Case No: UKSC 2024/0042

In the Supreme Court of the United Kingdom
ON APPEAL FROM
SECOND DIVISION OF THE INNER HOUSE
Neutral citation: [2023] CSIH 37

BETWEEN:

FOR WOMEN SCOTLAND LTD

Appellant/Petitioner

-and-

SCOTTISH MINISTERS

Respondent

-and-

THE LORD ADVOCATE

First Interested Party

-and-

SEX MATTERS LIMITED

First Intervener

-and-

(1) SCOTTISH LESBIANS
(2) THE LESBIAN PROJECT
(3) LGB ALLIANCE

Second Interveners

-and-

THE EQUALITY AND HUMAN RIGHTS COMMISSION

Third Intervener

-and-

AMNESTY INTERNATIONAL UK

Fourth Intervener

AMNESTY INTERNATIONAL UK WRITTEN INTERVENTION

A. INTRODUCTION & OVERVIEW

1. This appeal raises a point of statutory construction regarding the meaning of "*sex*" (and associated meaning of *"man"* and *"woman"*) in the Equality Act 2010 (**"EA 2010"**) in the case of a person with a full Gender Recognition Certificate (**"GRC"**), including pursuant to the legal effect of section 9 of the Gender Recognition Act 2004 (**"GRA 2004"**).

2. Amnesty International United Kingdom (**"AIUK"**) makes these written submissions pursuant to the order dated 7 October 2024. AIUK's central submission is that – to the extent there is in fact any real uncertainty on the issue at all – human rights principles and values (applicable to the Court's task of statutory construction on well-established principles) put the correctness of the lower Courts' construction beyond doubt.

3. AIUK develops three broad submissions:
   a. The relevant human rights principles and values identified in the European Court of Human Rights' (**"ECtHR"**) case law, which the GRA 2004 was enacted to give domestic effect to, necessarily inform the intent behind, and therefore the scope and any suggested limits of, the deeming provision in section 9 GRA 2004. Treating a person with a GRC other than in accordance with their acquired gender in respect of the fundamental matter of avoiding discrimination on the grounds of sex in the spheres of public life governed by the EA 2010 is inimical to these principles and values;

   b. The lower Courts' construction is confirmed (and indeed required) by European Community/Union sex discrimination case law applicable to the construction of the EA 2010 which specifically holds that "*sex*" cannot - consistently with applicable human rights principles - be given a purely biological meaning;

   c. Finally, any suggestion that the lower Courts' construction leads to unjust, absurd or anomalous results from a human rights perspective - such as in the operation of the EA 2010 exceptions - is entirely misplaced. The lower Courts' construction is in harmony with the European Convention on Human Rights (**"the Convention"**)

rights potentially engaged, when properly understood. Indeed, it is the petitioner's construction that raises potentially significant issues of human rights incompatibility and risks preventing a fair balance being struck by the EA 2010.

4. AIUK acknowledges the importance and sensitivity of linguistic choices within the broader societal context in which the question of law before the Court arises. Certain language used in leading human rights cases from only two decades ago (and *a fortiori* from other statutory contexts) can seem outmoded or inapt. Equally, it does not assist the clarity of a legal submission to attempt to re-write or reformulate language used in key relevant case law. AIUK has sought to strike a balance between these competing considerations in its written submissions below.[1]

B. HUMAN RIGHTS AS CRITICAL LEGISLATIVE CONTEXT

Why human rights are relevant

5. As is well-known, the GRA 2004 was enacted to give trans people with a GRC legal recognition in their acquired gender in order to give effect to requirements of international human rights law in response to the Grand Chamber's adverse decision in *Goodwin v The United Kingdom* (2002) 35 EHRR 18 (and thereafter the declaration of incompatibility made by the House of Lords in *Bellinger v Bellinger* [2003] UKHL 21; [2003] 2 AC 467).[2]

6. The key legislative mechanism through which this is achieved is found in section 9 GRA 2004, which provides that:
   a. Where a GRC 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)*": section 9(1), emphasis added. It is clear that gender and sex are

[1] For example, in these submissions, where possible AIUK use the term trans person / trans man / trans woman instead of the term "transsexual". AIUK refers to a non-trans woman / man as a cisgender woman / man respectively. Further, AIUK refers to a trans person without a GRC as a having the sex assigned at birth (**"SAAB"**) of female or male as appropriate, for the purposes of considering the statutory construction regarding the meaning of "sex" (and associated meaning of "man" and "woman") in the EA 2010.

[2] See GRA Explanatory Memorandum: Summary and Background; and see also *R (Castellucci) v. Gender Recognition Panel* [2024] EWHC 54 (Admin); [2024] 2 WLR 1201 at [71], [113].

here used interchangeably, as is indeed commonly the case: *R (Elan-Cane) v Secretary of State for the Home Department* [2021] UKSC 56; [2023] AC 559 at [52];

b. The effect of section 9(1) is to "…*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)*": section 9(2) GRA 2004. Thus the Explanatory Notes to section 9[3] explains that ss.9(1) *"… 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 male would, in law, become a woman for all purposes…"* and specifically gives as one of the two examples that such a person *"…would … be entitled to protection as a woman under the Sex Discrimination Act 1975"* **("SDA 1975")** (para. 27);[4] and

c. Section 9(1) is subject to exceptions contained elsewhere in the GRA 2004 or contained in any other enactment or subordinate legislation: section 9(3). As touched on in Sections C and D, no such exception is to be found in the language of the EA 2010, which consolidated the SDA 1975 along with other equality legislation.

