

The Supreme Court Ruling¹ in For Women Scotland v The Scottish Ministers 16 April 2025

The case brought by For Women Scotland (FWS) sought to establish the correct meaning of the words parliament used in the Equality Act in 2010 when legislating to protect women and members of the trans community.

The case began when the Scottish government chose to include transsexual women as literally women, when passing the Gender Representation on Public Boards (Scotland) Act in 2018. The purpose of that legislation was to provide for positive action in relation to the appointment of women on public boards. FWS successfully challenged the definition at judicial review, arguing that the Scottish government had impinged on the UK government's reserved powers relating to the Equality Act, on the nature of protected characteristics. In 2022, supported by the EHRC, the Scottish government issued statutory guidance asserting that a person with a Gender Recognition Certificate (GRC) had the literal sex of a woman and would count towards the 50% quota. FWS petitioned again for judicial review. Lady Haldane in the Court of Session dismissed the petition and held that section (91) of the GRA had the effect that certificated gender changed a person's sex for all purposes. Her decision was upheld by the Second Division, on the grounds that nothing in the EA 2010 mandated a contrary conclusion. At this, FWS appealed to the Supreme Court. The Supreme Court Justices heard from organisations on both sides of the argument (interveners): the EHRC, Sex Matters, Amnesty International, Scottish Lesbians, The Lesbian Project and the LGB Alliance. The hearings took place over 3 days in November 2024. Individuals were not permitted to give evidence; nor were unincorporated groups like Lesbian Labour.

The Justices looked at the legislation that the EA 2010 replaced, particularly the Sex Discrimination Act 1975. They found nothing to suggest Parliament intended to change the definition of sex in that legislation and that there was no doubt it intended sex to mean biological sex.

The definition of "Lesbian"

The Supreme Court said that without a clear definition of 'sex' as meaning biological sex in law, the protected characteristic of sexual orientation could not be defined.

Paragraph 204 of the judgement confirmed that

"the core provision is Section 12 of the EA 2010 which defines the protected characteristic of sexual orientation and is framed by reference to orientation towards persons of the same sex, the opposite sex, or either sex. Read fairly, references to sex in this provision can only mean biological sex. People are not sexually oriented towards those in possession of a certificate."

Paragraph 205 (2) reiterated that

"In relation to the protected characteristic of sexual orientation-
(a) a reference to a person who has a particular protected characteristic is a reference to a person who is of a particular sexual orientation;
(b) a reference to persons who share a protected characteristic is a reference to persons who are of the same sexual orientation."

Paragraph 206 continued that

"a person with same sex orientation as a lesbian must be a female who is sexually oriented towards (or attracted to) females, and lesbians as a group are females who share the characteristic of being sexually oriented to females. This is coherent and understandable on a biological understanding of sex. On the other hand, if a GRC under section 9(1) of the GRA 2004 were to alter the meaning of sex under the EA 2010, it would mean that a trans woman (a biological male) with a GRC (so legally female) who remains sexually

¹ https://supremecourt.uk/uploads/uksc_2024_0042_judgment_updated_16f5d72e76.pdf

oriented to other females would become a same sex attracted female, in other words, a lesbian. The concept of sexual orientation towards members of a particular sex in section 12 is rendered meaningless. It would also affect the composition of the groups who share the same sexual orientation (because a trans woman with a GRC and a sexual orientation towards women would fall to be treated as a lesbian) in a similar way as described above in relation to women and girls."

The right to freedom of exclusive association

Lesbians have gradually lost this right over the last decade due to trans women (biological men) self-identifying as lesbians or 'transbians'. Dating websites are no longer for biological females, some having up to 40% biological men.

The Justices recognised *"the inevitable loss of autonomy and dignity for lesbians"* in Paragraph 207 noting *"the practical implications for lesbian clubs and associations across several areas of their lives"*. For instance, clubs having more than 25 members could restrict their membership to those sharing a protected characteristic under Schedule 16 of the EA 2010, but there was no exception permitting the exclusion of a trans identifying male with a GRC. This meant that as soon as an association of lesbians had more than 25 members, it could no longer legally maintain its single-sex status, without contravening the EA 2010: they had, by law, to admit trans identifying males. This had a "chilling effect" on lesbians and their right to same-sex spaces.

When faced with this question at the hearing, the Scottish Ministers responded that lesbian associations could restrict membership to less than 25 women. The Justices deemed this Impractical. Their further suggestion that lack of attraction to a trans identifying male did not diminish the protections to which lesbians were entitled in terms of their own protected characteristic of sexual orientation was also dismissed in paragraph 208 of the Judgement:

"In short, the core provisions to which we have referred, which refer to sex, man or woman, are not capable of being read fairly and consistently with the terms of section 9(1) and (2) of the GRA 2004 without defeating their purpose and meaning."

The Judgment states that sex has a biological meaning throughout the legislation and the word "woman" always and can only mean a biological female of any age. Consequently, the protected characteristic of sex cannot be interpreted as including certified sex and "woman" does not include a male of any age who holds a GRC nor does it exclude a female of any age who holds a GRC.

Paragraph 209 concludes:

"To reach any other conclusion would turn the foundational definition of sex on its head and diminish the protection available to individuals and groups against discrimination on the grounds of sex."

and in paragraph 231, that in the EA,

"Schedule 16 and section 193(1) plainly intend that single-sex associations and charities should be permitted to exist along with other single-characteristic associations. A certificated sex meaning applied to these exceptions would make it impossible for any women's association or charity ... to be set up or to pursue a dedicated purpose which is directed at the needs of biological females. To require such associations or charities to reconceive of their objects as targeting a group that does not correspond with their original aims, and to allow trans people with a GRC (of the opposite biological sex) to join would significantly undermine the right to associate on the basis of biological sex (or sexual orientation based on biological sex)"...

Aren't men who have had a sex change biological women?

No. Regardless of how many 'sex-change' operations or cross-sex hormones they have had, biological men cannot change their biological sex. Their chromosomes remain XY and they retain other immutable characteristics associated with their sex. The same is true of trans identifying women. Those claiming the Judgement amounts to a loss of rights for trans people are misinterpreting the law. Trans people have lost no rights other than those to which they were not entitled. The ruling does not undermine the GRA 2004. In fact, trans people rightly continue to be protected against discrimination on the basis of their biological sex both in fact and by perception, and under the protected characteristic of gender reassignment.