

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

(1) COMMISSION FOR EQUALITY AND HUMAN RIGHTS

(2) AMNESTY INTERNATIONAL UK

(3) SCOTTISH LESBIANS, THE LESBIAN PROJECT *and* LGB ALLIANCE

(4) SEX MATTERS

INTERVENERS

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

WRITTEN SUBMISSIONS FOR THE COMMISSION FOR EQUALITY AND HUMAN RIGHTS

References in the form [AC/§**] and in the form [RC/§**] are references to paragraphs in the Appellant's and Respondent's written case respectively. [APP] refers to the Appendix to the Appeal.

A: INTRODUCTION

1. By order of 7 October 2024, the Commission for Equality and Human Rights, more commonly known as the Equality and Human Rights Commission (“**the Commission**”) was granted permission to intervene by way of written (20 pages) and oral submissions (one hour).
2. The central issue raised by the appeal is whether “*sex*” and “*man*” and “*woman*” in the Equality Act 2010 (“**EqA**”) refer only to the sex of a person “*in fact*” as assessed and determined at birth based on biological traits and then recorded on a birth certificate (“**the first definition**”, commonly referred to by the shorthand “*biological sex*” or “*natal sex*”), or do those terms also refer to a person’s “*sex*” as changed in law by dint of an application and issuance of a gender recognition certificate (“**GRC**”) under the Gender Recognition Act 2004 (“**GRA**”), such that the term “*woman*” includes those whose natal sex is male, but who later obtain a GRC and are recognised under the GRA as a woman (“**the second definition**”, commonly referred to by the shorthand “*legal sex*”) (“**the two definitions**”).
3. That issue in turn raises nuanced and complex questions of interpretation of the primary piece of legislation governing equality law in Great Britain. Its importance to those whose rights under the EqA are potentially affected is not to be understated. The Commission, as the body designated to encourage and support the development of a society in which (among other goals) equality and human rights are respected and protected, is cognisant that this case concerns potentially conflicting rights and interests. Whilst the debate in society over the proper scope of the rights of transgender persons is, in the words of Choudhury P in *Forstater v CGD Europe* [2022] ICR 1 too often conducted in “*hyperbolic and intransigent*” terms (§2), it is not uncommon for rights of one protected group to sit uncomfortably with the rights of another, creating difficult questions for equality law. The difficulties raised by the present appeal are particularly stark.
4. The Appellant rightly refers to the historic inequality experienced by women, and the context of discrimination and appalling sex-based violence still experienced by women today [AC§§33-37]. This Court will also recognise that a group of individuals whose legal rights will be affected by this judgment are those with a GRC. The historic disadvantages and challenges

which those individuals have faced, and the difficulties faced more generally by transgender people should not be ignored (*Forstater*, §3). The Court is invited to also keep both these aspects in mind in considering the central issue of statutory interpretation and the intention of Parliament in passing the GRA and the EqA. In making these submissions, the Commission is not seeking to advance, or advocate for, the preference of one group's rights over another's but to assist the Court in understanding which of the two definitions, as a matter of statutory interpretation, is correct in law and what are the consequences of that conclusion for the operation of equality law.

5. As explained below, the Commission's longstanding view and policy position has been that the correct understanding of "sex" and of "man" and "woman" in the EqA is that it includes those whose sex has been certified in a GRC. A "woman" under the EqA includes a person whose natal sex is male, but who obtained a GRC such that they are recognised as a "woman" under that Act (that is, the second definition). The purpose of s.9(1) of the GRA was to create a principle of statutory construction, applicable to all legislation whether passed prior or subsequent to the GRA (see s. 9(2)), that (see s. 9(3)) could be disapplied expressly or by necessary implication. That principle applied to the Sex Discrimination Act 1975 ("**SDA**") and was not disapplied, expressly or by necessary implication, by the EqA, which consolidated and, so far as relevant, continued the effect of the SDA.¹
6. That is not to say that the central issue of statutory interpretation raised by this appeal is straightforward. On the contrary, the Appellant has highlighted a number of significant difficulties, tensions and apparent inconsistencies which are created by the second definition and which seriously compromise the practical application of the EqA. The Commission addresses some particular problems created by the second definition below at §§31-46. These include, but are not limited to, a notable inconsistency in the rights of same sex attracted persons, when compared with other protected characteristics (particularly with regard to the formation of associations), and the challenges faced by those who wish to maintain single sex spaces aimed at protecting the safety and/or dignity of women. Notwithstanding these difficulties, tensions and apparent inconsistencies, the Commission considers it unavoidable that Parliament intended, at the time of passing the GRA and then the EqA, that a GRC

¹ It follows that the Commission's view is that, on the main issue of statutory construction, the Lord Ordinary correctly understood the EqA. It is entitled to say so, contrary to [AC/§29], which misunderstands and misapplies a dictum of Lord Reed in *R (Majera) v. Secretary of State for the Home Department* [2021] UKSC 46 [2022] AC 461 at (§ 44, 45-46).

would have the effect of changing a person’s sex for the purposes of the application of the EqA. However, the Commission also considers that that outcome impairs the proper functioning of aspects of the EqA and has the potential to jeopardise the rights and interests of women, not least given changes in the social landscape since 2004. This is a wholly unsatisfactory state of affairs. However, it is the proper constitutional role of Parliament to resolve these issues to the extent and in the way that it considers appropriate (see *R (on the application of Elan-Cane) v Secretary of State for the Home Department* [2021] UKSC 56 [2023] AC 559 *per* Lord Reed PSC at §61). In its letter to the Minister for Women and Equalities of 3 April 2023 (“**the 3 April Letter**” [APP/247]), the Commission recommended careful consideration of the EqA in order, *inter alia*, to address some of the same problems in the functioning of the EqA as are highlighted by this appeal.

