OUTER HOUSE, COURT OF SESSION

[2023] CSOH 89

P318/23

OPINION OF LADY HALDANE

In the petition

THE SCOTTISH MINISTERS

Petitioner

for

Judicial Review of the Gender Recognition Reform (Scotland) Bill (Prohibition on Submission for Royal Assent) Order 2023 made and laid before the UK Parliament by the Secretary of State (under section 35 of the Scotland Act 1998) on 17 January 2023

Petitioner: The Lord Advocate, Bain, KC; D Ross KC; P Reid KC; Scottish Government
Respondents: D Johnston KC; C Pirie KC; Dewart Advocate; Office of the Advocate General

8 December 2023

Introduction

[1] On 17 January 2023, the Secretary of State for Scotland made an order under section 35 of the Scotland Act 1998. The effect of that Order was to block Royal Assent to a Bill of the Scottish Parliament entitled "The Gender Recognition Reform (Scotland) Bill", which was passed by a majority in the Scottish Parliament on 22 December 2022. It could not therefore become law. The Order was made on the basis that the Secretary of State had reasonable grounds to believe that the Bill modified the law as it related to reserved matters, and that the Bill would have an adverse effect on the operation of the law as it related to reserved matters. By this Petition, the Scottish Ministers challenge the making of that Order

and invite this court to reduce it (declare it to be of no legal effect). The respondent is the Advocate General for Scotland, as representing the UK Government. He maintains that the Order was validly made and invites the court to refuse the petition.

[2] In addition to the petition and answers, parties lodged various inventories of productions and marked up bundles of documents, as well as notes of argument and a core bundle and reserve bundle of authorities. Leave was sought and granted for two written interventions, the first by Stonewall and two associated bodies, and the other by the Equality Network. The Interveners also each lodged documents in support of their written submissions. Oral submissions were made on behalf of the petitioners and the respondents during the course of the substantive hearing on 19 and 20 September 2023. All of the written material relied upon and the arguments advanced during the substantive hearing have been taken into account.

Background

[3] In 2016 the Scottish Government adopted the Fairer Scotland Action Plan, part of which involved a commitment to reforming the Gender Recognition Act 2004. It undertook two consultations on that topic between 2017 and 2020, the second of which was a consultation in respect of a proposed draft Bill with the aim of implementing that reform. In summary, the proposed Bill sought to amend the circumstances, and process by which a person might obtain a Gender Recognition Certificate (GRC) in Scotland. Specifically, the key changes proposed by the Bill were to lower the minimum age at which an application can be made from 18 to 16, to introduce a "reflection period" before a certificate can be granted, to reduce the period in which a person requires to have lived in their acquired gender from 2 years to, generally, 3 months, and to remove the requirement contained in the

2004 Act for a diagnosis of gender dysphoria. There would be no Gender Recognition Panel and instead applications would be made to the Registrar General for Scotland. A person satisfying the new requirements would be entitled to be granted a Scottish Gender Recognition Certificate (SGRC), which would have effect only in Scotland. The definition of a full GRC in section 25 of the 2004 Act was amended in the Bill to reflect the new process. There are no amendments or deletions proposed to section 9 of the 2004 Act, which sets out the effect of obtaining a full GRC (as defined in section 25).

[4] The Bill was introduced in March 2022. In accordance with usual practice, prior to that introduction the Bill and its supporting documents (a policy memorandum, a financial memorandum, an equality impact assessment and a delegated powers memorandum) were made available to the UK Government. The Bill then progressed through the usual parliamentary stages and procedure, though not before being subject to a number of amendments as it did so.

[5] On 7 December 2022 the UK Minister for Women and Equalities wrote a letter to the Cabinet Secretary for Social Justice, Housing and Local Government setting out a number of concerns which the Minister had about the Bill, including concerns raised by the Equality and Human Rights Commission in relation to "significant cross-border impacts" if the Bill were to pass into law. On 19 December 2022 a virtual meeting took place between the Minister and the Cabinet Secretary to discuss the concerns expressed in that letter. The Bill was considered by the Scottish Parliament in plenary session on 20 and 21 December 2022. A series of amendments were debated and voted upon. On 22 December 2022 the Bill was debated in its now final form and passed by 86 votes to 39.

[6] On the same day, 22 December 2022, The Secretary of State made a public statement indicating that he was considering making an Order under section 35 of the Scotland Act

1998. On 16 January 2023 the Secretary of State wrote to the then First Minister and to the Cabinet Secretary informing them that he intended to make an Order under section 35, giving them a brief description of why and informing them that his reasons would be set out in the Order. The Secretary of State sent a letter on the same date to the Presiding Officer of the Scottish Parliament advising that he had decided to make an Order under section 35. Also on 16 January 2023 the Secretary of State issued a further statement confirming he had decided to make such an Order. The Order was made by the Secretary of State at 12:25 on 17 January 2023. It was submitted to the Scotland Office's Parliamentary Section at 12:34 on the same day. At 13:49, the Secretary of State made an oral statement in the House of Commons about the Order. An emergency debate on the order began at 15.27, and the Order itself was registered at 16.05, having been published on the gov.uk website at around 15.15. Confirmation was received from the Scotland Office Parliamentary Section that the order had been laid at 17.11 on 17 January 2023. This represents the first occasion that an Order under section 35 of the Scotland Act 1998 has been made.

Legislative framework

[7] In order to place parties' arguments in context, it is necessary to understand the legislative framework against which they are made. The Scotland Act 1998 ("the 1998 Act") is the Act of the United Kingdom Parliament which legislated for the establishment of the Scottish Parliament.

[8] Section 35, which is the section upon which this litigation is focussed, is grouped with a number of other sections under the heading "legislation". It is in the following terms:

"35 Power to intervene in certain cases.

(1) If a Bill contains provisions—

(a) which the Secretary of State has reasonable grounds to believe would be incompatible with any international obligations or the interests of defence or national security, or

(b) which make modifications of the law as it applies to reserved matters and which the Secretary of State has reasonable grounds to believe would have an adverse effect on the operation of the law as it applies to reserved matters,

he may make an order prohibiting the Presiding Officer from submitting the Bill for Royal Assent.

(2) The order must identify the Bill and the provisions in question and state the reasons for making the order.

(3) The order may be made at any time during—

(a) the period of four weeks beginning with the passing of the Bill,

(b) any period of four weeks beginning with any approval of the Bill in accordance with standing orders made by virtue of section 36(5),

(c) if a reference is made in relation to the Bill under section 32A(2)(b) or 33, the period of four weeks beginning with the reference being decided or otherwise disposed of by the Supreme Court.

(4) The Secretary of State shall not make an order in relation to a Bill if he has notified the Presiding Officer that he does not intend to do so, unless the Bill has been approved as mentioned in subsection (3)(b) since the notification.

(5) An order in force under this section at a time when such approval is given shall cease to have effect."

I have highlighted for ease of reference the parts of the section which are relevant for present purposes, namely section 35 (1) (b), (2) and 3(a). The 1998 Act also sets out under the heading "Supplementary powers" the procedure by which legislation subordinate to an Act of the Scottish Parliament might be made. In this case some reliance was placed upon the terms of section 104 which is in the following terms:

"104 Power to make provision consequential on legislation of, or scrutinised by, the Parliament.

(1) Subordinate legislation may make such provision as the person making the legislation considers necessary or expedient in consequence of any provision made by or under any Act of the Scottish Parliament or made by legislation mentioned in subsection (2).

(2) The legislation is subordinate legislation under an Act of Parliament made by—

(a) a member of the Scottish Government,

(b) a Scottish public authority with mixed functions or no reserved functions, or

(c) any other person (not being a Minister of the Crown) if the function of making the legislation is exercisable within devolved competence."

Schedule 5 to the 1998 Act lists those matters which are reserved to the United Kingdom Parliament and upon which the Scottish Parliament may not competently legislate under the devolution settlement. These are numerous, but for present purposes the relevant reservations are found in Schedule 5, Part II, Section A1 (Fiscal, economic and monetary policy), Section F1 (Social Security Schemes) and Section L2 (Equal opportunities).

[9] The Section 35 Order which lies at the heart of this litigation is brief in its terms.

"Citation, commencement, extent and interpretation

1.—(1) This Order may be cited as the Gender Recognition Reform (Scotland) Bill (Prohibition on Submission for Royal Assent) Order 2023 and comes into force on 18th January 2023.

(2) This Order extends to England and Wales, Scotland and Northern Ireland.

(3) In this Order, references to "the Bill" are references to the Gender Recognition Reform (Scotland) Bill as passed in its final stage in the Scottish Parliament on 22 December 2022.

Prohibition on submission for Royal Assent

2. The Presiding Officer is prohibited from submitting the Gender Recognition Reform (Scotland) Bill for Royal Assent.

Relevant Provisions

> 3. Schedule 1 lists provisions of the Gender Recognition Reform (Scotland) Order which make modifications of the law as it applies to reserved matters, and which the Secretary of State has reasonable grounds to believe would have an adverse effect on the operation of the law as it applies to reserved matters.

Statement of Reasons

> 4. Schedule 2 states the reasons for making this Order."

Schedule 1 of the Bill sets out the provisions of the Bill that the Secretary of State asserts make modifications to the law as it relates to reserved matters and then in Schedule 2, the reasons for making the order are set out. Read short, Schedule 2 explains that the reserved matters upon which the Secretary of State believes the Bill will have an adverse effect are those of Fiscal, economic and monetary policy, Social Security schemes, and Equal opportunities. The way in which the Bill is anticipated to have an adverse effect on those areas is explained in paragraphs 4 to 12 of Schedule 2. These include the creation of two parallel and different regimes for issuing and interpreting GRC's, the impact of removing safeguards on the safety of women and girls, founding on the potential for an increased risk of fraudulent applications, and the impacts upon the Equality Act 2010. The reasons for arriving at those views are then set out in more detail in Schedule 2. For present purposes, it is also worth noting that paragraph 5 to Schedule 2 is in the following terms

> "The Secretary of State considers that each reason articulated individually amounts to an adverse effect which justifies the making of this order."

[10] The explanatory notes to the Order advise that a "fuller narrative of these reasons is set out in the Policy Statement of Reasons on the Decision to Use Section 35 Powers with Respect to the Gender Recognition Reform (Scotland) Bill" followed by a link to the gov.uk website. The Policy Statement of Reasons (PSOR) was before the Secretary of State when considering whether or not to make the Order.

Submissions for the Petitioners

[11] The Lord Advocate, appearing on behalf of the petitioners, adopted her note of argument and amplified those arguments in oral submission. She began by setting out what she contended was the correct constitutional context of this dispute. By way of preamble to her substantive submissions, the Lord Advocate set out what she suggested this dispute is not about. It is not, she said, concerned with the legislative competence of the Bill – if that had been in question, then a reference under section 33 of the Scotland Act would have been the route taken. Therefore it was common ground that the Bill as passed is within the legislative competence of the Scottish Parliament. Secondly the case was not about the merits of the Bill, whilst recognising that there would be those who disagreed with it, and who would have legislated differently, or not at all. The Secretary of State, she submitted, was one such person. The court was however not being asked to rule on whether the legislation could or should have been better or different. The petitioners' position was clear - if the Order in question is allowed to stand then it would follow that the Secretary of State could veto any act of the Scottish Parliament as having an impact on reserved matters because he disagreed on policy grounds. That was what had happened in this case. This would run counter to the overriding intention of the Scotland Act in terms of which power in respect of non-reserved matters had largely been devolved to the Scottish Parliament.

[12] The Lord Advocate submitted that what the present case is about on the other hand is the proper construction of section 35 and whether the requisite conditions are satisfied to permit the Secretary of State to prevent the Bill being submitted for Royal Assent. She developed her submission to emphasise the nature of the constitutional settlement set out in the Scotland Act and placed particular weight on two key principles: those of separation of

powers and parliamentary accountability which she said were important context to the exercise of the veto contained in section 35.

[13] So far as the significance of separation of powers is concerned, the Lord Advocate placed reliance on *Cherry and others* v *Advocate General for Scotland* 2020 (UKSC) 1 at paragraph 40 and *R* v *Home Secretary, ex parte Fire Brigades Union* [1995] 2 AC 513, at 567 -8, per Lord Mustill for the proposition that whilst properly respecting the separation of powers between the executive, parliament and courts, it is permissible on occasion for the courts to step in to protect the individual and to act as a check on the use of executive power – to occupy the "dead ground" as it was described by Lord Mustill. The Lord Advocate contended that this matter fell into the "dead ground" on the basis that insufficient time had been allocated for Parliament properly to fulfil its function of scrutinising this Order and therefore this court could properly step in to review how the executive had exercised its power in this case. This latter part of the submission was not common ground between the parties, the respondent not accepting that there was "dead ground" in this case in the manner contended for by the petitioners.

