UNTO THE RIGHT HONOURABLE

THE LORDS OF COUNCIL AND SESSION

PETITION

(as adjusted: 9 August 2023)

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

HUMBLY SHEWETH:-

Introduction

1. That the petitioners are the Scottish Ministers. They are established by s.44 of the Scotland Act 1998 ("**SA**"). They are designed in the instance. The respondent is the Advocate General for Scotland. He is the appropriate Law Officer in terms of the Crown Suits (Scotland) Act 1857. He is designed in Part 1 of the Schedule of Service. The interested parties, who may each have an interest in the subject matter of this petition, are: (a) the Presiding Officer of the Scottish Parliament (represented by the Scottish Parliamentary Corporate Body: s.40(2)(a) SA); (b) the Counsel General for Wales; and (c) the Attorney General for Northern Ireland. They are each designed in Part 2 of the Schedule of Service. On 22 December 2022, the Scottish Parliament passed the Gender Recognition Reform (Scotland) Bill ("**the Bill**"). The Bill was a Government Bill, having been introduced by the Cabinet Secretary for Social Justice, Housing and Local Government ("**the Cabinet Secretary**"). On 17 January 2023, the Secretary of State for Scotland ("**the Secretary of State**") made and laid before the UK

Parliament an order in terms of s.35 SA: the Gender Recognition Reform (Scotland) Bill (Prohibition on Submission for Royal Assent) Order 2023 ("**the Order**"). The effect of the Order is to prevent the first Interested Party ("**the Presiding Officer**") from submitting the Bill for Royal Assent and thus passing into law. The petitioners seek review of the Order. Having introduced the Bill into the Scottish Parliament, and in the circumstances more fully set out below, the petitioners have sufficient interest in, and are directly affected by, the Order such as to have standing to bring these proceedings. The Order will have effect within Scotland. There is a sufficient connection with Scotland. Accordingly, this court has jurisdiction.

The Decision that is Challenged

2. That on 17 January 2023, the Secretary of State made and laid before the UK Parliament the Order under s.35 SA. The Order prohibits the Presiding Officer from submitting the Bill for Royal Assent. The Order was subject to annulment in pursuance of a resolution of either House of Parliament (sch.7, paras.1 and 2 SA; Statutory Instruments Act 1946, s.5). No such resolution was passed by either House of Parliament within the prescribed period (although an Early Day Motion seeking annulment was tabled in the House of Commons and signed by 52 MPs, time was not allowed for a debate and/or vote on that Motion within the prescribed period). The Order is in force and shall remain in force. The Presiding Officer is, and shall remain, prevented from submitting the Bill for Royal Assent. That the grounds giving rise to this petition first arose on 17 January 2023. With reference to the respondent's averments in answer, admitted that Members of Parliament asked questions of the Secretary of State for Scotland on 17 January 2023. Erskine May at para. 31.18 is referred to for its terms beyond which no admission is made. *Quoad ultra* denied, save as coinciding herewith.

3. That the Order must identify the Bill, the provisions in question and state the reasons for it being made (s.35(2) SA). The provisions in question are set out in schedule 1 to the Order. The reasons for making the Order are set out in schedule 2 to the Order. Those provisions and reasons are referred to for their full terms, which are incorporated herein *brevitatis causa*. The respondent's averments in answer are denied, save as coinciding herewith. Explained and averred that for the purpose of determining the lawfulness of the Order, in particular compliance with the obligation to provide legally

adequate reasons, it is those reasons set out in schedule 2 to the Order which are relevant.

The Orders Sought

4. That the orders sought by the petitioners are:

   a. Reduction of the Order; and

   b. Such further orders (including an order for expenses) as Your Lordships may consider to be just and reasonable in all the circumstances.

The respondent's averments in answer are denied, save as coinciding herewith.

The Basis of the Petitioner's Challenge

5. That the specific circumstances in which the petitioners maintain that the Order is unlawful, and should be reduced, are set out below. In summary, the petitioners seek reduction of the Order on the following grounds (separately and cumulatively):

   a. Material Error of Law: the Secretary of State's assertion that the Bill would have an adverse effect upon the operation of the law as it applies to reserved matters is founded upon a material error of law in respect of the consequences of the Bill.

   b. Irrationality: having regard to the absence of any supporting evidence produced by the Secretary of State, and in the context of research, consultation and comparative information available to, and considered by, the Scottish Parliament during the Bill's passage, the Secretary of State's concerns about the operation of the Bill are irrational.

   c. Irrelevant Considerations: that in having regard to what the Secretary of State asserts are insufficient safeguards in the Bill, he has had regard to a policy issue which is irrelevant to the making of an Order under s.35 SA.

d. Inadequate Reasons: that the reasons provided by the Secretary of State are insufficient to discharge the duty imposed on him by s.35 SA to provide reasons when making the Order with the consequence that the Order is unlawful.

The respondent's averments in answer are denied, save as coinciding herewith.

Development of the Bill

6. That the Scottish Government committed to reforming the 2004 Act as part of the Fairer Scotland Action Plan which was adopted in 2016. Pursuant to that commitment, the Scottish Government undertook two consultations. The first consultation ran between November 2017 and March 2018. That was a consultation on the principles of reform of the 2004 Act. The second consultation ran between December 2019 and March 2020. That was a consultation upon a draft Bill. An analysis of the responses to each consultation has been published by the Scottish Government. There were 15,697 responses available for analysis following the first consultation. In respect of the proposal that applicants for a GRC (as hereinafter defined) should not have to demonstrate a medical diagnosis, 60% of those answering the question agreed with the introduction of a self-declaratory system for legal gender recognition. There were 17,058 responses available for analysis following the second consultation. A majority of respondents who answered the relevant question thought that the age at which a person can apply for a GRC should be reduced from 18 to 16. An analysis of comments made suggested that a small majority of organisations broadly supported moving to a statutory declaration-based system. In response to neither consultation (whether by formal response to either consultation or in official to official level conversations) did the UK Government raise the concerns now expressed in schedule 2 to the Order. On 7 September 2021, the Programme for Government published by the Scottish Government committed to bringing forward the Bill within the next year. With reference to the respondent's averments in answer, not known and not admitted that it is not the current or usual practice of the UK Government to respond to policy consultations carried out by the Devolved Administrations. *Quoad ultra* denied, save as coinciding herewith.

