

IN THE COURT OF SESSION
P318/23

PUBLIC INTEREST INTERVENTION

on behalf of

THE EQUALITY NETWORK

in the

PETITION

of

THE SCOTTISH MINISTERS

PETITIONER

for Judicial review

September, 2023

JUSTRIGHT SCOTLAND

Ref: BB/EQUA

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THE EQUALITY NETWORK

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PETITION

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THE SCOTTISH MINISTERS, Victoria Quay, Edinburgh, Scotland, EH6 6QQ

PETITIONERS

for

Judicial review of the Gender Recognition Reform (Scotland) Bill (Prohibition on Submission for Royal Assent) Order 2023 made and laid before the UK Parliament by the Secretary of State (under s.35 of the Scotland Act 1998) on 17 January 2023

Introduction

1. There are issues which arise in this petition on which the Intervener does not propose to make submissions, and in respect of which it did not seek permission to intervene. The Intervener makes no submissions on the correct approach to the interpretation of s.35 of the Scotland Act 1998. The Intervener is also content to leave the issue of devolved/reserved matters to the petitioners and respondent.
2. There is at the heart of the dispute a misconception about what having a Gender Recognition Certificate ('GRC') does and does not do. A GRC recognises the way in which a trans person is already living, it does not grant permission to them to do

so. There are, as the Intervener submits in more detail below, very few occasions in which having a GRC has a practical effect. That does not detract from what it means to a trans person to have a GRC; the statements from the trans community members included as part of this submission testify to that.

3. The focus of the respondent's reasons for making the s.35 Order is on 'legal sex'; but in the day-to-day life of a trans person, the concept of 'legal sex' is unimportant. The circumstances in which a person – whether trans or not – has to prove what sex they are, are very rare. It is submitted that when thoroughly analysed, the respondent's reasons, focussed as they are on 'legal sex', are erroneous, inadequate and unfounded in evidence.
4. Underlying most, if not all of the respondent's concerns, is the malicious actor – the person who abuses the new system to obtain a GRC. The system proposed by the Bill is not, however, new in the sense that self-determination models have been in existence in a number of countries for some time (see letter from the UN Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity: 6/25, p.13). That is seen as being in accordance with international human rights standards (supra 6/25, pp.3-8). Indeed, in connection with the risk of abuse of the new system, it is very difficult, if not impossible, to think of any circumstance in which being in possession of a GRC would enable a person to carry out a harmful act when they could not have done so without a GRC.

A. Inadequate and/or erroneous reasoning

Divergent regimes across the UK

5. The Order (6/1, para 6) and the Policy Statement of Reasons ('PSOR') (7/1, para 14ff) focus on the creation of divergent regimes across the UK as being an adverse effect of the Bill. However, the regimes to some extent already diverge. Firstly, there are a number of provisions in the 2004 Act which are Scotland-specific (e.g. sections 4C, 4E, 4F, 5C, 5D, 11C, 11D). These provisions were inserted into the 2004 Act as a consequence of the Marriage and Civil Partnership (Scotland) Act 2014, and the Civil Partnership (Scotland) Act 2020. Significantly, in Scotland (but not elsewhere in the UK), a married person or civil partner with an interim GRC may apply to the

court for the issue of a full GRC, where the spouse/civil partner does not consent to the marriage/civil partnership continuing after the issue of a full GRC: s.4E. This, in effect, removes spousal/civil partner veto - in Scotland only.

6. Secondly, the alternative grounds on which a person can apply for a GRC differ as between Scotland and the rest of the UK. For applicants in England, Wales and Northern Ireland, to obtain a GRC using these alternative grounds, the applicant must have or have had gender dysphoria, or have “undergone surgical treatment for the purpose of modifying sexual characteristics”: S.3A(5)(b). In Scotland, there is a third option which is that the applicant has undergone “such other treatment as the Scottish Ministers may by order prescribe, for the purpose of modifying sexual characteristics.” S.3C(5)(b)(ii). There has not, so far as the Intervener is aware, been an order made under this sub-section. That does not, however, detract from the point that the 2004 Act (as amended by the Marriage and Civil Partnership (Scotland) Act 2014), in this provision anticipated that there may be different conditions for applying for a GRC in Scotland, than in the rest of the UK.

