OUTER HOUSE, COURT OF SESSION

[2022] CSOH 90

P578/22

OPINION OF LADY HALDANE

in Petition of

FOR WOMEN SCOTLAND LIMITED

Petitioner

for

Judicial Review of the revised statutory guidance produced by the Scottish Ministers under section 7 of the Gender Representation on Public Boards (Scotland) Act 2018

Petitioner: O'Neill KC; Balfour + Manson LLP
Respondents and First Interested Party: R Crawford KC; L Irvine; SGLD
Fifth Interested Party: J Mitchell KC; D Byrne; Drummond Miller LLP

13 December 2022

Introduction

[1] The petitioner is a company registered in Scotland. It describes itself in the petition as an incorporated form of a previously unincorporated democratic grassroots feminist voluntary association. Their aim was and is to give ordinary women from all over Scotland a stronger political voice and to campaign and press for the strengthening of women's rights and children's rights in Scotland. The first respondent is the Scottish Ministers, and there are a number of interested parties, including the Lord Advocate and the Equality and Human Rights Commission ("EHRC"). Answers to the petition were lodged by the Scottish Ministers and the Lord Advocate (jointly) and by the EHRC. Detailed notes of argument

were also provided and adopted by parties. Written interventions were submitted by LGB Alliance and The Equality Network.

[2] It should be appreciated at the outset that this petition is the second challenge brought by the petitioner in respect of statutory guidance produced by the Scottish Ministers in terms of section 7 of the Gender Representation on Public Boards (Scotland) Act 2018 ("the 2018 Act"). The earlier proceedings sought to challenge certain provisions of the 2018 Act (as well as the associated statutory guidance) as relating to reserved matters and so beyond the legislative competence of the Scottish Parliament. The petitioner was unsuccessful in that challenge at first instance but on appeal the Second Division of the Inner House (the appeal court) held that the proposed definition in the 2018 Act of "woman" as including "transgender women" purported to expand the definition of protected characteristics within the Equality Act 2010 ("the 2010 Act") and thus did impinge upon a reserved matter. The effect of that decision was that the appeal court reduced (declared to be of no legal effect) both the definition of "woman" in the 2018 Act, and the associated statutory guidance (*For Women Scotland Ltd* v *The Lord Advocate* [2022] CSIH 4, 2022 SC 150 "FWS1").

[3] Following on that decision the Scottish Ministers produced revised statutory guidance to the 2018 Act, dated 19 April 2022. The revised guidance insofar as relevant to this petition, provides as follows:

> "The meaning of 'woman' for the purposes of the Act
>
> 2.12 There is no definition of 'woman' set out in the Act with effect from 19 April 2022 following decisions of the Court of 18 February and 22 March 2022.
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> Therefore 'woman' in the Act has the meaning under section 11 and section 212(1) of the Equality Act 2010. In addition, in terms of section 9(1) of the Gender Recognition Act 2004, where a full gender recognition certificate has been issued to a person that their acquired gender is female, the person's sex is that of a woman, and where a full

> gender recognition certificate has been issued to a person that their acquired gender is male, the person's sex becomes that of a man."

[4] That revised guidance, the petitioner contends, does not conform to the interlocutors of 18 February and 22 March 2022 pronounced by the Appeal Court in the earlier petition and is therefore unlawful. Therefore, it too ought to be reduced as had happened in FWS1. In particular, the petitioner contends that the definition of "woman" in the 2010 Act is to be taken as a reference to "biological woman" and that any attempt to conflate that concept with that of a person who has an acquired gender of female in terms of a gender recognition certificate ("GRC") issued under the Gender Recognition Act 2004 ("the 2004 Act") is impermissible, as well as defeating the purpose and undermining the policy of the 2018 Act. I intend no disrespect to the detail of the written submissions by the interveners when I summarise their positions on this matter as being that the LGB Alliance concurs that the revised guidance is unlawful and should be reduced, on the basis that the protected characteristics of sex and gender reassignment are entirely separate, whereas The Equality Network adopts the opposite stance and submits that the revised guidance is consistent with the definitions in the 2010 Act and is thus lawful.

[5] Therefore, at its heart, this petition is concerned with whether or not, as a matter of law, the definition of "woman" in the 2010 Act includes those persons holding a GRC stating that their acquired gender, and thus their sex, is female. The question can be posed relatively succinctly, the answer perhaps less so. However, it is important to reiterate, as was made clear in FWS1 both at first instance and on appeal, that the issue of transgender rights which forms a backdrop to this litigation is an often contentious social policy debate which is beyond the scope of this case. Therefore whilst submissions made either orally or by way of written intervention were informative insofar as they discussed the broader

policy issues at play in this area, ultimately submissions on those matters are not capable of determining the issue which is actually before the court, and which is in the end of the day one of legal interpretation.

The legislative framework

[6] In order to provide context to the parties' arguments, it is necessary to understand the legislative framework against which those arguments are made. The 2010 Act is an amending and consolidating statute which was intended, amongst other things, to "reform and harmonise equality law and restate the greater part of the enactments relating to discrimination and harassment related to certain personal characteristics" (long title). The Act makes provision for certain "protected characteristics" in section 4, including, amongst other characteristics, sex. So far as that protected characteristic is concerned, this is described in section 11 as follows:

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

In section 212, the interpretation provision, it is stated in subsection (1) that "'woman' means a female of any age and 'man' means a male of any age."

[7] A separate protected characteristic is that of "gender reassignment". This is defined in section 7 as follows:

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

[8] A number of services and public functions are excepted from the general requirement not to discriminate; these are listed in schedule 3 to the 2010 Act. Part 7 includes the ability to make separate services for the sexes on certain conditions. Paragraph 28 of part 7 provides:

> "(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."

[9] The 2010 Act was enacted subsequent to, (and indeed repealed certain parts of) the 2004 Act. The title to the 2004 Act states that its purpose is to "make provision for and in connection with change of gender". Sections 1-8 of the Act set out the framework within which a GRC may be applied for and granted. Section 9 then provides:

> "(1) Where a full gender recognition certificate is issued to a person, the person's gender becomes for all purposes the acquired gender (so that, if the acquired gender is the male gender, the person's sex becomes that of a man and, if it is female gender, the person's sex becomes that of a woman).
>
> (2) Subsection (1) does not affect things done, or events occurring, before the certificate is issued, but it does operate for the interpretation of enactments passed and instruments and other documents made, before the certificate is issued (as well as those passed or made afterwards).
>
> (3) Subsection (1) is subject to provision made by this Act or any other enactment or any subordinate legislation."