7. Section 9 GRA 2004 recognises in law a trans person with a GRC as having the sex of their acquired gender, notwithstanding their SAAB. This can be characterised as a "*deeming provision*". On well-established principles, deeming provisions must be construed on the following basis:

[3] On the permissibility of recourse to Explanatory Notes as an aid to construction see *R (Westminster City Council) v National Asylum Support Service* [2002] UKHL 38, [2002] 1 WLR. 2956 at [5] (per Lord Steyn) and Bennion, Bailey and Norbury on Statutory Interpretation (8th Edition), section 24.14.

[4] The same point was made by Lord Filkin, Under-Secretary of State in the Department of Constitutional Affairs, when introducing the Gender Reform Bill in the House of Lords on 18 December 2003. In explaining the provision that became GRA 2004 s 9, he said (Vol 655, Col 1322) "*On the important issue of discrimination, Clause 9 makes it clear that a trans […] person would have protection under the Sex Discrimination Act as a person of the acquired sex or gender. Once recognition has been granted, they will be able to claim the rights appropriate to that gender*."

"(1) The extent of the [legal effect][5] created by a deeming provision is primarily a matter of construction of the statute in which it appears;

(2) For that purpose the court should ascertain, if it can, the purposes for which and the persons between whom the [legal effect of the deeming provision] is to be resorted to, and then apply the deeming provision that far, but not where it would produce effects clearly outside those purposes;

(3) But those purposes may be difficult to ascertain, and Parliament may not find it easy to prescribe with precision the intended limits of the artificial assumption which the deeming provision requires to be made.

(4) A deeming provision should not be applied so far as to produce unjust, absurd or anomalous results, unless the court is compelled to do so by clear language.

(5) But the court should not shrink from applying the [legal effect] created by the deeming provision to the consequences which would inevitably flow from the [legal effect] being real. As Lord Asquith memorably put it in East End Dwellings Co Ltd v Finsbury [1952] AC 109 at 133 … The statute says that one must imagine a certain state of affairs. It does not say that, having done so, one must cause or permit one's imagination to boggle when it comes to the inevitable corollaries of that state of affairs."[6]

8. The "extent" of the deeming provision in section 9(1) – i.e. "*for all purposes*" – is clear, as is the breadth of the underlying purpose, and a court must not shrink from the inevitable consequences. However, to the extent that there remains any doubt as to the extent and limits of the section 9 deeming provision, the Court must look to the legislative purpose behind the deeming provision, namely here the Convention case law which the GRA 2004 was enacted to give domestic effect to.[7] In AIUK's submission, consideration

[5] The language of a "*statutory fiction*" used by Lord Briggs in this guidance the context of a tax statute is obviously inapt to the present context in which the very purpose of the provision is to *"…align the legal position with social and psychological reality*.": see R(C) v Secretary of State for Work and Pensions [2017] UKSC 72, [2017] 1 WLR 4127 at [28] and further below.

[6] Fowler v Revenue and Customs Commissioners [2020] UKSC 22, [2020] 1 WLR 2227 at [27] per Lord Briggs (with whom the other Justices agreed). See also *Bennion, Bailey and Norbury on Statutory Interpretation* (8th Edition), section 17.8; DCC Holdings (UK) Ltd v Revenue and Customs Comrs [2010] UKSC 58; [2011] 1 WLR 44 at [37]–[39]; Szoma v Secretary of State for Work and Pensions [2005] UKHL 64, [2006] 1 AC 564 at [25]; and Western Heritable Investment Co. Ltd. v Husband [1983] 2 AC 849.

[7] This submission also reflects the modern approach to statutory interpretation as being contextual and purposive: see for example, R (Quintavalle) v. Secretary of State for Health [2003] UKHL 13; [2003] 2 AC 687 (per Lord

of these rights (and the underlying values which the rights protect) strongly confirms the lower Courts' conclusion.

The human rights case law

Goodwin

9. In *Goodwin* the ECtHR sitting as a Grand Chamber held unanimously that the lack of legal recognition given to the applicant's gender reassignment breached the positive obligation under Article 8 to ensure respect for her private life. The ECtHR also found a breach of Article 12. As Lord Nicholls observed in *Bellinger*, the ECtHR's judgment in *Goodwin* was "*wide-ranging*"; it was not simply "*a 'marriage' case*" [22].[8] Rather the applicant's complaint was that across multiple dimensions of human interaction in life in the United Kingdom she, as a "*post-operative male to female trans [woman]*" [12], was subjected to discriminatory and humiliating treatment and deprived of fundamental legal protections. The applicant's complaint included, for example, her inability to secure a remedy for work-place sexual harassment in the Industrial Tribunal as she was considered in law to be a man [15].

