IN THE COURT OF SESSION

**GROUNDS OF APPEAL FOR THE PETITIONER AND RECLAIMER**

**in the**

**P E T I T I O N**

of

**FOR WOMEN SCOTLAND LIMITED, a company incorporated under the Companies Act and registered in Scotland with Company number SC669393 and with registered offices at 135 Greengairs Road, Greengairs, Airdrie, ML6 7SY.**

**PETITIONER AND RECLAIMER**

**for**

**Judicial Review of the revised statutory guidance produced by the Scottish Ministers under Section 7 of the Gender Representation on Public Boards (Scotland) Act 2018**

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In dismissing the petition for judicial review – see *For Women Scotland v. Scottish Ministers (No.2)* [2022] CSOH 90, 2023 SLT 50 [2023] IRLR 212 ("*FWS 2*") at § 54 - the Lord Ordinary erred in law in at least the following respects:

## 1. Ground 1 – The Lord Ordinary misunderstood and failed to apply the relevant law as set out in the binding decisions of this court

1.1 The decisions of the Second Division in *For Women Scotland v. Scottish Ministers* [2022] CSIH 4, 2022 SC 150 ("*FWS 1*") and in *Fair Play for Women Ltd v Registrar General for Scotland* [2022] CSIH 7, 2022 SC 199 established at least the following propositions:

- there is no universal legal definition of the word "sex" which applies by necessity or by default in all statutes; instead, following ordinary language usage, the meaning of the word "sex" may vary depending on how the word is defined and/or used in the particular statute.
- but there are some statutory contexts in which a definition of sex based on, and only on, a reference to biology *must* be adopted. In particular a definition which uses the word "sex in terms of being purely a reference to an individual's biology (as being either male or female, woman or man) may require to be applied in matters in statutory contexts

concerning individuals' status, or their rights or, importantly, the rights of others of that same biological class.

- and it may be necessary to construe "sex" as requiring a biological referent, and so exclude from its ambit those who claim a particular "certified sex" (by virtue of their having obtained a gender recognition certificate ("GRC") under the Gender Recognition Act 2004 ("GRA 2004") unsupported by or contrary to their biology.

1.2 In coming to her judgment in the present case the Lord Ordinary failed properly to apply these propositions drawn from the above cases, which decisions were binding on her. In particular in *FWS 1* this court stated unequivocally (at § 36 of its judgment) that

> "an exception [in paragraph L2 of schedule 5 to the Scotland Act 1998] which allows the Scottish Parliament to take steps relating to the inclusion of women, as having a protected characteristic of sex, is limited to allowing provision to be made in respect of a 'female of any age'. *Provisions in favour of women, in this context, by definition exclude those who are biologically male*".

But at § 45 of her judgment the Lord Ordinary opined that "that passage does *not* form part of the ratio of the court's decision" and declined to follow it. She was wrong to do so. First it is clear that that passage from this court's judgment was indeed part of the *ratio* of its decision and therefore was binding on the Lord Ordinary. But in an event, *esto* it was *obiter* (which is denied) it presented the considered opinion of this court and should therefore have been treated by the Lord Ordinary as being highly persuasive. Even if this were an *obiter* observations (which is denied) it was and is correct in law and should have been followed by the Lord Ordinary had she correctly directed herself in law. Her failure to do so vitiated her judgment and the resulting decision.

1.3 As a result of the misreading of these higher court decisions, the Lord Ordinary failed to draw the correct conclusion in law: namely, that the Equality Act 2010 ("EA 2010") is structured *as a whole* on the basis of the "protected characteristic" of "sex" as meaning, consistently with the pre-existing common law, a reference to an individual's biology: *Corbett v Corbett* [1971] P 83, followed by *R v Tan* [1983] QB 1053 and *Bellinger v Bellinger* [2003] 2 AC 467. In so doing the Lord Ordinary erred in law in a manner which vitiated her decision.

