IN THE SUPREME COURT OF THE UNITED KINGDOM **UKSC 2024/42**

ON APPEAL FROM
THE SECOND DIVISION OF THE INNER HOUSE OF THE COURT OF SESSION
BETWEEN

FOR WOMEN SCOTLAND LTD

Appellants

and

SCOTTISH MINISTERS

Respondents

and

THE LORD ADVOCATE

First Interested Party

WRITTEN INTERVENTION ON BEHALF OF SEX MATTERS

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1. This is the written intervention of the human rights charity, Sex Matters. The intervener's charitable object is to promote human rights where they relate to biological sex. It aims to promote clarity on sex in law and policy including through promoting understanding of, compliance with, and enforcement of the protections under the Equality Act 2010 ('EqA10').

Structure of this submission

2. This submission will address the following areas:

   2.1. First, relevant general principles of statutory interpretation.

   2.2. Second, the respective purposes of the Gender Recognition Act 2004 ('GRA') and the EqA10.

   2.3. Third, limits on the effect of s9(1) GRA as a deeming provision and in light of s9(3).

2.4. Fourth, whether a s9(1) GRA reading of 'sex' in the EqA10 (i) is necessary in order to achieve the purposes of either statute; and/or (ii) undermines any of those purposes or would produce unjust, absurd or anomalous results.

2.5. Fifth, the ways in which a s9(1) GRA reading of 'sex' in the EqA10 would infringe the Convention rights of, in particular, women, girls and minority sexual orientations.

(1) General principles of statutory interpretation

3. This appeal turns on a question of statutory interpretation: the meaning of 'sex' – and the related terms 'man' and 'woman' – in the EqA10. The Inner House suggested (at §53) that the meaning of those terms may vary across that Act and that it is neither practicable nor necessary for the court to attempt to examine every provision in which they are used.

4. That is, respectfully, contrary both to the conventional approach to statutory interpretation and to important features of the statutory context in this case. Four particular points may be made. First, statutory provisions *should* be read in the context of the statute as a whole (R (O) v Home Secretary [2023] AC 271, SC, §29 *per* Lord Hodge DPSC). Second, words used in a statute should generally be given a constant and predictable interpretation by reference to their ordinary meaning, in order to produce a coherent, stable and workable outcome (Imperial Tobacco v Lord Advocate (2013) SLT 2, SC, §14 *per* Lord Hope JSC). Third, the presumption in favour of a consistent meaning is reinforced in this instance because the protected characteristics set out in Chapter 1 of Part 2 of the EqA10, including 'sex' as defined in s11, provide the foundations on which the whole architecture of rights and protections under the EqA10 is built. Fourth, the related terms 'man' and 'woman' are given further general definitions in s212, further reinforcing the presumption that Parliament intended them to have consistent meanings throughout the Act.

5. Therefore, the term 'sex' and related expressions in the EqA10 should be given a consistent meaning, to be ascertained by reference to the whole statutory context, taking account of all relevant provisions of that Act. Moreover, since the particular issue before the Court is whether those terms in the EqA10 should be read as modified by s9(1) GRA, it is relevant to consider both the nature of s9(1) and the purposes of both statutes in order to ascertain which interpretation best gives effect to those purposes (see Uber BV v Aslam & others [2021] ICR 657, SC, §70 *per* Lord Leggatt).

(2) The purposes of the GRA and EqA10

The GRA

6. The GRA was enacted in response to the decisions of the Strasbourg Court in Goodwin v United Kingdom (2002) 35 EHRR and the House of Lords in Bellinger v Bellinger [2003] 2 AC 699.

7. In Goodwin, the Court held that the *'difficulties and anomalies of the applicant's situation as a post-operative transsexual'* (§89) and inability to marry a man breached Articles 8 and 12. The *'difficulties and anomalies'* in question were the practical effects on the applicant's life of the lack of legal recognition for gender identity, and the resulting sense of *'discordance'*, in relation to matters such as pensions and retirement age (§§76-77).

8. Importantly, although alleged discrimination in employment formed part of the factual background in Goodwin (§§15-16), the Court noted that, by the time of its judgment, UK law provided protection against discrimination in employment for transsexual persons (whether pre- or post-operative) as a distinct protected group pursuant to the Sexual Discrimination (Gender Reassignment) Regulations 1999 (§§43-45). Nothing in the judgment suggests that the Court considered that protection inadequate.

9. Bellinger concerned the specific issue of marriage, again in relation to a post-operative transwoman. The UK Government had not yet implemented a domestic mechanism to address Goodwin. The House of Lords therefore issued a declaration of incompatibility in respect of the Matrimonial Causes Act 1973 (§§50-55 *per* Lord Nicholls).

