

AS TO THE ADMISSIBILITY OF

Application No. 21830/93  
by X., Y. and Z.  
against the United Kingdom

The European Commission of Human Rights sitting in private on  
1 December 1994, the following members being present:

MM. C.A. NØRGAARD, President  
S. TRECHSEL  
A. WEITZEL  
F. ERMACORA  
E. BUSUTTIL  
A.S. GØZØBØYØK  
H.G. SCHERMERS  
H. DANELIUS  
F. MARTINEZ  
C.L. ROZAKIS  
Mrs. J. LIDDY  
MM. L. LOUCAIDES  
J.-C. GEUS  
B. MARXER  
G.B. REFFI  
N. BRATZA  
J. MUCHA  
E. KONSTANTINOV  
D. SVØBY

Mr. H.C. KRØGER, Secretary to the Commission

Having regard to Article 25 of the Convention for the Protection  
of Human Rights and Fundamental Freedoms;

Having regard to the application introduced on 6 May 1993 by X.,  
Y. and Z. against the United Kingdom and registered on 12 May 1993  
under file No. 21830/93;

Having regard to:

- the reports provided for in Rule 47 of the Rules of Procedure of  
the Commission;
- the observations submitted by the respondent Government on  
20 January 1994 and the observations in reply submitted by the  
applicant on 18 April 1994;
- the parties' oral submissions at the hearing on 1 December 1994;

Having deliberated;

Decides as follows:

#### THE FACTS

The applicants are British citizens, born in 1955, 1959 and 1992  
respectively, and resident in Manchester. They are represented before  
the Commission by Mr. David Burgess, a solicitor practising in London.

The facts as submitted by the parties may be summarised as  
follows.

A. The particular circumstances of the case

The first applicant is a female to male transsexual who has been living in a permanent and stable union with the second applicant, a woman. The third applicant is the child, born to the second applicant as a result of artificial insemination by a donor.

The first applicant had at birth the appearance of a biological female. From the age of four, he felt himself to be a sexual misfit and was drawn to male roles of behaviour. During adolescence, he suffered suicidal depressions at the discrepancies in sexual identity. At the age of 17, the first applicant read about the experiences of transsexuals.

In 1975, the first applicant started to take hormone treatment and to live and work as a man. In 1979, he began co-habiting with the second applicant.

Later in 1979, the first applicant underwent gender re-assignment surgery, having been accepted for treatment after counselling and psychological testing.

In 1990, the first and second applicants' doctor applied for treatment of the couple with a view to artificial insemination by donor (AID).

The first and second applicants were interviewed by the specialist in January 1991 in respect of obtaining private treatment and their case referred to the hospital ethics committee, supported by two referees and a letter from their doctor. Their application was refused.

The applicants appealed, making representations which included reference to a research study in which it was reported that of 37 children raised by transsexual or homosexual parents there was no evidence of abnormal sexual orientation or any other adverse effect.

The hospital ethics committee agreed on appeal to provide treatment to the applicants in November 1991. The first applicant was asked to acknowledge himself to be the father of the child within the meaning of the Human Fertility and Embryology Act 1990.

On 30 January 1992, the second applicant became pregnant through AID treatment with donated sperm. The first applicant was present throughout the process. The third applicant was born on 13 October 1992.

In February 1992, the first applicant had enquired of the Registrar General whether there was an objection to his being registered as the father of the child. In a reply dated 4 June 1992 to his Member of Parliament, the Minister of Health replied that the Registrar General had taken legal advice and took the view that only a biological man would be regarded as the father for the purposes of registration. It was pointed out that the third applicant could lawfully bear the first applicant's surname and, subject to the relevant conditions, the first applicant would be entitled to an additional personal tax allowance if he could show that he maintained the third applicant.

Following the third applicant's birth, the first and second

applicants attempted to register the child in their joint names as mother and father. The first applicant however was not permitted to be registered as the child's father and that part of the register was left blank. The third applicant was given the first applicant's surname.

## B. Relevant domestic law and practice

### Definition of gender in domestic law

Under the law of England and Wales, wherever sex is defined as a matter of law, biological criteria are employed (see eg *Corbett v. Corbett* [1971] Probate Reports 83).

### Registration of births

By section 2 of the Births and Deaths Registration Act 1953, it shall be the duty of the father and mother of a child to give to the registrar of the subdistrict in which it was born prescribed particulars within 42 days of the birth.

