IN THE COURT OF SESSION

NOTE OF ARGUMENT

for

LORD STEWART OF DIRLETON KC, THE ADVOCATE GENERAL FOR SCOTLAND, for and on behalf of **THE SECRETARY OF STATE FOR SCOTLAND**, having offices situated at Queen Elizabeth House, Edinburgh EH8 8FT

Respondent

to the Petition of

THE SCOTTISH MINISTERS, having offices situated at Victoria Quay, Edinburgh 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 ("SA")) on 17 January 2023

[**Pages in petitioners' ("P") or respondent's ("R") inventory of productions]**

1 Motion

1.1 The respondent invites the court to refuse to grant the remedies sought in statement 4 of the petition.

2 Introduction and summary

2.1 The respondent submits:

(a) The Bill modifies the law as it applies to the reserved matters specified in §1 of Schedule 2 to the Gender Recognition Reform (Scotland) Bill (Prohibition on Submission for Royal Assent) Order 2023 ("the Order").

(b) In making the Order the Secretary of State did not act irrationally on the basis of the evidence which was before him or by taking into account any irrelevant considerations.

(c) The reasons provided in Schedule 2 to the Order are adequate to allow the reasonably informed reader to understand the basis for making the Order.

3 Approach to interpretation of section 35 SA: preliminary points/principles

3.1 No special approach applies to the interpretation of the SA: *UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill* 2019 SC (UKSC) 13 at §12. Thus, the starting point in interpreting section 35(1)(b) SA is the same as in relation to other provisions of the SA: namely, to give effect to the ordinary meaning of the words used in the provision.

3.2 The 'construe narrowly with anxious scrutiny' approach suggested by the petitioners is wrong:

(a) Section 35 exists as part of the devolution framework. It forms part of a suite of carefully crafted checks and balances on the devolution of law-making

power from the UK Parliament to the Scottish Parliament, which includes, but goes beyond, the question of competency alone.

(b) On the one hand, the limits on the legislative competence of the Scottish Parliament are set out in sections 28-30, together with the list of reserved matters in Schedule 5 and the protected enactments and rules of law in Schedule 4. Any provision in an Act of the Scottish Parliament which falls outside those limits is *ultra vires* and not law, subject to any order made by the courts under section 102. There are various provisions providing for a Bill to be scrutinised before it is enacted to ensure that it is *intra vires*, both before its introduction (section 31) and by the United Kingdom Supreme Court after it has been passed but before it is submitted for Royal Assent (sections 32- 34).

(c) On the other hand, the UK Government can intervene in certain circumstances to prevent legislation of the Scottish Parliament from being submitted for Royal Assent, even although it is within its competence. This provides a balance to the power of the Scottish Parliament, ensuring that the operation of the law as it applies to reserved matters is protected, where those limited circumstances exist. Section 35 defines what those circumstances are. There is a related power in section 58(4) enabling the Secretary of State, in similar circumstances, to revoke subordinate legislation made by a member of the Scottish Government.

(d) The plain intent and purpose of the SA is accordingly that section 35 should be exercisable by the Secretary of State in areas of devolved competence, provided only that the specified preconditions are met. If that is so, there is nothing whatever to suggest that the UK Parliament intended some additional, unspecified constraint on the exercise of the power on the basis that the context involved a 'policy disagreement' (as the issue is framed by the petitioners) between the UK and Scottish Governments. The existence of the power in section 35 explicitly recognises the possibility that devolved policy may have an adverse impact on the operation of the law as it applies to reserved matters (as in the present case).

(e) The Memorandum of Understanding ("MoU") [**P108**] is a political agreement. It is expressly stated not to be legally binding. It did not exist at the point at which the SA was passed by the UK Parliament. It is irrelevant to the interpretation of section 35.

