

Paula James v. United Kingdom:

EUROPEAN COMMISSION OF HUMAN RIGHTS

Application No. 10622/83

Paula JAMES

against

the UNITED KINGDOM

REPORT OF THE COMMISSION

(adopted on 15 December 1988)

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I. INTRODUCTION

1. The following is an outline of the case, as submitted to the European Commission of Human Rights, and of the procedure before the Commission.

A. The application

2. The applicant is a British citizen, born on 10 August 1933 and living in Guiseley, Leeds. She is represented by Mr. H.H. Storey of the Harehills and Chapeltown Law Centre in Leeds.

3. The application is directed against the United Kingdom. The respondent Government are represented by their Agent, Mr. M.C. Wood, Foreign and Commonwealth Office.

4. The applicant is a transsexual who was registered at birth as being of male sex. When adult she has undergone extensive medical and surgical treatment changing her sex from male to female. Her request to amend the entry in the birth register was not complied with.

5. The applicant complains that under United Kingdom law she cannot claim full recognition of her changed status. She invokes Articles 8, 10 and 14 of the Convention.

B. The proceedings

6. The application was introduced on 13 September 1983 and registered on 19 September 1983. On 9 May 1984 the Commission decided in accordance with Rule 42 (2) (b) of its Rules of Procedure to give notice of the application to the respondent Government. In view of an analogous application, No. 9532/81, *Rees v. United Kingdom* (see para. 17 below), which had been declared admissible on 14 March 1984 and was at the time still pending before the Commission, the time-limit for the submission of observations in the present case was suspended pending the outcome of the *Rees* case.

7. On 12 March 1985 that case was brought before the European Court of Human Rights. In a letter of 4 April 1985 the respondent Government stated that they did not consider it appropriate to submit

any observations in the present case, as it raised the same issues which had already been discussed in the Rees case.

8. On 5 July 1985 the application was declared admissible.

9. After declaring the case admissible, the Commission, acting in accordance with Article 28 para. b of the Convention, also placed itself at the disposal of the parties with a view to securing a friendly settlement. In the light of the parties' reaction, the Commission now finds that there is no basis on which such a settlement can be effected.

C. The present Report

10. The present Report has been drawn up by the Commission in pursuance of Article 31 of the Convention and after deliberations and votes, the following members being present:

MM. C. A. NØRGAARD, President
J. A. FROWEIN
S. TRECHSEL
F. ERMACORA
E. BUSUTTIL
A. S. GOZBYK
A. WEITZEL
J. C. SOYER
H. G. SCHERMERS
H. DANELIUS
H. VANDENBERGHE
Sir Basil HALL
MM. F. MARTINEZ
Mrs. J. LIDDY

11. The text of this Report was adopted on 15 December 1988 and is now transmitted to the Committee of Ministers of the Council of Europe, in accordance with Article 31 para. 2 of the Convention.

12. The purpose of the Report, pursuant to Article 31 of the Convention, is:

- i) to establish the facts, and
- ii) to state an opinion as to whether the facts found disclose a breach by the State concerned of its obligations under the Convention.

13. A schedule setting out the history of the proceedings before the Commission is attached hereto as Appendix I and the Commission's decision on the admissibility of the application as Appendix II.

14. The full text of the parties' submissions, together with the documents lodged as exhibits, are held in the archives of the Commission.

II. ESTABLISHMENT OF THE FACTS

A. The particular circumstances of the case

15. The applicant was born as a boy and registered as such in the

birth register under the christian names Thomas Vincent. Her family name was Galley. When grown up the applicant worked as a male nurse, married and had two children. Later the applicant got divorced and subsequently irreversibly altered her sex from male to female by way of extensive medical and surgical treatment. Consequently she changed her christian names and surname to Paula James. She received a new passport containing her new names. The prefix "Ms." was, however, only added at a later date.

