IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM [2026] EWHC 279 (Admin)
B E T W E E N:

THE KING on the application of
(1) BOT
(2) BNW
(3) BBS

Claimants/Appellants

- and -

COMMISSION FOR EQUALITY AND HUMAN RIGHTS

Defendant/Respondent

(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

APPELLANTS' PERMISSION TO APPEAL SKELETON ARGUMENT

References to paragraphs in the judgment of Swift J ([2026] EWHC 279 (Admin)) are in the form "J/*".
References to the Core and Supplementary Bundles are in the form "CB/**/**" and "SB/**/**".[1]

A. INTRODUCTION

1. This is an appeal against a judgment of Swift J, concerning the lawfulness of guidance published by the Respondent (the "**EHRC**") on 25 April 2025, nine days after the Supreme Court's judgment in ***For Women Scotland Ltd v The Scottish Ministers*** [2025] 2 WLR 879 ("***FWS***"). The Guidance was entitled "An interim update on the practical implications of the UK Supreme Court judgment" (the "**Guidance**"). It purported to summarise the duties on employers and service-providers in relation to single-sex toilets, washing and changing facilities. In mandatory and unequivocal terms, it directed that all trans women must be excluded from women's facilities and all trans men from men's facilities, and that any departure from strict segregation by "biological sex" would entail that these mixed-sex facilities must be open to all.

[1] The Appellants are required to file Core and Supplementary Bundles within 14 days of the appeal notice being sealed by the court: PD52C, [14]. They will file an updated version of this Skeleton Argument, with references to those bundles included, as soon as possible thereafter.

2. The Guidance went far beyond what the Court decided in ***FWS***. The Supreme Court's decision was confined to the meaning of "sex", "man" and "woman" as those terms are used in the Equality Act 2010 ("**EA 2010**"). The Supreme Court emphasised its limited scope, expressly stating that its interpretation "would not have the effect of disadvantaging or removing important protection under the EA 2010 from trans people (whether with or without a GRC)"at [248][2]. The Court did not consider the Workplace (Health, Safety and Welfare) Regulations 1992 ("**1992 Regs**"), and did not analyse the position in relation to toilet facilities more generally. Nor did the judgment engage with the issues raised in the present claim as to Article 8 of the European Convention on Human Rights (**"ECHR"**) (save by way of contextual background at [63]-[68] and [73]).

3. The Guidance has had, and continues to have, a profound adverse effect on the Appellants. Each of them had, for years, used the toilet facilities corresponding to their lived gender without difficulty. Following publication of the Guidance, their employers changed their arrangements in reliance upon it, and those new arrangements remain in operation despite the deletion of the Guidance from the EHRC's website on 15 October 2025.

4. The Appellants submit that the Court below erred in the following respects:

    4.1. **Ground 1**: The Court held that the Guidance was accurate and contained no material omissions, when this was contradicted by its own findings as to the law.

    4.2. **Ground 2**: The Court erred in failing to construe the Guidance in accordance with its natural and ordinary meaning.

    4.3. **Ground 3**: The Court misconstrued the 1992 Regs.

    4.4. **Ground 4**: The Court erred in its approach to Article 8 ECHR.

    4.5. **Ground 5**: The Court erred in failing to identify a breach of the Respondent's specific mandatory duties under ss. 8 and 9 of the Equality Act 2006 (the "**EA 2006**").

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[2] In an interview with *The Times* published on 12 September 2025, Lord Hodge confirmed that "the case before the court had nothing to do with how or where single-sex spaces should be created. 'These points weren't argued before us,' he said. 'We were not there to decide points that were not put to us or were not raised in the course of argument' …" [**SB/461-462**]

5. The issues raised by this appeal are of considerable public importance. The Guidance was published by the statutory body tasked with promoting equality and human rights in the UK. The Court's legal analysis concerns matters of the utmost importance and sensitivity. The Special Procedures of the United Nations Human Rights Council has issued a joint statement in response to the judgment, urging the UK to ensure all policies, including in workplaces, are consistent with equality and human rights obligations.[3,4] The questions of law arising from this appeal merit determination by this Court.

B. BACKGROUND

B.1 Human rights of trans people

6. The right of trans people to personal development and to physical and moral security in the full sense enjoyed by others in society is protected by Article 8 of the Convention: see ***Goodwin v United Kingdom*** (2002) 35 EHRR 18 and ***TH v Czech Republic App*** no 33037/22 (ECtHR, 12 June 2025) at [48]-[53]. In ***Goodwin***, the ECtHR held that: (i) the failure to grant legal recognition, including a new birth certificate, to a post-operative transsexual was a breach of her right to respect for her private life under Article 8; and (ii) the failure to permit her to marry in her acquired gender was a breach of her right to marry under Article 12.

7. The Court stated at [77]:

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

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[3] Special Procedures of the UNHRC, Joint statement on the review of the UK Equality Act Guidance and international human rights compatibility, 27 February 2026.

[4] See also Mullins R, 'Biological Sex", Social Segregation, and the Freedom to Reassign Sex' (UK Constitutional Law Association, 9 March 2026). https://ukconstitutionallaw.org/2026/03/09/rob-mullins-biological-sex-social-segregation-and-the-freedom-to-reassign-sex/ for academic criticism of the judgment.

8. Further, the Court said at [90]:

> " … the very essence of the Convention is respect for human dignity and human freedom. Under Article 8 of the Convention in particular, where the notion of personal autonomy is an important principle underlying the interpretation of its guarantees, protection is given to the personal sphere of each individual, including the right to establish details of their identity as individual human beings … the right of transexuals to personal development and to physical and moral security in the full sense enjoyed by others in society cannot be regarded as a matter of controversy … In short, the unsatisfactory situation in which post-operative transsexuals live in an intermediate zone as not quite one gender or the other is no longer sustainable."

9. The ECtHR has since confirmed that the right to respect for private life under Article 8 applies fully to gender identity as a component of personal identity for all individuals, including trans people who have not undergone gender reassignment surgery or other medical treatment: see ***AP, Garçon and Nicot v France*** App nos 79885/12, 52471/13 and 52596/13 (ECtHR, 6 April 2017) at [94]–[95] and ***TH v The Czech Republic*** (supra) at [48].

