IN THE CANTERBURY COUNTY COURT

Claim no. K01CT207

BETWEEN

HARRIET HAYNES

Claimant

-and-

(1) PAUL THOMSON

(2) ANNA GOODWIN

ON BEHALF OF THE ENGLISH BLACKBALL POOL FEDERATION

(AN UNINCORPORATED ASSOCIATION)

Defendants

JUDGMENT

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1 This reserved judgment follows a trial which took place before me between 7 and 11 April 2025, following which the parties required further time in which to file detailed written submissions about the effect on this case of *For Women Scotland Ltd v The Scottish Ministers* [2025] UKSC 16 ("*FWS*"). The final round of submissions was filed on 27 May 2025.

2 The Claimant was represented at trial by Ms White; the Defendants by Ms Crowther KC and Mr Maini-Thompson. The Claimant's submissions regarding *FWS* were the combined work of Ms Russell KC, Ms White and the Claimant's solicitor Mr Champ.

3 Ms Haynes is an expert player of English eight-ball pool and a trans woman. She has a gender recognition certificate under the Gender Reassignment Act 2004.

4 Mr Thomson and Mrs Goodwin are respectively the Chairman and the Secretary of the English Blackball Pool Federation (the "EBPF").

5 The EBPF is an unincorporated association and one of the two main organisations which organize pool competitions in England. It is non-profit making, and is run by volunteers. The EBPF county competitions include a competition for Women's teams. Those counties which can muster enough female players divide Women's teams into A and B, but some just have a single team.

6 On 27 August 2023 the EBPF announced a change in its rules so that only people who were born female would be permitted to play in its female competitions and teams. The change took effect on 3 December 2023.

7 If it had not been for that rule change, the Claimant would have continued to play for the EBPF Kent women's county A team. The rule change has prevented her from doing so.

8 The Claimant asserts that this exclusion is direct discrimination against her on grounds of gender reassignment, in breach of the Equality Act 2010 ("the EA 2010"). Her pleaded claim also referred to discriminatory exclusion from other EBPF events, but Ms White confirmed to me on the second day of the trial that this complaint is not pursued.

Terminology

9 The game of pool exists in different forms. The variant dealt with by the EBPF is English eight-ball pool. Save when discussing different forms of the game, I will refer to English eight-ball pool simply as "pool".

10 I will follow the Supreme Court in *FWS* by using the term "biological women" for a person who was born female, "trans woman" for someone who was male at birth but who has the protected characteristic of gender reassignment, "GRC" for a gender reassignment certificate, "biological sex" to describe the sex of a person at birth, and "certificated sex" to describe the sex attained by the acquisition of a GRC.

The defence in outline

11 The Defendants raised essentially three lines of defence to the complaint of exclusion from the women's county A team.

12 First, they denied that the revised rules discriminated against the Claimant on the grounds of gender reassignment. They asserted that the rules excluded her because she was born male: if she had been a transgender person who was born female, she would not have been excluded. The exclusion was therefore discrimination on grounds of sex, not gender reassignment. As the claim did not allege sex discrimination it should be dismissed.

13 Second, if (contrary to their first point) the Defendants had discriminated on grounds of gender reassignment, there was no unlawful discrimination because pool is a "gender-affected activity" as defined in s195(3) of the EA 2010, and the revised rules were necessary to secure fair competition as permitted by s195(2).

14 Third, the Defendants argued that the revised rules were justified under paragraphs 26, 27 and 28 of Schedule 3 to the Act as a proportionate means of achieving a legitimate aim. That aim was said in the Defence to be "promoting the integrity of the game through fairness of competition and diversity through inclusion of females in the game of pool". Paragraphs 26 and 27 relate only to sex discrimination, and as no claim was ever made on that basis they are irrelevant. Paragraph 28 concerns gender reassignment discrimination.

The consequences of FWS

15 On 16 April 2025, five days after the trial concluded, the Supreme Court gave judgment in *For Women Scotland Ltd v The Scottish Ministers* [2025] UKSC 16. It is the Defendants' position that in the light of *FWS* the claim must be dismissed. The Claimant initially accepted that was so but then, with the Defendants' consent and my permission, reversed her position and filed amended submissions arguing that the claim should still succeed.

16 I have decided that the Claimant's original concession was correct. The claim cannot survive the outcome of *FWS*. I will explain why that is at paragraphs 61 to 124.

17 My conclusion means it is not necessary to decide whether the defences under s195 EA 2010 or paragraph 28 of Schedule 3 to EA 2010 pool are made out. However, the question of whether pool is

a gender-affected activity was thoroughly explored at the trial with the aid of expert evidence, and I will set out my views about it. I will also deal briefly with paragraph 28 of Schedule 3.

18 The five main sections of this judgment are:

> Section 1: factual evidence and findings of fact: paragraphs 19 to 51.
>
> Section 2: the relevant provisions of the Equality Act 2010: paragraphs 52 to 60.
>
> Section 3: the effect of *FWS*: paragraphs 61 to 124.
>
> Section 4: whether pool is a gender-affected activity and if so whether exclusion is necessary to secure fair competition: paragraphs 125 to 263.
>
> Section 5: whether exclusion is a proportionate means of achieving a legitimate aim: paragraphs 264 to 266.

FACTUAL EVIDENCE AND FINDINGS

19 The Claimant gave evidence herself. Both Defendants gave evidence. There were two other witnesses of fact: Harvey Elmhirst and James Goodwin. Mr Elmhirst was a member of the EBPF executive committee; Mr Goodwin was the husband of Anna Goodwin and helped her in running the EBPF.

20 The parties called two experts each. For the Claimant they were Professor Formaggio (physics) and Dr Hamilton (biology); for the Defendants they were Dr Alciatore (engineering) and Dr Hilton (biology). I will only discuss the witnesses of fact in this section of the judgment. The expert evidence dealt with whether pool is a gender-affected activity, and I will refer to it when I consider that question.

21 Both because of *FWS* and because of the way in which the dispute narrowed at trial, it is not necessary to set out all of the factual evidence that was given. As mentioned earlier, the pleaded claim alleged discriminatory exclusion from EBPF competitions as well as from the Kent county A team. The Defendants responded that in any event the Claimant was not eligible under its rules to enter those other competitions because of her professional status. The Claimant's position was that this was not a consistently applied rule, and that it was invoked as a pretext to exclude her. As this aspect of the claim was not pursued, I do not need to consider the evidence about the Defendants' interpretation and application of the EBPF rules about participation by professional players.

The Claimant's contract with Ultimate Pool Group

22 The Ultimate Pool Group ("UPG") is a commercial organisation which runs its own competitions.

23 The Claimant's written evidence was that she became a professional with UPG in December 2022. She said that she was a professional in the UPG "open" category until November 2023, and that in January 2024 she became a UPG female professional.

24 In cross examination, the Claimant confirmed that she had a written contract with UPG, and acknowledged that the Defendants had asked to see a copy which had not been provided. She belatedly produced a copy, and was recalled to give evidence about it on the third day of trial.

25 The Claimant's UPG contract is dated 20 December 2023. It runs until December 2026, terminable by UPG on three months' notice and by either party on 14 days' notice in case of material breach or insolvency. The Claimant said that it was still in force.

26 The UPG contract contains a clause which forbids her from playing in any non-UPG English eight-ball pool events (which expressly includes "any event, tournament or match") without UPG's prior written consent. Ms Haynes said in cross examination that although this is what the contract provides "it is not how it's deemed to be" as she knew of other players who had signed with UPG but played in other cue sports; she did not know whether all of them had UPG's prior consent but among them were some close friends who did not have it. She accepted however that she had no intention of breaking her contract with UPG. She did not accept that the definition of "event" was wide enough to cover a county match.

27 The Claimant said that before December 2023 she had played for UPG but without any written agreement. She did not accept that there had been a similar restriction on playing in non-UPG events, saying that she played in EBPF competitions in 2023.

28 The Claimant confirmed that she had never asked UPG for permission to play in an EBPF event: she said she believed that she would have been allowed to do so if she had asked, as there were "multiple occasions when UPG players had played in EBPF county competitions" last year.

29 The Claimant accepted that UPG had refused consent for another female professional (Danielle Randle) to play on a professional tour organized by the Defendants. I found some of her answers difficult to follow, but the position she generally took was that UPG did not or would not refuse consent for amateur events, and that its main concern was to stop its professionals from playing for its rival organisation, the International Pool Players Association.

30 I have no doubt that the EBPF county competition was an "event, tournament or match" for which the Claimant required written consent from UPG. As the Claimant had no intention of breaking her contract, I take it that she would not have played for the EBPF Kent A team without that consent. The Claimant could easily have put the matter beyond doubt by applying to UPG, but did not do so. If she was confident of their answer, it is difficult to see why she did not. Applying the balance of probabilities test, I am not satisfied that UPG would have consented.

The decision to make new rules

31 Prior to the rule change, the Defendants allowed trans women to play in female competitions provided blood tests showed that their testosterone was below a certain level. Ms Goodwin said in her witness statement that this was an approach which preceded her involvement with the EBPF and which she understood followed International Olympic Committee guidelines.

32 Mr Thomson's witness statement said that it was in 2022 that Ms Goodwin first made him aware of complaints made by female players about competing against transgender women; he asked Ms Goodwin and her husband to look into it further, which eventually led to a meeting of the EBPF Executive Committee on 30 July 2023 at which the issue was discussed. Mr Thomson confirmed that chronology when he gave evidence. He said in general terms that he had received "loads" of complaints about transgender players competing against women.

33 Ms Goodwin's witness statement also said she first became aware of complaints in 2022, at which point she had used a suggestions box and obtained "about 15-20 anonymous written suggestions", of

which about 90% were from other women saying either that it was unfair that they should have to compete against biological men or that they did not feel comfortable sharing toilets. In cross examination she said that the formal complaint to her and the subsequent use of a suggestions box was in 2023, and not 2022 as stated, but that she had been aware of complaints long before that. The event which produced the anonymous suggestions had 64 players taking part; some of those responses were one liners, some were longer; she had not kept any of them.

34 The decision to change the rules was made at a meeting of the EBPF executive committee on 31 July 2023. The EBPF AGM was due to take place in early October, just over two months later. It is common ground that the Executive Committee did not invite any trans player to attend the meeting or provide any comments for discussion. It had not taken any poll of its members about the proposed change.

35 The minutes of the meeting on 31 July 2023 mentioned Mr Thompson having "presented a brief presentation outlining other sporting organisations' rulings", to a discussion having taken place, and to a "majority vote that all EBPF ladies' events would now be a cis gender category. All other categories will be open events."

36 The EBPF announced the rule change in a Facebook post of 27 August 2023. The announcement said that "after careful consideration" it had decided "to revise the eligibility criteria for participation in our ladies' events, these events will be exclusively open to individuals who are born female".

37 This announcement was posted by Mr Thomson within a few hours of an announcement being made to the same effect by the WEPF and the UPG. He was adamant that he had drafted the EBPF document before seeing the UPG announcement and that indeed he had never read the UPG announcement. He became very heated when Ms White persisted with the suggestion that one had been copied from the other. The origin of the announcement has no bearing on my decision, but Mr Thompson's position was so odd that it deserves mention.