[14] On the linked question of Parliamentary accountability, under reference to paragraph 39 of *Cherry,* the Lord Advocate emphasised that the courts have a responsibility to uphold constitutional values and make them effective. These principles militated against an approach which she suggested was the one adopted by the respondent, which the Lord Advocate characterised as being that the decision at the heart of this case was essentially a political one that, if it were amenable to review at all, ought to be reviewed with minimal intensity. This was a theme to which the Lord Advocate returned later in her submissions.

[15] The Lord Advocate then turned to the background against which section 35 was enacted, and sought to rely upon, or at least make reference to, statements made in

Parliament at the time of the passing of the Scotland Act as to the intention behind the enacting of section 35. She did so in support of her contention that it was clear from debate in the UK Parliament at the time (and in this context particular reference was made to statements by the Rt Hon Donald Dewar MP and Lord Sewel in the House of Lords) that the greatest respect was to be given to the legislative intentions of the Scottish Parliament and that the power in section 35 was only ever intended as a "long stop". The common understanding, she argued, was that the existence of the power of intervention should be sufficient to ensure consultation between Whitehall and Edinburgh such that the power ought never in practice to be used. Reference to statements made in Parliament in this way was contentious so far as the respondent was concerned, and I will come on to set out his position on this issue shortly.

[16] In similar vein, the Lord Advocate placed reliance on the terms of the Memorandum of Understanding between the United Kingdom Government, and the devolved administrations, which underpins relations between them. This document, the Lord Advocate contended, reflected the understanding at the time of the devolution settlement that the section 35 power would only ever be a power of last resort. Whilst properly accepting that the Memorandum equally states in terms that it is, firstly, a statement of political intent, and secondly not legally binding as between the parties, nevertheless she argued that it is important context to the manner in which the power in section 35 had been exercised in this case. Specifically, the "spectre" of an order under section 35 being pronounced had never been raised between the administrations during the passage of the Bill. The Lord Advocate criticised the respondent for, in effect, "cherry picking" in setting out what normally happens as between administrations during the passage of a Scottish Bill (in short, that Whitehall would not normally interfere during the

passage of Scottish legislation where no issues of legislative competence arose) and at the same time effectively ignoring the understanding so far as good communication between the UK government and the devolved administrations was concerned, as reflected in the Memorandum of Understanding. The UK government had demonstrated a "complete failure" to engage with both the spirit and the terms of the Memorandum of Understanding in this case.

[17] Moving on from an analysis of the background to section 35, its purpose and effect, the Lord Advocate submitted that notwithstanding the intention that it would only ever be used as a last resort, it was clear in any event from the language of the section that certain pre-conditions needed to be fulfilled before an Order under the section could be pronounced. Firstly, it was clear from section 35(1)(b) that two conditions needed to be satisfied: that the Bill in question must "contain provisions…which make modifications of the law as it relates to reserved matters "and which the Secretary of State must have "reasonable grounds to believe would have an adverse effect on the operation of the law as it applies to reserved matters". If those two conditions are satisfied, then section 35(2) thereafter imposes two requirements as to the content of the order, namely that the Order must identify the Bill and the provisions in question and reasons must be stated for making the Order ("condition 3"). The petitioners contend that none of these conditions (other than identifying the Bill in question) have been satisfied.

[18] There were a number of aspects to this issue, it was argued, the first being whether or not the Bill did in fact modify the law, in other words, whether section 35 was engaged at all. The Lord Advocate developed that question to say that although there was a definition of the meaning of "modification" in the Scotland Act to be found in section 126 ("modify" includes amend or repeal"), she argued that "modification" should be given its ordinary and

natural meaning, that is to say simply a "change in in the law". The proper approach to this question she suggested could be found in passages from the decision of the Supreme Court in a reference to it under section 33 of the Scotland Act 1998 entitled *UK Withdrawal from the European Union (Legal Continuity)(Scotland) Bill 2019* S.C. (UKSC) 13, and in particular paragraph 51 which states:-

> "As appears from the authorities cited by the Lord Advocate, one enactment does not modify another merely because it makes additional provision in the same field of law. If it did, the important distinction between the protection of enactments from modification under sch 4 to the Scotland Act, and the inability of the Scottish Parliament to legislate in relation to reserved matters under sch 5, would become obscured. When the UK Parliament decides to reserve an entire area of the law to itself, it does so by listing the relevant subject-matter in sch 5. When it has not taken that step, but has protected a particular enactment from modification by including it in sch 4, it is not to be treated as if it had listed the subject-matter of the enactment in sch 5. Where the only relevant restriction on the legislative power of the Scottish Parliament is the protection of an enactment from modification under sch 4, the Parliament has the power to enact legislation relating to the same subject-matter as the protected enactment, provided it does not modify it. Without attempting an exhaustive definition, a protected enactment will be modified by a later enactment, even in the absence of express amendment or repeal, if it is implicitly amended, disapplied or repealed in whole or in part. That will be the position if the later enactment alters a rule laid down in the protected enactment, or is otherwise in conflict with its unqualified continuation in force as before, so that the protected enactment has to be understood as having been in substance amended, superseded, disapplied or repealed by the later one."

Despite the context of that case being a reference under section 33 of the Scotland Act on the question of legislative competence, the Lord Advocate submitted that the foregoing propositions were entirely apposite in the present case. Here the interface between the Scottish Bill, the existing Gender Recognition Act 2004 and in particular the Equality Act 2010 lies in section 9(1) of the 2004 Act which provides:

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

Although it would have been open to, and competent for, the Scottish Parliament to amend section 9, it had not done so. The effect of obtaining a Gender Recognition Certificate either under the 2004 Act or by way of the new Scottish procedure would therefore be exactly the same, and thus it could not be said that the Bill modified the law as it relates to reserved matters. If that proposition was correct, then that would be an end of matters – if there had been no modification to the law as it related to reserved matters at all, then section 35 was not engaged. However even if the court took the view that there had been such a modification to the law, then the petitioners' contention was that any such modification did not have an adverse effect on the operation of the law as it applies to reserved matters. The Lord Advocate revisited this question in more detail in her specific criticisms of the terms of the Order, but prefaced those criticisms by submitting that in this context any such effects must be sufficiently weighty and cogent to justify exercising an executive power which overrides an *intra vires* legislative act. She contended that in a context where divergence has specifically been permitted, as was the case here, then the Scotland Act had provided for procedure, notably in terms of section 104 (set out above in paragraph [8]), to address any anomalies without the need for recourse to the veto set out in section 35. In support of that contention she relied upon *Martin* v *Most* 2010 SC (UKSC) 40 at paras 78-90. This procedure had as a matter of fact been invoked on over 100 occasions and any suggestion by the respondents that an order under section 104 could not have been considered in the present situation were misleading. In conclusion, on this aspect of matters, the Bill had been brought before the Scottish Parliament following in depth consultation, research and analysis of the possible effects, both positive and negative. It was within legislative competence and passed by the Scottish Parliament by a clear majority. At no time had the Secretary of State, or any other relevant official, indicated that consideration was being given

to the passing of an Order under section 35. In any event the preconditions for passing such an order were not satisfied. The Order ought on those grounds alone, to be reduced.

[19] Moving on to the Order itself, and on the hypothesis that section 35 was in fact engaged, the Lord Advocate advanced criticisms under five headings, Error of Law, Irrationality, Adverse effects, Irrelevant considerations and Reasons. I deal with each of those in turn.

Error of law

[20] The Lord Advocate submitted that the Secretary of State had made two errors of law, each of which were material, meaning that it could not be said that the decision maker would inevitably have reached the same conclusion had he approached the question correctly (*R* v *Hull University Visitor, Ex parte Page* [1993] AC 682; *Sadovska* v *Secretary of State for the Home Department* 2018 S.C. (UKSC) 38). The first error was that already highlighted – the Bill does not make a modification to the law as it applies to reserved matters, not does it have an adverse effect on the operation of the law. The Lord Advocate observed that the same point was made in the written intervention by Stonewall and others. Since no change had been made to section 9 of the 2004 Act, there was no change as to how that section operated in practice. No differentiation is made or proposed as to its effect whether one is talking about a GRC or an SGRC. The Secretary of State had failed to understand the law and give effect to it. He had thus fallen into error (*Council of Civil Service Unions and others* v *Minister for the Civil Service* [1985] AC 374 at 410, per Lord Diplock).

[21] The second error of law was to be found in the alleged effect on social security systems. Paragraph 8 of schedule 2 to the Order states:

> "The creation of a dual-system has serious adverse practical consequences on the operation of the law as it applies to the administration of tax, benefits and State pensions which are managed by integrated systems across the United Kingdom."

The Lord Advocate contended that it was plain from the language of this paragraph, specifically the reference to "Dual-system" that it was an objection to divergence simpliciter, rather than the form of divergence. In addition, this reasoning amounted to an error of law because there are no gender specific provisions in the UK tax code, HMRC systems were able to accommodate differences in the law in different parts of the UK, and therefore it was hard to understand how having a different sex in one part of the UK from another should be insurmountable. It was not possible to ascertain from a plain reading of the paragraph what the substance of the concerns actually amounted to. The onus fell upon the Secretary of State, to explain why the creation of such a Dual-system justified the exercise of the section 35 veto. The Lord Advocate pointed in this connection to what she suggested was a shift in language between the how the concerns in this area were expressed in the PSOR using language which she suggested was more tentative, to the more definitive language ultimately used in the Order itself. She queried the basis upon which this had come about. In short, there was no explanation of how this amounted to an adverse effect on the operation of the law, as opposed to an effect on the operation of IT systems. In that context the Lord Advocate rejected the reliance placed by the respondent upon the case of *Hinchey* v *Secretary of State for Work and Pensions* [2005] 1 WLR 967 as supporting the proposition that the systems that administer benefits for example are part of the practical operation of the law. The Lord Advocate contended that *Hinchey* was centred on whether or not the claimant had failed to disclose a material fact in her application for benefits and did not support the respondent's position.

[22] Finally on error of law, the Lord Advocate invited me to express a view, albeit on an *esto* basis, as to whether the Secretary of State had proceeded upon a material error of law in the event that the decision in *For Women Scotland Limited* v *The Scottish Ministers* 2023 SC 61 ("FWS2") was overturned in the Inner House (that being a reference to the fact that an appeal in that case was pending before the appeal court as at the date of the substantive hearing). In fact, since the substantive hearing in this case, the Inner House has issued its decision on FWS2, upholding the decision at first instance. This "*esto*" argument therefore falls away.

Irrationality

[23] The Lord Advocate then turned to the second branch of her challenge to the Order, under the heading of Irrationality. She began by looking at what she described as "condition 2" of section 35, namely that the Secretary of State must have "reasonable grounds" to believe that the Bill would have an adverse effect on the operation of the law as it effects reserved matters. Her submission was that the grounds on which the Order had been made were not reasonable and therefore not rational and that the Order fell to be reduced as a consequence. She amplified that submission to say that Irrationality is not a fixed standard, and that the question is context dependent, under reference to *R* v *Secretary of State for the Home Department ex parte Bugdaycay* [1987] AC 514 at 531 and, more recently, the observations of Lord Mance, in *Kennedy* v *Charity Commission* [2015] AC 455 at para 51. The same principle of a variable intensity of review was endorsed by the Supreme Court in *AXA General Insurance Company* v *Lord Advocate* 2012 S.C. (UKSC) 122 at 142. In appropriate classes of case the courts will today look closely at the process by which facts have been ascertained and at the logic of inferences drawn from them (*R(Q)* v *the Secretary of State for*

the Home Department [2004] QB36 at para 112). Applying those principles to the present case, the Lord Advocate submitted that the decision to make an Order under section 35 was one which demanded the sort of scrutiny described in *R(Q)*. Here, although the respondent suggested that the decision of the Secretary of State was one which should be given particular respect on the basis, amongst other things, that he held a particular expertise in this sphere, the basis upon which that assertion was made was unclear. The decision was said to have been made having placed particular reliance upon advice received from the "Equality Hub" and set out in the PSOR. The Lord Advocate contended that the Equality Hub was a unit within the Cabinet Office and therefore the court was being asked, in essence, to defer to internal advice from one part of the government to another, which was entirely inappropriate. Further and in any event the fact that the Order had been subject to Parliamentary approval was not conclusive of the lawfulness of the decision and it could not render the unreasonable, reasonable (*R (Javed)* v *The Secretary of State for the Home Department and another* [2002] QB 129 at para 37). Standing the timeline of the introduction and approval of the Order, it could not be said that it had been properly reviewed by Parliament, and that whilst the petitioners did not criticise the procedure as such, they wished to draw attention to the fact that at the time the Secretary of State made the Order his reasons for so doing had not been published, and that no time was allowed for debate. For all those reasons it was appropriate firstly for the Court to intervene, and secondly to scrutinise the decision with a high level of intensity.

