

ECHR: Commission report on Horsham v. United Kingdom

Recommendation of the European Commission on Human Rights

January, 1997

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EUROPEAN COMMISSION OF HUMAN RIGHTS

**Rachel Horsham
against
the United Kingdom**

**REPORT OF THE COMMISSION
(adopted on 21 January 1997)**

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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 in 1946 and resident in Amsterdam. She is represented by Henri Brandman & Co., solicitors practising in London.

3. The application is directed against the United Kingdom. The respondent Government are represented by Mr. Martin Eaton, as Agent, from the Foreign and Commonwealth Office.

4. The case concerns the complaints of the applicant that the State refuses to give legal recognition to her status as a woman following gender re-assignment. The application, as declared admissible, raises issues under Articles 8, 12, 13 and 14 of the Convention.

B. The proceedings

5. The application was introduced on 25 August 1993 and registered on 7 February 1994.

6. On 4 July 1994, the Commission decided to communicate the application to the Government inviting them to submit observations on the admissibility and merits. It decided that the case should be given priority pursuant to Rule 33 of the Commission's Rules of Procedure.

7. On 16 November 1994, the Government submitted their observations and on 24 April 1995, the applicant submitted her observations in reply.

8. On 4 September 1995, the Commission decided to invite the parties to make submissions at an oral hearing concerning the applicant's complaints relating to the lack of respect for her private life, inability to marry, discrimination and lack of an effective remedy. The remainder of the application was declared inadmissible.

9. On 8 December 1995, the Government submitted further documents and on 15 January 1996, the applicant provided further material.

10. At the oral hearing, held on 19 January 1996, the Government were represented by Ms. Dickson, as Agent, Mr. Pannick Q.C., Counsel, Mr. Singh, counsel, Ms. Jenn and Mr. Jenkins as Advisers from the Department of Health and the Office of Population,

Censuses and Surveys. The applicant was represented by Messrs. Duffy, McFarlane and Heim as Counsel, Mr. Brandman, solicitor, and Professor Gooren as adviser.

11. On 19 January 1996, the Commission declared the application admissible.

12. The parties were then invited to submit any additional observations on the merits of the application.

13. On 20 March 1996, the Government submitted further observations and on 29 March 1996, the applicant submitted observations on the merits. The applicant submitted further information on 2 May 1996.

14. After declaring the case admissible, the Commission, acting in accordance with Article 28 para. 1 (b) of the Convention, placed itself at the disposal of the parties with a view to securing a friendly settlement of the case. In the light of the parties' reactions, the Commission now finds that there is no basis on which a friendly settlement can be effected.

C. The present Report

15. 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:

Mr. S. TRECHSEL, President

Mrs. G.H. THUNE

Mrs. J. LIDDY

MM. E. BUSUTTLI

A. WEITZEL

H. DANELIUS

F. MARTINEZ

C.L. ROZAKIS

L. LOUCAIDES

J.-C. GEUS

J. MUCHA

D. ŠVÁBY

A. PERENI

C. BÎRSAN

P. LORENZEN

K. HERNDL

16. The text of the Report was adopted by the Commission on 21 January 1997 and is now transmitted to the Committee of Ministers in accordance with Article 31 para. 2 of the Convention.

17. The purpose of the Report, pursuant to Article 31 para. 1 of the Convention, is

1) to establish the facts, and

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

18. The Commission's final and partial decisions on the admissibility of the application are annexed hereto (Appendices I and II).

19. 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. Particular circumstances of the case

20. The applicant was recorded at birth as being of the male sex.

21. From 28 December 1983, the applicant lived in the Netherlands.

22. From 1990, the applicant, who had been living as a female, underwent psychotherapy and hormonal treatment and finally underwent gender re-assignment surgery on 26 June 1992 at the Free University Hospital, Amsterdam.

23. On 11 September 1992, following an initial refusal, the United Kingdom Consulate in Amsterdam issued a passport in the applicant's new name which recorded the applicant's sex as female. She also obtained a birth certificate issued by the register of births in The Hague which recorded her new name and her sex as female, pursuant to an order by the Amsterdam Regional Court dated 27 July 1992 that such a certificate be issued.

