



OUTER HOUSE, COURT OF SESSION

[2026] CSOH 59

P1183/25

OPINION OF LADY ROSS

in Petition of

FOR WOMEN SCOTLAND

Petitioner

for

Judicial Review

Petitioner: A O'Neill KC; T Convery; Balfour + Manson LLP

Respondents: GJB Moynihan KC; L Irvine; Scottish Government Legal Directorate

**First intervener (Scottish Human Rights Commission): K McBrearty KC; R Breen;
Scottish Human Rights Commission**

**Second intervener (Equality and Human Rights Commission): JM Scott KC; D Anderson;
Equality and Human Rights Commission**

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19 June 2026

Introduction

[1] On 16 April 2025 the UK Supreme Court issued its decision in *For Women Scotland Ltd v Scottish Ministers* [2025] UKSC 16; 2025 SC (UKSC) 1 (“FWS 2”). In those proceedings, For Women Scotland Ltd sought judicial review of statutory guidance issued by the Scottish Ministers on the operation of the Gender Representation on Public Boards (Scotland) Act 2018, with particular reference to the meaning of “woman” in that guidance. The Scottish Ministers argued that the meaning extended to transgender women with a gender recognition certificate, and that that was the correct interpretation of section 9 of the Gender Recognition Act 2004 and sections 11 and 212(1) of the Equality Act 2010 (“the EA 2010”). The Supreme Court rejected that argument, holding that the words “sex”, “woman” and “man” mean, and were always intended to mean, biological sex, biological woman and biological man.

[2] The present proceedings concern the “SPS Policy for the Management of Transgender People in Custody Operational Guidance”, issued by the Scottish Prison Service (“SPS”) in February 2024 (“the Prisons Guidance”). SPS is an executive agency of the Scottish Ministers, the first respondents. The second respondent is the Lord Advocate, who is called as a relevant authority because the proceedings raise a devolution issue within the meaning of Schedule 6 to the Scotland Act 1998.

[3] In these proceedings, the petitioner, For Women Scotland, seeks judicial review of the Prisons Guidance, on the basis that it allows, in some circumstances, for the accommodation of some biological men within the women’s prison estate. The petitioner contends that the first respondents have a statutory obligation to provide women-only prison accommodation, and that, in the light of the decision in *FWS 2*, the Prisons Guidance is unlawful. The respondents advance two main arguments, the first of which is that the petition is irrelevant because the petitioner does not advance a specific claim of discrimination or harassment. The second argument is, in essence, that it may be necessary to place transgender prisoners in a prison of the opposite biological sex in order to avoid a violation of such prisoners’ rights in terms of the European Convention on Human Rights. The respondents contend that, because that may be required by section 6(1) of the Human Rights Act 1998 and, separately, section 57(2) of the Scotland Act 1998, the Prisons Guidance is not unlawful.

[4] The principal writ was also served on the Advocate General for Scotland, in accordance with chapter 25A.2 of the Rules of the Court of Session, but she did not enter process and took no part in these proceedings. The Scottish Human Rights Commission (“SHRC”) and the Equality and Human Rights Commission (“EHRC”), who are both statutory interveners in terms of chapter 94 of the Rules of the Court of Session, made

applications to intervene in these proceedings. I granted these applications and, having considered the written submissions for each, I directed that they also make oral submissions. Both the SHRC and the EHRC were represented at the substantive hearing.

Terminology

[5] Courts and tribunals dealing with litigation both before and after *FWS 2* have found it necessary to address the question of terminology. Section 7(2) of the EA 2010 provides that “[a] reference to a transsexual person is a reference to a person who has the protected characteristic of gender reassignment”. The Prisons Guidance itself mostly uses the terms “transgender woman” and “transgender man”. In this case, parties took different approaches, with the petitioner using the term “trans-identifying man claiming the protected characteristic of gender reassignment”, or “trans-identifying man” for short. The respondents and the interveners generally used the term “trans woman” to describe such a person. For consistency with the approach taken by the Supreme Court, I refer to a person who is a biological man with the protected characteristic of gender reassignment as a “trans woman” and to a person who is a biological woman with the protected characteristic of gender reassignment as a “trans man”. Where it is necessary to refer to transgender prisoners generally, but not to distinguish between trans women and trans men, I refer to “trans prisoners”. In the context of this case, it is unnecessary to draw any distinction between a trans prisoner who has a gender recognition certificate under the Gender Recognition Act 2004 and a trans prisoner who does not.

The Prisons Guidance

[6] The Prisons Guidance is non-statutory guidance. In 2022 the first respondents, through SPS, began work on their Equality and Human Rights Impact Assessment (“EHRIA”) as part of an exercise in revising and updating their policy for managing trans prisoners. The EHRIA was completed in November 2023 and in December 2023 the first respondents issued the “SPS Policy for the Management of Transgender People in Custody”. This is a relatively brief document which gives a generally expressed overview, beginning with this statement about the “policy intent”:

“We will admit, place, and manage transgender people in a way which is rights-based, consistent with the obligations of SPS as an Executive Agency of the Scottish Government, as a public body, and as a prison service which seeks to promote the health, safety, and wellbeing of all people who live in Scotland’s prison system.”

[7] There are further statements in similar and very generic terms. More substantial information about the implementation of the policy is contained in the Prisons Guidance, which was issued in February 2024. Appended to the Prisons Guidance are six annexes. Annex 1 sets out the standard operating procedure for “complex location decisions”. Annex 6 sets out the Violence Against Women and Girls (“VAWG”) criteria used in the risk assessment process. The present proceedings concern accommodation, and the Prisons Guidance sets out in some detail information about admissions and the placement process. It also covers other matters, including the recording of a person’s name, gender identity and other data, the use of names and pronouns in official paperwork, searching protocols and showering and changing arrangements.

[8] Part 3 of the Prisons Guidance deals with admissions and the procedure for making initial accommodation decisions is set out in a series of flowcharts. The processes for trans women and trans men are not symmetrical; in general terms, trans women are assessed by

reference to the risk that they may present, in terms of the VAWG criteria, and trans men are assessed by reference to their vulnerability.

[9] The VAWG criteria are explained in Annex 6 to the Prisons Guidance in the following way (emphases in the original):

“A transgender woman **will not** be eligible to be considered for admission or transfer to a women’s prison, where they are: convicted or have previously been convicted, found to have committed an offence, remanded for examination or trial, remanded following conviction but awaiting sentence, for any of the offences detailed below, or are/have been subject to any of the orders detailed below, where the victim was female **unless** they have, either currently or previously, been subject to a full assessment that considers the risk related to VAWG by the Risk Management Team which has been satisfied that there is compelling evidence to permit otherwise and its recommendation to permit otherwise is agreed by the Executive Panel [...].

Offences:

- Any offences that perpetrate violence against a female that results in physical, sexual or psychological harm or suffering to a female, which includes but are not limited to;
 - Murder
 - Culpable homicide
 - Assault
 - Robbery
 - Abduction
 - Threatening personal violence
 - Rape
 - Sexual harassment, bullying and intimidation in any public or private space, including work
 - Commercial sexual exploitation of women and girls including trafficking or women and girls for that purpose. Commercial sexual exploitation, includes prostitution, lap dancing, stripping and pornography.
 - Breach of the peace
- Any other offences which are listed in Schedule 3 of the Sexual Offences Act 2003;
- Any offence that is aggravated as described in section 1(1)(a) of the Abusive Behaviour and Sexual Harm (Scotland) Act 2016;
- Any offence under section 1(1) of the Domestic Abuse (Scotland) Act 2018;

- An offence under section 7(1) or 17(1) of the Domestic Abuse (Protection) (Scotland) Act 2021 which involved violence against a female that results in physical, sexual or psychological harm or suffering to that female, which includes stalking; and
- Any offences where the governor of the prison the transgender person is admitted to or detained in considers the circumstances of their offence would pose a risk of harm to a female.”

[10] There are, in addition, certain orders listed, including non-harassment orders imposed under section 234A of the Criminal Procedure (Scotland) Act 1995, as well as various orders relating to sexual offending.

[11] Where there is no apparent or obvious risk or vulnerability, then the directions are as follows:

“Transgender women

A transgender woman should be considered for admission into the women’s estate in circumstances where she does not meet [the VAWG criteria], and there is no other basis to suppose that she poses an unacceptable risk of harm to those housed in the women’s estates. Consideration should also be given to any other factors which may indicate risk of harm to those housed in the women’s estate. The following factors may also influence the decision as to where a transgender woman is located including:

- Any relevant intelligence SPS has on the individual
- Additional information provided by external partners on incidents that may not have resulted in a police charge
- Any other relevant information

If a transgender woman falls under any of the following criteria, then she should be considered for admission to the women’s estate:

- she does not meet the VAWG criteria [...]
- she does not demonstrate an unacceptable risk of harm to those housed in the women’s estate (including, but not limited to, any evidence under the above three bullet points) or
- she has previously been managed successfully by SPS in the women’s estate based on a multi-disciplinary assessment of both risk and need

Transgender men

A transgender man should be considered for admission into the men's estate if there are no concerns that his health, safety or wellbeing would be put at risk and if he has previously been managed successfully by SPS in the men's estate based on a multi-disciplinary assessment of both risk and need."

[12] Where there is a known or unknown risk or vulnerability, then the directions are in these terms:

"Transgender women

If a transgender woman meets the VAWG criteria [...] or there is another basis to suppose that she poses a risk to women, she must be located on admission to the men's estate.

If the initial information provided indicates that the individual does not meet the VAWG criteria [...] with their current offence, but SPS cannot be certain of all previous offences at the time of admission; or SPS cannot sufficiently assess the transgender woman's risks and needs as a result of the level of information available, then she should be deemed an 'unknown risk' and admitted to the men's estate until further information is made available.

From the point of admission all necessary information should be gathered to populate [...] the Case Conference for Initial Assessment form [...] as far as possible. The contents of the form will be discussed at the Transgender Case Conference (TCC), the first of which will be held, insofar as reasonably practicable, within 72 hours from the person's admission to custody in order to make an informed placement decision.

Transgender men

A transgender man should be admitted into the women's estate if there are concerns around risks to his health, safety or wellbeing at the time of admission or risks to health, safety or wellbeing of others were they to be admitted to the men's estate. In order to ensure the protection of both the transgender man and others that he is accommodated alongside, in cases where a transgender man meets the VAWG criteria [...], or there is another basis to suppose they pose an unacceptable risk of harm to women, or they are deemed an 'unknown risk', he may be managed under Rule 95(1) conditions within the women's estate until further information can be ascertained to make an informed placement decision at the TCC, the first of which will be held, insofar as reasonably practicable, within 72 hours from admission."

Rule 95(1) of the Prisons and Young Offender Institutions (Scotland) Rules 2011 permits a prison governor to order that a prisoner must be removed from association with other

prisoners, for purposes including protecting the interests of any prisoner and ensuring the safety of other persons.

[13] Part 5 of the Prisons Guidance contains detailed information relating to the Transgender Case Conference, or TCC. In the introduction it is explained that

“[t]he TCC process has been designed to allow staff and transgender individuals the opportunity to discuss their placement, accommodation and other aspects of their management while in SPS custody.”

After the initial TCC, according to the guidance, case conferences should be held at least monthly for the first 3 months, then quarterly longer term. There are particular provisions for consideration of a “complex location decision”, including in situations in which a trans woman meets the VAWG criteria. SPS will

“consider exceptions to the presumption [...] that no transgender woman with a history, or demonstrating behaviour of VAWG [...] should be considered for placement in the women’s estate.”

The standard operating procedure for complex location decisions is set out in Annex 1 to the Prisons Guidance. In general terms, that procedure allows for the local risk management team to consider whether there is compelling evidence that an individual transgender woman with a VAWG marker does not present an unacceptable level of risk if accommodated in the women’s estate, and in those circumstances a move to the women’s estate may be considered. Such a decision is taken at a higher level, by an executive panel, chaired by the SPS deputy chief executive. In determining whether a referral should be made to the executive panel, the factors to be considered include the time since the relevant VAWG behaviour and whether “the person has lived in their affirmed gender in the community and has and would ordinarily be treated as being that gender in the community.”

[14] Some provision is made in the Prisons Guidance for transitioning whilst in custody.

In Part 6 there is a brief reference to the response that should be made to a

“person in custody that requests assistance from SPS because they are considering transitioning or identifying as a different gender to that which they were assigned at birth”.

In such a case, arrangements must be made for a TCC to take place, insofar as reasonably practicable within 72 hours of the individual making their request for assistance. A request may be made to change accommodation.

[15] In relation to accommodation, and reduced to its essentials, the effect of the Prisons Guidance is that, in the absence of a VAWG marker, a trans woman prisoner should be considered for admission into the women’s estate. There is a presumption that where there is a VAWG marker a trans woman prisoner will not be admitted into the women’s estate, but in some circumstances there may be exceptions.

Relevant statutory provisions

[16] The accommodation of prisoners in Scotland is regulated under the Prisons (Scotland) Act 1989 and the Prisons and Young Offenders Institutions (Scotland) Rules 2011.

[17] Section 10 of the 1989 Act provides:

“Place of confinement of prisoners

- (1) A prisoner may be lawfully confined in any prison.
- (2) Prisoners shall be committed to such prisons as the Secretary of State may from to time direct, and may be moved by the Secretary of State from any prison to any other prison.
- (3) [...]”

[18] The 2011 Rules are made under section 39 of the 1989 Act.

[19] The interpretation provisions in rule 2 include this definition: “‘accommodation’ means the cells or rooms used to accommodate prisoners for living and sleeping purposes”.

[20] Part 13 of the 2011 Rules is headed “Female Prisoners” and rule 126 is of particular importance:

“126.– Separation of male and female prisoners

- (1) Female prisoners must not share the same accommodation as male prisoners.
- (2) The respective accommodation for male and female prisoners must, as far as reasonably practicable, be in separate parts of the prison.”

[21] Rules 127 and 128 cover, respectively, pregnancy and confinement, and the accommodation of female prisoners’ babies.

[22] Section 29 of the EA 2010 is in the following terms:

“29 Provision of services, etc.

- (1) A person (a ‘service-provider’) concerned with the provision of a service to the public or a section of the public (for payment or not) must not discriminate against a person requiring the service by not providing the person with the service.
- (2) A service-provider (A) must not, in providing the service, discriminate against a person (B) –
 - (a) as to the terms on which A provides the service to B;
 - (b) by terminating the provision of the service to B;
 - (c) by subjecting B to any other detriment.
- (3) A service-provider must not, in relation to the provision of the service, harass –
 - (a) a person requiring the service, or
 - (b) a person to whom the service-provider provides the service.
- (4) A service-provider must not victimise a person requiring the service by not providing the person with the service.
- (5) A service-provider (A) must not, in providing the service, victimise a person (B) –
 - (a) as to the terms on which A provides the service to B;
 - (b) by terminating the provision of the service to B;
 - (c) by subjecting B to any other detriment.

- (6) A person must not, in the exercise of a public function that is not the provision of a service to the public or a section of the public, do anything that constitutes discrimination, harassment or victimisation.
[...]"

