IN THE COURT OF SESSION

ANSWERS

(as adjusted to 15 August 2023)

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) on 17 January 2023

_____

ANSWERS FOR THE RESPONDENT

1. Admitted.

2. Admitted. Explained and averred that in relation to the Early Day Motion which prayed against the Gender Recognition Reform (Scotland) Bill (Prohibition on Submission for Royal Assent) Order 2023 ("the Order"), the Parliamentary procedure in relation to this instrument was in line with the usual procedures of Parliament (as outlined in Erskine May, at paragraph 31.18). Members of Parliament had questioned the Secretary of State for Scotland's decision following his oral statement on 17 January 2023, as well as during the emergency debate on the same date (which was tabled by the leader of the SNP group in the UK Parliament).

3. The Order is referred to for its terms. *Quoad ultra*, denied. Explained and averred that a fuller narrative of the reasons for making the Order is set out in the Policy Statement of Reasons. Reference is made to paragraph 30 of these answers.

4. Admitted that the petitioners seek reduction of the Order, under explanation that there is no merit in the grounds of challenge. *Quoad ultra*, denied.

5. Admitted that the petitioners challenge the Order on the stated grounds, under explanation that there is no merit in the grounds of challenge. *Quoad ultra*, denied.

6. Admitted that the Scottish Government undertook two consultations, under explanation that the second consultation was qualitative and the report provided no overall breakdown of where support lay among the individual responses. *Quoad ultra*, denied except in so far as coinciding herewith. Explained and averred that it is not the current or usual practice of the UK Government to respond to policy consultations carried out by the Devolved Administrations. Whilst official to official level conversations may take place, this would not amount to a formal consultation response. Reference is made to § 10 of these answers.

7. Admitted that in July 2018 the UK Government launched a public consultation on its own, separate, proposed reforms to the 2004 Act, under explanation that it was prompted by the results of the 2017 National LGBT survey and other research (including an inquiry by the Women and Equalities Select Committee) which suggested that people found applying for legal gender recognition too bureaucratic, expensive, and intrusive. Admitted that in September 2020 the UK Government published an independent analysis of responses to its consultation. Admitted that that analysis found that 64.1% of respondents said that there should not be a requirement for a diagnosis of gender dysphoria in future. *Quoad ultra*, denied. Explained and averred that the UK Government's consultation did not put forward any specific proposals for reform, but rather asked about particular aspects of the requirements in the 2004 Act and whether those requirements should be reformed or modified. The purpose of the consultation was to understand transgender people's experiences of the process of applying for a Gender Recognition Certificate ("GRC") under the 2004 Act. The UK Government did not commit itself to any specific reforms of the 2004 Act. The UK Government's response to the consultation was that the 2004 Act struck the correct balance between support for people who want to change their legal sex and checks and balances: the requirement for a diagnosis of gender dysphoria, as well as evidence of two years living in the acquired gender, meant that there were clear and important limits on who was eligible to apply. The response also set out that changes would be made to the application process to make it more straightforward.

8. Admitted that the Bill was introduced on 2 March 2022. Admitted that prior to its introduction the Bill and accompanying documents were made available to the UK Government, under explanation that the Bill was sent to the Office of the Advocate General by the Scottish Government Legal Department (SGLD) 3-weeks prior to introduction, in order that it could consider legislative competency. Admitted that the Bill was accompanied by a policy memorandum, a financial memorandum, an equality impact assessment ("EIA") and a delegated powers memorandum. Admitted that following introduction of the Bill, the Equalities, Human Rights and Civil Justice Committee was appointed the lead committee for the Bill. Admitted that the Lead Committee published its Stage 1 Report on 6 October 2022. Admitted that on 26 October 2022, the Scottish Government published its response to the Lead Committee's Stage 1 Report. Admitted that on 27 October 2022, the Scottish Parliament debated (in plenary session) the general principles of the Bill. Admitted that on 27 October 2022, those general principles were approved by the Scottish Parliament. Admitted that the Bill proceeded to Stage 2 consideration. Admitted that that stage concluded on 22 November 2022. The EIA is referred to for its terms, beyond which no further admission is made. *Quoad ultra*, denied. Explained and averred that it is not usual practice for the UK Government to engage with, or to criticise, a Scottish Government equality impact assessment. Acts of the Scottish Parliament are exempt from the public sector equality duty (s.149 of the Equality Act 2010) by virtue of the exception in Schedule 18, paragraph 4(1)). There is no basis on which the respondent could challenge the EIA that accompanied the Gender Recognition Reform (Scotland) Bill ("the Bill") in legal proceedings. Reference is made to § 12 of these answers.

