Case No. UKSC 2024/42

IN THE SUPREME COURT OF THE UNITED KINGDOM

ON APPEAL FROM

THE SECOND DIVISION OF THE INNER HOUSE OF THE COURT OF SESSION

BETWEEN:

FOR WOMEN SCOTLAND LIMITED

Appellants

– and –

THE SCOTTISH MINISTERS

Respondents

– and –

THE LORD ADVOCATE

First Interested Party

STATEMENT OF CASE FOR THE SCOTTISH MINISTERS & THE LORD ADVOCATE

Scottish Government Legal Directorate
Victoria Quay
Edinburgh EH6 6QQ

Part 1: Introduction

1. This is the written case for the Scottish Ministers as the respondents and the Lord Advocate as the first interested party to this appeal. The appeal arises from the refusal of the appellants' petition for judicial review of revised statutory guidance issued by the Scottish Ministers under the Gender Representation on Public Boards (Scotland) Act 2018 ("**2018 Act**"). The decision of the Lord Ordinary refusing the petition (**[2022] CSOH 90, 2023 SC 61**) **[App 5 p 24]** was upheld on appeal to the Inner House (**[2023] CSIH 37, 2024 SC 117**) **[App 3 p 7]**.

2. The 2018 Act is a positive action measure aimed at women. The appellant argues, in essence, that the revised statutory guidance issued under that Act is unlawful, in so far as it defines the term "woman" – for the purposes of the "gender representation objective" – under reference to the effects of section 9(1) of the Gender Recognition Act 2004 ("**2004 Act**"). Section 9(1) of the 2004 Act provides that: "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 the female gender, the person's sex becomes that of a woman)".

3. The agreed issues as set out at paragraph 21 of the statement of facts and issues **[SFI p 12]** are all concerned with the meaning of the terms "sex", "man" and "woman" as used in the Equality Act 2010 ("**2010 Act**"). For the reasons set out below, the definitions of the 2010 Act as to the "protected characteristic" of "sex" operate in this context as a form of devolved competence constraint. Although the issues are directed for that reason to the 2010 Act, they are all ultimately concerned with the effect in law – on a person's "sex", and so whether a person is a "man" or a "woman" – of a full Gender Recognition Certificate ("**GRC**") being issued under the 2004 Act. The effect and application of section 9(1) of the 2004 Act, which provides for the general legal consequences of the issuing of a full GRC, is central to the resolution of this appeal.

Part 2: Summary

4. The essential submission of the Scottish Ministers and the Lord Advocate is that section 9(1) of the 2004 Act, when read with section 9(2), sets down a generally-applicable presumption of statutory interpretation, which applies to the 2010 Act and the 2018 Act absent provision in either Act to the contrary in terms of section 9(3). In the absence of any such relevant provision in the 2010 Act for the purposes of this case, the term "woman" where used in the 2018 Act includes a person issued with a full GRC in the acquired gender of female – and excludes a person issued with a full GRC in the acquired gender of male.

5. The fact that the 2018 Act is a positive action measure aimed in part at addressing historical under-representation of women does not affect that conclusion. It is a class-based measure concerned with current representation of women, and so current membership of that class. Section 9(1) of the 2004 Act has re-drawn the boundaries of that class membership for these purposes, with the consequence for the 2018 Act that the "gender representation objective" in section 1 can be achieved by appointing a person who has been issued with a full GRC in the acquired gender of female, as well as by appointing a woman without a GRC of any type. The statutory guidance, which is to that effect, is within devolved competence and is otherwise lawful. The appeal should be refused.

Part 3: Statutory background & argument

<u>The 2018 Act</u>

6. The 2018 Act is: "An Act of the Scottish Parliament to make provision about gender representation on boards of Scottish public authorities" (long title). The purpose (or "intention") of the 2018 Act is: "to help address the historic and persistent underrepresentation of women in public life": Gender Representation on Public Boards (Scotland) Act 2018: statutory guidance (19 April 2022), para 1.3 **[App 13 p 211]**. The 2018 Act is a positive action measure. It disapplies the positive action provisions of the 2010 Act (and the prohibitions on discrimination

in the context of work) to prevent overlap: 2018 Act, section 11; Explanatory Notes, para 22. For a discussion of positive action measures in the context of the 2010 Act, see: paragraph 66 below.

7. Section 1(1) of the 2018 Act sets a "gender representation objective" for a public board, being that "it has 50% of non-executive members who are women". Section 4 of the 2018 Act comprises the principal mechanism for giving effect to the "gender representation objective". It provides for preference to be given to a particular candidate who is a woman in certain circumstances, but only where equally qualified to another candidate.

8. The terms "woman" and "women" are not defined in the 2018 Act. The definition of "woman" which was contained in section 2 of the Act as passed included, within the term "woman", a "person who has the protected characteristic of gender reassignment […] 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". That definition was reduced (quashed) by the Inner House on the basis that it "[impinged] on the nature of protected characteristics which is a reserved matter": **For Women Scotland Ltd v Lord Advocate [2022] CSIH 4, 2022 SC 150** at para [40]. The definition of "woman" in the 2018 Act was repealed by section 1 of the Gender Representation on Public Boards (Amendment) (Scotland) Act 2024.

9. The revised statutory guidance which is challenged in this appeal **[App 13 p 209]** was issued by the Scottish Ministers under section 7 of the 2018 Act. The original version of that guidance was consistent with the 2018 Act as passed in relation to the meaning of the term "woman" **[App 11 p 168]**, and the relevant sections of that guidance were reduced by the Inner House along with the statutory definition of that term.

10. The guidance now states, under the heading "The meaning of "woman" for the purposes of the Act" (footnotes omitted) **[App 13 p 215]**:

> "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."

The devolution context

11. "Equal opportunities" as an area of law in Scotland is a matter which is reserved to the UK Parliament and the UK Government by Schedule 5 to the Scotland Act 1998 ("**1998 Act**"), subject to certain exceptions – see: Section L2 of Part II of Schedule 5 to the 1998 Act (the "**L2 Reservation**"). An exception to a 'reserved matter' enlarges legislative and executive competence in the area or 'matter' in question, by removing it from the scope of the reservation. The effect is that devolved legislation can be passed and made, and devolved executive functions can be exercised in respect of the exception, without the legislation and the exercise of functions being unlawful in terms of section 29(2)(b) and section 54(3) of the 1998 Act.

12. The 2018 Act was passed by the Scottish Parliament, and the revised statutory guidance **[App 13 p 209]** was issued by the Scottish Ministers, pursuant to an exception to the L2 Reservation which permits both legislation and the exercise of executive functions in respect of:

> "Equal opportunities so far as relating to the inclusion of persons with protected characteristics in non-executive posts on boards of Scottish public authorities with mixed functions or no reserved functions" (the "**Public Boards Exception**").

13. “Equal opportunities” is defined in the L2 Reservation generally, and for the purposes of the Public Boards Exception, as “the prevention, elimination or regulation of discrimination between persons on grounds of sex or marital status, on racial grounds, or on grounds of disability, age, sexual orientation, language or social origin, or of other personal attributes, including beliefs and opinions, such as religious beliefs or political opinions.” The breadth of the definition encompasses positive action, of the sort envisaged by the Public Boards Exception itself.

14. The term “protected characteristic”, as it is used in the Public Boards Exception, is defined in the L2 Reservation to have “the same meaning as in the Equality Act 2010”. The meaning of the term “persons with protected characteristics” as it is used in the Public Boards Exception is accordingly determined by the 2010 Act – specifically, in the context of persons with the protected characteristic of “sex”, by sections 11 and 212 of the 2010 Act (see: paragraph 47 below). In this way, and more generally in terms of the L2 Reservation, the 2010 Act acts as a form of constraint on legislative and devolved competence, although it is “equal opportunities” as broadly defined in the L2 Reservation, rather than the subject-matter of the 2010 Act, which is reserved. The result is that the 2010 Act is not ‘protected’ in terms of paragraph 2(2)(a) of Schedule 4 to the 1998 Act, and, subject to the breadth of the constraint in the L2 Reservation, may be modified by an Act of the Scottish Parliament.

15. For these reasons, the question of whether the revised statutory guidance is lawful incorporates the devolution-specific question of whether it has been issued within the scope of the Public Boards Exception and so within the competence of the Scottish Ministers in terms of section 54(3) of the 1998 Act. That question requires, as indicated by the agreed issues **[SFI p 12]**, consideration of the meaning of “protected characteristic” and related terms in the 2010 Act. The essential position of the Scottish Ministers and the Lord Advocate on that issue is that the meaning of “protected characteristic” and related terms in the 2010 Act is determined, at least for the purposes of the 2018 Act, by the effects of section 9(1) of the 2004 Act. The 2004 Act is central to the resolution of this appeal, and is considered first.

