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*Judgment: approved by the Court for handing down (subject to editorial corrections)**	*ICOS No:* 20/032488/01
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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION
(JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY 'JR111'
FOR JUDICIAL REVIEW

(RULING ON REMEDY)

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Karen Quinlivan QC and Mr Steven McQuitty (instructed by Phoenix Law, Solicitors) for the applicant
Tony McGleenan QC and Gordon Anthony (instructed by the Crown Solicitor's Office) for the respondent

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SCOFFIELD J

[1] In my substantive judgment in the above proceedings ([2021] NIQB 48), alongside which this brief ruling on remedy should be read, I concluded that the applicant succeeded in her claim against the Government Equalities Office (GEO) insofar as the Gender Recognition Act 2004 ('the 2004 Act') imposes a requirement, through sections 2(1)(a) and 25(1), that she prove herself to be suffering or to have suffered from a "*disorder*" in order to secure a gender recognition certificate, which is incompatible with her rights under Article 8 ECHR.

[2] At paras [152]-[156] of my earlier judgment I raised the question of how the incompatibility identified by it could and should be remedied. I invited further submissions from the parties on this issue and am again grateful to counsel for both parties for their focused and helpful submissions.

[3] The applicant contends that the Court can remedy the identified incompatibility through interpretation of the relevant provisions of the 2004 Act pursuant to section 3 of the Human Rights Act 1998 (HRA). She urges me to do so in two ways:

(i) Firstly, by 'reading out' the word "*dysphoria*" where it is used in the 2004 Act and replacing it with "*incongruence*" by 'reading in' that word in its place. This would have the effect throughout the legislation of replacing any requirement for a diagnosis of gender dysphoria with a diagnosis of gender incongruence.

(ii) Secondly, by removing (or 'reading out') the entire statutory definition of "*gender dysphoria*", which includes the offending reference to that condition being a "*disorder*", whether or not this definition is then also to be replaced by a new statutory definition of gender incongruence to be 'read in' by the Court.

[4] The respondent contends that the appropriate remedy is the making of a declaration of incompatibility under section 4 of the HRA and that it would be inappropriate to seek to reinterpret the 2004 Act under section 3 by way of remedy in this case. First, it says that "*it is not possible for the Court to re-read the legislation without unsettling its design and begging questions about the meaning of the words that would be read into it*", in particular because, if "*gender incongruence*" is read in, that term would require to be defined, which would be going "*far beyond what is possible within the existing terms of the Act*". Second, and relatedly, the respondent says that reinterpretation would take the Court unavoidably towards the realm of impermissible judicial legislation in an area of complex and evolving policy; and that the making of a section 4 declaration of incompatibility would "*allow the legislature to consider afresh how best to strike the balance between the range of interests in this area and to address the issue of how to define any new terminology*". The respondent submits that this approach would not offend the distinction drawn in the authorities on section 3 between interpretation and amendment (see, for instance, para [69] of *McDonald v McDonald* [2016] UKSC 28; [2017] AC 273).

[5] I have come to the conclusion that the respondent's analysis is the better analysis on this issue and that seeking to cure the incompatibility identified in my earlier judgment by means of interpretation is not possible. In summary, the reasons for this view are as follows:

(a) Although reading words *into* a statutory provision and reading *down* a statutory provision are now well-recognised tools in the section 3 toolkit, the suggestion that words can simply be 'read out' of the statute as the applicant urges in this case (that is to say, ignored or given no effect whatever) is more problematic.

(b) I am also reticent about the propriety of applying section 3 of the HRA to the definition in section 25(1) of the 2004 Act since the latter is, in itself, a provision of the 2004 Act's interpretation section. It is expressly designed to provide a definition and there is a strong argument that re-interpreting the express interpretation provisions of a statute is going beyond the proper scope of the obligation in section 3 or, put another way, that the context of the

provision giving rise to the incompatibility reduces or excludes the scope for reinterpretation.

(c) The applicant's submissions accept that it may be necessary to retain reference to gender dysphoria within any revised statutory definition. This seems to me to be right. As discussed in the substantive judgment, a diagnosis of gender dysphoria under DSM-5 remains a recognised diagnosis which some practitioners (or, indeed, applicants for a GRC) may favour or consider appropriate. In addition, there may be some applicants armed with a present or historic diagnosis of gender dysphoria who should not be deprived of the 'benefit' of that diagnosis if a new diagnosis of gender incongruence now came to be required in its place. Although the requirement for a GRC applicant to prove that they have a "*disorder*" breaches their Article 8 rights in my judgment, the mere requirement to provide a diagnosis of gender dysphoria (at least for those applicants who can satisfy the diagnostic requirements), where the DSM-5 no longer considers this to be a disorder, does not.

