Neutral Citation Number: [2021] EWHC 1746 (Admin)

Case No: CO/4198/2019

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 02/07/2021

Before:

LORD JUSTICE HOLROYDE

MR JUSTICE SWIFT

Between:

THE QUEEN on the application of FDJ	**Claimant**
- and -	
SECRETARY OF STATE FOR JUSTICE	**Defendant**
SODEXO JUSTICE SERVICES	**Interested Party**
DR SARAH LAMBLE	**Intervener**

- -

Karon Monaghan QC, Jessica Jones and Julian Norman (instructed by **Birnberg Peirce Solicitors**) for the **Claimant**
Sarah Hannett QC, Alex Ustych and Nathan Roberts (instructed by **Government Legal Department**) for the **Defendant**
Stuart Withers (instructed by **Kesar & Co Solicitors)** for the **Intervener** (by written evidence only)

Hearing dates: 2 - 3 March 2021

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Approved Judgment

Lord Justice Holroyde:

1. The Claimant in this case challenges the lawfulness of the Defendant's policies relating to the care and management within the prison estate of persons who identify as the opposite gender from that which was assigned to them at birth. In particular, she challenges the policy in relation to the allocation to a women's prison of transgender women who have been convicted of sexual or violent offences against women.

Introduction:

2. The Claimant (who has been granted anonymity in these proceedings) served a sentence of imprisonment between October 2016 and June 2020. She asserts that in August 2017, whilst held at HMP Bronzefield, she was sexually assaulted by "J", a transgender woman prisoner with a gender recognition certificate (who has also been granted anonymity). The Defendant makes no admission as to the occurrence or circumstances of that alleged assault.

3. It is unnecessary to say more about the Claimant's personal history, which has little or no bearing on the issues which this court must decide.

4. The Claimant says in her witness statement that she does not object to transgender women who are not violent, and are not sexual predators, being allocated to a women's prison. But, she says, she and other women are scared about transgender prisoners who have committed sexual offences against women being in the same prison as them. She says that J had been convicted of serious sexual offences against women, but was at the material time accommodated within the general population of the prison. The Claimant describes J as being of large build and masculine appearance.

5. A statement from another woman prisoner raises similar concerns.

Transgender prisoners:

6. As Ms Monaghan QC on behalf of the Claimant pointed out, the relevant legislation (to which I will refer later in this judgment) tends to use the words "sex" and "gender" interchangeably, whereas in current use the two words have distinct meanings. For the purposes of this judgment, and without entering into any wider debate as to terminology, I shall give those words the meanings explained by Jeremy Baker J in *R (Elan-Cane) v Secretary of State for the Home Department* [2018] EWHC 1530 (Admin) at [96]:

> "Although at one time the terms 'sex' and 'gender' were used interchangeably (and confusingly still are on occasions), due to an increased understanding of the importance of psychological factors (albeit these may be due to differences in the brain's anatomy), sex is now more properly understood to refer to an individual's physical characteristics, including chromosomal, gonadal and genital features, whereas gender is used to refer to the individual's self-perception."

7. I shall use the word "transgender" to refer to a person who identifies as the opposite gender from that assigned at birth (whether or not they have undergone any alteration

of physical characteristics). Transgender persons may obtain formal legal recognition of their preferred gender pursuant to the provisions of the Gender Recognition Act 2004 and may apply for a gender recognition certificate (a "GRC"). It is unnecessary for present purposes to set out the criteria and evidential requirements for the issue of a GRC, which are contained in sections 1-3 of the Gender Recognition Act 2004. It is however important to note that by section 9 of that Act –

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

8. The female prison estate, like the male, includes both public prisons run by Her Majesty's Prison and Probation Service ("HMPPS"), of which HMP Downview is an example; and privately-managed prisons run by contractors, such as HMP Bronzefield, which is operated by the Interested Party. The population of the female estate constitutes less than 5% of the total adult prison population in England and Wales. For present purposes, it is unnecessary to consider wider issues about the circumstances of those who form the population of female prisons. It is however relevant to note that it is an important part of the Claimant's case that many in the female prison estate, including her, have been the victims of sexual abuse and/or domestic violence during their lives. The Defendant does not dispute that proposition, and accepts that women prisoners in general are a vulnerable cohort and that past experience of sexual abuse or rape is prevalent.

9. There is no statutory requirement that male and female prisoners be accommodated in different establishments, but rule 12(1) of the Prison Rules 1999 provides that –

> "Women prisoners shall normally be kept separate from male prisoners."

10. The population of a female prison may include persons who were born female and identify as such (referred to in this judgment as "women"); persons who were born male but identify as female, whether or not they have undergone any alteration of physical characteristics ("transgender women"); and transgender women who have obtained a GRC ("transgender women with a GRC"). It is important to the Claimant's case to note that both a transgender woman and a transgender woman with a GRC may retain male genitalia.

11. In March 2019, a special unit for high-risk transgender prisoners was created in E Wing at HMP Downview (hereafter, "E Wing"). The female estate does not include any

other accommodation specifically for transgender women, but transgender women in the general prison population may be subject to different accommodation arrangements or behavioural compacts.

12. The total number of known transgender persons in the prison estate is small, though there may well be others who prefer not to declare their identification as the opposite gender. In the course of this hearing, the obtaining of clear evidence as to the relevant statistics proved elusive, not least because the data collected by the Defendant do not include transgender prisoners who have obtained a GRC. Moreover, the data provided to the court lacked clarity, and left many questions unanswered: for example, it was unclear whether references to prisoners with convictions for sexual offences related only to prisoners currently serving a sentence for that type of offence, or also included prisoners who had in the past been convicted of such offences. Nor was it clear whether previous sexual offences by a transgender prisoner were committed before or after the person concerned expressed a wish to live in the opposite gender.

13. What can be said, however, is that data collected across the prison estate in March/April 2019 recorded the following:

    i) There were 163 transgender prisoners, of whom 81 had been convicted of one or more sexual offences.

    ii) 129 of those prisoners were allocated to the male estate, 34 to the female estate. Of the 129 in the male estate, 74 had been convicted of one or more sexual offences.

    iii) Although no records are kept, the number of transgender prisoners with a GRC is thought to be very low: a single-figure total across the estate as a whole.

14. Further data showed:

    i) Between 2016 and 2019, a total of 97 sexual assaults were recorded in women's prisons. Of these, it seems that 7 were committed by transgender prisoners without a GRC. It is not known whether any were committed by transgender women with a GRC.

    ii) In May 2020 the relevant Minister, in reply to a Parliamentary written question, provided the following information about involvement in sexual assaults of persons who were born, and remained in law, male, but self-identified as female: in 2019, 11 such persons were recorded as the victims of sexual assaults; one was recorded as the assailant; and one was recorded as involved in an incident in which there was no clear aggressor or victim. All these incidents were recorded as having taken place in the male estate. I take that to mean that in 2019, no sexual assault by a transgender woman without a GRC was recorded in the female estate.

    iii) In 2020, prisoners in the general population who were serving sentences for sexual offences constituted less than 20% of the male prison population and less than 5% of the female population.

iv) As at March 2019, there were 34 transgender women without GRCs who were allocated to the general population in the women's estate.

v) As at March 2021, one transgender woman, believed to have a GRC, was allocated to E Wing.

15. I shall return to the statistical evidence later in this judgment.

The policies challenged in this claim:

16. The Claimant challenges policies published and operated by the Defendant in relation to the care and management of transgender individuals ("the Care and Management Policy") and in relation to E Wing ("the E Wing Policy").

