# The case of *Green v Secretary of State for Justice* [2013] EWHC 3491 (Admin) should not be used to deny legal rights to transgender people

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## Abstract

'Gender critical' feminists (feminists who hold a trans exclusionary point of view) argue that a transgender woman who does not have a Gender Recognition Certificate ('GRC') has no right to bring a discrimination claim if she is excluded from a female single-sex space. They claim that she should always be compared to a cisgender man and hence it is lawful to exclude her from a space where a cisgender man would also be excluded. In making this argument they rely on the High Court case of *Green v Secretary of State for Justice* [2013] EWHC 3491 (Admin).

This article examines the case of *Green* in detail and finds multiple serious errors of law. It concludes that the legal reasoning in *Green* is unlikely to be followed in the future by the High Court and would be overturned by a more a senior court.

Further, this article looks at the effect of retained EU law when deciding to extent to which *Green* can be viewed as a precedent by the Employment Tribunal and County Court. It notes that *Green* is only concerned with domestic law and is inconsistent with prior and later European Court of Justice ('ECJ') cases on *gender reassignment* discrimination. However, discrimination in employment, social security and services *is* subject to retained EU law. As a result, no court, regardless of its seniority, would use *Green* as a precedent in *gender reassignment* cases in these areas.

An estimated 97% or more of transgender woman do not have GRCs and if 'gender critical feminists' are correct, these women can be lawfully excluded from toilets and changing rooms at work and during leisure. Given the current level of transphobic hatred in the UK, the effect would be to drive them out of society altogether. This article puts beyond doubt the fallacy of this 'gender critical' feminist position.

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# 1 Introduction

In this article the terms *transgender* or *trans*[1] refer to people who live as the opposite sex[2] to the sex that was registered to them at birth and who have the protected characteristic of *gender reassignment*[3]. Under the Gender Recognition Act 2004 ('GRA'), trans people can apply for a Gender Recognition Certificate ('GRC'), which, if granted, recognises their lived gender (in legal terms *acquired gender*) "*for all purposes*"[4].

'Gender critical' feminists believe on ideological grounds that transgender women are really men and should be excluded from all female single-sex spaces. To achieve this goal, they are following a two-pronged strategy to undermine the legal protections for transgender people related to employment and services.

i) They seek to rely[5] on the High Court case of *Green v Secretary of State for Justice*[6], and ignore other cases and statutory authorities, in order to argue that only the roughly 1% to 2.5%[7] of the trans population who have GRCs have any legal right to bring a claim under the Equality Act 2010 ('EA 2010') if they are excluded from using single-sex spaces in their acquired gender.

ii) They oppose[8] attempts to reform the GRA to remove the legal and practical barriers for the remaining 97.5% to 99% of the trans population to formalise their legal status.

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[1] In other contexts the terms transgender or trans have a wider meaning and include non-binary people and people, such as cross dressers, who do not live as members of the opposite sex.

[2] There is no such thing as a binary biological sex merely sexual characteristics. The notion that sex is binary is a social construction. See for example G. Davis and S Preves *Intersex and the Social Construction of Sex* Contexts, Vol 16, No. 1, p. 80

[3] Equality Act 2010 ('EA 2010') s. 7(1). Note it is hard to see how such people would not have this protected characteristic as s. 7(1) does not require a medical transition.

[4] Gender Recognition Act 2004 ('GRA') s. 9(1)

[5] See for example J Norman *Has everyone REALLY got it wrong?* (Filia, 26 Aug 2018). Available from https://filia.org.uk/latest-news/2018/8/23/has-everyone-really-got-it-wrong. [Last accessed 25 May 2021] MurrayBlackburnMackenzie. *The case for due diligence: assessing and owning policy and practice*. (murrayblackburnmackenzie.org, 22 February 2019) Available from https://murrayblackburnmackenzie.org/2019/02/22/the-case-for-due-diligence-assessing-and-owning-policy-and-practice. [Last accessed 11 June 2021]. A Asteriti and R Bull. *Gender Self-Declaration and Women's Rights: How Self Identification Undermines Women's Rights and Will Lead to an Increase in Harms: A Reply to Alex Sharpe, 'Will Gender Self-Declaration Undermine Women's Rights and Lead to an Increase in Harms?'.* Modern Law Review, 22 July 2020. Available from https://www.modernlawreview.co.uk/asteriti-bull-sharpe [Last accessed 29 May 2021]. Also note the claim that "*It is established in case law that the comparator for a transgender person claiming discrimination in relation to gender re-assignment is not the sex which they are seeking transition to but that which they are seeking transition from*" R Freedman, A Jones, A Palmer, M O'Hara and R Auchmuty *TIE Letter: Legal Response* forwomen.scot, 30 March 2019. Available from https://forwomen.scot/30/03/2019/tie-letter-legal-response [Last accessed 11 June 2021] M. Forstater *Revisting the Brook case* (a-question-of-consent.net, 29 May 2020). Available from https://a-question-of-consent.net/2020/05/29/the-case-of-sb/ [Last accessed 11 June 2021]