## 2. Ground 2 – The Lord Ordinary misinterpreted and wrongly applied the Equality Act 2010 ("EA 2010")

2.1 The Lord Ordinary erred in failing to appreciate that the correct starting point in this case was a consideration of the aims and purposes of the EA 2010 (and *not*, as stated at § 45, of the GRA 2004) and the plain meaning of the 2010 Act's key provisions.

2.2 In particular, the Lord Ordinary failed to approach the EA 2010 as a consolidating measure seeking, consistently with EU law, essentially to codify and to *reconcile within one statute* all the various formerly separate and discrete, and potentially competing, provisions making up the various strands of discrimination law. As such, and contrary to the approach taken by the Lord Ordinary, the EA 2010 has to be read within its own four corners, without any need for referencing the terms of any predecessor provisions. And there is simply no proper basis for the Lord Ordinary's claims (at § 51) that "whilst they [sex and gender reassignment] are separate and distinct characteristics, they are *not necessarily mutually exclusive in the context of the 2004 and 2010 Acts, read together*".

2.3 Section 11 EA 2010 defines the protected characteristic of "sex" in binary terms – it is a reference to either being a man or a woman. "Woman" means "a female of any age" – section 212(1) EA 2010. There is no other definition of "sex" or of "woman" within the EA 2010 so it must be presumed that Parliament intended that these terms be applied uniformly whenever used in the EA 2010. Instead – contrary to the plain terms of the EA 2010 - the Lord Ordinary proceeded on the basis that the term "sex" might have variable meanings even within the EA 2010, sometimes being a purely biological referent and other times being a reference to "certified sex", regardless of biology. Yet there is simply no warrant for any such variability of the meaning of the statutory defined word "sex" within the one statute. In so claiming the Lord Ordinary erred in law and this error vitiated her decision.

2.4 More particularly, the Lord Ordinary erred in failing to appreciate how the definition of the sex of a woman (or a man) is fundamental to equality law and underpins the protections intended specifically to be afforded to *women* in the EA 2010. In addition to pregnancy and maternity protections noted below, these provisions include, among others:

- Section 104 EA 2010, allowing registered political parties to make arrangements for single sex shortlists in relation to the selection of election candidates to address the under-representation of women in elected bodies;

- Section 193 EA 2010, allowing charities, if in line with their charitable instrument and if it objectively justified or to prevent or compensate for disadvantage, to provide benefits only to "women" as people who share the same protected characteristic of "sex";

- the provisions, contained in paragraphs 22 and 23 in Part 7 of Schedule 3 EA, 2010, allowing for the provision of services, if so advised, to and for women only, for example in hospitals, rape crisis centres, domestic abuse shelters, and prisons;

- the provision of single sex schools, contained in paragraphs 1 to 4 in Part 1 of Schedule 11 EA 2010;

- the provision of single sex institutions in the context of further and higher education, contained in paragraphs 1 to 3 in Part 1 of Schedule 12 EA 2010.

2.5 Throughout the EA 2010 "sex" is used as a specific "protected characteristic" which is distinct from gender reassignment. Indeed, the concept of being able to claim protection against discrimination because of the protected characteristic of "gender reassignment" is necessarily parasitic and dependent on a prior finding of what that claimant's "sex" is. This results from the very definition of the protected characteristic of "gender reassignment" in Section 7(1) EA 2010, which refers to such individuals being able to claim "gender reassignment" because of a "process … *changing* physiological or other attributes" of their *sex*. But there is *no* link made in the EA 2010 between the term "woman" (defined by reference to the protected characteristic of "sex") and the protected characteristic of "gender reassignment" (which is defined without reference to "sex").

2.6 There is, by contrast, a consistent and necessary link between the use of the word "woman" and the EA 2010 protected characteristic of "pregnancy and maternity". All of the references to "pregnancy and maternity" throughout the EA 2010 are made in relation to, and only to, women. "Women" necessarily involve a reference to female *biology* when used in relation to the EA 2010 protections against discrimination because of pregnancy and/or maternity.

