

W. v. United Kingdom

Application No. 11095/84

W.

against

the UNITED KINGDOM

REPORT OF THE COMMISSION

(adopted on 7 March 1989)

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I. INTRODUCTION

1. The following is an outline of the case, as submitted to the European Commission of Human Rights, and of the procedure before the Commission.

A. The application

2. The applicant is a British citizen, born on 25 May 1940 and living in London. She is represented by Messrs. Winstanley-Burgess, Solicitors in London.

3. The application is directed against the United Kingdom. The respondent Government are represented by their Agent, Mr. M.C. Wood, Foreign and Commonwealth Office.

4. The applicant is a transsexual who was registered at birth as being of male sex. When adult the applicant underwent extensive medical and surgical treatment changing sex from male to female.

5. The applicant complains that under United Kingdom law she cannot claim full recognition of her changed status and cannot marry a person of male sex and adopt children with a male partner. She invokes in particular Articles 8 and 12 of the Convention.

B. The proceedings

6. The application was introduced on 16 August 1984 and registered on 21 August 1984. On 6 May 1985 the Commission decided in accordance with Rule 42 (2) (b) of its Rules of Procedure to give notice of the application to the respondent Government. In view of an analogous application, No. 9532/81, Rees v. United Kingdom (see para. 18 below), which had been declared admissible on 14 March 1984 and was at the time still pending before the European Court of Human Rights, the respondent Government stated in a letter of 8 July 1985 that they did not object to the Commission declaring the complaints under Articles 8 and 12 of the Convention admissible.

7. On 10 October 1985 the Commission declared the application admissible. It found that the case raised issues under Articles 8 and 12 of the Convention, analogous to those in the Rees case, but not under Article 3 of the Convention which had also been invoked by the applicant. The Commission then adjourned the examination of the application pending the Court's judgment in the Rees case.

8. On 10 December 1986, following the Court's judgment in that case, the Commission resumed the examination of the present case and on 9 May 1987 it decided to request the parties to submit such further observations as they wished to make in the light of that judgment. The applicant submitted further observations on 25 August 1987, while the respondent Government stated in a letter of 16 June 1987 that

they saw no necessity to submit supplementary observations. In a further letter dated 29 September 1987 the Government stated that they did not wish to reply to the applicant's last submissions.

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

C. The present Report

10. The present Report has been drawn up by the Commission in pursuance of Article 31 of the Convention and after deliberations and votes, the following members being present:

MM. C. A. NØRGAARD, President
J. A. FROWEIN
S. TRECHSEL
G. SPERDUTI
E. BUSUTTIL
G. JØRUNDSSON
A. WEITZEL
J. C. SOYER
H. G. SCHERMERS
H. DANELIUS
G. BATLINER
Sir Basil HALL
M. F. MARTINEZ
Mrs. J. LIDDY

11. The text of this Report was adopted on 7 March 1989 and is now transmitted to the Committee of Ministers of the Council of Europe, in accordance with Article 31 para. 2 of the Convention.

12. The purpose of the Report, pursuant to Article 31 of the Convention, is:

- i) to establish the facts, and
- ii) to state an opinion as to whether the facts found disclose a breach by the State concerned of its obligations under the Convention.

13. A schedule setting out the history of the proceedings before the Commission is attached hereto as Appendix I and the Commission's decision on the admissibility of the application as Appendix II.

14. The full text of the parties' submissions, together with the documents lodged as exhibits, are held in the archives of the Commission.

II. ESTABLISHMENT OF THE FACTS

A. The particular circumstances of the case

15. The applicant was born as a boy and registered as such in the birth register under the christian names Richard Timothy Scott. Growing up she became more and more aware of the conflict between her

sense of femininity and her male physique. However, influenced by the attitude of her family she married in 1964 and had two children. The couple separated in 1967. Subsequently, the applicant started to undergo hormonal therapy but the social pressure became so great that she stopped the treatment. She married again and had two more children by the second wife. The couple separated in 1978 and in the autumn of 1979 the applicant consulted the gender identity clinic of Charing Cross Hospital, London. She was prescribed hormone therapy in preparation for gender reassignment surgery which was performed in October 1983. Although the applicant had been accepted for National Health Service surgery, the waiting list obliged her to arrange for private surgery. The surgical treatment has led to the removal of masculine external characteristics. The hormone treatment has led to the appearance of secondary feminine characteristics.

16. The applicant now considers herself a woman and is socially accepted as such. She adopted a female identity and arranged for all her documentation to be appropriately adapted. Her National Health Service medical card, her driving licence and her passport were altered to show her female identity. The Department of Health and Social Security informed the applicant in a letter of 22 February 1982 that her records had been changed to a female title and name but that this change would in no way affect her liability and her benefit entitlements which remained those of a man.

