COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

CASE OF CHRISTINE GOODWIN v. THE UNITED KINGDOM

(Application no. 28957/95)

JUDGMENT

STRASBOURG

11 July 2002

This judgment is final but may be subject to editorial revision.

In the case of Christine Goodwin v. the United Kingdom,

The European Court of Human Rights, sitting as a Grand Chamber composed of the following judges:

Mr L. WILDHABER, *President*,
Mr J.-P. COSTA,
Sir Nicolas BRATZA,
Mrs E. PALM,
Mr L. CAFLISCH,
Mr R. TÜRMEN,
Mrs F. TULKENS,
Mr K. JUNGWIERT,
Mr M. FISCHBACH,
Mr V. BUTKEVYCH,
Mrs N. VAJIĆ,
Mr J. HEDIGAN,
Mrs H.S. GREVE,
Mr A.B. BAKA,
Mr K. TRAJA,
Mr M. UGREKHELIDZE,
Mrs A. MULARONI, *judges*,

and also of Mr P. J. MAHONEY, *Registrar*,

Having deliberated in private on 20 March and 3 July 2002,

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

PROCEDURE

1. The case originated in an application (no. 28957/95) against the United Kingdom of Great Britain and Northern Ireland lodged with the European Commission of Human Rights ("the Commission") under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a United Kingdom national, Ms Christine Goodwin ("the applicant"), on 5 June 1995.

2. The applicant, who had been granted legal aid, was represented by Bindman & Partners, solicitors practising in London. The United Kingdom Government ("the Government") were represented by their Agent, Mr D. Walton of the Foreign and Commonwealth Office, London.

3. The applicant alleged violations of Articles 8, 12, 13 and 14 of the Convention in respect of the legal status of transsexuals in the United Kingdom and particularly their treatment in the sphere of employment, social security, pensions and marriage.

4. The application was declared admissible by the Commission on 1 December 1997 and transmitted to the Court on 1 November 1999 in accordance with Article 5 § 3, second sentence, of Protocol No. 11 to the Convention, the Commission not having completed its examination of the case by that date.

5. The application was allocated to the Third Section of the Court (Rule 52 § 1 of the Rules of Court).

6. The applicant and the Government each filed observations on the merits (Rule 59 § 1).

7. On 11 September 2001, a Chamber of that Section, composed of the following judges: Mr J.-P. Costa, Mr W. Fuhrmann, Mr P. Kūris, Mrs F. Tulkens, Mr K. Jungwiert, Sir Nicolas Bratza and Mr K. Traja, and also of Mrs S. Dollé, Section Registrar, relinquished jurisdiction in favour of the Grand Chamber, neither of the parties having objected to relinquishment (Article 30 of the Convention and Rule 72).

8. The composition of the Grand Chamber was determined according to the provisions of Article 27 §§ 2 and 3 of the Convention and Rule 24 of the Rules of Court. The President of the Court decided that in the interests of the proper administration of justice, the case should be assigned to the Grand Chamber that had been constituted to hear the case of *I. v. the United Kingdom* (application no. 25680/94) (Rules 24, 43 § 2 and 71).

9. The applicant and the Government each filed a memorial on the merits. In addition, third-party comments were received from Liberty, which had been given leave by the President to intervene in the written procedure (Article 36 § 2 of the Convention and Rule 61 § 3).

10. A hearing in this case and the case of *I. v. the United Kingdom* (no. 25680/94) took place in public in the Human Rights Building, Strasbourg, on 20 March 2002 (Rule 59 § 2).

There appeared before the Court:

(a) *for the Government*

Mr	D. WALTON,	*Agent*,
Mr	RABINDER SINGH,	*Counsel*,
Mr	J. STRACHAN,	*Counsel,*
Mr	C. LLOYD,	
Ms	A. POWICK,	
Ms	S. EISA,	*Advisers*;

(b) *for the applicant*

Ms	L. COX, Q.C.,	*Counsel,*
Mr	T. EICKE,	*Counsel,*
Ms	J. SOHRAB,	*Solicitor.*

The applicant was also present.

The Court heard addresses by Ms Cox and Mr Rabinder Singh.

11. On 3 July 2002, Mrs Tsatsa-Nikolovska and Mr Zagrebelsky who were unable to take part in further consideration of the case, were replaced by Mrs Mularoni and Mr Caflisch.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

12. The applicant is a United Kingdom citizen born in 1937 and is a post-operative male to female transsexual.

13. The applicant had a tendency to dress as a woman from early childhood and underwent aversion therapy in 1963-64. In the mid-1960s, she was diagnosed as a transsexual. Though she married a woman and they had four children, her conviction was that her "brain sex" did not fit her body. From that time until 1984 she dressed as a man for work but as a woman in her free time. In January 1985, the applicant began treatment in earnest, attending appointments once every three months at the Gender Identity Clinic at the Charing Cross Hospital, which included regular consultations with a psychiatrist as well as on occasion a psychologist. She was prescribed hormone therapy, began attending grooming classes and voice training. Since this time, she has lived fully as a woman. In October 1986, she underwent surgery to shorten her vocal chords. In August 1987, she was accepted on the waiting list for gender re-assignment surgery. In 1990, she underwent gender re-assignment surgery at a National Health Service hospital. Her treatment and surgery was provided for and paid for by the National Health Service.

14. The applicant divorced from her former wife on a date unspecified but continued to enjoy the love and support of her children.

15. The applicant claims that between 1990 and 1992 she was sexually harassed by colleagues at work. She attempted to pursue a case of sexual harassment in the Industrial Tribunal but claimed that she was unsuccessful because she was considered in law to be a man. She did not challenge this decision by appealing to the Employment Appeal Tribunal. The applicant was subsequently dismissed from her employment for reasons connected with her health, but alleges that the real reason was that she was a transsexual.

16. In 1996, the applicant started work with a new employer and was required to provide her National Insurance ("NI") number. She was concerned that the new employer would be in a position to trace her details

as once in the possession of the number it would have been possible to find out about her previous employers and obtain information from them. Although she requested the allocation of a new NI number from the Department of Social Security ("DSS"), this was rejected and she eventually gave the new employer her NI number. The applicant claims that the new employer has now traced back her identity as she began experiencing problems at work. Colleagues stopped speaking to her and she was told that everyone was talking about her behind her back.

17. The DSS Contributions Agency informed the applicant that she would be ineligible for a State pension at the age of 60, the age of entitlement for women in the United Kingdom. In April 1997, the DSS informed the applicant that her pension contributions would have to be continued until the date at which she reached the age of 65, being the age of entitlement for men, namely April 2002. On 23 April 1997, she therefore entered into an undertaking with the DSS to pay direct the NI contributions which would otherwise be deducted by her employer as for all male employees. In the light of this undertaking, on 2 May 1997, the DSS Contributions Agency issued the applicant with a Form CF 384 Age Exemption Certificate (see Relevant domestic law and practice below).

18. The applicant's files at the DSS were marked "sensitive" to ensure that only an employee of a particular grade had access to her files. This meant in practice that the applicant had to make special appointments for even the most trivial matters and could not deal directly with the local office or deal with queries over the telephone. Her record continues to state her sex as male and despite the "special procedures" she has received letters from the DSS addressed to the male name which she was given at birth.

19. In a number of instances, the applicant stated that she has had to choose between revealing her birth certificate and foregoing certain advantages which were conditional upon her producing her birth certificate. In particular, she has not followed through a loan conditional upon life insurance, a re-mortgage offer and an entitlement to winter fuel allowance from the DSS. Similarly, the applicant remains obliged to pay the higher motor insurance premiums applicable to men. Nor did she feel able to report a theft of 200 pounds sterling to the police, for fear that the investigation would require her to reveal her identity.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Names

20. Under English law, a person is entitled to adopt such first names or surname as he or she wishes. Such names are valid for the purposes of identification and may be used in passports, driving licences, medical and insurance cards, etc. The new names are also entered on the electoral roll.

