RE LEGALITY OF PROPOSED CONVERSION THERAPY BILL

ADVICE

INTRODUCTION AND SUMMARY OF CONCLUSIONS

1. In the Queen's speech of 10 May 2022, the Government announced a "*Conversion Therapy Bill*" ("**the CT Bill")**. The proposed effects of the Bill are set out below, but in summary, if passed, it would introduce measures seeking to protect people from conversion therapy ("**CT**") aimed at changing their sexual orientation. Initially, and as reflected in a consultation paper of 29 October 2021 ("**the CP**"), the Government proposal had been to protect people from CT aimed at changing their gender identity as well as their sexual orientation. For reasons set out below, protection from gender identity CT has been dropped from the proposed Bill.

2. I am asked to advise on whether legislation seeking to protect people from CT aimed at changing sexual orientation, but not gender identity, is lawful, and in particular whether, if enacted, it would breach Article 14 of the European Convention on Human Rights ("**the ECHR**") read with Article 8. In summary, and for the reasons set out below, I consider that a provision banning CT in relation to sexual orientation but not gender identity falls within Article 14, such that the difference in treatment between sexual orientation and gender identity would need to be justified and proportionate. From the information provided to me by those instructing, it is difficult to see how the difference in treatment is justified. At present virtually no explanation has been put forward by the Government for not providing protection in relation to gender identity CT, save for a "*recogni[tion]*" that the issue is "*complex*" and a general intention to give "*further thought [and] carry out separate work*". It is clear, however, from the decision of the Supreme Court in *R (Steinfeld and Keidan) v SSID* [2018] UKSC 32, [2020] AC 1, that deciding to "*wait and see*" or "*wait and evaluate*" does not justify a difference in treatment falling within ECHR Article 14. Insofar as other explanations have been put forward for excluding gender identity from the proposed CT Bill, I do not consider that they justify the relevant difference in treatment. I therefore consider, from the information before me, that an Act in the form of the CT Bill would likely breach ECHR Article 14, read with Article 8.

BACKGROUND TO THE PROPOSED CT BILL

3. On 29 October 2021, Rt Hon Liz Truss MP, Secretary of State for Foreign and Commonwealth and Development Affairs and Minister for Women and Equalities, presented a consultation paper to Parliament. The consultation was entitled "*Banning Conversion Therapy*".[1] It stated: "*The government will introduce a legislative ban on the practice of so-called conversion therapy. This consultation seeks views on proposals on how we plan to ban these practices, which particularly affect LGBT people*."

4. Liz Truss MP wrote the foreword to the CP and explained the Government's proposal in the following terms: "*Our proposed package of measures includes legislating to introduce a new criminal offence and to ensure that conversion therapy is recognised appropriately when it is the motivation for an existing crime. This is a robust, effective and proportionate policy that will have a demonstrable impact on the ground*." She continued: "*The proposed protections are universal: an attempt to change a person from being attracted to the same-sex to being attracted to the opposite-sex, or from not being transgender to being transgender, will be treated in the same way as the reverse scenario. They therefore protect everyone*". The Introduction to the CP §1 explained the basis for the Government's decision to "*ban conversion therapy*" as follows: "*There is no justification for these coercive and abhorrent practices and the evidence is clear that it does not work: it does not change a person from being LGBT and can cause long lasting damage to those who go through it. We are committed to building a society in which conversion therapy no longer takes place*."

5. The CP did not define CT, but it referred to CT as "*[a]n attempt to change a person from being attracted to the same-sex to being attracted to the opposite-sex*" (or vice versa) or an attempt to "*try to change another from being transgender or to being transgender*" (§2). The CP sought to distinguish CT, which was to be banned, from "*Legitimate talking therapies that support a person who is questioning if they are LGBT*" (§37). The Government explained that the latter "*do not start from the basis that being LGBT is a defect or deficiency. Instead the therapies are open and explorative discussions focused on helping a person to decide on their options in a supportive manner*" (ibid).

[1] https://www.gov.uk/government/consultations/banning-conversion-therapy/banning-conversion-therapy

6. As to the specific measures proposed in the CP, the Government at the time envisaged dealing with "*physical acts of conversion therapy*" (see §26-33). Such measures were designed to deal with those who commit physical criminal acts as part of an attempt to change a person's sexual orientation or gender identity. The proposal was to "*legislate to ensure that when existing violent offences are motivated by conversion therapy, this is considered as a potential aggravating factor by the judge upon sentencing by a court*" (§30). The CP continued: "*For example with a sexual assault charge, if it is demonstrated by prosecutors that it is committed as part of a conversion therapy practice, then a court must consider this as an aggravating factor upon sentencing*" (§31).

7. The CP dealt at §34-54 with "*talking conversion therapy*." The CP made clear that any ban on talking CT "*could not be reasonably understood to include communication such as casual conversations, exchanges of views, private prayer or pure speech acts*" (§34). It continued "*Legitimate talking therapies are important for society, indeed particularly for LGBT people, who have worse than average mental health outcomes. Banning conversion therapy must not result in interference for professional psychologists, psychiatrists, psychotherapists, counsellors and other clinicians and healthcare staff providing legitimate support for those who may be questioning if they are LGBT*" (§35). The CP explained "*Professional bodies and regulators are best placed to set out professional obligations and identify practices that are harmful for the individual involved*" (§37).