[24] The Lord Advocate contended that there were parallels to be drawn between the approach she submitted ought properly to be taken in this case, and that taken in *R(Evans)* v *Attorney General* [2015] AC 1787. She adopted what was set out in the written intervention by Stonewall and others in respect of what she and they asserted was the significance of, and

parallels to be drawn with, that case, in which the Attorney General issued a certificate under section 53(2) of the Freedom of Information Act 2000, thereby effectively overriding a decision of the Upper Tribunal. The Supreme Court held, by a majority, that he could not exercise the power to issue a certificate, which required to be done on "reasonable grounds", to override a judicial decision if, in truth, he simply disagreed with its conclusion. The Lord Advocate observed that the court in Evans had been very exacting in its review of the exercise of an executive power when that "rubbed up against" the principle of separation of powers, and argued that the same approach ought to be taken here.

[25] Drawing these strands together the Lord Advocate submitted that the power under section 35 amounted to executive veto of the democratic exercise of power and thus any decision taken under that section should be looked at closely as intense review was required to maintain the delicate constitutional balance to which she had earlier made reference. Applying that standard of review, in testing the rationality of any decision the Lord Advocate submitted that what was required of a decision maker before taking a decision of this nature was that he take reasonable steps to acquaint himself with the relevant facts and material. This forms part of the *Tameside* duty as enunciated by Lord Diplock (*Secretary of State for Education and Science* v *Tameside Metropolitan Borough Council* [1977] AC (HL) 1014 at 1065) and which has more recently been reiterated and amplified by Hallett LJ in *R (Plantagenet Alliance Ltd)* v *Secretary of State for Justice and others* 2015 3 All ER 261 at para 100. Since both parties ultimately relied on this iteration of the applicable duty in their submissions, it is perhaps convenient to set out here the principles Hallet LJ concludes can be drawn from the authorities on this question:

> "1. The obligation upon the decision-maker is only to take such steps to inform himself as are reasonable.

> 2. Subject to a *Wednesbury* challenge, it is for the public body, and not the court to decide upon the manner and intensity of inquiry to be undertaken …
>
> 3. The court should not intervene merely because it considers that further inquiries would have been sensible or desirable. It should intervene only if no reasonable authority could have been satisfied on the basis of the inquiries made that it possessed the information necessary for its decision ...
>
> 4. The court should establish what material was before the authority and should only strike down a decision by the authority not to make further inquiries if no reasonable council possessed of that material could suppose that the inquiries they had made were sufficient …
>
> 5. The principle that the decision-maker must call his own attention to considerations relevant to his decision, a duty which in practice may require him to consult outside bodies with a particular knowledge or involvement in the case, does not spring from a duty of procedural fairness to the applicant, but from the Secretary of State's duty so to inform himself as to arrive at a rational conclusion ...
>
> 6. The wider the discretion conferred on the Secretary of State, the more important it must be that he has all relevant material to enable him to properly exercise it ..."

[26] An application of those principles to the steps taken by the Secretary of State in this case led to the conclusion that he had not fulfilled the duties incumbent upon him. The Lord Advocate listed the documents she understood the Secretary of State had had before him when considering the making of the Order, which were eight in number, including a submission from the Scotland Office containing advice on the power available under section 35, a number of submissions from UN officials, a letter to the Minister for Women and Equalities from the Chair of the Equality and Human Rights Commission, and letters from four other interest groups all of which were "hostile" the Lord Advocate contended, apart from one letter from the UN Independent expert on protection against violence and discrimination based on sexual orientation and sexual identity. This document reported that there had been no information received by that organisation that suggested that gender self-identification had been used by predatory men for the purpose of perpetrating gender or sexual violence against women. The Secretary of State had failed to explain why he

considered that the Scottish experience would be any different to the international experience in this respect and accordingly why he asserted as part of the basis for making the Order that this was a reasonable concern, having been told there were no credible reports to support that. The Lord Advocate once again relied upon the written submission from Stonewall as well as that of the Equality Network in this context and drew attention to the information provided therein in respect of the international experience in this area. None of that material, she suggested, had been before the Secretary of State, and he had given no indication that he had considered to any extent the areas that had been considered by the Scottish Parliament or other jurisdictions. No Secretary of State could have reasonably considered he was in a position to make a decision to exercise the power under section 35 without having regard to arguments in favour of the Bill as well as against it. If the *Tameside* duty to familiarise himself with relevant material was engaged then it could not be permissible to shut his eyes to one side of the argument, otherwise there would be no point in imposing the duty. The consideration of the issues must be balanced in order to comply with the duty. The Lord Advocate submitted that if what the Secretary of State had done was held to be lawful that would "empty *Tameside* of any meaningful content."

Adverse effects

[27] Moving on to the question of adverse effects, the Lord Advocate contended that the Secretary of State's reasons for perceiving that the Bill would have adverse effects on the operation of the law as it relates to reserved matters were unfounded, too speculative or hypothetical, or insufficiently cogent or material to justify making the Order. His claim that there would be adverse effects was not one reasonably open to him and for that reason also the Order should be reduced.

Irrelevant considerations

[28] The next chapter of the Lord Advocate's submissions focussed on what she submitted were irrelevant considerations taken into account by the Secretary of State when making the Order. These criticisms were also relevant to consideration of "condition 2", that is to say the requirement that the Secretary of State must have reasonable grounds to believe that there would be an adverse effect on the operation of the law as it applies to reserved matters. The Lord Advocate advanced the proposition that a decision maker may be faced with three types of considerations: (a) those they are required to take into account, (b) those they are required **not** to take into account, and (c) those which they may choose for themselves whether or not to take into account (*R (Hurst)* v *London Northern District Coroner* (HL(E)) 2007] 2AC 189 at para 57). Failure to have regard to considerations of type (a) or (b) will vitiate the decision. So far as type (c) is concerned, the touchstone is irrationality. The Lord Advocate submitted that the Secretary of State had relied upon irrelevant considerations in two respects. The first was the divergence between the law of Scotland and that of England and Wales in this area. That was an irrelevant consideration and yet it featured heavily on the reasoning of the Secretary of State and in fact was one of the most significant reasons relied upon by him. Divergence in this area is a "type (b)" consideration – in other words one the Secretary of State was <u>not</u> allowed to take into account because Gender Recognition is an area in which the Scottish Parliament is permitted to legislate and therefore diverge from England and Wales. It is a policy question and so by necessary implication of the Scotland Act a matter the Secretary of State is required not to take into account. The Lord Advocate recognised that the Secretary of State's position was that the issue was not the <u>fact</u> of divergence but the <u>effect</u> of that divergence but she contended that the logic of that position was that the Secretary of State objected to and presumably would

veto any divergence that would lead to people having a different sex in Scotland or England and Wales, as well as the effect on the numbers applying for a SGRC.

[29] The second irrelevant consideration the Lord Advocate submitted was the question of fraudulent applications and the increase in the cohort as a result of the new provisions. This could be found in paragraphs 4(b) and 10 of Schedule 2 to the Order. The reason this was irrelevant could be stated succinctly – the proper purpose of section 35 is to block Royal Assent to a Bill which has an adverse effect on the operation of the law, not to block Royal Assent to devolved legislation where the Secretary of State considers that different policy choices could be made. There was no explanation given why fraudulent applications were thought to be a problem given the experience in other jurisdictions, and the Lord Advocate suggested this was another aspect of the Secretary of State failing to familiarise himself with information readily available. The Lord Advocate once again relied upon the written intervention by Stonewall and others at paragraphs 6-9 and that of the Equality Network at paragraphs 24-27 in support of her argument that the international experience did not support an increase in fraudulent applications in jurisdictions where gender self-identification was permitted.

Reasons

[30] The Lord Advocate then turned to the final chapter of her criticisms, focussing on the reasons set out for making the Order, which she contended were inadequate in law and thus did not satisfy "condition 3" of section 35. The informed reader and the court must be left in no real and substantial doubt as to the reasons for the decision and what material was taken into account in reaching the decision (*Wordie Property Co Ltd* v *Secretary of State for Scotland* 1984 SLT 345). Where the legislature has imposed an obligation on the decision maker to

provide reasons the common law has long required that those be of sufficient quality to discharge that obligation (*Chief Constable, Lothian and Borders Police* v *Lothian and Borders Police Board* 2005 SLT 315 at para 70*)*. It is the reasons in the order that require to be scrutinised, with an intensity of review greater than that in *Wednesbury (Associated Provincial Picture Houses Ltd* v *Wednesbury Corporation* (1948) 1 KB 223*)*. So far as the policy statement of reasons is concerned, the law requires the Secretary of State to reference his reasons in the Order, and the Order stands or falls on the strength of those reasons – in short it was not open to the court to look at the PSOR – the Order stands or falls on the reasons in that Order. Those reasons did not support the conclusion that the Bill would have an adverse effect on the operation of the law as it relates to reserved matters. Further it was clear that most of the perceived adverse effects related to the interaction with the Equality Act, but it was noteworthy that in the submission prepared by the Scotland Office dated 13 January 2023 the potential effects highlighted were all said to be problems that already exist in the interaction between the 2004 Act and the 2010 Act, but what had not been demonstrated by the Secretary of State by any evidence was that an increase in SGRC's would have any impact on the operation of the law. The Lord Advocate submitted that the Secretary of State would require to demonstrate any impact on the operation of the law by statistical evidence in relation to the Public Sector Equality Duty (PSED), for example. When pressed as to whether it was definitely the petitioners' position that statistical evidence would be required to discharge any duty incumbent upon the Secretary of State in this context, the Lord Advocate did not ultimately insist on that proposition, but did insist that the Secretary of State had to have some evidence, something to "point to" to justify the reasons upon which his decision was taken. However here there was no evidence or cogent explanation to vouch the proposition that the issues identified amounted to problems in the operation of

the law as it stands. More people using or falling within the terms of a legislative provision does not constitute an effect on the operation of the law. Rather what was required was evidence of an effect on the operation of the law itself which could not be demonstrated where the numbers likely to be involved were very small so far as the population of Scotland is concerned, and even smaller in the United Kingdom context. By way of contrast, it was the petitioners' understanding that the numbers of people applying for a GRC through the UK government's online application system had resulted in increased numbers of applications well beyond the numbers projected to apply for a SGRC under the proposed legislation. The reasons put forward by the Secretary of State were unsupported by evidence and the concerns expressed generally speculative. The example given of the impact on schools failed to recognise the fact that there are only six single sex schools in Scotland and that none of those had raised any concerns about the effect on them of the proposed legislation. The petitioners could not understand the basis for the concerns and if that were so the Lord Advocate queried rhetorically how an informed reader would not be left in real and substantial doubt about the basis for the reasons.

[31] In concluding her submissions under the heading of "Reasons", the Lord Advocate submitted that the Secretary of State's assessment of the effect of the Bill on the operation of the law was in every respect flawed in at least one of the ways set out by her. The consequence was that the order fell to be reduced.

[32] The Lord Advocate then addressed a point she anticipated might be raised by the respondent, and that was the proper approach to be taken if the court took the view that some, but not all of the reasons were flawed. Whilst accepting that a single powerful and cogent reason might be enough to "save" the Order, the Lord Advocate submitted that the proper approach in that situation was to consider whether the overall effect of any flawed

reasons was to undermine the decision as a whole such that it could not stand. Put another way, if reasons started to fall, then a "critical mass" might be reached beyond which the Order itself must inevitably fall. That assessment had to be made by reference to what the Lord Advocate contended was the appropriate standard of review against the background of what had actually occurred – an executive override of a lawful decision of parliament.

[33] In drawing her submissions to a conclusion, the Lord Advocate submitted that whilst the subject matter of this petition was gender recognition, the case raised important questions as to the constitutional arrangements of the United Kingdom. Under those, the Scottish Parliament has an unquestioned mandate to make laws it considers appropriate. It would be inconsistent with that position to recognise a broad and largely unfettered power to block those choices. The United Kingdom parliament cannot have intended to have enacted such a provision. Rather at the time it enacted section 35 it was understood to be a last resort only to be utilised by the executive under the close supervision of the court. If that proposition was accepted, then the reasons given for an Order under section 35 required close scrutiny.