10. In both cases, the courts recognised that the means for achieving recognition of gender reassignment were a matter for the UK Parliament (Goodwin, §§91 & 93; Bellinger, §§41-49 *per* Lord Nichols, §69 *per* Lord Hope). In particular, in Bellinger Lord Nicholls emphasised the complexity of the issue in relation to various areas including education, sport, and the needs of decency (§45). Those are areas which would plainly require account to be taken of the rights and interests of others.

11. In summary, the mischief which the GRA was intended to address – as identified in Goodwin and Bellinger – was the lack of legal recognition for gender reassignment in areas where that had a practical effect on important aspects of relations between the state and the

individual such as marriage, pensions, retirement and social security. Those cases were not concerned with the particular form of protection for trans people against discrimination in employment or other spheres, or with the balance of potentially conflicting rights and interests of different groups in the field of equality and discrimination law, which had already been addressed in UK law by other means.

The EqA10

12. The EqA10 is both a consolidating and amending statute: the long title makes clear that it is intended to both *reform and harmonise equality law'*. The precursor provisions may therefore be relevant to its purposes and interpretation, but it must ultimately be construed on its own terms by reference to its overall purposes.

13. The key purposes of the EqA10 relevant to this case are twofold. The first is to prevent unfavourable treatment, in the form of direct discrimination (s13) or harassment (s26), because of individual protected characteristics by a range of public and private employers, service providers and others. Particular provisions also cover less favourable or unfavourable treatment because of matters that are specific to disability (s15), gender reassignment (s16) and pregnancy/maternity (s17). These forms of unlawful conduct are intended to achieve '*formal equality of treatment'*: there must be no less favourable treatment between otherwise similarly situated people because of their individual protected characteristics, subject to express exceptions (R (E) v Governing Body of JFS & another [2010] 2 AC 728, SC, §56 *per* Baroness Hale JSC).

14. The second key purpose is to address, in relation to the actions of the same range of organisations, group disadvantages based on shared characteristics and, in certain circumstances, to balance the rights and interests of groups sharing different characteristics where they potentially conflict. There are, broadly, three types of provision relevant to this purpose:

    14.1. First, provisions dealing with indirect discrimination (ss19 & 19A) look *'beyond formal equality towards a more substantive equality of results'*: they are concerned with apparently neutral treatment which has a disproportionately adverse impact on people who share a particular characteristic, for reasons which may or may not be apparent but which often arise from the intersection of the treatment in question with specific features shared by the group or underlying societal structures or attitudes

towards people who share the characteristic (JFS, §56 *per* Baroness Hale JSC; Essop & others v Home Office (UK Border Agency) [2017] ICR 640, SC, §§1, 25-26 & 39 *per* Baroness Hale DPSC).

14.2. Second, there are provisions which promote action to address group-based disadvantages and other inequalities of opportunity. These include provisions permitting positive action – both generally (s158) and specifically in relation to recruitment and promotion in the sphere of work (s159) – in respect of *'persons who share a protected characteristic'*, where those persons suffer a disadvantage connected to the characteristic, have needs that are different from those of people who do not share it, or participate in a particular activity in disproportionately low numbers. In addition, there is a Public Sector Equality Duty ('PSED') (s149), which (amongst other things) requires public authorities or other persons exercising public functions to have due regard to the need to advance equality of opportunity between persons who share a relevant protected characteristic and those who do not, taking account of any particular disadvantages, needs or low participation levels, and to foster good relations between such groups. These provisions are intended to *'increase equality of opportunity'* (see the long title), and are concerned with the same sort of group disadvantages as the provisions dealing with indirect discrimination, whether referable to societal structures or attitudes or to material differences between groups.

14.3. Third, the EqA10 contains a variety of exceptions from its main prohibitions to accommodate ordinary, unobjectionable situations where people are treated differently in relation to protected characteristics and/or where there are potentially conflicting rights and interests. These include in particular various situations where sex matters such as sport (s195), separate or single-sex services provided to the public (Schedule 3, §§26-29), single-sex education (Schedules 11-12), and communal accommodation (Schedule 23, §3). There are also general exceptions which apply to any protected characteristic for genuine occupational requirements (Schedule 9, §1) and single-characteristic associations (Schedule 16, §1) and for charities (s193), as well as a scheme of statutory exceptions (Schedule 22).

15. There are two points which, in the context of the present case, merit emphasis in relation to the purposes of the EqA10 identified above. First, the purposes of the group-based rights and protections in the EqA10 recognise that people who share a particular characteristic

often have common experiences or interests, often arising from differences in needs, which give rise to particular disadvantages if they are not met, and which differ from those of other groups: commonality of experience is central.

16. Second, the EqA10 regulates the practical conduct of a wide range of public and private sector employers, service providers and others. Its terms require clear-sighted analysis of group-related advantages and disadvantages. For an employer to regulate its employment policies to avoid unlawful indirect discrimination, it must be able to identify the relevant groups in order to analyse the effect of those policies. Or, for an organisation to consider appropriate positive action, being able to identify membership of a disadvantaged group sharing a particular characteristic is essential. Similarly, in order for a public authority to analyse the impact of its policy-making on different groups, it must be able to identify those groups in order to analyse the features which may disadvantage some groups over others, or affect relations between them. In short, for the various group-based rights and protections to operate effectively, it is essential that there be clarity about how to identify the relevant groups that share particular characteristics.

