OUTER HOUSE, COURT OF SESSION

[2022] CSOH 20

P973/21

OPINION OF LORD SANDISON

In the Petition

FAIR PLAY FOR WOMEN LIMITED

Petitioner

for

Judicial review of the guidance issued by National Records of Scotland to accompany the "sex question" in the 2022 Scottish census

Respondents

Petitioner: Dunlop QC, Welsh; Balfour + Manson LLP
Respondents: D Ross QC, P Reid; Scottish Government Legal Directorate
Intervener: Springham QC

17 February 2022

Introduction

[1] A national census is to be held in Scotland on 22 March 2022. As has been the case in the previous censuses which have been held in Scotland every ten years since 1801, except in the wartime year 1941 and the pandemic year 2021, it will require respondents to provide particulars as to their sex, by answering the question "What is your sex?" by way of choosing one or other of binary "Female" or "Male" options. Official guidance as to how to answer that question was made available by the National Records of Scotland, a non-ministerial department of the Scottish Administration which is to take the census on behalf

of the Registrar General for Scotland, on 31 August 2021. That guidance is in the following terms:

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

[2] Fair Play For Women Limited, a not-for-profit organisation which campaigns and consults on matters concerning the rights of women and girls in the United Kingdom, claims in this petition for judicial review that that guidance is illegal, because it authorises or approves unlawful conduct in that it suggests that a respondent could properly answer the sex question in the census by stating that his or her sex is other than that stated in that respondent's birth certificate or GRC. It applies to this Court to have the guidance reduced, in other words for the Court to declare that the guidance has no legal validity. The Registrar General for Scotland and the Scottish Ministers resist that application and maintain that the guidance is entirely legal and should not be reduced. Upon being asked to do so, the Court gave the Equality Network, a charity working for lesbian, gay, bisexual, transgender and intersex equality and human rights in Scotland, the opportunity to intervene in the proceedings, and it did so by way of written submissions. It supports the proposition that the guidance is legal.

Background

[3] In order fully to follow the arguments which the parties advance, it is necessary to know something about the legal and factual background to the dispute.

Scottish Census Legislation

[4] Modern censuses take place in accordance with a framework established by a United Kingdom statute, the Census Act 1920. That Act permits subordinate legislation (specifically, an Order in Council) to be made directing that a census shall be taken on a specific date and what particulars are to be stated in the census returns. However, the only particulars which an Order may require to be stated in the returns are particulars with respect to the matters mentioned in the Schedule to the Act. Once an Order has been made in respect of a planned census, further subordinate legislation is made in order to set out the form of the actual questions to be asked of respondents so that they may provide the required particulars. The subordinate legislation which sets out the particulars to be stated in the 2022 Scottish census is the Census (Scotland) Order 2020. The form of the questions to be asked in order to enable the provision of the required particulars has been set out by the Census (Scotland) Regulations 2020.

[5] Although the 1920 Act is a United Kingdom statute, it may be amended in its application to Scotland by the Scottish Parliament. One of the matters in respect of which the Schedule to the 1920 Act has always permitted an Order to require particulars to be provided in a census is the "sex" of a respondent. In October 2018, the Scottish Ministers brought the Census (Amendment) (Scotland) Bill before the Parliament. One clause of the Bill sought to add, after the word "sex" in the Schedule to the 1920 Act, the words "(including gender identity)", although the Policy Memorandum and Explanatory Notes

issued to accompany the Bill made it clear that the Ministers, for their part, considered that the word "sex" in the Schedule already encompassed the concept of gender identity. The Committee of the Parliament which considered the Bill heard evidence about the proposed amendment from a wide variety of interested parties. It became apparent that there was widespread concern that the addition of "(including gender identity)" after "sex" in the Schedule to the 1920 Act risked adding confusion to an issue which many already considered to be far from clear or uncontroversial. The Committee recommended that that proposal be departed from, and thereafter the Scottish Ministers removed that clause from the Bill, so that the word "sex" in the Schedule to the 1920 Act as a matter about which an Order may require the provision of particulars in a census remains without further elucidation, and indeed has no specific definition anywhere within the four corners of the Act.

[6] Certain amendments to the Schedule to the 1920 Act in its application to Scotland were, however, made by the Census (Amendment) (Scotland) Act 2019, as the Bill became once enacted. The 2019 Act amended the Schedule to the 1920 Act so that it can now be ordered that a census in Scotland may require the provision of particulars about "transgender status and history" and "sexual orientation". The Census (Scotland) Order 2020 prescribes that particulars on those matters are indeed to be provided as part of the 2022 census, and the Census (Scotland) Regulations 2020 provide that the form of those questions is respectively to be: "Do you consider yourself to be trans, or have a trans history?", describing "trans" as "a term used to describe people whose gender is not the same as the sex they were registered at birth" and offering as available options for selection by way of answer either "No" or "Yes, please describe your trans status (for example, non-binary, trans man, trans woman"; and "Which of the following best describes your sexual

orientation?" with an indication that one of the options "Straight or Heterosexual", "Gay or Lesbian", "Bisexual" and "Other sexual orientation" should be selected by a respondent answering the question, with the opportunity to write in further details should the last such option be selected.

[7] No respondent to the 2022 census will be subject to a penalty for refusing or neglecting to answer those new questions about transgender status and history and sexual orientation; in that sense answering those questions is voluntary. In relation to the sex question, however, in common with most other questions in the census, respondents who refuse to answer, or who provide a false answer, are on summary conviction subject to a fine of up to £1,000. For those who are responding to the census online (and it is hoped that at least 70% of respondents will use that method) it will, indeed, not be possible to submit any response at all without answering, amongst others, the sex question.