38 Except for the word "ladies" the phrases quoted in paragraph 36 above also appeared in the UPG announcement. Other parts of the EBPF document were strikingly similar to the UPG document. I set out some examples:

UPG document	*EBPF document*
"committed to transparency and fairness within the realm of sports"	"committed to transparency and fairness within our organisation"
"we want to address an important update"	"we want to announce an important update"
"We understand that this decision may prompt questions and discussions within our sport"	"We understand that this decision may prompt questions and discussions within our sport"
"Our ultimate goal is to ensure the continued growth and development of the sport we all love, while maintaining a harmonious balance between inclusivity and the integrity of competition ."	"The EBPF goal is to ensure the continued growth and development of our sport we all love, whilst maintaining a harmonious balance between inclusivity and the integrity of competition we hold throughout the year."
"We recognise the importance of fostering an environment where everyone can participate and thrive, and we remain dedicated to upholding these principles to the best of our ability."	"The EBPF recognise the importance where everyone plays in an environment where individuals can participate and thrive, and we remain dedicated to upholding these principles to the best of our ability."

39 The final paragraph of the EBPF announcement did not have an equivalent in the UPG document, and said in its original version (punctuated as in the original)

> "We recognise. That this is a sensitive topic, but we the EBPF must look out for everyone and not just a few with that said its important we as an organisation promote and ensure fairness so we all enjoy a safer environment and play the game with equality and fairness for all."

40 Mr Thomson said that after discussion with another committee member he changed "safer" to "safe". That was done within a few hours of the original announcement being posted. Fairly soon afterwards he issued a further revision in which references to safety had been removed.

41 It is obvious that the EBPF announcement was substantially based on the UPG document, with a few minor (and in some cases ungrammatical) alterations. Mr Thomson's insistence to the contrary was unbelievable.

42 Mr Thomson signed two witness statements. The second statement said that there were errors in the first statement and set out the corrections. Despite that, Mr Thomson said at times in his oral evidence that he could not identify any errors in his first statement.

43 In view of those points, I would not have been willing to rely on Mr Thomson's uncorroborated evidence. However, I do not consider that any relevant point turns on that evidence. I see no reason to doubt Ms Goodwin's evidence about the complaints received from other players.

Injury to feelings

44 It is the Claimant's pleaded case that the announcement of the rule change caused her distress and upset, and that she was then subject to numerous hurtful remarks on social media that referenced her directly. That seems to imply that the Defendants were responsible for those remarks, but she did not assert in evidence that the Defendants had themselves made hurtful or abusive comments, or that they had encouraged or suggested that anyone else should do so.

45 The Claimant objected to the reference in the final paragraph of the August announcement to "a safer environment". She said she was particularly upset by the implication that she was making others feel unsafe. It was this part of the message which was subsequently edited out by the Defendants. I accept that the announcement as originally worded loosely suggested that it was in some way unsafe for trans women to participate in female competitions.

46 A second specific complaint made by the Claimant in oral evidence was that the Defendants had re-posted their announcement that she had brought a claim against them at a time when she was playing in a national event. She accepted that the announcement was in itself accurate and not offensively worded.

47 Thirdly, the Claimant said that "in a way" the Defendants were responsible for the situation which arose in November 2023 when Lynne Pinches conceded a final in an English Pool Association match rather than play against her. Although the EPA is quite separate from the EBPF and the Defendants had no control over Ms Pinches, the Claimant believed that Ms Pinches had been prompted to make her protest by the announced change in the EBPF rules, which the EPA had not followed.

48 I do not consider that the Defendants were responsible for the protest by Ms Pinches, and my overall assessment is that the short lived reference to a "safer environment" was the only way in which the Defendants worsened the impact of the rule change, and that only to a modest extent.

The participation of women in pool

49 Mr Goodwin's written evidence was that he had played pool between 1976 and 1982, and then from about 2004. He made general comments that "back then" pool was played in pubs and clubs where in his experience women rarely ventured and were subject to derogatory comments if they did, adding that "in the last 10 years or so… female participation in the game has begun to improve significantly. Women players still get the occasional derogatory comment from the men, but they're now confident to give as good as they get."

50 Mr Goodwin said in cross examination that in his view currently and over the previous decade there was still a sex difference in access to pool in pubs and clubs. Young men would not worry about going to a pub on their own to play; young women would – they may not feel safe; the difference was less but it was still there.

51 As previously mentioned, Mrs Goodwin referred in her statement to complaints made to her directly and via an anonymous suggestions box that some female players objected to competing with trans women on two grounds: they considered it unfair, and did not feel comfortable sharing toilets with them. Those seem to be the two reasons why the Defendants consider that allowing trans women to play in female competitions may reduce participation.

THE EQUALITY ACT 2010

52 I will set out or summarize the relevant provisions of the EA 2010.

Protected characteristics

53 The EA 2010 applies to the nine protected characteristics which are listed in section 4. These include "gender reassignment" and "sex".

Gender reassignment

54 The protected characteristic of gender reassignment is defined in section 7 EA 2010 which states:

> "(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."

Direct discrimination

55 Section 13 EA 2010 is headed "direct discrimination". I only need to quote subsection (1) which reads:

"(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."

Comparators

56 Section 23 EA 2010 is headed "Comparison by reference to circumstances". Subsection 23(1) states:

"(1) On a comparison of cases for the purposes of section 13, 14, 19 or 19A there must be no material difference between the circumstances relating to each case."

Provision of services

57 Section 29 EA 2010 is headed "Provision of services, etc". The first two subsections state:

"(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.

(2) A service-provider (A) must not, in providing the service, discriminate against a person (B)—

(a) as to the terms on which A provides the service to B;

(b) by terminating the provision of the service to B;

(c) by subjecting B to any other detriment."

58 The Defendants accept that the EBPF is a service provider in relation to organizing county fixtures.

Sport

59 Section 195 EA 2010 is headed "Sport" and reads:

"(1) A person does not contravene this Act, so far as relating to sex, only by doing anything in relation to the participation of another as a competitor in a gender-affected activity.

(2) A person does not contravene section 29, 33, 34 or 35, so far as relating to gender reassignment, only by doing anything in relation to the participation of a transsexual person as a competitor in a gender-affected activity if it is necessary to do so to secure in relation to the activity—

(a) fair competition, or

(b) the safety of competitors.

(3) A gender-affected activity is a sport, game or other activity of a competitive nature in circumstances in which the physical strength, stamina or physique of average persons of one sex would put them at a disadvantage compared to average persons of the other sex as competitors in events involving the activity.

(4) In considering whether a sport, game or other activity is gender-affected in relation to children it is appropriate to take account of the age and stage of development of children who are likely to be competitors."

60 Schedule 3 to the EA 2010 is headed "Services and public functions: exceptions". Paragraph 28 reads:

> **"28 Gender reassignment**
>
> (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."

FOR WOMEN SCOTLAND LTD v THE SCOTTISH MINISTERS

61 The Supreme Court gave a single judgment in *FWS*. It set out the general scope of the decision at [2] and [8]:

> "2. It is not the role of the court to adjudicate on the arguments in the public domain on the meaning of gender and sex, nor is it to define the meaning of the word "woman" other than when it is used in the provisions of the EA 2010. The principal question which the court addresses on this appeal is the meaning of the words which Parliament has used in the EA 2010 in legislating to protect women and members of the trans community against discrimination. Our task is to see if those words can bear a coherent and predictable meaning within the EA 2010 consistently with the Gender Recognition Act 2004 ("the GRA 2004")."
>
> "8. The legislation with which this appeal is principally concerned is the EA 2010 and we address the effect, if any, of the GRA 2004 on the interpretation of the terms "sex", "man", "woman", and "male" and "female" used in the EA 2010. The central question on this appeal is whether the EA 2010 treats a trans woman with a GRC as a woman for all purposes within the scope of its provisions, or when that Act speaks of a "woman" and "sex" it is referring to a biological woman and biological sex."

62 That central question arose in judicial review proceedings brought by For Women Scotland to quash guidance to the effect that references in the Equality Act 2010 to a "woman" included a trans woman with a GRC. The Supreme Court held that the guidance was incorrect and that in EA 2010 "woman" meant a biological woman.

63 The Supreme Court rejected the suggestion that "sex" or "woman" can have different meanings at different points in the statute: see [175] and [176] and [189] to [197]. For brevity, I quote only [175] – [176]:

> "175. It is significant, however, that there is only one definition of sex. The concept of sex is of foundational importance in the EA 2010. The words sex and woman appear across different parts of the Act and in many sections. It would be surprising if the words sex and woman were intended to have different meanings in different sections or parts of the EA 2010, as the Inner House concluded, especially given the definitions of "man" and "woman"

in section 212(1) of the EA 2010. Indeed, it would offend against the principle of legal certainty and the need for a meaning which is constant and predictable, especially in the context of an Act with the purposes we have identified, and which has such practical everyday consequences for so many individuals and organisations in society.

176. The general rule, as we have said, is that words or terms used more than once in the same legislation are taken to have the same meaning whenever they appear, and the general purpose of an interpretation provision is to fix the meaning of such a word or term throughout the legislation in question. This presumption can be rebutted where the context requires, even where a saving for context does not appear in the definition section. But this is likely to be rare and giving a variable meaning to a defined term is generally only done where it is clear that there is a genuine drafting error resulting in differential usage of the word or term in the text of the legislation: see for example the observations to this effect in a human rights context in *Secretary of State for Work and Pensions v M* [2004] EWCA Civ 1343, [2006] QB 380 at para 84."

64 The Supreme Court analysed the core provisions of EA 2010, and then considered seven other aspects of the Act, as to which it said at [210]:

"…they too demonstrate that an interpretation of sex based on certificated sex would render the EA 2010 incoherent and unworkable. In other words, the proper functioning of these provisions depends on a biological interpretation of sex."

65 As part of that exercise, the Supreme Court considered s195 EA 2010. At paragraph [232] it set out the terms of that section (as I have done above at paragraph 59). It then continued at paragraphs [233] to [236]:

"233. The Scottish Ministers and the EHRC submit that a biological sex reading of this provision makes it partly unnecessary. They contend that on this reading it would only be necessary in relation to single-sex sports to exclude indirect gender reassignment discrimination, rather than both direct and indirect as per section 195(2). We are doubtful that this submission is correct, but in any event, it appears to miss the point. The real question is whether the provision operates coherently or not if a certificated sex interpretation of sex is required to be adopted.

234. We consider that this provision is, again, plainly predicated on biological sex, and may be unworkable if a certificated sex interpretation is required. The exemption it creates is a complete exemption in relation to the prohibition against sex discrimination in sport in relation to the participation of a competitor in a sport that is a gender-affected activity (section 195(1)) and a partial exemption for gender reassignment discrimination in relation to the participation of a transsexual person as a competitor in a gender-affected activity but only where the treatment is necessary for fairness or safety reasons. In both cases the exemption cannot apply unless there is a gender-affected activity. This is a gateway condition.

235. A gender-affected activity is a defined term. It depends on a determination of whether the physical strength, stamina or physique of average persons of one sex would put them at a disadvantage as competitors in a particular sport when compared to average persons of the other sex. Take boxing as an example. This is undoubtedly a gender affected activity on a biological interpretation of sex in section 195(3). On this basis, it is readily apparent (indeed, obvious) that women's average physical strength, stamina and/or physique will disadvantage

them as competitors against average men in a boxing match. However, if average women as a group for comparison with average men for the purposes of section 195(1) includes trans women with GRCs (so legally female but biologically male) the differences in strength, stamina and physique between the two groups may begin to fade. Although at present the numbers of trans people with GRCs may be statistically insignificant, that could not have been predicted at the time the GRA 2004 was enacted, and the effect of section 9(1) cannot depend on how many people are issued with GRCs. Each group has members of the opposite biological sex in it and the gateway condition may be difficult to establish at all. Even if the gateway condition is established, the approach to the group of trans sportswomen who are potentially to be excluded would differ on a rationally unconnected basis: whether or not they have a paper certificate. To exclude trans women with a GRC from the boxing competition, the organiser would have the additional burden of showing that it was necessary to do so in the interests of fairness or safety, whereas a trans woman without a GRC could simply be excluded as a male under section 195(1).