16. Through her Member of Parliament the applicant then applied for an amendment to her birth certificate to be made to record the change in her status from male to female. This request was refused and applicant's counsel were informed by the General Registrar's Office in a letter of 11 October 1982 that there was no provision under the relevant legislation to permit an amendment to record an event subsequent to birth. In a letter of 2 August 1983 the General Registrar's Office wrote to applicant's counsel that they were aware of the result in the Van Oosterwijck application to the European Commission of Human Rights and of the fact that an application (No. 9532/81) made by a United Kingdom transsexual (Rees) was pending before the European Commission of Human Rights. As no decision had yet been reached with regard to the latter application, they maintained their position as set out in the letter of 11 October 1982.

17. The applicant Rees, whose case was decided by the European Court of Human Rights on 17 October 1986 with the finding that there was no violation of Articles 8 and 12 of the Convention (Series A, no. 106), was born in 1942 as a child of female sex and had been recorded in the birth certificate as a female. In 1974 he had undergone medical treatment for physical sexual conversion. He changed his names to male names and had been living as a male but had not been allowed to change the indication of his sex in the birth certificate.

B. Relevant domestic law and practice

1. Medical treatment

18. In the United Kingdom sexual reassignment operations are permitted without legal formalities. The operations and treatment may be carried out under the National Health Service.

2. Change of name

19. Under English law a person is entitled to adopt such first names or surname as he or she wishes and to use these new names without any restrictions or formalities, except in connection with the practice of some professions where the use of the new names may be

subject to certain formalities (see, inter alia, Halsbury's Laws of England, 4th ed., vol. 35, para. 1176). For the purposes of record and to obviate the doubt and confusion which a change of name is likely to involve, the person concerned very frequently makes a declaration in the form of a "deed poll" which may be enrolled with the Central Office of the Supreme Court.

The new names are valid for purposes of legal identification (see Halsbury's Laws of England, loc. cit., para. 1174) and may be used in documents such as passports, driving licences, car registration books, national insurance cards, medical cards, tax

codings and social security papers. The new names are also entered on the electoral roll.

3. Identity documents

20. Civil status certificates or equivalent current identity documents are not in use or required in the United Kingdom. Where some form of identification is needed, this is normally met by the production of a driving licence or a passport. These and other identity documents may, according to the prevailing practice, be issued in the adopted names of the person in question with a minimum of formality. In the case of transsexuals, the documents are also issued so as to be in all respects consistent with the new identity. Thus, the practice is to allow the transsexual to have a current photograph in his or her passport and the prefix "Mr.", "Mrs.", "Ms." or "Miss", as appropriate, before his or her adopted names.

4. The Register of Births

21. The system of civil registration of births, deaths and marriages was established by statute in England and Wales in 1837. Registration of births is at present governed by the Births and Deaths Registration Act 1953 ("the 1953 Act"). The entry into force of this Act entailed no material change to the law in force in 1933, the date of the applicant's birth. The 1953 Act requires that the birth of every child be registered by the Registrar of Births and Deaths for the area in which the child is born. The particulars to be entered are prescribed in regulations made under the 1953 Act.

A birth certificate takes the form either of an authenticated copy of the entry in the register of births or of an extract from the register. A certificate of the latter kind, known as a "short certificate of birth", is in a form prescribed and contains such particulars as are prescribed by regulations made under the 1953 Act. The particulars so prescribed are the name and surname, sex, date of birth and place of birth of the individual.

An entry in a birth register and the certificate derived therefrom are records of facts at the time of birth. Thus, in England and Wales the birth certificate constitutes a document revealing not current identity, but historical facts. The system is intended to provide accurate and authenticated evidence of the events themselves and also to enable the establishment of the connections of families for purposes related to success, legitimate descent and distribution of property. The registration records also form the basis for a comprehensive range of vital statistics and constitute an integral and essential part of the statistical study of population and its growth, medical and fertility research and the like.