B.2 The 1992 Regs

10. The 1992 Regs were made under s.15 of the Health and Safety at Work Act 1974 (**"HSWA 1974"**). By reg.3(1), they apply to any "workplace" (subject to limited exceptions). They are concerned with ensuring that workplaces comply with various requirements as to physical facilities and working conditions: see reg.4(1).

11. Regulation 20(1) provides that "[s]uitable and sufficient sanitary conveniences" must be provided at readily accessible places. By reg.20(2)(c), sanitary conveniences are not suitable unless "separate rooms containing conveniences are provided for men and women except where and so far as each convenience is in a separate room the door of which is capable of being secured from inside." The effect of that provision is that where: (a) sufficient facilities have been provided in separate lockable rooms, an employer is not required provide separate toilet facilities for men and women; and (b) when sufficient suitable facilities of either type have been provided, the employer is free to provide any kind of additional facilities that it chooses.

12. The words "men" and "women" are not defined in the 1992 Regs.

B.3 The Gender Recognition Act 2004

13. The Gender Recognition Act 2004 ("**GRA 2004**") was introduced in response to the Strasbourg case law recognising the rights of trans people to personal development and physical and moral security under Article 8 ECHR (see above). It was enacted:

> "to assist and protect a specific group of people facing the challenge of living with gender incongruence who have developed a secure identity in the opposite gender to that they were born in. It is crafted as a humane piece of legislation. Its provisions must be interpreted purposively": see ***W v Gender Recognition Panel*** **[2025] EWHC 2685 (Fam)** per Hayden J at [59].

14. The GRA 2004 enables trans people to apply for a gender recognition certificate (**"GRC**") if certain statutory conditions are met. Section 9(1) provides:

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

15. Section 9(1) is subject to the proviso in s.9(3) that it is "subject to provision made by this Act or any other enactment or any subordinate legislation." In ***FWS*** at [156], the Supreme Court explained that s.9(3) will displace s.9(1) only where another enactment expressly disapplies it, or where:

> "… the terms, context and purpose of the relevant enactment show that it does, because of a clear incompatibility or because its provisions are rendered incoherent or unworkable by the application of the rule in section 9(1)."

16. Section 22 makes it an offence for a person who has acquired "protected information" in an "official capacity" to disclose that information to any other person. Protected information in relation to a trans person who has obtained a GRC includes information about their former gender (s.22(2)(b)) and the prohibition extends to employers and most service-providers (s.22(3)).

17. The ongoing importance of the GRA 2004 was recognised in ***FWS*** at [100], where the Court stated that the Act "continues to have relevance and importance in providing for legal recognition of the rights of transgender people", including "recognising their personal autonomy and dignity and avoiding unacceptable discordance in their sense of identity as a transgender person living in an acquired gender".

B.4 Equality Act 2006

18. The EHRC was established by s.1 EA 2006. It is the statutory regulator tasked with promoting equality and human rights in the UK, with extensive powers and duties.

19. Pursuant to s.8(1) EA 2006, the EHRC is under a range of specific duties, in exercising its powers, which relate to promoting equality and diversity, including to promote awareness and understanding of rights under the EA 2010. Under s.9(1) EA 2006, the EHRC is under duties, in exercising its powers, to promote human rights, including Convention rights, and similarly to promote awareness, understanding and protection of human rights. Section 9(4) provides that "[in] fulfilling a duty under section 8... the Commission shall take account of any relevant human rights."

20. Section 13(1)(d) provides that the EHRC may "[i]n pursuance of its duties under sections 8 and 9… give advice or guidance (whether about the effect or operation of an enactment or otherwise)." As the Court below held, the Guidance was issued under s.13(1)(d): J/1, 83.

B.5 Equality Act 2010

21. The EA 2010 prohibits unlawful discrimination in relation to a number of protected characteristics, including "sex" and "gender reassignment": s.4. Under s.7(1), a person has the protected characteristic of gender reassignment if they are "proposing to undergo, are undergoing or have undergone a process (or part of a process) for the purposes of reassigning their sex by changing physiological or other attributes of sex".

22. Conduct prohibited under the EA 2010 includes *inter alia* direct discrimination (s.13), indirect discrimination (s.19) and harassment (s.26).

23. Part 3 prohibits unlawful discrimination in relation to the provision of services to the public or a section of the public, with the principal prohibitions in s.29. Schedule 3 contains exceptions from s.29. By para 26(1), the provision of separate services for persons of each sex does not contravene s.29 so far as relating to sex discrimination if: (a) a joint service for persons of both sexes would be less effective; and (b) the limited provision is a proportionate means of achieving a legitimate aim. By para 28, the provision of separate- or single-sex services does not contravene s.29 so far as relating to gender reassignment discrimination if the conduct is a proportionate means of achieving a legitimate aim.

24. Part 5 prohibits unlawful discrimination at work, with the principal prohibitions in s.39. Employers are under a duty not to discriminate against employees in the way that they afford

them "access, or by not affording [them] access … for receiving any other … facility or service" or "by subjecting [them] to any other detriment": ss.39(2)(b) and (d). The Schedule 3 exceptions do not apply to Part 5 and there is no equivalent exception for providing single-sex facilities in the workplace context.[5]

25. Section 158(1) permits positive action to be taken where a person reasonably thinks that persons who share a protected characteristic suffer a disadvantage connected to the characteristic or have different needs from those who do not share the characteristic. Section 158(2) provides that the EA 2010 does not prohibit action which is a proportionate means of achieving the aim of "enabling or encouraging persons who share the protected characteristic to overcome or minimise that disadvantage" or "meeting those needs".

B.6 *FWS*

26. The Supreme Court delivered judgment in ***FWS*** on 16 April 2025. Lord Hodge, Lady Rose and Lady Simler gave the judgment (with which Lord Reed and Lord Lloyd-Jones agreed).