24. The applicant requested that her original birth certificate in the United Kingdom be amended to record her sex as female. By letter dated 20 November 1992, the Office of Population Censuses and Surveys (OPCS) confirmed that there was no provision under United Kingdom law for any new information to be inscribed on her original birth certificate.

25. The applicant states that she is forced to live in exile because of the legal situation in the United Kingdom. She has a partner whom she plans to marry.

B. Relevant domestic law and practice

Names

26. Under United Kingdom law, a person is entitled to adopt such first names or surname as he or she wishes. Such names are valid for purposes of identification and may be used in passports, driving licences, medical and insurance cards etc.

Marriage and definition of gender in domestic law

27. Pursuant to United Kingdom law, marriage is defined as the voluntary union between a man and a woman, sex for that purpose being determined by biological criteria (chromosomal, gonadal and genital, without regard to any surgical intervention): *Corbett v. Corbett* [1971] P 83. This definition has however been applied beyond the context of the *Corbett* case eg. approved by the Court of Appeal in *R. v. Tan* (1983 QB 1053) where it was held that a person born male had been correctly convicted under a statute penalising men who live on the earnings of prostitution, notwithstanding the fact that the accused had undergone gender re-assignment therapy.

Birth certificates

28. Registration of births is governed by the Births and Deaths Registration Act 1953 which 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. An entry is regarded as record of the facts at the time of birth. A birth certificate accordingly constitutes a document revealing not current identity but historical facts.

29. The criteria for determining the sex of a child at birth are not defined in the Act. The practice of the Registrar is to use exclusively the biological criteria (chromosomal, gonadal and genital).

30. The 1953 Act provides for the correction by the Registrar of clerical errors or factual errors. The official position is that an amendment may only be made if the error occurred when the birth was registered. The fact that it may become evident later in a person's life that his or her "psychological" sex is in conflict with the biological criteria is not considered to imply that the initial entry at birth was a factual error. Only in cases where the apparent and genital sex of a child was wrongly identified or where the biological criteria were not congruent can a change in the initial entry be made and it is necessary for that purpose to adduce medical evidence that the initial entry was incorrect.

Social security, employment and pensions

31. A transsexual continues to be recorded for social security, national insurance and employment purposes as being of the sex recorded at birth. A male to female transsexual will accordingly only be entitled to a State pension at the state retirement age of 65 and not the age of 60 which is applicable to women.

C. Other relevant materials

32. In its judgment of 30 April 1996, in the case of *P. v. S.* and the Cornwall County Council, the European Court of Justice (ECJ) held that discrimination arising from gender re-assignment constituted discrimination on grounds of sex and accordingly Article 5 para. 1 of the directive on the implementation of the principle of equal treatment for man and women as regards access to employment, vocational training and promotion and working conditions, precluded dismissal of a transsexual for a reason related to a gender re-assignment. The ECJ held, rejecting the argument of the United Kingdom that the

employer would also have dismissed P. if P. had previously been a woman and had undergone an operation to become a man, that

"where a person is dismissed on the ground that he or she intends to undergo or has undergone gender re-assignment, 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 re-assignment.

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."

III. OPINION OF THE COMMISSION

A. Complaints declared admissible

33. The Commission has declared admissible the applicant's complaints that the lack of legal recognition of her gender re-assignment discloses a lack of respect for her private life, a denial of the right to marry and discrimination and that she does not have an effective remedy for her complaints.

B. Points at issue

34. The issues to be determined in the present case are:

- whether there is a lack of respect for the applicant's private life contrary to Article 8 of the Convention;
- whether there is a violation of Article 12 of the Convention in respect of an alleged denial of the right to marry;
- whether the applicant has been subject to discrimination in the enjoyment of her rights under the Convention contrary to Article 14 of the Convention;
- whether there has been a violation of Article 13 of the Convention in relation to her allegations of lack of an effective remedy in respect of her complaints.

C. As regards Article 8 of the Convention

35. Article 8 of the Convention provides as relevant:

"1. Everyone has the right to respect for his private ...life...

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."

