Session 2003 - 04

House of Lords

Judgments - A (Respondent) v. Chief Constable of West Yorkshire Police (Appellant) and another

HOUSE OF LORDS SESSION 2003-04
[2004] UKHL 21
on appeal from: [2002] EWCA Civ 1584

OPINIONS

OF THE LORDS OF APPEAL

FOR JUDGMENT IN THE CAUSE

A (Respondent)

v.

Chief Constable of West Yorkshire Police (Appellant) and another

ON

THURSDAY 6 MAY 2004

The Appellate Committee comprised:

Lord Bingham of Cornhill

Lord Steyn

Lord Rodger of Earlsferry

Baroness Hale of Richmond

Lord Carswell

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A (Respondent) v. Chief Constable of West Yorkshire Police (Appellant) and another

[2004] UKHL 21

LORD BINGHAM OF CORNHILL

My Lords,

1. On 9 March 1998 the Chief Constable of West Yorkshire rejected Ms A's application to become a constable in the West Yorkshire Police on the ground that, as a male-to-female transsexual, she could not perform the full searching duties required of a police constable. The issue in this appeal is whether he thereby discriminated against her unlawfully in breach of the Sex Discrimination Act 1975. In addressing that issue I gratefully adopt and need not repeat the summary given by my noble and learned friend Baroness Hale of Richmond of the facts, the history of the proceedings, the relevant statutory materials and the arguments.

2. The chief constable rejected Ms A's application in March 1998 on grounds which were in substance the following: (1) He was advised that in English domestic law Ms A remained a man, despite the change of gender she had effected and the gender reassignment surgery she had undergone, because her biological sex at birth was male and nothing that happened thereafter could change it. (2) He concluded that as (legally) a man Ms A could not lawfully search women pursuant to section 54 of the Police and Criminal Evidence Act 1984. (3) He concluded that as an apparent woman Ms A could not in practice search men pursuant to section 54. (4) He regarded it as necessary that a constable should be capable of searching either men or women pursuant to section 54. In the course of these proceedings, but not (I think) as early as March 1998, he inferred that he could not excuse Ms A from all section 54 searching duty without alerting her colleagues to her transsexual history, which he believed would be deeply unacceptable to her.

3. The advice given to the chief constable on English domestic law, summarised in (1) above, was correct. Such was the effect of *Corbett v Corbett* [1971] P 83. That case, it is true, concerned the capacity of a male-to-female transsexual to marry. But the Court of Appeal (Criminal Division) applied the same rule to gender-specific criminal offences in *R v Tan* [1983] QB 1053. Both decisions have been heavily criticised, and other jurisdictions have adopted other rules. But there was nothing in English domestic law to suggest that a person could be male for one purpose and female for another, and there was no rule other than that laid down in *Corbett* and *R v Tan*.

4. Since section 54(9) of the 1984 Act required a constable carrying out a search under the section to be of the same sex as the person searched, it necessarily followed that if Ms A was (legally) a man she could not lawfully search a woman under the section.

5. Since it is a requirement laid down in paragraph A 3.1 of the Codes prescribed under section 66 of the 1984 Act that "Every reasonable effort must be made to reduce to the minimum the embarrassment that a person being searched may experience", it was plain that Ms A, who appeared in every respect to be a woman, could not, even if legally a man, be permitted to search a man.

6. The chief constable was entitled to take the view summarised in (4) above. The employment tribunal found searching to be an integral function of a police constable and accepted the description of searching as a core competency. The tribunal considered it objectively

> "unreasonable to require the [chief constable] to employ [Ms A] as a police constable if in law and fact she could not carry out the full range of a police constable's duties."

7. Having read the three judgments of the employment tribunal and both judgments of the Employment Appeal Tribunal, I share the sense of surprise clearly felt by the Court of Appeal at the statement, made by Ms A's counsel on her behalf during her reply in the Court of Appeal, that if she became a constable Ms A would be willing for her colleagues at large, and if need be the public at large, to know of her transsexuality. The chief constable was well justified in believing that she would not be willing. But I do not think that the outcome of this appeal turns on whether she would or would not have been willing for such disclosure to be made.

8. Thus, in terms of English domestic law, the chief constable was bound to accept, as he did, that on the grounds of her transsexuality he had treated Ms A less favourably than he would have treated a woman who was not a transsexual, by refusing to offer her employment at an establishment in Great Britain, contrary to sections 2 and 6(1)(c) of the Sex Discrimination Act 1975. But he could claim that being a (non-transsexual) woman was a genuine occupational qualification for the job, since the job needed to be held by a woman to preserve decency or privacy because it was likely to involve physical contact with women in circumstances where they might reasonably object to its being carried out by a man, or because the holder of the job was likely to do her work in circumstances where women might reasonably object to the presence of a man (section 7(2)(b) of the 1975 Act). Put more shortly, it was a genuine occupational qualification of a constable to be capable of searching men or women under section 54, and Ms A could search neither. If the problem were purely one of domestic law, I very much doubt if this defence could be defeated.

9. To outflank it, Ms A relied on the law of the European Community. Her starting point was the duty imposed on British courts by section 2(1) of the European Communities Act 1972 to give legal effect to all rights, liabilities, obligations and restrictions from time to time arising by or under the Treaty of Rome. It is of course well-established that the law of the Community prevails over any provision of domestic law inconsistent with it. Ms A relied on the prohibition in article 2(1) of Council Directive 76/207/EEC of 9 February 1976 (the Equal Treatment Directive) of any "discrimination whatsoever on grounds of sex either directly or indirectly." This prohibition was qualified by reserving to member states the right to exclude from the field to which the Directive applied "those occupational activities . . . for which, by reason of their nature or the context in which they are carried out, the sex of the worker constitutes a determining factor." Section 17(1) of the 1975 Act provides that the holding of the office of constable shall be treated as employment, but does not exclude police searching activities from the application of the Act.

10. The sheet-anchor of Ms A's case was the important judgment of the European Court of Justice in *P v S and Cornwall County Council* (Case C-13/94) [1996] ICR 795, which concerned the dismissal of a male-to-female transsexual at a time when she had embarked on but not completed a course of gender reassignment surgery. I need not repeat the passages in the judgment and the opinion of Advocate General Tesauro which Lady Hale has cited. For present purposes the significance of the decision is twofold. First, it held in very clear and simple terms that the Directive prohibited unfavourable treatment on grounds of gender reassignment. Secondly, that prohibition was based not on a semantic analysis of the provisions of the Directive but on "the principle of equality, which is one of the fundamental principles of Community law" (paragraph 18 of the judgment) and on the Court's duty to safeguard the dignity and freedom to which an individual is entitled (paragraph 22). The Court adopted a similar approach in *K B v National Health Service Pensions Agency* (Case C-117/01) [2004] IRLR 240. That case concerned equal pay, not equal treatment, and judgment was given years after the chief constable's decision to reject Ms A's application. But there is nothing here to displace the ordinary principle that a ruling on the interpretation of Community law takes effect from the date on which the rule interpreted entered into force (see *Société Bautiaa v Directeur des Services Fiscaux des Landes* (Cases C-197/94 and C-252/94) [1996] ECR I-505, para 49).

