IN THE COURT OF SESSION

NOTE OF ARGUMENT

FOR THE SCOTTISH MINISTERS

in the petition of

THE SCOTTISH MINISTERS, 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

PART 1: INTRODUCTION

1. The Scottish Parliament was established by s.1 of the Scotland Act 1998 ("**SA**"). It has plenary legislative powers within the limits of its legislative competence. How to exercise those powers, what policy objectives to pursue and to how to achieve them are matters for the Scottish Parliament. Also established by the SA was the Scottish Government: s.44 SA. The meaning of devolved competence for the purposes of executive competence is largely tied to the legislative competence of the Scottish Parliament: s.54 SA. Broadly speaking, where the Scottish Parliament has legislative competence, the Scottish Government will have legal responsibility and political accountability for the policy area.

2. The stability and coherence which that structure was intended to produce would be disrupted if on a policy issue for which legislative competence has been given to the Scottish Parliament (and so legal responsibility and political accountability imposed upon the Scottish Government) the UK Government could readily veto the policy choices made, and legislation passed, by the Scottish Parliament. Whilst s.35 SA permits the Secretary of State to prevent submission of a Bill passed by the Scottish Parliament for Royal Assent if certain conditions are met, it is a power that must take its place within the broader constitutional settlement, which includes the principles of the separation of powers and Parliamentary accountability as well as the established system of devolved government.

3. For the first time since the advent of devolution, on 17 January 2023 the Secretary of State made an Order under s.35 SA preventing the Presiding Officer of the Scottish Parliament from submitting the Gender Recognition Reform (Scotland) Bill ("**the Bill**") for Royal Assent: the Gender Recognition Reform (Scotland) Bill (Prohibition on Submission for Royal Assent) Order 2023 ("**the Order**"). The petitioners seek reduction of the Order. They submit that it is unlawful for four reasons (which to some extent overlap):

    (a) the decision to make the Order is premised on a material error of law;

    (b) the decision to make the Order is irrational;

    (c) the Secretary of State had regard to irrelevant considerations; and

    (d) the reasons which the Secretary of State was obliged to produce are inadequate as a matter of law.

PART 2: CONSTITUTIONAL CONTEXT

4. Whilst the sovereignty of the UK Parliament and the rule of law often dominate discussion of common law principles of the UK constitution, other principles exist and are of equal importance to the UK constitutional order: ***Cherry v Advocate General for Scotland*** 2020

SC (UKSC) 1 at para.40. Two of those are of particular relevance: the separation of powers and parliamentary accountability.

5. The principle of the separation of powers between the executive, legislatures and the courts is a fundamental constitutional principle: ***Cherry***, above, at para.40. The court's role in this regard was described by Lord Mustill in ***R v Home Secretary, ex parte Fire Brigades Union*** [1995] 2 AC 513 at 567.

6. The concerns expressed about the parliamentary role are relevant in this case. At the time the Secretary of State informed the House of Commons of his decision to make the Order, his reasons were not published. The House could thus not effectively question him on those reasons). Moreover, a resolution seeking annulment of the Order was tabled but time was not allowed to debate and vote upon it (UK Parliament Early Day Motion, 6/16 at p1; House of Commons Library Research Briefing, *The Secretary of State's veto and the Gender Recognition Reform (Scotland Bill)* (26 April 2023), 6/17 at pp30-31). That forms part of the context in which the Court should approach its review of the lawfulness of the Order.

7. The second, and related, constitutional principle is that of Parliamentary accountability: ***Cherry***, above, at para.46. This is no less fundamental than Parliamentary sovereignty: ***R (Miller) v Secretary of State for Exiting the European Union*** [2018] AC 61 at para.249 (Lord Carnwath); see also ***Cherry***, at para.46.

8. Having largely transferred executive responsibility in respect of non-reserved matters to the Scottish Government, it follows that, in enacting the SA, the UK Parliament intended that the Scottish Government would be accountable in those areas to the Scottish Parliament. That intention is reflected in the resolution of the House of Commons passed on 25 October 1999 (quoted in Erskine May at para. 11.13, 6/18). It would be inconsistent

with, *inter alia*, the constitutional principle of Parliamentary accountability for the UK Government to be able to veto legislation introduced by the Scottish Government and passed by the Scottish Parliament on grounds of a policy disagreement.

