

I. v. United Kingdom

AS TO THE ADMISSIBILITY OF

Application No. 25680/94
by I.
against the United Kingdom

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

Mr. S. TRECHSEL, President

Mrs. G.H. THUNE

Mrs. J. LIDDY

G. JORDANSSON

A.S. GORBUNOV

A. WEITZEL

J.-C. SOYER

H. DANELIUS

F. MARTINEZ

C.L. ROZAKIS

L. LOUCAIDES

J.-C. GEUS

M.P. PELLONPAINEN

B. MARXER

M.A. NOWICKI

I. CABRAL BARRETO

B. CONFORTI

I. BOKROS

J. MUCHA

D. SVEDBY

G. RESS

A. PERENIC

C. BERSAN

P. LORENZEN

K. HERNDL

E. BIELIUNAS

E.A. ALKEMA

M. VILA AMIGÓ

Mrs. M. HION

MM. R. NICOLINI

A. ARABADJIEV

Mr. H.C. KRÖGER, 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 6 April 1994 by
I. against the United Kingdom and registered on 16 November 1994 under
file No. 25680/94;

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 13 May and 28 November 1996 and the observations in reply submitted by the applicant on 29 October 1996;

Having deliberated;

Decides as follows:

THE FACTS

The applicant is a United Kingdom citizen born in 1955. Before the Commission she is represented by MacLavery Cooper Atkins, solicitors from Kingston upon Thames.

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

A. Particular circumstances of the case

The applicant is a post-operative male-to-female transsexual. She worked for some time as a dental nurse in the army. In 1985 she applied for a course for the Enrolled Nurse (General) qualification, but was not admitted as she refused to present her birth certificate.

At the age of 33 the applicant retired with a disability pension on the basis of her ill health.

In 1993 and 1994 the applicant wrote letters to various institutions requesting amendments to the relevant legislation to allow the recognition of the transsexuals' changed gender.

B. Relevant domestic law and practice

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.

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.

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, for rape to be established there has to be a "vaginal or anal intercourse with a person".

In a judgment of 28 October 1996 the Reading Crown Court found that penile penetration of a male to female transsexual's artificially constructed vagina amounted to rape.

Imprisonment

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

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. 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.

Under Section 12(a) of the Matrimonial Causes Act 1973 a marriage which has not been consummated owing to the incapacity of either party to consummate may be voidable. Section 13(1) of the Act provides that the court must not grant a decree of nullity if it is satisfied that the petitioner knew the marriage was voidable, but led the respondent to believe that she should not seek a decree of nullity, and that it would be unjust to grant the decree.

C. 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 3 and 8 of the Convention that, due to the fact that she has a male birth certificate, she is constantly facing risks such as to be sent to a male prison or to be placed on a male hospital ward in cases of arrest or medical emergency respectively; and to experience embarrassment and humiliation when applying for employment or to obtain a professional qualification certificate as a first level nurse, as in such cases she would have to disclose her name and gender as registered at birth. Also, the applicant contends that she has no legal right to wear female clothes in public.

2. The applicant invokes Article 14 of the Convention referring to the alleged legal situation where a rape committed by a man against her would be punished by a lighter penalty compared to cases of rape against a woman born as such. Also, if a homosexual act is committed by a woman against her it would in fact be treated as a heterosexual act and, therefore, proof of lack of consent on her side would be necessary for the establishment of the perpetrator's criminal liability for indecent assault. Such proof would not be required on the other hand, if she had been treated the same as a woman born as such.

3. The applicant further submits that her situation is contrary to Articles 3, 8 and 14 of the Convention for the additional reason that it discloses lack of recognition of, and discrimination against, her "neuter gender". Thus even after the 1994 amendments of the provisions concerning rape, the law still envisages only men and women as it uses terms which refer only to female and male organs, but not to the new genitals of the "third gender". The legislation in the United Kingdom treated the people of the "neuter gender" as lesser people.