22. The 1953 Act provides for the correction of clerical errors, such as the incorrect statement or omission of the year of the birth, and for the correction of factual errors; however, in the latter case, an amendment can be made only if the error occurred when the birth was registered. The birth register may also, within twelve months from the date of registration, be altered to give or change the name of a child and re-registration of a birth is permitted where the child has been legitimated. In addition, under the Adoption Act 1958, where a child is adopted, the register of births is to be marked with the word "adopted"; the adoption is also registered in the Adopted Children Register and a short certificate of birth may be obtained which contains no reference to parentage or adoption.

23. The criteria for determining the sex of the person to be registered are not laid down in the 1953 Act nor in any of the regulations made under it. However, the practice of the Register General is to use exclusively the biological criteria: chromosomal, gonadal and genital sex. The fact that it becomes evident later in life that the person's "psychological sex" is at variance with these biological criteria is not considered to imply that the initial entry was a factual error and, accordingly, any request to have the initial entry changed on this ground will be refused. Only in cases of a clerical error, or where the apparent and genital sex of the child was wrongly identified or in case of biological intersex, i.e. cases in which the biological criteria are not congruent, will a change of the initial entry be contemplated and it is necessary to adduce medical evidence that the initial entry was incorrect. However, no error is accepted to exist in the birth entry of a person who undergoes medical and surgical treatment to enable that person to assume the role of the opposite sex.

24. The birth registers and the indexes of all the entries are public. However, the registers themselves are not readily accessible to the general public as identification of the index reference would require prior knowledge not only of the name under which the person concerned was registered, but also of the approximate date and place of birth and the Registration District.

25. The law does not require that the birth certificate be produced for any particular purpose, although it may in practice be requested by certain institutions and employers.

In particular, a birth certificate has in general to accompany a first application for a passport, although not for its renewal or replacement. A birth certificate is also generally (though not invariably) required by insurance companies when issuing pension or annuity policies, but not for the issue of motor or household policies nor, as a rule, for the issue of a life insurance policy. It may also be required when enrolling at a university and when applying for employment, inter alia, with the Government.

5. Marriage

26. In English law, marriage is defined as a voluntary union for life of one man and one woman to the exclusion of all others (per Lord Penzance in *Hyde v. Hyde* (1868) Law Reports 1 Probate and Divorce 130, 133). Section 11 of the Matrimonial Causes Act 1973 gives statutory effect to the common-law provision that a marriage is void ab initio if the parties are not respectively male and female.

27. According to the decision of the High Court in *Corbett v. Corbett* (1971) Probate Reports 83, sex, for the purpose of contracting a valid marriage, is to be determined by the chromosomal, gonadal and genital tests where these are congruent. The relevance of a birth certificate to the question whether a marriage is void only arises as a matter of evidence which goes to the proof of the identity and sex of the person whose birth it certifies. The entry in the birth register is prima facie evidence of the person's sex. It may, however, be rebutted if evidence of sufficient weight to the contrary is adduced.

28. If, for the purpose of procuring a marriage or a certificate or licence for marriage, any person knowingly and wilfully makes a

false oath or makes or signs a false declaration, notice or certificate required under any Act relating to marriage, he is guilty of an offence under Section 3 (1) of the Perjury Act 1911. However, a person contracting a marriage abroad is not liable to prosecution under this Act.

6. The legal definition of sex for other purposes

29. The biological definition of sex laid down in *Corbett v. Corbett* has been followed by English courts and tribunals on a number of occasions and for purposes other than marriage.