[6] *Green v Secretary of State for Justice* [2013] EWHC 3491 (Admin)

[7] Calculated using the Government's 2018 estimate that there are between 200,000 and 500,000 trans people in the UK, but only around 5000 had obtained GRCs. See Para. 28. Minister for Women and Equalities. *Reform of the Gender Recognition Act – Government Consultation*. July 2018. Available from https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/721725/GRA-Consultation-document.pdf [Last accessed 3 June 2021]

[8] See for example R Freedman and R Auchmuty *Women's Rights and the Proposed Reforms to the Gender Recognition Act* (OxHRH Blog, 17 August 2018) Available from http://ohrh.law.ox.ac.uk/womens-rights-and-the-proposed-changes-to-the-gender-recognition-act [Last accessed 3 June 2021]), Woman's Place

In this article we explore whether *Green* is a sound basis for making the assertion that trans people without GRCs can be excluded from single-sex spaces that match their acquired gender.

(https://womansplaceuk.org/gra/ [Last accessed 11 June 2021]), Fair Play for Women (https://fairplayforwomen.com/campaigns/gra-reform [Last accessed 11 June 2021]) and Transgender Trend (https://www.transgendertrend.com/transgender-trend-submission-gender-recognition-reform-scotland-bill [Last accessed 11 June 2021]))

## 2 The case of *Green*

The case of *Green* was brought by Kimberley Green, a transgender woman, who was a prisoner at HMP Frankland, a men's high security prison. She was denied access to various products including tights, wigs and make-up such as concealer, and brought a claim for judicial review of this decision on the grounds it breached the prison's policy on transgender prisoners. This article does not consider her judicial review and there is no reason to believe that this part of the judgment in *Green* is not good law[9]. Kimberley Green also made a second argument that denying her these items was discrimination on the grounds of *gender reassignment* under the EA 2010.

To make a discrimination claim it is normally[10] necessary to pick an individual, called *the comparator*, who does not share the protected characteristic, but who was treated differently from the claimant. The comparator can be real or hypothetical. The claimant then seeks to argue that the difference in treatment between herself and the comparator was due to the protected characteristic. For *gender reassignment* claims, the comparator has to be a cisgender individual, but their sex does not normally affect the outcome. However, for claims regarding single or separate sex services, the sex of the comparator can determine the outcome of the case[11].

In Green, the judge, HHJ Richardson, accepted that Kimberley Green had the protected characteristic of *gender reassignment*[12], but found that there had been no discrimination as she had been treated no worse than a male prisoner, the comparator, who was not undergoing gender reassignment. Per the judgment:

> "*I find it impossible to see how a female prisoner can be regarded as the appropriate comparator. The claimant is a man seeking to become a woman – but he is still of the male gender and a male prisoner. He is in a male prison and until there is a Gender Recognition Certificate, he remains male. A woman prisoner cannot conceivably be the comparator as the woman prisoner has (either by birth or election) achieved what the claimant wishes.*"[13] and "*I have no hesitation in saying the correct comparator is a male prisoner in Category B at HMP Frankland.*"[14]

If the reasoning in *Green* is correct and it applies universally, then it has a massive detrimental effect on the rights of trans people in the UK. It could mean that any trans person without a GRC can be excluded from the toilets at their work or from the changing room at their gym that matched their acquired gender; the reason being that a person of the same birth sex as them would also be excluded. For example, a transgender woman without a GRC could be excluded from the women's toilet because cisgender men are also excluded from the women's toilet. This would mean over 97% of trans population in the UK could potentially be legally excluded on a blanket basis from single sex spaces, and hence from employment, fitness facilities and even society in general.

The Equality and Human Rights Commission ('EHRC') has sought to limit the damage that would be caused if *Green* is followed by arguing that trans people without a GRC can bring a

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[9] In fact, *Green* is cited as an authority in *Gifford v The Governor of HMP Bure* [2014] EWHC 911 (Admin) in the context of judicial review

[10] See for example the discussion in *London Borough of Islington v Ladele* UKEAT/0453/08 para. 39, which explains the use of comparators can be positively misleading

[11] See for example *Croft v Royal Mail* [2003] EWCA Civ 1045

[12] *Green* para 66

[13] Ibid. para. 68

[14] Ibid. para. 70

claim for *indirect* discrimination[15]. This reasoning was approved in the abstract by J Henshaw in *AEA v EHRC*[16]. However, a claim of *indirect* discrimination is a weaker claim[17] than *direct* discrimination and it is hard to know how much protection this will provide for trans people in practice.

[15] This argument is covered in more detail later in this article.

[16] [2021] EWHC 1623 (Admin)

[17] For example, *indirect* discrimination is often justified on a blanket basis but *direct* discrimination on the grounds of *gender reassignment* has to be justified on a case-by-case basis (*Croft v Royal Mail* [2003] EWCA Civ 1045)

# 3 Problems with *Green*

*Green* suffers from a lack of judicial scrutiny that led to the court failing to take into account two points of statutory law and two cases that were binding. The combined effect of all four errors destroys any value *Green* may have as a legal authority.

