

Court Judgement Criticises UK Government's Lack of Action

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Although the bottom line decision of the recent European Court of Human Rights was a huge disappointment for Trans rights activists in the UK, this week's publication of the full judgement is putting smiles back on many faces at the heart of the campaign.

On July 30th, the European Court ruled, by the narrowest of possible margins (11 to 9), that the United Kingdom had not violated article 8 of the European Convention on Human Rights by failure to properly recognise the status of of Kristina Sheffield and Rachel Horsham.

The court also ruled, by 18 votes to 2, that the two women's rights under article 12 (the right to marry) had also not been violated .. and ruled unanimously that no violation of article 14 had occurred either.

That is, of course, the BAD news .. and as we've tried to discreetly imply over the months, it wasn't altogether unexpected.

The GOOD news is only apparent, however, when you read the actual judgement ... and for that we've had to wait patiently for a whole week, until the text was published on the Court's website.

As we announced earlier this week, the full text will be found in the legal section of this website.

The court may have been numerically divided on the finer legal point of whether Kristina and Rachel's cases brought any new facts to the table .. but it is as clear as day that no opportunity was spared to present us with as much POLITICAL ammunition as possible.

The main judgement is VERY critical of the British government's failure to do what it was instructed to do as long ago as 1990. Things like this are usually dressed up in doubletalk, but there can be no mistaking the meaning of the court's words on this occasion.

The main judgement also makes it clear that there is no doubt that the examples of privacy violations cited by Kristina in particular are real and significant.

Miss Sheffield's experiences [...] provided a convincing account of the extreme disadvantages which beset post-operative transsexuals and of how the current legal situation operated to the detriment of their privacy and even exposed them to the risk of penalties for the offence of perjury.

also, looking back to the commission's findings last year ...

The Commission considered that the applicants, even if they do not suffer daily humiliation and embarrassment, are nevertheless subject to a real and continuous risk of intrusive and distressing enquiries and to an obligation to make embarrassing disclosures. Miss Sheffield's case showed that this risk was not theoretical.

[..]

In the view of the Commission, appropriate ways could be found to provide for transsexuals to be given prospective legal recognition of their gender re-assignment without destroying the historical nature of the births register.

The dispute is over whether the disadvantages are frequent and unreasonable-enough to class as a rights violation. The comparison in that respect is with the *daily* humiliation exemplified by the Frenchwoman "B" (whom they supported in 1992). Remember that in her case the problem lay with a national identity card which countries such as France expect their citizens to produce on demand for just about anything. The other issue is that the court failed to be convinced that the Gooren-Schwaab research was of a sufficiently convincing nature (yet) to be able to conclude that the Government's refusal to alter birth certificates was incorrect ..

The court noted..

...the essence of [Kristina and Rachel's] complaints concerns the continuing insistence by the authorities on the determination of gender according to biological criteria alone and the immutability of the gender information once it is entered on the register of birth

and ruled..

In the view of the Court, the applicants have not shown that since the date of adoption of its Cossey judgment in 1990 there have been any findings in the area of medical science which settle conclusively the doubts concerning the causes of the condition of transsexualism.

The research proffered by the Liberty Amicus brief is also dismissed ...

... the Court is not fully satisfied that the legislative trends outlined by amicus suffice to establish the existence of any common European approach to the problems created by the recognition in law of post-operative gender status. In particular, the survey does not indicate that there is as yet any common approach as to how to address the repercussions which the legal recognition of a change of sex may entail for other areas of law such as marriage, filiation, privacy or data protection, or the circumstances in which a transsexual may be compelled by law to reveal his or her pre-operative gender.

In conclusion ...

It cannot be denied that the incidents alluded to by Miss Sheffield were a source of embarrassment and distress to her and that Miss Horsham, if she were to return to the United Kingdom, would equally run the risk of having on occasions to identify herself in her pre-operative gender. At the same time, it must be acknowledged that an individual may with justification be required on occasions to provide proof of gender as well as medical history. [..] However, quite apart from these considerations the situations in which the applicants may be required to disclose their pre-operative gender do not occur with a degree of

frequency which could be said to impinge to a disproportionate extent on their right to respect for their private lives.

However, in spite of the apparent negativity of those observations, the judgement (significantly) ENDS on a note which returns to the underlying theme of criticism of the British Government's position ...

(Para 60)

Having reached those conclusions, the Court cannot but note that despite its statements in the Rees and Cossey cases on the importance of keeping the need for appropriate legal measures in this area under review having regard in particular to scientific and societal development, it would appear that the respondent State has not taken any steps to do so.

