



OUTER HOUSE, COURT OF SESSION

[2021] CSOH 31

P697/20

OPINION OF LADY WISE

In the petition of

FOR WOMEN SCOTLAND LIMITED

Petitioner

for

Judicial Review of the definition of “Woman” contained in the
Gender Representation on Public Boards (Scotland) Act 2018 and decisions of the
Scottish Ministers related thereto

(FIRST) THE LORD ADVOCATE AND (SECOND) THE SCOTTISH MINISTERS

Respondents

FOR PUBLIC INTEREST INTERVENTION THE EQUALITY NETWORK

Intervenor

Petitioner: O’Neill QC; Balfour & Manson LLP

Respondents: Crawford QC, Irvine; SGLD

Intervenor: Bain QC; Justright Scotland (written submission only)

23 March 2021

Introduction

[1] The petitioner is a private company registered in Scotland. Its members comprise a group of women with an interest in promoting women’s rights and children’s rights in this jurisdiction. The first and second respondents are the Lord Advocate and the Scottish

Ministers respectively. In essence the petition challenges certain provisions of the Gender Representation on Public Boards (Scotland) Act 2018 (“the 2018 Act”) as relating to reserved matters and so beyond the legislative competence of the Scottish Parliament. The petitioners contend also that certain provisions of the 2018 Act are incompatible with EU law and the UN Convention on the Elimination of All Forms of Discrimination Against Women (“CEDAW”). The final challenge is that the Scottish Ministers acted unlawfully and in breach of the Public Sector Equality Duty (PSED) imposed by section 149 of the Equality Act 2010 (“EA 2010”) and associated regulations when bringing the substantive provisions of the 2018 Act into effect and issuing statutory guidance thereanent. It should be understood at the outset that the case does not form part of the policy debate about transgender rights, a highly contentious policy issue to which this decision cannot properly contribute. At its core, this litigation is concerned with whether certain statutory provisions were beyond the legislative competence of the Scottish Parliament. While I record certain statements that were made about Scottish Ministers’ policy or position on transgender rights, that matter was at best tangential to the central dispute and has had no bearing on the decision that I have made.

Relevant legislative provisions

Scotland Act 1998

[2] Section 28 of the Scotland Act 1998 as amended (“the 1998 Act”) provides that, subject to section 29, the Scottish Parliament may make laws to be known as Acts of the Scottish Parliament (“asp or asps”). Section 29 provides:

“(1) An Act of the Scottish Parliament is not law so far as any provision of the Act is outside the legislative competence of the Parliament.

- (2) A provision is outside that competence so far as any of the following paragraphs apply –
- (a) it would form part of the law of a country or territory other than Scotland, or confer or remove functions exercisable otherwise than in or as regards Scotland,
 - (b) it relates to reserved matters,
 - (c) it is in breach of the restrictions in Schedule 4,
 - (d) it is incompatible with any of the Convention rights or with EU law ...
- (3) For the purposes of this section, the question whether a provision of an Act of the Scottish Parliament relates to a reserved matter is to be determined, subject to subsection (4), by reference to the purpose of the provision, having regard (among other things) to its effect in all the circumstances.”

Section 30 provides that Schedule 5 of the Act, which defines reserved matters, shall have effect. Schedule 5 provides:

“Part II - Specific reservations

Preliminary

1. The matters to which any of the Sections in this Part apply are reserved matters for the purposes of this Act.
2. A Section applies to any matter described or referred to in it when read with any illustrations, exceptions or interpretation provisions in that Section.
3. Any illustrations, exceptions or interpretation provisions in a Section relate only to that Section (so that an entry under the heading ‘exceptions’ does not affect any other Section).

...

Reservations

L2. Equal opportunities

Equal opportunities

Exceptions

The encouragement (other than by prohibition or regulation) of equal opportunities, and in particular of the observance of the equal opportunity requirements.

Imposing duties on—

- (a) any office-holder in the Scottish Administration, or any Scottish public authority with mixed functions or no reserved functions, to make arrangements with a view to securing that the functions of the office-holder or authority are carried out with due regard to the need to meet the equal opportunity requirements, or
- (b) any cross-border public authority to make arrangements with a view to securing that its Scottish functions are carried out with due regard to the need to meet the equal opportunity requirements.

Equal opportunities so far as relating to the inclusion of persons with protected characteristics in non-executive posts on boards of Scottish public authorities with mixed functions or no reserved functions.

Equal opportunities in relation to the Scottish functions of any Scottish public authority or cross-border public authority, other than any function that relates to the inclusion of persons in non-executive posts on boards of Scottish public authorities with mixed functions or no reserved functions. The provision falling within this exception does not include any modification of the Equality Act 2010, or of any subordinate legislation made under that Act, but does include—

- (a) provision that supplements or is otherwise additional to provision made by that Act;
- (b) in particular, provision imposing a requirement to take action that that Act does not prohibit;
- (c) provision that reproduces or applies an enactment contained in that Act, with or without modification, without affecting the enactment as it applies for the purposes of that Act.

'Board' includes any other equivalent management body.

'Equal opportunities' means the prevention, elimination or regulation of discrimination between persons on grounds of sex or marital status, on racial grounds, or on grounds of disability, age, sexual orientation, language or social origin, or of other personal attributes, including beliefs or opinions, such as religious beliefs or political opinions.

'Equal opportunity requirements' means the requirements of the law for the time being relating to equal opportunities.

...

'Protected characteristic' has the same meaning as in the Equality Act 2010.

'Scottish functions' means functions which are exercisable in or as regards Scotland and which do not relate to reserved matters.

The references to the Equality Act 2010 and any subordinate legislation made under that Act are to be read as references to those enactments, as at the day on which section 37 of the Scotland Act 2016 comes into force ... but treating any provision of them that is not yet in force on that day as if it were in force."

Equality Act 2010

[3] The EA 2010 was passed, as its introduction states, to reform and harmonise equality law across the United Kingdom, restating many of the existing enactments relating to discrimination and harassment related to certain personal characteristics and to make new provisions to increase equality of opportunity and so on. It provides, so far as relevant to these proceedings, as follows:

Section 4:**“The protected characteristics**

The following characteristics are protected characteristics—

age;
 disability;
 gender reassignment;
 marriage and civil partnership;
 pregnancy and maternity;
 race;
 religion or belief;
 sex;
 sexual orientation.”

Section 7:

- “(1) A person has the protected characteristic of gender reassignment if the person is proposing to undergo, is undergoing or has undergone a process (or part of a process) for the purpose of reassigning the person's sex by changing physiological or other attributes of sex.
- (2) A reference to a transsexual person is a reference to a person who has the protected characteristic of gender reassignment.
- (3) In relation to the protected characteristic of gender reassignment—
- (a) a reference to a person who has a particular protected characteristic is a reference to a transsexual person;
- (b) a reference to persons who share a protected characteristic is a reference to transsexual persons.”

Section 11:

“In relation to the protected characteristic of sex—

- (a) a reference to a person who has a particular protected characteristic is a reference to a man or to a woman;
- (b) a reference to persons who share a protected characteristic is a reference to persons of the same sex.”

Section 14:**“Combined discrimination: dual characteristics**

- (1) A person (A) discriminates against another (B) if, because of a combination of two relevant protected characteristics, A treats B less favourably than A treats or would treat a person who does not share either of those characteristics.
- (2) The relevant protected characteristics are—
- (a) age;
- (b) disability;
- (c) gender reassignment;
- (d) race
- (e) religion or belief;
- (f) sex;

(g) sexual orientation.

Section 149 Public sector equality duty

- (1) A public authority must, in the exercise of its functions, have due regard to the need to—
- (a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;
 - (b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;
 - (c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

Section 158 Positive action: general

- (1) This section applies if a person (P) reasonably thinks that—
- (a) persons who share a protected characteristic suffer a disadvantage connected to the characteristic,
 - (b) persons who share a protected characteristic have needs that are different from the needs of persons who do not share it, or
 - (c) participation in an activity by persons who share a protected characteristic is disproportionately low.
- (2) This Act does not prohibit P from taking any action which is a proportionate means of achieving the aim of—
- (a) enabling or encouraging persons who share the protected characteristic to overcome or minimise that disadvantage,
 - (b) meeting those needs, or
 - (c) enabling or encouraging persons who share the protected characteristic to participate in that activity.

...

- (4) This section does not apply to—
- (a) action within section 159(3) ...

...

- (6) This section does not enable P to do anything that is prohibited by or under an enactment other than this Act.

Section 159 Positive action: recruitment and promotion

- (1) This section applies if a person (P) reasonably thinks that—
- (a) persons who share a protected characteristic suffer a disadvantage connected to the characteristic, or
 - (b) participation in an activity by persons who share a protected characteristic is disproportionately low.
- (2) Part 5 (work) does not prohibit P from taking action within subsection (3) with the aim of enabling or encouraging persons who share the protected characteristic to—
- (a) overcome or minimise that disadvantage, or
 - (b) participate in that activity.

- (3) That action is treating a person (A) more favourably in connection with recruitment or promotion than another person (B) because A has the protected characteristic but B does not.
- (4) But subsection (2) applies only if—
 - (a) A is as qualified as B to be recruited or promoted,
 - (b) P does not have a policy of treating persons who share the protected characteristic more favourably in connection with recruitment or promotion than persons who do not share it, and
 - (c) taking the action in question is a proportionate means of achieving the aim referred to in subsection (2).
- (5) ‘Recruitment’ means a process for deciding whether to—
 - ...
 - (h) offer a person an appointment to a public office, recommend a person for such an appointment or approve a person's appointment to a public office
 - ...
- (6) This section does not enable P to do anything that is prohibited by or under an enactment other than this Act.”

[4] A number of services and public functions are excepted from the general requirement not to discriminate; these are listed in schedule 3. Part 7 includes the ability to make separate services for the sexes on certain conditions. Paragraph 28 of part 7 provides:

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

Schedule 9 provides certain exceptions for occupational requirements including in relation to a requirement for work to have a particular protected characteristic.

“Equality Act 2010 (Specific Duties) (Scotland) Regulations 2012

Regulation 5 - Duty to assess and review policies and practices

- (1) A listed authority must, where and to the extent necessary to fulfil the equality duty, assess the impact of applying a proposed new or revised policy or practice against the needs mentioned in section 149(1) of the Act.
- (2) In making the assessment, a listed authority must consider relevant evidence relating to persons who share a relevant protected characteristic (including any received from those persons).”

The Scottish Ministers are a listed authority for the purpose of those regulations.