## a) Lack of judicial scrutiny

When deciding how much weight should be given to *Green*, it needs to be remembered that although a High Court decision, it is still a first instance decision made by just the one judge. The reason is that *Green* was a judicial review case and hence had to be brought in the High Court. The claim under the EA 2010 was a secondary claim that was not fully argued by the parties[18] and was dealt with by the judge in just nine paragraphs[19]. If the claimant and the respondent did not put full legal arguments before a judge, it is not surprising if this has led to poor judicial reasoning.

For the judicial review claim, the judge carefully weighed the security impact of allowing Kimberly Green to have the items she desired and came to the conclusion that the decision to deny these items was justified. Having carefully decided this claim, he took a very superficial approach to the EA 2010 claim and appeared to latch on to the simplest way to dismiss the claim. He wrote "[f]*rankly, it is almost beyond argument that the only comparator is a male Category B prisoner at HMP Frankland."*[20]

Discrimination on the grounds of *gender reassignment* though is a complicated area of law that seeks to balance the right not to suffer discrimination on the grounds of *gender reassignment* with other concerns. Had the judge taken the time to analyse this area of law and written a fully reasoned judgment, the same outcome could have been achieved in a far more satisfactory manner.

Other important cases dealing with the rights of transgender people have received scrutiny by numerous judges sitting in different courts. The Court of Appeal case of *Croft v Royal Mail Group*[21] was heard by two tribunals, the Employment Tribunal and the Employment Appeal Tribunal, prior to being heard by three senior full-time judges sitting in the Court of Appeal. The case *of A v Chief Constable of West Yorkshire Police*[22], was heard by the three judges sitting in the Employment Tribunal, two judges sitting in the Employment Appeal Tribunal, three judges sitting in the Court of Appeal before it reached the Appellate Committee of the House of Lords, then the most senior court in the UK. Here *A* was considered by five of the most senior and respected judges in the UK. Both *Croft* and *A* have been subject to considerably more judicial scrutiny than *Green*.

[18] *Green* para. 64
[19] Ibid. paras. 63-71
[20] Ibid. para. 68
[21] *Croft v Royal Mail* [2003] EWCA Civ 1045
[22] *A v Chief Constable of West Yorkshire Police* [2004] UKHL 21

### b) EA 2010 Schedule 3 Paragraph 28

The Court in *Green* stated the test for direct discrimination[23] on the grounds of *gender reassignment*[24] under the EA 2010 is a two-part test as follows:

> *"(1) Has the claimant been treated less favourably by the Governor than he would treat others in the exercise of his public function?*
>
> *(2) If he has so treated the claimant, was this due to the claimant's gender reassignment?"*[25]

However, we would argue that this is the wrong legal test because the court overlooked part of the EA 2010. The claim of *direct discrimination* on the grounds of *gender reassignment* was brought under EA 2010 part 3 s. 29(6) in that a person in the exercise of a public function must not do anything that constitutes discrimination. Sections 31(10) and 31(3) hold that sched. 3 applies to part 3 of the EA 2010 where there is a "*provision of a service in the exercise of a public function.*" EA 2010 sched. 3 para. 28 states that discrimination on the grounds *of gender reassignment* does not contravene s. 29 EA 2010 if it relates to *"the provision of separate services differently for persons of each sex"*[26] and the conduct is a "*proportionate means of achieving a legitimate aim*"[27]. So, in the context of prisons, para. 28 would suggest that it is not always inherently discriminatory to treat male and female prisoners differently.

Part of exercising the public function of running a prison is providing a service to the prisoners to enable the purchase of personal items such as tights or concealer. On security grounds, a separate service was applied to the different sexes and male prisoners were denied the ability to purchase concealer and tights whereas female prisoners detained on the female estate were allowed to purchase these items.

As EA 2010 sched. 3 para. 28 is engaged, provided the Governor was looking to achieve a legitimate aim and his actions were proportionate, then Kimberley Green would not have suffered unlawful discrimination. The missing final part to the test articulated by the court in *Green* must surely be '*Was the conduct a proportionate means of achieving a legitimate aim?*'

Failing to state the last part of the legal test creates doubt on whether the criterion, that without a GRC the correct comparator for Kimberley Green is a man, is also correct for the following reasons:

i) By introducing a new criterion, the court has circumvented the statutory exception in sched 3. This exception provides that discrimination on the grounds of *gender reassignment* related to separate sex spaces remains unlawful unless it is *proportionate* and in pursuit of a *legitimate aim* or falls into another statutory exception. By introducing a new criterion, not in the statute, the court held that discrimination on the grounds of *gender reassignment* can be lawful even when it is *not* proportionate or is not in pursuit of a legitimate aim; this cannot be what Parliament intended. If Parliament intended that *disproportionate* discrimination on the grounds of *gender reassignment* was lawful when the applicant did not have a GRC, then it would have explicitly stated this in the statute.

