# Goodwin. *v.* United Kingdom

EUROPEAN COMMISSION OF HUMAN RIGHTS

AS TO THE ADMISSIBILITY OF

Application No. 28957/95
by Christine GOODWIN
against the United Kingdom

The European Commission of Human Rights sitting in private on 1 December 1997, the following members being present:

Mr S. TRECHSEL, President
Mrs G.H. THUNE
Mrs J. LIDDY
MM E. BUSUTTIL
G. J�RUNDSSON
A.S. G�Z�B�Y�K
A. WEITZEL
J.-C. SOYER
H. DANELIUS
F. MARTINEZ
C.L. ROZAKIS
L. LOUCAIDES
M.P. PELLONP��
M.A. NOWICKI
I. CABRAL BARRETO
B. CONFORTI
I. B�K�S
J. MUCHA
D. SV�BY
G. RESS
A. PERENIC
C. B�RSAN
P. LORENZEN
K. HERNDL
E. BIELIUNAS
E.A. ALKEMA
M. VILA AMIG�
Mrs M. HION
MM R. NICOLINI
A. ARABADJIEV

Mr M. de SALVIA, 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 5 June 1995 by Christine Goodwin against the United Kingdom and registered on 21 October 1995 under file No. 28957/95;

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 12 June 1997 and the observations in reply submitted by the applicant on 11 and 12 August 1997;

Having deliberated;

Decides as follows:

THE FACTS

The applicant is a United Kingdom citizen born in 1937. At birth the applicant was registered as being of the male sex, but in 1990 had a gender re-assignment operation. Before the Commission she is represented by Chanas Solicitors practising in London.

a. Particular circumstances of the case

The facts of the case, as submitted by the parties, may be summarised as follows.

Since early childhood the applicant had a tendency to dress as a woman. In the 1960's the applicant underwent unsuccessfully "aversion therapy", a psychiatric treatment designed to make a patient give up an undesirable habit by associating it with unpleasant effects. In 1969 the applicant was diagnosed as a transsexual.

Until 1984 the applicant dressed as a man for work and as a woman in her free time. Since then she has been living fully as a woman. In 1986 she was put on the waiting list of the national Health Service for a gender reassignment surgery, which was effected in 1990.

The applicant claims that in 1990-92 some colleagues, including management, attempted "holding [her] to see what was under [her] skirt, feeling [her] breasts". She attempted unsuccessfully to take a case of sexual harassment to the Industrial Tribunal on Sex Discrimination, but was allegedly told that she has no case as she is legally considered a man. The applicant was dismissed from her job on grounds of ill health, the real reason allegedly having been that she is a transsexual.

The applicant submitted petitions to various administrative organs demanding official recognition of her changed gender.

When the applicant started a new job as a travel consultant in 1996 she had to give to her employer her National Insurance ("NI") number. She was concerned that through her NI number the employer would be in a position to "trace an employee back to the age of 16". Also, she was particularly worried as she had been employed by the same employer years ago, when she was known under a male identity. In view thereof she requested the allocation of a new NI number. As this was refused, she eventually had to give her original NI number.

The applicant sent letters to the Department of Social Security ("DSS") Contributions Agency inquiring about the possibility to receive a state retirement pension at the age of 60, but was informed that this was not possible.

In April 1997 the applicant's liability for NI contributions would have terminated had she been considered as a woman for NI

purposes. Since this was not the case, she was informed that contributions had to continue until she reached the pension age for men, in April 2002. On 23 April 1997 the applicant entered into an undertaking with the DSS to pay direct NI contributions otherwise to be deducted by her employer. On 2 May 1997, in the light of this undertaking, the DSS Contributions Agency issued the applicant with an Age Exemption Certificate on Form CF 384 (see below Relevant domestic law and practice).

On an unspecified date the applicant was granted a loan conditional on her obtaining a life insurance. However, this would have necessitated disclosure of her civil status. Thus she must now decline the loan.

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

Marriage and definition of gender in domestic law

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

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. 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 (National Insurance and State Retirement Pensions)

A transsexual continues to be recorded for social security and national insurance purposes as being of the sex recorded at birth.