27. The ratio of the judgment was that "sex", "man" and "woman", as those terms are used in the EA 2010, refer to "biological sex" i.e. sex as identified at birth: [6], [264]. Essentially, the Court held – relying on s.9(3) of the GRA 2004 – that numerous provisions of the EA 2010, including those concerning pregnancy, maternity and breastfeeding, would be unworkable or incoherent if one applied s.9(1) of the GRA 2004 to include trans people with a GRC within the definition of their acquired gender under the EA 2010: [177]-[180].

28. However, the Court emphasised the limited scope of its judgment. It stated at [2]:

> "It is not the role of the court to adjudicate on the arguments in the public domain on the meaning of gender or sex, nor is it to define the meaning of the word 'woman' other than when it is used in the provisions of the EA 2010."

29. The Court also emphasised that this interpretation "would not have the effect of disadvantaging or removing important protection under the EA 2010 from trans people (whether with or without a GRC)": [248]. In particular, the Court explained that trans people remain protected from discrimination [249]-[261]. The summary at [265(xvii)] confirmed

[5] Schedule 22 creates a far more limited exception, which is not relevant to the provision of toilets. See below at [60.3].

that the interpretation "does not remove or diminish the important protections available under the EA 2010 for trans people with a GRC".

B.6 The Guidance

30. On 25 April 2025, nine days after the judgment in ***FWS*** was handed down, the EHRC published the Guidance on its website. The minutes of the EHRC's special board meeting the previous day (which concluded at 4.20pm), indicate that the EHRC considered that it was under a "duty to act, and act quickly, to provide guidance on the practical implications of the law".[6] The Guidance was amended on a number of occasions after it was first published (in particular on 30 April 2025, 6 June 2025 and 24 June 2025) before being deleted on 15 October 2025.

31. The key passages of the Guidance stated (adding in bold the paragraph labelling used by Swift J at J/7):

> "**[1]** In workplaces it is compulsory to provide sufficient single-sex toilets, as well as sufficient single-sex changing and washing facilities where these facilities are needed.
>
> **[2]** It is not compulsory for services that are open to the public to be provided on single-sex basis or to have single-sex facilities such as toilets. These can be single-sex if it is a proportionate means of achieving a legitimate aim and they meet other conditions in the Act. However, it could be indirect sex discrimination against women if the only provision is mixed-sex.
>
> **[3]** In workplaces and services that are open to the public:
>
> - **[a]** 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, as this will mean that they are no longer single-sex facilities and must be open to all users of the opposite sex
> - **[b]** In some circumstances the law also allows trans women (biological men) not to be permitted to use the men's facilities, and trans men (biological women) not to be permitted to use the women's facilities

[6] [**SB/381**]

- **[c]** However where facilities are available to both men and women, trans people should not be put in a position where there are no facilities for them to use

- **[d]** Where possible, mixed-sex toilet, washing or changing facilities in addition to sufficient single-sex facilities should be provided

- **[e]** Where toilet, washing or changing facilities are in lockable rooms (not cubicles) which are intended for the use of one person at a time, they can be used by either women or men"

32. The Guidance thus stated in mandatory terms that – in both workplaces and premises of services open to the public – all trans women must be excluded from women's facilities and all trans men must be excluded from men's facilities. Further, it stated that, if any trans people were permitted to use the facilities of their lived gender, they would necessarily have to be operated as fully-mixed facilities. In other words, the Guidance was unequivocal in stating that employers and service-providers are prohibited from permitting any trans people from using toilets and other facilities in accordance with their lived gender.

33. The Guidance as originally published also stated (without qualification) that employers are obliged to provide single-sex toilets (notwithstanding that employers may instead provide separate lockable toilets). That error was corrected shortly after the present Claim was issued, on 24 June 2025, with a revised paragraph [1] (and the removal of paragraph [3e]).

B.7 The impact of the Guidance on the Appellants

34. The Guidance has had a serious adverse impact on trans and intersex people. The effect of the Guidance has been to require trans people to use the toilets of their "biological sex", or in some cases to use disabled toilets. That is so even if they have a GRC, whatever their anatomy or appearance, and regardless of how they had previously identified, been perceived or treated by others, whether at work or in public.

35. The Appellants filed evidence which set out the impact of the Guidance on them:

35.1. [redacted]

[redacted]

35.2. [redacted]

35.3. [redacted]

36. The Judge accepted the Appellants' evidence below: J/13. Even though the Guidance has now been removed from the EHRC website, Swift J held that the Appellants' employers "changed arrangements for who should use which lavatory relying on the [Guidance]" and "those new arrangements remain in operation": Ibid.

37. The Judge further noted that "[g]iven the significance that attaches in the public mind to guidance given by the EHRC", the Appellants' concerns that the Guidance may be adopted by service-providers was "not speculative": J/14. It was "highly likely" that service-providers "looked to and relied on" the Guidance when deciding the arrangements to be put in place; no revised guidance had yet been published; and the EHRC continued to maintain that the Guidance was correctly given: Ibid.

C. THE JUDGMENT BELOW

38. The judgment was handed down on 13 February 2026. The learned Judge dismissed the Grounds advanced by the Appellants on the following basis.

39. Under Ground 1, the Appellants had argued that the Guidance was unlawful, because it contained an erroneous analysis of the law. As to this, the Judge held as follows:

39.1. The EHRC's power under s.13(1)(d) EA 2006, read with its duties under ss. 3, 8 and 9, required it to "provide an accurate statement of the law without misstatement or material omission", equivalent to principle (ii) in ***R (A) v Secretary of State for the Home Department*** [2021] 1 WLR 3931 at [46] (**"Category (ii)"** unlawfulness): J/21.

39.2. As to paragraph **[3a]**, the "legal premise" for the assertion that trans people must not be permitted to use single-sex facilities was that doing so would amount to direct sex discrimination: J/57. Whether this legal premise was correct was fact-dependent, and there was "a strong argument" that a trans-inclusive toilets policy would give rise to different but not less favourable treatment: J/61.

39.3. However, this did not give rise to any legal error, because it was sufficient that the Guidance would be correct in some factual circumstances: J/76-77.

39.4. The Guidance could not be read as ever requiring a trans person to use the toilets of their "biological sex": J/69.

