



The definition of sex: *For Women Scotland (FWS) Ltd v The Scottish Ministers* (2025)

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ABSTRACT

This case concerns a legal challenge by For Women Scotland against the Scottish Government's revised statutory guidance on its Gender Representation on Public Boards (Scotland) Act 2018, which For Women Scotland argued misinterpreted the definition of 'sex' under the Equality Act 2010. The case centred on statutory interpretation and whether the term 'sex' in the Equality Act should be interpreted in light of the Gender Recognition Act 2004 which allows individuals with a Gender Recognition Certificate to be legally recognised in their acquired gender.

BACKGROUND

The *For Women Scotland* litigation reached the United Kingdom (UK) Supreme Court as an appeal from the Scottish Inner House of the Court of Session.¹ The case related to the Gender Representation on Public Boards (Scotland) Act 2018, devolved legislation by which the Scottish Government sought to increase the representation of women on public boards. Section 2 of this legislation, as introduced, had included a definition of woman that encompassed trans women, including those who had yet to receive a Gender Recognition Certificate (GRC) under the Gender Recognition Act 2004. In earlier litigation, For Women Scotland, a campaign group which advocates for a 'biological' approach to sex in law, had succeeded in a challenge to the inclusion of this definition.² That decision focused on devolution issues, with the petition succeeding on the basis that equality law was an issue reserved to the UK Parliament and that the inclusion of this definition was therefore outside of the Scottish Parliament's legislative competence.

In April 2022, following that Inner House decision, the Scottish Government issued new statutory guidance for the Gender

1 *For Women Scotland (FWS) Ltd v The Scottish Ministers* [2023] CSIH 37.

2 *For Women Scotland Ltd v Lord Advocate* [2022] CSIH 4.

Representation on Public Boards (Scotland) Act 2018 on the basis that the court had nullified the effect of section 2.³ This guidance stated that a person who had attained a GRC had the sex of a woman, and she would count towards meeting the 50 per cent objective for representation on Public Boards. This, as the Supreme Court accepted in its judgment in *For Women Scotland*, was in line with advice of the Equality and Human Rights Commission at that time.

CASE

For Women Scotland nonetheless challenged the Scottish Government's revised guidance on the basis it was based upon an error of law in misconstruing the definition of sex under the Equality Act 2010 and sought a declaration that the statutory guidance was therefore unlawful. In the Outer House of the Court of Session Lady Haldane held that the Gender Recognition Act 2004, which is applicable throughout the UK, resulted in those holding a GRC having the sex assigned in that certificate for all matters (except for specific listed exceptions), and that the statutory guidance was therefore lawful, and was not superseded by the later enactment of the Equality Act 2010.⁴ This position was upheld by the Inner House, which agreed that the 2004 Act was a 'far-reaching' enactment. Both Scottish courts accepted that when the UK Parliament subsequently passed the Equality Act 2010 the references to women encompassed trans women who had obtained a GRC and references to men intended to include trans men with a GRC.⁵ This conclusion was the focus of the appeal to the UK Supreme Court.

The case therefore centres on the correct interpretation of the Equality Act 2010 and whether it needs to be read consistently with the Gender Recognition Act 2004. This question, however, arises as part of a dispute that is more focused on the relationship between devolved legislation and a Westminster statute than on the legal interests of affected people, which makes for an awkward vehicle by which the courts are to reach a ruling with such far-reaching implications, perhaps explaining the reluctance of the Scottish courts to adopt a sweeping approach. The Supreme Court, however, conceived its task as being one of statutory interpretation, and specifically determining the meaning of 'sex' under the Equality Act 2010 and whether the enactment of the Gender Recognition Act 2004 altered the meaning of sex within anti-discrimination law. As the Supreme Court states:

3 The definition of woman provided under s 2 of the 2018 Act was also repealed by the Scottish Parliament through the Gender Representation on Public Boards (Amendment) (Scotland) Act 2024.

4 [2022] CSOH 90, para 47.

5 [2023] CSIH 37, para 42.

The central issue on this appeal is whether references in the EA 2010 to person's 'sex' and to 'woman' and 'female' are to be interpreted in the light of section 9 of the GRA 2004 as including persons who have an acquired gender through the possession of a GRC.⁶

Section 9(1) of the Gender Recognition Act states that once a person has a GRC 'the person's gender becomes for all purposes the acquired gender', while section 9(3) states that there is an exception, where this status is 'subject to ... any other enactment'. The Supreme Court conceived of its task as determining whether the Equality Act 2010 falls within the exception under section 9(3) of the Gender Recognition Act 2004. The Supreme Court did not follow the Scottish courts and rejected arguments in favour of a variable definition of sex within the Equality Act 2010.⁷