The 2004 Act

Background

16. In **Goodwin v United Kingdom (28957/95) (2002) 35 EHRR 18** (11 July 2002), the Grand Chamber of the European Court of Human Rights found the lack of legal recognition in the United Kingdom for a male-to-female transsexual, and her inability to marry a man, to violate Articles 8 and 12 ECHR. In reaching that decision in respect of Article 8 ECHR, the court expressly considered the "effects on the applicant's life where sex is of legal relevance and distinctions are made between men and women, as *inter alia*, in the area of pensions and retirement age" (para 76). It acknowledged, but reached its decision notwithstanding, 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" (para 91).

17. In respect of Article 12 ECHR, the court in **Goodwin** considered "whether the allocation of sex in national law to that registered at birth is a limitation impairing the very essence of the right to marry in this case". It found that it was "artificial to assert that post-operative transsexuals have not been deprived of the right to marry as, according to law, they remain able to marry a person of their former opposite sex. The applicant in this case lives as a woman, is in a relationship with a man and would only wish to marry a man. She has no possibility of doing so. In the Court's view, she may therefore claim that the very essence of her right to marry has been infringed" (para 101).

18. The relevant sections of the case report of **I v United Kingdom (2003) 36 EHRR 53** (also 11 July 2002) are in identical terms to those of **Goodwin**, which was heard by the Grand Chamber on the same date. The Court similarly found a violation in that case of Articles 8 and 12 ECHR.

19. In **Bellinger v Bellinger (Lord Chancellor intervening) [2003] UKHL 21, [2003] 2 AC 467** (10 April 2003), the House of Lords dismissed an appeal by a

male-to-female transsexual person who had sought a declaration of validity in respect of her marriage to a man. It held that the terms "male" and "female" as used in section 11(c) of the Matrimonial Causes Act 1973 ("**1973 Act**") referred to a person's status as determined at birth, so that, for the purposes of marriage, a person born with one sex could not later become a person of the opposite sex. A declaration of incompatibility was granted in respect of section 11(c) of the 1973 Act under section 4 of the Human Rights Act 1998, with reference to the petitioner's rights under Articles 8 and 12 ECHR. The court granted the declaration notwithstanding that the Government had already announced its intention to bring forward primary legislation on the subject. Although section 11(c) of the 1973 Act applies only in England & Wales, the Convention-incompatible limitation which it represented at the time of **Bellinger** on the ability to marry was also reflected in the Marriage (Scotland) Act 1977 (see e.g. the speech of Lord Hope of Craighead in **Bellinger** at p 485F para 64).

20. The speech of Lord Nicholls of Birkenhead in **Bellinger** (with whose analysis Lord Scott of Foscote and Lord Rodger of Earlsferry agreed) identified the far-reaching ramifications for a number of different areas of the law were the petitioner's arguments to have been accepted. The ramifications were identified both in so far as arising from marriage – in respect of "housing and residential security of tenure, social security benefits, citizenship and immigration, taxation, pensions, inheritance, life insurance policies, criminal law (bigamy)": p 479F para 42 – and more generally, including in the areas of "education, child care, occupational qualifications, criminal law (gender-specific offences), prison regulations, sport, the needs of decency, and birth certificates": p 480C para 45.

21. On 11 July 2003, the UK Government published a draft Gender Recognition Bill for pre-legislative scrutiny by the Joint Committee on Human Rights (Cm 5875). Clause 5(1) of that Bill provided that: "Where a full gender recognition certificate is issued to a person, the person's gender becomes for all purposes the acquired gender". On 17 November 2003, the Joint Committee on Human Rights published its response to the draft Bill. The response noted that the draft Bill used "the language of gender rather than sex"; that "the Sex Discrimination Act 1975 generally makes it unlawful to discriminate on the ground of sex, not gender";

and recommended: “To make absolutely sure that the legislation would achieve its intended effect, […] that it should expressly state that ‘sex’ in the 1975 Act is to be interpreted as including the acquired gender of a person who has obtained a full gender recognition certificate” (para 93). Although that was not expressly stated in the Bill as ultimately passed by Parliament, the wording of what was by then clause 9 was revised to the current form of section 9, to include reference to “sex” – see: paragraph 33 below. The court may have regard to both the draft Bill and the other pre-legislative materials as part of the context of the eventual legislation in assessing the purposes of it, as an external, secondary aid: for a discussion, see: **R (O) v Secretary of State for the Home Department [2022] UKSC 3, [2023] AC 255** at p 271B-272B paras 29-31 (Lord Hodge); and the judgment of Lady Arden (from p 280C para 58).

22. The 2004 Act obtained Royal Assent on 1 July 2004. It is stated to be: “An Act to make provision for and in connection with change of gender” (long title). The purpose of the 2004 Act is stated in the Explanatory Notes to be to “provide transsexual people with legal recognition in their acquired gender”: para 1. The Notes also refer, in the background section, to the findings in **Goodwin** and **I v United Kingdom** and state in this regard that: “The UK Government has a positive obligation under international law to secure the Convention rights and freedoms and must rectify these ongoing breaches”. The 2004 Act was enacted in order to rectify those breaches and that was the result (see: **Grant v United Kingdom (2007) 44 EHRR 1** at p 9 para 41, and the ending of victim status for that applicant when the 2004 Act came into force). The court may have regard to the Explanatory Notes for similar reasons to the pre-legislative materials – see: **R (O)**, at paragraph 21 above.

23. The 2004 Act has effect throughout the United Kingdom, although different provision is made in certain respects for England & Wales, Scotland, and Northern Ireland (e.g. in relation to the amendments to the law of marriage as it applies in each of those jurisdictions). Legal recognition is effected for all jurisdictions by the issuing of a full GRC, whether on first application or subsequent to the issuing of an interim GRC. See further: paragraphs 30 to 32 below. The following section of the case sets out the requirements for an

application for a GRC and is followed by sections setting out the circumstances in which a full GRC may be issued; and the legal consequences where that is done.

Applications

24. An application for a GRC is made under section 1(1) of the 2004 Act to the Gender Recognition Panel. An application may be made by a person of "either gender" who is aged at least 18 on the basis of "living in the other gender" – a section 1(1)(a) application; or "having changed gender under the law of a country or territory outside the United Kingdom" – a section 1(1)(b) application. Applications for a full GRC may also be made under certain other provisions of the 2004 Act where the outcome of the section 1 application is an interim GRC – see further: paragraph 32.

25. The "other gender" for the purposes of section 1(1)(a) of the 2004 Act, and the gender to which a person has "changed" for the purposes of section 1(1)(b) of that Act, is the "acquired gender". The "acquired gender" is defined in section 1(2) of the 2004 Act to mean, for section (1)(a) and (b) respectively, "the gender in which the person is living" at the time of the application or "the gender to which the person has changed" under the law of a country or territory outside the United Kingdom. In terms of section 25, "acquired gender" is to be construed for the purposes of the 2004 Act more generally in accordance with this definition.

26. The evidential requirements for an application for a GRC are set out in section 3 and, where the alternative grounds in sections 3A, 3C and 3E are relied on by an applicant, sections 3B, 3D, and 3F of the 2004 Act. Although section 27 of the 2004 Act modified section 1(1)(a) and the section 3 requirements, it applied only for applications made within the first two years of the operative provisions of the Act coming into force.

27. The requirements of a section 1(1)(a) application, made in satisfaction of the evidential requirements imposed by section 3, include two medical reports, one by a specialist in the field of gender dysphoria, detailing the applicant's diagnosis

of gender dysphoria and any treatment which has been given or is proposed "for the purpose of modifying sexual characteristics"; and various statutory declarations. The statutory declarations include a declaration by the applicant that they have lived in the acquired gender for two years prior to the application, and that they intend to continue living in the acquired gender until death. Although the alternative grounds requirements in sections 3B, 3D and 3F of the 2004 Act differ in certain respects (as did the grounds in section 27), they still require that the future intention requirement is satisfied (as did section 27). Only the section 1(1)(b) application does not require satisfaction of that requirement, presumably on the basis that intention is deemed to have been evidenced in the country or territory outside the United Kingdom and which has been "approved" in terms of section 2(4).