9. Admitted, under explanation that the series of amendments debated and voted upon were of considerable number and variety. Explained and averred that, in addition to the 86 votes to 39, 4 MSPs did not vote on the Bill.

10. Admitted that on 17 January 2023, the Order was made prohibiting the Bill being submitted for Royal Assent. Admitted that such an order has not been made before by the Secretary of State. Admitted that through the six years prior to the Bill being passed there had been inter-governmental dialogue between the Scottish Government and the UK Government, under explanation that in relation to the issue of gender recognition specifically, such dialogue was at official level and became regular from March 2022 when the Bill was introduced. Admitted that the UK Government expressly recognised (as it has consistently done) that Scotland could make separate, and potentially different, legislative provision in respect of gender recognition. *Quoad ultra*, denied. Explained and averred that the Secretary of State followed the procedure for making the Order prescribed by section 35 of and schedule 7 to the Scotland Act 1998 ("SA"). The SA does not prescribe any other procedure for making the Order; nor does it require the Secretary of State to give advance notice to the Scottish Government that a section 35 order is to be made. The Minister for Women and Equalities ("the Minister") wrote a letter to the Cabinet Secretary for Social Justice, Housing and Local Government on 7 December 2022. The letter set out a number of concerns which the Minister had about the Bill, including "*the serious implications of the Bill raised by the Equality and Human Rights Commission, including significant cross-border impacts*". The Minister requested a meeting with the Cabinet Secretary to discuss the "*serious problems that remain to be resolved*". On 19 December 2022, a virtual meeting took

place between the Minister and the Cabinet Secretary to discuss the concerns expressed by the Minister. On 22 December 2022, the Minister wrote to the Cabinet Secretary requesting an urgent response following a statement made by the Cabinet Secretary to the Scottish Parliament the previous day in response to a question by Labour MSP Michael Marra. The Cabinet Secretary clarified her earlier statement during the debate on 22 December 2022. The UK Government set out the reasons for exercising the power under section 35 of the SA ("section 35") in the Order. The Explanatory Note to the Order notes that a fuller narrative of those reasons is set out in the Policy Statement of Reasons. On 16 January 2023, the Secretary of State wrote to the then First Minister and to the Cabinet Secretary informing them that he intended to make an order under section 35, giving them a brief description of why and informing them that his reasons would be set out in the order. The Secretary of State sent a letter on the same date to the Presiding Officer of the Scottish Parliament advising that he had decided to make an order under section 35. On 17 January 2023, the Secretary of State made the Order. Reference is made to §12 of these answers.

11. Admitted that on 19 December 2022, a call took place between the Cabinet Secretary and the Minister. Admitted that this was the first discussion between the respective governments at ministerial level since the UK Government had been given notice of the Bill. Admitted that on 22 December 2022, the Minister sought clarification on a specific point, which was resolved before the Bill was finalised (being the point of urgent clarification referred to in Answer 10 above). Admitted that the first contact from the Secretary of State in respect of the Bill was on 16 January 2023, after the Bill had been passed. Reference is made to the terms of §§ 4, 27 and 29 of the Memorandum of

