

IN THE COURT OF SESSION

Court Ref: P578/22

WRITTEN INTERVENTION

by

SEX MATTERS LIMITED, a company limited by guarantee, incorporated under the companies acts (company number 12974690) and having its registered office at 63-66 Hatton Garden, London EC1N 8LE

INTERVENER

in the reclaiming motion of the decision of the Lord Ordinary in the petition of

FOR WOMEN SCOTLAND LIMITED, a company incorporated under the Companies Act and registered in Scotland with Company number SC669393 and with registered offices at 5 South Charlotte Street, Edinburgh EH2 4AN

PETITIONER AND RECLAIMER

for

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

1. Introduction

- 1.1. This written intervention is presented in accordance with this court's interlocutor of 29 August 2023.
- 1.2. The intervener's submissions contained herein are focussed on a discrete argument in support of the reclaiming motion, made in the public interest. For the reasons set out in detail below, the Lord Ordinary has erred in law by failing to consider the Convention compatibility of her preferred interpretation of 'sex' for the purposes of section 11 of the Equality Act 2010 as *not* meaning biological sex, as informed by her reading of section 9 of the Gender Recognition Act 2004 (§§48-50 and 53 of the Lord Ordinary's decision).
- 1.3. This intervention uses the term "trans-identifying man" to mean a person who is male but who identifies as a woman (sometimes referred to as a "transwoman"). Similarly, a "trans-identifying woman" is a person who is born female and who identifies as a man (sometimes referred to as a "transman").
- 1.4. The effect of the Lord Ordinary's decision (encapsulated at §53 of the decision) is that a trans-identifying man with a GRC is to be treated for *all* purposes that relate to EA2010 as sharing the protected characteristic of sex as a female with a biological woman, and vice versa for a trans-identifying woman with a GRC. The trans-identifying man with a GRC would not share the protected characteristic of sex with other biological men (including trans-identifying men without a GRC), and a trans-identifying woman with a GRC would not share the protected of sex with other biological females (including other trans-identifying women).
- 1.5. The trans-identifying man or woman would, of course, continue to be protected from discrimination on the grounds of gender reassignment if they meet the criteria of section 7 EA2010.
- 1.6. The intervener has a particular interest in ensuring that the broader consequences of the Lord Ordinary's decision are properly appreciated.

2. Convention Compatibility

- 2.1. The Lord Ordinary (and every other court in the United Kingdom) is obliged by sections 3 and 6

of the Human Rights Act 1998 to act in a manner which is compatible with Convention rights as protected by that Act and, in particular (per section 3(1)):

“... so far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights”

2.2. The intervener submits that the Lord Ordinary’s decision, insofar as interpreting section 11 EA2010 as informed by section 9 of GRA2004, fails to comply with the requirements of section 3 of HRA1998 because the effect of the decision is to undermine existing Convention rights when another compatible interpretation was available.

2.3. That is particularly so when one considers that the Lord Ordinary recognised at §45 that the interpretations under discussion in this case involve the most fundamental rights and status of individuals in the eyes of the law. This court recently held unanimously in *Fair Play for Women v Registrar General for Scotland* 2022 SC 199 at §21 that:

“There are some contexts in which a rigid definition based on biological sex must be adopted. Bellinger v Bellinger was perhaps a classic example. ... there are other circumstances in which matters affecting status, or important rights, in particular the rights of others, may demand a rigid definition to be applied to the term ‘sex’ ... The point which these examples all have in common is that they concern status or important rights.”

2.4. The Lord Ordinary was required, respectfully, to pay close and anxious attention to the alternative interpretations available in order to determine their compatibility with Convention rights. No attempt was made to do that.

3. The enactment of the GRA2004

3.1. The failure above is compounded by the failure to recognise the purpose for which the GRA2004 was enacted, namely to respond to the decision in *Goodwin v UK* (2002) 35 EHRR 18, where a lack of recognition was held to violate Article 8 and Article 12 ECHR, and the decision in *Bellinger v Bellinger* [2003] 2 AC 467 which flowed therefrom. In *Goodwin*, the Strasbourg Court expressly records at §90 that:

“In the twenty first century the right of transsexuals to personal development and to physical

and moral security in the full sense enjoyed by others in society cannot be regarded as a matter of controversy...In short, the unsatisfactory situation in which post-operative transsexuals live in an intermediate zone as not quite one gender or the other is no longer sustainable."

