

Cases on Sex and Gender

The terms 'sex' and 'gender' are often used interchangeably in discussions around the disadvantaged position of women within society and the measures which can be taken to address this. However these terms are contested in law and require careful definition. The context for this is the debate around the rights of people who are trans and how these interact with the rights of women.

The following cases are examples of recent jurisprudence from different areas of law where the courts have considered the legal meaning of relevant terms including 'sex', 'woman' and 'female'. Some of these cases involve direct consideration of the meaning of these terms within the Equality Act 2010, others are more general but import relevant legal principles:

- *R (Green) v Ministry of Justice (2013) EWHC 3491 (Admin)*: in this case a transgender woman without a Gender Recognition Certificate (GRC) who had been placed in the male prison estate claimed direct sex discrimination on the grounds of being a woman. The Court had "no hesitation" in concluding: *"He is in a male prison and until there is a Gender Recognition Certificate, he remains male"*
- *R (Fair Play for Women Ltd) v UK Statistics Authority (2021) EWHC 940 (Admin)*: in this case the Court held the Claimant had a "strongly arguable" case that 'sex' (within the meaning of the Census Act 1920) meant 'legal sex' with reference to an individual's sex at birth or their subsequent acquisition of a GRC. (Note, there is a Scottish judgment on a similar issue which reaches a different conclusion based upon the specific context of the census in Scotland, *Fair Play for Women Ltd v Registrar General for Scotland*, below).
- *R (FDJ) v Secretary of State for Justice [2021] EWHC 1746 (Admin)*: this was a challenge to the prison service's policy on the allocation of trans female prisoners which was premised on the basis of their 'legal sex'. Although not in issue, that interpretation of the definition of sex was not criticised by the court in its analysis.
- *A v Chief Constable of West Yorkshire Police [2004] UKHL 21*: this was a case brought by a trans-woman whose application to be a police constable was refused because she would be unable to carry out police searches. The case predated the Gender Recognition Act 2004 (GRA) (but was handed down whilst the Gender Recognition Bill was being considered in Parliament). In her speech, Lady Hale stated that the GRA: *"provides a definition and a mechanism for resolving these demarcation questions"* in assessing who is and who is not a woman.
- *R (Authentic Equity Alliance) v Commission for Equality and Human Rights [2021] EWHC 1623 (Admin)*: this case concerned the EHRC's code of practice in relation to shared and single sex services. Both parties and the Court agreed that references in the Equality Act 2010 to sex were to 'legal sex'.

- *For Women Scotland v The Lord Advocate* [2022] CSIH 4: the Scottish Inner House found that that Scottish legislation (which defined “woman” as including a person who had the protected characteristic of gender reassignment, but only if they were “living as a woman”) was unlawful. The Court considered the meaning of “sex” within the Equality Act 2010 and found that sex and gender reassignment were separate protected characteristics and should not be conflated. The judgement stated that references to sex were to ‘one or other sex, either male or female’.
- *MB v Secretary of State for Work and Pensions* Case C-451/16 [2019] 1 CMLR 4: this case considered whether a trans-woman who had not obtained a GRC could lawfully be refused access to a state pension. In determining the case under the Social Security Directive the Court of Justice of the European Union (CJEU) adopted a different test for when someone changes “sex” which was not based around the acquisition of a GRC. However CJEU also made it clear that it is for member states to determine the conditions under which legal recognition is given to the change of legal sex of a person.
- *Fair Play for Women Ltd v Registrar General for Scotland* [2022] CSIH 7: in this case, the Scottish Court of Session (Outer House) held that people could answer questions about their sex on the census by reference to how they self-identified (regardless of whether they had a GRC).