B: ON LANGUAGE

7. Language develops and has developed in this context in recent years with particular speed. Terms which were considered acceptable and appropriate, such as “*transsexual*”, are now in some circles avoided as derogatory and inaccurate, to be replaced by others (“*transgender*”). As the debate has shifted, so has language, to attempt to make sense of and describe properly and fairly, changing circumstances in society. The Court’s choice of language is important, both to those immediately affected by the issues raised on this appeal, in terms of how they describe themselves and how they are described, and also so as to ensure so far as possible that the terms of the Court’s judgment clarify, explain and create certainty in the law.
8. The terms ‘sex’ and ‘gender’ have historically been used interchangeably. In these submissions the words are given the meaning explained by Lord Reed PSC in *Elan-Cane* at §3: “*the term “gender” is used in this context to describe an individual’s feelings or choice of sexual identity, in distinction to the concept of “sex”, associated with the idea of biological differences which are generally binary and immutable.*” These submissions also adopt the phrase “*natal sex*” used by Choudhury P in *Forstater* to refer to the sex which was recorded on a person’s birth certificate. Where necessary, the term “*certified sex*” is used to refer to the sex that a person is certified as having after being granted a GRC under the GRA.
9. As to the term “*transgender*” these submissions adopt the definition provided by Lord Reed PSC at §7 in *Elan-Cane*: “*it describes those individuals who have acquired a gender, either male or female, which is different from the one recorded at birth*”. A person who identifies as transgender, and indeed a person who has a GRC, may have all of the biological and physical characteristics associated

with someone of their natal sex. There is no expectation that they have undergone any medical or surgical process before they are considered to be a transgender person and to have the protected characteristic of gender reassignment under s. 7(1) EqA.² In these submissions, the term “*transsexual*” is used where necessary to reflect the language of the EqA or the case law being described. The phrases “*trans man*” and “*trans woman*” are used respectively to refer to a natal woman and a natal man who have the protected characteristic of gender reassignment

C: SUBMISSIONS

10. These submissions, first, set out why this Court can conclude that the intention of s.9(1) of the GRA was that obtaining a GRC would change the sex of a person in law, subject to an express or necessarily implied exception made in the Act itself or in other enactments (s.9(3)). Second, these submissions explain why the EqA does not contain any express or necessarily implied exception to s.9(1). Third, they explain some of the difficulties, tensions and apparent inconsistencies that the Commission considers arise out of the second definition.

(1) The intention or purpose s.9(1) of the GRA

(i) Background to, and context of, the GRA

11. The Appellant advances two features of the legal context of the introduction of the GRA in support of its assertion that the first definition is correct: the decisions of the European Court of Human Rights (“**ECtHR**”) in *Goodwin v United Kingdom* (Application No 28957/95) (2002) 35 EHRR 18 and the House of Lords in *Bellinger v Bellinger* [2003] UKHL 21, [2003] 2 A.C. 467 [AC/§§19-21]. These authorities are relied upon in support of the proposition that “*the GRA 2004 essentially concerns the vertical relationship between an individual and the State (how the State records and retains and certifies and presents personal data about an individual’s sex)*” [AC/18].
12. However, there is a third relevant aspect of the legal context of the GRA, namely the cases applying European Union (“**EU**”) discrimination law: the Court of Justice of the European Union (“**CJEU**”) in *P v S and Cornwall County Council* [1996] ECR I-2143 [1996] ICR 795, and the House of Lords in *Chief Constable, West Yorkshire Police v A (No 2)* [2004] UKHL 21 [2005] 1 AC 51.

² “A person has the protected characteristic of gender reassignment if the person is proposing to undergo, is undergoing or has undergone a process (or part of a process) for the purpose of reassigning the person’s sex by changing physiological or other attributes of sex”. A “process” need not be a medical or surgical process.

13. In *P. v. S* the CJEU held that discrimination on the basis of “*transsexualism*” comprised discrimination on the ground of sex and was therefore unlawful under the EU Equal Treatment Directive (No.76/207)), holding (§21) that: “*Where a person is dismissed on the ground that he or she intends to undergo, or has undergone, gender reassignment, he or she is treated unfavourably by comparison with persons of the sex to which he or she was deemed to belong before undergoing gender reassignment*”. In other words, for the purposes of a claim of sex discrimination, a “*transsexual*” would be regarded as being of the sexual identity of their acquired gender and would compare themselves with persons of their natal sex who were not “*transsexual*”. Following *P. v. S*, the SDA was amended by the Sex Discrimination (Gender Reassignment) Regulations 1999 (SI 1999/1102 (“**the 1999 Regulations**”)). These regulations were made under s.2(2) of the European Communities Act 1972 and extended the SDA to cover discrimination on grounds of gender reassignment in employment and vocational training as well as making other related amendments. Prior to its amendment by the 1999 Regulations the SDA did not refer to “gender”, only to “sex”.
14. *A* concerned the employment rights of a post-operative “*transsexual*” where it was a “*genuine occupational qualification*” that they be able to conduct personal searches of detained persons, and the meaning of the term “*same sex*”. The key issue was whether in the employment context a person of the “*same sex*” could include a transsexual person’s chosen gender. Lord Bingham and Baroness Hale³ gave the leading judgments (with whom Lords Steyn §15 and Carswell §64 agreed) dismissing the appeal, with Lord Rodger dismissing the appeal for different reasons). Lord Bingham held at §11: “*In my opinion, effect can be given to the clear thrust of Community law only by reading “the same sex” in section 54(9) of the 1984 Act, and “woman”, “man” and “men” in sections 1, 2, 6 and 7 of the 1975 Act, as referring to the acquired gender of a post-operative transsexual who is visually and for all practical purposes indistinguishable from non-transsexual members of that gender. No one of that gender searched by such a person could reasonably object to the search.*” Baroness Hale, interpreting the principles laid down in *P. v. S*, and the later case of *KB v National Health Service Pensions Agency and Secretary of State for Health* (Case C-117/01) [2004] IRLR 240, held at §56

³ Baroness Hale provided a detailed explanation of the development of sex discrimination law and the interrelationship with transgender rights in the domestic context and in both the ECtHR and the ECJ at §§34-42. See in particular at [§42] Baroness Hale’s comments on the intended effect of the Gender Recognition Bill that was then before Parliament which she explained would lay down “*a comprehensive scheme*” and that “*In policy terms, therefore, the view has been taken that trans people properly belong to the gender in which they live.*”

that “for the purposes of discrimination between men and women in the fields covered by the directive, a trans person is to be regarded as having the sexual identity of the gender to which he or she has been reassigned”.