Submissions for the respondent

[34] In opening his submissions, Mr Johnston KC adopted his Note of Argument and invited me to refuse the petition. Prior to embarking upon his substantive submissions, Mr Johnston addressed the last of the points raised by the Lord Advocate, namely the proper approach to take if one or more reasons started to "fall". Under reference to *Holmes-Moorhouse* v *Richmond upon Thames LBC* [2009] 1 WLR (HL(E)) 413 at paragraph 51, Mr Johnston relied upon the analysis of Lord Neuberger, when he said:

> "…..a decision can often survive despite the existence of an error in the reasoning advanced to support it. For example, sometimes the error is irrelevant to the outcome; sometimes it is too trivial (objectively, or in the eyes of the decision-maker) to affect the outcome; sometimes it is obvious from the rest of the reasoning, read as a whole, that the decision would have been the same notwithstanding the error; sometimes, there is more than one reason for the conclusion, and the error only undermines one of the reasons; sometimes, the decision is the only one which could rationally have been reached. In all such cases, the error should not (save, perhaps, in wholly exceptional circumstances) justify the decision being quashed."

Mr Johnston drew from that passage the proposition that the proper approach would be to consider the materiality of any error or failure to give reasons and consider whether any such error or failure undermines one of the reasons, or all of the reasons, in other words weight or "critical mass' might be relevant. However he stressed the importance of bearing in mind the terms of paragraph 5 of schedule 2, stating that each reason set forth is a separate ground for making the Order – in other words they have separate force.

[35] In a submission mirroring that of the petitioners, Mr Johnston then set out what the respondent considered this case was <u>not</u> about, and listed two matters in particular – the merits of the policy to which the Bill gives effect; nor was it about a policy disagreement between the Scottish and UK governments. Rather the Secretary of State had set out in the Order his concerns that the Bill would have an adverse effect on the operation of the law.

[36] In developing that submission, Mr Johnston underlined that this case was not to do with legislative competence. Had that been so, the challenge would have been under an entirely different section of the 1998 Act. The validity of the Order under section 35 was the sole issue before the court. Mr Johnston further proffered the view that throughout her submissions the Lord Advocate seemed to be proceeding on the assumption that the Secretary of State ought to have been conducting the same sort of exercise as that carried out by the Scottish Parliament, but in so doing her approach was flawed. That was not the

exercise conducted by the Secretary of State, and that was not his duty. His concern was, and is, to protect the interests of the UK if he identified an adverse effect on the operation of the law as it affects reserved matters emerging from the Bill. Therefore his focus, and his concern, is very different from what the Scottish Parliament put out in their own published discussions and the report of their lead committee on the Bill.

[37] Mr Johnston then embarked on his substantive submissions which broke down into two broad chapters, firstly the law, the framework for review and submissions about the intensity of review, and secondly what he described as the "evidential question" and the grounds of challenge.

[38] Dealing firstly with the framework, Mr Johnston made eight separate points:

(i) The interpretation of section 35 is a matter for the court; the court's role in interpreting this Act as with any other is to give effect to ordinary meaning of the words in the section (*UK Withdrawal from the EU(Legal Continuity)(Scotland) Bill 2019* S.C.(UKSC) 13, para 12).

(ii) There are checks on the legislative competence of the Scottish Parliament built in to section 29 but that is not the only check, and this case is not about legislative competence.

(iii) Section 35 is a key feature of the devolution settlement of a different character than the rules on competence but integral to the constitutional balance of power. Section 35 is an express recognition on the face of the Act that a devolved bill may have an adverse impact on operation of the law. This gave rise to no ambiguity. Under reference to *Pepper (Inspector of Taxes)* v *Hart* [1993] AC 593 Mr Johnston submitted that there needed to be an ambiguity before it was permissible to look at a ministerial statement as the petitioners had sought to do; there being no such ambiguity, the conditions for "*Pepper* v *Hart*" use of ministerial statements were not met.

Nor, Mr Johnston continued, was there anything sinister about this power, it is part of the scheme of the Act, part of the machinery of how parliaments work. It enabled the Scottish Parliament to work within its competence on the one hand and on the other hand allows the UK executive to intervene, even though proposed legislation is within legislative competence. This is part of the scheme as a whole. It is not an unusual provision, it is meant to work together with the other parts of the devolution settlement.

(iv) The nature of the power conferred under section 35 determines the nature of this court's function in a challenge such as the present, the task is to apply the language and apply the structure enacted by parliament. The court's function is not to act as primary decision maker, that is vested in the Secretary of State, the court's function is one of review, one of rationality. In making that submission, Mr Johnston accepted that the language employed in the relevant case law has developed from that in *Wednesbury* or *Council of Civil Service Unions*, in that more recent cases are more likely to use 'range of reasonable responses open to decision maker' (see for example *Kennedy)* . Such developments still preserved the notion of review, that is to say whether the decision maker made a decision within a range of reasonable responses, not what the court would have decided for itself. It was consistent with the function of review that a decision ought to be reviewed on the basis of the material before decision maker. It was not appropriate to judge the rationality of the decision in light of material which had not been before the decision maker (*Tsiklauri* v *Secretary of State for the Home Department* 2020 SC 495, at paragraph 13 per Lord Brodie*)*.

(v) There exists a line of authority that indicates that close or intense scrutiny is appropriate when the decision in question determines the fundamental rights of the individual (*Kennedy* v *Charity Commission* [2015] AC 455 at paragraphs 51, 53 and 54*)*. There was therefore no 'read across' from cases relied upon by the petitioners which concerned

fundamental human rights, such as *R* v *Home Secretary Ex parte Bugdaycay* [1987] AC 514 at page 531. Mr Johnston's position was that intense scrutiny was appropriate where fundamental human rights were concerned, but in the present case in contrast there were no individual human rights at play, and there was no claim that the decision in question was contrary to the Human Rights Act. Therefore in this case low intensity was appropriate albeit the issue was a weighty one.

(vi) The courts recognise that certain kinds of decision are entitled to a particular degree of respect either because of the expertise of the decision maker or because the decision was not one that courts were well placed to examine, or both of those things (see *Kennedy, cited above).* In this context the observations of Lord Sumption in *R (Lord Carlile)* v *Home Secretary* [2015] AC 23 were particularly apposite and important, although made in the context of a case about human rights. At paragraph 32 he said the following:

> "The executive's assessment of the implications of the facts is not conclusive, but may be entitled to great weight, depending on the nature of the decision and the expertise and sources of information of the decision-maker or those who advise her. Secondly, rationality is a minimum condition of proportionality, but is not the whole test. None the less, there are cases where the rationality of a decision is the only criterion which is capable of judicial assessment. This is particularly likely to be true of predictive and other judgmental assessments, especially those of a political nature. Such cases often involve a judgment or prediction of a kind whose rationality can be assessed but whose correctness cannot in the nature of things be tested empirically'".

In the present case, although criticism had been made of the reliance placed on advice from the Equality Hub, the fact is that the government employs people to provide advice and it takes that advice. The Equality Hub is a unit within government, staffed by experts in the matter of equality and thus well placed to provide the sort of advice required by the Secretary of State. The observations of Lord Sumption about the nature of predictive assessments, there being possibly no single right answer and that a range of judgments might be made with equal propriety were entirely in point in this case. Provided that a

judgment was made by the decision maker within that range it is not to be disturbed by the court and is sound as a matter of public law. That approach was entirely consistent with earlier authorities such as *R* v *Secretary of State for the Environment ex parte Nottinghamshire County Council and another* [1986] 1 AC 240 at 250 B/H where Lord Scarman observed, *inter alia:*

> "If Parliament legislates, the courts have their interpretative role: they must, if called upon to do so, construe the statute. If a minister exercises a power conferred on him by the legislation, the courts can investigate whether he has abused his power…… But, if a statute, as in this case, requires the House of Commons to approve a minister's decision before he can lawfully enforce it, and if the action proposed complies with the terms of the statute (as your Lordships, I understand, are convinced that it does in the present case), it is not for the judges to say that the action has such unreasonable consequences that the guidance upon which the action is based and of which the House of Commons had notice was perverse and must be set aside. For that is a question of policy for the minister and the Commons, unless there has been bad faith or misconduct by the minister. Where Parliament has legislated that the action to be taken by the Secretary of State must, before it is taken, be approved by the House of Commons, it is no part of the judges' role to declare that the action proposed is unfair, unless it constitutes an abuse of power in the sense which I have explained"

Mr Johnston observed that this authority had been cited with approval in cases upon which the petitioners relied, in particular *Axa General Insurance Company* v *The Lord Advocate* 2012 S.C.(UKSC) 122 at paragraph 148.

(vii) Mr Johnston then moved to consider the specific wording of section 35(1)(b) and drew a parallel with a recent case in which similar wording had been employed, albeit in the context of Regulations empowering financial sanctions against companies operating in Belarus. From that case, *LLC Synesis* v *Secretary of State for Foreign, Commonwealth and Development Affairs* [2023] EWHC 541 at paragraphs 71,73,76,77, 81 and 82 Mr Johnston drew the following propositions:

That there was a distinction between the statutory threshold ("reasonable grounds to suspect" as it was in LLC Synesis, "reasonable grounds to believe" in the present case) and

the standard of review applied by the Court. The former required a state of mind, rather than a state of affairs. The latter, the standard of review, required no more and no less than the application of well-established principles.

[39] When considering the statutory threshold, the decision maker must consider all the material or information known to him or that ought to have been within his knowledge after reasonable inquiry. Importantly, "reasonable grounds to suspect (or believe)" does not import a standard of proof, it is arrived at on an assessment of the available information and material.

[40] This assessment involves the Secretary of State trying to assess what would happen if the Bill came into force, a predictive judgment, thus proof on balance of probabilities cannot be relevant because nothing has happened yet.

[41] *LLC Synesis* confirms that the role of the Court in reviewing a decision of this nature is not to stand in the shoes of the decision maker but to examine whether the decision was either based on no evidence or was irrational. In such a situation the margin of appreciation must be broad in a context which involved the making of expert judgments in an area of government policy. Thus the context of political judgment is relevant to the intensity of review.

[42] In this context Mr Johnston turned to the reliance placed by both the petitioner and Stonewall (in their written intervention) on the case of *Evans* (cited above). Such reliance was misconceived for two reasons, firstly because the decision in that case was predicated on the particular factual background, namely a situation where the executive had overruled the reasoned decision of a tribunal which had heard evidence in a public hearing. It was thus a binding decision as between the parties and could not be ignored or set aside by the executive. The second reason touched on rights under article 6 and the principle of legality

as explained by Lord Neuberger at paragraph 52. That principle had no application in the present case. Section 35 did not violate either of these two principles or touch on any other fundamental constitutional principles. There was no impact on either the separation of powers or parliamentary accountability by the making of an Order under section 35. Importantly, section 35 was as much a part of the constitutional framework as any other provision in the 1998 Act.

[43] Mr Johnston's point (viii) was that section 35 did not specify any considerations that must or must not be taken into account. That being so the duty on a minister under *Tameside* or *Plantagenet* is to take rational steps to inform himself. Therefore the court should only intervene if satisfied that no reasonable secretary of state, on the basis of the enquiries made, could have been satisfied he could make the Order. The four week time limit set down in the Act was important context. This allowed the Secretary of State to inform himself, and to form a reasoned view but did not envisage or permit an extended exercise of investigation of evidence gathering. That said, Mr Johnston took no issue with the proposition that draft legislation is provided to the UK government at various stages, to permit scrutiny for legislative competence. There was no dispute that the Secretary of State was able to see material earlier if he wished to. However, the Lord Advocate's argument overlooked the crucial point that the Secretary of State could not take a view under section 35 until the Bill was in its final form. Only then could he take a rational decision about whether there might be an adverse effect. In the specific context of this Bill it was noteworthy that the marshalled list of amendments to the Bill at stage 2 and 3 runs to 35 pages, with some making quite fundamental proposals for amendment. Therefore a decision could not be taken rationally until the Bill was in its final form.

