SECOND DIVISION, INNER HOUSE, COURT OF SESSION

[2022] CSIH 4
P697/20

Lord Justice Clerk
Lord Malcolm
Lord Pentland

OPINION OF THE COURT

delivered by LADY DORRIAN

in the reclaiming motion

by

FOR WOMEN SCOTLAND LIMITED

Petitioners and Reclaimers

against

(1) THE LORD ADVOCATE; and (2) THE SCOTTISH MINISTERS

Respondents

THE EQUALITY NETWORK

Interveners

Petitioners and Reclaimers: O'Neill QC; Balfour & Manson LLP
Respondents: Crawford QC; Irvine; Scottish Government Legal Directorate
Interveners: Non-participating party

18 February 2022

Introduction

[1] The petitioners sought judicial review of the Scottish Government's decision by way of the Gender Representation on Public Boards (Scotland) Act 2018 to implement certain positive action measures. In particular, they challenged the definition of "woman" in terms

of section 2 of the Act, and the disapplication in section 11 of certain provisions of the Equality Act 2010 as being outwith the legislative competence of the Scottish Parliament. By interlocutor dated 23 March 2021 the Lord Ordinary dismissed the petition. The petitioners reclaim against her decision. The respondents cross-appeal. The intervener provided written submissions in the Outer House but did not participate in the reclaiming motion.

The legislation

The Gender Representation on Public Boards (Scotland) Act 2018

[2] Section 1 introduced a "gender representation objective" for public boards:

> "(1) The 'gender representation objective' for a public board is that it has 50% of non-executive members who are women.
>
> (2) Where a public board has an odd number of non-executive members, the percentage mentioned in subsection (1) applies as if the board had one fewer non-executive member."

Section 2 provides that:

> "'woman' includes a person who has the protected characteristic of gender reassignment (within the meaning of section 7 of the Equality Act 2010) if, and only if, the person is living as a woman and is proposing to undergo, is undergoing or has undergone a process (or part of a process) for the purpose of becoming female."

[3] The positive action measures are contained in sections 3 and 4.

> "*3 Duty when appointing non-executive members*
> (1) Subsection (2) applies where there is—
> (a) a vacancy in a position of non-executive member of a public board,
> (b) more than one candidate for the position,
> (c) at least one candidate who is a woman, and
> (d) at least one candidate who is not a woman.
>
> (2) The appointing person must, in making the appointment to fill the vacancy, act in accordance with section 4 with a view to achieving (or making progress towards achieving) the gender representation objective immediately after the appointment takes effect.
>
> (3) When an appointing person is making more than one appointment—

(a) both or all of those appointments must be taken into account in identifying the number of non-executive members, and
(b) the appointing person must act with a view to achieving (or making progress towards achieving) the gender representation objective immediately after all of those appointments have taken effect.

4 Consideration of candidates

(1) The appointing person must determine whether any particular candidate is best qualified for the appointment.

(2) If no particular candidate is best qualified for the appointment, the appointing person must identify candidates it considers are equally qualified.

(3) Subject to subsection (4), the appointing person must give preference to a candidate identified under subsection (2) who is a woman if appointing that candidate will result in the board achieving (or making progress towards achieving) the gender representation objective.

(4) The appointing person—
(a) must consider whether the appointment of a candidate identified under subsection (2) who is not a woman is justified on the basis of a characteristic or situation particular to that candidate, and
(b) if so, may give preference to that candidate.

(5) In subsection (4), "characteristic" includes a protected characteristic (within the meaning of section 4 of the Equality Act 2010)."

[4] Section 11 provides:

"(1) Sections 158 and 159 of the Equality Act 2010 (positive action) do not apply to any action taken under this Act.
(2) Part 5 of the Equality Act 2010 (work) does not prohibit any action taken under this Act."

The Scotland Act 1998

[5] Section 29(1) provides that an Act of the Scottish Parliament is not law so far as any provision of the Act is outside its legislative competence. Section 29(1) was amended in December 2020, but under the legislation as applying to the Act of the Scottish Parliament with which this reclaiming motion is concerned, a provision would be outside that competence (subsection 2), *inter alia* if:

"(b) it relates to reserved matters,
(c) it is in breach of the restrictions in Schedule 4,
(d) it is incompatible with any of the Convention rights or with EU law.."