36. The applicant complains that the failure of the United Kingdom law to recognise her gender re-assignment constitutes a lack of respect for her private life guaranteed under Article 8 of the Convention. She refers to the fact that for legal purposes, such as appearance in court and documents (eg. insurance and contractual documents), a transsexual may be required to indicate birth gender and, on occasion, previous name and in official records (National Insurance and social security) and in the employment context, a transsexual continues to be regarded as being of the sex recorded at birth. Failure to declare her sex as male would in the court context or when taking oaths or making statutory declarations in other contexts eg. swearing affidavits render her liable to criminal sanctions under perjury provisions and it would be unlawful, and a ground for dismissal, if she failed to declare her birth gender in employment applications. For the purposes of the criminal law and criminal justice system, she would also continue to be treated as being of her birth gender ie. a man, where such was relevant to the definition of the offence or any sentencing consequences.

37. The applicant contends that the allocation of sex in United Kingdom law and practice by reference to biological indicators existing at the time of birth is not justified socially, medically or scientifically. The United Kingdom has failed to provide any viable justification for the refusal to afford legal recognition to her change of gender, giving no explanation of why it is not possible within a historical record system to make annotations or corrections, as has occurred in several instances in the past, where it is doubtful that any genuine "biological" mistake occurred at the time of birth (eg. the cases of Roberta Cowell, registered at birth in 1918 as Robert Cowell. and Sir Ewan Forbes, registred at birth in 1912 as Elizabeth Forbes-Sempil).

38. The applicant refers to developments in medical and scientific research that indicate that brain differences exist between men and women and that there are similarities in brain structure between women and genetically male transsexuals (eg. the article "A sex difference in the human brain and its relation to transsexuality" by Zhou, Hofman, Gooren and Swaab, Nature, 2 November 1995). The applicant also points to the decision of the European Court of Justice in P. v. S. and the Cornwall County Council as, together with social, medical and scientific developments, evidencing the existence of a broad consensus in Europe.

39. The Government submit that Article 8 does not require a Contracting State to recognise for legal purposes the new sexual identity of a person who has undergone gender re-assignment surgery. They refer to the wide margin of appreciation to be accorded to States in this area where difficult medical, social and moral questions arise on which there is not yet any international consensus (see Eur. Court H.R., Rees judgment of 17 October 1986, Series A no. 106; Cossey judgment of 27 September 1990, Series A no. 184, and B. v. France judgment of 25 March 1992, Series A no. 232-C). The Court's case-law indicates that the positive obligation of respect under Article 8 does not require the United Kingdom to adopt a new and radically different system of birth registration ie. from the existing system of historical fact to a system based on current identity.

40. The Government submit moreover that the applicant has not established a sufficient

degree of practical detriment, distress or stigmatisation which would amount to a denial of her right to respect for her private life. She has been able to change her name, and have this change entered on official documents such as her British passport. They dispute that the applicant suffers any less legal protection under civil or criminal law than any other person.

41. The Government dispute the significance of the alleged medical developments relied on by the applicant. They draw attention to the fact that in the same issue of "Nature" as referred to by the applicant (2 November 1995) an article by S. Marc Breedlove comments that the difficulties inherent in studying the diverse sexual behaviour of humans ensures that this will be far from the final word on the subject and that it could not be excluded that the differential brain sizes found derive from external causes such as the oestrogen treatment of transsexuals or developmental and social influences. They also point out that the case of *P. v. S.* was concerned with a narrow point of employment law and did not purport to deal with the question whether and in what circumstances a State is obliged to recognise for legal purposes that a person's sex has been changed by re-assignment surgery. Insofar as she refers to requirements to disclose her previous name or birth gender in insurance or court contexts, they point out that this information may be necessary, for example, in order for criminal records to be checked or where medical history is relevant. In any event, she can avoid entering into contracts with those companies who require her to give her this information.

42. The Commission observes that the applicant's complaints essentially challenge the existing state of law in the United Kingdom in relation to the legal status of transsexuals as disclosing a lack of respect for her right to private life. The Commission has therefore examined whether an effective respect for the applicant's private life imposes a positive obligation on the United Kingdom to modify its existing legal system as it applies to transsexuals. In determining whether or not such a positive obligation exists, regard must be had to the fair balance which has to be struck between the general interest of the community and the interests of the individual (see eg. Eur. Court H.R., *B. v. France* judgment of 25 March 1992, Series A no. 232-C, p. 47, para. 44). In striking this balance, the aims mentioned in the second paragraph of Article 8 may be of relevance.