39.5. The Court declined to consider separately the Appellants' submission on positive action under s.158 EA 2010: J/62.

39.6. The Court held that paras **[1]** and **[3e]** of the Guidance accurately stated the law regarding single-sex toilets in workplaces. It found that the 1992 Regs should be read as referring to "biological sex": J/34-50. The Court also rejected the submission that **[1]**, which stated that "in workplaces, it is compulsory to provide sufficient single-sex toilets", was inaccurate: J/76.

40. Under Ground 2, the Appellants had argued that the Respondent had breached its statutory duties under ss.8 and 9 of the EA 2006. The Court held that the duties were stated in broad terms; that the way in which the EHRC's purposes were pursued "must, primarily, be a matter for the EHRC"; and that it did not follow that, if the Guidance was inaccurate, the EHRC would have acted in breach of s. 8 and 9: J/82-83. Swift J held that the Guidance did not breach those duties: J/84-89.

41. Under Ground 3, the Appellants had argued that, if the statements of law in the Guidance were correct, the law would breach the Appellants' Convention rights and the Appellants would seek a declaration of incompatibility and/or disapplication of the relevant subordinate legislation:

41.1. While the Judge assumed that such a prohibition was capable of giving rise to an interference with Article 8, he stated that it was "open to doubt" and would be "less significant than considered by the courts so far": J/98.

41.2. In any event, Swift J concluded that "the fact that justification is possible, and on many scenarios highly likely to be present, is sufficient to dispose of this ground of challenge": J/100.

41.3. The Court did not address whether any interference in the Appellants' particular cases was justified, or whether the law struck an appropriate balance between individual competing rights and the rights of the community. It did not set out what the justification would be. The Minister had not advanced any case for justification.

D. GROUNDS OF APPEAL

GROUND 1: The Court erred in finding that the Guidance was accurate and contained no material omissions, when this was unsupported by its own findings as to the law

The principles relevant to the lawfulness of guidance

42. In ***R (A)*** at [46], Lord Sales and Lord Burnett set out the circumstances in which a statement of guidance as to the law may be unlawful:

> "In broad terms, there are three types of case where a policy may be found to be unlawful by reason of what it says or omits to say about the law when giving guidance for others: (i) where the policy includes a positive statement of law which is wrong and which will induce a person who follows the policy to breach their legal duty in some way (i.e. the type of case under consideration in *Gillick* [1986] AC 112); (ii) where the authority which promulgates the policy does so pursuant to a duty to provide accurate advice about the law but fails to do so, either because of a misstatement of law or because of an omission to explain the legal position; and (iii) where the authority, even though not under a duty to issue a policy, decides to promulgate one and in doing so purports in the policy to provide a full account of the legal position but fails to achieve that, either because of a specific misstatement of the law or because of an omission which has the effect that, read as a whole, the policy presents a misleading picture of the true legal position ..."

43. The Judge rightly held that the Guidance falls within the scope of Category (ii): J/20-21. The EHRC was under an obligation to provide advice or guidance that was accurate, free from misstatement or material omission.

GROUND 1A: The Court erred in finding that paragraph [3a] was not Category (ii) unlawful

44. Paragraph **[3a]** stated in unequivocal terms that trans women "should not be permitted to use the women's facilities" and trans men "should not be permitted to use the men's facilities" as "this will mean that they are no longer single-sex facilities and must be open to all users of the opposite sex".

45. The Judge rightly found that the "legal premise" of this statement was that any man excluded from a women's toilet which was open to trans women would succeed in a claim of direct sex discrimination: J/57. However, he then accepted that this legal premise would not always be correct, and that there was a "strong argument" that permitting trans women to use the female toilet but requiring cis men to use the male toilet would amount to different but not less favourable treatment on grounds of sex: J/61. Following the approach of the Court of Appeal in ***Smith v Safeway plc*** [1996] ICR 868 and ***R (Al Hijrah School) v HM Inspector of Education*** [2018] 1 WLR 1471, the exclusion of a cis man from a women's toilet might simply amount to "different but not less favourable treatment on grounds of sex" and "the circumstances of the case would be decisive": J/61.

46. Having found that the legal premise of the statement was flawed, the Judge ought to have found that paragraph **[3a]** of the Guidance was Category (ii) unlawful. The statement was couched in absolute terms, yet on the Court's finding it would in some circumstances be incorrect. Yet the Judge concluded J/77 that the statement was not "necessarily wrong", because its correctness "may turn on the facts of a situation". It is precisely because its correctness will be fact-dependent that the statement is incorrect and unlawful under Category (ii). The statement was <u>not</u> caveated by any statement that it would be correct only in some circumstances. On the contrary, the statement was unequivocally proffered as an absolute injunction: "trans women (biological men) should not be permitted…" A contingent statement which is expressed in absolute terms will necessarily be erroneous. The statement "all sheep are black" is manifestly incorrect, even if some sheep are black.

47. In any event, the "legal premise" of this statement – far from being fact-dependent – was itself incorrect. For treatment to be "because of" sex (for the purposes of direct discrimination under s.13 EA 2010), it must fall within one of the two limbs in ***R (Coll) v***

SSJ [2017] 1 WLR 2093 at [28]-[30] per Lady Hale. Either the reason for the treatment must be the person's sex, or there must be an exact correspondence between the disadvantaged class and the protected characteristic, such that the criterion is in reality a proxy for the protected characteristic. A rule which permits toilet access based on the gender in which a person lives falls within neither of these limbs. The reason for the treatment is not sex, but lived gender – a distinct concept from "biological sex". Nor is there an exact correspondence between lived gender and "biological sex". Thus, insofar as there is any discrimination on grounds of sex, it is indirect and capable of being justified. The Judge's reasoning on the judgment in ***Coll*** (at J/58) simply fails to address this analysis.

48. Further, and in any event, even if the "legal premise" that trans-inclusive toilets are inherently directly discriminatory on grounds of sex were correct, the provision of trans-inclusive toilets might well, depending on the circumstances, be rendered lawful by virtue of the positive action provisions contained in s.158 EA 2010. Given the marginalisation of trans people in society, and their particular need to live life fully in accordance with their acquired gender – as recognised in both the Strasbourg and domestic authorities – positive action taken in relation to inclusive toilets would be likely to be justified. The Judge erred in declining to consider this point separately, describing it as the same point put in a different way: J/62. The point is not only a different one, but highly significant, as it would further expand the proportion of cases in which a direct discrimination claim would be defeated and the Guidance would be incorrect.