[6] Para 1 of schedule 4 includes a list of provisions which cannot be modified by an Act of the Scottish Parliament. The Equal Opportunities Act 2010 is not on the list of protected provisions.

[7] Schedule 5 deals with reserved matters, of which "Equal opportunities" is one. The relevant paragraphs provide:

"Part II - Specific reservations

Preliminary

1. The matters to which any of the Sections in this Part apply are reserved matters for the purposes of this Act.

2. A Section applies to any matter described or referred to in it when read with any illustrations, exceptions or interpretation provisions in that Section.

3. Any illustrations, exceptions or interpretation provisions in a Section relate only to that Section (so that an entry under the heading 'exceptions' does not affect any other Section).

…

Reservations

L2. Equal opportunities

Equal opportunities

Exceptions

"The encouragement (other than by prohibition or regulation) of equal opportunities, and in particular of the observance of the equal opportunity requirements.

Imposing duties on—

(a) any office-holder in the Scottish Administration, or any Scottish public authority with mixed functions or no reserved functions, to make arrangements with a view to securing that the functions of the office-holder or authority are carried out with due regard to the need to meet the equal opportunity requirements, or

(b) any cross-border public authority to make arrangements with a view to securing that its Scottish functions are carried out with due regard to the need to meet the equal opportunity requirements.

Equal opportunities so far as relating to the inclusion of persons with protected characteristics in non-executive posts on boards of Scottish public authorities with mixed functions or no reserved functions.

Equal opportunities in relation to the Scottish functions of any Scottish public authority or cross-border public authority, other than any function that relates to the inclusion of persons in non-executive posts on boards of Scottish public authorities with mixed functions or no reserved functions. The provision falling within this exception does not include any modification of the Equality Act 2010, or of any subordinate legislation made under that Act, but does include—

(a) provision that supplements or is otherwise additional to provision made by that Act;
(b) in particular, provision imposing a requirement to take action that that Act does not prohibit;
(c) provision that reproduces or applies an enactment contained in that Act, with or without modification, without affecting the enactment as it applies for the purposes of that Act.

Interpretation

…

"'Equal opportunities ' means the prevention, elimination or regulation of discrimination between persons on grounds of sex or marital status, on racial grounds, or on grounds of disability, age, sexual orientation, language or social origin, or of other personal attributes, including beliefs or opinions, such as religious beliefs or political opinions.

...

"Protected characteristic" has the same meaning as in the Equality Act 2010."

The Equality Act 2010

[8] Section 4 details the characteristics protected under the statute, which include "sex" and "gender reassignment".

[9] Section 7 provides:

> "(1) A person has the protected characteristic of gender reassignment if the person is proposing to undergo, is undergoing or has undergone a process (or part of a process) for the purpose of reassigning the person's sex by changing physiological or other attributes of sex.
>
> (2) A reference to a transsexual person is a reference to a person who has the protected characteristic of gender reassignment.
>
> (3) In relation to the protected characteristic of gender reassignment-
> (a) a reference to a person who has a particular protected characteristic is a reference to a transsexual person;
> (b) a reference to persons who share a protected characteristic is a reference to transsexual persons."

[10] Section 11 provides:

> "In relation to the protected characteristic of sex-
>
> (a) a reference to a person who has a particular protected characteristic is a reference to a man or to a woman;
>
> (b) a reference to persons who share a protected characteristic is a reference to persons of the same sex."

According to the general interpretation provisions of *section 212*,

> "'man' means a male of any age;
>
> …
>
> 'woman' means a female of any age".

[11] Section 14 relates to "combined discrimination" where an individual possess dual protected characteristics, it provides that:

> "(1) A person (A) discriminates against another (B) if, because of a combination of two relevant protected characteristics, A treats B less favourably than A treats or would treat a person who does not share either of those characteristics."

[12] Section 149, referred to as the "Public Sector Equality Duty" ("PSED") imposes upon public authorities in the exercise of their functions the requirement to have due regard *inter*

alia to the need to eliminate discrimination, harassment, victimisation and any other conduct prohibited by or under the Act; and to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it.