In the Rees case the applicant has drawn the Court's attention to the following cases. In one case concerning prostitution, a male to female transsexual, who had undergone both hormone and surgical treatment, was nevertheless treated as a male by the Court of Appeal for the purposes of Section 30 of the Sexual Offences Act 1956 and Section 5 of the Sexual Offences Act 1967 (*Regina v. Tan and Others* 1983, <1983> 2 All England Law Reports 12). In two cases concerning social security legislation, male to female transsexuals were considered by the National Insurance Commissioner as males for the purpose of retirement age; in the first case the person in question had only received hormone therapy, in the second he had involuntarily begun to develop female secondary characteristics at the age of 46, which developments were followed by surgery and adoption of a female social role some 13 years later (cases R (P) 1 and R (P) 2 in the 1980 Volume of National Insurance Commissioner Decisions). Lastly, in a case before an Industrial Tribunal a female to male transsexual, who had not undergone any sex change treatment, was treated as a female by the Tribunal for the purposes of the Sex Discrimination Act 1975; the person in question had sought and received employment in a position reserved for men under the Factories Act, but was dismissed after discovery of her biological sex (*White v. British Sugar Corporation Ltd.* <1977> Industrial Relations Law Report p. 121).

III. SUBMISSIONS OF THE PARTIES

A. The applicant

30. The applicant considers that her case is distinguishable from the Rees case in view of her age, the fact that she has undergone sexual reassignment from male to female and that she was married in the past and there are two children from the marriage.

31. She submits that in many areas of United Kingdom law the birth certificate of a person is used to determine one's sex, and that 'adverse inferences' may be drawn from it in the case of a transsexual, since a transsexual presents him/herself as being of one sex and yet the birth certificate indicates otherwise. She considers that the limits placed by the United Kingdom on the alteration of birth certificates and the lack of legal protection for a transsexual discriminated against on account of the 'adverse inferences' that stem from the inconsistency of the certificate and the external appearance of a transsexual, together amount to the following breaches of the Commission :

1. Article 8

32. According to the applicant one aspect of the right to respect for private life is the protection of an individual's employment

prospects. In this respect she submits that she trained as a nurse at St. James's Hospital, Leeds, whilst in the male role. When she subsequently applied for work with a Nursing Agency, the Agency refused to register her for work because they were in possession of a reference from one of her former employers which contained information about the surgical and other treatment that she had undergone and the fact that she had previously been employed as a male nurse. Although her specific grievance on that occasion was settled without resort to an Industrial Tribunal, it is her belief that, following the case of *White v. British Sugar Corporation Ltd.* 1977 IRLR 121, there is no provision in the law of the United Kingdom which would prevent similar treatment of her in any application that she might make for further employment. On this basis she allegedly has been and continues to be handicapped in any effort that she makes to obtain different or better employment.

2. Article 10

33. The applicant argues that it is a requirement of Article 10 to give legal recognition to her sexual identity. In her opinion the Court appears to have accepted in the *Rees* case that the United Kingdom does recognise sexual identity for a variety of purposes, for example, passports, driving licences and national insurance certificates which are all issued in names that reflect the applicant's sexual identity. But the applicant submits that these documents are documents of description, not of legal identity. These practices have nothing to do with transsexuality; any man could call himself Paula James and require documentation to be issued in that name, irrespective of the reason why. The fact that these documents have no legal significance whenever the law asks the question 'what is a person's legal identity?' is demonstrated by the fact that she has

been and continues to be handicapped in her employment prospects and that the United Kingdom law concerning employment rights refuses to recognise these documents as authoritative when presented with the alternative of the birth certificate. This pattern is repeated in the fields of welfare, pension retirement, tax, inheritance and family rights. Article 10 requires the safeguarding of the freedom of expression regardless of frontiers. The applicant submits that the refusal of United Kingdom law to recognise her expression of her sexual identity and the consequences that flow from that non-recognition constitute a breach of Article 10 that cannot be necessary in a democratic society or for any other reason contained in Article 10 para. 2 of the Convention.