[23] Section 29 must be read with paragraphs 26 to 28 of Schedule 3 and with paragraph 1 of Schedule 22 to the EA 2010. Paragraphs 26 to 28 of Schedule 3 are in the following terms:

“26 Separate services for the sexes

- (1) A person does not contravene section 29, so far as relating to sex discrimination, by providing separate services for persons of each sex if –
- (a) a joint service for persons of both sexes would be less effective, and
 - (b) the limited provision is a proportionate means of achieving a legitimate aim.
- (2) A person does not contravene section 29, so far as relating to sex discrimination, by providing separate services differently for persons of each sex if –
- (a) a joint service for persons of both sexes would be less effective,
 - (b) the extent to which the service is required by one sex makes it not reasonably practicable to provide the service otherwise than as a separate service provided differently for each sex, and
 - (c) the limited provision is a proportionate means of achieving a legitimate aim.
- (3) This paragraph applies to a person exercising a public function in relation to the provision of a service as it applies to the person providing the service.

27 Single-sex services

- (1) A person does not contravene section 29, so far as relating to sex discrimination, by providing a service only to persons of one sex if –
- (a) any of the provisions in sub-paragraphs (2) to (7) is satisfied, and
 - (b) the limited provision is a proportionate means of achieving a legitimate aim.
- (2) The condition is that only persons of that sex have need of the service.
- (3) The condition is that –
- (a) the service is also provided jointly for persons of both sexes, and
 - (b) the service would be insufficiently effective were it only to be provided jointly.

- (4) The condition is that –
 - (a) a joint service for persons of both sexes would be less effective, and
 - (b) the extent to which the service is required by persons of each sex makes it not reasonably practicable to provide separate services.
- (5) The condition is that the service is provided at a place which is, or is part of –
 - (a) a hospital, or
 - (b) another establishment for persons requiring special care, supervision or attention.
- (6) The condition is that –
 - (a) the service is provided for, or is likely to be used by, two or more persons at the same time, and
 - (b) the circumstances are such that a person of one sex might reasonably object to the presence of a person of the opposite sex.
- (7) The condition is that –
 - (a) there is likely to be physical contact between a person (A) to whom the service is provided and another person (B), and
 - (b) B might reasonably object if A were not of the same sex as B.
- (8) This paragraph applies to a person exercising a public function in relation to the provision of a service as it applies to the person providing the service.

28 Gender reassignment

- (1) A person does not contravene section 29, so far as relating to gender reassignment discrimination, only because of anything done in relation to a matter within sub-paragraph (2) if the conduct in question is a proportionate means of achieving a legitimate aim.
- (2) The matters are –
 - (a) the provision of separate services for persons of each sex;
 - (b) the provision of separate services differently for persons of each sex;
 - (c) the provision of a service only to persons of one sex.”

[24] Paragraph 1 of Schedule 22 to the 2010 Act is headed “Statutory authority” and sub-paragraph (1) provides:

“A person (P) does not contravene a provision specified in the first column of the table, so far as relating to the protected characteristic specified in the second column in respect of that provision, if P does anything P must do pursuant to a requirement specified in the third column.”

[25] So far as relevant, the columns referred to provide:

Specified provision	Protected characteristic	Requirement
[...]	[...]	[...]
Section 29(6) and Parts 6 and 7 [...]	Sex [...]	A requirement of an enactment [...]

Paragraphs 26 and 27 of Schedule 3 to the EA 2010: a brief terminological point

[26] For the reasons given at paragraph [71] below, I consider that in making allocation decisions, the first respondents are exercising a public function rather than providing a service. However, it is important to be clear about the meaning of the terms that apply to services. In wider discussion relating to the EA 2010, there is a tendency to refer only to “single-sex” spaces or services and, to some extent, parties took that loose approach in their submissions. In Schedule 3 to the EA 2010 there is a distinction between “separate services for the sexes” (paragraph 26) and “single-sex services” (paragraph 27). Where a person provides the same services for persons of each sex, but does so on a separate basis, those are separate services. Where a different service is provided, separately, for persons of each sex, those are separate services. Where a person provides a service only to persons of one sex, that is a single-sex service. Insofar as they provide services to prisoners, the first respondents do so for persons of each sex. There are men’s prisons and women’s prisons. There may be some services which the first respondents provide only to male prisoners and not to female prisoners, and vice versa. Those would be single-sex services. There are further conditions within paragraph 27 of Schedule 3; a prison would come within the meaning of “another establishment for persons requiring special care, supervision or

attention” in paragraph 27(5)(b). In the present context, the services principally provided would be accommodation and the proper term would be separate services.

Affidavit evidence

[27] The petitioner lodged two affidavits and the respondents lodged one affidavit.

Affidavit of Rhona Hotchkiss

[28] The first of the petitioner’s affidavits was affirmed by Rhona Hotchkiss.

Ms Hotchkiss has significant experience in the management of prisons in Scotland, in particular as a former prison governor. Between 2009 and 2013, she served as deputy governor in two prisons in the male estate. From 2013 to 2019, she served as governor in charge in three establishments in succession, HMP Dumfries, HMP and YOI Cornton Vale and HMP Greenock. Whilst governor at HMP and YOI Cornton Vale, Ms Hotchkiss was the SPS lead for the new women’s estate. Her affidavit sets out, in general terms, factual information about the vulnerabilities of women in prison as well as her views about the risks associated with housing male prisoners, including trans women, with women. It is her view that “all transgender identified males pose a threat to the mental wellbeing of a significant number of women and some also pose a physical threat.” In her affidavit, Ms Hotchkiss recounts information provided to her by others, in particular female prisoners, about adverse consequences of being accommodated with males. She also notes the option for accommodating trans prisoners in a “third space”, suggesting that one or more small units operated or managed within SPS could serve that purpose.

Affidavit of AA

[29] The affidavit of AA was allowed to be received, although late, and her identity is anonymised. AA is a woman and a former prisoner, whose experience of custody includes a period spent on remand for nearly 2 years starting in 2022. In her affidavit, she provides information about her experience of being accommodated with trans women prisoners, and about her concerns and feelings. AA's affidavit contains several specific allegations about individual trans women prisoners accommodated in the women's estate and their conduct towards female prisoners and prison staff. Their identities are anonymised.

Affidavit of Linda Anne Pollock

[30] The respondents lodged an affidavit sworn by Linda Anne Pollock. Ms Pollock is the deputy chief executive of SPS and has been in that role since August 2023. In her affidavit, she explains that the development of the new policy began in 2021 and was concluded in 2023. She states that

“[t]he purpose of the 2023 policy is to protect the legal rights and welfare of transgender people living in Scotland's prisons in a way which promotes the safety of all people in custody.”

She describes the policy as affording “flexibility around individualised risk that allows SPS to consider transgender status as part of the decision-making process”. Ms Pollock's affidavit sets out an account of how the policy is applied by reference to hypothetical examples. The factual information provided includes the following statistics:

“We believe that decisions to place transgender people in an estate that does not align to their biological sex has operated since at least 2006, but we do not have clear records as 2014 was the first time that SPS began to collect specific data related to a person's transgender status through the introduction of specific markers on our Prisoner Records System. As such, we know that we have had 73 transgender people who have been in custody at the time of, or after, the 2014 changes to our records systems. 17, or about 23%, of transgender people have been accommodated

long-term in an estate that does not match their biological sex. We know that 51 of these transgender people identified as transgender women, and 14 of these 51 people, or about 28%, have been accommodated in an estate that does not match their biological sex (the women's estate). As such, the other 22 transgender people identified as transgender men, 3 of whom (about 14%) were accommodated in the male estate."

[31] In relation to the present position, Ms Pollock states that:

"Currently, almost 80% of accommodation decisions made about our current transgender people are to accommodate a transgender person in line with their biological sex."

[32] Ms Pollock also provides information about the practical reality of accommodating men and women separately. She states:

"The SPS's operational model is based on a model of separation of men and women living in custody for the purposes of accommodation or participation in day-to-day activities. The SPS have three establishments that house only women, and another three establishments that hold both women and men. In these mixed establishments, men and women are not accommodated in the same areas of halls and in nearly all circumstances are kept separate from each other when participating in day-to-day activities."

[33] So far as the consequences of the existing policy are concerned, Ms Pollock offers the following view:

"In considering whether the current policy infringes on the dignity of women or leads to the creation of a hostile or humiliating environment, our experience of this has been limited. Operational colleagues in the two establishments where transwomen are currently accommodated in line with their acquired gender were asked specifically with regards to any infringement of dignity, hostile or humiliating environment [sic]. Both have advised that that this [sic] not been their experience. During our development of our policy, we engaged with women in our custody and the position expressed by women in custody was generally a supportive one for transgender individuals in custody."

[34] Ms Pollock also expresses the view that:

"[w]ithout the flexibility of the 2023 policy there could be a risk of increase in harm including potentially unacceptable risk of harm or suicide, to transgender people in being housed by their biological sex where the risks are manageable in the estate of transgender person's affirmed gender."

[35] The affidavits of Ms Hotchkiss and Ms Pollock were both lodged in accordance with the timetable and in advance of the procedural hearing. The parties did not suggest that it would be necessary to cross examine either deponent, but nor was there any concession in respect of the contents of these affidavits. On the petitioner's opposed motion, which came shortly before the substantive hearing, I allowed the affidavit of AA to be lodged late, though recognising that the respondents did not have the opportunity, in advance of the substantive hearing, to investigate the allegations made or to provide a substantive response to other information provided by AA. There is no concession as to the veracity of its contents. That evidence has not been tested. I have not relied on it and I was not asked to make any findings in fact. It is not necessary for me to do so.

The parties' arguments

[36] In advance of the substantive hearing, parties prepared a "joint" statement of issues. The usefulness of this document was limited, in part because parties were not able to reach full agreement as to what the issues for determination were. In particular, it was the respondents' position that an issue arising for determination was whether or not the petitioner had pled a relevant case of unlawful sex discrimination or harassment in terms of the EA 2010 arising from the operation of prisons in accordance with the Prisons Guidance. The petitioner denied that this was an issue, with the insistence that these proceedings concern judicial review of policy. Both in their written submissions and in their oral submissions, the petitioner and the respondents took quite different starting points and it was not always easy to discern what the precise contours of the dispute were.

[37] The policy at the centre of these proceedings is the Prisons Guidance, and I have provided an overview at paragraphs [6] to [15] above. However, the arguments were

focused not on the precise terms of the Prisons Guidance themselves but on the petitioner's contention that no biologically male prisoners, whether or not they are trans women, may be admitted to the women's estate. The petitioner's argument was not that the Prisons Guidance is unlawful because it is too broad. Rather, the petitioner argued that the essential unlawfulness is in allowing for any trans women prisoners to be admitted to the women's estate. For their part, although the respondents sought to defend the Prisons Guidance as it stands, their main concern, at least at the stage of considering the Convention arguments, was to resist the argument that the only lawful policy would be the exclusion of all trans prisoners from prisons of the opposite biological sex.

The petitioner's argument: a brief overview

[38] The petitioner's argument, in its essentials, can be expressed very briefly and in the following way. The first respondents have a statutory obligation, under rule 126 of the 2011 Rules, to provide separate accommodation for male prisoners and female prisoners. The provision of women-only prison accommodation is intended for the protection of women prisoners as a group. That is a bright line rule. The allocation of prison accommodation is a public function in terms of section 29(6) of the EA 2010. Accommodating women prisoners in women-only prisons is lawful because rule 126 constitutes a "requirement of an enactment" for the purposes of paragraph 1 of Schedule 22 to the EA 2010. Accommodating men in women's prisons is unlawful. The petitioner contended that, in the light of the decision of the Supreme Court in *FWS 2*, the applicable provisions of the EA 2010 can only be read as referring to biological women, with the result that trans women cannot be accommodated in women's prisons in any circumstances and that the Prisons Guidance is premised on a mis-statement of the law.

[39] The petitioner also argued that promulgating and maintaining the Prisons Guidance are outside the first respondents' powers in terms of section 54(3) of the Scotland Act 1998. Under section L2 of Schedule 5 to the Scotland Act 1998, equal opportunities are a reserved matter. The content of the Prisons Guidance, insofar as it permits the admission of trans women prisoners to the women's estate, is incompatible with the EA 2010 and therefore with "the requirements of the law for the time being relating to equal opportunities".

[40] The petitioner refuted the respondents' argument that their obligations to respect the Convention rights of trans prisoners necessitate a policy allowing for case-by-case consideration, and argued that there is no case that recognises a right, whether expressed in terms of Articles 2, 3 or 8 of the Convention, to be accommodated in a prison of the opposite biological sex.

The respondents' arguments: a brief overview

[41] The respondents' position was that the answer to the present issue does not lie in the decision of the Supreme Court in *FWS 2*. As a result of that decision, the meanings of "man", "woman" and "sex" are settled, but the respondents argued that the petitioner's attempts to extrapolate from that are impermissible. The respondents viewed the *FWS 2* decision as the starting point but, they contended, the ratio in that case did not include Convention rights.

[42] The respondents presented two discrete arguments. The first, which they advanced as their primary argument, was an attack on the relevancy of the present petition. The second was in two parts and the respondents characterised these as subsidiary arguments, although they both rested on the same proposition, that being that trans prisoners have rights under Articles 2, 3, 8 and 14 of the Convention. The respondents argued that they

must act in accordance with Convention rights and that it is possible to construe the EA 2010 compatibly with Convention rights in this case. The two subsidiary arguments were framed by reference, on the one hand to section 29(1) to (5) of and Schedule 3 to the EA 2010, and, on the other, to section 29(6) of and Schedule 22 to the EA 2010.

[43] Although these arguments were advanced by the respondents as primary and subsidiary arguments, the respondents did not seek to persuade me that I should, on the basis of the primary argument, dismiss the petition as irrelevant and go no further. They accepted that there was a need to determine the question of the lawfulness of the Prisons Guidance. As a result, there was a certain tension in the respondents' position, since they contended both that the central question of lawfulness could not be properly tested in the abstract, and that the Prisons Guidance was lawful.

[44] The respondents resisted the petitioner's argument in relation to section 54(3) of the Scotland Act 1998 and the reservation in section L2 of Schedule 5. Their contention was that "the law for the time being relating to equal opportunities" must be understood to be broader than the provisions of the EA 2010 and, in particular, to encompass Convention rights compliance.

[45] As the respondents' submissions developed, they came to place less emphasis on the arguments relating to the construction of the EA 2010 and more on the Convention rights arguments, and in particular on Article 2 of the Convention in the context of suicide risk. At the close of the respondents' oral argument, senior counsel for the respondents described their task as having to deal with the practical consequences of *FWS 2* and submitted that, in view of their obligations under the EA 2010 and their duties in terms of sections 54(3) and 57(2) of the Scotland Act 1998 in respect of Convention rights, they act unlawfully whatever they do. That ultimately led the respondents to the argument that, unless it

was possible to construe Schedule 3 to the EA 2010 in a way that was compatible with Convention rights, it would be necessary to make a declaration of incompatibility.

The first interveners: the Scottish Human Rights Commission

[46] The written and oral submissions for the SHRC were directed exclusively at the Convention rights arguments. It was expressly stated that the SHRC would not seek to engage with the arguments relating to the construction of the EA 2010.

[47] The written submissions for the SHRC drew attention, first, to the Convention rights of female prisoners and staff, and, among other criticisms of the Prisons Guidance, noted the absence of any consideration of these therein. In relation to trans prisoners, the SHRC noted the recognition given by the Strasbourg Court to the Article 8 rights of trans prisoners. The SHRC did not contend that there was a positive obligation to place all trans prisoners in prisons according to their gender identity, or to operate a presumption to that effect, whether under Article 8 or otherwise. However, a “without exception” policy, which would exclude all trans prisoners from prisons for the opposite biological sex, could breach the rights of trans prisoners. The solution suggested by the SHRC was to have a human rights framework within which to make individual assessments.