[10] The general position as set out in section 9 is subject to certain exceptions, which are set out in the following sections, for example section 12 which states:

> "12 Parenthood
>
> The fact that a person's gender has become the acquired gender under this Act does not affect the status of the person as the father or mother of a child."

[11] When the 2004 Act was still at the stage of a Bill, the Parliamentary Joint Committee on Human Rights was invited to scrutinise and report on the proposed legislation. That invitation was extended because the Bill was a response to judgments of the European Court of Human Rights and the House of Lords (*Goodwin* v *The United Kingdom* (2002) 35 EHRR 18; *Bellinger* v *Bellinger* [2003] 2 WLR 1174). Those cases held that legislation in the United Kingdom at that time was incompatible with rights under the European Convention on Human Rights and the Human Rights Act 1998 insofar as it failed to give legal recognition to the acquired or reassigned sex or gender of a transsexual person. In its report at paragraph 20, under the heading "What the legislation needs to do", the Committee reported that any legislation must "as a minimum" achieve the following:

> "a) to comply with ECHR Article 12 (right to marry), either amend section 11 of the Matrimonial Proceedings Act 1973 or otherwise change the legal treatment of transsexual people so that once they have acquired a new sex or gender they are no longer disabled from entering into a valid marriage with a person of their birth sex;
>
> b) to comply with ECHR Article 8 (right to respect for private life), amend the law so that any failure to recognise a person's reassigned sex or gender is justifiable under Article 8.2 as being in accordance with the law and necessary in a democratic society (i.e. serving a pressing social need and being proportionate to it) in order to achieve one of the legitimate aims listed in that paragraph; and
>
> c) to avoid any incompatibility with ECHR Article 14 (right to be free of discrimination in the enjoyment of Convention rights) taken together with other Convention rights, ensure that arrangements which might lead to such discrimination are avoided."

It is noteworthy that in the Bill, and indeed the legislation as enacted, there is no requirement that the person should have undergone reconstructive surgery before the acquired gender is recognised. In this respect the Act goes further than some comparative jurisdictions. The committee also noted at paragraph 23(e) that:

> "Anti-discrimination law is to be brought into line with the new legal regime, so it will be unlawful to discriminate against a person by reason of his or her reassigned gender in any of the fields covered by the Sex Discrimination Act 1975, so far as discrimination against a person originally of that gender would previously have been unlawful"

[12] As is usual, statutory guidance was published in respect of the 2004 Act. Amongst other matters, it provided as follows:

> "4. In practical terms, legal recognition will have the effect that, for example, a male-to-female transsexual person will be legally recognised as a woman in English law. On the issue of a full gender recognition certificate, the person will be entitled to a new birth certificate reflecting the acquired gender (provided a UK birth register entry already exists for the person) and will be able to marry someone of the opposite gender to his or her acquired gender.
>
> ...
>
> 27. Subsection (1) states the fundamental proposition that once a full gender recognition certificate is issued to an applicant, the person's gender becomes for all purposes the acquired gender, so that an applicant who was born a male would, in law, become a woman for all purposes. She would, for example, be entitled to protection as a woman under the Sex Discrimination Act 1975; and she would be considered to be female for the purposes of section 11(c) of the Matrimonial Causes Act 1973, and so able to contract a valid marriage with a man."

The petitioner's submissions

[13] The petitioner's primary contention is that the revised guidance issued by the Scottish Ministers falls into the same trap as the guidance previously issued, in that it seeks to introduce a "new" category, that of "legal sex", which is not a protected characteristic in terms of the 2010 Act and thus intrudes upon a reserved matter in the same manner as did the previous guidance. The revised guidance therefore fails to comply with the interlocutor of the Inner House of 22 March 2022 and is thus unlawful. The petitioner's subsidiary argument is to the effect that inasmuch as there is a conflict between the two, the 2004 Act is impliedly repealed by the later 2010 Act.

[14] On the primary argument, the petitioner submitted that the reference to the 2004 Act in the revised statutory guidance is predicated upon a misunderstanding of the purpose behind that Act, which was brought into force in response to *Goodwin* and *Bellinger* and was a "carve out" in the particular context of marriage to permit what would otherwise have been categorised as "same sex" marriages which were unlawful at that time. However the situation now was markedly different than in 2004, same sex marriage was now lawful, and there had been, amongst other advances, equalisation of pension rights for example. Therefore whilst a GRC certifies that a person has obtained gender reassignment and that this might provide some "psychological comfort", the law relating to gender reassignment was now protected under the 2010 Act and those with a GRC came within that protected characteristic. To hold otherwise would drive a coach and horses through other protections in the 2010 Act such as those for single sex spaces.

[15] Senior counsel for the petitioner, Mr O'Neill KC, expanded upon this theme to submit that if it were held that any reference to a man or a woman in the 2010 Act included those with a GRC, the necessary consequence would be that any action taken to improve representation of women (such as in the 2018 Act) would be taken to <u>include</u> any biological men with a GRC, but would <u>exclude</u> biological women if and when they obtained a GRC. Therefore the result would be not giving more rights, but rather taking away rights afforded for the protection of women from any biological woman if and when they chose to obtain a GRC.

[16] Senior counsel illustrated his point under reference to rights and obligations imposed specifically on women, such as in the case of abortion, and suggested that on the reading of the 2010 Act contended for by the Scottish Ministers, biological women with a GRC would have forfeited their right to complain of discrimination as women. The removal or giving

up of rights could not be what was intended, but the issue simply did not arise if it was accepted that "sex" is a reference to a biological man or woman as the case might be. This notion was rooted historically in the struggle against biological determinism as illustrated by restrictions on women practising as doctors, or lawyers, all of which had gradually been dismantled. In the present case, on the other hand, what was at stake was not biological determinism but rather biological denialism.

