

IN THE SUPREME COURT OF THE UNITED KINGDOM

ON APPEAL

FROM THE INNER HOUSE OF THE COURT OF SESSION [2023] CSIH 37

BETWEEN:

FOR WOMEN SCOTLAND LIMITED

Appellant

and

THE SCOTTISH MINISTERS

Respondent

and

SEX MATTERS LIMITED

(1) SCOTTISH LESBIANS (2) THE LESBIAN PROJECT (3) LGB ALLIANCE

AMNESTY INTERNATIONAL UK

THE EQUALITY AND HUMAN RIGHTS COMMISSION

Interveners

SUBMISSIONS ON BEHALF OF

(1) SCOTTISH LESBIANS (2) THE LESBIAN PROJECT and (3) LGB ALLIANCE

A. Introduction

1. Scottish Lesbians is a limited company and membership organisation, consisting of around 60 members. Its objects relevantly include *“To promote and campaign on equality for, and the human rights of, lesbians (same-sex attracted females) in Scotland and elsewhere. To help to build and support lesbian community*

and associations specifically for lesbians.” (para. 1.1 Articles of Association; Annexures, p. 3).

2. The Lesbian Project is a limited company. Its objects relevantly include “(a) to build a knowledge base about lesbian lives, and to exist as an independent and credible source of information about lesbian lives in the UK;[...](c) to lobby on behalf of lesbians, in an evidence-based way, for sensible and evidence-based policy which takes account of lesbian needs, and to become an established presence whenever lesbian interests are being discussed by those with enough power to influence outcomes;[...](d) along with sister organisations, to help to build lesbian communities, especially for young lesbians, working-class lesbians, and for lesbians within religious and minoritised contexts;[..](f) to do anything which may be incidental or conducive to these objects.” (para.2 Articles of Association; Annexures, p. 5).
3. LGB Alliance is a limited company and a registered charity. Its charitable objects relevantly include “2.1.1 The elimination of discrimination on the grounds of sexual orientation; 2.1.2 Advancing education and raising awareness in equality and diversity in respect of lesbian, gay and bisexual people;...2.2.1 Cultivating a sentiment in favour of equality and diversity for lesbian, gay and bisexual people....2.2 To promote[...]the rights and freedoms of those who face discrimination on the grounds of sexual orientation, including by....2.2.7 Contributing to the sound administration of the law”. (para. 2 Governing Document; Annexures, p. 20).
4. In these submissions the Interveners above will be referred to collectively as “the Lesbian Interveners”.¹
5. These submissions are focussed on the meaning of “sex” as it impacts on lesbians in particular. The Lesbian Interveners have endeavoured not to repeat those made by the Appellant whose written case they have had the benefit of seeing in advance of preparing these submissions. The Interveners endorse the

¹ Each Intervener is recorded in their Certificates of Incorporation as being exempt from the requirements to have a name ending in ‘limited’ or a variation thereof.

submissions made by the Appellant with which they agree, save that they consider it of benefit to the Court to receive short submissions on relevant Convention rights.²

6. The Lesbian Interveners agree that this appeal can be disposed of without resort to the Convention rights, not least because the result of treating “sex” as including “certificated sex”³ would produce absurd and incoherent outcomes, and conflict with the purposes of the Equality Act 2010 (“EqA”).⁴ It is submitted that it cannot have been Parliament’s intention to treat the meaning of sex and its corollary “women” as referring to anything other than biological sex. This is so in particular when regard is had to the legislative and case law history preceding the enactment of the Gender Recognition Act 2004 (“GRA”) and the EqA. Nevertheless, reference is made in the Respondent’s written case⁵ and in the application by Amnesty International UK⁶ for permission to intervene, to the Convention rights of transgender people, and it is appropriate that the Court’s attention is drawn to the rights enjoyed by lesbians under the Convention.
7. The straightforward, clear and, with respect, obvious answer to what might be described otherwise as an ambiguity in the meaning of sex under the EqA (though the Lesbian Interveners do not assert that any such ambiguity exists) is resolved by s.9(3), GRA.
8. These matters are addressed more fully below.

B. Lesbians⁷

² The Lesbian Interveners do not seek a Declaration of Compatibility.

³ Appellant’s written case, para 4.

⁴ See Appellant’s written case paras 69-79; 85-92, 97, 102.

⁵ Paras 16-20, 22.

⁶ Para 12.

⁷ Much of the legal analysis and the disadvantages identified in these submissions as they apply to lesbians apply *mutatis mutandis* to gay men.