9. Fundamental change to the constitutional structure of the United Kingdom was introduced by the SA: ***BH v Lord Advocate*** 2012 SC (UKSC) 308 at para.30 (Lord Hope). The Scottish Parliament has plenary powers and 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: ***AXA General Insurance Company v Lord Advocate*** 2012 SC (UKSC) 122 ("***AXA***") at para.146 (Lord Reed). Its democratic mandate is beyond question: ***AXA*** at para.46 (Lord Hope). Those plenary powers do not need to be exercised for any specific purpose: ***AXA*** at para.147. Acts of the Scottish Parliament which are within its legislative competence enjoy the highest legal authority: ***AXA*** at para.46.

10. General legislative, and executive, competence was transferred to the Scottish Parliament and Scottish Government by the SA. That general transfer is subject to specific reservations: s.29 (legislative competence) and s.54 (executive competence). Policy responsibility and political accountability for the exercise of non-reserved policy rests with the Scottish Government. In respect of non-reserved matters, the constitutional principle of Parliamentary accountability is fulfilled by the Scottish Government accounting to the Scottish Parliament. Policy responsibility and political accountability for reserved matters remains with the UK Government (and Parliament). Whilst legislative competence in respect of non-reserved matters is shared, as a matter of constitutional propriety the UK Parliament does not (and should not) normally legislate on such matters without the consent of the Scottish Parliament. That has been expressly recognised by the UK Parliament: s.28(8) SA. Executive competence in respect of non-reserved matters is not

shared in the same manner and almost exclusively rests with the Scottish Government: s.53(1) SA. There are mechanisms to agree subordinate legislation to change the settlement (s.30 and s.63 SA) and for the UK Government to make provision in consequence of devolved legislation (s.104 SA).

11. The UK Parliament is presumed to have provided for a coherent, stable and workable scheme of devolution. That is best achieved by adopting an approach to the interpretation of the SA that is constant and predictable and by giving the words used their ordinary meaning: ***Imperial Tobacco Ltd v Lord Advocate*** 2013 SC (UKSC) 153 at para.14 (Lord Hope), re-affirmed by the Supreme Court in ***Lord Advocate's Reference (No.1 of 2022) (Devolution Issues)*** 2023 SC (UKSC) 40 at para.38 (Lord Reed).

12. Against this background, it is submitted that the UK Parliament cannot be taken to have conferred the almost unfettered discretion claimed by the respondent. It is constitutionally appropriate that the Court closely review any exercise of the discretion conferred by s.35.

PART 3: INTERPRETATION OF S.35 SA

13. The proper interpretation of s.35 SA has never before been considered by the Court. So far as relevant for present purposes, it provides:

> "***35 Power to intervene in certain cases***
>
> *(1) If a Bill contains provisions –*
>
> *(a) which the Secretary of State has reasonable grounds to believe would be incompatible with any international obligations or the interests of defence or national security, or*
>
> *(b) 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,*

he may make an order prohibiting the Presiding Officers from submitting the Bill for Royal Assent.

(2) The order must identify the Bill and the provisions in question and state the reasons for making the order.

(3) The order may be made at any time during –

(a) the period of four weeks beginning with the passing of the Bill,

…

(4) The Secretary of State shall not make an order in relation to a Bill if he has notified the Presiding Officer that he does not intend to do so …

…."

An order under s.35 is subject to annulment in pursuance of a resolution of either House of Parliament: Sch.7, para.1 SA.

14. Ministerial statements made during the passage of the SA in relation to what became s.35 made clear that

(a) the exercise of the power was to be subject to important safeguards;

(b) a reasonableness test was intended to be built into s.35;

(c) the exercise of the power would be subject to judicial review in which the courts would have to consider the adverse effects of such an order and apply the reasonableness test.

(d) in contrast to the so-called "governor generalship" powers under the Scotland Act 1978, under which the Secretary of State could have intervened on the basis that they did not approve of the policy adopted by the Scottish Parliament, the Secretary of State would be entitled to intervene only if there was an adverse impact on reserved matters;

(e) the power of intervention was intended to be a long stop, and

(f) the existence of the power should be sufficient to ensure consultation between Whitehall and Edinburgh so that there may be no need for them to be used.