Gender Representation on Public Boards (Scotland) Act 2018

[5] The provisions of the 2018 Act subject to specific challenge include:

“1. Gender representation objective

- (1) The ‘gender representation objective’ for a public board is this it has 50% of non-executive members who are women.
- (2) Where a public board has an odd number of non-executive members, the percentage mentioned in subsection (1) applies as if the board had one fewer non-executive member.

2. Key definitions

In this Act—

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

“11. Equality Act 2010

- (1) Sections 158 and 159 of the Equality Act 2010 (positive action) do not apply to any action taken under this Act.
- (2) Part 5 of the Equality Act 2010 (work) does not prohibit any action taken under this Act.”

Submissions on behalf of the petitioner

[6] Mr O’Neill QC sought to emphasise the importance of terminology in this area of law. EA 2010 defines “woman” as “a female of any age” at section 212(1). That is a reference to biological sex and is consistent with a number of decisions in which the courts have decided that it is not possible to alter these fixed biological concepts. Reference was made to *Corbett v Corbett* [1971] P 83 and *Bellinger v Bellinger* [2003] 2 AC 467. When the UK parliament did ultimately legislate for gender reassignment in terms of the Gender Recognition Act 2004, this was an innovation on the common law and it provided the UK’s answer to the ECHR requirement to allow gender change for all purposes. That legislation innovates on the common law and provides for social recognition of a change in gender

based on a process leading to the issue of a Gender Recognition Certificate. It creates a form of legal fiction and does nothing to change the existing rules on there being two biological sexes. The EA 2010 itself is predicated upon there being two biological sexes. Regardless of how that fits with current political debate, that is the legal position. The EA 2010 deals with changes of gender by creating a protected characteristic of gender reassignment. While one can have the protected characteristic of gender reassignment under EA 2010 without having a Gender Recognition Certificate, the legislation makes a clear and necessary distinction between the protected characteristic of sex and the protected characteristic of gender reassignment.

[7] It was noteworthy that even where a full Gender Recognition Certificate had been issued to a person in terms of the 2004 Act the Court of Appeal had recently held that a woman who had changed gender to male and subsequently given birth had to be registered as the child's mother, notwithstanding his desire to be registered as father - *R (McConnell) v Registrar General for England and Wales* [2020] EWCA Civ 559. The EA 2010 itself requires the notion of a process or intending to undergo a process before the protected characteristic of gender reassignment will apply. It is not sufficient to self-identify. The legislation does not use the term transsexual at all. Of the seven protected characteristics listed in section 4 of EA 2010, some such as sex and race were innate and others such a disability and gender reassignment were not. Sex and gender reassignment had different relevant characteristics and the Act was replete with provisions that made the distinction clear. For example, section 16 makes specific provision on gender reassignment discrimination in cases of absence from work, section 26(3) defines harassment as including "unwanted conduct of a sexual nature or that is related to gender reassignment or sex" and section 104(7) makes specific provision for, in effect, women only shortlists in elections to Parliament. Section 195

allows account to be taken in sports where one sex is generally at a disadvantage in comparison with the other and paragraph 1(4) of schedule 9 allows for justifiable work related requirements to be of a particular sex. One example of that would be a counsellor working with victims of rape. There are also justifiable Armed Forces requirements in paragraph 4(2)(b) and paragraph 3 of schedule 23 provides an exception to the general prohibition of sex and gender assignment discrimination for communal accommodation. There were other examples but the general point was that it is to go against the grain of the EA 2010 to confuse or conflate distinct protected characteristics in particular (biological) sex and gender reassignment. The legislation carefully and in detail distinguishes in many contexts the way in which the various protective characteristics can and cannot be relied upon in any particular situations.

[8] The law concerning equal opportunities, of which EA 2010 is part, normally requires equal treatment to be afforded to individuals regardless of any of their protected characteristics. Mr O'Neill drew attention to the limited positive action measures permitted by the legislation. It was clear from a House of Commons briefing note on EA 2010 and positive action (24 October 2011, SN/BT/6093) that an important distinction between positive discrimination and positive action should be understood. Positive discrimination is recruiting or promoting someone solely because they have a relevant protected characteristic. This might include setting quotas to recruit or promote a particular number or proportion of people with a protected characteristic. Positive discrimination was almost always unlawful. In contrast positive action (or affirmative action) was a law or policy that attempted to promote equal opportunity by taking into account gender, race, disability or other equality strands in order to positively improve outcomes for those groups. Both in EU law and in the EA 2010, the limited situations in which positive action measures can be

implemented have a built-in proportionality test in that they can only be invoked in certain cases and when the disadvantage that the provision seeks to address ceases the measures can no longer be used.

[9] The petitioner's contention was that because positive action measures are on the face of it a breach of the general principle of equal treatment the legislative exception allowing them was strictly hedged and bounded both procedurally and substantively. The relevant provisions are to be found in sections 158 and 159 EA 2010. Unless prohibited by other legislation section 158 allows for the possibility of positive actions measures to be used to alleviate disadvantage experienced by people who share a protected characteristic, reduce their underrepresentation in relation to particular activities and meet their particular needs. Importantly, such measures will be lawful only if shown to be a proportionate way of achieving the relevant aim. The extent to which any such measure might be found to be proportionate is intensely fact specific. There requires to be evidence showing, among other things, the seriousness of the relevant disadvantage among those with the protected characteristic, the extremity of their need or underrepresentation and the availability of other means of countering these identified needs. The explanatory notes to the legislation make clear that this provision must be interpreted in accordance with EU law and that it extends what is possible by way of positive action to the extent permitted by that law. Section 159(3) of the EA 2010 was the relevant *lex specialis* for workplace related positive action measures that applied.

[10] Applying that to the legislation under challenge, it was clear that the 2018 Act was a positive action measure. Accordingly, to be lawful it had to identify a disadvantaged group or insufficiently represented group and comply with the requirements of sections 158 and 159. To apply effectively as a positive action measure and provide a limited lawful

exception to the otherwise stringent requirements of equal treatment these closely defined circumstances for such measures had to be complied with. Legislation such as the 2018 Act treads a difficult path between lawful positive action on the one hand and unlawful positive discrimination on the other. The gender objective described in the legislation only applied if the public board in question had less than 50% women members. That is what triggers the positive action policy. Counsel noted that, unlike the Public Sector Equality Duty contained in section 149 EA 2010 there was no exclusion of the Scottish Parliament or its legislative activity from the ambit of and restrictions imposed by section 159. Accordingly it was necessary to consider whether the legislation fell within the parameters permitted for derogation from the principle of equal treatment by that provision.

[11] The positive action measures within the 2018 Act were said to fall outside the parameters for lawful positive action in a number of respects. First the Act creates, and its positive action measures apply to, a group of persons who do not “share” a protected characteristic under the EA 2010. The positive action required under the 2018 Act applies indiscriminately both to (a) women who share the protected characteristic of sex except for those transsexual persons, born female but who now have the protected characteristic of gender reassignment and (b) transsexual persons born male who now have the protected characteristic of gender reassignment under section 7. Secondly by lumping these groups together the Act fails to identify what, if any, relevant “disadvantage” (as required by section 159(1)) for persons who share a protected characteristic might justify the taking of the required positive action measure. It also fails to identify or classify a group of persons under reference to that group’s shared protected characteristic, which means that there can be a basis for the necessary finding that there is a disproportionately low participation in a specific identified activity by that group. Further, section 159 allowed for the possibility of

positive action measures only where the appointing body does not have a policy of treating persons who share the protected characteristic more favourably in connection with recruitment or promotion than persons who do not share it (159(4)(b)). Treating both women who do not have the protected characteristic of gender reassignment and men who do claim the protected characteristic of gender reassignment more favourably in connection with recruitment or promotion falls foul of this requirement. For these reasons the substantive positive action provisions of the 2018 Act were inconsistent and incompatible with the requirements of the positive action provisions allowed for under the EA 2010.

[12] The failure to follow the distinction between sex and gender reassignment in this respect was described as a remarkably radical change that appeared to have been carried out “en passant” and one which did not coincide with the requirements of either the EA 2010 or the Gender Recognition Act 2004. The assumption underlying section 2 of the Act was that born men who have the characteristic of gender reassignment are the same, or at least at the same disadvantage as, born women. That was not something that was permissible within the Equality Act. The section 2 provision had been inserted late in the drafting of the legislation without the necessary background work having been done. The gathering together of these two groups who do not share protected characteristic had led to this error. To some extent the major inconsistency appeared to have been recognised by the Scottish Parliament which then tried to remedy it by including section 11 of the 2018 Act which states in terms that sections 158 and 159 of the EA 2010 do not apply to any action taken under the Gender Representation on Public Boards Act. Similarly part 5 of the EA 2010 in relation to work is said not to prohibit any action taken under the Act. It was extraordinary to think that the positive action provisions of the EA 2010 could be swept away in this regard including all of the provisions that required preparatory work and an evidence base in order

to comply with this exception. The question arose as to whether any of this had been authorised by L2 of schedule 5 to the 1998 Act as amended.

[13] It was common ground that the reservation in paragraph L2 of schedule 5 (“the L2 reservation”) specified equal opportunities as a matter reserved to the UK Parliament and the UK Executive. It could hardly be disputed that the 2018 Act provisions relate to equal opportunities as defined in L2. It appeared that the respondents’ defence of the lawfulness of the provisions were that they fell within the exception carved out from the otherwise general prohibition on the Scottish Parliament legislating in relation to equal opportunities. The background to the legislation was of course that the Smith Commission had recommended that one of the areas in which the Scottish Parliament should be given power was that it would be given a positive action power in a particular area. However Mr O’Neill submitted that this power could only be exercised in accordance with section 159 of the 2010 Act. There was no power to redefine or modify section 159 and it had to be applied. If it was suggested that departing from section 159 was a necessary implication of the legislation that would be wrong as Westminster could not allow the Scottish Parliament to legislate on a sensitive matter where the UK legislation had been drafted to be the maximum allowed by EU law other than by express provision. As section 159 went to the limit of what was permissible under EU law the legislation was beyond the legislative competence of the Scottish Parliament which cannot pass EU incompatible legislation. It was incontrovertible that neither would the Westminster Parliament be able to do so - *R (Miller) v Secretary of State* [2017] UKSC 5.

[14] In terms of section 29 of the European Union (Future Relationship) Act 2020 the non-regression of domestic law from EU law in certain areas had been agreed and this included labour and social standards within which fundamental rights at work were

included. In Mr O'Neill's submission the interpretation likely to be urged on the court by senior counsel for the respondent would be a regression from section 159 EA 2010. Going beyond the limits of that section would breach EU law and would be unlawful both before and since the end of the transition period.