8. In relation to "*talking [CT]"* the Government proposal was "*to introduce a new criminal offence that will capture talking conversion therapies. Our view is that a talking therapy delivered to either a person under 18 or a person who is 18 or over and who has not given informed consent, with the intention of changing their sexual orientation or changing them to or from being transgender, should constitute a criminal offence*" (§42). Thus in relation to those under 18, it was proposed to ban CT entirely. For those over 18 it was proposed to ban CT unless the subject had given consent that was "*voluntary*" and "*informed*", and they had "*capacity*" to consent (§46-47). It was also proposed to introduce an offence of "*coercive or controlling behaviour*" to be applied in the context of CT (48-53). At §55-105 of the CP, the Government proposed other "*policy tools to end [CT]*". These included restricting the promotion of CT, protecting people from CT overseas, ensuring charities do not support CT, and ensuring nobody can profit from CT.

9. The Government sought to consult on the above proposals. The consultation closed on 4 February 2022. On 30 March 2022 a Government spokesman announced that the proposals would not be implemented as set out in the CP, but that instead the Government would review how existing law can be used more effectively to prevent CT. That led to the raising of widespread public concern. Some hours later, on the evening of 30 March / 1 April 2022, the Government announced that it would ban CT, but only in relation to sexual orientation and not gender identity. The latter proposal was reflected in the Queen's speech of 10 May 2022.

10. The Queen's speech announced a "*Conversion Therapy Bill*" which would be introduced. The Government's Briefing Notes, also produced on 10 May 2022, set out an explanation of the proposed Bill.[2] It explained that the purpose of the Bill would be to "*Ban conversion therapy practices intended to change sexual orientation*." (p 128). The "*main elements*" of the bill were stated to be as follows at p 128:

- *Strengthening existing criminal law by ensuring that violent conversion therapy is recognised as a potential aggravating factor upon sentencing.*
- *Introducing a criminal offence banning non-physical conversion therapies to complement existing legislation which protects people from acts which inflict physical harm. The offence will protect under-18s, regardless of circumstance, and over-18s who do not consent and who are coerced or forced to undergo conversion therapy practices.*
- *Ensuring those found guilty of conversion therapy offences have any profit they obtained from those crimes removed and strengthening the case for such individuals to be disqualified from holding a senior role in a charity.*
- *Introducing Conversion Therapy Protection Orders. These would set out certain conditions to protect a person from undergoing the practice, including removing a passport for those at risk of being taken abroad, or any requirement the court considers necessary to protect that person.*
- *Protecting freedom of speech, ensuring parents, clinicians and teachers can continue to have conversations with people seeking support.*
- *Respecting clinicians' independence. Our legislation will not impact the existing professional frameworks that guide clinicians' ability to support people. Robust, exploratory and challenging conversations which are part of regulated care do not fall within the scope of the ban.*

[2] https://www.gov.uk/government/publications/queens-speech-2022-background-briefing-notes

11. The Briefing Note set out the following "*key facts*" in relation to the proposed CT Bill at p 129:

- *Studies relating to conversion therapy for sexual orientation show that:*
    - *there is no robust evidence that conversion therapy can change sexual orientation;*
    - *there is self-reported evidence that conversion therapy causes harm; and*
    - *people's motivations for seeking conversion therapy tended to be associated with conflict about sexual orientation.*
- *Approximately 16 countries have placed some sort of nation-wide ban on conversion therapy practices, including Canada, France, Germany and New Zealand.*
- *Recognising the complexity of issues and need for further careful thought, we will carry out separate work to consider the issue of Transgender Conversion Therapy further.*

ADVICE ON POTENTIAL BREACH OF ECHR

Test in Article 14 cases

12. The relevant provisions of the ECHR are Article 14, which prohibits discrimination in relation to the enjoyment of other Convention rights, and Article 8, which protects private and family life. ECHR Article 14 provides:

> *The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status*

Article 8(1) provides "*Everyone has the right to respect for his private and family life, his home and his correspondence*."

13. There are four questions courts are directed to consider in Article 14 cases (see *Ghaidan v Godin-Mendoza* [2004] UKHL 30; [2004] 2 AC 557 §133-134; and *Wandsworth LBC v Michalak* [2003] 1 WLR 617 §20). These were encapsulated by Baroness Hale in *DA v SSWP* [2019] UKSC 21, [2019] 1 WLR 3289 at §136[3]:

> *(i) Does the subject matter of the complaint fall within the ambit of one of the substantive Convention rights? (ii) Does the ground upon which the complainants have been treated differently from others constitute a "status"? (iii) Have they been treated differently from other people not sharing that status who are similarly situated …? (iv) Does that difference*

[3] Baroness Hale dissented in *DA* but the test at she set out at §136 was not controversial and was applied by the majority.

> *… in treatment have an objective and reasonable justification, in other words, does it pursue a legitimate aim and do the means employed bear "a reasonable relationship of proportionality" to the aims sought to be realised?*

I will deal with each of the four questions in turn in relation to the CT Bill and the decision to exclude gender identity from the ban on CT.

(i) Would the subject matter of a complaint about the CT Bill, if enacted, fall within the "ambit" of a substantive Convention right?

Legal principles

14. In order for a claim to fall within the "*ambit*" of a substantive Convention right, it does not have to be shown that the substantive right has been breached. As the Grand Chamber held in *Stec v United Kingdom* (2005) 41 EHRR SE 295 §39, cited by the House of Lords in *R (Clift) v SSHD* [2006] UKHL 54, [2007] 1 AC 484 §12, "*The prohibition of discrimination in Article 14 … extends beyond the enjoyment of the rights and freedoms which the Convention and Protocols require each State to guarantee. It applies also to those additional rights, falling within the general scope of any Convention article, for which the State has voluntarily decided to provide*."