(See statements by the Secretary of State for Scotland, Rt Hon Donald Dewar MP (HC Deb 12 May 1998 Vol 312 c.274 at 6/19) and Lord Sewel (HL Deb Vol 592, c.1391-2 at 6/20). That the power of intervention was seen very much as a matter of last resort was subsequently confirmed by the Memorandum of Understanding between the UK Government and the devolved administrations (6/4 at paras. 27-28)).

15. It can be seen that s.35(1)(b) SA sets two conditions which must be satisfied before an order can be made in reliance upon it:

    (a) The Bill must "*contain provisions … which make modifications of the law as it applies to reserved matters*" ("**Condition 1**"); and

    (b) The Secretary of State must have "*reasonable grounds to believe* [that the provision(s)] *would have an adverse effect on the operation of the law as it applies to reserved matters.*" ("**Condition 2**")

16. If those conditions are satisfied, then s.35(2) SA imposes two requirements as to the content of any Order, namely that the Order must identify the Bill and the provisions in question and reasons must be stated for making the Order (for shorthand, these two requirements are referred to as "**Condition 3**"). The petitioners submit that none of those conditions have been satisfied. It is necessary at this point to address the proper construction of Conditions 1 and 2 (the meaning of Condition 3 being self-evident).

17. The term "modification" is not defined in the SA. In s.126(1) it is provided that *"'modify' includes amend or repeal"*. In other contexts, the UK Parliament has offered a definition of the term (e.g. Communications Act 2003, s.405). Since the SA should be given its

ordinary and natural meaning, it is submitted that "modification" simply means a "change" of the law as it applies to reserved matters.

18. Any change is not directed at the operation of the law outside Scotland. The language of s.35 SA would include an effect on the operation of reserved law within Scotland. In other words, s.35 SA goes to subject-matter and not geography. Given the structure of the SA, s.35 SA is directed at a change which it was within legislative competence to make.

19. Condition 1 is a pre-requisite to considering Condition 2. If the Bill does not contain provisions which make modifications of the law as it applies to reserved matters, then s.35 SA is not engaged whatever the effects of the Bill.

20. In summary, it is submitted that the expression "*make modifications of the law as it applies to reserved matters*" is satisfied where:

    (a) a Bill has made a change to the law (whether statutory or common law); and

    (b) that change has an impact upon the law (whether statutory or common law) as it applies to a reserved matter (whether within Scotland or elsewhere).

21. As to condition 2, what amounts to "*reasonable grounds to believe*" is discussed below. In short, the respondent's suggestion that it is all a matter for the Secretary of State whose judgment is not, in practical terms, amendable to review, is not accepted. The approach contended for is consistent with that taken to powers of executive veto in other contexts where the threshold is "*reasonable grounds*" to believe and where exercise of the veto would rub against fundamental constitutional principles: ***R (Evans) v Attorney General*** [2015] AC 1787.

22. In respect of "*adverse effect on the operation of the law*", the specific alleged adverse effects are considered below. At the general level, it is submitted that the effects must be sufficiently weighty and cogent (that is, not unduly abstract or hypothetical) to justify

exercising an executive power which overrides an *intra vires* legislative act. It is further submitted that cogency falls to be considered within the overall constitutional scheme, which recognises that the UK Parliament has specifically permitted divergence on this issue, specific provision has been made to address anomalies which may arise as a consequence of devolved legislation (notably in s.104 SA which has been invoked more than 100 times) and the UK Parliament retains the right to legislate if abstract or hypothetical concerns were to materialise (s.28(7) SA). The importance of s.104 orders in the scheme of devolution has been noticed by the courts: *Martin v Most* 2010 SC (UKSC) 40 at paras 78-90 (Lord Rodger).

23. Regard should also be had to the extent to which the effects relied upon are pre-existing rather than newly introduced by the provisions in question. In the context of the Order, as more fully explained below, each of these factors weigh against the reasonableness of the Secretary of State's assessment.

