SECOND DIVISION, INNER HOUSE, COURT OF SESSION

[2023] CSIH 37
P578/22

Lord Justice Clerk
Lord Malcolm
Lord Pentland

OPINION OF THE COURT

delivered by LADY DORRIAN, the LORD JUSTICE CLERK

in the reclaiming motion

by

FOR WOMEN SCOTLAND LIMITED

Petitioner and reclaimer

against

THE SCOTTISH MINISTERS

Respondents

Petitioner and reclaimer: O'Neill KC; Balfour & Manson
Respondents: Crawford KC, Irvine; SGLD

1 November 2023

[1] Section 1 of the Gender Representation on Public Boards (Scotland) Act 2018 introduced a "gender representation objective" with the aim that 50% of non-executive members of such boards should be women. In setting out steps designed to achieve that objective, the Act specified a definition of woman as including:

> "a person who has the protected characteristic of gender reassignment (within the meaning of section 7 of the Equality Act 2010) if, and only if, the person is living as a woman and is proposing to undergo, is undergoing or has undergone a process (or part of a process) for the purpose of becoming female".

[2] Following a challenge by the present reclaimer (*For Women Scotland Ltd* v *Lord Advocate* 2022 SC 150, "*FWS 1*") the court concluded that this proposed definition impinged upon a reserved matter. The court reduced both the definition of "woman", and the associated statutory guidance.

[3] The respondents thereafter issued revised guidance, which includes reference to the holder of a full gender recognition certificate (GRC), under the Gender Recognition Act 2004 (GRA), as follows:

> "The meaning of 'woman' for the purposes of the Act
>
> 2.12 There is no definition of 'woman' set out in the Act with effect from 19 April 2022 following decisions of the Court of 18 February and 22 March 2022.
>
> Therefore 'woman' in the Act has the meaning under section 11 and section 212(1) of the Equality Act 2010. In addition, in terms of section 9(1) of the Gender Recognition Act 2004, where a full gender recognition certificate has been issued to a person that their acquired gender is female, the person's sex is that of a woman, and where a full gender recognition certificate has been issued to a person that their acquired gender is male, the person's sex becomes that of a man."

[4] The issue in this reclaiming motion (appeal) is whether the Lord Ordinary erred in holding that the revised guidance is lawful. She concluded (para [53]):

> "in this context, which is the meaning of sex for the purposes of the 2010 Act, 'sex' is not limited to biological or birth sex, but includes those in possession of a GRC obtained in accordance with the 2004 Act stating their acquired gender, and thus their sex."

[5] The reclaimer asserts, in summary

(i) that the revised guidance falls into the same error as that initially issued, by conflating different protected characteristics;

(ii) the grant of a GRC in an acquired gender did not, for the purposes of the Equality Act 2010 (EA), allow the holder to assert the protection available against sex discrimination in that acquired gender for the purpose of section 11 of the EA;

(iii) such individuals remained biologically the gender assigned at birth, so that a person with a female-male GRC would continue to be able to avail themselves of the protection against discrimination against women, and vice versa;

(iv) the GRA, having been enacted for a limited purpose since achieved (to allow marriage) was now symbolic, and in any event had been impliedly repealed by the EA;

(v) the revised guidance failed to follow the decision in *FWS1* and was not consistent with *Fair Play for Women Ltd* v *Registrar General for Scotland* 2022 SC 199;

(vi) the Lord Ordinary's approach would effectively make the EA unworkable.

[6] On 29 August 2023 the court granted leave to intervene, by way of written submissions only, to "Sex Matters Limited", an organisation with the stated aim of clarifying the meaning of "sex" in law, policy and language for the protection of human rights, with a particular focus on the protections under the EA.

Background

Gender Recognition Act 2004

[7] The GRA was enacted in response to the judgments of the European Court of Human Rights in *Goodwin* v *United Kingdom* (2002) 35 EHRR 18 and the House of Lords in *Bellinger* v *Bellinger* [2003] 2 WLR 1174. Its purpose is, as stated in its title, "to make provision for and in connection with change of gender".

[8] An applicant will be issued a full GRC where they meet the conditions contained in section 2 of the Act. These are that the applicant (a) has or has had gender dysphoria, (b) has

lived in the "acquired gender" for two years immediately prior to applying, (c) intends to live in that gender until death, and (d) has provided medical evidence of gender dysphoria and a statutory declaration in relation to their marriage status.

The consequence of obtaining a GRC, is set out in section 9:

> "(1) Where a full gender recognition certificate is issued to a person, the person's gender becomes for all purposes the acquired gender (so that, if the acquired gender is the male gender, the person's sex becomes that of a man and, if it is female gender, the person's sex becomes that of a woman).
>
> (2) Subsection (1) does not affect things done, or events occurring, before the certificate is issued, but it does operate for the interpretation of enactments passed and instruments and other documents made, before the certificate is issued (as well as those passed or made afterwards).
>
> (3) Subsection (1) is subject to provision made by this Act or any other enactment or any subordinate legislation."

Certain exceptions to the provisions of section 9(1) are contained within the GRA itself. These include parenthood (section 12), sport (section 19) and gender-specific offences (section 20).

Equality Act 2010

[9] The purpose of the EA as set out in its long title includes, *inter alia*, "to reform and harmonise equality law and restate the greater part of the enactments relating to discrimination and harassment related to certain personal characteristics". Section 4 details the characteristics protected under the statute, which include "gender reassignment", "sex", and "pregnancy and maternity".

[10] The first two of these are defined in sections 7 and 11 respectively.

Section 7:

> "(1) 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.

(2) A reference to a transsexual person is a reference to a person who has the protected characteristic of gender reassignment.

(3) In relation to the protected characteristic of gender reassignment – (a) a reference to a person who has a particular protected characteristic is a reference to a transsexual person; (b) a reference to persons who share a protected characteristic is a reference to transsexual persons."