15. In *Smith v Lancashire Teaching Hospital* [2017] EWCA Civ 1916, [2018] QB 804, the Court of Appeal rejected a suggestion that a measure had to be "*very closely connected*" to a substantive right to fall within the ambit of Article 14. It stated "*on the contrary, the authorities have emphasised the width and flexibility of the ambit test*", and it referred to Sir Nicholas Bratza's observation in *Zarb Adami v Malta* (2007) 44 EHRR 3 at I-17 that "*it is indisputable that a wide interpretation has consistently been given by the Court to the term 'within the ambit'*".

16. *Smith* involved the right accorded by the Fatal Accident Act 1976 to claim bereavement damages in tort, which was available to a spouse and civil partner of the deceased but not a cohabitee. There is no obligation on the state to accord a right to bereavement damages under Article 8, but the Court of Appeal held that the relevant provisions of the Fatal Accidents Act fell within the "*ambit*" of Article 8 and so it was necessary to justify treating cohabitees differently from spouses / civil partners. Sir Terence Etherton MR (with whom the other members of the Court of Appeal in *Smith* agreed) set out the applicable principles at §55:

> *The legal position may … be summarised as follows in a case where, as here, the claim is that there has been an infringement of Article 14, in conjunction with Article 8. The claim is capable of falling within Article 14 even though there has been no infringement of Article 8. If the State has brought into existence a positive measure which, even though not required by Article 8, is a modality of the exercise of the rights guaranteed by Article 8, the State will be in breach of Article 14 if the measure has more than a tenuous connection with the core values protected by Article 8 and is discriminatory and not justified. It is not necessary that the measure has any adverse impact on the complainant … other than the fact that the complainant is not entitled to the benefit of the positive measure in question.*

17. The Court of Appeal held that the payment of bereavement damages fell within the ambit of Article 8 as the damages were "*intended to reflect the grief that ordinarily flows from the intimacy which is usually an inherent part of the relationship between husband and wife and civil partners*" (§72). The Court continued (ibid) "*It inevitably follows that the scheme for bereavement damages is properly regarded as a positive measure … by which the State has shown respect for family life, a core value of Article 8*" and the payment of damages to spouses/civil partners was more than tenuously connected to the "*core value*" Article 8 seeks to protect. It was not necessary for cohabitees to show they were "*adverse[ly] impacted*" and it was sufficient that they were not entitled to the benefit of the "*positive measure*" accorded to spouses and civil partners to fall within the "*ambit*" of Article 8.

Application to CT Bill

18. Would the enactment of measures to protect people from CT fall within the "*ambit*" of Article 8? In my view it is likely a court would find that it would. It may be that states have no obligation pursuant to Article 8 to enact measures of the kind proposed in the CT Bill. Once such protections are accorded, however, they must be provided in a non-discriminatory way. That is because, in my view, the measures constitute a way of showing respect for individuals' physical and psychological integrity and key aspects of their identity. That is more than tenuously connected to core values Article 8 seeks to protect.

19. It is well established that "*private life*", protected by Article 8, is "*a broad term*" (*Pretty v UK* (29 June 2002, App no 2346/02) §61). It covers "*the physical and psychological integrity of a person*" and "*aspects of an individual's physical and social identity*" (ibid). In particular it covers "*[e]lements such as, for example, gender identification, name and sexual orientation and sexual life [which] fall within the personal sphere protected by Article 8*" (ibid). More

recently the European Court of Human Rights ("**the ECtHR**") in Sousa Goucha v Portugal (22 March 2016, App 70434/12) §27 reiterated its well established caselaw that, pursuant to Article 8, "*sexual orientation is a profound part of a person's identity and that gender and sexual orientation are two distinctive and intimate characteristics*". The Court continued by noting "*cases which have been brought before the Court concerning gender identity revealing the intimate importance that one gives to it*" (ibid). It cited a number of instances in which the right to respect for private and family life protected by Article 8 had been held to include a right of individuals to be treated in accordance with their gender identity (see eg Grant v UK (23 August 2006, Ap 32570/03) where the ECtHR found a breach of Article 8 following a refusal to pay a trans woman a retirement pension at the same age as other women; and YY v Turkey (10 March 2015, App 14793/08) where the ECtHR found a breach of Article 8 in relation to a refusal to authorise surgery for a trans man and in which the Court reiterated that Article 8 accorded trans persons a right to personal development and physical and moral integrity).

20. The reason for providing protection from CT was explained by Liz Truss MP in the Foreword to the CP. It is to protect people from a "*coercive and abhorrent practice*" which does not work and "*can cause long lasting damage to those who go through it.*" Protecting people from such practices falls squarely within the "*ambit*" of Article 8. An individual's sexual orientation and the gender in which they present and identify are core parts of their identity. Efforts to change those aspects of identity by persuasion, force or pressure strike at core values Article 8 seeks to uphold, namely the protection of an individuals' psychological and physical integrity and their right to have their sexual orientation and gender identity recognised and respected. An enactment that seeks to protect individuals from CT is thus a positive measure that falls within Article 8 and must operate in a non-discriminatory way.

(ii) Would the ground upon which the complainants have been treated differently from others constitute a "status"?