9. It barely needs stating that lesbians are females who are sexually orientated to the bodies of other females. Again, it barely needs stating that there are anatomical differences between males and females. The defining characteristic of a lesbian is that she is not sexually attracted to male bodies, including penises, testicles, male body mass and shape⁸. Nor is she sexually attracted to certificates.
10. Lesbians have historically experienced, and presently experience, marginalisation and disadvantage. They have faced prejudice and discrimination arising both from their sexual orientation and their sex.
11. *Women's Rights, A Practical Guide* (1981)⁹ written by two well-respected authors, directed at a mainstream audience, contained the following advice,

The courts are very unlikely to grant custody of children to a homosexual parent so if you are a lesbian mother and you are separated or divorced from the father of your children, it is best to try to reach an agreement with him that the children should stay with you and that he should have access (if that is what you want). *If you cannot agree and have to go to court over it, you face a serious problem. Judges think homosexuality is a bad thing and should be discouraged as far as possible...* They have irrational fears that children will be 'harmed' if they are brought up in a homosexual household, by learning to accept homosexuality as normal or (worse still) by becoming homosexual or otherwise sexually 'deviant'.¹⁰ (Emphasis added).

⁸ Including where such bodies are modified by surgery amputating the penis or testes, creating artificial breasts or vaginas, or through hormones, see para 30 below.

⁹ Coote, A and Gill T (1981). *Women's Rights: A Practical Guide* (3rd ed.). Penguin.

¹⁰ *Women's Rights*, 243.

12. In *S v S (Custody of Children)* (1978),¹¹ the Judge referred to “the danger of children being exposed or introduced to ways of life of this kind and to the possibility that such exposure might scar them permanently.”¹²
13. While matters have plainly improved, discrimination in the context of family life has continued up until fairly recently. In *M v Secretary of State for Work and Pensions* (2006),¹³ for example, a disparity in the calculation of child support as between a lesbian mother and a heterosexual father was said by the House of Lords not to “impair the love, trust, confidence, mutual dependence and unconstrained social intercourse which are the essence of family life, nor does it invade the sphere of personal and sexual autonomy which are the essence of private life”. The fact that a lesbian paid a financial penalty for leaving her heterosexual partner for a lesbian relationship was said not even to fall within the ambit of Article 8 (for the purposes of Article 14).
14. It is not just in areas of family life that lesbians have experienced discrimination. They have also historically experienced disadvantages associated with housing as well as inheritance and tax law because “society [has]... decline[d] to accord to permanent homosexual relationships the same treatment which it accords to such heterosexual relationships...The only explanation for the adverse treatment of homosexuals is prejudice and personal aversion for a private life-style different from that of the majority”.¹⁴ A root cause of those prejudices and aversions as they relate, though not exclusively, to family life is patriarchy. Women loving women, and not men, presents a

¹¹ Per the first instance judge citing *In re D. (an Infant) (Adoption: Parent's Consent)* [1977] A.C. 602, 629 C-D, per Lord Wilberforce (“[W]hatever new attitudes Parliament, or public tolerance, may have chosen to take as regards the behaviour of [homosexual men]..., these should not entitle the courts to relax, in any degree, the vigilance and severity with which they should regard the risk of children, at critical ages, being exposed or introduced to ways of life which, as this case illustrates, may lead to severance from normal society, to psychological stresses and unhappiness and possibly even to physical experiences which may scar them for life.”).

¹² *S v S* (1980) 1 FLR 143, 146.

¹³ [2006] 2 AC 91, 99, para 5 per Lord Bingham. The ECtHR came to a different conclusion in this case; *JM v UK* (2010) (Application no. 37060/06).

¹⁴ Pannick, D. (1985). *Sex Discrimination Law*. Oxford University Press, 198.

fundamental challenge to “a male-ordered world”¹⁵ and with it “a hierarchical (hetero)sexual order”.¹⁶

15. Recent research commissioned by the Lesbian Project (one of the Interveners) indicates that prejudice and discrimination against lesbians continues. Evidence suggests that lesbians have experienced, and continue to experience, general harassment¹⁷ and bullying, including at work¹⁸ (and are less likely to be shortlisted for interview).¹⁹ Lesbians are often subject to “public objectification, fetishisation and tokenism”.²⁰ Also, “implicit association tests show that people associate lesbians ... with both promiscuity and sexually transmitted infections, with implications for prejudice and discrimination in healthcare and linked services”.²¹ Some research suggests that a higher proportion of lesbians are sexually assaulted than heterosexual women and the experience of sexual assault is linked to poor mental health and physical health outcomes.²²
16. While research suggests that some lesbians are more comfortable “coming out” now and so publicly embracing an identity as same-sex orientated,²³ there are at the same time fewer “lesbian spaces”; bars, clubs, dating apps, bookshops.²⁴

¹⁵ Atkins, S. and Hoggett, B. (1984). *Women and the Law*. Blackwell, 4. B. Hoggett became Lady Hale, ex-President of the Supreme Court.