10. The ECtHR's judgment in *Goodwin* reflects a number of themes. **First**, the values of "*human dignity*" and "*human freedom*" underpinned the ECtHR's conclusion on Article 8, with the ECtHR describing these as "*the very essence of the Convention*" [90]. The ECtHR stated [90]:

> "*Under Article 8 of the Convention in particular, where the notion of personal autonomy is an important principle underlying the interpretation of its guarantees, protection is given to the personal sphere of each individual, including the right to establish details of their identity as individual human beings. In the twenty first century the right of trans [persons] to personal development and to physical and moral security in the full sense enjoyed by others in society cannot be regarded as a matter of controversy requiring the lapse of time to cast clearer light on the issues involved. In short, the unsatisfactory situation in which post-operative trans*

Bingham at [8], and Lord Steyn at [21]); and *Test Claimants in the FII Group Litigation v. HMRC* [2020] UKSC 47; [2020] 3 WLR 1369 per Lord Reed and Lord Hodge at [155].

[8] See also Lord Hope who articulated the question raised in *Goodwin* as being "*whether it was a breach of [the applicant's] Convention rights for legal recognition to be denied to their new sexual identity*" [63].

[persons] live in an intermediate zone is not quite one gender or the other is no longer sustainable." (emphasis in underline added)

11. **Second**, the ECtHR highlighted the importance of consistency in the law, noting that "*serious interference with private life can arise where the state of domestic law conflicts with an important aspect of personal identity*" [77]. This discordance was not a "*minor inconvenience arising from a formality*" [77]. Rather, a "*conflict between social reality and the law arises which places the trans [person] in an anomalous position, in which he or she may experience feelings of vulnerability, humiliation and anxiety*" [77]. Accordingly, as the Supreme Court put it in *R(C) v Secretary of State for Work and Pensions* [2017] UKSC 72, [2017] 1 WLR 4127 at [28], the GRA 2004 "*…sought, so far as possible, to align the legal position with social and psychological reality*."[9]

12. Relatedly, **third**, coherence of the administrative and legal practices within the domestic system are important factors in the assessment to be carried out under Article 8, the ECtHR noted the illogicality of the state authorising and financing treatment and surgery and yet not recognising the legal implications of the result to which the treatment leads [78].

13. **Fourth**, the ECtHR held that biological factors alone could not be decisive in denying legal recognition to trans people (at [82] in the context of Article 8, and [100] in the context of Article 12).

14. **Overall**, the ECtHR held that the United Kingdom could no longer claim that the legal recognition of the acquired gender of trans people fell within the margin of appreciation under Article 8, save as regards the appropriate means of achieving recognition of the right protected under the Convention [93].[10] The ECtHR also found a breach of Article 12 [97]-[104]. The ECtHR considered Article 14, noting that the lack of legal recognition of the applicant's change of gender lay at the heart of the applicant's complaint under Article 14, but that these issues had already been examined under Article 8, resulting in

[9] Per Lady Hale, with whom the other judges agreed.

[10] As noted in *Bellinger*, the decision of the ECtHR was "*essentially prospective in nature*" [24].

the finding of a breach. The ECtHR therefore declined to make any separate finding under Article 14 [108].

The origins of *Goodwin*

15. The landmark decision in *Goodwin* did not come out of the blue. Early decisions of the European Commission on Human Rights (**"the Commission"**) and the ECtHR, recognised what it refers to as "sexual identity" as "*part of what one might call the core sense of self*",[11] but the ECtHR in particular had stopped short of the broad legal conclusion eventually reached in *Goodwin* on the basis that until then the issues arising generally remained within Member States' margin of appreciation.

16. This case law - and the associated developments in the legislation, case law and values of Member States - are distilled and analysed by Lord Reed in an International Bar Association lecture subsequently updated and published following the decision in *Goodwin*.[12] Lord Reed noted as of particular interest the human rights decision of the Bundesverfassungsgericht in 1978 requiring legal recognition of trans people founded in part on Article 1 of the Basic Law guaranteeing protection of human dignity and Article 2 of the Basic Law guaranteeing the right to self-determination.[13]

The post-*Goodwin* case law

17. There are a number of aspects of the Strasbourg case law after *Goodwin* which deserve emphasis.

18. **First**, the ECtHR has continued to reiterate that human dignity, human freedom and self-determination underpin the recognition of "sexual identity" as an aspect of private life.

[11] The description of Lord Reed in *Transsexuals and European Human Rights Law* (2005) Journal of Homosexuality 49, at 55. See e.g. *Van Oosterwijck v. Belgium* (1980) 3 EHRR 557 in which the Commission described the applicant's "*sexual identity resulting from his changed physical form, his psychical make-up and his social role*" as being an essential element of his personality [52] and in *Rees v. United Kingdom* (1987) 9 EHRR 56*,* the Commission described sex as "*one of the essential elements of human personality*", noting that Article 8 must be "*understood as protecting such an individual against the non-recognition of his/her changed sex as part of his/her personality*" [43]. See also for example the powerful dissent of Judge Martens in *Cossey v. United Kingdom* (1991) 13 EHRR 622 stating that "…*Human dignity and human freedom imply that a man should be free to shape himself and his fate in the way that he deems best fits his personality*" (para 2.7, page 648).

[12] Lord Reed, *Transsexuals and European Human Rights Law* (2005) Journal of Homosexuality 49, at 55.

[13] *Ibid* pp. 60-61.