7. That in July 2018 the UK Government launched a public consultation on its own, separate, proposed reforms to the 2004 Act. In that consultation, the UK Government indicated support for moving away from the requirement for a medical diagnosis before an application for a GRC could be made. It was said to be seeking views on how best to reform the process by which someone could change their legal sex. It stated that the UK Government was persuaded that the process should be made easier (para.26 of the consultation). In September 2020, the UK Government published an independent analysis of responses to its consultation. That analysis found that 64.1% of respondents said that there should not be a requirement for a diagnosis of gender dysphoria in future. In September 2020, the UK Government announced that it would not now take forward reforms to the requirements for gender recognition. With reference to the respondent's averments in answer, the purpose of the UK Government's consultation is not known and not admitted. *Quoad ultra* denied, save as coinciding herewith.

The Passage of the Bill

8. That the Bill was introduced on 2 March 2022. Prior to its introduction, and so prior to the Bill being made available to MSPs, and in accordance with normal practice, the Bill and the accompanying documents were made available to the UK Government. The Billwas introduced by the Cabinet Secretary (Shona Robison, MSP). The Bill was accompanied by a policy memorandum, a financial memorandum, an equality impact assessment ("**EIA**") and a delegated powers memorandum. In particular, the EIA considered whether the Bill impacted upon men and women in different ways, whether it impacted upon people because of their sexual orientation and whether it impacted upon transgender people. The Bill was assessed as having no negative impacts in respect of any of those groups. The terms of the EIA have not been challenged. In particular, the Secretary of State has never criticised (either publicly or in official to official conversation) the terms of the EIA that accompanied the Bill. Statements were made by the Cabinet Secretary and the Presiding Officer to the effect that they each believed the Bill to be within the legislative competence of the Scottish Parliament. Following introduction of the Bill, the Equalities, Human Rights and Civil Justice Committee was appointed the lead committee for the Bill ("**the Lead Committee**"). The Lead Committee issued a call for views, which ended on 16 May 2022. A short

summary of the responses to that call for views was published on 23 May 2022. After holding a number of evidence sessions, the Lead Committee published its Stage 1 Report on 6 October 2022. On 26 October 2022, the Scottish Government published its response to the Lead Committee's Stage 1 Report. On 27 October 2022, the Scottish Parliament debated (in plenary session) the general principles of the Bill. On 27 October 2022, those general principles were approved by the Scottish Parliament (88 votes for; 33 against; 4 abstentions). The Bill proceeded to Stage 2 consideration. That stage concluded on 22 November 2022. With reference to the respondent's averments in answer, not known and not admitted what is usual practice of the UK Government in relation to EIAs. S.149 and Schedule 18 of the Equality Act 2010 are referred to for their terms beyond which no admission is made. *Quoad ultra* denied, save as coinciding herewith.

9. That the Bill was considered by the Scottish Parliament in plenary session on 20 and 21 December 2022. A series of amendments were debated and voted upon. On 22 December 2022, the Bill in its now final form was debated at Stage 3 of the legislative process. It was passed by the Scottish Parliament by 86 votes to 39 and 4 MSPs did not vote (one being the Presiding Officer, who does not ordinarily vote unless there is a tie, and another was an MSP who was on maternity leave). The respondent's averments in answer are denied, save as coinciding herewith.

Section 35 Order

10. That on 17 January 2023, the Order was made prohibiting the Bill being submitted for Royal Assent. Never before has such an order been made by the Secretary of State. Through the six years prior to the Bill being passed, there had been inter-governmental dialogue between the Scottish Government and the UK Government. The concerns now cited in the reasons which accompany the Order had not been raised by the UK Government during those years of dialogue. The first meaningful expression of concern was raised by the UK Government's Minister for Women and Equalities ("**the Minister**") in a letter dated 7 December 2022. At no point during the years of dialogue did the UK Government identify concerns which might cause it to make an order under s.35 SA. Indeed, for a substantial period, the UK Government was broadly supportive of the policy objective. Separately, it expressly recognised that Scotland could make

separate, and potentially different, legislative provision in respect of gender recognition. No evidence was, or has since been, produced by the Secretary of State to support the concerns now raised. With reference to the respondent's averments in answer, admitted that: 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. Believed to be true that: 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. The correspondence mentioned by the respondent and section 35 and schedule 7 SA are referred to for their terms, beyond which no admission is made. *Quoad ultra* denied, save as coinciding herewith. Standing the respondent's denial of the averment that "at no point during the years of dialogue did the UK Government identify concerns which might cause it to make an order under s.35 SA", the respondent is called upon to explain, and produce vouching to support, when such concerns were raised. His failure to answer this call will be founded upon.