GROUND 1B: The Court erred in finding that the Guidance was Category (ii) lawful, despite its omission of any warning about the risks of gender assignment discrimination

49. While the EHRC was under no obligation to set out a comprehensive statement of the law, it purported to summarise when the provision of toilet facilities might give rise to risks of discrimination. In particular, as the Judge accepted, the Guidance stated that: (i) failing to provide a female single-sex toilet could constitute indirect sex discrimination against women (**[2]**); (ii) providing a trans-inclusive female toilet would constitute direct sex discrimination against men (**[3a]**); and (iii) in some circumstances, in may be permissible to exclude trans people from single-sex toilets that correspond to their sex at birth (**[3b]**).

50. By contrast, on a fair reading (and contrary to J/88), nowhere did the Guidance mention the risk of gender reassignment discrimination. That risk is an obviously material one, which accurate guidance would have addressed.

51. First, on any view, the exclusion of trans people from single-sex facilities appropriate to their lived gender is *prima facie* indirectly discriminatory and the EHRC's failure to advert to this risk was a material omission, which rendered the Guidance misleading:

51.1. An employer or service-provider who excludes trans people from facilities appropriate to their lived gender imposes the provision, criterion or practice ("**PCP**") of requiring people to use only facilities aligning with their "biological sex".

51.2. Such a PCP puts trans people (but not cis people) at a particular disadvantage, by preventing them from using facilities appropriate to their lived gender.

51.3. Such a PCP will be unlawful under section 19 EA 2010 unless it can be justified as "a proportionate means of achieving a legitimate aim" (see section 19(2)(d)). Further, the measure must go no further than is reasonably necessary to achieve its aim, which involves consideration of the available alternatives (***Homer v Chief Constable of West Yorkshire Police*** [2012] 3 All ER 1287 at [20]-[25]).

51.4. The Judge's apparent conclusion that proportionality would be met by the provision of an alternative third space went significantly further than the EHRC's case, which had acknowledged that a "biological sex" toilets policy would require "a sufficiently strong countervailing interest" to be objectively justified given the impact on trans persons. The EHRC had disavowed the suggestion that the Guidance was stating that providing alternative unisex facilities would be sufficient to comply with the requirement of proportionality (DGRs at [68], [87]). The Judge did not explain any countervailing interest. Nor did he acknowledge that any question of justification would be fact-sensitive.

51.5. Further, in holding at [67] that the provision of an alternative mixed-sex facility would, as a general rule, provide justification, the Judge failed to acknowledge the stigma caused to trans people by their exclusion, and the gravity of a trans person being outed. He said at [73] that "no employee can expect not to be the subject of gossip about something on some occasion. Gossip is usually temporary; it is in its nature to be short-lived with one subject quickly overtaken by another". These dicta minimise the profound and permanent impact on a trans person if the privacy surrounding their gender history is broken. The acute significance of this kind of breach of privacy has been acknowledged by its special statutory protection in section 22 of the 2004 Act, to

which a criminal penalty applies. Further, the Judge's analysis may be contrasted with Lady Hale's dicta at [1] of ***R (C) v SSWP*** **[2017]** 1 WLR 4127:

"… it does not take much imagination to understand that this is a deeply personal and private matter; that a person who has undergone gender reassignment will need the whole world to recognise and relate to her or to him in the reassigned gender; and will want to keep to an absolute minimum any unwanted disclosure of this history. This is not only because other people can be insensitive and even cruel; the evidence is that transphobic incidents are increasing and that transgender people experience high levels of anxiety about this. It is also because of their deep need to live successfully and peacefully in their reassigned gender, something which non-transgender people can take for granted."

52. Secondly, the exclusion of a trans woman (for example) who has undergone gender reassignment from a female toilet is, in fact, likely to constitute not merely indirect, but direct gender reassignment discrimination. The Guidance makes no reference to this:

52.1. Where a person has advanced sufficiently in their transition so they can be said to have "undergone gender reassignment", the relevant comparator is likely to be a person of their acquired gender.

52.2. In ***Croft v Royal Mail Group plc*** [2003] ICR 1425, decided prior to the GRA 2004, this Court considered the question of trans people's right to use the toilets corresponding to their lived gender. The claimant was a trans woman undergoing a process of gender reassignment who had been living as a woman for less than a year at the time of her alleged constructive dismissal. She alleged that her employer's refusal to allow her to use the women's toilets amounted to direct discrimination. While the employer was willing to contemplate her doing so at some point in the future, she did not accept that there should be any such delay. She resigned, claiming constructive dismissal and direct gender reassignment discrimination.

52.3. Pill LJ stated at [46]:

"I do not accept that employers can escape liability on the basis that the Appellant was at the material time a man and that a prohibition on the use of the female toilets meant that she was treated no differently from other men. Transsexuals have been recognised by statute, not as a third sex, but as a group who must not be discriminated against as such. That involves not only providing members of the group with toilet facilities no

less commodious than other toilets but considering whether the transsexual should be granted the choice she seeks. I would accept, applying the statement of Lord Nicholls in the *Bellinger* case … and the *Goodwin* case … that a permanent refusal to refuse that choice to someone presenting to the world as a woman could be an act of discrimination even if the person had not undergone the final surgical intervention."

52.4. The Guidance accordingly directed duty-bearers to undertake the very act (permanent refusal of access to toilet facilities of the acquired gender) identified as constituting direct gender reassignment discrimination by this Court more than 20 years ago.

52.5. At [48], Pill LJ found the employee is not being treated less favourably than other women employees "unless and until the employee can establish that she should be treated as a woman". Against that background, Pill LJ set out the test for determining when, in a process of transition, a trans person would be entitled to use the toilets of their acquired gender: this would be dependent on all the facts of the case, although it was accepted that a point would arise when there was such an entitlement: [53]. This was the *ratio* of the decision and was binding on the Court below. On the facts of ***Croft***, that stage had not yet been reached: [54]-[55].