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[23] EA 2010 s.13 (1)
[24] Ibid. s. 7
[25] *Green* para. 67
[26] EA 2010 sched. 3. para. 28(2)
[27] Ibid. sched. 3. para. 28(1)

ii) The decision was motivated by the "*serious security considerations*"[28] that apply in high security prisons and the court might have felt these considerations meant the comparator had to be male. However, had the court known about the sched. 3 statutory exception, it would have been able to take these security considerations into account without the need to introduce this criterion.

As the court failed to include the sched. 3 exception in its test, the reasoning in *Green* cannot be considered reliable.

### c) Equality Act 2006 ('EA 2006') s. 15(4)

Under EA 2006 s. 15(4)(b), a court needs to take into account a failure to comply with a provision of a statutory code where it appears to the court to be relevant. For *Green*, the relevant statutory code is the EHRC '*Services, public functions and associations: Statutory Code of Practice*' ('the Services Code').

#### i) The requirement to take into account the Services Code

The Services Code para. 1.6 makes it clear that the code covers public functions as set out in part 3 of the EA 2010 and para. 1.23 clarifies that the term "*service provider*" in the code includes those exercising public functions. Paras. 13.57-13.60 cover discrimination on the grounds of *gender reassignment* in the provision of separate sex services.

Paragraph 13.57 of the Services Code states the general rule that service providers "*should treat transsexual*[29] *people according to the gender role in which they present*". Paragraph 13.60 of the Code provides that they can be treated differently, but this will need to be proportionate and applied on a case-by-case basis. It further asserts that denial of a services can only occur in "*exceptional circumstances".*

Paragraph 13.58 of the Code, gives an example of the application of the EA 2010. It states that a trans woman should be permitted to use the women's changing room in a shop if there are cubicles as the provision of separate cubicles can ensure "*privacy and decency*" for all service users. The example does **not** state the trans woman needs to have a GRC.

Codes of practice are not in themselves the law. Nonetheless, LJ Sales in *City of York Council v P J Grosset*[30] notes they are "*a form of contemporanea expositio and a legitimate aid to interpretation*"[31]. Baroness Hale stated in the House of Lords in *SCA Packaging v Boyle*[32] that statutory guidance "*has, of course, to be taken seriously into account when it deals with the factual matters which are relevant to the application of the legal tests" [33].*

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[28] Ibid. para. 2

[29] Equality and Human Rights Commission *Services*('EHRC') *Public functions and associations: Statutory Code of Practice* ('the Services Code') (EHRC, 26 January 2011) para. 2.18 notes that a reference to a transsexual person is a reference to a person with the protected characteristic of *gender reassignment*. Available from https://www.equalityhumanrights.com/sites/default/files/servicescode_0.pdf [Last accessed 22 June 2021]

[30] [2018] EWCA Civ 110

[31] Ibid. para. 42.

[32] [2009] UKHL 37

[33] Ibid. para. 67

### ii) The conflict between *Green* and the Services Code

Under the Services Code, the Governor of HMP Frankland was required to treat Kimberley Green as female for the purposes of providing items such as wigs and tights unless it was proportionate for him to do otherwise. The judgment in *Green* does not consider whether the Governor breached the Services Code and hence could not consider the impact such a breach would have on the liability of the Governor.

Further, the decision in *Green* regarding the importance of a GRC appears to be inconsistent with the Services Code paras. 13.57-13.60. If *Green* is correct, then a trans woman without a GRC could *not* bring a claim for discrimination if excluded from a women's changing room in a shop as by excluding her she would have been treated no worse than a man. This conflicts with the example in the Services Code referred to above, which, per Baroness Hale, the court would have had to take "*seriously into account*" when deciding on the application of legal tests. Yet the decision in *Green* does not explain how it has taken the examples in the code into account.

### iii) *AEA v EHRC* - one possible resolution of the conflict

The apparent conflict between *Green* and the Services Code led to a recent attempt by the Authentic Equity Alliance ('AEA') to bring a judicial review of the Services Code on the grounds that it misstates the law[34]. Unfortunately, neither party sought to challenge the decision in *Green* so the status of *Green* was not considered in J Henshaw's ruling. Instead, after the litigation process had begun[35], the EHRC put forward a novel and ingenious argument. The argument asserts that transgender people without GRC's suffer not *direct* discrimination, but *indirect* discrimination, if they are excluded from separate sex services. The reason is that a policy of excluding people who were born male from female services applies equally to cisgender men and trans women, but it affects trans women more severely; excluding trans women humiliates them and risks outing them whereas cisgender men have no reason at all to use women's facilities. Thus, the EHRC argued, this can constitute *indirect* discrimination contrary to EA 2010 s. 19 and sched. 3 para. 28 applies to *indirect* discrimination in exactly the same way that it applies to *direct* discrimination. As a result, even if *Green* was decided correctly, the Services Code para. 13.57-13.60 were drafted correctly.

The High Court accepted the EHRC's arguments memorably remarking that "*the* [AEA's] *argument is an obvious absurdity because it would construe s.19 in such a way that Schedule 3 para. 28 could never apply to a transexual woman lacking a GRC who complained of indirect discrimination*"[36]. We accept the court's finding in *AEA v EHRC* that transgender people without a GRC can bring a claim of *indirect* discrimination to which sched.3 para. 28 would apply but do not believe the Services Code was drafted with this type of claim in mind.