28. A statutory declaration is also required for a section 1(1)(a) application as to whether the applicant is married or a civil partner. If they are married or a civil partner, various further statutory declarations are now required, following the availability of same-sex marriage and opposite-sex civil partnerships, in consequence of that fact. The declarations are all ultimately directed towards identifying whether the marriage or civil partnership is "protected" and, if so, whether the spouse or partner consents to the marriage or civil partnership continuing after the issuing of a full GRC. For the various marriage and civil partnership-related declarations required by section 3, see: subsections (6A), (6AA), (6B)(a)-(b), (6D)(a), (6D)(b)(i)-(ii), (6G)(b)(i)-(ii), (6F), and (6G)(a), all read with section 25 for the definitions of the various types of "protected" marriages and civil partnerships to which they apply.

Circumstances in which a full GRC may be issued

29. As the 2004 Act was enacted (prior to the Civil Partnership Act 2004), a full GRC could only be issued on first application to the Gender Recognition Panel where the applicant was not married. A full GRC could only otherwise be issued following the issuing of an interim GRC, either: (i) by the court, on granting decree of nullity of marriage or, in Scotland, divorce, where the ground relied on was that an interim GRC had been issued; or (ii) by the Gender Recognition Panel, on

subsequent application within 6 months of the interim GRC being issued, after the marriage had been dissolved or annulled on another ground or the spouse had died – see: section 4(2), section 5(1) and section 5(2) of the 2004 Act, as originally enacted.

30. As the 2004 Act is currently in force, a full GRC can only be issued on first application to the Gender Recognition Panel where (i) the applicant is not married and is not a civil partner; or (ii) the applicant is party to a particular form of "protected" marriage or civil partnership and certain requirements as to consent are satisfied.

31. The requirements for consent differ according to where the marriage was solemnised or the civil partnership was registered. For a "protected Scottish marriage" (being a marriage solemnised in Scotland) or a "protected Scottish civil partnership" (being a civil partnership registered in Scotland), both parties require to explicitly consent to the marriage or civil partnership continuing after the issuing of a full GRC – see: section 4(1A), (2), (3C) [Scotland]. For all other "protected" marriages and civil partnerships, only the spouse or civil partner requires to explicitly consent – see: section 4(2) [England, Wales & Northern Ireland]; for the definitions of "protected" relationships, see section 25.

32. Similarly to the 2004 Act as enacted, a full GRC may only otherwise be issued under the 2004 Act as currently in force following the issuing of an interim GRC. The limited circumstances in which a full GRC may now be issued after the issuing of an interim GRC are as follows:

    (i) On application to the Gender Recognition Panel, where spousal or civil partner consent is subsequently obtained or the spouse / civil partner dies – see: sections 4A-4D, section 5(2).

    (ii) By the court, where decree of nullity of marriage or divorce, or dissolution of a civil partnership is granted and the ground relied on is that an interim GRC has been issued – see: section 5(1) and

section 5A(1). For the provisions setting out the ground of divorce or dissolution for Scotland, see sub-paragraph (iv) below.

(iii) On application to the Gender Recognition Panel, within 6 months of the interim GRC being issued, after the marriage or civil partnership is dissolved or annulled on another ground – see: section 5(2) and section 5A(2).

(iv) In Scotland only, on summary application to the sheriff, within 6 months of the interim GRC being issued, where the consent of the spouse or civil partner has not been obtained – see: section 4E(2). This is the only instance in the 2004 Act of a full GRC being able to be issued in the context of a subsisting marriage or civil partnership, without spousal or civil partner consent. The non-consenting spouse or civil partner continues to be entitled to rely on the ground of divorce in the Divorce (Scotland) Act 1976 and the ground of dissolution in the Civil Partnership Act 2004, which would otherwise only be available in respect of an interim GRC. For the grounds, see: section 1(3B)(b) of the Divorce (Scotland) Act 1976; and section 117(3A)(b) of the Civil Partnership Act 2004.

Legal effect of a full GRC being issued

33. Sections 9 to 21 of the 2004 Act make provision in relation to the legal consequences, including as to status, of a person being issued with a full GRC (and only a full GRC). Section 9 of the 2004 Act makes general provision in this regard, with specific provision (e.g. as to parenthood, benefits, succession) being made in the provisions which follow. Section 9 of the 2004 Act is of central importance in this case and provides, in full, as follows:

"**9 General**

(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 the 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."

34. Section 9(1) of the 2004 Act "states the fundamental proposition that once a full gender recognition certificate is issued to an applicant, the person's gender becomes for all purposes the acquired gender, so that an applicant who was born a male would, in law, become a woman for all purposes": Explanatory Notes to the 2004 Act, para 27. As those Notes go on to state: "She [i.e. the applicant] would, for example, be entitled to protection as a woman under the Sex Discrimination Act 1975; and she would be considered to be female for the purposes of section 11(c) of the Matrimonial Causes Act 1973, and so able to contract a valid marriage with a man". The 2004 Act did not, therefore, amend section 11(c) of the 1973 Act, because by virtue of the effects of section 9(1) it did not require to do so; it also made, for the same reason, very limited amendments, in Schedule 6, to the Sex Discrimination Act 1975 ("**1975 Act**"). Schedule 6 is discussed further in paragraph 39(iv) below.

35. The general effects of section 9(1) of the 2004 Act flow from the presumptive "for all purposes" wording read in conjunction with the terms of subsection (2), by which section 9(1) is converted into a dual-facing, general provision of statutory interpretation, "[operating] for the interpretation of enactments passed […] before the certificate is issued (as well as those passed […] afterwards)". There are numerous other examples of Parliament having established in one Act a general presumption, or having made general interpretative provision, in either case to potentially affect a later Act of Parliament, without the principle of Parliamentary sovereignty being offended. The most obvious interpretation example, at the

level of an entire Act, is the Interpretation Act 1978; the most obvious example at the level of an individual section is section 3 of the Human Rights Act 1998, which sets down the presumption and possibility of contrary provision in subsection (1) ("[s]o 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") and the temporal application in subsection (2) ("This section—[…] applies to primary legislation and subordinate legislation whenever enacted […]").

36. The Rehabilitation of Offenders Act 1974 ("**1974 Act**") provides a further example, using the "for all purposes" wording of section 9(1). Section 4 of the 1974 Act provides that "a person who has become a rehabilitated protected person for the purposes of this Act in respect of a conviction shall be treated for all purposes in law as a person who has not committed or been charged with or prosecuted for or convicted of or sentenced for the offence or offences which were the subject of that conviction". It goes on, in the same subsection, to make provision as to the circumstances in which that presumption will take effect, "notwithstanding the provisions of any other enactment or rule of law to the contrary […]".

37. A status-specific example more analogous to section 9(1) may be seen in section 40 of the Adoption and Children (Scotland) Act 2007 ("**2007 Act**") (and, for England & Wales, in section 67 of the Adoption and Children Act 2002). Section 40 of the 2007 Act sets down, in subsections (1)-(4), the general presumptive rules in respect of the legal effect of an adoption order, in terms of the relationship between parent(s) and child. Their effect, read short, is that the adopted person is to be "treated in law as if born as the child of the adopters or adopter" (or the adopter and an existing parent: section 40(2)(b)), and "as not being the child of any person other than the adopter and the other member of the couple" (where the other member of the couple is an existing parent: subsection (3)); or "as not being the child of any person other than the adopters or adopter" otherwise: subsection (4). Section 40(10) of the 2007 Act makes generally-applicable, dual-facing interpretation provision, applying the presumptions of section 40 ("Subject to the provisions of this Chapter" – i.e. Chapter 3 of the 2007 Act) for "the

interpretation of enactments or instruments passed or made before as well as after the adoption and so applies subject to any contrary indication". See, similarly, section 67(1)-(3), (6) of the Adoption and Children Act 2002; and, for the similarly-worded predecessor Acts, see: section 39 of both the Adoption (Scotland) Act 1978 and the Adoption Act 1976.

38. Provision as to the effect of 'contrary indication' in the 2004 Act is made elsewhere within section 9 of the 2004 Act (rather than, as in the case of the 2007 Act, within the interpretative sub-section itself). Section 9(3) of the 2004 Act provides in this regard that: "Subsection (1) is subject to provision made by this Act [i.e. the 2004 Act] or any other enactment or any subordinate legislation". Examples of contrary indication in the 2004 Act include section 15 (succession); section 16 (peerages etc.); and section 20 (Gender-specific offences). A number of those provisions are considered in the following section of this case, which addresses the specific as opposed to general provision which is made in the 2004 Act in relation to the legal consequences for a person's status of being issued with a full GRC.