Implications for the application of s.22

7. The Order (6/1, para 6) and PSOR (7/1, paras 17 and 19) refer to there being a lack of clarity about the status of a Scottish GRC, which would be exacerbated by the application of section 22 of the 2004 Act. The PSOR does not articulate in what respect(s) there would be a so-called lack of clarity. There is no evidence provided by the respondent in the Order or the PSOR which evidences that there are “increased concerns” (PSOR, para 19, line 2) on the part of employers or providers.
8. Section 22 has been in force for over 18 years. The Intervener is not aware of there having been any prosecutions under section 22 throughout that time. If that is correct, it would suggest that there are no particular issues with the operation of section 22. The fact that there will be increased numbers of persons with GRCs, and that these may include persons in the 16-18 age range, does not mean that section 22 cannot continue to operate as it has done for many years.
9. A correct understanding of section 22 is important. It is an offence for a person who has acquired ‘protected information’ (as defined in s.22(2)) in an ‘official capacity’ (as defined in s.22(3)) to disclose that information to any other person. S.22(4) sets

out a number of circumstances in which it is **not** an offence to disclose protected information. This is supplemented by The Gender Recognition (Disclosure of Information) (Scotland) Order 2005 (SSI 2005/125). The following are of significance:-

- It is not an offence to disclose protected information if the information does not enable that person to be identified (s.22(4)(a)). Service providers, employers and others can therefore continue to record and hold information that service users or employees are trans persons (who have applied for or obtained a GRC). They simply have to do so in a way that means the individual in question is not identifiable. Monitoring of how inclusion of trans persons impacts (or not) on the operation of a workplace or a service can therefore still be done.
- It is not an offence to disclose protected information (which is so by virtue of sub-section (2)(b)), where the person by whom the disclosure is made does not know or believe that a full GRC has been issued (s.22(4)(c)). It is almost never the case that an employer or service provider asks for sight of a GRC, or is even aware that a person has one. If documentation is asked for, it would usually be identity documents that can be updated without obtaining a GRC, e.g. driving licence, passport. Occasionally, employers/service providers may ask to see a birth certificate. Once a GRC is obtained, the person's birth certificate will match their lived gender; it will be impossible to know from the new birth certificate that the person had a different gender at birth. The introduction of Scottish GRCs under the Bill does not change this analysis or create a greater problem (if there is already a problem).
- It is not an offence if the disclosure is for the purpose of preventing or investigating crime (s.22(4)(f)). If an employer, service provider or other had reason to believe that the individual had obtained a GRC (Scottish or otherwise) fraudulently, there would be no barrier to that being reported to the police. Given the concerns expressed by the respondent about the so-called lack of safeguards in respect of applications under the Bill, this

provides further assurance that 'bad actors' can be identified and investigated.

- It is not an offence if the disclosure is for the purpose of obtaining legal advice (2005 Order, paragraph 3). If an employer, service provider or other is unclear about their obligations under s.22, there is nothing to prevent them from disclosing protected information to their solicitors, in order to better understand their legal position.

10. Therefore, on a proper analysis of section 22, there is nothing to suggest that its application in conjunction with the Bill would be problematic. The respondent's reasoning on this point is erroneous and unsubstantiated.

Administration of tax and benefits.

11. The Order (6/1, para 8) and the PSOR (7/1, para 20) state that the creation of a dual-system has serious adverse practical consequences on the operation of the law as it relates to the administration of tax, benefits and State pensions which are managed by integrated systems across the UK. It may be of assistance to the court to know how, in practice, trans people are treated by HMRC and the Department for Work and Pensions.
12. In order for a trans person's record to be changed as regards their sex, a GRC is required by HMRC/DWP. Even then, the DWP (and it is understood, HMRC) will keep on record a person's previous details (i.e. previous names, titles or gender). Where a trans person does not have a GRC, they can still update their name and title so that they can receive correspondence from the DWP and HMRC using their current details. There is a system in place whereby trans people's records are stored as 'special customer records'; this limits access to them to a very small number of DWP and HMRC staff. (Details of the DWP system were considered in R (C) v Secretary of State for Work and Pensions [2017] 1 WLR 4127.)
13. The creation of Scottish GRCs, which the respondent may elect not to recognise, does not lead to 'serious adverse practical consequences' as the respondent contends. A person with a Scottish GRC, which is not recognised in the rest of the UK, will, in practice, still be able to update their details (name/title), although not their

sex. That is no different to the position, unsatisfactory though it is, of many other trans persons who do not have a GRC.