21. Article 14 prohibits discrimination on a number of listed grounds, including "*sex, race, colour*." The list is, however, non-exhaustive and Article 14 also protects against discrimination on "*other status*". In protecting individuals from CT seeking to change their sexual orientation but not their gender identity, does the proposed CT Bill give rise to a difference in treatment on the grounds of a "*status*" falling within ECHR Article 14?

Legal principles

22. The domestic courts have emphasised that a "*generous*" interpretation of "*status*" pursuant to Article 14 is appropriate (see *R (Stott) v SSJ* [2018] UKSC 59, [2020] AC 51 §56(i) and *R(SC) v SSWP* [2019] EWCA Civ 615, [2019] 1 WLR 5687 at §64). As Leggatt LJ explained in *SC* at §67 "*it must be possible to identify a ground for the difference in treatment in terms of a characteristic or classification [of the person] which is not merely a description of the difference in treatment itself*", but otherwise all that is required is an "*identifiable characteristic*" (see §62), which can cover grounds that are "*more a matter of choice or circumstance than personality*" (ibid). In order to constitute an "*identifiable characteristic*" for the purpose of Article 14, there is "*no requirement that a status must have social or legal significance outside the context of the [impugned measure] and apart from the fact that it is the ground on which the allegedly discriminatory treatment is based*" (*SC* §75). In order to fall within Article 14 "*a status need not be innate or an inherent aspect of an individual's personality but may be a feature of a person's circumstances or living situation on which a legal consequence depends*" (ibid §76).

23. Whether a person has some "*identifiable characteristic*" should be assessed "*taking into consideration all of the circumstances of the case and bearing in mind that the aim of the Convention is to guarantee not rights that are theoretical or illusory but rights that are practical and effective …*" (*Clift v UK* (App no 72015/07) §60). Given the express reliance on the latter aim, it is perhaps not surprising that, as the Court of Appeal observed in *SC*, the ECtHR finds "*other status*" to be established in the significant majority of cases and tends to focus on whether differences in treatment are justified. The Court of Appeal in *SC* noted at §64 only one "*rare recent example*" in which the ECtHR had found an applicant did not have a "*status*" covered by Article 14, and observed "*The same tendency to take an increasingly generous view of what is capable of amounting to a relevant status has been followed by the UK's highest court*" (§65).

24. The Supreme Court in *SC* endorsed Leggatt LJ's approach (see [2021] UKSC 26, [2022] AC 223). It held at §71:

> *The issue of "status" is one which rarely troubles the European court. In the context of article 14, "status" merely refers to the ground of the difference in treatment between one person and another. Since the court adopts a stricter approach to some grounds of differential treatment than others when considering the issue of justification … it refers*

specifically in its judgments to certain grounds, such as sex, nationality and ethnic origin, which lead to its applying a strict standard of review. But in cases which are not concerned with so-called "suspect" grounds, it often makes no reference to status, but proceeds directly to a consideration of whether the persons in question are in relevantly similar situations, and whether the difference in treatment is justified. As it stated in Clift v United Kingdom, para 60, "the general purpose of article 14 is to ensure that where a state provides for rights falling within the ambit of the Convention which go beyond the minimum guarantees set out therein, those supplementary rights are applied fairly and consistently to all those within its jurisdiction unless a difference of treatment is objectively justified". Consistently with that purpose, it added at para 61 that "while … there may be circumstances in which it is not appropriate to categorise an impugned difference of treatment as one made between groups of people, any exception to the protection offered by article 14 of the Convention should be narrowly construed." Accordingly, cases where the court has found the "status" requirement not to be satisfied are few and far between.

25. A number of different "*statuses*" have been recognised as falling within Article 14, and it is clear "*gender identity*" and "*sexual orientation*" are included. In Identoba v Georgia (12 May 2015, App 73235/12) at §96 the ECtHR reiterated its well-established jurisprudence "*that the prohibition on discrimination under Article 14 of the Convention … covers questions related to sexual orientation and gender identity*", and referred to a series of case to that effect. Discrimination on grounds of gender identity will thus be discrimination on the basis of a "*status*" falling within Article 14. Indeed, in my view there is an argument that discrimination on grounds of "*gender identity*", not only falls within Article 14, but that it is a ground of discrimination which attracts a strict standard of review in relation to any justification.

26. As the Supreme Court noted in SC, the ECtHR has recognised certain grounds of discrimination to be "*suspect*" and thus to attract closer scrutiny from the courts. That has been applied to race and sex. It has also been applied to discrimination on grounds of sexual orientation. As the ECtHR has held, "*discrimination based on sexual orientation is as serious as discrimination based on race, origin or colour or sex*" (see Vejdeland v Sweden (9 February 2012, App no 1813/07) §42). In Kozak v Poland (2 March 2010, App no 13102/02) the ECtHR held in relation to sexual orientation discrimination at §92:

Sexual orientation is a concept covered by Article 14. Furthermore, when the distinction in question operates in this intimate and vulnerable sphere of an individual's private life, particularly weighty reasons need to be advanced before the Court to justify the measure complained of. Where a difference of treatment is based on sex or sexual orientation the margin of appreciation afforded to the State is narrow, and in such situations the principle of proportionality does not merely require the measure chosen to be suitable in general for realising the aim sought; it must also be shown that it was necessary in the circumstances.

Domestically, and to similar effect, the Supreme Court held in R (Steinfeld and Keidan) v SSID [2018] UKSC 32 at §32 that "*where [a] difference in treatment is based on sexual orientation, a court must apply 'strict scrutiny' to the assessment of any asserted justification and particularly convincing and weighty reasons to justify it are required*."