National Insurance

The Department of Social Security ("DSS") is the governmental department responsible for the administration of National Insurance ("NI") and in particular NI contributions.

Each British citizen is registered by the DSS for NI purposes on the basis of the information in their birth certificate. Persons from abroad who wish to register for NI in the UK may use their passport or Identification Card as evidence of identity if a birth certificate is unavailable.

Each person registered for NI is allocated a NI number by the DSS. Each number issued is unique. The DSS uses this number to identify each person who has a NI account (there are at present approximately 60 million individual NI accounts).

A NI Number is in standard format consisting of two letters followed by three pairs of numbers and a further letter. It contains no indication in itself of the holder's sex or any other personal information.

The DSS uses the NI Number to record the details of all NI contributions paid into the account during the NI account holder's working life. The NI Number is an administrative device enabling the DSS to monitor each person's liabilities, contributions and entitlement to benefits accurately throughout their working lives and in retirement.

Relevant statutory provisions relating to NI Numbers are as follows:

a. Under Regulation 44 of the Social Security (Contributions) Regulations 1979, made under powers conferred by paragraph 8(1)(p) of Schedule 1 to the Social Security Contributions and Benefits Act 1992, specified individuals are placed under an obligation to apply for a NI Number unless one has already been allocated to them.

b. Under Regulation 45 of the 1979 Regulations, an employee is under an obligation to supply his NI Number to his employer on request;

c. Section 112(1) of the Social Security Administration Act 1992 provides:

> "(1) If a person for the purpose of obtaining any benefit or other payment under the legislation ...[as defined in section 110 of the Act]... whether for himself or some other person, or for any other purpose connected with that legislation –
>
> (a) makes a statement or representation which he knows to be false; or
>
> (b) produces or furnishes, or knowingly causes or knowingly allows to be produced or furnished, any document or information which he knows to be false in a material particular,
>
> he shall be guilty of an offence."

It would therefore be an offence under this section for any person to make a false statement in order to obtain a NI Number.

The DSS operates a policy of only issuing one NI Number for each person regardless of any changes that occur to that person's sexual identity through procedures such as gender re-assignment surgery. A renewed application for leave to apply for judicial review of the legality of this policy brought by a male-to-female transsexual was dismissed by the Court of Appeal in the case of R v. Secretary of State for Social Services ex parte Hooker (1993) (unreported). McCowan LJ giving the judgment of the Court stated (at page 3 of the transcript):

> "..since it will not make the slightest practical difference, far from the Secretary of State's decision being an irrational one, I consider it a perfectly rational decision. I would further reject the suggestion that the applicant had a legitimate expectation that a new number would be given to her for psychological purposes when, in fact, its practical effect would be nil."

Any person may adopt such first name, surname or style of address (e.g. Mr, Mrs, Miss, Ms) that he or she wishes for the purposes of the name used for NI registration. Any such amendments will be made to the person's computer records, manual records and NI Number card.

Any information held in the DSS NI records is confidential and will not normally be disclosed to third parties without the consent of the person concerned. Exceptions are possible in exceptional cases where the public interest is at stake or the disclosure is necessary to protect public funds. By virtue of Section 123 of the Social Security Administration Act 1992 it is an offence for any person employed in social security administration to disclose without lawful authority information acquired in the course of his or her employment.

The DSS operates a policy of normally marking records belonging to persons known to be transsexual as nationally sensitive. Access to these records is controlled by DSS management. Any computer printer output from these records will normally be referred to a special section within the DSS to ensure that identity details conform with those requested by the relevant person.

NI contributions are made by way of deduction from an employee's pay by the employer and then by payment to the Inland Revenue (for onward transmission to the DSS). Employers at present will make such deductions for a female employee until she reaches the pensionable age of 60 and for a male employee until he reaches the pensionable age of 65. The DSS operates a policy for male-to-female transsexuals whereby they may enter into an undertaking with the DSS to pay direct to the DSS any NI contributions due after the transsexual has reached the age of 60 which have ceased to be deducted by the employer in the belief that the employee is female. In the case of female-to-male transsexuals, any deductions which are made by an employer after the age of 60 may be reclaimed directly from the DSS by the employee.

