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Trans women can take seats on public boards set aside for women, Scottish judge rules

13 December 2022, 14:33 | Updated: 13 December 2022, 14:53



Susan Smith of For Women Scotland. *Picture: Alamy*



By Gina Davidson

Trans women should be regarded as the same as biological women when it comes to achieving a 50-50 balance of men and women on public boards, a Scottish judge has ruled.

Lady Haldane in the Court of Session said trans women who hold a Gender Recognition Certificate (GRC) can take seats which are earmarked for women.

She said the definition of sex was "not limited to biological or birth sex", that it could include people with GRCs, and as a result trans women can be legally classed as women for the purposes of gender balance.

The landmark case could have major implications for the Scottish Government's Gender Recognition Reform Bill which receives its final reading in Holyrood next week.

The government has claimed that by changing who can apply for a GRC, as a medical diagnosis of gender dysphoria will no longer be required, will have no impact on women's rights.

But the campaign group For Women Scotland, which had gone to court on the public boards issue, say Lady Haldane's ruling now makes that stance untenable.

Speaking to LBC, spokeswoman Susan Smith said they were disappointed with the ruling and are considering appeal grounds.

She added: "But at least we have some clarity going into the GRR final debate - it's quite shocking that the deadline for amendments has passed before MSPs were aware of this ruling because there's going to be massive implications. The Scottish Government has been saying a GRC makes no difference, it changes nothing, but now the court has said it does."

She added: "Measures which tackle discrimination against women need to take account of the structural reasons women are disadvantaged, career breaks for maternity, sexism in the workplace... and what we have now is a situation that male people if they get a GRC can declare they are a woman and take advantage of these measures so they become pretty meaningless and wholly divorced from the original intent.

"With the attempt by the Scottish Government to expand the pool of people who can get a GRC by removing a need for a gender dysphoria diagnosis, so basically anyone for any reason, and people aren't allowed to question it, they are undermining the principle of the Equality Act and are straying quite far into reserved matters."

She added: "This ruling draws a distinction between transgender people without a GRC and those with them. There is now a split within the protected characteristic of gender reassignment.

"The argument from the Scottish Government is that it makes no difference legally if someone has a GRC or not, but clearly it does.

If this ruling stands up then you can claim certain rights and privileges under law which you couldn't before.

"Our lawyers are looking at an appeal, but this ruling does open up the way for challenges to what the Scottish Government is doing with the GRR because it's quite clear now they're legislating on something potentially beyond their competence, and without giving full information to MSPs.

"The Scottish Government has said a GRC doesn't change what it means to be a man or a woman but this ruling proves it does, so this argument has been framed dishonestly from the very beginning.

"We would urge Westminster to relook at the reserved law and determine what is meant by sex because we can't go on with a muddle of it meaning one thing in one piece of legislation and something else in another."

For Women Scotland had originally taken the Scottish Government to court over the Gender Representation on Public Boards Act and the guidance published with it, in February.

While they lost the initial case, they won on appeal, when it was ruled that the Scottish Government had conflated two protected characteristics - that of sex and gender reassignment - and had over-stepped its competence, as those protections are laid out in the UK Equality Act, which is reserved to Westminster.

The Scottish Government then redrafted its guidance to public organisations on how to implement the legislation. But FWS went back to court stating that it still conflated sex and gender, and re-wrote the definition of the word woman.

However in her judgement Lady Haldane stated that sex and gender reassignment were separate and distinct characteristics but were not necessarily mutually exclusive.

She wrote: "I conclude that in this context... "sex" is not limited to biological or birth sex, but includes those in possession of a GRC obtained in accordance with the 2004 [Gender Recognition] Act stating their acquired gender, and thus their sex."

But she also added: "Such a conclusion does not offend against, or give rise to any conflict with, legislation where it is clear that "sex" means biological sex... the example of the Forensic Medical Services (Victims of Sexual Offences) 32 (Scotland) Act 2021 where references to the sex of the forensic medical examiner can only mean, read fairly, that a victim should have access to an examiner of the same biological sex as themselves. I agree.

"There are no doubt many other such examples. That does not give rise to the inevitable conclusion, as was urged upon me, that "sex" in the present context must mean the same thing as it does in others. A rigid approach in this context is neither mandated by the language of either statute nor consistent with their respective aims and purposes."