B. Marriage and definition of gender in domestic law

21. Under English law, marriage is defined as the voluntary union between a man and a woman. In the case of *Corbett v. Corbett* ([1971] Probate Reports 83), Mr Justice Ormrod ruled that sex for that purpose is to be determined by the application of chromosomal, gonadal and genital tests where these are congruent and without regard to any surgical intervention. This use of biological criteria to determine sex was approved by the Court of Appeal in *R. v. Tan* ([1983] Queen's Bench Reports 1053) and given more general application, the court holding 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 reassignment therapy.

22. Under section 11(b) of the Matrimonial Causes Act 1973, any marriage where the parties are not respectively male and female is void. The test applied as to the sex of the partners to a marriage is that laid down in the above-mentioned case of *Corbett v. Corbett*. According to that same decision a marriage between a male-to-female transsexual and a man might also be avoided on the basis that the transsexual was incapable of consummating the marriage in the context of ordinary and complete sexual intercourse (*obiter per* Mr Justice Ormrod).

This decision was reinforced by Section 12(a) of the Matrimonial Causes Act 1973, according to which a marriage that 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 would not seek a decree of nullity, and that it would be unjust to grant the decree.

C. Birth certificates

23. Registration of births is governed by the Births and Deaths Registration Act 1953 ("the 1953 Act"). Section 1(1) of that 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. An entry is regarded as a record of the facts at the time of birth. A birth certificate accordingly constitutes a document revealing not current identity but historical facts.

24. The sex of the child must be entered on the birth certificate. 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) as laid down by Mr Justice Ormrod in the above-mentioned case of *Corbett v. Corbett*.

25. 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. It is necessary for that purpose to adduce medical evidence that the initial entry was incorrect. 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.

26. The Government point out that the use of a birth certificate for identification purposes is discouraged by the Registrar General, and for a number of years birth certificates have contained a warning that they are not evidence of the identity of the person presenting it. However, it is a matter for individuals whether to follow this recommendation.

D. Social security, employment and pensions

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

1. National Insurance

28. The DSS registers every British citizen for National Insurance purposes ("NI") on the basis of the information in their birth certificate. Non-British citizens who wish to register for NI in the United Kingdom may use their passport or identification card as evidence of identity if a birth certificate is unavailable.

29. The DSS allocates every person registered for NI with a unique NI number. The NI number has a standard format consisting of two letters followed by three pairs of numbers and a further letter. It contains no indication in itself of the holder's sex or of any other personal information. The NI number is used to identify each person with a NI account (there are at present approximately 60 million individual NI accounts). The DSS are thereby able to record details of all NI contributions paid into the account

during the NI account holder's life and to monitor each person's liabilities, contributions and entitlement to benefits accurately. New numbers may in exceptional cases be issued to persons e.g. under the witness protection schemes or to protect the identity of child offenders.

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

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

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

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

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

34. Any person may adopt such first name, surname or style of address (e.g. Mr, Mrs, Miss, Ms) that he or she wishes for the purposes of the name used for NI registration. The DSS will record any such amendments on the person's computer records, manual records and NI number card. But, the DSS operates a policy of only issuing one NI number for each person regardless of any changes that occur to that person's sexual identity through procedures such as gender re-assignment surgery. A renewed application for leave to apply for judicial review of the legality of this policy brought by a male-to-female transsexual was dismissed by the Court of Appeal in the case of *R v. Secretary of State for Social Services ex parte Hooker (1993) (unreported)*. McCowan LJ giving the judgment of the Court stated (at page 3 of the transcript):

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

35. Information held in the DSS NI records is confidential and will not normally be disclosed to third parties without the consent of the person concerned. Exceptions are possible in cases where the public interest is at stake or the disclosure is necessary to protect public funds. By virtue of

Section 123 of the Social Security Administration Act 1992, it is an offence for any person employed in social security administration to disclose without lawful authority information acquired in the course of his or her employment.

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

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

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

2. State pensions

39. A male-to-female transsexual is currently entitled to a State pension at the retirement age of 65 applied to men and not the age of 60 which is applicable to women. A full pension will be payable only if she has made contributions for 44 years as opposed to the 39 years required of women.

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

In the case entitled *R(P) 2/80*, a male-to-female transsexual claimed entitlement to a pensionable age of 60. The Commissioner dismissed the claimant's appeal and stated at paragraph 9 of his decision:

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

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

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

41. The Government have instituted plans to eradicate the difference between men and women concerning age of entitlement to State pensions. Equalisation of the pension age is to begin in 2010 and it is anticipated that by 2020 the transition will be complete. As regards the issue of free bus passes in London, which also differentiated between men and women concerning age of eligibility (65 and 60 respectively), the Government have also announced plans to introduce a uniform age.

3. Employment

42. Under section 16(1) of the Theft Act 1968, it is a criminal offence liable to a sentence of imprisonment to dishonestly obtain a pecuniary advantage by deception. Pecuniary advantage includes, under section 16(2)(c), being given the opportunity to earn remuneration in employment. Should a post-operative transsexual be asked by a prospective employer to disclose all their previous names, but fail to make full disclosure before entering into a contract of employment, an offence might be committed. Furthermore, should the employer discover the lack of full disclosure, there might also be a risk of dismissal or an action by the employer for damages.

43. In its judgment of 30 April 1996, in the case of *P. v. S. and Cornwall County Council*, the European Court of Justice (ECJ) held that discrimination arising from gender reassignment constituted discrimination on grounds of sex and, accordingly, Article 5 § 1 of Council Directive 76/207/EEC of 9 February 1976 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 a gender reassignment. The

ECJ held, rejecting the argument of the United Kingdom Government 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 reassignment, 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 reassignment.
>
> 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." (paragraphs 21–22)

44. The ruling of the ECJ was applied by the Employment Appeal Tribunal in a decision handed down on 27 June 1997 (*Chessington World of Adventures Ltd v. Reed* [1997] 1 Industrial Law Reports).

45. The Sexual Discrimination (Gender Re-assignment) Regulations 1999 were issued to comply with the ruling of the European Court of Justice in *P. v. S. and Cornwall County Council* (30 April 1996). This provides generally that transsexual persons should not be treated less favourably in employment because they are transsexual (whether pre- or post-operative).

E. Rape

46. Prior to 1994, for the purposes of the law of rape, a male-to-female transsexual would have been regarded as a male. Pursuant to section 142 of the Criminal Justice and Public Order Act 1994, for rape to be established there has to be "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: *R. v. Matthews (unreported)*.

F. Imprisonment

47. Prison rules require that male and female prisoners shall normally be detained separately and also that no prisoner shall be stripped and searched in the sight of a person of the opposite sex (Rules 12(1) and 41(3) of the Prison Rules 1999 respectively).

48. According to the Report of the Working Group on Transsexual People (Home Office April 2000, see further below, paragraphs 49-50), which conducted a review of law and practice, post-operative transsexuals where possible were allocated to an establishment for prisoners of their new gender. Detailed guidelines concerning the searching of transsexual prisoners were under consideration by which post-operative male to female transsexuals would be treated as women for the purposes of searches and searched only by women (see paragraphs 2.75-2.76).

G. Current developments

1. Review of the situation of transsexuals in the United Kingdom

49. On 14 April 1999, the Secretary of State for the Home Department announced the establishment of an Interdepartmental Working Group on Transsexual People with the following terms of reference:

> "to consider, with particular reference to birth certificates, the need for appropriate legal measures to address the problems experienced by transsexuals, having due regard to scientific and societal developments, and measures undertaken in other countries to deal with this issue."

