Case No:
UKSC 2024/0042

IN THE SUPREME COURT OF THE UNITED KINGDOM

ON APPEAL FROM

THE SECOND DIVISION OF THE COURT OF SESSION

in the Petition of

FOR WOMEN SCOTLAND LIMITED

PETITIONER AND APPELLANT

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

APPELLANT'S REPLY NOTE

AB = Authorities Bundle Tab
App = Appendix Tab
CV = Core Volume Tab
EF = Electronic File Number page
SA = Supplementary Appendix Tab

1. SEX MATTERS

1.1 The appellant disagree with three points in the interveners, Sex Matters', submissions as follows:

(1) Genuine occupational requirement

1.2 The issue of whether the genuine occupational requirement amendment shows that legislature thought sex was non-biological. That makes no sense when seen in context of 1999 regulations **EF 4668** which are of course based on a biological concept of sex. These regulations were referred to in *Goodwin* and their existence in the terms then stood did not amount to a ECHR violation per the Strasbourg court. So all that that GOR exception is and can only be saying the fact that the definition of gender reassignment uses the terminology of "reassigning sex" that does not mean changing one's *sex*, so in refusing to treat a transwoman as a woman that is neither sex discrimination nor unlawful gender reassignment discrimination. **The exception is therefore predicated on a biological notion of sex.** As the Explanatory note states (at **EF 4674**:

> "It is not unlawful to discriminate on the grounds of gender reassignment where a person's sex is a genuine occupational qualification for that job and the employer can show that his treatment of the person is reasonable in view of section 7(2) or any other relevant circumstances

1.3 The reassignment of sex is for and for only the limited purposes then required as **a matter of EU law** (these were Section 2 regulations and it would have been *ultra vires* if they had gone further than that) So ***P v. S* CJEU 3223** means only that one needs to ensure as a matter of EU law that in national there is the possibility of employment protection against dismissal. Nothing more

(2) Section 7 definition of protected characteristic of *gender reassignment*

1.4 The claim that the terminology of "sex" in the gender reassignment definition in Section 7(1) EA 2010 confuses gender and sex, as if attributes of sex meant dresses etc. That is just wrong again. Draftsmen are not stupid. The distinction between sex and gender was clearly established from at least Simone de Beauvoir comments in the 1950s – and in subsequent feminist legal scholarship - about "one is not born a "woman", one becomes it through social conditions and patriarchal conditioning.

1.5 Contrary to the Scottish Ministers whether or not Strasbourg decisions, some of them presumably conducted and drafted and thought in French, confuse gender and sex is hardly to the point. We are dealing with how words have been used in a UK statute.

1.6 Contrary to what Sex Matters said, the words of Section 7(1) EA 2010 talk of the physiological or other attributes of sex. We see in Section 7(2)of SDA 1975 immediately before its repeal which states that "being a man is a genuine occupational qualification for a job only where—

> the essential nature of the job calls for a man for reasons of physiology (excluding physical strength or stamina) … so that the essential nature of the job would be materially different if carried out by a woman".

1.7 Physiology of a man here clearly then refers to his biology by reason of his sex being that of a man. And it is this term which is carried over into the 1999 regulations definition of 1999 the protected characteristic of gender reassignment.

1.8 Non-physiological attributes of sex of a man or of a woman are (contrary to what Mr Cooper seemed to claim) not how one chooses to dress or is not an attribute of one's sex. Non-physiological aspects may be psychological attributes of sex such as degree of aggression, assertiveness, readiness to resort to violence may be and they may be things which one seek to learn to change through counselling through one's gender reassignment.

1.9 Looking closely at Section 7(1) EA 2010 because at the time it was clear that sex at common law could not be changed (per *Corbett v. Corbett*) Scottish Ministers accept that GRA does <u>*not*</u> change the meaning of "sex". So in 1999 the fuzzy word in the definition is not "sex" but the word "reassigned".

1.10 It clearly does not mean for legal purposes in law (whether discrimination law or any other) albeit that there may be administrative provisions as regards census, passports etc which while not changing one's sex in law might give different assignation to what required as a matter of biology reading would require but not in any way that changes legal rights.

(3) EA 2010 and GRA 2004

1.11 It remains the case that the GRA is *primary* a statute with vertical effect concerning the relationship of the individual and the State. It does <u>*not*</u> impose obligations on private individual even in the law of succession It provides instead how the state authorities

will approach the interpretation of legal documents. So the point of distinction with the EA 2010 remains.

1.12 Basically the submission about the EA 2010 being a carefully balanced measure which treats in great detail each separate characteristic of among other "gender reassignment" and "sex" but each in their separate silos was what won the day before the CSIH in FWS 1. That analysis was correct and indeed should have been followed by the same court in *FWS 2*.