2.7 Similarly Section 12(1) EA 2010 defines the protected characteristic of "sexual orientation" as meaning "a person's sexual orientation towards— (a) persons of the same *sex*, (b) persons of the opposite *sex*, or (c) persons of either *sex*." This definition is also necessarily predicated on a biological referent: namely the "sex" in a (biological) sense both of the individual, and of the person to whom they are (sexually) attracted. The idea that a party's acquisition of a Gender Recognition Certificate transforms a heterosexual encounter or relationship into a homosexual one (or vice versa) is simply a pernicious absurdity, which has the potential to undermine the EA 2010 protections against sexual orientation discrimination by effectively depriving the very concept of sexual orientation of any meaning.

2.8 In failing properly to take into account the fact that the protected characteristics of "sex", "gender reassignment" "pregnancy and maternity" and "sexual orientation" are all predicated on *biological* referents to "sex" – the Lord Ordinary has erred in law such as to vitiate her decision.

2.9 And in failing to respect the fundamental definitional principles upon which the protections in the EA 2010 (in particular the biological definition of "sex") the Lord Ordinary's approach conflicts with and undermines the overall equal opportunities regime set down by the EA 2010.

2.10 The Lord Ordinary further erred and misdirected herself in law (at § 49) in founding on the lack of express reference in the EA 2010 to the phrase concept "biological sex" or terminology such as a "biological woman". But terms such as "biological woman" or "biological sex" contain a hopeless redundancy, because there is no such thing as "*non*-biological women" or "non-biological sex". For the purposes of the EA 2010 there are simply "women" and "men", and the (biological factual) reality of two different sexes.

2.11 Finally, there was simply *no* basis for the Lord Ordinary's claim (at § 44) that, in its decision in *FWS 1*, the Inner House "implicitly recognises that those in possession of a GRC are a distinct category of persons *not* to be treated as synonymous with, or *only as a subset of*, the protected characteristic of gender reassignment"; or with her suggestion (at § 51) that it is a category error or somehow otherwise contrary to the terms of the EA 2010 to hold that it is necessary condition of obtaining a GRC that a person claims to have the protected characteristic of "gender reassignment". Contrary to the Lord Ordinary's suggestion, the proper analysis is that an individual cannot lawfully or properly obtain a GRC under the GRA 2004 without having the EA 2010 protected characteristic of "gender reassignment", although it is not necessary in order to claim the EA 2010 protected characteristic of "gender reassignment" to have a GRC under the GRA 2004. Accordingly holders of a GRC will necessarily be a subset of, and contained wholly within, the broader category of those individuals who claim the EA 2010 protected characteristic of "gender reassignment".

2.12 In sum, while a Gender Recognition Certificate issued obtained under the GRA 2004 evidences the fact that the State has formally recognised that an individual has the EA 2010 protected characteristic of "gender reassignment", that certificate cannot, and does not change an individual's "sex" not least for the purposes of the EA 2010. Accordingly the within the context of a proper interpretation of the EA 2010, the provisions of Section 9(3) GRA 2004 such as render wholly inapplicable the claims and legal fictions set out in Section 9(1) GRA 2004. The Lord Ordinary's finding to the contrary vitiated her decision.