3. Article 14

34. The applicant submits that this provision is breached in the following manner: Where Article 14 says "on any grounds such as sex" this prohibits both discrimination on account of biological sex and discrimination on account of gender. To go further, the applicant submits that the anti-discrimination provisions of the Convention are targeted more at the social construction of sexual differentiation than they are at mere biological differences. This is because gender identity is the individual's psychological experience of being female or male. Gender identity relies on the social construction of femininity and masculinity as its base. It is societal stereo-typing of the gender roles that, in large part, lies at the heart of sex discrimination, rather than discrimination purely on biological grounds. Where there are good reasons to discriminate on biological grounds, for example, the provisions within United Kingdom Factory

Legislation, disallowing women from working in certain conditions on account of their physical make-up, this is not considered to be discriminatory at all. The aim of the provisions is to ensure equality of social treatment rather than biological assimilation. The legislation of the United Kingdom takes no account of discrimination based on gender and hence breaches Article 14.

35. Article 14 prohibits discrimination on account of transsexuality itself. This stems from the non-discrimination provisions based on "any grounds such as sex" as outlined above, or alternatively from the prohibition of discrimination based on "civil status". The United Kingdom discriminates against transsexuals in the following respects:

36. In the majority of cases a person's biological sex (that is their chromosomal, gonadal, and apparent [external genitalia] sex) corresponds to their psychological sex. Therefore, in relying exclusively on biological criteria in the determination of their sex, the United Kingdom respects their gender identity and civil status as heterosexuals. However, as far as transsexuals are concerned this is not the case since the phenomenon transsexualism arises from the conflict between having the biological characteristics in the legal determination of sex (rather than the social description of sex - as described above). The United Kingdom violates the right of a transsexual to fully express his/her psychological sexual identity.

37. In the great majority of cases where a person is born a hermaphrodite or with ambiguous genitalia (intersexuality) an operation will be carried out to remove certain parts of their genitalia and hence to align them more closely with one or other sex. In this event the United Kingdom makes provisions for post-operative recording of their sex in their birth certificate. However, no such provision is available to the transsexual who desires post-operative alteration of the details in their birth certificate. This amounts to discrimination on grounds of transsexualism, which is prohibited by Article 14.

38. Irrespective of the breaches of Article 14 set out above, the United Kingdom breaches the provisions of the Article in that it discriminates against transsexuals on account of 'birth'. Transsexualism can be defined as gender dysphoria. In the majority of cases there is no physical cause of gender dysphoria apparent. While the symptom of transsexualism is the major presenting feature of gender dysphoria, like other symptoms in medical practice it may have a number of underlying causes. Various theories of the causation of the condition have been proposed, based upon biological, familial, societal or psychological factors. The biological proposition is as follows:

39. During foetal life the developing brain is subjected to hormonal influences that may determine behaviour after birth and later in life. Hormones produced by the foetal gonads and the maternal gonads will circulate within the foetal blood vascular system. Likewise hormones administered to the mother may reach the foetus. It is postulated that alterations in the hormonal environment of the developing brain may switch its development in a direction opposite to that of the biological sex. Hence gender dysphoria arises.

40. Although the evidence of biological causes of gender dysphoria is much more extensive in the field of non-primates, it is not ruled out as a theory even by those who prefer the familial, societal or

psychological theories of causation. Its existence as a theory allows that it is at least arguable that transsexuals are born with the conflict that then becomes more apparent as they become more and more conscious of their own sex and sexuality. If this is so, they are born with a conflict and the United Kingdom, by relying exclusively on the biological characteristics as the determinant of sex in any given person, discriminates against them on account of their birth as effectively persons of both sexes.

41. Referring to paragraphs 35 - 38 of the Court's judgment in the Rees case, the applicant concludes that the nature of the breaches alleged, especially the breaches of Article 14, necessitates a higher degree of positive obligation than that accepted by the Court in the Rees case, which was only dealing with the question of alteration of the birth certificate itself and not the various inferences that arise from its non-alteration.

B. The respondent Government

42. In the respondent's Government's opinion none of the points made by the applicant distinguish her case from that of Rees.