15. The outcome of A, handed down shortly before the GRA obtained Royal Assent, was that EU principles of equal treatment required “same sex” in s. 54(9) of the Police and Criminal Evidence Act 1984 to be interpreted as including the acquired gender of a post-operative transsexual. That is, that for equality employment law purposes, a person’s “sex” could include their chosen gender, in circumstances where they were visually, and for all practical purposes, indistinguishable from non-transsexual persons of that sex (per Lord Bingham at §11; or – per Baroness Hale at §61 - “presents as a woman in every respect”).
16. It is against the backdrop of the House of Lords judgments in both Bellinger and A, that of the CJEU in P v. S and the ECtHR in Goodwin that Parliament passed the GRA and against which the intention of Parliament in relation to s.9(1) must be considered.⁴ This is a case where the context and background provide clear pointers to the objectives of the relevant provisions, and indicate that the focus of the GRA was not solely on the vertical relationship between the individual and the state, and matters such as marriages, social security benefits and pensions (cf [AC/18, 21]). The GRA was also concerned (*inter alia*) with the employment rights of individuals to bring claims in their chosen gender for sex discrimination, and the objective of the Government in seeking to give effect to EU and ECHR law. As Lord Nicholls noted in Bellinger, the GRA was intended to be “comprehensive” primary legislation (see §37), that would resolve not just the question of marriages, but would create a “coherent policy” in relation to areas including “education, child care, occupational qualifications, criminal law (gender-specific offences), prison regulations, sport, the needs of decency, and birth certificates” (§45).

(ii) The relevant provisions of the GRA

17. The GRA (i) prescribes a restricted set of circumstances in which a person can obtain a GRC (s.2) and a process for making the application for a GRC (ss. 1, 4), (ii) lays down a general principle as to the legal effect of a GRC (s.9(1)) and provides for exceptions to be made in

⁴ For the principle of construing legislation in light of the objective which appear from its purpose and background, see Kostal (UK) Ltd v Dunkley and others [2021] UKSC 47, [2022] 2 All E.R. 607, §30.

future legislation to the usual legal effect of a GRC (s.9(3)), and (iii) makes specific provision for the legal effect of a GRC, including by amending various other legislation (ss. 9-21).⁵

18. The circumstances in which a person can obtain a GRC are that the person has, or has had, gender dysphoria⁶, has lived in the acquired gender throughout the preceding two years, and intends to continue to live in the acquired gender until death (see s.2 GRA). There is no requirement under the GRA for an individual to be a “*fully achieved and post operative transsexual*” (*Goodwin*, §91) or as per *A* that they had “*done everything that she possibly could do to align her physical identity with her psychological identity*” (§61). And while the requirements under the GRA are tightly circumscribed, the effect of the restrictions, as chosen by Parliament, are that one cannot proceed on the assumption everyone who has a GRC is the category envisaged in *Goodwin* or *A*: it was intended by Parliament to be, and is, broader than that.
19. As foreshadowed above, it is the Commission’s longstanding position that it was intended by Parliament that the terms “*sex*” and “*man*” and “*woman*” in equality law refer not only to natal sex but also to certified sex where a GRC has been issued.⁷ That is the effect of s.9(1) GRA on the EqA, that (see Lord Nicholls in *Bellinger*, §36) in law “*a person may be born with one sex but later become, or become regarded as, a person of the opposite sex*”.
20. The starting point of the analysis of the terms of the GRA is the broad language used in s. 9(1) which provides that the effect of issuing a GRC is to change a person’s gender and sex

⁵ For a detailed account of the mechanics of obtaining a GRC, see *Jay v Secretary of State for Justice* [2018] EWHC 2620 (Fam), [2019] Fam 87, §§3-19.

⁶ “*Gender dysphoria*” is not defined in the GRA, and there are different medical definitions (see, eg, *Jay*, §§36, 39). A definition, drawn from the definition of “*transsexualism*” in the 10th revision of the International Statistical Classification of Diseases (“**ICD**”) (see *Jay*, §3) is: “*The desire to live and be accepted as a member of the opposite sex, usually accompanied by the wish to make his or her body as congruent as possible with the preferred sex with surgery and hormone treatment*”. Note, the latest, 11th edition (January 2024) of the ICD does not “*transsexualism*” but does include “*gender incongruence*”: “*Gender incongruence is characterised by a marked and persistent incongruence between an individual’s experienced gender and the assigned sex. Gender variant behaviour and preferences alone are not a basis for assigning the diagnoses in this group*”. The NHS also provides a definition “*a term that describes a sense of unease that a person may have because of a mismatch between their biological sex and their gender identity*.” Overview, Gender Dysphoria, <https://www.nhs.uk/conditions/gender-dysphoria/> (accessed 21 October 2024).

⁷ The Commission has policy guidance to that effect. See “*Separate and single-sex service providers: a guide on the Equality Act sex and gender reassignment provisions*”, p.5, “*Services, public functions and associations statutory code of practice*,” §§ 2.26, 13.86.