(3) The nature of s9(1) GRA and limits on its effect

17. Section 9(1) GRA is a deeming provision. At common law, sex is a binary, biological concept (Bellinger, §§11-12 & 36-37 *per* Lord Nicholls, §§56-57 & 62 *per* Lord Hope; Chief Constable of West Yorkshire Police v A (No 2) [2005] 1 AC 51, HL, §3 *per* Lord Bingham, §19 *per* Lord Rodger, §30 *per* Baroness Hale). The effect of s9(1) GRA is that the sex of a person who has obtained a full Gender Recognition Certificate ('GRC') is deemed for relevant legal purposes to be the sex with which they identify; it cannot in fact alter a person's biology and related needs, or the perceptions or beliefs of others (Forstater v CGD Europe & others [2022] ICR 1, EAT, §§97-99 *per* Choudhury P).

18. As a deeming provision, s9(1) GRA should be applied only insofar as is necessary to achieve its purpose and not so as to produce unjust, absurd or anomalous results (Fowler v Revenue and Customs Commissioners [2020] 1 WLR 2227, SC, §27 *per* Lord Briggs; cf also Moulsdale v HMRC [2023] 1 WLR 1264, SC, §3 *per* Lady Rose).

19. Moreover, pursuant to subsection (3), the deeming effect of s9(1) is expressly, and additionally, subject to any other enactment or subordinate legislation. There is nothing in subsection (3) to require express words to displace the effect of s9(1). Subsection (1) is,

therefore, a weak deeming provision, capable of being displaced wherever the language, purpose or context of other legislation so indicates.

20. In particular, where – as under the EqA10 – Parliament has chosen, in a particular sphere of law, to define and regulate the treatment of transgender people and other groups for a *different* purpose by reference to *different* criteria, the deeming effect of s9(1) will be readily displaced, particularly where it would produce unjust, absurd or anomalous results.

21. Therefore, the essential questions that must be asked in respect of the relevant provisions of the EqA10 are:

    21.1. Is it necessary to read 'sex' and related terms as modified by s9(1) GRA in order to achieve the purposes of either statute?

    21.2. Conversely, would adopting a s9(1) reading of 'sex' undermine the purposes, coherence or effectiveness of the EqA10 or otherwise produce unjust, absurd or anomalous results?

22. In addressing those questions, it will be relevant to consider the characteristics of the group of people who have obtained GRCs as compared with other relevant groups. This is relevant because it will be necessary to consider how a s9(1) reading of 'sex', compared with a biological reading, would affect both (a) the composition and coherence of the relevant groups in terms of their shared characteristics, interests and needs and (b) the ability of those whose behaviour the EqA10 is intended to regulate to identify and coherently analyse the effects of their policies and practices on the relevant groups.

23. It is, therefore, relevant to note that, when enacting the GRA, Parliament chose to extend the ability to obtain a GRC to a wider group than *'the case of fully achieved post-operative transsexuals'* that was within the contemplation of the Strasbourg Court in Goodwin (and the House of Lords in Bellinger). Parliament *'did not impose a requirement for surgery or for there to be a transition physiologically to the new gender'* (R (McConnell) v Registrar General for England and Wales [2020] 3 WLR 683, CA, §46 *per* Lord Burnett CJ, King & Singh LJJ).

24. Consequently, possession of a GRC does not necessarily track an individual's appearance or other physiological characteristics relevant to how they may be perceived by others.

This means that the biological sex of a person with a GRC will often be readily perceivable. Moreover, whether someone has a GRC is information to which access is highly restricted (GRA, s22), and so too is personal information about any surgical or medical treatment they have (or have not) had (GDPR, Art. 9).

(4) Analysis of the EqA10

The protected characteristics of gender reassignment and sex

25. The starting point is that in legislating about discrimination, Parliament has chosen to protect gender reassignment as a distinct protected characteristic from sex, using *different* criteria from those used in the GRA to define eligibility for a GRC.

26. That choice was first made when Parliament decided how to give effect to the judgment of the CJEU in P v S & Cornwall County Council [1996] ICR 795, that direct discrimination on grounds of 'sex' under the Equal Treatment Directive 76/207/EC included less favourable treatment of a person *'on the ground that he or she intends to undergo, or has undergone, gender reassignment… by comparison with persons of the sex to which he or she was deemed to belong before undergoing gender reassignment'* (§§20-21).

