SECOND DIVISION, INNER HOUSE, COURT OF SESSION

[2022] CSIH 7
P973/21

Lord Justice Clerk
Lord Malcolm
Lord Boyd of Duncansby

OPINION OF THE COURT

delivered by LADY DORRIAN, the LORD JUSTICE CLERK

in the Petition

by

FAIR PLAY FOR WOMEN LTD

Petitioners and Reclaimers

against

THE REGISTRAR GENERAL FOR SCOTLAND and THE SCOTTISH MINISTERS

Respondents

Petitioners and Reclaimers: Moynihan, QC, Welsh; Balfour and Manson LLP
Respondent: D. Ross, QC, P. Reid, Scottish Government Legal Directorate

24 February 2022

Introduction

[1] This reclaiming motion (appeal) arises out of a petition for judicial review of official guidance issued by the National Records of Scotland in connection with the completion of returns for a national census to be taken in Scotland in March 2022. The regulations governing the form of questions to be asked include a question "What is your sex?" which the respondent must answer by means of a binary choice "female" or "male". The guidance

suggested that some respondents could answer by selecting the sex other than that which appeared on their birth or gender recognition certificate ("GRC"). The reclaimers maintain that the guidance in respect of this question is unlawful and should be reduced. In essence the issue turned on whether in responding to the question an individual is legally bound to answer according to the sex stated on their birth certificate or GRC.

Background

Scotland

[2] As the Lord Ordinary explained, modern censuses take place in accordance with a framework established by the Census Act 1920. The Act permits subordinate legislation to be made directing that a census shall be taken, and specifying the particulars to be stated in the census returns. However, the only particulars which may be specified are those with respect to matters mentioned in the schedule to the Act. From its inception the itemised particulars listed in the schedule included, in para 1, "Names, sex, age". The 1920 Act contains no definition of the word "sex". Section 8 of the Act provides for penalties to be applied against those who fail to comply with the census, or who make a false declaration. The maximum penalty is a fine in the sum of £1,000. No person, however, will be penalised for refusing or neglecting to state their particulars with respect to the transgender status question (s 8(1A)(b)).

[3] In October 2018 the Census (Amendment) (Scotland) Bill proposed to amend the 1920 Act. As originally introduced the proposals were to amend schedule 1 para 1 by adding after the word "sex" the words "(including gender identity)"; and to introduce a new para 5B "Sexual orientation". The Policy Memorandum accompanying the Bill made it clear that the Scottish Ministers considered that the words "gender identity" were already

covered by the reference in the Schedule to "sex". The principal purpose of the Bill was identified as being to ensure that answering the additional questions would be voluntary and that no penalty would follow a failure to do so. The Committee of Parliament which considered the Bill heard evidence about the proposed amendment from a wide variety of interested parties. As the Lord Ordinary noted (para [5]): "It became apparent that there was widespread concern that the addition of "(including gender identity)" after "sex" in the schedule to the 1920 Act risked adding confusion to an issue which many already considered to be far from clear or uncontroversial." The Equality Network, responding to consultation on the Bill, suggested that introducing gender identity by means of para 1 of schedule 1 to the Act created confusion. It further suggested that the proposed amendment could be replaced by the inclusion of a separate para 5C in respect of transgender status and history. The Committee endorsed this proposal. In due course the Minister proposed the relevant changes to the Bill. The end result was the Census (Amendment) (Scotland) Act 2019 which amended the 1920 Act to introduce para 5B "Transgender status and history" and para 5C "Sexual orientation".

[4] The precise questions to be asked in the census are set out in schedules to the Census (Scotland) Regulations 2020. The relevant questions are:

(a) "What is your sex?" with a choice to select a box marked Male or a box marked Female. Instructions for the respondent in respect of this question are stated as follows: "The respondent is required to select one option only. A voluntary question about trans status or history will follow if the respondent is aged 16 or over."

(b) "Do you consider yourself to be trans, or have a trans history?". There are again two boxes available, one marked "No", and the other marked "Yes, please describe your trans

status (for example, non-binary, trans man, trans woman). The instructions for the respondent in respect of this question state:

> "This question is voluntary. Trans is a term used to describe people whose gender is not the same as the sex they were registered at birth. If the respondent choses to respond to this question they are required to select one option only. If the respondent selects "yes" to this question they may type how they describe their trans status in the box provided, for example, non-binary, trans man, trans woman".

