Claim No. AC-2025-LON-001953

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT

BETWEEN:

THE KING
on the application of
(1) GOOD LAW PROJECT LIMITED
(2) BOT
(3) BNW
(4) BBS

Claimants

-and-

THE COMMISSION FOR EQUALITY AND HUMAN RIGHTS

Defendant

-and-

(1) HEALTH AND SAFETY EXECUTIVE
(2) SECRETARY OF STATE FOR WORK AND PENSIONS
(3) MINISTER FOR WOMEN AND EQUALITIES
(4) WELSH MINISTERS
(5) SCOTTISH MINISTERS

Interested Parties

DEFENDANT'S SKELETON ARGUMENT
For oral permission hearing – 30 July 2025

Page references are in the form [xx], where x refers to page numbers in the Permission Hearing Bundle References to the Authorities bundle are in the form AB/[x]/[y], where [x] is the tab number and [y] is the pg number.

List of Essential Reading: -

- Version of the Commission's Interim Update challenged in these proceedings, dated 5 June 2025 **[69]**
- Current version of the Commission's Interim Update, published on 9 July 2025 **[271]**
- Claim Form and Statement of Facts and Grounds **("SFG") [4], [24]**
- Summary Grounds of Resistance **("SGR") [204]**
- *For Women Scotland Ltd v The Scottish Ministers* [2025] 2 WLR 879 **[AB/13/221] (***"FWS")*
- Correspondence between Leigh Day and the Commission re academic nature of claim, dated 27 June 2025 **[230],** 16 July 2025 and 22 July 2025 (copies of the latter two documents are attached as they were not included in the bundle)
- Claimant's application to amend the Claim Form, dated 22 July 2025.

A. Introduction

1. This is a claim for judicial review of what the Claimants persist in describing as "Guidance" published by the Commission on its website. In fact, what the Claimants seek to challenge is not formal guidance at all, but is simply a short online news update, described, entirely accurately, as "An Interim Update on the practical implications of the UK Supreme Court judgment" **("the Interim Update").** This is a reference to the *FWS* judgment, which was handed down by the Supreme Court on 16 April 2025. The Supreme Court held that the terms "sex", "man" and "women" in the Equality Act 2010 **("the 2010 Act")** meant "biological sex", "biological man" and "biological women". As explained in the SGR, the judgment attracted extensive public and media attention. There was significant public confusion about what had been decided by the Supreme Court and what steps duty-bearers were required to take to comply with the judgment. The Commission posted the Interim Update to its website shortly after *FWS* to help promote understanding of the Supreme Court's judgment, while work was ongoing to update the Commission's statutory Code of Practice (see SGR, §§3-6, 15-19). The Interim Update is a live webpage which is subject to change. The Commission has kept the contents of the Interim Update under active review, and it has been amended at various points in time (see SGR, §§20-23).

2. Paragraph 1 of the Claimants' skeleton argument makes clear that what they seek to achieve through this litigation is a ruling from the Courts on what they term "the Core Question". Yet the actual challenge is to the Interim Update, which must be read in full, rather than, as the Claimants seek to do, taking certain sentences in isolation and analysing them as though they were a statute. The Court's role is not to provide advisory opinions on questions to which the Claimants would like answers.

3. The claim was filed on 6 June 2025 and an updated SFG was filed on 17 June 2025 (although the claim was not served on the Commission until 23 June 2025). The Claimants were informed of further amendments to the Interim Update on 27 June 2025 but persisted with their claim. On 30 June 2025, Chamberlain J rejected the Claimant's application for expedition and adjourned the application for permission into open court.

4. The Commission does not repeat the submissions set out in its SGR, which the Court is invited to read in full. This skeleton argument briefly outlines the points in the SGR and then responds to the points made in the Claimants' skeleton argument. In

summary, the Commission submits that permission to apply for judicial review should be refused as: -

(1) The Claim is academic. The Claimants seek permission to challenge a version of the Interim Update which has been superseded (see section C, §§5-9). The Claimants frankly acknowledge that the purpose of this litigation is to persuade the Court to answer their "Core Question" (Skel Arg, §1).

