

Legal Clarity or Regression? Analysing the Supreme Court’s Judgment on the Definition of Sex under the Equality Act 2010

(The commentary is subject to updates due to the evolving nature of the issue)

Case Summary: For Women Scotland Ltd (Appellant) v The Scottish Ministers (Respondent)

Citation: UKSC/2024/0042

Court: UK Supreme Court

Date of Judgment: 16 April 2025 (Heard on 26 and 27 November 2024)

On Appeal From: [2023] CSIH 37

Judges: Lord Reed (President), Lord Hodge (Deputy President), Lord Lloyd-Jones, Lady Rose, and Lady Simler

Facts and Procedure

The case concerns the legal interpretation of the terms “woman”, “man”, and “sex” under the Equality Act 2010 (EA 2010), arising in the context of the Gender Representation on Public Boards (Scotland) Act 2018 (ASP 2018). It arose from a legal challenge brought by For Women Scotland Ltd, which identifies as a feminist organisation focused on protecting and strengthening women’s rights, particularly in response to public policy developments around gender identity and representation.

The ASP 2018 aimed to improve female representation on public boards in Scotland and initially defined “woman” broadly¹ to include not only individuals biologically female but

¹ Section 2 Gender Representation on Public Boards (Scotland) Act 2018 states:

“ “woman” includes a person who has the protected characteristic of gender reassignment (within the meaning of section 7 of the Equality Act 2010) if, and only if, the person is living as a woman and is proposing to undergo, is undergoing or has undergone a process (or part of a process) for the purpose of becoming female. This means that it is not necessary for a trans woman to have a Gender Recognition Certificate to be included as a woman for the purposes of the Act, provided they –

- have the protected characteristic of gender reassignment,

also those with the protected characteristic of gender reassignment who were living as women or undergoing gender transition. The ASP 2018 and the original statutory guidance defined “woman” as including people: (i) with the protected characteristic of gender reassignment; (ii) living as a woman; and (iii) proposing to undergo / undergoing / who have undergone a gender reassignment process.

For Women Scotland, in 2020, challenged this interpretation. In FWS1, the Inner House determined that the statutory definition was invalid, as it encroached upon the area of equal opportunities²—a matter reserved to the UK Parliament—and thus exceeded the legislative powers devolved to the Scottish Parliament.

Following that judgment, the Scottish Ministers issued revised statutory guidance,³ stating that the definition of “woman” under the ASP 2018 should now align with the EA 2010, where section 212 defines “woman” as “a female of any age.” However, the new guidance also maintained that a trans woman with a Gender Recognition Certificate (GRC) falls within this definition, effectively treating “sex” as including legal gender acquired via certification under the Gender Recognition Act 2004.

In 2022, the Appellant again challenged the lawfulness of this position, arguing that “woman” in the EA 2010 refers to biological sex alone and that including trans women with a GRC unlawfully alters the meaning of “sex” in a reserved area of law.⁴ Both the Outer House (2022)⁵ and the Inner House (2023)⁶ rejected the challenge, leading to the appeal before the UK Supreme Court.

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- are living as a woman, and
 - are proposing to undergo, are undergoing or have undergone a process (or part of a process) for the purpose of becoming female.
 - A trans man without a Gender Recognition Certificate would not be included as a woman for the purposes of the Act if they -
 - are not living as a woman, or
 - are proposing to undergo, are undergoing or have undergone a process (or part of a process) for the purpose of becoming male.”

This section has been amended by Section 2 Gender Representation on Public Boards (Scotland) Act 2024.