Guidance

[5] The guidance issued by the National Records of Scotland in relation to the question "what is your sex", states:

> "How do I answer this question?
>
> If you are transgender the answer you give can be different from what is on your birth certificate. You do not need a Gender Recognition Certificate (GRC).
>
> If you are non-binary or you are not sure how to answer, you could use the sex registered on your official documents, such as your passport.
>
> A voluntary question about trans status or history will follow if you are aged 16 or over. You can respond as non-binary in that question."

For the 2011 census formal guidance to assist in answering the sex question was published online, as follows:

> "More questions?
>
> I am transgender or transsexual. Which option should I select? If you are transgender or transsexual, please select the option for the sex that you identify yourself as. You can select either 'male' or 'female,' whichever you believe is correct, irrespective of the details recorded on your birth certificate. You do not need to have a Gender Recognition Certificate."

England and Wales

[6] The 1920 Act also provides the framework under which censuses in England and Wales proceed, and the particulars which may be required to be stated, again set out in

Schedule 1. Para 1 specifying "Names, sex, age.", applies equally in that jurisdiction. Schedule 1 has also been amended for that jurisdiction, in connection with the census taken there in 2021. The Census (Return Particulars and Removal of Penalties) Act 2019 added "Sexual orientation" and "Gender identity" to the list of particulars, with the *proviso* that there would be no penalty for failing or declining to answer. The sex question was phrased in the same binary terms as the proposed question in the Scottish census. The UK Statistics Authority produced guidance to assist respondents in answering that question, as follows:

> "Please select either 'Female' or 'Male'. If you are considering how to answer, use the sex recorded on one of your legal documents, such as a birth certificate, gender recognition certificate, or passport. If you are aged 16 or over, there is a later voluntary question on gender identity. This asks if the gender you identify with is different from your sex registered at birth. If it is different, you can then record your gender identity."

[7] The petitioners in the present case challenged that guidance on the basis that it allowed the use of a document other than a birth certificate or GRC, such as a passport, as the basis for the respondent's answer. The sex recorded on a document such as a passport would not necessarily reflect the person's sex recognised by law and shown on a birth certificate or GRC. The court (*R (on the application of Fair Play for Women Ltd* v *UK Statistics Authority and Anr* [2021] EWHC 940 (Admin)) held that there was "a strongly-arguable case" that there was a clear distinction in the legislation between particulars about a person's sex and particulars about a person's gender identity. The former related to the sex recognised by law, not as perceived by the individual respondent. The court indicated that it would be appropriate for the guidance to refer only to birth certificates or GRCs. The UK Statistics Authority agreed to publish its guidance in that form, and subsequently the court issued a consent order declaring that "sex" in the Schedule to the 1920 Act and the subordinate legislation in England and Wales meant sex as recorded on a birth certificate or GRC.

The Lord Ordinary's decision ([2022] CSOH 20)

[8] The Lord Ordinary noted that it was agreed that if the guidance permitted, sanctioned, approved or authorised unlawful conduct by those consulting it the court could intervene. That really turned, as he identified in para [38] of his opinion on "whether, absent possession of a GRC, a … person not sure how to answer the sex question would be acting lawfully by answering the question other than by reference to the sex recorded on that person's birth certificate". The nub of the petitioners' argument was that as a matter of law sex was determined for all legal purposes as that registered at birth, and that the only circumstances in which a person could answer the sex question differently would be where they had been granted a GRC. The Lord Ordinary noted that facilities were available for important documents such as driving licences or passports to be issued by reference to a person's lived sex, which would be difficult to reconcile with any general legal rule that a person's sex can only be considered to be that recorded on a birth certificate. The Lord Ordinary could not identify such a general rule from the authorities with the result that he could not conclude that the guidance permitted, authorised, sanctioned or approved unlawful conduct.