[44] Mr Johnston recognised that the petitioners' position was that the making of an Order under section 35 was in any event unnecessary, given the alternative procedure available in section 104 of the 1998 Act to bring forward subordinate legislation. However he rejected that as a realistic alternative. The proper use of section 104, he argued, arose when the two governments recognised that proposed legislation might give rise to an encroachment on reserved matters. A minor matter like that might easily be dealt with by subordinate legislation, but in the present case a very different situation had arisen. There was no scope for "tidying up" and making sure any competence issues were dealt with, here the issues raised by the Bill were much more significant. Whilst he did not go so far as to suggest it would not be competent to exercise the power in section 104 to bring forth subordinate legislation, Mr Johnston suggested that that power had never been used in an equivalent situation to the present one. The proper use of the section 104 procedure is explained in *Martin* v *Most* 2010 S.C. (UKSC) 40 at paragraphs 41-42 and 78-90. Mr Johnston also posed the rhetorical question as to what was the purpose of section 35 if a solution could be found by exercising the power in section 104 every time an issue of adverse effect on reserved matters arose. He answered his own question by suggesting that the explanation is that the respective powers were not overlapping. The sections dealing with legislative competence, including section 35 were clearly dealing with the fundamental issues of when the UK government has standing to intervene on these questions, and exactly what it can do in such a situation.

[45] In concluding this chapter of his submissions, Mr Johnston submitted that he drew from his first eight points the proposition that the UK parliament has set preconditions to the exercise of the section 35 power. Subject to those preconditions the power is a broad one for the judgment of the Secretary of State. Rationality is the touchstone of this court's

jurisdiction at each stage. That applies in relation to the manner and degree of enquiry where there are reasonable grounds to believe, and the exercise of the power itself. None of the cases relied upon by the petitioners assisted in identifying the appropriate standard of review, rather the petitioners were instead relying upon a number of broad themes such as separation of powers and parliamentary accountability in support of the proposition that particularly intense review should be carried out. When the Lord Advocate submitted that the respondent argued for an unfettered discretion, nothing could be further from the truth, and that was clear from the analysis conducted of the cases grounded in the 1998 Act and in the case law on the appropriate intensity of review. The power was a broad one, but far from unfettered – it could be exercised only when the statutory preconditions are satisfied and subject to the supervision of the court. That said, the court must be sensitive to the kind of decision being taken, its political context, and that it relates to anticipation of future events but that did not in any sense mean it was not a reviewable decision, on the contrary it was important that the court be entitled to supervise the decision making process.

[46] Mr Johnston then turned to analyse the submissions for the petitioners. In the first place he rejected the admissibility of any purported reliance on ministerial statements to interpret section 35. *Pepper* v *Hart* was clear and still provided the appropriate test. There was no ambiguity in the legislation that might make recourse to such statements admissible and any attempt to do so should be rejected. Secondly, the Lord Advocate was correct to accept that the Memorandum of Understanding was not an aid to construction of the section. It is clear that this document is a political agreement, and that on its face it is stated not to be legally binding. Furthermore it is a later document that did not exist at the time the Scotland Act was passed, and finally as is made clear in *R (Miller)* v *Secretary of State*

(SC(E&NI)) [2018]AC 61 at para 148 the extent to which a party did or did not comply with that political agreement is not a justiciable question.

[47] On the argument that because the Scottish Government is accountable to the Scottish Parliament it is or would be unconstitutional to veto legislation on the grounds of a policy disagreement, Mr Johnston's response was firstly that section 35 was in no way unconstitutional, it was expressly part of the constitutional structure. Secondly the suggestion that the veto had been used on the grounds of a policy disagreement was a "red herring", the sole question was whether the necessary preconditions in the section had been met and whether the discretion afforded had been exercised rationally. In the present case the order had been made because of an adverse effect on the operation of the law and nothing in the material before the court would permit the conclusion that the making of the Order was anything other than a good faith decision under section 35. It was important to bear in mind that the Scottish Parliament was not concerned with adverse effects of the law applying to reserved matters, rather it had wider policy considerations before it and the very least of the matters it had to consider is the one which the Secretary of State had before him. That is a highly relevant distinction, this matter was not in the territory of policy agreement or disagreement, rather the question for the Secretary of State was simply a different question from the one before the Scottish Parliament.

[48] Moving on, Mr Johnston rejected any suggestion that the procedure in Parliament at the time of the making of the Order had been anything other than in accordance with normal practice and that there was no question of this matter falling into the "dead ground", in the words of Lord Mustill, justifying intense review of the Order, and accordingly the "separation of powers" argument advanced by the petitioners had no force.

[49] How then should these principles apply to the present case? Mr Johnston turned firstly to the *Tameside* duty, which he accepted was applicable in this case. Put shortly, the Secretary of State had material before him to allow him to for a view on the likely adverse effects of the Bill if enacted. Secondly, the Secretary of State's decision that the provisions of the Bill would have an adverse effect on the operation of the law so far as the Equality Act, fiscal policy, and social security was within the range of reasonable decisions open to the Secretary of State. On the proper approach to the *Tameside* duty, Mr Johnston contended that the main thrust of the petitioners' arguments centred on the adequacy of information available, and the information it was suggested the Secretary of State ought to have considered. Properly understood, subject only to the *Tameside* duty to inform himself adequately, the assessment is one of rationality on the basis of the material which was before the Secretary of State. The fact that some material was not before him does not affect the rationality of the decision. It was important to remember that the decision for the Secretary of State was whether or not there would be an <u>adverse</u> effect on the operation of the law, so it was not surprising that much of the material to which he had regard focussed on that question. That was not to say that he was not permitted to look at other material, but it was rational that the material before him should primarily address the possibility of adverse effect. This material included detailed policy advice and advice from the Equality Hub that went on to form the basis of the PSOR. The Equality Hub, Mr Johnston explained, sits within the Cabinet Office and is comprised of different units focussed on issues such as disability, race equality and a social mobility unit. The collective expertise of the Equality Hub provided reports to various Ministers, in particular the Minister for Women and Equalities. The issues thrown up in this case would have been considered by the Government Equalities Office which forms part of the Equality Hub.

[50] There was a substantial body of material before the Secretary of State drawing attention to the potential adverse effects, for example the Report of the UN Special Rapporteur on violence against women and girls, Reem Alsalem, dated 29 November 2022. The Secretary of State also had before him the views of the Equality and Human Rights Commission expressed in a letter dated 22 December 2022, raising concerns about the potential impact of the Bill on cross border issues. He thus had a range of views available in detailed evidence before him. Mr Johnstone recognised that the petitioners criticised the approach of the Secretary of State to the consideration of material on the basis that no Secretary of State could have reasonably considered that he was in a position to make a decision without having regard to the material which had been before the Scottish Parliament and which was available from other jurisdictions. His response to that criticism was to point out that the concerns raised by the EHRC and other organisations were expressly before and taken into account by the nominated committee scrutinising the Bill and so much of the same material was before both the Scottish Parliament and the Secretary of State. More importantly however, the approach contended for by the petitioners on this aspect of matters came close to inviting the Court to conduct a merits review rather than the review function of the Court exercising its supervisory jurisdiction. Such an approach was entirely inconsistent with the authorities upon which the petitioners relied, such as *Plantagenet*. Specifically, the first four "*Plantagenet*" points (as set out in para [25] above) are wholly inconsistent with the approach adopted by the petitioners. The detailed criticism of the reasons upon which the Order was made are not compatible with recognising the respective roles of a Judge exercising the supervisory jurisdiction of the Court and that of the primary decision maker considering material upon which to make a decision. At every stage, however intensely the Court examines the decision, the test is still essentially one of

rationality, in other words the Court satisfying itself whether the decision was one no reasonable decision maker could have done, or been satisfied of. To comply with the *Plantagenet* approach, the question of what enquiries are appropriate turns on the question of the information necessary for the decision in question. Here the decision is one on the operation of the law as it affects reserved matters. The task for the Secretary of State is therefore a narrower one – to make his decision he needs material which allows him to assess whether as a matter of prediction there is likely to be an adverse effect on the operation of the law as it affects reserved matters. The suggestion that there had to be statistically significant material before the Secretary of State to allow him to do so was completely inconsistent with *Plantagenet* and *LLC Synesis* and in any event no authority had been cited to support that proposition. More broadly, the petitioners' argument failed to take account of the difference between the tasks upon which the Scottish Parliament and the Secretary of State were engaged. The Scottish Parliament were considering a wide range of policy issues but the statutory task was quite different. Since the only decision the Secretary of State had to make was one focussed on potential adverse effects on the operation of the law that is why the submissions before him centred on that question, so that the Secretary of State could decide whether or not to make the Order, that being the statutory question before him. In order to reach that decision he was not required to replicate the work that the Scottish Parliament had done, still less would it be possible to replicate that work in the statutory period of four weeks when the Scottish Parliament had taken a number of years to consider the question before it.

[51] Looking in more detail at the question of adverse effects, Mr Johnston submitted that the concern related to the impact of two different and parallel schemes, and the adequacy of the safeguards built in to the Bill. The Secretary of State did not rely on the fact of

divergence, it was accepted that the Scottish Parliament was entitled to make its own legislation within the extent of devolved power. Mr Johnston pointed to the PSOR, and in particular paragraphs 18 to 21 and asserted that he placed reliance on those reasons, which were as much the reasons for the decision as those in schedule 2 to the Order. Mr Johnston acknowledged that on the question of adequacy of safeguards, both the petitioners and the interveners relied upon international comparators to refute that concern but observed that there was no single model of self-identification across the various jurisdictions referred to and, importantly, none of the comparators relied upon had, so far as the respondent was aware, a similar constitutional structure to that of the UK. Further the international material could not assist in the interplay between the 2004 and 2010 Act and was therefore overall of limited assistance.

[52] Turning to the criticism made that the material relied upon by the Secretary of State, at least to some extent, founded upon issues and concerns that already existed, Mr Johnston's first response was that the suggested additional number of people who might obtain a SGRC in consequence of this legislation was believed to be significantly understated. In any event the concern was not just the size but the nature of the potential cohort. Not only might there be a significant increase in numbers, but the character of those applying would also change. That concern emerged partly from the lowering of the age limit, partly from the question of self-identification and also from the change to the period of time required to live in the acquired gender. The identified exacerbation of existing issues was a relevant consideration. As an aside, Mr Johnston observed that the criticism made by Stonewall in their intervention of the alleged failure by the Secretary of State to consider the positive effects of obtaining a SGRC was not mirrored in that of the Equality Network who suggested that, in contrast to Stonewall and others, there were very few occasions where

having a GRC had any practical effect. It was hard therefore to form a concluded view on the positive benefits of obtaining a SGRC in light of those different submissions. In contrast, in the time available and having had regard to advice from experts, notably the Equality Hub, the EHRC and the UN Special Rapporteur, the Secretary of State had taken rational steps to make his decision that separately and cumulatively there were adverse effects on the operation of the law. Mr Johnston reiterated that the effect of paragraph 5 of schedule 2 was that any particular adverse effect taken alone justified the making of the Order. Even if the Court came to the view that on the material available the Secretary of State could not have found an adverse effect on one ground or the other, unless that applied to all of the reasons the Order would survive.

[53] Mr Johnston then focussed his submissions on the alleged errors of law in the order. The first was the "*esto*" argument in terms of which the Court was being invited to make a decision on the hypothesis that the decision in *For Women Scotland* v *The Scottish Ministers* was overturned as a result of the Reclaiming Motion then pending before the Appeal Court. (For the reasons already explained, given that the decision in FWS 2 has now been upheld by the Appeal Court, this argument requires no further consideration.) The second substantive argument in relation to error of law was the petitioners' contention that the operation of the 2010 Act was not changed by the Bill. The respondent contended that it was, and therefore the Secretary of State was correct to conclude that the Bill modifies the law as it relates to reserved matters. Only on an unduly narrow view could it be said that the Bill did not do so. The 2004 Act is law which applies to reserved matters in the Order, as the only way to change legal sex is through the mechanism set out in the 2004 Act. The changes proposed in the Bill amount to modification because they change the conditions under the 2004 Act for a change of legal sex. The effect of the provisions of the Bill as to who

can obtain a SGRC and the process by which this is achieved will affect the unqualified continuation of the 2004 Act as it was before. Therefore it can correctly be said that the 2004 Act has been in substance amended, superseded or dis-applied (*UK Withdrawal from the European Union (Legal Continuity)(Scotland) Bill* 2019 SC (UKSC) 13 at para 50, 51*)*. The petitioners' argument simply misinterpreted the word modification, when they pointed to the language of section 9 and said that it was unchanged. Mr Johnston conceded that it was true that the text remained the same, but argued that textual amendment was not the test, the question was whether it could be said that the law has been in substance amended, superseded or dis-applied. The clear basis for that submission could be found at paragraph 9(c) of the Schedule to the Bill, where section 25, the definition section, is amended to change the meaning of "full gender recognition certificate" to that envisaged by the new procedure in the Bill. Therefore section 9 of the 2004 act, referring as it does to the effect of obtaining a "full gender recognition certificate" would mean something different to what it does currently. Although the petitioners argued that the effect would be the same so far as in the individual recipient of the certificate was concerned, that was not the question raised in section 35 or relevant to the considerations in the PSOR and elsewhere.