Developments in Census Law in England and Wales

[8] The Census Act 1920 is also the framework legislation for the holding of censuses in England and Wales. The Covid-19 pandemic notwithstanding, the authorities there decided not to delay the holding of a census in 2021, on the normal ten year cycle; it was held on 21 March 2021.

[9] The UK Parliament also made certain changes to the Schedule to the 1920 Act in its application to England and Wales before the 2021 census. By way of the Census (Return Particulars and Removal of Penalties) Act 2019, sexual orientation and "gender identity" were added to the list of specific matters about which an Order may require the provision of particulars in a census there, and the subordinate legislation paving the way for the 2021 census made it clear that questions on those subjects would indeed be asked. Just as

will be the case in the coming Scottish census, those new questions were asked in England and Wales in 2021 on a voluntary basis in the sense already described, whereas the long-established sex question was mandatory in that sense.

[10] A little over a month before the 2021 census was to be held, the UK Statistics Authority produced guidance to assist respondents to answer the sex question. It contained the following: "If you are considering how to answer, use the sex recorded on one of your legal documents, such as a birth certificate, gender recognition certificate, or passport." The petitioner in this case took exception to that guidance, just as it now does to the guidance which has been issued in relation to the forthcoming Scottish census, on the basis that the guidance approved the use of documents other than a birth certificate or GRC as the basis for answering the sex question. It took the matter to the High Court of Justice in London, where the case came before the Judge in Charge of the Administrative Court there, Mr Justice Swift. He was asked to direct the removal of that element of the guidance which was objected to on an interim basis. In order to do so, he had to be persuaded that there was a strong *prima facie* case that the guidance was unlawful and that the balance of convenience favoured the intervention of the Court at that stage. He considered that those conditions were indeed met, and his judgment on the application for an interim order was issued on 9 March 2021: *R (Fair Play for Women Ltd)* v *UK Statistics Authority, etc* [2021] EWHC 940 (Admin).

[11] In particular, Swift J considered that the separate provision enabling particulars to be required about the matters of sex and gender identity contained in the Schedule to the 1920 Act as amended for England and Wales, and in the relative subordinate legislation, indicated a clear distinction being drawn there between sex on the one hand and how a person described their gender, and whether that was the same as their sex registered at

birth, on the other. He considered that that distinction was borne out by the White Paper that had preceded the Census (Return Particulars and Removal of Penalties) Act 2019, and that the White Paper further supported the suggestion that the purpose of asking about gender identity in the census was to capture information about a person's perception of their gender identity, which would not be captured by the answer to the sex question. He rejected for similar reasons the suggestion on behalf of the UK Statistics Authority that "sex" in the Schedule to the 1920 Act and in the subordinate legislation was an umbrella term which could include biological sex, sex recognised by law, self-identified sex or sex as recorded in a state-issued document, as well as subsidiary arguments which the Authority made. He concluded that the references to sex in the 1920 Act and the subordinate legislation were references to a person's sex as recognised by law and not the sex with which the person self-identified, and that insofar as the guidance suggested otherwise, it was wrong and potentially encouraged the submission of a false answer to the question. He indicated that it would be appropriate to order the sentence of the guidance in question to be altered so as to read simply "If you are considering how to answer, use the sex recorded on your birth certificate or gender recognition certificate."

[12] With days to go before the holding of the census, the UK Statistics Authority agreed to publish its guidance in the form which Swift J had indicated he considered appropriate. On 16 March 2021 a consent order was issued by Swift J declaring that "sex" in the Schedule to the 1920 Act and the subordinate legislation in England and Wales meant sex as recorded on a birth certificate or GRC.

Previous Guidance on the Sex Question

[13] Formal guidance to assist in answering the sex question in the 2011 Scottish census was published online. Before then, census enumerators may have provided informal advice on the matter if asked to do so by individual respondents. The 2011 guidance was in the following terms:

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

[14] No formal guidance was issued in relation to the 2001 census, although in England and Wales the Office for National Statistics informally advised a campaign group that:

> "it would be reasonable … to respond by ticking either the 'Male' or 'Female' box whichever you believe to be correct, irrespective of the details recorded on your birth certificate".

Other aspects of the Census

[15] Other than the possibility of penalty for a false answer already mentioned, what any respondent states in response to a census question does not affect the legal rights, obligations or status of that respondent or any other person. According to an affidavit provided to the Court by the Director of Statistical Services for the National Records of Scotland, in the Scottish 2011 census there was a 94% response rate overall, and 99.2% of respondents provided an answer to the sex question. Several factors, intractable to a greater or lesser extent, combine to produce the result that the census output may not be quite as comprehensively precise as some may imagine. For example, as a result of the 2011 Scottish census, an estimate of the total Scottish population could only be stated as 5.295 million with

a confidence interval of plus or minus 85,000, ie the estimate was simply that the actual population was likely to be somewhere between 5.21 and 5.38 million. Individual census responses are presently closed to public examination for 100 years in terms of the Freedom of Information (Scotland) Act 2002.

[16] It was submitted on behalf of the petitioner in the present proceedings that there was an ongoing debate between and amongst ultimate users of the census output, and the census authorities throughout the UK, concerning *inter alia* the questions of whether subgroup analysis and comparability of data over time would be undermined by guidance on self-identification in relation to the sex question, and whether such guidance would be likely to encourage participation in the census. Material, including affidavits, touching on that debate, and expressing views all plainly held in good faith and on at least colourable grounds, was provided to the Court by both the petitioner and the respondents.

