

## A NEW LEGAL PRECEDENT ON COSTS RECOVERY IN PUBLIC INTEREST PROCEEDINGS

*R (on the application of Christie Elan-Cane) v Secretary of State for the Home Department* [2020] EWCA Civ 363

On 10 March 2020, the Court of Appeal handed down its judgment in *R (oao Elan-Cane) v Secretary of State for the Home Department*. Despite dismissing the case, the Court set out an important legal precedent in relation to civil rights litigation on gender identity and LGBTI+ rights (see [here](#) for further information).

The Court also set an important precedent regarding costs recovery in public interest proceedings, which we discuss further below.

### COSTS RECOVERY

The Administrative Court had reduced the costs payable by Christie Elan-Cane to the Secretary of State by one-third in recognition of Christie's partial success in the proceedings, namely that despite dismissing the judicial review claim, the Administrative Court agreed with Christie's claim that the facts of the case engaged the right to private life under Article 8 of the European Convention on Human Rights. The Administrative Court applied the one-third reduction to the capped costs amount, ordering that Christie pay £2000 (of the £3000 capped figure) to the Secretary of State.

The Secretary of State cross-appealed against the Administrative Court's decision on costs, arguing that the one-third reduction should have been applied to its actual costs incurred and that the Administrative Court's approach constituted an error in law. The two-thirds balance of the actual costs exceeded the £3000 cap, and so the practical consequence of Secretary of State's approach would be that Christie should have been ordered to pay the full amount of the capped costs, in any event.

### THE JUDGMENT

The Court of Appeal dismissed the Secretary of State's cross-appeal on costs. The Court held that a judge's discretion to apply a reduction in costs includes

#### Key issues

- The Court of Appeal finds that the Court may exercise its discretion (under CPR Rule 44.2) to reduce costs payable by applying a percentage reduction to capped costs, even where costs incurred exceed the cap in question.

discretion to apply any such reduction to the capped costs figure rather than the actual costs incurred.

The Court's rationale was to uphold the public policy objective of the costs capping regime in the Criminal Justice and Courts Act 2015 – to promote access to justice in public interest litigation by giving parties certainty as to their maximum costs exposure from an early stage in the proceedings. The Court held that such aim "*should inform the whole of the exercise of judicial discretion on costs*" under CPR Rule 44.2.

## **ACCESS TO JUSTICE**

Access to justice is central to Clifford Chance's Responsible Business strategy, and the firm is proud to have worked for many years and to continue to work alongside Christie Elan-Cane's campaign to attain recognition for individuals who do not identify as either male or female. Gender identity is a fundamental part of an individual's intimate, personal identity, and X passports are a crucial step in the protection of the human rights of this group of individuals, who otherwise face an unacceptable choice between forgoing a passport, and making a false declaration, and using a passport which misrepresents their essential and deeply held personal identity.

Christie Elan-Cane is represented *pro bono* by Clifford Chance (Narind Singh, Eraldo d'Atri, Anne Collins, Jemima Roe and Nazifa Chowdhury) and Blackstone Chambers (Kate Gallafent QC, Tom Mountford and Gayatri Sarathy). Clifford Chance and Blackstone Chambers, on behalf of Christie, have applied for permission to appeal before the Supreme Court.

*Nazifa Chowdhury, trainee solicitor, assisted in the preparation of this article.*

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