Section 11:

"In relation to the protected characteristic of sex –

(a) a reference to a person who has a particular protected characteristic is a reference to a man or to a woman;

(b) a reference to persons who share a protected characteristic is a reference to persons of the same sex."

[11] General interpretation provisions are contained in section 212, which provides:

"(1) In this Act-
….

'man' means a male of any age;

…

'woman' means a female of any age".

[12] Unlike the remainder of the list in Section 4, the protected characteristic of pregnancy and maternity is not subject to further provisions identifying how the protected characteristic manifests itself. This is hardly surprising since it hinges on a simple question of fact. Section 17 provides, for non-work cases, that:

"(2) A person (A) discriminates against a woman if A treats her unfavourably because of a pregnancy of hers.

> (3) A person (A) discriminates against a woman if, in the period of 26 weeks beginning with the day on which she gives birth, A treats her unfavourably because she has given birth.
>
> (4) The reference in subsection (3) to treating a woman unfavourably because she has given birth includes, in particular, a reference to treating her unfavourably because she is breast-feeding."

Section 18 is in similar terms for work cases.

[13] A number of services and public functions are excepted from the section 29 general requirement not to discriminate in the provision of services; these are listed in Schedule 3. Part 7 of the schedule includes the ability to make separate services for the sexes on certain conditions. It contains certain exceptions, such as those identified in paragraphs 26-28. We address these below. Further exceptions exist, for example in the context of sport, in particular a "gender-affected activity".

FWS 1

[14] The basis of the court's decision in *FWS 1* can be found in paragraphs 39 and 40 of its judgment:

> "[39] By incorporating those transsexuals living as women into the definition of woman the 2018 Act conflates and confuses two separate and distinct protected characteristics, and in one case qualifies the nature of the characteristic which is to be given protection….
>
> [40] In any event, the definition of woman adopted in the legislation includes those with the protected sex characteristic of women, but only some of those with the protected characteristic of gender reassignment. It qualifies the latter characteristic by protecting only those with that characteristic who are also living as women."

[15] The reclaimer maintains that the issue in the present case was determined in *FWS1* on the basis of the following paragraph:

> "[36] The protected characteristics listed in the 2010 Act include 'sex' and 'gender reassignment'. The Scottish Parliament would, as we have noted, have been entitled

> to make provision in respect of either or both these characteristics. So far as the characteristic of sex is concerned, it would be open to the Scottish Parliament to make provision only for the inclusion of women, since a reference to a person who has a protected characteristic of sex is a reference either to a man or to a woman. For this purpose a man is a male of any age; and a woman is a female of any age. Section 11(b) indicates that when one speaks of individuals sharing the protected characteristic of sex, one is taken to be referring to one or other sex, either male or female. Thus an exception which allows the Scottish Parliament to take steps relating to the inclusion of women, as having a protected characteristic of sex, is limited to allowing provision to be made in respect of a 'female of any age'. Provisions in favour of women, in this context, by definition exclude those who are biologically male."

Fair Play for Women Ltd* v *Registrar General for Scotland

[16] The reclaiming motion in *Fair Play for Women* followed that in *FWS 1*. It concerned a challenge to guidance on the Scottish census, in particular in relation to the question "what is your sex?" The guidance allowed respondents to answer according to the sex in which they identified. The Lord Ordinary dismissed an argument that sex had to be determined according to the sex recorded on a birth certificate or, where applicable, a GRC (2022 SC 199). The Second Division agreed that the meaning of "sex" was context-specific. There were cases in which a rigid definition of "sex" based on biological sex had to be adopted. Examples included marriage, (that is, prior to the equalisation of marriage, see *Bellinger*; *Chief Constable of West Yorkshire Police* v *A and anor (No.2)* [2005] 1 AC 51), and gender-specific offences (*R* v *Tan* [1983] QB 1053). On the other hand:

> "[22] … There are many circumstances in which the words 'sex' and 'gender' have been used synonymously and interchangeably. This was a matter explored by Lord Reed in *R (Elan-Cane)* v *Secretary of State for the Home Department*. The case concerned a non-gendered biologically female person who had applied for, and been refused, a passport which included a non-gendered marker ('X') for the holder's gender. In explaining (para 52) that there was no legislation in the United Kingdom which recognised non-gendered individuals, and that gender required to be stated under reference to 'male' or 'female' the court several times observed that public bodies and legislation frequently used the terms 'gender' and 'sex' interchangeably. This, of course, also reflects popular and common usage of the terms, synonymously, as was recognised by senior counsel for the reclaimers. In fact even the *Shorter Oxford*

> *English Dictionary* definitions to which we were referred reflect that popular usage: that relating to sex, quoted above (see para 10), goes on: '4 The difference between male and female, esp. in humans. Now spec. the sum of the physiological and behavioural characteristics distinguishing members of either sex;', and for gender: 'b Sex as expressed by social or cultural distinctions...'. So the definition of sex contains reference to behavioural characteristics, not merely biological sex; whilst that of gender contains a reference to sex."

Decision of the Lord Ordinary in the present case

[17] (i) The Lord Ordinary rejected the contention that the issue had been authoritatively decided in *FWS 1*, in which the court addressed a different question. Para [36] of *FWS 1* was not part of the *ratio* of the court's decision and had to be read in context.

(ii) The purpose of the GRA was to create a detailed mechanism to enable a person to effect a change to their legal sex "for all purposes" (section 9(1)). The submission that the GRA's purpose was solely to combat the "marriage mischief", and thus had now become symbolic, was not supported by the plain language of the Act or the supporting material published contemporaneously. There was no basis for interpreting it so restrictively.

(iii) There was no conflict between the GRA and the EA. They could be read together without absurdity or unworkability. The EA was drafted in full awareness of the GRA.