27. Parliament *could* have chosen to redefine the protected characteristic of 'sex' as including, in respect of each sex, persons of the opposite biological sex who had undergone or were intending to undergo gender reassignment. It did not do so. Instead, by the Sexual Discrimination (Gender Reassignment) Regulations 1999, it inserted new provisions into the Sex Discrimination Act 1975, creating a separate protected characteristic of gender reassignment in s82 of that Act (as amended) and a new s2A prohibiting discrimination on such grounds in the fields of work and vocational training. These provisions were extended to goods and services in 2008, subject to exclusions and exceptions (Sex Discrimination (Amendment of Legislation) Regulations 2008, Sched. 1, para 2).

28. In short, in this area, Parliament chose *not* to conflate sex and gender identity or to provide that a process of gender reassignment changes a person's protected characteristic of sex, but to protect sex and gender reassignment as separate protected characteristics. As noted at paragraph 8 above, that approach was not criticised by the Strasbourg Court in Goodwin.

29. In enacting the EqA10, Parliament chose to retain the separate protection for sex and gender reassignment as distinct protected characteristics. A person's protected characteristic of 'sex' is defined as being either a 'man' or a 'woman' and persons who share that protected characteristic for the purposes of the group-based rights and protections are persons of the same sex (s11). 'Man' and 'woman' are further defined as meaning, respectively, a male or female of any age (s212). The ordinary meaning of those terms corresponds with biological sex.

30. The protected characteristic of gender reassignment under EqA10, s7, is considerably broader than the category of people with a GRC. It includes anyone who *'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'* (s7(1)). Save where otherwise provided[1], the protected characteristic is being a transsexual and, for the purposes of the group-based rights and protections, the relevant group of people who share that characteristic is all transsexual people (s7(3)): not being a transsexual is not a protected characteristic and the group-based rights and protections do not apply to non-transsexuals as a group.

31. To fall within the definition in s7 EqA10, it is not necessary for someone to have, or to intend to apply for, a GRC. In practice, a majority of people with the protected characteristic of gender reassignment do not have a GRC: based on the most recent census data, the ONS estimated that there are approximately 48,000 'trans men' and 48,000 'trans women' in England and Wales[2] and Scotland's Census 2022 found that 19,990 people were trans[3], compared with a total of 8,464 people who have ever obtained a GRC as at June 2024[4].

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[1] E.g. for the purposes of the exception for genuine occupational requirements, a requirement to have a particular protected characteristic can include a requirement not to be a transsexual: EqA10, Sched. 9, §1(3).

[2] https://www.ons.gov.uk/peoplepopulationandcommunity/culturalidentity/genderidentity/bulletins/genderidentityenglandandwales/census2021

[3] https://www.scotlandscensus.gov.uk/news-and-events/scotland-s-census-sexual-orientation-and-trans-status-or-history

[4] https://assets.publishing.service.gov.uk/media/66fd6f9d30536cb927482b33/Main_Tables_Q1_2024_25.ods

Neither possession of a GRC nor the protected characteristic of gender reassignment requires any specific physiological change.

32. In short, therefore, there is no distinction between a person with the protected characteristic of gender reassignment who has a GRC and a person with that characteristic who does not, other than possession of the certificate itself – and no way of distinguishing between them in the absence of that information. In either case, the individual's biological sex may be readily perceivable and may form the basis of discrimination. It is likely that a majority of individuals in both categories will not have had surgery.

33. That being so, to apply a s9(1) reading of 'sex' in the EqA10 would cut across both of the relevant protected characteristics, with the effect that references to a 'woman', and to 'women' as a group sharing the same protected characteristic of sex, would include: (i) biological females who do not have the protected characteristic of gender reassignment; (ii) some biological females who do have the protected characteristic of gender reassignment (i.e. those who identify as male but do not have a GRC); and (iii) some biological males who have the protected characteristic of gender reassignment (i.e. those who identify as female and also have a GRC). But such references would exclude, as well as biological men who do not have the protected characteristic of gender reassignment: (i) some biological females who have the protected characteristic of gender reassignment (i.e. those who identify as male and also have a GRC); and (ii) some biological men who do have the protected characteristic of gender reassignment (i.e. those who identify as women but do not have a GRC). The converse position would apply in respect of references to 'man', and to 'men' as a group sharing the same protected characteristic.

34. Therefore, before even turning to consider the implications for specific rights and protections, it is apparent that to adopt a s9(1) reading of 'sex' as the default meaning in the EqA10 would entail concluding that:

    34.1. Parliament did *not* intend that the group-based rights and protections provided for under the EqA10 should apply to biological women and girls (or men and boys) as a distinct group, but only to the more complex groupings constituted as set out above;

    34.2. Parliament intended that conduct under the EqA10 in relation to sex-based rights and protections should be regulated by reference to categories that can only be

ascertained by knowledge of who possesses a certificate which is subject to strong limits on its disclosure (GRA, s22); and

34.3. Parliament intended that people with the protected characteristic of gender reassignment should be considered differently under the EqA10 depending on whether or not they possess a (confidential) certificate, even though in many cases there will be no material distinction in their personal characteristics, either as regards gender identity, or appearance, or as to how they are perceived or treated by others or society at large.

