



DISCRIMINATION LAW ASSOCIATION

Briefings

Meaning of 'sex' in the Equality Act 2010

For Women Scotland Limited v The Scottish Ministers • [2023] CSIH 37;
November 1, 2023

Facts

The Gender Representation on Public Boards (Scotland) Act 2018 passed by the Scottish Parliament introduced a policy objective that 50% of members of non-executive members of such boards should be women, which the Scottish government intended to include trans women. To achieve that, the 2018 Act included in its definition of women those with the protected characteristic of gender reassignment and who were living as women.

For Women Scotland (FWS), a pressure group, brought a successful action (FWS1)¹ which ruled the definition impinged on a matter reserved to the UK government under the Scottish devolution arrangements, and it was unlawful (the court 'reduced' it in Scottish legal parlance).

The Scottish government then issued guidance which stated that, for the purpose of the 2018 Scottish Act, 'woman' would have the meaning established under ss11 and 212 of the Equality Act 2010 (EA), including those who had been recognised as female under s9(1) of the Gender Recognition Act 2004 (GRA).

FWS brought a second action asking for the new guidance to be 'reduced' - ruled unlawful. That claim was heard at first instance by Lady Haldane in the Court of Session Outer House (FWS2)². She ruled that the meaning of 'sex' in the EA was not limited to biological sex and included those recognised by a gender recognition certificate (GRC) as female under the GRA.

FWS appealed. In Scottish parlance this appeal is referred to as a 'reclaiming motion'.

Court of Session Inner House

The reclaiming motion was considered by the CSIH (the Scottish equivalent of the England and Wales Court of Appeal) before Lady Dorian (the Lord Justice Clerk) and Lords Malcolm and Pentland (FWS3)³

FWS argued that:

- FWS1 had been determinative of the question;
- The GRA, which focused on marriage and pensions, was now largely symbolic after same-sex marriage and pension equalisation;
- The integrity of the EA could only be preserved if 'sex' was taken to mean 'biological sex',
- Pregnancy and maternity provisions (among others) would become unworkable unless 'sex' meant biological sex, and
- The EA had impliedly repealed the GRA.

¹ *For Women Scotland v Lord Advocate* [2022] CSIH 4, February 18, 2022

² [2022] CSOH 90, December 13, 2022

³ [2023] CSIH 37, November 1, 2023

The CSIH noted that the whole subject of gender reassignment, gender identity and gender recognition was difficult and sensitive. It also noted that FWS had altered its position from FWS1 which had not challenged that a person with a 'female' GRC was a woman for the purpose of the EA.

Nor had the GRA impliedly been repealed by the EA as certain provisions had been moved from the GRA into the EA but s9 of the GRA remained untouched. The GRA had been prompted by the European case of *Goodwin*. In *Goodwin* the court had found breaches of articles 8 and 12 of the European Convention on Human Rights (ECHR) which had led the UK government to enact a mechanism to effect a change in a person's status in the eyes of the law and that was the GRA.

FWS's arguments would undermine the whole purpose and effect of the GRA. As Lady Hale had noted in *R(C) v Secretary of State for Work and Pensions*⁴ the purpose was not to allow a person to live as a 'third sex' but fully as a man or woman. The GRA was not 'narrow' or 'symbolic' as FWS had suggested.

The 'marriage' cases of *Bellinger*⁵ and *Corbett*⁶ were now outdated.

In the EA the terms 'male, female, man or woman' were not limited to a biological definition. This is not required by ss212 or 11 which, the court said, were entirely capable of being read consistently with s9 of the GRA. The court noted that the terms 'sex' and 'gender' are often used interchangeably in the EA, for example in s7.

The CSIH found that the terms 'sex' and 'gender' should be given a contextual interpretation based on the circumstances in which the terms were used.

The court considered some of the examples put forward by FWS, namely the armed forces, single-sex spaces and services, sexual orientation, schools, communal accommodation, and pregnancy and maternity rights and found no difficulty with a contextual interpretation. Exemptions, where lawful and proportionate, could still be used to maintain single-sex spaces and services. Pregnancy was the basis for pregnancy and maternity rights, not sex. Examples where exemptions had not been provided did not lead to the interpretation that 'sex' meant biological sex.

A written intervention was allowed by the campaign group 'Sex Matters' which focused on ECHR rights. The court found this made no difference to its conclusions.

The CSIH concluded that a person with a GRC in their acquired gender should be recognised as such for EA purposes and so the Scottish government guidance was not unlawful.

Effect of the judgment

The judgment is binding on Scottish courts and tribunals and persuasive elsewhere in the UK. It would be a bold employment tribunal which would go against it.

However, on February 16, 2024 it was announced that FWS has been granted permission to appeal to the Supreme Court, so this will clearly be a case to watch.

Comment

The judgment makes plain that the legal sex status of a person with a GRC will be determined by the GRC.

⁴ *R(C) v Secretary of State for Work and Pensions* [2017] 1 WLR 4127

⁵ *Bellinger v Bellinger* [2003] UK House of Lords 21, April 1, 2003

⁶ *Corbett v Corbett* [1970] 2 All England Law Reports 32

The judgment makes plain that the legal sex status of a person with a GRC will be determined by the GRC.

The conclusion of the judgment states that the legal status of a person without a GRC remains that of their natal sex. That is an obiter comment as the guidance does not deal with the status of such persons.

The CSIH stated that persons with a GRC have a prima facie right to access single-sex services consistent with their legal sex. It did not analyse the indirect discrimination arguments which can be raised to show a person without a GRC but with the protected characteristic of gender reassignment may prima facie be subject to unlawful discrimination if excluded from facilities which match their acquired gender unless a lawful exclusion is proportionately applied.

Practical discrimination situations will have further added layers of complexity because a trans man, for example, may be *perceived* as a man or a woman by a discriminator and discriminatory conduct may be founded on their perceived rather than actual sex.

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