Specific provision as to status in the 2004 Act

39. The essential argument advanced in this case is that section 9(1) of the 2004 Act effects a change in legal status, including as regards a person's "sex", for all purposes subject to any contrary provision in the 2004 Act or any other enactment. There are a number of other status-related provisions in the 2004 Act, beyond section 9(1), which support this argument – that the Act effects a change in legal status, as to "sex" – and do so more or less expressly. They include:

    (i) Section 10 (Registration), which gives effect to Schedule 3. The provisions of Schedule 3 allow a person with a UK birth register entry, who has been issued with a full GRC, to obtain a re-issued birth certificate reflecting their new "sex". For Scotland, see: Schedule 3 paragraph 16 and the reference to "sex"; and the regulations made under paragraph 14, which prescribe "sex" as a

particular to be recorded in the Gender Recognition Register, and define it to mean the "acquired gender": the Gender Recognition (Prescription of Particulars to be Registered) (Scotland) Regulations 2005/151, reg 2(3)(e)(iii). For the equivalent regulations in England & Wales, see: the Gender Recognition Register Regulations 2005/912, and the references to "sex' – although not defined – in Schedule 1 to those regulations.

(ii) Section 11 (Marriage), which gives effect to Schedule 4 and amendments to the law of marriage. Paragraph 3 of Schedule 4 amended, on enactment, the Marriage Act 1949 (applicable in England & Wales) to insert a form of 'conscientious objection' provision into that Act, at a time when only opposite-sex marriage was available. The effect of the provision was and is to remove any obligation on a clergyman in the Church of England or a clerk in Holy Orders of the Church in Wales to solemnise the marriage of a person "if the clergyman reasonably believes that the person's gender has become the acquired gender under the Gender Recognition Act 2004". A person's gender only becomes the "acquired gender" on the issuing of a full GRC. This provision presupposes that the holder of a full GRC is, subject to the availability of an objection, entitled to be married in their "acquired gender" and – given the marriage context – their new "sex". That is confirmed by the fact that the Schedule 4 amendments did not, as enacted, include amendments to the law of marriage as to the grounds on which marriage could be entered into. (See: paragraph 34 above.)

(iii) Sections 11A-11D, which provide for the continuity of a marriage or civil partnership where a full GRC is issued to a party to the marriage or civil partnership. Sections 11A-11D were inserted into the 2004 Act following the availability of same-sex marriage and subsequently opposite-sex civil partnerships between 2013 and 2020. They pre-suppose that the marriage or civil partnership continues in its opposite form (same-sex where previously opposite-sex, and vice

versa). That is confirmed by regulations made under Schedule 3, pursuant to provisions inserted by the legislation effecting same-sex marriage and opposite-sex civil partnerships, which enable "qualifying" marriages and civil partnerships (and "qualifying Scottish" marriages and civil partnerships) to be effectively re-registered, "reflecting the name and gender" referred to on the full GRC: Gender Recognition (Marriage and Civil Partnership Registration) (Scotland) Regulations 2016/66, reg 4(2). The Marriage Schedule in Scotland, which provides the 'particulars' to be registered, in fact no longer requires the gender or sex of a party to a marriage to be stated, only their designation: Marriage and Civil Partnership (Prescribed Forms) (Scotland) Regulations 2014/306, reg 4(4); Sch 3.) For England & Wales, see: the Gender Recognition Register (Marriage and Civil Partnership) Regulations 2015/50, reg 6(2).

(iv) Section 14 (Discrimination), which gives effect to Schedule 6. As enacted, Schedule 6 contained limited amendments to both the 1975 Act and the Sex Discrimination (Northern Ireland) Order 1976/1042 ("**1976 Order**") in relation to genuine occupational qualifications based on sex (i.e. requirements imposed by an employer etc. that an applicant is a "man" or a "woman"). The 2004 Act amendments disapplied the availability of an existing exception in the 1975 Act and 1976 Order to the prohibition on discrimination relating to gender reassignment, the exception potentially rendering the discrimination lawful where based on that ground. The effect of the 2004 Act amendments was to remove the availability of such an exception where the discrimination was against "a person whose gender has become the acquired gender" under the 2004 Act. The 2004 Act amendments therefore brought within the terms "man" and "woman" where used in the context of genuine occupational qualifications in the 1975 Act, persons who had respectively been issued with full GRCs in the acquired gender of "male" and "female", as well as men and women without a GRC of any type. The "genuine occupational

qualifications" amendments of the 2004 Act remain in force for Northern Ireland, to which the 2010 Act largely does not apply. In any event, the amendments made to the 1975 Act by Schedule 6, although repealed by the 2010 Act along with the 1975 Act itself, are not for that reason inadmissible. They may be considered for the purposes of ascertaining the purpose of the provision of which they formed part, read as a whole: see e.g. **R (Worch) v HM Coroner for Greater Manchester North District** [1988] QB 513 **at p 528B (Slade LJ).** The 2010 Act re-enacts the occupational requirements provisions, with differences – see: paragraphs 60-61 below.

(v) Section 15 (Succession), which provides that: "The fact that a person's gender has become the acquired gender under this Act does not affect the disposal or devolution of property under a will or other instrument made before the appointed day". The backwards-looking nature of section 15 is such that the effects of section 9(1) of the 2004 Act apply to wills or other instruments made after that date (being 4 April 2005): cp. **R (C) v Secretary of State for Work and Pensions [2017] UKSC 72, [2017] 1 WLR 4127** at p 4136F para 23 (Baroness Hale of Richmond, referring to dispositions, rather than instruments, made after that date) – effecting a change, from that date, in the legal status of the person, in matters of succession and so relationships between private parties, based on "sex".

(vi) Section 20 (Gender-specific offences), which has the effect of preserving for certain sexual offences (the commission of which "involves the accused engaging in sexual activity") the ability of the person to whom a full GRC has been issued to commit the offence – thus preserving, in this context, their previous legal status, in terms of their "sex".

40. The clear import from all of these provisions, as well as section 9(1) itself, is that the legal recognition to which section 9(1) of the 2004 Act was intended to give effect was a change in legal status – both as regards the "gender" of the person

to whom a full GRC has been issued, but also as regards their "sex". The breadth of the terms of the section 9(1) presumption is such that the legal recognition effected by it extended, on enactment, to the sex-based protections of the 1975 Act (see: paragraphs 34 and 39(iv) above) – notwithstanding the absence of any express statement in the 2004 Act to that effect. Further, absent any provision to the contrary in the 2010 Act, and in line with the presumptive nature of section 9(1) and its application to later enactments, the legal recognition effected by it now extends to the same protections in the 2010 Act. In particular, section 9(1) extends to the meanings of "protected characteristic", "sex", "woman" and "man" as those terms are used in the 2010 Act, at least in so far as they apply for the purposes of the Public Boards Exception and the 2018 Act. The 2010 Act, and the effect on it of the 2004 Act, is now considered below.

The 2010 Act

Background

41. The 2010 Act is: "An Act […] to reform and harmonise equality law and restate the greater part of the enactments relating to discrimination and harassment related to certain personal characteristics; […] to increase equality of opportunity; […] and for connected purposes" (long title). The two main purposes of the 2010 Act are: "to harmonise discrimination law, and to strengthen the law to support progress on equality": Explanatory Notes, para 10. In terms of paragraph 11 of those Notes, the 2010 Act: "brings together and re-states all the enactments listed in paragraph 4 above [the list including the Sex Discrimination Act 1975] and a number of other related provisions. It will harmonise existing provisions to give a single approach where appropriate".

42. Although the 2010 Act is described in paragraph 649 of the Notes as involving "consolidation and harmonisation of previous legislation", it is not a pure consolidation measure. In any event, whilst a self-contained statute should be interpreted, if reasonably possible, without recourse to predecessor provisions, it is not impermissible to consider them: see e.g. **Scottish Widows plc v Commissioners for HM Revenue and Customs [2011] UKSC 32, 2012 SC**

(UKSC) 19 at p 25 para 15 (Lord Hope of Craighead); and **Manchester Ship Canal Co Ltd v United Utilities Water plc (Canal & River Trust and others intervening) [2014] UKSC 40, [2014] 1 WLR 2576** at p 2579G para 3 (Lord Sumption).

43. The "existing provisions" of the 1975 Act which were "harmonised" by the 2010 Act included provision which was inserted into the 1975 Act by the Sex Discrimination (Gender Reassignment) Regulations 1999/1102 ("**1999 Regulations**"). The 1999 Regulations, which introduced the concept of discrimination on the grounds of gender reassignment, were made under section 2(2) of the European Communities Act 1972 to "extend the Sex Discrimination Act 1975 […] to cover discrimination on grounds of gender reassignment in employment and vocational training, following the judgment of the European Court of Justice in Case No. C-13/94 *P v S and Cornwall County Council*": Explanatory Notes to the 1999 Regulations, para 1. In **P v S (Case C-13/94) [1996] ICR 795**, discrimination arising from gender reassignment was held by the European Court of Justice to be "based, essentially if not exclusively, on the sex of the person concerned". The court considered that, where a person is dismissed on the ground that he or she intends to undergo, or has undergone gender reassignment, "he or she is treated unfavourably by comparison with persons of the sex to which he or she was deemed to belong before undergoing gender reassignment" (para 21). The choice of comparator – a person of the 'previous' sex – implies that the court considered reassignment of gender to be (at least analogous to) reassignment of "sex". See also in this context: **Chief Constable of the West Yorkshire Police v A (No 2) [2004] UKHL 21, [2005] 1 AC 51**, decided on the law as in force prior to the 1999 Regulations. In that case, the phrase "the same sex" in section 54(9) of the Police and Criminal Evidence Act 1984 was held, in light of **P v S**, as applying, in the context of the search of a female suspect, to a person who had been issued with a full GRC in the acquired gender of female.