43. The Commission recalls that the impact of the legal situation of transsexuals on their private life in the United Kingdom has been considered by the Commission and Court in two previous cases, *Rees and Cossey* (Eur. Court H.R., *Rees* judgment of 17 October 1986, Series A no. 106 and *Cossey* judgment of 27 September 1990, Series A no. 184).

44. In *Rees*, the Court found no violation of the applicant's right to respect for private life by twelve votes to three as opposed to a unanimous finding of violation by the Commission in its opinion. The Court considered that requiring the United Kingdom to alter birth certificates of transsexuals would be tantamount to asking it to adopt a civil status register. It noted that it would not be possible to adopt annotations to the existing register which would be secret without fundamentally altering the present system and excluding the interests of third parties in obtaining information which they had a legitimate interest to receive. This would entail detailed legislation and having regard to the interests of others and the wide margin of appreciation to be afforded to States in this area, the positive obligations arising under Article 8 could not be held to extend that far.

The Court however expressed itself as conscious of the problems faced by transsexuals, recalled the principle that the Convention had to be interpreted and applied in light of current circumstances and stated that the need for appropriate legal measure should be kept under review having regard particularly to scientific and societal developments.

45. When, almost four years later, the Cossey case came before the Court, the Court found no violation of Article 8 upholding its opinion in the Rees case but by a narrower margin of ten votes to eight (op. cit.). It had regard to the developments which had occurred in the interval. It considered that no scientific developments had taken place and that while there had been developments in domestic law in some States and recommendations issued by the European Parliament and the Parliamentary Assembly of the Council of Europe, there was, in the Court's view, still little common ground. It again repeated its comment from the Rees case that the matter should be kept under review.

46. In a case concerning France less than two years later, the Court found a violation of the right to respect for private life by thirteen votes to five. It decided the case however on the basis of the situation pertaining in France, with its civil status system, and of the seriousness of the inconveniences facing the applicant, and declined to revisit its findings in Rees and Cossey as regarded any general right to recognition of the psycho-social reality of transsexualism (Eur. Court H.R., B. v. France judgment, op. cit., para. 48).

47. As regards the interests of the applicant in this case, the Commission notes that she is not subject to the daily humiliation and embarrassment facing B., who had been unable to change her forename on documents in common use. Indeed the applicant has been living for the past five years in the Netherlands where she has obtained a Dutch birth certificate recording her gender re-assignment. The Government have not sought to argue that she is as a result unable to claim to be a victim for the purposes of Article 8 of the Convention. The applicant is a British citizen, states that she left the United Kingdom because of the legal situation and that she would be subject to the alleged restrictions if she returned to live there. Thus, it is not contested by the Government that for legal purposes, the applicant, if living in the United Kingdom, would still be regarded as of the sex recorded at birth and that where there would be any difference in legal regimes applying to men or women, the applicant would also remain subject to that applicable to her birth gender eg. retirement age, pension entitlements (see para. 31 above). These instances differ considerably in their immediacy. That they are not hypothetical however is illustrated by another case raising similar issues, where the applicant, in court as surety, was required to disclose her original birth name which was in stark contradiction to her physical appearance (Kristina Sheffield v. the United Kingdom, No. 22985/93 Comm. Rep. 21.1.97 para. 46).

48. The Commission is of the opinion that the applicant may therefore claim that she would be subject to a real and continuous risk of intrusive and distressing enquiries and to an obligation to make embarrassing disclosures. While it might be said that, with care, such situations could be avoided, this in itself would threaten to impinge significantly on an individual's ability to develop and maintain relationships and to restrict the choices available in fulfilling personal and social potential. The Commission further recalls that, even where a person appears to suffer no immediate or direct consequences from an existing state of law, a disparity between an individual's private life and the law may,

where it relates to an important element of personal identity, result in internal conflict or stigmatisation which per se impinges on the enjoyment of rights guaranteed under the Convention (eg. *mutatis mutandis* Eur. Court H.R. Dudgeon judgment of 22 October 1981 concerning the effect of criminal prohibition of adult homosexual activities and *X. Y. and Z. v. the United Kingdom*, No. 21830/93 Comm. Report 27.6.95 pending before the Court, which concerns primarily legal recognition of family relationships where there is a transsexual partner).