11. That the Memorandum of Understanding between the UK Government and the devolved administrations ("**the MoU**") sets out the principles that were to underlie relations between the UK Government and the devolved administrations (para.1 of the MoU). The MoU provides, at paras.27-28:

> "*27. The devolution legislation contains various powers for the Secretary of State to intervene in devolved matters. It also contains powers for the Law Officers to refer questions of vires to the UK Supreme Court. Although the UK Government is prepared to use these powers if necessary, it sees them very much as a matter of last resort. The UK Government and the administration concerned will therefore aim to resolve any difficulties through discussion so as to avoid any action or omission by the devolved administration having an adverse impact on non-devolved matters. If formal intervention should become necessary, the UK Government will whenever practicable inform the devolved administration of its intentions in sufficient time to enable that administration to make any representations it wishes, or take any remedial action.*
>
> *28. In order to enable the UK Government to decide whether they need to activate these procedures, the devolved administration will notify legislative*

measures to the relevant UK Departments and Law Officers both when they are proposed and when they are adopted. Legislative proposals will normally have been subject to advance notification and consultation, in accordance with the general principles set out above."

Reference is also made to para.4 of the MoU. Consistent with the terms, and spirit, of the MoU the Scottish Government notified the UK Government of the Bill prior to its introduction. On 19 December 2022, a call took place between the Cabinet Secretary and the Minister. That was the first discussion between the respective governments at ministerial level since the UK Government had been given notice of the Bill. On 22 December 2022, the Minister sought clarification on a specific point, which was resolved before the Bill was finalised. The first contact from the Secretary of State in respect of the Bill was on 16 January 2023, after the Bill had been passed. Contrary to the terms, and spirit, of the MoU, the UK Government at no point prior to the passage of the Bill indicated that it was contemplating using s.35 SA to prevent it being submitted for Royal Assent. At no point, either prior to or since the passage of the Bill, has the UK Government given any indication of the changes to the Bill it considers necessary to address whatever concerns it purports to have. With reference to the respondent's averments in answer, admitted that: the MoU is dated October 2013; 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. *R (Miller) v Secretary of State for Exiting the European Union* is referred to for its terms, beyond which no admission is made. *Quoad ultra* denied save as coinciding herewith.

12. That the first indication that the UK Government was considering making an order under s.35 SA was a public statement by the Secretary of State on 22 December 2022. A statement to similar effect was also made by the Minister (on 22 December 2022) and the Prime Minister (on 23 December 2022). On 16 January 2023, the Secretary of State issued a statement confirming he had decided to make an order under s.35 SA. On 17 January 2023, the Secretary of State made a statement to the same effect in the House of Commons. In the course of that statement, the Secretary of State advised the House of Commons that the statement of reasons had been "*produced by our legal advisors*" and later referred another MP to the statement of reasons to "*see what legal counsel have determined*" (Hansard, House of Commons, 17 January 2023, col.203).

At the time the Secretary of State made his statement, and *a fortiori* at the time he made the decision to make the Order, the statement of reasons had not been published. Later that afternoon, after the Secretary of State had made his statement, the Order was laid before Parliament. It is unknown to the petitioners whether the statement of reasons had been completed when the decision to make the Order was taken. With reference to the respondent's averments in answer, the precise timing of, and processes involved in, the making of the Order are not known and not admitted. *Quoad ultra* denied, save as coinciding herewith. Explained and averred that whilst the power under s.35 SA can only be exercised once the Bill has been passed (and is in final form), consideration of the possible need for an order under s.35 SA is not similarly constrained. Consideration of a Bill is (or ought to be) an ongoing process, which begins prior to its introduction. A Government Bill (as this Bill was), and its accompanying documents, are sent to the UK Government prior to the Bill's introduction. The general principles of a Bill are approved by the Scottish Parliament at Stage 1. In this case, the purported concerns founded upon by the Secretary of State all related to provisions which were in the Bill and approved at Stage 1 (indeed, they were in the Bill as introduced). As a matter of routine, there is dialogue between officials over the content of a Bill during its passage. Power to refer a Bill to the Supreme Court under s.33 SA can only be exercised once the Bill has been passed but as a matter of routine issues of legislative competence are kept under review through the passage of a Bill. Separately, the reference to the statements made in the House of Commons which are mentioned by the petitioners do not offend parliamentary privilege. They vouch matters of historical fact. They are not relied upon for a wider purpose. Reference to ministerial statements in Parliament in judicial review proceedings for that reason is an established and recognised practice: e.g. ***Toussaint v Attorney General of Saint Vincent and the Grenadines*** [2007] 1 WLR 2825 at para.16.

The Legislative Framework: gender recognition and the Bill

13. That the Gender Recognition Act 2004 ("**the 2004 Act**") provides for when a person may obtain a Gender Recognition Certificate ("**GRC**"). The 2004 Act was passed by

the UK Parliament. A legislative consent motion ("LCM") was sought and passed by the Scottish Parliament in respect of the 2004 Act so as to facilitate its passage. So far as material for present purposes, the 2004 Act currently applies throughout the United Kingdom. With reference to the respondent's averments in answer, the LCM is referred to for its terms. *Quoad ultra* denied, save as coinciding herewith.

14. That, in short, under the 2004 Act, a GRC can currently be obtained following an application by a person who is aged at least 18 to a Gender Recognition Panel ("**GRP**") (s.1 of the 2004 Act). An application from a person who has not changed gender under the law of a country or territory outside the United Kingdom must be granted if the GRP is satisfied that the applicant:

(a) has or has had gender dysphoria;

(b) has lived in the acquired gender in the two year period prior to the making of the application;

(c) intends to continue living in the acquired gender until death; and

(d) has provided the required evidence (s.2(1)). The evidence required of such an applicant includes a report by an appropriate clinician practising in the field of gender dysphoria giving details of the diagnosis of the applicant's gender dysphoria (s.2(1)-(2)).