17. On 10 May 1982 the applicant changed her name by statutory declaration to Rachel Terry Scott W. The applicant did not apply for an amendment of her birth register and birth certificate to record the change in her status from male to female as there is no provision in the United Kingdom law allowing that such an alteration of the entries in the register be made (see para. 18 in fine).

18. The above-mentioned case of Rees was decided by the European Court of Human Rights on 17 October 1986 with the finding that there was no violation of Articles 8 and 12 of the Convention (Series A no. 106). The applicant in that case was born in 1942 as a child of female sex and had been recorded in the birth register as a female. In 1974 he had undergone medical treatment for physical sexual conversion. He changed his names to male names and had been living as a male but had not been allowed to change the indication of his sex in the birth register.

B. Relevant domestic law and practice

1. Medical treatment

19. In the United Kingdom sexual reassignment operations are permitted without legal formalities. The operations and treatment may be carried out under the National Health Service.

2. Change of name

20. 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 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.

3. Identity documents

21. 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.

4. The Register of Births

22. 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 1940, 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 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.

23. 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.

24. 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 Register 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.

25. 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.

26. 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.

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.

5. Marriage

27. 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.

28. 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.

29. 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 or she 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.

6. The legal definition of sex for other purposes

30. 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.

In the *Rees* case the applicant had 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 purpose of retirement age; in the first case the person in question had only received hormone therapy, in the second she 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 Report p. 121).

III. OPINION OF THE COMMISSION

A. Points at issue

31. The points at issue in the present application are

- whether there has been a violation of the applicant's right, under Article 8 (Art. 8) of the Convention, to respect for her private life, in that, under United Kingdom law, she cannot claim recognition of her present status by a change of the birth register and the birth certificate; and
- whether there has been a violation of Article 12 (Art. 12) of the Convention, in that, under United Kingdom law, she cannot marry a person of male sex and adopt children with a male partner.

B. Article 8 (Art. 8) of the Convention

32. Article 8 (Art. 8) of the Convention 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."

33. The applicant submits that since her application was made she has become a councillor at the London Borough of Lambeth. During the course of her electoral campaign for this position she allegedly suffered vilification in press reports. She considers that, had her sexual identity been harmonised by law, such prurient interest in her sexual identity would have been greatly reduced. The applicant criticises the Court's reasoning in the Rees case. She states that the applicant in that case required the United Kingdom to pass legislation to recognise Mr. Rees as a man. Such legislation would have no effect on the rest of the population apart from the comforting consideration that they could categorise their fellow citizens into male and female once more and eliminate the present third category of ambiguists. Furthermore, the Court's reasoning relating to Mr. Rees' request that an annotation be made in the birth register about the change of sex and that this annotation be kept secret from third parties missed the point. The Court considered that secrecy could prejudice the purpose and function of the birth register. The applicant submits that under the present adoption system the public are not allowed access to a register on which the original particulars of the adopted persons are recorded. Accordingly, the principle of public access had already been breached in the interests of social policies. Further, if the Court considered that the requirement of access to the register was of critical importance, there was no reason why it could not have required the endorsement of the change of sex on the register without the restriction of access to the amended register. While this solution would not be considered adequate by the applicant, it would have presented an advance on the present position in the United Kingdom and would require the authorities to recognise that something significant had happened to the individual's identity.

34. The applicant further points out that the change of name in documents such as driving licence and passport has no legal significance for a person's sexual identity. The documents in question are documents of description only and not of legal identity.

35. The respondent Government consider the applicant's criticisms of the judgment in the Rees case to be ill-founded. It is submitted that the applicant's assertion that members of the public are not allowed access to a register in which the original particulars of adopted persons are recorded is incorrect. The law requires that certified copies (certificates) be issued from an entry which has been marked "adopted" to any person who can identify the entry from the indexes. Thus, access to the original birth record of a person who has been adopted is no different from any other birth entry.

36. As regards compliance with Article 8 (Art. 8) of the Convention by the United Kingdom in relation to transsexuals, the Commission refers to the Rees judgment of 17 October 1986 (Eur. Court H.R., Series A, Vol. 106, p. 15-18 paras. 38-46) in which the Court stated:

"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 ..., 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 ... 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) ... 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 ... The production of such a birth certificate is not a strict legal requirement, but may on occasion be required in practice for some purposes ...

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 ... The existence of the unamended birth certificate might also prevent him from entering into certain types of private agreements as a man ...