[9] The Lord Ordinary considered that the core issue was not so much what the meaning of "sex" in the 1920 Act might be, but rather "the related but distinct issue of what a false answer to the question actually posed in accordance with the primary and subordinate legislation might be, and thence whether the guidance complained of encourages (in the senses already set out) such a false answer" (para [41]). He noted that numerous questions on the census which are compulsory and could attract a penalty for a failure to answer or for a false answer contain a degree of subjectivity, such as questions about health. At para [42]

he noted that a person registered female at birth and never having had cause for concern at that registration may well be answering falsely if she ticked "Male"; but it was not to him obvious that a person registered female at birth, without a GRC, but who has come to live to all practical intents and purposes as a male, perhaps with a greater or lesser degree of pharmaceutical or surgical intervention, would be providing a false answer by ticking the "Male" box.

Submissions

Reclaimers

[10] Senior Counsel for the reclaimers identified the issue thus: does the guidance sanction or approve an unlawful answer to the sex question in the census? The answer to that was a question of statutory interpretation. He acknowledged that sex and gender are interchangeable to a degree, but that interchangeability only worked within certain limits, largely according to the context in which the words were used. The default position, however, was that sex was a binary issue, whereas gender was non-binary. This was apparent from the dictionary definitions of the words, taken from the Shorter Oxford English Dictionary. The primary definition of sex was: "Either of the two main divisions (male and female) into which organisms are placed on the basis of their reproductive functions or capacities". That given for gender was: "The state of being male, female, or neuter; sex; the members of one or other sex. Now chiefly *colloq*. or *euphem.*".

[11] The guidance, by allowing a self-selected answer to the sex question conflated a binary with a non-binary issue, yet offered only the possibility of a binary answer. That binary question, as an expression of gender, could not be answered honestly by a non-gendered person such as the appellant in R(*Elan-Cane)* v *Secretary of State for the Home*

Department [2022] 2 WLR 133, who would select neither "male" nor "female", yet if they did not answer they committed an offence. The Scottish Ministers said in terms during stage 1 of the Bill that they did not intend to conflate sex and gender, yet that is the effect of what they have done, despite the fact that both questions seem to reflect a distinction between sex and gender, recognising that gender may not be the sex registered at birth.

[12] Sex as a discriminator was used in a variety of fields of law. The default presumption was that where sex was mentioned it was always biologically determined. It was a term with legal consequence at the level of individual status but also at a population level as a vital component of the approach to discrimination between the two sexes. In law the natural meaning of sex implied the biologically based distinction between men and women. The law could change this, by statute as under the Gender Recognition Act 2004 (GRA), or by court decision as in *Chief Constable of West Yorkshire Police v A (No.2)* [2005] 1 AC 51, but where it did so it did so clearly and directly. Once a person possessed a GRC they had the acquired gender for certain, but not all, purposes. The GRA carried through restrictions in relation to certain matters relating to marriage, succession, family, and offences which could only be committed by one or other sex.

[13] It is true that the 1920 Act provides no definition of what is meant in that context by "sex", but some words are so basic they defy the need for definition. Historically there was no definition of the term since, until recent discourse, the meaning was readily and naturally comprehended as a binary term admitting of no understanding but a biological one. It is only in recent times where gender is capable of being changed operatively that this has become a matter of debate

[14] The law does not allow self-identification. That is the default position as seen by the conditions imposed in the GRA for obtaining a GRC. A person may obtain a passport or

driving licence in their non-birth gender but that is not exclusively as a result of self-identification. For example, to obtain a passport on such conditions it is necessary first to prove identity by submitting the individual's birth certificate.

Respondents

[15] It was important to understand what the purpose of the census is. It is to collect 10 yearly data from the population for strategic planning, allocation of resources, and to get an understanding of the country's population, including where and how it lives at the date of the census. It was equally important to recognise what the census is not about: it does not confer, remove or qualify any rights or obligations of those who responded to it.

[16] There was no universal meaning or invariable use of the words sex and gender. It was now recognised and accepted that a person could change their sex: that could be done formally, by obtaining a GRC. A person may also informally change the sex in which they live their lives, and to an extent have that formally recognised by the issuing of a passport or other document. *Bellinger* v *Bellinger* [2003] 2 AC 467 was a case which turned on its specific facts, relating to the capacity to marry. Marriage was a status which had certain recognised legal consequences.