An application from a person who has changed gender under the law of a country or territory outside the United Kingdom must be granted if the GRP is satisfied that (a) the country or territory under the law of which the applicant has changed gender is an approved country or territory; and (b) the applicant has provided the required evidence (s.2(2)). Approved countries and territories are currently prescribed in the Gender Recognition (Approved Countries and Territories) Order 2011. The evidence required of such an applicant includes evidence that they have changed gender under the law of an approved country or territory (s.3(5)). All applicants must provide a statutory declaration attesting to such matters as are prescribed by s.3 of the 2004 Act. With reference to the respondent's averments in answer, the UK Government's intentions in respect of the 2011 Order are not known and not admitted. *Quoad ultra* denied, save as coinciding herewith.

15. That the effect of acquiring a GRC under the 2004 Act is prescribed by s.9 of the 2004 Act. So far as material for present purposes, that section provides:

"**9 General**

(1) Where a full gender recognition certificate is issued to a person, the person's gender becomes for all purposes the acquired gender (so that, if the acquired gender is the male gender, the person's sex becomes that of a man and, if it is the female gender, the person's sex becomes that of a woman)."

For the purposes of the 2004 Act, a full gender recognition certificate means a GRC issued under ss.4, 5 or 5A of the 2004 Act (s.25 of the 2004 Act). Reference is also made to ***For Women Scotland Ltd v Scottish Ministers*** 2020 SC 61 at para.45 (a reclaiming motion against which is pending before the Inner House). The respondent's averments in answer are denied, save as coinciding herewith.

16. That the Bill would amend the circumstances in, and process by, which a person may obtain a GRC in Scotland. It provides for the Registrar General of Scotland to issue a Gender Recognition Certificate, which would have effect in Scotland but not, without specific further provision recognising it, in the rest of the United Kingdom (s.8E of the 2004 Act as amended by the Bill; a "**SGRC**"). The availability of a SGRC does not preclude an application for a GRC under the 2004 Act as it would continue to apply in the rest of the United Kingdom. With reference to the respondent's averments in answer, admitted that a person who is the subject of a Scottish birth register entry would be eligible to apply for a SGRC. *Quoad ultra* denied, save as coinciding herewith.

17. That, in summary, the principal changes made by the Bill include that it would lower the minimum age at which an application can be made (from 18 to 16; s.8A of the 2004 Act as amended by the Bill), reduce the period in which a person requires to have lived in their acquired gender (from 2 years to, generally, 3 months; s.8C of the 2004 Act as amended by the Bill) and remove the requirement that an applicant have a diagnosis of gender dysphoria. For a person who has acquired a GRC under the 2004 Act, they are to be treated for all purposes as having a SGRC (s.8M of the 2004 Act as amended by the Bill). For a person who has changed gender under the law of a country or territory outside the United Kingdom, they are to be treated for all purposes as having a SGRC unless it would be manifestly contrary to public policy to treat the person as having a SGRC (s.8N of the 2004 Act as amended by the Bill). With reference to the respondent's averments in answer, the Bill is referred to for its full terms. *Quoad ultra* denied, save as coinciding herewith.

18. That the effect of acquiring a SGRC under the Bill would remain that prescribed by s.9 of the 2004 Act. That section is unamended by the Bill. Its effect in respect of a SGRC would be exactly the same as its effect in respect of a GRC. However, for the purposes of the Bill, a full gender recognition certificate means a SGRC issued under the 2004 Act as amended by the Bill (para.9(c) of Part 1 of the Schedule to the Bill). A SGRC issued under the 2004 Act as amended by the Bill only has effect in Scotland. 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. Accordingly, unless recognised elsewhere in the United Kingdom, a SGRC would be of no effect elsewhere in the United Kingdom. With reference to the respondent's averments in answer, the Bill and §§6-9 of Schedule 2 to the Order are referred to for their full terms. *Quoad ultra* denied, save as coinciding herewith.

The Legislative Framework: the devolution settlement

19. That the Scottish Parliament is established by s.1 SA. It is democratically elected. It has plenary legislative powers within the limits of its legislative competence. 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. Acts that the Scottish Parliament passes which are within its legislative competence enjoy the highest legal authority. The changes introduced by the SA were fundamental to the constitutional structure of the United Kingdom. They introduced a constitutional structure which was intended to be stable and coherent. Reference is made to ***AXA General Insurance Company v Lord Advocate*** 2012 SC (UKSC) 122 at paras. 46 and 146; ***UNCRC Bill Reference*** 2022 SC (UKSC) 1 at para.7; and ***BH v Lord Advocate*** 2012 SC (UKSC) 308 at para.30. The respondent's averments in answer are denied, save as coinciding herewith. Explained and averred that policy limitations upon the competence of the Scottish Parliament are imposed by s.29 SA. Within the limits of s.29 SA (and subject to s.28(7) SA, which recognises the UK Parliament's continuing ability to pass law in respect of non-reserved matters), policy responsibility has been allocated to the Scottish Parliament.

20. That the Scottish Government is established by s.44 SA. Its members, other than the Law Officers, must be elected members of the Scottish Parliament. Statutory,

prerogative and other executive functions so far as exercisable within devolved competence were transferred to the Scottish Ministers by s.53 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. Legal responsibility and political accountability for the exercise of non-reserved policy rests with the Scottish Ministers. With reference to the respondent's averments in answer, admitted that legal responsibility and political accountability for reserved matters remains with the UK Government. *Quoad ultra* denied, save as coinciding herewith.

21. That the 2004 Act is not a protected enactment in terms of schedule 4 to the SA. Nor is the subject matter of the 2004 Act (as is, for example, the subject matter of the Misuse of Drugs Act 1971: sch.5, Head B1(a)) a reserved matter in terms of schedule 5 to the SA. With reference to the respondent's averments in answer, admitted that, 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. The parts of the Order and provisions of the SA mentioned are referred to for their terms, beyond which no admission is made. *Quoad ultra* denied, save as coinciding herewith.