35. The absurdity and incoherence of a s9(1) construction is, therefore, immediately apparent. For a statute which requires a wide range of public and private organisations to analyse and regulate their policies and conduct by reference to distinct groups sharing protected characteristics, to define those groups in a way that would make them impossible to identify in practice is unsupportable.

36. In the intervener's experience, uncertainty and ambiguity about the circumstances in which it is legitimate to treat biological women and girls, in particular, as a distinct group whose interests need to be considered and protected, has the practical effect that many organisations feel deeply inhibited in doing so. Moreover, since it is in practice impossible for organisations to distinguish between people with the protected characteristic of gender reassignment who do and do not have a GRC, many organisations feel pressured into accepting *de facto* self-identification for the purposes of identifying whom to treat as a woman or girl when seeking to apply the group-based rights and protections of the EqA10 in relation to the protected characteristic of sex. For example, the intervener's research[5] has found many previously women-only and lesbian groups, organisations, and charities coming under pressure, including from funders and commissioners, to include men who identify as women. Many organisations coming under this pressure have decided to accept members or users of the opposite sex if they hold a GRC (or in some cases on the basis of self-ID). These decisions do not take place primarily at the point where a transgender person presents to a 'frontline' service provider, but as a matter of policy, when criteria are

[5] https://sex-matters.org/wp-content/uploads/2024/01/Womens-services -a-sector-silenced-Sex-Matters.pdf

being set by public bodies about funding, contracting and supporting services. A common consequence is that women who dissent from this approach will self-exclude.

Direct discrimination and harassment

37. It is well-established that both direct discrimination *'because of'* a protected characteristic (EqA10, s13) and harassment *'related to'* a protected characteristic (EqA10, s26) encompass not only cases where the victim has the protected characteristic in question, but also where the discriminator thinks that the victim has the characteristic, or in some other way associates the victim with the protected characteristic: the requirement is simply that the protected characteristic is a ground for the treatment in question (see English v Thomas Sanderson Ltd [2009] ICR 543, CA, §§37-40 *per* Sedley LJ; §§45-46 *per* Lawrence Collins LJ; Chief Constable of Norfolk Constabulary v Coffey [2020] ICR 148, CA, §11 *per* Underhill LJ; and this approach has received positive comment in this Court: JFS, §85 *per* Lord Mance JSC).

38. Therefore, a s9(1) GRA reading of 'sex' in the EqA10 is not necessary in order to achieve the purposes of either statute as regards protection from direct discrimination or harassment. A man who identifies as a woman who is treated less favourably or harassed because of the protected characteristic of gender reassignment, will be able to claim on that basis. A man who identifies as a woman who is treated less favourably or harassed not because of being trans (i.e. the protected characteristic of gender reassignment), but because of being perceived as being a woman, will be able to claim for direct sex discrimination or harassment related to sex on that basis. This does not entail any practical disadvantage and there will be no 'discordance' between the individual's position in society and the ability to claim on this basis: indeed, that position would be the premise of the claim. A s9(1) reading of sex is not necessary here, and the approach applies equally whether or not the claimant has a GRC.

39. Conversely, if a s9(1) GRA reading were adopted, it would have the effect of removing an important aspect of group protection for men or women in the way that direct discrimination under s13 has, to date, been understood to operate. It is well-established that where a policy or rule is applied which applies a criterion that is 'indissociable' from sex in order to determine entitlement to some benefit, that will necessarily constitute unlawful direct discrimination that cannot be justified (see e.g. James v Eastleigh Borough Council

[1990] ICR 554, HL, 566E *per* Lord Bridge). But in order for that principle to apply, there must be an *'exact correspondence'* between the protected characteristic and the criterion in question (Preddy v Bull [2013] 1 WLR 3741, SC, §21 *per* Baroness Hale DPSC). A s9(1) GRA reading of 'sex' under the EqA10 would have the effect of preventing that principle from applying in relation to application of a criterion which is indissociable from biological sex (e.g. one based on a sex-based biological characteristic) because that criterion would not be indissociable from the more complex grouping that would then constitute members of the relevant 'sex' as modified by s9(1) (outlined at paragraph 33 above). Instead, the application of such a criterion would fall to be considered as a case of indirect discrimination, with the potential for a justification defence. A s9(1) GRA reading of 'sex' would therefore remove this important aspect of protection in relation to direct discrimination under s13. It cannot be that the GRA is intended to remove such protection.