(f) The petitioners are wrong to say that the provision for consequential orders in section 104 of the SA supports their interpretation of section 35. Their argument rests on the implication that the Secretary of State could have made an order under section 104 as an alternative to an order under section 35. But, first, they fail to specify the terms in which any such order would be made or how it would address the concerns in issue in the present proceedings. Second, the terms of such an order would require extensive consideration by a number of UK Government departments. That exercise would not be possible within the four-week period within which the Secretary of State can

make a section 35 order. Third, to date, the power under section 104 has been used to make provision which, in essence, gives effect to an Act of the Scottish Parliament where there are concerns about competence: *Martin v HM Advocate* 2010 SC (UKSC) 40 at §§ 41-42 and 78-90. A section 104 order must be necessary or expedient in consequence of provision made by an Act of the Scottish Parliament. That requirement is not necessarily satisfied in relation to an order which would disapply a core part of the provisions of the present Bill. Fourth, the petitioners' argument depends on an impermissible assumption about how Parliament would be prepared to legislate in future, since an order under section 104 could only be an effective alternative if Parliament did not annul it in exercise of its power under schedule 7 SA (or, if the section 104 order involved amendment to primary legislation, if the order was approved by resolution by each House of Parliament). Fifth, if the petitioners' argument were correct, section 35 would be superfluous because any adverse effect could always be addressed by an order under section 104.

4 Legal test in section 35: rationality

4.1 The petitioners' principal challenge is to the rationality of the Secretary of State's judgement as to the adverse effects of the provisions of the Bill on the law as it applies to reserved matters, standing the steps which he took to gather information and the conclusions which he drew from the evidence which was before him.

4.2 Irrationality as a legal control recognises the primacy of the decision maker, and the court's supervisory or reviewing role. It imposes a hurdle for a petitioner to overcome, as all the cases since *Wednesbury* itself have made clear. The issue is whether the

decision was "*so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it*": per Lord Diplock in *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, 410G.

4.3 There are some contexts in which the judgement of the decision maker, here the Secretary of State, should be afforded particular respect. This context is one of them:

(a) The Secretary of State has particular expertise in this sphere, including having the benefit of expert advice from the Equality Hub: *R (Lord Carlile of Berriew) v Secretary of State for the Home Department* [2015] AC 945 at §32.

(b) The judgement is evaluative, predictive and not susceptible to objective assessment: *ibid*.

(c) The assessment of the nature of adverse effects, and whether they justify making an order, involves political judgement: *Kennedy v Charity Commission* [2015] AC 455 at §53.

(d) The order is subject to annulment in pursuance of a resolution of either House of the UK Parliament, in which the people of Scotland (and the rest of the UK) are democratically represented: section 35(3)(a) and Schedule 7 to the SA: *R v Secretary of State for the Environment, ex p Nottinghamshire County Council* [1986] AC 240 at p.250B - H. (If the petitioners mean by their

averments about the Early Day Motion to criticise the procedure by which Parliament carried out its function under Schedule 7, that is not a criticism that the separation of powers permits the court to entertain: *R (SC) v Secretary of State for Work and Pensions* [2022] AC 223 at §165 and §171.)

4.4 The following general points on the approach to assessing the rationality of the decision of the Secretary of State to make the Order under section 35 are to be noted. **First**, the phrase "*reasonable grounds to believe*" refers to a reasonable basis for making the order, a question of degree (rather than one that imports any standard of proof): *R (Youssef) v Secretary of State for Foreign and Commonwealth Affairs* [2016] AC 1457 at §50.

4.5 **Second,** section 35 does not envisage an evidence gathering exercise where the evidence does not already exist. That is plain on the face of the provision: "*reasonable grounds to believe*". Also, the four-week window for the Secretary of State to consider making an order under Section 35, which runs from the point at which the Bill is in final form, is not practically consistent with any such requirement or approach.

4.6 It follows that the Secretary of State does not require definitive empirical data as to the likely adverse effects of the provisions in the Bill. The Secretary of State does not require to prove a particular state of affairs. He is entitled to take account of the predictions of the Scottish Government as to the effects of the provisions (for example in relation to the likely significant increase in the number of annual applications **[R8]**), and to apply logic to whether there are likely to be adverse effects on the law as it relates to reserved matters.