Understanding between the UK Government and the Devolved Administrations ("the MoU"), beyond which no admissions are made. *Quoad ultra*, denied. Explained and averred that § 2 of the MoU provides: "*This Memorandum is a statement of political intent, and should not be interpreted as a binding agreement. It does not create legal obligations between the parties*"; see too the Explanatory Note. The MoU is dated October 2013. It is not part of the 'overall scheme of the SA' as averred by the petitioners. It is a non-legislative political agreement between governments. The courts cannot give legal rulings on its operation or scope: *R (Miller) v Secretary of State for Exiting the European Union* [2018] AC 61 at §§138 -151. It is not an aid for construction of the SA because it was not before Parliament when the Scotland Bill was passed. To treat it as such would amount to giving it indirect legal effect. Scotland Office officials consider every Bill of the Scottish Parliament once it has been passed and is in final form, for the purposes of providing advice to the Secretary of State on (among other things) whether any issues arise under section 35. The Order and the Policy Statement of Reasons make clear the adverse effects which require to be addressed should the Scottish Government wish to develop a revised bill. On 24 January 2023, the Secretary of State had a meeting with the Cabinet Secretary by telephone call. On the same date, the Secretary of State sent the Cabinet Secretary a letter. On both occasions, the Secretary of State indicated that he was prepared to offer engagement at the level of officials should the Scottish Government wish to develop a revised bill. It is not for the UK Government to redraft legislation which is before the Scottish Parliament. The Secretary of State will not propose changes to the Bill for that reason.

12. Admitted that the first indication that the UK Government was considering making an order under section 35 was a public statement by the Secretary of State on 22 December 2022, under explanation that the power under section 35 can only be exercised once the

Bill has been passed (and is in final form) and that concerns had been raised by the Minister about the Bill prior to its final stage in the Scottish Parliament. Admitted that a statement to similar effect was also made by the Minister (on 22 December 2022) and the Prime Minister (on 23 December 2022). Admitted that on 16 January 2023, the Secretary of State issued a statement confirming he had decided to make an order under s.35 SA. Admitted that on 17 January 2023, the Secretary of State made a statement to the same effect in the House of Commons, under explanation that the statement is subject to parliamentary privilege. Reference is made to Hansard, House of Commons, 17 January 2023, col.203 beyond which no admissions are made. *Quoad ultra*, denied. Explained and averred that the Scottish Government Legal Department (SGLD) sent the draft Bill to the Office of the Advocate General 3-weeks prior to introduction, in order that it could consider legislative competency. The Secretary of State followed the procedure for making the Order prescribed by section 35 of and schedule 7 to the Scotland Act 1998 ("SA"). The Secretary of State cannot know whether or in what terms the Scottish Parliament will pass a Bill until Stage 3 has been completed, which was on 22 December 2022. The Order, including the Statement of Reasons at schedule 2, was drafted by lawyers on the instructions of the Secretary of State's officials in the usual way. The Secretary of State had the benefit of policy advice from officials, including from the Equality Hub (of which the Government Equalities Office is a part). The Secretary of State made the decision to make the Order following careful consideration. The Secretary of State had the Policy Statement of Reasons before him prior to making the Order. The Order (including schedule 2) was made by the Secretary of State at 12:25 on 17 January 2023. It was submitted to the Scotland Office's Parliamentary Section at 12:34 on the same day. The UK Government follows the

convention that it does not publish delegated legislation until Parliament has seen it. At 13:49, the Secretary of State made an oral statement in the House of Commons about the Order. By the time that he did so, the Order had not yet been registered and it had not been laid before Parliament. The Secretary of State answered questions from MPs about the statement. Those answers (including the ones that the petitioners cite) cannot be read in the same way as a considered and deliberately composed statement: *DM v Secretary of State for the Home Department* 2014 SC 635 at §16. At 15:03, the House of Commons agreed to hold an emergency debate on the Order. By that time, Parliamentary Officials had not yet registered the Order and it had not been laid before Parliament. The Secretary of State obtained permission from the Speaker of the House of Commons to publish the Policy Statement of Reasons. At around 15:15, he published them on the gov.uk website. At 15:27, the emergency debate in the House of Commons on the Order began. At 16:05, the Order was successfully registered and certified copies were issued to Scotland Office officials. At 17:11, the Scotland Office Parliamentary Section confirmed that the Order had been laid. The Order appeared on legislation.gov.uk shortly thereafter. The parliamentary statement by the Secretary of State, and his answers to questions by MPs about the statement, are subject to parliamentary privilege. The reliance on the statements by the petitioners in these proceedings contravenes Article 9 of the Bill of Rights. *Esto* the statement and answers by the Secretary of State are not subject to parliamentary privilege, the statement does not support the inference that the Policy Statement of Reasons was an *ex post facto* justification for the Order as the petitioners suggest.