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 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 ... 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 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 ..., 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, (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 co-operated 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."

37. The Commission considers that the present application does not reveal a particular novel aspect of the situation of transsexuals in the United Kingdom, distinguishing it from the situation in the Rees case. In fact, it follows from paragraph 40 of the above-cited judgment that the Court took into consideration that, at the present stage of the development in the United Kingdom law, a transsexual is not recognised in his/her new status, inter alia, as far as marriage, pension rights and certain employments are concerned. The Court consequently took into consideration all drawbacks for transsexuals of the existing legal system. Nevertheless, it considered that "it must for the time being be left to the United Kingdom to determine to what extent it can meet the remaining demands of transsexuals" (loc. cit., para. 47).

38. Conclusion

The Commission concludes, by a unanimous vote, that there has been no violation of Article 8 (Art. 8) of the Convention in the present case.

C. Article 12 (Art. 12) of the Convention

39. 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 law governing the exercise of this right."

40. The applicant alleges a violation of this provision because she cannot marry a man and adopt children with him. She submits that her case is different from the Rees case as she could consummate marriage with a man. She considers that the development of the personality and self-fulfilment through a legally recognised life-long union are as valid objectives encompassed by the right to marry as the founding of a family by way of procreation.

As regards compliance with Article 12 (Art. 12) of the Convention by the United Kingdom in relation to transsexuals, the Commission again refers to the Rees judgment (loc. cit.), in which the Court stated in this respect:

"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:

...

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."

40. The Commission sees no reason to depart from these findings.

41. Conclusion

The Commission concludes, by 13 votes to 1, that there has been no violation of Article 12 (Art. 12) of the Convention in the present case.

D. Recapitulation

42. The Commission concludes, by a unanimous vote, that there has been no violation of Article 8 (Art. 8) of the Convention in the present case (para. 38).

43. The Commission concludes, by 13 votes to 1, that there has been no violation of Article 12 (Art. 12) of the Convention in the present case (para. 41).

Secretary to the Commission

President of the Commission

(H.C. KRÖGER)

(C.A. NØRGAARD)

Dissenting opinion of Mr. H.G. Schermers

In the Rees case (9532/81) which is analogous to the present

one the Commission unanimously found a violation of Article 8 of the Convention (Eur. Court H.R., judgment of 12 December 1984, Series A, No. 106, p. 27). The Court, however, found no breach of the Article in its decision of 17 October 1986 (*idem*, p. 18).

With respect to Article 8, the Commission considered that the present application did not reveal any new aspects in the situation of transsexuals in the United Kingdom which distinguished it from the situation in the Rees case (para. 37 of the Report). Feeling obliged to follow the Court's decision in that case it concluded that there had been no violation of Article 8 of the Convention.

Having regard to the importance of consistency between the decisions of the Commission and the Court I saw no sufficient ground for dissenting from that conclusion.

With respect to Article 12, the situation may be different, however. In the Rees case the Commission found no violation of that article. With some other members I supported that conclusion for the following reasons:

"It is true that as things stand the applicant is legally not entitled to marry a woman. This is, however, not the result of a specific act on the part of the respondent Government. It results directly from the fact that the applicant is not recognised as a 'man', a matter of which account has already been taken in connection with Article 8 of the Convention. There is no reason to believe that once this obstacle has been removed the applicant is still not able to marry. Both from the applicant's point of view and that of the respondent Government, the applicant's complaint based on an alleged violation of Article 12 of the Convention is thus in the last analysis identical with that raised under Article 8. What he is complaining of is only a necessary consequence of the violation of Article 8.

We conclude that there is no separate violation of Article 12." (Quoted from Eur. Court H.R., Series A. no. 106, p. 27).

In the present case, where no violation of Article 8 has been found, our opinion as to a possible violation of Article 12 must be reconsidered.

Article 12 provides that "men and women of marriageable age have the right to marry and to found a family according to the individual laws governing the exercise of this right." The Article contains two (interconnected) rights: the right to marry and the right to found a family. Unlike Articles 8-11, Article 12 has no second paragraph providing for interference with these rights by the public authorities in exceptional circumstances. This underlines the fundamental character of the right to marry and to found a family. In principle, these rights cannot be set aside in the public interest, and there are good reasons for that. The right to live in a family

and - when of marriageable age - to found a family is of paramount importance for the individual. Denial of this right means condemnation to solitude and loneliness. There must be strong arguments to justify such a condemnation.