[17] Whether the guidance complained of would encourage or discourage participation in the census, and whether its use would result in material inaccuracy in the census output, are matters in dispute between the parties. The petitioner suggests that the utility of the census output would be degraded by permitting or encouraging sex self-identification, and that there is no reliable basis for any suggestion that participation would be encouraged thereby. The respondents submit that self-identification is encompassed within the concept of "sex" in the legislation, and so no question of inaccuracy in that regard could ever arise. If some individuals, in accordance with the guidance, responded to the sex question other than according to their biological sex, it was reasonable to suppose that that had already happened in previous censuses and in any event the purpose of the census was not to identify the needs of, or make decisions about, individuals. It certainly was not concerned with altering the rights of individuals in any way. Rather, it was to make decisions about

resource allocation and strategic planning at a population level. The number and pattern of people likely to be acting on the guidance so as to respond other than by reference to biological sex was not sufficient to make any material difference to the utility of the census output at that level. The output would be presented with information for users explaining the gathering and processing methods used and describing the accuracy of the data. The Registrar General was clearly of the view, based on experience and consultation, that guidance was wanted by the trans community and that how they felt able to approach the sex question would probably affect their attitude to and participation in the census as a whole. The written submissions of the Equality Network largely mirrored those of the respondents on these matters.

[18] The petitioner's position is that the core question which arises in this case is the meaning of "sex" in the 1920 Act and its subordinate legislation, and that that is a pure matter of law. In seeking the remedy which it asks for in these proceedings, it accordingly does not rely on the suggestion that those elements of the guidance of which it complains, if left in place and followed by those to whom they are addressed, would result in material inaccuracy in the census output. That would be a mixed question of fact and law. The respondents accept that the question requiring an answer is a question of law, although – as will be seen – they suggest that the question of what the law is may be substantially informed by factual matters about the society which it is designed to serve. For present purposes, however, it is important to appreciate that the Court was not asked to resolve the disputes about material inaccuracy and encouragement of participation in coming to a decision about whether or not the guidance complained of should be reduced.

Petitioner's Submissions

[19] On behalf of the petitioner, the Dean of Faculty submitted orally and in writing that by suggesting that the sex question could be answered other than by reference to the respondent's sex as stated on a birth certificate or GRC, the guidance complained of permitted, sanctioned, positively approved or authorised unlawful conduct by those consulting it, and was accordingly unlawful and subject to reduction – see *R (A)* v *Secretary of State for the Home Department* [2021] UKSC 37, [2021] 1 WLR 3931 at paragraph 38, applying and to some extent explaining *Gillick* v *West Norfolk and Wisbech Area Health Authority* [1986] AC 112.

[20] The guidance ought to be so categorised because it was clear that if the Court carried out its proper task of ascertaining the objective intention of Parliament from the words that it chose to enact in the 1920 Act as amended from time to time (*R (Spath Holme Ltd)* v *Secretary of State for the Environment* [2001] 2 AC 349 at 396), sex in the 1920 Act meant sex as registered at birth (*Bellinger* v *Bellinger* [2003] UKHL 21, [2003] 2 AC 467) or, after the coming into force of the Gender Recognition Act 2004, sex as recorded on a GRC issued in terms of the provisions of that Act.

[21] *Bellinger* had clearly negatived the suggestion that a person born with one sex might later become, or even come to be regarded legally as, a person of the other sex, even though arguments about the various potential criteria for determining sex in modern times had been extensively canvassed; see Lord Nicholls of Birkenhead at paragraphs 34 to 37. Reference was also made to the speech of Lord Hope of Craighead at paragraphs 57, 64 and 68. The fact that the case was directly concerned with the concept of sex for the purposes of the law of marriage of England and Wales as it then stood did not detract from that general proposition.

[22] The only exception to the general principle set out in *Bellinger* was the route subsequently provided by the Gender Recognition Act 004, which permits an individual to apply for, and in suitable cases, obtain, a GRC. Where such a certificate was issued to any person,

> "the person's gender becomes for all purposes the acquired gender (so that, if the acquired gender is the male gender, the person's sex becomes that of a man and, if it is the female gender, the person's sex becomes that of a woman)" –

Gender Recognition Act 2004, section 9. Unless and until a GRC had been obtained, a person's sex remained that stated on that person's birth certificate for all purposes, including the obligation to state truly one's sex when required to do so as part of a census. One's legal sex could not be altered simply by an act of will.

[23] The fact that one could obtain certain official documents, such as a driving licence or passport, stating one's gender as other than the sex with which one had been (necessarily) registered at birth, was irrelevant to the question of what one's legally-registered sex was. It was the latter matter, rather than any other, to which the sex question in the census legislation fell to be regarded as being addressed.

[24] The legal conclusion that Swift J had reached in the 2021 English proceedings referred to above, and expressed in the consequent consent order, was sufficient to form a determination in law (*Greenpeace Ltd* v *Advocate General for Scotland* [2021] CSIH 53, 2021 SLT 1303 at paragraph 61). It was the correct determination in law and there was no reason to suppose that the 1920 Act fell to be construed differently in Scotland; indeed, a UK-wide statute ought to be applied consistently throughout the UK unless there was some compelling reason to the contrary. That the Scottish Administration took a different view about the legal position was entirely irrelevant – *Abel* v *Lee* (1870 - 71) LR 6 CP 365 at 371; *Yemshaw* v *Hounslow LBC* [2011] UKSC 3, [2011] 1 WLR 433 at paragraphs 25–27. The

Scottish Parliament had not left the 1920 Act untouched when it enacted the Census (Amendment) (Scotland) Act 2019; it had introduced the concept of transgender status and history into the Schedule of the 1920 Act, thus making it clear that that was something different from the concept of sex which was already used in the Schedule, and had thus created a situation in substance identical to that in the English legislation which had been the subject of the case before Swift J.

