

C. v. United Kingdom

Application No. 10843/84

C.

against

the UNITED KINGDOM

REPORT OF THE COMMISSION

(adopted on 9 May 1989)

10843/84

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I. INTRODUCTION

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

A. The application

2. The applicant is a British citizen, born on 31 August 1954 and living in London. She is represented by Mr. David Pannick, barrister, who is instructed by Messrs. Howard Kennedy, Solicitors in London.

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

4. The applicant is a transsexual who was registered at birth as being of male sex. When adult the applicant underwent extensive medical and surgical treatment to change sex from male to female.

5. The applicant complains that under United Kingdom law she cannot claim full recognition of her changed status. In particular, she complains that she cannot marry an Italian citizen, Mr. G.L., who wishes to marry her. She invokes Articles 8 and 12 of the Convention.

B. The proceedings

6. The application was introduced on 24 February 1984 and registered on 1 March 1984. On 9 May 1984 the Commission decided in accordance with Rule 42 (2) (b) of its Rules of Procedure to give notice of the application to the respondent Government. In view of an analogous application, No. 9532/81, Rees v. the United Kingdom (see para. 18 below), which had been declared admissible on 14 March 1984 and was at the time still pending before the Commission, the time-limit for the submission of observations was suspended pending

the Commission's Report in that case. On 12 December 1984 the Commission adopted its Report in the Rees case. It submitted it to the European Court of Human Rights on 12 March 1985. In a letter of 4 April 1985 the respondent Government stated that in view of this Report they did not consider it appropriate to submit any observations in the present case.

7. On 5 July 1985 the present application was declared admissible. The Commission found that the case raised issues under Articles 8 and 12 of the Convention analogous to those in the Rees case. It then adjourned the examination of the present application pending the judgment in the Rees case.

8. On 10 December 1986, following the Court's judgment in the Rees case, the Commission resumed the examination of the present application and on 9 May 1987 it decided to request the parties to state whether, in the light of the Rees judgment, they wished to submit further observations. Both parties renounced submitting observations on the merits.

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

C. The present Report

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

MM. J. A. FROWEIN, Acting President
S. TRECHSEL
F. ERMACORA
E. BUSUTTIL
A. S. GZBYK
A. WEITZEL
H. G. SCHERMERS
H. DANELIUS
J. CAMPINOS
H. VANDENBERGHE
Mrs. G. H. THUNE
Sir Basil HALL
MM. F. MARTINEZ
C.L. ROZAKIS
Mrs. J. LIDDY
Mr. L. LOUCAIDES

11. The text of this Report was adopted on 9 May 1989 and is now transmitted to the Committee of Ministers of the Council of Europe, in accordance with Article 31 para. 2 of the Convention.

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

i) to establish the facts, and

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

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

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

II. ESTABLISHMENT OF THE FACTS

A. The particular circumstances of the case

15. The applicant was born 1954 as a male and registered as such in the birth register under male christian names. Growing up the applicant became aware that psychologically she was of female sex.

In July 1972 she abandoned her given christian names and assumed a woman's name, which was confirmed by Deed Poll on 16 March 1973. Since that time she has been known under that name for all purposes, has dressed as a woman and adopted a female role for all purposes. In December 1974 the applicant had gender reassignment surgery carried out in Charing Cross Hospital. A medical report, dated 8 February 1984, describes her as a pleasant young woman and asserts that since the gender reassignment surgery the applicant has lived a full life as a female, both psychologically and physically. It also confirms that a genital examination of the applicant showed her to be female in all respects.

16. In 1976 the applicant was given a United Kingdom passport as a female.

17. According to her uncontested statements, the applicant wishes to marry an Italian citizen, who is willing to marry her. She therefore inquired whether she could validly contract such a marriage.

By letter of 2 August 1983 the Director and Registrar General informed the applicant that a marriage would be void because English law would treat the applicant as male, notwithstanding her anatomical and psychological status as a woman. The applicant's Member of Parliament informed her in a letter of 30 August 1983 that it would require a change in United Kingdom law to allow her to marry. On 18 January 1984, after another enquiry by the applicant, she was informed on behalf of the Registrar General that she could not be granted a birth certificate showing her sex as female, since a birth certificate records details as at the date of birth.