(2) The principles in *R (A) v Secretary of State for the Home Department* [2021] 1 WLR 2326 **[AB/11/162]** do not apply to the Interim Update. The Interim Update is not a "policy", is expressly stated to be "interim" and has been produced to provide some brief, initial, and high-level observations to assist duty bearers pending the revision of the Commission's statutory and non-statutory guidance in light of *FWS*. It is not, and has never purported to be, a statement of the Commission's policy (see Section D, §§10-11).

(3) In any event, the Interim Update does not even arguably breach the principles in *A,* had they applied (see Section E, §§12-19).

C. Claim is Academic

5. The chronology of amendments made to the Interim Update, and the way the Claimants have approached this litigation, is set out at SGR, §§20-23, and §§24-32.

6. The Claim Form, originally dated 6 June 2025, sought to challenge "the guidance published by the Defendant on its website on 25 April 2025 entitled 'An interim update on the practical implications of the UK Supreme Court judgment'." (emphasis added) **[11].** The version of the Interim Update that was published on 25 April 2025 has subsequently been amended several times, including on 24 June 2025. The Commission wrote to the Claimants on 27 June 2025 (four days after being served with the claim form) to advise them that the Interim Update had been amended and to ask them to reconsider the claim accordingly **[230].** No response was received, and nothing further was heard until the letter of 16 July 2025, responding to the SGR.

7. On 22 July 2025, the Claimants belatedly filed an application to amend the Claim Form, now seeking permission to challenge "the Defendant's Guidance both (a) the guidance as originally formulated; and (b) as now published and any future guise containing non-material amendments". However, the Claimants have not sought permission to

amend their SFG, and nowhere does their SFG engage with the version of the Interim Update that currently exists. As such: -

(1) The Claim Form purported to challenge the version of the Interim Update published on the Commission's website on 25 April 2025. The SFG appeared to challenge the version of the Interim Update published on the Commission's website on 5 June 2025 (which is identified by the Claimants as the "decision document" at Tab 5 of the Permission Hearing Bundle) **[2] [69].** The SFG contains extensive criticism of that previous version of the Interim Update.

(2) Any challenge to any previous version of the Interim Update is obviously academic. Yet the Claimants persist in seeking some kind of "advisory" ruling from the Court about previous iterations of the Interim Update so far as it relates to workplaces (see SkelArg, §14). They also focus only on the original wording of the Interim Update when criticising what it says about services, while neglecting to mention the amendments which preceded the words criticised (see Skel Arg, §20).

(3) The SFG does not explain why the current version of the Interim Update is said to be unlawful and does not even refer to the current version of the Interim Update. Parts of the Claimants' skeleton argument appear to acknowledge the amendments, but this falls far short of the requirements on a claimant to properly plead their case. Most of their pleaded case seems to have fallen away, with the focus now on the Claimants' "Core Question".

(4) The amended Claim Form seeks permission to challenge both old versions of the Interim Update and any future versions that may be published. The Claimants do not explain why some kind of "rolling judicial review" to take account of future amendments could possibly be appropriate. But in any event, the Claimants face the same problem that their pleaded case, set out in their SFG, does not engage with the version of the Interim Update that currently exists.

8. These are not "technical arguments" as the Claimants seek to characterise them. The Courts have repeatedly emphasised the important of procedural rigour in judicial review proceedings: see, for example, *R (Dolan) v Secretary of State for Health and Social Care* [2020] EWCA Civ 1605; [2021] 1 WLR 2326, where the Lord Chief Justice and King

and Singh LJJ emphasised the need for procedural rigour in judicial review and said at §118 "*[t]his Court has also deprecated the trend towards what has become known as a "rolling" approach to judicial review, in which fresh decisions, which have arisen after the original challenge… are sought to be challenged by way of amendment*". This is particularly so where the decision under challenge has been amended quickly and frequently. Further, the Courts have made clear that even if a claimant seeks to embark on a "rolling" judicial review, the need for procedural rigour remains: see *Dolan* at §§116-117.

