While the UK Supreme Court defines who is a ‘woman’ in law, trans people fight for survival

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TGEU’s statement on the UK Supreme Court judgment in *For Women Scotland v Scottish Ministers*

On 16 April, the UK Supreme Court delivered its judgment in *For Women Scotland v Scottish Ministers*. TGEU condemns this judgment, as the Court has interpreted the protected characteristic of ‘sex’ and the word ‘woman’ in the UK’s Equality Act (the anti-discrimination law) to mean ‘biological sex’ and ‘biological woman’. This means that now, trans people will not be recognised according to their gender marker obtained under the UK’s Gender Recognition Act 2004 for the purposes of the Equality Act. This will also create uncertainty as to how the Equality Act interacts with other laws.

This ruling significantly undermines the human rights and gender identities of trans people. We stand in unwavering solidarity with trans people in the UK and every trans person impacted by this ruling.

In its judgment, the Court went to great lengths to explain that it was neither defining the general meaning of the word ‘woman’ nor settling debates on the meaning of ‘sex’ – it was only providing an interpretation of these words for the purposes of the Equality Act. In doing so, it also clarified that trans people can claim discrimination based on ‘gender reassignment’ as a protected characteristic. In addition, trans people can claim direct and indirect discrimination on the basis of *being perceived* as belonging to the gender they identify as (i.e. based on their legal gender marker acquired under Gender Recognition Act 2004).

However, these are mere concessions against the significant damage that the decision will do. The decision will empower institutional and societal violence under the guise of clarity. The Court has effectively undone twenty years of struggles for equality protections for trans people based on a highly technical interpretative exercise. It undermines trans people’s dignity, forces trans, non-binary and intersex people into legal categories that do not reflect their lived identities, and erases the existence of lesbian trans women. The judgement also stands in opposition to the “clear premise” of the Equality Act to include trans women with a GRC as women for the sex discrimination provisions.

UK’s obligations under international human rights law

It is important to recall the context in which the UK’s Gender Recognition Act was passed. It was enacted following the European Court of Human Rights’ decision in *Christine Goodwin v. UK*, which found that trans people’s right to private life (Article 8 of the European Convention on Human Rights) was violated due to lack of legal gender recognition procedures, which impacted their ability to access a range of benefits and exposed them to discrimination.

Rights under the Convention have to be effective and practical, not theoretical and illusory. Therefore, legal gender recognition under the UK Gender Recognition Act should lead to the full recognition of a person on par with other members of the same gender in all areas of life. Article 8 of the Convention also entails a negative obligation for States to protect trans people effectively against arbitrary interference by public authorities. By effectively holding that legal gender recognition has no relation to the Equality Act and that a trans person would not be recognised according to their gender identity no matter the stigmatising hoops they have to jump through to change their

gender marker, the Supreme Court has whittled away the Gender Recognition Act.

The UK has consistently endorsed these standards. For instance, in the Committee of Ministers Recommendation CM Rec (2010)5 on measures to combat discrimination on the grounds of sexual orientation and gender identity, Member States of the Council of Europe are required to take appropriate measures to guarantee the full legal recognition of a person's gender reassignment *in all areas of life* (para 21).

Further, when the UK was still part of the EU, multiple decisions of the Court of Justice of the European Union (CJEU) involving the UK recognised discrimination against trans people as part of sex discrimination. As early as 1996, in *P. v. S and Cornwall County*, the CJEU clarified that sex discrimination protection cannot be strictly confined to whether a person belongs to one or other sex. Trans-specific discrimination is in fact at the heart of sex discrimination as the person defies expectations associated with the sex assigned at birth. Other UK-based cases, such as *Richards* or *M.B.* have reiterated the interpretation that a trans woman must be treated on par with a similarly positioned cisgender woman.

Impact of the decision: Growing risks of further exclusion and violence

The UK Supreme Court's decision has severely undermined legal certainty and reinforced the structural inequality of a community that already faces unprecedented levels of exclusion from basic services. The precise ramifications of the judgment will only become clear over time, especially on issues not covered specifically in the Equality Act and the Court's decision, but there is no doubt that it will come at great cost to the trans community.