¹⁶ Conaghan, J. (2013). *Law and Gender*. Oxford University Press, 175.

¹⁷ Pannick, D. (1985). *Sex Discrimination Law*. Oxford University Press, 198.

¹⁸ Gosling, M. and Stoianov, D. (2024) *Research and Policy Review Series, Summaries of Evidence on Lesbian Well-Being. 4. Workplace Review*. The Lesbian Project, 5 [Annexures, p.31].

¹⁹ *Research and Policy Review Series, Summaries of Evidence on Lesbian Well-Being. 4. Workplace Review*, 2 and 4 [Annexures, pp.28 and 30].

²⁰ *Research and Policy Review Series, Summaries of Evidence on Lesbian Well-Being. 2. Public Life Review*, 2024, 2 [Annexures, p.37]. See too, Douglas, L. and Willmott, J. (2023) *This is Who I am: Lesbian Coming Out Experiences*. Scottish Lesbians, 17 [Annexures, p.58].

²¹ Gosling, M. and Stoianov, D. (2024) *Research and Policy Review Series, Summaries of Evidence on Lesbian Well-Being. 2. Public Life Review*. The Lesbian Project, 3 [Annexures, p.38].

²² *Research and Policy Review Series, Summaries of Evidence on Lesbian Well-Being. 5. Safety Review*, 2. [Annexures, p.85]

²³ *Research and Policy Review Series, Summaries of Evidence on Lesbian Well-Being. 3. Family and Relationship Review*, p3 [Annexures, p 108].

²⁴ *Research and Policy Review Series, Summaries of Evidence on Lesbian Well-Being. 2. Public Life Review*, 3-4. [Annexures pages 38-9] Gosling, M. and Stoianov, D. (2024). *Research and Policy Review Series, Summaries of Evidence on Lesbian Well-Being. 3. Family and Relationship Review*. The Lesbian Project, 3 [Annexures page 95]. Douglas, L. and Willmott, J. (2023) *This is Who I am: Lesbian Coming Out Experiences*. Scottish Lesbians, 14 [Annexures, p.55].

17. Lesbians did not acquire any non-discrimination rights (outside of the Human Rights Act 1998) until 2003,²⁵ well after race, sex, disability and gender reassignment became protected characteristics.

C. Sex

18. The Equal Pay Act 1970 (“EPA”) was concerned with, broadly, equalising pay between men and women. So far as sex was concerned it provided at s.11(2) that,

In this Act the expressions ‘man’ and ‘woman’ shall be read as applying to persons of whatever age.

19. The EPA was enacted just about 4 months²⁶ after the judgment in *Corbett v Corbett*²⁷ was handed down.²⁸ In *Corbett v Corbett*, the court held that the criteria for determining what is meant by the word “women”, in the context of marriage, must be biological. This means that “the law should adopt in the first place, the first three of the doctors' criteria, i.e., the chromosomal, gonadal and genital tests, and if all three are congruent, determine the sex for the purpose of marriage accordingly, and ignore any operative intervention”.²⁹
20. It is relevant to the interpretation of the EPA that the meaning to be given the terms “woman” and “man” were terms on which a court, in *Corbett v Corbett*, had previously pronounced. It may be presumed that they were intended to have that same meaning in the interpretation provision in the EPA.³⁰

²⁵ The Employment Equality (Sexual Orientation) Regulations 2003, SI 2003/11.

²⁶ 29 May 1970, though it did not come into force until 5 years later; s.9(1).

²⁷ *Corbett v Corbett (Otherwise Ashley)* [1970] 2 WLR 1306.

²⁸ 2 February 1970.

²⁹ 1324 H-1325A-B.

³⁰ Bailey, D. and Norbury, L. (2017) *Bennion on Statutory Interpretation* (7th Edition) (2019 Supplement). LexisNexis Butterworths, section 24.6 pp.756-759, citing *Barras v Aberdeen Sea Trawling and Fishing Co Ltd* [1933] AC 402, 411. The *Barras principle* came to be known as such following the use of the expression in *EWP Ltd v Moore* [1992] QB 460, 467G-468B.