13. Admitted, under explanation that, in relation to the legislative consent motion (LCM)

passed by the Scottish Parliament, this was an active decision by the Scottish Parliament to opt in to the legislation. The LCM that was passed by the Scottish Parliament recognised the desirability of having a single coherent regime for obtaining a GRC which applied uniformly across the UK.

14. Admitted, under explanation that at the point at which the Gender Recognition (Approved Countries and Territories) Order 2011 ("the 2011 Order") came into force, it included countries and territories with systems for gender recognition which were at least as rigorous as the 2004 Act prescribed for the UK. The UK Government intends to update the list of approved countries and territories in the 2011 Order to remove countries and territories which no longer have an equivalently rigorous system, to preserve the integrity and credibility of the process in the 2004 Act.

15. Admitted that the effect of acquiring a GRC under the 2004 Act is prescribed by s.9 of the 2004 Act, under explanation that section 9 relies upon the definition of "full gender recognition certificate" which is provided in the interpretation section (section 25) of the 2004 Act. The terms of section 9 and section 25 of the 2004 Act are admitted. Reference is made to *For Women Scotland Ltd v Scottish Ministers* 2023 SLT 50 at §45, beyond which no admissions are made. *Quoad ultra*, denied.

16. Admitted, under explanation that the process is not only open to individuals ordinarily resident in Scotland, but to any individual born in Scotland and resident in the rest of the UK (or the rest of the world). Explained and averred that the modifications proposed

by the Bill will substantially change the cohort of individuals eligible to apply for a Gender Recognition Certificate in Scotland ("an SGRC") in both size and character (quantitatively and qualitatively). The modifications proposed by the Bill will remove any requirement for third party verification or evidence from the process, changing both the nature of the cohort of people eligible to apply, and, in doing so, the number of people able to do so (as set out in more detail in §11 of schedule 2 to the Order).

17. Admitted. Explained and averred that the modifications proposed by the Bill would also: (a) change the person who decides if an applicant satisfies the conditions for a GRC from a Gender Recognition Panel (whose members hold the legal / medical qualifications in schedule 1 to the 2004 Act) to the Registrar General for Scotland; and (b) remove the requirement to submit evidence, for example medical reports in respect of the diagnosis of gender dysphoria and supporting evidence of having lived in the acquired gender for the requisite period as may be required by the Gender Recognition Panel (as required by section 3(1) and (6) of the 2004 Act).

18. Admitted that the effect of acquiring a SGRC under the Bill would remain that prescribed by s.9 of the 2004 Act. Admitted that a SGRC issued under the 2004 Act as amended by the Bill only has effect in Scotland. Admitted that, in particular, a GRC issued under the 2004 Act as amended by the Bill is not the same as a GRC issued under the 2004 Act as it would continue to apply elsewhere in the United Kingdom. Admitted that accordingly, unless recognised elsewhere in the United Kingdom, a SGRC would be of no effect elsewhere in the United Kingdom, under explanation that whilst an SGRC would have no legal effect elsewhere in the UK an individual with a SGRC could