Overseas citizens

14. The Order (6/1, para 9) refers to a diverging system for overseas citizens to obtain GRCs, and that this increases the cohort of people for the purpose of the adverse effects described. The PSOR (7/1, para 21) puts the matter somewhat differently, stating that the Bill will allow for 'any overseas GRC holder to automatically obtain a Scottish GRC...'. This is inaccurate. Section 8 of the Bill inserts new sections 8N and 8O. Section 8N provides, in short, that a person who has obtained overseas gender recognition is to be treated as if they had been issued with a full GRC by the Registrar General of Scotland. This does not apply if treating the person in that way would be manifestly contrary to public policy. Section 8O enables a person who has obtained overseas gender recognition to apply to the Registrar General of Scotland for a 'confirmatory gender recognition certificate', the content of which is to be specified in regulations made by Scottish Ministers.
15. Other than the fact that these provisions may enable a greater number of trans persons born outside the UK to obtain recognition of their overseas gender recognition (the number of whom has not been quantified in the PSOR), the respondent does not identify why that would be problematic. The Intervener questions whether in practice many such applications (for a confirmatory GRC) would be made. A person who has already obtained legal gender recognition overseas would have identity documents and other documents relating to them, such as social security registration, which would reflect their acquired gender. They would not necessarily be identifiable to anyone as trans, and may not choose to apply for a confirmatory GRC in Scotland; there may simply be no need to do so.

B. Lack of evidential basis

16. In its PSOR justifying the s.35 Order, the respondent made a number of factual assertions in the absence of, or contrary to, relevant evidence.

17. The respondent would appear in its Note of Argument to accept that certain (unspecified) assertions contained in its reasons have been reached in the absence of relevant evidence (see paragraphs 4.5 to 4.8 thereof, where it is stated that s.35 does not envisage an evidence gathering exercise when the evidence does not already exist, and 4.9-4.10, 5.5 and 5.8).
18. The respondent makes reference to evidence apparently considered by him at paragraphs 4.9 to 4.10 as follows:
- “detailed policy advice” from the Equality Hub;
 - The PSOR (7/1); and
 - A “body of serious concern” citing evidence provided by the EHRC, and a letter from the UN Special Rapporteur for Women and Girls (“UNSRWG”) dated 29 November 2022. (This would appear to be those documents produced at 7/14 of process.)
19. It is unclear whether the above represents the totality of evidence upon which the respondent reached his decision to make the Order. No other evidence is identified by the respondent in his Note of Argument, and no evidence was referred to by the Secretary of State in his letter to the Presiding Officer of the Scottish Parliament dated 16/1/23 (7/4).
20. The Intervener would make two general submissions in respect of the evidence considered by the respondent:
- First, that policy advice from government departments does not of itself amount to evidence as to fact. Without such advice having a basis in fact or inferences drawn from facts it is mere opinion. A strongly held belief of a government advisor does not become evidence as to fact simply by being repeated to the Secretary of State. Advice to any minister will presumably arise from a consideration of the facts as known and inferences or surmisals to be drawn therefrom.
 - Second there was a substantial body of evidence presented to the Scottish Parliament’s Equalities, Human Rights and Civil Justice Committee (‘EHRCJC’) during the passage of the Bill, including from 39 witnesses¹

¹ <https://digitalpublications.parliament.scot/Committees/Report/EHRCJ/2022/10/6/d81c72da-4070-4355-aacb-cc58d9c1bc08#934267a8-afe5-4b1c-b5c1-1aba886cad6e.dita>

which was thus readily available to the respondent to inform his decision on the granting of the Order.

21. The respondent in its Reasons placed emphasis on the divergence of regimes for gender recognition between Scotland and England & Wales upon the coming into force of the Act. The respondent identifies the key issue in this regard to be “*not the fact of the divergence itself...but rather the effect that the particular examples of divergence would have on the operation of law as it applies to reserved matters*” (respondent’s Note of Argument, para 5.8). It is submitted that if this submission is sound, a rational decision will depend upon there being some [sound] evidential basis for it.
22. In assessing the effect of the legislation upon the operation of the law as it applies to reserved matters, it is submitted that relevant evidence includes *inter alia* the following matters drawn from the Secretary of State’s Reasons for the s.35 Order, considered below.

