



2025 No. 101415/01.

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND
KING'S BENCH DIVISION (JUDICIAL REVIEW)

**In the Matter of an Application for Leave to Apply for
Judicial Review by:**

EQUALITY COMMISSION FOR NORTHERN IRELAND

**And in the matter of the application of the judgment of the Supreme Court in
For Women Scotland Ltd v The Scottish Ministers in Northern Ireland**

**GROUNDING AFFIDAVIT OF GERALDINE MCGAHEY, ON BEHALF OF THE
EQUALITY COMMISSION FOR NORTHERN IRELAND**

I, Geraldine McGahey, Chief Commissioner of the Equality Commission for Northern Ireland, aged 18 years and upwards, make Oath and say as follows:

Introduction

1. I am Geraldine McGahey, Chief Commissioner of the Equality Commission for Northern Ireland ('the Commission', 'the Equality Commission', 'ECNI', 'the Applicant') and I am duly authorised to make this affidavit on behalf of the Applicant; and do so in order to set out succinctly the factual and evidential background in relation to the application and to exhibit relevant documents. This is the first affidavit I have made in this application.
2. I make this affidavit from my own knowledge and from examining the documents held by the Equality Commission for Northern Ireland in relation to the application. In the course of this affidavit, I refer to a bundle of documentation in support of the following averments, exhibited hereto and marked 'GMcG 1' at the time of swearing.

Equality Commission for Northern Ireland

3. The proposed Applicant is the Equality Commission for Northern Ireland, Equality House, 7-9 Shaftesbury Square, Belfast, BT2 7DP. The Commission is a non-departmental public body established by the Northern Ireland Act 1998. Its powers and duties derive from a number of statutes which have been enacted over the last decades, providing protection against discrimination on the grounds of age, disability, race, religion and political opinion, sex, gender reassignment and sexual orientation. The Commission has responsibilities arising from the Northern Ireland Act 1998 in respect of the statutory equality and good relations duties which apply to public authorities. The Commission also has functions under the Northern Ireland Act, as amended, in respect of the implementation of Article 2 of the Windsor Framework ('WF').

Background

4. The background to the application for leave to apply for judicial review by the Commission is the decision of the Supreme Court in *For Women Scotland Ltd v The Scottish Ministers* ('FWS') [GMcG 1, pages 51-138]. In *FWS*, the Supreme Court considered the meaning of 'man', 'woman' and 'sex' in the Equality Act 2010 ('EA 2010'). The issue arose in response to the definition of the term 'woman' in the Gender Representation on Public Boards (Scotland) Act 2018 ('2018 Act'). Statutory guidance produced by the Scottish Ministers stated that, under the 2018 Act, the definition of a 'woman' was the same as in the EA 2010. Section 212 of the EA 2010 defines 'woman' as 'a female of any age'. The statutory guidance also stated that a person with a Gender Recognition Certificate ('GRC') recognising their gender as female is considered a woman. A GRC is a document that allows people to change their gender legally, and the conditions under which a person can receive one are set out in the Gender Recognition Act 2004.
5. The Petitioner, For Women Scotland Limited, challenged the lawfulness of the statutory guidance. It argued that the definition of a 'woman' under the EA 2010 refers to biological sex only, meaning that a biological male with a GRC in the female gender is not considered a woman under the EA 2010.
6. The Scottish Ministers opposed this argument contending that the definition of a 'woman' under the EA 2010 also refers to 'certificated sex', meaning that it includes a biological man with a GRC in the female gender. This interpretation was supported by the Inner House of the Court of Session, which is the equivalent of the Court of Appeal in Northern Ireland. The Supreme Court, in its decision handed down on 16 April 2025, reached a different conclusion on how to define 'sex' than the Inner House of the Court of Session.
7. The Supreme Court in *FWS* unanimously decided that the terms 'man', 'woman' and 'sex' in the EA 2010 refer to biological sex only, as any other interpretation

would render the EA 2010 incoherent and impracticable to operate. Therefore, a person with a GRC in the female gender does not come within the definition of a 'woman' under the EA 2010 and the statutory guidance issued by the Scottish Ministers was incorrect. The Supreme Court was at pains to state that its interpretation of the EA 2010 does not remove protection from transgender people, with or without a GRC, as they were separately protected against unlawful discrimination on the ground of gender reassignment.