have a different gender (and therefore legal sex) in Scotland and in England & Wales and that particular adverse consequences could flow from that (as identified in §§6-9 of schedule 2 to the Order). *Quoad ultra*, denied. Explained and averred that the Bill (through section 16 and §9(c) of Part 1 of the schedule) amends section 25 of the 2004 Act. Section 25 of the 2004 Act defines "full gender recognition certificate" for the purposes of section 9 of the 2004 Act. The definition of "full gender recognition certificate" in the 2004 Act is amended to delete reference to the former provisions for obtaining a GRC and to make reference to the provisions inserted by the Bill (section 8E(2), (3) or (5), 8F(1), 8H(1), 8I(2)(a), 8J(1), 8K(1), 8Q(5)(a), 8R(3)(a) or 8S(3)(b)). The effect of the amendment to section 25 is to increase the size of the cohort of individuals eligible to obtain a full gender recognition certificate, and also to change the nature of the cohort of individuals who are eligible (to include those between the ages of 16 and 18 years; those without a diagnosis of gender dysphoria, and those without more than 3 (or 6) months lived experience of the acquired gender). Section 9 (so far as it applies to Scotland) is accordingly modified by the provisions of the Bill to the extent that the provisions of section 25 are amended and the cohort of those who can rely on section 9 is consequently changed in size and nature.

19. Admitted that the Scottish Parliament is established by s.1 SA. Admitted that it is democratically elected. Admitted that it has plenary legislative powers within the limits of its legislative competence. Admitted that it is for the Scottish Parliament to determine its own policy goals and the political and other considerations which are relevant to the exercise of those powers. Admitted that the changes introduced by the SA were fundamental to the constitutional structure of the United Kingdom. Admitted that they

introduced a constitutional structure which was intended to be stable and coherent. *Quoad ultra*, denied. Explained and averred (a) that the UK Parliament remains sovereign and (b) that the UK Parliament delegated the power to make laws for Scotland to the Scottish Parliament subject to the controls in sections 29 and 35 of the 1998 Act. Reference is made to §24 of these answers.

20. Admitted. Explained and averred that legal responsibility and political accountability for reserved matters remains with the UK Government. That includes legal responsibility and political accountability for any adverse effects on reserved matters which occur as a result of a legislative act by a devolved legislature, even where that act is within the competence of the powers of the devolved legislature. The power in section 35 conferred on the Secretary of State recognises that reality.

21. Admitted that the 2004 Act is not a protected enactment in terms of schedule 4 to the SA. *Quoad ultra*, denied. Explained and averred that the reserved matters identified in the Order are "Equal opportunities" (schedule 5 §L2 to the SA); "Fiscal, economic and monetary policy" (schedule 5 §A1); and "Social security schemes" (schedule 5 §F1) (see §§ 2 and 3 of schedule 2 to the Order). The reserved matter of "Equal opportunities" relates to "*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 opinion*". The reserved matter of equal opportunities includes the operation of the 2010 Act. The 2010 Act interacts with the 2004 Act as the effect of a GRC under section 9 is to change

the legal sex of an individual who obtains a GRC for the purposes of the 2010 Act. For the purposes of the 2010 Act, "sex" is not limited to biological or birth sex, but includes those in possession of a GRC obtained in accordance with the 2004 Act stating their acquired gender, and thus their sex. (*For Women Scotland Ltd v Scottish Ministers* 2023 SLT 50 at §45).

22. The SA 1998 and the procedures of the House of Commons are referred to for their terms. *Quoad ultra* denied. Explained and averred that the Secretary of State's power under section 35 is part of the constitutional framework established by the SA. It is part of a suite of checks and balances on the power of the Scottish Parliament to make laws for Scotland, exercisable on the judgement of the Secretary of State if the condition in subsection 35(1)(a) or (b) is met. It supports the effective functioning of the devolution settlement in Scotland, by providing a safeguard in relation to adverse effects on reserved matters. The "*reserved matters*" in section 35(1)(b) are matters in which the UK as a whole has an interest: *Christian Institute v Lord Advocate* 2017 SC (UKSC) 29 at §§28 and 65. An order made under section 35(1) of the SA is subject to annulment in pursuance of a resolution of either House of Parliament: schedule 7. The people of Scotland are democratically represented in both the United Kingdom and Scottish parliaments: *United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill* 2022 SC (UKSC) 1 at §8. The devolution scheme recognises that the United Kingdom Parliament has the power to make laws for Scotland that would be within the legislative competence of the Scottish Parliament: SA, section 28(7).

