

**Aidan O'Neill KC for the reclaimers For Women Scotland - Right of reply**  
**04 October 2023**

**Aidan O'Neill:**

I'm sorry to interrupt. There are just a couple of points which arose from the discussion, which I would like to have the opportunity to reply on, it won't take very long.

**Lady Dorrian:**

Briefly then.

**Aidan O'Neill:**

Yes, absolutely. I'll highlight each, as it were, bullet point. The first one is the proper interpretation of paragraph 28 of schedule 3 which came up in discussion, that's at page 669 to 670 if the court wants to have it before it. But that's the, what your ladyship called the carveout for gender reassignment discrimination in the case of single-sex services such as rape crisis centres and the like. It bears very, very close reading because I don't think it in fact, stands up to the meaning which seemed to be ascribed to it by the court in comments.

If we just look at it, it says: paragraph one, a person does not contravene section 29, which is a prohibition against discrimination in the provision of services, so far as relating to gender reassignment discrimination, only because of anything done in relation to matter within subparagraph two if the conduct in question is a proportionate means of achieving a legitimate aim. So, the matters are, things that you can do in terms of the provision of separate services for persons of each sex, provision of separate services differently for persons of each sex and the provision of a service only to persons of one sex. Now, I say that that exception can only make sense if sex means actual sex rather than as the Scottish Ministers say, certificated sex, because if certificated sex is included, as the Scottish Ministers say, then what you would be doing and trying to justify as a proportionate interference would be excluding a male with a GRC, who would be a kind of female, a woman according to Scottish Ministers, in order to keep separate services for women.

It helps to focus on one example because it's terribly difficult to work through, but think of women only wards in a hospital. The fact is, if you try and exclude a male with a GRC, then paragraph 28 potentially applies to say that is not gender reassignment discrimination, or it's not unlawful gender reassignment discrimination, even although by excluding a male with a GRC from a women only ward you're discriminating against that person because of their gender reassignment protected characteristic, in that you're keeping women in who don't have that protected characteristic. But you can only do that if by excluding that male with a GRC, who according to Scottish Ministers is a woman, is in fact a proportionate means, actually has a legitimate aim, is rationally connected to the legitimate aim of keeping the ward same sex for women-only. Now from Scottish Ministers, by excluding one kind of woman, that is a male with a GRC from a women's only ward in order to keep it for women only, that's just not making any sense. There is no rational connection. Because you're excluding one kind of woman, they say, to keep it only for women, single-sex.

It only makes sense if keeping things single-sex, or different provision for sex, means the actual sex. In which case, by excluding a male with a GRC who, under the section 9(1)

would be a woman, you are in fact achieving the end of a single-sex ward because sex means actual sex. So the carveout provision is predicated, because of its legitimate ends, on sex meaning actual sex, otherwise, it makes no sense at all. So that's number one. So in fact, paragraph 28 completely supports my approach, rather than the Scottish Ministers.

Second point. Much was made of it being of permanency, an intention to live until death, which means that it was submitted on rather a shoogly peg basically. That means that Parliament can never have anticipated Freddie McConnell. Again, that provision doesn't bear any of the weight which has been put on it. All that is required is an intention to live until death, there's no requirement that if that intention is changed that somehow one's gender recognition certificate is forfeit. What you actually have to do is go through another gender recognition process and get a new certificate with the acquired gender you now want to say that you live in. So permanency means nothing at all, its intention to live. There is no sanction against not living it. It's also assuming that being pregnant is not living as a man, to become pregnant is not to live as a man, anyway, which itself is...it raises all sorts of issues. But the point is, all it talks about is an intention to live permanently, no sanction for not doing so and no issue of persons such as Freddie McConnell becoming pregnant. And the important thing to get from this is that the Gender Recognition Act was passed knowing that there was no provision in it to make it dependent on a person not having the ability to have a child. And there's no requirement to say that they would not have children biologically. So Parliament knew what it was doing, as Lord Pentland points out, and it knew that it wasn't imposing any kind of biological requirements and biological fertility remains. So therefore, it is spurious to claim that because there was a permanency requirement Parliament could never have realised that what they would call transmen might become pregnant and need pregnancy protections.

One also has to bear in mind that the Gender Reform Scotland bill, which was passed by and Scottish Parliament and which they are continuing to challenge the UK Government in terms of their refusal to let it go for royal assent - so they say it should still be law - radically changes the Gender Recognition Act provisions which my learned friend Ms Crawford relied upon, because it takes away the need for any medical diagnosis of gender dysphoria. It takes away the need for any evidence of prolonged period of living presenting, it's not two years anymore, it's three months, or six months if you're 16. It takes away any objective consideration and exercise of judgement by a specialist panel. And so there is simply no objective criteria for gender reassignment. That's why it's all about self-ID. And that's why the UK Government noted in its paragraph 11 of schedule 2, which is tab 27, page 1032, that the thresholds for applications under the 2004 Act is modified by the Scottish bill because it changes the cohort of people with gender recognition certificates in two substantial ways: it changes the nature of people who are eligible to apply and in doing so it is likely significantly to increase the number of people able to do so. An effect of the bill would be there's no longer significant control over who might be included in it.

Turning to the issue of pregnancy. It was when My Lord Malcolm suggested that oh, well, maybe the way through this for the Scottish Ministers is effectively to deny Freddie McConnell and all transmen who are pregnant, pregnancy protections. That goes completely contrary, of course, to what the Scottish Ministers position was in their Note of Argument, which is that the intention was to protect the fact of pregnancy not the gender of the pregnant person.