27. The ECHR has not, to date, held that discrimination on grounds of gender identity attracts the same "*strict scrutiny*" as discrimination on grounds of sexual orientation. It is, however, difficult to see why it should not. A person's "*gender identity*" is no less an aspect of the "*intimate and vulnerable sphere of [their] private life*" than is their sexual orientation. Further, and as with sexual orientation, those whose gender identity is not regarded as conforming to particular norms have, historically, been targets of discrimination. That too suggests discrimination on grounds of gender identity should be treated as "*suspect*" and any justification for it subject to a strict scrutiny. I thus consider it likely that if the matter arose, a court would find that, like discrimination on grounds of sexual orientation, discrimination on grounds of gender identity requires "*particularly weighty reasons*" if it is to be justified, and that the state's margin of appreciation is correspondingly narrowed (see further discussion below on the applicable margin of appreciation in the present case).

Application to CT Bill

28. Given that it is clear that "*gender identity*" is a "*status*" protected by Article 14, difference in treatment on grounds of gender identity which are not justified will breach the Convention. The more difficult question in this case is whether the proposed CT Bill, in fact, gives rise to a difference in treatment on the grounds of gender identity. That, however, is probably better analysed when considering the third of the questions that arise in Article 14 cases, to which I now turn.

(iii) Would the proposed CT Bill treat people differently from others not sharing their status who are similarly situated?

29. Ordinarily, when one considers Article 14 one is examining a measure which advantages those with a particular status and disadvantages those without (e.g. it advantages men and disadvantages women). The proposed CT Bill seeks to ban CT in a way that is "*universal*" and "*symmetrical*", in that it will protect individuals of any sexual

orientation (i.e. it will protect people from CT being used to change their sexual orientation from heterosexual to homosexual as well as CT aimed at changing sexual orientation from homosexual to heterosexual). The CT Bill is, furthermore, silent on gender identity. It might be argued that the CT Bill, if passed, would not, therefore, disadvantage people based on their gender identity or advantage people based on their sexual orientation, but is neutral in that regard. Therefore, it could be said, the failure to protect individuals from CT aimed at changing their gender identity is not discriminatory and does not fall within Article 14.

30. In my view a court is likely to reject that argument. As set out above, the courts, both domestically and in Strasbourg, have recognised that "*the general purpose of article 14 is to ensure that where a state provides for rights falling within the ambit of the Convention which go beyond the minimum guarantees set out therein, those supplementary rights are applied fairly and consistently to all those within its jurisdiction unless a difference of treatment is objectively justified*". Thus, as the domestic courts have noted, issues such as "*status*" tend to be generously interpreted and rarely trouble the ECtHR, and the same is true of technical disputes about how exactly discrimination should be characterised. The ECtHR, instead, seeks to focus on ensuring that rights falling with the ambit of the Convention are applied fairly and consistently. In my view that would be the approach taken if an Act in the form of the CT Bill were challenged.

31. As set out above, the proposed CT Bill provides protection for those at risk of potentially harmful measures seeking to change their sexual orientation, but not those at risk of such measures seeking to change their gender identity. Both sexual orientation and gender identity are recognised, separately, to be "*statuses*" falling within Article 14 and both are statuses within the "*intimate and vulnerable sphere of an individual's private life*" such that any discrimination in relation to them attracts "*strict scrutiny*." There is no reason to believe CT seeking to change gender identity, and CT seeking to change sexual orientation, are not equally harmful, and in my view a person subject to CT seeking to change their gender identity is in an analogous position to someone subject to CT seeking to change their sexual orientation. In those circumstances a court is likely to take a straightforward and non-technical approach, and conclude that the CT Bill treats gender identity and sexual orientation differently, that both are "*statuses*" under Article 14, and that the difference in treatment therefore requires justification.

32. If, however, a court were concerned about the technicalities of "*status*" and pinpointing precisely how it relates to the difference in treatment in this case, the issue could be analysed differently. The matter could be approached from the perspective of indirect discrimination against those who are trans.

33. The ECtHR has recognised the potential for claims of "*indirect discrimination*" which arise where "*a general policy or measure … has disproportionately prejudicial effects on a particular group notwithstanding that it is not specifically aimed at that group*," (see Guberni v Croatia (22 March 2016, App 23682/13 §71) and DH v Czech Republic (13 November 2007, App 57325/00) §175)). The Supreme Court in SC at §53 summarised the ECtHR authorities on indirect discrimination as follows:

> *[I]t has to be shown by the claimant that a neutrally formulated measure affects a disproportionate number of members of a group of persons sharing a characteristic which is alleged to be the ground of discrimination, so as to give rise to a presumption of indirect discrimination. Once a prima facie case of indirect discrimination has been established, the burden shifts to the state to show that the indirect difference in treatment is not discriminatory. The state can discharge that burden by establishing that the difference in the impact of the measure in question is the result of objective factors unrelated to any discrimination on the ground alleged. This requires the state to demonstrate that the measure in question has an objective and reasonable justification: in other words, that it pursues a legitimate aim by proportionate means*