[17] Senior counsel suggested that recent Scottish authority (*Fair Play for Women Ltd* v *Registrar General for Scotland* [2022] CSIH 7) supported the view that in the context of the 2010 Act a rigid definition of sex based on biological sex must sometimes be taken, depending on the context, but what could not be done was to confuse gender reassignment, including those with a GRC, with sex, as defined in the 2010 Act.

[18] Senior counsel further developed his submission to say that the meaning of sex is strongly context dependent, and that where there were important rights such as status, or proof of identity a rigid biological definition might be demanded, whereas in others (such as the context of the public facing census document at the heart of the *Fair Play for Women* case) such a rigid approach might not be mandated. Senior counsel suggested that the "rigid" approach might even be taken in cases where a GRC had been obtained (see *R (McConnell)* v *Registrar General for England and Wales* [2020] EWCA Civ 559), in which case Mr McConnell, having obtained a GRC stating that he was of the male gender, became pregnant through in vitro fertilisation and wished to be registered as the father of the child. The Court of Appeal held that the exception in section 12 of the 2004 Act applied so that the fact that Mr McConnell had acquired the male gender under the 2004 Act could not affect his status as the mother of a child to whom he had given birth.

[19] The interpretation contended for by the petitioner was, it was submitted, fortified not only by the express terms of the 2010 Act, but also endorsed by the Inner House (appeal court) in its decision in FWS1 challenging the 2018 Act and guidance. Specifically, senior counsel pointed to paragraph 34 of that decision where the court analyses the protected characteristics under the 2010 Act in the context of the aims sought to be achieved by the Scottish Government. The paragraph concludes:

> "Thus an exception which allows the Scottish Parliament to take steps relating to the inclusion of women, as having a protected characteristic of sex, is limited to allowing provision to be made in respect of a 'female of any age'. Provisions in favour of women, in this context, by definition exclude those who are biologically male." (Emphasis added)

This passage makes clear that the appeal court were very much alive to issues around biology and the need to respect the separate and distinct categories of sex and gender reassignment in the 2010 Act. Thus the relevant issue has already been definitively determined by the appeal court. The opinion of the court does not refer to those with a GRC and that is because, contended senior counsel, it was implicitly recognised that those with a GRC are a subset of those with the protected characteristic of gender reassignment, and are therefore already protected within that category by virtue of their GRC. One significant consequence of concluding otherwise is that those who are biologically women but who have obtained a GRC will not be taken to be protected by positive action measures, such as those in the 2018 Act.

[20] Senior counsel then embarked upon a discursive examination of various other statutory provisions to illustrate what he described as the "absurdities" of the approach contended for by the Scottish Ministers, including the Abortion and Surrogacy Acts, as well as practical examples such as the provision of medical services in single sex wards to

those born biologically male but possessing a GRC stating they are female as against the (presumed) exclusion from a single sex ward of those born female but possessing a GRC stating that they are male. Reliance upon paragraph 28 of schedule 3 to the 2010 Act, which in short permits gender reassignment discrimination if it is proportionate, was no answer to the multiplicity of practical problems that would arise if sex were held to mean anything other than biological sex.

[21] Further, it was submitted, the explanatory notes to the 2010 Act only make sense if sex is assumed to mean biological sex, whereas the balance of the provisions of the Act would be upended if it was read in the manner contended for by the Scottish Government and the EHRC. Senior counsel conceded that on the approach contended for by him issues might arise in relation to single sex spaces as against trans inclusive spaces but emphasised that trans inclusive policies were not under attack in this litigation. When pressed to explain the purpose of obtaining a GRC if, as the petitioner contends, sex is presumed to mean biological sex for the purposes of the 2010 Act, senior counsel's response was that he recognised it was an important step, and that any birth certificate obtained on the strength of a GRC was an important document, which stated who you are, and that he did not seek to downplay the symbolic value and importance of holding a GRC and birth certificate in the acquired gender. The 2004 Act put in place a process to mark formal recognition by the state that a person has the important characteristic of gender reassignment. However fundamentally a GRC does not change the protected characteristic of biological sex for the purposes of the 2010 Act because to do otherwise would undermine the policy and purpose of the Act, most obviously so far as biological functions such as pregnancy were concerned.

[22] Senior counsel then turned to the second limb of his submissions, that of the implied repeal of the 2004 Act by the 2010 Act. Although at the end of the day this argument was not

pressed as forcefully as the primary submission, senior counsel submitted that the 2004 Act would be rendered incompatible with the later 2010 Act if the concept of "certificated sex" were substituted for biological sex. This, it was argued, would render the 2010 Act unworkable, unintelligible and in some respects totally redundant. The same issues would arise having regard to the apparent extent of section 9 of the 2004 Act in respect of Acts such as the Abortion Act and the Human Fertilisation and Embryology Act. So far as the latter enactment is concerned, on the respondent's reading, if a biological woman had a GRC their eggs would be a man's eggs and so not covered by that legislation. Other examples were offered on the same theme to illustrate the point. When asked to clarify whether the contention was that the whole of the 2004 Act was impliedly repealed by the later 2010 Act, senior counsel refined his position to be that section 9 only should be declared to dis-apply so far as the later legislation was concerned.

Submissions for the Scottish Ministers and the Lord Advocate

[23] Senior counsel, Ms Crawford KC submitted that the petition raised two short points: (1) the effect of the Inner House interlocutor of 22 March 2022, and (2) the effect of section 9(1) of the 2004 Act and the grant of a full GRC. Addressing the first point, senior counsel examined the terms of the interlocutor of 22 March, as well as the note appended to that interlocutor. The terms of the interlocutor and the note, taken together, she submitted, put in context the challenge brought in the present petition that the appeal court has heard and determined the issues identified above. It had done no such thing. The appeal court in the first petition was asked to determine whether the definition of "woman" in the 2018 Act together with the associated statutory guidance was beyond legislative competence. Section 2 of the Act at that time contained a definition that would include self-identifying

women. That was held to be beyond legislative competence as it impinged upon reserved matters. Therefore, the Scottish Ministers had obtempered the interlocutor of the appeal court which did not in any event hold that the definition of women did not include those with an acquired female gender based on a full GRC.