11. The question then arises whether the decisions of the European Court of Justice in *P v S* and *KB*, and the philosophical principles on which they rest, can cohabit with a rule of domestic law which either precludes the employment of a post-operative male-to-female transsexual as a constable of whom routine section 54 searching duties are required, or requires such a person to be willing to disclose her transsexual identity to working colleagues and, perhaps, members of the public. The first of these alternatives cannot be reconciled with the principle of equality: the exclusion is not one which applies to men or women but only to those who have changed their gender. Yet they also are entitled to be treated, so far as possible, equally with non-transsexual men or women. The second alternative derogates from the dignity and freedom to which a transsexual individual, like any other, is entitled.

In my opinion, effect can be given to the clear thrust of Community law only by reading "the same sex" in section 54(9) of the 1984 Act, and "woman", "man" and "men" in sections 1, 2, 6 and 7 of the 1975 Act, as referring to the acquired gender of a post-operative transsexual who is visually and for all practical purposes indistinguishable from non-transsexual members of that gender. No one of that gender searched by such a person could reasonably object to the search.

12. In reaching this conclusion, I do not intend to question or derogate from the very recent decision of the House in *Bellinger v Bellinger* [2003] 2 AC 467, affirming the decision in *Corbett v Corbett* [1971] P 83. The House affirmed that decision not because it was insensitive to the hardship which the rule in *Corbett*, strictly applied, could cause; nor because it was unaware of the criticism to which the decision had been subject; nor because it ignored the Strasbourg authorities on transsexuals. It did so because, alive to the wide ramifications of departure from the established rule, it regarded the field as one calling for comprehensive legislative reform and not piecemeal judicial development. I have no doubt that the decision was wholly correct, and there was a prompt legislative response to it. But the case concerned marriage, perhaps the most important and sensitive of human relationships. It lacked any Community dimension, so that *P v S* was not cited and there was no need to consider it. And the House exercised its power under section 4 of the Human Rights Act 1998 to declare that section 11(c) of the Matrimonial Causes Act 1973 was incompatible with articles 8 and 12 of the European Convention in failing to make provision for the recognition of gender reassignment.

13. I accordingly reach the same conclusion as the Court of Appeal, but in doing so I would not rely, as it did, on the decision of the European Court of Human Rights in *Goodwin v United Kingdom* (2002) 35 EHRR 447. When the chief constable made his decision in March 1998 the Human Rights Act 1998 had not been enacted. When enacted the Act did not, generally, have retrospective effect. Had it had retrospective effect, it would not have overridden or displaced provisions of primary legislation. Most importantly, the decision in *Goodwin* was, as its language makes clear and as the House held in *Bellinger* (paragraph 24), "essentially prospective in character". There is nothing in the Court's judgment to suggest that the earlier cases of *Rees v United Kingdom* (1986) 9 EHRR 56, *Cossey v United Kingdom* (1990) 13 EHRR 622 and *Sheffield and Horsham v United Kingdom* (1998) 27 EHRR 163, the last of these cases decided after the date of the chief constable's decision, had been wrongly decided. Rather, the Court recognised that the legal or administrative consensus among member states, the understanding of transsexuality, and evolving perceptions of individual dignity and freedom, had reached a point where the margin of appreciation accorded to a state could no longer be held to legitimise the denial of formal recognition to an acquired change of gender. The importance of the Convention in this appeal derives not from the decision in *Goodwin* but from the part which the Convention has played in shaping the current European understanding of what fundamental human rights mean and require.

14. I would dismiss this appeal.

LORD STEYN

My Lords,

15. I have read the opinions of my noble and learned friends Lord Bingham of Cornhill and Baroness Hale of Richmond. I agree with their reasons and conclusions. I would also dismiss the appeal.

LORD RODGER OF EARLSFERRY

16. Ms A is a post-operative male-female transsexual. Unhappily, in the past, when her situation became known in her local community, she suffered hostility, personal abuse, taunts and damage to her home and property; happily, she now lives in another community where she has always been known as a woman and where she experiences no such problems. In January 1997 she applied to become a police officer in the West Yorkshire Police Force, some distance from her home. In March 1998 the Chief Constable refused her application.

17. Ms A then lodged an application with the employment tribunal, alleging sex discrimination by the Chief Constable in terms of the Sex Discrimination Act 1975 ("the 1975 Act"). It is common ground that, in light of the decision of the Court of Justice in *P v S and Cornwall County Council* [1996] ECR I-2143, by 1998 it was known that discrimination against transsexuals fell within the scope of the Equal Treatment Directive 76/207/EEC ("the directive") and that, so far as possible, the 1975 Act had to be interpreted accordingly. It is also common ground that Ms A's application falls to be considered under the 1975 Act as it stood without the amendments introduced by the Sex Discrimination (Gender Reassignment) Regulations 1999 (SI 1999/102). The tribunal eventually held that Ms A was entitled both to a declaration that the Chief Constable had unlawfully discriminated against her and to compensation for that discrimination with effect from 1 September 1999. It remains the case that she seeks both remedies.

18. Because of what had happened in the past, Ms A was at pains to secure that she could conduct these proceedings without the facts being published in the media and her situation becoming known to the public. Not surprisingly, therefore, before the employment tribunal, the Employment Appeal Tribunal and - for most of the hearing - before the Court of Appeal, the proceedings were conducted on the basis that, at the time when the Chief Constable took his decision in March 1998, he was fully entitled to believe that she was not willing for her colleagues and the public at large to know that she was a transsexual. Towards the end of the hearing before the Court of Appeal, however, her counsel indicated that, if she became a police officer, Ms A would be willing for this matter to be made known to her colleagues. The Court of Appeal reached their judgment in favour of Ms A largely on the basis that this was, in fact, her position. But, in my respectful opinion, whatever may be her position now, in a case where she is seeking a declaration of sex discrimination and compensation for that discrimination, the issues must be determined on the basis of the situation in March 1998 as disclosed in evidence before the tribunal. In other words, the question is whether, in March 1998, the Chief Constable discriminated against Ms A unlawfully on the ground of her sex by refusing her application to become a police officer, at a time when he reasonably understood that she was

unwilling to reveal, or to allow others to reveal, to her colleagues and to members of the public that she was a transsexual. It is particularly important to be clear on this point since, throughout, the Chief Constable has acted honourably and in good faith.