52.6. Insofar as the learned Judge held at [50] that ***FWS*** altered the test for comparators, on the basis that Jonathan Parker LJ's judgment in ***Croft*** was at odds with that of Pill LJ, he was wrong to do so. In fact, Jonathan Parker LJ expressly agreed with the reasoning of Pill LJ (at [68]) and drew a distinction between the position of "a person who 'is undergoing' (as opposed to a person who 'has undergone') 'gender reassignment'": see [69].

52.7. That distinction aligns with the Supreme Court's reasoning in ***FWS*** at [134], where Jonathan Parker LJ's judgment was cited, and where the Supreme Court confined its remarks on comparators to "the case of a [male] person proposing to or undergoing gender reassignment to the opposite sex", its narrow language excluding the position of a person who "has undergone" such a process, in line with the reasoning in ***Croft***.

52.8. Further, any suggestion that ***FWS*** altered the comparator in direct gender reassignment discrimination cases runs contrary to the Supreme Court holding that a "biological sex" interpretation "would not have the effect of disadvantaging or removing important protection under the EA 2010 from trans people" (***FWS*** at [248]).

52.9. Further, any other conclusion would be contrary to the relevant assimilated case law of the CJEU, which the Court was bound to follow pursuant to s.6(3) of the European Union (Withdrawal) Act 2018, in which direct gender reassignment discrimination claims have arisen from trans people being treated less favourably than cis persons of their acquired gender: see C-423/04 ***Richards v Secretary of State for Work and Pensions*** [2006] ECR I-3585 at [29], and C-451/16 ***MB v Secretary of State for Work and Pensions*** [2019] 1 CMLR 4: both cases in which trans women successfully argued that they were treated less favourably than cis women in respect of retirement age.

52.10. Further, any other conclusion would be contrary to the plain wording of s.23(1) EA 2010, which requires there to be "no material difference between the circumstances relating to each case" when a comparator is identified. It is unreal to argue that a trans woman who has lived as a woman for decades, has obtained a full GRC, has had gender recognition surgery and is not "out" to her colleagues at work is in materially similar circumstances to a cis man, who could have no legitimate reason to use the women's toilets. The obvious comparator in such a case must be a similarly-positioned cis woman.

53. Whichever analysis is adopted, employers and service-providers following the Guidance ran an obvious risk of committing gender reassignment discrimination. The Court should have found a material omission when the Guidance did not alert its recipients to this risk.

<u>GROUND 2</u>: Failure to construe the Guidance in accordance with its natural and ordinary meaning

54. The purpose of the Guidance was to provide practical guidance to employers and other duty-bearers in the immediate aftermath of the Court's decision in ***FWS***. The Guidance must be construed on the basis of what a reasonable and literate person would have understood it to mean: see, e.g. ***R (Raissi) v Secretary of State for the Home Department*** [2008] QB 836 at [108]; ***In re McFarland*** [2004] 1 WLR 1289 at [24].

55. The recipients of the Guidance could not be assumed to have any familiarity with discrimination law, nor to have access to specialist legal advice. The Guidance was to be taken into account by employers and service-providers large and small, some of whom would have very limited understanding of the law and equally limited resources. In the circumstances, there was no basis for the findings that "the intended audience … will not be an unsophisticated audience"; that the employer or service-provider would have some

"acquaintance with discrimination or employment law"; or that they would take legal advice: J/71.

56. The Court erred in failing to construe the Guidance in accordance with its natural and ordinary meaning, read objectively in context, in the following respects:

56.1. First, for the reasons set out above under Ground 1A, the natural and ordinary meaning of the mandatory statement in **[3a]** was that, where men's and women's toilets are provided, trans people should always be excluded from the toilets of their lived gender. There is no sensible alternative reading of this statement.

56.2. Secondly, the natural and ordinary meaning of the Guidance, read as a whole, is that an employer can require a trans person to use the facilities designated for their "biological sex". The Court erred in interpreting it otherwise: J/70. Taken together, the elements of paragraph **[3]** advise employers and service-providers (in substance) that, if it is not possible to offer mixed-sex additional facilities, they are permitted to offer trans persons only the toilets of their "biological sex". **[3a]** requires trans people always to be excluded from the toilets of their lived gender; **[3b]** advises that "in some circumstances" a duty-bearer could prevent a trans person using both the men's and the women's toilets; **[3c]** prohibits a scenario where a trans person is left without access to any toilet; and **[3d]** advises provision of mixed-sex facilities in addition to single-sex facilities only "where possible". It follows that, where for practical reasons it is only possible to provide toilets designated for men and women, trans people may be required to use the toilets designated for their sex at birth. The Judge did not engage anywhere with the reality that a high proportion of duty bearers will not have the resources or facilities to offer additional, mixed-sex spaces.

56.3. Thirdly, **[1]** and **[3e]** of the Guidance were not merely an "incomplete" statement of the requirements of the 1992 Regs as the Judge found: J/34, J/76. **[1]** stated in mandatory terms that it is "compulsory" to provide sufficient single-sex toilets in workplaces. However, it is not, as the Judge accepted at J/34. An employer may provide no single-sex facilities at all, if it has provided sufficient facilities in a separate room with a lockable door: reg.20(2)(c). This erroneous articulation of an absolute requirement to provide single-sex facilities could not be cured by reading it with **[3e]**, (cf. J/76), as that paragraph merely stated in general terms that toilets in lockable rooms intended for use by one person at a time "can be used by either women or men". **[3e]** did not convey that an employer could lawfully provide only unisex individual

lockable rooms (or indeed sufficient lockable rooms alongside trans-inclusive toilets) and still meet the sufficiency test in reg.20.

56.4. Fourthly, on a fair reading, the Guidance made no reference to the risk of discriminating against trans people (contra J/88).

GROUND 3: The Court misconstrued the 1992 Regs

57. Properly construed, the duty to provide "separate rooms containing conveniences… for men and women" under reg.20(2)(c) of the 1992 Regs is consistent with provision on a trans-inclusive basis. Paragraph **[3a]** misstates the law insofar as it applies to workplaces for this further reason: cf. J/53-54. The Judge erred in concluding otherwise at J/36-40.