In some cases employers will require proof that an apparent female employee has reached, or is about to reach, the age of 60 and so will be entitled not to have the NI deductions made. Such proof may be provided in the form of an Age Exemption Certificate (form CA4180 or CF384). The DSS may issue such a certificate to a male-to-female transsexual where such a person enters into an undertaking to pay any NI contributions direct to the DSS.

State Retirement Pensions

Under current legislation with effect until 2010 a male-to-female transsexual will only be entitled to a state pension at the state retirement age of 65 and if she has made NI contributions for 44 years.

Such a person will not be entitled to a state retirement pension at the age of 60, with 39 years of contributions, applicable to women.

A person's sex for purposes of pensionable age is determined according to biological sex at birth. This approach was approved by the Social Security Commissioner (a judicial officer, who specialises in social security law) in the following two cases:

R(P) 1/80:

The Commissioner held, amongst other things, that although a claimant was living as a woman and had a NI card issued in her adopted female names, she continued to be biologically male and would be treated as a man for the purposes of pensionable age. The Commissioner refused to be guided by extra-statutory administrative action and stated (at paragraph 16):

"16. I have no doubt that when in November 1960 the consultant endocrinologist advised that the time had come for the claimant to change roles he was "assigning" the claimant to the gender, rather than the sex, in which his patient could best be managed and could live in society. I do not regard such assignment as the test of the question.... is the claimant a man or a woman, nor am I persuaded that I should be guided by extra-statutory administrative action, taken for medical and compassionate reasons to enable the claimant to live as a woman. The claimant was registered at birth as male, and a doctor and nurse were in attendance. It is not suggested that the particulars recorded in the birth certificate are in any way erroneous, and there is no suggestion that the claimant, living as a woman, is biologically, that is anatomically and physiologically, other than male. Although the claimant lives successfully in the role of a woman my conclusion on the evidence is that the claimant is male and a man, and has not attained the pensionable age of 65 years."

R(P) 2/80:

A male-to-female transsexual claimed entitlement to a pensionable age of 60. The Commissioner dismissed the claimant's appeal and stated at paragraph 9 of his decision:

"(a) In my view, the word "woman" in section 27 of the Act means a person who is biologically a woman. Sections 28 and 29 contain many references to a woman in terms which indicate that a person is denoted who is capable of forming a valid marriage with a husband. That can only be a person who is biologically a woman.

(b) I doubt whether the distinction between a person who is biologically, and one who is socially, female has ever been present in the minds of the legislators when enacting relevant statutes. However that may be, it is certain that Parliament has never conferred on any person the right or privilege of changing the basis of his national insurance rights from those appropriate to a man to those appropriate to a woman. In my judgment, such a fundamental right or privilege would have to be expressly granted.

...

(d) I fully appreciate the unfortunate predicament of the

> claimant, but the merits are not all on her side. She lived as a man from birth until 1975, and, during the part of that period when she was adult, her insurance rights were those appropriate to a man. These rights are in some respects more extensive than those appropriate to a woman. Accordingly, an element of unfairness to the general public might have to be tolerated so as to allow the payment of a pension to her at the pensionable age of a woman."

Other relevant materials

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 men and women as regards access to employment, vocational training and promotion and working conditions, precluded dismissal of a transsexual for a reason related to 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."

COMPLAINTS

1. The applicant complains under Articles 8 and 14 of the Convention that the United Kingdom legal system does not recognise her civil status as a female. The applicant claims that she is constantly facing embarrassing and humiliating situations. She also invokes Article 13 of the Convention.

The applicant complains that she has suffered sexual harassment, including "groping" incidents at the workplace, but could do nothing about it because the law treats her as a man and, as a result, would treat the incidents, if at all punishable, as a light case of common assault, and not as sexual harassment.

Also, she was refused a new National Insurance number and as a result her new employer can obtain information about her past history. She was thus put in a difficult situation when applying for a job: either to disclose her previous gender or to conceal it but later face the risk of being accused of lying.

