

The Rees case (ECHR, 1985)

September, 1986

EUROPEAN COURT OF HUMAN RIGHTS

THE REES CASE

(2/1985/88/135)

JUDGMENT

STRASBOURG

25 September 1986

In the Rees case*,

* Note by the Registrar: The case is numbered 2/1985/88/135. The second figure indicates the year in which the case was referred to the Court and the first figure its place on the list of cases referred in that year; the last two figures indicate, respectively, the case's order on the list of cases and of originating applications (to the Commission) referred to the Court since its creation.

The European Court of Human Rights, taking its decision in plenary session in pursuance of Rule 50 of the Rules of Court and composed of the following judges:

Mr. R. Ryssdal, President,
Mr. Thór Vilhjálmsson,
Mrs. D. Bindschedler-Robert,
Mr. G. Lagergren,
Mr. F. Gölcüklü,
Mr. F. Matscher,
Mr. J. Pinheiro Farinha,
Mr. L.-E. Pettiti,
Mr. B. Walsh,
Sir Vincent Evans,
Mr. C. Russo,
Mr. R. Bernhardt,
Mr. J. Gersing,
Mr. A. Spielmann,
Mr. A.M. Donner,

and also of Mr. M.-A. Eissen, Registrar, and Mr. H. Petzold, Deputy Registrar,

Having deliberated in private on 20 March and on 23 and 25 September 1986,

Delivers the following judgment, which was adopted on the last-mentioned date:

Procedure

1. The present case was referred to the Court by the European Commission of Human Rights (“the Commission”) on 14 March 1985, within the three-month period laid down by Article 32 para. 1 and Article 47 (art. 32-1, art. 47) of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”). The case originated in an application (no. 9532/81) against the United Kingdom of Great Britain and Northern Ireland, lodged with the Commission in 1979 by a British citizen, Mr. Mark Rees, under Article 25 (art. 25) of the Convention.

2. The Commission’s request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby the United Kingdom recognised the compulsory jurisdiction of the Court (Article 46) (art. 46). The object of the request was to obtain a decision by the Court as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Articles 8 and 12 (art. 8, art. 12) of the Convention.

3. In response to the inquiry made in accordance with Rule 33 para. 3 (d) of the Rules of Court, the applicant stated that he wished to take part in the proceedings pending before the Court and designated the lawyers who would represent him (Rule 30).

4. The Chamber of seven judges to be constituted included, as ex officio members, Sir Vincent Evans, the elected judge of British nationality (Article 43 of the Convention) (art. 43), and Mr. G. Wiarda, the then President of the Court (Rule 21 para. 3 (b) of the Rules of Court). On 27 March 1985, the President drew by lot, in the presence of the Registrar, the names of the five other members, namely Mrs. D. Bindschedler-Robert, Mr. G. Lagergren, Mr. R. Ryssdal, Mr. C. Russo and Mr. R. Bernhardt (Article 43 in fine of the Convention and Rule 21 para. 4) (art. 43).

5. Mr. Wiarda assumed the office of President of the Chamber (Rule 21 para. 5). He ascertained, through the Registrar, the views of the Agent of the United Kingdom Government (“the Government”), the Delegate of the Commission and the lawyers for the applicant regarding the need for a written procedure (Rule 37 para. 1). Thereafter, in accordance with the Orders and directions of the President of the Chamber, the following documents were lodged at the registry:

- on 19 August 1985, the memorial of the Government;
- on 26 August 1985, the memorial of the applicant;
- on 10 March 1986, various documents requested from the Commission.

By letter received on 13 November 1985, the Secretary to the Commission informed the Registrar that the Delegate did not wish to reply in writing to these memorials.

6. After consulting, through the Registrar, the Agent of the Government, the Commission's Delegate and the applicant's representatives, the President of the Chamber directed on 6 January 1986 that the oral proceedings should open on 18 March 1986 (Rule 38).

7. On 24 January 1986, the Chamber decided to relinquish jurisdiction forthwith in favour of the plenary Court (Rule 50), under the presidency of Mr. Wiarda's successor, Mr. Ryssdal.