The Care and Management Policy:

17. The Care and Management Policy applies to public and private prisons, the youth secure estate, approved premises and certain services. For present purposes, I am concerned only with its application to prisons. It was first issued in July 2019, replacing the former PSI 17/2016. It was revised and re-issued on 15 August 2019 and came into effect on 31 October 2019. In circumstances to which I shall refer further below, it was the subject of a further submission to the appropriate Minister which resulted in a further decision on 5 November 2020 maintaining it in force. The Defendant has not objected to an amendment of the claim to challenge that further decision.

18. The introductory section of the Care and Management Policy explains that it sets out minimum mandatory requirements for the care and management of transgender individuals, with –

> "… an emphasis on adopting a balanced approach which considers the safety and needs of those who are transgender, whilst ensuring that decisions do not negatively impact on the well-being and safety of others, particularly in custodial settings such as in women's prisons."

19. The purpose of the Care and Management Policy is stated in paragraph 1.1:

> "This Policy Framework is intended to provide staff with clear direction in the support and safe management of transgender individuals in our care, including managing risks both to and from transgender individuals, and enabling risk to be managed when an individual is placed into a prison which is different to that of their legal gender or where a Gender Recognition Certificate (GRC) has been obtained."

20. Paragraph 1.3 identifies the persons to whom the policy relates as –

> "… individuals who express a consistent desire to live permanently in the gender with which they identify, and which is opposite to the biological sex assigned to them at birth, including those who

- wish to seek to transition permanently to a new gender
- wish to consistently live in the gender with which they identify but do not seek to have this recognised in law
- have gained legal recognition of their new gender."

21. Paragraph 2.3 states that where individuals have gained legal recognition of the gender with which they identify, "they must be treated in accordance with their legally recognised gender in every respect".

22. The "Headline Requirements" of the Care and Management Policy are stated as follows in paragraph 4:

- "All individuals in our care must be supported to express the gender with which they identify.
- Their preference does not oblige us to allocate them to a men's or women's prison or approved premises accordingly; it is one of many factors that may influence such decisions.
- However, all individuals who are transgender must be initially allocated to part of the estate which matches their **legally recognised gender** (or best-known evidence where legal gender is not known).
- The only exceptions are when allocation decisions are approved by a Prison Group Director or the Community Interventions Deputy Director via a Complex Case Board … .
- A balanced approach must be adopted when making allocation, care and management decisions relating to transgender individuals, balancing the risks and well-being of the individual with the risks and impact on well-being that the person may present to others, particularly in custodial and residential settings.
- Additional structured risk assessments are required before a person is allocated or transferred to part of the estate which does not match their sex assigned at birth, including where a person has gained legal recognition of the gender with which they identify."

23. Paragraph 4.3 states:

> "All identified risks presented by the transgender individual which may impact on the safety and well-being of other individuals, or which may be presented by others to the transgender individual, must be considered as a priority from the

> outset. Thereafter this must be integral to all decisions relating to their care and management."

24. The systems and processes established by the Care and Management Policy involve the consideration of individual cases by a Local Transgender Case Board ("LCB") and/or a Transgender Complex Case Board ("CCB"). Detailed provision is made as to the constitution of these Boards. Those who must attend a CCB include the head of the women's team (for cases which involve the women's estate) and the HMPPS equalities team (to advise on equalities and compliance with the policy).

25. As I have indicated, initial allocation will be to the part of the prison estate appropriate to the individual's legally-recognised gender. If the individual wishes to live in the opposite gender, an LCB should be convened within 14 days. An LCB is accordingly not convened in the case of a transgender prisoner with a GRC: the court was told that this is one reason why (as noted at [12] above) the Defendant's statistics as to the number of transgender persons in the prison estate do not include those who have obtained a GRC.

26. By paragraph 4.14, if the LCB considers that the safest arrangements, both for the transgender person and for others in custody, would be best served by allocation to the part of the estate which does not match the individual's legally-recognised gender, a referral must be made to a CCB.

27. Provision is also made for a CCB to be convened, in some circumstances, without a LCB having taken place. Such circumstances, listed in paragraph 4.34, include:

> "Where a transgender prisoner may present a risk to others and/or to themselves which requires special management;
>
> …
>
> Where a transgender individual with a GRC presents risks which are deemed to be unmanageable within the estate of their legal gender and may need to be held in separate accommodation or in the estate of the opposite gender in accordance with Prison Rule 12."

28. Before coming to the decisions made by the Boards, it is important to note that the Care and Management Policy makes a number of provisions as to the period which will elapse between admission to the prison and the convening of the LCB:

    i) Para 4.5 recognises that some transgender individuals "may need to be placed in a supportive environment separate from the main regime" until an LCB has been convened.

    ii) Paragraph 4.7 refers to the initial allocation to an establishment matching the individual's legal gender and requires that "all known risks need to be taken into account and managed" until an LCB has been convened. In particular, "where a transgender woman is placed in the male estate, any risks posed to her by male prisoners, or vice versa, must be managed. In addition, where a transgender woman with a GRC is placed in the women's estate, all known or likely risks

she may pose to other women in the estate should be managed, with use of separate accommodation where appropriate."

iii) Paragraphs 4.28-4.29 state that the author of a pre-sentence report about a transgender individual must consider requesting an adjournment of sentence in order to propose a sentence which takes account of the transgender status. If an adjournment is granted, and custody is the likely outcome, an LCB can be convened, and if necessary a CCB convened, preferably prior to sentence.

29. At either type of Board, transgender individuals must be asked for their views as to allocation. If they prefer an allocation which is not consistent with their legally-recognised gender, they must be asked to provide confirmation of living in the gender with which they identify. The Care and Management Policy provides for counter evidence to be considered and expressly recognises that some prisoners may attempt to exploit or undermine the system. Annex B states:

> "In cases where there is a concern around an individual's sincerity, the confirmation that makes that person's views credible will be examined (including counter-evidence) and application of the decision-making criteria would be able to identify those who may pose a risk to others."

30. All assessments must be made on a case by case basis. Paragraph 4.18 states:

> "Decisions must be informed by all available evidence and intelligence in order to achieve an outcome that balances risks and promotes the safety of all individuals in custody as set out below.
>
> **Potential risks <u>to the individual</u> from others, or personal vulnerabilities of the individual, related to (* indicates critical factors):**
>
> - * mental health and personality disorder;
> - * history of self-harm;
> - * anatomy, including risk of sexual or violent assault;
> - * testimony from an individual about a sense of vulnerability, eg in a male environment, in a particular prison, or from a particular prisoner or group of other prisoners;
> - * risk of suicide;
> - * Medication including the absence of medication and the impact of known side effects;
> - * history of being attacked, bullied or victimised;

- * intelligence including evidence of coercion, manipulation or threats towards the individual;
- Family circumstances/relationships;
- Age;
- Physical health; learning disabilities or difficulties.

Potential risks presented by the individual to others in custody … related to (* indicates critical factors):

- * offending history, including index offence, past convictions and intelligence of potential criminal activity – eg credible accusations;
- * anatomy, including considerations of physical strength and genitalia;
- * sexual behaviours and relationships within custodial/residential settings;
- * use of medication relating to gender reassignment; and use of medication generally;
- * Past behaviour in custody, the community, in the care of the police, or in the care of prisoner escort services;
- * intelligence reports;
- *evidence of threats towards others;
- * mental health and personality disorder;
- Learning disabilities or difficulties;
- Substance misuse.

Views/characteristics of the individual (* indicates critical factors):

*birth, legal and presented gender;

* strength of confirmation of presented gender, including medical treatments and full evidence of gender identity (such as birth certificate or a GRC);

* view on establishment allocation, prison management and lifestyle."