- 3.2. The UK Government had not implemented a domestic mechanism to deal with that lack of recognition by the time of the decision in *Bellinger*, resulting in the declaration of incompatibility from the House of Lords outlined at §§68-70 of the decision. It is *entirely* to deal with the conclusion of the Strasbourg Court in *Goodwin* and the House of Lords in *Bellinger* that the GRA2004 was enacted. The Lord Ordinary appears to question the accuracy of that at §§46-47 of her decision. That is an error in the submission of the intervener.

4. The enactment of the EA2010 as regards sex discrimination

- 4.1. After the CJEU determined that dismissal based on gender reassignment was a breach of the relevant Council Directive, Parliament did not amend the domestic legislation so as to protect transsexuals under the existing provisions as regards sex. Instead, a new section 2A was added to the Sex Discrimination Act 1975 in 1999 –creating separate protection for transsexuals in relation to employment. This was extended to goods and services in 2008, and subsequently adopted in the EA2010.
- 4.2. On that particular issue, the leading textbook on Equality Law in the United Kingdom, Monaghan on Equality Law (2nd ed), provides at §5.134 that “... *the law constructs a concept of ‘sex’ which is binary and biologically determinist*” and goes on at §5.280 as follows:

“The binary approach to sex, adopted by, first, the [1975 Act] and now the EA 2010, is entirely dependent upon a biologically determinist view of sex. ‘Sex’ is to be determined by reference to certain biological characteristics that make individuals ‘men’ or ‘women’. These are assumed to be self-explanatory and require no further definition or explication. Further, women are treated as undifferentiated – an homogenous grouping. What matters is that which they have in common, namely biology.”

- 4.3. Protection from discrimination because of sex and gender reassignment were therefore discretely – and separately – provided for by Parliament. The Lord Ordinary’s decision elides those separate protections, permitting one protected characteristic to undermine another. Such a result cannot have been the intention of Parliament. Indeed, a Scottish court has already

warned against permitting one protection to override another in the interests of perceived protection of one group at the expense of another: *Billy Graham Evangelistic Association v Scottish Event Campus 2022 SLT (Sh Ct) 219* at §118.

- 4.4. Discrimination protection in relation to gender reassignment was extended to the goods and services provisions of the 1975 Act in 2008 “*except in so far as it relates to an excluded matter*” (i.e. situations where single sex services were allowed). There was no intention to give trans-identifying men the right to use women’s services, bearing in mind the change was made after the enactment of the GRA2004. The Minister introducing the amendment said “*Where the regulations will have an impact is by making it unlawful for a person to be denied access to a shop, for example, or refused service in a restaurant, or be the subject of abuse by a sales person on the grounds of their gender reassignment.*” There was no mention of forcing access to single sex spaces or the like.
- 4.5. The meaning of ‘sex’ for the purposes of the EA2010 is fundamental to the protection of sex-based rights, including protection against harassment related to the protected characteristic of sex. A blurring of what is meant by “a man” or “a woman” for the purposes of section 11 of the EA2010, and the concepts of “same sex” and “opposite sex” serves not to *increase* protections, but rather to *remove* existing protections, particularly (but not exclusively) for women.
- 4.6. That removal of protections for women is prevented from occurring simply by ensuring that ‘sex’ means *biological sex* in the manner that had always been understood to be the case. The Lord Ordinary’s suggestion at §49 of her decision that Parliament could have included ‘biological’ in the definition is, respectfully, flawed for the reasons set out in the passage from Karon Monaghan KC’s book set out at para 4.3 above: nobody could possibly have been under the impression that sex needed any further definition or explication. It is only in relatively recent times that the issue has been thrown into dispute.
- 4.7. These proceedings involve an interpretation of a provision which speaks to the heart of at least one fundamental legal status as well as a number of fundamental rights. A strict interpretation of the meaning of sex is therefore appropriate in accordance with the recent authority of this court, and an interpretation which is compatible with Convention rights must be preferred to one which is incompatible.