(iv) Nothing in the EA suggested a parliamentary intention to repeal the GRA. It was axiomatic from the titles of the 2004 and 2010 Acts alone that they had different purposes.

[18] The Lord Ordinary expressed her conclusion on the central issue as follows:

> "[53] For all of the foregoing reasons, I conclude that in this context, which is the meaning of sex for the purposes of the 2010 Act, 'sex' is not limited to biological or birth sex, but includes those in possession of a GRC obtained in accordance with the 2004 Act stating their acquired gender, and thus their sex. Such a conclusion does not offend against, or give rise to any conflict with, legislation where it is clear that 'sex' means biological sex. Mr O'Neill referred to the example of the Forensic Medical Services (Victims of Sexual Offences) (Scotland) Act 2021 where references to the sex of the forensic medical examiner can only mean, read fairly, that a victim

> should have access to an examiner of the same biological sex as themselves. I agree. There are no doubt many other such examples. That does not give rise to the inevitable conclusion, as was urged upon me, that 'sex' in the present context must mean the same thing as it does in others. A rigid approach in this context is neither mandated by the language of either statute nor consistent with their respective aims and purposes."

Submissions for the Reclaimer

[19] The court in *FWS 1*, in a clear and unequivocal statement at paragraph 36, had authoritatively decided the issue at the heart of this reclaiming motion. In issuing the revised guidance, the respondents applied section 9(1) of the GRA as a general interpretative principle, without considering the very broad exception contained in section 9(3). The latter did not require express disapplication of section 9(1) by a later enactment. Section 9 of the GRA conflated sex discrimination and gender reassignment discrimination, whereas the EA distinguished between them as protected characteristics. It followed that the principle *lex specialis derogat legi generali* (a law governing a specific situation prevails over that which is more general) applied, making it clear that section 9(1) set out a subordinate principle.

[20] Under reference to *Fair Play for Women*, the reclaimer submitted that it was necessary to consider the context to the relevant legislation. The context to the GRA was the decisions in *Goodwin* and *Bellinger*. Its focus was on the relationship between the individual and the State, for example in relation to same-sex marriages and pensions. These issues no longer arose, with the consequence that the GRA had now become largely symbolic. By contrast, the EA was of broader application and also regulated relationships between private individuals. The integrity of its provisions could only be preserved if "sex" referred to biological sex. What was meant by "woman" in section 212 had to be interpreted against the historical, biological and sociological background which underpinned the protection of women against discrimination.

[21] "Woman" was not an ambiguous term as defined in the EA, section 212. Interpreting "sex" in the way contended for by the respondents would render many provisions in the EA absurd and unworkable. The reclaimers referred to a letter by Baroness Falkner, Chairwoman of the Equalities and Human Rights Commission to the Minister for Women and Equalities, dated 3 April 2023, which described anomalies which resulted from the respondents' interpretation. For example, it was suggested that a lesbian or gay support group would be precluded from excluding a trans person with a GRC who remains attracted to members of the sex opposite from their birth sex. Single-sex spaces for women would have to admit a biological male while excluding those with a GRC in the male gender. Particular reference was made to the appellant in *R(McConnell)* v *Registrar General for England and Wales* [2020] EWCA Civ 559 who, for example, would be unable to access a women's only gynaecological ward while pregnant. Biological women with a GRC as male would be unable to benefit from the positive action measures brought in under the 2018 Act. Only by interpreting "sex" in the way which the reclaimer contends for could these provisions be made workable. The Lord Ordinary appeared to treat the meaning of "sex" as variable: it was not clear how those applying the provisions of the EA day to day would distinguish the situations in which each approach was to be taken. The result would be an inconsistent and unpredictable application of the provisions (*Imperial Tobacco Ltd* v *Lord Advocate*, 2013 SC (UKSC) 153, Lord Hope at para 14).

[22] There was a particular focus on the EA's pregnancy and maternity-related provisions (sections 17 and 18). If the Lord Ordinary and the respondents' interpretation was correct, a pregnant trans man, such as the appellant in *McConnell*, could never be covered. Those provisions were predicated on the person in question being a woman. The term "woman" in those provisions had to be interpreted according to section 212. They only made sense if

"woman" referred to a biological woman, thus "sex" refers to biological sex. There was a consequent effect on other legislation regulating pregnancy if the respondents' interpretation was correct, for example the Abortion Act 1967; the Surrogacy Arrangements Act 1985, and others.

[23] The reclaimers did not press the issue of implied repeal with any force, conceding that this was not the central issue. It was not necessary to attribute a particular intention to Parliament for the doctrine of implied repeal to apply. There was a practical overlap between the GRA and EA. Section 9 of the 2004 Act conflated what the 2010 Act distinguished, namely "sex" discrimination and "gender reassignment" discrimination. That being so, section 9 was impliedly repealed by the later 2010 Act. That this was Parliament's intention was plain from section 9(3).

Submissions for the respondents

[24] Paragraph 36 of *FWS 1* did not form part of the *ratio* of the court's decision. The meaning of "sex" under the EA was not authoritatively determined. Section 9(1) of the GRA provided the answer. It laid down a general rule of statutory interpretation and, subject to section 9(3), changed the person's legal sex for all purposes. No contrary intention could be found in the terms of the EA, which it had to be assumed was enacted in full knowledge of the GRA and its provisions. This had to be considered against the background that the EA had repealed certain provisions of the GRA, yet did not expressly repeal or disapply section 9(1), which further contradicted the reclaimer's case based on implied repeal. The Explanatory Notes to the GRA supported the view that a person with a GRC was entitled to claim sex discrimination in their acquired gender. The Lord Ordinary need not have

referred to these, but they demonstrated the intended effect of the GRA on sex-based protections.