Where the mother and father are not married, there is no obligation on the father to give such particulars and the registrar shall not enter the name of a father save in defined circumstances, including where there is a joint request by the mother and the person stating himself to be the father (section 10 of the 1953 Act, as amended by the Family Law Reform Act 1987).

It is a criminal offence to give false information to a registrar relating to particulars required to be registered concerning any birth (section 4(1)(a) Perjury Act 1911).

### Provisions governing human fertility and embryology

The Human Fertility and Embryology Act 1990 (the 1990 Act) makes provision in connection with human embryos, regulates certain practices and establishes a Human Fertilisation and Embryology Authority.

Section 25 provides inter alia:

"1. The Authority shall maintain a code of practice giving guidance about the proper conduct of activities carried on in pursuance of a licence under this Act and the proper discharge of the functions of the person responsible and other persons to whom the licence applies.

2. The guidance given by the code shall include guidance for those providing treatment services about the account to be taken of the welfare of the children who may be born as a result of treatment services (including a child's need for a father), and of other children who may be affected by such births."

By section 28(3) of the 1990 Act, where a man, who is not married to the mother, is party to the treatment which results in the sperm of another being placed in the woman, he shall be deemed to be the father of the child.

### The Children Act 1989

Under the terms of the Children Act 1989 (the 1989 Act), parental responsibility for a child vests in the mother and, where she is married, to her husband. An unmarried biological father may obtain

parental responsibility by agreement with the mother or by order of the court (section 4).

Pursuant to the provisions of the 1989 Act, application may be made (with leave or as of right) for a residence order in respect of a child (section 10). A residence order means an order settling the arrangements to be made as to the person with whom a child is to live (section 8). Where the court makes a residence order in favour of a person not the parent or guardian of the child that person has parental responsibility for the child while the order remains in force.

On 24 June 1994, the High Court made a joint residence order in respect of two women, who lived together with the child born to one of them as the result of an arrangement whereby she had become pregnant by a man who wanted no involvement in the child's life.

#### COMPLAINTS

The applicants complain that they are denied respect for their family and private life as a result of the lack of recognition of the first applicant's role as father to the third applicant. The first and second applicant are also unable to marry. The situation, in their submission, discloses discrimination and they have no effective remedy in respect of their complaints.

They invoke Articles 8, 12, 13 and 14 of the Convention.

#### PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 6 May 1993 and registered on 12 May 1993.

On 30 August 1993, the Commission decided to communicate the application to the Government and to ask for written observations on the admissibility and merits of the application.

The Government's observations were submitted on 20 January 1994, after three extensions in the time-limit fixed for this purpose, and the applicant's observations in reply were submitted on 18 April 1994 after one extension in the time-limit.

On 27 June 1994, the Commission decided to invite the parties to make submissions at an oral hearing.

At the hearing, which took place on 1 December 1994, the parties were represented as follows:

#### For the Government

Ms. Susan Dickson	Agent, Foreign and Commonwealth Office
Mr. D. Pannick QC	Counsel
Mr. R. Singh	Counsel
Ms. H. Jenn	Adviser
Mr. W. Jenkins	Adviser

#### For the applicants

Mr. N. Blake	Counsel
Mr. D. Burgess	Solicitor

THE LAW

1. The applicants complain that they are denied respect for their family and private life contrary to Article 8 (Art. 8) of the Convention in that the first applicant is unable to obtain legal recognition of his relationship with the third applicant. They contend that this situation discloses discrimination contrary to Article 14 (Art. 14) of the Convention.

Article 8 (Art. 8) of the Convention provides:

"1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

Article 14 (Art. 14) of the Convention provides:

"The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

The respondent Government submit that no family relationships exist between the first applicant and the other applicants, since the first applicant is still legally a female. As regards the third applicant, the Government submit that Article 8 (Art. 8) does not extend beyond recognising relationships of blood, marriage and adoption.

