





# ECHR: Commission's Final ruling on admissibility of the case of Rachel Horsham


## January 1996

AS TO THE ADMISSIBILITY OF

Application No. 23390/94  
by Rachel HORSHAM  
against the United Kingdom

The European Commission of Human Rights sitting in private on 19 January 1996, the following members being present:

MM. S. TRECHSEL, President  
H. DANELIUS  
C.L. ROZAKIS  
E. BUSUTTIL  
A. WEITZEL  
H.G. SCHERMERS  
Mrs. G.H. THUNE  
Mr. F. MARTINEZ  
Mrs. J. LIDDY  
MM. L. LOUCAIDES  
J.-C. GEUS  
M.P. PELLONP    
B. MARXER  
J. MUCHA  
D. SV  BY  
A. PERENIC  
C. B  RSAN  
P. LORENZEN  
K. HERNDL

Mr. H.C. KR  GER, Secretary to the Commission

Having regard to Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms;

Having regard to the application introduced on 25 August 1993 by Rachel HORSHAM against the United Kingdom and registered on 7 February 1994 under file No. 23390/94;

Having regard to:

- the reports provided for in Rule 47 of the Rules of Procedure of the Commission;
- the observations submitted by the respondent Government on 16 December 1994 and the observations in reply submitted by the applicant on 17 February 1995 ;
- the material submitted by the Government on 8 December 1995 and by the applicant on 15 January 1996;
- the observations submitted by the parties at the oral hearing held on 19 January 1996;

Having deliberated;

Decides as follows:

#### THE FACTS

The applicant is a British and Dutch citizen born in 1946 in the United Kingdom and resident in Amsterdam. The facts as submitted by the parties may be summarised as follows.

#### A. Particular circumstances of the case

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

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.

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.

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 OPCS (Office of Population Censuses and Surveys) confirmed that there was no provision under United Kingdom law for any new information to be inscribed on her original birth certificate.

#### B. Relevant domestic law and practice

##### Names

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 legal identification and may be used in passports, driving licences, medical and insurance cards etc.

##### Marriage

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.

##### Birth certificates

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.

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).

The 1953 Act provides for the correction by the Registrar of clerical errors or factual errors, but 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.

#### Rape

Prior to 1994, for the purposes of the law of rape, a male-to-female transsexual would have been regarded as a man.

Pursuant to section 142 of the Criminal Justice and Public Order Act 1994, rape is now defined as "vaginal or anal intercourse with a person".

#### Imprisonment

Prison rules require male and female prisoners to be detained separately.

The Government submit that in some cases post-operative transsexuals have been placed in a prison catering for the sex which accords with their new social status. Consideration is given to the circumstances of each individual case of a transsexual sent to prison as to what is appropriate.

#### Social security, employment and pensions

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.

#### COMPLAINTS

The applicant complains of the refusal of the United Kingdom to permit alteration of her original birth certificate to record her sex as female. She submits that this is in violation of her right to respect for her private life, contrary to Article 8 of the Convention. She submits that the legal position of transsexuals in the United Kingdom was deliberately altered to their detriment in the Corbett v. Corbett case and the true position misrepresented to the European Court of Human Rights. She also complains that the United Kingdom fails to recognise the marriages of transsexuals in violation of Article 12 of the Convention. At the time of her application, the applicant referred to her coming marriage with a Dutch male national.

The applicant complains that the United Kingdom fail to recognise her rights as a woman. She alleges that a transsexual can be legally raped, that the status of transsexuals at government employment

agencies, social security departments and retirement pension schemes remain as originally recorded at birth (the retirement age of 60 applicable to women does not apply to a male-to-female transsexual who will be governed by the male limit of 65) and that a transsexual on imprisonment would be held in a prison catering for persons of his or her original birth sex. A transsexual has no right, she submits, to conceal her original sex which must be declared when, for example, entering into an endowment insurance policy or joining a pension scheme.

The applicant complains of discrimination contrary to Article 14 of the Convention in that the United Kingdom refuse to recognise her rights as a woman.

#### PROCEEDINGS BEFORE THE COMMISSION

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

On 30 August 1994, the Commission decided to communicate the application to the respondent Government, pursuant to Rule 48 para. 2 (b) of the Rules of Procedure.

The Government's written observations were submitted on 16 December 1994 after one extension of the time-limit fixed for that purpose. The applicant replied on 17 February 1995.

On 4 September 1995, the Commission decided to invite the parties to an oral hearing concerning the applicant's complaints relating to the lack of respect for her private life, inability to marry and discrimination, such hearing to be joined for that purpose to Application No. 22985/93. The Commission declared inadmissible the remainder of the applicant's complaints.

The Government submitted documents on 8 December 1995 and the applicant further material on 15 January 1996.

At the hearing, which was held on 19 January 1996, the parties were represented as follows.

#### For the Government

|                   |   |
|-------------------|---|
| Ms. Dickson       | Agent, Foreign and Commonwealth Office              |
| Mr. Pannick, Q.C. | counsel   |
| Mr. Singh         | counsel   |
| Ms. Jenn          | adviser, Department of Health                       |
| Mr. Jenkins       | adviser, Office of Population, Censuses and Surveys |

#### For the applicants

|                  |           |
|------------------|-----------|
| Mr. Duffy        | counsel   |
| Mr. McFarlane    | counsel   |
| Mr. Heim         | counsel   |
| Mr. Brandman     | solicitor |
| Professor Gooren | adviser   |

Both applicants attended.

THE LAW

The applicant complains that the respondent State refuses to recognise her status as a woman. She makes a number of complaints in this context and invokes Articles 8, 12 and 14 (Art. 8, 12, 14) of the Convention.

Article 8 (Art. 8) of the Convention

"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."

Article 12 (Art. 12) of the Convention

"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."

Article 14 (Art. 14) of the Convention

"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."

The Government submit that Article 8 (Art. 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 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 Government submit that the applicant has not established a degree of practical detriment which would amount to a denial of her right to respect for her private life. Under Article 12 (Art. 12) of the Convention, there is no interference, 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.

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.

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 (Art. 8) of the Convention. For legal purposes, such as insurance and contractual documents, a transsexual is 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. 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. Accordingly the applicant submits that she is subject to serious, distressing and unnecessary interferences. The applicant complains also of a violation of her right to marry under Article 12 (Art. 12), since her change of gender is not taken into account and having been recorded at birth as being of the male sex, marriage to another person of the male sex is prohibited. Under Article 14 (Art. 14) of the Convention, 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. The applicant submits that legal, societal and scientific developments mean that the previous case-law of the Court requires re-examination. She refers in particular to new scientific research into the brain structure of transsexual persons.

The Commission has had regard to the observations submitted by the parties. It considers that these complaints raise serious and complex issues of law and fact under the Convention, the determination of which should depend upon an examination on the merits. The Commission therefore concludes that the remainder of the application is not manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention. No other ground for declaring it inadmissible has been established.

For these reasons, the Commission, by a majority,

DECLARES ADMISSIBLE, without prejudging the merits, the remainder of the application.

Secretary to the Commission

President of the Commission

(H.C. KRÖGER)

(S. TRECHSEL)