34. If the proposed CT Bill does not discriminate directly on grounds of gender identity / sexual orientation, there is a good argument that it constitutes *prima facie* indirect discrimination against those who are trans. If the CT Bill does not discriminate directly on grounds of gender identity, it would be regarded as being a "*general policy or measure*" that is "*neutrally formulated*". Is it a measure which affects a disproportionate number of persons who are trans? In my view it is. That is because a measure that seeks to protect people from therapies seeking to change fundamental parts of their identity, but which does not apply to gender identity, is very likely to disproportionately disadvantage those who are trans compared to those who are not trans. While any ban on CT therapy would be symmetrical (i.e. it applies equally to conversion to or from any particular gender identity) the impact of not providing protection against gender identity CT is likely to disproportionately disadvantage trans people compared to non-trans persons. While there may be cases of CT seeking to change a person's gender identity from being non-trans to being trans, it seems much more likely that CT would be used to attempt

to change the gender identity of those who are trans. Legislation which aims to ban CT, but which does not apply to gender identity, will thus constitute *prima facie* indirect discrimination against trans persons and require justification.

(iv) Is there an objective and reasonable justification for excluding gender identity from the CT Bill, in other words, does the exclusion pursue a legitimate aim and do the means employed bear "a reasonable relationship of proportionality" to the aims sought to be realised?

Legal principles

35. One issue of principle that has arisen domestically and in Strasbourg is the width of the margin of appreciation / intensity of the level of scrutiny given to any justification put forward for a relevant policy or difference in treatment. In particular, the courts have on various occasions considered whether it is appropriate to accord a wide margin of appreciation to a measure, and interfere only when the measure is "*manifestly without reasonable foundation*", or whether the court should accord the measure a more intensive scrutiny and require "*very weighty reasons*" to justify a difference in treatment. The matter was considered recently by the Supreme Court in *SC* (see §97-162).

36. The Supreme Court held that a "*mechanical approach*", based on the nature of the impugned grounds of discrimination or the nature of the underlying decision under challenge, was not appropriate (see §158). It noted, instead, that the Strasbourg jurisprudence identifies a number of factors that will affect the margin of appreciation / intensity of review. Two are relevant for present purposes:

    (i) One factor taken into account is the grounds of the treatment (§115(1)). A more intense review, and correspondingly narrower margin, is likely to be appropriate in relation to "*suspect*" grounds of discrimination, such as sex, race, nationality and sexual orientation (see discussion §100-113). As set out above, I consider that there are good reasons to place gender identity within this category.

    (ii) Another factor, repeated in the ECtHR judgments, and which will, conversely, suggest a wider margin and less intrusive scrutiny may be appropriate, applies to "*general measures of economic or social strategy*" (§115(2)). As the Court of Appeal explained in *R (Drexler) v Leicestershire County Council* [2020] EWCA Civ 502,

where a democratically accountable body is making decisions regarding the distribution of finite economic resources, it has an "*institutional competence*" and "*democratic legitimacy*" in determining how those resources should be distributed. That is not enjoyed by the court, and suggests the court should be slow to intervene in such decisions (*Drexler* §76 & 79). The same is true, according to the Supreme Court in *SC*, in areas "*such as national security, penal policy and matters raising sensitive moral or ethical issues*" (*SC* §160). In relation to such decisions, too, the courts should be cautious about intervening in a decision of the legislature or executive. Nonetheless, and even in areas of economic and social policy, where discrimination is on "*suspect*" grounds the court should still require a "*cogent justification*" for a difference in treatment and subject any justification to "*close scrutiny*" (see discussion in *SC* at §153 et seq & §159).

Application to CT Bill

37. The CT Bill does not concern matters of economic or social policy of the kind that arise in the context of social security or housing, where the State is inevitably balancing constraints on finite resources. In addition, the proposed Bill discriminates on a suspect ground. Both factors militate in favour of a narrow margin to be accorded to any justification. On the other hand, the issues covered by the CT Bill could be regarded as involving "*social policy*", and raising "*sensitive moral or political issues*". That would suggest a wider margin. Taking these various considerations into account, in my view a court considering a challenge to the CT Bill, if enacted, would, at least, seek to ensure that a "*cogent justification*" has been put forward for the decision to provide protection for CT in relation to sexual orientation but not gender identity, and to "*closely scrutinise*" any explanation for the distinction. But provided that the matter has been considered by the legislature / executive, and some cogent basis for the distinction put forward, the court would be slow to intervene. What then is the justification for excluding gender identity from the proposed CT Bill, does it pursue a "*legitimate aim*" and would an argument that it is proportionate survive "*close scrutiny*"?

Current justification put forward by the Government

38. One of the difficulties is that, to date, the Government has provided very little by way of explanation as to why gender identity and sexual orientation are being treated differently in relation to CT, or what "*legitimate aim*" is said to be pursued by excluding

gender identity from the proposed Bill. The only explanation, as far as I am aware, is that provided in the Notes to the Queen's Speech, namely that "*the complexity of issues and need for further careful thought*" mean that the Government wishes to "*carry out separate work to consider the issue of Transgender Conversion Therapy further.*" I do not consider that justification is likely to be accepted by a court. As the Supreme Court held in *Steinfeld*, simply taking time to decide what policy to adopt, while evidence is gathered, does not justify a difference in treatment (§41-46).