[15] As a matter of statutory construction, Mr O'Neill submitted that no power to modify the EA 2010 was ever granted to the Scottish Parliament. Looking at the very specific and limited exception the power was clearly intended to be an implementing power allowing the Scottish Parliament not to fundamentally change or alter the basis upon which equal opportunity is maintained across the United Kingdom but simply so that it could make legislative provision for certain positive action obligations insofar as compatible with existing equal opportunity requirements in the field of appointments of non-executive members to public boards in Scotland. It was noteworthy that section 37 of the Scotland Act 2016 which modified the L2 reservation of the 1998 Act confirmed that protected characteristics had the same meaning as in the EA 2010. In contrast with the provision under discussion, the Scottish Parliament had been given an express power to supplement the EA 2010 in relation to other exceptions. The absence of such an expressed power for the non-executive board provision itself confirmed the inability of the Scottish Parliament to do what it had now done because any power to modify or expand EA 2010 would have to have been express. It was untenable to suggest that the EA 2010 could in any respect be modified, repealed or disapplied *sub silentio*. In *AXA General Insurance v Lord Advocate* [2011] UKSC 46 Lord Reed had observed (at paragraph 151) under reference to earlier decisions that fundamental rights could not be overridden by general or ambiguous words because of the risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. At paragraph 153 Lord Reed confirmed that the nature and purpose

of the Scotland Act appeared consistent with the application of the principle that unless there is the clearest provision to the contrary, Parliament must be presumed not to legislate contrary to the rule of law. In the present case, the obligation to go with the grain of the EA 2010 arose because section 159 set the limits of what was permissible.

[16] The whole problem that had arisen in this case would have been avoided had the Scottish Parliament stuck to the traditional definition of women. The definition that included some people with the protected characteristic of gender reassignment as if they were women was inserted into the legislation at the committee stage and “rubber stamped” thereafter. The draft bill had contained no definition of women at all and the amendment to introduce a definition had been introduced at the committee stage after work with the Scottish Trans Alliance. There had been no external consultation so that other views could be obtained. The clear intention was to include trans women in the definition but to exclude trans men (ie those born as biological women but living as men). The respondents had accepted in the pleadings that the intention had been to exclude someone born as a woman but who is not living as a woman. That was confirmed by the guidance accompanying the legislation.

[17] There was some discussion in relation to an “annotated” version of section 37 under reference to a statement made by a minister about this matter on which it was anticipated the respondents would rely. Mr O’Neill objected to any such attempt as no formal application had been made to include a reference equivalent to one from Hansard. In essence, the matter of statutory interpretation that had to be decided was whether in terms of the new L2 exceptions there were two separate exceptions or two parts of one exception. If there were two separate exceptions there could be no modification of the EA 2010 because modification cannot be implicit and it is not referred to in the public boards exception.

Alternatively, if the whole passage in L2 was two parts of one exception there could still be no modification so far as public boards were concerned.

[18] Mr O'Neill presented a separate chapter in relation to the incompatibility of the 2018 Act definition of women with EU law. In *P v S and Cornwall County Council* [1996] 2 CMLR 247, the Court of Justice had held that the scope of the Equal Treatment Directive 76/207/EEC ("Equal Treatment Directive") could not be confined to discrimination based on the fact that a person is of one or other sex. It applied also to discrimination arising from the gender reassignment of the person concerned. That case had been decided before the UK had passed the 2004 Gender Recognition Act. However it was concerned with a situation where someone had undergone sex change surgery. There were no EU cases in which self-identification would be sufficient for a person to fall within the Equal Treatment Directive. However this case was about positive action and not equal treatment. More importantly, there could be no doubt that section 159 EA 2010 was deliberately limited to the positive action permitted by the CJEU in the approach it had taken in *Briheche v Ministre de l'Intérieur* [2004] ECR I-8807. In particular, paragraphs 27-33 which set out the Advocate General's opinion, illustrated that positive action in the workplace is only permissible under EU law if its object is equality of opportunity for members of a disadvantaged group rather than equality of outcome. A person who shares the protected characteristic of a group which has previously been identified as relevantly disadvantaged in the workplace or particular work sector can only be given priority or preference in circumstances where an objective assessment has been carried out to compare their position with that of a person who does not share the relevant characteristic and the two individuals are found to be otherwise equally qualified. That is the limit of EU law on the matter of positive action measures. Only where there is evidence about the particular disadvantage might the

relevant protected characteristic be taken into account as a tie-break at the end of an appointment process. Even then any general policy requires a “safety valve” provision to allow priority in exceptional cases for a person who does not share the relevant characteristics.

[19] There was a complete absence of evidence of career disadvantages of born men living as women. Nothing of that sort had been produced by the respondent. This was important in considering the likelihood that a positive action measure would achieve its aim because of the requirement that it be proportionate. The prohibition against automatic preference for a single group is reiterated at paragraph 22 of *Briheche*. It had to be borne in mind that in terms of articles 157 and 141 of the EU Treaty Member States could maintain measures to remedy disadvantage to achieve ultimate equality only if they were proportionate, something that required a close examination of the facts. In the absence of information and evidence from the respondents supporting that the inclusion of trans women in the definition of women in the 2018 Act was a proportionate way of achieving a legitimate aim of increasing their participation, there would be no prospect of the legislation being within legislative competence of the Scottish Parliament. Section 159 EA 2010 and EU law were at one on this issue.

[20] Turning to Convention rights, Articles 8 and 14 ECHR would also allow limited correction of previous discrimination. For example if women as a sex are underrepresented they can to some extent be treated differently to remedy that inequality - *Denisov v Ukraine* [2018] ECtHR 76639/11 (29 September 2018) at paragraph 115. Again any such differentiation in treatment in the workplace between different groups would have to be justified under reference to the principle of Convention proportionality. It could not be asserted or assumed that the workplace experience of women who do not have the

characteristic of gender reassignment is to be equated with the workplace experience of transsexual persons, born male, but who have the additional protected characteristic of gender reassignment. On the face of it these were distinct groups of person defined by quite distinct protected characteristics.

[21] On CEDAW Mr O'Neill contended that, while not incorporated, the Convention was relevant, including the recommendations of the Committee established under it, which were deserving of respect (*R (A) v Home Secretary* [2020] EWCA Civ 130, at paragraph 23).

Articles 3, 4, 5 and 11 of the Convention set out some of the principles and enjoined state parties to take measures to eliminate discrimination against women. Special measures aimed at accelerating equality between the sexes were approved, including those protecting maternity. Such measures were for the protection of biological women. The 2018 Act conflicted with the requirements of CEDAW and the court could grant a bare declarator to that effect. In *Wightman and others v Secretary of State for Exiting the European Union* [2018] CSIH 62 the Inner House had ultimately pronounced a declarator reflecting the ruling of the CJEU on a purely international issue. As a bare declarator has no mandatory force, no conflict with the constitutional principle of dualism arose as it would not amount to enforcement of the relevant international law.

[22] Finally, it was submitted that the respondents required to address whether they had breached the Public Sector Equality Duty in section 149(1) EA 2010 and the 2012 Scottish Regulations. Scottish Ministers' actions in bringing the substantive provisions of the 2018 Act into effect and issuing statutory guidance thereanent failed in the duty to assess the impact of applying the new policy or practice mandated under the Act against the needs mentioned in section 149(1) of the 2010 Act. In particular, the Scottish Ministers failed to consider relevant evidence relating to persons who share a relevant protected characteristic

(biologically born females) as distinct from section 11 EA 2010 “men” or “women” who do claim the section 7 EA 2010 protected status of “gender reassignment”. The Scottish Ministers’ consultation and approach has all been based on the assumption that those who would self-identify as female are on that basis simply to be counted as section 11 EA 2010 women. This was exemplified by their Equality Impact Assessment (“EQIA”) which stated:

“Another issue raised relating to the inclusiveness of the language used in the Bill was the definitions used for female and male in it, which it was felt should be ‘identify as female’ or ‘identify as male’ to avoid issues for transgender people. The Bill now uses the terminology ‘are women’ and the Scottish Government will consider whether this needs to be expanded.”

It was submitted that such a statement illustrated a complete misunderstanding and construction of the relevant statutory framework and had resulted in errors in the manner in which ministers had purported to carry out their public sector equality duties. Their actions in this regard were therefore unlawful. The respondents were wrong to contend that a question of whether Scottish Ministers had breached the duties imposed on them under the 2012 Regulations was non-justiciable. It was based on a misinterpretation of the provisions of the Equality Act 2006 which dealt with the enforcement powers of the Equality and Human Rights Commission. Section 32(11)(b) did not constitute a bar to the exercise of the court’s supervisory jurisdiction (*AXA General Insurance Co Ltd v Lord Advocate* [2011] UKSC 46 at paragraphs 151-153).

Submissions on behalf of the respondents

[23] Ms Crawford emphasised at the outset that the 2018 Act is limited in scope in that it makes provision only for Gender Representation on Public Boards. The background to its passing was that the report of the Smith Commission in November 2014, included as one of the “Heads of Agreement” that, whilst the Equality Act 2010 would remain reserved, the

powers of the Scottish Parliament would be extended to “include, but not be limited to, the introduction of gender quotas in respect of public bodies in Scotland”. The L2 exception to the general reservation of equal opportunities inserted into the 1998 Act by section 37 of the Scotland Act 2016 was the legislative articulation of that agreement. Separately from the exception under discussion, section 37 also provided for a further exception as regards equal opportunities in relation to the Scottish functions of any Scottish public authority other than any function that related to the inclusion of persons in non-executive posts on relevant boards. That second exception permitted any modification of the 2010 Act but only insofar as this supplemented or was otherwise additional to the provision made by the 2010 Act. The respondents’ general submission was that the petition could only be concerned with the legislative competence of the first of those exceptions.

[24] Insofar as the statutory guidance was also challenged, that guidance illustrated the purpose of the legislation the provision relating to the definition of women was restricted to how women would be defined for the purposes of Gender Representation on Public Boards and not for any other context. All of the Equality Act provisions relating to different treatment for sexes in respect of changing rooms, counselling, sports, prisons and so on was unaffected by the 2018 Act. Similarly the registration of parents as mother or father referred to in the *R (McConnell)* case referred to by Mr O’Neill was completely unaffected by the passing of the legislation. The final general point was that the exclusion from the reserved matter of equal opportunities contained within L2 related to the **inclusion** of persons with protected characteristics. It was specifically designed to allow the Scottish Parliament to include various persons rather than to be exclusive.