19. In March 1998 the Chief Constable had been advised that, even though she had successfully undergone all the usual treatment, including surgery, in law Ms A's sex was still male. In my view that advice on the domestic law of the United Kingdom was, and remains, correct: *Bellinger v Bellinger* [2003] 2 AC 467, especially at p 480, para 45 per Lord Nicholls of Birkenhead. Section 54(9) of the Police and Criminal Evidence Act 1984 ("PACE") provides: "The constable carrying out a search shall be of the same sex as the person searched." Parliament's laudable aim is to afford protection to the dignity and privacy of those being searched in a situation where they may well be peculiarly vulnerable. While her application to join the force was pending, Ms A herself very properly drew attention to the possible problem posed by this provision. On the basis of the legal advice given to him, the Chief Constable considered that, because of section 54(9), Ms A could not lawfully search female suspects. And, in practice, she could not search male suspects. Nor could the Chief Constable arrange for Ms A not to have to carry out searches without it becoming known why he was doing so. Since he understood that she was not willing for this to happen, the Chief Constable decided that he could not accept her application to join the force.

20. My noble and learned friend, Lady Hale, has set out the terms of the relevant legislation. Before the tribunal, the Chief Constable conceded that, but for section 7 of the 1975 Act, he would have unlawfully discriminated against Ms A on the ground of her sex by refusing to offer her employment: sections 1 and 6(1)(c). His position was, however, that section 6(1)(c) did not apply in this case since it was excluded by the existence of a genuine occupational qualification in terms of section 7.

21. My Lords, examination of the terms of section 7 soon shows that they were not drafted with the present kind of case in mind. In the first place, standing back, I find it impossible to say that being a man, as opposed to a woman, or vice versa, is a genuine occupational qualification for the office of police constable. Both men and women hold that office. More particularly, section 7(2)(b) provides that being a man, or being a woman, is a genuine occupational qualification "*only* where" the job needs to be held by a man, or a woman, to preserve decency or privacy. But, again, the office of police constable does not require to be held by a man, as opposed to a woman, or by a woman, as opposed to a man, in order to preserve decency or privacy. Here too, the fact that there are many officers of both sexes disproves any such suggestion. Indeed, section 54(9) of PACE presupposes that there will be officers of both sexes. Male officers search male suspects and female officers search female suspects, but otherwise they are employed on the same terms and have the same duties — just as, in practice, in many department stores selling clothes for both men and women, male assistants may be asked to measure male customers and female assistants female customers, but otherwise the assistants are employed on the same terms to carry out the same duties.

22. In reality, what the Chief Constable is arguing in the present case is not that being a man, as opposed to a woman, or a woman as opposed to a man, is a genuine

occupational qualification for being a police officer, but rather that, in terms of section 7(2)(b), the job of police officer needs to be held by a man *who can decently search men* or a woman *who can decently search women*. In my view, however, that involves reading into the provision an idea that is simply not to be found in the tightly drawn terms of section 7. This is hardly surprising since the section was drafted at a time when questions relating to transsexuals were not at the forefront of Parliament's attention. On the other hand, as I have already noted, in 1999, following the decision of the Court of Justice in *P v S and Cornwall County Council* [1996] ICR 795, Parliament approved an order that amended the 1975 Act and supplemented section 7 with sections 7A and 7B. The first of these sections introduced an exception that corresponds to section 7, but makes specific provision for the employer to show that the treatment of the transsexual is reasonable in the circumstances: section 7A(l)(b). The second introduced certain further genuine occupational qualifications in the case of transsexuals, including a much broader one for jobs which simply "involve the holder of the job being liable to be called upon" to perform intimate physical searches pursuant to statutory powers: section 7B(2)(a). These amendments, which regulate the position today, cannot, of course, be used to construe the Act as it stood in 1998, but the fact that they were made does tend to confirm the conclusion that the Chief Constable's interpretation of section 7 is unsound.

23. Section 7 is to be regarded as an exercise of the United Kingdom's right, under article 2(2) of the directive, to exclude from its field of application those occupational activities for which the sex of the worker constitutes a determining factor. While the proper interpretation of article 2(2) is relevant to defining the limits within which a member state may choose to exclude the application of the directive, the very nature of the provision means that its terms do not provide the basis for adopting a broad interpretation of any exclusion that a member state has chosen to make. More particularly, nothing in article 2(2) would justify the House in adopting a generous interpretation of the terms of section 7 of the 1975 Act in favour of the Chief Constable. That being so, there is no question as to the interpretation of the directive which it is necessary for the House to decide in order to enable it to give judgment — and hence no question which your Lordships are obliged to refer to the Court of Justice under article 234 EC: *Srl CILFIT v Ministry of Health* [1982] ECR 3415, 3429, para 10.

24. I conclude that being a man, as opposed to a woman, or vice versa, is not a genuine occupational qualification for the job of police officer in terms of section 7(2)(b) of the 1975 Act. It follows that section 7(l)(a) is not engaged and that section 6(1)(c) applies to such employment. In that situation the Chief Constable accepts that he discriminated unlawfully by refusing Ms A's application to join the force. This is so even though, in my view, section 54(9) of PACE means that it would have been unlawful for Ms A to search female suspects and in practice she could not have searched — and indeed would not have wanted to search — male suspects. The Chief Constable did not regard this problem as an insuperable obstacle to employing Ms A, however, if only because such searches have to be carried out relatively infrequently. He was prepared to employ Ms A on the basis that she would not carry out any necessary searches and that he would make arrangements for other officers to perform them. In other words, the Chief Constable regarded it as a precondition for employing anyone as a police officer,

either that he or she should be able to carry out searches, or that the Chief Constable should be free to make appropriate arrangements for other officers to carry out the searches that would ordinarily have fallen to the officer in question. That was the only relevant occupational qualification for the job. Chief Constables in other forces appear to have adopted the same pragmatic, or proportionate, approach. Since it was therefore not in fact a precondition of employing Ms A that she should be able to search female persons in terms of section 54(9) of PACE, there was no bar to her being allowed to join the force by reason of that section and no issue as to its interpretation in the light of the directive arises. The decision of the Court of Justice in *KB v National Health Service Pensions Agency and Secretary of State for Health* Case C-117/01 [2004] IRLR 240 is distinguishable.