8. In Great Britain, the Equality and Human Rights Commission (EHRC) has a similar, although not identical remit, to the Equality Commission in Northern Ireland. In particular, ECHR is not required to apply the requirements of the Windsor Framework. Proposed revisions to the EHRC Code of Practice for Service Providers have been submitted to the Government for approval and a decision on this is awaited. An 'interim update' was issued by the EHRC in the immediate aftermath of the Supreme Court judgment, but this has since been withdrawn.

The Commission's 'Roadmap'

9. On 27 June 2025, the Equality Commission produced a detailed analysis in a consultative Legal Paper [GMcG 1, pages 139-204] as to how and why it had come to a considered view that there is significant legal uncertainty in Northern Ireland. Importantly, the Commission did not seek to answer these legal uncertainties. This Legal Paper was published concurrently for consultation (see paragraph 15 below).
10. The Commission does not consider that these legal uncertainties are at all likely to be dealt with either in Parliament at Westminster or in the Northern Ireland Assembly. Although the Assembly has the competence to legislate in the area of equality and non-discrimination, to the extent that European Union law, via Article 2 WF, requires a different interpretation from that in *FWS*, Assembly legislation that attempted to impose the *FWS* interpretation in areas covered by the Windsor Framework, would be *ultra vires*. So too, unless Parliament limited the application of section 7A of the European Union (Withdrawal) Act 2018, equivalent legislation emanating from Westminster would be subject to being disapplied in Northern Ireland. Assuming that European Union law was contrary to the *FWS* interpretation, a UK-wide approach could be achieved that was consistent with Article 2 WF, but only by reversing the *FWS* judgment, and there is no indication that this is contemplated. As a result, the Commission concludes that the challenges posed for Northern Ireland are unlikely to be resolved through legislative action.
11. In Section C of the Equality Commission's Legal Paper, a proposed 'Roadmap' was included which set out a number of stages by which legal certainty may be maximised [GMcG 1, pages 168-171]. The Roadmap's aim was to bring together regulators, Government departments and other interested bodies in a joint

conversation which was intended to culminate in requesting the Courts to provide legal guidance on the various legal uncertainties.

12. For avoidance of any doubt, the Commission is not challenging the judgment of the Supreme Court in *FWS* as a decision regarding the interpretation of the Equality Act 2010 and the relationship between that legislation and the Gender Recognition Act 2004. We are working to maximise clarity as to the applicability of that judgment in Northern Ireland. Our aim, in first seeking legal clarity from the Court and only then developing guidance, is to ensure that we may produce guidance that is as accurate and as workable as is possible. The Commission considers that producing guidance first would result in an immediate legal challenge to some or all of the guidance, from conflicting positions, and without any certainty that the central legal issues would be the focus of such litigation. As is noted in our Order 53 Statement, the prospect of satellite litigation against the Commission is certain. We are already aware of one actual application for judicial review that has been commenced (taken by the Good Law Project: Application 2025 No. 058765/01), and of one other for which a pre-action protocol letter has been served (proposed by the Women's Rights Network Northern Ireland). In both, the issue of the application of the *FWS* judgment in Northern Ireland is central to the case, although in the Commission's opinion the issue is presented in both cases in ways that are not likely to result in the Court having the opportunity to consider the issue in the most productive way.
13. If the Commission were to be required to produce guidance without the central legal issues identified in the Order 53 Statement being resolved satisfactorily, further litigation is almost certain. Having to review guidance in light of waves of litigation as the various legal uncertainties in this field are litigated, perhaps over many years, would constitute, in the Commission's opinion, an inefficient use of the Commission's scarce resources, and an inefficient use of Court time. Protracted and *ad hoc* litigation, in our view, should be avoided if at all possible. In taking this course of action, we appreciate that it causes some delays in the Commission issuing guidance, but it has the aim of reducing the risk for employers and service providers that their policies will be subject to legal challenge. The consideration of these legal uncertainties by the Court at this time and in the way proposed has the potential to enable these contentious issues to be worked through systematically, in a focused manner which respects the diversity of deeply held beliefs. It is also hoped that this planned and structured approach may mitigate the toxicity of debate around how to address what may be considered as the tension between what are described as the rights of biological women and the rights of transgender persons.
14. The Commission's Roadmap, as set out in the Commission's Legal Paper consisted of six steps. The first step in the Roadmap was the publication of the Legal Paper itself, which included, at Annex 2, 'Interim Information' (not guidance)

for employers, service providers and public authorities [GMcG 1, pages 182-190]. The Legal Paper identified the principal legal uncertainties and posed various questions about what final guidance stakeholders will need from the Commission and whether it has appropriately mapped the areas where the Court could usefully provide more legal certainty.