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

B. Relevant domestic law and practice

1. Medical treatment

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

2. Change of name

20. Under English law a person is entitled to adopt such first names or surname as he or she wishes and to use these new names without any restrictions or formalities, except in connection with the practice of some professions where the use of the new names may be subject to certain formalities (see, *inter alia*, Halsbury's Laws of England, 4th ed., vol. 35, para. 1176). For the purposes of record and to obviate the doubt and confusion which a change of name is likely to involve, the person concerned very frequently makes a declaration in the form of a "deed poll" which may be enrolled with the Central Office of the Supreme Court.

The new names are valid for purposes of legal identification (see Halsbury's Laws of England, *loc. cit.*, para. 1174) and may be used in documents such as passports, driving licences, car registration books, national insurance cards, medical cards, tax codings and social security papers. The new names are also entered on the electoral roll.

3. Identity documents

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

4. The Register of Births

22. The system of civil registration of births, deaths and marriages was established by statute in England and Wales in 1837. Registration of births is at present governed by the Births and Deaths Registration Act 1953 ("the 1953 Act"). The entry into force of this Act entailed no material change to the law in force in 1940, the date of the applicant's birth. The 1953 Act requires that the birth of every child be registered by the Registrar of Births and Deaths for the area in which the child is born. The particulars to be entered are prescribed in regulations made under the 1953 Act.

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

An entry in a birth register and the certificate derived

therefrom are records of facts at the time of birth. Thus, in England and Wales the birth certificate constitutes a document revealing not current identity, but historical facts. The system is intended to provide accurate and authenticated evidence of the events themselves

and also to enable the establishment of the connections of families for purposes related to succession, legitimate descent and distribution of property. The registration records also form the basis for a comprehensive range of vital statistics and constitute an integral and essential part of the statistical study of population and its growth, medical and fertility research and the like.

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

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

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

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

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

employment, inter alia, with the Government.

5. Marriage

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

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

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

6. The legal definition of sex for other purposes

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

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

III. OPINION OF THE COMMISSION

A. Points at Issue

31. The points at issue in the present application are

- whether there has been a violation of the applicant's right, under Article 8 (Art. 8) of the Convention, to respect for her private life, in that, under United Kingdom law, she cannot claim recognition of her present status by a change of the birth register and the birth certificate; and
- whether there has been a violation of Article 12 (Art. 12) of the Convention, in that, under United Kingdom law, she cannot contract a valid marriage with a person of male sex and adopt children.

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

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

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

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

33. The applicant contends that the refusal by the United Kingdom to allow her birth certificate recording her female sex and to recognise her female sex for other legal purposes is a breach of her right to respect for her private life guaranteed by Article 8 (Art. 8) of the Convention. The denial of this right is in her submission not justified under paragraph 2 (Art. 8-2) of this provision; in particular she considers there is no "pressing social need" for the actions of the United Kingdom, so as to make them "necessary in a democratic society".

34. In her opinion the refusal to amend the birth register cannot be justified by any reasons of public interest. With regard to the respondent Government's submission that the birth register was intended to provide authentic evidence of the events and also to establish the connection of families for the purposes related to succession, legitimacy and the distribution of property, she argues that none of these purposes will be affected by an entry in the birth register to the effect that at a particular moment a person has changed sex. Nor would such an entry affect the statistical value of birth registers. On the contrary it would help to give a statistical picture corresponding to the actual situation.

35. The respondent Government limit themselves to arguing that there is no significant distinction between the present case and the Rees case.

36. As regards compliance with Article 8 (Art. 8) of the Convention by the United Kingdom in relation to transsexuals, the Commission refers to the Rees judgment of 17 October 1986, Eur. Court H.R., Series A no. 106, p. 15-18 paras. 38-46) in which the Court

stated:

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

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

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

Conversely, the drawback - emphasised by the applicant - is that, as the country's legal system makes no provision for legally valid civil-status certificates, such persons have on occasion to establish their identity by means of a birth certificate which is either an authenticated copy of or an extract from the birth register. The nature of this register, which furthermore is public, is that the certificates mention the biological sex which the individuals had at the time of their birth ... The production of such a birth certificate is not a strict legal requirement, but may on occasion be required in practice for some purposes ...

