

The UKSC decision *For Women Scotland Ltd v. The Scottish Ministers*: women (and men) are now defined by their biological sex

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Abstract: On 16 April 2025, the UK Supreme Court delivered a landmark ruling in the case of *For Women Scotland Ltd v. The Scottish Ministers* determining that the correct interpretation of the words ‘woman’, ‘sex’ and ‘man’ within the provisions of the Equality Act 2010 refer exclusively to biological sex. In this instance, the court was tasked with verifying if the wording used in the Equality Act 2010 aimed at protecting women and members of the trans community from discrimination bear a coherent meaning within the Gender Recognition Act 2004. The Supreme Court’s decision followed a thorough examination of the Equality Act 2010, beginning with the provisions that directly relate to ‘sex’, to establish that the term should be interpreted exclusively as biological sex and it could not also encompass individuals living in an acquired gender and holding a gender recognition certificate. The ruling clarified that ‘transsexual persons’ are already recognised as a protected category under the Equality Act 2010. Moreover, the Supreme Court underlined the importance of the comparator in discrimination claims. In particular, in cases involving trans women, the Court held that a sex discrimination claim can be pursued on the grounds of perceived sex – specifically, that the person was treated less favourably because perceived as a woman.

Keywords: Equality Act 2010; biological sex; transgender; discrimination; UK Supreme Court

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On 16 April 2025, the UK Supreme Court delivered a landmark ruling in the case of *For Women Scotland Ltd (Appellant) v The Scottish Ministers (Respondent)*¹ determining that the correct interpretation of the words ‘woman’, ‘sex’ and ‘man’ within the provisions of the Equality Act 2010 (the ‘EA 2010’)² refer exclusively to biological sex. In this instance, the court was tasked with verifying if the wording used in the EA 2010 aimed at protecting women and members of the trans community from discrimination bear a coherent meaning within the Gender Recognition Act 2004 (the ‘GRA 2004’).³ More specifically, the court was called to answer the question whether “the EA 2010 treats a trans woman with a GRC [gender recognition certificate reflecting the ‘acquired gender’ or ‘acquired sex’] 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.”⁴

The case was brought up by the appellant, a feminist voluntary organisation which campaigns in Scotland on women and children’s rights, to challenge for the second time the definition of ‘woman’ in the statutory guidance issued by the Scottish Ministers (the Respondent) under the Gender Representation on Public

¹[2025] UKSC 16. Available online <https://supremecourt.uk/cases/uksc-2024-0042> (accessed 7 May 2025).

² The Equality Act 2010 replaced previous individual discrimination laws by bringing together various protected characteristics, which include age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation. Available online <https://www.legislation.gov.uk/ukpga/2010/15/contents> (accessed 7 May 2025).

³ Gender Recognition Act 2004. Available online <https://www.legislation.gov.uk/ukpga/2004/7/contents> (accessed 7 May 2025). This Act comes after the landmark ruling in *Christine Goodwin v the United Kingdom*, App. no. 28957/95 (ECtHR 11 July 2002) which affirmed that legal gender recognition was fundamental to respect transgender rights protected by art. 8 (right to respect for private and family life) and art. 12 (right to marry and found a family). See also P. Cannoot, ‘The pathologisation of trans* persons in the ECtHR’s case law on legal gender recognition,’ in *Netherlands Quarterly of Human Rights* 2019; 37 (1), pp. 14-35; E. Crivelli, ‘I transessuali e il diritto europeo,’ in M. Cartabia ed. by, *I diritti in azione*, (Bologna: Il Mulino, 2007), pp. 331-347.

For a comparative account of possible issues surrounding gender recognition see also S. Aboim, ‘Fragmented Recognition: Gender Identity between Moral and Legal Spheres,’ in *Social Politics* 2022; 29 (1), pp. 71-94; S. Osella, R. Rubio-Marin, ‘Gender recognition at the crossroads: Four models and the compass of comparative law,’ in *International Journal of Constitutional Law* 2023; 21(2), pp. 574-602.

⁴ [2025] UKSC 16, §8.