25. While the Chief Constable was happy to adopt this approach, he perceived that Ms A herself had placed a major obstacle in its way. Making arrangements for other officers to carry out any searches of women would have meant that, sooner or later, Ms A's transsexuality would have become known to her colleagues and, therefore, more widely. The Chief Constable understood that she was anxious that this should not happen and he attached importance to that concern in deciding that he could not offer her employment. But the logic of the directive, and of the 1975 Act, must be that, while a Chief Constable — who is the equivalent of an employer for these purposes - is not entitled to refuse to employ a transsexual as a police officer on the ground of her sex, equally, she is not entitled, except as provided by the legislation, to insist that she be employed in a different way on the ground of her sex. More particularly, she cannot insist that she be employed in such a way that her transsexuality will be kept confidential in all circumstances, any more than a homosexual or dyslexic officer is entitled to insist that he be employed in such a way that his homosexuality or dyslexia is kept confidential in all circumstances. Of course, the Chief Constable should not compromise the officer's privacy by revealing the matter in question when there is no good reason to do so. But, equally, an officer cannot insist that his or her Chief Constable should act unlawfully, or permit the officer to act unlawfully, in order to keep it confidential. More generally, the Chief Constable must be free to take all appropriate decisions relating to the deployment of the officer even if, in consequence, the matter becomes known. It would have been open to the Chief Constable to explain this to Ms A and to indicate that he was prepared to accept her application to join the force on this basis. Ms A would then have had to choose whether to go ahead and join. According to the position adopted by her counsel in the Court of Appeal and before this House, she recognises that this would have been a proper approach for the Chief Constable to take.

For these reasons I would dismiss the Chief Constable's appeal.

THE BARONESS HALE OF RICHMOND

My Lords,

26. Ms A is a trans person. She does not consider that she has ever been male. She has lived for many years entirely successfully as a female, both before and after she underwent gender reassignment surgery in 1996. The people among whom she lives have never known her as anything else. The issue is whether it was lawful in March 1998 for the Chief Constable of West Yorkshire Police to refuse her application to join the Force as a woman.

The facts

27. She decided to apply to become a police officer in December 1996. After consulting the Force Medical Officer, she was completely open in her application form about her status and the treatment she had undergone. She was informed in April 1997 that full consideration had been given to her application and the points she had raised and the Force was happy for it to proceed. She successfully completed a Recruit Assessment in July 1997 and a further assessment and physical fitness test at the Police Training School in September. Background enquiries were then made. Becoming concerned at the apparent delay in proceeding to the final stages of the recruitment process, she wrote in November 1997 specifically drawing attention to the provisions of the Police and Criminal Evidence Act 1984 relating to police searches. In January 1998 she had a discussion with the Force equal opportunities officer who reassured her that trans people were allowed to serve as police officers although there would be occasions when they were not allowed to search. Still having heard nothing, she wrote again in February 1998. On 9 March 1998 she received the following reply:

> "I regret to inform you that since your initial application to join this Force, the issue of transsexual applicants has been further considered and the decision has been made that transsexuals will not be appointed to the Force.
> The decision has been made on the basis that candidates will not be appointed unless they are capable of performing the full duties of a Police Constable. Unfortunately, as you are already aware, legislation affects the carrying out of searches on persons in custody by transsexuals and, therefore, you would not be able to undertake full duties."

28. The question, therefore, is whether this was unlawful discrimination on grounds of sex. The Force has admitted, ever since its response to her SD74 questionnaire in April 1998, that it did discriminate against her on the grounds of her transsexuality but contends that this was not unlawful. Domestic law does not yet recognise gender reassignment. Ms A has therefore to be regarded as a man. As a man she cannot carry out routine searches upon women. As a person who presents to all practical purposes as a woman, she cannot search men. The ability to carry out searches is a genuine occupational qualification for the office of constable. Hence it was lawful to discriminate against her.

29. As is so often the case, the way in which the arguments were put has evolved in the course of these proceedings, not least because there have been significant developments in domestic and European law, including the decision of the European Court of Human Rights in *Goodwin v United Kingdom* (2002) 35 EHRR 18 while they were going on. As timing plays a considerable part in the arguments presented to us, it may be helpful to sketch the development of the law in roughly chronological order. Much fuller accounts of these

developments, and of the medical and scientific background, can be found in the reports of the decisions of Court of Appeal and House of Lords in *Bellinger v Bellinger* [2001] EWCA Civ 1140; [2002] Fam 150; [2003] UKHL 21; [2003] 2 AC 467.

Domestic law

30. In the well-known case of *Corbett v Corbett (orse Ashley)* [1971] P 83, Ormrod J held that, for the purpose of the law of capacity to marry, the sex of a person was fixed at birth. Accordingly a purported marriage in 1963 between a man and a male to female trans person was void ab initio. Shortly after this, the Nullity of Marriage Act 1971 provided that a marriage taking place after 31 July 1971 is void on the ground 'that the parties are not respectively male and female.' This was later consolidated as section 11(c) of the Matrimonial Causes Act 1973. The same approach was adopted by the Court of Appeal in *R v Tan* [1983] QB 1053 for the gender specific offences in the Sexual Offences Acts. The Court considered that 'both common sense and the desirability of certainty and consistency' demanded that the *Corbett* decision should apply in both contexts. Since then, it has been assumed that a person's gender is fixed at birth for the purpose of all legal provisions which make a distinction between men and women. *Corbett* was followed without challenge in *S-T (formerly J) v J* [1998] Fam 103.

31. The relevant provisions of the Sex Discrimination Act 1975, as they stood in 1998, are as follows:

"1 Direct and indirect discrimination against women

1) In any circumstances relevant for the purposes of any provision of this Act, other than a provision to which subsection (2) applies, a person discriminates against a woman if -

a) on the ground of her sex he treats her less favourably than he treats or would treat a man, . . .

. . .

5 Interpretation

. . .

3) A comparison of the cases of persons of different sex or marital status under section 1(1) . . . must be such that the relevant circumstances in the one case are the same, or not materially different, in the other.

6 Discrimination against applicants and employees

1) It is unlawful for a person, in relation to employment by him at an establishment in Great Britain, to discriminate against a woman -

a) in the arrangements he makes for the purpose of determining who should be offered that employment, or

b) in the terms on which he offers her that employment, or

c) by refusing or deliberately omitting to offer her that employment.

. . .

7 Exception where sex is a genuine occupational qualification

1) In relation to sex discrimination -

a) section 6(1)(a) or (c) does not apply to any employment where being a man is a genuine occupational qualification for the job, . . .

2) Being a man is a genuine occupational qualification for a job only where -

. . .

b) the job needs to be held by a man to preserve decency or privacy because -

i) it is likely to involve physical contact with men in circumstances where they might reasonably object to its being carried out by a woman, or

ii) the holder of the job is likely to do his work in circumstances where men might reasonably object to the presence of a woman because they are in a state of undress or are using sanitary facilities."