To succeed with a claim of *indirect discrimination* with regard to separate sex services, the claim would need to survive *two* exceptions: the EA 2010 s. 19(2)(d) exception (covered by the Services Code paras. 5.25 – 5.31)[37] and the EA 2010 sched. 3 para. 28 exception

[34] *AEA v EHRC*

[35] *AEA v EHRC Claimant's Skeleton for Permission Hearing* para. 5 notes that this argument was not included in the EHRC pre-action response.

[36] *AEA v EHRC* para. 17

[37] *The Services Code* margin notes give the exact piece of legislation to which the guidance applies

(covered by the Services Code paras. 13.57-13.60)[38]. As mentioned above, the Services Code para. 13.57 notes that service providers "*should treat transsexual people according to the gender role in which they present*" unless the sched. 3. Para. 28 exception applies[39]. But if a transgender person brings a claim of *indirect discrimination* this is not correct as the EA 2010 s. 19(2)(d) exception could be applied instead. In our view, paras. 13.57-13.60 were drafted with the belief that all trans people could bring a *direct* discrimination claim regardless of their GRC status.

### iv) *Green* post *AEA v EHRC*

Although the EHRC has succeeded in providing a post host justification for the statutory guidance, this is to some extent beside the point. The court in *Green* was bound by EA 2010 s.15(4)(b) to have regard to the guidance in the Services Code. If the court felt that in its opinion the Services Code does not represent the law or else that its decision was compatible with the Services Code due to the ability to bring a claim for *indirect discrimination* then this should have been stated in the judgment. Moreover, if the court felt the solution was an *indirect* discrimination claim, then surely it would have given directions to the claimant to amend its statement of claim rather than allow the claim to fail on a legal technicality. In any event, by failing to take EA 2010 s.15(4)(b) into account the court has made a clear error of law

## d) *A v Chief Constable of West Yorkshire Police*

The case of *A v Chief Constable of West Yorkshire Police* was a House of Lords case concerning a transgender woman who brought a claim of discrimination on the grounds of *sex* under the Sex Discrimination Act 1975 ('SDA') when she was refused employment in the police. A did not have a GRC as the events in the case occurred before the GRA commenced. The Chief Constable felt that as A was a woman, she was unable, in practice, to perform searches of men even though he thought this was allowed under s. 54(9) of the Police and Criminal Evidence Act 1984 ('PACE'). However, as he believed A to be legally male, he felt that A was legally unable to search women as s. 54(9) of PACE requires the search to be undertaken by an officer of the same sex as the person being searched.

Four of the five judges agreed that A could be viewed legally as a woman for the purposes of s.54(9) PACE. Lord Bingham found that EU law could only be given effect by reading s. 54(9) and the word *woman* in the SDA as referring to the gender in which she lived[40]. Baroness Hale stated that *"Thus, for the purposes of discrimination between men and women in the fields covered by* [Directive 76/207/EEC]*, a trans person is to be regarded as having the sexual identity of the gender to which he or she has been reassigned.*"[41]

Baroness Hale's statement of EU law makes no mention of the need for formal legal recognition of the new gender identity in a member state. The notion that a trans person who has completed their transition is automatically recognised for the purposes of EU employment discrimination law is incompatible with the position in *Green* that rights under EU discrimination law require formal legal recognition of the new gender.

[38] Ibid.
[39] Ibid.
[40] Ibid. para. 11
[41] Ibid. para. 56

There have been statutory developments since *A,* notable with the enactment of the GRA. However, the enactment of the GRA was anticipated by the Law Lords in *A*. Baroness Hale notes that Counsel for the government argued that there was no public policy objection to treating A as female for all purposes including intimate searches and *such a decision would not be inconsistent with the forthcoming GRA*[42]. More recently Lady Wise's judgment in *For Women Scotland v The Lord Advocate*[43] refers to *A.* She acknowledges that *A* was decided before formal recognition of gender reassignment in domestic law[44] and she then quotes with approval the part of Baroness Hale's speech in *A* regarding the "*sexual identity*" of a trans person that was quoted above[45].

There is no explicit language in the GRA overriding prior case law; instead, the GRA was carefully drafted to preserve prior law. Section 9(1) states *"… the person's gender becomes for all purposes the acquired gender …*". Use of the phrase "*for all purposes*" recognises that a trans individual's legal gender could be the acquired gender *for some purposes* without a GRC. Although the GRA is tightly drafted, should it contain ambiguous language then due to the principle of legality, as explained by Lord Hoffman in *ex parte Simms*[46]*, "[f]undamental rights cannot be overridden by general or ambiguous words*". Moreover, even if the GRA is interpreted as extinguishing rights in domestic law, the rights in *A* are EU law rights.

Our view[47], shared with White and Newbegin[48] is that the GRA preserves existing case law and that *A* remains good law.