(both terms are used) “for all purposes”. “For all purposes” must, in principle, include for the purposes of other legislation whose application is affected by the sex of an individual and s. 9(2) confirms that one of the purposes referred to in s. 9(1) is “the interpretation of enactments”, whether made before or after the issue of a GRC. As stated in the Explanatory Notes to the GRA at §4: “In practical terms, legal recognition will have the effect that, for example, a male-to-female transsexual person will be legally recognised as a woman in English law.”⁸ §§27-29 of the Explanatory Notes make clear that the Government’s intention was that the s. 9(1) principle would apply to equality law. §27 states with reference to s. 9(1): “Subsection (1) states the fundamental proposition that once a full gender recognition certificate is issued to an applicant, the person’s gender becomes for all purposes the acquired gender, so that an applicant who was born a male would, in law, become a woman for all purposes. She would, for example, be entitled to protection as a woman under the Sex Discrimination Act 1975; and she would be considered to be female for the purposes of section 11(c) of the Matrimonial Causes Act 1973, and so able to contract a valid marriage with a man” (emphasis added).

21. Section 9(3) then makes the effect of s. 9(1) “subject to” - that is, conditional upon – “provision made by this Act or any other enactment or any subordinate legislation”.⁹ In permitting the general principle of statutory interpretation laid down by s. 9(1) to be disapplied by provision made in other legislation, Parliament may have intended that express provision only should suffice: that is, subsequent legislation which consciously addresses what would ordinarily be the effect of s. 9(1). The Commission submits, however, that sufficient provision may be made for the purposes of s. 9(3) either expressly or by necessary implication, by analogy with the principle of legality: see *R (Anufrijeva) v London Borough of Southwark* [2003] UKHL 36 [2004] 1 AC 604, §27 (“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”). This is an appropriate analogy where what is at stake is the disapplication of the right conferred upon a person with a GRC to be treated as their acquired gender for all purposes.
22. The Commission understands that two of the Interveners, Amnesty and Sex Matters, propose to submit that assistance in the interpretation of s. 9(3) can be gleaned from the principles

⁸ Noting the weight which may properly be attached to Explanatory Notes: see *R (Westminster City Council) v National Asylum Support Service* [2002] UKHL 38, [2002] 4 All ER 654, §5 and *Flora v Wakom (Heathrow) Ltd* [2006] EWCA Civ 1103, [2006] 4 All ER 982, §§15-16.

⁹ The operation of s. 9(3) was facilitated by the order-making power in s. 23 GRA.

applied to statutory deeming provisions (see *Fowler v Revenue and Customs Commissioners* [2020] UKSC 22 [2020] 1 W.L.R. 2227, §27). The Commission has identified a number of difficulties with that approach. First, it is far from self-evident that s. 9(1) was intended to be, and should properly be described as, a deeming provision, which is commonly regarded as a provision which requires a state of affairs to be treated, by way of artifice or fiction, as something which it is not.¹⁰ Section 9(1) does not use any of the phrases commonly found in deeming provisions - “*shall be deemed*” “*treated as*”, “*regarded as*” or “*taken to be*” – and does not have the effect of deeming that the biological or natal sex of a person has changed upon issue of a GRC. Rather, the effect of s. 9(1), and other provisions of the GRA, is that the sex of an individual with a GRC changes for legal purposes, including in the interpretation and application of legislation. Second, the dictum from *Fowler* relied upon by Amnesty and Sex Matters assists in identifying the limits of the effect of a deeming provision, that is, the circumstances in which a fictional or artificial state of affairs must give way to factual reality: “*A deeming provision should not be applied so far as to produce unjust, absurd or anomalous results, unless the court is compelled to do so by clear language*”. The issue under s. 9 GRA is different: it is when a principle set out in one provision of legislation (s. 9(1)) is disapplied by, and must give way to, another provision of legislation. Third, the circumstances in which the s. 9(1) principle must give way are spelled out in s. 9(3). Importing the legal principles applicable to deeming provisions would be to import a different test than that stated in s. 9(3), and one which would be far from straightforward to apply (for example, where does one look for “*clear language*”?; how does one reconcile the fourth and fifth principles in *Fowler* in this particular context?).

23. Significantly, and as highlighted in §29 of the Explanatory Notes to the GRA, it is provision made in subsequent legislation which may alter the effect of s. 9(1). That is indeed the only construction of s. 9(3) which would be consistent with the fundamental principle that a later statute takes precedence over an earlier one and would enable s. 9(1) to have the general effect intended for it (since otherwise existing legislation could take precedence over the new GRA). There can, therefore, be no dispute, and the Appellant appears not to dispute, that s. 9(1) operated on the definition of “*sex*”, “*man*” and “*woman*” in the SDA.¹¹ It is only changes to equality law subsequent to the GRA which could make the provision required by s. 9(3).

¹⁰ “*Parliament uses a variety of different formulations to prescribe what might be a hypothetical state of affairs*”: *R (Charlesworth) v Crossrail Limited* [2019] EWCA Civ 1118, §12.

¹¹ The Appellant submits that “*there has never been any prior authoritative judicial interpretation of the SDA 1975 to the effect that the acquisition of a GRC changed an individual’s sex for the purposes for the SDA 1975*” [AC§55]. That is correct but does not establish sufficient room for doubt as to the impact of s. 9(1) GRA on the SDA.

24. The GRA made specific amendments to the SDA at s. 14 and Sch. 6 GRA. These include an amendment to s.7A (gender reassignment: exception for genuine occupational qualification) to prevent an occupational qualification from being relied upon in relation to “*a person whose gender has become the acquired gender under the Gender Recognition Act 2004*”. Equivalent amendments were made in relation to ss. 7B, 9 and 11 of the SDA (as well as to the Sex Discrimination (Northern Ireland) Order 1976 (S.I. 1976/1042 (N.I.15)). If Parliament had intended that the principle of construction established by s.9(1) should not apply to the SDA, it could have made specific provision alongside these amendments to the SDA which would have fallen within s. 9(3), as provision made under the GRA itself.
25. For these reasons, the Commission considers it to be unavoidable, having regard to the context of the GRA, that statute read as a whole, the language used in s. 9 GRA and the Explanatory Notes, that it was the intention of Parliament that the principle of construction created by s. 9(1) GRA would have the effect that those with a GRC would, under the SDA, obtain protection from discrimination in the employment context in their certified sex. That feature of the SDA was not displaced by the EqA either in the employment context or indeed in the other areas in which the EqA applies.