58. First, construed in light of the nature and purpose of the 1992 Regs, the wording of regulation 20 does not preclude an employer from allowing access to men's and women's toilets on a trans-inclusive basis. Reg.20 is a duty relating to provision of facilities. It is not a duty regarding management of access:

58.1. The 1992 Regs set out requirements for the physical provision of separate men's and women's toilet facilities, and are not concerned with the detail of access arrangements. This interpretation, also adopted by the Employment Tribunal in ***Kelly v Leonardo UK Ltd*** (ET Case No 8001497) at [207]-[212], is consistent with the legislation's wording in context, and draws a distinction between hard-edged questions of suitable physical provision, to be determined in the context of a health and safety prosecution, and more context-sensitive questions about trans people's access to toilet facilities to be determined by reference to the EA 2010, if necessary by way of a discrimination claim in the Employment Tribunal.

58.2. This point is borne out by the way the 1992 Regs have operated in practice. Since 2011, the EHRC's own Code of Practice has recommended a trans-inclusive approach to single-sex toilets at work, and many employers have followed the EHRC's advice over a period of years. Their toilets have not ceased to be men's and women's toilets merely because they may on occasion have been used by trans people in accordance with their lived gender. Such provision complies with the requirements of reg.20 if the toilets are meaningfully designated as for men and women respectively, and that distinction has been respected and understood by users. Any controversy as to the precise operation of the access arrangements, and how they are enforced, is a matter for determination under the discrimination provisions of the EA 2010.

58.3. The Judge's interpretation is inconsistent with this Court's decision in ***Croft***, where the requirements of the Workplace Directive and reg.20 were acknowledged, but the question of access to facilities was determined solely by reference to discrimination law (***Croft*** [34], [50]-[51]).

58.4. This interpretation of reg.20 is supported by the fact that an employer commits a strict liability offence if it breaches reg.20, with a maximum penalty of two years' imprisonment and an unlimited fine: see section 33(1)(c) of and Schedule 3A to the 1974 Act. It cannot be right that, where an employer has provided appropriately-designated facilities for both genders, it nonetheless risks committing a criminal offence wherever there is any departure from their strict segregation by "biological sex", and in circumstances where the meaning of reg.20 is itself ambiguous. Such liability would be contrary to the presumption against doubtful penalisation: see ***R v Copeland*** **[**2020] UKSC 8 [2020] 2 WLR 681 per Lord Sales at [28]. This in itself is an indicator of how the provision should be interpreted: see ***Bogdanic v Secretary of State for the Home Department*** [2014] EWHC 2872 (QB) per Sales J at [48].

59. Secondly, and alternatively, if reg.20 does impose a duty to manage individual access to toilets, the references to "men" and "women" should be interpreted by reference to certificated sex pursuant to s.9(1) GRA 2004:

59.1. The Judge's conclusion that s.9(3) applies to the 1992 Regs entails that Parliament intended, in passing the GRA 2004, to reverse the decision in ***Croft*** as it related to workplace toilets and impose a stricter "biological sex" approach: J/45. That is at odds with the general purpose of the GRA 2004 to enhance rights for trans people with a GRC, and would mean that the Act in fact cut back materially trans people's right to respect for their gender identity in their everyday lives.

59.2. Further, this interpretation of Parliamentary intent as to the scope of s.9 is incoherent when considered against the other provisions of the Act, and in particular, s.22 of the GRA 2004. Section 22 prohibits employers and their employees from disclosing the trans status of an employee with a GRC, even to other employees. It was passed to recognise the difficulties and indignities caused to trans workers by the non-consensual disclosure of their gender history in the professional context. It is difficult to see how trans people with a GRC could effectively be excluded from toilets appropriate to their certificated sex without disclosing their gender history in a way which would breach s.22 of the GRA 2004.

60. None of these submissions are undermined by the matters referred to in J/45:

60.1. A "biological sex" definition is not necessary for the coherence of reg.25, which requires suitable facilities for any person at work who is a "pregnant woman" or "nursing mother" to rest. Reg.25 only specifies the facilities that are required and does not prescribe who can use them: they can be used by a person of either sex (including a pregnant trans man). Further, reg.25(4) could always be read to include a pregnant trans man. This could either be done pursuant to s.6 Interpretation Act 1978, or pursuant to s.12 GRA 2004, or pursuant to s.3 HRA 1998 in order to avoid a breach of Article 8 and/or 14. These possibilities were not addressed in ***FWS***.

60.2. Neither is a "biological sex" definition necessary for the purposes of reg.24, which requires suitable provision of changing rooms where necessary for reasons of propriety. The concept of "propriety" does not require that a "biological sex" definition of men and women is adopted. For example, "propriety" may in some circumstances require separate changing rooms for trans men and cis women.

60.3. The Court's concern that a "biological sex" definition is necessary to preserve the operation of Schedule 22 EA 2010 was also misplaced. Schedule 22 para 2 provides an exemption from sex and pregnancy discrimination claims where employers do something for the protection of women from risk that they are required to do by a relevant statutory provision as specified by HSWA 1974. However, the 1992 Regs do not fall within this exemption and Schedule 22 is therefore a red herring:

(1) The protections in reg.20 are not for the protection of women from "risk". As the Judge found at J/45, the only purpose identified in the statute is "propriety" rather than "risk", and their provisions are targeted at the propriety of men and women equally: see, e.g. ***Kelly v Leonardo*** at [259].

(2) Indeed, there is no reason why Parliament would have intended the exemption to cover employers' provision of toilets or changing rooms. Employers have no need of this exemption in order to offer separate and equivalent single-sex facilities, because (as the Judge found) preventing access to an equally good facility will not be less favourable treatment. There is no reason why Parliament would have wished to create an exemption to employers offering inferior facilities to one sex.

61. In any event, legislation must be read compatibly with rights under the ECHR: s.3 HRA 1998. For the reasons set out under Ground 4, the exclusion of trans people from using toilets of their lived gender would be incompatible with their rights under Article 8.

GROUND 4: ERRONEOUS APPROACH TO ARTICLE 8 ECHR

62. The Court erred in concluding that – based on its findings as to the law – there would be no breach of Article 8 ECHR: J/96-100. The law, as the Judge had determined it, does not strike a fair balance between the interests of trans people and the interests of the community as a whole.