Mr Johnston recognised that the petitioners argued that the *Continuity Bill* case was not relevant because it was concerned with the question of competence, and not the application of section 35, but he contended that it was relevant for two reasons; firstly that in section 35 we are dealing with the same part of the 1998 Act dealing with the constitutional settlement powers conferred on the Scottish Parliament and those retained by the UK Parliament and secondly that given that this section is part of the same suite of powers it would be incoherent if modify meant one thing in one section of this part, and something else in another. In paragraph 50 of the *Continuity Bill* case the context was the definitions section of

the 1998 Act so there was no reason to restrict its application only to the sections under discussion in that case. Finally, on this aspect of matters, the proposition for the petitioners that more people using or falling within a statutory provision does not constitute an effect on the operation of the law was flawed. The question for the Secretary of State was one of the impact on how the law operates in practice. Therefore an increase in numbers, and/or a change in the nature of the cohort was clearly capable of falling within the meaning of those words.

[54] Mr Johnston then turned to the petitioners' criticisms of the reasons advanced in support of the Order. He disagreed with the analysis of the Lord Advocate that only the reasons in Schedule 2 to the Order could be considered in this forum, and not the PSOR. Mr Johnston's submission was that Parliament mandated that the Minister making the Order should give reasons for it. The Order complied with that requirement in setting out reasons in Schedule 2, however it was quite a different thing to say that the Court could only look at Schedule 2, to do so would involve shutting eyes to the whole context which was relevant to the interpretation of the Order. The terms of section 35(2) do not require that the Court ignore reasons not in the Order itself, and the contextual approach to legislation would make such an approach surprising. It was also important to note that the two documents were doing different things, the Order being legislation whilst the PSOR is a policy document setting out why the legislation was made. Thus they were written with different audiences in mind and it would not be expected to find the PSOR attached to the Order, and that was underscored when one had regard to the different language employed, and the different presentation of the documents. One was legislation, the other is the reasons for that legislation. Put another way, the PSOR presents the reasons for the Order essentially in the form in which they were considered by the Secretary of State. That being

so, it would be quite surprising if the document underlying the decision made were to be ruled out of consideration, when it was part of the context in which the Order was made. Mr Johnston referred to and relied upon *R (O)* v *Home* Secretary (SC(E)) [2023] AC 255 at para 30 in support of this proposition. For all of those reasons which overlap on the particular facts and as a matter of generality, the PSOR is part of the context of the reasons which the Court ought to scrutinise in exercising its supervisory jurisdiction. In any event the reasons provided in Schedule 2 are adequate as a matter of public law. The informed reader is aware of the terms of the Bill and the petitioners had failed to identify any reason about which such a reader would be in doubt, and it was incumbent upon them to do so (*Wordie Property, cited above and ,South Bucks District Council* v *Porter (No2)* [2004] 1 WLR 1953). The approach contended for to the scrutiny of reasons did not comply with the conventional approach. Mr Johnston observed that nothing in the correspondence following the making of the Order suggested that the Scottish Ministers were in any doubt about the meaning of the Order or the reasons for making it. On the argument that the reasons were hypothetical and speculative, Mr Johnston submitted that the nature of the judgment that the Secretary of State had to make, being predictive in nature was not speculative, rather he was seeking to prevent something happening on the basis of predictive judgment *(LLC Synesis* at para 77*).*

[55] Turning to the question of the effect of any material inadequacy of reasons, the Order would only fall if it could be shown that it was Parliament's intention that this should be the consequence (*R (Majera)* v *Secretary of State for the Home Department* [2022] AC 461 at para 27-31). Mr Johnston's position was that the reasons given in the Order were good reasons, but even if they were found to be materially inadequate the conclusion would not be that the Order would fall because the Secretary of State had substantially complied with

the statutory provision, the petitioners were in no doubt about the terms of the order and there was in any event no prejudice to them. The result in that scenario would be that unless the reasons were incapable of supporting the Order then the Order could stand, since the reasons challenge was "parasitic" on the other challenges brought. Much of the criticism made by the petitioners of the reasons was thus misdirected, there was no need or requirement to deal with the level of detailed criticisms advanced, the concern should only be to ensure there was a reasoned decision on the principal issue in controversy.

[56] As to the specific areas of adverse effect identified in the Order, Mr Johnston dealt firstly with the question of apprehended increase in fraudulent applications. The petitioners relied upon material from the UN independent expert suggesting that there was no credible evidence of such a problem, but whilst the Secretary of State had that material before him he also had the report from the UN special rapporteur, thus he had material representing two divergent views on this question and had to decide which view commended itself to him. On the question of the adverse effect on the operation of the law as regards taxation, the concern in this respect was the practical operation of the law having regard to the integrated systems across the UK, as part of which only one legal sex could be taken account of, with the resultant concern that it might be unmanageable to administer dual identities. This concern dovetailed into that of data shared between government departments and the need not to fall foul of section 22 of the 2004 Act. These were practical effects on the law, and the characterisation of these issues as being just about IT systems was misplaced, these systems were in place to give effect to the law, therefore the impact of the Bill was capable of having an effect on their operation. The reality is that these systems exist to serve the purpose of the legislation and therefore the legislation was materially impacted by the provisions identified.

[57] So far as the impact on clubs and associations was concerned, the effect was not that on the individual members, as suggested by the petitioners, rather the changes that would be required to be implemented by the clubs and associations to comply with the law that was the adverse effect of the Bill identified in the PSOR. The impact on single sex schools went wider than just on the limited number of single sex schools identified.

[58] Mr Johnston then turned briefly to the written interventions. He submitted that in parts the interventions strayed beyond the grounds of review in the petition and as such were not grounds upon which the Order could be reduced *(Prior* v *Scottish Ministers* 2020 SC 528). One example was the submission by the Equality Network at paragraph 10 to the effect that the Secretary of State had misrepresented section 22 of the 2004 Act, which was not a mater relied upon by the petitioners in their petition. Another example arose in the intervention by Stonewall and others summarised in paragraph 44 so far as monitoring for the public sector equality duty is concerned. Mr Johnston submitted that the argument misunderstood the PSOR in this regard and in any event was not an argument relied upon by the petitioners.

[59] In concluding, Mr Johnston renewed his motion and invited me to dismiss the Petition.

Reply for the petitioners

[60] In a succinct reply, the Lord Advocate reverted to the topic of section 104 orders which she contended had not only been used in areas of legislative competence and provided examples in the area of marriage and civil partnership to illustrate her point. On the issue of whether it was permissible to rely upon Parliamentary statements, the Lord Advocate reiterated her submission that this was entirely normal and had been done in

cases where provisions of the Act had been interpreted for the first time. In the present case, given the differing contentions of the parties as to what amounted to an adverse effect on the operation of the law, there was self-evidently an ambiguity arising from the legislation and thus reference to parliamentary materials was entirely permissible. On the question of divergence, there already existed divergence between the jurisdiction on the PSED and any alleged adverse effects in that area had to be seen in a context where there already was divergence. Turning to the question of what should happen if some but not all of the reasons survived challenge, the Lord Advocate submitted that there was not in the end much between the parties on this point. She did contend that if the reasons started to fall, then a point would be reached where the Court could not be satisfied that if the Secretary of State had "got that much wrong, we can't trust what is left," but conceded she could offer no authority directly on the point. Her position was that it might be appropriate, in such an eventuality, to invite further submissions on the matter. On the anticipated increase in the number of applications, the Lord Advocate contended that changes in the fees charged in England and Wales in order to apply for a GRC had resulted in a greater increase in numbers than was anticipated if the Bill were to become law in Scotland. Thus any reliance upon this perceived issue by the Secretary of State was misconceived.

Written interventions

[61] The two written interventions were detailed and informative. Both, in broad terms, supported the reduction of the Order on the basis that the underlying reasons for it were erroneous and/or unsubstantiated by evidence, in the face of competing evidence to the contrary. The intervention from Stonewall and others also analysed in some detail what it suggested was the proper approach to the construction of section 35 having regard to what it

submitted was the intention of Parliament and, in consequence, what it asserted was the appropriate standard of scrutiny. Some detailed analysis of authorities said to be in point, most notably *Evans,* was also provided. Its submissions on this point aligned with those of the petitioners and indeed, as already observed, the petitioners referred to and adopted parts of the approach contended for by Stonewall.

[62] Of note however, and as commented upon by the respondent, the Interveners were markedly at odds as to the significance, or otherwise, of a GRC (or SGRC). Stonewall and others state, at paragraph 14,

> "Trans people pursue this process because of the significant advantages that follow from obtaining a GRC. Without a GRC, the gender marker on a trans person's birth, marriage or death certificate will not match their gender presentation (and may not match the gender marker on legal documents such as passports and driving licenses, which do not require a GRC to change the gender marker). Any time a trans person is required to produce a birth, marriage or death certificate, they will be outed as trans. One case study explains how, without a GRC, the individual could not get married without outing himself to his partner's father. Another explains how applications for rental accommodation and applications for jobs always involve a consideration of the risk of transphobia resulting from being outed due to gender markers on legal documents not matching their gender presentation"

Whereas the approach of the Equality Network is the opposite. At paragraphs 2 and 3 of their intervention, they say

> "2. There is at the heart of the dispute a misconception about what having a Gender Recognition Certificate ('GRC') does and does not do. A GRC recognises the way in which a trans person is already living, it does not grant permission to them to do so. There are, as the Intervener submits in more detail below, very few occasions in which having a GRC has a practical effect. That does not detract from what it means to a trans person to have a GRC; the statements from the trans community members included as part of this submission testify to that.
> 3. The focus of the respondent's reasons for making the s.35 Order is on 'legal sex'; but in the day-to-day life of a trans person, the concept of 'legal sex' is unimportant. The circumstances in which a person – whether trans or not – has to prove what sex they are, are very rare. It is submitted that when thoroughly analysed, the respondent's reasons, focussed as they are on 'legal sex', are erroneous, inadequate and unfounded in evidence."

Thus although both interveners were at one in arguing that the reasons for the Order are erroneous, inadequate and lacking coherent evidence, there is a marked divergence between them when it comes to the question of the significance, or otherwise, of obtaining a GRC. This may simply be a reflection of the fact that the social policy arguments that form a backdrop to the legislation at the heart of this dispute are complex, and controversial. Parties, meaning the petitioner and the respondent, were however agreed that this case is not directly concerned with the question of gender reform, and that the focus ought properly to remain on section 35, and whether the conditions for the making of an Order thereunder have been met. For the avoidance of doubt I agree with the submission from Mr Johnston that the interventions do partly stray beyond the grounds of challenge in the petition, in the areas identified by him, and that whilst informative on those matters, in those respects could not form grounds for reduction of the Order *(Prior* v *Scottish Ministers* 2020 SC 528*).*

Analysis and decision.

[63] The power contained in the section of the Scotland Act 1998 that lies at the heart of this case has never before been invoked. That is a fact upon which the petitioners place some considerable emphasis, perhaps unsurprisingly. The overarching position of the Scottish Ministers therefore is that the making of the Order on this occasion constitutes an impermissible encroachment upon the separation of powers, fails to respect the principle of parliamentary accountability, and thus undermines the constitutional balance struck at the time the 1998 Act was enacted. The motivation for making the Order, the petitioners argue, emanates from a policy dispute on the topic of gender reform as between the UK and Scottish parliaments and thus constitutes an improper use of the power in section 35. The

petitioners stop short of alleging actual bad faith on the part of the Secretary of State however, and examples of what might constitute a permissible exercise of the power, by way of contrast, were not explored. This argument did not form a standalone ground for reduction in paragraph 5 of the petition. It was, however, argued as an introduction to the substantive grounds of challenge to the Order itself, as well as underpinning a number of the other challenges, and given the context as a whole, it is appropriate that it be addressed.