236. On the other hand, a biological definition of sex would mean that a women's boxing competition organiser could refuse to admit all men, including trans women regardless of their GRC status. This would be covered by the sex discrimination exception in section 195(1). But if, in addition, the providers of the boxing competition were concerned that fair competition or safety necessitates the exclusion of trans men (biological females living in the male gender, irrespective of GRC status) who have taken testosterone to give them more masculine attributes, their exclusion would amount to gender reassignment discrimination, not sex discrimination, but would be permitted by section 195(2). It is here that the gender reassignment exception would be available to ensure that the exclusion is not unlawful, whether as direct or indirect gender reassignment discrimination."

66 The conclusion was stated at [264]:

"264. For all these reasons, this examination of the language of the EA 2010, its context and purpose, demonstrate that the words "sex", "woman" and "man" in sections 11 and 212(1) mean (and were always intended to mean) biological sex, biological woman and biological man. These and the other provisions to which we have referred cannot properly be interpreted as also extending to include certificated sex without rendering them incoherent and unworkable. In other words, in relation to sex discrimination (for the purposes of sections 11 and 212(1)), a person with the protected characteristic of sex has the characteristic of their biological sex only: a trans man with a GRC (a biological female but legally male for those purposes to which section 9(1) of the GRA 2004 applies) is a woman for the purposes of section 11 and a trans woman with a GRC (biologically male but legally female for those purposes to which section 9(1) applies), is a man and not entitled to be treated as a woman under the EA 2010. This conclusion does not remove or diminish the important protections available under the EA 2010 for trans people with a GRC as we have explained. To the contrary, this potentially vulnerable group remains protected in the ways we have described. In these circumstances, and notwithstanding that there is no express provision in the EA 2010 addressing the effect which section 9(1) of the GRA 2004 has on the definition of "sex", we are satisfied that the EA 2010 does make provision within the meaning of section 9(3) that disapplies the rule in section 9(1) of the GRA 2004."

67 The effect of that paragraph was summarized at [265](xviii):

> "(xviii) We therefore conclude that the provisions of the EA 2010 which we have discussed are provisions to which section 9(3) of the GRA 2004 applies. The meaning of the terms "sex", "man" and "woman" in the EA 2010 is biological and not certificated sex. Any other interpretation would render the EA 2010 incoherent and impracticable to operate (para 264)."

The parties' submissions about FWS

68 Both parties have filed two sets of post-trial submissions about *FWS*: their arguments about its effect, and their responses to their opponents' submissions.

69 Ms Crowther submitted that the Claimant has been prevented from playing for the Kent women's A pool team because her biological sex is male. That, she argued, is discrimination on grounds of sex, not gender reassignment: the Defendants' rules do not involve any discrimination on grounds of gender reassignment, as they do not prevent a trans man from taking part in a women's competition. The present claim was brought only on grounds of gender reassignment discrimination. It has never been amended to allege sex discrimination. Ms Crowther submitted that it must therefore fail.

70 That submission follows from the conclusion reached by the Supreme Court in *FWS*. If "sex" in EA 2010 means biological sex, then the Claimant must be regarded as male. The Supreme Court rejected the idea that the term could have a different meaning in different parts of the statute. In relation to sport, they removed any possible doubt about the consequences of their ruling by the discussion at paragraphs [232] to [236] of *FWS* and in particular by the first two sentences of [236]:

> "…a biological definition of sex would mean that a women's boxing competition organiser could refuse to admit all men, including trans women regardless of their GRC status. This would be covered by the sex discrimination exception in section 195(1)."

71 The Claimant's position will take longer to describe. I will need to quote from the two sets of submissions filed on her behalf.

72 The first document to consider is the Claimant's Amended[1] Further Submissions. I set out below some passages from that document and my comments on them.

73 Paragraph 9 said this:

> "In essence, now that the Claimant is legally considered to be a male for the purposes of the EA 2010, regardless of her possession of a GRC the Defendants' refusal to allow her to play in a women's competition would be permitted sex discrimination pursuant to s195(1) EA 2010, without restriction or justification, regardless of whether that decision was necessary or proportionate so long as English eightball pool was found to be a GAA [gender-affected activity] pursuant to s195(3) EA 2010. That outcome significantly disadvantages the Claimant…"

74 That passage appears to accept that what is involved in the Claimant's exclusion from women's competitions is discrimination on grounds of sex. By referring to the Claimant as significantly disadvantaged it seems to imply that her exclusion cannot at the same time be gender reassignment discrimination.

[1] The amendment withdrew the concession that the claim must be dismissed.

75 The submissions went on to acknowledge at paragraph 12 that no claim of sex discrimination had been made:

> "The court will recall that the Claimant has pleaded a claim for gender reassignment discrimination only. That is, therefore, the only matter which the court is able to determine… It must follow that the defence relating to sex discrimination is otiose (since no such claim was pleaded): the only question that the court must answer is whether the Claimant suffered direct discrimination based upon gender reassignment."

76 Thus far, it seems to be the Claimant's stated position that (i) in view of *FWS*, the relevant exclusion was a matter of sex discrimination and (ii) she had not pleaded sex discrimination. I would have thought it followed that the claim must be dismissed. However, the Amended Further Submissions then argued that it should succeed:

> "To assert that the discrimination experienced by the Claimant is actually sex discrimination, and not gender reassignment discrimination, is incorrect. To adopt such an approach would render the protected characteristic of gender reassignment worthless and there is nothing in the *FWS* decision supporting such a position." (paragraph 13)

77 It seems to me that this passage contradicts what was said in paragraph 9 of the same submissions, as quoted above. Nor can I see how it is reconcilable with *FWS*. If (in accordance with *FWS*) I accept that the Defendants have excluded the Claimant from women's competitions because she is a biological male, then it cannot be said that they have instead, or additionally, excluded her *because* of gender reassignment. Indeed, it is more accurate to say that they have excluded her *despite* her gender reassignment.

78 It seems to be suggested on behalf of the Claimant that treating the present discrimination as sex discrimination and thus dismissing this claim would render the protected characteristic of gender reassignment worthless. That point is not further explained. It is perhaps an assertion that the dismissal would entail or imply that no claim for gender reassignment discrimination could succeed in any context. That must be wrong. Dismissal of this claim will have no bearing on most types of gender reassignment discrimination claim. It will not, for example, imply that a trans person who is dismissed from their job because of their gender reassignment cannot claim for direct discrimination. As a further example, relating to sport, paragraph [236] of *FWS* illustrates a situation where a gender reassignment discrimination claim would succeed if exclusion could not be justified under s195(2) of EA 2010.

79 Paragraph 14 of the Amended Further Submissions reiterated that I should find that the Claimant was treated less favourably because of her protected characteristic of gender reassignment, but did not offer any further supporting argument.

80 Attempting to engage with these submissions as best I can, I would say that the Defendants have treated the Claimant as a man (and therefore ineligible for the women's competition) because they have not accepted that her gender reassignment certificate requires her to be treated as a woman for the purposes of the EA 2010. The Claimant is aggrieved by that. But the Defendants' view is in accordance with the law as stated in *FWS*. Taking that view and acting on it cannot amount to unlawful discrimination on grounds of gender reassignment.

81 The Claimant's second set of submissions, the Reply to the Defendants' Submissions, set out an argument (at paragraph 3c) that the claim is not necessarily defeated by *FWS*. That was said to be for two reasons. The first reason put forward was that:

> "the claim was brought as a claim of gender reassignment discrimination and whether or not she was treated less favourably because of her trans status is an issue that needs to be determined".

82 I agree that the question whether the Claimant was treated less favourably because of her trans status needs to be answered, but that does not indicate what the answer is. The Claimant has not offered any reason why the answer should not be that the gender reassignment discrimination claim fails because in accordance with *FWS* there has been no such discrimination.

83 The second reason advanced was that:

> "… if the sport in question (Pool) is <u>not</u> a gender-affected activity pursuant to s195(3) EA 2010 , then neither the exception under s195(1) nor under s195(2) EA 2010 applies. A gender-affected activity is, as the Supreme Court noted at paragraph 234, a "gateway condition"."

84 I am afraid I do not understand how that second reason assists the Claimant. Whether pool is a gender-affected activity does not determine which type of discrimination was involved when the Claimant was excluded from women's competitions.

85 The difficulty which confronts the Claimant following *FWS* is that her exclusion is a matter of sex discrimination, not gender reassignment discrimination. If she had brought a claim for sex discrimination, then the Defendants would have needed to show that pool was a gender affected activity in order to justify her exclusion under s195(1). As she has not brought such a claim, they do not need to show that. The only claim the Claimant has brought is for gender reassignment discrimination. If, as the Defendants contend, there was no discrimination on grounds of gender reassignment then the question of whether discrimination can be justified under s195(2) does not arise.

Comparators

86 A further submission was made for the Claimant that in deciding whether there has been direct discrimination against her on grounds of gender reassignment I should compare her position with that of a biological female, who "is in the same or similar situation to the Claimant because she is living her life as a woman" (Reply to Defendant's Submissions, paragraph 10). As the Claimant has been excluded from competition when such a comparator would not be, that comparison would demonstrate direct discrimination. It was submitted that *FWS* was not focused on the question of comparators, and that the discussion at [134] of *FWS* was obiter.

87 Having referred to section 23 EA 2010 the Supreme Court said at [134] of *FWS*:

> "Where gender reassignment is the protected characteristic, in the case of a male person proposing to or undergoing gender reassignment to the opposite sex, the correct comparator is likely to be a man without the protected characteristic of gender reassignment and similarly for a woman (although there may be situations where the comparator's sex is immaterial to the comparison). See for example *Croft v Royal Mail Group plc* [2003] EWCA Civ 1045."

88 The Claimant's submissions about that paragraph highlighted the phrase "likely to be", and noted that in *Croft* the Court of Appeal held that the true comparators in that case were other employees, whether male or female. I do not think this advances the Claimant's case. It seems to me unsurprising, but of no assistance to the Claimant, that there are some circumstances where the comparator's sex is immaterial: for example, where a defendant has a policy that it will not employ anyone who has the protected characteristic of gender reassignment. The Claimant is seeking to argue here not that the comparator's sex is immaterial, but that it is material.

89 I do not agree with the Claimant's suggested comparator. That is because (i) there must be no material difference between the circumstances of the Claimant and the comparator, (ii) differences of sex are a material difference (as the Claimant's submissions implicitly recognize), (iii) the comparator in this case must therefore be of the same sex as the Claimant, and (iv) *FWS* requires me to find that for the purposes of EA 2010 the Claimant's sex is male.

90 Having reviewed all of the submissions made for the Claimant, I conclude that there is no basis consistent with *FWS* on which the claim can succeed.

The Human Rights Act 1998

91 The Claimant's Amended Further Submissions referred briefly to s3(1) of the Human Rights Act 1998. They went on to argue that I am obliged to follow *FWS* but that by doing so:

> "… the court is taking action in clear contravention of decided caselaw on the Claimant's, and other transgendered people's, Convention rights (especially Articles 8 and 14) and as such is unlawful." (paragraph 18)

92 As I understand it, that is a submission that I am required by domestic law to follow *FWS* but that I will thereby violate the Claimant's rights under the European Convention on Human Rights ("ECHR").