[25] Many of the difficulties raised in the Employment and Human Rights Commission's letter of 3 April 2023 were difficult to understand. The respondents did not accept that their interpretation presented any issues for the protected characteristic of sexual orientation. There was nothing extraordinary or irrational about a trans woman with a GRC being able to benefit from the protections under the equality of terms provisions (sections 64-71 and 78), positive action measures (section 159), shortlists for parliamentary election (section 104) or charitable benefits (section 193). This was the proper consequence of section 9(1) of the GRA. The only provisions in relation to which it was conceded that there may be a lack of clarity were those concerning pregnancy and maternity. It was submitted that, in enacting the GRA, Parliament did not anticipate the type of situation that arose in *McConnell*. Sections 17 and 18 were predicated on the fact of being pregnant or giving birth, not on the fact that the person in question is a woman.

[26] The GRA and EA addressed different purposes. There was no question of implied repeal. It was also incorrect to suggest that the GRA was directed only at the relationship between the individual and the State. It was not simply a bureaucratic or administrative provision.

Submissions for the interveners

[27] The focus of the interveners' written submission was on the alleged incompatibility of the Lord Ordinary's interpretation with the ECHR. Following *FWS 1*, a restrictive definition of sex was required; fundamental rights were at stake. The default position was that "sex" was defined according to biological characteristics (Monaghan on *Equality Law*

(2nd ed. 2013), 5.134 and 5.280). That being so it was unnecessary for the EA to make explicit reference to biology. Discrete provisions were enacted to protect against gender reassignment discrimination. The effect of the Lord Ordinary's decision was that one protected characteristic undermined another (*Billy Graham Evangelistic Association* v *Scottish Event Campus* 2022 SLT (Sh Ct) 219, para 118).

[28] Articles 3 and 8-11 were engaged in the context *inter alia* of strip searches, stop and search, and physical forensic examination. A biological woman confronted in such situations by a biological male with a GRC could not claim sex discrimination as the individual concerned would, as a matter of law, be female. Single and separate sex services would be undermined and a biological female's dignity and privacy would not be protected. Articles 9, 10 and 11 were engaged in the context of charities, schools and colleges, where there was no exception which entitled biological males with a female GRC to be excluded.

Analysis and decision

[29] The GRA was drawn in deliberately wide terms as was noted in *McConnell*, para 46:

> "46 It is important to appreciate, however, that the sort of case which the Strasbourg court had in mind was 'the case of fully achieved and postoperative transsexuals': see para 91 of its judgment. In enacting the GRA Parliament took a different course. It did not impose a requirement for surgery or for there to be a transition physiologically to the new gender. Parliament went further than the judgment of the Strasbourg court strictly required ... In any event, that is not the position which Parliament took in enacting the GRA. It is that fact which has led to the physical possibility that a trans man such as Mr McConnell can conceive, become pregnant and give birth to a child. He is by no means unique. The material before the court shows that there are other trans men who have been able to bear children in both this country and abroad."

[30] The issues which surround the whole subject of gender reassignment, gender identity, and gender recognition are difficult and sensitive. It is not always easy for the law to keep pace where societal attitudes and understandings are in a state of flux. The GRA

was introduced almost 20 years ago; and the EA is over 10 years old, with many of the provisions thereof having their foundation many years before. In the last 20 years the debate and understanding about the issues at the heart of this case have moved on significantly. Matters have also progressed in terms of the ECHR since the observations made in *Goodwin.* The ECtHR now considers that requiring gender recognition surgery prior to legal recognition of a change of gender violates Article 8 by creating a tension between two separate rights protected under that article. Such a requirement renders the right to respect for private life conditional on the person concerned relinquishing the full exercise of their right to physical integrity, particularly where they have rational or medical reasons for not wishing to submit to surgery (*AP, Garçon and Nicot* v *France* (2017), paras 94-95 and 126; *X and Y* v *Romania* (2145/16 and 20607/16) (2021)).

[31] This is an area on which individuals and organisations hold firm, even entrenched views, where there is intense public debate. At its heart are matters of social policy which are best addressed by parliaments. The issue which faces this court is not one of policy, rather it is one of statutory construction. It is important that in doing so the court should confine itself to determining the issue before it, and not seek to address wider issues of policy or social engineering.

FWS 1

[32] The issue in the present case did not arise in and was not determined by *FWS 1*. Furthermore we note from the terms of the petition in *FWS 1* that it did not appear that the parties were in dispute about the position of GRC women, and that such individuals would have been able to avail themselves of the benefits of the 2018 Act, even if the reference to those with the protected characteristic of gender reassignment had been removed from the

definition and the guidance. Had the guidance been as currently framed it seems that it would not have been objectionable to the reclaimer. (It can be noted that the petitioner in *Fair Play for Women* adopted the same position as to the effect of a GRC.) However, the reclaimer has now adopted a different position, and asserts that a person who has a GRC specifying their sex as the female gender does not come within the definition of "woman" in the EA and therefore cannot benefit from the provisions of the 2018 Act.

GRA

[33] We do not agree that the Lord Ordinary erred in starting her consideration of the subject by looking at the terms of the GRA. It is axiomatic that Parliament does not legislate in a vacuum and must be taken to be aware of legislation already on the statute book. When the EA was passed in 2010 it must be assumed that Parliament was fully cognisant of the purpose, terms and effect of the GRA. Lest there be any doubt about that, it is clear that Parliament had the GRA in mind since it repealed certain of its provisions and elsewhere made specific reference to that enactment. Whether section 9(1) contains a principle of general application, or whether the effect of section 9(3) is to limit its application as submitted for the reclaimer, is a question fundamental to the resolution of this reclaiming motion. The associated question which arises is whether, if section 9(1) is of general application, the provisions of the EA, either specifically or impliedly, impinge on the applicability of section 9(1) in such a way as to render unlawful the guidance issued in connection with the 2018 Act.