32. By section 17 of the 1975 Act, holding the office of constable is treated as employment by the Chief Constable. Searching people is an integral part of the duties of a constable. But there are different kinds of search, roughly falling into three categories:

(1) At one extreme are the various powers to search people without first arresting them. By virtue of section 2(9) of the Police and Criminal Evidence Act 1984 (PACE), these do not permit 'a constable to require a person to remove any of his clothing in public other than an outer coat, jacket and gloves.'

(2) At the other extreme is an 'intimate' search, which may be authorised under section 55. By section 65(1), this means 'a search which consists of the physical examination of a person's body orifices other than the mouth'. By section 55(5) this has to be done by a doctor or nurse unless this is impracticable, in which case it may be done by a constable, but by section 55(7) 'A constable may not carry out an intimate search of a person of the opposite sex.' Intimate searches are extremely rare and such searches by constables are even rarer. It is now common ground that this provision does not present an obstacle to the employment of a trans person as a police officer.

(3) In the middle are searches, under section 54 of the Act, of people who have been arrested or committed to custody by a court. By section 54(8), these searches must be carried out by a constable and by section 54(9), that constable 'shall be of the same sex as the person searched'.

33. On the face of it, therefore, if Ms A is still a man for the purpose of all legal provisions distinguishing between the sexes, she cannot carry out a search covered by section 54(9) or

55(7) upon a woman. And because to all intents and purposes she is a woman, a man might reasonably object to her carrying out a search upon him.

European Community law

34. The Sex Discrimination Act 1975 anticipated the EEC Council Directive 76/207/EEC, on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion and working conditions (the 'Equal Treatment Directive'). By Article 1(1) of the Directive:

> "The purpose of the Directive is to put into effect in the Member States the principle of equal treatment for men and women as regards access to employment, including promotion and to vocational training and as regards working conditions and, on the conditions referred to in paragraph 2, social security. This principle is hereinafter referred to as the principle of equal treatment."

By Article 2:

"(1) … the principle of equal treatment shall mean that there shall be no discrimination whatsoever on grounds of sex either directly or indirectly by reference in particular to marital or family status.

(2) This Directive shall be without prejudice to the rights of member states to exclude from its field of application those occupational activities and, where appropriate, the training leading thereto, for which, by reason of their nature or the context in which they are carried out, the sex of the worker constitutes a determining factor."

35. In *P v S and Cornwall County Council* (Case C-13/94) [1996] ICR 795, delivered on 30 April 1996, the European Court of Justice held that it was contrary to the Equal Treatment Directive to dismiss a person on the ground that they proposed to undergo or had undergone gender reassignment. This was discrimination based on sex. It will be necessary to return to the reasoning of the Court and the Advocate General, but it should be noted that the case was decided before the act of discrimination complained of in this case. The same principle has recently been held to apply to the conditions governing entitlement to pay and related benefits, in *KB v National Health Service Pensions Agency* (C-117/01) [2004] IRLR 240.

36. *P v S* led to the Sex Discrimination (Gender Reassignment) Regulations 1999, SI 1999/1102. These amended the 1975 Act. A new section 2A was added to deal with less favourable treatment on grounds of gender reassignment in relation to those areas covered by the Equal Treatment Directive. Section 7A made a corresponding exception where being a man or being a woman was a genuine occupational qualification for the job. Section 7B created supplementary genuine occupational qualifications, the only relevant one of which is in section 7B(2)(a): 'the job involves the holder of the job being liable to be called upon to perform intimate physical searches pursuant to statutory powers.' Other types of search are not referred to.

Jurisprudence of the European Court of Human Rights

37. It is remarkable that, in each of the cases brought by trans people under the European Convention on Human Rights, the European Commission on Human Rights found a breach

of a relevant article, whereas the Court has been slower and more selective in taking that view. As long ago as 1979, in *D Van Oosterwijk v Belgium* (Applic No 7654/76), the Commission found that the refusal of Belgium to enable the registers of civil status to reflect lawful sex-changes violated the right to respect for private life in article 8. In *Rees v United Kingdom* (1986) 9 EHRR 56, the European Court of Human Rights, by a majority of 12 to 3, held that the refusal of the United Kingdom to issue a new birth certificate to a post operative trans person was not in breach of its positive obligations under Article 8. The Court was strongly influenced by the fact that in this country birth registration is regarded as a matter of historical record but that thereafter a trans person can be issued with a driving licence and passport in the new name and title and thus present himself in the new gender for many practical purposes. The Court took the same view in *Cossey v United* Kingdom (1990) 13 EHRR 622*,* but this time by the slender majority of 10 to 8. There was a powerful dissent by Judge Martens, pointing to the increasing legislative and judicial recognition of trans people in European states and elsewhere and to the fundamental human rights involved which in his view should not be defeated by technicalities (p 648, para 2.7):

> "The principle which is basic in human rights and which underlies the various specific rights spelled out in the Convention is respect for human dignity and human freedom. Human dignity and human freedom imply that a man should be free to shape himself and his fate in the way that he deems best fits his personality. A transsexual does use those very fundamental rights. He is prepared to shape himself and his fate. In doing so he goes through long, dangerous and painful medical treatment to have his sexual organs, as far as is humanly feasible, adapted to the sex he is convinced he belongs to. After these ordeals, as a post-operative transsexual, he turns to the law and asks it to recognise the *fait accompli* he has created . . . . This is a request which the law should refuse to grant only if it truly has compelling reasons, for . . . such a refusal can only be qualified as cruel. But there are no such reasons."

38. In contrast, in *B v France* (1992) 16 EHRR 1 the Court by a majority of 17 to 1 found France to be in breach of article 8 by refusing to recognise the reassigned gender. French people are required to carry identity cards at all times, so the degree of interference with the trans person's right to respect for her private life was much greater than in the United Kingdom. The European Court of Justice's decision in *P v S* came next.

39. Then in 1997, the European Court of Human Rights, in *X, Y and Z v United Kingdom* (1997) 24 EHRR 143 refused to find that the failure of United Kingdom law to recognise a female to male trans person as the father of a donor insemination child, born to his partner and brought up as their child, was a breach of their rights to respect for their family life under article 8. This trend was continued, shortly after the Chief Constable's decision in this case, in *Sheffield and Horsham v United Kingdom* (1998) 27 EHRR 163, where the Court, by a majority of 11 to 9, again found no violation in the refusal to recognise the reassigned gender. By this stage, 37 out of the 41 member states of the Council of Europe recognised trans people in their reassigned gender. The United Kingdom was said to be alone in allowing (and even funding) gender reassignment treatment and surgery but failing to recognise its results.