[24] Accordingly the proper focus of the present case was the lawfulness of revised statutory guidance which the Scottish Ministers were required to provide under the 2018 Act. In order to fulfil the purposes of the legislation, those making appointments to public boards might ask applicants to provide evidence that they are women in order to meet the gender objective. Such applicants might well provide a GRC. That then raised the question if, in making an appointment to meet a gender recognition objective, such a board was to appoint a person with a full GRC, they would be acting unlawfully since, on the analysis of the petitioner, such a person is not entitled to benefit from the equality provisions set out in the 2010 Act. This analysis was misconceived, according to the respondents. Such a board would not be acting unlawfully in circumstances where it had been proffered a certificate issued by the state certifying that the person applying was female. Therefore, in summary, this case is about the effect of a full GRC once the process currently permitted under the 2004 Act had been undertaken and completed.

[25] Whilst that submission summarised what this case was about, it was important equally to appreciate what the case is <u>not</u> about, including the process of obtaining a GRC, whether that should be made harder or easier; what may or may not be enacted by the Scottish Parliament in due course on that topic; whether policies about trans inclusive spaces are lawful or not, or a good idea or not; nor whether gender recognition should be permitted or not. Equally the question for determination was not about confusing or undermining the protected characteristic of sexual orientation, or about taking away rights,

or about the harassment of women through abuse of a GRC or through claiming gender reassignment whether correctly or otherwise, a matter properly for the criminal courts.

[26] Senior counsel developed her submission that the revised guidance was lawful under reference to the decision in *Fair Play for Women* v *The Registrar General for Scotland* both at first instance and on appeal, ([2022] CSOH 20, [2022] CSIH 7) where it had been accepted that birth or biological sex and the acquired sex as stated on a GRC were, in effect, synonymous (see paras 22, 38, 39 and 40 in the decision at first instance, paragraph 23 of the decision of the appeal court). That approach was entirely consistent with the terms of section 9 of the 2004 Act which states that the effect of a full GRC being issued is that the person's gender becomes "for all purposes" the acquired gender. Thus where the acquired gender is female that person's sex becomes that of a woman and they will share that protected characteristic with other women. For completeness, they would also share the protected characteristic of gender reassignment, and indeed any other relevant protected characteristics depending on their individual circumstances.

[27] Further, it was clear from the terms of the explanatory notes to the 2004 Act what the UK Parliament intended to do when it enacted the GRA, which was to enable a person legally to change their sex. This could be seen for example from the terms of paragraphs 4 and 27 of the explanatory notes (set out in para [12] above). This made plain that the intention of Parliament so far as the ambit and effect of the 2004 Act was concerned was not limited in the manner contended for by the petitioner. Further the petitioner's contention that the revised guidance attempted to construct a "new" protected characteristic of "legal sex" was misconceived since the construction of words in a statute, which was what was required here, was self-evidently a question of law, and not one of fact. Thus section 9(1) of the 2004 Act, stating that the acquired gender becomes the sex of man or woman as

the case may be was, properly understood, sex recognised in law, or "legal sex". That conclusion flows from construing section 9(1) and giving the words in that section their plain and ordinary meaning, which was the proper and conventional approach to statutory construction, and did not offend against the defined protected characteristics set out in the 2010 Act.

[28] In conclusion, on this aspect of matters, the UK parliament can and should be presumed to have enacted the 2010 Act in the full knowledge that the 2004 Act permitted people to obtain a GRC with the legal effect that their sex became that acquired on the strength of the GRC. The 2010 Act does not, as it could have done, provide that "sex" in section 212 means biological sex or some other descriptor, or sex registered at birth, or explicitly exclude those who have the sex recognised in their GRC. The two Acts operate in harmony and do not lead to the "absurdity" contended for by the petitioner.

[29] Turning to the question of implied repeal, the respondents submitted that the 2010 Act does not expressly or impliedly repeal or dis-apply section 9(1). Importantly the 2004 Act was more than mere symbolism, it effects change. Whilst the respondents did not contend that the 2004 Act was a constitutional statute (and thus incapable of being altered other than by an express enactment), it was nevertheless a weighty statute, affecting as it does the sex of persons with a GRC for all purposes. Under reference to the speech of Lord Hope in *BH* v *The Lord Advocate* [2012] UKSC 24 at paragraph 30 and the speeches of Lord Carnwath and Lord Neuberger in *Cusack* v *Harrow LBC (SC(E))* [2013] UKSC 40 senior counsel advanced two propositions: The first is that there is a strong presumption that Parliament does not intend an implied repeal on the basis of the generally high standards of parliamentary draftsmanship; and the presumption is stronger the more "weighty" the enactment that is said to have been repealed by implication. The second is that the

presumption of statutory interpretation whereby general provisions give way to more specific provisions (*lex specialis derogat legi generali*) which applies where the literal meaning of a general enactment covers a situation for which specific provision is made in another enactment, does not assist in the exercise of statutory construction where the enactments in question have different purposes or focus, as was the case with the 2004 and 2010 Acts. The former had and has as its purpose gender recognition and the process for that, whereas the purpose of the 2010 Act is as a general equality measure and to make comprehensive provision in relation to anti-discrimination law and the advancement of equality. Its focus had nothing to do with the acquisition of a different gender and sex, and the effect of that.

[30] Senior counsel then addressed in turn the arguments put forward by the petitioner said to exemplify the difficulties that would arise in implementing legislation primarily aimed at women, were anything other than a biological interpretation applied to that term. On questions of pregnancy, and protections aimed at pregnant women, senior counsel submitted that it is the fact of pregnancy that gives rise to the relevant protections, not the fact of being a woman. So far as the perceived difficulties that would arise in the setting up and administration of single sex spaces are concerned, appropriate protections were provided in paragraph 28 of schedule 3 to the 2010 Act. This provides that a person does not contravene section 29 (which states, read short, that service providers must not discriminate against a person requiring that service) if the conduct in question is a proportionate means of achieving a legitimate aim. That assessment of proportionality would require to consider the impact of the exclusion that would necessarily require to address the impact on the individual being excluded and consideration of the availability of alternative provision. By way of practical example under reference to the case of *McConnell*, if Mr McConnell were to be excluded from a labour ward, that could be asserted to be

disproportionate but might well become proportionate if he was offered instead a single room. Thus through the lens of paragraph 28 it was perfectly possible to operate the provisions of the 2010 Act relating to single sex services, although a proportionality assessment might, depending on the circumstances, be required. In summary, the examples proffered by the petitioner did not give rise to the conclusion that "sex" in the 2010 Act could only and always mean biological sex or sex recognised at birth, rather the 2004 Act and the 2010 Act worked in harmony paying respect to the proposition that, as a matter of law, a person who obtains an acquired gender under the 2004 Act has an acquired sex for all purpose and therefore a person's sex can, as a matter of law, be changed. Appropriate exceptions to that proposition were recognised in the legislation itself.