It has already become clear that the privacy and safety of trans people while accessing essential services (hospital wards, refuges, public toilets, changing rooms), in prisons, and reception centres for asylum seekers is under serious risk. Already, the UK's senior politicians have publicly stated that trans people should use services such as toilets aligned with their 'biological sex'. Even though the precise obligations of service providers are yet to be clarified and the UK's Equality and Human Rights Commission has already issued preliminary guidance that proposes to restrict trans people from using services that align with their gender and in some cases, exclude them from services for either gender. Although more detailed statutory guidance is yet to be provided, government departments too have already begun changing their policies, to the detriment of trans people's rights. For example, the British Transport Police have already amended their strip-search policy stating that searches in custody will now take place in accordance with the 'biological sex' of the detainee. This means that trans women can now be searched by male police officers, putting at risk the safety of a group that historically faced high levels of violence and abuse particularly at the hands of law enforcement. There could be other similar ramifications of such an interpretation that the Court does not explicitly consider, such as the placement of trans asylum seekers in reception centers. Placing them according to their sex assigned at birth risks exposing trans women seeking asylum to sexual violence and harassment.

The Court's judgment highlights a critical problem: the lack of understanding in mainstream society about the lived experiences of trans people and the discrimination they face on the basis of both gender identity and sex. Trans people's rights and needs are hardly ever reflected in lawmaking. This is in no small part due to the fact that the trans people are not heard – a major shortcoming of the decision is that no trans person or organisation representing trans people were heard during the case even though multiple anti-trans groups were allowed to intervene.

A double-edged sword: Restricting trans rights hurts all women

In the UK, the rights of trans people, and especially trans women, have been framed in harmful binary terms, pitting cisgender women against trans women. Anti-trans groups such as For Women Scotland, Sex Matters, and LGB Alliance who initiated or participated in this case, and the UK's Equality and Human Rights Commission which has been criticised by the United Nations Independent Expert on sexual orientation and gender identity for its

transphobic lobbying, have fabricated a debate casting trans people as a threat to the safety of cis women, despite no evidence suggesting this. The judgment will only serve to further this exaggeration and misinformation about the risks to women's safety to justify the marginalisation of trans people.

The reality is that trans people, and especially trans women experience, heightened levels of gender-based violence, hate speech, and hate crime. The UK's Home Office has attributed the rise of such crimes in the UK to the harmful rhetoric used against trans people in the public sphere and by politicians. Fear-mongering around the inclusion of trans women in the category of 'women' serves to undo decades of substantial progress achieved by feminist movements in rejecting biological and essentialist understandings of sex and gender that reduce women to their bodies and ability to procreate.

The risks presented by such interpretations of 'sex' are high for cisgender women as well. It empowers the scrutiny of cisgender women whose appearance does not align with traditional or Western ideas of femininity and beauty standards, demands for proof of gender, and hate speech based on personal characteristics and gender expression. This is not an imagined risk – there have already been a number of instances in the UK and globally where cisgender women have been stopped from using public toilets and falsely labelled as trans to delegitimise them. There is no reasonable solution in such cases that can protect the dignity of all women. Would all women have to show their ID before using public services? And if a trans woman has ID with a female gender marker, how can she be barred from using single-sex services? Would associations and services now be entitled to demand proof that a person has not changed their legal gender, when that would be a clear violation of their right to privacy?

Denying trans people access to services in accordance with their gender identity necessarily means excluding them from participating in public life and will lead to withdrawal from accessing public services. Simple acts that many take for granted like going shopping, catching a train, visiting the cinema, and going to the doctor require second thoughts or involve serious security risks as trans people can no longer be confident about which spaces they can(not) use without being harassed. It is not an acceptable solution to further segregate trans people, keeping them at the margins of society.

Calls to action

TGEU affirms that trans women are women and trans men are men – any legal framework that refuses to recognise this puts all women at risk, especially women who are gender non-conforming, Black and brown women, and disabled women. We emphasise that the rights of trans people are inseparable from women's rights and are intertwined in the shared struggle for bodily autonomy, safety, and justice. We also have much work to do to ensure that non-binary people are able to access legal gender recognition.

We reject the 'separate but equal' logic being applied to protections for trans people in the UK, which only leads to deeper inequality. TGEU calls on key public services and associations in the UK to explicitly include trans people in their services and calls on the UK's Equality and Human Rights Commission to adopt guidance that ensures that trans people are protected in accordance with their lived realities and identities. Human rights organisations, feminist groups, and equality bodies across Europe have an obligation to defend the rights of trans people and uphold dignity for all.

It is time for robust anti-discrimination legislation in the UK and in Europe, that protects trans people's access to public goods and services on the basis of sex and on the basis of their gender identity. We urgently need laws that recognise the unique intersectional discrimination that trans people face, to prevent the kind of fall-out we are witnessing in the UK. Trans people's lives and identities are not up for repeated public scrutiny and debate. TGEU stands steadfastly with membership in the UK and wider trans community in the UK in navigating a vastly changed landscape on anti-discrimination. We are ready to support strategic litigation efforts, advocacy with European human rights institutions, and community initiatives in the UK. Please reach out to the Policy team

(policy@tgeu.org) or the Community Building team (miles@tgeu.org).

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