15. The second step was a 12-week consultation period in which all stakeholders had an opportunity to respond and comment on the issues in this Paper. A copy of the 'consultation invitation' is included herewith [GMcG 1, pages 205-207]. This consultation period began on 27 June 2025 and ended on 19 September 2025. The Commission was especially keen to hear from the regulators and Government departments that have an interest in the allied legislation which sits alongside the Sex Discrimination Order (NI) 1976. We, therefore, included in Annex 3 of our Legal Paper a range of allied legislation which use the words 'women', 'men', 'girls', 'boys' and 'sex', without definition [GMcG 1, pages 191-193]. Responses from employers, those providing goods and services to the public and broader civil society were encouraged.
16. The consultation focused on the Commission's understanding of the legal uncertainties with consultee responses presenting opposing views as to the extent to which the *FWS* judgment applied (in Northern Ireland) or not. We also asked consultees their views as to the usefulness of the 'Interim Information' provided by the Commission and whether further information would be helpful at this stage. The consultation elicited 39 responses, which the Commission has analysed. The results of this analysis (named the 'Consultation Summary Report') are included herewith [GMcG 1, pages 208-218].
17. The third step, and running concurrently with the consultation, was that the Commission sent pre-action protocol letters ('PAP letters') to people and organisations that we considered have a direct interest in resolving the legal uncertainties identified. As part of this process a number of additional organisations identified themselves as having an interest in this issue and requested a PAP letter from the Commission. I understand that these letters are a necessary part of the process of seeking the guidance of the Court in judicial review proceedings.
18. In order for the Courts to be in the best position to adjudicate, the Commission wanted a broad range of actors and views to join us in making this application or seeking to intervene in the case. We, therefore, sought to identify the questions we intended to present to the Court and the parties who might wish to intervene in this application to the High Court.
19. The Commission issued PAP letters over a period from 22 July to 7 August to 59 organisations that the Commission deemed were most likely to consider that they

had an interest (or that they considered had an interest) in the issues we now seek to litigate. The list of those who received a PAP letter [GMcG 1, pages 219-220] and a template of the PAP letter [GMcG 1, pages 222-252] are attached herewith. The same PAP letter was sent to all identified interested parties with the only changes being in respect of date of service and the recipients' respective names and addresses.

20. The Commission received 22 responses to the PAP letters. A list of those who responded [GMcG 1, pages 221] and copies of their individual responses [GMcG 1, pages 253-343] are included herewith.
21. Two of the respondents to the PAP letters, the Department of Education and the Department for Communities, objected to the Commission's proposed application to the Court. They requested specifically that their responses be brought to the Court's attention, and I do that accordingly [GMcG 1, pages 253 and 254-255 respectively].
22. Step 4 of the Roadmap is an application for leave to apply for judicial review to seek to elicit judicial guidance on how equivalent terms in the Northern Ireland equality legislation which is directly within the remit of the Commission should be interpreted, so as to enable the Commission to produce accurate and workable guidance for employers, service providers and public bodies, among others.
23. Having now completed the first three steps and carefully considered the resulting responses to the PAP letters and to the consultative Legal Paper, the Commission is now embarking on the fourth step, which involves this application for leave to apply for judicial review seeking an advisory declaration as to the correct legal approach to take. The Commission is realistic that the Court will not be in a position to answer each and every question posed in the Legal Paper along with each and every legal argument. But we are seeking its interpretation of the legislation with a view to identifying the foundational legal principles which the Commission can use subsequently to provide meaningful, practical and stable guidance.
24. The legal issues identified in the Order 53 Statement reflect our understanding of the responses of those consulted. We propose three alternative interpretations of the relevant legislation. For the avoidance of doubt, the three alternative formulations of the proposed advisory declaration are informed by the current debate concerning the meaning of 'sex' and related terms in Northern Ireland Equality Law and the Relevant Allied Legislation (for the definition of these terms, see Order 53 Statement, at paragraph 1.2 and 1.6 respectively) and are based on the Commission's current understanding of the conflicting views of how Northern Ireland Equality law should be interpreted following *FWS*. They set out the territory of the debate, and the Commission accepts that the Court may ultimately adopt a formulation which falls between these three interpretations. The proposed