[31] In conclusion, senior counsel rejected the contention that a GRC issued under the 2004 Act is purely symbolic, rather it respects fundamental rights afforded to all under Article 8 such as protection to individual dignity and freedom and quite simply went to the heart of what every individual is. To suggest that in its references to women the 2010 Act had thrown all of that away by implication was simply incorrect, having regard to the purposes for which Parliament enacted the 2004 Act. That being the case, the revised statutory guidance issued by the Scottish Minister was lawful, it respected the interlocutor of the appeal court dated 22 March 2022 and offered a definition of "woman" which was that provided by law as a result of the operation of section 9 of the 2004 Act. That definition was neither repealed or dis-applied by the 2010 Act and was entirely consistent with the terms of that legislation.

Submissions on behalf of the Equality and Human Rights Commission

[32] Senior counsel, Mr Mitchell KC opened his submissions by explaining the position of the EHRC in these proceedings. He submitted that its position was not that of a conventional respondent since it was akin to a referee, in the sense that it was no part of its function to align itself with one party or another, and that if a position were adopted by it, that was because the EHRC saw that as the "correct refereeing decision". It did not see its role to set up fights with non-existent opponents, but to further good practice in the proper operation of the law in its specialist field of interest.

[33] With that introduction, senior counsel adopted his note of argument and reiterated that the function of the court was not to inform the wider debate in this contentious area, but to say what the law is as it stands. That much, senior counsel recognised, was trite. However he took issue with the suggestion on the part of the petitioner that somehow the 2004 Act was now a dead letter, rather than the reformative piece of legislation it in fact was. Such a proposition was untenable in circumstances where individuals had obtained a GRC and a birth certificate that followed upon that. It was also untenable as running contrary to the presumption that Acts of Parliament are on the statute book to change the law, to do something. If it were the case that by 2022 the 2004 Act had nothing more than symbolic effect, that it had no bite upon the matters it had been enacted to deal with, then it should be off the statute book, but there had been no suggestion that this should in fact happen.

[34] Although senior counsel confessed to being unclear as to the judicial authority of the report of the Joint Committee on Human Rights previously referred to in the context of the 2004 Act, he did suggest it provided support for the proposition that at the time of the enactment of the 2004 Act, which adopted much of that recommended in the report,

Parliament thought it was doing something that mattered, for a practical purpose, to respect the dignity and private life of people going through the process of gender reassignment. It was notable, he suggested, that at the time of FWS1, what was in issue was the attempt by the Scottish Government to give the rights and status of women to those who were not entitled to these rights but who were in a wider sense transgender or transwomen. What was common ground at that time was that those who were in possession of a GRC did have that status. Put another way, the first petition was about the very wide concept of transgenderism, whereas this case was concerned with a much narrower concept.

[35] Senior counsel developed his submission to respond to the suggestion that the 2004 Act had been repealed, or more specifically that section 9 had been impliedly repealed or dis-applied. This proposition was at odds with modern parliamentary drafting, which does not proceed in this manner. Section 9 remained on the statute book and what was set out as a general rule in subsection (1) rebutted an argument that there existed an irreconcilable difference between acquired gender and sex, stating, as it does, that if the acquired gender is male, the sex becomes that of a man, and vice versa. The plain meaning of the words were supported by the explanatory notes to the 2004 Act which stated, for example at paragraph 78, in relation to the question of employment that once a person has been recognised in the acquired gender they are to be treated as being of their acquired gender "that is, of the opposite sex to their birth sex". In short, it was not possible to have an acquired gender without an acquired sex.

[36] Turning to the 2010 Act, senior counsel reiterated that the purpose of that act was to codify earlier provisions as to various forms of discrimination on ground of sex, race, disability, gender reassignment and so on and bring all of these measures together in one act. It did not, as the petitioner seemed to suggest, remove the right to complain

of sex discrimination but rather made clear that a person wishing to complain of, say, discrimination at work would require to do so in their acquired sex and gender but that such a person was protected by the same rights and freedoms as anyone born of that sex. Running through the 2010 Act is the desire, which was fully achieved, to give proper protection to holders of GRC's in their acquired sex and gender. Although such a person might also enjoy the protected characteristic of gender reassignment, protection against discrimination on that ground did not give protection for other purposes.

[37] Senior counsel refrained from further detailed oral submission conscious, as he put it, that to do so ran the risk of repetition of arguments already made on behalf of the Scottish Ministers, with whom he found himself largely in agreement. He therefore simply reiterated that the proper conclusion was to refuse the prayer of the petition.

Reply by the petitioner

[38] In a relatively brief reply, Mr O'Neill criticised the Scottish Ministers for what he suggested was a shift in their position from their written argument to that presented orally in court. Specifically he suggested that their apparent stance now, which was that the definition of sex in the 2010 Act sometimes meant a biological woman and sometimes a biological man with a GRC, was a recipe of chaos. They had abandoned any coherent principle of statutory interpretation and when presented with any difficulty, simply chose to fall back on the provisions of section 9(3) of the 2004 Act. This was against the core principle that the law needs to be interpreted in a coherent and consistent fashion. Adopting the interpretation contended for by the petitioner was, in contrast, a consistent and coherent one, which, if applied across the 2010 Act would allow easy understanding of how the Act works, what protections it gives and in particular what protection it offers to

biological women. So far as the position of the EHRC was concerned, Mr O'Neill suggested that their submissions that the effect of a GRC was only of concern to those directly affected by it failed to recognise those indirectly affected, such as women seeking refuge in women's only spaces, or those who wished to be medically examined by a woman. The Scottish Ministers were also silent when it came to saying what were the rights of women subject to assault and who required to undergo forensic examination, did they or did they not have a right to have a biological woman examine them. These illustrations offended against the proposition that statutory construction should be the servant of legal certainty. In a final robust criticism of the position of the Scottish Ministers, Mr O'Neill suggested their approach undermined much that had been done to dismantle the structural discrimination faced by women on a daily basis, which was the antithesis of the challenge to the structures of a patriarchal society that the 2010 Act had been designed to achieve.