Structure of the 2010 Act

44. The 2010 Act is in 16 'Parts' and contains 28 Schedules. It is structured so as to identify certain core concepts in Part 2 – the "protected characteristics" (Chapter 1 of Part 2) and the types of conduct which are prohibited in relation to those characteristics or some of them (Chapter 2 of Part 2) – and then to set out the particular areas of regulated activity in which the general prohibitions, as regards some or all of the "protected characteristics", are to have effect. The regulated activity is set out in Parts 3 to 7 and ranges from the provision of services and exercise of public functions (Part 3); to the disposal etc. of premises (Part 4); various aspects of different kinds of work (Part 5); the provision of education (including higher and further education) (Part 6); and the membership and conduct of associations (Part 7). Provision as to enforcement is made in Part 9 and provision as to the advancement of equality, as distinct from the prohibition of discrimination, is made in Part 11.

45. General exceptions to the prohibited conduct are set out in Part 14; interpretative provision is made in Part 16 (in particular section 212); and a number of the Schedules contain more detailed, subject-specific exceptions, including to the prohibited conduct in particular regulated activities, such as in relation to the provision of services and public functions (Schedule 3); work (Schedule 9); and associations (Schedule 16). Repeals and revocations are provided for in Schedule 27; and Schedule 28 "lists the places where expressions used in [the 2010 Act] are defined or otherwise explained" (section 214; Schedule 28 cross-referring in a number of respects to section 212).

The protected characteristics

46. Provision in relation to the "protected characteristics" is made in section 4 of the 2010 Act, which lists nine protected characteristics for the purposes of that Act, including "sex", "gender reassignment" and "sexual orientation". Further definitional provision is made in sections 5 to 12 of the 2010 Act in relation to eight of those protected characteristics, the exception being "pregnancy and maternity".

47. Section 11 of the 2010 Act makes provision in relation to the protected characteristic of "sex". It provides, in so far as relevant, that: "(1) 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 […]". Section 212 of the 2010 Act provides that: ""woman" means a female of any age"; and ""man" means a male of any age". The section 212 definitions are in similar, although not identical, terms to the equivalent provisions of the 1975 Act (sections 5 and 82), which provided that ""woman" includes a female of any age". Although section 212 of the 2010 Act does not include the introductory wording of section 82 of the 1975 Act – "unless the context otherwise requires" – this is a "general gloss of a kind that would have to be inferred in any event, where a provision elsewhere in the legislation to which the definition purported to apply showed by express provision or necessary implication that the definition was not intended to apply there": *Craies on Legislation* (12th edn) at para 24.1.5.1; **Secretary of State for Work and Pensions v M [2004] EWCA Civ 1343** at para 84 (Sedley LJ) – allowed on appeal on a different point: **[2006] UKHL 11, [2006] 2 AC 91**. The absence of the introductory wording in section 212 is, in short, not a barrier to a different meaning being given to any given term, if, as a matter of statutory construction, the context requires it.

48. Section 7 of the 2010 Act makes provision in relation to the protected characteristic of "gender reassignment". It provides, in so far as relevant, that: "(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". A person may, accordingly, have the protected characteristic of gender reassignment on the basis of a proposal to reassign their sex without having taken any steps towards doing so, but also on the basis of having done so – i.e. having "reassigned [their] sex" – and having changed physiological or other attributes of sex. The term "sex" for the purposes of the 2010 Act – including as it is used in section 7 – is defined under reference to section 11 and the protected characteristic of sex (see: Schedule 28; and the discussion of section 11 above). The possibility of a change in the protected characteristic of sex – from "man" to "woman" and vice versa – is, therefore,

inherent within the provision which is made in the 2010 Act in respect of the protected characteristic of gender reassignment, consistent with the provision which is made in the 2004 Act, for persons who have in fact proceeded to reassign (i.e. change) their sex, by obtaining a full GRC. The breadth of scope of section 7 – "if the person is proposing to undergo [...] a process (or part of a process) […]" – is, however, such that an individual may be entitled to the protection of it without ever applying for a GRC or even intending to apply for one.

49. The term "sex" is also used in the provision which is made in section 12 in relation to the protected characteristic of "sexual orientation". It is used to categorise the classes of persons to whom the person with the protected characteristic is attracted: "Sexual orientation means a person's sexual orientation towards—(a) persons of the same sex, (b) persons of the opposite sex, or (c) persons of either sex". The class of persons is determined, for single sex attraction, by reference to the orientation of the person holding the protected characteristic: "of the same sex [to the person with the protected characteristic]"; "of the opposite sex [to the person with the protected characteristic]". Where the legal status of "sex" changes, that would logically have the effect of changing, from the perspective of the 2010 Act, the class of persons to whom, in terms of section 12, the person is considered to be attracted as a matter of law. It would not, however, affect the ability of that person, prior to the issuing of a full GRC, to invoke the protections against direct discrimination on the basis of the sexual orientation which they consider themselves, and others perceive them, to hold – see: paragraph 50 below.

The prohibited conduct

50. Chapter 2 of Part 2 of the 2010 Act (sections 13 to 27) prohibits various forms of conduct, including different types of discrimination (e.g. direct discrimination, prohibited by section 13; and indirect discrimination, including that based on same disadvantage, prohibited by sections 19 and 19A) as well as the conduct of harassment (section 26) and victimisation (section 27). Some of the particular forms of discrimination which are prohibited by the 2010 Act concern specific

protected characteristics but otherwise apply in general, and others concern specific protected characteristics but apply only in particular circumstances. For example, section 13 prohibits direct discrimination generally – including direct discrimination based on perception, whether or not shared by the person being 'perceived' (**English v Thomas Sanderson Blinds Ltd [2008] EWCA Civ 1421, [2009] ICR 543**) – but is subject to the provisions concerning pregnancy and maternity, which set out the prohibited conduct specific to that protected characteristic. Section 16 makes provision for a specific form of gender reassignment discrimination, but applies only for the purposes of Part 5 (Work) and, in so far as it applies, disapplies section 13.

51. Section 25 of the 2010 Act defines references to the particular "strands of discrimination" for the purposes of that Act, defining "sex discrimination" as discrimination within section 13 or section 19 or 19A where the relevant protected characteristic is sex: section 25(8). "Gender reassignment discrimination" is similarly defined, with the addition of discrimination within section 16: section 25(3). "Pregnancy and maternity discrimination" as a particular type of discrimination is limited to discrimination within section 17 (Pregnancy and maternity discrimination: non-work cases) and section 18 (Pregnancy and maternity discrimination: work cases): section 25(5). It is possible for discrimination directed against a woman who is pregnant or breast-feeding to be "sex discrimination" which is otherwise prohibited by the generally-applicable provisions (see e.g. section 13(6)(a)), but "pregnancy and maternity discrimination" for the purposes of the 2010 Act is only discrimination within sections 17 and 18.

52. The protections of sections 17 and 18 of the 2010 Act are afforded only to a "woman" in the context of unfavourable treatment "because of a pregnancy of hers"; "because she has given birth"; "because she is breast-feeding"; "because of the pregnancy"; "because of illness suffered by her […] as a result of the pregnancy"; "because she is on [various forms of maternity leave]" or "because she is exercising or seeking to exercise, or has exercised or sought to exercise, the right to [various forms of maternity leave]": section 17(2), (3), (4), (5); section 18(2)(a)-(b), (3), (4). Those protections are all predicated on the fact of

pregnancy or the fact of having given birth to a child and the taking of leave in consequence of that fact. They are all capable of being interpreted so as to apply to the circumstances of persons such as the claimant in **R (McConnell) v Registrar General for England and Wales [2020] EWCA Civ 559, [2021] Fam 77** – i.e. a 'pregnant man'. Although interpreting those provisions in that way would require a different meaning to be given to the term "woman" in this context, that is not impermissible as a matter of statutory construction – see: paragraph 47 above. Alternatively, without requiring a different meaning to be given to the term "woman" in these provisions, a person such as Mr McConnell would potentially be entitled to protection under section 13 of the 2010 Act on grounds of gender reassignment – on the basis that, in so far as the protections afforded to "women" in respect of birth and maternity fall within the regulated activities, he would, in being treated less favourably by being denied those protections, have been directly discriminated against on that ground.