[17] The reclaimers' argument hinges on the suggestion that a person giving an answer other than per a birth certificate or GRC would be giving a false answer and thus committing an offence. An answer different to that on a birth certificate, made on reasonable grounds and in good faith would not be false. The question was formulated in the present tense. To interpret the question as meaning "what is your sex on census day" was consistent with the purpose of the question and avoided both the risk of penalisation and the narrow approach urged by the reclaimers.

[18] The 1920 Act is the framework within which censuses are conducted. Prior to that Act, Parliament made specific provision every 10 years or so. The intention of introducing the Act was to provide a framework under which future censuses could be carried out without resorting to fresh legislation every 10 years. It was an Act which was intended to evolve with the times, and a rigid and unaccommodating definition urged by the reclaimers should be rejected. Consistent with the 1920 Act and reflective of respect for and recognition of the status of trans people, the sex question should be capable of being answered in the way suggested by the guidance.

Analysis and decision

[19] It is a matter of agreement that before the court could interfere with the guidance issued it would need to be satisfied that the guidance sanctioned or approved unlawful conduct by those consulting it. The unlawful act which the guidance was said to authorise in this case was that of falsely answering the sex question. It was asserted that were a transgender individual not in possession of a GRC to answer the question by reference to the sex which does not appear on their birth certificate, that would be a false answer and would constitute an unlawful act. Whether this would be so hinged on whether the reclaimers were right in submitting that "sex" as a particular which requires to be stated in a census return in terms of schedule 1 of the 1920 Act can only mean sex as recorded on a birth certificate or GRC. This proposition rested largely on the submission that for the purposes of statutory construction there was a default definition of sex which involved the adoption of a binary biological categorisation of male and female.

[20] In our opinion the Lord Ordinary was correct to hold that there is no universal legal definition of the word "sex" which applied by default, and which, in particular, required to

be adopted for the purposes of the 1920 Act. There is no definition within the Act itself, and therefore the word "sex" in para 1 schedule 1 must be given the normal and ordinary meaning which its context dictates. However, as senior counsel for the reclaimers demonstrated in his opening submissions by reference to different meanings which might be born by the words sex, gender and intercourse depending on context, the meaning of the word "sex" is strongly context dependent.

[21] There are some contexts in which a rigid definition based on biological sex must be adopted. *Bellinger* was perhaps a classic example. It is not however an authority for the proposition advanced by the reclaimers. It was not concerned with the general question of whether there was a default definition to be applied to the word "sex" but to the correct construction of a particular statutory provision which required two parties to be "respectively male and female". Moreover, it arose in the specific context of capacity to marry, and validity of marriage. As was noted in *Chief Constable of West Yorkshire Police* (Lady Hale, para 51), "Marriage can readily be regarded as a special case … marriage is still a status good against the world in which clarity and consistency are vital." As Senior Counsel for the respondents submitted, marriage is a legal status which affects rights in other fields such as immigration, social security, pensions, and housing. There are other circumstances in which matters affecting status, or important rights, in particular the rights of others, may demand a rigid definition to be applied to the term "sex" of the kind proposed by the reclaimers. Examples, include *R* v *Tan* [1983] QB 1053, where being a male was an essential pre-requisite for the commission of a particular criminal offence. Some of these limitations have been carried over to apply even where a person has successfully obtained a GRC under the GRA. Examples may be seen in sections 9 and 12 of that Act, as illustrated in *R(McConnell)* v *Registrar General for England and Wales* [2020] EWCA Civ 559.

The point which these examples all have in common is that they concern status or important rights.

[22] There are other contexts in which a rigid definition based on biological sex is not appropriate. There are many circumstances in which the words "sex" and "gender" have been used synonymously and interchangeably. This was a matter explored by Lord Reed in *R (Elan-Cane)* v *Secretary of State for the Home Department*. The case concerned a non-gendered biologically female person who had applied for, and been refused, a passport which included a non-gendered marker ("X") for the holder's gender. In explaining (para 52) that there was no legislation in the UK which recognised non-gendered individuals, and that gender required to be stated under reference to "male" or "female" the court several times observed that public bodies and legislation frequently used the terms "gender" and "sex" interchangeably. This, of course, also reflects popular and common usage of the terms, synonymously, as was recognised by senior counsel for the reclaimers. In fact even the SOED definitions to which we were referred reflect that popular usage: that relating to sex, quoted above, goes on: "4 The difference between male and female, esp. in humans. Now *spec.* the sum of the physiological and behavioural characteristics distinguishing members of either sex;", and for gender: "b Sex as expressed by social or cultural distinctions...". So the definition of sex contains reference to behavioural characteristics, not merely biological sex; whilst that of gender contains a reference to sex.