In reaching this conclusion, the Supreme Court placed particular weight on the legislative history of the development of sex as a protected characteristic within anti-discrimination law and specifically the passage of the Sex Discrimination Act 1975, the Gender Recognition Act 2004 and Equality Act 2010. The Court concluded that the definition of sex under the of Sex Discrimination Act 1975 was 'biological', and that this carried through subsequent enactments.⁸ The Supreme Court held that the exception in section 9(3) of the Gender Recognition Act 2004 does not require an express disapplication of section 9(1) for the later Equality Act 2010 to take on the meaning it attributed to it. The Court held that the exception applies where the 'terms, context and purpose' of the enactment demonstrates a clear incompatibility or it renders the other enactment incoherent and unworkable.⁹ The Equality Act 2010 does not expressly disapply section 9(1), nonetheless, having examined the Equality Act 2010, the Court concluded that applying section 9(1) would make the Equality Act incoherent and unworkable.¹⁰ Following the Court's decision, a trans woman holding a GRC is treated as 'male' for the purposes of the Equality Act 2010, and a trans man holding a GRC is treated as 'female' for the purposes of the Equality Act 2010.

The Court insisted that the case is not about the status of trans people generally, but on the significance of holding a GRC, and whether this can be said to legally change one's sex for the purposes of the Equality Act. It specifically states that being trans remains a protected characteristic under the Equality Act and indeed started the judgment with a statement that:

6 *For Women Scotland (FWS) Ltd v The Scottish Ministers* [2025] UKSC 16, para 25.

7 *Ibid* paras 189–197.

8 *Ibid* para 265.

9 *Ibid* para 156.

10 *Ibid* para 264.

It is not the role of the court to adjudicate on the arguments in the public domain on the meaning of gender or sex, nor is it to define the meaning of the word ‘woman’ other than when it is used in the provisions of the EA 2010.¹¹

This could be treated as packaging, with the Court assuaging itself as to the even-handedness of a decision which has implications which reach far beyond the facts of the case. Much as the Court would loudly insist that ‘a biological sex interpretation would not have the effect of disadvantaging or removing important protection under the EA 2010 from trans people’,¹² it was obliged to acknowledge that its interpretation of the Equality Act would have implications across areas such employment, sports and other associations, with the court’s statements indicating that it will be possible for a range of bodies to adopt policies which restrict the participation of trans people in single-sex activities. Within maximalist readings of the judgment, including by the Equality and Human Rights Commission, this was rapidly presented as mandating such exclusions in a broad range of circumstances.¹³

ANALYSIS

There are many reasons to question the decision in *For Women Scotland*, and many of the problems resultant from the adoption of a position based around biological sex are beyond the scope of a short case note. The Court reached for the presumption that there is a uniform meaning in a particular term across a statute almost reflexively,¹⁴ hoping that it would avoid the complexity involved in the more nuanced approach which had been adopted by the lower courts. But to do so, it had to neglect, sidestep or fudge its approach to several significant issues, including the application of the European Convention of Human Rights (ECHR), the application of European Union (EU) law and the consequential effect of its judgment for Northern Ireland. Instead of bringing clarity, *For Women Scotland* is likely to trigger multiple strands of litigation, and particularly so if the maximalist readings of the decision are adopted.¹⁵

11 Ibid para 2.

12 Ibid para 248.

13 Equality and Human Rights Commission, ‘An interim update on the practical implications of the UK Supreme Court judgment’ (25 April 2025).

14 As set out in cases like *Imperial Tobacco Ltd v The Lord Advocate (Scotland)* [2012] UKSC 61, para 14 (Lord Hope).

15 This analysis draws upon the authors’ work, alongside Sylvia de Mars and Anurag Deb, in Anurag Deb, Sylvia de Mars, Colin Murray and Aoife O’Donoghue, ‘Limits to the UK Supreme Court’s reach: Northern Ireland, the Windsor Framework and trans rights’ (*Administrative Court Blog* 30 April 2025).

First, in terms of the ECHR, the Human Rights Act 1998 is only mentioned in passing in the judgment.¹⁶ The Court did not consider section 3(1) on the necessity of reading and giving effect to primary and subordinate legislation in way that is compatible with Convention rights. It also did not address section 6(1) on the requirement that public authorities act in ways that are ECHR compatible. The Court did not engage in any detailed consideration of whether its interpretation of ‘sex’ is compatible with Article 8 ECHR, which is a particularly problematic omission given that the Gender Recognition Act 2004 was passed in response to *Goodwin v United Kingdom* which found that states should not leave trans people in an intermediate zone in terms of their acquired gender, neither treated as fully female nor male outside of proportionate exceptional circumstances, or they would find themselves in breach of Article 8 ECHR.¹⁷ The Supreme Court, unsurprisingly in light of its general jurisprudence on statutory intention, did not reference the explanatory notes or the comments of ministers in Parliament as regards to the passage of the Gender Recognition Act in its decision. In this instance, this approach undoubtedly facilitated the Court’s reaching an interpretation of these provisions which hollowed out much of the value of a GRC, notwithstanding the statements of ministers in enacting key measures.¹⁸ But, in sidestepping ministerial comments, the Court was also avoiding the underlying legal issues which generated this position, which will inevitably give rise to further human rights challenges to the Equality Act as it is now interpreted. The Supreme Court anchored its use of the term ‘transgender status’ in *AP, Garçon and Nicot v France*,¹⁹ but in that case Strasbourg discussed the issues at stake in terms of transition in gender identity and the recognition of trans people in the gender they present.²⁰ It does not provide authority for the ECHR allowing for trans people to be separated out from the gender in which they present. The Supreme Court’s adoption of a general approach to issues of sex/gender which is immutable and binary in *For Women Scotland* is thus difficult to square