[34] Like the Lord Ordinary, therefore, we start with consideration of the GRA. The impetus for the GRA was the case of *Goodwin*. In *Bellinger* Lord Nicholls pointed out that *Goodwin*:

> "21 …. was not a 'marriage' case. Her complaint was that in several respects she, as a post-operative transsexual person, was not treated fairly by the laws or practices of this country. She was unable to pursue a claim for sexual harassment in an employment tribunal because she was considered in law to be a man. She was not eligible for a state pension at 60, the age of entitlement for women. She remained obliged to pay the higher car insurance premiums applicable to men. In many instances she had to choose between revealing her birth certificate and forgoing advantages conditional upon her producing her birth certificate. Her inability to marry as a woman seems not to have been the subject of specific complaint by her. But in its judgment the court expressed its views on this and other aspects of the lack of legal recognition of her gender reassignment."

[35] The fundamental issue in *Goodwin* was whether there had been a breach of a positive obligation to ensure the right of the applicant, a post-operative male to female transsexual, to respect for her private life, in particular through the lack of legal recognition given to her gender re-assignment. The court did find that there had been a breach of article 12, but that was quite separate from its finding of a breach of article 8. In connection with the latter it noted the complaints of Ms Goodwin (which were those summarised by Lord Nicholls in *Bellinger)* and stated (para 91) that:

> "The Court does not underestimate the difficulties posed or the important repercussions which any major change in the system will inevitably have, not only in the field of birth registration, but also in the areas of access to records, family law, affiliation, inheritance, criminal justice, employment, social security and insurance … No concrete or substantial hardship or detriment to the public interest has indeed been demonstrated as likely to flow from any change to the status of transsexuals and, as regards other possible consequences, the Court considers that society may reasonably be expected to tolerate a certain inconvenience to enable individuals to live in dignity and worth in accordance with the sexual identity chosen by them at great personal cost."

[36] The 2004 GRA was thus a measure intended not merely, as the reclaimer submitted, to put beyond doubt the intention to disapply, for a very limited class of same sex couples one of whom had gender reassignment, the requirement that for a valid marriage one party had to be male and the other female. Nor is the statute's continuing value merely symbolic

(whatever the reclaimer meant by that term). The GRA was intended to be a far-reaching enactment which, as the Lord Ordinary correctly noted (para 45),

> "was to put into place a detailed mechanism that ultimately effected a change to a person's status in the eyes of the law, specifically, their sex."

[37] The legislation achieved that change in strong, clear and unequivocal terms in section 9(1) by providing that where a certificate has been issued the person's gender becomes "for all purposes" the acquired gender so that if the acquired gender is the male gender, "the person's sex becomes that of a man" and if it is the female gender, "the person's sex becomes that of a woman." It could hardly be more clearly stated that in this connection there is no distinction between sex and gender, and that reference to sex within the GRA is not a reference to biological determinants. This is not surprising given that, as the court noted in *Fair Play for Women* there is generally no default meaning of sex or gender, and the terms are frequently used interchangeably (see also *R(Elan-Cane)* v *Secretary of State for the Home Department* [2022] 2 WLR 133, Lord Reed para 3).

[38] Rather than the GRA being redundant, as the reclaimer asserts, it is the cases of *Corbett* and *Bellinger* which are now of limited application. Save for situations where the same historical circumstances apply (see, for example *P* v *P* [2019] EWHC 3105 (Fam), the observations in *Bellinger* and *Corbett v Corbett* [1971] P 83 require to be considered subject to the provisions of the GRA. We address this issue more generally when dealing with the terms of the EA.

[39] The arguments for the reclaimer would undermine the whole purpose and effect of the 2004 Act. As Lady Hale noted in *R(C)* v *Secretary of State for Work and Pensions*, [2017] 1 WLR 4127, it is

> "beyond doubt that the way in which the law and officialdom treat people who have undergone gender reassignment is no trivial matter. It has a serious impact upon their need, and their right, to live, not as a member of a 'third sex', but as the person they have become, as fully a man or fully a woman as the case may be."

[40] Section 9(1) is stated as a broad and generally applicable principle. This is confirmed by section 9(2) which specifies that section 9(1) operates "for the interpretation of enactments passed and instruments … made, before the certificate is issued (as well as those passed or made afterwards)". It has been interpreted as such elsewhere, for example in *R(Green)* v *Secretary of State for Justice* [2013] EWHC 3491 (Admin) para 8; *McConnell*, paras 7 and 54; and *J* v *C* 2007 Fam 1, para 48.

[41] The general principle is made the subject of specific exceptions within the GRA itself, for example regarding parenthood, succession, sport, and gender-specific offences. Several of these would not have been required had the intention been that the Act was to bear the narrow interpretation advanced for the reclaimer. In our view it is clear that the intention was that on receipt of a GRC a person's sex was to be that of their acquired gender, man or woman.

[42] Section 9(3) requires to be understood as allowing for the possibility that further exceptions might arise in subsequent enactments. Section 9(1), read with sections 9(2) and (3), essentially means that the person with the GRC acquires the opposite gender for all purposes unless there is a specific exception in the GRA; or unless the terms and context of a subsequent enactment require a different interpretation to follow. Should that occur, however, it is to be expected that the inapplicability of section 9(1) would be clearly stated, or at the very least, (and this is essentially what the reclaimers say in respect of section 212 of the EA) that the terms of the subsequent legislation are such that they are incompatible with,

and would be rendered meaningless or unworkable by, the application of the general principle stated in section 9(1).

[43] To that issue we now turn.