2 EHRC

2.1 The EHRC's submission are basically a counsel of despair. They EA 2010 does not function in terms of the protection of women's rights as Parliament had thought (and presumably intended) – but it mangled matters because it was all too complicated. There is nothing the court can do about it, so leave it to Parliament.

2.2 That is getting things wrong. The reason we have courts is so that they can make sense of statute. It is not good enough for the EHRC to say as they do that for women the EA 2010 is just nonsensical.

3 Scottish Ministers

(1) **Living "as a woman"**

3.1 Basically this is just about documentation. It cannot mean the act of performative femininity – wearing dresses, make-up etc. – because that relies on *stereotypical* presumption about what a woman does or how she should speak or how dress in order to be a woman which the SDA onward has sought to challenge with all its patriarchal and patronising assumptions.

3.2 In *AB v. Gender Recognition Panel* [2024] EWHC 1456 (Fam), it is clear from §§54-56 that all they are concerned about is documentation. That is in line with the guidance circulated earlier. It is expressly noted at §24 that the person had no intention of having surgery because the express purpose was to retain a "functioning penis".

(2) **"Adoption" of a child is *not* the same as GRC.**

3.3 Adoption does *not* make a child a biological child. It is does *not* change the facts. But it changes the legal rights associated with being a biological child. Most importantly adoption of a child is a matter of and for families – the basis building block of society undoubtedly. It does not impact outside of that.

3.4 GRC by contrast, as we have seen on the Scottish Ministers' interpretation, directly impacts upon – and, the EHRC accept, *adversely* affects and compromises - women's rights at large. Adoption does no so such thing. It does not take away the rights/obligations of anyone other than to transfer parental rights from the biological parents to the adoptive parents. It is essentially a private, family law matter.

(3) **Section 9(2) GRA 2004 – past enactment have to be read in the light of the legal presumption giving effect to legal recognition that a person's gender and se has been changed**.

3.5 According to the Scottish Ministers there is simply to room for the Section 9(3) disapaplictaion of the Section 9(1) GRA 2004 legal fiction in relation to the definition of "man" and "woman" in pre-GRA 2004 law. In all cases these are to be taken now to be references to "certificated sex". But that means, among other things, that there is no statutory regulation of termination of pregnancy of "pregnant man". A "pregnant man" has apparently (subject to arguments about the common law) an unlimited right to choose, whether and how to carryout a pregnancy to full terms. A pregnant woman has to comply with the procedure under the Abortion Act 1967. See other pre-2004 enactments set out in the Appellant's Case at EF Page **194-194.**

3.6 The "deep political waters" which arise from the problem of the pregnant arise only because of the ludicrous position taken by the Scottish Ministers that certificated sex trumps actual sex in the EA 2010 for the purposes of determining who is a woman.

(4) **Section 9(3) GRA 2004**

3.7 **On the Scottish Ministers' submission the Section 9(3)** disapplication of the Section 9(1) legal fiction is basically deprived of all meaning and effect if need express provision or necessary implication, which is a matter of logic not reasonableness.

3.8 What, then of the Forensic Victims legislation **EF Page 4643** (which post-dated the GRA 2004) which the Lord Ordinary said it was just obvious that a biological notion of sex applied to allow women at §53 **EF Page 876** ?

3.9 Do the Scottish Ministers now say that the specific amendment, after political lobbying, to change the statutory wording from "gender" of examining physician to "sex" of examining physician was to no effect ? and that a women victim of sexual violence who requests to be examined by another woman will, in fact, just to have to accept a natal man with a GRC examining her ?

(5) Natal sex v. Certificated sex

3.10 Scottish Minsters say that any group of women will be strangely constituted however one defines sex. If natal sex it will comprise natal women without gender reassignment; it may also comprise natal women who do have the protected characteristic of gender reassignment; it will also include women with a GRC.

3.11 Some of them, said Ms Crawford KC, may have undergone gender reassignment surgery

3.12 But women can and do, for example, had double mastectomy and hysterectomies for medical reasons. But that does not make into any the any strange or odd class of women, or any less of a woman..

3.13 Just because similar surgery may have been done for non-medical reasons, but from feeling of gender dysphoria (which is apparently not a medical disorder) does not make then different kinds of woman (or indeed make them into men).

(6) Goodwin v. UK

3.14 Re Scottish Ministers' heavy reliance on **Goodwin v. UK** and the needs of Article 8 ECHR for gender identity as individual human beings. That is all fine. But **Goodwin** deals only with the class of *fully achieved post-operative transexual* and the GRA goes far wider than that in terms of its class. So it cannot be said – and no Strasbourg case has been pointed out, which says that it is a ***requirement of Strasbourg law that a person claiming the gender identity as a woman as to be treated as for all purposes in national law, and in particular national sex***

discrimination as being a woman. So the Scottish ministers suggestion that their reading of the EA 2010 is *required* by human rights law is simply unsupported.