Even assuming the applicants could be regarded as a family unit, the Government submit that they are not prohibited from living as such and there are no significant practical detriments suffered by the applicants in this case. The child, the third applicant, suffers no prejudice as regards nationality since she is a British citizen through her mother and the first applicant can arrange by will for her succession rights. Furthermore, the first and second applicants are able to apply to the courts for a joint residence order giving rise to rights in relation to parental responsibility in respect of the third applicant. They refer to the wide margin of appreciation to be accorded to the Contracting State in an area posing difficult questions of social policy and contend that in the absence of real and practical disadvantages to the applicants, they have no duty to recognise for legal purposes that a person's sex is changed by gender reassignment surgery.

In the context of Article 14 (Art. 14), the Government submit that the first applicant is in an analogous position to any other woman. Therefore the Government submit that there is no discrimination within the meaning of Article 14 (Art. 14) of the Convention.

The applicants submit that the failure of English law to give legal recognition to the de facto father-child relationship discloses a violation of their right to respect for family and private life. They complain that English law refuses to recognise that a person with the

biological characteristics of one sex can be irrevocably assigned to the opposite one. They submit that the first applicant cannot be vested with parental rights, even with the second applicant's agreement, and cannot make a joint adoption application, such matters being restricted to married couples. The third applicant will be prejudiced in that she cannot inherit from the first applicant on intestacy, will have no right to financial support from him and cannot benefit through him from the transmission of tenancies or from nationality and immigration measures.

Further, the applicants assert that there are no strong factors of social policy weighing against the acknowledgment of the applicants' family relationships given, inter alia, that recognition of the first applicant's role as father would not require falsification of the system of birth registration and that under the legislation relating to births by artificial insemination by donor fatherhood is no longer equated purely with biological links. This situation discloses a discrimination under Article 14 (Art. 14) of the Convention based on the first applicant's status.

The Commission considers, in the light of the parties' submissions, that the case raises complex issues of law and fact under the Convention, the determination of which should depend on an examination of the merits of the application as a whole. The Commission concludes, therefore, that the application is not manifestly ill-founded, within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention. The application must therefore be declared admissible, no ground for declaring it inadmissible having been established.

2. The applicants complain of a violation of Article 12 (Art. 12) of the Convention in that the first applicant is unable to marry the second applicant and establish a family on the basis of a married relationship.

Article 12 (Art. 12) of the Convention provides:

"Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right."

The Commission recalls that similar complaints were raised in the cases of Rees and Cossey in relation to the inability of a transsexual to marry a person of the same sex as registered at birth (Eur. Court H.R., Rees judgment of 17 October 1986, Series A No. 106 and Cossey judgment of 27 September 1990, Series A No. 184). The Court found that the legal impediment on marriage in the United Kingdom of persons who are not of the opposite biological sex was not in violation of Article 12 (Art. 12) of the Convention.

The Court held in the case of Cossey (loc. cit. p. 18, para. 46) that:

"the attachment to the traditional concept of marriage provides sufficient reason for the continued adoption of biological criteria for determining a person's sex for the purposes of marriage, this being a matter encompassed within the power of Contracting States to regulate by national law the exercise of the right to marry."

The Commission has examined the material provided by the applicants. It finds however that it provides no basis on which it can

depart from the findings of the Court.

It follows that this aspect of the application must be rejected as manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

3. The applicants further invoke Article 13 (Art. 13) of the Convention which provides:

"Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

The Commission notes that the applicants' complaints of alleged violations relate to the state of United Kingdom law which fails to recognise the first applicant's new sexual identity and consequently the applicants' family relationship. Article 13 (Art. 13) cannot however be interpreted as guaranteeing a remedy against, or judicial review of, domestic law which is not considered to be in conformity with the Convention (*mutatis mutandis*, Application No. 10243/83, Dec. 6.3.85, D.R. 41 p. 123 and *Young, James and Webster v. the United Kingdom*, Comm. Rep. 14.12.79, para. 177, Eur.Court H.R., Series B no. 39, p. 49, paras. 174-178).

It follows that this complaint must also be rejected as manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

For these reasons, the Commission

unanimously,

DECLARES ADMISSIBLE the applicants' complaints under Articles 8 and 14 (Art. 8, 14) of the Convention, without prejudging the merits of the case;

DECLARES INADMISSIBLE the applicants' complaints under Article 13 (Art. 13) of the Convention

by a majority,

DECLARES INADMISSIBLE the applicants' complaints under Article 12 (Art. 12) of the Convention.

Secretary to the Commission

President of the Commission

(H.C. KRØGER)

(C.A. NØRGAARD)