8. On 21 February and on 13 March 1986, respectively, the Government and the applicant submitted, of their own motion, a number of further documents.

9. The hearings were held in public at the Human Rights Building, Strasbourg, on 18 March 1986. Immediately before they opened, the Court had held a preparatory meeting.

There appeared before the Court:

- for the Government

Mr. M. Eaton, Legal Counsellor, Foreign and Commonwealth Office, *Agent*,

Mr. N. Bratza, Barrister-at-Law, *Counsel*,

Mr. J. Nursaw, Home Office,

Mr. P. Lucas, Department of Health and Social Security,

Mr. W. Jenkins, Central Register Office, *Advisers*;

- for the Commission

Mr. B. Kiernan, *Delegate*;

- for the applicant

Mr. N. Blake, *Counsel*,

Mr. D. Burgess, *Solicitor*.

10. The Court heard addresses by Mr. Bratza for the Government, by Mr. Kiernan for the Commission and by Mr. Blake for the applicant, as well as their replies to its questions. At the hearing the Government and the applicant filed a number of other documents.

As to the facts

I. The particular circumstances of the case

11. The applicant, a British citizen born in 1942, lives at Tunbridge Wells in England.

12. At birth the applicant possessed all the physical and biological characteristics of a child of the female sex, and was consequently recorded in the register of births as a female, under the

name Brenda Margaret Rees. However, already from a tender age the child started to exhibit masculine behaviour and was ambiguous in appearance. In 1970, after learning that the transsexual state was a medically recognised condition, she sought treatment. She was prescribed methyl testosterone (a hormonal treatment) and started to develop secondary male characteristics.

13. In September 1971, the applicant - who will henceforth be referred to in the masculine - changed his name to Brendan Mark Rees and subsequently, in September 1977, to Mark Nicholas Alban Rees. He has been living as a male ever since. After the change of name, the applicant requested and received a new passport containing his new names. The prefix "Mr." was, however, at that time denied to him.

14. Surgical treatment for physical sexual conversion began in May 1974 with a bilateral mastectomy and led to the removal of feminine external characteristics. The costs of the medical treatment, including the surgical procedures, were borne by the National Health Service.

15. The applicant made several unsuccessful efforts from 1973 onwards to persuade Members of Parliament to introduce a Private Member's Bill to resolve the problems of transsexuals. Representations were also made by him, and by a number of Members of Parliament on his behalf, to the Registrar General to secure the alteration of his birth certificate to show his sex as male, but to no avail.

16. On 10 November 1980 his solicitor wrote to the Registrar General making a formal request under Section 29(3) of the Births and Deaths Registration Act 1953, on the ground that there had been "a mistake in completing the Register". In support of his request, the applicant submitted a medical report by Dr. C.N. Armstrong. The report stated that, in Dr. Armstrong's opinion, of the four criteria of sex - namely chromosomal sex, gonadal sex, apparent sex (external genitalia and body form) and psychological sex, the last was the most important as it determined the individual's social activities and role in adult life, and it was also, in his view, pre-determined at birth, though not evident until later in life. Dr. Armstrong considered that as the applicant's psychological sex was male, he should be assigned male.

On 25 November the Registrar General refused the application to alter the Register. He stated that the report on the applicant's psychological sex was not decisive and that, "in the absence of any medical report on the other agreed criteria (chromosomal sex, gonadal sex and apparent sex)", he was "unable to consider whether an error (had been) made at birth registration in that the child was not of the sex recorded". No further evidence in support of the applicant's request was subsequently submitted.

17. The applicant considers himself a man and is socially accepted as such. Except for the birth certificate, all official documents today refer to him by his new name and the prefix "Mr.", where such prefix is used. The prefix was added to his name in his passport in 1984.

II. Domestic law and practice

A. Medical treatment

18. In the United Kingdom sexual reassignment operations are permitted without legal formalities. The operations and treatment may, as in the case of Mr. Rees, be carried out under the National Health Service.