Boards (Scotland) Act 2018.⁵ The guidance aims to promote representation of women on the boards of certain Scottish public authorities where 50% of non-executive members must be women.⁶ According to the respondent, a person with a full GRC showing an acquired female gender would be considered to have the sex of a woman and therefore would count towards fulfilling the quota for women.⁷ On this, in fact, section 9(1) of the GRA 2004 established that “where a full gender recognition certificate is issued to a person, the person’s gender becomes for all purposes the acquired gender (so that, if the acquired gender is the male gender, the person’s sex becomes that of a man and, if it is the female gender, the person’s sex becomes that of a woman).”⁸ Thus, the central question before the court in the first instance was whether the terms ‘women’, ‘sex’, and ‘female’ in the EA 2010 should be interpreted in the light of section 9(1) of the GRA 2004 to include individuals who have acquired a new legal gender and hold a GRC.⁹ Both the Outer House in 2022¹⁰ and the Second Division of the Inner House¹¹ the following year argued that the GRC had the overarching power to determine who was a female, i.e. a ‘woman’, for the purpose of the EA 2010: a conclusion that the Supreme Court overturned.

The Supreme Court’s decision followed a thorough examination of the EA 2010, beginning with the provisions that directly relate to ‘sex’, to establish whether the term should be interpreted exclusively as biological sex or if it could also encompass individuals living in an acquired gender and holding a GRC.¹²

⁵ Gender Representation on Public Boards (Scotland) Act 2018. Available online <https://www.legislation.gov.uk/asp/2018/4/contents> (accessed 8 May 2025).

⁶ Ibid, sec.1 (1). Available online <https://www.legislation.gov.uk/asp/2018/4/section/1> (accessed 8 May 2025).

⁷ [2025] UKSC 16, §19.

⁸ Gender Recognition Act 2004, sec. 9 (1). Available online <https://www.legislation.gov.uk/ukpga/2004/7/section/9> (accessed 8 May 2025).

⁹ See [2025] UKSC 16, §25.

¹⁰ See *Opinion of Lady Haldane in Petition of For Women Scotland Limited*, [2022] CSOH 90. Available online <https://www.scotcourts.gov.uk/media/lgu1zd/court-of-session-petition-of-for-women-scotland-limited-for-judicial-review-13-december-2022.pdf> (accessed 8 May 2025).

¹¹ See *For Women Scotland v the LA & the Scottish Ministers*, [2022] CSIH 4. Available online <https://www.scotcourts.gov.uk/media/0a1plqgo/court-of-session-judgement-reclaiming-motion-by-for-women-scotland-limited-against-the-lord-advocate-and-others-18-february-2022.pdf> (accessed 8 May 2025).

¹² [2025] UKSC 16, §161.

First, the court took into account sections 13(6), 17 and 18 of the EA 2010¹³ which relate to sex, pregnancy and maternity discrimination and their related provisions. These instances clearly identify women as members of the female biological sex because only in this case can they become pregnant and, therefore, claim the relevant exemptions and duties in relation to their treatment.¹⁴ If the term ‘women’ in these contexts should be seen in the light of section 9(1) of the GRA 2004 – as mentioned above –, conversely, “this would suggest a legislative intention to provide protection only for pregnancies of women who do not have a GRC and to exclude persons living in the male gender (biological women) who have a GRC (and so are male on the Scottish Ministers’ case) who may become pregnant.”¹⁵

To further clarify this passage, the court refers to section 7 of the EA 2010¹⁶ which explicitly identifies individuals with the protected characteristic of gender reassignment as ‘transsexual persons.’ This indicates that ‘sex’ and ‘gender reassignment’ are treated as two distinct protected characteristics under the Act, each forming a separate basis for claims of inequality and discrimination.¹⁷ Importantly, Section 7 does not mention GRCs, suggesting that the scope of protection is not limited to those who have legally changed their gender. In fact, only a minority of trans people hold a GRC¹⁸ and a person obtains the protected characteristic of gender reassignment as soon as they start the transition process which means that they may not yet have changed their external appearance.¹⁹

¹³ See Equality Act 2010. Available online <https://www.legislation.gov.uk/ukpga/2010/15/contents> (accessed 7 May 2025).