## 3. Ground 3 – The Lord Ordinary misinterpreted and wrongly applied the Gender Recognition Act 2004 ("GRA 2004")

3.1 The GRA 2004 as a whole has to be interpreted within its specific historic and legislative context. The GRA 2004 was intended to remedy the human rights incompatibility in UK

law which was identified in *Goodwin v. United Kingdom* (2002) 35 EHRR 18 and in respect of which a declaration of incompatibility was made in *Bellinger v Bellinger* [2003] UKHL 21 [2003] 2 AC 467, namely the inability of couples of the same sex, one of whom had undergone a process of gender reassignment, to marry. But "'marriage can readily be regarded as a special case": *Chief Constable, West Yorkshire Police v A (No 2)* [2004] UKHL 21 [2005] 1 AC 51 *per* Baroness Hale at § 51. The reference to "sex" in Section 9(1) GRA 2004 (and not simply to "gender") was therefore intended to ensure and put beyond doubt that Parliament intended that for a very limited class of same sex couples seeking to marry - namely those where one of them had gender reassignment – the requirement that one party be male and the other female for a marriage to be valid was disapplied.

3.2 But now that same sex couples are able to marry regardless of gender reassignment (and opposite sex couples to enter into civil partnerships) then the "marriage mischief" that the GRA 2004 was specifically intended to address has fallen away. That has now been subsumed under the subsequent general legal changes which have provided for couples to marry [1] or to enter civil partnerships [2] regardless of their sex (or whether they claim gender reassignment). Further, since the decision in *Goodwin* there has been an equalisation of State pension ages between men and women in the UK, and so one's sex is no longer a determinant factor of pension age: cf *R (C) v Work and Pensions Secretary* [2017] UKSC 72 [2017] 1 WLR 4127 *per* Baroness Hale at § 32. Accordingly, as the law now stands, the only continuing practical significance of the GRA 2004 are its provisions regarding the alteration of the record of an individual's sex on their original birth certificate. Against that background, since the principal mischiefs which the GRA 2004 was intended to address have now been remedied by the general law, Section 9(1) GRA 2004 has essentially become a redundant provision. So the Lord Ordinary is in error of law in her finding that Section 9(1) GRA 2004 has at least the following effects:

- that where a full gender recognition certificate is issued to a man with the protected characteristic of gender reassignment person, that man's sex becomes that of a woman for *all* purposes (including for the purposes of this man's inclusion in all and any protections otherwise afforded by law – whether in the EA 2010 or other statutes - to *women* because of their sex) ; and

[1] The Marriage and Civil Partnership (Scotland) Act 2014 extended marriage to same sex couples in Scotland. The Marriage (Same Sex Couples) Act 2013 legislated for the extension of marriage to same sex couples in England and Wales.

[2] Following the declaration of Convention rights incompatibility of the exclusion from civil partnerships of opposite sex couples pronounced by the UK Supreme Court *R (Steinfeld) v. Secretary of State for International Development* [2018] UKSC 32 [2020] AC 1 the Civil Partnership Act 2004 was amended by the Westminster Parliament to allow opposite sex couples to conclude civil partnerships

- that where a full gender recognition certificate is issued to a woman with the protected characteristic of gender reassignment person, that woman's sex becomes that of a man for all purposes (such that that woman is, by virtue of holding a gender recognition <u>*excluded*</u> from all and any protections afforded by law – whether in the EA 2010 or other statutes - to *women* because of their sex, including pregnancy and maternity protections: cf *R. (McConnell) v Registrar General for England and Wales* [2020] EWCA Civ 559 [2021] Fam. 77)