interpretations are not intended to set out any Commission policy position of the type that would be called for were fresh legislation proposed, for example. The Commission's policy position is to seek clarity from the Court *de lege lata*.

25. In making this application, the Commission is mindful of the limits of its statutory responsibilities and, as a result, the grounds on which the Commission is seeking leave are neither as broad as some of those consulted would have wished, nor as comprehensive as the Court might expect.
26. To date, two organisations, the Good Law Project and the Rainbow Project, have indicated in their responses to the PAP letters that they will or are minded to intervene in judicial proceedings [GMcG 1, pages 256-259 and 278-298 respectively]. Two other organisations, the Women's Rights Network NI and the Northern Ireland Office, have indicated in their responses to the PAP letters a wish to be notified as interested parties [GMcG 1, pages 260-277 and 305-310 respectively]. One other organisation, Sex Matters, has indicated a wish to be informed of any application to the Court [GMcG 1, pages 299-304]. The Commission has separately identified two organisations, the NI Human Rights Commission (who responded to the PAP letter [GMcG 1, pages 311-317]) and the NI Commissioner for Children and Young People ('NICCY') (who was not served with a PAP letter, but who responded to the general consultation [GMcG 1, pages 344-347]), who it intends to notify as interested parties for reasons outlined in paragraphs 28-29 below.
27. The Commission, in its Order 53 Statement, has also identified Relevant Allied Legislation, i.e. the legislation which most closely interacts with Northern Ireland Equality Law and which will impact on the day-to-day operations of many service providers and employers. In this regard we have requested the Court to indicate whether or not there is a presumption that terms like 'sex' have the same meaning in this relevant allied legislation as the equality legislation. Answering this question would create significantly more legal certainty. In Great Britain, we understand that the meaning of such terms in allied legislation is proving controversial since it was not addressed directly by the Supreme Court.
28. An equivalent issue arises with regard to the potential application of the Human Rights Act 1998 to the issues that the Supreme Court decided in *FWS*. It is beyond the powers of the Commission to initiate litigation under the Human Rights Act 1998. That is within the competence of the Northern Ireland Human Rights Commission ('NIHRC'). We hope that NIHRC will seek to join this application so that a more comprehensive analysis of the legal principles may be undertaken by the Court.
29. An equivalent issue arises with regard to another aspect of international human rights law. There are two types of international human rights law. The first, the

European Convention of Human Rights, has been implemented in Northern Ireland via the HRA (see preceding paragraph). The second is non-implemented conventions like the UN Convention on the Rights of the Child which may also be relevant. This Convention is relevant to the work of NICCY.

30. In the event of the Court granting leave and providing clarification of the legal position, the Commission is minded to move to the fifth step of the Roadmap when the Commission will provide draft guidance, which will then be subject to consultation. The sixth and final step of the Roadmap is when the Commission will provide final, high-level guidance for employers, service providers and public bodies. The Equality Commission, unlike the EHRC, may only produce a Code of Practice under the Sex Discrimination (NI) Order 1976 in the context of employment issues and not on the provision of goods, facilities and services.

31. Save as otherwise appears I depose the foregoing from my own personal knowledge and belief.



SWORN at .. Lewis Silkin (NI) LLP, LINEN
SILEE,
in the City of Belfast
this 2nd day of December 2025
before me, a solicitor CIARA FULTON
empowered to administer oaths

This affidavit is filed on behalf of the Applicant by their Solicitor, Eoin O'Neill, of the Equality Commission for Northern Ireland of Equality House, 7-9 Shaftesbury Square, Belfast, BT2 7DP.