B. Change of name

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

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

C. Identity documents

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

D. The Register of Births

21. The system of civil registration of births, deaths and marriages was established by statute in England and Wales in 1837. Registration of births is at present governed by the Births and Deaths Registration Act 1953 ("the 1953 Act"). The entry into force of this Act entailed no material change to the law in force in 1942, the date of the applicant's birth. The 1953 Act requires that the birth of every child be registered by the Registrar of Births and Deaths for the area in which the child is born. The particulars to be entered are prescribed in regulations made under the 1953 Act.

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

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

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

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

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

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

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

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

E. Marriage

26. In English law, marriage is defined as a voluntary union for life of one man and one woman to the exclusion of all others (per Lord Penzance in *Hyde v. Hyde* (1868) Law Reports 1 Probate and Divorce 130, 133). Section 11 of the Matrimonial Causes Act 1973

gives statutory effect to the common-law provision that a marriage is void ab initio if the parties are not respectively male and female.

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

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

F. The legal definition of sex for other purposes

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

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

Proceedings before the Commission

30. In his application (no. 9532/81) lodged with the Commission on 18 April 1979, Mr. Rees complained that United Kingdom law did not confer on him a legal status corresponding to his actual condition. He invoked Articles 3, 8 and 12 (art. 3, art. 8, art. 12) of the Convention.

31. On 15 March 1984, the Commission declared admissible the complaints under Articles 8 and 12 (art. 8, art. 12). In its report of 12 December 1984, it expressed the unanimous

opinion that there had been a breach of Article 8 (art. 8), but not of Article 12 (art. 12). The full text of the Commission's opinion is reproduced as an annex to the present judgment.

Final submissions made to the court

32. At the hearing on 18 March 1986, the Government formally invited the Court to reach the conclusion and make the findings (1) that there has been no breach of the right to respect for the private life of the applicant under Article 8 para. 1 (art. 8-1) of the Convention and (2) that there has been no breach of the applicant's right to marry and found a family under Article 12 (art. 12) of the Convention.

The applicant, for his part, asked the Court to find that there had been a breach of both Articles (art. 8, art. 12).

As to the law

I. Alleged violation of Article 8 (art. 8)

33. The applicant claimed to be the victim of national legislation and practices contrary to his right to respect for his private life, enshrined in Article 8 (art. 8), which provides:

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

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

34. The applicant complained primarily of the constraints upon his full integration into social life which were a result of the failure of the Government to provide measures that would legally constitute him as a male for the purposes of the exhaustive classification of all citizens into male or female.

In particular, he complained of the practice of issuing him with a birth certificate on which his sex continued to be recorded as “female”. Such a certificate, he alleged, was effectively an irrebuttable description of his sex, wherever sex was a relevant issue and, revealing as it did the discrepancy between his apparent and his legal sex, it caused him embarrassment and humiliation whenever social practices required its production.

The Government contested the applicant's claim; the Commission, on the other hand, agreed with it in its essentials.

A. Interpretation of Article 8 (art. 8) in the context of the present case

35. The Court has already held on a number of occasions that, although the essential object of Article 8 (art. 8) is to protect the individual against arbitrary interference by the public authorities, there may in addition be positive obligations inherent in an effective respect for

private life, albeit subject to the State's margin of appreciation (see, as the most recent authority, the *Abdulaziz, Cabales and Balkandali* judgment of 28 May 1985, Series A no. 94, pp. 33-34, para. 67).

In the present case it is the existence and scope of such "positive" obligations which have to be determined. The mere refusal to alter the register of births or to issue birth certificates whose contents and nature differ from those of the birth register cannot be considered as interferences.

36. The Commission and the applicant submitted that the applicant has been socially accepted as a man (see paragraph 17 above) and that, consistently with this, the change in his sexual identity should be given full legal recognition by the United Kingdom. It was only with regard to the choice of the necessary measures that there could be any room for a margin of appreciation, or for any balancing with countervailing public interests.