22. That central to the constitutional framework established by the SA is an allocation of policy responsibilities. Policy responsibility for reserved matters (listed in sch.5 to the SA) lies with the UK Government. Otherwise, policy responsibility for Scotland rests with the Scottish Government. In respect of those policy responsibilities, the Scottish Government is accountable to the Scottish Parliament. The Scottish Parliament has shared legislative competence in respect of those policy responsibilities with the UK Parliament, given s.28(7) SA. As a matter of constitutional propriety, the UK Parliament will not normally legislate on such matters without the consent of the Scottish Parliament (s.28(8) SA). Recognising that the primary policy responsibility rests with the Scottish Government, the House of Commons does not ordinarily permit questions to be asked of UK Government Ministers in respect of non-reserved matters. Separately, the constitutional framework established by the SA includes s.104 SA. That confers a broad power to make provision addressing the effects of an Act of the Scottish Parliament. That is the normal means by which any broader effects of an Act of the Scottish Parliament are addressed. In considering the reasonableness of the view taken by the Secretary of State as to the effects, and whether they are sufficiently adverse reasonably to justify making an order under s.35 SA, the availability of s.104 SA is a

factor properly to be taken into account. With reference to the respondent's averments in answer, admitted that an order under s.35(1) is subject to annulment in pursuance of a resolution of either House of Parliament. Admitted that the people of Scotland are democratically represented in both the United Kingdom and Scottish parliaments. The passages in the cases mentioned are referred to for their terms, beyond which no admission is made. *Quoad ultra* denied, save as coinciding herewith. Explained and averred that s.35 SA provides a power that cannot be invoked purely on the basis of policy disagreements. Exercise of the power under s.35 SA is subject to review by both Parliament and the courts. In respect of Parliament, an order under s.35 SA is subject to annulment. Whether Parliament can, however, exercise effective review of the use of the power under s.35 SA is largely in the hands of the executive. The UK Government did not make parliamentary time available to consider a resolution seeking annulment of an order under s.35 SA. Parliament not having been allowed effectively to exercise its power of review, the court, when called upon to review the exercise of the same power, should apply a heightened standard of review.

The legislative framework: s.35 SA

23. That s.35 SA, so far as material, provides:

> "**35 Power to intervene in certain cases**
>
> *(1) If a Bill contains provisions -*
>
> *...*
>
> *(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 Officer 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,

..."

24. That s.35 falls to be construed and applied in the context and overall scheme of the SA. In particular, it falls to be construed and applied having regard to the allocation of policy responsibilities established by the SA. It also falls to be construed and applied having regard to the overall purpose of the SA in establishing a stable and coherent scheme of devolution. That includes the Scottish Parliament, which is a self-standing democratically elected legislature with a mandate to make laws for the people of Scotland, within its legislative competence. It also includes the MoU, which is a long-standing statement of policy on the operation of the devolution scheme which is important to securing the stability of the scheme. It also includes the broad power conferred by s.104 SA. That scheme of devolution takes its place in the general constitutional structure of the United Kingdom, which includes as fundamental constitutional principles the separation of powers and parliamentary accountability. Against that background, a power of executive veto of legislation, passed by a democratically elected legislature, which is of the highest legal authority should be construed narrowly. Such a construction is necessary to respect the constitutional order of the United Kingdom. The respondent's averments in answer are denied, save as coinciding herewith.

25. That the court has never before had occasion to consider the proper interpretation and application of s.35 SA. The discretion conferred upon the Secretary of State by s.35 SA confers upon the executive a veto over the democratically determined (and *intra vires*) legislative choices of the Scottish Parliament. In a constitutional order which is founded upon principles which include, amongst other things, the separation of powers, such a provision should be read narrowly and its exercise subjected to anxious scrutiny. That is especially so where the executive exercising the power has not given the legislature the opportunity to exercise its control function. With reference to the respondent's averments in answer, the passages in the cases mentioned are referred to for their terms, beyond which no admission is made. *Quoad ultra* denied, save as coinciding herewith. Explained and averred that any assessment made by the Secretary of State must be reasonable. Like any discretionary decision-making power, the normal

principles of administrative law apply. To the extent the respondent suggests the discretion conferred by s.35 SA requires a political assessment which is not capable of objective assessment, he contends in effect for an unfettered policy veto over the legislative decisions of the Scottish Parliament. Such a power would be incompatible with the UK constitutional order. Separately, it is a power that was expressly rejected by the UK Parliament during the passage of the SA.

26. That three conditions require to be satisfied before the Secretary of State can make an order under s.35 SA. First, the Bill must contain provisions which make modification of the law as it applies to reserved matters. 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. Because the grounds must be reasonable, they cannot be unduly speculative, theoretical or abstract. The grounds have to be reasonable in the sense of being sufficiently cogent to justify the overriding of the *intra vires* and democratic decision of the Scottish Parliament in respect of an issue on which policy responsibility has been allocated (by the UK Parliament) to the Scottish Government. Thirdly, the Secretary of State is required to state the reasons for making an order under s.35 SA. Where Parliament has imposed a requirement to provide reasons, the validity of the decision is ordinarily conditional upon adequate reasons being provided: ***Chief Constable v Lothian and Borders Police Board*** 2005 SLT 315 at para.70 (Lord Reed). The reasons provided must rationally relate to the evidence that is available: De Smith's Judicial Review at para.7-110 and cases cited therein. That requires the Secretary of State to have taken reasonable steps to acquaint himself with the relevant information and evidence to reach a properly reasoned view on the matter: ***Secretary of State for Education v Tameside MBC*** [1977] AC 1014 at 1065 (Lord Diplock). Legally adequate reasons are required as a condition of making a valid order under s.35 SA. If the reasons provided are legally inadequate, the Order is not properly made and falls to be reduced. With reference to the respondent's averments in answer, the passages in the cases mentioned are referred to for their terms, beyond which no admission is made. *Quoad ultra* denied, save as coinciding herewith. Explained and averred that consideration of the possible need to make an order under s.35 SA does not begin (or ought not responsibly to begin) upon passage of the Bill. The UK Government had proper and timely notice of the Bill and its terms (as the respondent admits: Ans.31). It had notice of the Bill prior to its introduction. It had

ample time to consider the information which underpinned the Bill and which ought properly to have informed any consideration of an order under s.35 SA.