49. To weigh in the balance against the applicant's interest is the interest of the general community. The Government have referred, expressly, to the concerns identified, and accepted by the Court, in the *Cossey* case (paras. 18 and 38) in relation to entering the change of gender in the birth register. This explains that the birth register is based on a system of historical fact which is generally accessible to the public. Any annotation could not be kept secret from third parties without a fundamental modification of the system and if secrecy was achieved, it could have considerable unintended results, for example, prejudicing the purpose and function of the register by complicating factual issues arising in the fields of family and succession law, and might deprive third parties of information which they had a legitimate interest to receive. The applicant argues that this does not furnish convincing justification, failing to detail any specific instance of objectionable complications which could in fact arise.

50. The Commission has doubts as to the severity of the alleged detrimental consequences of any alteration in the birth registration system in the United Kingdom. It notes that the number of requests for alteration of certificates was identified in a Parliamentary debate as being an average of thirty over a period of the last ten years (2 February 1996, Second Reading of a Private Member's Bill on Gender Identity (Registration and Civil Status)). While this cannot reflect the actual number of transsexuals in the United Kingdom, many of whom will not attempt to obtain a change, there is nothing in the material before the Commission to indicate that the scale of applications for change would be in itself a daunting feature. The argument that subsequent social or legal changes cannot feature in a historical system is flawed by the fact that the birth register system copes currently with recording adoptions. As regards the alleged problem of secrecy, the Commission understands the applicant's complaints to centre on the lack of legal recognition of the re-assignment of gender from the moment of that re-assignment. While the applicant does not agree with the Government's denial that complete rectification is possible, the matters relied on before the Commission principally refer to the embarrassment of having to declare birth gender in official or legal contexts or of continuing to be regarded as being of the sex registered at birth for legal purposes. There is no reference by the applicant to any fear of discovery or intrusion from third parties obtaining access to the birth register.

51. It seems to the Commission that the record of gender in the birth register is in any event a secondary or indirect aspect of the case. The inability of the applicant to obtain legal recognition of her gender re-assignment derives from the principle in domestic law, established in the case of *Corbett v. Corbett*, that sex is fixed immutably by conventional biological considerations as existing at the time of birth. It would appear that domestic law could, by whatever means it found appropriate, provide for transsexuals to be given prospective legal recognition of their gender re-assignment, without necessarily destroying the historical nature of the birth register as a record of the facts as perceived at that time. If it is possible for documentation, such as passports and driving licences, to

indicate the change of gender, it is not readily apparent why transsexuals should remain under a general obligation to declare their birth gender in other official or employment and contract contexts. While there may be a legitimate interest, for example, in the context of life insurance, for a person to be required to disclose details of medical history, there would appear to be no such automatic necessity to declare birth gender in subscribing to house insurance.

52. The Commission nonetheless acknowledges that there are legitimate public interest considerations to weigh in the balance against the applicant's interests, where it is being claimed that established legal principles and practices require to be modified. It further recalls that the Court has previously stated that, as concerned transsexuals, where it considered that there was little common ground in Contracting States and the law appeared to be in a transitional stage, the Contracting States enjoyed a wide margin of appreciation (see Eur. Court H.R., Rees judgment of 17 October 1986, *op. cit.*, p. 15, para. 37 and Cossey judgment of 27 September 1990, *op. cit.*, p. 16, para. 40). It is thus argued by the Government that where the phenomenon of transsexualism is still the subject of social, medical and scientific controversy, the position in the United Kingdom, where transsexuals are able to live in their new gender in society, obtaining change of name and identity documentation, must reasonably be within their margin of appreciation.

