

Who is a woman? Sex, gender and the courts

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Equality Act 2010

- Defines a “transsexual” person as someone who is

“proposing to undergo, is undergoing a or has undergone a process (or part of a process) for the purpose of reassigning the person’s sex by changing physiological or other attributes of sex”.

That person then has a protected characteristic of “gender reassignment” and so is protected from discrimination in the workplace, the provision of services and in education

In the UK, the terminology has changed even since 2010 so one would now say “Transgender”.

NB: a person does not have to have had surgery or any kind of hormonal treatment to acquire this characteristic or without their legal sex being changed.

Legal change to gender

- In the UK, this requires the issue of a gender recognition certificate which is issued by a panel including a lawyer
- One does not need to have had any form of surgery or hormonal treatment, but one has to evidence to the satisfaction of a specialist panel that they have lived in their “acquired gender” for at least 2 years and have a medical diagnosis of gender dysphoria (a diagnosis recognised under DSM IV and V)
- That leads to the issue of a Gender Recognition certificate where their legal sex is changed.
- Fewer than 5,000 of the estimated 600,000 transgender people in the UK have a GRC.

Equality Act 2010

- Sex – which is defined under the Equality Act 2010 as the characteristic of being a “man or a woman”.
- Discrimination on the grounds of sex is unlawful.
- But there are a series of exceptions, including in the provision of single sex services – so changing facilities, toilets, refuges, sex specific services, single sex education, and even sports.
- It is lawful under the EQA 2010 to provide a single sex service where a joint service for persons of both sexes would be less effective, and the extent to which the service is required by persons of each sex makes it not reasonable practical to provide separate services
- Providing that it is a “proportionate means of meeting a legitimate aim”.

The debate

There are a number of debates which are finding their ways to the court in the UK about the reconciliation of the rights of those who are transgender and those who are women – although both these terms really go to the heart of the issue which is – what is sex, and what is gender and how does that impact upon single sex environments?

- (a) Can you say that you are a woman simply by identifying as such and so gain access to single sex environments (toilets, prisons, domestic violence refuges, schools)?
- (b) When is someone protected under the EQA 2010 as a transgender person, and is the information issued by many public bodies correct in its legal analysis?
- (c) Is the expression of “gender critical beliefs” particularly in public, something which can lead to your dismissal from work?
- (d) Should you be considered to have used “hate speech” by stating these

To give some examples of current debates

- Is saying that “trans women are not women” something which should give rise to a claim in discrimination if said in the workplace?
- Can someone be compelled to use someone’s preferred pronouns in a work or educational setting, even if they have a reasonable belief for religious or on the basis of their belief that sex is immutable, but gender is not (something which was held to be a philosophical belief worthy of protection in the EAT decision of *Forstater v CGD Europe* [UKEAT /0105/20/JOJ]) .
- Who is a woman for the purposes of the census?
- Who is a woman for the purpose of admission to participate in sport?

Current meaning of sex and gender ?

- *R(Elan Cane) v SSHD* [2018] EWHC 1530 at [96]

NB: most legislation uses sex and gender interchangeably, whereas in the UK, these two words have come to have distinct meanings.

”Sex” – now commonly understood to refer to an individual’s physical characteristics, their chromosomes, gonads and genital features.

“Gender” – their individual self perception.

Jurisprudence as currently developing

- *R(FDJ) v Secretary of State for Justice* [2021] EWHC 1746
- Challenge by a female prisoner who alleged that she was sexually assaulted whilst in a women's prison by a transgender woman prisoner with a gender recognition certificate.
- Allegation that the current policy of the government to permit transgender women who have committed sexual offences against women should not be in women's prison.
- Less than 5% of prisoners are female, but many of them have been the victims of sexual abuse or domestic violence during their lives.
- There is one special unit for transgender women in the UK prison estate.
- Estimates that there were 163 transgender prisoners, 81 convicted of one or more sexual offences. 129 were in male prisons and 34 in women. Less than 10 of these have a GRC

R(FDJ) (No 2)

- Claimant argued that the policies were unlawful because they indirectly discriminated against women – contrary to the Equality Act 2010 and the Human Rights Act : and because they failed to take account of the exemptions for single sex accommodation/services under the EQA 2010.
- This was because the location of transgender women in the female prisons exposes female prisoners to a greater risk of sexual assault than a single sex only prison – and sexual assault is inhuman and degrading treatment and/or an interference with a women’s dignity .
- There is however no increase in risk for men in male prisons, and men in prisons are less likely to have been the victim of sexual offending/abuse in childhood.
- This is a disproportionate impact on women.