The second interveners: the Equality and Human Rights Commission

[48] In its submissions, the EHRC set out a brief explanation of what it considered to be the consequences of the *FWS 2* decision in the context of prisons. The existing Prisons Guidance requires to be reconsidered. Placing a trans woman in a women’s prison makes it difficult to maintain separate accommodation for female prisoners, in accordance with the

requirements of the EA 2010. Logically, the effect is likely to be that there will be a mixed sex prison estate.

[49] The EHRC disagreed with the respondents' argument in relation to the relevancy of the petition, and submitted that, as a challenge to policy, the petition proceeds on the same basis as the *FWS 2* case. The EHRC expressed "some sympathy" with the petitioner's submission that the Prisons Guidance presents a misleading picture of the true legal position and that it is unlawful.

[50] The EHRC acknowledged that, at least in Scotland, the impact of the Human Rights Act 1998 is a matter primarily for the SHRC, and its submissions in relation to Convention rights were relatively brief. It noted the absence of Strasbourg authority requiring prison accommodation to be provided in line with gender identity. It resisted the respondents' argument that the EA 2010 and the 2011 Rules could be read down, arguing that the "grain" of the EA 2010 was predicated on biological sex, making an interpretation diverting therefrom incompatible with that core.

The respondents' first argument: relevancy

[51] Notwithstanding the petitioner's refusal to recognise that relevancy is an issue in these proceedings, it is necessary to deal with these points. That exercise entails an examination of the applicable provisions of the EA 2010.

[52] The respondents expressly admitted that the petitioner has sufficient interest to give it standing in these proceedings. They also acknowledged that, in terms of section 113(3)(d), there is a general rule making it clear that the provisions requiring proceedings relating to a contravention of the EA 2010 to be brought in the Sheriff Court do not prevent an application being made to the supervisory jurisdiction. There is also no dispute that, in a

case involving review of policy, the proper approach for the court to take is that set out in *R (A) v Secretary of State for the Home Department* [2021] UKSC 37; [2021] 1 WLR 3931.

To that extent, there was common ground. However, the respondents emphasised that their acceptance of these points did not entail any concession in respect of relevancy.

[53] The respondents contended that the petition was irrelevant because it proceeded on what they characterised as a fundamental misunderstanding of the nature of the EA 2010, and because no discrimination or harassment claim was advanced by the petitioner. The respondents described section 29 and Schedules 3 and 22 as being within the delictual parts of the EA 2010. They objected that the petitioner's case was based on assumptions and argued that the existence of underlying sex discrimination, or harassment, could not be assumed and that a claim must be established by reference to fact-specific circumstances. They argued that section 29 of the EA 2010 did not provide for a freestanding legal prohibition against sex discrimination or harassment, or a "norm" for sex segregation in prisons. It provides a remedy for an individual who is able to establish a claim, and if an individual were to bring a claim based on sex discrimination, that person would need to show what conduct had taken place. In the event that such a claim were to be made in relation to the provision of a service and sex discrimination, paragraph 26 of Schedule 3 would make a defence available. These provisions were characterised as a shield and it was said that to convert them into a sword would subvert the EA 2010.

[54] The starting point for the petitioner was quite different. The petitioner's submissions focused on *R(A)* and the amenability of the Prisons Guidance to judicial review, but, beyond that, the petitioner's response to the relevancy challenge was sparse. It was submitted that these were judicial review proceedings concerned with the proper interpretation of the

EA 2010 and that the fact that individuals might take proceedings on the basis of a delictual breach did not matter.

[55] The EHRC engaged briefly with the respondents' arguments on relevancy in its written submission, with the explanation that a policy or decision may be viewed as unlawful on the basis that it will give rise to unlawful discrimination or harassment under the EA 2010, without reference to the particular circumstances of an underlying claim. Referring to the analysis by the UK Supreme Court in *FWS 2* of Part 3 of the EA 2010, in particular at paragraph [211], it was argued that women's prisons are a quintessential example of the provision of a separate space or service made available for women as a group, in accordance with the provisions in the EA 2010 which derogate from the prohibition against discrimination in section 29.

The relevancy argument: discussion

[56] It is true that the EA 2010 provides a mechanism for individuals to vindicate their rights. This is a sophisticated and well-established scheme routinely used by individuals in, amongst other fora, the Employment Tribunal and the Sheriff Court and, in that context, there will normally be evidence led in support of such claims. The way in which the key concepts relating to prohibited conduct are set out in sections 13 to 27, by reference to "a person (A)" and "another (B)", is consistent with a statutory structure that allows individuals to explain what has happened in particular circumstances and why that is said to constitute discrimination, harassment or victimisation. These may reasonably be described as delictual provisions. Where an individual brings a claim in respect of an alleged breach of section 29, whether that is in relation to discrimination, harassment

or victimisation, the proper response may involve reference to the derogations in either Schedule 3 or Schedule 22, and they may reasonably be described as a shield in that context.

[57] Separately, there are positive obligations under section 149 of the EA 2010 in terms of the public sector equality duty, as well as further provisions relating to positive action, in particular under section 158. No argument was advanced in these proceedings in relation to the public sector equality duty or the positive action provisions.

[58] However, the structure of the EA 2010 and the fact that it allows for individuals to bring claims do not provide a complete answer to this petition in the way contended for by the respondents. In general terms, service-providers and those who exercise public functions must make sure that the ways in which they carry out those responsibilities are lawful. They must be prepared to meet individual claims but they will only be able to do that in a considered and consistent way if, at the stage of devising policy, they take account of all of their obligations, including those under section 29 of and Schedules 3 and 22 to the EA 2010. If they adopt a policy which, when implemented in individual cases, will result in a breach of their statutory obligations, then that policy may be challenged as being unlawful. In these proceedings, the petitioner seeks judicial review of a policy, and that involves consideration of its lawfulness at a general level.

The legal basis for sex segregation in prisons

[59] The starting point is that, in Scottish prisons, women and men are accommodated separately, in other words that there is sex segregation. It is undisputed that that is required by rule 126 of the 2011 Rules. Rule 126 refers to “accommodation” and that is defined in rule 2 as meaning “the cells or rooms used to accommodate prisoners for living and sleeping purposes”. Senior counsel for the respondents submitted that rule 126 is not happily drafted

and that the explanation for the inclusion of both “cells” and “rooms” in rule 2 is that, historically, men’s prisons had “cells” and women’s prisons had “rooms” and that these have essentially the same meaning. It cannot be taken from that, though, that compliance with rule 126 would only require the respondents to ensure that no cell is shared by a male prisoner and a female prisoner, since there is also a requirement in rule 126 that accommodation for male and female prisoners must, as far as reasonably practicable, be in separate parts of the prison. Rule 126 contemplates that, within a single establishment, there might be accommodation for both women and men, and, indeed, such prisons exist, but there is a clear requirement that the respective spaces within such an establishment will be separate. It cannot have been contemplated that, for example, toilets, washing areas or other living spaces could be shared by male prisoners and female prisoners, and, unsurprisingly, there was no suggestion by the respondents that rule 126 ought to be construed in that way. Rule 126 of the 2011 Rules requires the existence of a separate male prison estate and female prison estate in Scotland.

[60] There was also no real dispute that, as a matter of generality, the reasons for sex segregation in prisons are to protect the safety of women and to secure the privacy and dignity of both women and men. That is the principle underpinning rule 126. That principle, and that statutory requirement, are consistent with international standards. The petitioner’s pleadings and argument drew attention to, among other things, the United Nations Standard Minimum Rules for the Treatment of Prisoners, also referred to as the Nelson Mandela Rules, adopted by the UN General Assembly in 2015, and the United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders, also referred to as the Bangkok Rules, adopted by the UN General Assembly in 2010. The respondents’ own EHRIA, carried out prior to the introduction of

the Prisons Guidance, makes references to the Nelson Mandela Rules, and in particular to rule 11, which is in these terms:

“Men and women shall so far as possible be detained in separate institutions; in an institution which receives both men and women, the whole of the premises allocated to women shall be entirely separate.”

There is also recognition in the Nelson Mandela Rules, in rule 7, of the need to respect a prisoner’s self-perceived gender, but that is in the context of recording information on admission to prison. In the preamble to the Bangkok Rules, reference is made to an acknowledgement by the United Nations General Assembly:

“of the fact that violence against women has specific implications for women’s contact with the criminal justice system, as well as their right to be free of victimization while imprisoned. Physical and psychological safety is critical to ensuring human rights and improving outcomes for women offenders [...]”.

[61] Segregation by sex does not necessarily give rise to less favourable treatment and, as a consequence, direct discrimination. There may be circumstances, though, in which some individuals are treated less favourably because of the protected characteristic of sex. An example of such a situation can be found in *R (Coll) v Secretary of State for Justice* [2017] UKSC 40; [2017] 1 WLR 2093. In that case, the claimant, a female prisoner serving a life sentence, anticipated that, if she were released on licence, she may be required to live in single sex approved premises. In England and Wales, there were only six such premises for women, in contrast to 94 approved premises for men. That gave rise to a much greater risk for women of being placed far from home than for men. That was found to constitute direct discrimination contrary to section 13 of the EA 2010. That was unlawful unless justified under paragraph 26 of Schedule 3, and no such justification had been shown by the Secretary of State. At paragraph 34, Baroness Hale explained that paragraph 26 of

Schedule 3 proceeds on the assumption that, without it, the provision of single sex services would be unlawful discrimination.

[62] The respondents argued that, without an established claim, no assumptions can be made, and that reviewing the Prisons Guidance as a policy by reference to either Schedule 3 or Schedule 22 of the EA 2010 involved converting the justification “shield”, which should only be used by those subject to challenge in cases where there are established facts, into a “sword” used to attack the policy. They argued that the EA 2010 does not mandate sex segregation in prisons, and that it contains no “norm”, positive or negative, express or implied in that regard.

[63] The first difficulty with the respondents’ approach is that it does not properly take into account the interaction of the EA 2010 and the 2011 Rules. Rule 126 does mandate sex segregation in prisons. It is more than a “norm”. It is a statutory requirement. It was, unsurprisingly, no part of the respondents’ argument that sex segregation in prisons does not have a lawful basis. At no point did the respondents suggest that a male prisoner, who is not a trans woman, could be admitted to a female prison. However, the logical consequence of the respondents’ argument on relevancy and the construction of the EA 2010 would have to be that sex segregation in prisons is just a policy choice and would be susceptible to challenge by any male prisoner who wanted to be accommodated in a women’s prison, or indeed any female prisoner who sought to be transferred to a men’s prison and that, in any such challenge, the response would have to be fact-specific. That is not how the system works either in principle or in practice. The first respondents apply rule 126 of the 2011 Rules and maintain separate estates for men and women.

[64] There is lawful separate sex provision. Prisons are not unique in this respect. Such provision is normal in a range of public services. As Lord Reed observed in *R (Elan-Cane) v Home Secretary* [2021] UKSC 56; [2023] AC 559, at paragraph 53:

“A binary approach to gender also forms the basis of the provision of a wide variety of public services. The prison estate, for example, is divided into male and female prisons. Hospitals have wards where patients can only be of a single sex. Local authorities may fund rape crisis centres or domestic abuse refuges which offer their services only to women. Many schools only admit pupils of a particular sex. Much of this is underpinned by, or permitted by, legislation.”

[65] It may be that sex segregation in prisons could give rise to complaints of less favourable treatment. It might be envisaged, for example, that a male prisoner could complain that he is treated less favourably than a female prisoner because the quality of accommodation in the women’s estate is, or is perceived to be, higher than that in the men’s estate. That was a hypothetical example mentioned by senior counsel for the EHRC. Whether or not a complaint about the quality of accommodation could be substantiated would depend on an analysis of the facts and, if there were substance in that complaint, it might be addressed in various ways but that could not, in any circumstances, extend to admitting a male prisoner to the female estate. There would be no contravention of section 29 of the EA 2010. Any claim made by a male prisoner that the first respondents were in breach of section 29 of the EA 2010 by treating him less favourably than a female prisoner would be answered by reference to paragraph 26 of Schedule 3 (if this were provision of a service) or paragraph 1 of Schedule 22 (if the exercise of a public function). Leaving aside the question of accommodating trans prisoners, a request made by a male prisoner to be accommodated in the female estate would be refused. It would be contrary to rule 126 of the 2011 Rules to accede to such a request. The refusal of such a request would be lawful in terms of the EA 2010.

[66] The respondents argued that, as a matter of relevancy, there cannot be a challenge to policy based on assumptions about less favourable treatment, direct discrimination and the availability of a relevant defence, and that these can only be tested in the context of a claim in which there are established facts. However, it would be an entirely safe and well-founded assumption that, leaving aside the first respondents' policy on trans prisoners, no man would be accommodated in the women's estate in Scotland. It would be legally well-founded because, as the respondents accept, that is what is required in terms of rule 126. That is part of the legislative underpinning to which Lord Reed referred, in general terms, in *Elan-Cane*. Sex segregation in prisons may or may not give rise to less favourable treatment. If it does, there will be no breach of section 29 of the EA 2010, because there is a justification for separate sex provision which applies in every case. If it does not, then no EA 2010 issue arises and it is simply a legal requirement.

[67] In order to examine the justification in the EA 2010 for sex segregation in prisons, it is necessary to consider first whether the allocation of prisoners to prison accommodation is the provision of a service, and subject to section 29(1) to (5) of the EA 2010, or the exercise of a public function, in which case section 29(6) applies.

The provision of a service or the exercise of a public function?

[68] The positions of the parties and the EHRC on this question were not entirely consistent. The primary argument for the respondents was that this is a public function and that section 29(6) and Schedule 22 apply, although that was qualified by a submission that there might be services provided "downstream", such as the provision of education and food. The respondents presented a subsidiary argument in relation to public services and section 29(1) and Schedule 3. The petitioner's position was less than clear. The petitioner's

pleadings set out a lengthy explanation of the basis for separate sex provision by reference to Schedule 3 but also include an admission that section 29(6) and paragraph 1 of Schedule 22 apply. The view expressed by the EHRC is that both section 29(1) and section 29(6) may be engaged, noting that prisoners may be provided with services whilst incarcerated.

[69] The wording of sections 29 and 31 makes it clear that a single act cannot be both the provision of a service and the exercise of a public function at the same time. Services may be provided in the exercise of a public function, and those are treated as services. A reference to the provision of a service includes a reference to the provision of a service in the exercise of a public function: section 31(3). A person which has exercised a public function might then go on to provide a service, but that would be a sequence of acts rather than a single act. Paragraphs 26(3) and 27(8) of Schedule 3, which cover separate services for the sexes and single-sex services respectively, provide that those paragraphs apply to persons exercising a public function in relation to the provision of a service as they apply to the person providing the service, but that does not result in any overlap in relation to the original act.