In *Van Kück v. Germany* (2003) 37 EHRR 51 at [69] the ECtHR noted that the concept of private life was "*a broad term not susceptible to exhaustive definition*", but which covers the physical and psychological integrity of a person such that gender identification falls within the personal sphere protected by Article 8. Further, "*personal autonomy is an important principle underlying the interpretation of its guarantees*", and "*the very essence of the Convention being respect for human dignity and human freedom, protection is given to the right of trans [persons] to personal development and to physical and moral security*".[14]

19. The matters that fall to be considered in determining a State's positive obligations under Article 8 therefore include factors relevant to the applicant (the importance of the interest at stake and whether "*fundamental values*" or "*essential aspects*" of private life are at stake): see the decision of the Grand Chamber in *Hämäläinen v. Finland* (2014) 37 BHRC 55 at [66].[15]

20. **Second**, the ECtHR has continued to emphasise the importance of consistency and coherence in domestic law when determining a state's positive obligations under Article 8. Thus, one of the factors weighing on the side of the applicant is the "*impact on the applicant of a discordance between the social reality and the law, the coherence of the administrative and legal practices within the domestic system being regarded as an important factor in the assessment carried out under [Article 8]*": *Hämäläinen* at [66].

21. **Third**, the ECtHR in *Goodwin* had in mind "*the case of fully achieved and post-operative trans [persons]*" [93]. In enacting the GRA 2004 Parliament "*went further than the judgment of the Strasbourg Court [at that stage] strictly required*",[16] in not imposing a

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[14] See also *AP, Garçon and Nicot v France* at [93] (*"The Court has also emphasised that the notion of personal autonomy is an important principle underlying the interpretation of the guarantees of Article 8 of the Convention … This has led it to recognise, in the context of the application of that provision to transgender persons, that it includes a right to self-determination …of which the freedom to define one's sexual identity is one of the most basic essentials … It has also found that the right of transgender persons to personal development and to physical and moral security is guaranteed by Article 8 …"*).

[15] Factors which relate to the applicant must be balanced against the impact of the alleged positive obligation at stake on the State concerned, the question being whether the alleged obligation is narrow and precise, or broad and indeterminate, and about the extent of any burden the obligation would impose on the state: *Hämäläinen* at [66].

[16] *R (McConnell) v. Registrar General for England and Wales* [2020] EWCA Civ 559; [2020] 3 WLR 683 at [46].

requirement for surgery or any physiological transition to the new gender.[17] More recent ECtHR case-law has confirmed that the rights conferred by Article 8 are not limited to "*post operative*" trans people. In *AP, Garçon and Nicot v France (*Application Nos. 79885/12, 52471/13 and 52596/13) (unreported) 6 April 2017 the ECtHR noted that its judgments to date had concerned the gender identity of trans applicants who had undergone reassignment surgery and the conditions of access to such surgery. It could not, however, "*be inferred from this that the issue of legal recognition of the gender identity of transgender persons who have not undergone gender reassignment treatment approved by the authorities, or who do not wish to undergo such treatment, does not come within the scope of application of Article 8 of the Convention*" [94]. Rather, "*the right to respect for private life under Article 8 of the Convention applies fully to gender identity, as a component of personal identity. This holds true for all individuals*" [95]. Indeed, a requirement to undergo surgery prior to obtaining legal recognition of an acquired gender breaches Article 8 [135].

22. **Fourth**, although States enjoy a certain margin of appreciation in implementing their positive obligations under Article 8, where a "*particularly important facet of an individual's existence or identity is at stake, the margin allowed to the state will be restricted*": see *Hämäläinen* at [68]; *AP, Garçon and Nicot v France* at [123].

Construing "sex" in the EA 2010 in light of this legislative context

23. As set out above, the fundamental purpose of section 9 GRA 2004 was to give legal recognition to trans people pursuant to the body of human rights case law, and the underlying values of human dignity and personal autonomy as well as legal and administrative coherence. In AIUK's submission, it is inimical to this purpose to classify a person with a GRC other than in accordance with their legally acquired gender for the purposes of sex discrimination legislation.[18]

[17] Section 3 of the GRA 2004 requires the applicant to provide evidence of any treatment that they may have undergone, or which is prescribed or planned for the purpose of modifying sexual characteristics, but no such treatment (and therefore no such surgery) is a necessary condition for a GRC.

[18] As considered in Section C below, this is a conclusion specifically supported by the European sex discrimination case law decided on the basis of the very same human rights and values.

24. To do so would be to consign such persons to an "*intermediate zone [that] is not quite one gender or another*".[19] It would also be productive of deep internal inconsistency within domestic law lacking any objective justification: on the one hand, broad legal effect is given to acquired gender for *"all purposes"* (section 9 GRA 2004), but on the other, this is denied in respect of the fundamental matter of legal protection from sex discrimination in the important spheres of human interaction governed by Parts 3-7 of the EA 2010 (namely, services and public functions, work, education, and associations). Indeed, this would mean that Ms. Goodwin could still be treated as a man before an Employment Tribunal in the very same way she complained about in her ECtHR application ([15]). It would also serve to perpetuate the indignity, humiliation and insecurity of trans persons within everyday life which *Goodwin* required Member States to take action to redress.

25. It also bears reiterating that the EA 2010 is restricted to the specific spheres of activity identified in Parts 3-7 of the Act and does not otherwise apply to the private or domestic sphere.[20] Parts 3-7 themselves in turn contain a number of exceptions which as considered in Section D below were clearly drafted on the premise of the lower Courts' construction.