21. The purpose of the words “applying to persons of whatever age”, after “woman” was plainly to indicate that the Act was intended to apply not only to adult females but also to girls.³¹ Unless explicitly included, girls might otherwise have fallen outside the scope of the Act. The principle of equal pay, then, applied to everyone in the prescribed employment relationships and the interpretation provision made that explicit. Given *Corbett v Corbett*, this Court should presume that the meaning of “woman” (and therefore girl) is intended to be determined by reference to biological criteria.
22. For the avoidance of doubt, though *Corbett v Corbett* concerned the meaning of sex for the purposes of marriage, there is no reason why the meaning afforded that term would be different in other contexts (absent particular provision otherwise). This is especially so in the case of the EPA because the EPA contained specific provision concerning marriage related benefits.³² Marriage was not defined in the EPA and so it must be supposed that it was intended to have the same meaning as that in *Corbett v Corbett*; that is, a union between one (biological) male and one (biological) female. Absent specific provision otherwise (and there is none), it is impossible to see how Parliament intended that man and woman was to refer to biological sex for the purposes of marital related benefits but something else for the purposes of other aspects of remuneration.
23. When the Sex Discrimination Act (“SDA”) was enacted, the terms used were slightly different to those used in the EPA but to the same effect. The words in s.5(2), SDA³³ (“In this Act—“woman” includes a female of any age”) ensure that “woman” is understood as including girl. “Includes”, for these purposes, means nothing more than girls form part of the group described as women. It can be assumed (given the history) that Parliament (and the drafters) understood that given the extension of protection against discrimination

³¹ The same is true of “man” and “boy” but these submissions are concerned with women.

³² See the exclusions in ss.6(1) and s. 8, EPA.

³³ And s.82(1), SDA.

afforded women (and girls) by the SDA to include, for example, services³⁴ it was especially important that the meaning of “woman” was put beyond doubt. Again, the SDA addressed married persons³⁵ (and “marital status”³⁶), without defining marriage, so it can properly be assumed that marriage under the SDA was to be determined in accordance with the criteria in *Corbett v Corbett* for the same reasons as apply in the case of the EPA.

24. In 1996, *P v S and Cornwall CC*³⁷ the ECJ (as is it was then) decided that the scope of the Equal Treatment Directive 76/207 (ETD) “on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions” was such “as to apply to discrimination arising... from the gender reassignment of the person concerned...Such discrimination is based, essentially if not exclusively, on the sex of the person concerned.”³⁸ The UK could have given domestic effect to this ruling by leaving it to the courts and tribunals to interpret sex discrimination (man and woman, male and female) under the SDA as including gender reassignment discrimination, or amend the SDA to make clear that this was so. However, instead, regulations were introduced making discrete provision addressing gender reassignment within parameters mirroring the scope of the ETD.³⁹ The meaning of sex remained undisturbed.
25. The meaning of sex under the SDA was carried through to s.11 (and s.212), EqA. This means that unless there is an exception (for example, s. 29(1)(a) in respect of age discrimination and children), the sex discrimination and equal pay provisions in the EqA apply equally to girls as to women.

³⁴ Section 29, SDA.

³⁵ Section 3.

³⁶ Section 5(3).

³⁷ (Case C-13/94) [1996] ICR 795; [1996] ECR I-2143).

³⁸ Paras 20 -21.

³⁹ The Sex Discrimination (Gender Reassignment) Regulations 1999, SI 1999/1102, made under s.2(2), European Communities Act 1972, revoked by the EqA. The Regulations made clear that the EPA did not apply in the case of gender reassignment (reg. 3 amending s.6, SDA), leaving no room for doubt.

26. By the time of the enactment of the EqA, Parliament can be taken to have been fully cognisant of the GRA and, for the purposes of this appeal, s.9(1), GRA. It will also have been aware of the complexities and incoherence that would arise from introducing provision to the effect that sex was to be determined by reference to “legal sex”; that is, by reference to a person’s natal sex or, where one exists, by reference to sex as recorded on a Gender Recognition Certificate (“GRC”). Those complexities and that incoherence have been explained by the Appellants (Written Case paragraphs 69-107). This is no doubt why Parliament did not alter the meaning of “sex” and “woman” and “man” by including reference to a GRC. It could easily have done so (albeit necessitating significant modification of many other of the provisions of the EqA, including by way of example only, the protections against pregnancy discrimination). Section 212, EqA, could have included the words “section 9(1) applies for the purposes of this Act” or similar. But Parliament did not make such provision, no doubt because of the absurdities and confusion that would follow.
27. It is plain that s.9(1), GRA is not intended to apply to every statute in its entirety whatever the context and/or that it is necessary for a statute to contain some explicit words if the apparent default in s.9(1) is to be displaced. It is apparent that s.9(1) does not as a matter of fact operate in that way (see the examples in the Appellant’s Written Case at paragraphs 75, 97-98). Given the clear words in s.11 and s.212 and their legislative history, as well as for the reasons given by the Appellants and the Lesbian Interveners in these submissions, s.9(1) does not and cannot operate to change the meaning of sex under what is now the EqA by incorporating within the meaning of “woman”, males with a GRC where such record males’ “acquired gender” (s.9(1), GRA) as female.