93 Despite that, paragraph 43 of the same document then invited me to make a series of findings "as if FWS had not been decided", including a finding that "the Claimant has been treated less favourably as a result of her gender reassignment".

94 In the same vein, the Reply to the Defendant's Submissions seemed to suggest (at paragraph 3d) that I am required by domestic law *not* to follow *FWS*:

> "… as set out in the Claimant's Amended Further Submissions, the court's obligations extend to reading the Equality Act in such a way that is compatible with her Article 8 and 14 rights and, when that exercise is undertaken, the only conclusion available is that the Claimant has been prohibited from this sport unlawfully."

95 The obligations referred to there must be those imposed by s3(1) of the Human Rights Act 1998. Section 3 provides:

> "(1) So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights."

96 This line of argument was not further developed in either set of submissions. They did not identify which provisions of the EA 2010 are in issue or in what way they should be read. If it is suggested that the claim should be upheld by adopting a particular (and if necessary strained) construction of the Act, it is necessary to state which passages are referred to and what meaning they should be given. Without that, I cannot tell what interpretation of the Act is sought.

97 I am not sure whether the Claimant's case is now that I should interpret the Act in a way that is contrary to *FWS*, or whether instead it is that I can distinguish *FWS* while adopting the Claimant's interpretation of the EA 2010 (whatever that interpretation may be). That makes it difficult for me to engage with or respond to the submission. I can only say that the County Court is bound to follow a Supreme Court authority, that I must therefore follow *FWS*, and that I cannot see any way to distinguish it.

98 In my view the arguments raised about the Human Rights Act 1998 do not change the position, and the claim must be dismissed.

Incompatibility and permission to appeal

99 The Claimant's written submissions went on to contend that if I dismiss the claim I should find that the EA 2010 as interpreted in *FWS* may be incompatible with the ECHR, and for that reason I should grant permission to appeal.

100 That submission relied on what was said by Lord Bingham in *Kay v London Borough of Lambeth* [2006] UKHL 10 at [43]:

> "…It will of course be the duty of judges to review Convention arguments addressed to them, and if they consider a binding precedent to be, or possibly to be, inconsistent with Strasbourg authority, they may express their views and give leave to appeal, as the Court of Appeal did here. Leap-frog appeals may be appropriate. In this way, in my opinion, they discharge their duty under the 1998 Act. But they should follow the binding precedent…"

101 The Defendants have pointed out that that this request is premature. By CPR 52.3(2)(a) an application for permission may be made (and by implication may only be made) to the lower court

> "… at the hearing at which the decision to be appealed was made or any adjournment of that hearing"

102 Both parties nevertheless made detailed submissions about whether I should grant permission to appeal. While I agree with the Defendants that there cannot yet be a valid application for permission, it will cause unnecessary delay if I revisit the same submissions at or after handing down judgment. I will therefore set out below how I would decide any post judgment application for permission to appeal if that application were made on the same grounds as at present.

103 Permission to appeal is governed by CPR 52.6. By rule 52.6(1), permission may only be given where

> "(a) the court considers that the appeal would have a real prospect of success; or
>
> (b) there is some other compelling reason for the appeal to be heard."

104 The Defendants referred to note 52.6.2 in the White Book, which suggests that test (b) is irrelevant to a proposed appeal from the County Court to the High Court. I accept that I should instead focus on the question of real prospect of success.

105 The Defendants further submitted that even if a declaration of incompatibility were made, that would not cause the claim to succeed. That is because of s4(6) of the Human Rights Act 1998, which provides that:

> "A declaration under this section ('a declaration of incompatibility') -

(a) does not affect the validity, continuing operation or enforcement of the provision in respect of which it is given; and
(b) is not binding on the parties to the proceedings in which it is made."

106 I am not persuaded that is in itself a reason to refuse permission. In the absence of any cited authority to the contrary, it seems to me that it could be regarded as a "success" within the meaning of CPR 52.6(1)(a) for the Claimant to obtain a declaration of incompatibility.

107 The Defendants have made the further objection that the Claimant did not, until her written submissions on *FWS,* seek a declaration of incompatibility: if that had been part of her pleaded case, the claim would have been transferred to the High Court before trial. I do not accept that this would necessarily require me to refuse permission to appeal, as it appears to me from the comments in *Kay* quoted above that granting permission on that ground does not depend on either party having originally sought the declaration.

108 I then consider whether there is any real prospect of the Claimant obtaining a declaration of incompatibility.

109 The Claimant's submissions related to articles 8 and 14 of the ECHR, which I will discuss in turn.

Article 8

110 Article 8 of the ECHR is as follows:

> "(1) Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> (2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

111 The Claimant's submissions as to Article 8 were substantially based on the decision of the European Court of Human Rights ("the EctHR") in *Goodwin v The United Kingdom* (2002) 35 EHRR 18. The Supreme Court gave a summary of *Goodwin* at paragraph [63] of *FWS*:

> "In *Goodwin*, the applicant's biological sex was male but she had undergone gender reassignment surgery. The ECtHR held that it was a breach of the applicant's right to respect for private life under article 8 of the Convention for there to be no legal recognition of her acquired gender."

112 The Claimant relied particularly on what was said by the ECtHR in *Goodwin* at [90], which I quote in part:

> "… Under Article 8 of the Convention… protection is given to the personal sphere of each individual, including the right to establish details of their identity as individual human beings. In the twenty first century the right of transsexuals to personal development and to physical and moral security in the full sense enjoyed by others in society cannot be regarded as a matter of controversy…. [T]he unsatisfactory situation in which post-operative transsexuals live in an intermediate zone as not quite one gender or the other is no longer sustainable."

113 The Claimant's submissions also referred also to paragraph [77] of *Goodwin*:

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

114 The Claimant's submissions went on to quote from ECtHR cases subsequent to *Goodwin* (*Van Kuck v Germany*; *AP, Garcon and Nicol v France*; and *Hamalainen v Finland*) but did not explain how those decisions expanded on *Goodwin* in a way that supported her position. It does not seem to me that they do.

115 It was submitted on the Claimant's behalf that there are striking similarities between her case and that of Ms Goodwin. Both were claims brought by trans women. In my view however there are substantial differences. Ms Goodwin's complaint was that there was no legal recognition at all of her acquired gender. That complaint went to fundamental questions of identity in all respects. The position has changed significantly since then. Legal recognition is now available (and has been obtained by the Claimant in the form of a GRC), and discrimination on grounds of gender reassignment is now unlawful. The focus of the present case is far narrower. As stated at paragraph 37 of the Claimant's Amended Further Submissions, what is in issue here is that

> "she has had her identity of playing pool in the female category taken from her"

Article 14

116 The Claimant's Amended Further Submissions argued that to follow *FWS* would also be a breach of her rights under Article 14 ECHR. It was said that this would give rise to *Thlimmenos* discrimination.

117 Article 14 states:

> "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

118 It was submitted for the Claimant (at paragraph 35 of her Amended Further Submissions) that

> "Article 14 prohibits discrimination that arises when the State fails "without an objective and reasonable justification... to treat differently persons whose situations are significantly different" (referred to as "*Thlimmenos* discrimination"): *Thlimmenos v Greece* (2001) 31 EHRR 15 at [44]… The components of *Thlimmenos* discrimination are: (1) the relevant treatment is within the ambit of a convention right (in this case it would be Article 8); (2) they have "status" for the purpose of Article 14 (in this case it would be the status of a trans person with a GRC); (3) they are in a significantly different situation to a comparator who is treated in the same way as them (here the fact that a trans woman with a GRC is in a significantly different situation to a cis woman); and (4) the failure to treat them differently is not proportionately justified."

119 Points (3) and (4) as quoted above amount to a complaint that there has been a failure to treat differently a trans woman with a GRC on the one hand and a biological woman on the other. That is

the opposite of the complaint made in this case, where it is alleged that there has been an unlawful failure to treat the Claimant in the same way as a biological woman. The Defendants' response was essentially that this submission does not make sense. I have to say that I agree with the Defendants, as it seems to me that the argument raised here contradicts the rest of the Claimant's case.

FWS

120 The question of incompatibility was not directly addressed in *FWS*. It seems to me that this was because none of the participants thought it arguable, and not because it was overlooked. The Supreme Court heard from leading counsel for both parties and for two interveners, and considered written representations from two further sets of interveners. It discussed *Goodwin* at paragraphs [63] to [66] of its judgment. It manifestly had section 4 of the Human Rights Act 1998 in mind: indeed, it noted at [67] that *Goodwin* led to a declaration of incompatibility in *Bellinger v Bellinger* [2003] UKHL 21.

121 The Supreme Court set out at [248] of *FWS* that

> "… we have concluded that a biological sex interpretation would not have the effect of disadvantaging or removing important protection under the EA 2010 from trans people (whether with or without a GRC)"

122 Given that view, which was supported by the detailed reasons given at paragraphs [249] to [263], I think it is inconceivable that the Supreme Court would have accepted that the EA 2010 as interpreted by it was incompatible with the ECHR.

123 For those reasons I consider it extremely unlikely that any higher court would grant the declaration of incompatibility which the Claimant now wishes to seek. The position is different from that in *Kay*, where a binding domestic authority conflicted with a subsequent ECtHR decision, creating an obvious need for reconsideration. Here, the Supreme Court has only just considered the matter, and there is no subsequent ECtHR decision.

124 I therefore do not consider that the suggested grounds of appeal have any real prospect of success. If an application for permission to appeal were made to me on those grounds, I would refuse it.

GENDER-AFFECTED ACTIVITY

125 The Claimant's final written submissions asked me to find that English eight-ball pool is not a gender-affected activity. The Defendants submitted that I no longer needed to address that issue – but that, if I did, I should find that English eight-ball pool is a gender-affected activity.

126 The conclusion I have already reached disposes of the claim, whether or not English eight-ball pool is a gender-affected activity within the meaning of s195 EA 2010. Nevertheless, as the point was fully argued with evidence from two experts on each side, I will address it.

127 The Defendants have accepted that if they had needed to justify discrimination, it would have been for them to establish on a balance of probabilities that pool is a gender-affected activity.

128 Some points were not in dispute. Counsel agreed that there are no reported cases on the meaning of "gender-affected activity" in s195 EA 2010, and that s195(3) sets up a binary test: either pool is a gender-affected activity or it is not. It was also uncontroversial that pool is a "sport, game or

other activity of a competitive nature". The contentious question is whether, to quote s195(3) EA 2020 again, it is a game conducted

> "… in circumstances in which the physical strength, stamina or physique of average persons of one sex would put them at a disadvantage compared to average persons of the other sex as competitors in events involving the activity."

Disadvantage

129 It was submitted for the Defendants that, so long as the advantage conferred by an average difference in physical strength, stamina or physique is more than minimal, it does not matter how great that advantage is. I agree that is so in relation to the test for "gender-affected activity". I do not see any justification for reading into the test a qualification that the advantage must be a major one. In sport, a small but clear advantage can make the difference between winning and losing.

Average persons

130 What is an "average person" for the purposes of s195(3)?

131 It was submitted for the Defendants that in comparing the physical abilities of men and women the court should consider competitors in events involving the relevant activity. It was submitted for the Claimant that would be wrong: those competitors are an elite sub group, and the court should consider men and women as a whole. The difference is an important one. As I will go on to discuss, the argument that pool is a gender-affected activity substantially depends on the importance of the break shot. But it may be that the break shot is only an important factor when the players are reasonably skilled in the game. The average male or female competitor is likely to have developed some skill; the average man or woman from the general population is not.