R(FDJ) (No 3)

- The policy was not proportionate because there were lots of other measures which could have been adopted such as :
 - (a) Adopting a test of proportionality when deciding if transgender women should be in women's prisons
 - (b) Carrying out a risk assessment
 - (c) Having a policy that those who have committed sexual offences against women even if they have a GRC should not be accommodated in the female estate .
 - (d) They also failed to consider the exemptions to permit single sex accommodation under the Equality Act 2010

R(FDJ) (No 4)

- D said:
 - (a) Policies set out a fact sensitive approach which look at competing interests in a difficult area - so for example those in the transgender wing wish to be moved into the general women's population
 - (b) It does not engage inhuman treatment and no particular disadvantage to women or such effect is justified – or rather on the facts of her case article 3 there was no substantive breach of Article 3.
 - (c) Single sex exemptions under the EQA are permissive
 - (d) Transgender prisoners should not be treated differently merely on the basis of subjectively negative attitudes of others towards them.
 - (e) The statistics on assaults are so small and so few that one cannot draw any meaningful conclusions
 - (f) No realistic less intrusive policy could be identified.

R(FDJ) (No 5)

- Court found:
 - (1) Statistics were so small, and incomplete and not collected with any precision that it was impossible to say that those who are transgender are more likely to commit sexual assault on a non transgender prisoner – and in any event the prison does do a risk assessment ?
 - (2) Articles 3 and 8 of the ECHR were engaged .
 - (3) But the policies were nuanced – and the need to manage all risks if emphasised: and one has to balance the rights of women and those of transgender women: there are risk assessment by panels: they have to take into account the offending history of the transgender woman and their sexual behaviours.
 - (4) So the policy when properly applied did not have a disproportionate impact.

R(FDJ) (No 6)

- (5) But even if this was not the case, the difference was in pursuit of the legitimate aim of ensuring that the safety and welfare of all prisoners whilst enabling transgender prisoners to live in their chosen gender, and these means are reasonable and proportionate.
- (6) Could not accept that less intrusive measures could have been adopted.
- (7) The single sex exemptions were permissive and the minister was under no obligation to apply them .

R(Fair Play for Women) v Office of National Statistics

- Challenge brought by feminist organisation about the guidance given on how to answer the question in the 2021 census

“What is your sex?”

The guidance initially issued by the ONS had said that in answering this question, one could answer what one considered as one’s gender identify, or one’s self identified sex or those on legal documents such as a passport (which are not required to record legal sex)

Fair Play said – the way that the question is framed means that “sex” here means what is on your birth or gender recognition certificate

Arguments

- CI: The statute empowering a census to take places identifies that the census must state “sex” , and must ask “what is your sex” and have only two answers – either female or male (this is in contrast to other questions to be posed which are more nuanced – eg how would you describe your national identity?) . This is therefore a binary question – and not one of self identification
- D: “sex” was an umbrella term including a series of concepts such as “lived” and “self identified sex” .

Judge: there is a strongly arguable case that the Claimant was right – and granted an interim injunction compelling the ONS to change its guidance as per the Claimant’s case.

Forstater v CGD (UKEAT/0105/20/JOJ)

- Claimant holds gender critical beliefs – including the belief that sex is immutable and not to be conflated with gender identity.
- She is an enthusiastic user of social media to explore those views.
- She worked for a development charity: some of her work colleagues said that her comments were “offensive” and “transphobic” – her contract was therefore not renewed.
- She complained that this discriminated against her because of her belief: the argument was whether it fell into a philosophical belief within the meaning of s10 of the Equality Act 2010.

Forstater (2)

- Beliefs , even if unpopular or offensive were not excluded from respect . Only those which amounted to things such as Nazism or totalitarianism would be excluded from rights under Article 9 and 10 of the ECHR – which is the right to manifest one’s philosophical and religious beliefs and freedom of expression.
- The Claimant’s gender critical beliefs – which were widely shared – and which did not seek to “destroy” the right of trans persons, clearly did not fall into that category.
- The Claimant’s belief, whilst offensive to some , and whilst arguably amounting to harassment of trans persons in some circumstances, fell within the protection of article 9 of the ECHR and therefore s10 of the EQA 2010.

Thank you for listening

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