[13] Sections 158 and 159 relate to positive action as follows:

"Section 158 Positive action: general

(1) This section applies if a person (P) reasonably thinks that—

(a) persons who share a protected characteristic suffer a disadvantage connected to the characteristic,
(b) persons who share a protected characteristic have needs that are different from the needs of persons who do not share it, or
(c) participation in an activity by persons who share a protected characteristic is disproportionately low.

(2) This Act does not prohibit P from taking any action which is a proportionate means of achieving the aim of—
(a) enabling or encouraging persons who share the protected characteristic to overcome or minimise that disadvantage,
(b) meeting those needs, or
(c) enabling or encouraging persons who share the protected characteristic to participate in that activity.

…

(4) This section does not apply to—
(a) action within section 159(3) …

…

(6) This section does not enable P to do anything that is prohibited by or under an enactment other than this Act.

Section 159 Positive action: recruitment and promotion

(1) This section applies if a person (P) reasonably thinks that—
(a) persons who share a protected characteristic suffer a disadvantage connected to the characteristic, or
(b) participation in an activity by persons who share a protected characteristic is disproportionately low.

(2) Part 5 (work) does not prohibit P from taking action within subsection (3) with the aim of enabling or encouraging persons who share the protected characteristic to—
(a) overcome or minimise that disadvantage, or

(b) participate in that activity.

(3) That action is treating a person (A) more favourably in connection with recruitment or promotion than another person (B) because A has the protected characteristic but B does not.

(4) But subsection (2) applies only if—

(a) A is as qualified as B to be recruited or promoted,

(b) P does not have a policy of treating persons who share the protected characteristic more favourably in connection with recruitment or promotion than persons who do not share it, and

(c) taking the action in question is a proportionate means of achieving the aim referred to in subsection (2).

(5) 'Recruitment' means a process for deciding whether to—

…

(h) offer a person an appointment to a public office, recommend a person for such an appointment or approve a person's appointment to a public office

…

(6) This section does not enable P to do anything that is prohibited by or under an enactment other than this Act."

Gender Recognition Act 2004

[14] Generally speaking, a gender recognition certificate must be provided (section 2) where a gender recognition panel is satisfied that the applicant has or has had gender dysphoria; has lived in their acquired gender throughout a period of two years prior to the application; intends to continue to live in the acquired gender until death, and otherwise complies with the evidential requirements. Subject to other provisions in the Act, or other enactments, section 9 provides that where a full gender recognition certificate is issued to a person, the person's gender becomes for all purposes the acquired gender. Specific arrangements are provided where the individual is a party to a marriage or civil partnership.

Decision of the Lord Ordinary

[15] The L2 public boards exception in question (the "PBE") was crafted to allow the introduction of measures designed to improve the representation of women on public bodies in Scotland which was the purpose of the 2018 Act, which sought to increase the representation of women on Scottish public boards to the level of 50%. There was a visual element to such representation. As a result of the PBE, the Scottish Parliament had devolved power to legislate for equal opportunities if, and for present purposes only if, the subject matter of the relevant provisions was the inclusion of anyone with any protected characteristic on Scottish public boards. The very specific and clearly defined exception allowed for the inclusion of persons with more than one protected characteristic as the plural form was adopted. Section 2 did not redefine woman for any purpose other than to include transgender women as another category of people who could benefit from the positive measure.

[16] The 2018 Act did not interfere with the principle of equal treatment because its measures were designed to accelerate or achieve equality of representation on Scottish public boards. *P* v *S and Cornwall County Council* [1996] 2 CMLR 247; [1996] ICR 795 confirmed that EU law supported the conclusion that in discrimination matters, trans people are to be included as being of the sex to which they have reassigned.

[17] An Equality Impact Assessment ("EQIA") had been carried out at the Bill stage and assessed the proposals therein against the three requirements of the PSED. The results of the EQIA highlighted concerns about the narrow focus of the Bill on the single protected characteristic of sex and was one of the factors that led to amendment to include those with the protected characteristic of gender reassignment, living as women. The duty to have regard to the requirements of section 149 was met.

The submissions

[18] Detailed notes of argument, and supplementary notes of argument, were presented to the court. We will not attempt to summarise these in detail, even if their discursive and repetitive nature permitted such an exercise.