The House of Lords decision in *A* was binding on the Court in *Green* but the decision in *Green* is inconsistent with *A*. If the court in *Green* felt that *A* was no longer good law and hence it was not bound by A, then it should have stated so and provided reasons for this. Alternatively, if the court felt that it could distinguish *A,* again reasons should have been provided so that the decision in *Green* could be confined appropriately. As it is, the court has failed to take into account an authority that was binding on it.

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[42] Ibid. para. 47 Per Baroness Hale "*In the light of the Gender Recognition Bill, currently before Parliament, there is no policy objection to regarding Ms A as female for all purposes, including intimate searches. Nor would it be inconsistent with the wider ranging provisions in the Bill for us to hold that European Community law required that it be anticipated in this respect.*"

[43] [2021] CSOH 31

[44] Ibid. para. 60

[45] Ibid.

[46] [2000] 2 AC 115

[47] We provide further analysis of the statutory developments since *A* in TransLegalProject *Disposing of the myth that you must discriminate against trans people in the workplace* ('Disposing of the myth') (TransLegalProject, 5 June 2021) Available from https://www.translegalproject.org/workplacediscrimination05-06-21 [Last accessed 8 June 2021]

[48] RM White and N Newbegin *A Practical Guide to Transgender Law.* Law Brief Publishing, 2021. See for example page 16

### e) *Croft v Royal Mail*

The Court of Appeal case of *Croft v Royal Mail* was brought by a transgender woman, Sarah Croft. Her employers, the Royal Mail, refused to allow her to use the women's toilet at work and as a result she claimed discrimination on the grounds of *gender reassignment*.

LJ Pill in the leading judgment stated he did *not* accept "*that the respondents can escape liability on the basis that the applicant was at the material time a man and that a prohibition on the use of the female toilets meant that she was treated no differently from other men."* [49] LJ Parker considered the respondent's primary submission "*that it is necessary to determine to which sex the applicant belongs, since the proper comparators are other employees of the respondent who are also members of that sex."*[50] and then stated *"I agree with* [LJ Pill] *that submission is to be rejected."*[51]. And LJ Keene stated he agreed with both judgments[52].

LJ Pill notes "*It is in my judgment inherent in a situation in which two sets of facilities, male and female, are required and in which a category of persons changing from one sex to the other is recognised, that there must be a period during which the employer is entitled to make separate arrangements for those undergoing the change"*[53]*.* He then sets out the correct legal test for the moment when a transgender woman is entitled to use the women's toilets. The moment "*depends on all the circumstances, including her conduct and that of the employers*" and "*employers must take into account the stage reached in treatment, including the employee's own assessment and presentation*"[54].

As in *A*, *Croft* has to be read in light of the statutory developments including the enactment of the GRA. Our view[55] is that the legal test in *Croft* remains good law; however, were it to be applied to the same facts today, a court would be likely to reach a different conclusion due to the greater acceptance of transgender people in society and government policies supporting trans inclusion. White and Newbegin also believe that *Croft* has survived the statutory developments, but note that "*it is unlikely now to reflect best practice"*[56]. They highlight that the need, stated in *Croft,* to take into account but not be governed by the "*susceptibilities of other members of the workforce*"[57] should now be viewed as particularly problematic[58].

The Court in *Green* seemed to approve *Croft* stating "*I am influenced by the judgment of the Court of Appeal in [Croft]*"[59]. However, the judgment in *Green* was the diametric opposite of the reasoning in *Croft.* In *Croft*, the judges found that the fact that Sarah Croft might legally be a man had no impact on whether her employers could escape liability for discriminating against her. However, in *Green*, the fact that Kimberley Green was legally a man meant that no discrimination could have occurred. Sharpe, writing in the Modern Law Review, notes

[49] *Croft* para. 46
[50] Ibid. para. 72
[51] Ibid. para. 72
[52] Ibid. para. 77
[53] Ibid. para. 51
[54] Ibid. para. 53
[55] *Disposing of the myth*
[56] RM White and N Newbegin page 118
[57] *Croft* para. 53
[58] RM White and N Newbegin page 118
[59] *Green* para. 68

"*Croft, which precedes the* [EA 2010], *and which must be read in light of its provisions, does not support the assertions of HHJ Richardson* [in Green]"[60].

The court in *Green* appears to have recognised the importance of *Croft*, but misunderstood the judgment. As *Croft* was binding on the court in *Green* and the reasoning in *Green* is not confined to just the exercise of a public function, the court has failed to correctly take into account a case which was binding on it.

[60] A Sharpe *Will Gender Self-Declaration Undermine Women's Rights*. Modern Law Review. (2020) 83(3) MLR 539

# 4 Distinguishing *Green* from *A* and *Croft*

Although the judgment in *Green* does not itself attempt to distinguish *A* and *Croft*, by confining the overly broad language in *Green, A* and *Croft* can be distinguished from *Green*. Therefore, first instance courts will usually not find themselves in a position of having to decide whether to follow *A* and *Croft*, or *Green*.