[25] The suggestion made by the Scottish Ministers that an updating or "always speaking" approach should be taken by the Court to the construction of the 1920 Act was misplaced, and amounted to an impermissible invitation to judicial legislation – cf *R (McConnell)* v *Registrar General for England and Wales* [2020] EWCA Civ 559, [2020] 3 WLR 683, at paragraphs 34–35. *R (Quintavalle)* v *Secretary of State for Health* [2003] UKHL 13, [2003] 2 WLR 692 did not permit the Court to construe statutory language contrary to its natural and ordinary meaning. There had been no relevant change in social attitudes since the passing of the 1920 Act. In the case of the word "sex", the ordinary and natural meaning was to be found in the OED as "Either of the two main categories (male and female) into which humans and many other living things are divided on the basis of their reproductive functions; (hence) the members of these categories viewed as a group". The possibility of a construction of the 1920 Act which did not give effect to that natural and ordinary meaning might only be countenanced if that meaning could be said, in context, to be contrary to the intention of the legislature – *R* v *Z (Attorney General for Northern Ireland's Reference)* [2005] UKHL 35, [2005] 2 AC 645 at paragraph 49; *Littlewoods Ltd* v *Revenue and Customs Commissioners* [2017] UKSC 70, [2018] AC 869 at paragraphs 37 and 39.

[26] Moreover, the modern approach of the law involved a generalised distinction between "sex" on the one hand and "gender" or matters flowing from that latter concept on

the other. That could be seen from observations in *R (Elan-Cane)* v *Secretary of State for the Home Department* [2021] UKSC 56, [2022] 2 WLR 133, where the Court at paragraph 3 had noted that:

> "The term 'gender' is used in this context to describe an individual's feelings or choice of sexual identity, in distinction to the concept of 'sex', associated with the idea of biological differences which are generally binary and immutable".

[27] A similar approach could be seen in the Equality Act 2010, where gender reassignment was treated separately and distinctly from sex as a protected characteristic, and in the Forensic Medical Services (Victims of Sexual Offences) (Scotland) Act 2021, which amended previous legislation so that a victim of sexual offending could have a choice of medical examiner according to the latter's "sex" rather than "gender".

[28] The legislative history of the 2018 Census (Amendment) (Scotland) Act 2019 supported the petitioner's position in relation to the proper construction of the 1920 Act and its subordinate legislation in Scotland. The Scottish Ministers had taken a deliberate decision not to proceed with a proposed amendment to the 1920 Act which would have added "(including gender identity)" after the reference to sex in the Schedule to the 1920 Act. They were to be presumed to have done so advisedly – *R (N)* v *Walsall MBC* [2014] EWHC 1918 (Admin), [2014] PTSR 1356 at paragraph 66. There was no need to speculate about what the Parliament might or might not have done in one scenario or another – a course of action warned against in *Royal College of Nursing of the United Kingdom* v *Department of Health and Social Security* [1981] AC 800 – because in the present case it was clear that it had not amended the 1920 Act to link "sex" with "gender identity". Rather, it had decided to ask a completely different question about transgender status and history, leaving the sex question as a simple and binary one.

Respondents' Submissions

[29] Mr Ross, QC, on behalf of the Registrar General for Scotland and the Scottish Ministers, submitted that there was no definition of the word "sex" which applied for all purposes. *Bellinger* was simply about the definition of the terms "male" and "female" for the purposes of the (then) English law of marriage as set out in the Matrimonial Causes Act 1973, an area of law where individual rights were clearly at stake and there was a plain need for legal certainty and a consequent concentration on biological sex. However, Lord Nicholls had observed at paragraph 32 that the criteria for recognising self-perceived gender in one context might not be appropriate in another. The present case involved an entirely different context which had nothing at all to do with individual rights.

[30] "Sex" was not defined in the 1920 Act or any of its subordinate legislation. It was not a technical term and the full range of its ordinary, everyday meanings was available in construing the legislation. Moreover, "sex" and "gender" were not terms with settled distinct meanings, either in the legal context or more generally. The *Shorter Oxford English Dictionary* (6th ed.) defined "sex" as including *inter alia* "the sum of the physiological and behavioural characteristics distinguishing members of either sex" and "gender" as including *inter alia* "sex as expressed by social or cultural distinctions". Examples of "sex" and "gender" being regarded as at least to some extent synonymous could be found in case law in *Advocate General for Scotland* v *MacDonald* [2003] UKHL 34, 2003 SC(HL) 35, per Lord Nicholls at paragraph 7 and in *Chief Constable of West Yorkshire Police* v *A (No 2)* [2004] UKHL 21, [2005] 1 AC 51 per Lord Bingham of Cornhill at paragraph 11 and Baroness Hale at paragraph 56. In *Elan-Cane*, the Court had referred (at paragraph 5) to the fact that, subject to the inclusion of transgender persons within the category of their acquired gender, public agencies tended to use the terms "gender" and "sex" interchangeably to refer to the

biological categories of male and female, and had made the same point in more general terms at paragraph 52.

[31] The sex or gender in which people lived their lives was in modern times routinely recognised by organs of the state, irrespective of what was set out on a birth certificate, or of the possession of a GRC. The very fact that GRCs existed was one example of the kind of recognition that the modern law now afforded to the acquired gender of trans people. Driving licences, passports and NHS records were further cases in point. All of that reflected the modern reality that sex was not generally now regarded as a pure matter of biology, but was instead a much more nuanced concept. Certainly nowadays, and indeed probably at any time since the 1920 Act came into force, a respondent could reasonably have read the sex question in a census as referring to any of biological sex, sex recognised by law, or self-identified (or "lived") sex as at the date of the census, rather than in any more limited way. An answer to that question that had a reasonable basis in fact, which was all that the guidance complained of suggested as acceptable, would not attract the statutory penalty for a false answer, since it would not be a false answer, or at the very least would be entitled to the benefit of the presumption against doubtful penalisation, cf *Bennion, Bailey and Norbury on Statutory Interpretation* (8th ed), paragraph 26.5; *R* v *Z*; *Tuck & Sons* v *Priester* (1887) 19 QBD 629.