39. In *Steinfeld* the issue arose as follows. The Civil Partnership Act 2004 created an alternative to marriage open only to same-sex couples. Following the enactment of the Marriage (Same Sex Couples) Act 2013, which extended marriage to same-sex couples, same-sex couples could choose whether to marry or enter a civil partnership, while opposite-sex couples only had the option of marriage. The difference in treatment was challenged by an opposite-sex couple who wished to enter a civil partnership. The justification put forward by the Government for the difference in treatment was that it needed "*to have time to assemble sufficient information to allow a confident decision to be made about the future of civil partnerships*" (§42). The Court of Appeal accepted that such a policy of "*wait and see*" or "*wait and evaluate*" was a "*legitimate aim*". The Supreme Court disagreed. It accepted the claimants' submission that to be legitimate, "*the aim [of a difference in treatment] must address the perpetration of the unequal treatment*" and "*must be intrinsically linked to the discriminatory treatment*" (§42). It is not sufficient, the Supreme Court held, simply that the Government wanted "*time to assemble sufficient information*" to determine how to proceed (ibid). The apparent desire to "*wait and see*" or "*wait and evaluate*" is the only justification currently put forward for the decision to exclude gender identity from the CT Bill. Following *Steinfeld* it does not constitute a "*legitimate aim*" and cannot therefore justify the difference in treatment.

Alternative justifications

40. Oher explanations for excluding gender identity from the CT Bill have been put forward (albeit not expressly by the Government). For example Nikki da Costa, former director of legislative affairs at No 10, spoke to the BBC Radio 4's Today Programme on 1 April 2022, shortly after the decision to exclude gender identity from the ban on CT therapy was announced. She suggested that extending the ban to gender identity would have "*profound consequences for children struggling with gender dysphoria*". She stated "*Doctors,*

therapists and parents would be deterred from exploring with a child any feelings of what else may be going on for fear of being told they're trying to change a child's identity". It was further suggested by the BBC correspondent that "*It is thought that the government sees it as too complicated to avoid any unintended consequences of the legislation - which may affect parents, teachers, and therapists who are helping children experiencing gender identity issues*."

41. It is not clear if this is the Government's justification for not proposing to ban CT in relation to gender identity. If it is the justification, it would not, in my view, survive the scrutiny of the court (and that is so whatever level of scrutiny were applied). That is because the apparent concerns in relation to gender identity apply equally to CT in relation to sexual orientation and therefore cannot justify the difference in treatment.

42. No doubt there are children and adults who struggle with issues around sexual orientation and gender identity. No doubt many will seek, and be given, legitimate and much needed support by parents, teachers or therapists, and no-one would wish to prevent, undermine or deter such support. It is, however, clear that a distinction can be drawn between legitimate therapy and appropriate intervention seeking to help those struggling with their sexual orientation or gender identity, and harmful CT. That is well-recognised by professionals. In October 2017 (revised in July 2019) a group of organisations, including The British Psychological Society, NHS England, NHS Scotland, The Royal College of GPs, Relate and other organisations produced a "*Memorandum of Understanding on [CT] in the UK*." It used the phrase CT to describe "*a therapeutic approach, or any model or individual viewpoint that demonstrates an assumption that any sexual orientation or gender identity is inherently preferable to any other, and which attempts to bring about a change of sexual orientation or gender identity, or seeks to suppress an individual's expression of sexual orientation or gender identity on that basis*" (§2). The signatory organisations agreed that "*the practice of conversion therapy, whether in relation to sexual orientation or gender identity, is unethical and potentially harmful*" (§3).

43. The Memorandum went on to explain the difference between legitimate therapy and such harmful conversion practices (§6):

> *This position [in relation to CT] is not intended to deny, discourage or exclude those with uncertain feelings around sexuality or gender identity from seeking qualified and appropriate help.*

> *This document supports therapists to provide appropriately informed and ethical practice when working with a client who wishes to explore, experiences conflict with or is in distress regarding, their sexual orientation or gender identity.…*
>
> *For people who are unhappy about their sexual orientation or their gender identity, there may be grounds for exploring therapeutic options to help them live more comfortably with it, reduce their distress and reach a greater degree of self-acceptance. Some people may benefit from the support of psychotherapy and counselling to help them manage unhappiness and to clarify their sense of themselves. Clients make healthy choices when they understand themselves better.*
>
> *Ethical practice in these cases requires the practitioner to have adequate knowledge and understanding of gender and sexual diversity and to be free from any agenda that favours one gender identity or sexual orientation as preferable over other gender and sexual diversities….*

44. The key distinction drawn by the Memorandum of Understanding is thus between legitimate therapies and interventions which seek to assist those struggling with their sexual orientation or gender identity, and which will help them manage "*unhappiness*" and "*clarify [their] sense of self*", and illegitimate and harmful CT which takes as its starting point that some "*sexual orientation or gender identity is inherently preferable to any other, and which attempts to bring about a change of sexual orientation or gender identity*" in accordance with the pre-determined starting point. It is a difference between helping people to explore, come to terms with and understand their sexual orientation or gender identity, whatever that is, and therapy or an intervention which begins from the assumption that one sexual orientation or gender identity is to be preferred and has as its goal encouraging, coercing or forcing those subject to the therapy or intervention to change their sexual orientation or gender identity.

45. This distinction was also recognised by the Government in the CP. The CP expressly distinguished between therapies which "*have the intention of changing a person's sexual orientation or changing them to or from being transgender*" (§36) from "*legitimate talking therapies that support a person who is questioning if they are LGBT*" (§37). It explained that the latter "*do not start from the basis that being LGBT is a defect or deficiency. Instead the therapies are open and explorative discussions focused on helping a person to decide on their options in a supportive manner*" (ibid). The CP considered that legislation could distinguish between such legitimate practices and CT, and made clear that the proposed ban on CT "*could not be reasonably understood to include communication such as casual*

conversations, exchanges of views, private prayer or pure speech acts" (§34) and that banning CT would not "*result in interference for professional psychologists, psychiatrists, psychotherapists, counsellors and other clinicians and healthcare staff providing legitimate support for those who may be questioning if they are LGBT*" (§35).