## a) *Green* concerns discrimination in the course of a public function

In domestic law, a transgender person's acquired gender is only recognised if they have obtained a GRC under the GRA[61]. But under EU law a transgender person without a GRC can still have their acquired gender recognised for some purposes[62]. The doctrine of discrimination on the grounds of *gender reassignment* was created by the CJEU[63] and then codified into domestic law[64]. However, it is unclear how discrimination on the grounds of *gender reassignment* differs between domestic law and EU law. This is a key point as EU law only covers discrimination on the ground of *gender reassignment* in some contexts.

Discrimination in employment[65], the provision of services[66] and social security[67] is prohibited by EU directives and domestic law must be interpreted[68] to give effect to these directives. On the other hand, discrimination in the course of executing a public function is only subject to domestic law.

If discrimination on the grounds of *gender reassignment* differs between EU law and domestic law, then it is possible to distinguish *Green* from *A* and *Croft*. However, if this approach is used to explain the incompatibility of *Green* with *A* and *Croft*, *Green* **cannot** then be used as a precedent in the employment, services and social security.

## b) *Green* refers to decisions related to high security prisons

*Green* concerned the exercise of a public function in a high security prison. The Court noted "*At all stages of this case it is critical to remember the context in which I decide this case is that of a prison, and there are serious security considerations. What may happen in everyday life without too much difficulty, when translated to a prison suddenly poses truly difficult issues.*"[69] The reasoning in *Green* was clearly motivated by the context of a high security prison. As a result, first instance courts will often be able to avoid being bound by the erroneous precedent of *Green* by confining it to cases involving high security prisons.

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[61] *Corbett v Corbett* [1971] P83, *R v Tan* [1983] QB 1053, *A v Chief Constable of West Yorkshire Police, P v P (Transgender Applicant for Declaration of Marriage)* [2019] EWHC 3105 (Fam)

[62] *A v Chief Constable of West Yorkshire Police*, *MB v Secretary of State for Work and Pensions* Case C-451/16

[63] *P v S and Cornwall Case* C-13/94

[64] Originally by The Sex Discrimination (Gender Reassignment) Regulation 1999 and then consolidated into the EA 2010

[65] Originally Council Directive 76/207/EEC of 9 February 1976, but now recast as Directive 2006/54/EC

[66] Directive 2004/113/EC.

[67] Directive 79/7/EEC

[68] See the rule in *Marleasing v La Comercial Internacional de Alimentacion SA*. Case C-106/89

[69] *Green* para. 2

# 5 Cases post *Green*

Since the judgment in *Green*, there have been two further cases that also provide insight into the extent *Green* can be viewed as a binding authority.

## a) *MB v Secretary of State for Work and Pensions*

In *MB v Secretary of State for Work and Pensions*[70], MB, a transgender woman without a GRC, was refused permission to claim a pension at the age of 60, the then retirement age for women. The grounds given were that without a GRC she had to be treated as a man for the purpose of determining her pensionable age. She brought a legal claim that was heard by the Grand Chamber of the ECJ. It held that for the purposes of the EU Social Security Directive[71], MB should be viewed as a woman.

The opinion that Attorney General Bobek gave to the court in *MB* is particularly helpful in understanding how EU law protects trans people from discrimination on the grounds of *gender reassignment*.

1. Gender reassignment discrimination is a subcategory of sex discrimination and needs flexibility in the choice of comparators[72].
2. The choice of comparator may vary. In the case of discriminatory dismissal, a transgender woman may be compared with a cisgender man, but she can be compared to a cisgender woman when considering access to benefits[73].
3. "*The dynamic nature of reassignment means that the protection awarded by EU law is not inextricably linked to the 'end destination' — full legal recognition under national law of the legal effects of that reassignment."*[74]

The rule in *Green* was that the comparator for a transgender woman without a GRC is always a *cisgender man*, but both AG Bobek's summary of EU law and also the decision in *MB* show that the comparator for a transgender woman without a GRC can be a *cisgender woman*.

*MB* provides further evidence that the decision in *Green* is incompatible with EU law and hence should not be applied to discrimination in the areas of employment, social security or services.

## b) *Brook v Tasker*

In *Brook v Tasker*[75], Susan Brook, a transgender woman, was refused access to the women's toilet by a pub landlord and then barred from the pub when she complained.[76] The County Court held that by refusing to allow her to use the toilets she was a victim of *direct discrimination* under ss. 13 and 29 EA 2010 and by barring her she had been victimised.

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[70] Case C-451/16

[71] Directive 79/7/EEC

[72] Opinion of AG Bobek to the ECJ in *MB v Secretary of State for Work and Pensions* C-451/16 para. 37

[73] Ibid. para. 39

[74] Ibid. para. 38

[75] Unreported 7 March 2014, Halifax County Court

[76] See https://www.lawcentres.org.uk/policy/news/news/kirklees-law-centre-wins-landmark-transgender-discrimination-case [Last accessed 15 June 2021]

The court did not discuss whether the claimant had a GRC at all and did not require knowledge of GRC status to reach its decision[77].