Indirect discrimination

40. Pursuant to EqA10, s19, unlawful indirect discrimination occurs where the discriminator applies a provision, criterion or practice ('PCP') which places the claimant and persons who share the same protected characteristic at a particular disadvantage, and the treatment in question cannot be justified. Pursuant to s19A, that protection is extended to persons who do not share the same protected characteristic but suffer the same disadvantage as those who do. That provision was introduced with effect from 1 January 2024 by the Equality Act 2010 (Amendment) Regulations 2023 (made under the Retained EU Law (Revocation and Reform) Act 2023 ('REULA'), ss12(3) & 13) in order to preserve the effect of EU law, in particular the effect of the CJEU's judgment in Chez Razpredelenie Bulgaria AD v Komisia za zashita ot discriminatsia (Case C-83/14) [2015] IRLR 746. In that case, the Court held that the principle of discrimination by association extends to both direct and indirect discrimination, so that where a group which shares a protected characteristic is put at a particular disadvantage, a person who is also put at that same disadvantage may claim even if she does not share the characteristic in question (§§56-61). The EAT has confirmed that, prior to the UK's exit from the EU and subsequently pursuant to the European Union (Withdrawal) Act 2018 (before that Act was in turn superseded by REULA), the EqA10 would have been interpreted so as to give effect to Chez (British Airways plc v Rollett & others [2024] EAT 131, §61 *per* Eady P).

41. Consequently, transgender people (irrespective of whether they have a GRC) are again, and at all material times have been, protected by the indirect discrimination provisions of the EqA10 without the need for a s9(1) GRA reading of 'sex', both in respect of any particular disadvantage suffered by them as a group sharing the characteristic of gender reassignment and, where members of the sex with which they identify are put at a particular disadvantage, insofar as they are also put at that disadvantage. Again, this does not entail any practical disadvantage or involve any 'discordance' between the claim and the individual's position in society: on the contrary, the claim will be founded on the facts of a particular shared disadvantage. Finally, such individuals are also protected in respect of any particular disadvantage which they share with members of their biological sex.

42. Therefore, a s9(1) GRA reading is not required to achieve any relevant purpose of either statute in respect of indirect discrimination. Conversely, if 'sex' here does not mean biological sex, that would undermine the ability to conduct clear and robust analysis of biological women (or men) as a class with a shared characteristic (see paragraphs 33-34 above). In short, a s9(1) GRA interpretation of 'sex' in the EqA10 would mean concluding that Parliament did not intend biological women (or men) to be a distinct protected group within its core indirect discrimination provision.

Sexual orientation

43. The intervener is conscious that other interveners will make detailed representations on this matter. Briefly, definition of 'sexual orientation' in s12 EqA10 is framed by reference to orientation towards persons of the same sex, the opposite sex, or either sex. If 'sex' is given a s9(1) reading, the coherence of that definition and the rights and protections built upon it would be undermined. At worst, the concept of sexual orientation towards members of a particular 'sex' may be rendered meaningless if 'sex' depends partly on possession of a GRC. At best, possession of a GRC would effect a change in the sexual orientation of the individual in question, and consequently the composition of the groups who share the same sexual orientation (e.g. because a man with a GRC and a sexual orientation towards women would fall to be treated as a lesbian). This would have important implications, in particular, for the rights of minority sexual orientations to associate as such (see below).

44. Conversely, a s9(1) reading of 'sex' within the definition of sexual orientation is not required in order to achieve the relevant legislative purposes: insofar as transsexuals may

be directly discriminated against because they are perceived as gay (or any other sexual orientation) they will be protected by the principles of perceived or associative discrimination; and for the purposes of indirect discrimination, s19A EqA10 will provide protection insofar as they may suffer from the same disadvantage as people with any particular sexual orientation.

Pregnancy discrimination

45. As the Inner House recognised, the provisions relating to pregnancy and maternity discrimination (ss17-18) are expressly confined to 'women'. Other associated provisions are also so confined (see e.g. s13(6), Sched. 3, §14, Sched. 16, §2). Since Parliament has, in s212, provided a single definition of 'woman' for the purposes of the EqA10, if the deeming effect of s9(1) GRA were taken to apply to that definition, then this must mean that Parliament intended to provide protection only for pregnancies of women who do not have GRCs and to exclude transmen (i.e. biological women) with a GRC who may (as illustrated by the circumstances of the claimant in McConnell) become pregnant. This is a strong indicator that Parliament intended that the definitions of 'woman' and 'man' in s212 are intended to have their natural, biological meanings. Thus, not only is the deeming effect of s9(1) limited by the different legislative purposes of the EqA10 and GRA and by the absurd consequences that would follow from its application to the EqA10, but s212 constitutes a 'provision made' for the purposes of s9(3) GRA.