[32] If, contrary to the respondents' primary position that the 1920 Act had always used "sex" in a wider sense than that contended for by the petitioner, an updating construction should be applied in light of the changes in the law and in social conditions and attitudes since 1920 already identified, so that the Act could be treated as "always speaking" and thus as including within the term "sex" now, at least, the sex or gender in which respondents actually lived their lives rather than necessarily the sex with which they happened to have

been born – cf *Royal College of Nursing* at page 822 and *Quintavalle* at paragraph 24. As Lord Steyn had remarked in *R* v *Ireland* [1998] AC 147 at 158:

> "Bearing in mind that statutes are usually intended to operate for many years it would be most inconvenient if courts could never rely in difficult cases on the current meaning of statutes. Recognising the problem Lord Thring, the great Victorian draftsman of the second half of the last century, exhorted draftsmen to draft so that:
>
> 'An Act of Parliament should be deemed to be always speaking … the drafting technique of Lord Thring and his successors has brought about the situation that statutes will generally be found to be of the 'always speaking' variety'".

That was a mode of construction particularly appropriate for a framework statute such as the 1920 Act which was intended to serve as the basis for censuses over many decades, during which various aspects of society would have been expected to change, and had changed, in many and unpredictable ways. In any event, an updating construction of legislation was generally to be preferred: *R (N)* v *Walsall* at paragraph 45.

[33] Finally, the case brought in 2021 by the present petitioners in England had been decided on an interim basis only by Swift J before the defendant had made a concession which was not being made in this case. The case had concerned a version of the 1920 Act which was different from that applicable in Scotland, which had different subordinate legislation and a different legislative history, and proceeded on the basis of different arguments. In passing the Census (Amendment) (Scotland) Act 2019, the Scottish Parliament had been aware of the view of the Scottish Ministers that "sex" in the 1920 Act already encompassed gender identity, and had taken no steps to provide any different definition to the word. That was the kind of presumptively deliberate course of action which was being referred to in *R (N)* v *Walsall*.

Intervener's Submissions

[34] On behalf of the Equality Network, Ms Springham, QC, lodged written submissions which agreed with those of the respondents that there was no single legal definition of "sex" which applied in every context, and certainly not in the context of the 1920 Act and its subordinate legislation. An "always speaking" construction should be adopted, which would favour the legislation being construed in a sense which would include the sex acquired by transgender people, regardless of the existence of a GRC. Such certificates were often not obtained by transgender people because they felt that the legislation pathologised their gender identity, or because there were practical difficulties in the prescribed process for obtaining a GRC which could prove insuperable. Many felt no need to obtain a GRC when every official document pertaining to them, other than their birth certificate, referred to their acquired sex. To compel transgender people to respond to the sex question in the census by reference only to a birth certificate or GRC would be a failure to respect their identity in breach of section 6 of the Human Rights Act 1998 and Article 8 of the European Convention on Human Rights and would amount to direct gender reassignment discrimination contrary to sections 13 and 29(6) of the Equality Act 2010. I observe that the respondents specifically dissociated themselves from the intervener's submissions as to the impact of the human rights legislation in this regard.

[35] The concepts of "sex" and "gender" were intrinsically interlinked. The Equality Act did not provide support for any suggestion that a person's sex was solely biologically determined, and defined the protected characteristic of gender reassignment, and the concept of indirect sex discrimination, very widely. A similar interlinking of "sex" and "gender" could be seen in aspects of the jurisprudence of the European Union and in various other provisions of domestic law. *Bellinger* was concerned with the English law of

marriage as it then stood and had been overtaken by subsequent legal and social developments.

[36] The ultimate outcome of the petitioner's English case depended on a concession not made here. Swift J's interim decision was not based on full argument or with the assistance of intervention from any interested party.

[37] The submissions from the Equality Network also contained informal statements from transgender individuals in support of its position and describing, so far as material to the present litigation, their own experiences in interacting in their acquired sex with the state and others, and how they considered a requirement to answer the sex question in the census only by reference to their birth certificate (none had a GRC) would adversely affect them.

Discussion and Decision

[38] It is a matter of agreement in this case that, if the guidance complained of permits, sanctions, positively approves or authorises unlawful conduct by those consulting it, it would to that extent be unlawful and the Court could properly intervene in the situation so created: *R (A)* v *Secretary of State for the Home Department*. It is, further, a matter of agreement that a person in possession of a GRC could properly respond to the sex question in the forthcoming census by reference to the sex so acquired and set out in the relevant certificate. The guidance addresses itself only rather obliquely to that situation and is not subject to direct criticism on that account. What divides the parties is whether, absent possession of a GRC, a transgender person, non-binary person or any other person not sure how to answer the sex question would be acting lawfully by answering the question other than by reference to the sex recorded on that person's birth certificate.

[39] The petitioner's answer to that question is that, leaving aside those with GRCs, as a matter of law a person's sex is determined for all legal purposes (including, crucially for present purposes, the obligation to answer correctly the census sex question) as being that with which that person was registered at birth. It argues that that legal rule may be seen exemplified in the decision of the House of Lords exercising its former judicial functions in the case of *Bellinger*. I am unable to find that the existence of any such rule of general application was recognised or affirmed in *Bellinger*. Rather, I consider that the observations in *Bellinger*, so far as they might be thought to touch upon the issue in the present litigation, were directed solely at the particular issue with which that case was concerned, namely the identification of the sex of a person for the purpose of determining whether that person was male or female within the meaning of the Matrimonial Causes Act 1973, so that the validity of a marriage entered into by that person with another person could in consequence be ascertained. In that context, in which the rights and status of the person in question and of the putative spouse were at stake, and a variety of wider rights and interests engaged, it was plainly desirable that the question of a person's sex ought to be capable of ascertainment by objective and preferably simple means. The same considerations do not apply when the question of a person's sex is raised in other contexts, particularly in contexts in which no consequences at all for anyone's rights flow from the matter of what sex is claimed by a particular person. That is the very point which I understand Lord Nicholls to have been making when he said at paragraph 32 of *Bellinger* that "[t]he criteria appropriate for recognising self-perceived gender in one context, such as marriage, may not be appropriate in another …" Examples of state recognition of a person's sex as different from that set out in a birth certificate or GRC are to be found in the facilities made available for important documents such as a driving licence or passport to be issued by reference to a person's lived