50. The Working Group produced a report in April 2000 in which it examined the current position of transsexuals in the United Kingdom, with particular reference to their status under national law and the changes which might be made. It concluded:

> "5.1. Transsexual people deal with their condition in different ways. Some live in the opposite sex without any treatment to acquire its physical attributes. Others take hormones so as to obtain some of the secondary characteristics of their chosen sex. A smaller number will undergo surgical procedures to make their bodies resemble, so far as possible, those of their acquired gender. The extent of treatment may be determined by individual choice, or by other factors such as health or financial resources. Many people revert to their biological sex after living for some time in the opposite sex, and some alternate between the two sexes throughout their lives. Consideration of the way forward must therefore take into account the needs of people at these different stages of change.
>
> 5.2. Measures have already been taken in a number of areas to assist transsexual people. For example, discrimination in employment against people on the basis of their transsexuality has been prohibited by the Sex Discrimination (Gender Reassignment) Regulations 1999 which, with few exceptions, provide that a transsexual person (whether pre- or post-operative) should not be treated less favourably because they are transsexual. The criminal justice system (i.e. the police, prisons, courts, etc.) try to accommodate the needs of transsexual people so far as is possible within operational constraints. A transsexual offender will normally be charged in their acquired gender, and a post-operative prisoner will usually be sent to a prison appropriate to their new status. Transsexual victims and witnesses will, in most circumstances, similarly be treated as belonging to their acquired gender.
>
> 5.3. In addition, official documents will often be issued in the acquired gender where the issue is identifying the individual rather than legal status. Thus, a transsexual person may obtain a passport, driving licence, medical card etc, in their new gender. We understand that many non-governmental bodies, such as examination authorities, will often re-issue examination certificates etc. (or otherwise provide evidence of qualifications) showing the required gender. We also found that at least one insurance company will issue policies to transsexual people in their acquired gender.

5.4. Notwithstanding such provisions, transsexual people are conscious of certain problems which do not have to be faced by the majority of the population. Submissions to the Group suggested that the principal areas where the transsexual community is seeking change are birth certificates, the right to marry and full recognition of their new gender for all legal purposes.

5.5. We have identified three options for the future;

– to leave the current situation unchanged;

– to issue birth certificates showing the new name and, possibly, the new gender;

– to grant full legal recognition of the new gender subject to certain criteria and procedures.

We suggest that before taking a view on these options the Government may wish to put the issues out to public consultation."

51. The report was presented to Parliament in July 2000. Copies were placed in the libraries of both Houses of Parliament and sent to 280 recipients, including Working Group members, Government officials, Members of Parliament, individuals and organisations. It was publicised by a Home Office press notice and made available to members of the public through application to the Home Office in writing, E-mail, by telephone or the Home Office web site.

2. Recent domestic case-law

52. In the case of *Bellinger v. Bellinger*, EWCA Civ 1140 [2001], 3 FCR 1, the appellant who had been classified at birth as a man had undergone gender re-assignment surgery and in 1981 had gone through a form of marriage with a man who was aware of her background. She sought a declaration under the Family Law Act 1986 that the marriage was valid. The Court of Appeal held, by a majority, that the appellant's marriage was invalid as the parties were not respectively male and female, which terms were to be determined by biological criteria as set out in the decision of *Corbett v. Corbett* [1971]. Although it was noted that there was an increasing emphasis upon the impact of psychological factors on gender, there was no clear point at which such factors could be said to have effected a change of gender. A person correctly registered as male at birth, who had undergone gender reassignment surgery and was now living as a woman was biologically a male and therefore could not be defined as female for the purposes of marriage. It was for Parliament, not for the courts, to decide at what point it would be appropriate to recognise that a person who had been assigned to one sex at birth had changed gender for the purposes of marriage. Dame Elizabeth Butler-Sloss, President of the Family Division noted the warnings of the European Court of Human Rights about continued lack of response to the situation of transsexuals and observed that largely as

a result of these criticisms an interdepartmental working group had been set up, which had in April 2000 issued a careful and comprehensive review of the medical condition, current practice in other countries and the state of English law in relevant aspects of the life of an individual:

> "[95.] ... We inquired of Mr Moylan on behalf of the Attorney-General, what steps were being taken by any government department, to take forward any of the recommendations of the Report, or to prepare a consultation paper for public discussion.
>
> [96.] To our dismay, we were informed that no steps whatsoever have been, or to the knowledge of Mr Moylan, were intended to be, taken to carry this matter forward. It appears, therefore, that the commissioning and completion of the report is the sum of the activity on the problems identified both by the Home Secretary in his terms of reference, and by the conclusions of the members of the working group. That would seem to us to be a failure to recognise the increasing concerns and changing attitudes across western Europe which have been set out so clearly and strongly in judgments of Members of the European Court at Strasbourg, and which in our view need to be addressed by the UK...
>
> [109.] We would add however, with the strictures of the European Court of Human Rights well in mind, that there is no doubt that the profoundly unsatisfactory nature of the present position and the plight of transsexuals requires careful consideration. The recommendation of the interdepartmental working group for public consultation merits action by the government departments involved in these issues. The problems will not go away and may well come again before the European Court sooner rather than later."

53. In his dissenting judgment, Lord Justice Thorpe considered that the foundations of the judgment in *Corbett v. Corbett* were no longer secure, taking the view that an approach restricted to biological criteria was no longer permissible in the light of scientific, medical and social change.

> "[155.] To make the chromosomal factor conclusive, or even dominant, seems to me particularly questionable in the context of marriage. For it is an invisible feature of an individual, incapable of perception or registration other than by scientific test. It makes no contribution to the physiological or psychological self. Indeed in the context of the institution of marriage as it is today it seems to me right as a matter of principle and logic to give predominance to psychological factors just as it seem right to carry out the essential assessment of gender at or shortly before the time of marriage rather than at the time of birth...
>
> [160.] The present claim lies most evidently in the territory of the family justice system. That system must always be sufficiently flexible to accommodate social change. It must also be humane and swift to recognise the right to human dignity and to freedom of choice in the individual's private life. One of the objectives of statute law reform in this field must be to ensure that the law reacts to and reflects social change. That must also be an objective of the judges in this field in the construction of existing statutory provisions. I am strongly of the opinion that there are not sufficiently compelling reasons, having regard to the interests of others affected or, more relevantly, the interests of society as a whole, to deny this appellant legal recognition of her marriage. I would have allowed this appeal."

He also noted the lack of progress in domestic reforms:

> "[151.] ...although the [interdepartmental] report has been made available by publication, Mr Moylan said that there has since been no public consultation. Furthermore when asked whether the Government had any present intention of initiating public consultation or any other process in preparation for a parliamentary Bill, Mr Moylan said that he had no instructions. Nor did he have any instructions as to whether the Government intended to legislate. My experience over the last 10 years suggests how hard it is for any department to gain a slot for family law reform by primary legislation. These circumstances reinforce my view that it is not only open to the court but it is its duty to construe s 11(c) either strictly, alternatively liberally as the evidence and the submissions in this case justify."

3. Proposals to reform the system of registration of births, marriages and deaths

54. In January 2002, the Government presented to Parliament the document "Civil Registration: Vital Change (Birth, Marriage and Death Registration in the 21st Century)" which set out plans for creating a central database of registration records which moves away from a traditional snapshot of life events towards the concept of a living record or single "through life" record:

> "In time, updating the information in a birth record will mean that changes to a person's names, and potentially, sex will be able to be recorded." (para. 5.1)

> "5.5 Making changes
>
> There is strong support for some relaxation to the rules that govern corrections to the records. Currently, once a record has been created, the only corrections that can be made are where it can be shown that an error was made at the time of registration and that this can be established. Correcting even the simplest spelling error requires formal procedures and the examination of appropriate evidence. The final records contains the full original and corrected information which is shown on subsequently issued certificates. The Government recognises that this can act as a disincentive. In future, changes (to reflect developments after the original record was made) will be made and formally recorded. Documents issued from the records will contain only the information as amended, though all the information will be retained. ..."

H. Liberty's third party intervention

55. Liberty updated the written observations submitted in the case of Sheffield and Horsham concerning the legal recognition of transsexuals in comparative law (Sheffield and Horsham v. the United Kingdom judgment of 30 July 1998, *Reports of Judgments and Decisions* 1998-V, p. 2021, § 35). In its 1998 study, it had found that over the previous decade there had been an unmistakable trend in the member States of the Council of Europe towards giving full legal recognition to gender re-assignment. In particular, it noted that out of thirty seven countries analysed only four (including the

United Kingdom) did not permit a change to be made to a person's birth certificate in one form or another to reflect the re-assigned sex of that person. In cases where gender re-assignment was legal and publicly funded, only the United Kingdom and Ireland did not give full legal recognition to the new gender identity.