The Government, on the other hand, maintained that the whole matter depended on the balance that had to be struck between the competing interests of the individual and of society as a whole.

37. As the Court pointed out in its above-mentioned *Abdulaziz, Cabales and Balkandali* judgment the notion of "respect" is not clear-cut, especially as far as those positive obligations are concerned: having regard to the diversity of the practices followed and the situations obtaining in the Contracting States, the notion's requirements will vary considerably from case to case.

These observations are particularly relevant here. Several States have, through legislation or by means of legal interpretation or by administrative practice, given transsexuals the option of changing their personal status to fit their newly-gained identity. They have, however, made this option subject to conditions of varying strictness and retained a number of express reservations (for example, as to previously incurred obligations). In other States, such an option does not - or does not yet - exist. It would therefore be true to say that there is at present little common ground between the Contracting States in this area and that, generally speaking, the law appears to be in a transitional stage. Accordingly, this is an area in which the Contracting Parties enjoy a wide margin of appreciation.

In determining whether or not a positive obligation exists, regard must be had to the fair balance that has to be struck between the general interest of the community and the interests of the individual, the search for which balance is inherent in the whole of the Convention (see, *mutatis mutandis*, amongst others, the *James and Others* judgment of 21 February 1986, Series A no. 98, p. 34, para. 50, and the *Sporrong and Lönnroth* judgment of 23 September 1982, Series A no. 52, p. 26, para. 69). In striking this balance the aims mentioned in the second paragraph of Article 8 (art. 8-2) may be of a certain relevance, although this provision refers in terms only to "interferences" with the right protected by the first paragraph - in other words is concerned with the negative obligations flowing therefrom (see, *mutatis mutandis*, the *Marckx* judgment of 13 June 1979, Series A no. 31, p. 15, para. 31).

B. Compliance with Article 8 (art. 8)

38. Transsexualism is not a new condition, but its particular features have been identified and examined only fairly recently. The developments that have taken place in consequence of

these studies have been largely promoted by experts in the medical and scientific fields who have drawn attention to the considerable problems experienced by the individuals concerned and found it possible to alleviate them by means of medical and surgical treatment. The term “transsexual is usually applied to those who, whilst belonging physically to one sex, feel convinced that they belong to the other; they often seek to achieve a more integrated, unambiguous identity by undergoing medical treatment and surgical operations to adapt their physical characteristics to their psychological nature. Transsexuals who have been operated upon thus form a fairly well-defined and identifiable group.

39. In the United Kingdom no uniform, general decision has been adopted either by the legislature or by the courts as to the civil status of post-operative transsexuals. Moreover, there is no integrated system of civil status registration, but only separate registers for births, marriages, deaths and adoption. These record the relevant events in the manner they occurred without, except in special circumstances (see paragraph 22 above), mentioning changes (of name, address, etc.) which in other States are registered.

40. However, transsexuals, like anyone else in the United Kingdom, are free to change their first names and surnames at will (see paragraph 19 above). Similarly, they can be issued with official documents bearing their chosen first names and surnames and indicating, if their sex is mentioned at all, their preferred sex by the relevant prefix (Mr., Mrs., Ms. or Miss) (see paragraph 20 above). This freedom gives them a considerable advantage in comparison with States where all official documents have to conform with the records held by the registry office.

Conversely, the drawback - emphasised by the applicant - is that, as the country’s legal system makes no provision for legally valid civil-status certificates, such persons have on occasion to establish their identity by means of a birth certificate which is either an authenticated copy of or an extract from the birth register. The nature of this register, which furthermore is public, is that the certificates mention the biological sex which the individuals had at the time of their birth (see paragraphs 21 and 24 above). The production of such a birth certificate is not a strict legal requirement, but may on occasion be required in practice for some purposes (see paragraph 25 above).

It is also clear that the United Kingdom does not recognise the applicant as a man for all social purposes. Thus, it would appear that, at the present stage of the development of United Kingdom law, he would be regarded as a woman, *inter alia*, as far as marriage, pension rights and certain employments are concerned (see paragraphs 27 and 29 above). The existence of the unamended birth certificate might also prevent him from entering into certain types of private agreements as a man (see paragraph 25 above).