[25] In the circumstances outlined, it was clear that this judicial review could not be about gender recognition or conditions in which one might change gender and any case law

relating to that was irrelevant. The respondents' position was that it would be within legislative competence to enact legislation on the conditions in which one can change one's gender although it was acknowledged that that was likely to be an argument for different proceedings at some future point. It had to be acknowledged that the highly sensitive political debate about "transsexual rights" provided context and background to the discussion, notwithstanding what the respondents regarded as the limited focus of the case. Also as background, CEDAW should be given respect insofar as the general recommendations (Nos 28 and 35) of the relative Committee commented on these matters. Ms Crawford then stated in terms that Scottish Government policy was that transgender women are to be treated as non-transgender women unless to do so would be prohibited by law. She stated that such a policy reflected the recommendations of CEDAW and initially went so far as to say that the policy found its way into the 2018 Act in that the inclusion of transgender women was within the legislative competence of the Scottish Parliament.

[26] Turning to the reserved matters challenge senior counsel noted that the challenge in the pleadings related to sections 2 and 11. The petitioner's note of argument, however, raised positive action measures as being reserved matters and it was not clear whether the petitioner accepted that the 2018 Act would not relate to reserved matters absent section 11. The oral argument presented focused on the different matter of whether the construction of the public board exception allowed or did not allow modification of the Equality Act. In any event, however it is framed, the petitioner's argument failed to properly address and construe the reserved matter set out in L2 and which the court required to construe. It should be borne in mind that section 29(3) of the 1998 Act as amended provided that the question of whether a provision of an asp relates to a reserved matter is to be determined by reference to the "purpose of the provision, having regard (among other things) to its effect in

all the circumstances". The effect of an exception to a reservation is to make the exception an area excluded from the reservation so it meant nothing to say that equal opportunities were reserved without adding the exception or exceptions to that in the amended legislation. Ms Crawford pointed out that prior to the 2016 amendments the equal opportunities reservation had specifically included the subject matters of the Equal Pay Act 1970, the Sex Discrimination Act 1975, the Race Relations Act 1976 and the Disability Discrimination Act 1995. These legacy statutes had been overtaken by the EA 2010. The current iteration of the equal opportunities reservation makes no reference to any statute. The reserved matter is equal opportunities as defined, which definition includes the prevention, elimination or regulation of discrimination between persons on a number of grounds including sex, sexual orientation and other personal attributes. While some of the grounds listed in that definition were similar to EA 2010 characteristics there was no direct read across between the two.

[27] Equal opportunities are reserved but that reservation is subject to a number of exceptions including (1) the duty to encourage equal opportunities other than by prohibition or regulation, (2) imposing duties on office holders of the Scottish Administration or Scottish public authorities and any cross-border public authority to see to it that functions are carried out with due regard to the need to meet equal opportunity requirements, (3) the inclusion of persons with protected characteristics in non-executive posts on public boards ("the public board exception"), and (4) equal opportunities in relation to the Scottish functions of any Scottish public authority or cross-border public authority that do not fall within the public board exception. Senior counsel submitted that only in relation to (4) which might be termed the "non-public board exception" did any issue arise about the extent to which the Equality Act could be amended. The public board exception says nothing about the

Equality Act. If the court did consider there was any ambiguity about this it might be helpful to look at the annotated version, but that was subject to objection by Mr O'Neill.

[28] The real question underlying the petition was the construction of the reservation in L2 and specifically whether the 2018 Act provisions fall within the public boards exception in relation to the inclusion of persons with protected characteristics on such public boards or alternatively whether any provisions of the 2018 Act are reserved matters within the general equal opportunities reservation. In Ms Crawford's submission, if the legislative provisions under challenge fell properly within the public boards exception and so within legislative competence, then it was also within legislative competence to make a relative positive measure and disapply certain provisions of the Equality Act within that exception. The central point was that the public boards exception accepts or qualifies the reserved matter of equal opportunities and thereby enlarged the legislative competence of the Scottish Parliament. The words "so far as relating to" the inclusion of persons with protected characteristics in the exception to the reservation meant that any measure seeking to eliminate discrimination between persons on the grounds listed in the definition of equal opportunities would plainly not be outside the legislative competence of the Scottish Parliament if it was an inclusive provision. The definition of "woman" in section 2 of the 2018 Act makes provision in relation to the **inclusion** of persons with protected characteristics, mainly women with the protected characteristic of sex and, relatedly, transwomen with the protected characteristic of gender reassignment. So far as the latter category are concerned, it was not sufficient for persons to fall within that protected characteristic to be included as women within section 2, they must also comply with the additional requirement of having the other personal attribute of living as a women. In considering the purpose and effect of the provision, it was to ensure that the 2018 Act was

inclusive of all women, living as such. Understood this way, it was clear that the definition of women in section 2 did not “relate to” a reserved matter but fell squarely within the scope of the public boards exception and so was not reserved.

[29] So far as the challenge to section 11 of the 2018 Act was concerned the public boards exception did not prohibit modifying the EA 2010 other than supplementing or adding to it. The contrast between the non-public boards exception which expressly prohibited modification and set out the limited extent to which provision relating to the 2010 Act may be made stood in contrast to the public boards exception which did not prohibit modification at all. The UK Parliament had ceded legislative power to the Scottish Parliament on the whole issue of non-executive posts on boards of Scottish public authorities and the inclusion therein of persons with protected characteristics. The exception was rather wider in its scope than Mr O’Neill had contended. Had the Scottish Parliament been given a power that was limited in the way that the non-public board exception is, that would require to have been expressed in the exception to the reservation. For the petitioner to be correct on the issue of modification of the Equality Act, this would have to apply to any attempt by the Scottish Parliament to legislate on public boards at all whether in relation to disabled people, ethnic minorities and so on. The public boards exception would have no force at all if it prohibited the Scottish Parliament from adopting positive measures generally. The whole purpose of the Scottish public boards exception was to allow the Scottish Parliament to take positive action measures. In doing so, it was entitled to disapply section 158 and 159 (by section 11 of the 2018 Act) to avoid arguments about whether the positive action measures were consistent with those provisions or not. The Scottish Parliament was entitled to deviate from the provisions in order to legislate on the matter specifically excepted from the reservation and has done so comprehensively.

[30] On the issue of construction of the provision, counsel referred to *Imperial Tobacco Limited v Lord Advocate* [2012] UKSC 61 and in particular paragraph 12 thereof where Lord Hope laid down the principles to be applied when considering challenges to whether provisions are outwith legislative competence. Then at paragraph 18, Lord Hope had set out the correct staged approach in dealing with such challenges. Some analogies could be drawn between that case and the current one in that the court had (at paragraph 27) rejected the sort of broad approach contended by the challenger in both cases. At paragraph 29 the discussion about how to look at the purpose and effect of a provision under challenge is set out. What was an issue in this case was the extent of the “carve out” from the general reservation of equal opportunities. Paragraph 39 of *Imperial Tobacco* was also of interest. It assists in explaining how to look at the effect of a provision. Whether or not the purpose of a provision has been achieved is not the test. So far as the current provision was concerned, its effect was to include all those the Scottish Government wanted to include within the definition of women for a particular purpose. That was enough. Finally, at paragraph 43 of *Imperial Tobacco* the court had clarified that even if one of the purposes of Scottish Parliament legislation relates to a reserved matter that is inconsequential. Translating that to the present case the positive action measure of the enactment was just the means to an end. The purpose was to secure the representation of women (within the inclusive definition of the act) on public boards.

[31] Under reference to *Christian Institute v Lord Advocate* [2016] UKSC 51 at paragraphs 63-66 Ms Crawford submitted that even where legislation was specifically stated to be reserved the Scottish Parliament may competently enact on the issue if, for example, that possibility is contemplated by the UK legislation itself. In that case, there were two pieces of legislation that were specifically reserved to Westminster, including the Data

Protection Act but the UK Supreme Court was not persuaded that certain provisions of the Scottish enactment related to the subject matter of those. What mattered was the overall purpose of the legislation (in that case the Children and Young People (Scotland) Act 2014) was not data sharing but was to serve and promote the interests of children. Therefore in principle, the Act had been within the legislative competence of the Scottish Parliament, albeit that there were difficulties with some of the information sharing provisions. It was also clear from the case involving the reference on the *UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill* [2018] UKSC 64 that to relate to a reserved matter a provision must have more than a loose or consequential connection with it. The court had reiterated that point under reference to *Martin v Most* [2010] UKSC 10 in *Imperial Tobacco*. In the present case, if the respondents' approach to construction was accepted, it became clear that the 2018 Act does not relate to reserved matters at all. Rather it fell squarely within the scope of the defined public boards exception and so within the legislative competence of the Scottish Parliament. The petitioner's argument to the contrary should be rejected.

[32] Senior counsel contended that the relevant reserved matter in this case related to equal opportunities (as defined) and not to the Equality Act 2010. Accordingly even if the provisions of the 2018 Act "go against the grain" of the Equality Act it would not matter. However, even if that was not accepted, for the reasons she had contended in relation to the construction of the exception to the reservation, there was no difficulty with section 11 of the Act whose purpose was to prevent duplication of a statutory provision regarding positive action in the appointment of persons to public boards where the action in question is taken under the devolved power.

[33] On the EU law challenge, the provisions of the Treaty and Directives on Equal Treatment did not preclude measures regulating discrimination that applied to transwomen

who are relevantly similar to women for the purposes of equality of treatment. Support could be found in the case of *P v S and another* (Case C-13-94), a decision of the CJEU which had concerned dismissal of an employee who was undergoing gender reassignment. The discrimination against her was discrimination on the basis of the sex she had held before gender reassignment. The question was whether a dismissal due to the gender reassignment fell within the Equal Treatment Directive (76/207/EEC). It was clear from the opinion of the Advocate General, accepted by the court, that where unfavourable treatment of a transsexual is related to their change of sex, the discrimination is by reason of sex. Importantly, the Advocate General had added (at paragraph 20) that in the context of that case sex was important as a convention, a social parameter. To maintain that the unfavourable treatment suffered by the applicant was not on grounds of sex but because it was due to her change of sex, would be a “quibbling formalistic interpretation and a betrayal of the true essence of that fundamental and inalienable value which is equality”. The court accepted that view and found that the scope of the Directive applied to discrimination arising from the gender reassignment of the person concerned. The court’s conclusion is reflected in the preamble to the successor Directive 2006/54/EC (paragraph 3).