[70] Section 31(4) provides that a public function is a function that is a function of a public nature for the purposes of the Human Rights Act 1998. In *R (Coll)* at paragraph [23], Baroness Hale categorised the provision of approved premises to prisoners released on licence as a function of a public nature, but the further discussion in that case was under reference to Schedule 3 to the EA 2010, and the court apparently proceeded on the basis that the provision of such premises was a service in the exercise of a public function. In *Gichura v Home Office and another* [2008] EWCA Civ 697; [2008] ICR 1287, the Court of Appeal considered a claim of disability discrimination in relation to facilities at an immigration removal centre. It distinguished between functions which were “purely

governmental”, such as the administrative handling of the detainee on his arrival, and services provided to a detainee once admitted, which are provided to him as a member of a section of the public. In *R (FDJ) v Secretary of State for Justice* [2021] EWHC 1746 (Admin); [2021] 1 WLR 5265, parties proceeded on the basis that the allocation of prisoners to particular detention facilities was the provision of a service to a section of the public within the meaning of section 29(1) of the EA 2010, but that was not a matter which the court was required to determine.

[71] In deciding to which prison a prisoner is to be committed, the first respondents exercise a power under section 10(2) of the Prisons (Scotland) Act 1989. That is a governmental function, which can be discharged only by the first respondents, and in doing that they are exercising the coercive powers of the state. They are not simply providing an accommodation service to a section of the public. Once admitted to a particular establishment, the respondents will be responsible for the provision of services to that prisoner. However, the critical act is the decision in relation to prison allocation. In my view, that is the exercise of a public function and is subject to section 29(6) and Schedule 22.

[72] If I am wrong about that and that decision is properly characterised as one relating to the provision of prison accommodation as a service in the exercise of a public function, in terms of section 31(3), then it is necessary to consider section 29(1) and (2) and Schedule 3 to the EA 2010.

The effect of section 29

[73] Section 29 prohibits discrimination and applies to the first respondents in their exercise of their public function in determining in which prison a prisoner is to be accommodated. The first respondents’ determination will be informed by a range of

considerations, but, at a basic level, it must be made on the basis of the prisoner's sex. If section 29 applied in an unqualified way, then there could be no discrimination on the basis of sex. The first respondents could not do anything that would mean treating a woman less favourably than a man, or vice versa, or would put women at a disadvantage relative to men, or vice versa. The first respondents would not be permitted to restrict their allocation decision in respect of a man to a men's prison. However, the qualification, or derogation, in paragraph 1 of Schedule 22 does apply. There is no contravention of section 29(6) if the first respondents' act of allocating prisoners to establishments according to sex is done pursuant to a requirement of an enactment. The 2011 Rules are an enactment. Rule 126 prohibits the sharing of the same accommodation by female prisoners and male prisoners.

[74] The respondents argued that section 29 of the EA 2010 is not a free-standing legal prohibition against sex discrimination or harassment. For the reasons given, I consider that the respondents' approach does not properly take into account the structure of the EA 2010 when read with rule 126 of the 2011 Rules. There is a further and important difficulty with the respondents' approach, that being that it is inconsistent with that taken by the UKSC in *FWS 2*. The respondents resisted the concept of a general prohibition, but that is the term used by the Supreme Court in describing section 29, in *FWS 2* at [211]:

"Part 3 of the EA 2010 regulates the provision of services and public functions, and we have set out above the terms of the prohibition in sec 29 (making it unlawful, among other things, to discriminate in the provision of a service or the exercise of a public function). Schedule 3 contains exemptions from this general prohibition. As we shall explain, some of these permit what would otherwise constitute gender reassignment discrimination but make no similar provision for persons issued with a full GRC. Other provisions permit carve-outs from what would otherwise constitute sex discrimination under the EA 2010. In enacting these exemptions, the intention must have been to allow for the exclusion of those with the protected characteristic of gender reassignment, regardless of the possession of a GRC, in order to maintain the provision of single or separate services for women and men as distinct groups in appropriate circumstances. These provisions are directed at maintaining the availability of separate or single sex spaces or services for women

(or men) as a group, for example, changing rooms, homeless hostels, segregated swimming areas (that might be essential for religious reasons or desirable for the protection of a woman's safety, or the autonomy or privacy and dignity of the two sexes) or medical or counselling services provided only to women (or men), for example, cervical cancer screening for women or prostate cancer screening for men, or counselling for women only as victims of rape or domestic violence."

[75] What is said in paragraph [211] in relation to Schedule 3 applies with equal force to Schedule 22. That is the equivalent exemption, or carve-out, in relation to the exercise of a public function. Although the language of separate or single-sex spaces is not used in Schedule 22, the effect is the same. There is an assumption that sex segregation would be unlawful. That is the general prohibition in section 29. There are, however, exemptions. Rule 126 is an enactment mandating the provision of separate prison accommodation for women and men. The examples listed in paragraph [211] - changing rooms, homeless hostels, segregated swimming area - are all within the services category. These are all services provided to both men and women, but separately, and for reasons including the protection of women's safety and the autonomy or privacy and dignity of the two sexes. The underlying rationale for rule 126 is clearly consistent with that. The statutory requirement reflects a well-recognised need, in the prison setting, to protect the safety of women and the privacy and dignity of both men and women. If anything, the existence of a statutory basis for segregated prisons reinforces the strength of the exemption.

[76] The respondents took issue with what the petitioner described as the "underlying sex discrimination". I have referred already to *R (Coll)* and to the observation made by Baroness Hale at paragraph 34 that "paragraph 26 proceeds on the assumption that, without it, the provision of single sex services would be unlawful discrimination". The Court of Appeal in *R (Interim Board of Al-Hijrah School) v HM Chief Inspector of Education, Children's*

Services and Skills [2017] EWCA Civ 1426; [2018] 1 WLR 1471, considered that observation and stated, further, at paragraph 68, that:

“[t]he legislative assumption that the provision of separate but equal treatment is capable of being unlawful discrimination within section 13(1) of EA 2010 is also underscored by paragraph 27 of Schedule 3”.

[77] In the context of prisons generally, discriminating against a prisoner as to the terms on which the first respondents provide services to that prisoner would be unlawful under section 29(2) but is justified under paragraph 26 of Schedule 3. Doing anything constituting sex discrimination would be unlawful under section 29(6) but is justified under Schedule 22. Those derogations exist to protect separate provision. If, to any extent, the allocation decision entails sex discrimination, sex segregation in prisons can be justified and there will be no breach of section 29(6). The justification does not require a case-by-case analysis. It is not necessary to refer to specific evidence relating to an individual claim. The only question that needs to be asked is whether sex segregation is done pursuant to an enactment, and the answer to that question is that it is.

[78] The respondents did not argue that the reference to female prisoners and male prisoners in rule 126 should be understood in any way other than by reference to biological sex. This is an enactment read with section 29 of and Schedule 22 to the EA 2010 and any alternative reading would be impossible following *FWS* 2.

The alternative view: public services and section 29(1) and (2)

[79] If, contrary to the view that I have reached, the allocation decision is not the exercise of a public function, with the result that section 29(6) applies, it could be understood as the provision of a service in the exercise of a public function, in terms of section 31(3), and in

that event the general prohibition against discrimination is under section 29(1) and (2), subject to the exemptions in Schedule 3.

[80] In providing separate prison accommodation for women and men, the respondents are providing separate services for the sexes and so paragraph 26 of Schedule 3 would apply. A women's prison is not a single-sex service within the meaning of paragraph 27 of Schedule 3 because the first respondents require to provide prison accommodation to both women and men, although there may also be single-sex services provided to prisoners of one sex. Under paragraph 26(1) separate provision is permitted if a joint service for persons of both sexes would be less effective, and the limited provision is a proportionate means of achieving a legitimate aim. On the basis of the uncontroversial proposition that segregated prison accommodation is necessary to protect the safety of women and the privacy and dignity of both men and women, unsegregated accommodation plainly would be less effective, because it would be less safe and less dignified. Maintaining female prisoners' safety and the privacy and dignity of women and men are legitimate aims and segregation by sex is proportionate. There is force in the submission for the EHRC to the effect that a female prison is a quintessential example of separate sex provision which would unarguably meet the requirements of paragraph 26 of Schedule 3 to the EA 2010.

[81] The respondents maintained that it is difficult to envisage in practice an insistence that the requirements of paragraph 26 of Schedule 3 be met on an entirely exclusive basis and that, on a pragmatic basis, there must be room for exceptions. They refer to the example of a mother taking her young son into a female only space, such as a changing room or a toilet, and argue that what is essentially a single-sex (or separate sex) space can be maintained notwithstanding this limited exception, because allowing that exception does not give rise to sex discrimination. This comparison is not apt. The toilet or changing room

remains a separate sex service, even if there is an infant boy present. His presence derives from that of his mother. It is not some kind of exception that is a gateway to other exceptions. Closer to the actuality of the present case, rule 128 of the 2011 Rules provides that a female prisoner may be permitted to have her baby with her in prison. If a female prisoner has a baby boy, the prison is still a female prison. It remains so regardless of the presence of male babies, male visitors or male members of staff. Those are not exceptions to the rule that only female *prisoners* may be admitted. It is not difficult to envisage a rule that operates on an entirely exclusive basis, consistently with the provisions in paragraph 26 of Schedule 3 to the EA 2010.

[82] Sex segregation in prisons is not mandated in terms by the EA 2010, but it is lawful. Sex segregation is protected by the provisions of the EA 2010 which are, as expressed by the Supreme Court, “directed at maintaining the availability of separate or single spaces or services for women (or men) as a group”. That can be accepted without the need to examine the circumstances of an individual prisoner in the context of a delictual claim. For separate spaces to be maintained in a way that is foreseeable and consistent, there require to be rules, whether statutory, as in this case, or otherwise, which are capable of general application. The exemptions or carve-outs, whether in terms of Schedule 3 or Schedule 22, can only sensibly be operated on a group basis. A separate sex space is lawful if either of those exemptions applies. Following *FWS 2*, lawful sex segregation in prisons means that trans prisoners are excluded from prisons for the opposite biological sex.

Paragraph 28 of Schedule 3 and paragraph 3 of Schedule 23

[83] The arguments before the court focused on paragraph 26 of Schedule 3 and paragraph 1 of Schedule 22 to the EA 2010. Analysis of paragraph 28 of Schedule 3 and

paragraph 3 of Schedule 23 supports the conclusion that sex segregation in prisons, on the basis of biological sex, is lawful.

[84] Paragraph 28 of Schedule 3 confirms that there is no contravention of section 29, so far as relating to gender reassignment discrimination, only because of anything done in relation to the provision of separate services or single-sex services, provided that the conduct in question is a proportionate means of achieving a legitimate aim. In *FWS 2*, at paragraph [221], the Supreme Court explained the need for paragraph 28 of Schedule 3:

“[...] if sex means biological sex, then provided it is proportionate, the female-only nature of the service would engage para 27 and would permit the exclusion of all males including males living in the female gender regardless of GRC status. Moreover, women living in the male gender could also be excluded under para 28 without this amounting to gender reassignment discrimination. This might be considered proportionate where reasonable objection is taken to their presence, for example, because the gender reassignment process has given them a masculine appearance or attributes to which reasonable objection might be taken in the context of the women-only service being provided. Their exclusion would amount to unlawful gender reassignment discrimination not sex discrimination absent this exception.”

In the context of a prison, sex segregation would engage paragraph 26, and, because it is a proportionate means of achieving a legitimate aim, that results in the exclusion of all males including those who are trans women. Excluding a trans woman from the female prison estate does not constitute gender reassignment discrimination.

[85] In paragraph 3 of Schedule 23 to the EA 2010, it is recognised that, where communal accommodation is provided, there will be a need to protect separate sex provision.

Paragraph 3(1)(a) of Schedule 23 provides that there is no contravention of the EA 2010

“so far as relating to sex discrimination or gender reassignment discrimination, only because of anything done in relation to the admission of persons to communal accommodation”.

[86] Communal accommodation is defined at paragraph 3(5) as:

“residential accommodation which includes dormitories or other shared sleeping accommodation which for reasons of privacy should be used only by persons of the same sex”.

At paragraph 3(6)(b) and (c) the following specific examples are given: “ordinary sleeping accommodation” and “residential accommodation all or part of which should be used only by persons of the same sex because of the nature of the sanitary facilities serving the accommodation”.

[87] However the particular cells and sanitary facilities of any individual prison may be configured, on any view a prison provides ordinary sleeping accommodation and would come within the meaning of communal accommodation. The essential purpose of paragraph 3 of Schedule 23 is plain: providing separate sex communal accommodation will not constitute sex discrimination. So far as gender reassignment discrimination is concerned, there is an added qualification in paragraph 3(4) in that the conduct must be a proportionate means of achieving a legitimate aim. The Supreme Court considered the provisions in Schedule 23 relating to communal accommodation at paragraphs [222] to [225] in *FWS 2*. The conclusion in paragraph [225] is very clear:

“On any view, the plain intention of these provisions is to allow for the provision of separate or single-sex services for women which exclude all (biological) men (or vice-versa). Applying a biological meaning of sex achieves that purpose.”

The first respondents’ obligations under the EA 2010

[88] In this case, the petitioner challenges the lawfulness of the Prisons Guidance and, in further support of that argument, submitted that the admission of trans women prisoners would result in a breach of the first respondents’ obligations towards female prisoners under the EA 2010.

[89] The petitioner's position was that placing male prisoners in the female estate would undermine the justification for the derogations from section 29 and would itself result in sex discrimination, contrary to section 29. The petitioner also contended that the accommodation of trans women prisoners in the female estate would at least be perceived as having the effect of violating the dignity of women prisoners or creating an intimidating, hostile, degrading, humiliating or offensive environment for them, and that that would be harassment contrary to section 29(3) or 29(6). The respondents' position was that, in respect of both discrimination and harassment, evidence would be needed. It cannot be assumed, according to the respondents, that the accommodation of a trans woman in a women's prison would result in less favourable treatment for women, or the creation of a harassing environment. The respondents relied on observations made by Baroness Hale in *R (C) v Secretary of State for Work and Pensions* [2017] UKSC 72; [2017] PTSR 1476 at paragraph [45]. In that case, the claimant, a trans woman with a gender recognition certificate, sought judicial review of policies relating to the retention and processing of, and access to, historical gender data. She claimed that the policies breached her rights under Articles 8 and 14 of the Convention and, separately, were directly and indirectly discriminatory of her, contrary to sections 13 and 19 of the EA 2010. Before the Supreme Court, she also argued that the policies created a harassing environment, contrary to section 26 of the EA 2010. In relation to that latter part of the argument, having noted that it had not been advanced in the courts below and was not clearly spelled out in the appellant's case, Baroness Hale stated:

"This is not an allegation which can sensibly be made in a claim for judicial review of the DWP's policies in relation to transgender people. It might be made in a substantive claim under the Equality Act in relation to the sorts of incidents of which the appellant has complained [...]. Then there would have to be specific evidence directed towards such a claim and the DWP would have the opportunity of investigating the complaint and putting in evidence in rebuttal."

[90] In relation to the harassment element of section 29, there is some force in the argument that evidence would be needed to establish a breach. It is not difficult to configure circumstances in which the presence of a male prisoner in a female prison might create an intimidating or hostile environment. There is a connection between that and the need to protect women's safety. A prudent policy-maker would be well-advised to take that into account, but there is a step between that and the conclusion that the admission of an individual trans woman prisoner would necessarily have that effect. In the petitioner's pleadings, it was said that women prisoners have the right to object to the placing of a trans woman prisoner in a female prison if that has the effect of violating their dignity or creating a harassing environment. That is true, but that is not the same as that being the inevitable consequence. However, it is not necessary, in order to plead a relevant case, for the petitioner to establish that the policy must result in harassment within the meaning of sections 26 and 29 of the EA 2010.