3.3 The Lord Ordinary's approach results in a nonsensical reading which clearly runs wholly contrary to the intention of the legislature in passing any number of statutory provisions, not just in the EA 2010 but also in, among others: the Abortion Act 1967; the Surrogacy Arrangements Act 1985; the Human Fertilization and Embryology Act 1990; the Victims and Witnesses (Scotland) Act 2014 (as amended by the Forensic Medical Services (Victims of Sexual Offences)(Scotland) Act 2021); and the National Health Service (Free Prescriptions) Scotland Regulations 2011. At § 53 the Lord Ordinary asserts that "providing that the plain language of section 9, and any relevant exceptions, is applied" this gives no "rise to any absurdity, or unworkability". But if and insofar as the Lord Ordinary means by this that, in relation to any of these aforementioned statutory provisions, the claims of Section 9(1) GRA 2004 (replacing "biological sex" with "certified sex") are to be *disapplied* by virtue of Section 9(3) GRA 2004 she offers no principle of statutory interpretation as to when, how and why Section 9(3) GRA 2004 might be given precedence over Section 9(1) GRA 2004. The Lord Ordinary has, instead, simply abdicated the responsibility placed on the court "to adopt an approach to the meaning of a statute that is constant and predictable" and her decision fails to ensure that "a coherent, stable and workable outcome is achieved" on: whether, when, and how the legal fiction (that gender recognition certificate "changes" sex) may, or may not, be applied in any particular statutory context; and, in particular, how and why it is to be applied in the context of the Gender Representation on Public Boards (Scotland) Act 2018 ("GRPB(S)A 2018"): cf *Imperial Tobacco Ltd v Lord Advocate* [2012] UKSC 61, 2013 SC (UKSC) 153 per Lord Hope at § 14.

3.4 In sum, the Lord Ordinary erred in law in applying a decontextualised and dehistoricised apparently literalist reading of the GRA 2004 – and in particular Section 9 GRA 1994. The Lord Ordinary wrongly treated Section 9(1) GRA 2004 as if it were a provision of universal application. On the Lord Ordinary's reading of this provisions an individual obtaining a gender recognition certificate effected a change of their "sex" "for all purposes". If the Lord Ordinary were correct, the GRA 2004 should properly have been entitled the "Sex Change Act 2004" or the "Sex Interpretation Act 2004" because Section 9(1) GRA 2004, according

to the Lord Ordinary, created a wholly new (and revolutionary) statutory interpretative principle. This is to the effect that in <u>all</u> statutory contexts, - whether pre-dating or subsequent to the coming into force of the GRA 2004 - the word "sex" has to be taken to mean (unless this Section 9(1) GRA 2004 substitution was expressly disapplied by the legislature) always and only the individual's "certified sex". This "certified sex" would be, and only be, that which was shown on an individual's birth certificate, whether as originally issued or as altered upon a person obtaining a gender recognition certificate: cf *X Petitioner - re application to change birth certificate*, 1957 SLT (Sh. Ct.) 61. This error in law runs wholly contrary to the *Fair Play for Women Ltd v Registrar General for Scotland* [2022] CSIH 7, 2022 SC 199 and in any event wholly vitiated the decision of the Lord Ordinary.

## 4. <u>Ground 4</u> – The Lord Ordinary misinterpreted and failed to apply the constitutional concept of implied repeal/disapplication as between earlier and later statutes

4.1 The Lord Ordinary's decision was founded in part on her claim (at § 52), in error of law, that the GRA 2004 had a "weighty" (quasi-) constitutional status. Contrary to the Lord Ordinary's claim was and is <u>no</u> presumption against the GRA 2004 being (impliedly) repealed by the provisions of any later statutes, particularly the EA 2010 (which in large measure seeks to implement in a coherent and consistent the underlying obligations under EU equality law to prohibit workplace/work-related discrimination because of sex, pregnancy and maternity, sexual orientation, gender reassignment, age, race, disability, religion or belief and separately sex and/or discrimination in the provision of goods and service). Such a claim by the Lord Ordinary (largely adopting the submissions of the EHRC on this point) was inept and inapt and wholly unfounded in law. Instead "the most fundamental rule of UK constitutional law is that Parliament, or more precisely the Crown in Parliament, is sovereign and that legislation enacted by Parliament is supreme": *In re Allister judicial review* [2023] UKSC 5 [2023] 2 WLR 457 per Lord Stephens at § 66. There is no hierarchy to be afforded among Acts of Parliament, other than the time when they were passed. And because Parliament cannot bind its successors this means that the suspension, subjugation, or modification of rights contained in an earlier statute may be effected by express words in a later statute. But it is also the case that the provisions of an earlier statute may, by the requirements of a later statute, be repealed or suspended or disapplied by <u>implication</u> in any particular factual situation: *Hamnett v Essex County Council* [2017] EWCA Civ 6 [2017] 1 WLR 1155 per Gross LJ at § 26.