Furthermore, under the existing legislation she will be entitled to a pension only after the age of 65 because she is legally considered a man. The same is true as regards entitlement to certain social benefits.

The applicant states that her case is different from the cases of Rees and Cossey (Eur. Court HR, Rees v. the United Kingdom judgment of 17 October 1986, Series A no. 106; Cossey v. the United Kingdom

judgment of 27 September 1990, Series A no. 184) because she does not seek the amendment of her birth certificate.

2. The applicant also complains that the law does not allow a marriage between a transsexual and a person of the gender to which the transsexual belonged before.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 5 June 1995 and registered on 21 October 1995.

On 7 April 1997 the Commission decided to communicate the application to the respondent Government.

The Government's written observations were submitted on 12 June 1997. The applicant replied on 11 and 12 August 1997.

THE LAW

The applicant complains under Articles 8 and 14 (Art. 8, 14) of the Convention that the United Kingdom legal system does not recognise her civil status as a female. The applicant claims that as a result she is constantly facing embarrassing and humiliating situations and that she could not take legal action when she was a victim of sexual harassment. She also invokes Article 13 (Art. 13) of the Convention. The applicant further raises a complaint under Article 12 (Art. 12) of the Convention that she cannot marry a man.

Article 8 (Art. 8) of the Convention, insofar as relevant, reads as follows:

> "1. Everyone has the right to respect for his private and family 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."

Article 12 (Art. 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."

Article 13 (Art. 13) of the Convention provides as follows:

> "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."

Article 14 (Art. 14) of the Convention provides as follows:

> "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."

Referring to the Court's case-law and in particular, as a latest authority, to the case of X., Y. and Z. v. the United Kingdom (Eur. Court HR, judgment of 22 April 1997, to be published in Reports of Judgments and Decisions for 1997), the Government maintain that there is no generally accepted approach among the Contracting States in respect of transsexuality and that, in view of the margin of appreciation left to States under the Convention, the lack of recognition in the United Kingdom of the applicant's new gender identity for legal purposes does not entail a violation of Article 8 (Art. 8) of the Convention.

The Government dispute the applicant's assertion that scientific research and "massive societal changes" have led to wide recognition and consensus on issues of transsexualism.

The Government accept that there may be specific instances where the refusal to grant legal recognition of a transsexual's new sexual identity may amount to a breach of Article 8 (Art. 8). In their submission whether a Contracting State's treatment of a transsexual amounts to such a breach depends on a consideration of the fair balance between the general interests of the community and the interests of the individual which, in turn, will depend on the nature and degree of any detriment suffered by the transsexual.

The Government further analyse the complaints raised by the applicant of specific instances of alleged embarrassing and humiliating situations related to her change of sexual identity.

As regards the applicant's NI number the Government submit that, unlike in the case of B. v. France (Eur. Court HR, judgment of 1991, Series A no. 232-C), an employer is unable to establish the sex of the applicant from the NI number itself since it does not contain any encoded reference to her sex. Furthermore, the applicant was issued with a new NI card with her changed name and style of address. The Government also submit that the DSS has a policy of confidentiality of the personal details of a NI number holder and in particular a policy and procedure for special protection for transsexuals. As a result, in the Government's submission, an employer has no means of lawfully obtaining information from the DSS about a previous sexual identity of an employee.

The Government further submit that it is very unlikely that the applicant's employer, for whom she had worked years ago when she had a male sexual identity, would discover her change of sexual identity through her NI number. The Government submit that employers usually adopt independent systems of staff numbering and that, unless the applicant herself informs her employer that she had worked there before, she would normally have a new staff number. The Government submit that in any event in the applicant's case the feared "tracing back" does not appear to have taken place.

The Government argues that the applicant's fear that her previous sexual identity will be revealed upon reaching the age of 60 when her employer will no longer be required to make NI contribution deductions from her pay is entirely without foundation, the applicant having been in fact issued with a suitable Age Exemption Certificate on Form CF384 on 2 May 1997.

The Government conclude that the refusal to issue a new NI number to the applicant has not resulted and will not result in her previous sexual identity being revealed and that therefore there has been no breach of her right to respect for her private life under Article 8

(Art. 8) of the Convention. The Government further maintain that the refusal to issue a new NI number is justified, the uniqueness of the NI number being of critical importance in the administration of the national insurance system, and for the prevention of fraudulent use of old NI numbers.