5. Engagement of Convention Rights

- 5.1. There is a clear engagement of a number of Convention rights if the Lord Ordinary is correct that trans-identifying men with a GRC are to be regarded as part of the same category as women for the purposes of sex discrimination protections and the concept of “sex” in the Equality Act and vice versa for trans-identifying women.
- 5.2. The following examples are real and practical examples of how the Lord Ordinary’s interpretation of the meaning of ‘sex’ in the EA2010 will engage the Convention rights of others.

Article 3 – Protection from inhuman or degrading treatment

- 5.3. The carrying out of intimate searches has been found by the Strasbourg Court to engage Article 3 where such searches are carried out without due respect for human dignity and without a legitimate purpose. Article 3 is an absolute right which may not be derogated from, limited or restricted in any way. In *Wieser v Austria* (Case 2293/03), the Strasbourg Court records as follows at §39 (internal references omitted):

“The Court notes that it has already had occasion to apply the principles of Article 3 of the Convention set out above in the context of strip and intimate body searches. A search carried out in an appropriate manner with due respect for human dignity and for a legitimate purpose may be compatible with Article 3. However, where the manner in which a search is carried out has debasing elements which significantly aggravate the inevitable humiliation of the procedure, Article 3 has been engaged: for example, where a prisoner was obliged to strip in the presence of a female officer, his sexual organs and food touched with bare hands and where a search was conducted before four guards who derided and verbally abused the prisoner. Similarly, where the search has no established connection with the preservation of prison security and prevention of crime or disorder, issues may arise.”

- 5.4. Full (strip) searches are carried out by the police when individuals are brought into custody as well as by the Prison Service when inmates are imprisoned.
- 5.5. If the Lord Ordinary’s decision were correct, there would be circumstances where (i) a person carrying out a search, and (ii) a person being searched will be regarded as a matter of legal fiction as being of the sex other than their biological sex for the purposes of discrimination law without

reference to the effect of that on the human rights of others.

- 5.6. It is important to note that a GRC is a legal fiction, and does not alter fundamental science or perceived reality. It is not possible for a person actually to change sex, either by having cosmetic surgery or taking hormones, or by gaining a certificate. There is often a temptation to assume that a person with a GRC has undergone surgery or must outwardly appear in a particular way. However, the number of people gaining GRCs (1,240 GRCs were issued in 2022/23) is much higher than the numbers having surgery of any kind (355 gender reassignment surgeries were undertaken by NHS England in 21/22).
- 5.7. In Scotland, guidance is provided in the context of police searches in the Scottish Government's document "Stop and Search of the Person in Scotland: code of practice for constables", published under the Criminal Justice (Scotland) Act 2016. Annex B to that code provides as follows:

"1. Certain provisions of this Code explicitly state that searches and other procedures may only be carried out by, or in the presence of, persons of the same sex as the person subject to the search or other procedure.

2. All searches and procedures must be carried out with courtesy, consideration and respect for the person concerned. Constables should show particular sensitivity when dealing with transgender individuals.

...

10. Once the gender of the constable conducting the search has been established, the search should commence. The transgender status and appearance of the person being searched should not be commented upon. If any physical variation is encountered due to gender reassignment during searching, the constable should maintain a professional and respectful manner as per any physical variation encountered due to disability during searching."

- 5.8. It is clear that there will be circumstances where a biologically female individual will be intimately searched by a biologically male officer who holds a GRC, requiring that officer to be treated as female. Similarly, there will be circumstances where a biologically male individual with a GRC requiring that person to be treated as female will require a biologically female officer to carry out the intimate search.