56. In its follow up study submitted on 17 January 2002, Liberty noted that while there had not been a statistical increase in States giving full legal recognition of gender re-assignment within Europe, information from outside Europe showed developments in this direction. For example, there had been statutory recognition of gender re-assignment in Singapore, and a similar pattern of recognition in Canada, South Africa, Israel, Australia, New Zealand and all except two of the States of the United States of America. It cited in particular the cases of *Attorney-General v. Otahuhu Family Court* [1995] 1 NZLR 60 and *Re Kevin* [2001] FamCA 1074 where in New Zealand and Australia transsexual persons' assigned sex was recognised for the purposes of validating their marriages: In the latter case, Mr Justice Chisholm held:

> "I see no basis in legal principle or policy why Australian law should follow the decision in Corbett. To do so would, I think, create indefensible inconsistencies between Australian marriage law and other Australian laws. It would take the law in a direction that is generally contrary to development in other countries. It would perpetuate a view that flies in the face of current medical understanding and practice. Most of all, it would impose indefensible suffering on people who have already had more than their share of difficulty, with no benefit to society...
>
> ...Because the words 'man' and 'woman' have their ordinary contemporary meaning, there is no formulaic solution to determining the sex of an individual for the purpose of the law of marriage. That is, it cannot be said as a matter of law that the question in a particular case will be determined by applying a single criterion, or limited list of criteria. Thus it is wrong to say that a person's sex depends on any single factor, such as chromosomes or genital sex; or some limited range of factors, such as the state of the person's gonads, chromosomes or genitals (whether at birth or at some other time). Similarly, it would be wrong in law to say that the question can be resolved by reference solely to the person's psychological state, or by identifying the person's 'brain sex'.
>
> To determine a person's sex for the law of marriage, all relevant matters need to be considered. I do not seek to state a complete list or suggest that any factors necessarily have more importance than others. However the relevant matters include, in my opinion, the person's biological and physical characteristics at birth (including gonads, genitals and chromosomes); the person's life experiences, including the sex in which he or she was brought up and the person's attitude to it; the person's self-perception as a man or a woman; the extent to which the person has functioned in society as a man or a woman; any hormonal, surgical or other medical sex re-assignment treatments the person has undergone, and the consequences of such treatment; and the person's biological, psychological and physical characteristics at the time of the marriage...

> For the purpose of ascertaining the validity of a marriage under Australian law the question whether a person is a man or a woman is to be determined as of the date of marriage...”

57. As regarded the eligibility of post-operative transsexuals to marry a person of sex opposite to their acquired gender, Liberty's survey indicated that 54% of Contracting States permitted such marriage (Annex 6 listed Austria, Belgium, Denmark, Estonia, Finland, France, Germany, Greece, Iceland, Italy, Latvia, Luxembourg, the Netherlands, Norway, Slovakia, Spain, Sweden, Switzerland, Turkey and Ukraine), while 14% did not (Ireland and the United Kingdom did not permit marriage, while no legislation existed in Moldova, Poland, Romania and Russia). The legal position in the remaining 32% was unclear.

III. INTERNATIONAL TEXTS

58. Article 9 of the Charter of Fundamental Rights of the European Union, signed on 7 December 2000, provides:

> “The right to marry and the right to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights.”

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

59. The applicant claims a violation of Article 8 of the Convention, the relevant part of which provides as follows:

> “1. Everyone has the right to respect for his private ... life...
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

A. Arguments of the parties

1. The applicant

60. The applicant submitted that despite warnings from the Court as to the importance for keeping under review the need for legal reform the

Government had still not taken any constructive steps to address the suffering and distress experienced by the applicant and other post-operative transsexuals. The lack of legal recognition of her changed gender had been the cause of numerous discriminatory and humiliating experiences in her everyday life. In the past, in particular from 1990 to 1992, she was abused at work and did not receive proper protection against discrimination. She claimed that all the special procedures through which she had to go in respect of her NI contributions and State retirement pension constituted in themselves an unjustified difference in treatment, as they would have been unnecessary had she been recognised as a woman for legal purposes. In particular, the very fact that the DSS operated a policy of marking the records of transsexuals as sensitive was a difference in treatment. As a result, for example, the applicant cannot attend the DSS without having to make a special appointment.

61. The applicant further submitted that the danger of her employer learning about her past identity was real. It was possible for the employer to trace back her employment history on the basis of her NI number and this had in fact happened. She claimed that her recent failure to obtain a promotion was the result of the employer realising her status.

62. As regarded pensionable age, the applicant submitted that she had worked for 44 years and that the refusal of her entitlement to a State retirement pension at the age of 60 on the basis of the pure biological test for determining sex was contrary to Article 8 of the Convention. She was similarly unable to apply for a free London bus pass at the age of 60 as other women were but had to wait until the age of 65. She was also required to declare her birth sex or disclose her birth certificate when applying for life insurance, mortgages, private pensions or car insurance, which led her not to pursue these possibilities to her advantage.

63. The applicant argued that rapid changes, in respect of the scientific understanding of, and the social attitude towards, transsexualism were taking place not only across Europe but elsewhere. She referred, *inter alia*, to Article 29 of the Netherlands Civil Code, Article 6 of Law No. 164 of 14 April 1982 of Italy, and Article 29 of the Civil Code of Turkey as amended by Law No. 3444 of 4 May 1988, which allowed the amendment of civil status. Also, under a 1995 New Zealand statute, Part V, Section 28, a court could order the legal recognition of the changed gender of a transsexual after examination of medical and other evidence. The applicant saw no convincing reason why a similar approach should not be adopted in the United Kingdom. The applicant also pointed to increasing social acceptance of transsexuals and interest in issues of concern to them reflected by coverage in the press, radio and television, including sympathetic dramatisation of transsexual characters in mainstream programming.

2. The Government

64. Referring to the Court's case-law, the Government maintained that there was no generally accepted approach among the Contracting States in respect of transsexuality and that, in view of the margin of appreciation left to States under the Convention, the lack of recognition in the United Kingdom of the applicant's new gender identity for legal purposes did not entail a violation of Article 8 of the Convention. They disputed the applicant's assertion that scientific research and "massive societal changes" had led to wide acceptance, or consensus on issues, of transsexualism.

65. The Government accepted that there may be specific instances where the refusal to grant legal recognition of a transsexual's new sexual identity may amount to a breach of Article 8, in particular where the transsexual as a result suffered practical and actual detriment and humiliation on a daily basis (see the B. v. France judgment of 25 March 1992, Series A no. 232-C, pp. 52-54, §§ 59-63). However, they denied that the applicant faced any comparable practical disadvantages, as she had been able *inter alia* to obtain important identification documents showing her chosen names and sexual identity (e.g. new passport and driving licence).

66. As regards the specific difficulties claimed by the applicant, the Government submitted that an employer was unable to establish the sex of the applicant from the NI number itself since it did not contain any encoded reference to her sex. The applicant had been issued with a new NI card with her changed name and style of address. Furthermore, the DSS had a policy of confidentiality of the personal details of a NI number holder and, in particular, a policy and procedure for the special protection of transsexuals. As a result, an employer had no means of lawfully obtaining information from the DSS about the previous sexual identity of an employee. It was also in their view highly unlikely that the applicant's employer would discover her change of gender through her NI number in any other way. The refusal to issue a new NI number was justified, the uniqueness of the NI number being of critical importance in the administration of the national insurance system, and for the prevention of the fraudulent use of old NI numbers.

67. The Government argued that the applicant's fear that her previous sexual identity would be revealed upon reaching the age of 60, when her employer would no longer be required to make NI contribution deductions from her pay, was entirely without foundation, the applicant having already been issued with a suitable Age Exemption Certificate on Form CF384.