[34] Article 3 of the current Directive provides that Member States may maintain or adopt measures within the meaning of Article 141(4) of the Treaty with a view to ensuring full equality and practice between men and women in working life. It was unclear which provisions of the 2018 Act the petitioner’s challenge based on the Equal Treatment Directive was directed towards. The “positive action” measures of the 2018 Act are principally contained within sections 3 and 4 and it seemed likely that those were the target of the petitioner’s complaint. However the main contention seemed to be the definition of women in section 2 of the Act. None of the sections of the 2018 Act violated the EU law principle of

equal treatment on grounds of sex because, as the Court of Justice recognised in *P v S and another*, the scope of that principle is also apt to apply to discrimination arising from the gender reassignment of the person concerned. In the more recent case of *MB v Secretary of State for Work and Pensions* (Case C-451/16) the Court of Justice of the European Union considered whether someone who had changed gender and become a woman would not be recognised for the UK State pension as she had no Gender Recognition Certificate. She had so been treated as a man for the purpose of that statement. The UK Supreme Court had referred to the CJEU the question of whether Council Directive 79/7/EEC precluded the imposition in national law of a requirement that, in addition to satisfying the physical, social and psychological criteria for recognising a change of gender, a person who had changed gender must also be unmarried in order to qualify for a State retirement pension. The UK Government had submitted that the situation of a person who changed gender after marrying and the situation of a person who has retained his or her birth gender and is married were not comparable on the ground that the marital statuses of those people would be different. However the court decided (at paragraph 42) that the comparability of situations must be assessed not in a global and abstract manner, but in a specific and concrete manner having regard to all the elements which characterise them and in the light, in particular, of the subject matter and purpose of the national legislation which makes the distinction at issue. This required to be done where appropriate in the light of the principles and objectives pertaining to the field in which the national legislation related. The two situations in that case were accordingly comparable, so the national legislation that provided less favourable treatment, directly based on sex, to a person who changed gender after marrying than that accorded to a person who had kept his or her birth gender and married was prohibited by the Directive.

[35] Applying that to the arguments in this case, the comparability was as between women who were born women and transwomen living as women. The Member States of the EU were able to legislate to prohibit discrimination against either of those groups of women and to legislate against discrimination arising from gender reassignment. There was simply no violation of the principle of equal treatment or the permitted derogations from it. The positive action measures of the 2018 Act could not be said to be beyond legislative competence on any EU law grounds.

[36] Counsel for the petitioner's argument that it was not open to the Scottish Parliament to effectively collapse the distinction between sex and gender reassignment was misconceived. The legislation was not about gender recognition at all but rather about the inclusion of those with protected characteristics as women for application to public boards. To include a trans woman within the definition of women for that purpose is not discriminatory at all in terms of the Equal Treatment Directive. In addition to the cases already cited Lady Hale had reinforced the point in the case of *Chief Constable of the West Yorkshire Police v A and another* (No 2) [2004] UKHL 21. In that case a transsexual's application to be a police constable had been refused and the applicant then claimed discrimination on the basis of sex. At paragraph 55, Lady Hale had specifically addressed the Equal Treatment Directive and the case of *P v S* (cited above). Having discussed the provisions of the Directive and their interpretation, Lady Hale concluded that there was a right to an identity as a man or as a woman rather than of some "third sex" and so a transsexual person was to be regarded as having the sex to which he or she has reassigned. While the case of *A* had been decided before the passing of the Gender Recognition Act 2004, Ms Crawford submitted that the legislation setting out the circumstances in which Gender Recognition Certificates can be obtained did not alter the issue of principle at all.

[37] Turning to the ECHR challenge, senior counsel pointed out that this was brought on an *ab ante* basis and so it was necessary for the petitioner to establish that the relevant Convention rights would be violated in every or almost every case. Authority for that proposition could be found in *Christian Institute v Lord Advocate* (cited above) and *R (Bibi) v Secretary of State for the Home Department* [2015] 1 WLR 5055 at paragraph 60. If a provision is capable of being operated compatibly with ECHR it will not give rise to an unjustified interference. The first respondent did not accept the petitioner's submission that Article 8 ECHR will be engaged in its private life aspect in most cases falling within the scope of the 2018 Act. Although employment related disputes are not *per se* excluded from the scope of private life for the purposes of Article 8 the threshold for engagement is fact sensitive and high. As the petition did not contend that Article 8 would be engaged in all or nearly every case or even about the nature of the alleged violation, there was no scope to allow justification to be assessed and so the Article 8 challenge was fundamentally irrelevant. In *Denisov v Ukraine* [2018] ECtHR 76639/11 various challenges had been made by the past president of an administrative court including an Article 8 challenge. He had been dismissed from his position on the basis of applicable law that was too vague and did not provide for procedural safeguards to prevent its arbitrary application. At paragraph 110-115 the court analysed the claim on a consequence based approach. The court made clear (at paragraph 115) that there were some typical aspects of private life that might be affected in employment type disputes. For example an applicant's inner circle, his/her opportunity to establish and develop relationships with others and social and professional reputation are such aspects. However the difference between the impact on private life because of the underlying reasons for the impugned measure (where the court would employ a reasons based approach) or because of the consequences for private life (in which case the court

would employ the consequence based approach) was important. Ms Crawford submitted that it was noteworthy in the present case that the petitioner gave no clue as to whether a consequence based or reasons based approach should be adopted.

[38] It was simply impossible to deal with any Article 8 challenge without knowing what exactly the basis for this was. So far as Article 14 was concerned, the petitioner had failed to identify the category of persons discriminated against. Mr O'Neill had appeared to draw a comparison between those who were born as women and women who had the protected characteristic of gender reassignment. While it was accepted that like cases should be treated alike and *vice versa*, the petitioner could not invoke a generalised "principle of non-discrimination" not found in Article 14 and so not a constraint on the Scottish Parliament's legislative competence. It could be seen from the case of *Napotnik v Romania* [2020] ECtHR 33139/13, at paragraph 71, that comparator groups did not need to be identical. What mattered was that only differences in treatment based on an identifiable characteristic were capable of amounting to discrimination. The Scottish Government's position was that "transwomen are women" and there was no reason why that position or policy should not apply so that it is inclusive of transwomen.

[39] In relation to CEDAW, in respect of which the petitioner was seeking a declarator, Ms Crawford emphasised that this is an unincorporated international treaty and so does not give rise to enforceable obligations in domestic law - *R (SG and others) v Secretary of State for Work and Pensions (Child Poverty Action Group and another intervening)* [2015] 1 WLR 1449 at 1474. As CEDAW was not currently enforceable as a matter of domestic law, it could not be a constraint on the legislative competence of the Scottish Parliament as it did not fall within the provisions of section 29 of the 1998 Act. Mr O'Neill had relied on the case of *Wightman v Secretary of State for Exiting the European Union* [2018] CSIH 62 to support his

argument, but that decision did not assist. Following the referral to the CJEU the Inner House has made a declarator in circumstances where the matter of the Article 50 Notice giving notice of EU departure was not academic and had clear domestic consequences. In contrast, CEDAW currently has no such consequences. In any event, while CEDAW could be used as an aid to construction, having regard to the General Recommendations of the relative UN Committee on the Elimination of Discrimination against Women, those supported the respondents' stance. In particular, General Recommendation No 28 made clear that gender included socially constructed identities and went beyond biological sex. Further, it made clear that discrimination of women based on sex and gender is inextricably linked with other factors affecting women, including gender identity. The declarator sought on the basis of purported incompatibility of the 2018 Act with CEDAW should be refused as incompetent.

[40] Turning to the challenge based on the Public Sector Equality Duty (PSED) and the 2012 Regulations, the respondents accepted without question the propositions relied on by the petitioner in the written argument in relation to the interpretation of the section 149 EA 2010 duty summarised in *Annand v Kensington and Chelsea RLBC* [2019] EWHC 2964. It was clear, however, that this statutory duty does not compel a particular outcome. The purpose of the duty is to ensure that public authorities, such as the second respondents, consider the likely impact of any given policy on different groups (defined by reference to the protected characteristics) before any decision relating to that policy is taken. While the section 149 duty is justiciable by way of judicial review, the court's only focus is limited to whether the duty to have "due regard" to the factors listed in the act has been discharged - *R (Hurley & Moore) v Secretary of State for Business, Innovation and Skills* [2012] EWHC 201 at 77-78.

[41] The specific duties imposed by regulation 5 of the 2012 Regulations were complementary to the PSED but in terms of section 32(11) Equality Act 2006 were enforceable only by notice issued by the Equality and Human Rights Commission and so not by proceedings for judicial review. In *Hunter v Student Awards Agency for Scotland* [2016] CSOH 71 Lady Scott had accepted that enforcement of the 2012 Regulations was only through compliance notice issued by the Commission. In any event, it was apparent from the factual background to the 2018 Act being passed that the second respondents had discharged their duties to have regard to the need to eliminate discrimination, advance equality of opportunity and foster good relations between persons who share protected characteristics. The second respondents had prepared an EQIA in relation to the draft Bill. They had publicly consulted on draft regulations and the draft statutory guidance had been issued in 2019. Amongst other matters the consultation had included questions on the scope of the guidance to be issued and on the proposed definition of “woman” for the purpose of the legislation. A report in relation to the consultation response was published. The exercise had illustrated that the definition of women for the purposes of the legislation was wrong and required amendment. The detail of the due level of regard that had been given to the needs promoted by the section 149 duty was set out in the Affidavit (No 21 of process) of the Scottish Government’s Equality Policy Manager. The petitioner’s claims of breach of duty and of the 2012 Regulations should be refused on the merits, with the 2012 Regulations challenge also being incompetent.

Equality network intervention

[42] A detailed and helpful written submission was lodged on behalf of the intervener that addressed some of the equal opportunities arguments from the perspective of

transgender people. It included a contention there is no single legal definition of the term “woman” that applied throughout the UK. The petitioner’s argument was wrong insofar as it suggested that only those with a Gender Recognition Certificate could benefit from equal opportunities measures designed to promote equality of opportunity for women. The concepts of “sex” and “gender” and the instances of discrimination relating to them were so interrelated that they could not be kept entirely separate. In the Employment Law context, many provisions and relative claims focused on the persistent socially constructed gender role of female responsibility for childcare, a matter not directly linked to biological sex. There was nothing in the EA 2010 that would prevent a transgender woman without a Gender Recognition Certificate bringing a sex discrimination claim as a woman. The 2018 Act did not promote equality of opportunity of two protected characteristics at once, it simply included as women those with another intersecting protected characteristic. It was clear from the case of *Goodwin v UK* (2002) 35 EHRR 447 that a purely physiological/biological definition of sex had been out of step with the European approach for some time.