9. Nor do the Claimants identify any exceptional circumstances in support of their contention that the Court should embark on determining academic issues: see *R v Secretary of State for the Home Department ex p Saleem* [1999] AC 450, at 457 per Lord Slynn **[AB/6/79]**.

D. Interim Update is not a "policy"

10. The Claimants rely on *R (A) v Secretary of State for the Home Department* [2021] 1 WLR 3931 [**AB/11/162]**, which concerned the contents of a "policy document" or "statement of practice". However, the Interim Update is plainly not a "policy" to which the reasoning in *A* applies. It expressly distinguishes itself from the Commission's statutory and non-statutory guidance; it is expressly "interim"; it does not purport to be a comprehensive statement of the law in this area; and it expressly emphasises that duty bearers must follow the law and should take legal advice: SGR, §§40-§46.

11. Paragraph 36 of the Claimants' skeleton argument fails to properly engage with these points.
    (1) The purpose of the Interim Update was and is to assist those affected by FWS to understand the key practical consequences. But it does not follow that it is a "policy". The assertion that the Commission admits that it has been "*correcting*" (as opposed to "*amending*") the Interim Update "*to have a material impact on the way in which duty bearers behave*" is wrong, and §§20-22 of the SGR to which the Claimants refer offer no support for it. In any event, that would not render the Interim Update a "policy" even if it were correct.
    (2) The Commission published the Interim Update pursuant to its statutory power under s.13 of the 2006 Act. That power is distinct from the Commission's power to publish statutory Codes of Practice pursuant to s.14. As the Interim Update itself

makes clear, it was published on an interim basis pending revisions to the Commission's statutory and non-statutory guidance, including the Code of Practice which was the subject of consultation and is currently being revised. Plainly not all documents published by the Commission pursuant to its broad powers under s.13 are "policies" to which the principles in *A* apply.

(3) The reason that there is "no clear alternative source of legal advice" from the Commission is that the Commission has consulted on, and is in the process of updating, the Code of Practice: SGR, §§4-5, §13. That process takes time. The fact that it has not yet concluded cannot turn the Interim Update into a "policy".

E. Substantive Grounds are unarguable

12. In any event, the substantive grounds of challenge are unarguable. As to Ground 1, the Interim Update does not "misstate the law" and does not "*positively authorise or approve unlawful conduct by others*" (see *A,* §38).

(1) Workplaces

13. The Claimants seem to advance two alternative bases on which they say the Interim Update misstates the law on access to workplace toilets. First, they contend that the terms "men" and "women" in reg. 20(2)(c) of the 1992 Regulations must be interpreted as meaning "biological men and those whose 'lived gender aligns' with men" and "biological women and those whose 'lived gender aligns with women". Second, they contend that the terms "men" and "women" must be interpreted as meaning "biological men and biological women who have a GRC in the male gender" and "biological women and biological men who have a GRC in the female gender" (Skel Arg, §17).

14. The first interpretation is based on an argument that the 1992 Regulations are assimilated law and that there is "assimilated case law which requires a trans-inclusive approach" (Skel Arg, §17). There are three fundamental difficulties with this submission: -

(1) First, there is no assimilated case law that interprets the words "men" and "women" as used in either the Workplace Directive or the 1992 Regulations that implemented the Directive.