Public Sector Equality Duty and positive action

46. The intervener has a particular concern in relation to the effect of the interpretation of the courts below on the ability properly to comply with the PSED (EqA10, s149). Any organisation subject to the PSED must have due regard, in considering its rules, policies or practices, to the matters set out in s149. It is required to undertake an Equality Impact Assessment. That exercise requires it to consider the question of social groups and protected categories. The possibility of a s9(1) GRA reading of 'sex' thus raises a crucial question: are biological males who identify as women and have GRCs people whose interests should be considered as part of the group that share the protected characteristic of being 'women', or must the organisation consider the interests of biological female people separately from those who do not share that characteristic, including transwomen? If the former, the PSED will require consideration of an entirely artificial group containing some

but not all biological females, and some but not all males who are protected under gender reassignment. There is nothing that this group would have in common beyond state documentation. This approach would involve obvious absurdity. For example, where there are conflicts of interests between biological women and biological males with a GRC, for example in relation to circumstances where privacy and decency are relevant, a s9(1) GRA reading would mean that public authorities would not be able to treat them as different groups whose interests should be considered separately.

47. A similar question arises in relation to the provisions which permit positive action to address particular disadvantages, needs or underrepresentation of persons who share a protected characteristic (EqA10, ss158-9). Thus, in that context, the possibility of a s9(1) GRA reading of 'sex' raises the question: can an organisation consider the needs of, or disadvantage to, biological women separately from biological males, and if it identifies a need for positive action must it include biological males with GRCs (but not those without) within that action, and exclude biological females with GRCs?

48. In the case of both the PSED and positive action provisions, references to the particular needs, disadvantages or participation levels of a particular group must, as regards the protected characteristic of sex, be references to the different needs, experiences and circumstances of men and women. But the purpose of addressing those is undermined if 'women' includes biological men with a GRC because those biological men will not have the experiences or characteristics of a woman. By definition, they will have male bodies, and will have grown up and lived as boys and men and could never have the same experiences as a biological woman. That is self-evident in relation to matters such as menstruation, risk of pregnancy, pregnancy and maternity. Many transsexuals will always be objectively identifiable as transsexuals and, as a result, will not be treated in society in the same manner as biological women (and vice versa). They cannot, therefore, have the same experience. These are not matters of ideology but obvious fact.

49. The different needs of, or disadvantages to, transsexual people (whether or not they have a GRC) can – and in the case of the PSED must – be considered *separately* under the relevant provisions. Partially conflating the distinct characteristics impedes clarity of analysis of the different needs which arise from different experiences and circumstances, to the detriment of both. Indeed, a s9(1) GRA reading of 'sex' would imply that the needs and interests of transsexuals without a GRC are different from those with a GRC, though their

circumstances will often be indistinguishable. The guidance at issue in the present case is a good illustration of the absurd and illogical results of a s9(1) reading in this context: even if one were to treat a transwoman as meeting the need for greater representation of women, what possible difference could it then make to a Board whether a transsexual member does or does not hold a GRC?

50. A s9(1) GRA reading of 'sex' in the EqA10 is not, therefore, necessary in order to meet the purposes of either statute in relation to the PSED or positive action provisions; whereas such a reading would both undermine the purposes of those provisions and impede clarity of analysis of the different needs of groups with different protected characteristics under them. It is important to emphasise that these provisions deal with potentially conflicting *group* interests in the particular field of equality and discrimination law in which Parliament has chosen to protect sex and gender reassignment as distinct protected characteristics; they do not concern individual rights that affect how transsexuals are treated in their general lives, or their ability to bring claims for any form of unlawful discrimination. They do not, therefore, engage the purposes for which the GRA was enacted.

Single sex services and accommodation

51. Paragraphs 26-28 of Schedule 3 to the EqA10 provide for exceptions from both sex discrimination (§§26-27) and gender-reassignment discrimination (§28) where one or more of the conditions justifying the provision of separate or single-sex services to the public or a section of the public in §§26-27 is met. They are plainly intended to allow for separate or single-sex services based on biological sex where those conditions are met. However, the gateway conditions cannot be coherently applied if 'sex' itself does not mean biological sex. For example, for the purposes of the condition under §27(2) (that only persons of one sex have need of the service), it is difficult to envisage any circumstances in which only persons of one sex would have need of a particular service if each 'sex' includes members of the opposite biological sex with a GRC and excludes members of the same biological sex with a GRC. Or, for the purposes of the condition under §27(6) (that a person of one sex might reasonably object to the presence of a person of the opposite sex), on a s9(1) GRA reading, it is difficult to imagine circumstances in which it might be reasonable for a woman to object to members of the opposite 'sex', which would include transwomen who do not have a GRC, but not to members of her own 'sex' as deemed by s9(1) GRA – i.e. biological men with a GRC (who may be indistinguishable from transwomen who do not

have a GRC). Whatever reasonable objection she might have, it cannot be grounded on possession or lack of a certificate, especially when she is unlikely to have that information at the point at which objection might be raised.

52. Similar points may be made about the exceptions for single-sex communal accommodation (Sched. 23, §3), which also depend in the first instance on the circumstances being such that *'for reasons of privacy [the accommodation] should be used only by persons of the same sex'* (§3(5)). If 'sex' is given a s9(1) reading, it is difficult to envisage any circumstances in which this gateway could sensibly be met, since there would be no rational basis for saying that *'for reasons of privacy'* any particular accommodation *'should'* be used by women and transwomen with a GRC, but not by transwomen without a GRC, who may be indistinguishable from those with.