Access to particular services, spaces, or rights

23. From the Intervener’s work with service providers and employers, and ongoing engagement with the trans community, it understands that the occasions on which an individual would require to exhibit a GRC or birth certificate for these purposes in either law or in practice are extremely limited. Extracts of evidence from members of the trans community obtained by the Intervener are set out below.

Evidence germane to any increase of fraudulent applications for GRCs, or otherwise obtained by ‘malicious actors’

24. On 6/10/22 the EHRCJC issued its Stage 1 Report (6/10) summarising written and oral evidence it had received. This included:
- evidence as to other European countries that have adopted ‘self-declaration’ models of gender recognition (Denmark, Malta, Ireland, Norway, Belgium, Luxembourg, Portugal, Iceland & Switzerland), with no evidence provided of negative impacts or unintended consequences of similar legislation in those jurisdictions;
 - that no witness was able to provide concrete examples (actual evidence) of abuse or concerns when asked to do so by EHRCJC;

- Letter of 29/11/2022 from the UN Special Rapporteur on Violence against Women & Girls (“UNSRVWG”) (7/9)
- Letter of 13/12/22 from the UN Independent Expert on Protection against Violence and Discrimination based on Sexual Orientation and Gender Identity (6/25) (“UNIEPVDSOGI”) (in addition to earlier expert evidence) in response to the concerns raised by UNSRVWG, which included the following:

In the current matter, there is no credible evidence supporting the submission that requirements currently in place in Scotland for legal gender recognition are effective or efficacious safeguards to prevent sexual and gender-based violence, or that these requirements are even remotely connected to it; there is also no credible evidence supporting the idea that maintaining them in whole or part or devising other gatekeeping mechanisms will serve that preventive purpose either. The only connection between undue obstacles to legal recognition for trans women and freedom of all women from gender and sexual-based violence is based on an erroneous perception of trans women as being males and, specifically, predatory males.

Such arguments were also described as ‘misinformed’ and ‘incorrect’ later in the same letter.

25. Disclosure Scotland provided evidence by way of letter dated 31/5/2022 (referred to at para 35 of the Stage 1 report of EHRCJC, 6/10) which stated *inter alia*:

- That any criminal history information including convictions and other relevant information that falls to be disclosed by law will be disclosed, even if that information predates the current name or gender of the application, and even if it includes details of a gender-specific offence (by reference to section 22(4)(j) GRA 2004);
- That Disclosure Scotland systems are already designed to find people who have changed their names for any reason. The system is alert to the possibility of any person concealing previous names or trying to hide their identity. Gender is not a category used by Disclosure Scotland when carrying out vetting checks.
- Where there is a doubt about a person’s identity after further enquiries, Disclosure Scotland has the power to ask for fingerprints to check a person’s identity.
- Where an application is not supported by required evidence of identity, Disclosure Scotland can refuse to issue a disclosure certificate.
- That the holding of a GRC does not dilute the information necessary for an application for disclosure.

Evidence germane to the anticipated increase of membership of single-sex associations and any impact upon said associations

26. Of the published responses to the EHRCJC's call for written responses during the period of consultation between 21 March and 16 May 2022 (of which there were 814), no responses were identifiable as from any single-sex association.
27. There is no reference by the Secretary of State to any such evidence in his Reasons for the s35 Order, or to any other evidence in this regard.

Evidence germane to concerns held by employers as to the impact of reforms to matters connected with employment and industrial relations

28. Of the 814 published written submissions to EHRCJC, or from any evidence provided orally to the committee, no representations were made by employers or any associations of employers providing evidence of an apprehended impact of an increase in the number of employees who may obtain a GRC. There has similarly been no such evidence referred to by the Secretary of State to form a basis for this consideration within his Reasons for the s35 Order other than the statement by Baroness Falkner, EHRC, in her letter of 22/12/2022 that "*...the operation of other provisions [of the Equality Act 2010] relating to sex discrimination across Britain, including equal pay between women and men, gender pay gap reporting, and measures to address disadvantages experienced by women, will be affected by the proposed changes to the law in Scotland.*" That statement has not been expanded upon by EHRC or the Secretary of State by way of further explanation as to the points being there made, or by way of the basis upon which those points are made. No employer has, it would appear, thought it necessary to raise any concerns as to the potential impact of the Bill's provisions on its relations with its employees.
29. Since the enactment of the GRA 2004 it has been the case that an individual who holds a GRC is for all purposes the acquired gender in law (section 9 GRA). The protected characteristic of 'sex' is defined in the Equality Act 2010 as being either a man or a woman (section 11 EqA). It has therefore been the case since before the enactment of the Equality Act 2010 that an employee holding a GRC could raise claims of sex discrimination or equal pay on the basis of their acquired gender, citing comparators of the opposite sex to their acquired gender.
30. It is unclear what concern there might be to that state of affairs. Equal pay claims (strictly speaking, claims for breach of the sex equality clause in a contract of

