa, and thereafter be treated for all purposes as being of the sex to which they have transitioned. In my view, it is reasonable to conclude that a person who absolutely rejects this established legal right, and seeks to be exempted from recognising it on the basis of their belief, cannot be said to have a belief worthy of respect in a democratic society.

⁴² M. Forstater, "Women's Liberation 2020: My Speech", <https://hiyamaya.net/2020/02/02/womens-liberation-2020-my-speech> [Accessed 28 February 2020].

⁴³ Forstater v CGD Europe [2019] UKET 2200909/2019 (18 December 2019) at [39.13].

⁴⁴ Ella Baker Center for Human Rights, "We Remember Bayard Rustin", <https://ellabakercenter.org/blog/2012/08/we-remember-bayard-rustin> [Accessed 3 April 2020].

⁴⁵ Christian Education South Africa v Minister of Education (CCT4/00) [2000] ZACC 11 at [35].