[43] The intervener had participated in the pre-legislative consultation process that preceded the 2018 Act and was aware of the detailed equality impact assessment that had taken place. There was no basis for the petitioner’s apparent belief that express inclusion of transgender women would negatively impact women who are not transgender. The arguments about the exclusion of transgender men from the 2018 Act measure ignored the fact that biological women reassigning their gender are visually indistinguishable from biological men and would not want or expect to be counted as women.

Discussion

[44] I had the benefit of written Notes of Argument from both main parties in this case, together with a detailed speaking note tendered by Mr O'Neill. These cited a large number of authorities and raised a number of tangential points and authorities. While I have considered them all carefully, this discussion will focus on the salient issues identified in oral argument. I will address the challenges to the legislation in the order in which they were presented, namely (i) "reserved matters" (ii) EU Law (iii) ECHR (iv) CEDAW and (v) PSED and the 2012 Regulations.

Reserved matters challenge

[45] The central issue was agreed to be the first challenge, namely that of whether any of the provisions of the 2018 Act relate to reserved matters and so were outside the legislative competence of the Scottish Parliament. The proper approach to arguments of this type is authoritatively summarised by Lord Hope in the case of *Imperial Tobacco Limited v Lord Advocate* [2012] UKSC 61. Insofar as they have a direct bearing on the present case, the principles to be followed when undertaking this exercise are there enunciated as follows:

"[13] First, the issue of competence must be determined in each case according to the particular rules that have been set out in sec 29 of, and schs 4 and 5 to, the 1998 Act. It is not for the courts to say whether legislation on any particular issue is better made by the Scottish Parliament or by the Parliament of the United Kingdom at Westminster (*Martin v Most*, para 5)...

[14] Second, those rules must be interpreted in the same way as any other rules that are found in a UK statute. The system that those rules laid down must, of course, be taken to have been intended to create a system for the exercise of legislative power by the Scottish Parliament that was coherent, stable and workable. This is a factor that it is proper to have in mind. But it is not a principle of construction that is peculiar to the 1998 Act. It is a factor that is common to any other statute that has been enacted by the legislature, whether at Westminster or at Holyrood. The best way of ensuring that a coherent, stable and workable outcome is achieved is to adopt an approach to the meaning of a statute that is constant and

predictable. This will be achieved if the legislation is construed according to the ordinary meaning of the words used.

[15] Third, the description of the Act as a constitutional statute cannot be taken, in itself, to be a guide to its interpretation. The statute must be interpreted like any other statute. But the purpose of the Act has informed the statutory language. Its concern must be taken to have been that the Scottish Parliament should be able to legislate effectively about matters that were intended to be devolved to it, while ensuring that there were adequate safeguards for those matters that were intended to be reserved. That purpose provides the context for any discussion about legislative competence. So it is proper to have regard to the purpose if help is needed as to what the words actually mean....

[16] It will, of course, be necessary to identify the purpose of the provision if the challenge is brought under sec 29(2)(b) on the ground that it relates to a reserved matter, bearing in mind that the phrase 'relates to' indicates something more than a loose or consequential connection (see *Martin v Most*), Lord Walker, para 49...

[18] The first step in the analysis that must now be carried out is to examine the provisions whose legislative competence has been brought into question and identify the purpose of the provisions according to the test that sec 29(3) lays down. Then the rules that the 1998 Act sets out, so far as relevant, must be examined in more detail in order to identify the tests that have to be applied in order to determine whether the provisions are outside competence. This, the second stage, is of critical importance and it requires to be handled with great care. The final stage will be to draw these two exercises together to reach a conclusion as to whether or not the grounds of challenge are well-founded."

[46] The 2018 Act introduces what is termed, in section 1, a "gender representation objective". That objective is for a Scottish public board to have 50% of non-executive members who are women. In that context, the first provision under challenge is section 2, insofar as it defines "woman" for the purposes of the act. Section 2 of the 2018 Act provides that:

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

Section 3 imposes a duty on those appointing people to fill vacancies on public boards to do so in accordance with section 4, with a view to achieving the gender representation

objective. The positive action measure itself is contained in section 4, which is invoked only where there are candidates who are equally qualified for the position. If there are such candidates, preference must be given, as between them, to a candidate “who is a woman” if that would achieve or make progress towards achieving the gender representation objective. So those who might benefit from this positive action measure are women as defined in section 2. Importantly, the positive action measure is not a quota as such, in that it does not allow candidates to be chosen because they are members of a particular group or have a particular protected characteristic. Only in the closely defined circumstances described in section 4 could someone falling within the description of woman be preferred over a candidate not described as a woman for the purposes of the legislation. There are then provisions on achieving the stated objective of the legislation followed by a specific duty in section 7 to publish guidance on the operation of the Act. Section 11 provides that:

- “(1) Sections 158 and 159 of the Equality Act 2010 (positive action) do not apply to any action taken under this Act.
- (2) Part 5 of the Equality Act 2010 (work) does not prohibit any action taken under this Act.”

The arguments about how to construe those provisions differ and I will deal with them separately.

[47] The background to the 2018 Act was agreed to be as outlined by counsel in their submissions. It followed a negotiated exception to the general reservation of equal opportunities, and was one of the matters emanating from the Smith Commission Report in November 2014. The exception was crafted to address a matter of interest to the Scottish Government, namely the introduction of measures designed to improve the representation of women on public bodies in Scotland. In short, that is the purpose of the legislation now challenged. It is to increase, with a view to achieving representation at the level of 50%,

women on Scottish public boards. Self-evidently there is a visual element to such representation. The effect of the provision is likely to be that Scottish public boards will be visibly more gender balanced.

[48] The issue of whether or not the 2018 Act “relates to reserved matters” in terms of section 29(2)(b) of the 1998 Act can only be determined by reference to the specific parameters of the exception contained within the now amended Act of 1998. The specific exception carved out from the general reservation of equal opportunities that requires construction is in brief terms. It provides:

“Equal opportunities so far as relating to the inclusion of persons with protected characteristics in non-executive posts on boards of Scottish public authorities with mixed functions or no reserved functions.”

While there follows thereafter a further exception, set out in full at paragraph 2 above, the legislation under challenge is dealing only with this particular exception which can be termed the “Scottish public boards exception”. For reasons that will become apparent, the separation of the exception from the further exception that follows it, is significant.

[49] There was some discussion in argument about whether the challenged provisions of the 2018 Act were concerned with “equal opportunities” as that phrase is defined in section L2 of part 2 of schedule 5 of the 1998 Act. Senior counsel for the respondents sought to draw a distinction between the equal opportunities reservation prior to the 2016 amendments, which had specifically included the subject matters of four named pieces of legislation and the current reservation which was simply “equal opportunities” as defined. It seems to me, however, that the provisions of the 2018 Act indisputably relate to equal opportunities. The definition of equal opportunities in the L2 reservation is extremely wide and includes the “prevention, elimination or regulation of discrimination” on a number of grounds that include not just sex and sexual orientation but also other personal

attributes. The Equality Act 2010 is an overarching statute making provision for equality law across the United Kingdom. It now contains many of the provisions on equal opportunities that were previously dealt with by individual statutes. The regulation of discrimination between groups is a matter in which the UK as a whole has an interest and so the Equality Act, which is part of that subject matter is reserved, other than for any topic or area specifically carved out as devolved. If the Scottish Parliament is able to modify or otherwise deviate from the provisions of UK wide legislation it can only do so if the enactment falls within a clearly defined exception. The 2018 Act itself refers to the EA 2010 as part of the definition of those included as women for the purposes of the legislation. That is as one would expect because alteration of the definition of protected characteristics listed in section 7 of the EA 2010 does not fall within the exception to the reservation; they are to have the same meaning as given in the EA 2010 (Scotland Act 2016, section 37(4)).

[50] What then is the scope of the Scottish public boards exception? It seems to me that, giving the words used in the exception to the equal opportunities reservation their ordinary meaning, the Scottish Parliament now has devolved power to legislate for equal opportunities if, and for present purposes only if, the subject matter of the relevant provisions is the inclusion of anyone with any protected characteristic on Scottish public boards. It is no longer appropriate to talk of equal opportunities being a reserved matter without reference to this exception, amongst others, because to the extent that a provision falls within the four corners of an exception it is devolved and so within legislative competence. Both women with the protected characteristic of sex and those who have the protected characteristic of gender reassignment would clearly fall within the definition. To put it another way, the exception covers any aspect of equal opportunities that falls within the scope of “relating to the inclusion of persons with protected characteristics” on Scottish

public boards. So there is no restriction on the nature of the steps that can be taken to eliminate or regulate discrimination if the measures in question are inclusive of those with EA 2010 protected characteristics. The wording of the exception requires to be read as a whole in order to understand its scope.

[51] The extent to which the Scottish Parliament can legislate where some consequential aspects of the relevant provisions relate to a reserved matter was examined in *Christian Institute v Lord Advocate* [2016] UKSC 51. In that case, the purpose of a piece of legislation (Children and Young Persons (Scotland) Act 2014) was to promote the wellbeing of children and young people. One part of the statute made provisions about data protection, a reserved matter subject to two pieces of UK wide legislation. The UK Supreme Court was not ultimately persuaded that the parts of the 2014 Act that affected the way in which the UK wide data protection legislation applied to the measures being introduced “related to” the subject matter of the Data Protection Act and relative EU Directive. The Scottish legislation did not detract from the regime established by the UK legislation and the different application of the data protection regime for the purpose of the Scottish Act was consequential upon, or incidental to, its primary purpose. In the present case, although the EA 2010 falls within the generally reserved matter of equal opportunities, not all Scottish legislation in the area of equal opportunities will relate to that reserved matter. Scottish legislation on one carefully defined devolved aspect of equal opportunities will not detract from the otherwise UK wide approach to the area. The purpose of the 2018 Act is to improve gender representation on Scottish public boards. While the visible representation the legislation aims to increase is that of women, the inclusion of those with the protected characteristics of gender reassignment and living as women for that purpose does not fall within the reserved matter of equal opportunities because of the terms of the public boards

exception. Had the exception been restricted to “the inclusion of woman as defined in the Equality Act 2010” on Scottish public boards the conclusion on this point might be different. The broader power to make provision for the inclusion of anyone with protected characteristics permits the Scottish Parliament to decide who all should be included in a measure of this sort, so long as it relates to posts on Scottish public boards.