The regulated activities & the corresponding exceptions

53. Although none of the particular regulated activities in Parts 3 to 7 of the 2010 Act or their corresponding exceptions are directly in issue in this case, certain of the exceptions in particular have been put in issue in the appeal, and it is appropriate to consider them (and the general exceptions in so far as relevant) in circumstances where the appeal is concerned with the meaning of a particular term, read in the context of the 2010 Act as a whole.

Part 3 & Schedule 3

54. Part 3 of the 2010 Act makes provision in relation to services and public functions. Section 29 prohibits, amongst other things, discrimination in the provision of a service or the exercise of a public function, and gives effect to Schedule 3. Schedule 3 includes a number of exceptions in relation to the general prohibition in section 29.

55. Parts 6 and 6ZA of Schedule 3 make provision in relation to gender reassignment discrimination in the context of solemnisation of marriage and (in Scotland only) registration of civil partnerships. As to marriage, paragraph 24(2) and paragraph 25(1) have, since enactment in Part 6 (and so prior to the availability of same-sex marriage), disapplied the section 29 prohibition so far as relating to gender reassignment discrimination in the following circumstances: where either an "approved celebrant" [Scotland] or the person whose consent is required for a marriage to be solemnised in a registered building [England & Wales] "reasonably believes that B's gender has become the acquired gender under the Gender Recognition Act 2004". As to civil partnerships, paragraph 25(3)-(4) were inserted (and paragraph 25 as a whole was moved to Part 6ZA) by paragraph 19 of Schedule 5 to the Marriage and Civil Partnership (Scotland) Act 2014 and Civil Partnership Act 2004 (Consequential Provisions and Modifications) Order 2014/3229. The effect of the amendment was to insert an equivalent 'conscientious objection' provision in relation to the registration of a civil partnership, where the celebrant is a member of or approved by a religious or belief body ('religious and belief' civil partnerships are not available in England & Wales). The provisions of Part 6 were not otherwise amended by the legislation on same-sex marriage. As a person's gender only becomes the "acquired gender" under the 2004 Act when a full GRC is issued, the provisions of Parts 6 and now 6ZA presuppose the continued application of section 9(1) for the purposes of the 2010 Act. Further, as the effect of section 9(1) was to permit opposite-sex marriage in the acquired gender and "sex", additional 'conscientious objection' provision required to be and was inserted into Schedule 3 of the 2010 Act following the availability of same-sex marriage – see: Part 6A and paragraph 25A, and Part 6B and paragraph 25B of Schedule 3 to the 2010 Act. The purposes of those provisions and paragraphs 24 and 25 of the 2004 Act are distinct (cp. the appellant's case at paragraph 87).

56. Part 7 of Schedule 3 makes provision in relation to separate, single and concessionary services in the context of sex and gender reassignment discrimination. Paragraph 26 within Part 7 permits separate and different separate services for the sexes in certain circumstances, disapplying the prohibition in section 29 as regards sex discrimination, where the provision is a

proportionate means of achieving a legitimate aim. Paragraph 27 similarly permits single-sex services – i.e. providing services only to persons of one sex – subject to a proportionality requirement and provided certain conditions are met.

57. Paragraph 28 disapplies the section 29 prohibition in relation to gender reassignment discrimination, subject to a proportionality requirement, by providing that a person does not contravene that provision "only because of anything done in relation to a matter within subsection (2)", those matters being: (a) the provision of separate services for persons of each sex and (b) the provision of separate services differently for persons of each sex (i.e. as regards both of these matters, the provision of services permitted by paragraph 26); and (c) the provision of a service only to persons of one sex (i.e. the provision of a service permitted by paragraph 27).

58. The breadth of the wording of paragraph 28 ("anything done in relation to a matter") is such that it applies to the provision of services to certain persons of one sex, as well as to all persons of that sex. It would, accordingly, be open to a service provider to refuse to provide a women-only service to a person with a full GRC in the acquired gender of female (i.e. to provide services only to women without full GRCs), without that refusal constituting unlawful discrimination on the ground of gender reassignment, notwithstanding that the person with the full GRC would otherwise be entitled to access the service as a member of the female "sex". See: paragraph 740 of the Explanatory Notes to the 2010 Act for an example relating to 'transsexual persons' generally.

Part 5 & Schedule 9

59. Part 5 of the 2010 Act makes provision in relation to various types of work including employment and contract work (sections 39, 41), partnerships (sections 44, 45), offices (section 49, 50) and certain other positions (those listed in section 60A). Schedule 9 makes provision for general exceptions to Part 5, including as to occupational requirements.

60. Paragraph 1 of Schedule 9 provides that a person does not contravene the provisions of Part 5 listed in paragraph 59 above by applying a requirement that a person is to have a protected characteristic (or, in the case of gender reassignment, by applying a requirement that a person is not to be a transsexual person: Sch 9 para 1(3)(a)), in the following circumstances: (i) if the person applying the requirement can show that, having regard to the nature or context of the work, it is an occupational requirement; (ii) the application of the requirement is a proportionate means of achieving a legitimate aim; and (iii) the person to whom the requirement is applied does not meet it, or the person applying it has reasonable grounds for not being satisfied that the person meets it. Where the requirement is to be of a particular sex, there is no 'reasonable grounds' basis on which to discriminate: the person either meets the requirement by being a "man" or a "woman", or they do not: Sch 9 para 1(4).

61. An employer seeking to appoint a woman to a position in reliance on paragraph 1 of Schedule 9 could, therefore, lawfully discriminate, including on the basis of a reasonable grounds assessment, against someone with the protected characteristic of gender reassignment, irrespective of whether they hold a full GRC – see: the rape counselling example given in the Explanatory Notes to the 2010 Act at paragraph 789. That is a departure from the position in the 1975 Act (see: paragraph 39(iv) above) but not from the principle as to the effect of the issuing of a full GRC.

Part 7 & Schedule 16

62. Part 7 of the 2010 Act makes provision in relation to the membership of associations and persons who may be appointed to (as well as join) them. It applies to all of the protected characteristics other than marriage and civil partnership. In terms of section 101, an association must not discriminate against a person e.g. by not accepting an application for membership. In terms of section 107(2), an "association" is an association of persons which has at least 25 members, and admission to which is regulated by rules and involves a process of selection. Schedule 16 provides for exceptions to Part 7. In terms of paragraph 1(1) of Schedule 16, an association does not contravene section 101 by

restricting membership to persons who share a protected characteristic (with a race-based exception). In terms of section 12(2)(b), a reference to persons who share a protected characteristic is a reference to persons who are of the same sexual orientation. It would accordingly not be open to an association of 25 or more members, which sought to restrict its membership to lesbian women, to refuse an application for membership by a person with a full GRC in the acquired gender of "female" who is attracted to women – but it would be open for an association of less than 25 members to do so, on the basis that such an association would not be an "association" for the purposes of Part 7.

Part 14 & Schedule 23

63. Part 14 does not regulate a particular activity but rather makes general provision, including in relation to sport in section 195; and by giving effect to Schedule 23. Section 195(2) provides that a person does not contravene section 29 or certain provisions relating to premises (sections 33, 34 and 35), so far as relating to gender reassignment, only by doing anything in relation to the participation of a transsexual person as a competitor in a gender-affected activity if it is necessary to do so to secure in relation to the activity (a) fair competition, or (b) the safety of competitors. A "gender-affected activity" is defined in section 195(3) as "a sport, game or other activity of a competitive nature in circumstances in which the physical strength, stamina or physique of average persons of one sex would put them at a disadvantage compared to average persons of the other sex as competitors in events involving the activity". Section 195 effectively replicates the provision which was made in section 19 of the 2004 Act in relation to persons whose gender has become the acquired gender, although does so for the protected characteristic of gender reassignment as a whole.

64. Schedule 23 provides for general exceptions to the prohibitions of the 2010 Act, including in relation to communal accommodation. Communal accommodation is defined as "residential accommodation which includes dormitories or other shared sleeping accommodation which for reasons of privacy should be used only by persons of the same sex". Paragraph 3(1) provides that a person does not contravene the 2010 Act, so far as relating to sex discrimination or gender

reassignment discrimination, only because of anything done in relation to the admission of persons to communal accommodation (provided the accommodation is managed in a way which is as fair as possible to "both men and women": para 3(2)) or because of the provision of a benefit, facility or service linked to the accommodation. Account requires to be taken, in applying the exception which permits gender reassignment discrimination in admission to communal accommodation, of "whether and how far the conduct in question is a proportionate means of achieving a legitimate aim": para 3(4).