23. Section 35 of the Scotland Act is referred to for its terms, which are admitted.

24. Admitted that s.35 falls to be construed and applied in the context and overall scheme of the SA. *Quoad ultra*, denied. Explained and averred that the SA must be interpreted in the same way as any other statute and according to the ordinary meaning of the words used: *UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill* 2019 SC (UKSC) 13 at §12. The terms of the MoU, which is a political agreement, are irrelevant to the proper interpretation of the power conferred on the Secretary of State by section 35.

25. Admitted that the court has not had occasion before to consider the proper interpretation and application of section 35, under explanation that the Secretary of State has not exercised the power in section 35 in more than 20 years of devolution. *Quoad ultra*, denied. Reference is made to the averments at § 22 and 24 of these answers. Explained and averred that section 35 forms part of a suite of checks and balances on the devolution of the law-making power from the UK Parliament to the Scottish Parliament, which is not limited to questions of competence alone. There is no reason to depart from the language used in section 35 itself in interpreting the provision. The intensity with which the court reviews judgements in the exercise of statutory powers varies with the circumstances: *Brown v Parole Board for Scotland* 2021 SLT 687 at §35. The circumstances relevant here are that the Order involved questions of judgement for the Secretary of State that were: (a) the subject of advice from the Equality Hub; (b) political (in respect of the judgement he is required to exercise in assessing the nature of the adverse effects); (c) evaluative and not susceptible to objective assessment; and

(d) subject to the control in schedule 7 of the SA of both Houses of Parliament: *Huang v Secretary of State for the Home Department* [2007] 2 AC 167 at §16; *Kennedy v Charity Commission* [2015] AC 455 at §53; *R (Lord Carlile of Berriew) v SSHD* [2015] AC 945 at §32; *R v Secretary of State for the Environment, ex p Nottinghamshire County Council* [1986] AC 240 at p247-250, and *Bank Mellat v HM Treasury (No.2)* [2014] AC 700 at §44 of second decision (p.780).

26. Admitted that first, the Bill must contain provisions which make modification of the law as it applies to reserved matters. Admitted that secondly, the Secretary of State must have reasonable grounds to believe that the relevant provisions would have an adverse effect on the operation of the law as it applies to reserved matters. Admitted that thirdly, the Secretary of State is required to state the reasons for making an order under s.35 SA. Reference is made to *Chief Constable v Lothian and Borders Police Board* 2005 SLT 315 and *Secretary of State for Education v Tameside MBC* [1997] AC 1014 for their terms, beyond which no admissions are made. *Quoad ultra*, denied. Explained and averred that the obligation on the Secretary of State prior to making the Order was to take such steps to inform himself with the relevant information and evidence as were reasonable (*Balaljigari v Secretary of State for the Home Department* [2019] 1 WLR 4647 at §70). It was for the Secretary of State to decide what those steps should be. What amounts to reasonable steps by the Secretary of State ought to be viewed in the context of the short four-week timescale in which the section 35 power must be exercised. Reference is made to §§12 and 36 of these answers.

27. Denied. Explained and averred that the Bill contains provisions which make

modification of the law as it applies to reserved matters. The Order identifies these provisions in schedule 1. There were reasonable grounds for the Secretary of State to believe that the relevant provisions would have an adverse effect on the operation of the law as it applies to reserved matters. The reasons for the Secretary of State's reasonable belief are set out in schedule 2 of the Order, as more fully narrated in the Policy Statement of Reasons. The Secretary of State took reasonable steps to inform himself of the relevant information and evidence prior to making the Order. The Secretary of State has provided the reasons for making an order in schedule 2 of the Order, as required under section 35(2). The Order is accordingly lawful.

28. The terms of paras. 1-3 of schedule 2 to the Order are admitted. *Quoad ultra*, denied. Explained and averred that the Order provides that "*Schedule 1 lists provisions of the [Bill] which make modifications of the law as it applies to reserved matters, and which the Secretary of State has reasonable grounds to believe would have an adverse effect on the operation of the law as it applies to reserved matters*" (article 3). The reasons for the Order are set out in schedule 2 (article 4). Schedule 1 to the Order identified the provisions of the Bill which make modifications of the law as it applies to reserved matters. Schedule 1 includes "*Section 16 (Further modification of enactments)*".