(2) Second, insofar as the Claimants seek to rely on *P v S* [1996] ICR 795 **[AB/14/295]**, as the assimilated case law, all that *P v S* established is that there is a right under the Equal Treatment Directive not to be discriminated against on the grounds of gender reassignment. As was acknowledged by the Supreme Court in *FWS* at §§55-62, that led to the protection in domestic law against discrimination on the grounds of gender reassignment which is reflected today in the 2010 Act. *P v S* did not hold that the terms "men" and "women" in the Equal Treatment Directive must be interpreted as the Claimants contend. Indeed, had it done so, the Supreme Court could not have reached the result it did in *FWS* (as the 2010 Act itself is, at least in part, assimilated law as it implements various EU Directives).

(3) Third, any attempt by the Claimants to rely on general principles of EU law is doomed to fail as a result of section 5(A4) of the European Union (Withdrawal) Act 2018 ("*No general principle of EU law is part of domestic law after the end of 2023").*

15. The second interpretation is also unarguable in light of *FWS.* Many of the same features that led the Supreme Court to conclude that the terms "men" and "women" in the 2010 Act meant biological men and women are found in the 1992 Regulations. In particular, the Supreme Court held that the exemptions for single sex services in para.26 and 27 of Schedule 3 to the Equality Act "*are directed at maintaining the availability of separate or single spaces or services for women (or men) as a group – for example changing rooms, homeless hostels, segregated swimming areas (that might be essential for religious reasons or desirable for the protection of a woman's safety, or the autonomy or privacy and dignity of the two sexes)*" (§211), which indicated the Parliamentary intention for the sex to mean biological sex. The Supreme Court also relied on the protections for pregnant women in the 2010 Act, as only biological women can become pregnant. Express protections for pregnant women are also found in the 1992 Regulations: see reg. 25(4) ("*suitable facilities shall be provided for any person at work who is a pregnant woman or nursing mother to rest").* Accordingly, the approach taken in *FWS* applies to the interpretation of the 1992 Regulations.

16. As for the reliance on *Croft v Royal Mail* [2003] ICR 1425 [**AB/7/88]**, this is equally misconceived: -

(1) First, the ratio of *Croft* is that it was <u>not</u> unlawful for the defendant employer to deny the claimant employee – a biological man who identified as a trans woman – access to the female toilets. The highest that the Court of Appeal put matters was

that, once the trans woman had "become a woman" it *could* be an act of discrimination to permanently refuse her access to women's toilets (see §46). Indeed, at §47, Pill LJ confirmed that a male employee could not, by presenting as female, necessarily and immediately assert the right to use female toilets. He emphasised that (under the law as it then stood), the tribunal had to make a judgment as to when the employee "becomes a woman" and then became entitled to use the same facilities as other women.

(2) Second, *Croft* was decided after the ECtHR judgment in *Goodwin,* and before the Gender Recognition Act 2004 **("the GRA")** was enacted. It was decided at a time when the courts considered that "*pending any action by Parliament*" (§39), they had to attempt to determine a claimant's legal gender by reference to their stage of transition.

(3) Since *Croft* was decided, Parliament has taken action and has enacted the GRA. The circumstances in which an individual can change their gender, so that the person's sex becomes that of the acquired gender, is now governed by the GRA, and by section 9(1)-(3) of the GRA in particular. The courts are no longer in the invidious position of determining when or whether such a change has occurred without a statutory framework. The decision in *Croft* has been overtaken by the GRA. The Supreme Court in *FWS* has determined how section 9 of the GRA applies.

(2) Services

17. So far as it is possible to understand the Claimants' argument on services, it appears to be based on omitting the words that precede the extract that is criticised (Skel Arg, §20). The Claimants' contention that the entirety of the extract breaches *A* is hopeless. The Supreme Court has held that the term "men" and "women" in the 2010 Act means "biological men" and "biological women". Where the single sex exemptions in para 26-27 of Schedule 3 of the 2010 Act apply, a service provider does not contravene the prohibition on sex discrimination in section 29 of the 2010 Act by providing separate or single sex services. The Interim Update says no more than that "where separate single-sex facilities are lawfully provided" (i.e. when a service provider is relying on the exemptions in para 26 or 27 of Schedule 3 to the 2010 Act) trans-women (biological men) should not be permitted to use the women's facilities and trans-men (biological women) should not be permitted to use the men's facilities. This is for the rather obvious reason that if one admits a person of the opposite sex to a separate or single-