53. In its report in the case of X. Y. and Z. (*op. cit.*, para. 67), the Commission was of the opinion that there was a clear trend in Contracting States towards the legal acknowledgement of gender re-assignment (see eg. the specific domestic legislation of Germany, Italy, the Netherlands, Sweden and Turkey, and also the Recommendation 1117(1989) of the Parliamentary Assembly of the Council of Europe on the condition of transsexuals, which recommends the introduction of legislation by member States, *inter alia*, to allow the rectification of birth registers). It further notes a recent development in the law of the European Union, extending protection to transsexuals in the employment sphere, the European Court of Justice finding that the dismissal of a transsexual because of gender re-assignment constituted discrimination on grounds of sex. As the Government have pointed out, the judgment is limited in its scope and does not purport to give any opinion on the issues in this application. The Commission considers however that the judgment is a further authoritative recognition of the right of transsexuals to respect for their dignity and freedom.

54. As regards the scientific and medical developments to which the applicant refers, the Commission notes that the recent findings as to similarity in brain structure between biological females and male-to-female transsexuals are not, and do not claim to be, conclusive or exhaustive. It agrees with the Government who refer to the complexity of this area of continuing research. It is of the opinion however that it is more significant, whatever the cause of transsexualism (hormonal or chemical action on the brain of the foetus or young child, social and environmental influences, or a combination of any number of factors), that the medical profession has reached a consensus that transsexualism is an identifiable medical condition, gender dysphoria, in respect of which gender re-assignment treatment is ethically permissible and can be recommended for the purpose of improving the quality of life. As a result, the treatment is not only accessible, but provided by State medical establishments in a number of the Contracting States of the Council of Europe. In these circumstances, a certain social reluctance to accept, or suspicion of, the phenomenon of transsexualism and difficulties in assimilating it readily

into existing legal frameworks cannot, in the Commission's view, be of decisive weight. It recalls that the social problems surrounding children born out of wedlock in previous years were not found to justify legal exclusion (see eg. Eur. Court H.R., Inze judgment of 28 October 1987, Series A no. 126).

55. Having regard to the above, the Commission finds that the concerns put forward by the Government, even having regard to their margin of appreciation, are not sufficient to outweigh the interests of the applicant. Consequently, it finds that there has been a failure to respect her right to private life.

CONCLUSION

56. The Commission concludes, by 15 votes to 1, that there has been a violation of Article 8 of the Convention.

D. As regards Article 12 of the Convention

57. Article 12 of the Convention provides:

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

58. The applicant, who has a partner of the male sex, has stated that she would wish to marry. She complains of a violation of her right to marry, since her change of gender is not taken into account in the United Kingdom and since she has been recorded at birth as being of the male sex, marriage to another person of the male sex is prohibited. She submits that notwithstanding the fact that she could marry in the Netherlands, it is undoubtful that such marriage would be recognised in the United Kingdom. According to English law, the capacity to marry is governed by the law of each party's ante nuptial domicile. If the domestic courts considered that she was still domiciled in the United Kingdom, they would take the view that she was barred from contracting a valid marriage with a male. If it was considered that she was domiciled in the Netherlands, the test would suggest that her marriage would be recognised since it would be valid under Dutch law. While there is some ground in judicial dicta and academic textbooks for suggesting that the English courts would nonetheless refuse to recognise a marriage on the basis that it would be unconscionable and offensive to the conscience of the English court, there are equally indications that the courts might seek to exercise common sense, good manners and reasonable tolerance since they have recognised polygamous marriages validly contracted under the law of the parties' domicile. The applicant submits that uncertainty as to whether or not she would be seen as domiciled in the Netherlands or whether public policy would exclude recognition is however deeply discouraging, imposes emotional strain and undermines the usual marital basis for pooling property, wills etc.

59. The Government submit that there is no interference under this provision, since the Court and Commission have recognised that marriage may legitimately be restricted under national laws to union between a man and woman of biological origin. They also point out that in any event this applicant is able to contract marriage in the Netherlands where she is now living. They basically agree that the question of recognition of the marriage in the

United Kingdom would depend on where she was considered to be domiciled. Since, however, there is a strongly arguable case that the courts would give recognition to the applicant's marriage in the Netherlands if she was considered to be domiciled there, the applicant by failing to seek an appropriate declaration in the courts has not in fact established that her marriage would not be recognised. In that respect she has failed to exhaust her domestic remedies.