41. For the applicant and the Commission this situation was incompatible with Article 8 (art. 8), there being in their opinion no justification for it on any ground of public interest. They submitted that the refusal of the Government to amend or annotate the register of births to record the individual’s change of sexual identity and to enable him to be given a birth certificate showing his new identity cannot be justified on any such ground. Such a system of annotation would, according to the applicant, be similar to that existing in the case of adoptions. The applicant and the Commission pointed to the example of certain other Contracting States which have recently made provision for the possibility of having the original indication of sex altered from a given date. The Commission additionally relied on the fact that the United Kingdom, through its free national health service, had borne the costs

of the surgical operations and other medical treatment which the applicant had been enabled to undergo. They considered that this medical recognition of the necessity to assist him to realise his identity must be regarded as a further argument for the legal recognition of the change in his sexual identity; failure to do so had the effect that the applicant was treated as an ambiguous being.

42. The Court is not persuaded by this reasoning.

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

Albeit with delay and some misgivings on the part of the authorities, the United Kingdom has endeavoured to meet the applicant's demands to the fullest extent that its system allowed. The alleged lack of respect therefore seems to come down to a refusal to establish a type of documentation showing, and constituting proof of, current civil status. The introduction of such a system has not hitherto been considered necessary in the United Kingdom. It would have important administrative consequences and would impose new duties on the rest of the population. The governing authorities in the United Kingdom are fully entitled, in the exercise of their margin of appreciation, to take account of the requirements of the situation pertaining there in determining what measures to adopt. While the requirement of striking a fair balance, as developed in paragraph 37 above, may possibly, in the interests of persons in the applicant's situation, call for incidental adjustments to the existing system, it cannot give rise to any direct obligation on the United Kingdom to alter the very basis thereof.

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

Whilst conceding that additions can be made to the entries in the birth register in order to record, for example, subsequent adoption or legitimation (see paragraphs 22-23 above), the Government disputed that the proposed annotation was comparable to additions of this kind. They submitted that, in the absence of any error or omission at the time of birth, the making of an alteration to the register as to the sex of the individual would constitute a falsification of the facts contained therein and would be misleading to other persons with a legitimate interest in being informed of the true situation. They contended that the demands of the public interest weighed strongly against any such alteration.

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

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

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

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

45. This conclusion is not affected by the fact, on which both the Commission and the applicant put a certain emphasis, that the United Kingdom cooperated in the applicant's medical treatment.

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

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

47. That being so, it must for the time being be left to the respondent State to determine to what extent it can meet the remaining demands of transsexuals. However, the Court is conscious of the seriousness of the problems affecting these persons and the distress they suffer. The Convention has always to be interpreted and applied in the light of current circumstances (see, *mutatis mutandis*, amongst others, the Dudgeon judgment of 22 October 1981, Series A no. 45, pp. 23-24, paragraph 60). The need for appropriate legal measures should therefore be kept under review having regard particularly to scientific and societal developments.

II. Alleged violation of Article 12 (art. 12)

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

“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.”

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

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

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

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

For these reasons, the court

1. Holds by twelve votes to three that there is no violation of Article 8 (art. 8);
2. Holds unanimously that there is no violation of Article 12 (art. 12).

Done in English and in French, and delivered at a public hearing at the Human Rights Building, Strasbourg, on 17 October 1986.

Signed: Rolv RYSSDAL (President)

Signed: Marc-André EISSEN (Registrar)

The dissenting opinion of Judges Bindschedler-Robert, Russo and Gersing is annexed to the present judgment in accordance with Article 51 para. 2 (art. 51-2) of the Convention and Rule 52 para. 2 of the Rules of Court.

Initialled: R. R.

Initialled: M.-A. E.