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

man ...

41. For the applicant and the Commission this situation was incompatible with Article 8 (Art. 8), there being in their opinion no justification for it on any ground of public interest. They submitted that the refusal of the Government to amend or annotate the register of births to record the individual's change of sexual identity cannot be justified on any such ground. Such a system of annotation would, according to the applicant, be similar to that existing in the case of adoptions. The applicant and the Commission pointed to the example of certain other Contracting States which have recently made provision for the possibility of having the original indication of sex altered from a given date. The Commission additionally relied on the fact that the United Kingdom, through its free national health service, had borne the costs of the surgical operations and other medical treatment which the applicant had been enabled to undergo. They considered that this medical recognition of the necessity to assist him to realise his identity must be regarded as a further argument for the legal recognition of the change in his sexual identity; failure to do so had the effect that the applicant was treated as an ambiguous being.

42. The Court is not persuaded by this reasoning.

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

Albeit with delay and some misgivings on the part of the authorities, the United Kingdom has endeavoured to meet the applicant's demands to the fullest extent that its system allowed. The alleged lack of respect therefore seems to come down to a refusal to establish a type of documentation showing, and constituting proof of, current civil status. The introduction of such a system has not hitherto been considered necessary in the United Kingdom. It would have important administrative consequences and would impose new duties on the rest of the population. The governing authorities in the United Kingdom are fully entitled, in the exercise of their margin of appreciation, to take account of the requirements of the situation pertaining there in determining what measures to adopt. While the requirement of striking a fair balance ... may possibly, in the interests of persons in the applicant's situation, call for incidental adjustments to the existing system, it cannot give rise to any direct obligation on the United Kingdom to alter the very basis thereof.

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

Whilst conceding that additions can be made to the entries in the birth register in order to record, for example, subsequent adoption or legitimation ..., the

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

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

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

However, such secrecy could not be achieved without first modifying fundamentally the present system for keeping the register of births, so as to prohibit public access to entries made before the annotation. Secrecy could also have considerable unintended results and could prejudice the purpose and function of the birth register by complicating factual issues arising in, inter alia, the fields of family and succession law. Furthermore, no account would be taken of the position of third parties, (e.g. life insurance companies) in that they would be deprived of information which they had a legitimate interest to receive.

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

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

applicant's medical treatment.

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

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

37. The Commission considers that the present application does not reveal a particular novel aspect of the situation of transsexuals in the United Kingdom, distinguishing it from the situation in the Rees case as far as the right to respect for private life is concerned.

Conclusion

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

C. Article 12 (Art. 12) of the Convention

39. Article 12 (Art. 12) of the Convention reads:

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

40. The applicant complains that she is denied the right to marry a man as she is in this respect treated as a man by the United Kingdom authorities. She states that her sexual conversion enables her to consummate marriage with a man and that she wishes to marry an Italian citizen who also wishes to marry her.

41. As regards compliance with Article 12 (Art. 12) of the Convention by the United Kingdom, the Commission again refers to the Rees judgment (loc. cit.) in which the Court stated in this respect:

"48. The applicant complained of the undisputed fact that, according to the law currently in force in the United Kingdom, he cannot marry a woman. He alleged a violation of Article 12 (Art. 12), which provides:

...

The Government contested this; the Commission was divided between two conflicting views.

49. In the Court's opinion, the right to marry guaranteed by Article 12 (Art. 12) refers to the traditional marriage between persons of opposite biological sex. This appears also from the wording of the Article which makes it clear that Article 12 (Art. 12) is mainly concerned to protect marriage as the basis of the

family.

50. Furthermore, Article 12 (Art. 12) lays down that the exercise of this right shall be subject to the national laws of the Contracting States. The limitations thereby introduced must not restrict or reduce the right in such a way or to such an extent that the very essence of the right is impaired. However, the legal impediment in the United Kingdom on the marriage of persons who are not of the opposite biological sex cannot be said to have an effect of this kind.