D. Sexual Orientation

28. A male can never be a lesbian as a matter of fact whether he is in possession of a GRC recording his acquired sex as female or not. This is because he will never be female. It cannot seriously be disputed that humans are a sexually

dimorphic species. This fact is reflected in the differences in sex characteristics as between women and men as was identified in *Corbett v Corbett*⁴⁰ and later in *Bellinger v Bellinger*⁴¹. These characteristics are innate and sex, therefore, is immutable. As it was put in *Bellinger v Bellinger*,

The distinction between male and female exists throughout the animal world. It corresponds to the different roles played in the reproductive process. A male produces sperm which fertilise the female's eggs. In this country, as elsewhere, classification of a person as male or female has long conferred a legal status. It confers a legal status, in that legal as well as practical consequences follow from the recognition of a person as male or female. The legal consequences affect many areas of life, from marriage and family law to gender-specific crime and competitive sport. It is not surprising, therefore, that society through its laws decides what objective biological criteria should be applied when categorising a person as male or female. Individuals cannot choose for themselves whether they wish to be known or treated as male or female. Self-definition is not acceptable. That would make nonsense of the underlying biological basis of the distinction.⁴²

29. This means that “even the most extreme degree of transsexualism in a male or the most severe hormonal imbalance which can exist in a person with male chromosomes, male gonads and male genitalia, cannot reproduce a person who is naturally capable of performing the essential role of a woman in marriage” (*Corbett v Corbett*). As was said in *Bellinger v Bellinger* “medical science is unable, in its present state, to complete the process. It cannot turn a man into a woman

⁴⁰ Some people have “disorders [or differences] of sexual development” (DSDs) but these are by their nature outside the binary and biological norm.

⁴¹ [2003] 2 AC, paras 28, 56, 57. See too, *R (Elan-Cane) v Secretary of State for the Home Department* [2023] AC 559, para 3 (and see at first instance, *R (Elan-Cane) v Secretary of State for the Home Department (Human Rights Watch intervening)* [2018] 1 WLR 5119, paras 96-7.

⁴² [2003] 2 AC, para 28, *per* Lord Nicholls.

or turn a woman into a man.”⁴³ Changing sex, then, is impossible⁴⁴ and what will always be an imperfect attempt at a facsimile of a woman’s body will not make a male a female. This means that a male who is sexually attracted to women will always be heterosexual; even with a GRC, he can never be a lesbian.

30. Acquiring a GRC does not in any event require any “extreme degree of transsexualism” by which it is taken to mean the sort of extensive surgery (including by the “amputation of the testicles and most of the scrotum” and “the construction of a so called ‘artificial vagina’”) that the respondent in *Corbett v Corbett* had undergone.⁴⁵ Section 2, GRA prescribes the conditions that an applicant must satisfy to qualify for a GRC. They do not include that an applicant has undergone surgery to alter physiological characteristics. Indeed, save that it may be relevant to the question whether an applicant has “lived in the acquired gender throughout the period of two years ending with the date on which the application is made” (s.2(1)(b), GRA), an expressed wish to retain the capacity to have a functional penis, with capacity for erection and genital sexual response, does not necessarily preclude a successful application for a GRC recording the applicant’s sex as female.⁴⁶ To be clear, the Lesbian Interveners do not in these submissions advocate a change to the GRA by making the qualifying conditions more stringent or by requiring surgery. They simply contend that a GRC does not make a male a female as a matter of fact, and s.9(1), GRA does not deem that to be so for the purposes of the EqA.
31. The status of a GRC under the EqA is important for the meaning of sexual orientation under the EqA. Section 12 provides that,
- (1) Sexual orientation means a person's sexual orientation towards-
- (a) persons of the same sex,

⁴³ Para 57, per Lord Hope.

⁴⁴ *Bellinger v Bellinger*, para 57, per Lord Hope.

⁴⁵ 1310, F-H.

⁴⁶ *AB v Gender Recognition Panel* [2024] EWHC 1456 (Fam), para 40, per Macfarlane P.

(b) persons of the opposite sex, or

(c) persons of either sex.

(2) In relation to the protected characteristic of sexual orientation –

(a) a reference to a person who has a particular protected characteristic is a reference to a person who is of a particular sexual orientation;

(b) a reference to persons who share a protected characteristic is a reference to persons who are of the same sexual orientation.

32. For the purposes of the EqA, therefore, a lesbian is a female who is sexually orientated towards females, and lesbians are females who share the characteristic of being sexually orientated to females.

33. The Inner House below stated that,

It is not a necessary inference from Section 9 of the GRA that a person's sexual orientation changes on acquiring a GRC. There is no such thing as being "legally lesbian" and we have not identified a problem which would require that sex be referable to biology alone. (Para 57).