4.7 **Third**, the common law obligation on the Secretary of State to inform himself is only to take such steps as are reasonable. The court should only intervene if it considers that no reasonable Secretary of State could have been satisfied that he or she was in a position to make the Order on the basis of the inquiries which had been made: *R (Balajigari) v Secretary of State for the Home Department* [2019] 1 WLR 4647 (CA) at §70.

4.8 **Fourth**, since section 35 does not specify any considerations that must or must not be taken into account, the considerations which the Secretary of State took into account can only be challenged on rationality grounds: *R (Friends of the Earth Ltd) v Secretary of State for Transport* [2021] PTSR 190 at §§116-121. The weight that those considerations carry is a matter for the Secretary of State: *ibid*.

4.9 **Fifth**, the Secretary of State was in receipt of detailed policy advice as to the potential adverse effects of the Bill from the Equality Hub (which includes the Government Equalities Office) prior to making the Order. The Secretary of State had the Policy Statement of Reasons ("PSOR") **[R3]** before him prior to making the Order. Policy advice from the relevant Governmental department concerned with equal opportunities on the likelihood of adverse effects as a result of the modifications proposed by the Bill was a factor of significant weight which the Secretary of State was entitled to have regard to.

4.10 Moreover, there was (and is) a body of serious concern about the potential adverse effects of the Bill, including concerns expressed during the passage of the Bill through

the Scottish Parliament by the Equality and Human Rights Commission (EHRC) and the UN Special Rapporteur for Women and Girls, specifically about the removal of safeguards by the Bill: letter from the UN Special Rapporteur on violence against women and girls, its causes and consequences, dated 29 November 2022. That body of serious concern was also a factor to which the Secretary of State was entitled to have regard (and which was before him in §27 of the PSOR [**R9**]).

4.11 **Sixth**, the PSOR is an aid to understanding the Order as it is part of the context in which the Order was made: *R (Westminster City Council) v National Asylum Support Service* [2002] 1 WLR 2956 at §5.

4.12 **Finally**, the Order identifies three categories of adverse effect: §4 of Schedule 2 to the Order [**P5**]. Within the three categories of adverse effect, the specific reasons for making the Order are identified: §§6-9; §10 and §§11 and 12 of Schedule 2 to the Order [**P6 - 10**]. It is expressly stated in the Order that each of those reasons "*individually, amounts to an adverse effect which justified the making of this Order*": §5 of Schedule 2 to the Order [**P6**]. Therefore, any irrationality must affect each of those reasons before it can vitiate the Order. Moreover, if, contrary to the submissions below, there is any irrationality in the Order, §5 of Schedule 2 makes that error of law immaterial.

5 Response to the alleged irrationality

5.1 The respondent submits that the Secretary of State's decision that, for the reasons set out in Schedule 2 to the Order, the provisions of the Bill would have an adverse effect on the operation of the law as it applies to the reserved matters of "equal opportunities";

"fiscal policy" and "social security" was within the range of reasonable decisions that were open to him.

5.2 The Order is said to be irrational in so far as it: (i) relies on the impact of the provisions of the Bill on monetary policy and/or social security schemes (statement 30 of the petition); (ii) relies on an adverse effect from the creation of two different and parallel regimes on the basis of 'abstract and hypothetical' examples (statement 32 of the petition); (iii) relies on a concern over increased fraudulent applications as a consequence of a lack of adequate safeguards (statement 33 of the petition); and (iv) relies on supposed adverse effects upon the operation of the 2010 Act in the absence of evidence and on the basis of abstract and hypothetical examples (statement 35 of the petition).

5.3 In relation to (i), an adverse effect on the "*operation of the law*" can encompass matters of practical administration, particularly where the decision-making processes involved are complex and call for good administration: *Hinchy v Secretary of State for Work and Pensions* [2005] 1 WLR 967 at §§14, 21 and 28. Whether the adverse effect justifies the Order is a question of judgement which Parliament has conferred on the Secretary of State. The judgement to make the Order on the basis of (i) was one which was reasonably open to him.

5.4 In relation to (ii)-(iv), these were plainly matters on which the Secretary of State, applying the approach set out above, was entitled to rely. The judgement that, individually and cumulatively, they were adverse effects was also one which was reasonably open to him.