[91] The respondents relied on the statement of Baroness Hale in *R(C)* in relation to harassment and asserted that if an argument that a policy might give rise to a harassing environment cannot sensibly be made in a claim for judicial review, then the same applies to sex discrimination. That does not follow. In *R (C)* the Supreme Court did consider, within judicial review proceedings, arguments about both direct and indirect sex discrimination. Of course, that case was brought by an individual claimant, but the approach taken by the Supreme Court was to consider the policies and their effect in terms of discrimination at a level of generality and by reference to transgender customers as a group, relative to other groups. This case does not assist the respondents in their argument that a court can only properly look at section 29 of the EA 2010 in the context of a specific claim brought by an

individual. In relation to sex discrimination, there is no need to refer to the circumstances of an underlying claim in order to bring a challenge to the policy.

[92] There is, however, a basis to conclude that the accommodation of male prisoners in the female estate would result in female prisoners receiving less favourable treatment because of their sex. There are disadvantages associated with the sharing of accommodation by female and male prisoners; were it otherwise, there would be no need for sex segregation. At a minimum, those disadvantages are a risk to physical safety and violation of dignity. Those disadvantages would, on the respondents' own statistics, as set out in Ms Pollock's affidavit, have a greater effect on women than on men, since there are significantly more men in custody than there are women. The respondents' statistics also show that the number of trans women accommodated in women's prisons far exceed the numbers of trans men accommodated in men's prisons.

[93] It is not necessary to establish that the admission of trans women to the female estate would result in a breach by the first respondents of their obligations towards any one or more individual female prisoners. However, the consequences for female prisoners, as a group, in terms of sex discrimination as a result of the admission of male prisoners are consistent with sex segregation in prisons being a lawful requirement.

The trans man issue

[94] In challenging the lawfulness of the Prisons Guidance, the petitioner focused exclusively on the policy so far as it relates to trans women prisoners and the impact on women prisoners in the female estate. In his submissions, senior counsel for the petitioner expressly stated that the consequences for trans men prisoners did not concern him. In their written and oral submissions, the respondents drew attention to the fact that restricting the

accommodation of prisoners to prisons for their biological sex would mean that trans men would require to be accommodated in the female estate. The respondents noted that in *FWS 2* the Supreme Court contemplated that a trans man of masculine appearance may have to be excluded from a female facility. This, contended the respondents, contradicts the argument that biology is the sole determining factor, and results in a risk of violation of the trans man prisoner's Convention rights under Articles 8 and 14, and it is not sustainable to hold such a person in an intermediate zone.

[95] I have referred already to the discussion in *FWS 2*, at paragraph [221], of the meaning of paragraph 28 of Schedule 3 to the EA 2010. The Supreme Court noted the possibility that trans women could be excluded from a female-only service. The respondents also pointed to paragraphs [232] to [236] in *FWS 2*. In this section, the Supreme Court considered the lawfulness of excluding both trans men who have taken testosterone and trans women from women's sport. The provisions relating to fair participation in sport have no real bearing on the assessment of the lawfulness of segregation in prisons on the basis of biological sex. For present purposes, the important point in paragraph [221] concerns proportionality. The exclusion of a trans man from a female facility may, in general terms, be proportionate, but in the context of a prison, where there is both compulsion and no alternative, it would not be an option. Management of prisoners generally will take into account risks and dangers, whether or not prisoners are transgender, and in the case of an individual trans man prisoner that may, or may not, result in special arrangements being necessary within the women's estate. Accommodation in the female estate may engage the individual trans man prisoner's rights under Article 8, but, for the reasons given below, sex segregation is justified as a bright line rule. If the first respondents were to choose to make provision for trans men away from the women's estate, or, indeed, for trans women away from the men's estate, that

could be lawfully achieved by the application of paragraph 28 of Schedule 3 to the EA 2010.

The inclusion of trans men prisoners in the female estate is lawful and does not, as the respondents suggest, expose a contradiction.

[96] For all of these reasons, I reject the respondents' primary argument in relation to the relevancy of the petitioner's case. The petitioner challenges the Prisons Guidance on the basis that it mis-states the law and, in order to do that in relation to sex discrimination, it is not necessary to put before the court the circumstances of any individual case.

Judicial review of policy

[97] Parties were agreed that in judicial review of a policy what the court is required to do is to follow the steps set out in *R (A) v Secretary of State for the Home Department* [2021] UKSC 37; [2021] 1 WLR 3931.

[98] The Supreme Court, at paragraph [46], identified three types of case where a policy may be found to be unlawful by reason of what it says or omits to say about the law when giving guidance for others:

- “(i) where the policy includes a positive statement of law which is wrong and which will induce a person who follows the policy to breach their legal duty in some way (i.e. the type of case under consideration in *Gillick* [1986] AC 112);
- (ii) where the authority which promulgates the policy does so pursuant to a duty to provide accurate advice about the law but fails to do so, either because of a misstatement of law or because of an omission to explain the legal position; and
- (iii) where the authority, even though not under a duty to issue a policy, decides to promulgate one and in doing so purports in the policy to provide a full account of the legal position but fails to achieve that, either because of a specific misstatement of the law or because of an omission which has the effect that, reads as a whole, the policy presents a misleading picture of the true legal position. [...] where a Secretary of State issues guidance to his or her own staff explaining the legal framework in which they perform their functions, the context is likely to be such as to bring it within category (iii).”

[99] The purpose of the Prisons Guidance is not to give a detailed exposition of the law. Rather, it sets out the circumstances in which SPS may accommodate trans prisoners in a prison of the opposite biological sex. That is necessarily premised on an understanding that that step is lawful. The difference between the parties is stark. The petitioner's position is that it is not lawful in any circumstances because it is in breach of rule 126 and the obligations on the respondents under section 29 of the EA 2010 not to do anything constituting discrimination, and, further, that it is beyond the scope of what the first respondents may do in terms of section L2 of Schedule 5 to the Scotland Act 1998; the respondents' position is that it is lawful in some circumstances, specifically where it is necessary to protect the Convention rights of trans prisoners.

Section L2 of Schedule 5 to the Scotland Act 1998

[100] It is convenient to deal, first, with the argument relating to the constraints on the first respondents in terms of section 54 of the Scotland Act 1998 and section L2 of Schedule 5 to that Act. Section L2 provides that "equal opportunities" are a reserved matter, and they are defined as meaning

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

[101] There are exceptions to the reservation, and, so far as relevant, these are:

- The encouragement (other than by prohibition or regulation) of equal opportunities, and in particular of the observance of the equal opportunity requirements.
- Imposing duties on [...] any office-holder in the Scottish administration or any Scottish public authority with mixed functions or no reserved functions, to make arrangements with a view to securing that the functions of the office-holder or authority are carried out with due regard to the need to meet the equal opportunity requirements [...]

- Equal opportunities in relation to the Scottish functions of any Scottish public authority [...]"

[102] The petitioner's position was that the equal opportunity requirements are now almost entirely contained in the EA 2010. A mis-statement of the requirements of the law relating to equal opportunities would render the Prisons Guidance of no effect, since it would be outside the first respondents' powers.

[103] The respondents took a broader approach to the interpretation of "the requirements of the law for the time being relating to equal opportunities", contending that they also include, so far as relevant, the provisions of the Human Rights Act 1998 and section 57(2) of the Scotland Act 1998. They also sought to rely on the statutory exceptions, particularly that relating to the encouragement of equal opportunities, and on what they characterised as a more expansive definition of "equal opportunity requirements" encompassing transgender identity within the category of "other personal attributes". In short, it would be within competence for the first respondents to protect the Convention rights of trans prisoners, and to promote equal opportunity requirements for trans prisoners.

[104] It is not obvious that Convention rights compliance must be within the scope of "equal opportunity requirements" in section L2, as the respondents contended. Within the careful structure of the Scotland Act 1998, there are separate provisions requiring the first respondents to act within devolved competence and not to act in a way which is incompatible with Convention rights, found at sections 54(3) and 57(2) respectively. Given the existence of the section 57(2) obligation, there is no need for an additional Convention compliance requirement within section 54(3) or within the meaning of "the requirements of the law for the time being relating to equal opportunities" for the purposes of section L2.

[105] The exceptions listed in section L2 spell out what the first respondents may do within the area of equal opportunities, which would otherwise be reserved. Among other things, they may require Scottish public authorities to make arrangements to carry out their functions having due regard to the requirements of the law relating to equal opportunities. That has a clear meaning and adding in an extra qualification “insofar as compatible with Convention rights” is unnecessary. The Scottish Ministers have no power to act incompatibly with Convention rights and, as senior counsel for the respondents submitted, referring to *Somerville v Scottish Ministers* [2007] UKHL 44; 2008 SC (HL) 45 at paragraph [32], they cannot rely on section 6(2) of the Human Rights Act 1998. That does not entail the special construction of section 54(3) or section L2 for which the respondents contended. In any event, that would only arise were there to be a conflict between the requirements of the EA 2010 and those of the Human Rights Act 1998. For the reasons discussed hereafter, there is no Convention incompatibility in the applicable provisions of the EA 2010.

[106] The definition of “equal opportunities” in section L2 encompasses discrimination on grounds of “other personal attributes” and the argument for the respondents was that that is not co-extensive with the definition of protected characteristics in the EA 2010. Gender reassignment is a protected characteristic in the EA 2010. Conceivably, a more expansively defined “attribute”, as opposed to “characteristic”, might cover gender identification as something going beyond gender reassignment, but this does not assist the respondents. The first respondents cannot require public authorities to act in a way which is contrary to the EA 2010. An attempt to broaden a definition for the purpose of regulating anti-discrimination measures will impinge on the nature of protected characteristics, and that is a reserved matter. The Inner House in *For Women Scotland v Lord Advocate* [2022]

CSIH 4; 2022 SC 150 at paragraph [40] made it clear that such a step was impermissible. That case concerned legislation rather than exercising a non-legislative function, but the principle is the same.

[107] The difficulty with the respondents' argument becomes clearer when its logical consequence is considered. If that argument were correct and the definition of "equal opportunity requirements" were not tethered to the EA 2010 but understood by reference to broader concepts, then "equal opportunities" and the EA 2010 itself would be construed in different ways in different parts of the United Kingdom. The effect of a broader construction in Scotland of "equal opportunity requirements" in a way which permitted the use by trans women of separate sex spaces for women would conflict with the clear interpretation by the Supreme Court of the EA 2010 as a United Kingdom statute in a Scottish case.

[108] It is within the first respondents' devolved competence to encourage equal opportunities. It is also within their devolved competence to impose duties with a view to securing that the functions of SPS are carried out with due regard to the need to meet the equal opportunity requirements. However, the respondents seek to apply an over-expansive construction of "equal opportunity requirements". Promulgating and applying a policy which is inconsistent with the "equal opportunity requirements", as defined in section L2 of Schedule 5, and by reference to the EA 2010, read, in this case, with the 2011 Rules, would result not in the observance of those requirements but in a breach. That would not be within devolved competence.

Protections for the rights of trans prisoners within the EA 2010

[109] Before turning to the Convention rights arguments, it is necessary to recognise that there are important protections for the rights of trans prisoners within the EA 2010 itself.

The existence of such protections has a bearing on the Convention rights analysis.

[110] Trans people, including trans prisoners, are protected by the protected characteristic of gender reassignment, which is defined in section 7 of the EA 2010. As noted by the Supreme Court in *FWS 2* at paragraph [199], the EA 2010 recognises sex and gender reassignment as distinct and separate bases for discrimination and inequality, giving separate protection to each. It would be unlawful for the first respondents to discriminate against or harass a trans woman prisoner held in the male estate. In terms of section 19 of the EA 2010, there may be indirect discrimination if a trans prisoner is placed at an unjustified disadvantage when held in a prison corresponding to biological sex. It is unnecessary to rehearse the forms that discriminatory conduct or treatment might take. Depending on individual circumstances, a trans woman prisoner, for example, may have a basis to argue that it is necessary to provide accommodation in a third space, that is to say separate from the men's estate and from the women's estate. The trans woman prisoner cannot insist on accommodation in the women's estate, and, for the reasons already given, in terms of the EA 2010 that would be unlawful, but it is likely to be that within the men's estate different provision is required, specifically taking account of the trans woman prisoner's needs.

[111] Even without making a third space available - and the need or otherwise for such an arrangement would depend on individual circumstances - it is necessary for SPS to put in place measures so that trans prisoners are not treated less favourably because of the

protected characteristic of gender reassignment, and are not put at a particular disadvantage when compared with persons who do not share that protected characteristic.

[112] The existing Prisons Guidance recognises that there is a need to make special provision for trans prisoners. It is not the case that a trans woman prisoner accommodated in a men's prison is treated in every respect as a man. The Prisons Guidance covers matters beyond location decisions and includes directions which are clearly aimed at protecting the rights and welfare of trans prisoners, regardless of location. For example, there are specific directions to the effect that data should be recorded accurately and that trans prisoners' preferred names and pronouns are respected during their time in custody. Separately, there are directions relating to searching and the provision of samples in the context of compulsory drugs and alcohol testing, as well as the enhanced privacy requirements necessary for showering and changing. The Prisons Guidance also recognises that "transgender individuals in custody may need access to additional property to assist them to live in their affirmed gender" and continues with this provision:

"Access to additional property that is necessary to support an individual's gender reassignment process should be provided to all people in custody who are transgender, regardless of which establishment they have been allocated to."

In law and in practice, there are important provisions in place to protect the interests and rights of trans prisoners.

The Convention rights of trans prisoners: Articles 2, 3, 8 and 14

[113] The arguments relating to Convention rights were presented by the respondents in their written submission as their subsidiary arguments, but they came to the fore in the course of the submissions put forward by senior counsel for the respondents at the substantive hearing. The respondents' position has at its foundation certain important

propositions relating to their obligations in terms of section 6 of the Human Rights Act 1998 and section 57 of the Scotland Act 1998. The Scottish Ministers do not have the power to act in a way which is incompatible with any of the Convention rights: section 57(2) of the Scotland Act 1998. As already noted, and under reference to *Somerville*, there is no defence available to them under section 6(2) of the Human Rights Act 1998. That the respondents must act compatibly with Convention rights is uncontroversial and the petitioner took no issue with these essential principles; the real substance of the dispute lies elsewhere. The essential questions are whether a trans prisoner can have a Convention right to be accommodated in a prison for the opposite biological sex, and whether, in order not to breach the Convention rights of trans prisoners, it is necessary for the respondents to maintain a policy which will allow them to take a case-by-case approach to the accommodation of trans prisoners, and will include the option of accommodation in a prison of the opposite biological sex.

[114] The petitioner's position, simply expressed, was that there is no basis in Strasbourg authority to support the claim that failing to place a trans prisoner in a prison for the opposite biological sex may engage that prisoner's rights under Articles 2, 3, 8 or 14 of the Convention. In the absence of such authority, it is not open to the court to undertake a development of the Convention law in a substantial way. Relying on *Animal Defenders International v United Kingdom* (2013) 57 EHRR 21 at [106], the petitioner maintained that a general measure can be adopted which applies to pre-defined situations regardless of the individual facts of each case even if this might result in individual hard cases.