PART 4: THE BILL

24. No issue as to legislative competence arises in these proceedings. It was open to the UK Government's Law Officers to refer the Bill to the Supreme Court to determine its legislative competence (s.33 SA). That was not done. The respondent admits that the Scottish Parliament could make separate, and potentially different, legislative provision in respect of gender recognition (Ans.10). He also admits that the 2004 Act is not a protected enactment in terms of Sch.4 SA (Ans.21) and does not suggest that the Bill offends any of the reservations in Sch.5 SA.

25. It is important to note what the Bill does not do. In particular, while it would be within legislative competence for the Scottish Parliament to amend s.9 of the 2004 Act, the Bill

does not do so. Accordingly, the consequences of obtaining a SGRC under the Bill are identical to the consequences of obtaining a GRC under the 2004 Act. As the respondent avers, the 2010 Act interacts with the 2004 Act because of the effect s.9 of the 2004 Act gives to a GRC (and would give to a SGRC) (Ans.21). In other words, the interface between the two Acts is s.9 of the 2004 Act and that provision is untouched by the Bill.

26. The development and passage of the Bill are narrated at paras.6 to 9 of the petition. The changes which it would make are summarised at paras.16 and 17. The substance of those averments are not repeated but are referred to for their terms.

PART 5: ERROR OF LAW

27. It is convenient to start by dealing briefly with ***For Women Scotland Ltd v Scottish Ministers*** 2023 SC 61. The Secretary of State's analysis, and almost all of his concerns about the Bill, is underpinned by the assumption that the meaning and effect of s.9 GRA is correctly explained by the Lord Ordinary in that case. The petitioners agree that it is. If, however, the Lord Ordinary's explanation of the meaning and effect of s.9 GRA was not supported by the appellate courts, then the Secretary of State's decision to make the Order has proceeded on an incorrect understanding of the law, that incorrect understanding is material to the decision to make the Order, and the Order would fall to be reduced. This is the *esto* argument set out in para. 35A of the petition. The Court is respectfully invited to determine the petitioners' *esto* argument so that, in the event of a successful appeal in ***For Women Scotland***, the consequence for this petition is clear (and it would not require to be re-argued).

28. The remainder of this ground of challenge proceeds upon the basis that ***For Women Scotland*** was correctly decided and is directed at Condition 1. As explained at para.20, above, Condition 1 requires that two things be established. First, that a Bill makes a change

to the law (whether statutory or common law). Secondly, that the change would have an impact upon the law (whether statutory or common law) as it applies to a reserved matter. In being satisfied that Condition 1 was fulfilled, the Secretary of State materially erred in law and so vitiated his decision to make the Order.

29. A person exercising a discretion conferred upon them by statute must properly understand the law that governs the exercise of that decision: ***Council of Civil Service Unions v Minister for the Civil Service*** [1985] AC 374 per Lord Diplock at 410.

30. In order to vitiate a decision, an error of law on the part of a decision-maker must be material. It is material if it was an error in the actual making of the decision which affected the decision itself: ***R v Hull University Visitor, ex parte Page*** [1993] AC 682 at 702 (Lord Browne-Wilkinson). An error of law affects a decision unless it can be said that the decision-maker would have inevitably reached the same decision on a correct understanding of the law: ***Sadovska v Secretary of State for the Home Department*** 2018 SC (UKSC) 38 at para.33 (Baroness Hale).

31. The Secretary of State's error is a sharp but fundamental one: nothing in the Bill has an adverse effect upon the operation of the law as it applies to reserved matters. That is because the interface between the Bill and the wider law (in particular the 2010 Act which is the principal focus of the Secretary of State's reasons) is s.9 of the 2004 Act. Nothing in the Bill changes how that provision would operate. The operation of s.9 of the 2004 Act does not differentiate between a GRC and a SGRC. The same consequences flow from the possession of each. If that submission is accepted, the Secretary of State has not properly understood the law relevant to the decision he made, that misunderstanding was material to the making of the Order and reduction of the Order should follow.