34. But if a GRC affects the meaning of sex under the EqA it means that a heterosexual male who secures a GRC recording his sex as female will become homosexual; that is, he becomes in law a lesbian (or a "legal lesbian"). It is therefore a necessary inference that, if the Inner House is correct, s.9(1), GRA would change a person's sexual orientation for the purposes of the EqA. Stated in these bald terms, the absurdity that results from the Inner House's holding is obvious. Apart from anything else, if the Inner House were right, the category of same-sex attracted people would be eliminated.

35. It is submitted, therefore, that the Inner House's decision must be incorrect.

E. The EqA and GRA

36. Apart from the impairing of lesbians' dignity, respect and autonomy, a reading of the EqA that deemed a person's sex changed as a matter of law by reason of a GRC would also have implications for lesbians across multiple areas of their lives, including as follows.
37. **Service provision (s.29 EqA).** The existence of services catering specifically to the needs of biological women who are same-sex attracted is important. These services might include:
- (a) Healthcare services. Research indicates that women who are same-sex attracted are less likely to have cervical smear tests or be tested for sexually transmitted infections.⁴⁷ Some research suggests that they experience particular forms of prejudice and stereotyping within health services, including, for example, that their sexual lives are associated with fewer sexual health risks.⁴⁸ Lesbians may also experience worse mental health than heterosexual women and appear more likely to experience stress as a result of their sexual orientation than other LGB groups.⁴⁹ Stressors may include stigma, alienation, discrimination and victimisation. Experiences of heterosexist discrimination and victimisation may lead to symptoms of post-traumatic stress disorder in lesbians.⁵⁰
 - (b) Support Services. Women who are same-sex attracted have particular needs and concerns. For example, there is research suggesting that distrust of law enforcement may prevent lesbians from reporting

⁴⁷ *Research and Policy Review Series, Summaries of Evidence on Lesbian Well-Being.6. Health Review, 11 [Annexures, p.103].*

⁴⁸ *Research and Policy Review Series, Summaries of Evidence on Lesbian Well-Being.6. Health Review, 2 [Annexures, p.94].*

⁴⁹ *Research and Policy Review Series, Summaries of Evidence on Lesbian Well-Being.6. Health Review, 5 [Annexures, p.97].*

⁵⁰ *Research and Policy Review Series, Summaries of Evidence on Lesbian Well-Being.6. Health Review, 5 [Annexures, p.97].*

domestic abuse.⁵¹ They may too struggle to get professional support in the case of domestic abuse.⁵²

(c) Social, leisure and community services. These services are particularly important in enabling women who are same-sex attracted to meet potential partners and to be able to participate in a community which shares a common interest and experience. Personal and community relationships are central to human flourishing and good mental health, particularly for marginalised groups. Lesbian spaces, however, are diminishing in number.⁵³

38. It is permissible to exclude a male from a women's single-sex service but not a male with a GRC recording their sex as female, if the Inner House is correct.⁵⁴ Since for a women's single-sex service to be lawful at all, it must first meet conditions some of which are plainly directed at differences in biological sex (for example, the need for physical contact⁵⁵), this would make no sense. Further, if the definition of a woman who is same-sex attracted includes biological males with a GRC, this would impact upon the provision of single-sex services supporting lesbians and on the class of persons whom service providers could or could not exclude. It would necessarily mean that lesbian users of a women's single-sex service could find themselves in a mixed sex environment.

39. **Clubs and Associations (ss.101, 102 and Schedule 16 EqA).** Clubs and associations permit women who are same-sex attracted to meet and build

⁵¹ *Research and Policy Review Series, Summaries of Evidence on Lesbian Well-Being.5. Safety review, 4* [Annexures, p.87].

⁵² *Research and Policy Review Series, Summaries of Evidence on Lesbian Well-Being.5. Safety review, 2.* [Annexures, p.85]

⁵³ *Research and Policy Review Series, Summaries of Evidence on Lesbian Well-Being. 2. Public Life Review, 3-4.* [Annexures pages 38-9] Gosling, M. and Stoianov, D. (2024). *Research and Policy Review Series, Summaries of Evidence on Lesbian Well-Being. 3. Family and Relationship Review.* The Lesbian Project, 3 [Annexures, p.108].

⁵⁴At least unless the exception in Sch 3, para 28, EqA applied requiring even small single-sex services to meet further conditions. See further Appellant's Written Case, paras 85-92.