[115] In terms of Convention rights, the respondents' starting position, in their pleadings and note of argument, was to defend the existing policy, primarily on the basis of the Article 8 rights of trans prisoners and drawing on the approach taken by the Strasbourg

Court in *Goodwin v United Kingdom* (2002) 35 EHRR 18, and the cases in England, *R (C)* and *R (FDJ)*. However, in oral submissions made by senior counsel for the respondents, the focus came to be very much more on Article 2 and the need to protect against the risk of suicide. To a lesser extent, there were also submissions for the respondents in relation to Article 3 and degrading treatment, but it was the respondents' position that the court ought to be concentrating on suicide risk, and, to reinforce that point, it was said that, even if it served to protect only one trans prisoner, a policy with some degree of flexibility would be necessary.

[116] Senior counsel for the respondents submitted that it was possible to construe and apply the EA 2010 consistently with trans prisoners' Convention rights, and in a way that allows, on a case-by-case basis and in appropriate cases, the allocation of trans prisoners to prisons for the opposite biological sex. Referring to *Ghaidan v Godin-Mendoza* [2004] UKHL 30; [2004] 2 AC 557 at paragraph 106, public authorities are required by section 3 of the Human Rights Act 1998 to construe and apply their powers and duties in a way which is compatible with Convention rights. The application of that principle to the construction of rule 126 of the 2011 Rules would mean construing "reasonably practicable" as encompassing the accommodation of trans prisoners in prisons for the opposite biological sex. Recognising some of the difficulties with this argument, senior counsel for the respondents, referring to *R (Z) v Hackney London Borough Council* [2020] UKSC 40; [2020] PTSR 1830 at paragraph 114, submitted that applying a particular interpretation in order to comply with section 3 of the Human Rights Act 1998 can result in the same provision having two different meanings in two different contexts. A case-by-case approach could permit this.

[117] In a submission which was consistent with one developed in the substantive hearing on behalf of the EHRC, senior counsel for the respondents further argued that it would be

possible to disapply statutory rules so far as they apply to an individual, and that support for that approach could be found in *RR v Secretary of State for Work and Pensions* [2019] UKSC 52; [2019] 1 WLR 6430 and *A v Principal Reporter* [2025] CSIH 9; 2025 SC 262.

[118] The first intervener, the SHRC, set out in its written submissions the argument that, having regard to Strasbourg and domestic jurisprudence, it would be open to the court to conclude that in some specific cases, but not all, or even most cases, a without exception policy may, in its implementation, result in unlawful interference with an individual's Convention rights. The SHRC drew attention to *A.P., Garçon and Nicot v France* (Application nos. 7988/12, 52471/13 and 52596/13, 6 April 2017), *B v France* (1993) 16 EHRR 1 and *Prusianu v Braila Court of Law, Romania* [2022] EWHC 1929 (Admin); [2023] 1 WLR 495, but made it clear that it did not contend that there is a positive obligation to place all trans prisoners in a prison which is of the opposite biological sex, or even to operate a presumption to that effect. However, it was said that failing to take such steps could, in some cases, amount to a breach of the state's negative obligation not to interfere unlawfully with an individual's Article 8 rights. The SHRC argued that, in principle, there would be no difficulty with an individualised risk assessment, but stated expressly that it did not seek to support the respondents' existing Prisons Guidance, which it criticised on the basis that it does not adequately recognise the rights of women prisoners or members of staff.

[119] The submissions for the EHRC in relation to Convention rights were relatively brief. The EHRC noted that there was no positive obligation in terms of Article 8 to provide prison accommodation in line with gender identity. In oral submissions, senior counsel for the EHRC referred to the possibility of disapplying subordinate legislation in an extreme case, and in the context of a threat to life and Article 2. The EHRC resisted the argument for

the respondents that there was a need to read down the provisions of the EA 2010 or the 2011 Rules, or to make a declaration of incompatibility.

Article 8

[120] Article 8 provides:

“1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights or freedoms of others.”

[121] In *Goodwin*, the Grand Chamber held that the continuing failure of the United Kingdom government to take effective steps to effect the legal recognition of the change of gender of post-operative trans people was in breach of Article 8. It was this decision, along with that of the House of Lords in *Bellinger v Bellinger* [2003] 2 AC 467, which led to the Gender Recognition Act 2004. In *R (C)*, at paragraphs 27 and 28, Baroness Hale emphasised two passages from paragraphs 77 and 90 of the judgment in *Goodwin*, which are in these terms:

“The stress and alienation arising from a discordance between the position in society assumed by a post-operative transsexual and the status imposed by law which refuses to recognise the change of gender cannot, in the court’s view, be regarded as a minor inconvenience arising from a formality. A conflict between social reality and law arises which places the transsexual in an anomalous position, in which he or she may experience feelings of vulnerability, humiliation and anxiety.

[...]

the very essence of the Convention is respect for human dignity and human freedom. Under article 8 of the Convention in particular, where the notion of personal autonomy is an important principle underlying the interpretation of its guarantees, protection is given to the personal sphere of each individual, including the right to establish details of their identity as individual human beings. In the 21st century,

the right of transsexuals to personal development and to physical and moral security in the full sense enjoyed by others in society cannot be regarded as a matter of controversy ... In short, the unsatisfactory situation in which post-operative transsexuals live in an intermediate zone [in] not quite one gender or the other is no longer sustainable."

[122] Baroness Hale's further comment, at paragraph 29, is that:

"This puts it beyond doubt that the way in which the law and officialdom treat people who have undergone gender reassignment is no trivial matter. It has a serious impact on their need, and their right, to live, not as a member of a 'third sex', but as the person they have become, as fully a man or fully a woman as the case may be."

[123] The respondents sought to draw from these cases that the Article 8 rights of trans prisoners are far from trivial, that they are engaged in the present context and should be respected, but did not go so far as to argue that that entailed a positive right for any individual trans prisoner to be accommodated in a prison of the opposite biological sex. The Article 8 rights of trans prisoners may be engaged when they are admitted to custody but it does not follow that there is a right to be accommodated in a particular prison.

[124] There are, of course, means of protecting trans prisoners' rights which do not involve accommodation in a prison for the opposite biological sex. I have referred already, at paragraphs [7] and [112], to the various forms of special provision set out in the Prisons Guidance. In this context, it can be understood that there are arrangements made allowing a trans prisoner to "live in their affirmed gender" and that, with those measures in place, the respondents respect that trans prisoner's Article 8 right to a private life. It is beyond the scope of this judgment to canvass the circumstances in which, for a hypothetical individual, a third space may be required, separate from both the men's estate and the women's estate, but that is an option in principle. The practical feasibility of that must be a matter for the first respondents.

[125] A trans prisoner may consider that these measures, even taken at their most extensive, are insufficient to allow for life, to use Baroness Hale's words, "as fully a man or as fully a woman as the case may be" but there is no case to support an argument that Article 8 entails a right for a trans woman to live in the same place as and in the company of women. It is precisely because of the impact of mixed sex accommodation provision on the privacy and dignity of the would-be fellow prisoners that the restriction in rule 126 exists and that immediately shows that, even if Article 8 rights are engaged, the interference is justified under Article 8(2). Sex segregation is necessary for the protection of health or morals, or for the protection of the rights or freedoms of other prisoners. As all parties, and interveners, recognised, the Convention rights, under Articles 2, 3 and 8, of female prisoners are engaged in circumstances in which the respondents operate a process for allocating trans women prisoners to the women's prison estate.

[126] The prison context is important. Custody imposes very significant limitations on the private and family lives of all prisoners, and the ability to express gender identity and the ability to live life "as fully a man or fully a woman as the case may be" are only one aspect of private life. Of course, the Convention rights of prisoners are important and should, so far as possible, be respected. But, in the custodial setting, accommodating the wish of a trans woman prisoner to live as a woman by a transfer to the female estate entails association with an identifiable group of other prisoners, that is to say women prisoners. There is no obvious parallel outside imprisonment or detention. At liberty, a trans woman may consider that she can best express her female identity by sharing accommodation with women, and that may be achieved on the basis of consent, but a person, whether male or female, cannot be compelled to share the living space needed for essential daily activities such as eating and washing, with another person. A trans prisoner cannot live in his or her transgender

identity in the abstract. Accommodating a trans woman prisoner in the women's estate necessarily involves association with women, and their circumstances are such that they cannot opt out.

[127] That is a distinctive feature of living in a prison that makes it difficult to draw meaningful comparisons with the experiences of trans people in other settings, or indeed to draw from authorities relating to Article 8 rights in non-custodial contexts. In *Goodwin and R (C)* the issues with which the courts were concerned were the maintenance of government records and the retention of official data. The implementation of policies relating to such matters may well engage Article 8 rights, but there will be no direct impact on other individuals in respect of whom official records are maintained.

[128] Of course, the Convention rights of trans prisoners have come before the courts previously. In *WW v Poland* (2025) 80 EHRR 9, the applicant was a trans woman prisoner who, for a period whilst in prison, did not have access to hormone treatment. The Strasbourg Court noted, at paragraph 84:

“When it comes to balancing the competing interests, the Court has emphasised the particular importance of matters relating to one of the most intimate parts of an individual's life, namely the determination of an individual's gender.”

The court found that the authorities had failed to strike a fair balance between the competing interests at stake, resulting in a violation of Article 8. In reaching that conclusion, the court had in mind, at paragraph 96:

“the applicant's particular vulnerability as an imprisoned transgender person undergoing a gender reassignment procedure, which required enhanced protection from the authorities.”

The applicant also complained under Article 2 that the interruption of hormone treatment had caused her emotional distress which had put her at risk of committing suicide. The

court saw no need to examine that complaint. There was no argument in that case of a right to be accommodated in a women's prison.

[129] In *R (B) v Secretary of State for Justice* [2009] EWHC 2220 (Admin); [2009] HRLR 35, the claimant, a trans woman prisoner who held a certificate under the Gender Recognition Act 2004, challenged a decision to keep her in the male prison estate and not to transfer her to a female prison. Whilst in the male prison, she could not be considered for gender reassignment surgery. It was held in the High Court that the decision to hold the claimant in a male prison interfered with her Article 8 rights and that, the Secretary of State not having provided a sufficient justification in terms of Article 8(2), there was a violation. Beyond noting that the case makes clear the relevance of Articles 8 and 14 in the prison context, the respondents did not seek to rely on *R (B)*. That is unsurprising, given that the decision proceeded on the basis that the "for all purposes" provision in section 9 of the Gender Recognition Act 2004 meant that the claimant had to be treated as a woman, albeit taking into account her pre-operative physical state. That approach to section 9 of the 2004 Act does not survive the decision in *FWS 2*. It is unnecessary to consider it further.

[130] The decision of the Supreme Court in *FWS 2* also limits the assistance that the more recent case of *R (FDJ)* might otherwise be able to provide. That case involved a challenge to the Secretary of State's policies which allowed for the placement of trans women prisoners in women's prisons. It was argued that these policies were unlawful because they indirectly discriminated against women, contrary to Articles 3, 8 and 14, as well as section 19 of the EA 2010. The Divisional Court held that the policies were within the ambit of Articles 3 and 8 for the purposes of Article 14, but that, because there was case-by-case risk assessment, they did not have a disproportionately prejudicial effect on female prisoners. It was not argued, and Holroyde LJ expressed the view that it was not possible to argue,

that the Secretary of State should have excluded from women's prisons all trans women. His view was that "[t]o do so would be to ignore, impermissibly, the rights of transgender women to live in their chosen gender". Following *FWS 2*, that right, described in that way, cannot be reconciled with the protection recognised by the Supreme Court which is afforded to separate sex spaces, in respect of which sex is biological sex. A separate point is that, in England, rule 12 of the Prison Rules 1999 is not in the same terms as rule 126 of the 2011 Rules.

[131] Finally, in *Prusianu* the appellant was a trans woman and Romanian national who sought to appeal an extradition order. There were three grounds of appeal. Two of these, which were refused, related to specific sections of the Extradition Act 2003 and are not relevant. However, a separate ground of appeal was that extradition would amount to a disproportionate interference with the appellant's Article 8 rights. She succeeded on that ground. Fordham J concluded that the question of Article 8 proportionality ought to have been decided differently, although he did so expressly on the special combination of facts and circumstances in the case, and having noted that Article 8 proportionality cases are intensely fact specific. Analysis of the material before the court disclosed a protection gap relating to a 21 day quarantine period in which the appellant would be accommodated in a prison with young men and without an assessment of vulnerability. Fordham J also observed, at paragraph 43 and referring to *R (FDJ)* at paragraph 83,

"notwithstanding domestic recognition that this can be appropriate [...], there is no human rights guarantee that a transgender woman serve her sentence in a women's prison."

[132] None of these cases establishes that trans women have a Convention right to accommodation in the women's estate, or a right to be considered for accommodation in the women's estate. Trans women have Article 8 rights, but respect for those rights does

not extend to an obligation to provide accommodation with women. Such respect may well necessitate measures which can be, and are, taken within the men's estate, including ensuring access to hormone treatment and maintaining privacy and dignity in showering arrangements. These provisions are set out in the Prisons Guidance. Such measures do not involve any conflict with the protection of separate spaces. So far as accommodation is concerned, though, the relevance of the qualifications in Article 8(2) is immediately apparent. Sex segregation in prisons is in accordance with law and is necessary, at least, for the protection of health and morals, and to protect the rights and freedoms of others, specifically women prisoners. These are essentially reasons which support the maintenance of separate spaces in the context of the EA 2010, and as discussed in *FWS 2*.

[133] It is necessary to recognise the Article 8 rights of female prisoners in the women's estate, a point emphasised by the SHRC in their submissions. Male prisoners accommodated in the men's estate also have privacy rights within the meaning of Article 8. Sex segregation in prisons, which has statutory force in terms of rule 126 of the 2011 Rules, serves to protect such rights.

[134] Although the respondents characterised the right of the transgender person to live as the person they have become as being at the heart of the case, and drew attention to the Article 8 rights of trans prisoners, they did not ultimately seek to press the argument that trans women prisoners' Article 8 rights create a positive obligation requiring accommodation in the women's estate. However, in order not to breach trans prisoners' Article 8 rights, the respondents argued that a flexible policy permitting that is necessary. Applying a case-by-case approach to accommodation decisions would allow the rights of individual trans prisoners to be respected. Senior counsel for the respondents submitted that it is not a justification for treating a trans woman as a man to say that the law, or one

part of the law, that being the construction of the Supreme Court of the EA 2010, defines “man” in biological terms. The first problem with that argument is that it assumes that the way in which a trans prisoner is treated starts and stops with prison allocation. Accommodation is only one part of the life of a prisoner. The respondents do make provision for trans women prisoners within the men’s estate. It is not accurate to say that trans women prisoners are treated in the male estate in the same way as men. The second problem is that it is well-recognised that bright line rules are legitimate and Convention compatible.

Bright line rules

[135] It must be recognised that for at least some trans women prisoners the consequences may be, or may be perceived to be, harsh, and perhaps especially for trans women well-accustomed to living as such for a long period prior to custody. However, the law recognises the necessity for clear rules which are not subject to a case-by-case analysis in their application. The imposition of a bright line rule may have adverse consequences for individuals but there is a strong line of authority which makes clear that, as explained by the European Court of Human Rights in *Animal Defenders* at paragraph 106:

“a state can, consistently with the Convention, adopt general measures which apply to pre-defined situations regardless of the individual facts of each case even if this might result in individual hard cases”.