sex. It is very difficult indeed to reconcile the provision of such facilities with any general legal rule that a person's sex can only be considered to be that recorded on a birth certificate or GRC; rather, the implication of such practices – the legality of which has not been successfully challenged – is that how various emanations of the state recognise a person's sex is indeed a matter to which the context of the recognition sought makes at least a substantial contribution.

[40] Having reached the conclusion that there is no general rule or principle of law that a question as to a person's sex may only properly be answered by reference to the sex stated on that person's birth certificate or GRC, it is necessary to pause and take stock. The arguments of the parties to this litigation suggest that, if there is no such general rule of law, it would be appropriate to turn to consider more specific issues capable of informing the answer to the question of the proper construction of the word "sex" within the 1920 Act. I do not think, however, that that is the correct approach to the problem which presents itself in this case. It will be recalled that the Schedule to the 1920 Act simply provides a list of matters about which an Order providing for a specific census to be held may require particulars to be provided. One of those matters is "sex". In other words, all that the Act relevantly provides is that an Order may be made requiring respondents to a census to provide particulars about their sex. The Census (Scotland) Order 2020 duly provides (by its Article 6 and paragraph 4 of its Schedule 2) that "sex" is indeed a matter in respect of which a respondent to the 2022 census is to be required to provide particulars, and the Census (Scotland) Regulations 2020 provide that the precise form of question in that connection is to be:

What is your sex?	The respondent is required to select one option only. A voluntary question about trans status or history will follow if the respondent is aged 16 or over.	☐ Female ☐ Male

[41] It is not suggested by the petitioner in this case that there is anything unlawful about the form or substance of the Order or the Regulations. The only duties which a respondent to the census has (at least in the sense that there is a potential penalty in terms of section 8 of the 1920 Act for acting otherwise) is to answer all the mandatory questions posed (of which the sex question is one) and to not to provide a false answer to any question. The core issue in this case, then, is not directly what the meaning of "sex" in the Schedule to the 1920 Act might be, but is, rather, the related but distinct issue of what a false answer to the question actually posed in accordance with the primary and subordinate legislation might be, and thence whether the guidance complained of encourages (in the senses already set out) such a false answer. This approach has some resonances with, though I do not consider it to be a direct application of, the legal principles underlying the presumption against doubtful penalisation referred to in the respondents' argument.

[42] It is obvious that the sex question might be answered falsely. For example, a respondent registered as female at birth, and who has never entertained any concern or doubt about that assigned sex before the census day, might well be providing a false answer by ticking the "Male" box in answer to the sex question. It is much less obvious that a respondent registered female at birth, without a GRC, but who has come to live to all practical intents and purposes as a male, perhaps with a greater or lesser degree of pharmaceutical or surgical intervention, would be providing a false answer by ticking the

"Male" box. One could only definitively say in the abstract that such a person was indeed providing a false answer if, in accordance with the petitioner's principal position, a person's sex is for all legal purposes defined by that person's birth certificate or GRC. I have already concluded that there is no such general rule of law.

[43] There are questions in the 2022 census (all of which relate to matters authorised in specific or general terms by the Schedule to the 1920 Act as matters about which particulars may be required) which require an answer based explicitly on some objective legal criterion. For example, one question is "On [census day], what is your legal marital or registered civil partnership status?" (emphasis added). Another which at least alludes to a matter of objective legal status (ie nationality) is "What passports do you hold?" Others ask expressly for subjective answers, for example whether the respondent "considers" him - or herself to have a transgender status or history, or the question which asks "What do you feel is your national identity?" Most questions, however, including the sex question, refer expressly neither to some objective legal criterion nor to mere subjective opinion. In that category of question, it is difficult to escape the conclusion that an answer provided in good faith and on reasonable grounds would not be a false answer in the relevant sense, even if persons other than the respondent providing it might not think it the "right" answer. Sometimes the available margin for answering seems rather wide. To take but one example, respondents to the 2022 census must answer the question "How is your health in general?", with the available options being "Very good", "Good", "Fair", "Bad" or Very Bad". It is a matter of common experience that some people consider themselves to be in excellent health even though their general practitioners think otherwise. For others, the reverse might be the case. Leaving aside very extreme cases, and even though the question on its face asks for an objective rather than subjective response, it is difficult to see how an answer provided in

good faith and on reasonable grounds could be castigated as a false one for the purposes of the census legislation. The sex question appears to me to fall into an essentially similar category.

[44] Further, the guidance complained of (unlike the guidance in the English litigation already mentioned) is notably limited in nature, in that it does not positively instruct or even recommend any particular mode of answering the sex question in individual cases; rather it merely says to transgender people that their answer "can be" different from that on their birth certificate and that they do not need a GRC. Even if one reads the reference to not needing a GRC as meaning that one does not need a GRC before providing an answer different to that on one's birth certificate (which seems to be what is intended), the guidance does not go the length of saying that transgender people in that position should respond to the sex question by claiming a sex other than that on their birth certificate; it merely contemplates the prospect that some of them may do so. If, as I have held, there is no rule of law that one's legal sex in every context is that recorded on one's birth certificate or GRC, it is not possible to say that that guidance permits, sanctions, positively approves or authorises unlawful conduct. For the reasons already stated, some transgender people at the very least would not be answering the sex question falsely by stating that their sex was other than that recorded on their birth certificate and the guidance merely acknowledges that.