27. That in the present circumstances, none of the three conditions necessary for making an order under s.35 SA have been properly satisfied. The respondent's averments in answer are denied, save as coinciding herewith.

Condition 1: modification as it applies to reserved matters

28. That the Secretary of State identified the modifications of the law as it applies to reserved matters at paras.1-3 of Schedule 2 to the Order. At para.1, it is said(footnotes omitted):

> "*The provisions of the Bill listed in Schedule 1 make modifications to* [the 2004 Act] *as it applies to the reserved matters of "Fiscal, economic and monetary policy", "Social security schemes" and "Equal opportunities". The modifications to the 2004 Act significantly alter how an applicant can be issued with a gender recognition certificate under Scots law and the process by which a person who has obtained overseas gender recognition is to be treated as if they had been issued with a full gender recognition certificate. Section 9 of the 2004 Act provides that where a full gender recognition certificate is issued to a person, the person's gender becomes for all purposes the acquired gender.*"

That statement reveals that the Secretary of State has materially erred in law. His concerns are also irrational. The respondent's averments in answer are denied, save as coinciding herewith.

29. That the provisions of the Bill listed in Schedule 1 to the Order do not make modifications to the 2004 Act as it applies to reserved matters. Who is eligible to obtain, the circumstances in which and the process by which they may obtain a SGRC does not apply to reserved matters. It is s.9 of the 2004 Act which would apply to reserved matters. That provision is unchanged by the Bill. If the Bill receives Royal Assent and is brought into force, s.9 of the 2004 Act will continue to operate in exactly the same manner in respect of reserved matters as it has done since it was itself brought into force. In apparently concluding otherwise, the Secretary of State has erred in law.

That error is material to his decision to make the Order. If the Secretary of State has not founded upon such a conclusion, he has failed to provide any reasons for whatever conclusion in respect of the first condition he did reach. Either way, the decision to make the Order is vitiated and the Order should be reduced. The respondent's averments in answer are denied, save as coinciding herewith.

30. Separately, so far as the Secretary of State relies upon an impact upon fiscal, economic and monetary policy and/or social security schemes, his concerns are irrational. The explanation of those apparent concerns is set out at para.8 of schedule 2 to the Order. No detail is given of the concerns held by the Secretary of State. For the purpose of assessing the adequacy of the reasons provided, it is only those in schedule 2 to the Order which are relevant. *Esto* the Secretary of State relies, or seeks to rely, upon the full Statement of Reasons which was produced by him, they reveal concerns which are irrational. In short, the Secretary of State founds upon problems likely to arise in the management of social security and tax systems. At best, these amount to an effect on an IT system rather than an adverse effect on the law. In any event, these concerns are insufficiently cogent or material, when regard is had to the extent to which differences between Scots and English law already impact the operation of these systems, properly to justify making the Order. The respondent's averments in answer are denied, save as coinciding herewith.

Condition 2: adverse effect

31. That the reasons now advanced by the Secretary of State were first mentioned after the Bill had passed and then only more fully articulated after the Order had been made. They represent concerns that cannot have first arisen only after the Bill was passed by the Scottish Parliament. They relate to matters which were in the Bill as introduced and approved by the Scottish Parliament at Stage 1. From the very start, it ought to have been clear to the Secretary of State that these were central features of the Bill. However, these concerns were not raised by the UK Government during the policy development or passage of the Bill. In accordance with both the terms and the spirit of the MoU, the Scottish Government ensured the UK Government had proper and timely notice of the Bill. To the extent the UK Government did engage, it did not raise any concerns which would cause it to block submission of the Bill for Royal Assent. That

is despite a reasonable expectation (based both on the terms of the MoU and over 20 years of consistent practice, encompassing over 300 Bills passed by the Scottish Parliament) that any concerns which might result in an order under s.35 SA would be raised with the Scottish Government in a timely manner. That failure to engage, and the failure to raise seemingly fundamental concerns with the Bill, is inconsistent with the stability which is meant to underpin the devolution settlement and which the MoU is meant to secure. Having regard to the failure of the UK Government to raise any of the concerns now founded upon, and with it a failure to respect both the terms and spirit of the MoU, the petitioners reasonably believe that the reasons now offered are an after-the-event justification of a decision taken by the Secretary of State which rests upon a policy disagreement. With reference to the respondent's averments in answer, not known and not admitted that the Policy Statement of Reasons was before the Secretary of State prior to making the Order. *Quoad ultra* denied, save as coinciding herewith. Standing the respondent's denial of the averment that "to the extent the UK Government did engage, it did not raise any concerns which would cause it to block submission of the Bill for Royal Assent", the respondent is called upon to explain, and produce vouching to support, when such concerns were raised. His failure to answer this call will be founded upon.