40. But in all these cases, the Court emphasised that times were changing, and that member states should keep the matter under review, as there might come a time when they would no longer enjoy a margin of appreciation. The United Kingdom had until then failed to heed such warnings, but in April 1999 the Home Secretary set up an interdepartmental working group. This reported in April 2000 and suggested putting the three options identified

out to public consultation. To the dismay of the Court of Appeal in *Bellinger v Bellinger* [2001] EWCA Civ 1140; [2002] Fam 150, para 96, this was not done. A year later, in *Goodwin v United Kingdom* (2002) 35 EHRR 18, the European Court of Human Rights unanimously found that English law was in breach of both article 8 and article 12.

Domestic law after Goodwin

41. Following *Goodwin*, this House declined, in *Bellinger v Bellinger* [2003] UKHL 21; [2003] 2 AC 467, to read and give effect to section 11(c) of the Matrimonial Causes Act 1973 so as to recognise the validity of a purported marriage in 1981 between a man and a male to female trans person. At the time the marriage had taken place, European Convention law did not require us to recognise the trans person's reassigned gender. The *Goodwin* decision was prospective in nature, requiring the United Kingdom to change its law for the future. This raised many difficult questions, in particular of definition and proof, which were better dealt with by Parliament. But until then, as our law no longer complied with the Convention, it was appropriate to make a declaration that section 11(c) of the Matrimonial Causes Act 1973 was incompatible with the Convention rights. *P v S* was cited and referred to without comment by the Court of Appeal in *Bellinger* but appears not to have been cited to the House of Lords.

42. The Gender Recognition Bill is currently before Parliament. This lays down a comprehensive scheme for recognising the reassigned gender of a trans person in defined circumstances. These are wider than the post-operative conditions with which the domestic and European case law has been concerned. Once recognised, the reassigned gender is valid for all legal purposes unless specific exception is made. It will no longer be a genuine occupational qualification that the job may entail the carrying out even of intimate searches. In policy terms, therefore, the view has been taken that trans people properly belong to the gender in which they live.

These proceedings

43. Ms A applied in May 1998 to an Employment Tribunal complaining of sex discrimination. On 18 March 1999, the Tribunal decided unanimously that the refusal to offer her employment as a constable was unlawful under the Sex Discrimination Act. The Tribunal found (para 10) that Ms A had applied to this particular force 'because it was away from the area in which she lived but was accessible to it. In order to function normally in society, she needs to conceal the fact that she is a transsexual. She is willing, however to disclose that fact to those who need to know it for whatever purpose'. They also found (para 30) that 'searching is an integral part of being a police constable. It is what the respondent describes as a core competency . . . Further, we find that it would be objectively unreasonable to require the respondent to employ the applicant as a police constable if in law and fact she could not carry out the full range of a police constable's duties.' They accepted 'that there are many people in our society who would have religious, cultural or moral objections to being searched by a transsexual.' But they continued, at para 33:

> "Whilst respecting these objections, we do not think that they are contemplated by the expression 'might reasonably object' [in section 7(2)(b) of the 1975 Act]. . . . Given the application of the principle of equal treatment, we cannot see that there is any obligation upon the respondent to disclose to anyone that the applicant is transsexual. . . The respondent also employs officers who are known to be homosexual. . . . Again there are persons who for cultural or moral reasons might object to being searched by

> a homosexual. The common factor in such an objection is knowledge, something of which the suspect or prisoner is rightly deprived."

44. After dismissing as negligible the risk of criminal or civil liability for assault, they concluded (para 37):

> "We return to the principle of proportionality. We are required to reconcile the principle of equal treatment as far as possible with the requirement of full operational policing. In our judgment, the risks to the respondent in permitting the applicant as a transsexual to carry out the full range of duties including the searching of women are so small that to give effect to them by denying the applicant access to the office of constable would be wholly disproportionate to the denial of the applicant's fundamental right to equal treatment."

45. The Employment Appeal Tribunal (reported as *West Yorkshire Police v A (No 2)* [2002] ICR 552) held that the job did need to be held other than by a transsexual to preserve decency or privacy. Once it had been accepted that there were people with objections to being searched by a transsexual, these could not simply be dismissed on the basis that they were not reasonable. The police could not be involved in the deception of concealing the facts and the alternative of giving special instructions would destroy the privacy sought by the applicant.

46. By the time the case reached the Court of Appeal in October 2002 (reported at [2003] ICR 161), the European Court of Human Rights had decided the case of *Goodwin*: the refusal of English law to recognise the applicant's gender reassignment was, in the absence of significant factors of public interest, a breach of her rights under articles 8 and 12 of the European Convention on Human Rights. The Court of Appeal allowed Ms A's appeal on the basis that the Convention jurisprudence was read into domestic law through the medium of the Equal Treatment Directive. If, in the light of *Goodwin*, the Chief Constable was bound to treat Ms A as female, it was not open to him to discriminate against her on the basis that she was a transsexual and no possibility of invoking section 7 of the 1975 Act could arise. Buxton LJ, however, pointed out that article 8 rights were not absolute, so that there might be countervailing factors of public interest. The court could give weight to the difficulties perceived by the Chief Constable but he had on obligation to manage his force in such a way as to avoid situations arising which would threaten the individual's article 8 interests. This might not be possible if the individual insisted on her transsexuality remaining undisclosed. But it had been made clear in the course of the hearing that she had no objection to colleagues generally, and if need be members of the public with whom she dealt, knowing of her transsexuality. Accordingly that problem did not arise.

This appeal

47. The Secretary of State for Trade and Industry has intervened in this appeal. She has ministerial responsibility for the Sex Discrimination Act 1975 and the implementation of EC law on sex discrimination in domestic law. Her main concern, as Mr Rabinder Singh QC made plain on her behalf, was with the reasoning in the Court of Appeal on the interplay between the European Convention on Human Rights and the Equal Treatment Directive. The *Goodwin* decision was plainly prospective, as this House held in *Bellinger*. Yet because the normal rule is that decisions on the interpretation of EC legislation operate *ex tunc*, the Court of Appeal held that the *Goodwin* decision *required* that the Equal Treatment Directive be interpreted in the light of *Goodwin*. Mr Singh accepts that it would have been possible so to

interpret it before then, based upon the human rights values which underpin the EC treaties. His quarrel is with the suggestion that *Goodwin* required this result. 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.