[64] Perhaps self-evidently, if this power had been invoked purely in response to, or as a result of, a policy disagreement between the respective legislatures, then that would be an end of matters. The conditions for the making of an Order under section 35 would clearly not be met. In support of this contention, the petitioners point to the lack of advance warning or discussion between relevant personnel in Edinburgh and London, before the decision to make the Order was intimated, and cite the Memorandum of Understanding between the legislatures in this respect. The petitioners also argue that if there had been real concerns about the legislation, then all relevant documents had been submitted to the UK Parliament (as is customary) many months before the Bill was actually passed, and any concerns could have been flagged at that stage. They rely also on what they argue was the lack of time afforded to debate the passing of the Order. In other words, they invite the court to draw an inference or conclusion from a number of adminicles of evidence that a policy disagreement lies at the heart of the decision in this case. However, as was ultimately not seriously contested between parties, the Memorandum of Understanding is a political agreement and compliance or otherwise therewith is not justiciable (*R (Miller)* v *Secretary of State* (SC(E&NI)) [2018]AC 61). Accordingly whilst it might entirely understandably be thought to be good practice, or even perhaps in accordance with usual practice, to flag significant concerns about a Bill at the earliest possible opportunity, it is equally the case, as

the respondent argued, that until a Bill is in final form (assuming there is no concern about its overall competency) the question of whether or not it might actually (a) modify the law and (b) have an adverse effect upon reserved matters, cannot be known. More fundamentally, taking this particular submission, together with the documents produced in support, at their highest does not support the inference or conclusion that a policy disagreement lay behind the making of the Order. There is no reference, direct or indirect, to that being a concern motivating the making of the Order. Whilst therefore I have no hesitation in accepting that the petitioners hold a sincere view as to what they suspect to be the motivation behind the making of the Order I cannot on the material before me, conclude that the Order was made on this basis.

[65] As part of this overarching submission, the petitioners relied upon statements made in Parliament at the time of the passing of the 1998 Act to support the contention that the exercise of the power in section 35 was considered to be a power of "last resort" which ought not in fact ever require to be invoked. Such reference was contentious between the parties, with the respondent relying upon the principles in *Pepper* v *Hart* as well as correspondence from Parliamentary counsel about such references more generally. The principle enunciated in *Pepper* v *Hart*, read very short, is that recourse may be made to statements made in the House of Commons or House of Lords as an aid to construction of primary legislation where the meaning of that legislation is ambiguous or obscure. The petitioners suggested that there was such ambiguity here, given the dispute between the parties as to how the power in section 35 ought to be invoked, if at all. I can identify no such ambiguity in the language of section 35 and thus on well understood principles, reference to statements in Parliament would be impermissible. Properly understood, the dispute between the parties centres not on what the words in section 35 mean, but whether, firstly,

the preconditions to its being invoked existed at the relevant time, and secondly, if so, whether the terms of the Order are rational and survive scrutiny in the context of the exercise of the supervisory jurisdiction of the court.

Is section 35 engaged?

[66] That being so, I move on to consider whether the first precondition for an order under section 35 is met. Does the Bill have the effect of modifying the law as it relates to reserved matters? The petitioners argue that because the "interface" between the Bill and the Equality Act is to be found in section 9 of the 2004 Act, which has not been amended by the Bill, the effect of that section remains the same, and there has thus been no modification of the law, at all, and certainly not as it affects reserved matters.

[67] Section 9 is the section which sets out the effect of obtaining a "full gender recognition certificate." The petitioners' proposition however elides the fact that there is in paragraph 9(c) of the schedule to the Bill a substantive amendment to the definition of the term "full gender recognition certificate" to reflect the proposed new procedure for obtaining a SGRC. Since the whole purpose behind the Bill is to widen the category of those who may apply, and to simplify the overall process by which a certificate may be obtained, it cannot be asserted that the meaning overall of section 9 has not changed, looked at objectively. The words "full gender recognition certificate" will no longer mean the same thing as they do currently, and focussing on the lack of amendment to the language of section 9 itself is to ignore the significance of a proposed amendment to the underlying meaning of a key component of that section. That analysis is consistent with *UK Withdrawal from the European Union (Legal Continuity)(Scotland) Bill 2019* S.C. (UKSC) 13, and in particular paragraph 51, the relevant part of which provides:-

> "…..Without attempting an exhaustive definition, a protected enactment will be modified by a later enactment, even in the absence of express amendment or repeal, if it is implicitly amended, disapplied or repealed in whole or in part. That will be the position if the later enactment alters a rule laid down in the protected enactment, or is otherwise in conflict with its unqualified continuation in force as before, so that the protected enactment has to be understood as having been in substance amended, superseded, disapplied or repealed by the later one."

The effect of the amendment to section 25 will be to alter the unqualified continuation in force of section 9 of the 2004 Act. That section has in substance been amended by the Bill, and on the basis of the acceptance by the petitioners that section 9 operates as the interface between the Bill and the Equality Act, which is within the reserved area of Equal Opportunities, the first precondition of section 35 has been met, and the section is therefore engaged.

Even if section 35 is engaged, could concerns have been addressed by way of an order under section 104?

[68] The Petitioners argue that a less draconian approach to any perceived encroachment on reserved matters could have been addressed by way of an Order under section 104 of the 1998 Act. The terms of that section are set out in paragraph [8] above. What then is the purpose of that section and would that have been an alternative (and preferable) route to have been followed in the present case, thus avoiding an entire "veto" of the Bill? Both parties founded upon *Martin* v *Most* 2010 SC (UKSC) 40 in support of their competing arguments on this point. The context of that case was whether legislation increasing the maximum sentence that could be imposed by a Sheriff in respect of a particular breach of the Road Traffic Act 1988 impinged upon a reserved matter, thus far removed from the circumstances of the present case. However the question of the proper use of the procedure

provided for under section 104 was a key aspect of the case. At paragraph [41] Lord Hope expressed the following opinion:-

> "Section 104 of the 1998 Act enables Her Majesty in Council or a Minister of the Crown, with the consent of both Houses of the UK Parliament, to make such provision as is considered necessary or expedient in consequence of any provision made by or under any Act of the Scottish Parliament. As the explanatory notes to that section point out, the power to make provision consequential on legislation under para 3 of sch 4 is very limited. Among other things, it does not enable the Scottish Parliament to legislate otherwise than as a matter of Scots law. It does not have power under that provision to make any consequential provisions that require to take effect elsewhere in the United Kingdom. Examples of the use that is made of the power under sec 104 are to be found in the Adults with Incapacity (Scotland) Act 2000 (Consequential Modifications) (England, Wales and Northern Ireland) Order 2005 (SI 2005/1790) and the Police, Public Order and Criminal Justice (Scotland) Act 2006 (Consequential Provisions and Modifications) Order 2007 (SI 2007/1098). There are many others. Lord Rodger (para 81) has mentioned some of them.
>
> In paragraphs 78-80 Lord Rodger expressed the matter thus:
>
>> '…..For Scotland, however, the necessary powers are divided between two executives and two legislatures. Even though the legislative arrangements for Scotland have changed in this way, the nature of the problems to be tackled by legislation has not changed. So, for example, some measures, like mental health legislation, which are devolved matters, still have a cross-border dimension. Similarly, proposed legislation in one field, which happens now to be devolved may require substantial amendment to legislation in another field, which happens now to be reserved.'
>
> [79] In these situations the Scottish Parliament will not have all the powers that are needed to make a fully effective reform. So its legislation can take the matter only so far. If it is to be fully effective, the legislation passed by the Scottish Parliament will require to be 'topped up' by legislation of the UK Parliament dealing with any aspects which are beyond its competence.
>
> [80] The need to provide for such situations was foreseen by those who drafted the 1998 Act. Section 104, which is designed to be used when they arise, is therefore a key element of the scheme for devolution. It contains a tailor-made mechanism for using the powers of the UK Parliament to supplement legislation of the Scottish Parliament, without the need for full scale legislation by Parliament'

Applying those insightful analyses to the present case leads to the conclusion that an Order under section 104 whilst not perhaps strictly speaking incompetent, would not have been the appropriate route to be taken. In the first place, the dispute does not centre on the

competency of the Bill. Parties are agreed that bringing forward legislation in this area is within the legislative competence of the Scottish Parliament. Secondly, the question is not one of 'topping up' the legislation to deal with matters beyond its competence, as it was put by Lord Rodger. The central question is whether the law as it affects reserved matters has been modified, and if the Secretary of State has reason to believe such modification will have adverse effects on the law in the reserved area(s). There is therefore no issue of the competence *per se* of an aspect of the Bill, and no question of subordinate legislation being able to "top up" the proposed legislation to deal with any such conflict. In the whole circumstances therefore, an Order under section 104 would not have been capable of addressing the concerns identified by the Secretary of State in this case. In particular, and significantly, the question of "adverse effects" is one that is specifically within the province of section 35, whereas section 104, properly understood, creates a mechanism to permit Scottish legislation to work in devolved and non-devolved areas. The question of "adverse effects" is not a consideration under that procedure. There is also some force in any event in the contention that these two provisions are found in different parts of the Act, and are reasonably understood to have been enacted for different purposes. Where otherwise competent legislation has the effect of modifying the law as it relates to reserved matters, with adverse effects anticipated, as opposed to needing some "supplement" to make it "work" in the area of or alongside reserved matters, then the proper procedure is that found in section 35.

What is the appropriate intensity of review of an Order under section 35?

[69] The parties adopted entirely opposing positions on this question. The petitioners contend for a high level of scrutiny, relying upon factors such as the relatively short time

afforded for debate on the Order in Parliament, and perhaps more fundamentally the constitutional principles of the separation of powers and parliamentary accountability. The petitioners rely upon the analysis in *Cherry* at paragraphs 39, 40 and 46 in support of their overarching submission that the exercise of the power in section 35 amounts to an impermissible intrusion on the constitutional settlement enshrined in the 1998 Act, being motivated by a disagreement on policy, and thus offends the fundamental constitutional principles described above. The respondent, on the other hand, refutes the contention that the Order was motivated by a policy disagreement. Rather, Parliament has provided for the power in section 35 within a broader constitutional framework and whilst any exercise of the power is properly susceptible to review by the courts, given the nature of the decision and the decision maker, certain decisions are entitled to be afforded "great weight" as described by Lord Sumption in *R (Lord Carlile)* v *Home Secretary* [2015] AC (SC(E) 23. This decision, given its' context, is one of those.

[70] It is undoubtedly the case that the case law on the question of intensity of review has developed and evolved since *Wednesbury* and *Council of Civil Service Unions*, in that more recent cases are more likely to use the language of "range of reasonable responses open to decision maker", as was employed in *Kennedy*. I have already explained that there was no material before me that would permit me to conclude or draw the inference that an impermissible motive, such as a policy disagreement, underlies the decision in question. The courts have also recently and repeatedly confirmed that the context in which the decision is made is significant (see for example Lord Reed in *Axa General Insurance Company Ltd* v *Lord Advocate* [2011] UKSC 46 at para 142). The context of the decision in *Cherry* was the exercise of prerogative powers not constituted by any document or statute. The question then of where the delineation of the power was to be found, and how to assess whether that

line had been crossed, involved scrutiny of key underlying constitutional principles. However in this case no such question arises. The nature of the power that has been invoked, whilst a constitutional one, is described and delineated within the four walls of the 1998 Act. There are preconditions to its exercise set out in section 35 (1)(b). There is a specified time frame within which the power must be exercised set down in section 35(3). Therefore far from being an impermissible intrusion upon the constitutional settlement, section 35 is an intrinsic part of it. It follows also that the power, being exercisable only upon certain preconditions being fulfilled, is not an unfettered one. Its exercise is properly subject to review by the courts but the intensity of that review is less than that described in the cases relied upon where fundamental human rights are involved (see for example, *R* v *Secretary of State for the Home Department ex parte Bugdaycay* [1987] AC 514 at 531).

[71] The petitioners also rely upon, and draw parallels with, the case of *Evans*, in support of their argument that a high level of intensity of review is appropriate in this case. Stonewall and other too, discuss this case at some length in their intervention. In that case the Attorney General issued a certificate in terms of section 53 of the Freedom of Information Act 2000 preventing disclosure of communications passing between the Prince of Wales (now King Charles III) and various government departments. In so doing, the Attorney General overrode a decision of the Upper Tribunal, which had heard evidence on the matter and permitted disclosure of some of the material requested. The government departments themselves did not appeal that decision. The Supreme Court rejected the Attorney General's appeal from the lower court, having regard, amongst other matters, to the principle of legality. This was described under reference to the speech of Lord Hoffman in *R* v *Secretary of State for the Home Department, Ex parte Simms* [2000] 2 AC 115, at 131, where he said

> "the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words…..In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual…."

Lord Neuberger went on to quote with approval the following iterations of the same concept at paragraph 57 in *Evans*

> ". …..At p575 (in R v Secretary of State for the Home Department, Ex p Pierson [1998] AC 539), Lord Browne-Wilkinson said that*:*
>
> > 'A power conferred by Parliament in general terms is not to be taken to authorise the doing of acts by the donee of the power which adversely affect the legal rights of the citizen or the basic principles on which the law of the United Kingdom is based unless the statute conferring the power makes it clear that such was the intention of Parliament.'
>
> To much the same effect, Lord Steyn said, at p 591, that 'Unless there is the clearest provision to the contrary, Parliament must be presumed not to legislate contrary to the rule of law'".