Submissions on behalf of the LGB Alliance and The Equality Network

[39] I was favoured with detailed and helpful written submissions by both these organisations. The submission by the LGB Alliance made clear that their purpose in intervening was to ensure that the court considered the consequences on other protected characteristics under the 2010 Act of the arguments presented by the Scottish Ministers. Their primary contention was that the conflation of sex and gender was prejudicial to those whose interests they represented, that is to say lesbians and gay men. This unhelpful conflation could be seen in the terms of section 9(1) of the 2004 Act where the term "gender" was used throughout to refer to something other than the person's sex at birth. The 2004 Act was effectively a mechanism to recognise that a person's sex and gender identity may not align and thus it created a "legal fiction" which purported to resolve the difficulty for that

individual. Importantly however the 2004 Act does not change a person's biology. Further the fiction created by the 2004 Act is displaced by the later 2010 Act which protects separately "sex" and "gender reassignment". These distinct concepts are not to be elided and such is confirmed by the decision of the appeal court in FWS1 (under reference to paras 36, 38, 39 and 40 of the judgment). Although the first part of the revised statutory guidance was uncontentious, the part referring to those in possession of a GRC expressly authorised or at least approved of unlawful conduct, specifically the inclusion of biological men in figures that are designed to increase the number of women on public body boards. The LGB Alliance intervention then provides an informative chapter on the wider effect from its perspective on protections afforded to women and the effects of gender identity ideology on lesbians in particular. Its conclusion overall is that the revised statutory guidance should be reduced.

[40] For its part, The Equality Network adopts the opposite stance to that of the LGB Alliance. It submits that the first petition did not determine the issue at question in this case. The first case was about the issue of legislative competence, whereas this case concerned the question of whether the revised statutory guidance mis-states the meaning of the protected characteristic of "sex" in the 2010 Act, as understood in light of the 2004 Act. The Equality Network highlights the stance adopted by the petitioner in FWS1, which was unequivocally to accept that a person in possession of a GRC stating that their acquired gender is female was and is able to benefit from the non-discrimination provisions of the 2010 Act in relation to the protected characteristic of sex as a woman. This was directly contrary to what the petitioner said in this petition. The construction of the 2010 Act now contended for by the petitioner is inconsistent with the 2004 Act and, if correct, would frustrate the purpose of that legislation. Further the suggestion that the only purpose of the 2004 Act was to address

the mischiefs identified in *Goodwin* and *Bellinger* was not correct. Its purpose and ambit was much wider than that, and the 2004 Act was far from being either redundant or a dead letter as suggested by the petitioner. Importantly, the petitioner conflated the concepts of gender reassignment with those in possession of a GRC. A GRC was not necessary in order to benefit from the protected characteristic of gender reassignment; that was clear from the relevant provisions of the 2010 Act. However possession of a GRC was important from the perspective of privacy so far as those who had gone through the process was concerned. A GRC allowed such people to obtain a birth certificate with their acquired gender and sex on it and thus live their lives without fear of being "outed" at any time when they required to show their birth certificate. Far from being symbolic, such issues were fundamental to the privacy and dignity of a transgender person. The significance of this issue was recognised by the prohibitions contained in section 22 of the 2004 Act relating to privacy. In conclusion, the question for this court could be determined by straightforward interpretation of the statutory language. To do otherwise, in particular to require a transgender person to state that their gender is not that stated in their GRC, but that assigned at birth, would be a significant interference with their Article 8 rights. This issue had arisen in the case of *McConnell* but the court concluded that such interference could be justified. In this case, no justification is offered by the petitioner for such a course, nor could there be any.

Analysis and decision

[41] As I indicated at the outset of this opinion, I have had the benefit of written pleadings, detailed notes of argument, oral submissions, and written interventions by two interested parties. In addition a number of productions were lodged, as well as a joint bundle of authorities running to some 2805 (electronic) pages. All of this material to a

greater or lesser extent addressed not only the key issue in the case but also a number of associated issues and the more general socio-political background or debate around this topic. Ultimately however, the question for resolution remains that which was a matter of agreement between parties and which is set out at the beginning of para [5]. Parties were also largely agreed that the matter at the end of the day was one of statutory interpretation, although there was less concurrence as to how that exercise should be carried out, nor the outcome which would be achieved as a result. That said, the petitioner did initially contend that the question for determination had already in effect been authoritatively decided by the appeal court in its decision in FWS1 and it is appropriate that I deal first with that issue, as a positive answer to that question would largely, if not wholly, determine the outcome of this litigation.

[42] In FWS1, at first instance, the argument of the petitioner mirrored to a significant extent that presented in this case, namely that "woman" so far as the 2010 Act is concerned is restricted to biological women and does not include, as the 2018 legislation originally envisaged within its gender representation objective, transgender women. The Lord Ordinary disagreed, reasoning that the Scottish Government has scope, within the "public boards exception" to legislate to eliminate or regulate discrimination so long as the measures proposed were inclusive of those with protected characteristics under the 2010 Act (such as "sex" and "gender reassignment"). Although there was some discussion about the 2004 Act, and its effect, the Lord Ordinary rejected any suggestion that the 2004 Act had any bearing on the central issue which was before her for determination, which was whether in including transgender women within the definition of women in the 2018 Act, the Scottish Government had conflated two protected characteristics in a reserved matter and thus acted outwith its legislative competence in a reserved area, namely that of equal opportunities.