It does seem, rather throwing, as it were, pregnant transmen under a bus in order to maintain the ideological approach, which is that certificated sex otherwise has to be read in all cases, in the case of women.

The section 7 whataboutery approach was that, well, if you think it's difficult with section 212 just having one definition of women, rather than as the Scottish Ministers would have liked, a different definition when it came to pregnancy and maternity, they then said well, section 7, that's predicated on sex and so therefore, because it talks about changing the physiological or other attributes of sex. Again, this does not bear the weight which is put upon it. The very fact that section 7 refers to a process of seeking to change physiological, physiological or other presumably psychological attributes of sex, is again pointing to the reality of actual sex. You can only claim to change sex if you know what your sex was in the first place. And in any event, it doesn't say anything about gender recognition certificates as pointing to a process, or that being of changing sex having been achieved, all it talks about is the process that one is willing to undergo in order to claim that achievement has been potentially completed. So the GRC doesn't say anything at all for the purposes of section 7. All that we do know is that contrary to Lord Ordinary, and I think it seems to be common ground, is that you can only get a GRC if you have the protective characteristic of gender reassignment; it is a subset of those.

On the point of the abandonment of the paragraph 18 issue, that was because it was never enforced. That's important. It can't just be left, because it was the only provision which the Scottish Ministers said expressly supported their position in the Equality Act. It doesn't. It's not there. The Equality Act was never amended in that way. And that weak reply on paragraph 25 in terms of religious celebrations of marriage, we have to be clear, there is no religious belief, as far as I know, that people shouldn't be married because they've got themselves a gender recognition certificate. I mean, certainly, that's not the case. What the religious objection to is marrying people of the same sex. The whole point about paragraph 25 is it shows that Parliament recognised that sex is not changed for a GRC, other than for the now wholly redundant purposes of civil marriage, and that change was done when civil marriage was prohibited in the case of same sex couples.

The explanatory notes were referred to, at least one paragraph of them, at page 5 of the appendix, paragraph 27, where my learned friend read out the explanatory note, which as we say, is what somebody says Parliament meant rather than what Parliament actually said, saying that subsection (1) states a fundamental proposition that once a full gender recognition certificate is issued the person's gender becomes for all purposes, the acquired gender. She would, for example, be entitled to protection as a woman under the Sex Discrimination Act and be considered female.

And that was presented as, oh well, that's section 27(1), under reference to a now repealed Act. But paragraph 29 says subsection 3 means that the general proposition is subject to exceptions made by the remainder of the Act and for the future by any other enactment or subordinate legislation. So once again, 9(3) counts. And we get nothing. I've heard nothing from the Scottish Ministers as to why it is that the 9(3) exception does not apply in the Equality Act. Why not? I say because it makes perfect sense in terms of the aims, purposes and objects. We get nothing in terms of the aims, purposes and objects of the Equality Act as to why it is 9(1) rules and trumps everything, rather than 9(3). And when the hard cases

come about the regulation, what about the regulation of the pregnancies of transmen, pregnant men in the abortion, and surrogacy, and all the rest of it? All they do is just hold up their hands and say, oh, well, section 9(3) applies in those cases so, and anyway, this court isn't concerned with other statutes, and it's all so complicated.

But they are ready to surrender on the points made in relation to these other statutes about the regulation of pregnancy but they still, ideologically, and without proper backing maintain this claim about section 9(1) applying in all cases, within the Equality Act. And what it comes down to is this, is that the approach seems to be that the changing of one's sex, if section 9(1) is not given primacy and trumps in the Equality Act, then it means that somehow some people are losing out because they're not getting the rights that would otherwise be available to them in terms of sex discrimination. They cannot claim the rights, if they are males with a GRC, on my reading, that women can claim and they say, well, that's unfair, they should be able to get women's rights too. But let's work out what that means. I think in response to the the question from Lord Malcolm with a suggestion from Lord Malcolm, well, maybe the Freddie McConnell's of this world, the pregnant men were not supposed to get pregnancy protection is a zero sum game, is that if you're giving some men, males with a GRC, the rights that women are getting, are given under the Equality Act...

**Lord Malcolm:**

Just for the sake of accuracy, Mr O'Neill, that was not my suggestion. That was my understanding of what Ms Crawford was submitting.

**Aidan O'Neill:**

My apologies, My Lord, I'm sorry, I'm trying to keep this...so it wasn't my understanding of what Ms Crawford was submitting in her written argument, but she might have changed it on her feet. But there it is. The fact is, on her analysis, on the Scottish Ministers analysis, it is a zero sum game, that some men, males when they get a GRC get the protections which women get. But similarly, females who once they get a GRC, they lose the protections and rights that women get, including pregnancy and maternity.

So there are losers in this game, but the losers are, as so often is the case, women. Not men. Men get more rights, apparently, on the Scottish Ministers reading, because once they get their GRC they get all those rights and protections, which Parliament, in its wisdom over the years has afforded to women, because of their experience, within, as I say, a sexist and patriarchal society. The idea that somehow men should also be able to benefit from centuries, millennia, of oppression of patriarchy because they could get a certificate issued by the state is more than a little ironic. And there's something that's fundamentally wrong with such a reading, which basically ends up with women being the losers, again, if they get a GRC, whereas men get more. So that's another reason why the Scottish Ministers interpretation should be rejected, and instead this reclaiming motion upheld. Those are my submissions, unless there's anything else I can assist the court on.

**Lady Dorrian:**

No, thank you very much. The court is obliged to parties for their submissions, but obviously it will take some time to consider these and the court will issue its decision in due course in writing. And meanwhile, the court makes avizandum.