The fact that a transsexual is able to record his or her new sexual identity on a driving licence or passport or to change a first name are not innovative facilities. They obtained even at the time of the Rees case.

Even if there have been no significant scientific developments since the date of the Cossey judgment which make it possible to reach a firm conclusion on the aetiology of transsexualism, it is nevertheless the case that there is an increased social acceptance of transsexualism and an increased recognition of the problems which post-operative transsexuals encounter.

Even if it finds no breach of Article 8 in this case, the Court reiterates that this area needs to be kept under review by Contracting States.

More interesting still are the separately penned statements issued by some of the judges.

First, BRITISH Judge Sir John Freeland agreeing (but only just) with the decision ...

My vote in favour of the finding that there had been no violation of Article 8 of the Convention in these cases was cast after much hesitation and even with some reluctance. The cases disclosed a wider range of situations in which difficulty and embarrassment may be caused to post-operative transsexuals in the United Kingdom than had been demonstrated to the Court in the Rees and Cossey cases.

It has not been easy to weigh up the various factors and I acknowledge that continued inaction on the part of the respondent State, taken together with further developments elsewhere, could well tilt the balance in the other direction. My overall conclusion was, however, that in the light of scientific and legal developments so far and in the particular circumstances of these cases it would not be right for the Court now to find a violation of Article 8.

(Or, in other words ... "We may have sided with you again, Britain, but don't expect to get off again")

Judges BERNHARDT, THR VILHJLMSSON, SPIELMANN, PALM, WILDHABER, MAKARCZYK and VOICU, expressing their partial dissent with the judgement, went further ...

We are of the conviction that in the almost twelve years since the Rees case was decided important developments have occurred in this area. However, notwithstanding these changes and the above cautionary remarks, United Kingdom law has remained at a standstill. No review of the legal situation of transsexuals has taken place. In our opinion the fair balance that is inherent in the Convention tilts decisively in favour of protecting the transsexuals' right to privacy.

Referring to the Liberty Amicus brief ..

These figures in themselves — without needing to go into the varying details of such legislation — demonstrate convincingly that the problems of such transsexuals are being dealt with in a respectful and dignified manner by a large number of Convention countries. We do not believe that the Court need wait until every Contracting Party has amended its law in this direction before deciding that Article 8 gives rise to a positive obligation to introduce reform.

Continuing on the same theme, and referring to the figures showing that Britain is one of just FOUR states to have done nothing on this issue, to dissenting judges say...

...how can we expect uniformity in such a complex area where legal change will necessarily take place against the background of the States' traditions and culture? However the essential point is that in these countries, unlike in the United Kingdom, change has taken place — whatever its precise form is — in an attempt to alleviate the distress and suffering of the post-operative transsexual and that there exists in Europe a general trend which seeks in differing ways to confer recognition on the altered sexual identity.

And on the issue of the medical research ...

Our quarrel is not with the statement that Professor Gooren's research into the role of the brain in conditioning transsexualism does not enjoy universal support in the scientific world

[..]

It is not a sufficient answer to this important development that the scientific community cannot agree on the explanation of the causes of transsexualism or that surgery cannot — and perhaps will never be able to — lead to a change in the biological sex. Respect for privacy rights should not, as the legislative and societal trends referred to above demonstrate, depend on exact science. What is undisputed is that the harsh and painful path of gender re-assignment surgery may lead to an improvement in the medical condition of the transsexual.

We are convinced therefore in light of the evolution of attitudes in Europe towards the legal recognition of the post-operative transsexual that the States' margin of appreciation in this area can no longer serve as a defence in respect of policies which lead inevitably to embarrassing and hurtful intrusions into the private lives of such persons. If the State can make exceptions in the case of driving licences, passports and adoptive children solutions can be found which respect the dignity and sense of privacy of post-operative transsexuals.

And finally, in words which no UK activist should forget to repeat as often and as loudly as possible ...

It is no longer possible, from the standpoint of Article 8 of the Convention and in a Europe where considerable evolution in the direction of legal recognition is constantly taking place, to justify a system such as that pertaining in the respondent State, which treats gender dysphoria as a medical condition, subsidises gender re-assignment surgery but then withholds recognition of the consequences of that surgery thereby exposing post-operative transsexuals to the likelihood of recurring distress and humiliation.

JUDGE CASADEVALL, in a separate dissenting submission, echoes many of these sentiments and points out that ...

[obtaining] findings in the field of medical science which settle conclusively the doubts concerning the causes of transsexualism [would be] a very difficult thing to require them to do

... and on the subject of Birth Certificate changes ...