- 5.9. In light of the Lord Ordinary's interpretation, the woman being searched, or being forced to search a man would have no claim in sex discrimination or sex-based harassment under EA2010, as the law would not recognise that they are being forced to search or be searched by a member of the opposite sex. However, from the perspective of their Article 3 rights, this is exactly what is happening. They are being forced into a humiliating and degrading situation.
- 5.10. Absent the Lord Ordinary's decision, Police Scotland might, for example, seek to make use of the exception at para 27(7) of schedule 3 EA2010. That exception provides that there is no contravention of section 29 EA2010 as regards sex discrimination where there is likely to be physical contact between people and one might reasonably object if the other were not of the same sex as them. However, in light of the Lord Ordinary's decision, if that other person holds a GRC, that person is to be treated as being of the *same* sex as the person being searched, so the exception would appear to have been undermined.
- 5.11. Similarly at para 28 of the same schedule, it is provided that a person does not contravene section 29 EA2010 in relation to gender reassignment discrimination in certain circumstances where there is the provision of separate services for persons of each sex. But that exception would seemingly not be of assistance in protecting individuals from the circumstances set out above in light of the Lord Ordinary's decision because the individual with the GRC is to be treated *as a matter of law* as being of the same sex as the biological female (or male as the case may be) and not a member of the opposite sex who could lawfully be excluded.
- 5.12. So, in the context of intimate searching, an individual would be unable to insist that they were searched by someone of the same biological sex. They would be stripped of that right, and would be required to accept a legal fiction in place of biological reality.
- 5.13. This is not a hypothetical scenario. Only earlier this year were biologically female prison guards ordered and forced to strip search – involving a full body search – a trans-identifying man, known as Tiffany Scott (previously known as Andrew Burns) who is subject to an order for lifelong restriction for being an unmanageable risk to public safety. Separately, a decision was taken to place the trans-identifying man, Isla Bryson (formerly Adam Graham) into a women's prison, despite having been convicted of raping two women.
- 5.14. The same applies in the context of forensic medical examinations. Individuals would be required to proceed on the basis that the searcher (or searchee) was of the same sex notwithstanding the

biological reality. Specific legislation enacted by the Scottish Parliament (such as section 9 of the Victims and Witnesses (Scotland) Act 2014, in which the government's own confusion over what is meant by sex and gender had to be rectified by amendment) which is designed to prevent such a circumstance from occurring would potentially be rendered entirely ineffective as a result of the Lord Ordinary's decision.

- 5.15. The issue is not any individual doctor acting inappropriately because of their trans identity, but the impact of the policy on women. If a policy permits a patient to request a female health care professional, the Lord Ordinary's decision makes it possible that the patient may be treated by a trans-identifying man with a GRC with no ability to object. Of itself, that may be direct or indirect discrimination or harassment absent the Lord Ordinary's decision, but would likely not be recognised as such for EA2010 purposes. The intervener has provided to the court press coverage of some of the recent examples.
- 5.16. The implications of the Lord Ordinary's decision, in these circumstances, are traumatic, distressing, and humiliating for the individuals involved.
- 5.17. Being forced to be intimately searched or examined by a member of the opposite sex and to pretend that they are the same sex is a profound violation of a person's dignity and autonomy, which would engage Article 3, bearing in mind the passage from *Wieser* which is quoted at para 5.3 above.
- 5.18. That breach of a fundamental right is avoided by interpreting 'sex' in the EA2010 as meaning biological sex. In light of the interpretative requirements set out at para 2.1, that interpretation should be preferred over the interpretation chosen by the Lord Ordinary.

Article 8

- 5.19. The circumstances described above, even if they do not reach the severity required to engage Article 3, are likely to engage Article 8. The Article 8 rights of transgender individuals (to privacy etc) must, of course, be balanced with the Article 8 rights of others where those rights come into conflict.
- 5.20. EA2010 is designed to protect people from discrimination because of protected characteristics. Being discriminated against for being female is something that may be experienced by all people

who *are* or are *perceived to be* female. The same applies to being male. Respectfully, even with surgery, it is rarely possible for a person to appear convincingly as a member of the opposite sex. Transgender individuals are, of course, as likely to experience sex discrimination as anyone else – but as a member of their biological sex rather than the sex with which they seek to identify themselves.