32. The respondent argues that the meaning of the words in s.9 of the 2004 Act are altered by the Bill (Ans.29). That appears to hinge upon the change in the definition of a GRC for the purpose of amendments made by the Bill. Nothing of substance is said on that in the reasons provided for making the Order (cf. para.2 of Sch 2 to the Order). The observations made by the Supreme Court in ***UK Withdrawal from the European Union (Legal Continuity)(Scotland) Bill*** 2019 SC (UKSC) 13 at para.51 to which the respondent refers offer him no assistance. In the context of discussing prohibition on the modification of protected enactments (s.29(2)(c) and Sch.4 SA), and not s.35 SA, it was observed that a modification would arise where the protected provision "*has to be understood as having been in substance amended, superseded, disapplied or repealed by the later one.*" (para.51) The Bill makes no such modification (or change) to s.9 of the 2004 Act. To the extent that the Secretary of State proceeded on that basis, he materially erred in law.

33. Separately, to the extent that the Secretary of State relied upon the alleged effect of the Bill on the operation of social security and HMRC systems, he erred. It is apparent from what is said in the Policy Statement of Reasons that the Secretary of State founds upon speculative and hypothetical concerns (para. 20 with emphasis supplied):

> "*Those responsible for the systems consider that it <u>may</u> be unmanageable…*" (para.20)

34. The use of the word "may" is conspicuous. At no point during the development or passage of the Bill (which stretched over a number of years) were any of these concerns raised by the UK Government as adverse effects. Furthermore, given that the UK Parliament has expressly conferred upon the Scottish Parliament the competence to diverge in relation to gender recognition, this reason is tantamount to an executive refusal to allow that intention to be given effect. Speculative concerns of unidentified officials about the ability of IT experts to make the appropriate technical changes are insufficiently cogent to support the

decision to make the Order. They do not satisfy Condition 1. By proceeding upon the basis of this reason, the Secretary of State erred in law.

PART 6: IRRATIONALITY

35. This ground of challenge is directed at Condition 2 which requires the Secretary of State to have formed a reasonable view (that is, a rational view) that the provision in question would have an adverse effect upon the operation of the law as it applies to reserved matters. Largely as a consequence of the Secretary of State's failure to acquaint himself properly with the relevant facts and material, and for the reasons more fully set out below, the decision cannot be said to be reasonable (or rational). It is therefore unlawful and should be reduced.

36. The classic statements of irrationality are trite and are not repeated. Irrationality is not a fixed standard; what is required will vary depending upon the circumstances of the particular case. A more variable standard of rationality review is often attributed to Lord Bridge in ***R v Secretary of State for the Home Department, ex parte Bugdaycay*** [1987] AC 514 at 531 where he said that:

> "*the court must … be entitled to subject an administrative decision to the more rigorous examination, to ensure that it is in no way flawed, according to the gravity of the issue which the decision determines.*"

In a similar vein, Lord Phillips MR explained in ***R(Q) v Secretary of State for the Home Department*** [2004] QB 36 at para.112:

> "*The common law of judicial review in England and Wales has not stood still in recent years. … the courts … have developed an issue-sensitive scale of intervention to enable them to perform their constitutional function in an increasingly complex polity. They continue to abstain from merits review … but in appropriate classes of case they will today look very closely at the process by which facts have been ascertained and at the logic of the inferences drawn from them.*"

Drawing on those authorities, Lord Mance explained in ***Kennedy***, at para.51, that:

> "*The common law no longer insists on the uniform application of the rigid test of irrationality once thought applicable under the so-called* Wednesbury *principle.*"

At para.54, Lord Mance added that the intensity of review is "*heavily dependent on the context.*" The variable approach to intensity of review set out in ***Kennedy*** has been approved by the Supreme Court: ***Pham v Secretary of State for the Home Department*** [2015] 1 WLR 1591 at para.60 (Lord Carnwath) and para.109 (Lord Sumption).

37. That same idea of a variable intensity of review was expressed by Lord Reed in ***AXA***, above, at para.142 (see also para. 143):

> "*The courts … have the responsibility of ensuring that the public authority in question does not misuse its powers or exceed their limits. The extent of the courts' responsibility in relation to a particular exercise of power by a public authority necessarily depends upon the particular circumstances, including the nature of the public authority in question, the type of power being exercised, the process by which it is exercised, and the extent to which the powers of the authority have limits or purposes which the courts can identify and adjudicate upon.*"

38. To the extent that the respondent prays in aid parliamentary review of the Secretary of State's decision, two points require to be noticed:

    (a) Parliamentary approval is not conclusive evidence of lawfulness and it cannot render the unreasonable reasonable: ***R (Javed) v Secretary of State for the Home Department*** [2002] QB 129 at para.37 (Lord Phillips, MR).