4.2 This means in the present case that section 9 GRA 1994 Act can only lawfully read and be given effect subject to its consistency with (the terms schema and objective of) the EA 2010 (rather than the other way around). And it is of no real significance whether the language

used is that provisions of the GRA 2004 which are inconsistent with the scheme of the EA 2010 are suspended or modified by, or subjugated to, the EA 2010. The Lord Ordinary erred in finding otherwise and this error vitiated her decision.

## 5. Ground 5 – The Lord Ordinary misinterpreted and wrongly applied the Gender Representation on Public Boards (Scotland) Act 2018 ("GRPB(S)A 2018").

5.1 The Lord Ordinary misdirected herself in law at § 53 in stating that the question before her for determination was what "*is the meaning of sex for the purposes of the EA 2010".* The question in fact before her was whether or not the Scottish Ministers' were correct in their claim - set out in their revised statutory guidance issued on 19 April 2022 under Section 7 GRPB(S)A 2018 – that among the persons who could lawfully claim the protections of the workplace positive action measures in favour of *women* set out in GRPB(S)A 2018 were *men* who had obtained a full gender recognition certificate certifying that "their acquired gender is female," and also, by necessary implication, that women who had obtained a full gender recognition certificate certifying that "their acquired gender is male," were *excluded* from being able to claim or benefit the protections of the workplace positive action measures in this Act (or indeed from all and any other statutory provisions made to or for the benefit or protection of women and women's rights

5.2 In any event, the Lord Ordinary erred in holding that, properly interpreted in a manner consistent with the limits on the legislative competence of the Scottish Parliament, the GRPB(S)A 2018's workplace positive action measures in favour of "women" *encompassed* men with the EA 2010 protected characteristic of gender reassignment who had obtained a gender recognition certificate under the GRA 2004 and *excluded* women with the EA 2010 protected characteristic of gender reassignment who had obtained a gender recognition certificate under the GRA 2004. In so doing the Lord Ordinary simply failed to take into account and apply the analysis of this court in *FWS 1* particularly at §§ 38-39 that the GRPB(S)A 2018 was intended to make provision, consistently with the overall requirements of the EA 2010, for lawful positive action to be put in place for *women* in the workplace. While as this court confirmed in its decision in *FWS 1* there is undoubtedly significant and weighty evidence attesting to the under-representation of women (who form just over half of the total population overall) in the workplace, there simply was and is *no* evidence to support the Lord Ordinary's assumptions/presumptions in interpreting the GRPB(S)A 2018 either:

- that there *is* significant workplace under-representation (which mirrors the degree of underrepresentation of women overall) of the distinct category or class of "men with the

EA 2010 protected characteristic of gender reassignment who had obtained a gender recognition certificate under the GRA 2004"; or

- that there is *no* significant workplace under-representation (in contrast to the degree of underrepresentation of women overall) of the distinct category or class of "women with the EA 2010 protected characteristic of gender reassignment who had obtained a gender recognition certificate under the GRA 2004"

5.3 The result of the Lord Ordinary's interpretation and upholding the lawfulness of the Scottish Ministers revised statutory guidance is that the intended purpose of the GRPB(S)A 2018 is subverted and undermined. The result of her decision is that a measure which was intended, consistently with the positive action provisions in the EA 2010, to increase the workplace representation and participation of *women* by *including* within the scope of the Act's positive action measures a sub-class of *men* (those with the EA 2010 protected characteristic of gender reassignment who had obtained a gender recognition certificate under the GRA 2004) and *excluding* from its scope a sub-class of women (those with the EA 2010 protected characteristic of gender reassignment who had obtained a gender recognition certificate under the GRA 2004). This error in law vitiated her decision.

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