(d) Although a reinterpreted requirement of a diagnosis of gender incongruence might be defined as *including* a diagnosis of gender dysphoria, it appears to me that that result could only be achieved through judicial over-reach in the use of section 3. I am inclined to agree with the respondent's suggestion that the inclusion of gender incongruence within the statutory scheme would require that condition to be defined. Although there may be something to be said for the applicant's submission that these terms can and should be left to the diagnostic classifications used by the specialist clinicians involved – and that on analysis the present definition really does little more than this – this appears to me to be a substantive question going beyond the scope of the Court's interpretative role.

[6] In summary, although I do not consider that the interpretative exercise which would be required to cure the incompatibility the Court has identified would 'go against the grain' of the 2004 Act as a whole (indeed, in my view, it would be consistent with the thrust of the Act), it is problematic for the reasons summarised above. More particularly, as I adverted to in para [156] of my earlier judgment, there may be several ways of making the impugned provisions Convention-compliant in this case and that choice may involve issues which call for, or are at least better suited to, legislative deliberation (see Lord Nicholl's comments at para [33] of the *Ghaidan v Godin-Mendoza* case). Indeed, in light of the previous consideration of reform discussed in my earlier judgment, the respondent may choose to pursue a means of curing the incompatibility identified by these proceedings which goes beyond the bare minimum required. However, that is really a choice for the legislature.

[7] In light of the above, I will make a declaration in the following terms:

> "The Court DECLARES, pursuant to section 4(2) of the Human Rights Act 1998, that sections 2(1)(a) and 25(1) of the Gender Recognition Act 2004 are incompatible with the applicant's Convention rights under Article 8 ECHR insofar as they impose a requirement that she prove herself to be suffering or to have suffered from a "*disorder*" in order to secure a gender recognition certificate."

[8] Consistent with section 4(6) of the HRA and the maintenance of Parliamentary sovereignty which it is designed to safeguard, this declaration does not affect the validity or continuing operation of those provisions of the 2004 Act. However, in addition to Parliament's ability to amend a previous Act at any time, it also opens up the possibility of amendment of the 2004 Act by way of remedial order under section 10 of, and Schedule 2 to, the HRA. Subject of course to the question of any appeal of my substantive judgment, I hope that Parliament will in due course have an opportunity to reconsider the issue raised by these proceedings in one manner or another.

Postscript

[9] My earlier judgment also drew attention (at paras [17]-[18] and [157](d)) to the anticipated second stage of these proceedings, namely a challenge to the Belfast Health and Social Care Trust's policy that the reports required to support an application for a GRC would not be provided on the NHS and that, in any event, it was very difficult as a matter of practicality to obtain such reports within Northern Ireland. In the event, that aspect of the application did not proceed and was disposed of by way of a consent order agreed between the applicant and the Trust in September 2021. The Trust agreed to provide and pay for the applicant to have an expert psychiatric assessment and for a report to be completed by a suitably qualified psychiatrist practising in the field of gender dysphoria at no cost to the applicant. An appointment was provided for this purpose. In light of this resolution between the parties, the second element of the applicant's challenge was dismissed by consent, with the respondent Trust agreeing to pay the applicant's reasonable costs of that aspect of the challenge.

[10] In addition, the Trust confirmed to the Court that, following a review of the issue of the provision of reports for the purposes of GRC applications, such reports would be provided, on request and without charge, to patients under the care of the Belfast Gender Identity Clinic as part of the Clinic's core services and where there is sufficient diagnostic information available to the Clinic to confirm such a diagnosis. Furthermore, in respect of any individual who was formerly a patient within Brackenburn Clinic, such as the applicant in these proceedings, the Trust confirmed that it would separately fund an assessment and report by an external consultant psychiatrist in respect of any diagnosis of gender dysphoria and at no cost to this cohort of former patients. This facility would not be considered by the Trust to be a core service of the Gender Identity Clinic, which is already dealing with highly

pressured open lists of patients, but would be provided and funded externally from that service on the basis of that cohort's previous patient status.