² For Women Scotland Ltd v The Lord Advocate [2022] CSIH 4, 2022 SC 150 “a1”

³ For more information: <https://www.gov.scot/publications/gender-representation-public-boards-scotland-act-2018-statutory-guidance-2/> (last visited: 09/05/2025)

⁴ Second Division, Inner House, Court of Session [2022] CSIH 4 P697/20

⁵ Ibid

⁶ Second Division, Inner House, Court of Session [2023] CSIH 37 P578/22

The Supreme Court intended to answer the question that ‘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’. ⁷

Judgment

In its unanimous judgment, the Supreme Court upheld the appeal and held that the terms “man,” “woman,” and “sex” within the meaning of the Equality Act 2010 refer to biological sex. ⁸

The Court began by recognising that protection against sex-based discrimination was first established under the Sex Discrimination Act 1975 (SDA), ⁹ which prohibited both direct discrimination, where a woman is treated less favourably than a man on the basis of sex—and indirect discrimination, where a neutral condition disadvantages women more than men. ¹⁰ Importantly, the Act also included exceptions, particularly in contexts involving privacy and decency, such as shared accommodation, changing rooms, and toilets, which permitted separate facilities for men and women. ¹¹ In its judgment, Parliament consistently employed the terms “man” and “woman” in the SDA 1975 to delineate groups on the basis of biological sex, and stated there was no indication that these terms were intended to have any other meaning. ¹²

Following the ruling of the European Court of Justice in *P v S and Cornwall County Council*, ¹³ which acknowledged protection for individuals undergoing gender reassignment, the UK responded with the Sex Discrimination (Gender Reassignment) Regulations 1999. While these amendments extended the SDA’s protections to trans individuals, the Court

⁷ Para 8

⁸ Paras 36 – 51

⁹ Section 1 - Part I, Sex Discrimination Act 1975

¹⁰ Paras 36 – 40

¹¹ Paras 41 – 48

¹² Para 51, 162

¹³ *P v S and Cornwall County Council*, Judgment of 30 April 1996, Case C-13/94: ECLI:EU:C:1996:170

observed that they did not alter the original, biological understanding of “man” and “woman” in the legislation.¹⁴

Subsequently, both the SDA 1975 and the 1999 Regulations were repealed and replaced by the Equality Act 2010, which consolidated equality law and introduced protection for additional characteristics, including sex and gender reassignment.¹⁵ However, the Court found no evidence that the Equality Act redefined “man,” “woman,” or “sex” in a way that departed from the biological meaning established under the earlier legislation.¹⁶

Turning to the Gender Recognition Act 2004 (GRA), the Court examined section 9(1), which provides that a person with a Gender Recognition Certificate (GRC) is to be treated as their acquired gender “for all purposes.” However, the Court emphasised that this provision is subject to section 9(3), which permits the disapplication of section 9(1)¹⁷ where its application would be incompatible with the context, purpose, or terms of other legislation—even in the absence of express language to that effect.¹⁸

Applying this reasoning, the Court determined that the Equality Act 2010 does not explicitly incorporate or rely upon the certificated sex of individuals. Rather, the structure and language of the Act, particularly in relation to provisions on pregnancy, maternity, single-sex services and spaces, sport, education, and sexual orientation—require a biological understanding of sex. The Court was clear that interpreting “sex” as referring to certificated sex would introduce internal inconsistency and undermine the coherence of the statute. It would also unjustifiably privilege trans individuals with a GRC over those without. Accordingly, the

¹⁴ Paras 54 – 62

¹⁵ Para 113 – 116, para 142 – 149

¹⁶ Para 162 – 164

¹⁷ Section 9: “General

(1) Where a full gender recognition certificate is issued to a person, the person’s gender becomes for all purposes the acquired gender (so that, if the acquired gender is the male gender, the person’s sex becomes that of a man and, if it is the female gender, the person’s sex becomes that of a woman).

(2) Subsection (1) does not affect things done, or events occurring, before the certificate is issued; but it does operate for the interpretation of enactments passed, and instruments and other documents made, before the certificate is issued (as well as those passed or made afterwards).

(3) Subsection (1) is subject to provision made by this Act or any other enactment or any subordinate legislation.”

¹⁸ Para 75, para 99 – 104 and para 156

Court held that section 9(3) of the GRA must operate to disapply section 9(1) in the context of the Equality Act.