[43] On appeal, the appeal court ultimately disagreed with the Lord Ordinary that in acting as it did, the Scottish Government was legitimately exercising the public board exception to include those with protected characteristics on relevant public boards, and was thus acting within its legislative competence. Rather, the 2018 Act as it was then drafted conflated two completely distinct protected characteristics, which was impermissible. Paragraphs 34 to 40 contain the court's analysis of the issue of protected characteristics. Paragraph 36 was, as set out above, relied upon by the petitioner in support of the proposition that the court implicitly, or perhaps explicitly accepted the proposition that "sex" in the context of the 2010 Act, refers to biological sex, and it points to the explicit reference to "those who are biologically male" as evidence of this acceptance. It is undoubtedly true that in that passage the appeal court uses that phrase. However, as with many things in life, context is everything. Firstly, that passage does not form part of the ratio of the court's decision. Secondly, the passage must be seen in the whole context of the court's analysis and reasoning, including paragraph 14 which is in the following terms:

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

The opinion also goes on to state:

> "[37] The matter does not end there, however, because it is clear that the PBE would entitle the Scottish Parliament to legislate in favour of increased representation on public boards of those holding any protected characteristic, including that of gender reassignment. **A person has that protected characteristic if the person is 'proposing to undergo, is undergoing or has undergone a process (or part of a process) for the purpose of reassigning the person's sex by changing physiological or other**

attributes of sex.' (2010 Act, sec 7(1).) A reference to a person having such a characteristic is a reference to a transsexual person (sec 7(3)(a)), and no distinction is made between those for whom the relevant process would involve reassignment male to female or vice versa. This is emphasised by the fact that sec 7(3)(b) specifies that in relation to gender reassignment a reference to those who share the characteristic is a reference to 'transsexual persons'. **In other words, it is the attribute of proposing to undergo, undergoing or having undergone a process (or part of a process) for the purpose of reassignment which is the common factor, not the sex into which the person is reassigned. It is reasonable to assume that at some stage of the process in question the individual will start living as a member of the sex to which they are seeking to transition, but it is not a specified requirement for the acquisition of the protected characteristic.**" (Emphasis added).

Paragraph 38 then continues:

> "[38] PvS was decided at a time when protection against discrimination on the basis of gender reassignment was not included in the UK legislation, then the Sex Discrimination Act 1975 (cap 65). The case was referred to the European Court of Justice on the question whether dismissal for a reason connected to gender reassignment was a breach of Art 5(1) of Council Directive 76/207/EEC ([1976] OJ L39/40), designed, inter alia, to prevent discrimination on the grounds of sex. The conclusion was that, standing the fundamental purpose of equality between the sexes which underlay the Directive, its scope was not confined to discrimination based on the fact that a person was of one or other sex, but also extended to discrimination arising from the gender reassignment. It led to recognition of gender reassignment as a basis of discrimination being added to the 1975 Act, in sec 2A. **While it recognised that discrimination on the basis of gender reassignment was most likely to be sex discrimination, neither it nor *Chief Constable, West Yorkshire Police* v *A and anr (No 2)*, which anticipated the Gender Recognition Act 2004, is authority for the proposition that a transgender person possesses the protected characteristic of the sex in which they present. These cases do not vouch the proposition that sex and gender reassignment are to be conflated or combined, particularly in light of subsequent legislation on the matter in the form of the 2010 Act which maintained the distinct categories of protected characteristics, and did so in the knowledge that the circumstances in which a person might acquire a gender recognition certificate under the 2004 Act were limited.**"
> (Emphasis added)

[44] Looked at as a whole, the court clearly sets out what it means when it describes the protected characteristic of gender reassignment, which, as it goes on to explain, is a much broader constituency of people than those in possession of a GRC. Further, whilst the court also makes clear that the protected characteristics of "sex" and "gender reassignment" are

not to be conflated, it implicitly recognises that those in possession of a GRC are a distinct category of persons not to be treated as synonymous with, or only as a subset of, the protected characteristic of gender reassignment. I do not accept that, read fairly and as a whole, the decision in FWS1 is authority for the proposition that the appeal court has authoritatively determined that "sex" for the purposes of the 2010 Act, means only biological sex, and therefore that any further or alternative consideration of that issue is foreclosed. For completeness therefore, it follows that I accept the submission for the respondents that the issue for determination in FWS1 was not the same issue as is focussed in the present case.

[45] That being so, I move to the question which is at the heart of this case which is whether, for the purposes of the revised statutory guidance to the 2018 Act, the respondents are correct in law when they purport to include those with a GRC within the definition of woman in terms of the 2010 Act. The answer to that question begins with consideration of the aims and purposes of the 2004 Act, and the plain meaning of its key provisions. That is the conventional approach to statutory interpretation and entirely consistent with the principle as explained by Lord Hope in *Imperial Tobacco Ltd* v *Lord Advocate* [2012] UKSC 61, 2013 SC (UKSC) 153, paragraph 14*:*

> "The best way of ensuring that a coherent, stable and workable outcome is achieved is to adopt an approach to the meaning of a statute that is constant and predictable. This will be achieved if the legislation is construed according to the ordinary meaning of the words used."

Applying that approach to 2004 Act leads me to conclude that far from being symbolic, the purpose of the legislation was to put into place a detailed mechanism that ultimately effected a change to a person's status in the eyes of the law, specifically, their sex. That is explicitly stated in section 9(1). The section of course goes further. Not only does it confirm

that upon a full GRC being issued the person's sex becomes that of their acquired gender, but that this change of status has effect "for all purposes". The language of the statute could scarcely be clearer. However, I recognise that the petitioner contends that a simplistic reading of the statute in that fashion is misconceived, in short firstly because to do so fails to recognise the context and background against which the 2004 Act was enacted, and secondly because to adhere to that interpretation is inconsistent and conflicts with the later 2010 Act. I deal with each of these propositions in turn.

[46] The petitioner contends that the 2004 Act has to be seen, in effect, as "of its time", as a response to the issues raised in *Goodwin* and *Bellinger* and intended to address the question of "same sex" marriage which was legally impermissible at that time. The legislation needs to be viewed through that prism and it must be recognised that much has changed since the legislation was enacted, not least the legality of same sex marriage. Mr O'Neill did not of course suggest that the legislation was therefore entirely devoid of meaning, but that its purpose now was more symbolic, to allow those to whom it mattered, or to whom it might bring psychological comfort, to obtain a GRC.