As regards the impossibility for the applicant to obtain a state retirement pension at the age of 60 the Government submit that the distinction between men and women as regards pension age has been held to be compatible with European Community law (Article 7(1)(a) of Directive 79/7/EEC; European Court of Justice, R. v. Secretary of State for Social Security ex parte Equal Opportunities Commission Case C-9/91 [1992] ECR I-4927). Also, since the preserving of the applicant's legal status as a man is not contrary as such to Article 8 (Art. 8) of the Convention, it would constitute favourable treatment unfair to the general public to allow the applicant's pension entitlement at the age of 60.

As regards the applicant's complaint that she cannot marry a man the Government refer to the Court's case-law and maintain that neither Article 12 nor Article 8 (Art. 12, 8) of the Convention requires a State to permit a transsexual to marry a person of his or her original sex.

In respect of Articles 13 and 14 (Art. 13, 14) of the Convention the Government submit that no issues arise which are different from those addressed under Article 8 (Art. 8) of the Convention.

The applicant replies that the lack of legal recognition of her changed gender is the cause of numerous discriminatory and humiliating experiences in her everyday life.

She submits that all special procedures through which she has to go in respect of her NI contributions and state retirement pension constitute in themselves unjustified difference in treatment as they would have been unnecessary had she been recognised as a woman for legal purposes. In particular, the very fact that the DSS operates a policy of marking records of transsexuals as sensitive is a difference in treatment. As a result, for example, the applicant cannot attend the DSS without having to make a special appointment.

The applicant further submits that the danger of her employer learning about her past identity is real and has materialised. She submits that the very fact that she has to present to her employer a special certificate on Form CF 384 puts the employer on notice of her birth category. Also, the applicant argues that it is possible for the employer to trace back her employment history on the basis of her NI number and that this has in fact happened in her case.

As regards pensionable age the applicant submits that having commenced work at the age of 16 she will herself have worked 44 years and not 39. On this background refusing her entitlement to a state retirement pension at the age of 60 on the basis of the pure biological test for determining sex is contrary to Article 8 (Art. 8) of the Convention.

Referring to the Court's case-law the applicant argues that the Court has taken the view that the need for appropriate legal measures in respect of transsexuals should be kept under review in the light of societal changes occurring.

The applicant maintains that such rapid changes, in respect of the scientific understanding of, and the social attitude towards, transsexualism are taking place not only across Europe. In the 1960's

transsexualism was considered a disease and the applicant herself had to undergo aversion therapy. Later she was advised by the national health authorities to undergo gender re-assignment.

The applicant also refers, inter alia, to Article 29 of the Civil Code of the Netherlands, Article 6 of Law No. 164 of 14 April 1982 of Italy, and Article 29 of the Civil Code of Turkey as amended by Law No. 3444 of 4 May 1988. Also, under a 1995 New Zealand statute, Part V, Section 28, a court may order the legal recognition of the changed gender of a transsexual after examination of medical and other evidence. The applicant sees no reason why a similar approach should not be adopted in the United Kingdom.

The applicant finally submits that in respect of Articles 8 and 14 (Art. 8, 14) of the Convention the Government observations do not detract from her submissions in respect of the difficulties encountered as regards private insurance and pension, as in the absence of an amendment to her birth certificate she must disclose her previous sexual identity.

In respect of Article 12 (Art. 12) of the Convention the applicant replies that she has currently a full physical relationship with a man, but that she and her partner know that they cannot marry because the law treats her as a man.

Having examined the applicant's complaints, the Commission finds that they raise serious questions of fact and law which are of such complexity that their determination should depend on an examination of the merits. The application cannot, therefore, be regarded as manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention, and no other ground for declaring it inadmissible has been established.

For these reasons, the Commission, unanimously,

DECLARES THE APPLICATION ADMISSIBLE.

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| M. de SALVIA | S. TRECHSEL |
| Secretary | President |
| to the Commission | of the Commissi |