Other relevant provisions of the 2010 Act

65. The provisions of the 2010 Act which have been discussed up until this point have all been concerned with the negative prohibition on discrimination (or harassment or victimisation). Part 11 of the 2010 Act makes provision in relation to the positive advancement of equality. It imposes, in section 149, a public sector equality duty, and permits, in sections 158 and 159, certain types of positive action. The public sector equality duty imposed by section 149(1) of the 2010 Act is primarily directed at class-based policy decisions, not at the application of policy to individual cases, on the basis that the substantive obligation not to discriminate is contained elsewhere in the 2010 Act – see e.g. **R (Marouf) v Secretary of State for the Home Department [2023] UKSC 23, [2023] 3 WLR 228** at p 247B para 62 (Lady Rose). The second and third aspects of the duty, relating to the 'needs' of advancing equality and promoting good relations, relate in any event to "persons who share a relevant protected characteristic and persons who do not share it", and so are inherently class-based.

66. Similarly, the positive action provisions in sections 158 and 159 of the 2010 Act are concerned with securing substantive class-based equality in practice, as distinct from addressing specific instances of discrimination. Although section 159, which makes provision for positive action in the specific context of recruitment and promotion, permits action directed at particular individuals, it is only engaged if, assessing the circumstances of the class as a whole, a person reasonably thinks that the class of "persons who share a protected characteristic" suffer a disadvantage connected to the characteristic, or participation in an

activity by such a class of persons is disproportionately low. There will always be members of a class who do not conform to the characteristics of the majority of a class. It does not follow that they are not to be taken as falling within that class and entitled to the benefits to be afforded to it. In any event, the parameters of a particular class may be expanded or contracted either by a change in the factual circumstances of the individuals who fall within it (e.g. in relation to the protected characteristic of "pregnancy and maternity"; or "disability") or, potentially, by an Act of Parliament. The effect of the 2004 Act on the definitions in the 2010 Act, including on the parameters of the class of "women", is now considered below.

The effect of the 2004 Act on the definitions in the 2010 Act

67. There is no express provision made in the 2010 Act as to the effect which section 9(1) of the 2004 Act has on the protected characteristic of "sex" or on the terms "woman" or "man" as used in the 2010 Act. There are, however, clear indications in the 2010 Act (including as passed in 2010, and as subsequently amended) that the 2004 Act is intended to continue to have full effect and to do so as provided for by way of the presumptive rule of interpretation in section 9(1) – namely to reflect, by way of a person having acquired another gender, a change, as a matter of law, in their "sex".

68. A number of examples have already been set out above (see, in particular, paragraph 55, which sets out the only reference in the 2010 Act as enacted to the 2004 Act and the "acquired gender"). The clearest example, however, is given by what is not contained in the 2010 Act. As passed on 8 April 2010, the 2010 Act did not repeal any provisions of the 2004 Act in the table contained in Schedule 27 of the 2010 Act. On 1 October 2010, the Equality Act 2010 (Consequential Amendments, Saving and Supplementary Provisions) Order 2010/2279 ("**2010 Order**") came into force having been subject to the affirmative procedure, and replaced the repeals table in Schedule 27. The replaced table repeals, amongst other provisions of other Acts, two provisions of the 2004 Act, being: (i) section 19 (Sport), the effect of which had already been re-enacted in section 195(2) of the 2010 Act (see paragraph 63 above); and (ii) Part 1 of Schedule 6 to the 2004 Act, which had amended the 1975 Act (see paragraph

39(iv) above), but had itself already been repealed by the 2010 Act in its entirety, rendering the references to the 1975 Act in the 2004 Act redundant. The Explanatory Memorandum for the 2010 Order confirms the purpose of the amendments to the repeals table as follows: "All the repeals inserted into the table are consequential on the commencement of the core provisions of the [2010 Act] and relate to provisions in other Acts which will be spent on repeal of the 1975 Act, the [Race Relations Act 1976] and the [Disability Discrimination Act 1995] and other legislation or where terms have become redundant because of a replacement provision in the [2010 Act]".

69. Parliament is to be assumed, for the purposes of statutory construction, to have legislated in the knowledge of the existing state of the law, and the court may take into account the extent of repeals in considering what Parliament is to be taken as having intended in passing legislation in a given area. See: e.g. **R (Robinson) v Secretary of State for the Home Department [2019] UKSC 11, [2020] AC 942** at p 966 para 38 (Lord Lloyd-Jones). The limited repeals of the 2004 Act, which were ultimately effected by the 2010 Act after amendment by the 2010 Order, support the conclusion that Parliament, in passing the 2010 Act, is to be taken as not having intended to affect the operation of the 2004 Act in the sphere of anti-discrimination law, including as regards the operation of the presumptive interpretation provision in section 9(1) of the 2004 Act.

70. There is no realistic argument, against that background, that the 2004 Act was impliedly repealed by the 2010 Act (although that is no longer understood to be in issue); or that the 2004 Act as the earlier statute requires to 'give way' to the 2010 Act as the later one, given the nature of the section 9(1) presumption and the fact that they are different statutes pursuing fundamentally different purposes. See: **BH v Lord Advocate ([2012] UKSC 24, 2012 SC (UKSC) 308** at pp 318-319 para 30 (Lord Hope of Craighead); and **Cusack v Harrow London Borough Council [2013] UKSC 40, 2013 1 WLR 2022**, in particular paras 12 (Lord Carnwath) and 61 (Lord Neuberger). The essential issue in the appeal is whether the section 9(1) presumption has been expressly disapplied in relation to the 2010 Act by virtue of section 9(3) of the 2004 Act (appellant's case, para 43). The position of the Scottish Ministers and the Lord Advocate is that section

9(1) of the 2004 Act has not been disapplied in relation to the 2010 Act, for the reasons set out below in response to the issues in the appeal.

Part 4: Response to the issues in the appeal

The agreed first, second, third and fourth issues

71. The first, second and third issues in the appeal **[SFI p 12]** are, respectively, concerned with (i) the meanings of the terms "sex", "man" and "woman" in the 2010 Act; (ii) whether, and if so to what extent, the issuing to an individual of a full GRC in the acquired gender of "female" results in that individual falling within the term "woman" in the 2010 Act; and (iii) whether, and if so to what extent, the issuing to an individual of a full GRC in the acquired gender of "male" results in that individual falling within the term "man" in the 2010 Act. All three issues require consideration of, and are determined by, the effects of section 9 of the 2004 Act. They in turn determine the fourth issue **[SFI p 12]**, as to whether the revised statutory guidance is lawful, having regard to the limits on devolved competence. It is instructive to consider the effects of section 9 in three stages, under reference to subsections (1), (2) and (3) of that provision.

72. Section 9(1) of the 2004 Act sets down a statutory presumption to the effect that a person's "sex" as well as their "gender" changes as a matter of law on being issued with a full GRC. That this is the effect of the presumption, and was the intended effect of the issuing of a full GRC, is supported by a number of factors: (i) the express reference in section 9(1) to "sex", and to it 'becoming' the opposite "sex" (see: the terms of section 9, set out at paragraph 33 above); (ii) the existence in the 2004 Act of a number of other status-related provisions either effecting a change in "sex" or preserving the previous "sex" (see: paragraph 39 above); (iii) the limited amendments made by the 2004 Act to the existing law of marriage and so existing concepts based on (at the time, opposite) "sex" (see: paragraphs 34 and 39(ii) above); and (iv) the purposes for which the 2004 Act was passed, being to remedy ongoing violations of Articles 8 and 12 ECHR, based on the absence of legal recognition in areas relating to "sex" (see: paragraphs 16-17 above). It is not necessary for the court to consider the

supportive secondary materials to reach this conclusion, but it is open to the court to do so – see: paragraph 21 above. There is no argument properly available, against the background just set out, that the recognition effected by the issuing of a full GRC "retains a largely symbolic value": appellant's case at para 112. It effects a change in the legal status of the person to whom it is issued, as to their "sex", and it does so – subject to the remaining provisions of section 9 – "for all purposes".

73. Section 9(2) of the 2004 Act converts section 9(1) into a general provision of statutory interpretation. The wording of section 9(2) in this respect is unambiguous: "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)". For a person without a full GRC ("before the certificate is issued"), section 9(2) has no application or effect. For a person with a full GRC, section 9(2) provides that the section 9(1) presumption applies in respect of the interpretation of an enactment, whenever passed or made. The 2010 Act is such an enactment, and the starting position in terms of statutory interpretation is that section 9(1) should apply to it, from the point in time at which a person is issued with a full GRC.