29. Denied. Explained and averred that the provisions in the Bill listed in schedule 1 to the Order make modifications to the 2004 Act as it applies to reserved matters for the reasons given in §2 of schedule 2 to the Order and §§6 - 9 of the Policy Statement of Reasons. §9(c) of the schedule to the Bill "*makes modifications of*" section 9 of the 2004 Act within the meaning of that phrase in section 35(1)(b) of the SA because it

alters the meaning of the words in section 9 that make up the condition for the person's gender and sex to change for all purposes: *UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill* 2019 SC (UKSC) 13 at §51.

30. Admitted that the explanation of the Secretary of State's concerns about impact upon fiscal, economic and monetary policy and/or social security schemes is set out at para.8 of schedule 2 to the Order, under explanation that there is a fuller narrative of the reasons in schedule 2 set out in the Policy Statement of Reasons. *Quoad ultra*, denied. Explained and averred that §§11 and 20 of the Policy Statement of Reasons are an aid to understanding §8 of schedule 2 to the Order because they are part of the context in which the Order was made: §10 of these answers; *R (Westminster City Council) v National Asylum Support Service* [2002] 1 WLR 2956 at §5. The law of tax and social security operates (in the first instance) in the UK through administrative decision-making. The decision-making processes are complicated and call for good administration: e.g. *Hinchy v Secretary of State for Work and Pensions* [2005] 1 WLR 967 at §§14, 21 and 28. An "*adverse effect on the operation of the law*" can encompass matters of practical administration. The law is operated through practical administration. Such effects are matters of policy, but that aligns with the purpose of section 35 in any event. Good administration requires IT systems. An adverse effect on those systems amounts to an effect "*on the operation of the law*" within the meaning of that phrase in section 35(1)(b) of the SA. It was open to the Secretary of State to find that he had "*reasonable grounds to believe*" that the effect of the Bill (if enacted) on the operation of IT systems would be "*adverse*" within the meaning of those words in section 35(1)(b). Whether the adverse effect justifies the Order is a question of

judgement that Parliament has given to the Secretary of State. His judgement was within the range of reasonable responses to the Bill that were open to him.

31. Admitted that the Scottish Government ensured the UK Government had proper and timely notice of the Bill. *Quoad ultra*, denied. Explained and averred that the Policy Statement of Reasons was before the Secretary of State prior to making the Order. Reference is made to the averments at §12 of these answers.

32. Admitted that the Secretary of State relies upon three broad concerns about the effect of the Bill. *Quoad ultra*, denied. Explained and averred that section 35(1)(b) requires the Secretary of State to satisfy himself after reasonable enquiry that there are reasonable grounds to believe that the Bill contains provisions which would have an adverse effect on the operation of the law as it applies to reserved matters. The Order is referred to for its terms. The concern of the Secretary of State set out at §§ 6-9 is not the possibility of divergence between the two regimes proposed by the Bill, but the adverse impact which the particular divergence of the two systems may have on the operation of the law as it applies to reserved matters. Three specific and particular examples of the adverse effects which the particular divergence of the two systems would cause are identified in §§ 6-7 of schedule 2 to the Order and §§ 18 - 21 of the Policy Statement of Reasons. Those adverse effects follow as a matter of logic from the application of the amendments to the 2004 Act in the Bill to the 2010 Act. Whether an adverse effect justifies the Order is a question of judgement that Parliament has given to the Secretary of State. His judgement was within the range of reasonable responses to the Bill that were open to him. The existence of the section 35 power explicitly

recognises the possibility of devolved policy making having an adverse impact on the law as it applies to reserved matters. Reference is made to §§25-30 and 33 of these answers.