...it would not be too difficult for domestic law to be changed so as to give the applicants, by whatever means were deemed appropriate, legal recognition of their new post-operative identity, without necessarily destroying or impairing the historical nature of the British system for the registration of births (if not by correction then at least by means of an addition, a margin note or simply a comment in order to reflect the present situation).

The judge's real point relates to the British Government's inactivity over the last 11-12 years, having been instructed in 1987 to keep the situation under review. Referring back to paragraph 60 (see above), Casadevall points out that the court ...

noted: " it would appear that the respondent State has not taken any steps to do so";

and

observed: "there is an increased social acceptance of transsexualism and an increased recognition of the problems which post-operative transsexuals encounter";

and

reiterated that: " this area needs to be kept under review by Contracting States";

With obvious irony, the judge concludes by saying ..

Unfortunately, the majority of the Court have not drawn the logical consequences from those findings and observations.

(Or, in other words, if a state so blatantly demonstrates that it has failed to follow the court's direction, whilst so many other European states *have* done, what are you to conclude about their attitude towards the spirit of article 8 in this case !)

The last and most intriguing dissenting view of all is from Judge VAN DIJK, although you have to read carefully down to his paragraph four to find it ...

... almost twelve years have passed since the Court delivered its Rees judgment and almost eight years since it delivered its Cossey judgment. However, the British Government have not taken any substantial action to improve the legal situation of post-operative transsexuals in the United Kingdom.

Only at a very late stage in the present procedure have the British (Labour) Government indicated their willingness to seek a solution within the framework of a friendly settlement, thus making it clear that in their opinion also the problems on which previous Governments had relied during all those years were not insolvable ones.

READ THAT AGAIN.

The Government were, it seems, ready to negotiate.

The judge continues though ...

what is at stake here is the fundamental right to self-determination: if a person feels that he belongs to a sex other than the one originally registered and has undergone treatment to obtain the features of that other sex to the extent medically possible, he is entitled to legal recognition of the sex that in his conviction best responds to his identity.

The right to self-determination has not been separately and expressly included in the Convention, but is at the basis of several of the rights laid down therein, especially the right to liberty under Article 5 and the right to respect for private life under Article 8. Moreover, it is a vital element of the “inherent dignity” which, according to the Preamble to the Universal Declaration of Human Rights, constitutes the foundation of freedom, justice and peace in the world.

(Or, to put it more succinctly, here is ONE judge who has grasped that an individual does not need to have been medically diagnosed and sanctioned in order for their identity to be recognised as a fundamental)

Criticising the readiness of the court’s majority to accept the Government’s submission, Judge Van Dijk continues ...

In particular, they should have taken into account, on the one hand, that the detriment to [Kristina Sheffield] is not limited to the specific incidents advanced by her (to be considered quite serious in themselves), but consists of a continuous risk of being forced to reveal her pre-operative gender which she deliberately and at great cost has abandoned and, on the other hand, that the Government have not made out any plausible argument that the interests of third parties referred to by the majority cannot be met in another less distressing way for the applicant and without destroying the historical nature of the births register.

This is not just nice rhetoric as, in fact, the judge is referring back to the Court’s case-law in the case of *Dudgeon v. the United Kingdom* judgment (22 October 1981) where it held that “the maintenance in force of the impugned legislation constitutes a continuing interference with the applicant’s right to respect for his private life (...) within the meaning of Article 8 1

In other words, the continued presence of the circumstances facing British trans people constitutes an every day, rather than exceptional or occasional burden.

Judge Van Dijk continues by asking why it is that so many other states have been able to alter their system of birth certification without encountering the sort of difficulties which the British Government has always alluded to but failed to qualify ...

It is my firm belief that British society, or the English legal system, cannot have such specific features in this respect that these require and justify an interference of such a scope in the private lives of post-operative transsexuals while other European democratic societies apparently feel no need for such an interference.

Returning to the Government's previously mentioned last-minute willingness to negotiate, Judge Van Dijk continues ...

... from the fact that at a certain stage the present British Government offered to find a solution within the framework of a friendly settlement, it may be concluded that the Government themselves did not think that the problems advanced by them were insolvable within the English legal system.

I could go on quoting ... the more you read of the dissenting views, in particular, the more apparent it is that the general trend, and the pointers being laid down to the *new* court, are all very plain.

Indeed, the more you read overall, the more apparent it becomes that the final decision was, indeed, a very very narrow one indeed.