    (b) Accepting the respondent's averments at Ans.12 about the timing of publication of the Order, it cannot be said that Parliament has in fact considered and reviewed the Order. That being so, the Court should not be deterred from reviewing the reasonableness of the decision to make the Order.

39. It is submitted that a decision to make an order under s.35 SA is a decision which calls for the sort of scrutiny suggested by Lord Phillips in ***R(Q)***. The constitutional framework within which s.35 sits is explained above. To the extent that the respondent maintains that s.35 confers a discretion which is not in practical terms subject to review by the Court, such a position is untenable. The terms of s.35 and the background to its enactment make clear that Parliament did not intend to confer upon the Secretary of State such a discretion. (see paras. 13-14, above). In those circumstances, an intense review of the decision to make an order is necessary to maintain the proper constitutional balance.

40. A decision-maker has a duty to take reasonable steps to acquaint themselves with the relevant facts and material before making their decision: ***Secretary of State for Education and Science v Tameside Metropolitan Borough Council*** [1977] AC 1014 at 1065 (Lord Diplock) ("**the *Tameside* duty**"). The principles relevant to the ***Tameside*** duty were summarised by Hallett LJ in ***R (Plantagenet Ltd) v Secretary of State for Justice and others*** [2015] 3 All ER 261 at para.100 (internal citations omitted):

> "*1. The obligation upon the decision-maker is only to take such steps to inform himself as are reasonable.*
> *2. Subject to a* Wednesbury *challenge, it is for the public body, and not the court to decide upon the manner and intensity of inquiry to be undertaken …*
> *3. The court should not intervene merely because it considers that further inquiries would have been sensible or desirable. It should intervene only if no reasonable authority could have been satisfied on the basis of the inquiries made that it possessed the information necessary for its decision ...*
> *4. The court should establish what material was before the authority and should only strike down a decision by the authority not to make further inquiries if no reasonable council possessed of that material could suppose that the inquiries they had made were sufficient …*
> *5. The principle that the decision-maker must call his own attention to considerations relevant to his decision, a duty which in practice may require him*

to consult outside bodies with a particular knowledge or involvement in the case, does not spring from a duty of procedural fairness to the applicant, but from the Secretary of State's duty so to inform himself as to arrive at a rational conclusion ...

6. *The wider the discretion conferred on the Secretary of State, the more important it must be that he has all relevant material to enable him to properly exercise it ...*"

That summary has been approved by the Court of Appeal: ***R (Balajigari) v Secretary of State for the Home Department*** [2019] 1 WLR 4647 at para.70. As explained by Lord Phillips in ***R(Q)*** the intensity with which the Court will review the extent to which a decision-maker discharged their duty, and the inferences drawn from what they did review, is variable. It is context dependent.

41. Applying these principles to the instant case, there are two main limbs to the petitioners' rationality complaint about the Order:

    (a) the Secretary of State did not fulfil the ***Tameside*** duty;

    (b) in any event, his conclusion that there were reasonable grounds to believe there would be an adverse effect on the operation of the law as it applies to reserved matters was not reasonably open to him.

42. Dealing first with the Tameside duty, the respondent avers that the Secretary of State had the benefit of advice from policy officials, including from the Equality Hub (Answers 12, 25 and 33). That advice was provided to the petitioners in partially redacted form on 8 August 2023. Further material, which it is said that the Secretary of State had before him when considering the matter, was provided on 11 August. There is no indication that he considered to any significant extent the evidence considered by the Scottish Parliament in the course of the Bill's passage or evidence of the experience in other jurisdictions which have introduced similar systems. In respect of a policy which had been developed over

years, undergone extensive consultation and on which the UK Government had been sighted from the formative stages, no Secretary of State could have reasonably considered that he was in a position to make a decision to exercise his power under s.35 without having regard to such material. He failed in his duty to familiarise himself with relevant evidence that was available to him. Reference is made in particular to the Equality Impact Assessment (6/9); the Stage 1 Report of the Equalities, Human Rights and Civil Justice Committee dated 6 October 2022 (6/10, especially at pp61-72 and 76-82); the draft response to the UN Special Rapporteur provided by the Scottish Government to the UK Government (6/24), the letter dated 13 December 2022 from the UN Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity to the UK Government (6/25). The Secretary of State's decision was thus unlawful and falls to be reduced.