C. THE SIGNIFICANCE OF EU SEX DISCRIMINATION LAW

26. As is also well-known, the EA 2010 was enacted to consolidate, harmonise and strengthen the preceding disparate equality legislation. Some, but not all, of this predecessor legislation implemented European Directives.[21]

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[19] *Goodwin* at [90].

[20] See e.g. *Dockers Labour Club & Institute Limited v Race Relations Board* [1976] AC 285 per Lord Reid at 291-293 regarding the scope of predecessor service provision discrimination legislation: "…*so far as I am aware, never been in doubt that the Act does not apply to discrimination in the domestic sphere: it is no offence to discriminate between persons in a private household. The reason for that can only be that members of a private household are not, within the meaning of this section, a section of the public. … The true antithesis of public is not domestic but private. Then it had to be determined whether clubs fell within the private or the public sphere*" (all emphasis in underline added). Note also that the EA 2010 does not regulate associations with less than 25 members, see section 107(2)(a) EA 2010.

[21] See Explanatory Notes, paras. 4-5, 10-11 and 21.

27. The lower Courts' construction receives yet further support from case law regarding these European Directives, which the EA 2010 (as consolidating/harmonising legislation) continued to give effect to, and which indeed is still relevant to the construction of "assimilated law" following the UK's exit from the EU.[22]

28. The structure of the EA 2010 is that the "protected characteristics", including the protected characteristic of sex found in section 11 EA 2010, are common to both (i) the different types of discrimination and prohibited conduct, and (ii) to the different spheres of activity to which the EA 2010 applies. Given this structure and the harmonising intent of the EA 2010, it is not plausible that Parliament intended the meaning of "sex" in the EA 2010 to differ as between provisions implementing EU law and provisions that do not. As such, the European case law bears on the meaning of sex for the purposes of the EA 2010 as a whole.

29. In *P v S and anor* (Case C-13/94) [1996] ICR 795 the European Court of Justice held that the concept of sex discrimination under the Equal Treatment Directive (implemented in domestic law by the SDA 1975) encompassed discrimination on grounds of gender reassignment (see at [21]-[22])[23]. *P v S* has been followed and applied in subsequent cases.[24] This can be identified as the origin of the different protected characteristic (of gender reassignment) in the EA 2010: see section 7, re-enacting similar provision in the SDA 1975.[25]

30. Importantly for present purposes, however, the effect of *P v S* extended beyond this. In *Chief Constable of West Yorkshire v A (No. 2)* [2004] UKHL 21, [2005] 1 AC 51, the House of Lords held that the *P v S* line of case law also required trans people to be recognised in their reassigned genders for the purposes of EU sex discrimination

[22] See section 2 (read with the definition of EU-derived domestic legislation in sections 1B(7)) and 6 of the European Union (Withdrawal) Act 2018 (as amended).
[23] And see Advocate General Tesauro at paras. 10-13 and 22-24.
[24] See *KB v National Health Service Pensions Agency* (Case C-117/01) [2004] ICR 781 and also *MB v Secretary of State for Work and Pensions* (Case C-451/16) [2019] ICR 115.
[25] See Explanatory Notes, para. 43.

legislation.[26] It appears that this was not a legal conclusion resisted by the Government (then in the process of promoting the Gender Recognition Bill before Parliament), which intervened only to emphasise the prospective nature of the *Goodwin* ruling: see [47].[27]

31. Baroness Hale explained as follows at [56]:

> "It might be possible to regard [*P v S*] as simply a decision that discrimination on grounds of transsexuality is discrimination "on grounds of sex" for the purpose of the Equal Treatment Directive. But there are many reasons to think that it is not so simple. The purpose of the Directive, set out in article 1(1), is to "*put into effect in the member states the principle of equal treatment for men and women ...*" The opinion of Advocate General Tesauro, at p 810, para 22, was emphatic that "*trans [persons] certainly do not constitute a third sex, so it should be considered as a matter of principle that they are covered by the Directive (76/207/EEC), having regard also to the above-mentioned recognition of their right to a sexual identity*". The "*right to a sexual identity*" referred to is clearly the right to the identity of a man or a woman rather than of some "*third sex*". Equally clearly it is a right to the identity of the sex into which the trans person has changed or is changing. In sex discrimination cases it is necessary to compare the applicant's treatment with that afforded to a member of the opposite sex. In gender reassignment cases it must be necessary to compare the applicant's treatment with that afforded to a member of the sex to which he or she used to belong. Hence the Court of Justice observed, at p 814, para 21, that the trans [person] "*is treated unfavourably by comparison with persons of the sex to which he or she was deemed to belong before undergoing gender reassignment*". Thus, for the purposes of discrimination between men and women in the fields covered by the Directive, a trans person is to be regarded as having the sexual identity of the gender to which he or she has been reassigned."

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[26] See Lord Bingham at [11] and Baroness Hale at [54], [56] and [63], with whom Lord Steyn and Lord Carswell agreed: [15] and [64]. Similar statements can be found in subsequent EU case law e.g. *MB v Secretary of State for Work and Pensions* at [35] (*"for the purposes of the application of [EC direction 79/7/EEC equal treatment of men and women in the matter of social security] , persons who have lived for a significant period as persons of a gender other than their birth gender and who have undergone a gender reassignment operation must be considered to have changed gender"*).