(2) The effect of the EqA on s. 9(1) GRA

26. It follows that in order for the first definition to prevail, it must be established that the EqA both (a) effected an important change in equality law as it stood under the SDA, reverting to the pre-GRA position, and (b) made the express or necessarily implied provision required by s. 9(3) to disapply s. 9(1).
27. The EqA sought, amongst other things, to both “*reform and harmonise equality law*” and to restate the greater part of the enactments relating to discrimination and harassment. The Commission’s position with regard to the correct interpretation of the EqA is as follows:
- (1) As the IH held, ss. 11 and 212 EqA do not on their face mandate a biological interpretation of “*sex*” and are capable of being read naturally and consistently with s. 9 GRA (§§47-48). There is no express provision in the EqA disapplying s. 9(1). Nor, notwithstanding the difficulties created by the second definition, are there provisions from which it must necessarily be implied that Parliament’s intention was to disapply s. 9(1). The Appellant’s analysis in [AC§38] – that “*there would have to be an express, unequivocal and inescapable provision in the [EqA] itself admitting of no doubt or any possible interpretation other*

than that” s. 9(1) GRA was to apply to the EqA is the wrong way around – what is necessary for the purposes of its case is clear provision disapplying s. 9(1) and changing the position which pertained under the SDA.

- (2) The EqA read as a whole, supports the conclusion that the intention of Parliament was not to depart from the position under the SDA, which had been modified by s. 9(1) and other provisions of the GRA, so that a person could bring a claim for sex discrimination in their certified rather than natal sex.
- (3) There is no reason to suppose that Parliament intended, by the EqA, to introduce a change of substance from the SDA, read as per s. 9(1) GRA. It may therefore be said in this case, as in *Ayodele v Citylink Ltd* [2018] ICR 748, §96, that “*it is telling that nothing in the Explanatory Notes ... or in any other document which led up to the enactment of the Equality Act 2010 pointed to there being any perceived mischief that needed a change of substance in the law*” (approved in *Efobi v Royal Mail Group Ltd* [2021] UKSC 33 [2021] 1 WLR 3863, §§24-34).
- (4) With respect to the IH’s conclusion that the meaning of “*woman*” in ss.17 and 18 could in effect be different from elsewhere in the Act; a consistent definition of the terms “*sex*” and “*man*” and “*woman*” is required across the EqA. It cannot be right that a term, particularly one which is foundational to the EqA and the rights it confers, has one meaning in most sections of the Act and another elsewhere. That offends against the principle of legal certainty and the need for a meaning which is constant and predictable (*Imperial Tobacco Ltd v Lord Advocate* [2012] UKSC 61, 2013 SC (UKSC) 153, §14).
- (5) The difficulties created by the second definition, although significant, are not sufficient to compel this Court to adopt the first definition, but are properly for Parliament to consider and resolve.

(i) Meaning of ss. 11 and 212 EqA

28. The only positive indication relied upon by the Appellant that Parliament intended in the EqA to alter the position under the SDA, is the difference in wording between s. 92 SDA and s. 212 EqA [AC§55]. The Commission can see no material difference between s.92 SDA (“*woman*’ includes a female of any age”) and s. 212(1) EqA (“*woman*’ means a female of any age”). The purpose of both of these provisions is to put beyond doubt that “*woman*” includes “*girl*”. The terms “*includes*” and “*means*” are not sufficiently or obviously distinctive enough for this Court to draw the conclusion that the EqA intended to alter the position under the SDA and reverse

the effect which the GRA had had on the SDA. There is a presumption that Parliament does not intend implied repeal, which is stronger the more weighty the enactment that is said to have been impliedly repealed (*H v Lord Advocate* [2012] UKSC 24, [2013] 1 AC 413, §30).

(ii) Context of the EqA

29. As held by the IH at §33, the relevant context of the EqA must include the GRA, since it is clear from the EqA that Parliament had had the GRA in mind when passing the EqA. The EqA repealed aspects of the GRA (Sch. 6, GRA), where it had made express exceptions as to the application of a GRC on sport (see s.19 GRA) which subsequently became s.195(2) EqA; see also the provisions of the EqA on the solemnisation of marriages (§24 of Part 6 of Sch.3 EqA). The relevant context also includes the continuing application of the principles established by the CJEU in *P. v. S.*, as applied by the House of Lords in *A*. This context supports the view that Parliament intended the EqA to continue to apply the SDA principle that an individual could bring a claim for sex discrimination in their certified sex. If, notwithstanding that context, Parliament had intended in the EqA to reverse the position under the SDA, one might have expected to see some indication to that effect in the pre-legislative materials and clear words being used in the EqA itself.