60. Having regard to its conclusion above that there has been a failure to respect private life (para. 56), the Commission finds it unnecessary to examine separately the applicant's complaint under Article 12 of the Convention.

CONCLUSION

61. The Commission concludes, by 10 votes to 6, that the applicant's complaint under Article 12 of the Convention does not give rise to any separate issue.

E. As regards Article 14 of the Convention

62. Article 14 provides:

"The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

63. The applicant complains that she is subject to discrimination as regards the inconsistency in practice of rectification of birth certificates as carried out by the United Kingdom authorities. This subjects her to an unjustifiable difference of treatment in respect of her rights under Articles 8 and 12 of the Convention.

64. As regards the alleged discrimination, the Government consider that the applicant receives the same treatment as all persons in her position who have undergone gender re-assignment surgery. She cannot, in their submission, seek to compare herself with the category of persons who obtain rectification of the birth register as a result of a mistake made at the time of registration.

65. The Commission recalls its findings above concerning her complaints under Articles 8 and 12 of the Convention (paras. **) In these circumstances it finds it unnecessary to determine separately whether this situation also discloses discrimination contrary to Article 14 of the Convention.

CONCLUSION

66. The Commission concludes, unanimously, that the applicant's complaint under Article 14 of the Convention does not give rise to any separate issue.

F. As regards Article 13 of the Convention

67. Article 13 of the Convention provides:

"Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

68. The applicant submits that she has no effective remedy available to her in respect of her complaints. She states that case-law referring to the inapplicability of Article 13 to legislation is irrelevant since there has been no legislative determination of the issues before the Commission.

69. The Government submit that established case-law (eg. Eur. Court H.R. Lithgow and others judgment of 8 July 1986, Series A no. 102, para. 206) indicate that insofar as the applicant complains about the content of legislation Article 13 does not require a remedy to be provided in domestic courts.

70. The Commission notes that the applicant's complaints of alleged violations relate essentially to the state of United Kingdom law which fails to recognise the applicant's gender re-assignment. Article 13 cannot however be interpreted as guaranteeing a remedy against, or judicial review of, domestic law (whether legislative or based on judicially developed common law) which is not considered to be in conformity with the Convention (*mutatis mutandis*, Application No. 10243/83, Dec. 6.3.85, D.R. 41 p. 123 and *Young, James and Webster v. the United Kingdom*, Comm. Rep. 14.12.79, para. 177, Eur. Court H.R., Series B no. 39, p. 49, paras. 174-178).

CONCLUSION

71. The Commission concludes, unanimously, that there has been no violation of Article 13 of the Convention.

G. Recapitulation

72. The Commission concludes, by 15 votes to 1, that there has been a violation of Article 8 of the Convention (para. 56).

73. The Commission concludes, by 10 votes to 6, that the applicant's complaint under Article 12 of the Convention does not give rise to any separate issue (para. 61).

74. The Commission concludes, unanimously, that the applicant's complaint under Article 14 of the Convention does not give rise to any separate issue (para. 66).

75. The Commission concludes, unanimously, that there has been no violation of Article 13 of the Convention (para. 71).

H.C. KRÜGER
Secretary to

S. TRECHSEL
President of

(Or. English)

Partially dissenting opinion of Mrs. G.H. Thune, Mm. J. Mucha, P. Lorenzen and K. Herndl

In view of the conclusion arrived at in para. 56 that there has been a violation of article 8 of the Convention, the majority of the Commission have taken the view that it is unnecessary to examine separately the complaint under Article 12. We do not share this view. We find that in the present case there is no violation of Article 12 for the following reasons.

We would recall that the applicant has been living for some time in the Netherlands, without any expressed intention of returning to the United Kingdom. Neither has she expressed any intention that she would return to the United Kingdom after marriage or seek to be married in the United Kingdom. We note that there is, on the view of both parties, a possibility that, if the applicant is regarded as domiciled in the Netherlands, a marriage validly contracted there would be recognised by the courts under English law. In these circumstances, we find that the applicant has not established that she is currently in a position where the essence of her right to marry under Article 12 has been substantially impaired by the legal situation pertaining in the United Kingdom.