43. Moreover, the respondent Government consider that the applicant's further submissions raise issues falling outside the Commission's decision on admissibility of 5 July 1985, according to which the application only raises an issue under Article 8 of the Convention.

44. Even if the facts of the present case could give rise to an issue under Article 10, the respondent Government consider that it is not open to the applicant to raise such an issue at this stage of the proceedings.

IV. OPINION OF THE COMMISSION

A. Point at issue

45. The only point at issue in the present application is whether the refusal to change the birth certificate with the effect that the applicant's present status is not recognised for every legal purpose amounts to a violation of her right to respect for her private life as guaranteed by Article 8 (Art. 8) of the Convention.

46. The applicant also submits that her case discloses a separate violation of Article 8 (Art. 8+14) read in conjunction with Article 14 of the Convention. In this respect the Commission found in the decision on the admissibility of the application (p. 22 below) that no separate issue arises under these provisions taken together.

47. The applicant now also invokes Article 10 (Art. 10) of the Convention in relation to the facts submitted in the application. However, her arguments in this respect are part of and another aspect of her complaint under Article 8 (Art. 8) of the Convention. A possible issue under Article 10 (Art. 10) is consequently absorbed by the wider issue under Article 8 and need not be dealt with separately (see, *mutatis mutandis*, Eur. Court H.R., Dudgeon judgment of 22 October 1981, Series 45, p. 26 para. 69).

B. Article 8 (Art. 8) of the Convention

48. 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."

49. As regards compliance with this provision by the United Kingdom in relation to transsexuals, the Commission refers to the Rees judgment of 17 October 1986, Eur. Court H.R., Series A, Vol. 106, p. 15-18 paras. 38-46) in which the Court stated:

"38. Transsexualism is not a new condition, but its particular features have been identified and examined only fairly recently. The developments that have taken place in consequence of these studies have been largely promoted by experts in the medical and scientific fields who have drawn attention to the considerable problems experienced by the individuals concerned and found it possible to alleviate them by means of medical and surgical treatment. The term 'transsexual' is usually applied to those who, whilst belonging physically to one sex, feel convinced that they belong to the other; they often seek to achieve a more integrated, unambiguous identity by undergoing medical treatment and surgical operations to adapt their physical characteristics to their psychological nature. Transsexuals who have been operated upon thus form a fairly well-defined and identifiable group.

39. In the United Kingdom no uniform, general decision has been adopted either by the legislature or by the courts as to the civil status of post-operative transsexuals. Moreover, there is no integrated system of civil status registration, but only separate registers for births, marriages, deaths and adoption. These record the relevant events in the manner they occurred without, except in special circumstances ..., mentioning changes (of name, address, etc.) which in other States are registered.

40. However, transsexuals, like anyone else in the United Kingdom, are free to change their first names and surnames at will ... Similarly, they can be issued with official documents bearing their chosen first names and surnames and indicating, if their sex is mentioned at all, their preferred sex by the relevant prefix (Mr., Mrs., Ms. or Miss) ... This freedom gives them a considerable advantage in comparison with States where all official documents have to conform with the records held by the registry office.

Conversely, the drawback - emphasised by the applicant - is that, as the country's legal system makes no provision for legally valid civil-status certificates, such persons have on occasion to establish their identity by

means of a birth certificate which is either an authenticated copy of or an extract from the birth register. The nature of this register, which furthermore is public, is that the certificates mention the biological sex which the individuals had at the time of their birth ... The production of such a birth certificate is not a strict legal requirement, but may on occasion be required in practice for some purposes ...

It is also clear that the United Kingdom does not recognise the applicant as a man for all social purposes. Thus, it would appear that, at the present stage of the development of United Kingdom law, he would be regarded as a woman, *inter alia*, as far as marriage, pension rights and certain employments are concerned ... The existence of the unamended birth certificate might also prevent him from entering into certain types of private agreements as a man ...