5.5 The steps needed and appropriate to inform those judgements were themselves a matter of judgement for the Secretary of State. In the time available, and having regard to the advice received in particular from the Equality Hub, the steps taken were sufficient and on any view rational.

5.6 Again, what is a relevant consideration is a matter for the Secretary of State, subject only to a rationality challenge: see eg *R (DSD) v Parole Board* [2019] QB 285 especially at §141.

5.7 The petitioners identify two considerations which are said to be irrelevant. It was not irrational for the Secretary of State to take account of either.

5.8 The **first** is said to be the existence of a divergence between the schemes for gender recognition in Scotland and the rest of the UK (i.e. the creation of two parallel and different schemes) (statement 32 of the petition). The petitioners misinterpret the Order. It is not the fact of the divergence itself which is considered by the Secretary of State to be adverse, but rather the effect that the particular examples of divergence would have on the operation of the law as it applies to reserved matters, as set out in §§6-7 of schedule 2 to the Order [**P6 - 7**] and §§18 - 21 of the PSOR [**R6 - 7**].

5.9 The **second** consideration is concern about the adequacy of safeguards in the Bill amounting to a policy disagreement (statement 34 of the petition). But even if the Bill is within the competence of the Scottish Parliament, if it has an adverse effect upon the operation of the law as it applies to reserved matters in the predictive and evaluative

judgement of the Secretary of State, for the reasons set out in schedule 2 to the Order, that may ground a belief sufficient for the Secretary of State to make an order under s35. Concern about the adequacy of safeguards in the Bill had been expressed during the passage of the Bill through the Scottish Parliament, including by the UN Special Rapporteur.

6 Response to remaining grounds of challenge

Error of law

6.1 The Secretary of State did not err in law in concluding that the provisions of the Bill listed in Schedule 1 to the Order modify the law as it applies to reserved matters. The petitioners' argument relies upon an incorrect, formalistic and unduly narrow interpretation of section 35.

6.2 The 2004 Act is law which 'applies to' the reserved matters identified in the Order because the only way to change legal sex for the purposes of the 2010 Act and of the systems applying to the administration of tax, benefits and state pensions is through the mechanism that the 2004 Act establishes. The changes proposed by the Bill amount to a modification of that law because they change the conditions that the 2004 Act sets for the change of legal sex. The effect of the provisions of the Bill as to who can obtain a Scottish Gender Recognition Certificate ("SGRC") and the process by which they can do so affect the unqualified continuation of the 2004 Act as it was before, such that the 2004 Act can be said to have been in substance amended, superseded or disapplied by the provisions of the Bill: *Continuity Bill* at §51.

6.3 More particularly, the petitioners' argument rests on a misinterpretation of the word "*modifications*" in section 35. The argument is that "*it is s.9 of the 2004 Act which would apply to reserved matters*" and "*that provision is unchanged by the Bill*": statement 29 of the petition. The petitioners are right to say that section 9 is unchanged in the sense that the Bill does not amend its text. They are wrong, however, to imply that a textual amendment is a necessary condition for "*modification*". There is modification "*even in the absence of express amendment*" if section 9 is "*in substance amended*": *Continuity Bill* at §51. §9(c) of the Schedule to the Bill [**P43**] amends section 9 in substance because it changes the meaning of the phrase "*gender recognition certificate"* - the condition for change of legal sex - by its express amendment of the definition in section 25 of the 2004 Act. "*Full gender recognition certificate*" will mean something different in section 9 if the Bill becomes an Act.

Adequacy of reasons

6.4 **First**, the reasons provided in Schedule 2 to the Order are adequate. The informed reader of the Order is aware of the terms of the Bill and the PSOR. The petitioners fail to identify anything about which he or she would be in doubt. That is not surprising because they are not in doubt about anything either: the Scottish Minister who introduced the Bill wrote to the UK Government three times about the Order and there is no suggestion in that correspondence that the reasons for making the Order were unclear [**R24 - 34**].

6.5 **Second**, any inadequacy must affect each and every reason for the Order in order to be material: schedule 2, §5 [**P6**].