31. Specific provision is made in paragraphs 4.64-4.69 for high-risk prisoners:

> "**Care and management of transgender women and women who have gained a GRC**
>
> 4.64 The Gender Recognition Act 2004 section 9 says that when a full GRC is issued to a person, the person's gender becomes, for all purposes, their acquired gender. This means that transgender women prisoners with GRCs must be treated in the same way as biological women for all purposes. Transgender women with GRCs must be placed in the women's estate … unless there are exceptional circumstances, as would be the case for biological women.
>
> 4.65 When considering whether to hold a transgender woman with a GRC with other women, or in separate accommodation, all risks need to be taken into account. Any significant risks posed by a transgender woman with a GRC to other women, or by other prisoners to the individual, should be assessed in order to make sure that appropriate accommodation, regime and supervision is provided to manage such risks appropriately.
>
> 4.66 If risk is particularly high, it may not be appropriate to hold a transgender woman with a GRC in the women's estate, either with the general population or on a bespoke unit.
>
> 4.67 It may then be necessary to locate a transgender (male to female) woman with a GRC in the men's estate. This can only happen if the risk concerns surrounding the transgender individual are at the equivalent level to those that would apply to any other woman that may need to be held in the male estate.
>
> 4.68 If a transgender woman with a GRC must be placed in the male estate, she must be treated as a female prisoner in the men's estate. She must be held separately and according to a women's regime as set out in the Women's Policy Framework. This provision exists as the men's estate has greater capacity to manage individuals in custody who pose an exceptionally high risk of harm to others.
>
> 4.69 Local and Complex Case Boards must not treat a transgender woman with a GRC less favourably than a biologically female person, and vice versa for a transgender man with a GRC. However, all risks of a transgender woman with a GRC must be taken into account with respect to her management as set out in section 4.18 above."

The E Wing Policy:

32. This Policy, which is undated, provides a framework for the care and case management of persons allocated to E Wing by the CCB. Paragraph 1.1 explains that such persons will be transgender women holding GRCs who have been assessed as presenting a high risk of harm to other women in custody, and exhibiting behaviour that is dangerous,

disruptive and/or particularly challenging, where the risk cannot safely be managed on normal location within the women's estate. E Wing thus caters for those who are legally female but who pose too high a risk to other women to be located in the general population of the women's estate.

33. The aim of E Wing is stated in paragraph 2.1 to be the provision of a safe, decent and secure location where high-risk individuals can be managed, whilst maintaining order, control and safety for all residents in HMP Downview.

34. Paragraph 3.1 refers to E Wing accommodating transgender women who pose too high a risk to women to be addressed on normal location, but who –

> "… are required to be located in the women's estate because they hold Gender Recognition Certificates (GRC) and are legally female."

35. Paragraph 3.2 states:

> "E Wing will be considered by the PGD [Prison Group Director] within the Transgender Complex Case Board once they have assessed that on balance the risks that an individual transgender woman with a GRC presents would prevent us from fulfilling our duty to protect the rights of the other women held in custody to live in safety and free from abuse. If the PGD determines that the prisoner's risk could not be appropriately managed on E Wing, the PGD will also consider whether the exceptional circumstances in which a female prisoner would be held in the male estate or the requirements for segregation are met."

36. Paragraph 8.1 emphasises that location on E Wing is not punitive and that those located there will as far as possible be afforded the same facilities and opportunities as those in the general population at HMP Downview, though this is subject to appropriate risk assessment and operational requirements. Paragraph 10.2 provides for core activities of exercise, library, association, employment and gym to be offered on E Wing itself. By paragraph 10.3, those on E Wing will have access to other activities within the main site, but –

> "Access to these activities and level of supervision required will be part of the individual's risk assessment."

37. The Defendant has put forward evidence as to the use made of E Wing. Although the Claimant alleges that E Wing residents have been left unsupervised in activities bringing them into contact with the general prison population, the Defendant denies that this is so. Since E Wing was established, there have never been more than four persons accommodated within it at any one time and in recent months there have only been one or two. Staffing levels are sufficient to ensure that any transgender prisoner who leaves E Wing is escorted and supervised at all times. In response to the Covid-19 pandemic, E Wing has in recent months also accommodated a number of women prisoners who elected to be placed there in order to shield; but they were on a separate landing from the transgender women.

38. The Governor of HMP Downview says in her witness statement that a transgender prisoner who is accommodated in the general population on B Wing, as J has been, would not be allowed to shower at a time when women prisoners have access to the shower area.

The legislative framework:

39. I have already mentioned the Gender Recognition Act 2004. It is relevant also to consider the Human Rights Act 1998 and the Equality Act 2010. Section 6 of the 1998 Act makes it unlawful for a public authority to act in a way which is incompatible with a Convention right. The Convention rights which are relevant in this case are those guaranteed by Article 3 (prohibition of torture, etc), Article 8 (right to respect for private and family life) and Article 14 (prohibition of discrimination). For convenience, I set out the relevant provisions of the 2010 Act in an Annex which follows the judgments.

40. I now turn to the arguments advanced on each side. I have considered all the points which were made in the course of the hearing, but do not think it necessary to mention all of them.

The grounds of claim:

41. The Claimant originally sought an order quashing the challenged policies. The relief sought was subsequently amended to claim a declaration that the challenged policies are unlawful in their entirety. Pursuant to limited permission granted by Linden J, she puts forward two grounds:

Ground 1: the policies are unlawful because they indirectly discriminate against women, contrary to art. 14 of the Convention read with arts. 3 and/or 8, and contrary to section 19 of the Equality Act 2010.

Ground 2: the Defendant, in formulating the policies, failed to take into account a material consideration, namely the exemptions for single sex accommodation and provision of services under the Equality Act 2010, and the policies are unlawful because they therefore misstate the law.

42. In very brief summary, the Claimant's case is that the presence of transgender women and/or transgender women with GRCs in female prisons exposes other women to a risk of harm which is not suffered as a result of the presence of transgender men in a male prison. That risk arises particularly when a transgender woman has a history of committing sexual and/or violent offences against women. The effect of the policies is to require initial allocation of prisoners to the estate of their legal gender, without any contrary presumption where (for example) the offending history of a transgender woman with a GRC suggests they would pose a particular risk to women; and to allow prisoners (subject to the approval of the CCB) to be accommodated in the part of the prison estate which corresponds to their declared gender identity, whether or not they have taken any legal or medical steps to acquire that gender. Although paragraph 4.64 of the Care and Management Policy provides for a transgender woman with a GRC not to be allocated to the women's estate if there are exceptional circumstances, nothing in the Care and Management Policy deems a previous history of sexual offending against women to be an exceptional circumstance for this purpose, and there is no requirement for an assessment of exceptional circumstances to be made.

43. Ms Monaghan on behalf of the Claimant points to the data referred to at [13]-[14] above, and in particular to the contrast between the respective proportions of transgender prisoners and non-transgender prisoners who have been convicted of sexual offences. She submits that there is an increased risk to women prisoners if transgender women who have committed sexual offences are accommodated in the female prison estate. She also points to the acknowledged vulnerability of women prisoners in general, and the prevalence of previous adverse experiences at the hands of men, and submits that the presence of transgender prisoners, especially those who retain male genitalia, creates a risk that women prisoners will suffer fear, anxiety and "re-traumatisation".

44. Ms Monaghan contends that the initial ministerial decision to approve the Care and Management Policy was taken without proper consideration of the single-sex exemptions under schedule 3 to the Equality Act 2010. Hence, she submits, the need for a fresh decision in November 2020. Even then, however, there was no consultation "with any stakeholders", no compliance with the Public Sector Equality Duty ("PSED") under section 149 of the Equality Act and no express reference to the possible option of treating transgender prisoners less favourably. Moreover, whatever the E Wing Policy may say, transgender women accommodated on E Wing have in fact participated without supervision in activities within the general population of HMP Downview.