16 *For Women Scotland* (n 6 above) para 67.

17 *Goodwin v United Kingdom* (2002) 35 EHRR 18.

18 See, for example, David Lammy’s explanation in committee session, as Parliamentary Under-Secretary of State for Constitutional Affairs, on the Gender Recognition Bill that ‘[o]nce a person has recognition of their acquired gender, he or she will be protected against discrimination on the basis of that acquired gender, in the same way as any other person of that gender is protected’: Gender Recognition Bill, Standing Committee A, col 185 (16 March 2004).

19 *AP, Garçon and Nicot v France* (unreported, 6 April 2017) para 140.

20 It should be noted that the Supreme Court had previously advanced a binary approach to sex/gender as being inherent to many areas relating to public provision of services in *R (Elan-Cane) v Secretary of State for the Home Department* [2021] UKSC 56, para 55.

with Strasbourg's Article 8 jurisprudence on personal characteristics. This may generate difficulties for public bodies seeking to comply with the judgment in light of their Human Rights Act obligations.

The Supreme Court also neglected to engage in a detailed discussion of EU law. It did refer to how the Equality Act 2010 had been amended to protect against indirect discrimination in light of the jurisprudence of the Court of Justice of the European Union (CJEU), which meant that 'transgender people (irrespective of whether they have a GRC) are protected by the indirect discrimination provisions of the EA 2010 without the need for a certificated sex reading of the EA 2010'.²¹ But the development of anti-discrimination law in the UK and the meaning of sex as a protected characteristic was, from inception, intertwined with EU law. The Court did not, for example, reference the requirements of EU law at the time of the passage of the Equality Act 2010 which, going as far back as *P v S and Cornwall County Council* case, that trans people are protected against discrimination in relation to gender reassignment as 'essentially if not exclusively' a form of sex discrimination.²² This decision was followed by *Richards*, in which the UK Secretary of State for Works and Pensions was found to be wrong in using 'men who have not undergone gender reassignment surgery' as the correct comparator to a 'trans woman', with the CJEU reiterating the stance it had adopted in *P v S and Cornwall County Council*.²³ Furthermore, although the Supreme Court mentioned the UK House of Lords' decision in *Chief Constable of West Yorkshire v A*, it did not address Lord Bingham's finding that the meaning of sex under the Sex Discrimination Act 1975 had to be given a trans-inclusive meaning as a result of the UK's EU law obligations:

In my opinion, effect can be given to the clear thrust of [EU] law only by reading 'the same sex' ... and 'woman', 'man' and 'men' [in the relevant pieces of domestic legislation] as referring to the acquired gender of a post-operative transsexual who is visually and for all practical purposes indistinguishable from non-transsexual members of that gender.²⁴

The Equality Act 2010 was enacted in the context of the UK being an EU member state. It is therefore implausible to insist that the meaning of sex within the enactment does not fully reflect the requirements of EU law. The unspoken element of the UK Supreme Court's reasoning, necessary to bridge these inconvenient facts, is that the UK has, in the interim, left the EU and the domestic courts are no longer generally

21 *For Women Scotland* (n 6 above) para 260.

22 C-13/94 *P v S and Cornwall County Council* ECLI:EU:C:1996:170, para 21.

23 C-423/04 *Richards v Secretary of State for Work and Pensions* ECLI:EU:C:2006:256, para 24.

24 *Chief Constable of West Yorkshire v A (No 2)* [2004] UKHL 21, para 11.

bound to interpret domestic law in light of EU law's requirements.²⁵ In its rush to take advantage of this opportunity, however, the UK Supreme Court did not engage with the challenges which its decision posed for Northern Ireland.