51. There is accordingly no violation in the instant case of Article 12 (Art. 12) of the Convention."

42. The Commission also had regard to the opinion which its members expressed in the Rees Report of 12 December 1984 on this issue. Five members found that there was no separate violation of Article 12 (Art. 12) of the Convention as the impossibility under British law of the applicant Rees to marry a person of female sex was only a necessary consequence of the violation Article 8 (Art. 8) of the Convention which the Commission unanimously found in that case. Five other members considered that Article 12 (Art. 12) of the Convention was not violated.

43. The Commission now considers that marriage and the foundation of a family are particular events in the life of individuals which go beyond the mere realisation of private and family life as they involve two persons who form a legally and socially recognised union which creates both responsibilities and privileges. Article 12 (Art. 12) of the Convention therefore guarantees a specific and distinctive right of an independent nature as compared with the right to protection of private and family life guaranteed by Article 8 para. 1 (Art. 8-1) of the Convention.

In fact the distinction between Articles 8 (Art. 8) and 12 (Art. 12) must be seen essentially as a difference between the protection under Article 8 (Art. 8) of de facto family life irrespective of its legal status (cf. Eur. Court H.R., Marckx judgment of 13.6.1979, Airey judgment of 9.10.1979 and Johnston judgment of 18.12.1986, Series A Nos. 31, 32 and 112) and the right under Article 12 (Art. 12) for two persons of opposite sex to be united in a formal, legally recognised union.

Therefore, the finding that there has been no violation of Article 8 (Art. 8) of the Convention does not automatically exclude the finding of a violation of Article 12 (Art. 12).

44. As far as the present applicant's right to marry is concerned, the Commission first observes that her application contains a factual element which distinguishes it from the Rees case and the other transsexual cases so far considered, in that the present applicant has, according to her uncontested statements, a male partner wishing to marry her.

45. The Commission agrees, in principle, with the Court, that Article 12 (Art. 12) refers to the traditional marriage between persons of opposite biological sex. It cannot, however, be inferred from Article 12 (Art. 12) that the capacity to procreate is a necessary requirement for the right in question. Men or women, who are unable to have children, enjoy the right to marry just as other persons. Therefore, biological sex cannot for the purpose of Article

12 (Art. 12) be related to the capacity to procreate.

46. It is certified by a medical expert that the applicant is anatomically no longer of male sex. She has been living after the gender reassignment surgery as a woman and is socially accepted as such.

In these circumstances it cannot, in the Commission's opinion, be maintained that for the purposes of Article 12 (Art. 12) the applicant still has to be considered as being of male sex. The applicant must therefore have the right to conclude a marriage recognised by the United Kingdom law with the man she has chosen to be her husband.

47. Conclusion

The Commission concludes, by ten votes to six, that there has been a violation of Article 12 (Art. 12) of the Convention.

D. Recapitulation

48. The Commission concludes:

- by 10 votes to 6, that there has been no violation of Article 8 (Art. 8) of the Convention (para. 38);

- by 10 votes to 6, that there has been a violation of Article 12 (Art. 12) of the Convention (para. 47).

Secretary to the Commission

Acting President of the Commission

(H.C. KRÖGER)

(J.A. FROWEIN)

Dissenting opinion of Mr. J.A. Frowein,
joined by MM. Ermacora, Gzdyk, Rozakis, Schermers and Mrs. Thune

We have voted for a violation of Article 8 (Art. 8). For the reasons developed in the opinion by five members in the case of Rees (p. 27 para. 54), we consider that Article 8 (Art. 8) and Article 12 (Art. 12) in a case of transsexualism cannot be separated completely.

We consider that a violation of Article 8 (Art. 8) has taken place because in the present case there are clear indications that the applicant, who is socially accepted as a woman, and another person are willing to marry. Under these circumstances we do not feel bound by the judgment of the Court in the case of Rees. For us, Article 8 (Art. 8), as protecting human dignity, requires that a person, after undergoing surgery for changing sex and being now socially accepted as a woman, be recognised legally in her new identity.

In the case of Rees, the opinion of five members to which we referred saw Article 12 (Art. 12) as not raising an independent issue (loc. cit.). We have come to a different conclusion in this case where

the applicant has alleged that she has a concrete possibility to get married.