45. Ms Hannett QC on behalf of the Defendant resists the claim. The Defendant's case is that the Minister who approved the initial Care and Management Policy was aware of the schedule 3 exemptions. There was however a concern about a potential argument that the possibility of treating transgender prisoners less favourably than others may not have been expressed as an available policy option, an argument which would have given rise to issues of waiver of legal professional privilege. For that reason, it was felt appropriate for a Minister to make a fresh decision in November 2020. The Minister who did so was aware of the exemptions and had been provided with equality analyses for the policies.

46. Ms Hannett submits that the Claimant's case has changed in the course of these proceedings and that it is unclear precisely which aspects of the policies are challenged. She further submits that the Claimant has belatedly attempted to introduce submissions concerning the allocation of resources, an issue which has not been raised in the pleadings.

The Interested Party:

47. The Interested Party has played no active part in these proceedings.

The Intervener:

48. Permission was granted to Dr Sarah Lamble (Reader in Criminology and Queer Theory at Birkbeck, University of London) to intervene by way of written evidence. The Claimant was permitted to respond with the written evidence of Professor Jo Phoenix (Professor of Criminology and Chair in Criminology at the Open University).

49. Dr Lamble urged the court to be cautious in assessing claims as to the risk profile of transgender prisoners, because in her view any statistical claim as to the prevalence of sexual offending within the transgender community in prison is tainted by a lack of

reliable data. There is uncertainty as to the number of transgender people in the prison estate, compounded by the fact that the unsystematic data collection relies on formal self-declaration by prisoners who may have a number of reasons not to disclose their sexual and gender identities. Claims about the likelihood of transgender prisoners carrying out sexual assaults in women's prions are based on limited and unreliable evidence: since the total number of transgender prisoners is unknown (but is likely to be greater than the number recorded), then the proportion who have committed sexual offences cannot be known (but is likely to be lower than the proportion put forward by the Claimant). There is not a reliable basis for generalised claims that transgender women have "male patterns of criminality".

50. Professor Phoenix agrees that there are ambiguities and deficiencies in the Government's data collection and statistics, and agrees that the total transgender prisoner population is not known. She therefore agrees that it is not possible to draw from those data general conclusions about the transgender prisoner population. She does not however agree with Dr Lamble's view that no conclusions can be drawn about the known transgender prisoner population. She points out that the qualifying population for allocation to the women's estate in accordance with the policies is the known transgender women prisoner population, over 50% of whom have committed sexual offences. It is known that a history of sexual offending is an indicator of a risk of future sexual offending. It follows, in her opinion, that it can be concluded from the available data that transfer of transgender women prisoners from the male estate into the women's estate is likely to introduce into the women's estate a level of risk of sexual offending which does not otherwise exist.

The submissions: Ground 1:

51. On behalf of the Claimant, Ms Monaghan QC submits that the policies, and in particular the Care and Management Policy in combination with the E Wing Policy, have a disproportionate, and therefore unjustified, impact on women within the ambit of art 3 and/or art 8, and are unlawfully discriminatory contrary to art.14. She refers to *Carson v UK* (2010) 51 EHRR 369 at [61], and *R (SG) v Secretary of State for Work and Pensions* [2015] 1 WLR 1449 at [8] and submits that art.14 is violated if there is (a) a difference in treatment (within the ambit of a substantive Convention right) of (b) persons in relevantly similar circumstances (c) which does not pursue a legitimate aim or (d) there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised. She submits that the disproportionally prejudicial effects of a measure on a particular group may be considered discriminatory even though the measure was not aimed at that group.

52. Ms Monaghan's argument is as follows:

i) The Defendant's own statistics show that the location of transgender women in the women's estate exposes female prisoners to a greater risk of sexual assault than would exist in a population composed entirely of women. Sexual assault is of sufficient seriousness to reach the art.3 threshold. An increase in the risk of art.3 mistreatment is within the ambit of art.3, even if there has been no substantive violation of art.3: see eg *In re McLaughlin* [2018] UKSC 48, [2018] 1 WLR 4250 at [16]; *Stevenson v Secretary of State for Work and Pensions* [2017] EWCA Civ 2123 at [35]; and *R (SC) v Secretary of State for Work and Pensions* [2019] 1 WLR 5687.

ii) In the light of rule 12 of the Prison Rules, accommodation in a mixed-sex environment is not an ordinary consequence of prison life. Nor is exposure to a risk of sexual assault. The policies therefore bring about two consequences which are within the ambit of art.8.

iii) The accommodation of transgender women in the women's estate thus introduces a level of risk to women prisoners which does not arise in a population of women. It does so despite the Defendant's acceptance of the vulnerability of women prisoners in general.

iv) There is no corresponding increase in risk for male prisoners in the men's estate, because the accommodation of transgender men in the male estate does not increase the proportion of sex offenders in the population of that estate; and male prisoners are less likely than women to have suffered historic sexual abuse and less likely to be the victims of sexual offences.

v) Thus, the allocation of transgender prisoners to the estate corresponding to their gender identity carries an increased risk which negatively impacts on women prisoners but does not have a comparable impact on male prisoners. The relevant disadvantage suffered by women prisoners as a result of the policies is, therefore, that they – a particularly vulnerable cohort – are exposed to an increased risk of sexual assault in prison.

vi) The burden is on the Defendant to justify that disadvantage. Weighty reasons are required to show such a justification. In *R (Tigere) v Secretary of State for Business, Innovation and Skills* [2015] 1 WLR 3280 at [33], Baroness Hale set out a four-stage test of justification: whether there is a legitimate aim for the difference in treatment, sufficient to justify the limitation of a fundamental right; whether the measure concerned is rationally connected to that aim; whether a less intrusive measure could have been used; and whether, bearing in mind the severity of the consequences, the importance of the aim and the extent to which the measure will contribute to that aim, a fair balance has been struck between the rights of the individual and the interests of the community.

vii) The Defendant cannot satisfy the third of those stages, because the policies are not the least intrusive measure which could have been adopted. Less intrusive ways of achieving the legitimate aim of caring for and managing transgender women prisoners include (a) incorporating a test of proportionality, not exceptionality, for allocating high risk transgender women prisoners away from the female estate; (b) carrying out a risk assessment before initial allocation to the female estate of a transgender woman with a GRC; or (c) adopting a presumption that high risk transgender women prisoners with convictions for violent and sexual offences against women should not be accommodated in the female estate. The E Wing Policy could ensure complete segregation from the general prison population instead of allowing some shared activities. The policies could direct the CCB to have regard to the vulnerability of women generally and to the likelihood that many women prisoners have been the victims of sexual assault and domestic violence.

viii) Nor can the Defendant satisfy the fourth stage, because he failed to consider the exemptions in schedule 3 to the Equality Act 2010 and therefore cannot have

> struck a fair balance. The systems established by the Care and Management Policy, including in particular those relating to initial allocation, create risks to female prisoners: they do so because the Defendant failed to take account of the schedule 3 exemptions and wrongly proceeded on the basis that a transgender women with a GRC must be treated as a woman for all purposes, without exception. That error was not cured by the fresh decision of November 2020, which maintained the policies in terms which misrepresent the law.

53. Ms Monaghan further argues, under Ground 1, that the policies indirectly discriminate against women and therefore breach section 19 of the Equality Act 2010. She submits:

    i) The policies amount to a relevant provision, criterion or practice ("a PCP").

    ii) The PCP affects all prisoners (and not just those transgender prisoners whose allocation is the specific subject of the policies) because it determines the population of the prisons in which they are held and the risks to which they are exposed.

    iii) The PCP has a discriminatory effect against women, in that it places them at a particular disadvantage compared to men, for the reasons argued in relation to art.14.

    iv) It is for the Defendant to justify that PCP. In particular, the Defendant must show that the practice pursuant to the policies, of allocating transgender women with convictions for violent and sexual offences against women to the female estate, is no more than is necessary.

    v) There is no evidence that the Defendant considered the PSED or the impact on women when approving the Care and Management Policy in November 2020, and therefore the PCP cannot be justified.