EA

[44] The terms male, female, man, woman and even sex and gender, may be capable of a scientific, biological definition, under which the word in question is given an attribution which hinges on chromosomal or gonadal characteristics. Equally, these words may have a meaning according to common and popular usage which does not hinge on strict biological criteria. In *Corbett* and *Bellinger* in the context of validity of marriage it was held that the words required the application of a chromosomal, gonadal and genital definition. The decision of the UK Parliament to enact the GRA in the wide terms which it did necessarily, however, drives us away from a strict biological definition unless the context clearly and necessarily dictates otherwise. That this might follow from a Parliamentary recognition of gender reassignment was anticipated in *Bellinger* by Lord Nicholls:

> "31. Recognition of gender reassignment will involve some blurring of the normally accepted biological distinction between male and female. …. It will mean that in law a person who, unlike an inter-sexual person, had all the biological characteristics of one sex at birth may subsequently be treated as a member of the opposite sex."

[45] In Bellinger it was also noted that :

> "Recognition of Mrs Bellinger as female for the purposes of section 11(c) of the Matrimonial Causes Act 1973 would necessitate giving the expressions 'male' and 'female' in that Act a novel, extended meaning: that a person may be born with one sex but later become, or become regarded as, a person of the opposite sex."(para 36)

This is what the GRA achieved. Lord Hope observed that

> "the ordinary meaning of the word 'male' is incapable, **without more**, of accommodating the transsexual person within its scope."(para 62) (emphasis added.)

That "more" has now been provided by the GRA.

[46] *Bellinger* was concerned with the precise terms of section 11 of the Matrimonial Causes Act 1973, and the meaning of "male" and "female" in that specific context. For example, Lord Rodger's comment that Parliament appeared to consider "gender as fixed and immutable" (another instance of gender being used interchangeably with sex), was specifically qualified as being "in relation to the validity of marriage". Moreover, consistent with the decision in *Fair Play for Women,* it was recognised that a definition which might be necessary in one context, might be equally unsuitable in another:

> "… The criteria appropriate for recognising self-perceived gender in one context, such as marriage, may not be appropriate in another, such as competitive sport." (Lord Nicholls, para 32).

We do not therefore consider that *Bellinger* provides the answer to the issue arising in this case.

[47] The context of the EA includes the enactment of the GRA, and the known consequences which flow from section 9 thereof. The terms of sections 7, 11 and 212 of the EA do not, on their face, or in the context in which they occur, mandate the adoption of a biological interpretation. They do not on their face exclude those with a GRC identifying them in the female gender from the definition of woman or female, or those with a GRC in the opposite direction from qualifying as a man or male.

[48] Section 11, which refers to man or woman, is capable of being read naturally and consistently with the terms of section 9 GRA, whereby the acquired sex becomes that of "woman" or "man" accordingly. The definition of these terms contained within section 212(1), when applied in particular to section 11 (which is essentially the issue at the heart of this case) is equally capable of being interpreted in a way which accommodates those in possession of a GRC.

[49] When a child is registered at birth the certificate requires to record the sex of the child. In Scotland, the Registration of Births, Still-births, Deaths and Marriages (Prescription of Forms) (Scotland) Regulations 1997 (1997/2348) specify the prescribed particulars for recording the birth of a child. Apart from details of names, place, date and time of birth, there is a requirement to specify the "sex" of the baby. The answer is recorded under the heading "sex" (see Sch 1 to the Regulations). Similarly, the English form (Schedule 1 of the Births, Deaths and Marriages Regulations 1968 (1968/2049) requests particulars of "sex". It is this which is the subject of alteration when a GRC is issued. Regulation 2 of the Gender Recognition (Prescription of Particulars to be Registered) (Scotland) Regulations 2005 (2005/151) includes the details of birth, including "sex" (Reg 2(3)(e)). However these regulations also require the registration of particulars as at the date of registration (Reg 3(1)(c)). Reg 3(4) specifies those particulars as including "sex", which, according to Reg 3(5) "means the acquired gender of the person". The Register will therefore contain the person's birth sex and the sex in accordance with the acquired gender. For England and Wales, see Reg 2 and Sch 1 of the Gender Recognition Register Regs 2005 (2005/912). We note that in *McConnell,* para 7, it is recorded that the sex on the GRC was recorded as "male"; and see *J* v *C* (para 9(xiii)): "On 1 June 2005 Mr J obtained a gender recognition certificate under the 2004 Act. This shows (1) his gender to be male, and (2) that he is, from 1 June 2005 "of the gender shown". He has also obtained a fresh birth certificate, giving his sex at birth as male.

[50] The provisions of the GRA and the EA may in our view be interpreted consistently for the purposes of both statutes without defeating the terms of either. This is on the basis that section 9 of the GRA requires the sex of the individual for the purposes of sex discrimination to be understood to be that of the acquired gender. In relation to sex discrimination, an individual will still be entitled to protection against discrimination on the

grounds of sex, although when they have a GRC it will be in respect of their acquired sex, not the sex attributed at birth. A person with a female birth certificate but a male GRC will be treated as a man for this purpose; and a person with a male birth sex but a female GRC will be entitled to the protection afforded to women under section 11. We do not accept the submissions of the reclaimer that this somehow turns the provisions on their head, or diminishes the protection available to individuals against discrimination on the grounds of sex. The interpretation which we have identified will meet the objective of non-discrimination between the sexes and the intent behind the GRA that individuals with a GRC should be able to live as fully as they can within their acquired sex or gender. It would be anomalous in our view to suggest that a person with a GRC in the male sex, having regard to the conditions for granting the same, should be able to assert protection against sex discrimination as a woman, and vice versa. Such an approach would seriously undermine the intention behind the GRA. It cannot be viewed as mandated by or an intended consequence of the EA.

[51] As all parties agree, and as is patently obvious, the protected characteristic of sex is not the same as that of gender reassignment. The reclaimer asserts that gender is addressed in the EA only in section 7, and that this is necessarily something different from sex in section 11, which can only mean biological sex. We cannot agree.