[19] The submissions for the reclaimers had three central themes. First, that the relevant provisions were outwith the competence of the Scottish Parliament, as (i) they related to a reserved matter; and (ii) any legislation in terms of the PBE required to conform to the structures of the 2010 Act, whereby the protected characteristics of sex and gender reassignment were wholly separate. Any positive measures under the PBE could not exceed those provided in sections 158 and 159 of the 2010 Act, which required individual focus on groups with shared characteristics. The groups identified in the 2018 Act definition of "woman" were not analogous and did not share protected characteristics. By amalgamating the two groups, the Act failed to identify what disadvantage experienced by those sharing the protected characteristic the positive measures aimed to address. That, in turn, had the effect of obscuring the assessment of whether there was a disproportionately low participation by that group. The measures went beyond the parameters of lawful positive action and strayed into reverse discrimination, a practice of treating those with the protected characteristic more favourably than persons who do not share it, which was not lawful. There was no power to modify, amend or disapply provisions of the 2010 Act. By combining the distinct protected characteristics of sex and gender reassignment the 2018 Act was fundamentally incompatible with the rights of those born women; was in conflict with the equal opportunities provisions of the 2010 Act; and purported to create an "equal opportunities" right that was broader than the Scottish Parliament had power to create

under the Scotland Act 1998. The provisions also discriminated against biological women with the protected characteristic of gender reassignment. There was no cogent, reliable and positive evidence relied upon by the respondents to the effect that this group was already proportionately represented on public boards in Scotland such that they could properly be excluded from the provisions of the 2018 Act.

[20] Second, since the terms of sections 158 and 159 represented the limit of what was permissible under community law in respect of positive action, the provisions of the 2018 Act were also incompatible with EU law and Convention rights. Workplace positive action was permissible only for the object of equality of opportunity for members of a disadvantaged group, rather than equality of outcome (*Briheche* v *Ministre de l'Intérieur* [2004] ECR I-8807). It was impossible for the respondents to show that the measures were a proportionate means of achieving representation on public boards for all those included in the definition of "woman". Neither *P* v *S* (*supra*), nor *Chief Constable of West Yorkshire Police* v *A and another (No.2)* [2004] UKHL 21, [2005] 1 AC 51 was authority for the proposition that a transgender person possesses the protected characteristic of their adopted sex.

[21] Third, that in implementing the 2018 Act, the Scottish Ministers failed to comply with the PSED duty. There was no evidential basis to vouch the assumptions upon which the measures appeared to have been based.

[22] The respondents' position was that the PBE was a wide one, designed to give extensive legislative competence to the Scottish Parliament in this area. It qualified the reserved matter of equal opportunities and thereby widened the legislative competence of the Parliament. The terms of the exception – compared, for example with that which followed it –contained no restriction on modifying the 2010 Act, which was not itself a protected statute. The exception therefore has no link to the 2010 Act. The legislative

competence had to be assessed having regard to the overall purpose of the legislation (*Imperial Tobacco Limited* v *Lord Advocate* 2013 SC (UKSC) 153), although the question was not whether that purpose had been achieved. The Lord Ordinary was correct to highlight that the purpose of the legislation was not to make provision in respect of transgender discrimination but to take positive action measures to increase the participation of women on public boards. The case of *P* v *S (supra)* supported the approach of including in the scope of the measures trans women, who "were relevantly similar to biological women" for the purposes of equality of treatment.

[23] According to *P* v *S (supra)*, the scope of the principle ensuring equality between men and women in working life included discrimination arising from gender reassignment. Discrimination against trans women was sex discrimination about which Member States could legislate, including in derogation from the principle of equal treatment. In any case, for the petitioners to succeed on the EU grounds, they would have to demonstrate that the relevant convention rights would be violated in almost every case. The PSED did not compel a particular outcome and all that was required was to consider whether the duty to have "due regard" to the relevant factors has been discharged. An argument forming a cross appeal limited to the effect of regulations relating to the PSED was not insisted in.