33. Admitted that, secondly, the Secretary of State relies upon concerns about increased fraudulent applications as a consequence of there being, in his view, more limited "safeguards", under explanation that the second category of adverse effect is set out at paragraph 10 of schedule 2 to the Order. *Quoad ultra*, denied. Explained and averred that the "adverse effect" which requires to be identified under section 35 is a question of judgement and analysis, as opposed to a question of fact to be proved by the Secretary of State. The Secretary of State could not wait for an extended evidence- gathering exercise before considering whether to make the Order, standing the short four-week period during which an order must (if at all) be made. Before he made the Order, the Secretary of State took advice from the Equality Hub. Evidence considered by the Scottish Parliament, such as some of that put to the EHRCJ Committee, was considered by officials and formed part of the understanding used to advise Ministers. The Secretary of State's belief that he had sufficient information to make the Order was one that was open to him. It follows as a matter of logic from their terms that the amendments in the Bill would reduce the safeguards in the 2004 Act against fraudulent or malign applications. It was open to the Secretary of State to find that that effect is an "*adverse*" one on the operation of the law as it applies to reserved matters for the purposes of section 35(1)(b) of the SA. Whether the adverse effect justifies the Order is a question of judgement that Parliament has given to the Secretary of State. His judgement was within the range of reasonable responses to the Bill that were open to him. Reference is

made to *R (Justice for Health) v Secretary of State for Health* [2016] EWHC 2338 (Admin) at §185. In any event, a pure comparison with other jurisdictions is irrelevant, standing the unique interaction of the 2004 Act with the 2010 Act in the United Kingdom (with or without the amendments proposed by the Bill). Reference is made to §§25-30 of these answers.

34. Denied. Explained and averred that the extent to which there are adequate safeguards in the Bill is relevant to the questions in section 35(1)(b) of the SA: (a) whether there are reasonable grounds to believe that the effect of the Bill's modifications of the law as it applies to reserved matters on the operation of the law as it applies to reserved matters is adverse; and, if so, (b) whether to exercise the discretion to make an order.

35. Denied. Reference is made to §§32 - 34 of these answers.

35A The Order and the Policy Statement of Reasons are referred to for their terms, beyond which no admissions are made. *Quoad ultra*, denied.

36. Denied. Explained and averred that the Policy Statement provides a fuller narrative of the reasons in the Order. On 20 and 24 January 2023, the Cabinet Secretary wrote to the Secretary of State about the Order. On 9 March 2023, she wrote to the Minister for Women and Equalities about the Order. In none of those letters did she state that she could not understand why the Order had been made or ask what the Secretary of State's reasons for the Order were. The reasons provided by the Secretary of State in schedule 2 to the Order are adequate and allow the reasonably informed reader to understand why the decision was made. *Esto* the Order is unlawful, the court should decline to reduce it because the petitioners have not genuinely suffered substantial prejudice as a result of the inadequacy.

37. Denied. Explained and averred that *esto* the Secretary of State erred in law in any of the ways averred in §§28 - 36 of the petition, his error is immaterial unless he made it in relation to each of his reasons for making the Order: §5 of schedule 2 to the Order.

38. Admitted that in the circumstances set out above, the petitioners have sufficient interest in, and are directly affected by, the subject matter of this application. *Quoad ultra*, denied.

39. Not known and not admitted.

40. Admitted that the petition is not subject to mandatory or discretionary transfer to the Upper Tribunal.

PLEAS-IN-LAW FOR THE RESPONDENT

1. The petitioners' averments being irrelevant *et separatim* lacking in specification, the petition should be dismissed.
2. The petitioners' averments, so far as material, being unfounded in fact, the remedies sought should be refused.
3. The decision of the Secretary of State to make the Order complained of being neither irrational, nor unlawful, the remedies sought should be refused.
4. The Order being lawfully made in terms of section 35(1)(b) and (2) of the Scotland Act 1998, the petition should be refused.

IN RESPECT WHEREOF

INTIMATED

P318/23

In the Court of Session

ANSWERS
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

PETITIONER

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

2023

OFFICE OF THE ADVOCATE GENERAL