In support of its interpretation, the Court reaffirmed the principle that a term used repeatedly within the same statute is presumed to have a consistent meaning, unless Parliament expressly provides otherwise. This approach is rooted in long-established authority, including *R v Secretary of State for the Environment, ex p Spath Holme Ltd* [2001] 2 AC 349, *R (Quintavalle) v Secretary of State for Health* [2003] UKHL 13, and *R (O) v Secretary of State for the Home Department* [2022] UKSC 3. The Court also reiterated that where a term is expressly defined, such as “woman” in section 212 of the Equality Act 2010—the statutory definition should guide its interpretation across the Act. While external materials, such as Explanatory Notes, may assist interpretation, they cannot override clear statutory language (*R (O)* at [30]).

Finally, the Court was clear that this interpretation does not remove or diminish legal protections afforded to trans individuals. Trans people, regardless of whether they possess a GRC, remain fully protected under the characteristic of gender reassignment. They may also invoke provisions on direct and indirect discrimination, and harassment. The Court recognised that, in light of case law, a trans woman may bring a claim for sex discrimination on the basis that she is perceived to be a woman—demonstrating that a certificated sex interpretation is not necessary for these protections to apply.¹⁹

Commentary

In the following sections, the commentary explores the possible implications of the For Women Scotland decision through a rights-based lens, examining how the judgment may affect the legal position of transgender individuals under the Equality Act and the Gender Recognition Act. At the heart of this analysis lies a fundamental question: what does this ruling actually mean for trans people in practice? How and in which contexts will they be included or excluded under the law?

¹⁹ Paras 248 – 263

The judgment introduces a significant degree of legal and practical uncertainty, leaving individuals, institutions, and service providers without clear guidance on how to navigate issues of access, recognition, and protection. While we are waiting for the Equality and Human Rights Commission (EHRC) to update the Statutory Code of Practice in light of the ruling, it remains unclear whether these revisions will meaningfully resolve the uncertainties or merely shift them elsewhere. While the ruling purports to clarify the meaning of “sex” in the Equality Act 2010, it simultaneously generates ambiguity about the status and treatment of trans people, particularly those with a Gender Recognition Certificate. This commentary critically engages with the tension between achieving legislative clarity and safeguarding lived equality, highlighting how the ruling may create inconsistencies, diminish protections, and increase marginalisation.

a) Legal Clarity Versus Social Consequences

Baroness Falkner, Chair of the Equality and Human Rights Commission (EHRC), aptly stated that redefining “sex” as biological could bring clarity “in a number of areas, but potential ambiguity in others.”²⁰ This duality is evident in the Supreme Court’s reasoning, which while aiming to ensure legislative coherence, has potentially jeopardised the rights of some of the most marginalised members of society.

The judgment addresses specific domains, such as single-sex spaces, sports, education, and charities, where sex-based distinctions are permissible under the Equality Act. Yet, while the ruling purports to preserve the integrity of sex-based protections for women and girls, it raises serious concerns about the effective inclusion of transgender individuals who hold a Gender Recognition Certificate (GRC). This is especially troubling in light of the existing legal criteria for obtaining a GRC, which already demand a high threshold of commitment to the acquired gender, such as living in it for at least two years, being diagnosed with gender dysphoria, and intending to live in that gender for life, alongside the shortage of necessary specialist services, such as years-long waiting times at gender clinics in Scotland.²¹

b) The Limits of Legal Recognition

²⁰ equalityhumanrights.com/media-centre/news/clarifying-definition-sex-equality-act (Last visited: 09/05/2025)

²¹ Chapter 7, [Gender Recognition Act 2004](#)

A core inconsistency arises from the Court’s suggestion that legal recognition via GRC does not necessarily entitle a trans person to be treated as their acquired sex in all contexts. This undermines the very essence of the GRC regime and creates a paradox where a person recognised in law as female may be excluded from women-only spaces or services.

In its judgment, the court addressed the issue of sport. Under Section 19 of the Gender Recognition Act 2004, trans women could be excluded from women’s sports:

“(1) A body responsible for regulating the participation of persons as competitors in an event or events involving a gender-affected sport may, if subsection (2) is satisfied, prohibit or restrict the participation of persons whose gender has become the acquired gender under this Act.