Background to the PBE and the 2018 Act

(i) Introduction of the PBE

[24] The exception was introduced by section 37 of the Scotland Act 2016. The trigger for the 2016 Act was the Report of the Smith Commission for further devolution of powers to the Scottish Parliament, dated 27 November 2014. On 19 January 2016, replying to a proposed amendment to clause 35 of the bill, which was the inception of that part of section

37 which introduced the Scottish functions of certain public authorities exception, the then Parliamentary Under-Secretary of State for the Scotland Office, Lord Dunlop, stated:

> "The equality provisions in the Bill relate to public sector bodies in Scotland and will enable the Scottish Parliament to make provision for the promotion and enhancement of equality in the public sector without any extension to the private sector. That is an important point to make; I know that that issue was raised by the House of Lords Constitution Committee. It is important to remember that the Smith Commission was explicit that the Equality Act 2010 as a whole is to remain reserved. The Government are confident that the Bill ensures that the benefits of a cohesive framework of discrimination law remains across Great Britain."

The Scotland Act received Royal Assent on 23 March 2016.

(ii) The 2018 Act

[25] Shortly thereafter, in its publication entitled "A Plan For Scotland: The Scottish Government's Programme for Scotland 2016 -17[1]", dated 6 September 2016, the Scottish Government announced its plan to make use of the new powers available to it under the revised exceptions to introduce what was then referred to as "a Gender Balance on Public Boards Bill to redress the gender imbalance of public authority non-executive board members". In January 2017, the Scottish Government launched its consultation on the Draft Gender Representation on Public Boards (Scotland) Bill. It was noted that the Bill would require positive action to be taken to redress gender imbalances on public sector boards. The consultation paper included a draft Bill. On 15 June 2017 the Gender Representation on Public Boards (Scotland) Bill was introduced to the Scottish Parliament and referred to the Equalities and Human Rights Committee as lead committee at Stage 1. As originally included in the bill, the gender representation objective was worded to provide that a public board should have (a) 50% of non-executive members who are female or who identify as female, and (b) 50% of non-executive members who are male or who identify as male.

[1] Available at: A plan for Scotland: the Scottish Government's programme for Scotland 2016-2017 - gov.scot (www.gov.scot)

During the passage of the bill, following responses to the consultation, the requirement for 50% of non-executive members to be male was removed, resulting in the wording which is now set out in section 1(1). The definition of "woman" in section 2 was introduced in consequence of this change.

Decision and analysis

[26] It is important at the outset to identify what this case is not about. As the Lord Ordinary noted in para [1] of her opinion:

> "It should be understood at the outset that the case does not form part of the policy debate about transgender rights, a highly contentious policy issue to which this decision cannot properly contribute. At its core, this litigation is concerned with whether certain statutory provisions were beyond the legislative competence of the Scottish Parliament. While I record certain statements that were made about Scottish Ministers' policy or position on transgender rights, that matter was at best tangential to the central dispute and has had no bearing on the decision that I have made."

[27] These observations continue to have force. During the hearing of the reclaiming motion certain submissions were made in respect, for example, of the Gender Recognition Act 2004, critical of the process involved in obtaining a gender recognition certificate. Policy issues of this kind are wholly beyond the scope of the case. Moreover, the Gender Representation Objective which is the aim of the 2018 Act, is not challenged. We do not understand it to be suggested that to pursue that objective by means of positive action in respect of the appointment of women to public boards, as provided for in sections 3 and 4, would be beyond the legislative competence of the Scottish Parliament. What is suggested is that by means of the definition of "woman" provided for in section 2, the Act goes beyond the scope of the PBE by providing for the inclusion of those with characteristics which do not reflect the definition of "protected characteristic" in the Equality Act 2010, which sets the limit on the scope of the PBE. The sole issue for the court is thus whether sections 2 and 11

of the Act were within legislative competence. The answer to that question hinges not on a debate about the rights and wrongs of policy decisions in this area, but on the proper interpretation of these sections, considered in the light of section 29 of the Scotland Act 1998, and in particular, the PBE in schedule 5 of that Act.

[28] The respondents submitted that the Lord Ordinary, whilst reaching the correct decision, had erred in stating that the 2010 Act was a reserved statute. It is true that the Lord Ordinary stated that the 2010 Act was reserved, but we do not understand her to mean that it was itself a protected statute. What the Lord Ordinary stated (para [49]) was that:

> "The regulation of discrimination between groups is a matter in which the UK as a whole has an interest and so the Equality Act, which is part of that subject matter is reserved, other than for any topic or area specifically carved out as devolved."