43. As for adverse effects, the Secretary of State purports to rely upon various concerns about the effect of the Bill. They are unfounded *et separatim* insufficiently cogent and material to justify the making of the Order. Reference is made to Part 8, below, on the reasons in Sch 2 of the Order. In particular:

    (a) The Secretary of State's reliance lies upon the impact of two parallel and different schemes of gender recognition and concerns about more limited "safeguards" are, for reasons explained more fully below, irrelevant considerations.

    (b) As explained above, the operation of the 2010 Act is not changed by the Bill. In any event, the concerns relied upon by the Secretary of State are irrational. *Separatim*, such concerns are, in the overall scheme of the Bill, too speculative, hypothetical and/or insufficiently cogent properly to justify the exceptional step of preventing its submission for Royal Assent. Reference is made to Part 8, below.

44. In these circumstances, the Secretary of State's view that the Bill would have adverse effects on the operation of the law as it applies to reserved matters was not reasonably open to him and his decision falls to be reduced.

PART 7: IRRELEVANT CONSIDERATIONS

45. This ground of challenge is also directed at Condition 2. In short, because the Secretary of State has had regard to irrelevant considerations (or, put another way, has acted irrationally in having regard to those considerations) when making his decision, the decision is unlawful and should be reduced.

46. A decision-maker may be faced with three types of consideration:

    (a) those they are required to take into account;

    (b) those they are required not to take into account; and

    (c) those which they may choose for themselves whether or not to take into account

    (***R (Hurst) v London Northern District Coroner*** [2007] 2 AC 189 at para.57 (Lord Brown)). Failure to have regard to a type (a) consideration or taking into account a type (b) consideration, will vitiate the decision. The obligation in respect of type (a) and type (b) considerations can be implicit in a statute: ***CREEDNZ Inc v Governor General*** [1981] 1 NZLR 172 at 183 (Cooke J; approved by Lord Brown in ***Hurst*** at para.57). For a type (c) consideration, the touchstone is irrationality: was it irrational for the decision-maker to take into account (or leave out of account) that consideration?

47. Applying these principles to the instant case, divergence between the law of Scotland and the law of England and Wales as a consequence of the passage of the Bill is an irrelevant consideration. It is by way of necessary implication a type (b) consideration as a consequence of the terms of the SA. *Esto* it is not a type (b) consideration, it is a type (c)

consideration to which it was irrational for the Secretary of State to have regard given the fact that divergence between the law of Scotland and the law of England and Wales on this matter is envisaged and allowed by the statutory framework.

48. Further and in any event, the Secretary of State's reliance upon concerns about increased fraudulent applications as a consequence of there being, in his view, more limited "safeguards" is an irrelevant consideration. The proper purpose of an order under s.35 SA is to block Royal Assent of devolved legislation which has an adverse effect on the operation of the law as it applies to reserved matters. It is not to block Royal Assent of devolved legislation where the Secretary of State considers different policy choices could (or should) have been made. *Separatim*, no reasons are offered to explain why, contrary to the experience of other jurisdictions, he is apprehensive of this being a problem in Scotland (and/or the wider UK). As noted above, he failed in his duty to familiarise himself with relevant available information.

49. For these reasons, the Secretary of State's decision proceeded to a material extent upon irrelevant considerations and thus falls to be reduced.

PART 8: REASONS

50. This ground of challenge is directed at Condition 3, namely the requirement to provide reasons. Whilst Sch 2 to the Order contains what are said to be the reasons for making it, the petitioners submit that those reasons are inadequate in law. Accordingly, Condition 3 has not been satisfied by the Secretary of State and the Order should be reduced.

51. Reasons must leave the informed reader and the court in no real and substantial doubt as to what the reasons were for a decision and what were the material considerations which

were taken into account in reaching it: ***Wordie Property Co Ltd v Secretary of State for Scotland*** 1984 SLT 345 at 348.