32. That the Secretary of State purports to rely upon three broad concerns about the effect of the Bill. Each is unfounded. First, he relies upon the impact of two parallel and different schemes in respect of gender recognition. That is an irrelevant consideration in respect of s.35 SA. That the Bill is within devolved legislative competence demonstrates that the legislature (the UK Parliament) has determined that the Scottish Parliament is entitled to introduce a parallel and/or different scheme. If the UK Parliament had fundamental concerns about divergence on this topic, either the 2004 Act would have been prescribed in sch.4 SA or its subject matter listed in sch.5 SA. The UK Parliament has done neither. That being so, the UK Parliament has permitted divergence on the issue of gender recognition. It has permitted the Scottish Parliament to modify, amend or even repeal, so far as it applies within Scotland, the 2004 Act. That being so, the making of the Order amounts to an inappropriate use by the executive of a discretionary power. The Secretary of State having relied upon divergence within the United Kingdom as a reason for making the Order, the decision to make the Order is vitiated. Separately, the concerns expressed by the Secretary of State (for example,

in respect of equal pay) are irrational. Each of the examples given is abstract and hypothetical. The chances of them materialising are so remote that they cannot rationally cause the Secretary of State sufficient concern to justify the exceptional step of preventing the Bill's submission for Royal Assent. With reference to the respondent's averments in answer, admitted that: s.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. *Quoad ultra* the respondent's averments are denied, save as coinciding herewith. Explained and averred that what the Secretary of State claims follow "as a matter of logic" do not so follow and, in any event, are not consistent with actual experience following the introduction of comparable schemes. The Secretary of State had a duty to familiarise himself with the available information when considering making an order under s.35 SA. He had a duty to base any decision on that information and not what is claimed to be a logical (but entirely unvouched) deduction.

33. 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". That concern is irrational. During the passage of the Bill, the Scottish Parliament considered evidence from jurisdictions where similar changes had been made. There was no evidence to support the concern that moving to a self-declaration model led to an increase in fraudulent applications. No evidence is cited by the Secretary of State to support his concerns. 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). Nothing in the reasons suggests the Secretary of State has, as he is required to do, familiarised himself with the available evidence on this issue (which was considered by the Scottish Parliament). The respondent's averments in answer are denied, save as coinciding herewith. Explained and averred that there was no need for an "extended evidence gathering exercise" as the respondent appears to suggest. Instead, the Secretary of State was under a duty to familiarise himself with the evidence that was in fact available. There is no lack of evidence about the Bill and its effects. Separately, what the respondent claims follows "as a matter of logic" does not so follow. Had the Secretary of State familiarised himself with the evidence that he was under a duty to familiarise himself with, he would have been aware that the real world

experience of comparable schemes did not accord with what he now says follows "as a matter of logic". His belief to the contrary is an unreasonable one. In any event, what is required of the Secretary of State is that he has acted reasonably, both in familiarising himself with the relevant information and in the conclusions he reaches. His belief that he had "sufficient information to make the Order" is irrelevant if he had in fact not obtempered his duty to familiarise himself with the relevant evidence. Assuming all the Secretary of State had before him was advice from the Equality Hub (which advice was provided to the petitioners in partially redacted form on 8 August 2023), he could not reasonably conclude that he had sufficient information to make the Order. The Secretary of State knew (or ought reasonably to have known) that the Bill had passed its various stages before the Scottish Parliament where these issues, and associated evidence, were debated and considered. He knew that information was available and ought to have familiarised himself with it.

34. Separately, concern about the adequacy of "safeguards" is an irrelevant consideration. At para.10 of Schedule 2 to the Order, it is said:

> "*The Secretary of State does not believe that the Bill retains or creates sufficient safeguards to mitigate the risk of fraudulent or malign applications and believes that the reformed system will be open to abuse and malicious actors. Adverse effects identified are of particular concern in relation to the operation of the 2010 Act provisions relating to sex-segregated spaces, services, competitive sports and occupational requirements. The Secretary of State considers there to be a risk of people self-excluding from sex-segregated settings as a result of concern about the possibility of someone with malicious intent being able to obtain a gender recognition certificate.*"

Disagreements over how the Scottish Parliament chooses to exercise its legislative competence are an irrelevant consideration when contemplating making an order under s.35 SA. It is implicit in the scheme of devolution that there are likely to be disagreements over the content of legislation. Such disagreements do not engage s.35 SA. A concern on the part of the Secretary of State that provisions of the Bill could (or should) have been different (and with it, 'better') is an irrelevant consideration so far as s.35 SA is concerned. 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. The respondent's averments in answer are denied, save as coinciding herewith.

35. That, thirdly, the Secretary of State relies upon concerns about the impact of the changes upon the operation of the Equality Act 2010 ("**the 2010 Act**"). The operation of the 2010 Act is not changed by the Bill. The interface between the2010 Act and the 2004 Act (in its original or amended form) remains s.9 of the 2004 Act. That provision is unamended by the Bill and its practical operation and effect would be unchanged by the coming into force of the Bill. In any event, the concerns relied upon by the Secretary of State are irrational. Again, the Secretary of State has provided no evidence in support of his concerns. Nor has he explained why concerns which do not appear to have materialised in other jurisdictions would manifest themselves in Scotland (and/or the wider UK). Separately, the concerns relied upon by the Secretary of State are abstract and hypothetical. No evidence is provided by the Secretary of State of such concerns manifesting themselves either under the 2004 Act as it currently stands or in jurisdictions which have made changes comparable to those contained in the Bill. Such concerns are, in the overall scheme of the Bill, too minor properly to justify the exceptional step of preventing its submission for Royal Assent. The respondent's averments in answer are denied, save as coinciding herewith.

35A That, *esto* ***For Women Scotland Ltd v Scottish Ministers*** 2023 SC 61 is wrongly decided in respect of the effect of s.9 of the 2004 Act (which is denied), the Secretary of State has based his decision to make the Order, and the reasons offered in support of the Order, upon a material error of law. The premise of the Secretary of State's decision, and the reasons provided to support it, proceed on the basis the law is as explained by the Lord Ordinary in ***For Women Scotland Ltd***. That is admitted by the respondent: Ans.21. If that decision does not correctly state the law, the Secretary of State has proceeded upon an erroneous understanding of the law. Such an error is material to his decision to make the Order. Accordingly, if the decision in ***For Women Scotland Ltd*** is materially changed on appeal, the Order will be based upon a material error of law and will fall to be reduced.