132 Ms Crowther submitted that the Claimant's suggested approach would be inconsistent with the purpose of s195: it would involve considering men and women who do not participate in the relevant activity to decide a question about men and women who do participate.

133 It seems to me that the resolution of this disagreement turns on a close reading of s195(3) EA 2010. That subsection requires answers to two questions. The first is whether there are differences between the physical strength, stamina or physique of average persons of one sex compared with average persons of the other sex. The second is whether those are differences which "*would* put them at a disadvantage… as competitors"

134 In relation to the first question, the court must consider the physical differences which exist between men and women as a whole. There is no basis in the language of the subsection for taking a narrower approach. To that extent I agree with Ms White's submission for the Claimant.

135 In answering the second question, the court is dealing with a hypothetical. It must assess what *would* happen if two persons of different sexes and of average physical characteristics competed in the relevant activity. In considering that situation, I do not see why it should assume that the competitors are unskilled. Section 195 only applies to events which have been organized with a degree of formality, as part of which there are rules about who may or may not take part. Most people who compete in organized events have a level of skill and experience significantly above that of the average person, and it is these hypothetical competitors the court should consider when deciding whether on sex would be at a disadvantage.

136 I agree with Ms Crowther that it would be odd to apply the test in s195(3) by ignoring the type of competitor who will be affected by it. To do so would lead to a conclusion that a sport is not a gender-affected activity if gender only gives an advantage to people who participate in it regularly.

137 If that view is wrong and one has to consider only average unskilled persons, the same conclusion can still be reached. Consider a sport in which the physical differences between average men and women mean that as between skilled participants men will generally perform better, but that as between unskilled participants there is no difference. Ice hockey is an example: until the players have mastered the basics of skating, greater size and strength make no difference; once they can skate, greater size and strength will probably benefit the average male. But even at the point when neither is able to skate the female novice can foresee that if she and her male counterpart put the same effort into learning to play he will begin to outstrip her. To be faced at the initial stage with that prospect is a disadvantage.

138 In my view s195(3) EA 2010 requires the court to consider whether a woman of average physical strength, stamina and physique and who is reasonably experienced in the relevant sport game or activity would be at a disadvantage when competing against a similarly experienced man of average physical strength, stamina and physique.

Average persons of one sex

139 *FWS* establishes that the "average persons of one sex" to be considered under s195(3) EA 2010 do not include people who were of the opposite sex at birth. That follows from the decision summarized at [265](xviii) that "sex", "man" and "woman" in the EA 2010 refer to biological and not certificated sex, and is articulated in the discussion at [235] and [236].

English eight-ball pool

140 In simplified summary, English eight-ball pool is played on a rectangular table with six pockets. The balls used are a (white) cue ball, eight red ball, eight yellow balls, and one black ball. By striking the cue ball with their cue, players seek to send into pockets (to pot) first the balls of their chosen colour, whether red or yellow, and then finally the black ball. At the start of play, all the balls other than the cue ball are arranged in a triangle and the cue ball is played from some distance away. This initial shot is the "break shot", which was the subject of much expert evidence. If the break shot results in a red or yellow ball being potted, the player keeps their turn so as to take another shot.

English pool compared with American pool

141 The Defendants' engineering expert Dr Alciatore had extensive experience of American forms of pool, and he and his opposite number discussed the significance of a rating system based mainly on the American game. The main differences from the English game are as follows:

> 1 In all American games the cue ball weighs 169 grammes as against 96 grammes for the cue ball in the English game.
>
> 2 In all American games the object balls also weigh 169 grammes, while in the English game they are 119 grammes.
>
> 3 In American games cues typically weigh between 19 and 21 ounces (about 538g to 595g), while in England the range is between 17 and 19 ounces (about 482g to 538g).
>
> 4 The table size for 9- 10- and some American 8-ball is 9 feet by 4.5 feet; English pool is played on tables of 7 feet by 3.5 feet or 6 feet by 3 feet.

5 Some variants of American pool are nine-ball or ten-ball.

The Defendants' case

142 In outline, the Defendants' case on gender-affected activity was as follows.

143 Data collected by the Fargo Rating System ("FargoRate") shows that on average men perform better than women when playing American pool. There is no equivalent data available for English eight-ball pool, but the games are so similar that the same is likely to be the case for English eight-ball. The FargoRate data cannot explain why men tend to do better, but the expert evidence shows that there are differences of physical strength, stamina and physique and demonstrates that those differences are relevant to pool and create a male advantage.

144 The break shot is important. A player with a better break shot will often win a match, especially at high levels of play. Within the range of what is humanly achievable, a break shot taken at higher speed but without loss of accuracy or loss of control of the cue ball is more likely to be successful. The average man can reliably and consistently generate a higher cue speed with less effort than the average woman. That is a result of differences in physical strength and physique. Those differences confer other advantages as well.

145 The physical differences are that on average men are stronger than women; they have greater reach, larger hands and longer fingers; they are taller and have greater shoulder width. They are not affected by monthly hormonal fluctuations which generate physical disadvantages.

146 Greater reach is an advantage because it assists in hitting shots with greater balance and stability. Larger hands and fingers allow greater control and accuracy. Height gives an advantage in frame planning and endurance.

The Claimant's case

147 In summary, the Claimant's response is that, while FargoRate does show better performance by men than women in American pool, that is a sufficiently different game for the FargoRate data to be irrelevant to English eight-ball pool. Moreover, as the Defendants accepted, the FargoRate data only shows differences in performance and not their causes.

148 It is accepted for the Claimant that good execution of the break shot is an important aspect of pool when skilled players compete, but not otherwise. Moreover, there is a threshold above which a higher cue speed on the break shot makes no difference to the success of the shot. The Claimant's case is that this threshold speed is easily achievable by women as well as men. Thus, although the average man is stronger and can generate a higher maximum cue speed than the average woman, this does not give an advantage. The other differences in physique relied upon by the Defendants do not confer an advantage in English eight-ball pool.

The experts – physics and engineering

149 Joseph Formaggio is a Professor of Physics at the Massachusetts Institute of Technology, specialising in nuclear and particle physics. His duties include teaching physics at graduate and undergraduate level, including a course for undergraduates in classical mechanics. He is not a pool player.

150 David Alciatore has a doctorate in Mechanical Engineering, and was formerly an Associate Professor at Colorado State University. He is the author of a book *The Illustrated Principles of Pool*

and Billiards, published in 2004, has created instructional videos, and runs a website about the subject. His oral evidence was that he has taught pool to about 1,000 students at all levels. He said in evidence that his own level of play would probably equate to a Fargo score of 650 or so, which I understand from his other answers would make him a very good player by amateur standards. His experience is largely in American rather than English pool.

151 Both experts made initial reports. They discussed each other's views and provided a helpful joint statement. Dr Alciatore made a Supplemental Report dated 20 March 2025, part of which I allowed to stand as further expert evidence. Professor Formaggio produced two undated notes which were supplied to the Defendants and the court during trial. Both these experts gave evidence by video link.

152 Professor Formaggio and Dr Alciatore took different approaches, but in both cases the main focus of their evidence was on the break shot. Professor Formaggio relied chiefly on computer simulations to model the effect of different cue and cue ball speeds on the outcome of that shot. Dr Alciatore did not accept the reliability of those simulations, drew on his direct experience of playing and teaching pool, and referred to the FargoRate data which he considered showed that men tended to perform significantly better in the game as a whole.

Areas of agreement

153 Professor Formaggio and Dr Alciatore agreed on a number of points which they set out in their joint statement of 20 December 2024, including that:

> "The break shot is very important and even small differences in break shot effectiveness can have a big impact on match outcomes" and
>
> "Break speed, beyond a certain threshold, does not result in a better ball spread with a square (solid) hit on the head ball of a tight rack (with all balls touching)."

Computer modelling

154 Professor Formaggio told me that he had run about 5,000 simulations altogether. These were all based on the cue ball hitting the apex ball in the rack. He was aware that not all break shots are made in this way. Some are "cut breaks" (where the cue ball strikes a ball other than one at the apex of the rack). He had not tried to model those other types of break shots because, he said, he did not know how to optimise that approach – he did not know what the player would be aiming to do.

155 His conclusion, as set out in the joint statement he made with Dr Alciatore, was that

> "once a particular range of speed of break shot is reached (attainable by both average men and women) a maximum level of randomness of the distribution of balls (and so chance of potting an initial ball) is reached."

156 In Professor Formaggio's view, based on his simulations and set out in his initial report, the optimum speed for the cue ball is not more than about 5 m/s: there is no benefit to the player in exceeding that threshold figure. At cue ball speeds between about 5 and 10 m/s "almost all shots [are] legal" (as noted in Figure 3 of his report). A cue ball speed above 10 m/s is disadvantageous because simulations show an increased chance of potting the cue ball. In cross examination, he said his simulations indicated that even a cue ball speed of 2.5 m/s is enough to ensure that on average more than one ball is potted on the break shot.

157 Professor Formaggio calculated that to achieve a cue ball speed of 5 m/s when using an English cue ball would require the player to move the cue at just over 3 m/s. It was not disputed that average women would be comfortably able to achieve that. Professor Formaggio's understanding (set out in Table 1 of his report, which was not challenged) was that skilled female players taking part in tournaments on average achieve a cue speed on break shots of 6 m/s, with the equivalent average figure for men being 7 m/s).

158 Ms Crowther submitted that a flaw in Professor Formaggio's approach was that in assessing his results he assumed that the player who takes the break shot will keep their turn if at least four object balls hit a cushion: while that would be so in American pool, there is no such rule in the English version. However, both in his original report (at paragraph 31) and in cross examination Professor Formaggio said that he had also kept track of whether a ball was potted. I thought it was clear that in his oral evidence he was applying the relevant (English) criteria for success, and maintaining that this also only required a low cue speed.

Criticism of the modelling

159 Dr Alciatore raised a written objection before the trial began that Professor Formaggio's simulations were oversimplified. They assumed that none of the balls in the rack were touching each other when the break shot was taken, so that modelling the outcome of a shot was done by analysing a series of one to one collisions.

160 Dr Alciatore said that this was unrealistic. It was likely some or all of the balls in the rack would be touching each other, in which case both they and the cue ball would behave differently on impact both as to speed and direction taken. In oral evidence he emphasized this, saying that many of the balls in the rack would be touching: a good player setting up the rack for themselves would try to ensure that they were.

161 Professor Formaggio gave evidence that, having received that objection, and accepting that it was well founded, he ran further simulations. These assumed that all balls were in contact with (as he put it) their "nearest neighbours". He considered that his adjusted programme was not perfect but it was a much better model. The results were similar to those from the original programme, with randomization being achieved at slightly lower cue speeds. He considered that this reinforced the conclusion he had previously reached. Having taken account of the new data, he said he would put the ideal cue ball speed range at 3m/s to 4 m/s.

162 Professor Formaggio gave evidence that modelling all the possible variables as to which balls or groups of balls within the rack were in contact would have required much more computer time than he had been able to deploy in studying the issue. He gave an off the cuff estimate that there were between 50 and 100 combinations possible as to which balls were touching which other balls.