Dissenting opinion of Judges Bindschedler-Robert, Russo and Gersing

(Translation)

1. With regard to Article 8 (art. 8), the applicant complained that the Government had not taken the necessary measures to ensure recognition of his sexual identity in all the circumstances in which this could be of importance. In particular, he criticised the Government for continuing to issue him with a birth certificate showing that he was of the female sex, without any further explanation. The Commission considered that the United

Kingdom had failed to respect the applicant's private life as required under Article 8 para. 1 (art. 8-1) of the Convention, because it had not made any provision for measures which would make it possible to take account, in the applicant's civil status, of any legitimate changes. In what follows, it seems to us that we can accordingly concentrate on the question whether respect for Mr. Rees's private life entails certain measures being taken by the State with respect to the way in which civil-status documents concerning him are drawn up.

2. The operations Mr. Rees underwent and the concomitant anguish and suffering show how real and intense was his desire to adopt a new sexual identity as far as possible. We agree with the majority, moreover, that the United Kingdom endeavoured to go a considerable way towards meeting the applicants's demands, for example by giving him - like everyone else - the opportunity of changing his name, by giving him a passport which showed his new sexual identity and by allowing him to a large extent to adopt socially the male role corresponding to his innermost inclinations and to his new sexual appearance.

3. With regard to one thing - his birth certificate - however, the British authorities did not feel bound or able to take Mr. Rees's new identity into account. In practice, though, it appears necessary to produce a birth certificate in connection with a number of formalities, such as applying for a passport for the first time or enrolling at university. This has resulted - and may again result - in the applicant's having to face distressing situations which amount to an interference with his private life and thus to a breach of Article 8 (art. 8). We are of the view that this could be avoided by means of an annotation in the birth register to the effect that there had been a change in Mr. Rees's sexual identity; at the same time, it could be made possible for the applicant to obtain a short certificate which would indicate only his new sexual identity and thus make it easier to safeguard the inviolability of his private life. We recognise, moreover, that in this sphere the State has a wide margin of appreciation as regards the method to be used in order to remedy the situation in question and we do not in any way rule out the possibility that other measures might achieve the same aim. It will be remembered, for instance, that on 5 October 1982 the Commission endorsed a friendly settlement between a group of applicants and Italy (application no. 9420/81) whereby as a result of an Act recently passed in Italy, the applicants can henceforth secure rectification of their civil status.

4. We do not, on the other hand, consider that Article 8 (art. 8) requires that Mr. Rees be guaranteed secrecy in the sense that only his new sexual identity should appear in all official documents: the birth register is public and there is certainly a public interest in its remaining so.

5. A variety of objections, which seem to us unconvincing, have been made to this conclusion that it is necessary to reflect Mr. Rees's change of sexual identity in official documents concerning him.

(a) There is obviously no question of correcting the registers by concealing the historical truth or of claiming that Mr. Rees has changed sex in the biological sense of the term. The idea is merely (as already happens in the United Kingdom in other cases - for example, with adoption) to mention a development in the person's status due to changes in his apparent sex - what we have called his sexual identity - and to give him the opportunity to obtain a short certificate which does not disclose his previous status. This would better reflect the real situation and to that extent would even be in the public interest.

(b) The arrangement we envisage would certainly not solve all Mr. Rees's problems and would not entirely fulfil his hopes, but it would lessen his difficulties. At all events it would remove the current discrepancy, firstly, between the various identity documents he has to use and, secondly, between his current appearance and the entry relating to his sex in his birth certificate.

(c) Nor does it seem to us that an annotation in the birth register would entail any kind of change in the British system of recording civil status; the practice in other States has shown that this was not an inevitable consequence.

(d) In rejecting the arrangement we recommend, the majority of the Court also relies on the fact that the aforementioned annotation would not relate to facts of legal significance, unlike the case with adoption and legitimation. It may be said against this argument that the annotation in question would also certainly have legal significance even if it was not expressly provided for in law, in that it would imply that in all situations where the apparent sex was decisive (work, retirement, etc.), Mr. Rees should be treated as an individual of the male sex.

6. As regards the alleged breach of Article 12 (art. 12), we share the view of the majority.