[27] Baroness Hale recorded the Government's position as being: "*In the light of the Gender Recognition Bill, currently before Parliament, there is no policy objection to regarding Ms A as female for all purposes, including intimate searches. Nor would it be inconsistent with the wider ranging provisions in the Bill for us to hold that European Community law required that it be anticipated in this respect.*"

(all emphasis in underlining added)

32. As such, "…*Community law required … that … a person be recognised in [their] reassigned gender for the purposes covered by the Equal Treatment Directive*." ([63]; see to similar effect Lord Bingham at [11]). Both Baroness Hale and Lord Bingham drew attention to the difficult questions of demarcation arising ([11] and [60]). However, as Baroness Hale noted in her speech, the problem was likely to be short-lived in the UK since the Gender Recognition Bill (then before Parliament) would provide a "*definition and a mechanism for resolving these demarcation question*s" (see ([42] and [60]). She was of course here recording her understanding of the anticipated effect of the GRA 2004 on the proper construction of sex in the SDA 1975.[28]

33. Both Lord Bingham and Baroness Hale also explained how this conclusion flowed from the requirements of applicable human rights (and the underlying values of individual dignity and freedom they protected) considered in both the *P v S* line of cases and the ECtHR cases preceding *Goodwin*: see at [13] and [37] and [43].[29] As Baroness Hale put it: "*The human rights values which led to the decisions in B v France 16 EHRR 1 in 1992 and Goodwin in 2002, as well as to the many Commission decisions and dissenting opinions, also underpin the EC legislation*."

34. Parliament in enacting the EA 2010 must in the usual way be presumed to legislate in the knowledge of, and having regard to the *P v S* line of cases (and specifically the House of Lord's decision in *A No. 2*) regarding the meaning of the protected characteristic of sex.[30] Moreover, those parts of the EA 2010 that re-enacted legislation implementing EU law had to be (and still generally should be[31]) interpreted in a manner that conforms with this EU case law. There is nothing in the statutory language used in the EA 2010 to indicate

[28] See e.g. *Lord Chancellor and Secretary of State for Justice and anor v McCloud and ors* [2018] EWCA Civ 2844, [2019] ICR 1489 (an equal pay case) which the lead Claimant, Dr McCloud (a trans woman with a GRC), would not have been entitled to bring if she were treated as of the "male" legal sex for the purposes of the EA 2010.

[29] See also *P v S* at [22] and Advocate General Tesauro's opinion at paras. 10-13 and 22-24.

[30] *Barras v Aberdeen Steam Trawling and Fishing Co* Ltd. [1993] AC 402, 411 and Bennion, Bailey and Norbury on Statutory Interpretation (8th Edition), section 24.6.

[31] Section 6 of the European Union (Withdrawal) Act 2018.

any intention to depart from the judicial construction of sex under the SDA 1975 pursuant to the above case law.[32]

35. It has been argued that such an indication can be found in the fact that in the SDA 1975 "*woman*" is defined as *" includ[ing]* a female of any age" (section 5(2) SDA 1975) whereas in the EA 2010 woman is defined as *"...mean[ing]* a female of any age" with the consequence (it is argued) that it "*narrow[ed] the definition from the 1975 Act by confining the meaning of woman to mean a female of any age"* (section 212 EA 2010).[33] However, there are insuperable difficulties with this argument.

36. **First**, the definition in section 5(2) SDA 1975 pre-dates the *P v S* line of case law and the decision in *A No. 2* such that it is difficult to attach the suggested significance to the word *"includes"*. **Secondly**, since the effect of section 9(1) GRA 2004 is to deem a person with a GRC to be of the sex of their acquired gender there is no need for any expanded definition of man and woman in the EA 2010 (whether through the word *"includes"* or otherwise). A trans man with a GRC is already deemed a man/male as a matter of law (and vice versa). For the deeming effect of section 9(1) to be excluded pursuant to subsection 9(3), clear contrary provision would need to have been made in the EA 2010, but there is none. **Thirdly**, there is no other evidence of any Parliamentary intention to reverse the judicially determined effect of the *P v S* line of cases or the well-understood effect of the GRA 2004 on the definition of sex under the SDA 1975 (as correctly explained in the GRA 2004 Explanatory Notes[34]). If the intention had been to undo such significant developments, one would expect there to be clear evidence of this in the background legislative materials, but none is to be found.[35]

37. For all these reasons, the European sex discrimination case law (founded on the same human rights and values considered in Section B above) puts beyond doubt the correctness of the lower Courts' construction.

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[32] Or to constitute contrary provision made for the purposes of section 9(3) GRA 2004.

[33] Foran, Michael P., On Defining Sex in Law (August 28, 2023). Available at SSRN: https://ssrn.com/abstract=4553987 or http://dx.doi.org/10.2139/ssrn.4553987, p.13

[34] See again GRA Explanatory Notes, para. 27.

[35] See e.g. Explanatory Notes to. sections 11 EA (para. 54) and 212 EA 2010 (paras. 659-662).

D. UNDERSTANDING THE EA 2010 EXCEPTIONS FROM A HUMAN RIGHTS PERSPECTIVE

38. The petitioner's construction of section 11: (a) produces an absurd result by rendering the EA 2010's gender reassignment-based exceptions superfluous; and (b) is likely to lead to human rights incompatibility, in particular incompatibility with the Article 8 and/or Article 14 rights of trans persons with a GRC.