48. Mr David Bean QC, on behalf of the appellant Chief Constable, also argues that it was wrong to give retrospective effect to *Goodwin* simply because the matter is governed by EC law. He accepts that if Ms A is to be treated as a woman for the purpose of section 54(9) of PACE she must succeed. But to do so she must displace the domestic law decided in *Corbett* and *Tan*. The Equal Treatment Directive and the cases of *P v S* and *KB* did not require this result.

49. Mr Nicholas Blake QC, on behalf of Ms A, accepts, as he has to do, that in the light of *Bellinger*, *Corbett* remains the domestic law on capacity to marry unless and until it is changed by the Gender Recognition Bill. He argues that it was open to this House to hold that *Tan* was not good law, so that even in domestic law gender reassignment might be recognised for some purposes and not for others. His principal submission, however, is that EC law required the Chief Constable to recognise Ms A's sexual identity as female for the purpose of appointment as a constable and of any domestic legislation restricting access to such appointment. His secondary submission is that a blanket policy of denying access could not satisfy the strict requirements for a genuine occupational qualification and in particular the principle of proportionality as an aspect of that concept.

Discussion

50. In my view, the answer to this appeal must turn upon the rights of a trans person under the Equal Treatment Directive in March 1998, rather than upon domestic law or the impact of the *Goodwin* decision. Before turning to that issue, however, I would venture a few comments upon the other two.

51. As to domestic law, there might be good policy reasons for distinguishing between the different purposes for which the decision in *Corbett* may be invoked. Marriage can readily be regarded as a special case. True, it is perfectly possible to have a valid marriage between two people who cannot have children together. Also true, the fact that marriage law traditionally distinguished between husband and wife cannot be a conclusive argument against the marriage of two people who for all practical purposes are of opposite sexes. But marriage is still a status good against the world in which clarity and consistency are vital. In England, the Church has a role in celebrating marriages which means that special exceptions have to be made for people who are able to marry in civil but not ecclesiastical law. It is scarcely surprising that this House, in *Bellinger*, held that these difficult questions of definition, demarcation and impact upon others were for Parliament rather than the courts to decide.

52. But the House in *Bellinger* was concerned only with capacity to marry and in particular with the meaning of the words 'respectively male and female' in section 11(c) of the Matrimonial Causes Act 1973. These presuppose two clearly distinguished genders. It is less clear why the immutability of birth gender for marriage purposes should apply for all other purposes, in particular to those criminal offences which used to depend upon the gender of the accused or the victim. Many of those distinctions were of historical origin having nothing

to do with the different physical characteristics of the people concerned. It was a nonsense at the time of *Tan* that the offence of living on the immoral earnings of a prostitute could only be committed by a man and scarcely surprising that the Court of Appeal found it convenient to apply the *Corbett* reasoning in that case. On the other hand, insofar as criminal offences did depend upon sexual differences, it might be thought that the physical differences which enabled the various acts to be performed were more important than chromosomal similarities, so that a female to male trans person might be guilty of rape (as originally defined) and a male to female transsexual might be its victim. For present purposes, it is unnecessary to decide the point. The Sexual Offences Act 2003 adopts a gender neutral approach which makes it much less important irrespective of the Gender Recognition Bill.

53. As to the European Convention on Human Rights, the Court in *Goodwin* held that the refusal of domestic law to recognise the reassigned gender 'no longer falls within the United Kingdom's margin of appreciation'. But it would be for the United Kingdom to decide how to fulfil its obligation to secure to trans people their right to respect for their private life and their right to marry. *Goodwin* was clearly intended to operate prospectively rather than retrospectively. The Human Rights Act 1998 is only retrospective to the limited extent provided for in the Act. Hence, the House decided in *Bellinger* that neither could be used to legitimate a marriage which had taken place in 1981. For the same reason, I agree with the Secretary of State that the *Goodwin* decision did not require that the Equal Treatment Directive be interpreted as if *Goodwin* had been the law from the moment the Directive came into effect.

54. However, this clearly does not preclude a decision that the Directive is indeed to be interpreted as requiring that trans people be recognised in their reassigned genders for the purposes covered by the Directive. The general rule is that the interpretation given to a rule of community law 'clarifies and defines where necessary the meaning and scope of that rule as it must be or ought to have been understood and applied from the time of its coming into force'. Temporal restrictions can only exceptionally be allowed by the Court of Justice and then without prejudice to individuals who had already made a claim: see *Defrenne v Sabena* [1976] ICR 547, paras 69 to 75; *Amministrazione delle Finanze v Salumi* [1980] ECR 1239, para 11. The human rights values which led to the decisions in *B v France* in 1992 and *Goodwin* in 2002, as well as to the many Commission decisions and dissenting opinions, also underpin the EC legislation.

55. What interpretation is then to be given to the Directive? This depends upon the two decisions of the Court of Justice referred to earlier. In *P v S and Cornwall County Council* [1996] ECR 1-2143, the applicant was dismissed from her employment as a manager in an educational establishment because she was undergoing male to female gender reassignment treatment and surgery. She notified her superiors of her intention to do so. She was given notice after it had begun and the final operation was performed during her notice period. She brought proceedings for sex discrimination. These were resisted on the ground that a female to male trans person would have been treated in the same way. The Court pointed out that 'the directive is simply the expression, in the relevant field, of the principle of equality, which is one of the fundamental principles of community law' (para 18); and that 'the right not to be discriminated against on grounds of sex is one of the fundamental human rights whose observance the Court has a duty to ensure' (para 19). It continued:

"20. Accordingly, the scope of the directive cannot be confined simply to discrimination based on the fact that a person is of one or the other sex. In view of its purpose and the nature of the rights which it seeks to safeguard, the scope of the directive is also such as to apply to discrimination arising, as in this case, from the gender reassignment of the person concerned.
21. Such discrimination is based, essentially, if not exclusively, on the sex of the person concerned. Where a person is dismissed on the ground that he or she intends to undergo or has undergone gender reassignment, he or she is treated unfavourably by comparison with persons of the sex to which he or she was deemed to belong before undergoing gender reassignment.
22. To tolerate such discrimination would be tantamount, as regards such a person, to a failure to respect the dignity and freedom to which he or she is entitled, and which the Court has a duty to safeguard.
23. Dismissal of such a person must therefore be regarded as contrary to Article 5(1) of the directive, unless the dismissal could be justified under Article 2(2). There is, however, no material before the Court to suggest that this was so here."