[52] The essence of the petitioner’s argument is that the term “woman” means biological woman for the purposes of equalities legislation and that the Scottish Parliament had no power to alter that reserved matter. In my view this argument is misconceived. Section 2 of the 2018 Act acknowledges that those whose biological sex is female will be included in those who may benefit from the positive action measure. The provision does not redefine woman for any purpose other than to include transgender women as another category of people who can benefit from that measure. As indicated the Scottish Parliament’s ability to do so emanates from the wording of the exception allowing for the inclusion of people with different protected characteristics to be the subject of Scottish legislation. Senior counsel for the petitioner contended that section 14 of the EA 2010, which relates to combined discrimination, would preclude provisions such as those under the 2018 Act which apply indiscriminately both to biological women and to transgender people who had been born male but who now have the protected characteristic of gender reassignment. In my view section 14 of the 2010 Act has no bearing on the issue I have to decide. It relates to discrimination on the basis of a combination of two relevant protected characteristics where there is less favourable treatment of someone with that combination as compared with someone who does not share either of the characteristics. I have concluded that the very specific and clearly defined devolved power in play in this case allows the inclusion of persons with more than one protected characteristic as the plural form is used in the

exception to the reservation. As the Equality Network pointed out in its helpful written submission, protected characteristics often “intersect”, with many individuals having more than one protected characteristic. For example, transgender people may or may not be also from an ethnic minority background and/or disabled. Most transgender women will have two protected characteristics, one of sex and the other of gender reassignment. A provision of inclusion such as section 2 of the 2018 Act does not seem to me to offend against a requirement not to discriminate against someone because of a combination of two relevant protected characteristics. Much was made in argument of the effect of the 2018 Act being to exclude or discriminate against biological women who are changing gender and living as men, who could not benefit from its positive action measures. That ignores the obvious point that such people are visually and socially male and so not operating as women for the purposes of the gender representation objective.

[53] It is noteworthy that the reference to all those who will be included within the term “woman” for the purposes of the 2018 Act is part of the interpretation section for the purposes of the legislation. It seeks to include a number of persons with protected characteristics as women for the purpose of the positive action measure that the Act introduces. Two types of people with protected characteristics fall within the definition of woman in section 2. First a woman whose biological sex is female and always has been would clearly fall within the definition. Secondly, those who have the protected characteristic of gender reassignment as defined in section 7 of the EA 2010 are included but only if in addition to proposing to undergo, undergoing or having undergone a process for the purpose of becoming female that person is already living as a woman. It is clear, then, that the 2018 Act does not purport to redefine woman in the sense of excluding those who have that biological sex, nor does it seek to redefine the protected characteristic of gender

reassignment which definition is governed by UK wide legislation and not part of the exception. The key definition has the effect only of including as women, for the purpose of a piece of legislation designed to improve gender representation on public boards, those who can meet the aforementioned stringent criteria. If they do, they are deemed to be representative of the female gender in this limited context; they are included as women for that single purpose.

[54] There was some discussion in argument about the provisions of the Gender Recognition Act 2004. In my view none of the provisions of that legislation or its consequences have any bearing on the statutory provisions under discussion in this case. The definition of gender reassignment in the EA 2010 makes clear that to have the protected characteristic of gender reassignment it is not necessary to have changed or be planning to change the physiological aspects of one's biological sex. The reference to "... other attributes of sex" in section 7(1) EA 2010 illustrates that the protection attaches not just to those who are changing physiological aspects but also those who wish to change other attributes of sex. While the 2010 Act uses biological sex to define the protected characteristic of sex in section 11, that has no real bearing on the discussion about the inclusion of transgender women in the 2018 Act. Mr O'Neill relied on the case of *R (McConnell) v Registrar General for England and Wales* [2020] EWCA Civ 559 as support for the contention that a woman who had changed gender to male and subsequently given birth could not be registered as the father rather than the mother of the child notwithstanding that a full Gender Recognition Certificate had been issued. In my view that decision has no bearing on an argument about whether or not section 2 of the 2018 Act goes beyond the Equality Act definition of women and/or those with the protected characteristic of gender reassignment. It related to a

completely different matter, namely the consequences for birth registration of the issuing of a Gender Recognition Certificate.

[55] The second argument under the “reserved matters” aspect of the case relates to whether the 2018 Act was intended to introduce and authorise measures falling within the definition of “positive action” set out in section 159(3) of the EA 2010. Section 159(2) EA 2010 departs from the general prohibition against occupation related discrimination on the protected grounds of which would otherwise be imposed under part 5 (work) EA 2010. Part 5 prohibits the treating of a person more favourably in connection with recruitment or promotion because that person has a protected characteristic. Section 159(2) permits such positive action if it is done

“with the aim of enabling or encouraging persons who share the protected characteristic to overcome or minimise the relevant disadvantage or participate in the relevant activity.”

There are limited grounds on which positive action which would otherwise be in breach of the general prohibition is permitted. These include that the person to be treated more favourably is as qualified as the other person to be recruited or promoted, that the person making the decision does not have a policy of treating persons who share the protected characteristic more favourably in connection with recruitment or promotion than persons who do not share it and that taking the action in question is a proportionate means of achieving the identified legitimate aim for favouring persons who share the protected characteristic with those who do not. The issue raised by the petitioner is that the positive action measures which the 2018 Act introduces seem to require of the persons appointing candidates to non-executive posts in public boards in Scotland that they depart from the strict requirements laid down by section 159 EA 2010. The particular challenge pursued in argument was that because the positive action measures of the 2018 Act apply

indiscriminately to both biological women and those who fall within the gender reassignment protected characteristic, the legislation fails to identify what, if any, is the relevant disadvantage for persons who share those protected characteristics which might justify the taking of the measure. There is said also to be a failure to identify or classify a group of persons under reference to their shared protected characteristic. Notably, section 159(4)(b) EA 2010 permits positive actions measures only where the appointing body does not have a policy of treating persons who share the protected characteristic more favourably in connection with recruitment or promotion than persons who do not share it. Counsel for the petitioner contended that it would run wholly against the grain of the EA 2010 provisions which allow for very limited circumstances in which positive action may be implemented to permit those provisions simply to be disapplied. There had been no proportionality exercise and the legislation as a whole imposed requirements on appointing bodies to public boards to take action that the EA 2010 clearly prohibited unless the conditions in the legislation were fulfilled.

[56] It is indisputable that the principle of equality of treatment lies at the centre of the list of fundamental rights protected at common law and within current domestic legislation. As Lord Reed observed (at paragraph 151) in *AXA General Insurance v Lord Advocate* [2011] UKSC 46 under reference to established authorities the principle of legality includes the rule that fundamental rights cannot be overridden by general or ambiguous words. However, it does not seem to me that the 2018 Act interferes with the principle of equal treatment once it is understood that measures designed to accelerate or achieve equality can be taken consistently with that principle. The 2018 Act is clearly designed to accelerate broad equality of representation on Scottish public boards. I reject the contention that section 11 of

the 2018 Act, in disapplying the positive action provisions of the 2010 Act, offends against the fundamental principle of equal treatment.

[57] On the statutory construction point, much depends on the relationship between the Scottish public boards exception and the exception in relation to other Scottish functions of any Scottish public authority. As can be seen from the exceptions to the equal opportunities reservation listed in paragraph (2) above, the Scottish public boards exception is listed quite separately from the non-public boards exception that follows it. While the non-public boards exception makes clear provision that the Equality Act 2010 may not be modified but that devolved legislation may supplement or add to it or impose a requirement that the act does not prohibit and so on, the public boards exception includes no such restriction.

Mr O'Neill sought to argue that, in accordance with the maxim *expressio unius est exclusio alterius*, that the express prohibition against modification meant that the alternative, that modification or disapplication could be allowed by implication, would be an impermissible interpretation of the L2 reservation. In my view, scrutiny of the exception provisions serves to contradict rather than reinforce that argument. For non-public board functions there is an express prohibition on modification of the EA 2010, otherwise excepting equal opportunities so that it becomes a devolved matter would have permitted the Scottish Parliament to depart from any aspect of equal opportunities in fulfilment of any purpose related to Scottish or cross-border public authorities. As the EA 2010 is part of the greater general subject matter of equal opportunities, it can be departed from only to the extent that the legislative act is devolved, ie relates to the carefully defined excepted matter, here the inclusion of persons with protected characteristics on Scottish public boards. It cannot be modified or disappplied for provisions relating to any other public authority functions, albeit that enactments on public authority non-public boards functions may supplement, go

legitimately beyond or reproduce its provisions. There was no need for the Scottish public boards exception to refer to the EA 2010 (other than indirectly for the definition of protected characteristics) because that legislation is part of the general subject of equal opportunities and equal opportunities are not reserved to the extent of that closely defined and limited exception. Accordingly, a deviation from or modification of the EA 2010 insofar as necessary to fulfil the purpose of including persons with protected characteristics on Scottish public boards is an acceptable, ancillary consequence of legislating within the exception.

[58] Properly understood, section 11 of the 2018 Act disapplies the positive action provisions of the Equality Act 2010 only to signal that this legislative scheme is designed to impose bespoke measures for a single area of equal opportunities that has been devolved to the Scottish Parliament. Only in relation to that limited exception can there be any interference with the provisions of the Equality Act 2010. So the 2018 Act replaces the positive action measures of the Equality Act 2010 but only for that one specified matter in relation to Scottish public boards. For these reasons I accept the submissions of senior counsel for the respondent that the Scottish public boards exception is not subject to all Equality Act restrictions in the way contended for on behalf of the petitioner.

[59] Drawing together, then, the provisions of the 2018 Act and their purpose (and intended effect) read with the express terms of the exception to the reservation, I have concluded that there is no conflict between the two. The 2018 Act does not seek to interfere with the protections created by the EA 2010 in relation to certain single sex services such as communal accommodation or facilities such as single sex changing rooms. It does not and could not alter the protected characteristics defined in the EA 2010 as the exception itself refers to protected characteristics as the benchmark for inclusion on Scottish public boards about which the Scottish Parliament can legislate. It is otherwise clear from the express

terms of the exception that equal opportunities are now within devolved competence but only for equal opportunities measures relating to the inclusion of those with protected characteristics on Scottish public boards. I indicated earlier that there was argument about reference to external material as an aid to construction in the event of ambiguity. Various authorities were advanced for and against the argument that material such as Ministerial statements could be used to assist the interpretation of the relevant provisions. Ultimately I have been able to determine the statutory construction point without reference to those materials and the purpose of the provisions under challenge was not in dispute. Accordingly I have not required to explore that material in order to reach my decision.