The EA 2010 Exceptions

39. The EA 2010 contains a number of sex-based exceptions (i.e. provisions that render conduct that would otherwise amount to sex discrimination lawful where certain conditions are met)[36]. Save for one[37], the relevant legislative provisions each contain (separate and additional) exceptions relating to gender reassignment (i.e. provisions that render conduct that would otherwise amount to gender reassignment discrimination lawful where certain conditions are met)[38].

40. The petitioner's construction renders the exceptions relating to gender reassignment superfluous and fails to recognise, still less secure, the Article 8 and/or 14 rights of trans persons with a GRC. Two examples suffice to make good the point.[39]

41. **Single sex/separate services**: paragraphs 26 and 27 of Schedule 3 EA 2010 contain exceptions for single sex/separate services (**"SSS"**). Services may be limited to one sex or provided separately/ differently for each sex where specific conditions are met[40] and

[36] Namely, section 104(7), section 195(1), paras. 26, 27 of Schedule 3, para 4(2)(a) of Schedule 9 and para 3 of Schedule 23 EA 2010.
[37] Namely, all women shortlists per section 104(7) EA 2010.
[38] Namely, section 195(2), para 28 of Schedule 3, para 4(2)(b) of Schedule 9 and para 3 of Schedule 23 EA 2010.
[39] See also: (a) para 9 of Schedule 4 which permits the Armed Forces, in the context of Part 5 (Work) EA 2010, to apply, in relation to service in the armed forces: (i) a requirement to be a man; (ii) a requirement not to be a trans […] person, if the same is a proportionate means of ensuring the combat effectiveness of the armed forces; and (b) para 3 of Schedule 23 EA 2010 provides for a person regulated by the EA 2010 to, subject to certain conditions, discriminate on grounds of sex or gender reassignment in respect of communal accommodation (or benefits, facilities or services linked to the accommodation). Critically, para 3(4) of Schedule 23 EA 2010 provides that where gender reassignment is the ground of any difference in treatment, account must be had as to how far the conduct in question is a proportionate means of achieving a legitimate aim.
[40] For example: the service would be insufficiently effective were it only to be provided jointly (para 26(1)(a), para 27(3)(b) of Schedule 3); the service is provided for, or is likely to be used by, two or more persons at the

the provision of the service is a proportionate means of achieving a legitimate aim. The consequence is that, where the conditions in paragraphs 26 and 27 are satisfied, conduct that would otherwise amount to sex discrimination, may be lawful. Separately (and additionally), by virtue of paragraph 28 of Schedule 3 EA 2010, a person with the protected characteristic of gender reassignment may be lawfully excluded from a SSS (that has been lawfully established pursuant to paragraphs 26 and 27 of Schedule 3) where that exclusion is a proportionate means of achieving a legitimate aim.

42. Applying the petitioner's construction of section 11 EA 2010 to paragraphs 26 and 27 of Schedule 3 renders paragraph 28 of Schedule 3 superfluous. On the petitioner's construction paragraphs 26 and 27 can be used to exclude/separate *all* individuals who were assigned the male sex at birth (even where they are recognised as women by virtue of having a GRC) from cisgender women services and vice versa. On that construction, there would be no (separate and additional) need to distinguish (and discriminate) on the grounds of gender reassignment in respect of lawfully established SSSs pursuant to paragraph 28 of Schedule 3 because the relevant SSS would already be confined to cisgender women *or* cisgender men.

43. In contrast, on the lower Courts' construction paragraphs 26 and 27 cannot be used to exclude a trans woman with a GRC from a (lawfully established) SSS for women. Paragraph 28 of Schedule 3, however, permits the lawful exclusion of a trans woman with a GRC from a SSS for women where that is a proportionate means of achieving a legitimate aim. This construction ensures that each of the paragraphs in Schedule 3 has a distinct purpose.

44. **Sport**: section 195(1) EA 2010 provides that a person will not commit sex discrimination in relation to the participation of another as a competitor in a *"gender effected activity"*[41].

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same time, and the circumstances are such that that persons of one sex might reasonably object to the presence of a person of the opposite sex (para 27(6) of Schedule 3); there is likely to be physical contact between a person (A) to whom the service is provided and another person (B), and (b) B might reasonably object if A were not of the same sex as B (para 27(7) of Schedule 3).

[41] Defined in section 195(3) EA 2010 as: "*A gender-affected activity is 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"*.

This sets a relatively low threshold, so long as the relevant activity is a gender effected activity, any conduct in relation to participation in that activity that would otherwise amount to sex discrimination, is lawful. There is no requirement to demonstrate a particular aim, or to meet a requirement of proportionality. Separate provision is made in relation to gender reassignment discrimination in section 195(2) EA 2010; this provision imposes a higher threshold. For conduct in relation to participation as a competitor in a gender effected activity that would otherwise amount to gender reassignment discrimination to be lawful it must be *necessary* to secure: (a) fair competition; or (b) safety of competitors.