In my opinion the fundamental human right underlying Article

12 should also be granted to homosexual and lesbian couples. They should not be denied the right to found a family without good reasons. That question is not, however, at stake in the present case, which concerns a person who, psychologically, is a woman, and who feels and acts like a woman. The Commission, therefore, in ascertaining the facts, under Article 28 of the Convention, would be entitled to hold that for the purpose of Article 12 the applicant is a woman and therefore should have the right to marry a man.

In this respect the Rees judgment of the Court would be no obstacle. In that case, the Commission did not establish the sex of the applicant specifically for the purpose of Article 12, as its decision was founded on Article 8. It is not for the Court to establish the facts and it did not actually do so in the Rees case. Its reasoning with respect to Article 12 in that case is very short (para. 48-51, entirely quoted in para. 40 of the above Report of the Commission). It concerns only the right to marry, not the right to found a family. The Court refers (in para 16 of its decision in the Rees case, Series A. no. 106, p. 9) to the expert opinion of Dr. Armstrong who mentions four criteria of sex - namely chromosomal sex, gonadal sex, apparent sex and psychological sex - but in its decision the Court only mentions "biological sex", without explaining what that means. All four criteria of sex mentioned by Dr. Armstrong are biological. In the final part of para. 42 of the Rees judgment (p. 18) the Court seems to accept that biological sex is not the same as apparent sex, but that it has many different characteristics. In the middle of para. 40 the Court refers to the "biological sex which the individuals had at the time of their birth", thus implying that the biological sex may change later. Therefore, the wording used by the Court in the Rees case does not clearly exclude the marriage of two persons of opposite psychological sexes. But even if the Court wished to express in the latter case that Mr. Rees was not of the male sex - though referred to by the Court as "Mr" -, that does not prevent the Commission from concluding that in the present case Mrs. W. is of female sex, at least with regard to the application of Article 12.

My conclusion, therefore, is that, without contradicting existing case law, the Commission could have found a violation of Article 12 of the Convention in respect of the right to marry, and more particularly in respect of the right to found a family.

So much for my legal reasoning. There is however one further argument, which concerns the application of the principle of proportionality, a moral principle which is at the same time one of the fundamental principles of law. Almost any individual right may be sacrificed when the higher interests of others or of the community so require. But the interests involved should be carefully weighed up. It is with good reason that scales are used as a symbol of justice. In the present case all the rights and interests should be weighed. In one pan of the scales we find the fundamental interests of a human being. The applicant feels so strongly female that she underwent the enormous inconvenience of an operation and treatment to change her outward appearance from male to female. She feels strongly feminine and wants to be a mother. Although she cannot bear children she could adopt them if she were permitted to found a family. Her right to

family life, her right to play the ultimate feminine role of mother, is at stake in one pan of the scales. What is there on the other side to justify denying her that right, to justify ruining a human life?

I find very little on the other side of the scales. It has been said that public order would be disturbed if persons of the same sex could found a family. I doubt whether that is a valid argument, but it is not in issue. The applicant is a woman or at least in many respects can easily be regarded as a woman. The number of transsexuals who have undergone operations to change their sex is so limited that one cannot really expect disturbance of public order if they are allowed to marry. Others consider that the social purpose of Article 12 includes the physical capacity to procreate. Traditionally this may indeed have been one of the purposes of marriage, but it is not - in any case no longer - its only role in society. Its function of establishing and preserving the family as the smallest and most important unit of society is at least equally important. Furthermore, it would be unacceptable discrimination if only those who are able to procreate had the right to family life. Is there anything else weighting on this side of the scales? Administrative difficulties? More administrative efforts are made for the sake of many less important human interests. As far as I can see no balance can be struck between the two pans of the scales, when one contains the most essential elements of the life of a human being and the other is practically empty. The flagrant imbalance between the interests involved is a clear indication that the situation is unsatisfactory.

APPENDIX I

HISTORY OF PROCEEDINGS

Date	Item
16 August 1984	Introduction of the application
21 August 1984	Registration of the application
Examination of admissibility	
6 May 1985	Commission's decision to invite the Government to submit observations on the admissibility and merits of the application
8 July 1985	Government renounces submission of observations in view of the Rees case
10 October 1985	Commission declares the application admissible and adjourns its examination of the merits pending the outcome of the Rees case
Examination of the merits	
10 December 1986	Commission's deliberations
9 May 1987	Commission's decision to invite the parties to submit observations on the merits in the light of the

	Rees judgment
16 June 1987	Government's letter
25 August 1987	Applicant's observations
29 September 1987	Government's letter
6 May 1988	Commission considers state of proceedings
7 March 1989	Commission's deliberations on the merits, final vote and adoption of the Report