EU law and ECHR

[60] I turn now to examine the EU law and ECHR issues. The 2018 Act would be outside the legislative competence of the Scottish Parliament insofar as incompatible with EU law, defined in section 126(9) of the Scotland Act 1998 by reference to the EU Treaties and all remedies and procedures provided for by or under those Treaties. The oral argument in relation to EU law focused on the cases of *P v S and Cornwall County Council* [1996] 2 CMLR 247 and *Brieche v Ministre de L'Interieur* [2004] ECR I-8807 and the Equal Treatment Directive (76/207/EEC). In essence, counsel for the petitioner contended first that that EU law provided for very limited circumstances in which positive action measures could be taken and this would only be lawful with an evidence base on the relevant disadvantage and that any such measure required to be proportionate. In my view, the case law does not support the petitioner's argument. When the case of *Chief Constable of the West Yorkshire Police v A and another (No 2)* [2004] UKHL 21 was decided, domestic law had not yet formally recognised gender reassignment. Notwithstanding that position, Lady Hale, at

paragraph 55, under reference to the Equal Treatment Directive, cited the following passage from the case of *P v S and Cornwall County Council*:

“The scope of Directive 76/207 cannot be confined simply to discrimination based on the fact that a person is of one or the other sex. In view of its purpose and the nature of the rights which it seeks to safeguard, the scope of the Directive is also such as to apply to discrimination arising, as in this case, from the gender reassignment of the person concerned.”

Then at paragraph 56, Lady Hale concluded that the correct interpretation of *P v S* was that:

“... for the purposes of discrimination between men and women in the fields covered by the Directive, a transperson is to be regarded as having the sexual identity of the gender to which he or she has been reassigned.”

[61] The short point deriving from this is that, far from EU law restricting the ambit of equality between the sexes to the biological sexes, there is sufficient authority to support a conclusion that in discrimination matters it acknowledges that transgender people are to be included as being of the sex to which they have reassigned (or to which they intend to reassign) where issues of equal treatment arise. EU law on equal treatment includes as sex discrimination, unfair treatment of those who fall within the gender reassignment category. This is reinforced by the preamble to the successor Equal Treatment Directive 2006/54/EC, which refers to *P v S and Cornwall County Council*. In any event, Article 3 of the current Directive provides that Member States may maintain or adopt measures within the meaning of Article 141(4) of the treaty with a view to ensuring full equality and practice between men and women in working life. Women in this context would clearly include transgender women. So far as the proportionality argument is concerned, it should be remembered that the purpose of the legislation is not to make provision in respect of transgender discrimination, it is to take positive actions measures to increase the participation of women on public boards. As EU law confirms that discrimination against transwoman is sex discrimination about which Member States can legislate, the 2018 Act does not seem to me to

offend the principle of equal treatment and the limited permitted derogation from that principle. Alternatively, if the purpose of the legislation is understood as increasing the participation of those with protected characteristics, transgender women fall within the protected characteristic of gender reassignment.

[62] So far as the ECHR challenge is concerned, the considerations are different. It was uncontroversial that some employment related disputes can fall within the scope of “private life” within the meaning of Article 8 - *Denisov v Ukraine* [2018] ECtHR 76639/11, at paragraph 115. As Ms Crawford pointed out, however, the approach to any allegation of incompatibility of a provision with Article 8 rights would depend on whether it arose because of the underlying reasons for it or due to its consequences for private life. In the present case the petitioner has not sought to categorise the challenge that way. The argument is that certain provisions of the Act are incompatible with Article 8 ECHR. I reject the premise of the petitioner’s oral argument that Article 8 would be engaged in most cases falling within the scope of the 2018 Act. The case of *Denisov v Ukraine* serves to emphasise the highly fact sensitive nature of such cases. It is not feasible to address in the abstract whether and in what way Article 8 might be engaged in specific claims under the Act. There is nothing in the provisions themselves that causes me to doubt that they could be operated compatibly with the private life aspects of Article 8 ECHR and no particular provision was identified in that context.

[63] In relation to Article 14, the decision in *Napotnik v Ukraine* [2020] ECtHR 33139/13 (Fourth Section, 20 October 2020) is of interest. The court there summarised some of the case law on Article 14 and the approach to measures imposing a difference in treatment and reiterated (at paragraph 75) that:

“advancement of the equality of the sexes is a major goal in the member States of the Council of Europe. This means that very weighty reasons would have to be advanced before a difference in treatment on the grounds of sex could be regarded as being compatible with the Convention.....the principle of proportionality does not merely require that the measure chosen should in general be suited to the fulfilment of the aim pursued, but it must also be shown that it was necessary in the circumstances.”

On the face of it the provisions of the 2018 Act represent a measure designed to achieve broad equality of gender representation, expressed as an objective. It was not suggested by Mr O’Neill that a measure with that aim would be disproportionate so long as women were defined by their biological sex. However, once it is understood that discrimination measures relating to sex can include those who are undergoing gender reassignment, the 2018 Act appears to fall within the type of action permitted by Article 14. A choice had to be made as to the inclusion of transgender people as women or men in this context. Biological women and transgender women can be regarded as in analogous or relevantly similar situations to biological women for the purpose of analysing the measure. Transgender women will for practical purposes be indistinguishable from non-transgender women in the implementation of the measure. On that basis no issue of the proportionality of the measure arises from treating transgender women as women for this purpose.

CEDAW

[64] The argument in relation to CEDAW was limited. Mr O’Neill accepted that as an international instrument not incorporated into Scots law, the Convention was not directly enforceable - *Whaley v Lord Advocate* [2007] UKHL 53; *R (SG and others) v Secretary of State for Work and Pensions (Child Poverty Action Group and another intervening)* [2015] 1 WLR 1449 at 1474. The Scottish Government has accepted a recommendation that CEDAW be so incorporated. The petitioner’s contention was that there was a legitimate interest in parties

establishing whether certain provisions of domestic law were compatible with the proper implementation of such a Convention before it was incorporated into domestic law. I reject that argument and the suggestion that it is supported by the approach taken in *Wightman and Others v Secretary of State for Exiting the European Union* [2018] CSIH 62. The context of the *Wightman* case was that the declarator sought had the domestic backdrop of the UK's exit from the EU. There would be no consequences in this case of a bare declarator in relation to CEDAW. It was suggested that even if not justiciable, CEDAW could be used as an interpretative aid. I have concluded that, if that approach is adopted, CEDAW and the associated recommendations of the UN Committee on the Elimination of Discrimination against Women ("the Committee") do not support the petitioner's argument. Article 4 of CEDAW approves the adoption of temporary special measures aimed at accelerating de facto equality between men and women. General Recommendation No 28 of the Committee confirms (at paragraph 5) that the Convention covers both sex-based and gender-based discrimination against women, with gender referring to socially constructed identities, attributes and roles. The intersectionality of discrimination based on sex and gender and other factors is emphasised at paragraph 18. General Recommendation No 35, which addresses gender based violence, is not directed only at protecting women whose biological sex is female. Notably, that recommendation (published in 2019) acknowledges the 2018 Act within a list of positive efforts made towards CEDAW's aims. There appears to me to be no inconsistency between the types of discrimination addressed by CEDAW and the provisions of the 2018 Act.

Public Sector Equality Duty and 2012 Regulations

[65] The final challenge relates to the PSED and associated Regulations. In *Annamd v Kensington and Chelsea RLBC* [2019] EWHC 2964 Lang J summarised the case law on the Public Sector Equality Duty at paragraphs 87-92. As indicated, both counsel accepted that synopsis as a clear statement of the relevant duty. In essence, the duty is not to achieve a particular result, but to “have due regard” to the need to achieve the goals listed in section 149. The challenge under this topic relates to the alleged failure on the part of Scottish Ministers to assess the impact of applying a new policy or practice against the section 149 goals. Insofar as there was also an issue about the justiciability of the 2012 Regulations, I acknowledge that in *Hunter v Student Awards Agency for Scotland* [2016] CSOH 71 Lady Scott appears to accept the premise that the 2012 Regulations are enforceable only by a compliance notice issued by the Equality and Human Rights Commission (“the Commission”) under reference to section 32(11) of the 2006 Act. However, such a notice had already been issued in that case and there does not appear to have been any substantive argument about whether any breach of the Regulations could be justiciable in an application to the court’s supervisory jurisdiction. I am not convinced that section 32(11) of the 2006 Act ousts the jurisdiction of the court to consider the alleged failure to comply with the Regulations. Section 32 applies where the Commission considers that a body has failed to comply with certain EA 2010 duties, but the provision does not seem to me to extend to excluding justiciability where there has been no involvement of the Commission. Accordingly, I will address the merits of the argument.

[66] The contention is that, insofar as Scottish Ministers now had a policy of treating all those who self-identify as women as “section 11 EA 2010 women” they had failed to consider relevant evidence on the distinction between the two groups. Regulation 5 of the

2012 Regulations confirms the statutory requirement to make an EQIA on such matters. In oral argument, the issue of whether the 2018 Act did or did not represent a new policy or practice on the part of Scottish Government insofar as it included transgender women as women was discussed. Initially Ms Crawford stated, on instructions, that the government's policy was that "transwomen are woman" as a generality. She was constrained to accept however, that there had been no announcement far less assessment of such a policy and she later explained that she had not intended to use the word "policy" as a term of art, but rather as a statement of the government's view. It was accepted that the question of whether transwomen could be included as women in other contexts was for a future discussion.

Accepting that revised position for these proceedings, the purpose of the relevant EQIA was to assess the proposals in the Bill against the three requirements of the PSED. This is confirmed in the Affidavit (No 21 of process) of the Scottish Government's Equality Policy Manager. The results of the EQIA (No 7/16 of process) highlighted concerns about the narrow focus of the Bill on the single protected characteristic of sex and was one of the factors that led to amendment to include women with the protected characteristic of gender reassignment. On the basis of the available material, I conclude that the duty to have regard to the listed requirements of section 149 was met. There is no identified breach of regulation 5 of the 2012 Regulations as the 2018 Act did not promote or implement a new policy, but was part of an existing policy of advancing equal opportunities. The proposed legislation was restricted to one narrow area of that established policy, namely the aim of increased representation of those with protected characteristics on Scottish public boards. When the consultation responses disclosed the lack of inclusivity in the range of women who could benefit the measure, an amendment was framed. That did not necessitate the carrying out of a further EQIA. For these reasons the petitioner's final challenge also fails.

Disposal

[67] I have concluded that none of the challenges to the 2018 Act advanced by the petitioner can succeed for the reasons given in relation to each one. The Act was within the legislative competence of the Scottish Parliament and does not offend against the fundamental principle of equality of treatment. I will dismiss the petition and reserve meantime all questions of expenses.