[52] It is not the case, as asserted by the reclaimer, that sex is addressed in section 11 and gender in section 7. The terms sex and gender are terms often used interchangeably within the EA. For the purposes of section 7 there is no distinction between the meaning of sex and gender; and section 7 is not concerned with gender *per se* but with reassignment of gender. Further, section 7 provides that the protected characteristic of gender reassignment arises when a person meets the requirements of section 7(1) for the purpose of "**reassigning** the

person's **sex**" by "changing physiological or other attributes of **sex**" (emphasis added). Again, this shows that the terms gender and sex are not differentiated for these purposes. Subsection (2) refers to a trans**sexual** person, not a trans**gender** person. What is protected for the purpose of section 7 is the reassignment. A person with a GRC will necessarily have the protected characteristic of gender reassignment; and they will have a separate protected characteristic of sex, which will be that of their acquired sex. This does not involve in any way the conflation of two separate protected characteristics.

[53] We have so far concentrated on the provisions of section 7, section 11 and section 212 of the EA and section 9 of the GRA, since this is the specific context in which the issue before us arises. The 2018 Act is an Act which relates to permissible positive measures in favour of women, in circumstances which might otherwise constitute sex discrimination. The issue is whether the guidance issued is inconsistent with the EA sections 11 and 212; and whether it conflates the protected characteristics referred to in section 11 with those in section 7. As noted at the outset, the court is required to consider the specific question before it, and not other matters which are academic for resolution of that issue. It is neither practical nor necessary for the court to attempt to examine every section and every schedule of an Act of Parliament, which stretches to some 336 pages, to determine whether in some different and hypothetical set of circumstances it may be necessary to adopt a contextual interpretation of terms such as "sex" or "gender" based on biology. However, we are mindful of the importance of consistency and practicability, so we will address some of the examples suggested by the reclaimer in submitting that an interpretation which involved treating a person with a GRC as a person of their acquired sex would render the EA unworkable.

Armed Forces

[54] Schedule 9 provides:

> "4(1) A person does not contravene section 39(1)(a) or (c) or (2)(b) by applying in relation to service in the armed forces a relevant requirement if the person shows that the application is a proportionate means of ensuring the combat effectiveness of the armed forces.
>
> (2) A relevant requirement is—
>
> (a) a requirement to be a man;
>
> (b) a requirement not to be a transsexual person.
>
> (3) This Part of this Act, so far as relating to age or disability, does not apply to service in the armed forces; and section 55, so far as relating to disability, does not apply to work experience in the armed forces."

Thus the EA makes provision for a specific exception to employment-related discrimination within the context of the armed forces. It permits the imposition of a requirement, for a specific purpose, that the individual be a man which would not constitute sex discrimination, if justified for the reasons set out in paragraph 4(1). "Man" in this context includes a person with a GRC in the male gender. Paragraph 4(2)(b) however allows a requirement that the individual for these purposes (the "man") is not a transsexual person. Thus it would be possible to exclude, if it can be shown to be proportionate, a person with a GRC in the male gender: if justifiable this would not constitute gender reassignment discrimination. The operation of these provisions is consistent with the definitions which we have identified.

Separate and single sex spaces

[55] Paragraphs 26 and 27 of Schedule 3 provide that in certain circumstances separate or single sex services will not constitute sex discrimination in the provision of services (see section 29). Generally, this is permitted where such provision is a proportionate means of

achieving a legitimate aim and where joint services for both sexes would be less effective. A person with a GRC has a *prima facie* right to access the services of their acquired sex. There is no basis within paragraphs 26 and 27 for excluding them, whereas a person with a GRC in the opposite sex could be excluded on the basis that their sex, being the sex that they acquired, is not that for which the services are provided. The import of paragraphs 26 and 27 is that this would not constitute sex discrimination.

[56] Paragraph 28 prescribes an additional exception in the context of provision of separate and single sex services in respect of gender reassignment discrimination:

> "(1) A person does not contravene section 29, so far as relating to gender reassignment discrimination, only because of anything done in relation to a matter within sub-paragraph (2) if the conduct in question is a proportionate means of achieving a legitimate aim.
>
> (2) The matters are—
>
> (a) the provision of separate services for persons of each sex;
> (b) the provision of separate services differently for persons of each sex;
> (c) the provision of a service only to persons of one sex."

This entitles the service provider, subject to a proportionality test, to exclude a transsexual person. That is so whether or not the person holds a GRC, given that they continue to possess the protected characteristic of gender reassignment. While it is not clear that paragraph 28 was directed specifically towards those holding a GRC, it is in this context that it is most likely to operate. Those without a GRC remain of the sex assigned to them at birth and therefore would have no *prima facie* right to access services provided for members of the opposite sex. Clearly, paragraph 28 might still have some utility in the case of those who do not hold a GRC, for example, where a service provider does not require proof of sex by presentation of a birth certificate or GRC, yet still refuses access to a person, which can only be on the basis of their gender reassignment. However, the importance of this paragraph is

that it provides the only basis upon which a person might be permitted to exclude a person with a GRC from services which are provided for their acquired sex. We note that this is consistent with Guidance issued by the Equalities and Human Rights Commission as to the operation of these provisions.

Sexual orientation

[57] This issue was advanced by means of an example provided by Baroness Falkner on behalf of the EHRC in her letter dated 3 April 2023 to the Minister for Women and Equalities, which stated:

> "Freedom of association for lesbians and gay men: If 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. As things stand, a lesbian support group (for instance) may have to admit a trans woman with a GRC attracted to women without a GRC or to trans women who had obtained a GRC. On the biological definition it could restrict membership to biological women."

We confess that we have not found it easy to follow this particular submission. 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.