All the Lord Ordinary is meaning here is that equal opportunities is a reserved matter, save within the limited scope of the exception; that the 2010 Act is the manifestation of how equal opportunities law is applied in Great Britain; and that any legislation by the Scottish Parliament, to be within devolved competence, must come within the specific terms of the exception. There is no basis for suggesting that the Lord Ordinary erred in her understanding of the matter which was reserved, she was merely repeating the point she made elsewhere, that the reservation must be construed alongside its exceptions.

[29] The Lord Ordinary correctly noted that in addressing whether an Act of the Scottish Parliament relates to a reserved matter it is necessary first to identify the purpose of the impugned provision. That purpose, as the Lord Ordinary also identified, was to introduce measures to improve the representation of women on public boards in Scotland, the objective being to arrive eventually at a situation where 50% of the non-executive members of such boards are women. The Lord Ordinary concluded, again correctly, that the

provisions relate to equal opportunities, as defined in L2 of schedule 5. Although equal opportunities was a reserved matter, the Lord Ordinary noted (para [50]) that:

> "It is no longer appropriate to talk of equal opportunities being a reserved matter without reference to this exception, amongst others, because to the extent that a provision falls within the four corners of an exception it is devolved and so within legislative competence."

She then stated that:

> "… the exception covers any aspect of equal opportunities that falls within the scope of 'relating to the inclusion of persons with protected characteristics' on Scottish public boards. So there is no restriction on the nature of the steps that can be taken to eliminate or regulate discrimination if the measures in question are inclusive of those with EA 2010 protected characteristics. The wording of the exception requires to be read as a whole in order to understand its scope."

[30] So far we would agree with the Lord Ordinary's analysis. The critical question however, is whether the measures are indeed inclusive of those with 2010 Act protected characteristics. The PBE is an unqualified one which places within devolved competence the matter of equal opportunities in so far as it relates to the "inclusion of persons with protected characteristics in non-executive posts" on the relevant boards. It is clear that in he exercise of that devolved competence the Scottish Parliament would be entitled to make provision for the inclusion of women on such boards. They would also have been able to make such provision in relation to those with the protected characteristic of gender reassignment.

[31] Moreover, the PBE is sufficiently widely worded to allow amendment or modification of the 2010 Act so far as doing so serves the purpose of the PBE, namely the inclusion of those with protected characteristics on relevant public boards. The Lord Ordinary noted that for non-public board functions there was an express prohibition on modification of the 2010 Act; however there was no such restriction in the PBE, and this is because equal opportunities was not reserved to the extent of that closely defined and

limited exception. She concluded that a deviation from or modification of the 2010 Act in so far as necessary to fulfil the purpose of including persons with protected characteristics on Scottish public boards was an acceptable ancillary consequence of legislating within the exception. Section 11 of the 2018 Act disapplied the positive action provisions of the 2010 Act only to signal that the 2018 scheme was designed to impose bespoke measures for a single devolved area of equal opportunities.

[32] We agree with the Lord Ordinary that the relevant exception allows modification of the 2010 Act, so far as required for the purposes of legislating in respect of the exception. Apart from the wide and otherwise unqualified terms of the PBE itself, it may usefully be compared with the exception which follows it, which specifically provides that "this exception does not include modification of the Equality 2010 Act", subject to certain provisos. Accordingly, if an enactment were otherwise within the scope of the PBE, it would be open to the Scottish Parliament to modify the terms of the 2010 Act in any respect concerning the inclusion on public boards of persons with the relevant protected characteristics. This would include the disapplication of sections 158 and 159 so long as the disapplication was limited to the pursuit of the exception. The 2018 Act introduces specific positive measures designed to advance the PBE, and the disapplication of sections 158 and 159 is for that limited purpose. This avoids the possibility of two separate positive measures being capable of applying to the same set of circumstances, and makes it clear that for the purposes of the PBE it is the 2018 Act which operates. The provisions of sections 158 and 159 are not disapplied for any other purpose. As the Lord Ordinary put it, the disapplication is a signal that the 2018 scheme was designed to impose bespoke measures for a single devolved area of equal opportunities. So long, therefore, as the primary provisions of the 2018 Act fell within the scope of the PBE, disapplication of provisions of

the 2010 Act, for that limited purpose, would be permitted. The essential difference between the positive measures under the 2010 Act, and those in the 2018 Act is that the former refer to those who share a protected characteristic, whilst the latter refer to "woman" as defined for the purposes of that Act. The issue of whether disapplying the 2010 Act provisions was within legislative competence thus turns, as with the primary issue regarding section 2, on whether the definition of "woman" takes the matter beyond legislative competence.