[23] It is at this point pertinent to recall the purpose of a census, as referred to by senior counsel for the respondents. Its primary purpose is to gain information about the population and it does that as a "snapshot" exercise across the country on one particular day. The census form is, perhaps more than any other official document, a public facing one, seeking responses from the populace about a whole raft of things, some of which may,

as the Lord Ordinary noted, contain to a greater or lesser extent subjective elements. It is to be expected that the language used, and the meaning to be attributed to the words used, are to be interpreted according to their popular and common meaning, not according to a specialist, restricted definition which may be adopted where matters of status and rights may be in issue. This applies not only to the census form but to the identification of the relevant particulars which may be required under the 1920 Act: the legislation was drafted for the purpose of enabling these particulars to be asked of the general population in a census and there is no reason to apply anything other than an ordinary, everyday meaning to the words used. We see no reason to think that the fact that it may be necessary to apply a biological definition of sex in prescribed circumstances involving status, proof of identity or other important rights mandates that a similar approach must be adopted when the issue does not involve these matters. We do not think that the question "what is your sex" should be interpreted as meaning "what is the sex registered on your birth certificate (or GRC)" We recognise that in 1920 gender and sex would probably have been understood by most people in rather more simplistic terms than nowadays, but we have no reason to think that the term sex would not, even then, have been treated as synonymous with gender. In this connection in any event we consider that there was force in the submissions for the respondents that the 1920 Act has to be treated as an instrument which is always speaking. Senior counsel for the respondents referred to *R(N)* v *Walsall Metropolitan Borough Council* [2014] PTSR 1356. The following passage, from Leggatt J (as he then was) has particular relevance:

> "45 It is not difficult to see why an updating construction of legislation is generally to be preferred. Legislation is not and could not be constantly re-enacted and is generally expected to remain in place indefinitely, until it is repealed, for what may be a long period of time. An inevitable corollary of this is that the circumstances in which a law has to be applied may differ significantly from those which existed

> when the law was made–as a result of changes in technology or in society or in other conditions. This is something which the legislature may be taken to have had in contemplation when the law was made. If the question is asked 'is it reasonable to suppose that the legislature intended a court applying the law in the future to ignore such changes and to act as if the world had remained static since the legislation was enacted?' the answer must generally be 'no'. A 'historical' approach of that kind would usually be perverse and would defeat the purpose of the legislation."

[24] Given that the 1920 Act was introduced with the intention that it should apply to all future censuses, a purpose it has now served for over a hundred years, it is obvious that the meaning to be attached to certain elements of it may be more nuanced in 2022 than in 1920. Whether or not the words – and to some extent concepts – of sex and gender were used interchangeably and synonymously in 1920 it is clear that in popular usage they have become intertwined in that sense.

[25] Senior counsel for the reclaimers relied strongly on *R (On the application of Fair Play for Women Ltd* v *UK Statistics Authority and Anr*, but, in agreement with the Lord Ordinary we do not derive assistance from that case. It was a decision made only on the basis of the existence of a *prima facie* case, and the matter was disposed of by concession. The *prima facie* arguments were not tested in developed argument. Nor do we see it as a problem that there may be a divergence between jurisdictions in this respect. There are already divergences in the specification of particulars which may be required, as seen in para 5 of schedule 1 to the 1920 Act, and there is no requirement that the questions posed for shared particulars be expressed in the same manner in each jurisdiction.

[26] Given the tight timescale before the start of the census and the consequential need for an expedited decision, we have not addressed in detail all the matters addressed in the opinion of the Lord Ordinary, however we endorse all of his reasoning. For these reasons the reclaiming motion is refused.