(2) This subsection is satisfied if the prohibition or restriction is necessary to secure—

(a) fair competition, or

(b) the safety of competitors.”

While this provision was relatively neutral and fair, the Supreme Court’s ruling now prohibits all trans women from participating in female sports based solely on their biological sex, without considering other factors. In practice, this may also bar them from male sports due to their physical attributes or gender identity. This situation can lead to discrimination and social isolation for trans individuals.

The contradiction is further exposed in scenarios involving trans men who become pregnant. If “sex” is strictly defined as biological, then protections under pregnancy and maternity provisions, originally intended for women, would not automatically extend to trans men with male legal status. The case of *Freddy McConnell*²² exemplifies the legal limbo created by such interpretation. Ironically, the recognition of biological sex in law might offer protection to trans men in such cases, suggesting that the current GRC framework may itself require re-evaluation. Moreover, The UK could move toward decoupling legal gender recognition from automatic access to all sex-based rights, thus maintaining protections for women as a class

²² R (McConnell and YY) v Registrar General [2020] EWCA Civ 559

while respecting gender identity. Therefore, a trans man with a GRC could still be eligible for pregnancy protections based on capacity, not legal gender.

c) Discrimination and the Erosion of Practical Protections

Though the Court has reiterated that the Equality Act continues to protect against discrimination based on gender reassignment, the practical implications cast doubt on this assurance. The ruling risks creating scenarios where trans people can be excluded from both men's and women's spaces—effectively rendering them invisible in law and society. This 'neither here nor there' legal identity is contrary to the principles of dignity and inclusion that underpin anti-discrimination law.

If the exclusion of trans people from single-sex spaces is framed as a protective measure for women and girls, this rationale becomes questionable, as empirical evidence does not support the assertion that trans women pose a significant risk. As such, the judgment in question may be viewed as more reactive, driven by perceived threats or social pressures, rather than grounded in objective, evidence-based reasoning.

Moreover, requiring individuals to prove their legal sex to access rights introduces invasive scrutiny into daily life. As noted in legal guidance, most trans people—and even cisgender individuals—are not typically asked to show a Gender Recognition Certificate or birth certificate in everyday settings. However, this judgment may shift that norm, particularly for those whose appearance does not conform to conventional expectations of femininity. Such requirements can amount to indirect discrimination, especially in employment, membership for association and single-sex services.

d) Unintended Consequences and Policy Missteps

This judgment exemplifies a broader tension in equality law: the balance between collective protections and individual dignity. It is notable that the Court did not settle disputes over access to single-sex spaces but arguably made them more complex. Organisations now face potential liability for both sex and gender reassignment discrimination, complicating employer responsibilities, charitable statuses, and public sector equality duties.

One particularly illustrative example of this uncertainty concerns access to toilets and other single-sex facilities. While the Equality Act 2010 provides a framework for lawful sex-based distinctions in certain contexts, it does not comprehensively regulate the provision of toilets, which are often governed by separate building regulations, health and safety codes, or local authority guidelines. As a result, there is no uniform legal requirement across all settings, and service providers are left to interpret how the Court's ruling interacts with these overlapping regulatory regimes. This creates further ambiguity, as the question of who is legally entitled to use a particular facility may now hinge on an unclear combination of biological definitions, risk assessments, and administrative discretion. Such ambiguity reinforces the need for clear, consistent guidance to prevent discriminatory practices and ensure the dignity and safety of all users.

For another example, we can point to hospitals. Hospitals illustrate the practical challenges of the ruling's strict definition of sex. A trans man may be placed in a women's ward based on biological sex, regardless of his legal gender or lived identity. This can create distressing situations for the individual and confusion for staff and patients, especially when objections arise or policies are unclear. Such scenarios risk undermining dignity, privacy, and continuity of care, revealing how a rigid legal approach can produce harmful outcomes in sensitive healthcare contexts.