- 5.21. The emphasis on the fact that transgender people remain (often visibly) the sex that they always were is not intended to be inflammatory or offensive. It matters, however, both in considering the balancing of competing rights, and the strength of the Article 8 provision against which they need to be balanced. That is particularly so, given that it has been settled since at least the *Spycatcher* litigation that privacy and confidentiality carry significantly less weight when the information is no longer secret.
- 5.22. EA2010 protects against harassment at section 26. In situations where a woman is undressing, washing, sleeping, or being examined or searched in a situation where she reasonably expects a female only space, the intrusion of a member of the opposite sex would violate her privacy, her dignity, and would create an intimidating environment. The provision of facilities which are safe and *feel* safe is crucial. A woman who reasonably expects a female-only environment has as much right to consider a male person with a GRC to be male, as one without one. The Lord Ordinary's decision upsets the ability to carry out that balancing exercise.
- 5.23. EA2010 allows for the provision of single and separate sex services, including for the purposes of personal bodily privacy. Redefinition of 'sex' undermines this. This is not an argument that trans-identifying men are more likely to engage in voyeurism or sexual exposure than other males, but the experience for a woman of being surprised and frightened by the presence of a male person in a space that is designated "female only" is upsetting, humiliating and frightening. The intervener has made available the report from July 2022 into single sex services.

Articles 9, 10 and 11 ECHR

- 5.24. In addition to Articles 3 and 8, the intervener submits that Articles 9, 10, and 11 are also engaged.
- 5.25. If the Lord Ordinary is correct, single sex associations and charities, schools and colleges would not be able to exclude individuals of the opposite biological sex who hold a GRC. This is because they are covered not by Part 3 of EA2010 (services and public functions) where there is an

exception (at Schedule 3 para 28) to allow gender reassignment discrimination, but by exceptions in Schedule 16 and section 193 which do not include the same exception. Those associations include lesbian groups, feminist campaign groups and social organisations such as the Girl Guides and Women's Institute, but also include counselling charities and support such as rape crisis centres, domestic abuse shelters, and menopause support charities.

- 5.26. The intervener's research, which has been made available to the court, has found many previously women-only groups and lesbian groups coming under pressure to include men who identify as women. Many organisations faced with this risk decided to accept members of the opposite sex if they hold a GRC (or in some cases on the basis of self-ID). A common consequence is that women who dissent from permitting such men access are themselves excluded.
- 5.27. Associations and charities set up for women at their most more vulnerable are also affected. It is self-evident that women at a rape crisis centre want and reasonably expect to find a female-only space. The presence of a biological man in such a situation undermines and effectively destroys the purpose of such a service. The providers of such services must be permitted to exclude biological men from those services whether or not those biological men have a GRC. The impact on women of facing trans-identifying men in women's refuges can be devastating. Many women self-exclude from the groups, or are compelled to pretend that men are women, at great cost to their mental health.
- 5.28. The exception provided at para 28 could be applied in relation to the exclusion of individuals holding a GRC but might be challenged on the basis that a single-sex service by definition includes both people who are that sex by birth, and by certificate.
- 5.29. Crucially, charities and associations can be pressured by funders (particularly local authorities) who (often by reference to the PSED) say that they must treat males with a GRC as sharing the protected characteristic of being female. Without funding, these groups will close or severely reduce their services as was the case with RISE Brighton, a domestic violence and abuse charity, which lost its contract with Brighton and Hove Council.
- 5.30. Gender based violence is recognised for ECHR purposes as discrimination for which the State must take preventive operational measures (*Branko Tomašić and Others v. Croatia*, 2009 (case 46598/06), §§ 52-53; *Opuz v. Turkey*, 2002 (case 33401/02) § 129; *A and B v. Georgia*, 2022 (case 73975/16), § 49). Making women's refuge sites of sex-based harassment such that women do

not feel safe to use them is a violation of their rights, which is unjustifiable.

- 5.31. There can be no suggestion that it was the intention of Parliament, when enacting the EA2010, to make it difficult or impossible for a rape crisis centre or women's refuge to be able to exclude certain biological men from the group. But that is the effect of the Lord Ordinary's decision.
- 5.32. The Lord Ordinary's interpretation is incompatible with Articles 8, 9, 10 and 11 ECHR as well as with Article 3. The alternative interpretation set out at para 5.21 above avoids that incompatibility entirely and, therefore, is the interpretation that ought to be preferred.