56. It might be possible to regard this as simply a decision that discrimination on grounds of transsexuality is discrimination 'on grounds of sex' for the purpose of the Directive. But there are many reasons to think that it is not so simple. The purpose of the Directive, set out in Article 1(1), is to 'put into effect in the Member States the principle of equal treatment for men and women . . . ' The opinion of Advocate General Tesauro was emphatic that 'transsexuals certainly do not constitute a third sex, so it should be considered as a matter of principle that they are covered by the directive, having regard also to the above-mentioned recognition of their right to a sexual identity'. The 'right to a sexual identity' referred to is clearly the right to the identity of a man or a woman rather than of some 'third sex'. Equally clearly it is a right to the identity of the sex into which the trans person has changed or is changing. In sex discrimination cases it is necessary to compare the applicant's treatment with that afforded to a member of the opposite sex. In gender reassignment cases it must be necessary to compare the applicant's treatment with that afforded to a member of the sex to which he or she used to belong. Hence the Court of Justice observed that the transsexual 'is treated unfavourably by comparison with persons of the sex to which he or she was deemed to belong before undergoing gender reassignment.' Thus, for the purposes of discrimination between men and women in the fields covered by the directive, a trans person is to be regarded as having the sexual identity of the gender to which he or she has been reassigned.

57. That this is the correct interpretation of *P v S* emerges clearly from the recent decision in *KB v National Health Service Pensions Agency and Secretary of State for Health* (Case C-117/01) [2004] IRLR 240. The female applicant complained that the denial of a widower's pension to the female to male trans person, with whom she had celebrated what would have been a marriage had it been possible in English law, was sex discrimination contrary to the principles of equal pay contained in Article 141 of the EC Treaty and the Equal Pay Directive 75/117. The Court of Justice had earlier held that it is permissible to withhold such benefits from unmarried partners, including those in homosexual relationships who are also not permitted to marry by English law: see *Grant v South West Trains Ltd* (Case C-249/99) [1998] ECR I-621; *D and Sweden v Council* (Case C-125/99) [2001] ECR I-4319. The question was whether the prohibition of trans people marrying in their reassigned gender was in the same category, and thus not sex discrimination because it applied equally both ways, or whether it was discrimination on grounds of sex. *P v S* showed that this was sexual discrimination. The only difference in this case was that it related to one of the pre-conditions

for the enjoyment of a community right rather than directly to the right itself. This made no difference. Hence in principle it was incompatible with Article 141. But since the conditions for the recognition of gender reassignment had been left to the national authorities in *Goodwin*, it was for the national court to determine whether the applicant could rely on Article 141 to gain recognition of her right to nominate her partner as the beneficiary of a survivor's pension.

58. This decision confirms the right of the trans person to be recognised in the reassigned gender, not only for the purpose of the direct enjoyment of community rights, but also for the purpose of the pre-conditions of such a right. This must have an effect upon the proper approach to the question of 'genuine occupational qualification' under section 7 of the 1975 Act, which in turn rests upon the legality of searches under section 54 of PACE. Article 2(2) of the Equal Treatment Directive allows member states to exclude 'those occupational activities . . . for which, by reason of their nature or the context in which they are carried out, the sex of the worker constitutes a determining factor.' But article 2(2) is a derogation from an individual right which must be interpreted strictly and in accordance with the principle of proportionality: see *Johnston v Chief Constable of the Royal Ulster Constabulary* (Case 222/84) [1987] QB 129, paras 36, 38.

59. If in principle the trans partner of an employee must be recognised in the reassigned gender for the purpose of death benefits, the employee herself must in principle be recognised in the reassigned gender for the purpose of carrying out the duties of the post. This means that section 54(9) of PACE must be interpreted as applying to her in her reassigned gender, unless, as was acknowledged in *P v S,* there are strong public policy reasons to the contrary. It is difficult to argue that such public policy reasons existed in this case even in 1998. Intimate searches were expressly recognised as a supplementary genuine occupational qualification under section 7B of the 1975 Act, but the Chief Constable accepts that they do not present a practical problem to which exclusion from the Force would be a proportionate response. If the Gender Assignment Bill becomes law, they will cease to be recognised as such at all. Section 54 searches were not expressly recognised in section 7B, which was introduced in 1999 but in response to the decision in *P v S* in 1996. This is not surprising. By that time, the United Kingdom authorities were already doing everything they could to enable a trans person to live a normal life in her reassigned gender. There are many occupations which involve physical contact with members of the opposite sex. Although these are not usually in the circumstances of compulsion entailed in a section 54 search, they are often not truly voluntary - as for example in hospital wards where there are doctors and nurses of both sexes. And there are some, such as compulsory hospital patients, who have no choice. We generally depend upon the professionalism of the individual, backed up by the ordinary law and complaints mechanisms, to protect people's sensibilities. Those sensibilities may be rational as well as real. For example, it may well be rational to object to being nursed by a heterosexual person of the opposite sex. It may also be rational to object to being nursed by a homosexual person of the same sex. But it would not be rational to object on similar grounds to being nursed by a trans person of the same sex. In those circumstances it is not surprising that the Employment Tribunal held that an objection to being searched by a trans person would not be reasonable.

60. Until the matter is resolved by legislation, there will of course be questions of demarcation and definition. Some of these, for the reasons explained in *Bellinger,* will be sensitive and difficult. That is presumably why the Court of Justice in *KB* acknowledged the role of the national court in deciding whether the principle did in fact apply in the particular

case. One can well envisage a person who claims to have gender dysphoria but who has not successfully achieved the transition to the acquired gender. (One could also envisage a relationship which was not as close to marriage as the relationship in that case.) The Gender Recognition Bill provides a definition and a mechanism for resolving these demarcation questions. But until then it would be for the Employment Tribunals to make that judgment in a borderline case.

61. In this case, however, Ms A has done everything that she possibly could do to align her physical identity with her psychological identity. She has lived successfully as a woman for many years. She has taken the appropriate hormone treatment and concluded a programme of surgery. She believes that she presents as a woman in every respect.

62. She meets entirely the plea of Advocate General Ruiz-Jarabo Colomer in *KB*, at para 79*:*

> "Transsexuals suffer the anguish of being convinced that they are victims of an error on the part of nature. Many have chosen suicide. At the end of a long and painful process, in which hormone treatment is followed by delicate surgery, medical science can offer them partial relief by making their external physical features correspond so far as possible to those of the sex to which they feel they belong. To my mind it is wrong that the law should take refuge in purely technical expedients in order to deny full recognition of an assimilation which has been so painfully won."

63. In my view community law required in 1998 that such a person be recognised in her reassigned gender for the purposes covered by the Equal Treatment Directive This conclusion does not depend upon *Goodwin* and this case can readily be distinguished from *Bellinger*. I would dismiss this appeal.

LORD CARSWELL

My Lords,

64. I have had the advantage of reading in draft the opinions of my noble and learned friends Lord Bingham of Cornhill and Baroness Hale of Richmond. I am in agreement with them and for the reasons which they have given I too would dismiss the appeal.