(Or. English)

Partially dissenting opinion of Mrs. J. Liddy

As to Article 8

The complaint declared admissible is that the lack of legal recognition of the applicant's gender reassignment discloses a lack of respect for her private life. The majority of the Commission has acknowledged the difficulties in "assimilating" the phenomenon of transsexualism readily into existing legal frameworks but found that the failure to so assimilate the phenomenon constitutes a failure to respect the applicant's private life (paras. 53 and 54 of the Report).

The applicant goes rather further. She wishes to be protected against any obligation to reveal her former name or birth gender when asked a direct question by public authorities within certain contexts (court appearances or for the purpose of confidential social security records) or by private bodies within certain contractual situations (insurance or employment contracts).

As the law stands the applicant is not required in her daily life to carry an identity card revealing her birth gender and there has been no legal or practical barrier to her changing

her name. Her passport and driving licence do not reveal her past identity. The situation is therefore clearly distinguishable from that in *B. v. France* (Judgment of 25 March 1992, Series A. No. 232-C). It is closer to that prevailing in the *Rees and Cossey Cases* (Judgments of 17 October 1986 and 27 September 1990 respectively, Series A. Nos. 106 and 184). At paragraph 52 and a relevant footnote to the Report the Commission refers to changes in the law in about twelve countries to assimilate the phenomenon of transsexuality. It is not clear whether these are countries where identity cards are in daily use or whether any of the laws would protect the applicant against revealing information about her past in response to a direct question from a body with a legitimate interest in tracing past records. Certainly the Private Members' Bill presented to the House of Commons by Mr. Alex Carlisle and intended to provide for the registration and civil status of transsexuals does not attempt to deal with these difficult questions.

The law has in fact developed since the case of *B. v. France* as a result of the law of the European Union to give, in the majority's words (with which I agree) "authoritative recognition of the right of transsexuals to respect for their dignity and freedom on a footing of equality with non-transsexuals" in the field of employment (para. 52 of the Report). The precise ramifications of the European Court of Justice judgment have yet to be established and in particular its impact, if any, on any existing European Union law savers for different treatment of the sexes in areas of employment calling for a particularly intimate relationship between the employee and a member of the public and designed to respect the sensitivities of particular members of the public, such as the relationship between nurse and patient. Its significance for Convention law is arguable, as the Convention does not govern employment matters generally although it may create positive obligations to protect against harassment (*Whiteside v. UK* DR. 76A, 80).

The Commission has noted at para. 53 of the Report that scientific and medical developments since the *Rees and Cossey Cases* are neither conclusive nor exhaustive.

While one sympathises with the applicant's wish not to be asked questions about her past history, it seems that this concern would not be answered by the consequential remedy: the introduction in the Respondent State of a short-form birth certificate omitting mention of sex or of some kind of official documentation of current social gender which would be sufficiently widely used not to be associated with transsexuals (notwithstanding that the introduction of documentation of the latter type would run counter to that and other States' popular and long-standing concept of civil liberties and their non-reliance on any identity card system). It appears to me that she has not shown that her private daily life has been so affected in concrete terms as to mean that there is an obligation under Article 8 for the State to take positive measures to further assist her in concealing her past. In the case of *B. v. France*, in which I had the honour of presenting the Commission's Report to the Court, there was (in the form of inter alios an identity card and invoices and cheques indicating that applicant's former name and masculine form of address) clear evidence of painful embarrassment and the risk of being compelled to disclose personal medical history merely in the course of routine and economic daily life. I consider that the present case is clearly distinguishable and much more abstract in nature.

As to Article 12

For the reasons given by the Court in the *Cossey* case I consider that there has been no

violation.

Partially dissenting opinion of Mr. L. Loucaides

While on the facts of this case it may not be necessary to consider the substance of the applicant's complaints under Article 12 (see the partially dissenting opinion of my colleagues Mrs. G.H. THUNE, MM. J. MUCHA, P. LORENZEN and K. HERNDL). I would refer to my dissenting opinion in the case of Sheffield v. the United Kingdom (No. 22985/93, Comm. Rep. 21.1.97) and find no violation for the reasons given therein.