

Case Name: Petition of Fair Play for Women for judicial review of guidance issued by National Records of Scotland to accompany the 'sex question' in the 2022 Scottish census

Case Ref No: P973/21

Date of Hearing: 23 February 2022

Division: 2nd Division

Agents:

For the petitioner: Balfour + Manson

For the respondent: Scottish Government Legal Directorate

Case Description

The petitioner seeks to challenge, by way of judicial review, guidance issued by the respondent (acting on behalf of the Registrar General for Scotland) relative to the upcoming Census. It reclaims the decision of the Lord Ordinary dated 17 February 2022 refusing the petition. The reclaiming motion is brought on an urgent disposal basis. It is submitted that the guidance is unlawful because it has the effect of permitting persons responding to the Census to submit inaccurate answers. The dispute centres on what is the meaning of 'sex' in this context.

The Census Act 1920 provides the statutory framework. Schedule 1 of the 1920 Act makes provision as to the particulars to be included in the census, one of which, under para.1, is 'sex'. Proposals in the Census (Amendment) (Scotland) Bill 2018 recommended that the particular of 'sex' be expanded to include the words 'including gender identity'. This was ultimately not enacted. In August 2021, the respondent issued guidance to the following effect relative to the 'sex' question:

“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.”

Before the Lord Ordinary, the petitioner's position was that the guidance is illegal, because it authorises or approves unlawful conduct in that, following the guidance, a person could

properly respond to the sex question with an answer other than that stated in their birth certificate or as assigned by a GRC. That position is predicated on the correct interpretation of sex being that assigned at birth or by a GRC. The respondents submitted that the definition of sex was not so narrow in scope and could include a person's birth sex; that acquired by GRC or that assigned self-identification. The Lord ordinary agreed with the respondent that the definition of 'sex' was not so narrow. It followed that a person answering the sex question with an answer other than their birth sex or that assigned by a GRC would not be acting unlawfully. It followed that the guidance did not permit unlawful behaviour.

The petitioner submits that the Lord Ordinary erred in law in that he:

- Misinterpreted the Census Act 1920 in holding that "sex" meant anything other than one's sex as recorded on a birth certificate or Gender Recognition Certificate.
- Failed properly to construe the meaning of the term "sex" in the context of the combination of (a) the Census Act 1920, as amended, Schedule paras 1 and 5C, (b) the Census (Scotland) Order 2020, section 8(1A)(b) and Schedule 2, paras 4 and 6 and (c) the Census (Scotland) Regulations 2020, Schedule 2.
- Found that giving an answer to the question "what is your sex?" on the census other than one's sex as recorded on a birth certificate or Gender Recognition Certificate would be lawful.
- Found that the guidance issued by the respondent to accompany the 'sex question' in the 2022 Scottish census does not permit, sanction, authorise or approve unlawful conduct by those to whom it is directed.