⁵⁵ Schedule 3, para 27(7), EqA.

personal and community relations with other such women: as a very small percentage of the total population, it is often difficult for them to do so unless accessing special-interest groups. There has been a reduction in the number of lesbian spaces, making this an important site of concern. The impact of treating a GRC as changing a person's sex for the purposes of the EqA has particular implications for clubs and associations. The EqA outlaws discrimination, harassment and victimisation against applicants for membership, members and their guests, of clubs and associations. These include small associations so long as they have at least 25 members and admission to which is regulated by the association's rules and involves a process of selection.⁵⁶ The EqA permits clubs and associations to restrict membership and access to women or to same-sex attracted people, but it contains no exception permitting the exclusion of males holding a GRC recording their sex as female.⁵⁷ If a GRC changes a person's sex for the purposes of the EqA, therefore, a women-only club and a club reserved for same-sex orientated people would have to admit a heterosexual male with a GRC into a club only for women/those who are same-sex orientated. Some evidence suggests that lesbians are "self-excluding" from lesbian spaces because of the presence of males identifying as women.⁵⁸

40. **Claims in direct and indirect discrimination (ss.13 and 19 and 19A EqA).** The inclusion of biological males with a GRC within the category of women who are same-sex attracted would affect, *inter alia*, (i) the question whether any treatment was less favourable for the purposes of s.13 EqA ("direct discrimination"); (ii) the identity and characteristics of any comparator for the purposes of ss.13, 19 and 19A, EqA ("direct" and "indirect discrimination") and (iii) the potential class (or pool) of persons facing the same disadvantage for the purposes of s.19 and 19A EqA ("indirect discrimination").

⁵⁶ Section 107(2), EqA.

⁵⁷ See, Schedule 16

⁵⁸ Douglas, L. and Willmott, J. (2023) '*This is Who I am: Lesbian Coming Out Experiences*. Scottish Lesbians, 34. [Annexures, p.75]

F. Convention rights

41. Given the above, the definition of “sex” and, by extension, “sexual orientation”, will have implications for the rights of same-sex attracted women, in particular as they relate to,
- (a) Private and family life, under Article 8;
 - (b) Freedom of Association, under Article 11; and
 - (c) Freedom from discrimination, under Article 14.
42. These are matters to which the Court can have regard in arriving at a conclusion in this appeal.⁵⁹ As stated above, as with the Appellant, the Lesbian Interveners consider that it is not necessary to have regard to the Convention rights for the purposes of disposing of this appeal in favour of the Appellant. Nevertheless, a number of cases on the human rights of transgender people have been referred to in the written cases/submissions. *Goodwin v UK*⁶⁰ is one key example. It is important to recognise the limits of *Goodwin v UK*. The ECtHR did not hold that the state was under a positive duty to treat a person in their reassigned gender *for all purposes*. Instead, it held that a positive obligation arose under Article 8 to ensure that the applicant (a post-operative transsexual) was able to obtain legal recognition of gender reassignment.⁶¹ This is secured through the GRA and, so far as non-discrimination is concerned, through the prohibitions on gender reassignment discrimination under the EqA.⁶²
43. As to the relevant Convention rights enjoyed by lesbians:
44. **Article 8.** While gender identity engages important human rights, so does sexual orientation. Sexual orientation is an important element of the personal sphere protected by the right to respect for private life under Article 8.⁶³ It secures to individuals the freedom to pursue the development and fulfilment

⁵⁹ See too the compelling obligation under s.3, Human Rights Act 1998.

⁶⁰ *Goodwin v United Kingdom* (28957/95) (2002) 35 EHRR 18.

⁶¹ *Goodwin*, para 93.

⁶² Section 7, EqA.

⁶³ See *Dudgeon v UK* (1982) 4 EHRR 149, para 52.

of their personality.⁶⁴ In the context of sexuality, this development and fulfilment is not something that is confined to the bedroom: “It would be wrong... to limit the areas of behaviour that must be protected to the kinds of matters which I have just described – essentially, those which will enable the applicant to attract sexual partners and establish and maintain relationships with them in the same way as happens between persons who are straight. As Gummow and Hayne JJ pointed out in *Appellant S395/2002 v Minister for Immigration* 216 CLR 473, 500-501, para 81: ‘Sexual identity is not to be understood in this context as confined to engaging in particular sexual acts or, indeed, to any particular forms of physical conduct. It may, and often will, extend to many aspects of human relationships and activity. That two individuals engage in sexual acts in private (and in that sense ‘discreetly’) may say nothing about how those individuals would choose to live other aspects of their lives that are related to, or informed by, their sexuality.’ In short, what is protected is the applicant's right to live freely and openly as a gay man. That involves a wide spectrum of conduct, going well beyond conduct designed to attract sexual partners and maintain relationships with them”.⁶⁵

45. The same is true of lesbians who may wish to socialise, support, date, access women only/lesbian services, and dress in ways which reflect their sexual identity. Article 8 guarantees to them the right to respect for their identity, dignity and autonomy as lesbians, and respect for their choice to live an authentic life.⁶⁶ An interference in this, including by a legislative measure that requires that a male be treated as if he were a lesbian and be permitted to access lesbian spaces, interferes with lesbians’ core interests protected by Article 8. Since sexual orientation concerns “a most intimate part of an individual’s

⁶⁴ *A-MV v Finland* (Application No 53251/13) (2017) 158 BMLR 51, [2017] ECHR 273, para 76.