Condition 3: reasons

36. That as already averred above in respect of each of the other two conditions, the reasons provided by the Secretary of State are inadequate. It is a necessary condition of making a valid order under s.35 SA that lawfully adequate reasons are provided. This requires the Secretary of State to properly familiarise himself with the relevant materials. It requires the reasons provided with the Order to be such that a reasonably informed person could understand why the decision had been made. In the context of the Order, the relevant reasons are those set out in schedule 2 to the Order. Those reasons are inadequate. Accordingly, the Order is unlawful. With reference to the respondent's averments in answer, the letters from the Cabinet Secretary dated 20 and 24 January and 9 March 2023 are referred to for their terms, beyond which no admission is made. *Quoad ultra* denied, save as coinciding herewith. Explained and averred that in the event the court is satisfied that the Order is unlawful, there are no proper grounds for refusing to reduce the Order. In that scenario, the court has held that the Secretary of State unlawfully sought to prevent a Bill properly passed by the Scottish Parliament receiving Royal Assent and entering into law. The proposition, advanced by the respondent, that no "substantial prejudice" results from such an unlawful act is untenable.

Grounds of Review: Conclusion

37. That individually, *et separatim* cumulatively, the grounds of review set out above vitiate the Order. In those circumstances, the Order should be reduced. The respondent's averments in answer are denied, save as coinciding herewith.

Permission to Proceed

38. That the petitioners satisfy the requirements of s.27B(2) of the Court of Session Act 1988. In the circumstances set out above, the petitioners have sufficient interest in, and are directly affected by, the subject matter of this application. The Order directly concerns them. The Order is unlawful. That proposition (for the reasons set out above) has a real prospect of success. Accordingly, permission should be granted in terms of

s.27B of the Court of Session Act 1988. The respondent's averments in answer are denied, save as coinciding herewith. Explained and averred that permission has now been granted.

39. That the following documents are relevant to whether to grant permission: (a) the Order; (b) the Statement of Reasons; and (c) the Bill. Each are produced with this petition.

Transfer to the Upper Tribunal

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

PLEAS-IN-LAW FOR THE PETITIONERS

1. The Order being premised upon a material error of law on the part of the Secretary of State, it should be reduced.

2. *Esto* the effect of s.9 of the 2004 Act is not as explained by the Lord Ordinary in ***For Women Scotland Ltd v Scottish Ministers***), the Order proceeds upon a material error of law and should be reduced.

3. *Separatim*, the reasons proffered by the Secretary of State being irrational, the Order should be reduced.

4. *Separatim*, the Secretary of State having had regard, to a material extent, to irrelevant considerations, the Order should be reduced.

IN RESPECT WHEREOF

SCHEDULE FOR SERVICE

PART 1: RESPONDENT

On whom service is sought in common form:

1. The Advocate General for Scotland, Office of the Advocate General for Scotland, Queen Elizabeth House, Edinburgh, EH8 8FT

PART 2: INTERESTED PARTIES

On whom service is sought in common form:

1. The Scottish Parliamentary Corporate Body, as representing the Presiding Officer of the Scottish Parliament, The Scottish Parliament, Edinburgh, EH99 1SP

2. The Counsel General for Wales, Welsh Government, 5th Floor, Ty Hywel, Cardiff Bay, CF99 1NA

3. The Attorney General for Northern Ireland, Office of the Attorney General for Northern Ireland, PO Box 1272, Belfast, BT9 7LU

SCHEDULE OF DOCUMENTS

PART 1: DOCUMENTS WITHIN THE POSSESSION OR CONTROL OF THE PETITIONER

1. The Gender Recognition Reform (Scotland) Bill (Prohibition on Submission for Royal Assent) Order 2023

2. The Gender Recognition Reform (Scotland) Bill (as passed by the Scottish Parliament)

3. The Gender Recognition Act 2004 (as prospectively amended)

4. Memorandum of Understanding between the UK Government and the devolved administrations

5. *Review of the Gender Recognition Act 2004: a consultation*, Scottish Government, November 2017

6. *Reform of the Gender Recognition Act 2004*, UK Government consultation, July 2018

7. *Gender Recognition Reform (Scotland) Bill: consultation*, Scottish Government, December 2019

8. *Policy Memorandum* for the Gender Recognition Reform (Scotland) Bill

9. *Equality Impact Assessment* for the Gender Recognition Reform (Scotland) Bill

10. Stage 1 Report of the Equalities, Human Rights and Civil Justice Committee dated 6 October 2022

11. Scottish Government response to the Stage 1 Report of the Committee dated 26 October 2022

12. Letter dated 7 December 2022 from the Minister for Women and Equalities

13. Extract from Hansard containing the Secretary of State for Scotland's statement to the House of Commons on 17 January 2023

PART 2: DOCUMENTS NOT IN THE POSSESSION OR CONTROL OF THE PETITIONER

1. Any documents showing when the Secretary of State took the decision to make the Order.

   Any such documents are believed to be in the possession or control of the Secretary of State.

2. Any documents showing the reasons the Secretary of State had at the time he took the decision to make the Order.

   Any such documents are believed to be in the possession or control of the Secretary of State.

INTIMATED

P318/23

In the Court of Session

PETITION
(as adjusted 9 August 2023)
(Clean copy)

FOR

THE SCOTTISH MINISTERS

in the petition

of

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

for

JUDICIAL REVIEW

2023

THE SCOTTISH MINISTERS
(Scottish Government

INTIMATED

Legal Directorate)