[47] I do not accept that characterisation of the 2004 Act. In the first place, the narrow purpose of the legislation contended for by the petitioner is not supported either in the plain language of the Act itself, or in any of the supporting material published at that time, by which I mean in particular the explanatory notes and indeed the report by the Joint Committee on Human Rights. I agree with Mr Mitchell that the authority of that publication is not entirely clear, but I have not approached that document on the basis of it being authoritative in the legal sense, but rather illuminating as to the range of issues perceived to be behind the tabling of the Bill, and the later passing of the 2004 Act. I note that the ultimate terms of the Act reflect almost entirely the issues identified by the committee as

requiring to be addressed. There is no suggestion in that document, or the explanatory notes to the 2004 Act, that it is to be interpreted or applied in the restricted manner contended for by the petitioner. I am fortified in that conclusion by the very fact that the Act contains a number of provisions to deal with exceptions to the section 9(1) principle, for example in section 9(3), as well as other sections dealing with for example marriage, parenthood, succession, peerages, and trustees. Thus the founding principle is a broad one, that the acquired gender becomes the person's sex "for all purposes" subject to any other enactments, or the statutory exceptions listed. I do not accept that this gives rise to any absurdity, or unworkability, as suggested by the petitioner, providing that the plain language of section 9, and any relevant exceptions, is applied.

[48] The second broad proposition is that the 2004 Act is in conflict with the 2010 Act which has consolidated anti-discrimination legislation and creates certain key "protected characteristics" including that of sex. The contention is that the only way the 2010 Act (and indeed any other related legislation) can be made to work is if the definition of woman in that Act is taken to mean biological woman. I have concluded that that argument is flawed for a number of reasons.

[49] In the first place, the word "biological" does not appear in the definition. It would have been entirely open to the drafters of the legislation to put the matter beyond doubt by including that adjective or descriptor, but they did not. Again, well-established principles of statutory interpretation include the presumption that the drafters of the legislation, highly skilled individuals, do not insert or omit words or use language carelessly.

[50] In the second place, and perhaps self-evidently, the 2010 Act was drafted in full awareness of the 2004 Act, and its ambit. It is worth reiterating that the explanatory notes to the 2004 Act state, amongst other things, that upon the issuing of a GRC,

> "the person's gender becomes for all purposes the acquired gender, so that an applicant who was born a male would, in law, become a woman for all purposes. She would, for example, be entitled to protection as a woman under the Sex Discrimination Act 1975;"

Thus when consolidating anti-discrimination legislation, including the Sex Discrimination Act 1975 and providing a definition of terms such as "sex" and "woman" the drafters of the 2010 Act did so with the benefit of that knowledge. Lest that proposition be controversial in any way, I observe that the 2010 Act did, for example, repeal section 19 of the 2004 Act but did not seek in any way to amend or repeal section 9(1) of the 2004 Act.

[51] In the third place, the petitioner's argument erroneously conflates, in the sense of treats one as a subset of the other, possession of a GRC with the protected characteristic of gender reassignment in terms of the 2010 Act. I reach that conclusion having regard to the plain reading of the definition of gender reassignment which describes a much broader concept, and process than does the definition of the effect of obtaining a GRC in terms of section 9 of the 2004 Act. Thus whilst a person in possession of a GRC *may* share the protected characteristic of gender reassignment, their sex for the purposes of the 2010 Act is female, or male, according to the terms of their GRC. I find support for that conclusion having regard to the opinions of the court both at first instance and on appeal in FWS1 and the *Fair Play for Women* case where it is clear that parties, and the court, proceeded upon the basis that a person with a GRC possessed the sex stated in any such certificate. The petitioner of course, and understandably, points to the reference to "biologically male" in the FWS1 decision on appeal. I remain of the view that the understanding of the court as to the effect of a GRC (so far as relevant to that decision) is clear when the decision is read as a whole. Such an approach does not offend against the contention that sex and gender reassignment are separate and distinct protected characteristics. They are. But whilst they

are separate and distinct characteristics, they are not necessarily mutually exclusive in the context of the 2004 and 2010 Acts, read together.

[52] I turn now to the question of implied repeal. As indicated above, this argument was pressed with less force than his other arguments by Mr O'Neill, and at the end of the day became refined to the proposition that section 9(1) was dis-applied by the 2010 Act. Whether one chooses to present the question as one of implied repeal, or dis-application, I do not accept that either doctrine is applicable in this case. I reach that conclusion essentially for the reasons set out by the respondents' and adopted by Mr Mitchell under reference to Lord Hope in *BH* v *The Lord Advocate* [2012] UKSC 24 at paragraph 30 and the speeches of Lord Carnwath and Lord Neuberger in *Cusack* v *Harrow LBC (SC(E))* [2013] UKSC 40. In short, I accept that whilst the 2004 Act is not a constitutional statute, it is nevertheless a weighty one and that there is nothing in the 2010 Act that suggests that Parliament intended that statute to repeal, in whole or in part, the 2004 Act by implication. Indeed, where it sought to achieve repeal of part of the 2004 Act it did so explicitly. I accept also that the principle of *les specialis derogate legi generali* is not applicable here on the basis that these two Acts have different purposes, as is clear, if nothing else, from their titles. For those reasons, the contention that the 2004 Act, or any particular part of it, has been impliedly repealed or dis-applied, by the 2010 Act fails.

[53] For all of the foregoing reasons, I conclude that in this context, which is the meaning of sex for the purposes of the 2010 Act, "sex" is not limited to biological or birth sex, but includes those in possession of a GRC obtained in accordance with the 2004 Act stating their acquired gender, and thus their sex. Such a conclusion does not offend against, or give rise to any conflict with, legislation where it is clear that "sex" means biological sex. Mr O'Neill referred to the example of the Forensic Medical Services (Victims of Sexual Offences)

(Scotland) Act 2021 where references to the sex of the forensic medical examiner can only mean, read fairly, that a victim should have access to an examiner of the same biological sex as themselves. I agree. There are no doubt many other such examples. That does not give rise to the inevitable conclusion, as was urged upon me, that "sex" in the present context must mean the same thing as it does in others. A rigid approach in this context is neither mandated by the language of either statute nor consistent with their respective aims and purposes.

Disposal

[54] The consequence is that the revised statutory guidance issued by the Scottish Ministers on 19 April 2022 is lawful, albeit I concur with the observation made by Mr Mitchell in his note of argument and in submission that the use of the words "In addition" is arguably otiose. Accordingly I will sustain the pleas in law on behalf of the respondents and the fifth interested party; repel the pleas in the law for the petitioner and dismiss the petition. I reserve meantime all questions of expenses.