[33] The reclaimers argued that (notwithstanding that the measures themselves, contained in sections 3 and 4, were not the subject of direct challenge) the extent of the positive measures which could be introduced by the Scottish Parliament had to reflect precisely those measures contained in sections 158 and 159, under which measures can be taken only for those who "share" a protected characteristic, and that the effect of sections 2 and 11 was to lump together individuals who did not share characteristics. This argument also turns on the issue of the definition of "woman", and we address that issue below. Otherwise we reject the argument that it would not have been open to the Scottish Parliament to introduce positive measures of the kind specified in sections 3 and 4, if applied to clearly defined protected characteristics. The section 4 positive measures apply only for the purpose of increasing representation, and in strictly limited circumstances which largely echo section 159; they can only be invoked when all candidates are viewed as being equally well-qualified; they require the individual to be favoured to be equally qualified with others; they only apply where appointment will make progress towards achieving the Gender Recognition Objective ("GRO"); as well as where consideration has been given to appointing someone who is not a woman on the basis of a particular characteristic which they possess. On an issue as narrow as representation, the terms of sections 3 and 4 are proportionate, subject only to the legitimacy of the approach to the

definition of "woman", and the proportionality of a GRO of 50% applying to all those falling within that definition.

[34] In this regard it is important to recognise one aspect of the 2010 Act which cannot be modified, namely the definition of "protected characteristic", which for the purpose of any exceptions has the same meaning as in the Equality Act 2010. The question whether the 2018 Act is within devolved competence must first be addressed by examining the purpose of the legislation. Whilst the purpose may reasonably be said to be identified in the GRO in section 1, as being designed to achieve a situation where 50% of those on relevant boards in Scotland are women, that purpose cannot be understood or fully identified without associating it with the definition to be given to "woman" for the purpose of the objective, and asking whether it comes within the scope of the PBE which allows only for the inclusion of those with protected characteristics.

[35] The PBE devolves, for certain limited purposes, issues relating to the prevention, elimination, or regulation of discrimination between persons on various grounds, including sex and sexual orientation. Gender reassignment is not specifically included but must be included inferentially, having regard to the reference in the exception to persons having protected characteristics. The essence of discrimination is that it occurs when a person with a particular characteristic, or a group of persons sharing that characteristic, is treated less favourably on account of that characteristic than a person who does not have or share the relevant characteristic.

[36] The protected characteristics listed in the 2010 Act include "sex" and "gender reassignment". The Scottish Parliament would, as we have noted, have been entitled to make provision in respect of either or both these characteristics. So far as the characteristic of sex is concerned, it would be open to the Scottish Parliament to make provision only for

the inclusion of women, since a reference to a person who has a protected characteristic of sex is a reference either to a man or to a woman. For this purpose a man is a male of any age; and a woman is a female of any age. Section 11(b) indicates that when one speaks of individuals sharing the protected characteristic of sex, one is taken to be referring to one or other sex, either male or female. Thus an exception which allows the Scottish Parliament to take steps relating to the inclusion of women, as having a protected characteristic of sex, is limited to allowing provision to be made in respect of a "female of any age". Provisions in favour of women, in this context, by definition exclude those who are biologically male.

[37] The matter does not end there, however, because it is clear that the PBE would entitle the Scottish Parliament to legislate in favour of increased representation on public boards of those holding any protected characteristic, including that of gender reassignment. A person has that protected characteristic if the person is "proposing to undergo, is undergoing or has undergone a process (or part of a process) for the purpose of reassigning the person's sex by changing physiological or other attributes of sex." (2010 Act, section 7(1)). A reference to a person having such a characteristic is a reference to a transsexual person (section 7(3)(a)), and no distinction is made between those for whom the relevant process would involve reassignment male to female or *vice versa*. This is emphasised by the fact that section 7(3)(b) specifies that in relation to gender reassignment a reference to those who share the characteristic is a reference to "transsexual persons". In other words, it is the attribute of proposing to undergo, undergoing or having undergone a process (or part of a process) for the purpose of reassignment which is the common factor, not the sex into which the person is reassigned. It is reasonable to assume that at some stage of the process in question the individual will start living as a member of the sex to which they are seeking to transition, but it is not a specified requirement for the acquisition of the protected characteristic.