68. Concerning the impossibility for the applicant to obtain a State retirement pension at the age of 60, the Government submitted that the distinction between men and women as regarded pension age had been held to be compatible with European Community law (Article 7(1)(a) of Directive 79/7/EEC; European Court of Justice, *R. v. Secretary of State for Social Security ex parte Equal Opportunities Commission Case* C-9/91 [1992] ECR I-4927). Also, since the preserving of the applicant's legal

status as a man was not contrary as such to Article 8 of the Convention, it would constitute favourable treatment unfair to the general public to allow the applicant's pension entitlement at the age of 60.

69. Finally, as regards allegations of assault and abuse at work, the Government submitted that the applicant could have pressed charges under the criminal law against harassment and assault. Harassment in the workplace on the grounds of transsexuality would also give rise to a claim under the Sex Discrimination Act 1975 where the employers knew of the harassment and took no steps to prevent it. Adequate protection was therefore available under domestic law.

70. The Government submitted that a fair balance had therefore been struck between the rights of the individual and the general interest of the community. To the extent that there were situations where a transsexual may face limited disclosure of their change of sex, these situations were unavoidable and necessary e.g. in the context of contracts of insurance where medical history and gender affected the calculation of premiums.

B. The Court's assessment

1. Preliminary considerations

71. This case raises the issue whether or not the respondent State has failed to comply with a positive obligation to ensure the right of the applicant, a post-operative male to female transsexual, to respect for her private life, in particular through the lack of legal recognition given to her gender re-assignment.

72. The Court recalls that the notion of "respect" as understood in Article 8 is not clear cut, especially as far as the positive obligations inherent in that concept are concerned: having regard to the diversity of practices followed and the situations obtaining in the Contracting States, the notion's requirements will vary considerably from case to case and the margin of appreciation to be accorded to the authorities may be wider than that applied in other areas under the Convention. In determining whether or not a positive obligation exists, regard must also 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 (Cossey v. the United Kingdom judgment of 27 September 1990, Series A no. 184, p. 15, § 37).

73. The Court recalls that it has already examined complaints about the position of transsexuals in the United Kingdom (see the Rees v. the United Kingdom judgment of 17 October 1986, Series A no. 106, the Cossey v. the United Kingdom judgment, cited above; the X., Y. and Z. v. the United Kingdom judgment of 22 April 1997, *Reports of Judgments and Decisions* 1997-II, and the Sheffield and Horsham v. the United Kingdom judgment of

30 July 1998, *Reports* 1998-V, p. 2011). In those cases, it held that the refusal of the United Kingdom Government to alter the register of births or to issue birth certificates whose contents and nature differed from those of the original entries concerning the recorded gender of the individual could not be considered as an interference with the right to respect for private life (the above-mentioned Rees judgment, p. 14, § 35, and Cossey judgment, p. 15, § 36). It also held that there was no positive obligation on the Government to alter their existing system for the registration of births by establishing a new system or type of documentation to provide proof of current civil status. Similarly, there was no duty on the Government to permit annotations to the existing register of births, or to keep any such annotation secret from third parties (the above-mentioned Rees judgment, p. 17, § 42, and Cossey judgment, p. 15, §§ 38-39). It was found in those cases that the authorities had taken steps to minimise intrusive enquiries (for example, by allowing transsexuals to be issued with driving licences, passports and other types of documents in their new name and gender). Nor had it been shown that the failure to accord general legal recognition of the change of gender had given rise in the applicants' own case histories to detriment of sufficient seriousness to override the respondent State's margin of appreciation in this area (the Sheffield and Horsham judgment cited above, p. 2028-29, § 59).

74. While the Court is not formally bound to follow its previous judgments, it is in the interests of legal certainty, foreseeability and equality before the law that it should not depart, without good reason, from precedents laid down in previous cases (see, for example, *Chapman v. the United Kingdom* [GC], no. 27238/95, ECHR 2001-I, § 70). However, since the Convention is first and foremost a system for the protection of human rights, the Court must have regard to the changing conditions within the respondent State and within Contracting States generally and respond, for example, to any evolving convergence as to the standards to be achieved (see, amongst other authorities, the Cossey judgment, p. 14, § 35, and *Stafford v. the United Kingdom* [GC], no. 46295/99, judgment of 28 May 2002, to be published in ECHR 2002-, §§ 67-68). It is of crucial importance that the Convention is interpreted and applied in a manner which renders its rights practical and effective, not theoretical and illusory. A failure by the Court to maintain a dynamic and evolutive approach would indeed risk rendering it a bar to reform or improvement (see the above-cited *Stafford v. the United Kingdom* judgment, § 68). In the present context the Court has, on several occasions since 1986, signalled its consciousness of the serious problems facing transsexuals and stressed the importance of keeping the need for appropriate legal measures in this area under review (see the Rees judgment, § 47; the Cossey judgment, § 42; the Sheffield and Horsham judgment, § 60).

75. The Court proposes therefore to look at the situation within and outside the Contracting State to assess "in the light of present-day conditions" what is now the appropriate interpretation and application of the Convention (see the *Tyrer v. the United Kingdom* judgment of 25 April 1978, Series A no. 26, § 31, and subsequent case-law).

2. The applicant's situation as a transsexual

76. The Court observes that the applicant, registered at birth as male, has undergone gender re-assignment surgery and lives in society as a female. Nonetheless, the applicant remains, for legal purposes, a male. This has had, and continues to have, effects on the applicant's life where sex is of legal relevance and distinctions are made between men and women, as, *inter alia*, in the area of pensions and retirement age. For example, the applicant must continue to pay national insurance contributions until the age of 65 due to her legal status as male. However as she is employed in her gender identity as a female, she has had to obtain an exemption certificate which allows the payments from her employer to stop while she continues to make such payments herself. Though the Government submitted that this made due allowance for the difficulties of her position, the Court would note that she nonetheless has to make use of a special procedure that might in itself call attention to her status.

77. It must also be recognised that serious interference with private life can arise where the state of domestic law conflicts with an important aspect of personal identity (see, *mutatis mutandis*, Dudgeon v. the United Kingdom judgment of 22 October 1981, Series A no. 45, § 41). The stress and alienation arising from a discordance between the position in society assumed by a post-operative transsexual and the status imposed by law which refuses to recognise the change of gender cannot, in the Court's view, be regarded as a minor inconvenience arising from a formality. A conflict between social reality and law arises which places the transsexual in an anomalous position, in which he or she may experience feelings of vulnerability, humiliation and anxiety.

78. In this case, as in many others, the applicant's gender re-assignment was carried out by the national health service, which recognises the condition of gender dysphoria and provides, *inter alia*, re-assignment by surgery, with a view to achieving as one of its principal purposes as close an assimilation as possible to the gender in which the transsexual perceives that he or she properly belongs. The Court is struck by the fact that nonetheless the gender re-assignment which is lawfully provided is not met with full recognition in law, which might be regarded as the final and culminating step in the long and difficult process of transformation which the transsexual has undergone. The coherence of the administrative and legal practices within the domestic system must be regarded as an important factor in the assessment carried out under Article 8 of the Convention.

Where a State has authorised the treatment and surgery alleviating the condition of a transsexual, financed or assisted in financing the operations and indeed permits the artificial insemination of a woman living with a female-to-male transsexual (as demonstrated in the case of X., Y. and Z. v. the United Kingdom, cited above), it appears illogical to refuse to recognise the legal implications of the result to which the treatment leads.

79. The Court notes that the unsatisfactory nature of the current position and plight of transsexuals in the United Kingdom has been acknowledged in the domestic courts (see *Bellinger v. Bellinger*, cited above, paragraph 52) and by the Interdepartmental Working Group which surveyed the situation in the United Kingdom and concluded that, notwithstanding the accommodations reached in practice, transsexual people were conscious of certain problems which did not have to be faced by the majority of the population (paragraph 50 above).

80. Against these considerations, the Court has examined the countervailing arguments of a public interest nature put forward as justifying the continuation of the present situation. It observes that in the previous United Kingdom cases weight was given to medical and scientific considerations, the state of any European and international consensus and the impact of any changes to the current birth register system.