41. For the applicant and the Commission this situation was incompatible with Article 8 (Art. 8), there being in their opinion no justification for it on any ground of public interest. They submitted that the refusal of the Government to amend or annotate the register of births to record the individual's change of sexual identity cannot be justified on any such ground. Such a system of annotation would, according to the applicant, be similar to that

existing in the case of adoptions. The applicant and the Commission pointed to the example of certain other Contracting States which have recently made provision for the possibility of having the original indication of sex altered from a given date. The Commission additionally relied on the fact that the United Kingdom, through its free national health service, had borne the costs of the surgical operations and other medical treatment which the applicant had been enabled to undergo. They considered that this medical recognition of the necessity to assist him to realise his identity must be regarded as a further argument for the legal recognition of the change in his sexual identity; failure to do so had the effect that the applicant was treated as an ambiguous being.

42. The Court is not persuaded by this reasoning.

(a) To require the United Kingdom to follow the example of other Contracting States is from one perspective tantamount to asking that it should adopt a system in principle the same as theirs for determining and recording civil status.

Albeit with delay and some misgivings on the part of the authorities, the United Kingdom has endeavoured to meet the applicant's demands to the fullest extent that its system allowed. The alleged lack of respect therefore seems to come down to a refusal to establish a type of documentation showing, and constituting proof of, current civil status. The introduction of such a system has not hitherto been considered necessary in the United Kingdom. It would have important administrative consequences and would impose new duties on the rest of the population. The governing

authorities in the United Kingdom are fully entitled, in the exercise of their margin of appreciation, to take account of the requirements of the situation pertaining there in determining what measures to adopt. While the requirement of striking a fair balance ... may possibly, in the interests of persons in the applicant's situation, call for incidental adjustments to the existing system, it cannot give rise to any direct obligation on the United Kingdom to alter the very basis thereof.

(b) Interpreted somewhat narrowly, the applicant's complaint might be seen as a request to have such an incidental adjustment in the form of an annotation to the present birth register.

Whilst conceding that additions can be made to the entries in the birth register in order to record, for example, subsequent adoption or legitimation ..., the Government disputed that the proposed annotation was comparable to additions of this kind. They submitted that, in the absence of any error or omission at the time of birth, the making of an alteration to the register as to the sex of the individual would constitute a falsification of the facts contained therein, and would be misleading to other persons with a legitimate interest in being informed of the true situation. They contended that the demands of the public interest weighed strongly against any such alteration.

The Court notes that the additions at present permitted as regards adoption and legitimation also concern events occurring after birth and that, in this respect, they are not different from the annotation sought by the applicant. However, they record facts of legal significance and are designed to ensure that the register fulfils its purpose of providing an authoritative record for the establishment of family ties in connection with succession, legitimate descent and the distribution of property. The annotation now being requested would, on the other hand, establish only that the person concerned henceforth belonged to the other sex. Furthermore, the change so recorded could not mean the acquisition of all the biological characteristics of the other sex. In any event, the annotation could not, without more, constitute an effective safeguard for ensuring the integrity of the applicant's private life, as it would reveal his change of sexual identity.

43. The applicant has accordingly also asked that the change, and the corresponding annotation, be kept secret from third parties.

However, such secrecy could not be achieved without first modifying fundamentally the present system for keeping the register of births, so as to prohibit public access to entries made before the annotation. Secrecy could also have considerable unintended results and could prejudice the purpose and function of the birth register by complicating factual issues arising in, inter alia, the fields of family and succession law. Furthermore, no

account would be taken of the position of third parties, (e.g. life insurance companies) in that they would be deprived of information which they had a legitimate interest to receive.

44. In order to overcome these difficulties there would have to be detailed legislation as to the effects of the change in various contexts and as to the circumstances in which secrecy should yield to the public interest. Having regard to the wide margin of appreciation to be afforded the State in this area and to the relevance of protecting the interests of others in striking the requisite balance, the positive obligations arising from Article 8 (Art. 8) cannot be held to extend that far.