What is interesting about *Brook*, is not that it overrules *Green* (it can't as it is in a lower court) but the decision by Judge Miller in *Brook* not to follow *Green*. The judge must have either have felt that *Green* was *per incuriam* or else that they could distinguish *Green*.

'Gender critical' feminist Maya Forstater[78] points out that the respondent in *Brook* was a litigant in person who chose not to attend the final hearing. She therefore argues that Judge Miller would never have considered the case of *Green.* However, Susan Brook was professionally represented and the representatives were partly funded by legal aid[79]. All professional representatives with rights of audience have a professional overriding *"duty to the court to act with independence in the interests of justice*"[80]; when the other side is unrepresented this duty can extend to drawing to the court's attention decisions which might be adverse to the interests of their clients[81]. The assumption must be that the case was fully argued and all relevant authorities were considered.

[77] Private correspondence between Harry Josephine Giles and the Kirklees Citizens Advice & L aw Centre viewed by the author

[78] M Forstater *Revisting the Brook case*. (a-question-of-consent.net, 29 May 2020). Available from https://a-question-of-consent.net/2020/05/29/the-case-of-sb/ [Last accessed 11 June 2021]

[79] Ibid. *Giles and the Kirklees Law Centre*

[80] Legal Services Act 2007 s. 1(3)(d)

[81] The Law Society *Litigants in person: guidelines for lawyers* (The Law Society, June 2015) para. 8 Available from https://www.barcouncilethics.co.uk/wp-content/uploads/2017/10/litigants_in_person_guidelines_for_lawyers_-_1_june_2015.pdf [Last accessed 11 June 2021]

# 6 Conclusion

*Green* contains serious errors of law; it misses two points of statutory law; it ignores a binding House of Lords case and it misapplies a binding Court of Appeal case.

These serious errors of law make using *Green* as a precedent problematic. But the difficulties do not stop there. *Green* concerns discrimination on the grounds of *gender reassignment* in the *exercise of a public function*, which is not an area covered by EU law. The later ECJ case of *MB* makes clear the incompatibility of the decision in *Green* with EU discrimination law. The UK's exit from the EU occurred after *MB*, but this does not change the application in the UK of EU discrimination law. Therefore, *Green* should never be cited as a precedent in discrimination cases in areas covered by retained EU discrimination law such as employment, services and social security. The only situation where *Green* can have any precedent value would be a first instance court considering discrimination involving the exercise of a public function. Even here the court would be wise to confine *Green* to the context of a high security prison.

Superior courts will almost certainly overturn[82] *Green.* We don't believe that going forward the High Court will find *Green* persuasive and instead it will choose not to follow it. First instance courts, such as the Employment Tribunal and the County Court, are likely to distinguish *Green*. This was demonstrated in *Brook* in the County Court, where the principle articulated in *Green* was not followed in a case involving discrimination with respect to a toilet in a pub.

'Gender critical' feminists use *Green* to argue that trans people without a GRC have no right to bring a discrimination claim on the grounds of *gender reassignment* in respect of separate sex services in the context of employment and services. In response, supporters of trans rights have either ignored[83] *Green* as being irrelevant to employment and services, which it is, or, as Sharpe has done[84], pointed out that *Green* is unreliable.

This article fully analyses the legal problems with *Green* and puts beyond doubt that *Green* should **never** be used as a precedent when considering discrimination on the grounds of *gender reassignment* in the context of employment, services and social security.

[redacted]
*Trans Legal Project*
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*14 September 2021*

[82] Professor Sharpe notes "*It seems unlikely Green would have survived an appeal or that our superior courts presented with such a scenario today would proceed as HHJ Richardson did*" (A Sharpe *Will Gender Self-Declaration Undermine Women's Rights*.)
[83] RM White and N Newbegin *A Practical Guide to Transgender Law.*
[84] A Sharpe *Will Gender Self-Declaration Undermine Women's Rights*.

# Appendix – The legal effect of the UK's exit from the EU

The UK left the EU on the 31 January 2020 ('Exit Day'). After Exit Day, certain parts of EU law ('Retained EU Law') continue to be recognised and enforced in the UK courts[85]. Retained EU Law includes rights that arise from EU directives that have been recognised either by the CJEU or the UK courts in cases decided prior to Exit Day[86].

When interpretating Retained EU Law, the courts, except the Supreme Court, are bound by decisions of the CJEU made before exit day[87]. The principles of supremacy of EU law and harmonious interpretation (espoused in *Marleasing*) still apply to Retained EU Law[88] .

The rights of transgender people not to be discriminated against on the grounds of *gender reassignment* were articulated in the UK cases of *A* and *Croft*, and in a number of ECJ cases, which were summarised by AG Bobek in *MB*. Therefore, these rights are part of Retained EU Law and will continued by be recognised by UK courts.

[85] European Union (Withdrawal) Act 2018 s. 4(1)
[86] Ibid. s. 4(2)(b)
[87] Ibid. ss. 6(3)(a) and 6(4)(a)
[88] Ibid. ss. 5(2) and s. 4(1)