⁶⁵ *HJ (Iran) v Secretary of State for the Home Department; HT (Cameroon) v Same* [2011] 1 AC 596, para 78, per Lord Rodger.

⁶⁶ *Peck v United Kingdom* (2003) 36 EHRR 719, para 57: Article 8 “also protects a right to identity and personal development, and the right to establish and develop relationships with other human beings and the outside world and it may include activities of a professional or business nature. There is, therefore, a zone of interaction of a person with others, even in a public context, which may fall within the scope of ‘private life’”.

private life”, there must exist “particularly serious reasons” before such interferences can satisfy the requirements of Article 8(2).⁶⁷

46. **Article 11.** The Convention right to freedom of association covers associations formed for protecting cultural heritage or for asserting a minority consciousness, both of which are important to the proper functioning of a pluralistic democracy.⁶⁸ The participation of citizens in the democratic process is to a large extent achieved through belonging to associations in which they may integrate with each other and pursue common objectives collectively.⁶⁹ Freedom of association is particularly important for persons belonging to minorities and indeed forming an association in order to express and promote its identity may be instrumental in helping a minority to preserve and uphold its rights.⁷⁰ A law which requires that a lesbian association, whether formally constituted or not, admit males, interferes with lesbians’ rights to freedom of association. It is an especially important right for lesbian groups given their minority status, the disadvantages they experience and the desire of many to have their collective voice heard: “Where associations are formed by people, who, espousing particular values or ideals, intend to pursue common goals, it would run counter to the very effectiveness of the freedom at stake if they had no control over their membership.”⁷¹
47. **Article 14.** Discrimination for the purposes of Article 14 may occur where a general, measure couched in neutral terms has disproportionately prejudicial effects on a particular group.⁷² Article 14 will only apply where the matter in issue falls within the ambit of another Convention right. Having regard to the submissions above, it is submitted that if a GRC were to alter the legal sex of a person for the purposes of the EqA, then lesbians’ right under Articles 8 and 11

⁶⁷ *Smith and Grady v UK* (1999) 27 E.H.R.R. CD 42, paras 89-90; *Lustig-Prean and another v UK* (1999) 7 BHRC 65, para 82.

⁶⁸ *Gorzelik and others v Poland* (App no 44158/98) [2004] ECHR 44158/98, para 92.

⁶⁹ *Moscow Branch of the Salvation Army v. Russia* (2006) (Application no. [72881/01](#)), para 61

⁷⁰ *Gorzelik and others v Poland* (App no 44158/98) [2004] ECHR 44158/98, para 93.

⁷¹ *Associated Society of Locomotive Engineers and Firemen (ASLEF) v. the United Kingdom* (2007) (Application no. [11002/05](#)), para 39.

⁷² *D.H. and Others v. the Czech Republic* (App. no. 57325/00) (2007) 47 EHRR 59 ECHR, para 184.

would be engaged (if not violated). Justification would therefore be required if a violation of Article 14 with Article 8 and/or 11 were not to be found. The test for determining whether justification is made out is fourfold: “(i) does the measure have an legitimate aim sufficient to justify the limitation of a fundamental right; (ii) is the measure rationally connected to that aim; (iii) could a less intrusive measure have been used; and (iv) bearing in mind the severity of the consequences, the importance of the aim and the extent to which the measure will contribute to that aim, has a fair balance been struck between the rights of the individual and the interests of the community?”⁷³ Given the subject matter, and the severe impact on lesbians as described above, any purported justification will be subject to strict scrutiny.⁷⁴

48. Lesbians’ rights matter too, therefore.

G. Conclusion

49. This case is centrally concerned with the rights of biological women and lesbians. If the Inner House’s Judgment and reasoning are correct, the category of same-sex orientation would be eliminated. This is something that would be profoundly homophobic and undermine the efforts made over decades by lesbians and gay men for equality as such. It would make lesbians invisible, cloaked behind a legal device that treats males as lesbians with an entitlement to occupy lesbian spaces and appropriate lesbian identity. Authentic lesbianism would again become the love that cannot speak its name.



KARON MONAGHAN KC

BETH GROSSMAN

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⁷³ *R (Tigere) v Secretary of State for Business, Innovation and Skills (Just For Kids Law intervening)* [2015] 1 WLR 3820, para 33.

⁷⁴ *Macatè v Lithuania* [2023] ECHR 61435/19, para 209.