3. Medical and scientific considerations

81. It remains the case that there are no conclusive findings as to the cause of transsexualism and, in particular, whether it is wholly psychological or associated with physical differentiation in the brain. The expert evidence in the domestic case of *Bellinger v. Bellinger* was found to indicate a growing acceptance of findings of sexual differences in the brain that are determined pre-natally, though scientific proof for the theory was far from complete. The Court considers it more significant however that transsexualism has wide international recognition as a medical condition for which treatment is provided in order to afford relief (for example, the Diagnostic and Statistical Manual fourth edition (DSM-IV) replaced the diagnosis of transsexualism with "gender identity disorder"; see also the International Classification of Diseases, tenth edition (ICD-10)). The United Kingdom national health service, in common with the vast majority of Contracting States, acknowledges the existence of the condition and provides or permits treatment, including irreversible surgery. The medical and surgical acts which in this case rendered the gender re-assignment possible were indeed carried out under the supervision of the national health authorities. Nor, given the numerous and painful interventions involved in such surgery and the level of commitment and conviction required to achieve a change in social gender role, can it be suggested that there is anything arbitrary or capricious in the decision taken by a person to undergo gender re-assignment. In those circumstances, the ongoing scientific and

medical debate as to the exact causes of the condition is of diminished relevance.

82. While it also remains the case that a transsexual cannot acquire all the biological characteristics of the assigned sex (Sheffield and Horsham, cited above, p. 2028, § 56), the Court notes that with increasingly sophisticated surgery and types of hormonal treatments, the principal unchanging biological aspect of gender identity is the chromosomal element. It is known however that chromosomal anomalies may arise naturally (for example, in cases of intersex conditions where the biological criteria at birth are not congruent) and in those cases, some persons have to be assigned to one sex or the other as seems most appropriate in the circumstances of the individual case. It is not apparent to the Court that the chromosomal element, amongst all the others, must inevitably take on decisive significance for the purposes of legal attribution of gender identity for transsexuals (see the dissenting opinion of Thorpe LJ in *Bellinger v. Bellinger* cited in paragraph 52 above; and the judgment of Chisholm J in the Australian case*, Re Kevin*, cited in paragraph 55 above).

83. The Court is not persuaded therefore that the state of medical science or scientific knowledge provides any determining argument as regards the legal recognition of transsexuals.

4. The state of any European and international consensus

84. Already at the time of the Sheffield and Horsham case, there was an emerging consensus within Contracting States in the Council of Europe on providing legal recognition following gender re-assignment (see § 35 of that judgment). The latest survey submitted by Liberty in the present case shows a continuing international trend towards legal recognition (see paragraphs 55-56 above). In Australia and New Zealand, it appears that the courts are moving away from the biological birth view of sex (as set out in the United Kingdom case of *Corbett v. Corbett*) and taking the view that sex, in the context of a transsexual wishing to marry, should depend on a multitude of factors to be assessed at the time of the marriage.

85. The Court observes that in the case of Rees in 1986 it had noted that little common ground existed between States, some of which did permit change of gender and some of which did not and that generally speaking the law seemed to be in a state of transition (see § 37). In the later case of Sheffield and Horsham, the Court's judgment laid emphasis on the lack of a common European approach as to how to address the repercussions which the legal recognition of a change of sex may entail for other areas of law such as marriage, filiation, privacy or data protection. While this would appear to remain the case, the lack of such a common approach among forty-three Contracting States with widely diverse legal systems and traditions is hardly surprising. In accordance with the principle of subsidiarity, it is indeed primarily for the Contracting States to decide on the

measures necessary to secure Convention rights within their jurisdiction and, in resolving within their domestic legal systems the practical problems created by the legal recognition of post-operative gender status, the Contracting States must enjoy a wide margin of appreciation. The Court accordingly attaches less importance to the lack of evidence of a common European approach to the resolution of the legal and practical problems posed, than to the clear and uncontested evidence of a continuing international trend in favour not only of increased social acceptance of transsexuals but of legal recognition of the new sexual identity of post-operative transsexuals.

5. Impact on the birth register system

86. In the Rees case, the Court allowed that great importance could be placed by the Government on the historical nature of the birth record system. The argument that allowing exceptions to this system would undermine its function weighed heavily in the assessment.

87. It may be noted however that exceptions are already made to the historic basis of the birth register system, namely, in the case of legitimisation or adoptions, where there is a possibility of issuing updated certificates to reflect a change in status after birth. To make a further exception in the case of transsexuals (a category estimated as including some 2,000-5,000 persons in the United Kingdom according to the Interdepartmental Working Group Report, p. 26) would not, in the Court's view, pose the threat of overturning the entire system. Though previous reference has been made to detriment suffered by third parties who might be unable to obtain access to the original entries and to complications occurring in the field of family and succession law (see the Rees judgment, p. 18, § 43), these assertions are framed in general terms and the Court does not find, on the basis of the material before it at this time, that any real prospect of prejudice has been identified as likely to arise if changes were made to the current system.

88. Furthermore, the Court notes that the Government have recently issued proposals for reform which would allow ongoing amendment to civil status data (see paragraph 54). It is not convinced therefore that the need to uphold rigidly the integrity of the historic basis of the birth registration system takes on the same importance in the current climate as it did in 1986.

6. Striking a balance in the present case

89. The Court has noted above (paragraphs 76-79) the difficulties and anomalies of the applicant's situation as a post-operative transsexual. It must be acknowledged that the level of daily interference suffered by the applicant in B. v. France (judgment of 25 March 1992, Series A no. 232) has not been attained in this case and that on certain points the risk of

difficulties or embarrassment faced by the present applicant may be avoided or minimised by the practices adopted by the authorities.

90. Nonetheless, the very essence of the Convention is respect for human dignity and human freedom. Under Article 8 of the Convention in particular, where the notion of personal autonomy is an important principle underlying the interpretation of its guarantees, protection is given to the personal sphere of each individual, including the right to establish details of their identity as individual human beings (see, *inter alia*, *Pretty v. the United Kingdom*, no. 2346/02, judgment of 29 April 2002, § 62, and *Mikulić v. Croatia,* no. 53176/99, judgment of 7 February 2002, § 53, both to be published in ECHR 2002-...). In the twenty first century the right of transsexuals to personal development and to physical and moral security in the full sense enjoyed by others in society cannot be regarded as a matter of controversy requiring the lapse of time to cast clearer light on the issues involved. In short, the unsatisfactory situation in which post-operative transsexuals live in an intermediate zone as not quite one gender or the other is no longer sustainable. Domestic recognition of this evaluation may be found in the report of the Interdepartmental Working Group and the Court of Appeal's judgment of *Bellinger v. Bellinger* (see paragraphs 50, 52-53).

91. The Court does not underestimate the difficulties posed or the important repercussions which any major change in the system will inevitably have, not only in the field of birth registration, but also in the areas of access to records, family law, affiliation, inheritance, criminal justice, employment, social security and insurance. However, as is made clear by the report of the Interdepartmental Working Group, these problems are far from insuperable, to the extent that the Working Group felt able to propose as one of the options full legal recognition of the new gender, subject to certain criteria and procedures. As Lord Justice Thorpe observed in the *Bellinger* case, any "spectral difficulties", particularly in the field of family law, are both manageable and acceptable if confined to the case of fully achieved and post-operative transsexuals. Nor is the Court convinced by arguments that allowing the applicant to fall under the rules applicable to women, which would also change the date of eligibility for her state pension, would cause any injustice to others in the national insurance and state pension systems as alleged by the Government. No concrete or substantial hardship or detriment to the public interest has indeed been demonstrated as likely to flow from any change to the status of transsexuals and, as regards other possible consequences, the Court considers that society may reasonably be expected to tolerate a certain inconvenience to enable individuals to live in dignity and worth in accordance with the sexual identity chosen by them at great personal cost.