[38] *P* v *S (supra)* was decided at a time when protection against discrimination on the basis of gender reassignment was not included in the UK legislation, then the Sex Discrimination Act 1975. The case was referred to the ECJ on the question whether dismissal for a reason connected to gender reassignment was a breach of Council Directive 76/207, Art 5(1), designed *inter alia* to prevent discrimination on the grounds of sex. The conclusion was that, standing the fundamental purpose of equality between the sexes which underlay the Directive, its scope was not confined to discrimination based on the fact that a person was of one or other sex, but also extended to discrimination arising from the gender reassignment. It led to recognition of gender reassignment as a basis of discrimination being added to the 1975 Act, in section 2A. Whilst it recognised that discrimination on the basis of gender reassignment was most likely to be sex discrimination, neither it nor the *Chief Constable of West Yorkshire Police (No 2) (supra)* case, which anticipated the 2004 Act, is authority for the proposition that a transgender person possesses the protected characteristic of the sex in which they present. These cases do not vouch the proposition that sex and gender reassignment are to be conflated or combined, particularly in light of subsequent legislation on the matter in the form of the 2010 Act which maintained the distinct categories of protected characteristics, and did so in the knowledge that the circumstances in which a person might acquire a gender recognition certificate under the 2004 Act were limited.

[39] By incorporating those transsexuals living as women into the definition of woman the 2018 Act conflates and confuses two separate and distinct protected characteristics, and in one case qualifies the nature of the characteristic which is to be given protection. It would have been open to the Scottish Parliament to include an equal opportunities objective on public boards aimed at encouraging representation of women. It would have been open to them separately to do so for any other protected characteristic, including that of gender

reassignment. That is not what they have done. They have chosen to make a representation objective in relation to women but expanded the definition of women to include only some of those possessing another protected characteristic. Having regard to the general proportions within society of men and women, an objective aimed at achieving on public boards a representation of women in a measure of 50% would seem entirely reasonable and proportionate. It would not be such as might risk turning a legitimate positive measure into reverse discrimination, such as might have arisen if the figure aimed at were, say, 95%. Moreover, what would be a reasonable percentage for a representation objective in relation to other protected characteristics would depend on various factors, including the extent of current under-representation, but it would be unlikely to result in an objective aimed at 50% being viewed as proportionate for those other protected characteristics, having regard to the general population. The point is illustrated by the reclaimers' submission – admittedly far-fetched and unlikely to happen – that under this definition the representation objective could as a matter of law be met by the appointment of no individuals possessing the protected sex characteristic of women. The fact that an appropriate percentage for a representation objective in relation to one protected characteristic may not be proportionate and appropriate to another characteristic highlights why it is important to apply an individual approach to the characteristics and to focus in each case on those who share a relevant protected characteristic. A measure which reflected an equal opportunities-appropriate representation objective for one group, might, if applied to another, reveal itself not to be an equal opportunities measure at all.

[40] In any event, the definition of woman adopted in the legislation includes those with the protected sex characteristic of women, but only some of those with the protected characteristic of gender reassignment. It qualifies the latter characteristic by protecting only

those with that characteristic who are also living as women. The Lord Ordinary stated that the 2018 Act did not redefine "woman" for any other purpose than "to include transgender women as another category" of people who would benefit from the positive measure. Therein lies the rub: "transgender women" is not a category for these purposes; it is not a protected characteristic and for the reasons given, the definition of "woman" adopted in the Act impinges on the nature of protected characteristics which is a reserved matter. Changing the definitions of protected characteristic, even for the purpose of achieving the GRO, is not permitted and in this respect the 2018 Act is outwith legislative competence.

[41] For the above reasons the reclaiming motion succeeds. We will put the case out by order for discussion of the appropriate orders to make.