163 Having heard Professor Formaggio's evidence, Dr Alciatore continued to dispute the reliability of the computer modelling. Despite the recent revisions, he had major concerns about its accuracy. He said that Professor Formaggio had not adequately explained how his revised model dealt with multi ball collisions. The revised model had gone beyond treating the break shot as causing a series of one to one collisions, but Dr Alciatore believed the model was still only working out the result of a collision between one ball and its two immediate neighbours, and not allowing for the fact that those neighbours might themselves be in contact with other balls. He said he was "very confident" that this was the most that could have been done to improve the original modelling. Dr Alciatore gave two reasons for that.

164 The first was that it would have taken far more work to develop a programme which would simulate a collision with multiple balls touching. The calculations involved would be so complicated that the computer would run very slowly. Dr Alciatore pointed out that the simulations were based on a pre-existing programme called "pooltool", which was designed for interactive game play and which therefore had to process the result of shots very quickly: it was very good at simulating one to one collisions but was not set up to do more than that.

165 The second point raised a more general issue about the conflict between the simulation and Dr Alciatore's reported experience. He said that the numbers produced by the simulation bore no resemblance to his direct experience of playing pool. In particular, whereas the model predicted that a break with a cue speed of less than 4 m/s would normally pot a ball, his experience was that potting a ball with that cue speed was very unlikely. He added that no good player would ever deliberately break at such low speed: they would normally achieve a cue speed about twice as great. (That point is approximately consistent with the figures given by Professor Formaggio in his Table 1). The suggestion that that a lower break speed would be better was in his view "preposterous". The fact that the revised model produced an even lower rather than a higher optimum break speed was in his view a strong indication that it was wrong.

166 I asked Dr Alciatore why he did not agree with Professor Formaggio that beyond a certain point putting more energy into the system became unhelpful because of an increased risk of potting the cue ball. He agreed that in theory there would be a threshold above which increased cue speed would have that effect, but said that the threshold speed was far higher than any speed humanly achievable. He added that it was wrong to assume that the cue ball would be moving about randomly, because a good player would seek to control its position so that very often it would rebound from the apex ball and stop. In high level play with high break speeds it was rare for the cue ball to be potted.

167 I asked Dr Alciatore whether as a teacher he always advised using as much power as possible on the break shot consistent with keeping control. He said that he did, except in a situation (which does not occur in English eight-ball pool) where the position of the object balls is set by, for example, depressions moulded into the table and they break apart more predictably.

American versus English pool

168 In the joint report Dr Alciatore described American 8-ball as "almost identical to the English version". Cross examined about this, he did not accept that the features described at paragraph 141 above meant that there were substantial differences. He maintained that a good player could easily move from one game to the other in a short space of time. He did not accept that comparing the area of the tables used gave a good sense of the degree of difference: he said it was more relevant to consider the distances involved.

169 Dr Alciatore's evidence was that the diameter of the balls (which did not vary greatly) was more important than their weight. He mentioned that the cloth on an English pool table is slower than that in the US. He did however accept that the larger tables and larger and heavier balls of the American game did require more effort from the player.

170 Professor Formaggio did not express any opinion that Dr Alciatore was understating the importance of the differences between the English and the American game.

Statistical evidence

171 FargoRate collects data from pool tournaments and leagues. The data is collected automatically from tournament and league management-system software, and includes results from all games from all matches played. The accuracy of entered data is verified by both participants in every match. Most of the date sources are American. Dr Alciatore confirmed that most of the participants are amateurs, who mainly play eight-ball; professionals generally play nine-ball or ten-ball.

172 Having considered further information provided by Dr Alciatore, Professor Formaggio accepted that the FargoRate data was collected in an unbiased way, and that it showed a statistically significant difference in performance between men and women.

173 Professor Formaggio remained concerned that the FargoRate data showed that the male participants had on average played more games than the women. He said that the data also showed that ratings tend to be better among those who have played more games, and concluded that the better average scores for men may be wholly or partly a reflection of their having played more often. He referred to that in the joint statement as "the practice effect". When I asked him about that, he accepted that causation could work in either direction so that (i) playing more often tends to cause an improvement in standard of play but (ii) being a good player tends to cause people to play more often. He said that both appeared to him equally likely.

174 Dr Alciatore accepted that playing more will generally make someone a better player, but he did not accept that all players benefitted from frequent competition. He said he knew quite a few who remained "terrible".

175 In his supplementary report Dr Alciatore plotted each player's FargoRate ability score against the number of games they had played. He showed the results differently for men and women. The plots clearly showed that on the whole men had played more games and performed better. He then restricted the results to men and women who had played between 200 and 500 games: this showed a clear male advantage despite apparently similar levels of experience. The average male rating in that category was 463, the average female rating was 342. He repeated the exercise by then limiting the study to players with over 3,000 recorded games and demonstrated a clear but smaller male advantage (588 against 512).

176 The FargoRate score partly depends on the quality of the defeated opponent: beating a higher ranked opponent will generate a larger improvement than beating one with a lower score. If women generally played each other but did not play men, that might mean they would have fewer opportunities to improve their FargoRate score by taking on higher ranked opponents. However, Dr Alciatore said that in most of the American leagues which largely provided the FargoRate data, men and women competed together.

The importance of the break shot

177 Dr Alciatore's position, as set out in his report, was that

> "The break shot, the first shot of the game, where significant force is used, is very important, and can often be the deciding factor in a high-level match"

178 Dr Alciatore said that the break shot became more important to the game as the standard of play rose. At lower levels, there were some advantages to making a successful break shot but the effect was less: if a player potted a ball on the break, they would often lack the skill to keep their turn thereafter.

179 Dr Alciatore gave evidence that a good break shot began to give a clear advantage when the players had FargoRate scores in the 500 range, which (in the terms used on his pool web site) he described as being at least of "upper intermediate" standard. He then corrected himself, and said that even at lower levels the break creates an advantage, albeit less so than for better players. To give some context to this discussion about levels of play, I note Dr Alciatore would consider Ms Haynes a very high level player, albeit appreciably below world class; that he was not familiar with English county matches and could not comment on the level of play there; and that he estimated that if he had a FargoRate number himself it would be about 650.

Strength and the break shot

180 Dr Alciatore maintained the position he took in his first report:

> "Men generally have more strength and faster-twitch muscles that make it easier to execute power shots."

181 He added that the break shot was not the only "power shot" involved in pool. There were other points in game where shots requiring significant cue speed can be needed.

182 As to the relationship between strength and making successful shots, Dr Alciatore's opinion was "if you can generate more cue speed with less effort… you will generally be more accurate and have better control and consistency." In his opinion, a player attempting to use all the power they could muster to take a shot would lose some precision in doing so: it was necessary to maintain control by reducing power to some extent.

Other factors

182 Dr Alciatore included in his first report a list of fourteen items labelled from (a) to (n) of "things most top players have in common". In drawing up this list he relied on his experience of playing pool at a high level, studying other players, and speaking to them. He had not studied these other attributes in any systematic way. His list mentioned factors such as practice, focus, experience and motivation. The only listed items which wholly or partly related to physical attributes were (d) hand-eye coordination, accuracy and speed, (e) visual acuity and perception and (k) "the mental and physical stamina necessary to play with excellence over the long hours required in tournaments". However, he did not assert that men and women had different levels of stamina in this sense.

Physique - height

183 Dr Alciatore noted that some world class players had been quite short – he mentioned two players of 5 foot 3 inches and 5 foot 4 inches – and accepted that there was no clear tendency for very good pool players to be particularly tall. He noted in his report that height had its disadvantages as well as advantages – it required more bending down to get low on the shot for accuracy.

Physique – chest

184 Dr Alciatore mentioned that "a woman with a large chest can be limited in stance possibilities" but added "(just like a man or woman with a large belly or lack of flexibility)". His evidence was that as a teacher he had dealt with women who found this a problem and were never able to achieve a comfortable stance, and others who managed to do so. He accepted that this was not a scientific study.

The experts - biology

185 The Claimant's expert was Blair Hamilton. Dr Hamilton has a degree in Exercise for Health and a PhD in Sports Medicine. She is now a research associate at Manchester Metropolitan University.

186 The Defendants' expert was Emma Hilton. Dr Hilton has a degree in Biochemistry and a PhD in Developmental Biology. She is a postdoctoral research fellow in Infection, Immunity and Respiratory Medicine at the University of Manchester.

187 Neither Dr Hamilton nor Dr Hilton claimed any particular expertise in pool. Dr Hilton had made a study of video recorded pool games, but her written evidence about that was provided too late to be used at the trial.

188 Both experts produced a written report, and they then made a joint report. The joint report tended to set out one expert's position and then the other's, without giving a condensed version of the reasons for disagreement. Both experts attended court and gave evidence at the trial.

Independence

189 Neither Dr Hamilton nor Dr Hilton stand to receive any direct benefit from the outcome of this case. Both came to the litigation with established positions regarding trans people in sport. I will briefly mention them, but I do not consider that in either case it renders their evidence inherently unreliable.

190 Dr Hilton has published several papers on sex and categories in sport, including what she described as "an extensive review of evidence rebutting the long-held yet unproven position that testosterone suppression in transgender women (who are biologically male) secures fairness and safety for female athletes". She is presently a trustee and was a board member of Sex Matters, which she described as "a UK human rights charity who lobby for clarity on the protected characteristic of sex in UK law".

191 Dr Hamilton described herself in cross examination as a non-binary woman. She has played in goal for the England Universities Women's Team. She accepted that she had some personal interest in the case but said that it was mostly professional.

Differences between average men and average women

192 Dr Hamilton and Dr Hilton agreed in their joint report that

> "…there are evolved biological differences between those whose biological sex is male and those whose biological sex is female, including differences in adult skeletal size/movement levers, lean mass, skeletal muscle/strength, and overall body composition."

193 Among the skeletal differences are that men on average have longer arms, larger hands and longer fingers.

194 Dr Hamilton and Dr Hilton further agreed that

> "… as a group, cisgender males have greater muscle mass and are consequently stronger than cisgender females in absolute metrics, while differences in relative metrics (mass and strength adjusted for height and/or weight) are smaller."

Extent of differences in muscle mass

195 Dr Hilton went into detail in the joint statement about what she said were marked differences in muscle mass:

> "Upper body muscle mass differentials exceed 50%. Strength differences range from 60% in the biceps to 90% in the shoulders, synergised by longer skeletal levers. Male shoulder velocity – the speed of shoulder movement, relevant for propelling objects – is 15% faster than in females. Males have over 40% more muscle mass in the lower body, enabling at least 50% greater strength in the quadriceps."

196 Dr Hamilton did not dispute what was said about these differences in absolute strength, but commented in the joint statement that "when controlled for exercise levels and body weight, muscle mass and quality between sexes are equivalent". Dr Hilton's rejoinder was that in this context it is wrong to adjust for body weight: "compared with females, males have greater absolute metrics that are capable of higher absolute outputs. These are, in part, because males are larger than females, but this is precisely the type of sex difference that female categories seek to exclude."

Strength and power

197 Dr Hamilton and Dr Hilton agreed in their joint statement that a large portion of game time in eight-ball pool does not rely on maximum strength and power. They also agreed that physical attributes like upper body strength are relevant in certain 'power shots' but they disagreed on the relative importance of strength in the ability to execute these shots.

198 Dr Hilton's opinion was that increased strength provides a steadier base for taking a power shot: "upper and lower body strength [allow]… players to more precisely stabilise and manage their power application" – that is, the ability to execute power shots while maintaining precision. She referred in this regard to the need for "controlled power".