92. In the previous cases from the United Kingdom, this Court has since 1986 emphasised the importance of keeping the need for appropriate legal measures under review having regard to scientific and societal developments (see references at paragraph 73). Most recently in the Sheffield and Horsham case in 1998, it observed that the respondent State had not yet taken any steps to do so despite an increase in the social acceptance of the phenomenon of transsexualism and a growing recognition of the problems with which transsexuals are confronted (cited above, paragraph 60). Even though it found no violation in that case, the need to keep this area under review was expressly re-iterated. Since then, a report has been issued in April 2000 by the Interdepartmental Working Group which set out a survey of the current position of transsexuals in *inter alia* criminal law, family and employment matters and identified various options for reform. Nothing has effectively been done to further these proposals and in July 2001 the Court of Appeal noted that there were no plans to do so (see paragraphs 52-53). It may be observed that the only legislative reform of note, applying certain non-discrimination provisions to transsexuals, flowed from a decision of the European Court of Justice of 30 April 1996 which held that discrimination based on a change of gender was equivalent to discrimination on grounds of sex (see paragraphs 43-45 above).

93. Having regard to the above considerations, the Court finds that the respondent Government can no longer claim that the matter falls within their margin of appreciation, save as regards the appropriate means of achieving recognition of the right protected under the Convention. Since there are no significant factors of public interest to weigh against the interest of this individual applicant in obtaining legal recognition of her gender re-assignment, it reaches the conclusion that the fair balance that is inherent in the Convention now tilts decisively in favour of the applicant. There has, accordingly, been a failure to respect her right to private life in breach of Article 8 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 12 OF THE CONVENTION

94. The applicant also claimed a violation of Article 12 of the Convention, which provides as follows:

> "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."

A. Arguments of the parties

1. The applicant

95. The applicant complained that although she currently enjoyed a full physical relationship with a man, she and her partner could not marry because the law treated her as a man. She argued that the *Corbett v. Corbett* definition of a person's sex for the purpose of marriage had been shown no longer to be sufficient in the recent case of *Bellinger v. Bellinger* and that even if a reliance on biological criteria remained acceptable, it was a breach of Article 12 to use only some of those criteria for determining a person's sex and excluding those who failed to fulfil those elements.

2. The Government

96. The Government referred to the Court's previous case-law (the above-cited Rees, Cossey and Sheffield and Horsham judgments) and maintained that neither Article 12 nor Article 8 of the Convention required a State to permit a transsexual to marry a person of his or her original sex. They also pointed out that the domestic law approach had been recently reviewed and upheld by the Court of Appeal in *Bellinger v. Bellinger*, the matter now pending before the House of Lords. In their view, if any change in this important or sensitive area were to be made, it should come from the United Kingdom's own courts acting within the margin of appreciation which this Court has always afforded. They also referred to the fact that any change brought the possibility of unwanted consequences, submitting that legal recognition would potentially invalidate existing marriages and leave transsexuals and their partners in same-sex marriages. They emphasised the importance of proper and careful review of any changes in this area and the need for transitional provisions.

B. The Court's assessment

97. The Court recalls that in the cases of Rees, Cossey and Sheffield and Horsham the inability of the transsexuals in those cases to marry a person of the sex opposite to their re-assigned gender was not found in breach of Article 12 of the Convention. These findings were based variously on the reasoning that the right to marry referred to traditional marriage between persons of opposite biological sex (the Rees judgment, p. 19, § 49), the view that continued adoption of biological criteria in domestic law for determining a person's sex for the purpose of marriage was encompassed within the power of Contracting States to regulate by national law the exercise of the right to marry and the conclusion that national laws in that respect could not be regarded as restricting or reducing the right of a

transsexual to marry in such a way or to such an extent that the very essence of the right was impaired (the Cossey judgment, p. 18, §§ 44-46, the Sheffield and Horsham judgment, p. 2030, §§ 66-67). Reference was also made to the wording of Article 12 as protecting marriage as the basis of the family (Rees, *loc. cit*.).

98. Reviewing the situation in 2002, the Court observes that Article 12 secures the fundamental right of a man and woman to marry and to found a family. The second aspect is not however a condition of the first and the inability of any couple to conceive or parent a child cannot be regarded as *per se* removing their right to enjoy the first limb of this provision.

99. The exercise of the right to marry gives rise to social, personal and legal consequences. It is subject to the national laws of the Contracting States but 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 (see the Rees judgment, p. 19, § 50; the F. v. Switzerland judgment of 18 December 1987, Series A no. 128, § 32).

100. It is true that the first sentence refers in express terms to the right of a man and woman to marry. The Court is not persuaded that at the date of this case it can still be assumed that these terms must refer to a determination of gender by purely biological criteria (as held by Ormrod J. in the case of *Corbett v. Corbett*, paragraph 21 above). There have been major social changes in the institution of marriage since the adoption of the Convention as well as dramatic changes brought about by developments in medicine and science in the field of transsexuality. The Court has found above, under Article 8 of the Convention, that a test of congruent biological factors can no longer be decisive in denying legal recognition to the change of gender of a post-operative transsexual. There are other important factors – the acceptance of the condition of gender identity disorder by the medical professions and health authorities within Contracting States, the provision of treatment including surgery to assimilate the individual as closely as possible to the gender in which they perceive that they properly belong and the assumption by the transsexual of the social role of the assigned gender. The Court would also note that Article 9 of the recently adopted Charter of Fundamental Rights of the European Union departs, no doubt deliberately, from the wording of Article 12 of the Convention in removing the reference to men and women (see paragraph 58 above).

101. The right under Article 8 to respect for private life does not however subsume all the issues under Article 12, where conditions imposed by national laws are accorded a specific mention. The Court has therefore considered whether the allocation of sex in national law to that registered at birth is a limitation impairing the very essence of the right to marry in this case. In that regard, it finds that it is artificial to assert that post-operative transsexuals have not been deprived of the right to marry as, according to law, they remain able to marry a person of their former opposite sex. The

applicant in this case lives as a woman, is in a relationship with a man and would only wish to marry a man. She has no possibility of doing so. In the Court's view, she may therefore claim that the very essence of her right to marry has been infringed.

102. The Court has not identified any other reason which would prevent it from reaching this conclusion. The Government have argued that in this sensitive area eligibility for marriage under national law should be left to the domestic courts within the State's margin of appreciation, adverting to the potential impact on already existing marriages in which a transsexual is a partner. It appears however from the opinions of the majority of the Court of Appeal judgment in *Bellinger v. Bellinger* that the domestic courts tend to the view that the matter is best handled by the legislature, while the Government have no present intention to introduce legislation (see paragraphs 52-53).

103. It may be noted from the materials submitted by Liberty that though there is widespread acceptance of the marriage of transsexuals, fewer countries permit the marriage of transsexuals in their assigned gender than recognise the change of gender itself. The Court is not persuaded however that this supports an argument for leaving the matter entirely to the Contracting States as being within their margin of appreciation. This would be tantamount to finding that the range of options open to a Contracting State included an effective bar on any exercise of the right to marry. The margin of appreciation cannot extend so far. While it is for the Contracting State to determine *inter alia* the conditions under which a person claiming legal recognition as a transsexual establishes that gender re-assignment has been properly effected or under which past marriages cease to be valid and the formalities applicable to future marriages (including, for example, the information to be furnished to intended spouses), the Court finds no justification for barring the transsexual from enjoying the right to marry under any circumstances.

104. The Court concludes that there has been a breach of Article 12 of the Convention in the present case.

III. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION

105. The applicant also claimed a violation of Article 14 of the Convention, which provides as follows:

> "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

106. The applicant complained that the lack of legal recognition of her changed gender was the cause of numerous discriminatory experiences and prejudices. She referred in particular to the fact that she could not claim her

State pension until she was 65 and to the fact that she could not claim a "freedom pass" to give her free travel in London, a privilege which women were allowed to enjoy from the age 60 and men from the age of 65.

107. The Government submitted that no issues arose which were different from those addressed under Article 8 of the Convention and that the complaints failed to disclose any discrimination contrary to the above provision.