53. Again, therefore, a s9(1) GRA reading produces incoherence. Moreover, it is not necessary to achieve the purposes of either statute, since on any view Parliament intended here to allow for the provision of separate or single-sex services for women which exclude <u>all</u> (biological) men (or vice-versa). The straightforward reading of the provisions, applying a biological meaning of 'sex', is that the exception for sex discrimination under §§26-27 allows for the provision of single-sex services, and the exception for gender reassignment discrimination under §28 allows, in addition, for the exclusion of members of the sex to which the services are provided where they have the protected characteristic of gender reassignment and their exclusion is a proportionate means of achieving a legitimate aim. An equivalent interpretation can be applied to the communal accommodation provisions under Sched. 23, §3.

54. For example, in the case of a rape crisis service, it is self-evident that women using the service would want and reasonably expect to find a female-only space. The presence of a biological man in such a situation effectively destroys the purpose of such a service and, worse still, can serve to retraumatise the very women for whom the service is intended to be provided. The impact on women of facing (or hearing) male individuals in women's refuges or counselling services can be devastating. Many women self-exclude from the services, or are compelled to pretend that men are women, at great cost to their mental health. A biological reading of 'sex' would therefore allow providers of such services to exclude all biological males, including transwomen with a GRC, pursuant to §27 – as Parliament plainly intended. In addition, §28 would allow for the exclusion of transmen

(i.e. biological women with the protected characteristic of gender reassignment) if that were a proportionate means of achieving a legitimate aim, for example because they have undergone a process of medical masculinisation which gives rise to a legitimate objection from other service users.

Single sex higher education institutions

55. The exception from sex discrimination provisions for single-sex higher education institutions (EqA10, Sched. 12, §1) would not allow such institutions to be limited to biological women if 'sex' does not mean biological sex because there is no separate exception for gender reassignment discrimination in that regard. It was plainly Parliament's intention to allow single-sex higher education institutions and there can be no rational basis for a s9(1) reading which would oblige such institutions to admit transsexual members of the opposite (biological) sex with a GRC, whose biological sex is likely to be readily identifiable, whilst excluding others without a GRC, whose circumstances may be materially indistinguishable.

Single characteristic associations and charities

56. Similarly, the exception from sex discrimination provisions for single characteristic associations (EqA10, Sched. 16, §1) would not permit such associations with 25 members or more (s107(2)) to be limited to biological women if 'sex' does not mean biological sex, because *not* being transsexual is not a protected characteristic and so there is no possibility of restricting membership of such an association to non-transsexuals. Nor would single-sex charities be able to use the exception at s193, which allows them to restrict the provision of benefits to persons who share a protected characteristic in pursuance of a charitable instrument.

57. The result of a s9(1) GRA reading of 'sex' in relation to these exceptions would therefore make it impossible for any women's association or charity – including, for example, a mutual support association for women who are victims of male sexual violence, a lesbian social association, a breastfeeding support charity, or a non-competitive women's sporting association (noting that s195 EqA10 applies only to competitive sport) – to be set up or to pursue a dedicated purpose which is directed at the needs of biological females. That cannot have been Parliament's intention: it plainly intended that single-sex associations should be permitted along with other single-characteristic associations. To require such associations

to reconceive of their objects as targeting a group that does not correspond with their original aims, and to allow members of the opposite (biological) sex with a GRC to join would significantly undermine the right to associate on the basis of biological sex (or sexual orientation based on biological sex).

(5) Interference with Convention Rights

58. A s9(1) GRA reading of 'sex' in the EqA10 would involve an infringement of Article 8 in relation to (at least): (i) the consequential inability to consider the interests of biological women separately from transwomen for the purposes of the PSED and positive action provisions; and (ii) the practical impact on the ability coherently to operate and apply the exceptions for single-sex services/accommodation and single-characteristic associations in circumstances where the privacy and dignity of women are engaged. In addition, the limits on the exception for single-characteristic associations if a s9(1) GRA reading were applied clearly infringe Article 11.

59. Since a s9(1) GRA reading of 'sex' in the EqA10 is not necessary to meet the purposes of the GRA to provide adequate recognition for gender reassignment in UK law, those infringements cannot be justified. Accordingly, s3 HRA requires that such a reading be avoided: 'sex' in the EqA10 must be read as referring to biological sex.

Conclusion

60. A s9(1) GRA reading of 'sex' in the EqA10 is not necessary to meet the legislative purposes of either statute, would lead to absurd, unjust and irrational results, would run counter to the legislative purposes of the EqA10, and would infringe the rights of women and girls under Articles 8 and 11. Accordingly, such an interpretation should be avoided and 'sex' in the EqA10 should be construed as referring to biological sex.

BEN COOPER KC

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