3.15 ***AP Garcon Nicot*** (which is at **EF page 2888**) deals with and only with the issue of the Convention compatibility of a national requirement for sterlisation surgery as a condtion for gender reassignment recognition **EF page 2923, 2932**

> "116. The first issue that arises in the present case is whether, by requiring transgender persons seeking recognition of their gender identity to demonstrate the "irreversible nature of the change in appearance", French positive law as it existed at the time of the events in the present case made such recognition conditional on surgery or treatment resulting in sterilisation.
>
> 117. The Court observes at the outset the ambiguity of the terms used. The reference to "appearance" suggests superficial change, whereas the notion of irreversibility reflects a radical transformation which, in the context of a change in the legal identity of transgender persons, in turn raises the notion of sterility. The Court considers this ambiguity to be problematic where individuals' physical integrity is at stake.
>
> ...
>
> **EF page 2924**
>
> 120. The Court will therefore proceed on the basis that, ***at the time of the circumstances in the applicants' case, French positive law made recognition of the gender identity of transgender persons conditional on sterilisation surgery or on treatment which, on account of its nature and intensity, entailed a very high probability of sterility***.
>
> ....
>
> 150. That being said, the Court must take into consideration the fact that the first applicant, who opted to undergo gender reassignment surgery abroad, argued in the domestic courts that he had thereby fulfilled the conditions laid down by positive law in order to obtain a change in civil status.

And the Strasbourg Court found as follows **EF page 2933**:

- **that there has been a violation of Article 8 of the Convention in respect of the second and third applicants *on account of the requirement to demonstrate an irreversible change in appearance* (applications nos. 52471/13 and 52596/13);**

- *Holds*, unanimously, that there has been no violation of Article 8 of the Convention in respect of the second applicant on account of the requirement to demonstrate the existence of a gender identity disorder (application no. 52471/13);

- *Holds*, unanimously, that there has been no violation of Article 8 of the convention in respect of the first applicant on account of the requirement to undergo a medical examination (application no. 79885/12);

(7) Why is availability of sex discrimination by pereception insufficient/breach of human rights for natal males with GRC ?

3.16 And as we have seen under the EA 2010 a natal man with the protected characteristic of gender reassignment (whether or not they have a GRC) may *already* claim protection against sex discrimination if and insofar as treated *as if* a woman on the basis of perception discrimination or discrimination by association (and this might apply in Equal Pay claims among others).

3.17 Ms Crawford says however it is a breach of natal man with a GRC fundamental rights if they are only able to take such a sex discrimination as *if* a "woman", rather than *as* a woman.

3.18 Where is the breach ? Does it come down then to just people's feelings ? If so why is it the hurt feelings of those "natal men" with a GRC over the right of *women as women*.

(8) Women rights are human rights

3.19 Strangely too, of course, the Strasbourg also accepts that women as women have rights to have their dignity identity and privacy protected. Gender reassignment or gender identity are not higher fundamental rights (claimed apparently by a tiny percentage of the population) and they are *not* a trump card against the rights of women (forming a majority of the population). Even on the Strasbourg jurisprudence at its highest there are competing rights.

3.20 The problem with the Scottish Government approach is that, women rights are simply *ignored*. No even discounted. but just wholly *ignored*.

3.21 As we have seen – in proper repudiation of its common law roots in the patriarchy - UK law now seeks to protect women's rights too. The common law moves on and I would hope it is uncontroversial now to state that the common law too now respects women rights not just to formal but also substantive equality as fundamental constitutional rights.

3.22 So it is not just persons with a gender identity which does not conform to their biology who have right to individual and moral security as a human being, but *women* who are entitled to respect for their identity, privacy and security from male violence and the

unwanted and intrusive male gaze, and consequently women's safe spaces and women only services (particularly when at their most vulnerable) who have human rights.

3.23 One might say indeed that **Women's Rights are Human Rights.**

(9) Conclusion – women can pray in aid *Anufrijeva* presumption

3.24 So one applies the *Anufrijeva* presumption to women rights per Lord Steyn at **EF 1600** read as follows:

> "Parliamentary sovereignty means that Parliament can, if it chooses, legislate contrary to fundamental principles of *women's* rights.
> …
>
> But the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost.
>
> *Women's* fundamental rights *cannot be overridden by general or ambiguous words*. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process.
>
> In the absence of express language or necessary implication to the contrary, the courts therefore presume that *even the most general words* were intended to be subject to the basic rights of the individual *women as women.*

3.25 This court should therefore confirm and affirm that basic (and, one would have hoped by now, self-evident and incontrovertible) proposition that **Women's Rights are Human Rights** by **upholding this appeal.**