(iii) The EqA read as a whole

30. A reading of the EqA as a whole also supports the conclusion that the first definition is not correct. A number of provisions of the EqA would be in part or in whole unnecessary if the first definition were correct:
- (1) In relation to sport under s.195 EqA, if “sex” had the first definition within the EqA, it would only be necessary in relation to single sex sports to exclude claims for *indirect* gender reassignment discrimination, rather than both *direct* and *indirect* as per s.195(2). Section 195(1) creates a complete exemption in relation to a claim for sex discrimination for single sex sports which is essential on both the first and second definitions. Section 195(2) creates a partial exemption in relation to a claim for “gender reassignment discrimination” (as defined in s.25(3) as including direct (s.13) and indirect discrimination (s.19)), for the participation of a transsexual person as a “competitor” in a “gender affected activity”. If “sex” refers only to natal sex, it would not be necessary to include s.195(2) in relation to a claim for direct discrimination on grounds of gender reassignment because a male to female transsexual will continue to be regarded as male and may lawfully be excluded from women’s sport pursuant to s. 195(1) and without it being necessary to rely

upon their gender reassignment in order to exclude them. It may be necessary to exclude a female competitor from female sport where that competitor has the protected characteristic of gender reassignment, but this would not merely be on account of gender reassignment but rather because they had physiological characteristics (for example, high testosterone levels) which prejudiced fairness or safety reasons. The claim of that competitor could only be for indirect discrimination on grounds of gender reassignment.

- (2) Similarly, §28 of Sch. 1 EqA creates an exception in relation to gender reassignment discrimination for the provision of separate services for each sex or the provision of services to only one sex. On the first definition, this provision would be redundant in relation to a claim for direct discrimination on grounds of gender reassignment. In the case of female-only services, the excluded individual (in a case of male to female gender reassignment) would have been excluded on grounds of their sex and not on account of gender reassignment; and in the case of female to male gender reassignment would have been excluded on account of their physiological characteristics and not merely on account of gender reassignment (a claim for indirect discrimination). §3 of Sch. 23 creates an exception in relation to “*communal accommodation*”, the purpose of which (see Explanatory Note §997) is to allow communal accommodation to be restricted to only one sex. Again, the exception in relation to *direct* gender reassignment discrimination would be unnecessary.
- (3) §18 of Sch. 9 EqA concerns benefits dependent on marital status. Sub- paragraphs 1A and 1B were introduced by the Marriage (Same Sex Couples) Act 2013¹² (§17(3) of Sch. 4(6)). §18 of Sch. 9 to the EqA provides that it is not discrimination because of sexual orientation to restrict access to a benefit, facility or service that would be available to a person who was married to someone who is in a civil partnership, in relation to rights accrued before 5 December 2005 (the date the Civil Partnership Act came into force). The amendment removed the word “*married*” from sub-paragraph (1) and inserted a new sub-paragraph (1A) into §18 of Sch. 9 to the EqA. This extends the exception so that it

¹² The Appellant’s Case at fn 53 notes that this provision has not been brought into force but legislation that is not yet in force may be relied upon where it forms part of the relevant context for the purposes of construing legislation that is in force: *R (SXM) v Disclosure and Barring Service* [2020] EWHC 624 (Admin), [2020] 1 W.L.R. 3259, §45. See also *Bennion, Bailey and Norbury on Statutory Interpretation* (8th Edition, Second Supplement, December 2023), Section 7.9.

also applies to same sex couples in the same way as to civil partners. Sub-paragraphs (1A)(c) and (1B) provide that this exception does not apply to people who were in a marriage with a person of the opposite sex, but who are now in a marriage of a same sex couple as a result of one spouse obtaining a GRC. This provision would be entirely unnecessary if “sex” in the EqA, only meant natal sex, as they would not in fact be married to a “*person of the same sex in a relevant gender change case*”, they would still be married to a person of the opposite sex.

(3) Particular challenges created by the second definition

31. These submissions now focus on four of the difficulties and inconsistencies in the operation of the EqA caused by the second definition, as identified by the Commission in the 3 April Letter [APP/247]. The Commission’s position is that these difficulties are significant and concerning, that they impair the proper functioning of the EqA, that it is unlikely that Parliament appreciated the serious implications for the rights of women of s. 9(1) GRA applying to the EqA and that these implications have become more serious with societal change since the GRA. Should it assist the Court the Commission will stand ready to provide oral submissions on the other difficulties identified in the 3 April Letter, as well as the difficulties that may arise if the first definition is adopted.

(i) The provisions concerning discrimination on grounds of pregnancy and maternity

32. The IH reasoned in §§62-63 that the use of the term “*woman*” in ss. 17 and 18 EqA, which limits the scope of protection afforded on grounds of pregnancy and maternity, should not be regarded as depriving a person of protection who is “*pregnant as both a matter of fact and biology, regardless of the terms of any GRC*”. The approach of the IH extends the meaning of the word “*woman*” in ss. 17 and 18 to persons who are to be regarded as “*male*” elsewhere in the EqA. The Commission submits that it would be deeply unsatisfactory, for the same word to have a different meaning in different sections of the EqA. In particular where that word, “*woman*”, is foundational to the protected characteristic of “*sex*” and so to a fundamental aspect of the protection afforded by the EqA. In the interests of legal certainty and clarity, there should be a single definition which applies across the EqA.
33. Adopting the second definition, and applying it to ss. 17 and 18 EqA, would mean that a group of persons with the biological capacity to become pregnant, that is, natal women with a GRC, is left without the specific protection of the EqA for that particular protected characteristic. Sections 17 and 18 will still apply to the overwhelming majority of natal women

who require their protection. Even the small minority who are unprotected by ss. 17 and 18 has the possibility of a claim for discrimination on grounds of gender reassignment, on the basis that a natal woman who is pregnant is or would be afforded greater protection or better treatment than a trans man with a GRC.