6. The Public Sector Equality Duty

- 6.1. There is an issue caused by the Lord Ordinary's decision in relation to the Public Sector Equality Duty, found at section 149 of the EA2010. This issue, whilst being of significant wider importance, also relates directly to the guidance and legislation at the heart of this judicial review.
- 6.2. Any organisation subject to the PSED must have due regard, in considering which rules to adopt, to the matters set out in section 149. The organisation may undertake an Equality Impact Assessment. That exercise requires them to consider the question of categories: is a trans-identifying man with a GRC a woman whose interests should be considered as part of the group that share the protected characteristic female or must the organisation consider the interests of female people separate from those who do not share that characteristic?
- 6.3. The legislation at the heart of this judicial review is a useful example of the unworkable effect of the Lord Ordinary's decision. Within the Policy Memorandum for the Gender Representation on Public Boards (Scotland) Act 2018, it is expressly stated that part of the reason for having more women on boards is that "the board benefits from diverse perspectives" (para 12).
- 6.4. The diversity in question must be a reference to the different experiences of men and women. But that purpose is undermined if 'women' includes biological men with a GRC because those biological men will not have the experience of a woman. By definition, they will have grown up and lived as a member of their biological sex. Indeed, biological men with a GRC could never have the experience of a biological woman. That is self-evident in relation to matters such as menstruation, pregnancy and maternity but, additionally – and respectfully – many trans-

identifying men will always be identifiable as biological men, and, as a result, will not be treated in society in the same manner as biological women. They cannot, therefore, have the same experience.

- 6.5. Some boards may, of course, find it useful to have the experience of a trans-identifying person among their number. However, the purpose of the 2018 Act, is to increase the input on boards of those who have the experience of being a woman. As this court has previously identified, it is open to Parliament to make provision for the increased presence of trans-identifying people on boards, but that was not the purpose of the 2018 Act.
- 6.6. That same logic applies in relation to all public sector decision making in line with the PSED where lawful and workable policies must be promulgated in a practical sense. On the basis of the Lord Ordinary's decision, the category of "man" would be deemed to include both biologically male and female people and the category of "woman" to include both male and female people. Therefore, under the PSED, public authorities will not be required to consider how policies impact on male and female people differently, but only how it impacts on people with a "female" certificate or a "male" certificate.
- 6.7. On this matter, it is unacceptable for public bodies to be left in a position of uncertainty. They cannot be expected just to "get on with it" when promulgating policies which will form the basis of a statutory defence to any discrimination claim if they cannot be certain who is intended to be included in each protected characteristic.
- 6.8. In any situation where there is a conflict of interests between biological women and biological males with a GRC, public authorities would not be able to treat them as different groups whose interests should be considered separately. The Lord Ordinary's decision creates an inherent (and insuperable) tension for public authorities and the formulation of such policies becomes impossible.

7. Conclusion

- 7.1. The ramifications of the Lord Ordinary's decision are far-reaching and substantial, particularly in light of the Scottish Government's determination to make it *simpler* for individuals to acquire a GRC. There are already no requirements on an individual to undergo surgical transition as part of acquiring a GRC, and no definition of what is meant by 'living in the acquired gender' for such

purposes, meaning that many trans-identifying individuals appear outwardly clearly to be their biological sex. It is important that it be recognised that 'transsexual' has taken on a significantly broader meaning that it had even in the recent past.

- 7.2. The GRA went significantly beyond the *Goodwin* decision in enabling people to change their legal sex without surgery, but the underlying human rights justification of Art 8 and Art 12 remain. These cannot and should not be used as battering rams against the Art 3, 8, 9,10, 11 rights of other people, particularly women, or to make the law impossible to understand and unworkable. This is what a far-reaching decision here would do.
- 7.3. Whilst, of course, this court is not being asked to make any orders in relation to the wider context, it is obliged to have regard to the ECHR context when reaching a decision on legislative interpretation. The intervener invites this court to bear in mind that specific consideration needs to be made in this reclaiming motion to ensuring that no broad-brush interpretation is adopted which (i) cuts across Strasbourg authority, and (ii) makes it impossible for public authorities to promulgate and implement policies that are compliant with the Public Sector Equality Duty.
- 7.4. It may be that the matter can only definitively be resolved by way of legislative amendment to remove ambiguity about whether parliament intends for a GRC to change a person's sex for the purposes of the Equality Act, and prevent court time being taken up with similar such arguments, and the intervener very much favours this court expressing as much in its decision.

David Welsh, advocate