54. In response to Ground 1, Ms Hannett QC on behalf of the Defendant submits that the policies implement a fact-sensitive approach to the balancing of competing interests in a difficult area in which it is unlikely that any policy could satisfy all interested persons. As an indication of the difficulty of striking a correct balance, Ms Hannett points out that the Defendant faces both this claim and a claim by transgender prisoners allocated to E Wing who seek transfer to the general women's population.

55. It is submitted that the claim does not engage either art.3 or art.8, and that the policies give rise to no differential effects or particular disadvantages to women. In the alternative, any such effect is justified.

56. Ms Hannett acknowledges that art.14 does not necessarily presuppose the violation of one of the substantive Convention rights, but submits that where the obligation relied upon is a negative obligation to desist from conduct which will infringe a Convention right, then

> "… it is necessary for an art.14 complainant to show that he has suffered an adverse impact as a result of the conduct": see *R (Akbar) v Secretary of State for Justice* [2020] HRLR 3 at [69].

57. She further submits that the PCP relied upon, which is in any event too broad and unclear, does not apply to the Claimant, who is not a transgender prisoner, and who has not suffered any particular disadvantage. If justification of the policies is needed, Ms Hannett advances the same justification in respect of both the art.14 claim and the indirect discrimination claim.

58. Ms Hannett points out that the single-sex exemptions are permissive: she submits that the Defendant is not required to make use of them. She further submits that transgender women prisoners in general should not be differently treated merely on the basis of the subjectively negative attitudes of others towards them, or towards some of them. The single-sex exemptions should so far as possible be given effect in a way which is compatible with the art.8 rights of the transgender prisoner against whom the exemption may be applied. Ms Hannett refers in this regard to *R (B) v Secretary of State for Justice* [2010] 2 All ER 151, in which a transgender woman prisoner, whose previous convictions (when legally a man) included manslaughter and the attempted rape of a woman, successfully challenged a decision refusing to move her from a male prison to the women's estate, where that move was said to be necessary as a step towards transition surgery.

59. Ms Hannett relies upon *Strbac v Secretary of State for the Home Department* [2005] EWCA Civ 848 in support of her submission that since the Claimant does not allege any substantive breach of art.3 her claim is not within the ambit of art.3 and so the art.14 ground must fail. In that case, Laws LJ at [46] rejected a submission that there may be a viable claim of violation of the Convention constituted by a combined application of art.3 and art.14 where the facts did not warrant a finding of breach of art.3 taken alone.

60. As to art.8, it is submitted that occasional contact with another prisoner does not engage art.8 and that the Claimant has not shown that she has suffered any adverse impact.

61. As to differential treatment, Ms Hannett submits that the statistics relied on by the Claimant involve so few cases of sexual assaults by transgender prisoners on other prisoners that it is impossible to draw any meaningful conclusion. Further, information gathered in May 2020 showed that there had been no sexual assaults in the women's estate by transgender women without a GRC since the Care and Management Policy came into effect. The Claimant's submissions overlook the fact that E Wing exists as a separate unit.

62. In relation to justification, the Defendant submits that the Claimant has failed to distinguish between the policies and the application of the policies in individual cases. If they are realistically capable of being implemented lawfully, as they are, then they are not unlawful even if their application in individual decisions may be susceptible to challenge. The policies pursue legitimate aims in ensuring the safety and welfare of prisoners and enabling transgender individuals to live in their chosen gender. No realistic less intrusive alternative has been identified. In this sensitive and difficult area, a margin of discretion should be allowed to the Defendant in striking the appropriate balance. The policies permit the necessary balancing of competing rights and provide a list of relevant factors to be considered.

63. As to section 19 of the Equality Act 2010, it is submitted that section 19(2)(a) is not satisfied because the policies do not apply to individuals who are not transgender. The policies were not applied to the Claimant and she cannot show that she has suffered any

particular disadvantage. In any event, the factors relating to justification on which the Defendant relies in relation to art.14 apply equally to this part of the claim

64. As to the evidence of the Intervener, the Claimant submits, relying on Professor Phoenix, that the most recent data published by the Defendant show that of 163 transgender prisoners, 81 have convictions for sexual offences, and 76 of those prisoners were held in the male estate at the time when the data were collected (shortly before the Care and Management Policy came into effect). That shows a prevalence of sexual offending by the known transgender prison population of over 50% compared to a prevalence of around 18% in male prisons generally and around 4% in female prisons generally. A history of sexual offending is an indicator of risk of future sexual offending; and women are more likely than men to be the victims of sexual offending. The evidence therefore supports the existence of a prejudicial effect on women if transgender prisoners in the male estate are transferred into the female estate.

65. The Defendant reiterates his submission that the Claimant has not put forward any clear case as to a disproportionate risk of harm and that in any event there is no reliable foundation for a claim based on statistics. There is no reliable statistical case that transgender women prisoners pose a disproportionate risk of harm to non-transgender women prisoners: and even if there were, it could not impact on the lawfulness of the policies because they provide for risk assessment on a case by case basis. The policies provide for account to be taken, in decisions as to allocation, of all the risks posed by and to the transgender prisoner concerned.

The submissions: Ground 2:

66. Ms Monaghan relies on *Gillick v West Norfolk and Wisbech Health Authority* [1986] AC 112 as establishing a principle that if a government department promulgates in a public document advice which is erroneous in law, the court has jurisdiction to correct that error by an appropriate declaration. She points to the way in which the *Gillick* principle was encapsulated by Richards LJ in *R (Tabbakh) v Staffordshire and West Midlands Probation Trust* [2014] I WLR 4620 at [46]:

> "… a policy which, if followed, would lead to unlawful acts or decisions, or which permits or encourages such acts, will itself be unlawful."

67. Ms Monaghan, relying on *R (Gill) v Secretary of State for Justice* [2010] EWHC 364 (Admin), submits that the allocation of prisoners to particular detention facilities is the provision of a service to a section of the public within the meaning of section 29 of the Equality Act 2010. The Defendant does not dispute that proposition; but even if it were wrong, the allocation of prisoners is a public function within section 29(6). The provisions of sections 7, 11, 19 and 29 prohibiting discrimination against women and against transgender women therefore apply to the allocation of prisoners; but so too do the exemptions in schedule 3. The policies fail to mention those exemptions. On the contrary, paragraphs 2.3 and 4.64 of the Care and Management Policy, and paragraph 3.1 of the E Wing Policy, impose obligations or presumptions on the basis that a transgender woman with a GRC must be treated as a woman for all purposes.

68. Ms Monaghan submits that the policies are therefore wrong in law: the correct position is that a transgender woman with a GRC must be treated for all purposes as a woman

except in the provision of single-sex services or accommodation where that is a proportionate means of achieving a legitimate aim or where it is impracticable to provide the service to them. She submits that those exemptions clearly apply to the case of a transgender woman prisoner with a GRC who has convictions for violent or sexual offences against women. Although the effect of section 9 of the Gender Recognition Act 2004 is to confer a right to live and be treated as the sex which conforms with a person's gender identity, that right is subject to provisions made by any other enactment, including those made by schedule 3 to the 2010 Act. The single-sex services and single-sex accommodation exemptions in that schedule permit the different treatment of transgender women (with or without a GRC), as compared to other women. They permit the allocation of transgender women prisoners to particular prisons, and/or the provision of particular services to transgender women, where that would be a proportionate means of achieving a legitimate aim. By failing to refer to those exemptions, and by misstating the law, the policies fail to reflect the careful balance which Parliament has struck between the need to respect the rights of transgender persons and the need for single-sex provisions in certain circumstances. In particular, the policies impose a threshold of exceptionality rather than proportionality.