45. Applying the petitioner's construction of section 11 EA 2010 to section 195(1) EA 2010 renders section 195(2) EA 2010 superfluous. If section 195(1) can be used to prevent *all* individuals who were assigned the male sex at birth (even where they have a GRC) from competing with *all* cisgender women, there is no meaningful role for section 195(2) EA 2010. In contrast, applying the lower Courts' construction of section 11 EA 2010 to section 195 EA 2010 gives meaning to the separate sex and gender reassignment-based exceptions contained in sections 195(1) and 195(2) EA 2010 respectively (because section 195(1) cannot be used to exclude a trans person with a GRC from competing with persons of the sex stated on their GRC but, if the higher threshold is satisfied, section 195(2) can be used to do so).[42]

46. In both examples, the lower courts' construction of section 11 respects the Article 8 rights of trans people with GRCs by ensuring that they are legally recognised (and treated) on the basis of the sex required by their GRC unless failure to do so can be justified as a proportionate means of achieving a legitimate aim[43]. The petitioner's construction, in

[42] Section 195(2) EA 2010 closely reflects the language of (the now repealed) section 19 GRA 2004. Section 19 GRA 2004 was directed, and only directed, at circumstances where trans persons with a GRC could lawfully be excluded from competing with persons of their sex (i.e. the sex stated on their GRC); indeed by virtue of section 19(5), the GRA 2004 expressly preserved section 44 of the SDA 1975 which separately contained the (sport) sex based exception and which mirrors the language used in section 195(1) EA 2010. That section 195 EA 2010 uses materially similar language as section 19 GRA 2004 puts it beyond doubt that the purpose of section 195(2) EA 2010 is to provide for the exclusion of (for example) trans women with a GRC competing with cisgender women where the criteria in section 195(2) EA 2010 are met and therefore confirms the lower Courts' construction.

[43] Indeed, a survey of the gender reassignment related exceptions in the EA 2010 demonstrates that, with the exception of the (very specific) context Religious Organisations and the solemnisation of marriage (at para 25A of Schedule 3 EA 2010), any conduct that discriminates on the grounds of gender reassignment must be (or, in

contrast, would give rise to a blanket approach to trans people with GRCs, treating them according to the sex they were assigned at birth for the purposes of (say) SSS or sports. For example, on the petitioner's construction, section 195(1) EA 2010 could be used to exclude a trans woman with a GRC from competing in a gender affected activity with cisgender women without any requirement that that exclusion (and the failure to legally recognise her as the sex stated on her GRC that that exclusion entails) be a proportionate means of achieving a legitimate aim; only the low threshold in section 195(1) EA 2010 would need to be met. That is impossible to reconcile with the analysis of Article 8 and its underlying values set out in Section B above.

47. Further, the petitioner's construction fails to respect Article 14 of the Convention. Article 14 prohibits discrimination that arises when the State fails "*without an objective and reasonable justification… to treat differently persons whose situations are significantly different"* (often referred to as *"Thlimmenos* discrimination").[44] The petitioner's construction fails to recognise that a trans woman with a GRC is in a significantly different situation to a cisgender man and therefore, Article 14 requires that she be treated differently from him i.e. not be excluded from a SSS or from sport on the same basis (and for the same reasons) as a cisgender man (unless the failure to do so can be proportionately justified). In contrast, the lower Courts' construction gives effect to Article 14 by acknowledging the significant differences between a trans woman / man with a GRC and a cisgender man / woman (respectively), and ensures that they will be treated in accordance with the sex stated on their GRC unless differential treatment on

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respect of communal accommodation and para 3 of Schedule 23, take account of how far it is) a proportionate means of achieving a legitimate aim before it will be lawful. This reflects a deliberate choice by Parliament to enact a legislative scheme that treats persons with a GRC as the sex stated in their GRC unless failing to do so is justified as a proportionate means of achieving a legitimate aim; it also ensures that the significant difference between a trans woman /man with a GRC and a cisgender man / woman is properly accounted for throughout the EA 2010.

[44] See *Thlimmenos v Greece* (2001) 31 EHRR 15, [44], *R (DA) v Secretary of State for Work and Pensions* [2019] UKSC 21, [2019] 1 WLR 3289, [40]-[45], *Burnip v Birmingham City Council* [2012] EWCA Civ 629, [2013] PTSR 117, [15] and [17] – [18], and *R(SC) v Secretary of State for Work and Pensions* [2021] UKSC 26, [2022] AC 223 at [48]. To prove *Thlimennos* discrimination an individual must establish that: (i) the relevant treatment is within the ambit of a convention right (relevant here, Article 8 (and potentially Articles 9, 10 and 11)); (ii) they have "status" for the purposes of Article 14 of the Convention (relevant here, the status of being a trans person with a GRC); (iii) they are in a significantly different situation to a comparator who is treated in the same way as them (relevant here, the fact that a trans woman / man with a GRC is in a significantly different situation to a cisgender man / woman respectively); and (iv) the failure to treat them differently is not proportionately justified.

the grounds of gender reassignment can be justified as a proportionate means of achieving a legitimate aim.

48. Applying the lower Courts' construction to the relevant exceptions cannot be said to lead to anomalous results. To the contrary, it presents a coherent and consistent statutory scheme which secures the Article 8 and/or 14 rights of persons with a GRC and reflects the decision of Parliament, both when passing the GRA 2004 and the EA 2010, that, in the critical spheres of public life that the EA 2010 regulates, individuals with a GRC must be treated according to the sex required by their GRC unless the statutory gender reassignment based exceptions in the EA 2010 apply.

E. CONCLUSION

49. For the reasons articulated above, AIUK respectfully invites the Court to dismiss the appeal and uphold the lower Courts' construction.

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