The same principle was considered by the Strasbourg Court in *Pretty v United Kingdom* (2002) 35 EHRR 1 at paragraphs 72 to 76 and in *Zdanoka v Latvia* (2007) 45 EHRR 17 at paragraphs 112 to 114. In his discussion of these and other cases in *R (P) v Justice Secretary*, Lord Sumption noted, referring at paragraph 50 to *Animal Defenders*, that

“the stronger the justification for legislating by reference to pre-defined categories, the less the weight to be attached to any particular illustration of its impact in individual cases.”

More recently, in *In re JR 123* [2025] UKSC 8; [2025] AC 1256, the Supreme Court has referred to the importance of *Animal Defenders*, per Lord Sales and Sir Declan Morgan at paragraphs 64 to 66. These issues of principle were not in dispute between the parties.

[136] It is necessary to consider the margin of appreciation which the state has in regulating the allocation of prisoners. In general terms, that margin will be wide. Being trans may be an important facet of an individual’s existence or identity, but it does not follow that that must have the consequence of restricting the margin allowed to the state. In *Elan-Cane*, the interest at stake concerned gender identity. The claimant identified as non-gendered. That was an aspect of private life, giving the claimant the right to respect for Article 8 rights, but there was no obligation to issue a passport with a gender-neutral “X” marker. As Lord Reed observed at paragraph 35, in discussing the general principles at issue in the context of Article 8 and the state’s margin of appreciation:

“Where a particularly important facet of an individual’s existence or identity was at stake, the margin allowed to the state would be restricted. Where, however, there was no consensus within the member states of the Council of Europe, either as to the relative importance of the interest at stake or as to the best means of protecting it, particularly where the case raised sensitive moral or ethical issues, the margin would be wider. There would also usually be a wide margin if the state was required to strike a balance between competing public and private interests or Convention rights.”

[137] The application of all of these principles in the present case is clear, at least in relation to the Article 8 rights of trans prisoners. Sex segregation in prisons is very well-established and is consistent with international standards. The brightness of the statutory line underpinning sex segregation is set by rule 126, read with Schedule 22 to the EA 2010, and the protection given to separate and single sex spaces in the EA 2010,

as explained by the Supreme Court in *FWS 2*. That decision also makes clear that the demarcation of separate sex spaces, including within prisons, is based on biological sex. That it is legitimate to protect women's safety and the privacy and dignity of the sexes is not in doubt. The consequence that that will exclude a trans woman who does not present any risk of physical harm and who, in order to express a female gender identity, would wish to associate with women in a women's prison might be seen as harsh in respect of that individual, but that does not mean that the rule is incompatible with that person's Convention rights. There is an existing scheme which maintains sex segregation in prisons. There is a clear justification for legislating by reference to pre-defined categories of sex. That is well within the margin of appreciation afforded to the state.

Articles 2 and 3

[138] Whilst the respondents did not press the Article 8 argument with real vigour, their position was different in relation to Articles 2 and 3 of the Convention, and they placed particular emphasis on Article 2. Senior counsel for the respondents referred to the need to protect against the risk to mental health through the application of unnecessary psychological pressure. He submitted that putting trans women in men's prisons entails a challenge to part of their identity and a higher risk of harm to mental health. The risk of suicide cannot be avoided. Decisions in relation to placement would be difficult and highly sensitive and it is important to have a policy allowing for a case by case analysis. Senior counsel for the respondents described the constraint of defining men and women in biological terms as an artificial parameter. Imposing such a constraint would add pressure to a small number of people and, in circumstances where suicide is a possibility, even if only for one person, that is not acceptable.

[139] Senior counsel for the respondents and senior counsel for the SHRC both emphasised that the line of authority concerning bright line rules found in *Animal Defenders* and other cases relates to Article 8, which is a qualified right. They argued that, because the rights protected by Articles 2 and 3 are unqualified, there is no scope for the acceptance of harsh cases resulting from the application of a bright line rule.

[140] The criticism made by senior counsel for the petitioner of the arguments for the respondents and the SHRC in relation to Articles 2 and 3 was that these were based on assertions and not on caselaw. Accepting that Article 2 imposes a positive obligation on the state, he submitted that this extended to reasonable steps to protect life in custody, including suicide prevention policies, rather than whatever steps might be suggested. In relation to bright line rules, senior counsel for the petitioner resisted the argument that the *Animal Defenders* line of authority is relevant only to qualified rights and referred to *Pretty v United Kingdom* (2002) 35 EHRR 1 as a case in which the Strasbourg Court found that the blanket nature of the ban on assisted suicide was not disproportionate.

[141] The submissions for the EHRC in relation to Convention rights were relatively brief. Senior counsel for the EHRC made the submission, in general terms, that the whole structure for the EA 2010 is based on complementarity with Convention rights. It would be a mistake to see the decision in *FWS 2* as giving rise to a clash with rights protected by the Convention. In common with the SHRC, the EHRC drew attention to the need to protect the Convention rights of women prisoners and to the need to balance those rights in the event of a conflict.

[142] In response to the arguments for the parties in relation to Articles 2 and 3, the submission for the EHRC offered a degree of nuance. Senior counsel for the EHRC also referred to *Pretty*, but noted the flexibility within the “blanket ban” in the system for

enforcement. Developing the argument that, in truly extreme cases, the law can permit disapplication of regulations in order to protect Convention rights, she drew attention to *RR* and *A v Principal Reporter*, both cited in the respondents' pleadings. In the latter case, the Inner House had been prepared to allow that, in the exceptional circumstances of the case, and in order to protect the Article 8 rights of two children, a public authority could disapply certain provisions within subordinate legislation.

[143] More generally, though, the position of the EHRC was that matters which might engage Article 2 or Article 3 in respect of individual prisoners were capable of being dealt with in the way the first respondents manage the prison estate. A risk to life would be at the extreme end. In relation to Article 3, for there to be a breach, conduct must reach a minimum level of severity, which usually means actual bodily injury or intense physical or mental suffering.

[144] Article 2 of the Convention protects the right to life and Article 3 provides that "no one shall be subjected to torture or to inhuman or degrading treatment or punishment."

[145] The respondents and the SHRC both argued that, these being unqualified rights, there was no scope to allow for a hard case resulting from the imposition of a bright line rule. Whilst the line of authority following from *Animal Defenders* permits harsh consequences for individuals if a general rule is justified, that could only extend, in the context of the present case, to Article 8 rights. There is force in this argument. All of the authorities referred to in this context concerned qualified rights. Senior counsel for the petitioner sought to rely on *Pretty* as an example of a case in which a general rule was justified, notwithstanding the impact of that rule, a ban on assisted suicide, on individuals suffering as a result of irreversible and fatal diseases and their rights under Articles 2 and 3. *Pretty* does not assist in the way contended for on behalf of the petitioner. That is so for two

reasons. First, in relation to Article 2, the court found that no right to die could be derived from Article 2: paragraph 40. Further, the court concluded that no positive obligation arose under Article 3 requiring an undertaking not to prosecute in an assisted suicide case or the provision of a lawful opportunity for any other form of assisted suicide: paragraph 56. Proportionality did not arise in respect of these aspects of the case. Secondly, insofar as proportionality did arise in the context of Article 8, the absolute nature of the ban was subject to some qualification in that there would be scope for flexibility in individual cases in prosecution decisions. There was a system of enforcement and adjudication which allowed due regard to be given in individual cases to, among other things, the public interest in bringing a prosecution. The prohibition was not arbitrary: paragraph 76.

[146] No case was cited in which a bright line rule was found to be justified, notwithstanding the impact on individuals' rights under either of Articles 2 or 3. That is not surprising. It is entirely consistent with these rights being unqualified.

[147] However, it does not follow that it is necessary to have in place a scheme which allows SPS to make case by case decisions in relation to the accommodation of trans prisoners in prisons for the opposite biological sex. Before reaching any question of whether, and if so how, the legislation might be construed in order to respect the rights of trans prisoners in terms of Articles 2 or 3, it is necessary to consider what the substance of such a right would be. Absent from the authorities cited was any case, from Strasbourg or elsewhere, establishing that, on the basis of Convention rights under either Article 2 or Article 3, a trans prisoner has the right to be accommodated in a prison for the opposite biological sex. These proceedings involve judicial review of policy; there are no case-specific facts before the court and so it is impossible to conclude, on the basis of evidence, that there would be any breach of any individual trans prisoner's Article 2 or

Article 3 rights. The proposition that there is such a risk, and that this necessitates a flexible policy, involves a degree of speculation.

[148] Senior counsel for the respondents submitted that putting a trans woman in a male prison would place her at higher risk. In terms of physical safety, I did not understand the respondents' position to be that a trans woman would be unsafe in a male prison. As Ms Hotchkiss observed in her affidavit, and the respondents did not suggest otherwise, the SPS is adept at managing safely men who are deemed vulnerable for various reasons. The respondents did not argue that SPS cannot manage trans women prisoners' safety in the men's estate.

[149] The respondents did submit, though, that accommodation in the men's estate could, through the imposition of psychological pressure, damage a trans woman prisoner's mental health. In their pleadings and note of argument, the respondents referred to the EHRIA and to evidence referred to therein relating to risk of suicide. However, the extent of information contained in the part of the EHRIA referred to in the respondents' pleadings is, in full:

"In relation to Article 2, there is a known increased risk in relation to death by suicide during the first three months in custody and a known increased risk in relation to death by suicide for transgender individuals."

The first point has as its source a publication issued by the first respondents on the mental health of prisoners generally and is not specific to trans prisoners. The second point appears to be a reference to risk in the general trans population rather than risk in the trans prisoner population. It has as its source, according to the footnote in the EHRIA, a survey carried out by the organisation Stonewall in relation to mental health in the LGBT community. Beyond these quite general points, there was no further or more specific information about risk and nothing before the court that would allow any conclusion to be drawn about the likelihood of any breach of trans prisoners' rights under Articles 2 or 3.

[150] Of course, that does not lead to the conclusion that there is no risk. In terms, first, of Article 2, it is proper for the first respondents, through SPS, to have in place strategies for suicide prevention in prisons that take into account the vulnerabilities of different parts of the prison population, including trans prisoners. Notwithstanding the shortage of evidence within the material produced, it may be that trans prisoners are at heightened risk and it is at least prudent for the first respondents to have in place measures that reduce that risk.

The existence of risk, though, does not necessitate an option, as a matter of policy, to accommodate trans women prisoners within the women's estate. The women's estate is not a neutral space; those accommodated within it are women who, as was submitted for the petitioner, have their own vulnerabilities in terms of poor mental health and risk of suicide.

In that connection, the petitioner made reference to statistics contained in the equal treatment bench book for England and Wales. Separately, suicide prevention strategies are implemented in both the men's estate and the women's estate. Ultimately, what the respondents seek to maintain is a policy to manage a risk, the extent of which is unknown, and to allow them, as a suicide prevention strategy, to transfer a hypothetical trans prisoner to a prison for the opposite biological sex, in order to protect the Article 2 rights of that prisoner.

[151] In terms of Article 3, there was no suggestion that declining to accommodate a trans prisoner in a prison for the opposite biological sex would necessarily constitute inhuman or degrading treatment. The respondents' evidence is that almost 80% of trans prisoners are accommodated in line with their biological sex. The measures that are in place to respond to their needs exist to mitigate the negative experience that they may have as a result of being trans in prison. However, the respondents' position is that even if there were only a very small number of trans prisoners for whom the experience of incarceration in line with their

biological sex was so traumatising that it met the high threshold for inhuman or degrading treatment, and could not otherwise be addressed, then it is necessary to have as an option transfer to a prison for the opposite biological sex.

[152] Ultimately, the argument concerns the question of whether there can be any flexibility to allow for the truly exceptional case where, if accommodated in a prison in accordance with the trans prisoner's biological sex, there is a threat to life or of harm that is so severe that it meets the Article 3 threshold. The first point is that it would be necessary to consider all possible means of addressing that threat, including means for which no provision is currently made.

[153] The first respondents would have to be satisfied that there is no other measure that could be put in place to protect these rights. Just because, in an individual case, a trans woman prisoner's experience of custody in the male estate results in a threat to life through suicide, it does not necessarily follow that there should be a transfer to the women's estate. Parties addressed, to a limited extent, the option of a "third space", that is the creation of a dedicated unit for trans prisoners whether in a separate place, or within an existing prison building. In her affidavit, and from a perspective of expertise, Ms Hotchkiss referred to the "third space" option, stating:

"[s]uggestions that small units cannot be operated or managed within the SPS does not reflect the reality of the current situation whereby there are several small units fulfilling several functions across the estate, not least the new women's community custody units which accommodate 16 and 24 women."

[154] In an annex to a policy review document prepared by SPS in advance of the Prisons Guidance, there is brief reference to the situation in England and Wales, where there exists a dedicated wing within a prison for trans women prisoners. The policy relating to that arrangement was discussed in *FDJ* at paragraphs 32 to 38. Beyond that, no information was

made available to the court about alternative approaches to accommodation elsewhere. Senior counsel for the respondents drew attention in his submissions to the difficulties with comparisons with England and Wales because of the difference in population size. Accommodation in a specialist unit may, he submitted, breach the rights of trans men prisoners, given the very small numbers involved. The practical feasibility of such a measure is an operational matter for the first respondents. It is not for the court to assess its potential efficacy, not least because of the absence of specific information, but, on the face of it, it is a measure which it would be open to the first respondents to use, if it were considered necessary to accommodate, for example, a trans woman prisoner other than in a men's prison, in order protect the Convention rights of that prisoner.

[155] Turning to the question of whether accommodating a trans woman prisoner in the women's estate could be achieved in a way that is consistent with rule 126 of the 2011 Rules and with the EA 2010, the submission for the respondents was that "reasonably practicable" can be construed in a way that permits the admission of trans women prisoners into the female estate. It was argued that the 2011 Rules are derivative of section 10 of the 1989 Act, and the primary legislation confers a wide discretion on the first respondents. The problem with that argument, though, is that the words in rule 126 carry a clear and obvious meaning. The sharing of accommodation by female prisoners and male prisoners is expressly prohibited. The "reasonably practicable" qualification to the requirement that respective accommodation for male and female prisoners be in separate parts of the prison connotes actual, practical considerations. It does not suggest that the requirement may be waived for some individual prisoners or for a particular category of prisoners. To take an unrelated and hypothetical example, if it were necessary to have contingency arrangements to accommodate prisoners in an emergency such as a fire or a flood, "practicability" might

allow the accommodation of male prisoners in the same part of the prison as female prisoners, on a temporary basis and subject to arrangements being in place to protect safety and dignity. What is practicable is determined by reference to the accommodation itself, not to the identity of those who occupy it.

[156] Senior counsel for the respondents relied on *Ghaidan v Godin-Mendoza* at paragraph 106 and the requirement on public authorities to read their statutory powers and duties in the light of Convention rights. The difficulty, though, is that within that paragraph Lord Rodger qualified the obligation to give effect to powers and duties in a Convention rights compatible way by “so far as possible”. It is not possible, as Lord Rodger made very plain in the paragraphs which follow, and however powerful the interpretative obligation in section 3(1) of the Human Rights Act 1998 may be, “to change the substance of a provision completely, to change a provision from one where Parliament says that *x* is to happen into one saying that *x* is not to happen.” That rule 126 fits within the overall scheme of the 1989 Act, which in section 10 gives the first respondents the power to direct prison allocation, does not take away from its clear terms. The construction for which the respondents contended would have the result that not all biological male prisoners would be excluded from the women’s estate. That does not run with the grain of the legislation.