Drawing those strands together, Lord Neuberger concluded that if section 53 was to have the effect and power contended for, permitting the Attorney General to overrule the decision of a tribunal, binding between parties, then the language of the Act permitting that must be "crystal clear" in order to permit the conclusion that Parliament intended to interfere with fundamental rights. He did not consider that was the case and concluded:

> "All this militates very strongly in favour of the view that where, as here, a court has conducted a full open hearing into the question of whether, in the light of certain facts and competing arguments, the public interest favours disclosure of certain information and has concluded for reasons given in a judgment that it does, section 53 cannot be invoked effectively to overrule that judgment merely because a member of the executive, considering the same facts and arguments, takes a different view."

That however is not the situation here. The principle of legality has no application in the present case where the question is not whether the executive is seeking to override the rule of law, or otherwise interfere with a reasoned decision of a court or other Tribunal. In other

words, whether the executive is using a statutory power to interfere with a fundamental or constitutional right. Rather the question is whether a statutory power, enshrined in the 1998 Act, is engaged, and, if so, whether the Order pronounced thereunder has been promulgated lawfully. Section 35 does not, in and of itself, impact on the separation of powers or other fundamental constitutional principle. Rather it is itself part of the constitutional framework. The political context is an important one and the touchstone remains that of rationality. The level of intensity of review has to be viewed in that context and is as a consequence less than that employed where fundamental human rights are at stake, or where there is a challenge to the rule of law as was the case in *Evans*, albeit the subject matter of the present case, and its context are weighty ones.

The irrationality challenge

[72] Without prejudice to their overarching submissions, the petitioners challenged the rationality of the Order on the basis that the Secretary of State had failed to acquaint himself with the relevant facts and material before making the Order. I propose to address this matter out of the order taken by the Lord Advocate in her submissions, simply because the rationality or otherwise of the decision affects and is intertwined with the other distinct grounds of challenge. In the context of this challenge, both parties accepted the relevance and application of the *Tameside* duty, as it is generally known, and the more recent iteration of that duty as described by Hallet LJ in *R (Plantagenet Ltd)* v *Secretary of State for Justice and others* 2015 3 All ER 261 at para 100 set out in paragraph [25] above. What steps therefore did the Secretary of State take to acquaint himself with the relevant facts and material? He had before him several documents setting out information and advice on the question of the competence of making an Order, and to what extent adverse effects were anticipated, should

the Bill pass into law. These included a submission from Laurence Rockey, the Director of the Scotland Office dated 13 January 2022, together with a number of appendices and supporting documents, for example a Note Verbale (submission) from Reem Alsalem, UN Special Rapporteur on violence against women and girls, its causes and consequences; a Note Verbale from Victor Madrigal-Borloz, UN Independent expert on protection against violence and discrimination based on sexual orientation and gender identity; and a letter from the Chair of the EHRC to the then Secretary of State for Women and Equalities. Much of this material supported the concerns raised about adverse effects, particularly as regards the issue of inadequate safeguards, and some did not provide such support, such as the letter from Mr Madrigal- Borloz. He also had available to him submissions and material from groups and organisations active in the area of sex-based rights, such as "Sex Matters" as well as from the policy analysis group Murray Blackburn Mackenzie.

[73] This list is not exhaustive but the exercise carried out by the Secretary of State has to be seen in its proper context. He was constrained by a four week statutory timeframe and the obligation upon him to inform himself as to whether the preconditions set out in section 35 were satisfied so as to justify making an Order. The time frame did not permit an extensive information gathering exercise as had been carried out by the Scottish Parliament before the introduction of the Bill. In particular, he could not reasonably have been expected to instruct statistical analysis of the impact of increased numbers of applications on the areas of adverse effect identified by him. I do not accept that the fact that much of this material was collated and/or compiled by the Equality Hub undermines its relevance to the task required of the Secretary of State. There was nothing before me to suggest that the fact that this department sits within the Cabinet Office leads to the conclusion that the material must be treated with particular caution or considered to be invalid when testing the ultimate

decision against the *Tameside* duty. The material actually compiled by the Equality Hub came from a number of different sources, much of which was wholly independent of government. Of course, criticism was also made of the fact that the majority of the material supported the inference that the Bill would have an adverse effect on reserved matters, whereas only one submission of significance pointed the other way. The Secretary of State had therefore failed to adopt a balanced approach to the available material. Superficially, this criticism carries some weight. However, as the respondent argued, the question of which the Secretary of State required to be satisfied was whether any adverse effects could in fact be identified, justifying intervention in the manner proposed. In other words, the fundamental question before him was different from that faced by the Scottish Parliament. Its task was to carry out sufficient inquiry to allow it to bring forward legislation in furtherance of its commitment to reform gender recognition legislation. The Secretary of State's task was to determine whether that proposed legislation modified the law as regards reserved matters, and if there would be any adverse effects on reserved matters from that, if so. Viewed thus, the approach taken to the material ingathered is reasonable in all the circumstances.

[74] All that said, the Secretary of State did require to take rational steps to inform himself. His task was, by its very nature, a predictive one, as that concept was described by Lord Sumption in *Carlile* at paragraph 32 (see paragraph [38] above). Given the whole context taken together with the inherent nature of the supervisory jurisdiction, the test is not whether there was more, or other material that the Secretary of State could have taken into account – plainly the answer to that would be "yes". Rather the approach is to test the matter in the way described by Hallet LJ in *Plantagenet* at paragraph 100 where she summarised the *Tameside* duty, and in particular the requirement to ask whether "no

reasonable council (as it was in that case) possessed of that material could suppose that the inquiries they had made were sufficient".

[75] Applying the principles enunciated by Hallet LJ and accepting, as was a matter of agreement, that they correctly encapsulate the *Tameside* duty which was the one incumbent upon the Secretary of State in this case, I cannot conclude that he failed in his duty to take such steps as were reasonable in all the circumstances to acquaint himself with material sufficient to permit him to reach the decision that he did. Others may have reached a different conclusion on the same material. This is plainly a situation where another decision might have been made with equal propriety, and its predictive nature means that there is possibly no single right answer. That being so, and in accordance with the third principle enunciated by Hallett LJ, the court should intervene only if no reasonable authority could have been satisfied on the basis of the inquiries made that it possessed the information necessary for its decision. I cannot conclude that that limb of the test is satisfied in this case.

[76] Rationality was of course but one ground of challenge brought by the petitioners. They sought to reduce the Order also on the basis that the Secretary of State proceeded upon errors of law which it was argued were material, meaning that it could not be said that he would inevitably have reached the same conclusion had he approached the question correctly. The first error identified was that the Secretary of State was wrong to conclude that there had been a modification of the law as required by section 35. For the reasons already given, I do not accept that submission. The second error related to the alleged effect on social security systems. In short, that it was plain from the language of paragraph 8 to Schedule 2 that it was an objection to divergence *simpliciter* rather than the form or effect of the divergence. Put another way, that it identified a potential effect on the operation of IT systems, at best, rather than an adverse effect on the operation of the law.

[77] A fair and objective reading of paragraph 8 leads to the conclusion that the concern is one relating to how the law operates in practice, and that it is a concern about the effect of divergence, rather than divergence *per se*, which the respondent accepted, as he was bound to, was not the issue in this case. The law operates and is delivered in many different ways, one of which may be by the use of IT systems. Therefore a concern about an adverse effect of divergence is, on the face of it, a legitimate one. The petitioners suggest, perhaps correctly, that such concerns could be addressed in a technical way, by employing new or different software for example. I had no information before me to permit me to draw a conclusion about that one way or the other. But on the hypothesis that they are correct about that, such would not in and of itself render the predictive assessment carried out by the Secretary of State invalid on the basis that it is vitiated by error of law. It is equally the case, that were this the only reason advanced in support of the exercise of the power in section 35, then arguments based on rationality might have more force. However as was discussed by the Supreme Court in *R (Majera)* v *Secretary of State for the Home Department* [2022] AC (SC(E)) 461 at para 27-31), even where a court has decided that an act or decision was legally defective, that does not necessarily imply that it must be held to have had no legal effect. In any event, as paragraph 5 of schedule 2 to the Order states, each reason articulated individually amounts to an adverse effect which justifies the making of the Order. Therefore, even were I satisfied that this particular challenge was well founded, it would not in and of itself, result in reduction of the whole Order.

[78] There were further criticisms made under the heading of "Irrelevant considerations" which, as the Lord Advocate fairly recognised, overlapped to some degree with other areas of criticism. The first aspect was an allegation that the Secretary of State founded on divergence *per se* as discussed above. For the reasons given, I do not consider that this

criticism is made out. The second aspect under this heading was the reliance upon the perceived risk of an increase in fraudulent applications. This overlapped with the rationality challenge on the basis that material which was available to the Secretary of State ran counter to the conclusion that there was a real risk of this sort. Again, for the reasons already given, this challenge fails. Specifically, the fact that there were alternative or other views available, and therefore that a different or other conclusion might permissibly have been reached, does not vitiate the conclusion actually reached by the Secretary of State on the basis of material that he equally permissibly had regard to in this respect.

[79] Finally, the Order was challenged on the basis that the reasons given therefore were inadequate in law and accordingly did not satisfy the final precondition set out in section 35. The reasons were inadequate in terms of their quality and did not support the conclusion reached. Further they identified concerns, many of which were already pre-existing, according to the submission from the Scotland Office. Any inadequacy in the reasons appended to the Order could not be "saved" by having recourse to the PSOR.

[80] Dealing firstly with the question of whether or not it is permissible, in the context of reasons, to look beyond the four walls of the Order and have regard to the PSOR, I have concluded that it is. Not to do so would be to ignore an important part of the context in which the decision was made, not least because the Explanatory Notes to the Order specifically direct the reader to have regard to the PSOR as a "fuller narrative" of the reasons. It is relevant to the exercise of the supervisory jurisdiction of the court to have full regard to all relevant circumstances relating, or underpinning the decision, to grant the Order. Further, I can discern no ambiguity that would leave the informed reader in any doubt as to what are the reasons underlying the Order. For the avoidance of doubt that conclusion would apply even if one did in fact set to one side the PSOR, but the "fuller

narrative" provided in the PSOR provides important context. This conclusion is consistent with the approach taken in *R(O)* v *Home Secretary (SC(E))* [2023] AC 255 at para 30 where Lord Hodge DPSC described the proper approach thus:

> "External aids to interpretation therefore must play a secondary role. Explanatory notes, prepared under the authority of Parliament, may cast light on the meaning of particular statutory provisions. Other sources, such as Law Commission reports, reports of Royal Commissions and advisory committees, and Government White Papers may disclose the background to a statute and assist the court to identify not only the mischief which it addresses but also the purpose of the legislation, thereby assisting a purposive interpretation of a particular statutory provision. The context disclosed by such materials is relevant to assist the court to ascertain the meaning of the statute, whether or not there is ambiguity and uncertainty, and indeed may reveal ambiguity or uncertainty: *Bennion, Bailey and Norbury on Statutory Interpretation, 8th ed (2020), para 11.2*. But none of these external aids displace the meanings conveyed by the words of a statute that, after consideration of that context, are clear and unambiguous and which do not produce absurdity. In this appeal the Page 11 parties did not refer the court to external aids, other than explanatory statements in statutory instruments, and statements in Parliament which I discuss below."

[81] Of course not all of the reasons carry equal weight. That much is clear perhaps simply from reading the schedule containing the reasons, as some are afforded considerably more detailed treatment than others. The concerns expressed in relation to the adverse effect on those parts of the Equality Act relating to clubs and associations, and single sex schools, for example, might be thought to be less weighty than some of the others identified. But I cannot agree that any or all of them must fall on the basis that they are unsupported by "evidence", having regard to the context in which the decision was made, the Secretary of State only being bound to take such steps as are reasonable to inform himself and provide reasons, as well as the lack of any specific requirement in the 1998 Act as to any particular requirements or standard that the reasons must achieve. It is also worth noting perhaps, that until the present litigation, there was no suggestion on the part of the petitioners that

they were unable to understand the reasons or found them to be unintelligible or ambiguous.

Decision

[82] It follows from all of the foregoing analysis that the challenge to the Order pronounced under section 35 of the 1998 Act, laid on 17 January 2023, fails. In so concluding it is important to recognise the novelty and complexity of the arguments and the sophisticated manner in which those arguments were presented before me and from which I derived considerable assistance.

[83] I will accordingly sustain the pleas in law for the respondent, repel the pleas in law for the petitioners and dismiss the Petition. I reserve meantime all questions of expenses.