45. This conclusion is not affected by the fact, on which both the Commission and the applicant put a certain emphasis, that the United Kingdom co-operated in the applicant's medical treatment.

If such arguments were adopted too widely, the result might be that Government departments would become over-cautious in the exercise of their functions and the helpfulness necessary in their relations with the public could be impaired. In the instant case, the fact that the medical services did not delay the giving of medical and surgical treatment until all legal aspects of persons in the applicant's situation had been fully investigated and resolved, obviously benefited him and contributed to his freedom of choice.

46. Accordingly, there is no breach of Article 8 (Art. 8) in the circumstances of the present case."

50. The Commission considers that the present application does not reveal a particular novel aspect of the situation of transsexuals in the United Kingdom, distinguishing it from the situation in the Rees case. In fact, it follows from paragraph 40 of the above-cited judgment that the Court took into consideration that, at the present stage of the development in the United Kingdom law, a transsexual is not recognised in his/her new status, *inter alia*, as far as marriage, pension rights and certain employments are concerned. The Court consequently took into consideration all drawbacks for transsexuals of the existing legal system. Nevertheless, it considered that "it must, for the time being, be left to the United Kingdom to determine the extent to which it can meet the remaining demands of transsexuals" (*loc. cit.*, para. 47).

C. Conclusion

51. The Commission concludes, by eleven votes to three that there has been no violation of Article 8 (Art. 8) of the Convention in the present case.

Secretary to the Commission

President of the Commission

Dissenting Opinion of Mr. Ermacora

The Commission, in its report in the Rees case (Application No. 9532/81), argued that there was, in its opinion, no justification on any ground of public interest for the failure of the United Kingdom to recognise the applicant as a man for all social purposes. The refusal of the Government to amend or annotate the register of births to record the individual's change of sexual identity would not in fact be justified on any such ground. The Commission stated, *inter alia*, that the medical recognition of the necessity to assist the applicant to realise his identity must be regarded as a further argument for the legal recognition of the change in his sexual identity. Failure to do so had the effect that the applicant was treated as an ambiguous being.

Having regard to the reference in the preamble of the European Convention to the Universal Declaration of Human Rights of 10 December 1948 which states that all human beings are born free and equal in dignity and rights (Article 1) and that everyone has the right to recognition everywhere as a person before the law, I have difficulty in following the reasoning of the Court in their judgment in the Rees case. In this case the Court relies mainly on considerations which seem to disregard the human rights' substance of the case and of similar cases of this nature. Therefore, I am not in agreement with the majority of the Commission in merely quoting the judgment of the Court in the Rees case. I still adhere to the Commission findings in the Rees case which should also have been followed in the present case.

&_APPENDIX I&S

HISTORY OF PROCEEDINGS

| Date | Item |
|------------------------------|--|
| 13 September 1983 | Introduction of the application |
| 19 September 1983 | Registration of the application |
| Examination of Admissibility | |
| 9 May 1984 | Commission's deliberations and decision to invite the Government to submit observations on the admissibility and merits of the application |

| | |
|---------------------------|--|
| 26 June 1984 | Government's request to adjourn consideration of the application, pending the outcome of the Rees case |
| 4 April 1985 | Government renounces submission of observations in view of the Commission's Report in the Rees case |
| 5 July 1985 | Commission's decision to declare the application admissible and adjourn its examination pending the outcome of the Rees case |
| Examination of the merits | |
| 7 October 1985 | Decision on admissibility transmitted to the parties |
| 9 May 1987 | Decision to invite the parties to submit observations on the merits |
| 16 June 1987 | Government's observations on the merits |
| 7 March 1988 | Applicant's observations on the merits |
| 20 April 1988 | Government's reply |
| 6 May 1988 | Commission's consideration of the state of proceedings |
| 15 December 1988 | Commission's deliberations on the merits, final vote and adoption of the Report |