sex service, it is no longer separate or single-sex. The Interim Update goes on to state that trans persons should not be put in a position where there are no facilities for them to use, and confirms that, where possible, mixed-sex toilet, washing or changing facilities, in addition to single-sex facilities, should be provided. When one reads the extract in full, instead of selectively extracting parts of it, the Interim Update is plainly lawful and reflects *FWS* (see SGR, §51). It certainly does not "*positively authorise or approve unlawful conduct*" by others.

(3) Human Rights

18. As for the Claimants' attempts to rely on human rights arguments to interpret the relevant legislation, these ignore the following crucial matters:-

(1) *Goodwin v United Kingdom* (2002) 35 EHRR 18 **[AB/15/316]** concluded that the UK was in breach of Article 8 as post operative transexuals were living in an "intermediate zone" as not quite one gender or the other, as a result of the UK's failure to grant legal recognition, including a new birth certificate, to reflect the fact that the applicant was a post operative male to female transexual. The UK Government remedied that breach of Article 8 by enacting the GRA.

(2) There is no ECtHR case law that even suggests trans people must be treated for all purposes in domestic law as being the sex or gender with which they identify, nor that they must always be able to access toilet facilities designed and operated for those of the opposite biological sex. The Claimants are inviting the Court to go far beyond the ECtHR, contrary to the well-known principles in *R (AB) v Secretary of State for Justice* [2021] UKSC 28; [2022] AC 487 at §§54-60. This Court plainly cannot be "*fully confident*" that the ECtHR would extend its case law in the way that the Claimants suggest. That is particularly so given the wide margin of appreciation afforded to Contracting States in this area (given the lack of consensus across Contracting States, the sensitive nature of the issues, and the need to strike a balance between competing Convention rights, including the rights of biological women to privacy, dignity and safety).

(3) Further, the Claimants entirely ignore the fact that Article 8 is a qualified right and may be interfered with where that is necessary in a democratic society for the legitimate aim of protecting the rights and freedoms of others (e.g. the rights of biological women to privacy, dignity and safety). Similarly, the Claimants fail to engage in any way with the fact that prima facie discrimination under Article 14 can be objectively justified if it pursues a legitimate aim and is proportionate.

19. There is no "lacuna" in the Interim Update as the Claimants suggest. It will always be open to employers and service providers to *either* offer a toilet in a separate lockable room (which can be used by all) *or* to offer single-sex facilities and mixed sex ones. Using such facilities will not "out" a person as trans and will not result in trans people "*being required to use toilets of the sex with which they do not identify*" (Skel Arg, §24(a)). Nor does the Interim Update require employers and service providers to breach section 22 of the GRA. Employers are not disclosing any protected information to any person: they are simply providing workforce toilets in accordance with the 1992 Regulations. Similarly, even if a service provider had any idea about the protected information of a member of the public, they are not disclosing that protected information by providing toilets on a single-sex basis where permitted to do so under Schedule 3 to the 2010 Act.

Ground 3: legislation incompatible with Convention rights

20. This ground of challenge proceeds on the basis that the Commission's Interim Update is correct in law and does not breach Convention rights. In those circumstances, it is impossible to see how Ground 3 could add anything. The Commission is not responsible for the legislation but, for the reasons set out above, that legislation is not incompatible with Convention rights.

Ground 2: No Breach of Statutory Duties

21. Finally, it is absurd to submit that when considering the key practical implications of *FWS* (which itself carefully analysed the relevant discrimination and human rights issues) that the Commission somehow neglected to consider those very matters.

F. Conclusion

22. For the reasons set out above, and in the SGR, permission to apply for judicial review should be refused.

[redacted]

24 July 2025