69. The Defendant's short answer to Ground 2 is that the *Gillick* principle has no application, for the simple reason that the policies do not purport to set out the law: they provide practical guidance as to the policy adopted by the Defendant, rather than state what the legislation says or set out propositions of law.

70. Ms Hannett on behalf of the Defendant further submits that, whilst any application of a single-sex exemption must meet the test of proportionality, the Defendant is under no obligation to apply those exemptions at all. The provisions of the policies as to the starting-point for allocation are not inconsistent with the 2010 Act.

71. I am grateful to all counsel for their written and oral submissions.

Discussion:

72. It is necessary to be clear about what the court is, and is not, called upon to decide. Important though it is, the claim has a comparatively narrow focus: it is a challenge to the lawfulness, not the desirability, of the policies. Wider questions as to the imprisonment of women, or as to the amount and allocation of funding in the prison estate, are not relevant to the issues which this court has to decide (and for that reason, much of the evidence of Elizabeth Hogarth, on which the Claimant sought to rely, is simply not relevant and therefore not admissible).

73. It is also important to emphasise that the Defendant in formulating the policies had to consider competing interests and to balance competing rights. I agree with Ms Hannett that this is a sensitive area, in which it is unlikely that any policy could be devised which would be to the satisfaction of all persons affected by it. The court is concerned with the lawfulness of the policies, not with whether the Defendant might have taken a different approach.

Ground 1:

74. The claim is pleaded as a challenge to the policies in their entirety, and the relief sought is a declaration that they are unlawful in their entirety. I agree with Ms Hannett that

that is far too broad an attack. Nor does it reflect the Claimant's own case[1], which is that she does not seek to exclude all transgender women from women's prisons. As the hearing developed, the real focus of the claim appeared to be the effect of the policies in relation to transgender women who had been convicted of sexual or violent offences against women. But that apparent focus was blurred by submissions as to the triggering of fear and anxiety (or "re-traumatising") consequent upon the presence in a women's prison of any male or male-bodied person, even a prison officer or prison employee.

75. The statistical evidence available to the court is unsatisfactory. It is clear that the number of transgender women in women's prisons is small, and the number who hold GRCs (and are therefore entitled to be treated as women in accordance with the Gender Recognition Act 2004) is very small. Professor Phoenix is in my view correct to say that the data, limited though they are, do permit some conclusions about the population of known transgender women. There is however a severe limit to those conclusions, both because the numbers involved are small and because the manner in which the data have been collected and presented to the court left many questions unanswered. I accept that the statistical evidence shows that the proportion of transgender prisoners who have been convicted of one or more sexual offences is substantially greater than the corresponding proportions of non-transgender men and women prisoners. I do not accept that the statistical evidence permits the conclusion, for which the Claimant contends, that a transgender prisoner is 5 or 6 times more likely than a non-transgender prisoner to commit a sexual assault on a non-transgender prisoner: that seems to me a misuse of the statistics, which in any event are so low in number, and so lacking in detail, that they are an unsafe basis for general conclusions. I can accept, at any rate for present purposes, that the unconditional introduction of a transgender woman into the general population of a women's prison carries a statistically greater risk of sexual assault upon non-transgender prisoners than would be the case if a non-transgender woman were introduced. But that statistical conclusion takes no account of the risk assessment which the policies require.

76. I fully understand the concerns advanced on behalf of the Claimant. Many people may think it incongruous and inappropriate that a prisoner of masculine physique and with male genitalia should be accommodated in a female prison in any circumstances. More importantly for the Claimant's case, I readily accept that a substantial proportion of women prisoners have been the victims of sexual assaults and/or domestic violence. I also readily accept the proposition (for which Ms Hogarth provides evidence) that some, and perhaps many, women prisoners may suffer fear and acute anxiety if required to share prison accommodation and facilities with a transgender women who has male genitalia, and that their fear and anxiety may be increased if that transgender woman has been convicted of sexual or violent offences against women.

77. Sexual assault is capable of attaining the level of gravity contemplated by art.3 (though not every sexual assault will necessarily do so). I accept Ms Monaghan's submission that the taking by the Defendant of steps which increase the risk of art.3 mistreatment of women prisoners is within the ambit of art.3. I also accept that in *Strbac* the court did not require an actual (as opposed to an anticipated) violation of art.3 before a violation of art.14 could be found. Rather, it rejected a submission that ill treatment which would not be sufficiently grave to violate art.3 could be brought up to that level of gravity by the addition of discrimination on a ground prohibited by art.14. In

[1] See [4] above

principle, therefore, I accept that arts. 3, 8 and 14 are engaged on the facts alleged in this case.

78. However, the subjective concerns of women prisoners are not the only concerns which the Defendant had to consider in developing the policies: he also had to take into account the rights of transgender women in the prison system.

79. Throughout the policies, the need to assess and manage all risks is repeatedly emphasised. A transgender woman, with or without a GRC, who is assessed as suitable to be accommodated in the general population may be subject to restrictions if necessary. A transgender woman with a GRC will, if necessary for the safety of herself and/or others, be accommodated on E Wing and have no unsupervised contact with women prisoners elsewhere in the prison. In an exceptional case, a high risk transgender woman, even with a GRC, can be transferred to the male estate because of the higher level of security which is there available.

80. The LCBs and CCBs are expert multi-disciplinary panels. Their members are the persons best placed to assess the risks, and determine the appropriate management of those risks, in a particular case. Those members will surely be well aware of the vulnerabilities of the women who are held in the female prison estate, and of the fear and anxiety which some of them will suffer if a transgender woman, particularly one with male genitalia and/or with a history of sexual or violent offending against women, is accommodated in the same prison. The members are expressly required by the Care and Management Policy[2] to take into account – amongst other relevant factors – the offending history of the transgender woman concerned; the "anatomy, including considerations of physical strength and genitalia" of that person; and the sexual behaviours and relationships of that person. They can in my view be expected to be astute to detect any case of a male prisoner who, for sinister reasons, is merely pretending to wish to live in the female gender. These features of the decision-making processes established by the polices are to my mind very important when considering the limited conclusions which can be drawn from the statistical evidence, and the submissions on behalf of the Claimant based on that evidence. It is for that reason that I have set out the relevant provisions of the policies at some length.

81. I recognise, of course, that in the usual way an LCB will not be convened until some days after the individual concerned has identified as transgender, and there will accordingly have to be an initial allocation before the full risk assessment can be made. That is unavoidable: a pre-sentence LCB[3] is desirable, but it will not always be possible. Even when it is not possible, however, the policies provide a number of safeguards. In any event, the principle that initial allocation must be based on the individual's legally-recognised gender is in my view plainly correct.

82. The Claimant does not criticise any of the risk factors which are listed in the Care and Management Policy: her complaint is that the list should also include a factor or factors relating to the vulnerability of women prisoners, their frequent experiences of sexual assaults and domestic violence, and the fear and anxiety they may experience as a result of sharing accommodation and facilities with transgender women.

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[2] See [30] above
[3] See [28(iii)] above

83. The difficulty which the Claimant faces, in my view, is that it is not possible to argue that the Defendant should have excluded from women's prisons all transgender women. To do so would be to ignore, impermissibly, the rights of transgender women to live in their chosen gender; and it is not the course which the Claimant herself says the Defendant should have taken. The submissions on behalf of the Claimant attached weight to the offending history of the transgender woman concerned; but that is a factor which the Care and Management Policy specifically requires the LCB and/or CCB to consider. More generally, once it is acknowledged that a policy could not require the total exclusion of all transgender women from the female prison estate, then in my view the policies require consideration of all the relevant factors to enable the risks to be assessed and managed on a case by case basis.

84. The criticism that the policies apply a test of exceptionality rather than proportionality does not in my view advance the Claimant's case. The Care and Management Policy repeatedly emphasises the need to consider all the risks both to and from the transgender woman concerned. It is not suggested that, if the risk assessment points to a need for separate accommodation, that step will not be taken.