199 Rather than engaging directly with the relevance of strength, Dr Hamilton's responses in the joint statement emphasized that there were many other relevant factors: "the ability to execute power and controlled shots effectively is far more dependent on skill, precision, and practice than on raw physical attributes"; "table clearance and winning the frame are likely influenced by multiple factors and cannot be predicted by the break shot characteristics alone"; "players invest years in perfecting their techniques, such as grip, stance, and follow-through, which are critical for executing power and controlled shots"; "the power draw (screw shot) relies more on the precise striking of the cue ball and the quality of cue control than on brute strength"; "players with superior technique can offset any potential strength disadvantage through enhanced precision."

Relative strength or absolute strength?

200 The experts discussed "relative strength": that is, strength relative to height and/or weight. They agreed that when one considers relative rather than absolute strength the average difference between the sexes is smaller.

201 Dr Hamilton generally took the position that relative strength was the more important measure to consider. However, when pressed in cross examination about the contribution of absolute strength and relative strength to making a power shot, her position seemed to me quite similar to Dr Hilton's. Both experts agreed that the only aspect where relative strength was involved was in the player holding themselves in position to take the shot. Dr Hilton described that as a really small factor, saying that it was just a matter of resisting gravity by not falling over; Dr Hamilton did not go that far,

but conceded at one point that in relation to the power shot it was "potentially" the absolute strength of the player that was relevant.

The need to achieve a high cue speed in the break shot

202 Dr Hilton expressed the view in the joint statement that "observation of competition breaks shows that players place great value on maximum possible power". It seems to me however that the importance of power (and therefore cue ball speed) to the success of the break shot was not within the biological experts' expertise.

Longer reach

203 Dr Hilton identified the longer reach enjoyed by the average male (a result of a larger skeleton and longer limbs) as a significant advantage. She said in the joint statement that

> "Longer reach along the hand-arm-shoulder-torso-leg axis increases shot availability. Players can more comfortably access more areas of the table without needing to reposition to use mechanical aids such as rests or extensions" and that "males with a longer reach do not have to have [sic] play awkward shots as frequently… they can more easily maintain a relaxed stance… "

204 Dr Hamilton's opinion was that longer reach had counterbalancing disadvantages. These included a need to stretch farther over the table on certain shots, compromising stability; and that when stretching to the maximum extent the bridge hand might not be as secure, making it hard to align the cue properly, and making it harder to maintain balance. I did not follow why having a longer reach would mean that one would have to stretch further. Dr Hamilton also mentioned that on smaller tables and in crowded environments players with longer arms might find it harder to manoeuvre comfortably: as to that, it seems to me unlikely that any organized game of pool would be played in such cramped conditions. Third, Dr Hamilton suggested that a longer reach "might encourage players to overextend" I am not sure why it would have that effect, as players with a longer reach do not have to extend themselves as far as other players do.

205 One aspect of having a longer reach is that there may be less need to use mechanical aids. When making a shot the player normally uses one hand to propel the cue, and the other hand is placed on the table to form a bridge. Instead of making a bridge with their other hand, players can use a mechanical aid – a "rest". A player who cannot reach far enough across the table has no choice but to use a rest.

206 It is common ground that rests are sometimes used in pool despite the relatively small size of the table compared with other cue sports. Rule 2(d) of the blackball rules which govern the game expressly provides for the use of three types of rest.

207 Dr Hilton's opinion was that, due to differences in skeletal levers and reach length, females are more likely to have to use mechanical aids. She said that these aids introduce complexity as they require players to adjust their technique.

208 Dr Hamilton acknowledged there were what she called "potential challenges" posed by using rests, but she considered that "players who develop proper technique can use rests … with minimal impact on control precision and spin". She said that from her observation of pool, when a player could comfortably bridge or use a rest, they tended to bridge. She could not say why that was.

Bridging

209 Dr Hilton said that larger hands and longer fingers provide an advantage, particularly in creating bridges which are higher, stable and more secure bridges. She pointed out that a higher bridge makes it easier to cue over an obstacle ball. "Larger hands and longer fingers permit greater flexibility in adjusting the height and angle of the bridge."

210 Dr Hamilton agreed that longer fingers offer more flexibility but said that they "may reduce the ability to make fine, precise adjustments", make it harder to create compact bridges in tight spaces, might obstruct the cue stick's path during low bridge shots, and would require more conscious effort to maintain consistent hand positioning.

Height

211 Dr Hilton suggested that taller players have a better view of the table, which helps in planning shots. Dr Hamilton said that there was no inherent advantage in height, which could be a disadvantage as regards fatigue or discomfort from bending more significantly over the table, a point which Dr Hilton acknowledged to have some force. Dr Hamilton also referred to reduced stability due to a higher centre of gravity.

Hormonal cycles

212 Dr Hilton highlighted in the joint statement that

> "The hormonal cycles and reproductive physiology of females have a significant impact on their performance in cue sports. [Dr Hilton] argues that (1) physiological symptoms such as headaches, hot flashes, hearing changes and pain (eg abdominal, and back pain) are unpredictable, disorientating and sometimes impossible to manage (2) these symptoms, whether caused by menstrual cycles, pregnancy, or peri/menopause, are associated with general unwellness and performance detriments. Sleep disruption, fatigue, and low energy can reduce focus, mental sharpness and physical coordination…"

213 She went on to mention there could also be cognitive and emotional effects which hindered strategic decision making, and noted that in cue sports "mental focus and concentration in high-pressure situations is a key advantage".

214 Dr Hamilton acknowledged that these were valid points when comparing biological men and women.

The position of transgender women

215 Dr Hamilton's initial report drew on her own research, as reported in the paper *Strength, power and aerobic capacity of transgender athletes: a cross-sectional study* (Hamilton et al, British Journal of Sports Medicine, 2023). As its title indicates, the participants studied were (or declared themselves to be) athletic. They had all declared that they participated in competitive sports or underwent physical training at least three times per week.

216 Ms Crowther highlighted a number of limitations affecting that study, as set out in the paper itself. These included a risk of selection bias, as the participants were self-selected, and a risk of recall bias, as the subjects' athletic training intensity was self-reported. All of the trans athletes had been

taking gender affirming hormone treatment ("GAHT"), but not necessarily all of the same type. The study was not longitudinal, and so did not show how the effect of GAHT varied over time.

217 The study compared different groups who were (or reported themselves to be) unusually fit. Dr Hamilton accepted that the biological gender women in the study were "certainly very fit athletes", and conceded that they were not representative of the general population. The study does not provide a good basis for understanding what differences in strength and stamina there are likely to be between average trans women and average biological women.

218 The paper itself stated:

> "… while this study provides a starting point for understanding the complex physiology in GAHT and athletic performance, this study does not provide evidence that is sufficient to influence policy for either inclusion or exclusion" (that is, I take it, inclusion or exclusion of transgender people in or from single sex sporting groups).

219 Dr Hamilton and Dr Hilton agreed that

> "… the typical pharmaceutical/surgical steps that transgender women may undertake will not affect skeletal size/movement levers, but can affect bone density, lean mass, skeletal muscle/strength and overall body composition."

220 They agreed that GAHT causes the loss of muscle mass and gain of body fat. They did not agree about whether there then remained a significant difference in those respects between trans women who had undergone that treatment and biological women.

221 Dr Hamilton's original report stated:

> "Testosterone suppression and oestrogen supplementation (also known as gender-affirming hormone treatment) result in significant reductions in muscle mass (also known as fat-free mass or lean mass), muscle cross-sectional area and strength, while gains in body mass, fat mass, body fat percentage and BMI happen over time. These changes mitigate any residual physical advantages that transgender women might have from male puberty, further reducing the relevance of sex-based differences in cue sports performance."

222 Dr Hamilton's report said that in her view after GAHT there was no significant difference in relative strength between trans women and biological women.

223 Dr Hilton's response (as set out in the joint statement) was that

> "Several studies have shown that while some muscle mass is lost, a gap in both mass and strength remains between transgender women and females."

224 In cross examination, Dr Hamilton accepted that a gap existed as regards absolute strength, saying that average trans women after GAHT would fall somewhere between average biological males and average biological females.

225 Dr Hamilton pointed out in the joint statement that the hormonal regimes taken by transgender women are distinct from those experienced by cisgender men or women, and can have significant side effects including fatigue and loss of stamina. She noted that the long term implications of high oestrogen levels induced by injections remain poorly understood.

Handicaps

226 In Dr Hilton's contribution to the joint statement she mentioned handicaps in cue sports. She said this:

> "At least one pool federation – the International Heyball Pool Association – applies handicap rules to female players in mixed sex matches, in recognition of superior male breaking capacity. Specifically, females are not required to achieve the same scatter of object balls as males, and male players must concede either the first or last object ball to female opponents"

227 Dr Hilton was cross examined about the possibility of a handicap system in English eight-ball pool. She was unable to add much to her written evidence. She accepted that in principle it would be possible to compensate for an identified difference by way of a handicap. This was not a point that was explored with any of the other lay or expert witnesses.

Assessment of the expert evidence

Professor Formaggio and Dr Alciatore

228 The physics/engineering experts gave their evidence in a balanced and non-combative way. Both have very substantial expertise in their academic field. Both engaged thoughtfully with all questions put to them. They were willing to shift from the positions they had originally taken in the light of new information.

229 I accept Dr Alciatore's view that despite the larger scale of the American game, the two games are very similar such that data about performance in American pool is relevant to discussion of English eight-ball pool. That position was not significantly disputed by Professor Formaggio, whose expertise put him in a good position to assess the importance of different table sizes and cue and ball weights.

230 The FargoRate data clearly indicates a sex difference in performance. The data cannot be dismissed as merely showing that men perform better because they play more often. There is broadly a correlation between ability and number of games played, but that does not mean that one of those things causes the other (or which if either is the cause and which the effect): moreover, when players are grouped by number of games played the average male score is still better. The FargoRate data cannot itself explain the cause of that difference. However, it does seem to me to suggest a physical rather than a social difference. There may be social factors which inhibit women from playing frequently, but it is not easy to imagine social factors which cause women who play as many competitive games as men on average to score worse.

231 As to the break shot, I consider that despite Professor Formaggio's careful evidence the views of Dr Alciatore are more persuasive.

232 Dr Alciatore has substantial experience of pool whereas Professor Formaggio does not. I appreciate that Dr Alciatore's experience is with American and not English pool, but I was persuaded by his evidence that for present purposes there is no significant difference between the games. He did accept that greater force was needed on the American break shot, but if he is right that no human player can achieve the fastest desirable cue speed in either game, that does not undermine his opinion.

233 Professor Formaggio's views rely on computer simulations. Dr Alciatore's views are substantially based on his direct experience. Reality is messy; one of the risks involved in simulating it is that the modelling programme may be oversimplified. It seems to me that this is likely to be the case here.

234 Professor Formaggio's initial report was based on a simulation which incorrectly modelled the collisions which occur when the break shot is taken. He did not make it entirely clear what alterations he made to his revised simulation, but it evidently did not model all of the ways in which the balls in the rack could be touching: if it had, he would have been able to say precisely how many variables there were rather than estimating somewhere between 50 and 100. In view of that, and noting also Dr Alciatore's point about the far greater computing power needed once one goes beyond the basic pooltool analysis, it seems to me likely that Dr Alciatore was probably right in his belief that the revised simulation was not a great advance on the original one.

235 Dr Alciatore's evidence based on his own experience of playing and teaching a very large number of people over two decades was convincing. He said that his approach and advice had always been that on the break shot the player should aim for the fastest cue speed they could achieve without sacrificing control. There was no suggestion that this was an idiosyncratic view. Indeed, it was consistent with the figures for tournament players' cue speeds which Professor Formaggio had found from published sources and included in his report. Dr Alciatore's approach appears to be a matter of received wisdom among good pool players. Received wisdom is not necessarily correct, but it is worth pausing to consider what the implications would be if in this instance it were wrong.