For UK activists, of course, the challenge is to now seize the POLITICAL capital provided by the judgement ... which (even where it fails to find favourably) represents today's most comprehensive and accurate summary of the situation, and how it is construed internationally.

The European Court of Human Rights has again let the government off the hook ... but, in doing so, it has signalled in the bluntest possible terms that it is unlikely to do so again.

The Government has been strongly criticised for failing to take any action to review the law since they were instructed to do so by the court in 1987 (and again, in case they hadn't heard, in 1990). Furthermore, the balance of the debate is shifting to recognise that the Government have never spelled out what's so *impossible* about creating a system such as that applied for adoptees ... during a time when its' contemporaries have found no difficulty in creating procedures.

The Sheffield and Horsham cases have also exposed a wider and more serious catalogue of problems than many observers had previously appreciated. As the foreword to the Liberty Amicus brief notes, trans people frequently adopt a lifestyle in which they prefer to opt out of key aspects of society .. leading solitary lifestyles, tolerating discrimination and failing to apply their talents in public life because of a continuous awareness that to do otherwise risks an immediate and intolerable violation of their privacy.

A society in which people are unwilling to appear as witnesses because the court will humiliate them is a society that is deeply flawed. A society which accepts a treatment deemed necessary for the well-being of a citizen and then fails to take account of the result of

that treatment can expect to be judged as gratuitously cruel by history. Gradually, the court is recognising these realities.

The majority decision of the court has observed that the “concessions” which the UK Government claims to have granted are no such thing at all. The right to take whatever name you choose has been available to British citizens for hundreds of years. The ability to have a passport or driving license altered existed before the Rees case in 1987. In noting the transparency of these claims to “action”, the court has therefore signalled a greater degree of awareness and scepticism than it has formerly shown ... picking up on opinions expressed in the dissenting views of previous judgements.

The value of the dissenting views in this case, therefore ... quite apart from the fact that they represent nearly half the court ... is that they have thrown down the gauntlet for the next court to consider them seriously as fact.

... And that is why the clock is now ticking for the Government.

The challenge, therefore, is to get this across to politicians, quickly and accurately. Use this article if it helps ... print out the full judgement and mark the passages with a highlighter pen before sending it to your MP ... and ask them to ACT NOW.

Losing this case was sad for everyone concerned ... not least for Kristina Sheffield and Rachel Horsham, who put in so much over such a long time only to see their hopes dashed by the smallest of margins.

Had the wavering British Judge, Sir John Freeland, swung the other way an 11 to 9 vote would have been a 10:10 impasse instead. Had the other judges looked more closely at the supposed scientific opposition to the Gooren-Schwaab paper, they would have found that the objections concerned were actually addressed in that paper and that the objectors had no conflicting research results of their own to offer ... a fact which is significant in the light of the reliance placed upon the need for a scientific aetiology.

Yet for all the sadness, it is impossible to read the full judgement without concluding that a corner has been turned. In 1987 the court rejected the case of Mark Rees by 12 votes to 3. In 1990, the margin for Caroline Cossey's case was reduced substantially to 10 votes to 8. This time around, the FULL court came to an 11 to 9 decision. The trend is obvious ... but a Government which regularly renews its' public commitment to principles of human rights and equality should not have to wait for another expensive and gruelling case to be brought before taking action.

The dissenting judges noted correctly that nobody is demanding that the historical record contained in the Births Register should be altered. The birth certificate is only significant because of the consequences of its' continued use ... officially or not ... as the only effective instrument for legally defining a citizen's sex and their status as the child of their parents (with all the inheritance implications that implies).

An adequate solution is to permit the official register to be annotated, as it was prior to 1970, and for copies of the record issued subsequent to that to appear as though the forenames and sex of the bearer had always been as they appear. The “historical” record is no more compromised by this than in the case of a child issued with a “new” birth certificate

following adoption. Legal recognition follows logically ... provided the government is then prepared to alter social security and other official records accordingly. Again, nobody argues the possible need to store, elsewhere, what the former sex designation *was*. The issue is about recognising what it is NOW and not using the previous information in an inappropriate manner.

And nine out of twenty judges ... including Britain's *own* delegate ... have gone out of their way to spell out that this is a reasonable approach, given the position adopted by the majority of our European neighbours and the rest of the world. The other eleven haven't said that it's Unreasonable ... merely that they can't yet convince themselves that trans people are "real" enough to justify commanding the Government to fall into line.

All in all, therefore, just about as bright a prospect as you could hope for as a second-best to actually *winning* the case.

But now YOU have to get out and ram that message down people's throats until they fully understand it and take some action.

Happy campaigning!

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