85. Ms Monaghan accepted that, in principle, the two different ways in which she advanced her submissions on Ground 1 might lead to different results, though she did not argue that they should. In my view, they lead to the same result.

86. Looking first at her submissions in relation to art.14, I have already accepted that art.3 and art.8 are engaged, and that the unconditional introduction of a transgender woman into the general population of a women's prison carries a statistically greater risk of sexual assault upon non-transgender prisoners than would be the case if a non-transgender woman were introduced. However, the policies require a careful, case by case assessment of the risks and of the ways in which the risks should be managed. Properly applied, that assessment has the result that non-transgender prisoners only have contact with transgender prisoners when it is safe for them to do so. I am therefore not persuaded that the policies have a disproportionately prejudicial effect on non-transgender female prisoners as compared with non-transgender male prisoners.

87. But even if I am wrong about that, I have no doubt that any difference in treatment is in pursuit of the legitimate aims of ensuring the safety and welfare of all prisoners whilst enabling transgender prisoners to live in their chosen gender, and that the Defendant has shown that the means adopted are reasonable and proportionate. I cannot accept Ms Monaghan's submissions that less intrusive measures could realistically have been adopted. In particular, I do not accept that it would have been more appropriate for the Defendant to adopt a presumption relating to high risk transgender women with convictions for sexual or violent offences against women, because such a presumption would in any event necessitate a consideration of the matters relating to offending history which the policies require.

88. As to the exemptions in schedule 3 to the Equality Act 2010, it is in my view clear that – whatever the position may have been when the initial decision was taken – the minister who approved the policies in November 2020 was fully advised as to the law, including the schedule 3 exemptions. The key point about those exemptions, in my view, is that made by Ms Hannett: namely, that the minister was under no obligation to apply them, either generally or in any particular case. In addition, it seems to me that the risk assessment required by the policies substantially covers the same ground as

would be covered in considering whether one of the exemptions could properly be applied.

89. I therefore reject Ms Monaghan's first argument. The policies are in my view capable of being operated lawfully, and in a manner which does not involve unjustified or disproportionate interference with the Convention rights of women prisoners. Individual decisions may be susceptible to challenge, but that does not render the policies unlawful.

90. As to Ms Monaghan's second argument, I agree with her that the relevant PCP is the process by which prisoners are allocated within the estate. I accept that the PCP is applied not only to an individual who is allocated to a prison location in accordance with it, but also to all other prisoners who are thereby caused to share accommodation and/or facilities with that individual. If the effect of applying the policy to A is that A will share accommodation and facilities with B, it seems to me unrealistic (at any rate in the prison context) to say that the policy has not been applied to B.

91. I cannot however accept the further stages of Ms Monaghan's argument based on section 19 of the Equality Act 2010. They largely echo the corresponding stages of her first argument, and I again reject them for the reasons which I have given. With respect to Ms Monaghan, who presented the Claimant's case with customary skill, the weakness of the arguments is the failure to give sufficient weight to the way in which the policies permit, and indeed require, the necessary balancing of competing rights. The concerns of the Claimant are of course understandable, but are not the only concerns which the Defendant had to consider, and I agree with Ms Hannett that a margin of discretion has to be allowed to the Defendant in striking the appropriate balance.

92. Ground 1 therefore fails.

Ground 2:

93. I can address Ground 2 quite briefly, because in my view neither of the policies is, or purports to be, a statement of the law. They are guides to the implementation and operation of policies, not statements of the law relating to transgender prisoners.

94. In *Gillick*, Lord Bridge of Harwich confirmed the jurisdiction of the court to correct, by an appropriate declaration, advice promulgated by a government department in a public document which is erroneous in law. He went on, however, to say (at p195H) –

> "But the occasions of a departmental non-statutory publication raising … a clearly defined issue of law, unclouded by political, social or moral overtones, will be rare. In cases where any proposition of law implicit in a departmental advisory document is interwoven with questions of social and ethical controversy, the court should, in my opinion, exercise its jurisdiction with the utmost restraint …"

95. Although the policies refer to section 9 of the Gender Recognition Act 2004, and do so without explicit reference either to section 9(3)[4] of that Act or to the exemptions contained in schedule 3 to the Equality Act 2010[5], they do so by way of a general explanation rather than as a definitive statement of law. I cannot accept the submission that the policies contain an error or errors of law which will lead to unlawful acts or decisions. The policies could no doubt be better expressed; but that does not lead to the conclusion that they are unlawful on Ground 2. They do not, in my view, come within the rare category of publications which raise "a clearly defined issue of law, unclouded by political, social or moral overtones".

96. Ground 2 therefore fails.

97. I would therefore dismiss the claim.

Mr Justice Swift:

98. I agree with the conclusions and reasons set out by Lord Justice Holroyde. I wish only to make a handful of additional observations relating to Ground 1.

99. It is important to have well in mind that the Claimant's challenge is directed to the legality of the Secretary of State's policies (the "Care and Management of Individuals who are Transgender" policy and the "HMP Downview E Wing Policy"), not to their application in any specific case. To assess the legality of these arrangements as policies, they must be considered as a whole, including any/all safeguards included within the arrangements. Further, the legality of the policies must be assessed on the assumption they will be applied in accordance with their terms. The task is to determine, on that basis, whether the policies are such that when applied they will produce unlawful outcomes or give rise to an unacceptable risk that unlawful decisions will be taken. The issue is the same whether the matter is formulated as a Convention rights claim or as a claim under the Equality Act 2010.

100. The premise of the indirect discrimination claim is that the provision made in the policies as to when a transgender woman prisoner will be accommodated in a women's prison puts women prisoners who are not transgender at a particular disadvantage; a disadvantage not suffered by non-transgender men held together with transgender men in a men's prison. Like Lord Justice Holroyde, I accept the psychological impact on non-transgender women prisoners held in prisons with transgender women is likely, in many instances, to be significant: see paragraphs 76 – 77 above. I am prepared to accept the effect on non-transgender men in the corresponding scenario is likely to be less significant. However, when the full provisions of the policies are considered, the Secretary of State's approach to the issue of where and under what conditions transgender women prisoners will be held rests on case-by-case assessment of risk.

101. The policies start with the principle that prisoners will be *"allocated to the part of the estate which matches their legally recognised gender"* (see, for example, paragraphs 4 and 4.6 of the Care and Management Policy). Any decision to the contrary must be taken by a Complex Case Board ("CCB"). From this starting point, two scenarios need to be considered. First, transgender woman prisoners who do not have a GRC. These

[4] See [7] above
[5] See Annex below

prisoners will not be placed into a women's prison other than following a decision of a CCB. As Lord Justice Holroyde explains, the Care and Management Policy provides that every such decision depends on a comprehensive process of identification and assessment of risk – both from the point of view of the transgender woman and from the point of view of the non-transgender women with whom she will be held if the CCB's decision is that she should move to a women's prison. Paragraph 4.18 of the Care and Management Policy requires *"all available evidence and intelligence"* to be considered and states that the objective is an *"outcome that balances risks and promotes the safety of all individuals …"*. Although it is correct to say that risk or likelihood of non-physical harm is not one of the matters expressly listed under the heading *"Potential risks presented by the [transgender prisoner]"*, consideration of such risks is the necessary consequence of taking account of the matters that are listed. For example, a number of the listed matters concern the transgender prisoner's past behaviour: considering these matters necessarily requires regard to be had as much to the risk of non-physical harm to other prisoners as to the risk of physical harm. In this way, the policies, read as a whole, will not result in decisions to place a transgender woman without a GRC into a women's prison unless the particular disadvantages that could arise for relevant non-transgender women have been assessed, and to the extent necessary, addressed by measures to be put in place in the women's prison for that purpose. A decision that did not do this could not be one that "promoted the safety of all individuals" – a requirement under the Care and Management policy.