[157] The respondents submitted that construing rule 126 in a way that permitted trans prisoners to be accommodated in a prison of the opposite biological sex would not go against the grain of the legislation because that construction would reflect the corresponding rule in England. Rule 12(1) of the Prison Rules 1999 provides that “[w]omen prisoners shall normally be kept separate from male prisoners”. That rule, which makes no reference to trans prisoners in any event, has no application in Scotland and cannot be used to assist in construing the rule which does apply. The terms of rule 126 are clear. I do not accept the

argument that the words “reasonably practicable” can be construed in a way that allows trans women to be admitted to the female estate.

[158] I am fortified in that view by the observations of Lord Reed in *Elan-Cane* at paragraph 90 and the warning against:

“domestic courts [modifying] unambiguous legislation under section 3(1) so as to bring about a result which departs from Parliament’s intention in enacting that legislation, where they consider that Parliament’s approach fails to comply with Convention rights, even though the European court would itself accept that Parliament’s assessment was legitimate.”

In submitting that I should conclude that a Convention compliant reading of rule 126 requires construing its terms as permitting the accommodation of trans women in female prisons, the respondents are inviting the court to develop the law in relation to Convention rights beyond the limits of the Strasbourg case law. However, the domestic courts should not go further than they can be confident that the European court would go: *Elan-Cane*, paragraph 63. I cannot be confident that the European court would go so far as to recognise a Convention right for a trans prisoner to be accommodated in a prison for the opposite biological sex; no authority has been cited that would allow me to reach that conclusion.

Article 14

[159] Article 14 of the Convention prohibits discrimination and is in the following terms:

“The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”

[160] It is possible to deal with the Article 14 arguments briefly. For the purposes of Article 14, discrimination includes not only the failure to treat similar people equally but also the failure to treat different people differently: *Thlimmenos v Greece* (2000) 31 EHRR 15.

Parties were agreed that a trans woman is different from a non-trans man, and that a trans man is different from a non-trans woman. The averment for the respondents was that it would be a breach of Article 14 automatically to treat a trans woman in exactly the same way as a non-trans man, and vice versa, only because they share the same biological sex.

[161] In the first place, trans women and non-trans men are not treated in exactly the same way. A trans woman who is accommodated in a men's prison will have available special provision consistent with her trans status. Location is only one aspect of treatment in custody.

[162] Separately and in any event, a difference in treatment, or, in a *Thlimmenos* discrimination case, not treating individuals differently, is discriminatory if it has no objective and reasonable justification; in other words, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised. This point made at paragraph 32 in a summary and explanation of the position by Lord Reed in *R (Jwanczuk) v Secretary of State for Work and Pensions* [2025] UKSC 42; [2025] 3 WLR 741. The explanation continued:

“The contracting state enjoys a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment. The scope of this margin will vary according to the circumstances, the subject matter and the background.”

[163] The justification, in the Convention context, for maintaining sex segregation in prisons has already been canvassed. The same considerations apply in relation to Article 14.

The Article 14 arguments do not add substance to the respondents' position.

The disapplication question

[164] The respondents made the further submission that, if rule 126 cannot be construed in a Convention compatible manner, it can be disapplied relative to any prisoner whose Convention right is infringed, and that that would not affect the validity of the rule relative to other prisoners. In oral submissions, senior counsel for the EHRC also referred to the possibility that, in an extreme case, it may be necessary to disapply subordinate legislation. The context for these submissions was the potential breach of the unqualified rights in terms of Articles 2 and 3, and not Article 8 rights.

[165] The Supreme Court has held that a public authority may disregard subordinate legislation which cannot be interpreted or given effect in a way which is incompatible with Convention rights. In *RR v Secretary of State for Work and Pensions*, a case concerning housing benefit and unjustified discrimination on grounds of disability contrary to Article 14, Baroness Hale noted, at paragraph 27:

“There is nothing unconstitutional about a public authority, court or tribunal disapplying a provision of subordinate legislation which would otherwise result in their acting incompatibly with a Convention right, where this is necessary in order to comply with the HRA.”

[166] In the recent decision in *A v Principal Reporter*, the Inner House considered the approach taken by the children’s hearing in relation to their case management powers and the terms of the subordinate legislation regulating the participation of certain persons. The children’s hearing had, in effect, disregarded a particular provision of that legislation in order to avoid acting incompatibly with the Convention rights of a child and his mother. Consistent with the principle in *RR*, the Inner House held that the children’s hearing had acted lawfully, but was careful to note that the circumstances were exceptional.

[167] It is conceivable that, in an extreme case involving a threat to life and a potential breach of Article 2, a trans prisoner may be able to argue that the first respondents ought to disapply rule 126 of the 2011 Rules. Whether or not such an argument could be advanced would depend on the specific circumstances of that prisoner and on whether other suicide prevention measures had been tried. Within the present proceedings, it is impossible to say whether that could be done, and whether any such argument would succeed. The disapplication of rule 126 would be more complex than the disregard of the subordinate legislation relating to housing benefit considered in *RR*. It would involve, among other things, consideration of the Convention rights of other prisoners. The provisions of the EA 2010 were not in issue in either *RR* or *A v Principal Reporter*. Disapplying rule 126 would, in effect, mean that the scheme of the EA 2010 would have to be understood as being subject to an exception in an individual case, and that may be at odds with the recognition by the Supreme Court in *FWS 2* of the lawfulness of and necessity for separate sex spaces. There would be a further obstacle insofar as the provision of services to prisoners following admission, described in submissions as “downstream” services, would be subject to section 29(1) to (5) of and Schedule 3 to the EA 2010. These are among the matters that would require to be analysed; it is not possible to do that in the abstract and within the present proceedings.

[168] These proceedings concern the lawfulness of the first respondents’ policy. The policy must not mis-state the law. The law, for present purposes and applying section 29(6) of and Schedule 22 to the EA 2010 and rule 126 of the 2011 Rules, is that male and female prisoners must be accommodated separately. The statutory scheme does not permit exceptions. For the first respondents to operate a policy which is premised on the possibility that it might disapply the applicable subordinate legislation would undermine the clarity of the existing

scheme. A statement in a policy, in advance and in the abstract, and in the absence of an established Convention right, to the effect that a public authority might disregard the statutory requirements would also mis-state the law. It is part of the law that, in general terms, and following *RR* and *A v Principal Reporter*, a public authority may disregard subordinate legislation which would otherwise result in it acting incompatibly with a Convention right. But to take that general proposition and to convert it into a policy statement that a specific public authority may disapply a specific legislative provision would present a misleading picture of the true legal position.

Paragraphs 26 to 28 of Schedule 3 to the EA 2010 and the respondents' arguments in respect of a declaration of incompatibility

[169] If, contrary to the view that I have expressed, the allocation of prisoners is not a public function in terms of section 29(6) of the EA 2010, but is instead the provision of a service in terms of section 29(1) to (5), then Schedule 3 applies, and, in that event, the question of disapplication of subordinate legislation, specifically rule 126, would not arise.

Were the exercise to be subject to paragraph 26 of Schedule 3 then, that being primary legislation, it could not be disregarded by the first respondents in an individual case.

[170] Were that to be the applicable Schedule, the contention for the respondents was that paragraphs 26 to 28 can be read down in terms of section 3 of the Human Rights Act 1998 so that they regulate the provision of services "primarily" for persons of the same sex and, where necessary to avoid a breach of Convention rights, do not exclude the admission of trans persons to prisons for the opposite biological sex. If such a construction were not possible, then, in the respondents' submission, the court should issue a declaration of incompatibility in respect of paragraphs 26 to 28 of Schedule 3,

in terms of section 4 of the Human Rights Act 1988. Relying on obiter observations by Lord Sales and Sir Declan Morgan in *In re JR 123* at paragraph 92, senior counsel for the respondents submitted that the court could make such a declaration if it could reasonably foresee that individuals would be adversely affected. Three possible “constructs” were identified: a trans prisoner with a gender recognition certificate, a trans prisoner who had lived in a gender identity of the opposite biological sex for an extended period, and a trans man prisoner. It was submitted that it would be open to the court to conclude that the first respondents would act incompatibly with the rights of any of those three hypothetical individuals by placing them in the prison corresponding to their biological sex, and thus that there would be an incompatibility between the EA 2010 and Convention rights.

[171] These arguments were resisted by the petitioner. In the first place, the overall system of equality law, as set out in the EA 2010, is Convention compatible, as seen in the overlap between the protections afforded by the EA 2010 and those afforded by the Human Rights Act 1998. The petitioner also argued that it would not be constitutionally open to the court to conclude that the application of the Human Rights Act 1998 required a different result from that which Parliament intended be reached in any particular case by the proper application of the provisions set out in the EA 2010. In any event, a declaration of incompatibility should not be made in the abstract, and ought only to be granted if a rule is found to give rise to an unjustified interference in all or almost all cases in which it applies. That could not be said to be the case in relation to the provisions in Schedule 3 to the EA 2010.

[172] The EHRC also resisted the respondents’ arguments, both in relation to the construction of Schedule 3 to the EA 2010 and to the need for a declaration of incompatibility. Senior counsel for the EHRC submitted that the whole structure for the

EA 2010 is based on its equality provisions and Convention rights being complementary. The EA 2010 may be seen as an outworking of Convention rights, and the Supreme Court in *FWS 2* did not anticipate there being any clash.

[173] In the first place, and for the reasons already given, there is no established Convention right for a trans prisoner to be accommodated in a prison for the opposite biological sex. Without that, and without speculation, it is not possible to say that there is a Convention incompatibility. I do not accept that it would be either necessary or possible to read down paragraphs 26 to 28 of Schedule 3 to the EA 2010 in the way contended for by the respondents. I have referred already to the guidance in *Elan-Cane* and to the caution issued by Lord Reed in that case at paragraph 90.

[174] Paragraphs 26 to 28 of Schedule 3 are unambiguous. To construe them as regulating the provision of services “primarily”, but not exclusively, for persons of the same sex would yield a result contrary the conclusion of the Supreme Court in *FWS 2*. The respondents are bound to accept the definitions of “woman”, “man” and “sex” in terms of the decision of the Supreme Court in that case. The effect of qualifying the scope of separate (or single) sex provision by reading in “primarily” would, in the prisons context, be that women’s prisons accommodate biological women and a subset of biological men. That cannot be reconciled with the decision of the Supreme Court in *FWS 2* and its approach to Schedule 3. The separate sex and single sex provisions relative to services in paragraphs 26 to 28 depend on “separate” and “single” being exclusive. Reading in a qualification would take that away. That must go against the grain of the legislation.

[175] Had I considered the allocation decision to be the provision of a service, and subject to Schedule 3, and having rejected the respondents’ argument in relation to reading down paragraphs 26 to 28, I would not have been prepared to make a declaration of

incompatibility. Given my conclusion in relation to section 29(6) and Schedule 22, a decision is not necessary and my observations in relation to this argument are brief.

[176] To have made a declaration of incompatibility would have been to go further than could be justified, having regard to the Strasbourg jurisprudence. In any event, this question would have arisen in the abstract. In *Attorney General of the Cayman Islands and another v Buray and another* [2025] UKPC 22; [2025] 1 WLR 2599, a case involving an argument about the incompatibility of a measure with the Cayman Islands Bill of Rights, the Privy Council explained the reasons for it being inappropriate to make a finding and declaration of incompatibility on an abstract basis, the core reason being:

“the nature of the judicial function and the constitutional and practical unsuitability of court proceedings as a means of deciding questions in the abstract, unmoored from the facts of an actual dispute.”

The respondents sought to rely on *In re JR 123* to open the possibility of a declaration of incompatibility in more general terms. However, in that case the Supreme Court did not find that there was any incompatibility, and only went so far as to observe that it may be appropriate to grant a declaration that a provision is generally incompatible with the rights of a class of persons. That was premised on there being an individual claimant entitled to a remedy for violation of rights, and it being foreseeable that the rights of any individual in the same class of persons as the individual claimant must inevitably be violated by the same provision applied to the claimant. That is not the scenario here.

Summary and conclusion

[177] In the present proceedings, the petitioner challenges the Prisons Guidance at a policy level. In order to advance this argument, based on the statutory scheme, comprising the EA 2010, the Prisons (Scotland) Act 1989 and the 2011 Prisons Rules, and with reference to

sex discrimination, it is not necessary to consider evidence relating to the facts of individual cases. It is open to the petitioner to challenge the first respondents' policy on the basis that it mis-states the law. The respondents' arguments in relation to relevancy are not well-founded.

[178] Sex segregation in prisons in Scotland is lawful. The statutory scheme, based on the EA 2010 and the 2011 Rules, requires separate prison accommodation for men and women. Following *FWS 2*, this means sex segregation in prisons according to biological sex.

[179] Insofar as the Prisons Guidance allows SPS to accommodate trans prisoners in prisons for the opposite biological sex, it is in conflict with the requirement that prison accommodation be provided separately for men and women. That constitutes a mis-statement of the law.

[180] Equal opportunities are a reserved matter in terms of section L2 of Schedule 5 to the Scotland Act 1998. Insofar as the Prisons Guidance allows the SPS to accommodate trans prisoners in prisons for the opposite biological sex, it is in conflict with the law for the time being relating to equal opportunities, within the meaning of section L2. Applying the Prisons Guidance would be outside the first respondents' powers in terms of section 54(3) of the Scotland Act 1998.

[181] All prisoners have rights under the European Convention on Human Rights. Trans prisoners have rights under Article 8, but this does not extend to a right to be accommodated in a prison for the opposite biological sex. Article 8 rights are qualified and there is a justification for maintaining sex segregation in prisons. The statutory scheme imposes a bright line rule and sex segregation in prisons does not admit of exceptions on the basis of Article 8 rights.

[182] There are obligations in terms of Article 2 to protect life and Article 3 not to subject prisoners to inhuman or degrading treatment. There is no positive obligation, in general terms, based on Article 2 or Article 3, to accommodate a trans prisoner in a prison for the opposite biological sex.

[183] On the basis that the first respondents are exercising a public function and that section 29(6) and Schedule 22 apply, the question of disapplication of rule 126 may arise. It is possible that, in an exceptional individual case, in a situation where there is a threat to life through suicide, it may be necessary to consider an argument that accommodation in a prison for the opposite biological sex is necessary and that rule 126 should be disappplied. Whether that could be achieved compatibly with the requirements of the EA 2010 cannot be determined in the abstract. In any event, disapplication or disregard of subordinate legislation cannot form part of a general policy.

[184] In all the circumstances, the Prisons Guidance is unlawful and the petitioner is entitled to orders for declarator and reduction. I will put the case out by order to allow for submissions on the appropriate terms of the interlocutor.

Procedural postscript

[185] These proceedings were raised as an ordinary action for declarator. The then first defenders, now first respondents, enrolled a motion seeking an order, under Rule of Court 58.15, that the action proceed as a petition for judicial review. It was entirely unsurprising that such an order was sought, but the motion was opposed. In a lengthy written submission, the then pursuer insisted that it had taken the proper procedural course, but at the hearing on the opposed motion, senior counsel for the pursuer did not press the argument and candidly stated that the reason for this procedural choice had been a concern

about the time limit provisions in section 27A of the Court of Session Act 1988. There was no objection from the now respondents in relation to time bar. There was no need to explore these issues in this case. However, resorting to the procedural device of raising an ordinary action in order to avoid the provisions of section 27A of the 1988 Act is not a course which should be followed.