¹⁴ See [2025] UKSC 16, §§ 177-184. For more on the topic see also A. Margaria, ‘Trans Men Giving Birth and Reflections on Fatherhood: What to Expect,’ in *International Journal of Law, Policy and the Family* 2020, 34, pp. 225-246.

¹⁵ [2025] UKSC 16, §196.

¹⁶ See Equality Act 2010. Available online <https://www.legislation.gov.uk/ukpga/2010/15/contents> (accessed 7 May 2025).

¹⁷ See [2025] UKSC 16, §199.

¹⁸ See the document produced by the charity Sex Matters, *Applying for a gender-recognition certificate: the facts*, 24 June 2024. Available online <https://sex-matters.org/wp-content/uploads/2024/06/Facts-about-the-GRC-1.pdf> (accessed 8 May 2025). See also Official Statistics, *Tribunal Statistics Quarterly: January to March 2024* Sec 8. Available online <https://www.gov.uk/government/statistics/tribunals-statistics-quarterly-january-to-march-2024/tribunal-statistics-quarterly-january-to-march-2024#gender-recognition-certificates> (accessed 8 May 2025).

¹⁹ See [2025] UKSC 16, §202. It is important to stress that transgender people represent a highly heterogeneous group, ranging from individuals who have just begun the medical transition process to those who transitioned decades ago.

Secondly, when it comes to service-providers the Court clearly affirmed that the workability of the EA 2010 cannot encompass a definition of woman and man beyond biological sex, in order to maintain the availability of separate and single-sex spaces or services for women or men as a group and to protect their safety, autonomy and dignity.²⁰ For instance, in the context of changing rooms, homeless hostels, female hospital wards or rape counselling groups but also cervical cancer screening for women²¹ and prostate cancer screening for men. On the one hand, segregation of the sexes helps to create a safe and dignified environment that may be prejudiced by the entry of a person with an acquired gender different from their biological sex; on the other hand, there are health screenings that necessarily relate to sexual biology such that exclusion on the basis of acquired gender as opposed to biological sex may be prejudicial to health.²² The court, then, refers to single-sex higher education, single-sex charities and associations and women's fair participation in gender-affected sport/activity. In these cases, the court highlights similar incoherencies, affirming that the definition of woman and sex in such instances should be biological.²³ Hence, it would be lawful to exclude trans women from women's groups if this is a proportionate means of achieving a legitimate aim. There is also an excursus on sexual orientation where the court claims that the EA 2010 refers to either sexual orientation towards the opposite biological sex or to the same biological sex, thus excluding *a priori* the possibility that a trans woman (biological man) can be attracted to women and then defined as lesbian. Lesbian organisations may in fact perceive the inclusion of biological men as compromising their objectives or the integrity of their spaces.²⁴ The Court argues that "The group-based rights and duties are concerned with identifying the shared needs and disadvantages that affect women as a group, or trans people as a group. If the first group were to include men and the second group people who are not trans people, it is unlikely that they would have the same needs or share the same disadvantages that would justify their inclusion in the particular group."²⁵

²⁰ See [2025] UKSC 16, §211.

²¹ On this topic see A.M. Berner, D.J. Connolly et al, 'Attitudes of transgender men and non-binary people to cervical screening: a cross-sectional mixed-methods study in the UK,' in *British Journal of General Practice* 2021; 71 (709), e614-e625.

²² See [2025] UKSC 16, §§ 216-225.

²³ See [2025] UKSC 16, §§229-246. For instance, in competitive sports, differences in human biology can still lead to significant differences between women and men in terms of physical performance outcomes.

²⁴ See [2025] UKSC 16, §206.

²⁵ See [2025] UKSC 16, §243.

Finally, the judges, wrapping up their arguments, answer the question why a biological definition of sex – established as the correct interpretation throughout the EA 2010 – does not discriminate against trans people with or without a GRC.