34. The Appellant's written Case [AC/§68] mentions a series of provisions which relate to "*pregnancy and maternity*", some but not all of which include a specific reference to "*women*" as a limit on the scope of their protection. Where there is no such reference, those provisions would not be affected by the same difficulties which arise under ss. 17 and 18: i.e. ss.39(6), 49(12), 50(12) and 106(6)(b). Those provisions which are affected include ss. 73-76 EqA relating to further protections that are extended during maternity (maternity equality clause) and which would apply only to a "*woman*" by dint of s.72. They would not apply to a trans man with a GRC.
35. Equally, the "*Health and safety*" exemption provided at §14 of Sch. 3 is affected: that permits a service provider to refuse to provide a service to a "*pregnant woman*" if they reasonably believe that to do so would create a risk to her "*health and safety*" (and similarly in relation to a conditional service). If a service provider refused to provide the services to a pregnant trans man who has been issued with a GRC, they would not be protected against a claim for discrimination on grounds of pregnancy, but no such claim could be brought by a trans man with a GRC, as the right under s. 17 EqA to claim discrimination on grounds of pregnancy against a service provider only applies to a "*woman*" (see also §2 of Sch. 16 in relation to associations). Further protection for "*women*" only who are pregnant appears in §2 of Sch. 22 in relation to work and vocational training. This protection would not apply to a trans man with a GRC (see also §23(2)(d) of Sch. 3, §2 of Sch. 7 and §20(2)(c) of Sch. 9).
36. In short, there is a range of EqA provisions directed at the protected characteristic of pregnancy which do not, on the second definition, serve to protect those who have GRCs in the male acquired gender and who may have the capacity to become pregnant.

(ii) Effect of a GRC on protection against sexual orientation discrimination

37. In §57 of its judgment, the IH criticised the 3 April Letter for a paragraph which included "*[i]f sex means legal sex, then sexual orientation changes on acquiring a GRC: some trans women with a GRC become legally lesbian, and some trans men with a GRC become gay men.*" This paragraph was put forward to the Minister as one of eight areas in which the definition of sex for the purposes

of the EqA as biological/ natal sex would bring greater legal clarity. The IH held that it “*is not a necessary inference from Section 9 of the GRA that a person’s sexual orientation changes on acquiring a GRC. There is no such thing as being “legally lesbian” and we have not identified a problem which would require that sex be referable to biology alone*”.

38. In common with the Appellant (see [AC§106]), the Commission maintains that the IH was wrong to cast doubt upon its analysis. It is correct that on the footing that “sex” in the EqA includes certified sex, then for example, a heterosexual man, who is sexually attracted to women, to whom a GRC is issued in the acquired gender of female will, at that point, be regarded as a woman who is sexually attracted to women, and so, as a matter of law under the EqA, a lesbian (a person with the protected characteristic of sexual orientation towards persons of the same sex: s. 12(1)(a)). The legal consequences of that include that certain exceptions within the EqA cannot be relied upon by those who are same sex attracted unless they are willing to include those with a GRC. For example, a lesbian students club (that meets the definition of an association under s.107 EqA) could not lawfully exclude a trans woman with a GRC, and so a “*woman*”, who was attracted to women. §1(1) of Sch. 16 permits the club to restrict membership to those who share the protected characteristic of same sex orientation but in this case the likely analysis is that a person who shares that characteristic has nevertheless been (unlawfully) excluded on grounds of their gender reassignment. It is deeply problematic, and unfair, that lesbians and gay men for whom the biological aspect of their same sex attraction is defining may be precluded from forming (and maintaining the integrity of) an association, when those with another shared protected characteristic are not.

(iii) Effect of a GRC on §§26-28 of Sch. 3 EqA (“single sex services”)

39. §§26-28 of Sch. 3 establish exemptions to allow for the operation of single sex services. These provisions are critical for maintaining the availability of women-only spaces, including changing rooms, or segregated swimming areas, which are considered significant by some women and absolutely essential, for example for religious reasons, by others. It is necessary to understand how §§26-28 operate in practice when a women-only space is sought to be accessed by (a) a trans woman who has been issued with a GRC, and (b) a man (including a trans woman who has not been issued with a GRC). As to (a), the position of a trans woman with a GRC, the Commission’s view is as follows:

- (1) §§26-27 of Sch. 3 EqA contain exceptions to the prohibition by s.29 read with s.11 EqA of sex discrimination in the provision of services.
- (2) As a result of s.9 GRA, a person who has been issued with a GRC is to be treated for the purposes of s.29, and the exceptions to it, as having their acquired gender.
- (3) If such a person is refused access to services on the grounds that they are intended for women only, they have not suffered sex discrimination. They have been treated differently as compared with others whose sex is female. Therefore, the exceptions in §§26-27 EqA are not engaged.
- (4) That person may have suffered discrimination on grounds of gender reassignment, if a natal woman would not have been refused access to the relevant services. Such discrimination is capable of justification pursuant to §28 of Sch. 3, if it is “*a proportionate means of achieving a legitimate aim*”.
- (5) The Appellant is wrong to suggest [AC§89(2)] that §28 of Sch. 3 cannot be relied upon to justify refusal of access to services of a trans woman with a GRC because the service provider is not doing something “*in relation to ... the provision of a service only to persons of one sex*” (§28(2)(c)). A service provider who provides services only to women, but not to trans women who have been issued with a GRC in the acquired gender of female, is providing services only to persons of one sex, albeit that not all persons of that sex are permitted to access the services. The same would follow if, for example, the service was provided for women over 50: it is a service only for persons of one sex.
- (6) The Appellant is correct to note [AC§46] that a single-sex service must exclude persons of that natal sex with a GRC, and whose “sex” for the purposes of the EqA is now different. However, it is clear on the face of the GRA that the grantee of a GRC stands to lose accesses and privileges afforded to persons of their natal sex, as a result (*inter alia*) of s. 9(1) GRA.
- (7) This interpretation of §§26-28 of Sch. 3 gives rise to practical difficulties in its application. Objective justification under §28, whilst available in theory, can be very challenging in practice, particularly if there is a threat of legal proceedings. The need to establish such justification is a significant deterrent to women-only service provision.