Non-discrimination law in Northern Ireland has a much longer history than in other parts of the UK, and the main body of the Equality Act 2010 does not apply in Northern Ireland, with the exception of a limited number of provisions that were not relevant to the judgment.²⁶ Equality, moreover, is a devolved matter in Northern Ireland. This places Northern Ireland in a different position to Scotland, as the devolution of this area of law-making means that the Representation on Public Boards (Scotland) Act 2018, even in its original form, would have been within the legislative competence of the Northern Ireland Assembly. That having been said, the current sex discrimination law is analogous to other parts of the UK, and, ordinarily, the UK Supreme Court ruling would be persuasive in this context. The issue, however, is that not all parts of the UK left the EU on the same terms, and the Windsor Framework maintained a connection between Northern Ireland law and significant EU law rights and equality protections. Article 2(1) of the Windsor Framework states that:

The United Kingdom shall ensure that no diminution of rights, safeguards or equality of opportunity, as set out in that part of the 1998 Agreement entitled Rights, Safeguards and Equality of Opportunity results from its withdrawal from the Union, including in the area of protection against discrimination, as enshrined in the provisions of Union law listed in Annex 1 to this Protocol, and shall implement this paragraph through dedicated mechanisms.²⁷

Article 2 imposes two obligations upon the UK. The first element of Article 2(1) directly references the 1998 Agreement and commits to non-diminution, as a result of Brexit, of any EU law which sustains the provisions of its chapter on Rights, Safeguards and Equality of Opportunity, while the second expressly references a collection of EU anti-discrimination laws listed in Annex 1. In the *Allister* case the UK Supreme Court found that under section 7A of the European

25 European Union (Withdrawal) Act 2018, s 6(1).

26 These three provisions are s 82 (offshore work), s 105(3) and (4) (expiry of Sex Discrimination (Election Candidates) Act 2002) and s 199 (abolition of presumption of advancement).

27 Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and European Atomic Energy Community [2019] OJ C 384 I/92, Protocol on Ireland/Northern Ireland (now called Windsor Framework), Decision no 1/2023 of the Joint Committee established by the Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community.

Union (Withdrawal) Act 2018, the Windsor Framework (or Protocol) is operative within domestic law and obligations therein must be given effect,²⁸ and this has been affirmed by the Northern Ireland Court of Appeal in *Dillon* in the context of Article 2 (although this decision is currently under appeal to the UK Supreme Court).²⁹ This decision accorded a broad meaning to the ‘civil rights’ of everyone in the community under the 1998 Agreement, and the specific listing of measures in Annex 1 should provide a powerful indication that they are presumed to be connected to this commitment.

Both aspects of Article 2 are potentially relevant to the *For Women Scotland* decision, but it is the express commitment of the six equality directives listed in Annex 1, which are subject to dynamic alignment between EU law and Northern Ireland law under Article 13(3) of the Windsor Framework, that are most significant.³⁰ These measures include the most significant EU law protections against sex discrimination in relation to the provision of goods and services, employment and social security. As noted above, the CJEU, in interpreting these measures, has treated gender reassignment discrimination as *essentially, if not exclusively*, a form of sex discrimination. Insofar as EU law continues to apply in Northern Ireland, trans individuals should therefore be considered to hold the sex that they have acquired, rather than the sex they were assigned at birth. This means that in Northern Ireland a GRC is given its full meaning in contexts in which EU law applies. The Windsor Framework, in short, could be interpreted as precluding a general interpretation of ‘sex’ as meaning ‘biological sex’ in the context of gender reassignment.³¹

CONCLUSION

Far from producing clarity, therefore, this decision opens the door to a range of resultant litigation and highlights the strains that devolution imposes on attempts to impose one-size-fits-all standards from Westminster in many areas of law. Lost in much of the furore around

28 *In re Allister* [2023] UKSC 5, para 74.

29 *In re Dillon and Others* [2024] NICA 59, para 85.

30 Race Equality Directive: Directive 2000/43/EC; Framework Directive (religion and belief; age; sexual orientation; and disability): Directive 2000/78/EC Gender Goods and Services Directive: Directive 2004/113/EC; Equal Treatment Directive (Recast) (employment): Directive 2006/54/EC; Equal Treatment Directive (self-employment): Directive 2010/41/EU; Equal Treatment Directive (social security): Directive 79/7/EEC.

31 Equality Commission for Northern Ireland, ‘Legal paper and information: the meanings of “sex”, “men”, “women” and “gender reassignment” in equality and allied legislation in Northern Ireland and interim information for employers, service providers and public authorities’ (June 2025) 14.

For Women Scotland is the underlying problem of representation on public boards and the aim of the Scottish Parliament to ensure that women should make up half of non-executive board membership. But in determining the question of whether ‘a trans woman who has a GRC counts towards achieving the goal set in the gender representation objective’ in the negative,³² the Supreme Court sustained a narrative that trans women were displacing ‘biological’ women on boards. It is a narrative that overlooks the existence of trans men in balancing out any such effect, and, indeed, the case’s outcome ensures that any trans men on a public board will count towards the representation of women under the 2018 Act.

32 *For Women Scotland* (n 6 above) para 267.