On the one hand, the court stresses that ‘transsexual persons’ – as mentioned above – are already in a protected category under the EA 2010.²⁶ So, when it comes to *direct discrimination*, it is important to identify on which ground it is perpetrated. For instance, a trans woman can be discriminated against at work because of a colleague making sexualised comments. In this case, the victim can bring a claim for harassment related to sex, but she can also decide to bring a claim related to the protected characteristic of gender reassignment.²⁷ The EA 2010 also still protects trans people from *indirect discrimination* and without the need to hold a GRC “both in respect of any particular disadvantage suffered by them as a group sharing the characteristic of gender reassignment and, where members of the sex with which they identify are put at a particular disadvantage, insofar as they are also put at that disadvantage.”²⁸ On the other hand, the court underlined the importance of the comparator when it comes to discrimination, explaining that in the context of a discrimination claim brought by a trans woman (a trans-identified biological male, with or without a GRC), the claimant may allege sex discrimination on the basis that she is perceived as a woman. For the purpose of comparison, she can contrast her treatment with that of someone who is not perceived as a woman – such as a biological male or a trans man who is perceived as male. Crucially, she does not need to disclose her biological sex to make this claim. This approach does not place trans women at a disadvantage. In fact, “neither a biological woman nor a trans woman brings a claim for direct sex discrimination *as a woman*”²⁹ in a strict biological sense; rather, both are asserting that they have been treated less favourably because they are perceived as women.

In the light of this court ruling, when it comes to practical implications for service-providers or, in other words, the application of the EA 2010 on a day-to-day basis, perception of the sexual self needs to give way to the importance of biological sex in order to guarantee not only safe spaces, but a context that fosters equality of all protected categories.

In the meantime, the Equality and Human Rights Commission (EHRC) is working to update its statutory Code of Practice for services, public functions and associations in the light of the Supreme Court’s judgment. While it has undertaken

²⁶ See S. Fredman, *Discrimination Law*, 2nd Edition, (Oxford: Oxford University Press, 2011), pp. 93-95.

²⁷ See [2025] UKSC 16, §256.

²⁸ See [2025] UKSC 16, §260.

²⁹ [2025] UKSC 16, §250.

a public consultation (19 May-30 June 2025)³⁰ to seek views on the practical implications of the ruling, the EHRC has issued an interim update on the matter which highlights the main consequences of the UKSC decision *For Women Scotland v The Scottish Ministers*.

As mentioned earlier, the decision affects workplaces, services open to the public, sporting bodies, schools and associations. So far, the EHRC has noted that workplaces should provide sufficient single-sex toilets and changing facilities while public services may provide these as long as “it is a proportionate means of achieving a legitimate aim and they meet other conditions in the Act [EA 2010],” bearing in mind that “it could be indirect sex discrimination against women if the only provision is mixed-sex.”³¹ The EHRC clearly states that single-sex toilets and facilities are intended for use by individuals of the corresponding biological sex; otherwise, they would no longer qualify as ‘single-sex’ spaces. However, it also emphasizes that trans individuals should not be left without access to appropriate facilities. To address this, the EHRC encourages the provision of lockable rooms for individual use or the provision of mixed-sex facilities in addition to single-sex facilities.³² Schools are also told they may need to find alternative arrangements to accommodate trans pupils, as they are not permitted to use the facilities for the sex with which they identify.³³ When it comes to membership of associations (>25 people) these can be single sex, and can be limited to people with two protected characteristics (for instance, gay men-only associations cannot admit trans-men and lesbian women-only associations cannot admit trans-women).³⁴

Questions that remain include: what about individuals who, at least in terms of outward appearance, no longer share biological characteristics with other members of their birth sex? How will trans people’s biological sex be established on a day-to-day basis (that is, without recourse to their GRC or medical file) if the person prefers not to disclose it? While no doubt there are ways of working through different scenarios – and controversies may arise only if the person is open about their trans status – any new guidance following this court decision will need to be nuanced and carefully crafted.

³⁰EHRC, Update on arrangements for Code of Practice consultation, 14 May 2025. Available on line <https://www.equalityhumanrights.com/media-centre/news/update-arrangements-code-practice-consultation> (accessed 28 May 2025).

³¹EHRC, An interim update on the practical implications of the UK Supreme Court judgment, 25 April 2025. Available on line <https://www.equalityhumanrights.com/media-centre/interim-update-practical-implications-uk-supreme-court-judgment> (accessed 28 May 2025).

³² Ibid.

³³ Ibid.

³⁴ Ibid.