40. As to (b) in §39 above, in the Commission’s view, the difficulties in the application of §§26-28 of Sch. 3 are potentially more acute in the case of a person of the male sex who seeks access to a single sex, women-only service. In order to take advantage of the exceptions in §§26-27 for single sex services, so as to defend a claim by a man who is refused access, a service must fulfil one of the conditions in §27(2)-(7). The Commission apprehends that these conditions were drafted with natal sex in mind. They are difficult to apply in modern circumstances, where many trans people do not fulfil the description in §§1 and 61 of A (see §15 above).
41. Some of the conditions in §27(2)-(7) may be difficult for a women-only service to satisfy once it is appreciated that a person of one (legal) sex includes – taking the example of the male sex – (a) a person who is a natal male and does not identify as transgender, (b) a person who is a natal female but has a GRC, and (c) a person who is a natal male, is a trans woman, but does not have a GRC.
42. For example, the condition in §27(6), which is the legal basis for many women-only spaces, is that “(a) *the service is provided for, or is likely to be used by, two or more persons at the same time, and (b) the circumstances are such that a person of one sex might reasonably object to the presence of a person of the opposite sex*”. This condition relies upon there being a meaningful and observable differentiation between the categories of those included in the service and those excluded from it (see the *dictum* of Lord Bingham in A, quoted in §14 above). Plainly, that differentiation is undermined if “*men*” and “*women*” may be of either natal sex. It may, for example, be unreasonable for a woman to object to the presence of a trans woman without a GRC, who is both a biological and a legal male, where a trans woman with a GRC, and so is a biological male but legally female, as a result of s. 9 GRA, is entitled to use the service. There may be no difference whatsoever in appearance between the two trans women in this example. The only difference between them may be non-observable and immaterial to the provision, namely that one has a GRC and the other does not.¹³
43. Similar difficulties may arise in relation to the other conditions in §§27(2)-(7), save for that relating to hospitals and analogous establishments in §27(5). Contrary to [AC§32], it is not

¹³ The Commission has advised service-providers that they should not ask to see a GRC when presented with a potential customer who is transgender in its Single Sex Service Guidance, p.11.

the Commission's position that it is impossible in practice, on the second definition, to make provision for women-only hospital wards.

44. In summary, whilst the Commission accepts that s. 9(1) GRA falls to be applied to §§26-28 of Sch. 3, the Court is invited to acknowledge the very significant difficulties which may arise in practice from applying s.9 GRA to provisions which were drafted for the case of, and make sense in the context of, single natal sex services.

(iv) Communal accommodation

45. Similar points arise in relation to §3 of Sch. 23 EqA – which exempts discrimination on grounds of sex or gender reassignment in relation to communal accommodation. Section 9(1) GRA should be applied to these provisions: there is no necessary implication that it be disapplied, but the likely result is considerable difficulty in practice and an undermining of the utility of the provisions. Accordingly:

- (1) A person who has been issued with a GRC is to be treated for the purposes of §3 of Sch. 23 as having their acquired gender. A person who is a natal man with a GRC (a trans woman) is regarded as a woman for the purposes of access to communal accommodation.

- (2) Such a person who is refused access to communal accommodation within the definition in §3(5) (“*residential accommodation which includes dormitories or other shared sleeping accommodation which for reasons of privacy should be used only by persons of the same sex*”) on the grounds that they are intended for women only does not suffer sex discrimination, because they are treated differently as compared with others whose sex is female. That person does however suffer discrimination on grounds of gender reassignment, if only trans women with the protected characteristic of gender reassignment are refused access to the relevant accommodation. Such discrimination is not unlawful, pursuant to §3(1)(a) of Sch. 23, subject to account being taken of various factors including whether the refusal of access is “*a proportionate means of achieving a legitimate aim*” (§3(4)).

46. The correct interpretation of §3 of Sch. 23, as set out above, gives rise to practical difficulties in its application. Establishing that accommodation is “*managed in a way which is as fair as possible to both men and women*” (§3(2)) can be very challenging in practice and the need to establish such matters could be a significant deterrent to maintaining women-only communal

accommodation. As in the case of the single sex service provisions, fairness between men and women must mean fairness between, on the one hand, the three artificial categories in §41 above, and on the other hand the three converse categories of “*woman*”.

(4) The Human Rights Act 1998

47. The Commission’s proposed interpretation of the various relevant provisions of the EqA is advanced without reference to the Human Rights Act 1998 (“**HRA**”). That is for three reasons. First, even assuming that it were applicable, it is not necessary to resort to the principle of interpretation in s. 3 HRA, in order to justify the conclusion that the second definition is the one adopted in the EqA. Second, in areas of difficulty of interpretation, notably ss. 17 and 18 EqA, even assuming that it were applicable, s. 3 HRA would not compel the unsatisfactory conclusion that “*woman*” should have different meanings across the EqA. Third, and in any event, the Commission is sceptical that Convention rights provide a useful framework, or tool, by which the Court may resolve the contentious issues in this case. There are, after all, two competing strands of rights at issue: the rights of trans people, as recognised, for example, in *Goodwin*; and the rights of women to be protected from violence by men (eg *Luca v Moldova* (2024) 79 EHRR 2, §50) and from having to share certain spaces with trans women and men, thereby creating embarrassment, shame and potentially an increased risk of violence (see *FDJ v Secretary of State for Justice* [2021] EWHC 1746 (Admin), [2021] 1 WLR 5265, §§76-78, 98 and 100). It is for Parliament to decide, against the background of the HRA, how these competing strands of rights should be reconciled.

D: CONCLUSION

48. For the reasons summarised above it is the Commission’s position that the second definition is correct in law. The difficulties identified above in relation to the application of the EqA in light of this definition are profound and significantly impair the proper functioning of the EqA but, ultimately, they are for Parliament to resolve. In the Commission’s view, the arguments ventilated, and to be ventilated, on this appeal highlight the importance and the urgency of Parliament giving careful consideration to the drafting of the EqA and the balance which it currently strikes (*inter alia*) between the rights of women and those of transgender persons.

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21 October 2024