Single sex schools/institutions

[58] We acknowledge that there is no exception for gender reassignment discrimination in respect of single-sex schools (Sch 11) or single-sex institutions i.e. further and higher education institutions (Sch 12). However, we do not consider that this supports the proposition that "sex" in section 11 of the EA is to be read as reference to a biological determinant. These schedules can simply be read as circumstances in which Parliament did not consider that an additional carve out in respect of persons with a GRC was necessary. It

does not follow from the absence of an exception for gender reassignment discrimination in certain cases that Parliament must have intended that "sex" be biologically determined.

Communal accommodation

[59] There is a specific exception for communal accommodation in Schedule 23, paragraph 3 which makes exception for *both* sex discrimination and gender reassignment discrimination:

> "(1) A person does not contravene this Act, so far as relating to sex discrimination or gender reassignment discrimination, only because of anything done in relation to—
>
> (a) the admission of persons to communal accommodation;
> (b) the provision of a benefit, facility or service linked to the accommodation."

The same factors as discussed in relation to Schedule 9, paragraph 4 (armed forces) and Schedule 3 (separate and single sex services) of the EA apply with equal force in respect of this provision. No difficulty arises from the fact that "sex" in this context is defined as including birth sex, where still living in that sex, and those in possession of a GRC in an acquired sex.

[60] We have identified only one area where a different interpretation may be mandated, namely pregnancy and maternity.

Pregnancy/Maternity

[61] Section 4 of the EA identifies "pregnancy and maternity" as one of the relevant protected characteristics. Sections 17 and 18 provide that a person discriminates "against a woman" if they treat her unfavourably "because of a pregnancy of hers".

[62] The reclaimer points to the use of the word "woman" and the definition contained in section 212 as supporting its argument. Otherwise those born female but with a male GRC, and who became pregnant, which is not unknown, would be excluded from, among other things, the "maternity and pregnancy" protections afforded under the EA 2010 and elsewhere. That, they say, necessarily means that the definition of "woman" including a reference to "female" is, throughout the EA and for all purposes, a biological one. We recognise that the pregnancy and maternity provisions refer to discrimination against a "woman", but we doubt whether this is as significant a matter as suggested for the reclaimer. The basis of the discrimination is not that the individual is a woman. This is not in reality merely sex discrimination, since not all women do, or can, become pregnant or give birth. It is a specific and discrete form of discrimination separate from that which is addressed to the protected characteristic of sex; and the basis of it is not that the individual is a woman, but that she is pregnant, has given birth or is breast feeding. A definition of "woman" is not the essential element at which the protection is aimed; rather it is the fact of pregnancy, birth or breast feeding. Moreover, the context is one in which the importance of biology is blatantly clear. Unlike other forms of discrimination, no comparator is identified, simply because there can be none. Section 212 does not include the words "except where the context otherwise requires" but these are implicit in any statutory definition. In our view this is a situation where the context manifestly "otherwise requires": pregnancy is a matter of fact which hinges entirely on biology. To interpret these provisions as including only those who are pregnant both as a matter of fact and biology, regardless of the terms of any GRC, does not detract from the proposition that the default interpretation of "woman" or "female" would, elsewhere in the Act, include such a person. We do not consider that such an approach leads to an interpretation which is other than "constant and predictable"

(*Imperial Tobacco,* Lord Hope, para 14). We do not understand the observations in *Imperial Tobacco* as excluding an interpretation under which a word or phrase has a default meaning within a statute other than where the context clearly mandates otherwise. What is required is that whenever the phrase or word occurs, its meaning within the particular context where it appears is clear and predictable. The approach which we have identified achieves that.

[63] It may be, as was submitted for the respondents, that at the time when these provisions were enacted it was not anticipated, for example, that a person in the position of the appellant in *McConnell* might give birth, given the conditions which the GRA imposes for the granting of a GRC. It may be that the issue was simply not adequately considered in the passage of what was on any view a complex and multifaceted piece of legislation which underwent various iterations and amendments during its passage from bill to statute. Extensive amendments were proposed during the passage of the bill, and in the debates, though ultimately many were withdrawn. The Committee sat twenty times and debate was equally protracted in the Upper Chamber.

ECHR

[64] The petition contains no challenge on Convention grounds. However, the interveners raised this as an issue for consideration in their submissions so it is right that we should address the matter, albeit briefly. Much of what we have said in relation to the exceptions highlighted by the reclaimer applies with equal force to the interveners' submissions. The focus on Convention rights does not change this reality. The exception provisions of the EA (in particular Schedule 3 para 28) apply to enable providers of single-sex services to exclude trans individuals, including those with a GRC who would otherwise be entitled to be included. The issue before us concerns the interpretation of specific

provisions within the EA, and the Guidance to the 2018 Act. Other legislation would require to be interpreted according to relevant circumstances and the precise terms, intent and content of the legislation. This is an observation which applies equally to the reclaimer's submissions about other statutes such as the Abortion Act 1967, the Surrogacy Arrangements Act 1985 and so on. Where an issue of interpretation arises under the terms of different legislation and in different circumstances those terms will require to be construed according to those circumstances and in that context. In short, the interveners have not shown that these provisions are incapable of being operated in a Convention-compliant manner.

Conclusion

[65] The Guidance does not conflate two separate protected characteristics. A person with a GRC in their acquired gender possesses the protected characteristic of gender reassignment for the purposes of section 7 EA. Separately, for the purposes of section 11 they also possess the protected characteristic of sex according to the terms of their GRC. For the purposes of section 11, individuals without a GRC, whether they have the protected characteristic of gender reassignment or not, retain the sex in which they were born. No conflation of the protected characteristics is involved. A person with a GRC in the female gender comes within the definition of "woman" for the purposes of section 11 of the EA, and the guidance issued in respect of the 2018 Act is lawful. The reclaiming motion is refused.