[45] The position is similar with the remainder of the criticised guidance, which informs non-binary people or those not sure of how to answer the sex question that they "could use the sex registered on your official documents, such as your passport". Again, the guidance does not suggest to any particular person that the sex shown on such documents should be used as the basis for the answer to the census question, merely that it could be. Absent the rule of law for which the petitioners have unsuccessfully contended, that guidance cannot,

as already explained, properly be said to encourage or condone (in the senses already stated) unlawful conduct. The guidance is measured and restrained. It neither states nor implies that respondents should give whatever answer they like to the sex question. The petitioner's position that it is unlawful is unsustainable.

[46] I am, for the reasons which I have already given, in a position to refuse the prayer of the petition without reference to some of the remaining arguments presented by the parties; in essence, those proceeding on what I regard as the incorrect assumption that the proper construction of the word "sex" in the Schedule to the 1920 Act, setting out one of the matters in respect of which an Order paving the way for a census may require particulars to be provided, simultaneously provides in some way parameters for gauging the truth or falsity of the particulars ultimately provided. However, out of deference to the care with which those arguments were presented, and also because an approach different to mine appears to have been taken in the English litigation to which I have referred, it is appropriate for me to record, at least briefly, my view on what the proper construction of "sex" in the 1920 Act as now amended is.

[47] In that connection, I would firstly not have found it possible to ascertain from the various statutory references to "sex" and "gender" to which I was referred any justification for an approach to construction of the 1920 Act entailing that a reference in statute to "sex" falls to be read, definitively or even presumptively, as a reference to a person's sex as recorded in a birth certificate or GRC, or by extension, to biological sex only. There are certainly instances where it is clear, usually from the context rather than exclusively from the word used, that "sex" in a statute does indeed mean biological sex. A good example is the Forensic Medical Services (Victims of Sexual Offences) (Scotland) Act 2021, where it is clear that a potentially ambiguous reference to the "gender" of a medical examiner of a

victim of sexual offending was deliberately replaced with a reference to the examiner's "sex" specifically in order to make the point that the applicable legal rule was that a victim should be able to select an examiner according to the latter's biological sex rather than by reference to any other attribute. In other instances, the use of the different available words may simply be to draw a distinction which it would otherwise be difficult to draw; in yet others, the rationale for the choice of one word as opposed to the other is elusory. In any event, any determined attempt to construct a cohesive picture out of the isolated incidences in which the words in question have been used in diverse statutory provisions appears to be more of a legal Rorschach test than anything else, in that it risks being much more a reflection of the mindset of the observer than a recognition of objective features of the field surveyed. Ultimately, at least for now, the recent observations in paragraphs 5 and 52 of the Supreme Court judgment in *Elan-Cane*, that the terms "gender" and "sex" have been used essentially interchangeably in various forms of legal and non-legal discourse, hold good.

[48] Turning now to the recent legislative history of the 1920 Act, it will be recalled that originally the Scottish Ministers proposed in the Census (Amendment) (Scotland) Bill to add the words "(including gender identity)" after the word "sex" in the Schedule to the 1920 Act, while maintaining that the amendment was strictly unnecessary since in their view "sex" in the Schedule already encompassed "gender identity". Had the attempt explicitly to add those words succeeded, then it would have been tolerably clear that a respondent to the sex question could properly have answered it otherwise than by reference to sex as indicated on a birth certificate or GRC. The attempt, however, did not succeed. Many of those consulted on the proposed amendment considered that it would risk causing confusion, although it is plain that those holding different points of view about the policy merits of the proposed amendment had their own separate views about what sort of confusion would be created

and how it might come about. In the event, the Committee examining the Bill expressed concern about the proposed amendment and the Minister – not the Parliament – decided not to proceed with it. From the legal point of view, the situation thereby created might colloquially be described as a no-score draw. Parliament did not endorse the Ministers' view that the amendment was unnecessary because "sex" already included "gender identity", nor did it endorse any view that "sex" did not already include "gender identity". It simply left the term "sex" in the Schedule without any further definition one way or the other.

[49] Parliament did, however, make changes elsewhere in the Schedule to the 1920 Act in its application to Scotland by way of the Census (Amendment) (Scotland) Act 2019, which added a new paragraph to the Schedule, separate from that allowing a question about sex, so that a census in Scotland may now ask questions about "transgender status and history". One argument advanced by the petitioner is that the fact that questions may now lawfully be asked about those subjects clearly implies that the question about sex must be about something that cannot in itself comprehend issues of transgender status and history. I disagree. It is entirely rational for a census to ask a sex question and then separately to enquire whether the person who has answered that question is trans or has a trans history. The second enquiry enables the provision of further information about the basis of the answer to the first. For example, if a respondent answers the sex question by selecting the option "Male" and then answers the transgender status and history question positively and describes himself in doing so as a trans man, a more complete picture of that person's sex and gender identity is obtained. The same applies to various other potential answer permutations. The fact that the transgender status and history question is voluntary, because of its potential sensitivity and its resonance for issues of the privacy of the

respondent, may mean that that full picture is not obtained in every case, but that does not result in the conclusion that that question must fall to be regarded as entirely otiose unless one reads the sex question as impliedly excluding an answer based on something other than a birth certificate or GRC.