The applicant submits that transsexuals should be issued with special certificates, which would have the same legal significance as birth certificates. Such a solution would not involve alteration of the existing system of civil records, a difficulty which was central to the Court's decisions in the Rees and Cossey cases. It would not burden the society and would not affect the rights of others because in addition to the existing birth certificate, a transsexual would have a second document.

4. Under Article 12 of the Convention the applicant complains that she, as a transsexual, could not marry either a man, or a woman.

5. Under Articles 6 and 13 of the Convention the applicant complains of the alleged lack of an effective remedy and of access to court for the determination of her civil status as a transsexual and of the alleged lack of an effective remedy against the violations of the Convention in her case.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 6 April 1994 and registered on 16 November 1994.

On 16 October 1995 the Commission decided to communicate the application to the respondent Government.

On 2 December 1995, upon the request of the respondent Government, the Commission decided to adjourn the examination of the application, pending the Commission's decisions on the admissibility of applications Nos. 22985/93 and 23390/94. On 2 March 1996 the Commission resumed the examination of the application and invited the respondent Government to submit written observations.

The Government's written observations were submitted on 13 May 1996. The applicant's representatives did not reply within the fixed time-limit and did not request its extension. On 29 October 1996 the applicant herself submitted written observations in reply. The Government submitted additional information on 28 November 1996. The applicant's representatives submitted written observations on 22 May 1997.

On 24 May 1996 the Commission granted the applicant legal aid.

THE LAW

1. The applicant complains under Articles 8 and 14 (Art. 8, 14) of the Convention that the lack of recognition of her gender re-assignment amounts to a breach of her right to respect for her private life and leads to unjustified discrimination.

The Government, relying on the Court's case-law, 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 had gender reassignment surgery and, in the case of the United Kingdom, to introduce changes in the birth registration system. Nor does it require the authorities to prevent questions being asked about the applicant's past by persons who have legitimate interest in knowing such information.

Furthermore, none of the complaints made by the applicant establish a degree of practical detriment which would amount to a breach of her right to respect for her private life. She is free and able to live a female social role. Thus, she has been able to change her name. Also, nothing prevents her from wearing woman's clothes. In case she decides to resume her professional activity of a nurse she would have to register with the Central Council for Nursing, Midwifery and Health Visiting, whose policy is to amend the gender on record upon the submission of a letter from a consultant psychiatrist confirming that there has been a gender re-assignment.

The Government submit that if the applicant is sentenced to a term of imprisonment, the question whether she would be held with men or with women would be resolved on the basis of the individual circumstances. Thus, there have been cases of transsexuals having been placed with persons of the sex which accords with their new social status. Also, in case of hospitalisation it is for the hospital staff to determine where the applicant should be accommodated. The hospital would not normally see her birth certificate and, in any event, her legal status is unlikely to influence the staff's decision.

As regards the law of rape, without commenting on the situation prior to the amendment of the relevant law of 1994, the Government submit that since then the existence of rape does not depend on the gender of the victim. This was confirmed by the judgment of the Reading Crown Court of 28 October 1996.

The applicant replies inter alia that she suffers practical consequences of the lack of recognition of her gender re-assignment. Thus, the Central Council for Nurses requires the production of a birth certificate. Also, there is a risk that she would have to stay in a male hospital ward or be held in a male prison, and the Government do not deny it. The law as it stands, by requiring that the legal gender should be disclosed in certain situations and, at the same time, by not allowing the issuance of a replacement certificate of current gender status, creates such a risk. Therefore, in the applicant's view, the law should be changed, the fact that the existing risk may not materialise being irrelevant.

The applicant submits that it was for the respondent Government to show a good cause why her new gender should not be recognised legally, and that they have failed to do so.

In their observations of 22 May 1997 the applicant's representatives submit that they rely on the Commission's reasoning in its reports in the cases of Sheffield and Horsham v. the United Kingdom (nos. 22985/93 and 23390/94, Comm. Reports 21.01.1997, pending before the Court). They also state that this submission is not affected by the recent judgment of the Court in the case of X., Y. and Z. v. the United Kingdom (Eur. Court HR, judgment of 22 April 1997) which concerned adoption and not the lack of recognition of the transsexual's change of identity.