102. The position of transgender women prisoners with GRCs is different. For this group the overarching rule is at paragraph 4.64 of the Care and Management Policy – they *"… must be placed in the women's estate … unless there are exceptional circumstances, as would be the case for biological women"*. Exceptional circumstances is a high bar; the working assumption must be that transwomen prisoners with a GRC will be placed in women's prisons. However, the Care and Management Policy then requires risk assessment to ensure arrangements for *"appropriate accommodation, regime and supervision"*, including the option that these prisoners will be in women's prisons but not within the general population (and the way in which specific risks can be managed within a specialist unit is further addressed by the E Wing Policy). Hence the policies require steps to be taken to identify and manage any particular disadvantage that would be relevant for the purposes of an indirect discrimination claim. For this group of prisoners too, the requirement to "promote the safety of all individuals in custody" is the objective of the assessment process.

103. One matter that does concern me is the possibility that HMPPS may not hold accurate information as to the numbers of transgender prisoners (both those with GRCs and those without). The quality of this information was questioned during the hearing. Following the hearing we were provided with a third witness statement from Yaser El-Borgi, the Deputy Director of Interventions and Operational Services at HMPPS and chairman of the Transgender Advisory Board. What emerges is that accurate information on the numbers of transgender prisoners (either with or without GRCs) is not held in any central list. Mr El-Borgi says this at paragraph 10 of the statement:

> "10. As we exclude prisoners with GRCs from central lists, we do not have a ready list of people with a GRC, and as a result we do not centrally record how many people have a GRC. That is not to say we do not record whether someone has a GRC, for example, in the course of conducting a

> Local Case Board or Complex Case Board – it is just that there is no central record of all prisoners with GRCs across the prison estate."

104. Yet the premise of the policies is that they must be applied to transgender prisoners – see for example paragraph 4.7 of the Care and Management Policy. Further, the policies distinguish between transgender prisoners depending on whether or not they have a GRC, so that information too, must be known. The policies cannot be effectively applied unless HMPPS knows which prisoners are within their scope. Whether this information is held centrally or locally is not critical; what is critical is that the information must be held and must be robust. The reference to CCBs recording this information is not the answer. The only persons who will (under the policies) come before CCBs will be transgender prisoners. The concern is not whether or not all prisoners who come before CCBs are transgender, but rather that the circumstances of every transgender prisoner are considered by a CCB. This a matter of real importance and, in my view, one on which HMPPS needs to have a very high degree of confidence. However, this is not something which affects the outcome of the claims presently before the Court, which are directed only to the legality of the policies, *per se*.

Annex: extracts from the Equality Act 2010:

The following sections of the Act, and paragraphs of schedule 3 to the Act, are relevant to this claim:

> "**7 Gender reassignment**
>
> (1) A person has the protected characteristic of gender reassignment if the person is proposing to undergo, is undergoing or has undergone a process (or part of a process) for the purpose of reassigning the person's sex by changing physiological or other attributes of sex.
>
> (2) A reference to a transsexual person is a reference to a person who has the protected characteristic of gender reassignment.
>
> (3) In relation to the protected characteristic of gender reassignment—
>
> (a) a reference to a person who has a particular protected characteristic is a reference to a transsexual person;
>
> (b) a reference to persons who share a protected characteristic is a reference to transsexual persons.
>
> …
>
> **11 Sex**

In relation to the protected characteristic of sex—

(a) a reference to a person who has a particular protected characteristic is a reference to a man or to a woman;

(b) a reference to persons who share a protected characteristic is a reference to persons of the same sex.

…

13 Direct discrimination

(1)A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others. …

…

19 Indirect discrimination

(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.

(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—

(a) A applies, or would apply, it to persons with whom B does not share the characteristic,

(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,

(c) it puts, or would put, B at that disadvantage, and

(d) A cannot show it to be a proportionate means of achieving a legitimate aim.

(3) The relevant protected characteristics are -

gender reassignment …

sex …

…

29 Provision of services etc

(1) A person (a "service-provider") concerned with the provision of a service to the public or a section of the public (for payment

or not) must not discriminate against a person requiring the service by not providing the person with the service.

…

(6) A person must not, in the exercise of a public function that is not the provision of a service to the public or a section of the public, do anything that constitutes discrimination …

…

31 Interpretation and exceptions

…

(3) A reference to the provision of a service includes a reference to the provision of a service in the exercise of a public function.

(4) A public function is a function that is a function of a public nature for the purposes of the Human Rights Act 1968.

…

(10) Schedule 3 (exceptions) has effect.

…

149 Public sector equality duty

(1)A public authority must, in the exercise of its functions, have due regard to the need to –

(a) eliminate discrimination … and any other conduct that is prohibited by or under this Act;

(b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;

(c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

(2) A person who is not a public authority but who exercises public functions must, in the exercise of those functions, have due regard to the matters mentioned in subsection (1)."

…

Part 7 of Schedule 3 to the Act relates to separate and single sex services. Paragraphs 26, 27, 28 and 30 are as follows:

"**Separate services for the sexes**

26

(1) A person does not contravene section 29, so far as relating to sex discrimination, by providing separate services for persons of each sex 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.

(2) A person does not contravene section 29, so far as relating to sex discrimination, by providing separate services differently for persons of each sex if—

(a) a joint service for persons of both sexes would be less effective,

(b) the extent to which the service is required by one sex makes it not reasonably practicable to provide the service otherwise than as a separate service provided differently for each sex, and

(c) the limited provision is a proportionate means of achieving a legitimate aim.

(3) This paragraph applies to a person exercising a public function in relation to the provision of a service as it applies to the person providing the service.

Single-sex services

27

(1) A person does not contravene section 29, so far as relating to sex discrimination, by providing a service only to persons of one sex if—

(a) any of the conditions in sub-paragraphs (2) to (7) is satisfied, and

(b) the limited provision is a proportionate means of achieving a legitimate aim.

(2) The condition is that only persons of that sex have need of the service.

(3) The condition is that—

(a) the service is also provided jointly for persons of both sexes, and

(b) the service would be insufficiently effective were it only to be provided jointly.

(4) The condition is that—

(a) a joint service for persons of both sexes would be less effective, and

(b) the extent to which the service is required by persons of each sex makes it not reasonably practicable to provide separate services.

(5) The condition is that the service is provided at a place which is, or is part of—

(a) a hospital, or

(b) another establishment for persons requiring special care, supervision or attention.

(6) The condition is that—

(a) the service is provided for, or is likely to be used by, two or more persons at the same time, and

(b) the circumstances are such that a person of one sex might reasonably object to the presence of a person of the opposite sex.

(7) The condition is that—

(a) there is likely to be physical contact between a person (A) to whom the service is provided and another person (B), and

(b) B might reasonably object if A were not of the same sex as B.

(8) This paragraph applies to a person exercising a public function in relation to the provision of a service as it applies to the person providing the service.

Gender reassignment

28

(1) A person does not contravene section 29, so far as relating to gender reassignment discrimination, only because of anything done in relation to a matter within sub-paragraph (2) if the conduct in question is a proportionate means of achieving a legitimate aim.

(2) The matters are –

(a) the provision of separate services for persons of each sex;

(b) the provision of separate services differently for persons of each sex;

(c) the provision of a service only to persons of one sex.

…

Services generally provided only for persons who share a protected characteristic

30

If a service is generally provided only for persons who share a protected characteristic, a person (A) who normally provides the service for persons who share that characteristic does not contravene section 29(1) or (2) –

(a) by insisting on providing the service in the way A normally provides it, or

(b) if A reasonably thinks it is impracticable to provide the service to persons who do not share that characteristic, by refusing to provide the service."