236 If Professor Formaggio's view about break speeds were correct, that would mean that Dr Alciatore has for many years have been taking the wrong approach to a critical part of the game (which he plays to a high standard), and giving his students entirely the wrong advice about it. If the simulations were a reliable guide, aiming for the highest possible cue speed would not merely be unnecessary but counterproductive. If players could achieve equally good results at much lower cue speeds, they could reduce that speed and focus on control and accuracy, as well as (according to the simulations) reducing their risk of potting the cue ball.

237 It is difficult to imagine that Dr Alciatore would not over a long period of play and teaching have noticed a fundamental flaw in his technique. Even if he had not, it is hard to believe that in a competitive sport played at quite a high level, other players would not have discovered that it was pointless to invest effort in achieving more than a modest cue speed. Where there is regular competition, even small advantages in technique will be sought out and, once found, seized upon and adopted by other players. Even if Dr Alciatore did not stumble upon this revelation in the course of his own play or teaching, as a keen participant in and observer of pool games he would surely have come across other players who had adopted the Formaggio approach of using a lower cue speed to their advantage. I have to ask why that has not happened. By far the most likely answer is that the approach is wrong – all else being equal, a slower cue speed translates to a less successful outcome.

238 Those are the main reasons why I prefer Dr Alciatore's view. There are two ancillary reasons. First, Professor Formaggio's modelling was not comprehensive, as it ignored the cut shot approach to the break. Second, there is the point that Professor Formaggio took it that greater speed translated to a greater risk that the cue ball would end up in a pocket. That assumes that the course taken by the cue ball is more or less random, and cannot be controlled by the player. I believe that assumption is wrong. Dr Alciatore's evidence, which is based on his experience and which I accept as more likely than not to be correct, is that a good player seeks to control the movement of the cue ball, and that in games played at a high level it is rare for the cue ball to be pocketed on the break shot.

239 I am therefore satisfied that an important factor in making a successful break shot is to achieve the highest cue speed possible without losing accuracy. The same goes for other "power shots", although it did not become clear to me how often those are needed during a typical game, and so I think that only adds a little to the point about break shots.

240 It is common ground between Professor Formaggio and Dr Alciatore that the break shot is important to the entire game in a contest between good players. I accept that. I do not accept the Claimant's argument that the point should be disregarded as affecting only such players. For the reasons stated at paragraphs 130 to 138 I consider that s195(3) EA 2010 requires me to assess what advantage there would be as between the average man and the average woman who are reasonably skilled in the relevant game.

Dr Hamilton and Dr Hilton

241 There is no real challenge to Dr Hilton's evidence that there is a difference in absolute strength between the average male and the average female. It does not remove that difference to say that greater strength is partly the result of larger size. The reference in s195(3) EA 2010 to "strength" is unqualified: if the Act had meant the court to consider only strength relative to body size, it would have said so.

242 Greater absolute strength gives an advantage in pool because, all else being equal, it translates to a higher achievable cue speed and thus a better break shot. The relative strength needed to let a player hold the right stance while taking the shot appears to me a much less important factor. There was no evidence that a significant number of people lack that level of relative strength.

243 I have already accepted that the quality of the break shot is an important aspect of the game. To the extent that Dr Hamilton suggested otherwise, I prefer the evidence of Dr Alciatore on the point, chiefly because of his substantial knowledge of pool. Dr Hamilton's comments that many other factors apart from strength are relevant to the success of a power shot seem to me slightly off the point. The Defendants have not sought to show that superior technique has no part in success at pool, but only that the physical differences between the sexes give an advantage. An advantage in a significant aspect of an important part of the game is still an advantage. That is particularly so when the game is one where (as Professor Formaggio and Dr Alciatore agreed is the case here) a small difference in ability can make a big difference to the outcome.

244 Dr Hamilton's evidence was that the use of rests was not disadvantageous, or at least not disadvantageous once the player had learned how to employ them. I do not accept that.

245 First, there is no evidence that players who could comfortably bridge choose to use rests instead of bridging. Dr Hamilton confirmed that from her limited observation of the game that they did not. That strongly suggests that using a rest is less satisfactory. Second, it is not hard to see why a rest would not be a good substitute for a bridge: only the bridge formed by a hand can be altered in shape to suit the circumstances. Third, even if it were the case that a rest could be just as good once the correct technique has been acquired, that would still mean that the player who is more dependent on using a rest has to divert more of their practice time to that technique (and therefore less to other skills) than other players.

246 In my view, the ability to take more shots without resorting to a rest is a further advantage enjoyed by the average male over the average female. It is a sex related advantage because, as the experts agreed, the average male has a larger frame and so a longer reach.

247 The last area to discuss is the effect of hormonal changes on women. Dr Hamilton did not dispute Dr Hilton's remarks as summarised at paragraph 212 above and showing that there is a significant difference between the sexes.

248 However, I am dubious about how that factor relates to s195(3) EA 2010. This question does not seem to me straightforward, and it was not much explored in argument. I will only express a tentative view. It does not affect my overall conclusion as to gender-affected activity, and even that conclusion is on an issue which is not determinative of the claim.

249 For what it is worth, I believe there are two difficulties in relying on hormonal issues in relation to s195(3). First, it not so easy to say which part of "physical strength, stamina or physique" is engaged. I do not think that the effects Dr Hilton described go to strength or physique. That leaves only stamina. Dr Hilton did not in terms say that stamina would be affected, although perhaps it could be inferred that was her opinion. The second difficulty is that the point may prove too much. If it is valid, it would mean that every game sport or activity requiring more than minimal stamina could be said to put the average woman at a disadvantage and to be a gender-affected activity. I am doubtful whether that can be right, because if Parliament's view had been that every sporting activity requiring stamina was a gender-affected activity, it could have said as much in the EA 2010.

250 Nevertheless, I conclude that lesser strength and reach put the average woman at a disadvantage when competing against the average man at English eight-ball pool. Pool is therefore a gender-affected activity.

Section 195(2) EA 2010: necessary to secure fair competition?

251 I approach this question on the basis that, as Ms White submitted, "necessary" means something that is more than merely desirable, but may be less than utterly essential.

252 Ms White further submitted that the reference to "the participation of *a* transsexual person" in s195(2) EA 2010 was deliberate. It meant that whether it was necessary to exclude a person should be decided on a case by case basis, looking at their personal characteristics.

253 I am not sure that is right. Even though s195(1) permits the exclusion of an entire sex, it is also phrased in the singular, as it refers to "… the participation of *another*...". The wording of s195(2) may simply be following the language of s195(1).

254 The starting point for this discussion is to consider what are the relevant differences of physical strength, stamina and physique as between trans women and biological women.

255 Some differences will certainly exist: it was common ground that skeletal size will be unaffected by gender reassignment, and as to that I have accepted that a greater reach is likely to be an advantage. I have also accepted that greater strength gives an advantage. Differences in absolute strength will on average have reduced, but Dr Hamilton accepted they will still be present. There is then the further difficulty that the extent of any reduction in strength will be highly variable, probably depending on the nature and duration of any GAHT taken. Some people with the protected characteristic of gender reassignment may not be taking any form of GAHT at all. In relation to those who are undergoing GAHT there is no published research to indicate what range of reduction might be expected. The limitations acknowledged in Dr Hamilton's paper show how much is presently unknown. Moreover, neither of the biological experts asserted that it was possible to say from any given level of testosterone that a trans woman would have lost any particular proportion of muscle mass.

256 It seems to me that this makes it impossible to say in general terms that the difference between trans and biological women is so much less than that between biological men and women that there is no need to take any step to secure fair competition between trans and biological women. It also makes it difficult to identify what steps short of exclusion of trans women would be enough to ensure fair competition.

257 Ms White argued that it was for the Defendants to demonstrate necessity, and that they could not do that in the absence of any evidence that they had explored any alternatives to exclusion. As to what those alternatives could have been, Ms White referred to (i) testosterone suppression, with testing to check each player's testosterone levels and (ii) the handicap system used in Heyball and mentioned by Dr Hilton.

258 While I agree that it is for the Defendants to persuade the court that exclusion is necessary, I do not accept that they can only do that by showing that they considered what lesser steps they could take before deciding to exclude. Whether or not they considered other options before the rule change has no bearing on the objective question of whether any given alternative course would have been sufficient to ensure fairness.

259 As to that question, I do not accept that testing for testosterone suppression and allowing trans women to compete if below a certain level would be viable. Suppression will not remove the advantage of reach, and its impact on absolute strength (i) is uncertain (ii) may depend on the length of time for which testosterone has been suppressed, not merely its current level and (iii) is apparently not enough to reduce the strength of an average biological male to that of the average female. Demonstrating a testosterone figure below a particular value will not show with any clarity to what extent relevant physical differences between trans and biological women have been reduced.

260 The other suggested option is some form of handicap. This was not proposed before the trial by either party and was not the subject of any written evidence save for the brief mention by Dr Hilton in the joint statement. The possibility was not put to any witness other than Dr Hilton.

261 The Claimant has not proposed any particular form of handicap. Dr Hilton's reference in cross examination to using handicaps to remove an identified difference highlights the problem: it is necessary to estimate the size of a difference in order to set a fair handicap. The Claimant has not suggested how that could be done. If one tried to assess the difference between the average trans woman and the average biological woman the difficulty arises that the trans group is so varied, containing some people with a long history of GAHT and some who have had no treatment likely to affect their strength. Setting an individual handicap on a case by case basis does not seem workable: even if the impact of GAHT could be reliably assessed for each person, I doubt whether pool offers scope for a range of different handicaps tailored to match those assessments. In the absence of any submissions on the point, I have not been able to think of any realistic way to set an individualised handicap for a particular trans woman.

262 I am not therefore persuaded that a workable handicap system could be devised which would provide a fair alternative to exclusion.

263 It therefore appears to me that there is no reasonable alternative way of achieving fair competition short of exclusion, so that it if this were a case of gender reassignment discrimination I would have said that exclusion of trans women from female English eight-ball pool was justified under s195(2) EA 2010.

Paragraph 28 of Schedule 3

264 The Defendants' case regarding paragraph 28 is that the exclusion of trans women from female competitions was a proportionate means of achieving a legitimate aim, that aim being to ensure (i) fairness of competition and (ii) diversity through the inclusion of females.

265 It seems to me that the first point substantially overlaps with the question previously discussed of whether exclusion is necessary to secure fair competition. Fairness of competition is undoubtedly a legitimate aim, and if (as I have accepted) exclusion is necessary to achieve fairness then it must be a proportionate means of doing so.

266 As to the second aim, I accept that women have been historically underrepresented among pool players. The FargoRate data indicates that in America they still are, and that is likely to be the case in the UK as well. Encouraging greater female participation is a clearly legitimate aim. I do not accept, however, that (were it not for the need to achieve fairness) excluding trans women from female competitions would be a proportionate means of achieving it. The Defendants' evidence was that the only complaints they received other than those about fair competition were objections to sharing toilets, and that is an issue which could arise whenever trans women are present, whether or not they are competing in the same event.

CONCLUSION

267 Having come to the end of what is essentially a long footnote to this judgment, I reiterate that in my view the effect of the decision in *FWS* is that the claim fails at the first hurdle because there has been no gender reassignment discrimination. The claim must therefore be dismissed.

HHJ Parker

1 August 2025