Having examined the applicant's complaints under Articles 8 and 14 (Art. 8, 14) of the Convention, 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. This part of 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 grounds for declaring it inadmissible have been established.

2. The applicant complains under Article 12 (Art. 12) of the Convention that she cannot marry either a man, or a woman.

The Government submit that a transsexual cannot marry a person of the same sex as the transsexual had at birth and that this is not contrary to Article 12 (Art. 12), as confirmed in the Court's case-law.

The Government also contend that the applicant does have a right to marry a woman. Such marriage may be voidable under Section 12(a) of the Matrimonial Causes Act 1973, but if the applicant made clear to a woman whom she intended to marry that she would not be able to consummate the marriage and that woman accepted the situation, it is unlikely, in the Government's submission, that a court would grant a decree of nullity on the grounds of the applicant's inability to consummate the marriage.

The applicant replies that sex should be determined based on the "brain sex" of a person. Thus, medical science has shown that the brain of a male to female transsexual is similar to that of a woman. Also, a marriage with a woman would be voidable.

Having examined the applicant's complaint under Article 12 (Art. 12) of the Convention, the Commission finds that it raises serious questions of fact and law which are of such complexity that their determination should depend on an examination of the merits. This part of 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 grounds for declaring it inadmissible have been established.

3. The applicant complains, invoking Articles 6 and 13 (Art. 6, 13) of the Convention, that she does not have an effective remedy against the alleged breaches of the Convention and that she is denied access to a court for the determination of her right to have her changed gender registered and her rights as a transsexual acknowledged.

The Government submit that the applicant has not made an arguable claim of a violation of another Convention provision and, in the alternative, that Article 13 (Art. 13) does not require a remedy in respect of complaints directed against the contents of the legislation.

The applicant submits that Article 13 (Art. 13) plainly requires a domestic remedy in cases of breaches of the Convention.

Insofar as the applicant invokes Article 6 (Art. 6) of the Convention, the Commission recalls that this provision extends only to disputes over "civil rights and obligations" which can be said, at least on arguable grounds, to be recognised under domestic law; it does not in itself guarantee any particular content for civil rights in the substantive law of the Contracting States (*H. v. Belgium* judgment of 30 November 1987, Series A no. 127-B, para. 40).

However, it does not appear to be disputed that the rights claimed by the applicant do not exist in United Kingdom law. Indeed, their non-existence is the basis of the applicant's complaints under Articles 8, 12 and 14 (Art. 8, 12, 14) of the Convention.

As regards the complaint under Article 13 (Art. 13), the Commission recalls that this provision cannot 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).

It follows that this part of the application is partly incompatible *ratione materiae* with the provisions of the Convention, and partly manifestly ill founded, and that it has to be rejected under Article 27 para. 2 (Art. 27-2) of the Convention.

4. The applicant complains that the lack of recognition of her gender re-assignment amounts to ill-treatment contrary to Article 3 (Art. 3) of the Convention.

The parties do not comment on this point in their observations.

The Commission recalls that ill-treatment must attain a certain level of severity if it is to fall within the scope of Article 3 (Art. 3) (*Eur. Court HR, Ireland v. the United Kingdom* judgment of 18 January 1978, Series A no. 25, p. 65 et seq., paras. 162 et seq.). The

Commission does not consider that such level has been reached in the present case.

It follows that the remainder of the application is manifestly ill-founded and has to be rejected under Article 27 para. 2 (Art. 27-2) of the Convention.

For these reasons, the Commission, unanimously,

DECLARES ADMISSIBLE, without prejudging the merits, the applicant's complaints under Articles 8, 12 and 14 of the Convention;

DECLARES INADMISSIBLE the remainder of the application.

H.C. KRÖGER
Secretary
to the Commission

S. TRECHSEL
President
of the Commission