A Scottish Government spokesperson said: "We are pleased to note the outcome of this challenge."

Asked about the potential impact of the ruling on the GRR Bill, he added: "The Gender Recognition Reform Bill is about the process of getting a Gender Recognition Certificate, not the effect of having one."

Scottish Trans welcomed the ruling, with manager Vic Valentine saying it confirmed the position as they had understood it and upholds the rights of transgender people.

"A trans person who receives a GRC might be discriminated against because of their recognised sex, and they would be protected from that discrimination by the Equality Act.

"It is important to add that this ruling does not affect the exceptions in the Equality Act which mean that single-sex services can exclude trans people or treat them less favourably where it is a proportionate means to a legitimate aim, although services are not required to do so.

"They can do that whether or not the trans person has a GRC. In short, the ruling confirms the status quo and the rights of women and trans people under it."

Meanwhile Scottish Labour has said it will table a series of last-minute amendments to the GRR Bill next week.

The party said it wants the Scottish Government to address concerns, including those raised by some women's groups and by the UN Rapporteur on Violence Against Women and Girls, and build consensus.

The amendments will seek to clarify the primacy of the Equality Act, ensure single-sex spaces are protected, and strengthen requirements around guidance, monitoring and review of the law.

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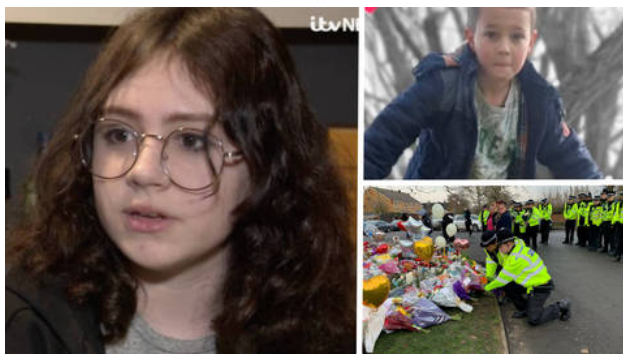
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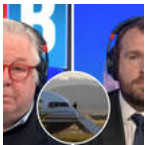
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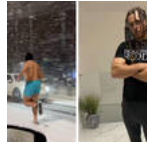
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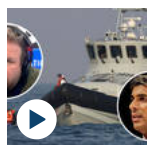
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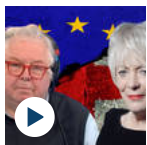
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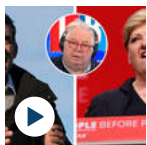
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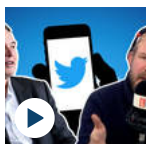
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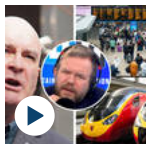
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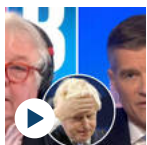
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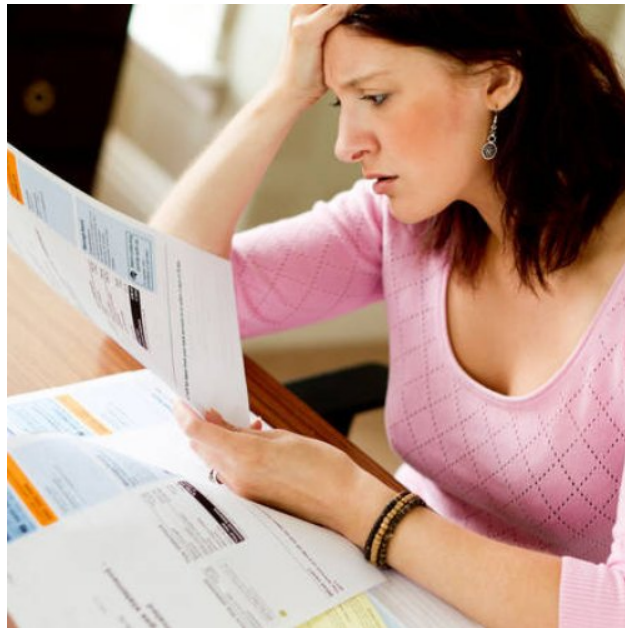
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