46. The distinction is, furthermore, reflected in the proposed CT Bill itself. The Notes to the Queen's speech state expressly that one of the "*main elements*" of the proposed CT Bill seeking to ban sexual orientation CT will be "*Protecting freedom of speech, ensuring parents, clinicians and teachers can continue to have conversations with people seeking support.*" Another of the "*main elements*" will be "*Respecting clinicians' independence.*" The Note continues: "*Our legislation will not impact the existing professional frameworks that guide clinicians' ability to support people. Robust, exploratory and challenging conversations which are part of regulated care do not fall within the scope of the ban.*"

47. The Government thus evidently considers that it can legislate so as to protect legitimate therapy aimed at supporting and assisting those struggling with their sexual orientation, while at the same time banning therapies that treat one sexual orientation as preferable and aim to "*convert*" (whether by pressure, persuasion, force or coercion) people to it. The problem is that if that can be achieved for sexual orientation, it is very difficult to see why it could not be done equally in relation to gender identity. It is very hard to see how the concerns expressed by those such as Nikki da Costa about "*doctors, therapists and parents being deterred from exploring with a child any feelings of what … may be going on*" does not apply to sexual orientation as much as gender identity, and why concerns about protecting legitimate treatment and interventions could be dealt with by legislation in relation to sexual orientation but not gender identity. If it is unacceptable for therapy to take as its starting point that it is preferable to be heterosexual and then to seek to "*change*" those with different sexual orientations, it is impossible to see how it is not equally unacceptable for therapy to take as its starting point that it is preferable not to be trans and to seek to change those who are trans. And if it is possible to distinguish such unacceptable treatment from legitimate therapy and assistance for those struggling with their sexual orientation, then it is impossible to see why the same distinction cannot be drawn for those struggling with their gender identity. On that basis including sexual orientation but excluding gender identity from the CT Bill is not justified.

Justification for the extent of the difference in treatment

48. Even if the above is wrong, however, it may not be the end of the matter as far as justification is concerned. If, contrary to the above, it was possible to justify some differences in treatment as between sexual orientation and gender identity, the provision proposed in the CT Bill may still breach Article 14. In this regard it is important to identify what must be justified. As Lord Bingham explained in *A v SSHD* [2005] 2 AC 68 at §68, "*What has to be justified is not the measure in issue but the difference in treatment between one person or group and another*". It would thus not be sufficient to note differences between sexual orientation and gender identity which may justify some differences in approach. It is "*the difference*" not "*a difference*" which must be justified. Thus even if it were possible to justify some difference in treatment as between gender identity and sexual orientation in relation to CT, what would need to be justified was the specific differences that arise from the CT Bill, namely having the range of measures set out in the proposed CT Bill in relation to sexual orientation, but applying none of them to protect against gender identity conversion. It is difficult to see, on any analysis, how that could be justified.

49. The CT Bill proposes a variety of measures in relation to sexual orientation, including "*Strengthening existing criminal law by ensuring that violent conversion therapy is recognised as a potential aggravating factor upon sentencing*" and introducing criminal offences banning non-physical CT for "*over-18s who do not consent and who are coerced or forced to undergo conversion therapy practices*" (see Briefing Notes to Queen's Speech). Even if, contrary to the above, there was justification for some difference in approach as between sexual orientation and gender identity, it is impossible to see any justification for not treating them in the same way when it comes to "*violent conversion therapy*". As set out in the CP, it is proposed that if a rape or sexual assault is committed in an attempt to change someone's sexual orientation, that will be treated as a potential aggravating factor in sentencing. It is impossible to see any justification for not treating a rape or sexual assault committed as part of an attempt to change someone's gender identity in the same way. Similarly, it is impossible to see any justification for creating a criminal offence to protect people from being "*coerced or forced*" to undergo CT to change their sexual orientation, but not those "*coerced or forced*" to undergo CT to change their gender identity.

REMEDY AND POTENTIAL CHALLENGES

50. As to potential legal challenges, in my view any challenge that was brought before the CT Bill is enacted would be dismissed by the courts on the basis that it was premature. If the currently proposed CT Bill were enacted, however, it could be challenged. If the Act treated sexual orientation and gender identity differently without justification, it would, for the reasons set out above, breach ECHR Article 14 read with Article 8. A challenge could be brought by someone who is a victim, or likely to be a victim, of CT aimed at changing their gender identity.

51. If it were "*possible*" to read the legislation "*in a way which is compatible with the Convention rights*" such a reading would be required under Human Right Act 1998 s 3(1). It would seem unlikely, however, that any legislation would be drafted in such a way as to render it "*possible*" to read it as applying to gender identity CT, where the aim is clearly only to cover sexual orientation. If a Convention compliant reading is not possible, the only remedy available would be a "*declaration of incompatibility*" under Human Right Act 1998 s 4(2). It would then be a matter for Parliament whether it would change the law.

CONCLUSION

52. If any questions arise from the above advice, or if further information is available on the Government's proposals, and in particular if any further explanation is put forward for excluding gender identity from the proposed CT Bill, I would be happy to advise.

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MATRIX CHAMBERS

26 MAY 2022