Dissenting opinion of Mr. H. Danelius,
joined by MM. Weitzel, Vandenberghe, Sir Basil Hall and Mrs. Liddy
(in regard to Article 12 (Art. 12) of the Convention)

In the Rees case, the European Court of Human Rights considered that the legal impediment in the United Kingdom which made it impossible for the applicant in that case to marry a woman was not such as to impair the right to marry guaranteed by Article 12 (Art. 12) of the Convention. The Court therefore concluded that there had been no violation of that Article (Art. 12) (para. 41 above).

I find it natural to take the Court's reasoning in the Rees case as the starting-point in the present case. It remains to be examined whether there are any reasons for distinguishing the present case from the Rees case.

The Court's reasoning in the Rees case as referred to above was of a general character and based on an evaluation of a principle of United Kingdom law rather than on an assessment of any concrete circumstances pertaining to the specific case. Consequently, it would not seem justified to distinguish the present case from the Rees case on the ground that the present applicant appears to have a male partner wishing to marry her (para. 44 above). Nor can I find any other distinguishing elements which could be relevant to the conclusion drawn in relation to Article 12 (Art. 12).

It follows, in my view, that the present case cannot be distinguished from the Rees case. Following the Court's case-law on this matter, I have therefore voted against the Commission's conclusion in paragraph 47 of the Report.

Dissenting opinion of Mr. F. Martinez

I differ from the opinion of the majority of the Commission in their finding that there has been a violation of Article 12 (Art. 12) of the Convention. My reasons are as follows:

1. The Lawless judgment says that the Commission is an auxiliary of the Court.

I think, therefore, that the Commission should not go against the Court's doctrine, but attempt to keep to it.

2. Where Article 12 (Art. 12) of the Convention is concerned, it seems to me that the Commission is not following the Court, but contradicting it.

The Court held in the Rees judgment that, at the present stage of the development of United Kingdom law, a transsexual cannot be considered as a woman where marriage is concerned (para. 40 of the judgment).

3. In departing from the Court's opinion, the Commission finds a difference between the Rees case and the one with which we are concerned, the difference being that there is a person of the male sex wishing to marry the applicant (para. 44 of the Report).

But I do not think that this fact allows a valid distinction to be drawn between the two cases because it is actual capacity, and not a partner's wish, which makes a person capable of contracting a marriage.

4. In support of the impediment barring the applicant from contracting the desired marriage, I would draw attention to the Court's opinion that the guarantee contained in Article 12 (Art. 12) of the Convention concerns traditional marriage between persons of biologically opposite sexes (Rees judgment, para. 49).

But there is also the actual text of Article 12 (Art. 12), which, as the Court pointed out, refers to the national law of the States party to the Convention (Rees judgment, para. 50). This means that it is for the laws of the state to specify the essence of marriage and the conditions governing access to it.

In English law, marriage is subject to the condition that the partners should be of the male and female sex respectively (cf. Comm. Report, para. 27). Where marriage is concerned, sex is to be determined by chromosomal, gonadal and genital tests (Comm. Report, para. 28).

For this reason, since the applicant fails to show that her female sex has been determined by chromosomal, gonadal and genital tests, she does not have the right to marry "according to the national laws governing the exercise of this right".

5. Marriage is not merely a question of wishes, but a question of legal capacity.

If the applicant were a citizen of a state for which marriage is simply the lawful union of two consenting individuals, she would have no difficulty in contracting a marriage.

APPENDIX I

HISTORY OF PROCEEDINGS

Date	Item
24 February 1984	Introduction of the application
1 March 1984	Registration of the application
Examination of Admissibility	
9 May 1984	Commission's decision to invite the Government to submit observations on the admissibility and merits of the application
4 April 1985	Government's letter renouncing to submit observations on admissibility

5 July 1985	Commission's decision to declare the application admissible and to adjourn the examination on the merits
Examination of the merits	
10 December 1986	Commission resumes examination of the case
9 May 1987	Commission invites parties to submit observations on the merits
16 June 1987	Government renounces to submit observations
25 June 1987	Applicant renounces to submit observations
11 April 1989	Commission's deliberations on the merits
4 May 1989	Commission's deliberations and final vote
9 May 1989	Adoption of the Report