The judgment may embolden blanket exclusions justified by the notion of "biological fairness," particularly in sports and associations. These risks reversing years of advocacy aimed at integrating trans people into social, cultural, and occupational life. While safety and fairness must be preserved, these aims can and should be addressed through nuanced, case-by-case assessments rather than blanket policies rooted in fear or prejudice.

Beyond its immediate implications for transgender individuals, the policing of gender expression may have broader ramifications for anyone who does not conform to rigid gender norms. This includes cisgender women whose appearance, behaviour, or lifestyle may deviate from traditional expectations of femininity. In practice, the entrenchment of biological essentialism may legitimise intrusive scrutiny and gatekeeping not only of trans identities but also of cis women themselves, ironically undermining the freedoms of the very group that organisations like For Women Scotland claim to protect. This narrowing of acceptable gender expression risks curtailing personal autonomy and reinforcing regressive social norms,

thereby diminishing the liberty of all individuals to live authentically without fear of institutional or societal sanction.

e) A Rights-Based Perspective

From a human rights standpoint, the judgment may conflict with Article 8 of the European Convention on Human Rights,²³ which guarantees respect for private and family life. When legal sex is rigidly tied to biology, it ignores the lived realities and identities of trans people. Although the Court asserts²⁴ that rights are maintained, its reasoning suggests a narrowing of scope rather than a strengthening of protections.

Dr Nick McKerrell, senior law lecturer at Glasgow Caledonian University, has correctly said that the ruling will have significant implications for trans people. He pointed out that the decision could leave trans women with GRCs unable to claim discrimination as women, a legal impossibility that undermines the very purpose of recognition laws. He said that: “It doesn’t mean everything overnight is going to change in terms of stopping trans people from accessing services. It will depend on what providers think the new definition will mean for them.”²⁵

f) Reconsidering Legal Clarity: Impacts on Trans Rights

In the Letter to the Minister for Women and Equalities on the definition of the protected characteristic of ‘sex’ in the Equality Act 2010 (3 April 2023), the Equality and Human Rights Commission noted:

“The potential implications of this change should be carefully identified and considered, with due regard to the Public Sector Equality Duty and in particular any possible disadvantages for trans men and trans women.”²⁶

²³ Article 8:

“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.”

²⁴ Para 73

²⁵ <https://www.bbc.co.uk/news/live/cvgg9ejql39t?>

²⁶ [letter-to-mfwe-definition-of-sex-in-ea-210-3-april-2023.pdf](#)

This raises a fundamental question: shouldn't such considerations come before legal changes are made, particularly when they affect a marginalised group, rather than treating the assessment of implications as an afterthought?

While legal clarity is important for consistency and enforceability, it must be carefully balanced against the potential social impact on already vulnerable communities. Sound policymaking, especially in equality law, demands a proactive rather than a reactive approach to protecting vulnerable populations.

Conclusion: Towards a More Inclusive Framework

In seeking clarity, the Supreme Court has arguably created a brittle and exclusionary legal framework, one that raises more questions than it resolves. While the protection of women's rights is essential, it must not come at the expense of trans rights. The ruling leaves open significant uncertainty about how trans individuals, including those with Gender Recognition Certificates, will be included or excluded across different legal and institutional contexts. Without coherent guidance, service providers and public bodies are left to interpret the ruling in ways that may vary widely, leading to inconsistency, confusion, and potential discrimination.

Single-sex spaces are at the core of the debate, and the creation of a third or gender-neutral space is often proposed as a solution. While this may address some concerns, it introduces new problems, such as forcing trans people into visibly separate categories, potentially exposing them to stigma or risk. Moreover, such arrangements may be impractical or unaffordable for many institutions, making them an incomplete and uneven response to a complex issue.

While updates to the Statutory Code of Practice may offer some clarification, it remains uncertain whether they will provide the level of practical guidance needed to resolve these ambiguities or merely shift the burden of interpretation onto frontline institutions. Rather than reinforcing rigid binary categories, the legal system must evolve to reflect the complexity of human identity while upholding dignity and substantive equality for all. Law, after all, should be a shield for the vulnerable, not a gatekeeper of belonging.