[50] It was a variation of the argument that recent changes to the Schedule to the 1920 Act controlled the meaning of "sex" there which found favour with Swift J in the case raised by the petitioner in England. No party to this litigation suggested that Swift J's decision was binding on me; rather, the petitioner suggested that it was strongly persuasive in nature and that it was desirable that a UK statute be interpreted similarly in each UK jurisdiction. It must be remembered, however, that the Schedule to the 1920 Act was not amended for England and Wales in quite in the same way as it has been amended in Scotland. As Swift J pointed out in his judgment, the legislation that changed the Schedule in English law was preceded by a White Paper issued in December 2018 and entitled "Help Shape our Future". That White Paper identified a need for future censuses to provide information about the transgender population, using "transgender" as "an overarching term used to describe those whose gender identities do not match the sex they were registered at birth" (paragraph 3.34). It in turn borrowed a definition of "gender identity" from the Equality and Human Rights Commission, namely "the way in which an individual identifies with a gender category" (paragraph 3.37), and noted that there were complex issues to consider in designing a question on the subject.

[51] The White Paper went on to note that three potential ways of ascertaining the desired information about the transgender population by way of census questions had been identified. The first was to expand expressly the scope of the sex question so that it would clearly encompass issues of gender identity, perhaps offering more options for answers than

simply "male" or "female". In the event, no UK jurisdiction chose that route, although the initially-proposed amendment in Scotland, namely to add "(including gender identity)" after "sex", might be thought to be a variant of it. The second route identified as possible in the White Paper was to ask a sex question and then a separate question about gender, "aiming to identify the transgender population through differing responses to the two questions" (paragraph 3.40). That was the route ultimately chosen in England and Wales. It is not difficult to see that, if one is hoping for a differential response by some people to two questions, those two questions must be intended to ask about two different things. To the extent that they ask about the same thing, or even are perceived to be asking about the same thing, the prospect of any differential responses must be non-existent or at best extremely limited. It makes sense, therefore, to regard the questioning model adopted in England as inherently meaning different things when it talks about "sex" on the one hand and "gender identity" (sci "the way in which an individual identifies with a gender category" – the gender categories made available for selection being "male" and "female" in this context) on the other. As I understand it, that was in essence what Swift J was pointing out in his judgment.

[52] However, the English route was not the one chosen in Scotland. The third possible route identified by the White Paper was to ask a sex question and then straightforwardly go on to ask a different question about transgender status. That was the route chosen in Scotland. Unlike the position in England, that questioning model is not predicated upon the expectation of any differential response by transgender people. Rather, in essence it asks a question about the respondent's gender category – "male" or "female" – and then asks whether the respondent's chosen category is a trans status, ie a gender which is not the same as the sex with which the respondent was registered at birth. That model carries with it no

implication that the appropriate gender category to be selected must be that assigned by way of birth certificate or GRC; rather, any implication that arises as a result of the question model selected seems to me to be to the opposite effect, in that the particular rationale that any respondent has for selecting a gender category in response to the sex question (and in particular whether it was selected for biological or other reasons) is exactly what the subsequent trans status and history question is directly designed to extract.

[53] In relation to the remainder of the arguments presented and dealt with in the English litigation, it suffices for present purposes to say that they differed very significantly from the arguments presented in this case, and that little or nothing is thus to be gained from addressing them at length here. The reason that I have drawn attention to the existence of clear differences in the form of the legislative history and the current nature of the statutory provisions in Scotland and in England and Wales is simply as a warning against an over-ready conclusion that the apparently differing decisions of Swift J and myself on their import are necessarily irreconcilable, although he and I certainly disagree about whether they provide the key to the correct answer to the questions posed in the respective English and Scottish litigations.

[54] Having determined that there is no such control as that for which the petitioner contends on the meaning of "sex" in the Scottish version of the Schedule to the 1920 Act, I turn to examine at large the question of what, from the words that it chose to enact, was the objective intention of Parliament in its allowance of census questions on that subject. For the avoidance of any possible doubt, no one disputes that that is a question for the Court and not for the respondents (or indeed the petitioner) in this case to decide.

[55] In that connection I accept the submission for the respondent that the 1920 Act, as a statute designed to provide a framework for the holding of censuses for an indefinite future

period, falls into the category of statutes which ought to be regarded as "always speaking"; in other words, the proper question is what "sex" as an object of questioning in a census means now rather than what (if different) it may have meant in that context in 1920. The parties to this litigation agreed before me that there would have existed people in 1920 who, in our modern eyes, would be regarded as transgender at least in the core sense that their own conception of their gender identity would not have matched the sex with which they were registered at birth. In all probability, the ability of those people to give voice and expression to that conception would in most instances have been markedly more limited than is the case now, however far from perfect some may think present conditions to be in that regard. In the modern age, where social change has meant that such issues are much more openly and widely discussed and debated, I would find it impossible to find that the word "sex" in a statute enabling the general population to be asked questions for the wide and general purposes for which a census is conducted falls to be regarded as restricted in the sense for which the petitioner contends; rather, I would accept the suggestion that biological sex, sex recognised by law, or self-identified (or "lived") sex as at the date of the census are all capable of being comprehended within the word. If support for that view were to be needed, I would find it in the implication which I have indicated that I consider flows from the questioning model selected by way of the Census (Scotland) Regulations 2020, being the mode by which the Scottish Parliament has chosen to give effect to the empowering provisions of the 1920 Act and the 2020 Order.

[56] Finally, I do not find it necessary to determine the merits of the intervener's suggestions that a restrictive interpretation of "sex" in the Schedule to the 1920 Act would contravene the ECHR Article 8 rights of transgender census respondents, or would involve a breach of the Equality Act 2010. Those contentions are by no means straightforward and the

intervener chose not to lodge any answers to the petition or to participate to any greater extent than by way of restricted written submissions. In the event, the petition is to be disposed of in the way for which the interveners argued, and to that extent at least the arguments presented by them which extend beyond those successfully presented by the respondents do not require separate consideration.

Disposal

[57] For the reasons stated the Court sustains the third plea-in-law for the respondents, repels the petitioner's pleas, and refuses the prayer of the petition. All questions of expenses are meantime reserved.