

X, Y and Z: Review of the Judgement

ECHR fails to take on board transsexual issues

Senior Law Lecturer [Stephen Whittle](#) gives his professional opinion on the recent European Court of Human Rights Judgement in the case of X, Y and Z v UK Govt. (75/1995/581/667 ECHR)

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Once again the European Court of Human Rights has failed to respond to the problems that transsexuals in the UK face.

However the decision, albeit disappointing, does still give hope for the future.

Transsexual and transgendered people are experiencing a new atmosphere of understanding here in Britain, as was illustrated by the universally excellent and sympathetic news coverage given of this case decision. Most of this must be put down to the excellent work of the many Press For Change activists who have worked hard over the last 5 years to re-educate the media and the general public.

The decision

The case was heard by a grand chamber of 20 judges.

Articles being cited

Article 8:

Everyone has a right to respect for his private and family life, his home and his correspondence,

Article 14:

The enjoyment of the rights and freedoms set forth in the 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 court unanimously decided that Article 8 was applicable in this case as they considered, despite the arguments to the contrary by the UK government, that de facto family ties did exist between the 3 applicants.



Lawyer failed by the law: Stephen Whittle vows to fight on

However they went on to say that as there is little common ground amongst the member states of the European council as to whether any non-biological father should be recorded on donor inseminated children's birth certificates, and there is no common European standard with regard to the granting of parental rights to transsexuals, then generally speaking the law is in a transitional stage and states must be allowed a wide margin of appreciation.

As to whether a fair balance had been struck between the interests of the applicants and the interests of the state, the court then held that transsexuality raises complex scientific, moral and social issues hence Article 8 cannot, in this context, be taken to imply an obligation for the state to recognise as the father of a child a person who is not a biological father. That being so the failure of UK law to recognise the relationship between X (the transsexual man) and Y (his female partner) does not amount to a failure to respect family life.

The court further held, that the complaint made under Article 14, was tantamount to a restatement of the complaint under Article 8 and raised no separate issue. Therefore in view of their findings there was no need to examine the issue again in the context of Article 14.

Critique

The case raises many issues and its failure tends to say more about the current state of the European Court of Human Rights, rather than the state of transsexual rights in the United Kingdom. In recent decisions the "wide margin of appreciation" that the court is currently allowing member states could be said to be becoming wider in many areas of the court's jurisdiction and this does not bode well for the future of human rights in Europe.

However the case itself makes some progress, not least that the court held that Article 8 was applicable because there was a recognisable de facto family relationship in existence.

The decision though fails to recognise in this area that there are, or should be, limits imposed by respect for fundamental rights, guaranteed by the convention. In the Cossey case, Judge Martens held, in his dissenting opinion that the refusal of a new identity in law for those who had undergone gender reassignment treatment "can only be qualified as cruel"

That cruelty, it would appear, is being allowed to continue.

Looking to X, Y and Z and the dissenting opinions; Judges Casadevall, Russo and Makarczyk argue that the government should accept the consequences of allowing X to have gender reassignment and of allowing Y to have fertility treatment during which X was obligated to acknowledge paternity. This they see, as obligating the government, to take all measures needed, without discrimination, to allow the applicants to live a normal life.

Judge Thor Vilhjalmsson, also in dissent, argues that as other non-biological fathers are allowed to be registered on the birth certificates of donor inseminated children, to not allow X to do so is discrimination on the grounds of sex under Article 14.

Further this also leads him to conclude that the family ties between X, Y and Z were not being respected under Article 8. The fact that the male partner is a transsexual should be irrelevant.

Judge Foighal, who also dissents, argues that in *Cossey* the court held that though the law was in a transitional state legal measures should be kept under review to take account of medical, social and moral developments. He maintains that the majority decision in *X, Y and Z* does not reflect the changes that have taken place in recent years, although they were given ample evidence of those changes.

He also states that it is part of our common European heritage that governments are under a duty to take special care of individuals who are disadvantaged in any way. As the government had not advanced any convincing arguments with regard to competing interests, nor had they made any attempt to justify their failure to help X further by ensuring his change of sex receives legal recognition, which would help him and harm no-one, therefore there is, in his opinion, a violation of Article 8. Following the dissention of Thor Vilhjalmsson, he similarly finds a contravention of Article 14.

Judge Gotchev also argues a contravention of both articles, but from the standpoint of the "welfare of the child", which should, in his opinion, be the prevailing consideration. He states that this obligates a state to allow the, unanimously decided, *de facto* family ties to be legally safeguarded; to render possible from the moment of birth or as soon as practicable thereafter, the child's integration into the family. This would include recognising X as Z's father.

The dissenting opinions give hope in that they give possible ways forward for the future. Certainly any further "transsexual" cases to the court should ensure they emphasise and evidence even more strongly the social, moral and legal changes that have taken place over recent years. They should argue that transsexuals are being discriminated against on ground of sex, birth or social origin. Finally we must ensure we strongly evidence the lack of privacy we face in our daily lives - identity documentation is not the same as status recognition. It is only status acknowledgment which will afford us true employment protection and relationship recognition.

Stephen Whittle
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