52. Where the legislature has imposed an obligation upon a decision-maker to provide reasons for a discretionary decision, the common law has long required that those be of a sufficient quality to discharge the statutory obligation: ***Chief Constable v Lothian and Borders Police Board*** 2005 SLT 315 at para.70, per Lord Reed. An obligation to provide reasons is an express condition of making an order under s.35: s.35(2). That Parliament intended the requirement to provide reasons as a condition of the validity of a decision to make an order under s.35 is clear from the language used ("[t]*he order must … state the reasons…*"; emphasis added) and the fact the obligation is contained in a specific subsection.

53. When considering whether the Secretary of State has discharged the statutory obligation imposed upon him by Parliament:

    (a) it is the reasons produced with the Order which fall to be scrutinised, and

    (b) the intensity of review is greater than what was classically understood as a *Wednesbury* assessment (see paras.36-39, above).

    The former is a consequence of the proper interpretation of s.35 SA. The latter is a consequence of viewing it in its proper place within the constitutional structure of the United Kingdom.

54. Applying these principles to the instant case, the reasons in Sch 2 of the Order are inadequate in law. In particular (all references to para. numbers being to Sch 2):

    (a) As explained above, the creation of different regimes for issuing GRCs and concerns about safeguards are irrelevant consideration (paras. 4(a) and (b), 6-10).

    (b) The main grounds of concern advanced by the Secretary of State relate to the effect which he claims the Bill will have on the 2010 Act (paras. 4(c), 7, 11-12).

For reasons explained above, the Bill does not have an adverse effect upon the operation of the law in that Act.

(c) The essence of many of the concerns is that issues which already arise – or might arise - under the current law may arise more often (paras. 11 and 12). More people using, or falling within the scope of, a legal provision does not constitute an effect upon the operation of the law. That is all the more so when the numbers of additional people who would likely obtain SGRCs is very small in relation to the population of Scotland and smaller still in relation to the population of the United Kingdom.

(d) As explained above, the Secretary of State's concerns are almost entirely unsupported by evidence. That is so, for example, in relation to the concerns about safeguarding and fraudulent or malign applications (paras. 4(b), 10).

(e) Several of the reasons raise hypothetical and theoretical concerns which are very unlikely to arise in practice, or at least may arise very infrequently, or are not cogently explained. That is so, for example, of the effects on the equal pay claims (paras. 6(c), 12(c)), public sector equality duty (paras. 6(b), 12(b)), the alleged but unspecified consequences for the administration of tax, benefits and state pensions (para. 8) and education (para. 12(e)).

(f) Other reasons are irrational. That is so in relation to the concern about the system for overseas citizens to obtain SGRCs (para. 9). As matters stand, several countries with "self-dentification" systems of gender recognition are on the approved list under the Gender Recognition (Approved Countries and Territories) Order 2011. Whatever is now said about the UK Government's intention to revise that list, the 2011 Order remains in force and has done, unamended, for some time.

PART 9: CONCLUSIONS

55. Under the constitutional arrangements of the United Kingdom, the Scottish Parliament has an unquestioned democratic mandate to make laws within its legislative competence which it considers appropriate for the people of Scotland. Such laws enjoy the highest legal authority. It is inconsistent with that constitutional structure, which was enacted by the UK Parliament, to recognise a broad and largely unfettered power to block the *intra vires* legislative choices of the Scottish Parliament. Such a power is only exercisable in limited and exceptional circumstances. It was a power which the UK Parliament understood would be exercised as a last resort and under the supervision of both the UK Parliament and the courts. The characterisation of s.35 SA presented on behalf of the Secretary of State is untenable.

56. For the reasons set out above, the conditions that must necessarily be fulfilled before such an order can be made have not been satisfied. That being so, the Order should be reduced.

IN RESPECT WHEREOF

Rt. Hon. Dorothy Bain, K.C., LORD ADVOCATE

Douglas Ross, K.C.

Paul Reid, Advocate

Counsel for the Scottish Ministers

INTIMATED

P318/23

In the Court of Session

NOTE OF ARGUMENT

FOR THE SCOTTISH MINISTERS

in the petition of

THE SCOTTISH MINISTERS

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

2023

SCOTTISH MINISTERS
(Scottish Government Legal Directorate)