employment under section 66 EqA) are capable of being brought by either men or women, citing a comparator of the opposite sex. For any equal pay claim to succeed an employment tribunal must conclude:

- (i) that a comparator is paid more than a claimant of the opposite sex for doing equal work (as defined in section 65 EqA); and
- (ii) that the employer has not demonstrated that the difference of pay is because of a reason (a 'material factor' – see section 69 EqA) which is not because of the difference in sex and has not demonstrated, if the reason is a factor that places persons of the claimant's sex at a particular disadvantage in comparison with the opposite sex, that reason as a proportionate means of achieving a legitimate aim (s.69(1)&(2) EqA).

31. On that analysis, it is by no means axiomatic that an employee acquiring the opposite gender upon obtaining a GRC will expose an employer to well-founded equal pay claims. Indeed, it is possible for claimants to raise equal pay claims citing comparators of the same sex where their claims are contingent upon a successful claim made by a colleague of the opposite sex against the same comparator (known as 'piggy back claims' – see Hartlepool BC v Llewellyn [2009] ICR 1426 EAT).

Evidence of impact upon public bodies performing their public sector equality duty

32. There was no evidence before EHRCJC, and no evidence referred to by the Secretary of State, to suggest that an increase in the number of individuals holding GRCs would have any bearing upon a public body's duties of consultation under the Public Sector Equality Duty, sections 149 & 153 EqA.
33. It should be noted that in terms of data collection, trans people are not routinely asked to respond with the sex on their current birth certificate. Indeed, guidance from Scotland's Chief Statistician recommends that public bodies in Scotland take an approach to asking about sex that allows trans men and women to answer in line with how they are living.

C. Section 104

34. S.104 of the Scotland Act 1998 confers a power to make subordinate legislation as is considered 'necessary or expedient' in consequence of any provision made by or under any Act of the Scottish Parliament. That power may be exercised by the Secretary of State for Scotland. It is a power which has been exercised previously

in matters relating to status. The Marriage and Civil Partnership (Scotland) Act 2014 and Civil Partnership Act 2004 (Consequential Provisions and Modifications) Order 2014 (SSI 2014/3229) was subordinate legislation made by the Secretary of State in consequence of same sex marriage becoming lawful under Scottish legislation, namely the Marriage and Civil Partnership (Scotland) Act 2014, and the introduction of civil partnerships under the Civil Partnership Act 2004 (Westminster legislation which included Scottish provisions as was agreed by the Scottish Parliament). The 2014 Order is wide-ranging, and modifies primary and secondary legislation, including the Equality Act 2010 (SSI 2014/3229, Schedule 5, para 19).

35. The Intervener does not accept that the Secretary of State's reasons are lawful, but at least some of them could have (and still could be) addressed by him using his powers under s.104. For example, it would be a relatively simple matter to extend to associations with 25 or more members (Part 7 of EqA), and to single sex schools (Part 6 of EqA) the gender reassignment exception which applies in relation to single-sex services (EqA Sch.3 para28). These were matters which were evident from the Bill when it was first introduced into the Scottish Parliament (on 2/3/22). There may be other matters which could be dealt with in the same way, if the Secretary of State was minded to do so. The petitioners and respondent will know more than the Intervener about what discussions there were (or were not) at ministerial or official level as the Bill progressed. From the Intervener's perspective there was ample time for the concerns referred to above (and indeed others) to have been addressed by the Secretary of State using his s.104 powers, had he wished to do so. The fact that he did not do so, and appears not to have considered doing so, undermines the rationality of his having made the s.35 Order (at least insofar as the above aspects are concerned).

D. Excerpts from statements of trans individuals

Personal information redacted.