The obligations arising under Article 8 ECHR

63. The right to gender identity and personal development is a "fundamental aspect" of the right to respect for private life under Article 8: ***Van Kück v Germany*** (2003) 37 EHRR 51 at [75]. Both Strasbourg and the domestic courts have developed a clear line of authorities establishing the vital importance of enabling a trans person to live in a way that corresponds to their gender identity: see above at [6]-[9] and [51.5].

64. Article 8 may "impose on a state certain positive obligations to ensure effective respect for the rights protected by art 8": ***Hamalainen v Finland*** (app no. 37359/09, 16 July 2014) at on't[62]. This is how the ECtHR has analysed complaints concerning gender identity: see, e.g. ***Hamalainen*** at [64]; ***AP, Garçon and Nicot v France*** (app no. 79885/12, 6 April 2017) at [99]-[100]; ***X v Former Yugoslav Republic of Macedonia*** (app no. 29683/16, 17 January 2019) at [63]-[65]. When considering such cases, a court must identify whether the importance of the interest at stake requires the imposition of the positive obligation sought. It undertakes a weighing exercise to identify a fair balance between the interests of the individual and the interests of the community as a whole: ***Hamalainen*** at [65].

65. The margin of appreciation to the State is "commensurately narrow" where fundamental rights such as sex/gender are at stake: ***R (Steinfeld) v Secretary of State for International Development*** [2018] 3 WLR 415 at [32], [38]; ***YY v Turkey*** (app no. 14793/09, 10 March 2015) at [101]-[102]; ***AP, Garçon and Nicot*** at [121]-[123]. Further, "since the notion of personal autonomy is an important principle underlying the interpretation of the guarantees of Article 8 and the right to gender identity and personal development is a fundamental aspect of the right to respect for private life, the States have only a narrow margin of appreciation in that area": ***TH v Czech Republic*** at [53].

F.2 The Court erred in its approach to Article 8 ECHR

66. First, the Court should have asked itself whether the law, as it had found it to be, complies with the positive obligation to protect the rights of trans and intersex people to personal development and to physical and moral security, and to avoid relegating them to life in "an intermediate zone as not quite one gender or the other": ***Goodwin*** at [90]. This question concerns the State's positive obligations and not individual interferences by employers and service-providers, and therefore turns on whether the legislation itself strikes a fair balance between the competing interests of the individuals concerned and the community as a whole: ***AP, Garçon and Nicot*** at [101].

67. Secondly, in the alternative, the Court erred in concluding that any interference in the present scenario would be "less significant" than those which had been considered by the ECtHR previously: J/98. Prohibiting trans people from using the toilet according with their lived gender creates a daily discordance between their social position and legal or practical treatment which goes to the heart of their gender identity. The stress and alienation arising from such a discordance "cannot be regarded as a minor inconvenience arising from a formality". Such conflicts place trans people "in an anomalous position, in which [they] may experience feelings of vulnerability, humiliation and anxiety": ***Goodwin*** [77].

68. The Article 8 case law is not – contrary to the Judge's finding at [98] – concerned only with civil status. As Lord Nicholls recognised in ***Bellinger v Bellinger*** [2003] 2 AC 467 at [22], the judgment in ***Goodwin*** was "wide-ranging", with Ms Goodwin complaining across a range of contexts she was "not treated fairly by the laws or practices of this country". Policies which expose a trans person's gender history – which may occur if a trans person is required to use a toilet other than one provided for their lived gender – are a "very serious matter" going to "the heart of how the appellant, and others in her situation, relate to the world and the world relates to them": ***R (C) v SSWP*** at [31].

69. Thirdly, the Court failed to recognise the narrow margin of appreciation in this context.

70. Fourthly, the Court erred in concluding that any interference would be "capable of being justified", that "justification is possible" and "on many scenarios highly likely to be present": J/100. No reasons were provided for these conclusions. In any event, the burden of justification lies with the decision-maker (in this case the Minister). It must identify a "pressing social need" and establish that the measure is proportionate to the legitimate aim pursued and that the reasons adduced to justify it are "relevant and sufficient": ***YY v Turkey***

at [100]. The Minister declined to advance any justification. It cannot therefore be concluded (and certainly cannot be assumed) that the current law strikes a fair balance.

F. GROUND 5: ERRONEOUS APPROACH TO SECTIONS 8 AND 9 EA 2006

71. The Judge erred in holding that ss.8 and 9 of the EA 2006 were analogous to the "generally-framed duties" imposed on the Secretary of State by s.7 of the Children and Young Persons Act 2008: J/82. In fact, the EHRC's "general duty" is set out in s.3 of the EA 2006, while ss.8 and 9 contain a series of specific, mandatory duties with which it was required to comply when publishing the Guidance.

72. For example, it is inconsistent with the duty to "promote awareness and understanding of rights under the Equality Act 2010" (s.8(1)(d)) to give erroneous or misleadingly incomplete guidance about the operation of the EA 2010. Equally, it is inconsistent with the duty to "work towards the elimination of unlawful discrimination" to fail to alert duty-bearers to the risk of discrimination against persons with the protected characteristic of gender reassignment (s.8(1)(f)). The Judge erred in treating these important mandatory duties as being merely general or aspirational in nature. Having recognised at J/21 that the requirement for the EHRC's guidance issued pursuant to s.13 to be accurate came from the obligations in ss.8 and 9, the Judge should have recognised that a breach of s.13 caused by the publication of inaccurate guidance which misstated equality and human rights law would also breach those express duties.

73. Further, the Judge failed to address the argument that the EHRC did not take account of trans people's Articles 8 and 14 ECHR rights when publishing the Guidance, contrary to the express duty to do so under s.9(4) of the EA 2006. Such Convention rights were a mandatory relevant consideration, and the EHRC had failed to establish in evidence that it took such matters into account. The EHRC led no evidence to explain how trans people's human rights were taken into account in the process of drafting and publishing the Guidance.

G. CONCLUSION

74. For these reasons, the Appellants respectfully invite the Court to grant permission.

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16 March 2026 **GAYATRI SARATHY**