6.6 **Third**, any material inadequacy of reasons would not make the Order invalid. That would only be the case if it were Parliament's intention: *R (Majera) v Secretary of State for the Home Department* [2022] AC 461 at §§27 - 31. That cannot be said to be the case here because the Secretary of State has substantially complied with section 35(2) and the petitioners, having expressed no real and substantial doubt about the reasons for the order, have not suffered prejudice from the inadequacy.

6.7 **Fourth**, the court should not give the petitioners a remedy. Where the ground of unlawfulness is inadequacy of reasons, the court will exercise its discretion in accordance with the principle that reduction will be granted only if the person requesting it can satisfy the court that he or she has genuinely been substantially prejudiced by the inadequacy: *South Bucks District Council v Porter (No 2)* [2004] 1 WLR 1953 at §36. Having expressed no real and substantial doubt about the reasons for the order, the petitioners have not suffered that prejudice.

Ex post facto justification of the reasons for the decision

6.8 Whilst it does not amount to a ground of challenge, there is a suggestion by the petitioners that the reasons promulgated in the Order and / or the PSOR were not the 'real' reasons for the decision to make the Order, but rather an *ex post facto* justification, the Order having been made for other political reasons: statements 12 and 31 of the petition. There appear to be two asserted bases for the suggestion.

6.9 **First**, the petitioners quote statements made by the Secretary of State in answer to questions posed to him in Parliament [**P831 - 832**]. The court cannot draw the inference the petitioners seek to draw from those statements:

(a) The statements are privileged. One aspect of Parliamentary privilege is expressed in Article 9 of the Bill of Rights Act 1689: *Coulson v HMA* 2015 SLT 438 at §11. It provides: "*The freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place outside Parliament*". This means that a party to litigation cannot rely on what is said in Parliament because that would require his opponent to question it: *Office of Government Commerce v Information Commissioners* [2010] QB 98 at §58; *R (Heathrow Hub Ltd) v Secretary of State for Transport* [2020] 4 CMLR 17 at §§158 and 169. A letter dated 26 July 2023 from Speaker's Counsel to the Office of the Advocate General makes it clear that the approach the petitioners adopt here amounts to impermissible impeaching and questioning of proceedings in Parliament; and that it is for the House of Commons, not the courts, to evaluate the adequacy of a statement made to the House.

(b) If, contrary to that argument, the court is entitled to have regard to the statements, they anyway do not support the inference which the petitioners seek to draw from them. Statements made on the floor of the House in answers to Members' questions cannot be construed in the same way as a deliberate and considered statement: *DM v Secretary of State for the Home Department* 2014 SC 635 at §16. Also, the petitioners' quotation is partial. It is clear from the deliberately composed statement that preceded the questions that the Order and the PSOR "*set out in full* " the Secretary of State's reasons for making the Order (**P829**).

6.10 **Second**, the petitioners rely on what they say is an absence of prior notice of the Secretary of State's concerns about the Bill contrary to the "*terms and spirit of the MoU*". The court also cannot draw the inference which the petitioners seek to draw from this:

(a) The respondent has explained in §§6 and 10 - 11 of his answers the UK Government's approach to Scottish Government consultations, and the communications between the two governments about the Bill.

(b) The Secretary of State followed the procedure set by section 35: there was no requirement for him to do more.

(c) The extent to which the Secretary of State did or did not comply with the MoU is not justiciable: *R (Miller) v Secretary of State for Exiting the European Union* [2018] AC 61 at §§138 and 151. That is obvious on its face: the explanatory notes (**P110**) and §2 (**P111**) expressly state that the MoU is not legally binding.

6.11 The reasons for the Order are set out in Schedule 2 to the Order and the Order states on its face that it was made at 12.25 pm on 17 January 2023 and laid before Parliament at 5 p.m. (**P1**). There is no reason for the court not to accept the averment in §12 of the respondent's answers to the petition that the PSOR was before the Secretary of State at the point at which the Order was made: c.f. *Vince v Prime Minister* 2020 SC 78 at §43 (approved 2020 SC 90 at §§6 and 8).

INTIMATED

P318/23

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2023

OFFICE OF THE ADVOCATE GENERAL