74. Section 9(3) of the 2004 Act subjects the section 9(1) presumption to other provision made by the 2004 Act "or any other enactment or any subordinate legislation". In the absence of any such provision, the statutory presumption applies. The essential question in this appeal is whether the 2010 Act contains any provision which is contrary to the general presumption in section 9(1). It does not. There are, in any event, a number of factors which support the conclusion that the section 9(1) presumption was intended to continue to apply for the purposes of the 2010 Act: (i) as first enacted, the 2010 Act did not repeal any provisions of the 2004 Act, and the only provisions subsequently repealed were either re-enacted in the 2010 Act, or had become spent (see: paragraph 68 above); (ii) as enacted, the 2010 Act contained (and still contains) an exemption for gender reassignment discrimination in the context of solemnisation of marriage, which refers expressly to the effects of section 9(1) – "the person's

gender has become the acquired gender under the Gender Recognition Act 2004"; and (iii) the existing law in the knowledge of which Parliament is to be assumed to have legislated, in passing the 2010 Act, includes not only the 2004 Act but the case-law which prompted it (**Goodwin**) and which confirmed the 2004 Act as having remedied the Convention breach (**Grant**). The presumption in section 9(1) of the 2004 Act accordingly applies to the 2010 Act by virtue of section 9(2), and to the terms "sex", "man" and "woman" as used in the 2010 Act. For the purposes of the 2010 Act, a person issued with a full GRC in the acquired gender of female is a woman, and a person issued with a full GRC in the acquired gender of male is a man.

75. In so far as the effects of section 9(1) give rise to difficulties of interpretation, they are either surmountable or do not displace the presumption to which that provision gives effect. The pregnancy and maternity provisions are either capable of being interpreted to apply to a 'pregnant man', or the man would potentially be entitled to bring a claim of direct discrimination on grounds of gender reassignment under section 13 (see: paragraph 52 above). The single-sex service provisions permit gender reassignment discrimination and so the exclusion of a person as a woman from a woman-only space even where the person holds a full GRC, subject to a proportionality requirement (see: paragraphs 57-58 above). The association provisions do not permit an association of more than 25 people and which is governed by rules to restrict membership on the basis of more than one protected characteristic, and would not permit such an association of e.g. lesbian women to exclude a person with a full GRC in the acquired gender of "female" who was attracted to women – but the provisions do not apply to associations otherwise (paragraph 62 above), and the intention of Parliament, objectively construed, was to provide for such a person to be considered a woman. The fact that the members of the association may not be attracted to that woman or wish to associate with her does not diminish the protections which they are entitled to in terms of their own protected characteristic of sexual orientation. The question of the proportionality of any interference in their right to freedom of association would be for resolution in a case in which it arose. Further, the fact that a person's own sexual orientation would 'change' in terms of section 12 of the 2010 Act by virtue of the issuing of

a full GRC, would not affect their ability to rely on the protections of that Act in terms of the sexual orientation which they already considered themselves, or were perceived to hold. In short, none of these or any other provisions of the 2010 Act require an alternative interpretation of the terms "sex", "man" or "woman" as defined in sections 11 and 212 of the 2010 Act, such as would be required to displace the section 9(1) presumption in the circumstances of this case.

76. The conclusion that the presumption in section 9(1) of the 2004 Act applies to the 2010 Act, and the terms "sex", "man" and "woman" as used in that Act, is not affected by the fact that the 2018 Act at issue in this case is a positive action measure aimed in part at addressing historical under-representation of women. Positive action permits class-based measures which are concerned with addressing past issues of under-representation, but are given effect by way of increasing current representation – and so are concerned with current membership of the class. The membership of the class of "women" for the purposes of the 2010 Act and so 2018 Act, is determined in part by section 9(1) of the 2004 Act, the effect of which is to change the legal status of "sex", for the reasons set out above. The result is that the boundaries of class membership for both "women" and "men" have, as regards the category of persons wishing and able to satisfy the requirements of the 2004 Act, been re-drawn.

77. The consequence for the 2018 Act, and the revised statutory guidance at issue in this case **[App 13 p 209]**, is that the "gender representation objective" in section 1 of the 2018 Act can be achieved by appointing a person who has been issued with a full GRC in the acquired gender of "female" (as well as a woman without a GRC of any type), and cannot be achieved by appointing a person who has been issued with a full GRC in the acquired gender of "male" (or by appointing a man without a GRC of any type).

78. The appellant suggests that it is "inherently unlikely" (appellant's case, para 37) that Parliament intended to exclude, from the category of "women" who might benefit from a positive action measure, persons who have been issued with a full GRC in the acquired gender of male. Such persons have, in applying for a GRC,

chosen to satisfy onerous requirements as to proof of a change in gender, and have statutorily declared that they intend to continue living in the "acquired gender" until death (see paragraph 27 above). It would not only be inherently unlikely in those circumstances that Parliament intended to include them in the category of beneficiaries for a positive action measure aimed at women – it would, to force them to 'benefit' from such a measure, where it was intended to increase the representation of a class of persons to which they have declared they no longer belong, be to deny them the legal recognition identified in **Goodwin** as necessary to avoid a breach of their Convention rights. A similar point might be made in so far as it is suggested that a person with a full GRC in the acquired gender of female does not require to fall within the post-2004 Act class of women, because he or she is entitled to protection on the basis of the "sex" which he or she is 'perceived' to be. The purpose of the 2004 Act was to secure legal recognition, not protection on the basis of perception. That requires enabling a person issued with a full GRC in the acquired gender of female, to be able to invoke, as a woman, the anti-discrimination protections afforded to "women" as a class.

79. The revised statutory guidance which is challenged in this appeal **[App 13 p 215]** is to the effect that a person with a full GRC in the acquired gender of female is a woman, and is entitled as an individual to the (individual and social) benefits of the positive action measures contained in the 2018 Act. The guidance gives effect to the section 9(1) presumption in the 2004 Act and does so consistently with the way in which the terms "protected characteristic", "sex", "man" and "woman" are defined in the 2010 Act. The guidance is within devolved competence in terms of the Public Boards Exception, and is otherwise lawful. The appeal, which challenges the lawfulness of the revised statutory guidance, should be refused on that basis.

<u>The appellants' fifth issue</u>

80. The appellant's fifth issue ("The proper scope and application of the GRA 2004 and its effect on the interpretation of other laws governing the rights and obligations ordinarily referable to men or women") **[SFI p 12]** is concerned with

matters beyond the scope of this appeal. As a general proposition, the proper scope and application of the 2004 Act is to be determined by the effects of section 9, read as a whole. Where giving effect to the purpose of any given legislation requires an alternative interpretation to the section 9(1) presumption, given effect by section 9(2), that is expressly permitted by the terms of section 9(3). Beyond that, and particularly in relation to substantive matters of Scots criminal law over which this court has no relevant jurisdiction, the question of interpretation of other laws is for a case in which such issues properly arise.

Part 5: Conclusion & summary

81. The court below was correct to refuse the appellant's reclaiming motion. None of the grounds of appeal advanced by the appellant in respect of the Inner House decision (which are not in any event specifically addressed in the appellant's case) give rise, properly analysed, to any error of law. The essential question in this appeal is whether the section 9(1) presumption has been expressly disapplied in relation to the 2010 Act by virtue of section 9(3) of the 2004 Act (appellant's case, para 43). That question should be answered in the negative, and the appeal refused, BECAUSE:

    (1) Section 9(1) of the 2004 Act, when read with section 9(2), has the effect of changing a person's legal status as to their "sex" for the purposes of the interpretation of enactments passed before and after the issuing of a full GRC.

    (2) Section 9(3) subjects the presumptive effect of section 9(1) to provision made by "any other enactment", but the 2010 Act does not contain any provision which displaces that effect for the purposes of that Act.

    (3) The term "woman" as defined in section 212 of the 2010 Act, for the purposes of the "protected characteristic" of "sex" as defined in section 11 of the 2010 Act, accordingly includes, by operation of section 9(1) of the 2004 Act, a person issued with a full GRC in the

acquired gender of “female”, and excludes a person issued with a full GRC in the acquired gender of “male”.

(4) The revised statutory guidance, which defines the term “woman” under reference to sections 11 and 212 of the 2010 Act and the effects of section 9(1) of the 2004 Act as set out above, was accordingly issued within the devolved competence of the Scottish Ministers in terms of section 54(3) of the 1998 Act and the L2 Reservation, and is otherwise lawful.

RUTH CRAWFORD KC
LESLEY IRVINE, ADVOCATE