108. The Court considers that the lack of legal recognition of the change of gender of a post-operative transsexual lies at the heart of the applicant's complaints under Article 14 of the Convention. These issues have been examined under Article 8 and resulted in the finding of a violation of that provision. In the circumstances, the Court considers that no separate issue arises under Article 14 of the Convention and makes no separate finding.

IV. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

109. The applicant claimed a violation of Article 13 of the Convention, which provides as follows:

> "Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

110. The applicant complained that she had no effective remedy available to her in respect of the matters complained of above.

111. The Government submitted that no arguable breach of any Convention right arose to engage the right to a remedy under Article 13. In any event, since 2 October 2000 when the Human Rights Act 1998 came into force, the Convention rights could be relied on in national courts and the applicant would now have a remedy in a national court for any breach of a Convention right.

112. The Court reiterates that Article 13 of the Convention guarantees the availability at the national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they might happen to be secured in the domestic legal order. Its effect is to require the provision of a domestic remedy to deal with the substance of an "arguable complaint" under the Convention and to grant appropriate relief (see, amongst other authorities, the Aksoy v. Turkey judgment of 25 September 1996, *Reports* 1996-VI, p. 2286, § 95).

113. Having found above that there have been violations of Articles 8 and 12 of the Convention, the applicant's complaints in this regard are without doubt arguable for the purposes of Article 13 of the Convention. The case-law of the Convention institutions indicates, however, that Article 13 cannot be interpreted as requiring a remedy against the state of domestic law, as otherwise the Court would be imposing on Contracting

States a requirement to incorporate the Convention (see the James and Others v. the United Kingdom judgment of 21 February 1986, Series A no. 98, p. 48, § 86). Insofar therefore as no remedy existed in domestic law prior to 2 October 2000 when the Human Rights Act 1998 took effect, the applicant's complaints fall foul of this principle. Following that date, it would have been possible for the applicant to raise her complaints before the domestic courts, which would have had a range of possible redress available to them.

114. The Court finds in the circumstances no breach of Article 13 of the Convention in the present case.

V. APPLICATION OF ARTICLE 41 OF THE CONVENTION

115. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

116. The applicant claimed pecuniary damage of a total of 38,200 pounds sterling (GBP). This represented a sum of GBP 31,200 in respect of the pension which she had been unable to claim at age 60 and GBP 7,000 as the estimated value of the pensioner's bus pass which she had not been eligible to obtain. The applicant also claimed for non-pecuniary damage the sum of GBP 40,000 in respect of distress, anxiety and humiliation.

117. The Government submitted that were the Court to find any breach of the Convention this finding would of itself be sufficient just satisfaction for the purposes of Article 41 of the Convention.

118. The Court recalls that there must be a clear causal connection between the pecuniary damage claimed by the applicant and the violation of the Convention and that this may, in the appropriate case, include compensation in respect of loss of earnings or other sources of income (see, amongst other authorities, the Barberà, Messegué and Jabardo v. Spain judgment of 13 June 1994 (Article 50), Series A no. 285-C, pp. 57-58, §§ 16-20; the *Cakıcı v. Turkey* judgment of 8 July 1999, *Reports* 1999-IV, § 127).

119. The Court observes that the applicant was unable to retire at age 60 as other female employees were entitled and to obtain a state pension or to claim a bus pass for free travel. The degree of financial detriment suffered

as a result, if any, is not clear-cut however as the applicant, though perhaps not by choice, continued to work and to enjoy a salary as a result. While it has adverted above to the difficulties and stresses of the applicant's position as a post-operative transsexual, it would note that over the period until 1998 similar issues were found to fall within the United Kingdom's margin of appreciation and that no breach arose.

120. The Court has found that the situation, as it has evolved, no longer falls within the United Kingdom's margin of appreciation. It will be for the United Kingdom Government in due course to implement such measures as it considers appropriate to fulfil its obligations to secure the applicant's, and other transsexuals', right to respect for private life and right to marry in compliance with this judgment. While there is no doubt that the applicant has suffered distress and anxiety in the past, it is the lack of legal recognition of the gender re-assignment of post-operative transsexuals which lies at the heart of the complaints in this application, the latest in a succession of cases by other applicants raising the same issues. The Court does not find it appropriate therefore to make an award to this particular applicant. The finding of violation, with the consequences which will ensue for the future, may in these circumstances be regarded as constituting just satisfaction.

B. Costs and expenses

121. The applicant claims for legal costs and expenses GBP 17,000 for solicitors' fees and GBP 24,550 for the fees of senior and junior counsel. Costs of travel to the Court hearing, together with accommodation and other related expenses were claimed in the sum of GBP 2,822. This made a total of GBP 44,372.

122. The Government submitted that the sum appeared excessive in comparison to other cases from the United Kingdom and in particular as regarded the amount of GBP 39,000 claimed in respect of the relatively recent period during which the applicant's current solicitors have been instructed which would only relate to the consolidated observations and the hearing before the Court.

123. The Court finds that the sums claimed by the applicant for legal costs and expenses, for which no detail has been provided by way of hours of work and fee rates, are high having regard to the level of complexity of, and procedures adopted in, this case. Having regard to the sums granted in other United Kingdom cases and taking into account the sums of legal aid paid by the Council of Europe, the Court awards for this head 39,000 euros (EUR), together with any value-added tax that may be payable. The award is made in euros, to be converted into pounds sterling at the date of settlement, as the Court finds it appropriate that henceforth all just

satisfaction awards made under Article 41 of the Convention should in principle be based on the euro as the reference currency.

C. Default interest

124. As the award is expressed in euros to be converted into the national currency at the date of settlement, the Court considers that the default interest rate should also reflect the choice of the euro as the reference currency. It considers it appropriate to take as the general rule that the rate of the default interest to be paid on outstanding amounts expressed in euro should be based on the marginal lending rate of the European Central Bank to which should be added three percentage points.

FOR THESE REASONS, THE COURT

1. *Holds* unanimously that there has been a violation of Article 8 of the Convention;

2. *Holds* unanimously that there has been a violation of Article 12 of the Convention;

3. *Holds* unanimously that no separate issue arises under Article 14 the Convention;

4. *Holds* unanimously that there has been no violation of Article 13 of the Convention;

5. *Holds* unanimously that the finding of violation constitutes in itself sufficient just satisfaction for the non-pecuniary damage sustained by the applicant;

6. *Holds* unanimously that the respondent State is to pay the applicant, within three months, EUR 39,000 (thirty nine thousand euros) in respect of costs and expenses, together with any value-added tax that may be chargeable, to be converted into pounds sterling at the date of settlement;

7. *Holds* by fifteen votes to two that simple interest at a rate equal to the marginal lending rate of the European Central Bank plus three percentage points shall be payable from the expiry of the above-mentioned three months until settlement;

8. *Dismisses* unanimously the remainder of the applicant's claim for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 11 July 2002.

Luzius WILDHABER
President

Paul MAHONEY
Registrar

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

(a) concurring opinion of Mr Fischbach;
(b) partly dissenting opinion of Mr Türmen;
(c) partly dissenting opinion of Mrs Greve.

L.W.
P.J.M

CONCURRING OPINION OF JUDGE FISCHBACH

Even though I voted with the majority of the Court as concerns point 7 of the operative part of the judgment, I would have preferred a fixed rate of default interest to have been set.

PARTLY DISSENTING OPINION OF JUDGE TÜRMEN

As concerns default interest, I would have preferred, at point 7 of the operative part of the judgment, for a fixed rate to have been set.

PARTLY DISSENTING OPINION OF JUDGE GREVE

In the present case I do not share the views of the majority of my colleagues concerning the default interest to be paid.

There is agreement among the judges that the euro is *a suitable reference currency* for all awards under Article 41. The Court wants such *awards paid promptly*, and the default interest rate is intended to be an incentive for prompt payment *without* it having a *punitive character*. So far I fully agree.

Under the Court's new policy awards are made in the euro to be converted into national currencies at the day of settlement. This means that in the present case the applicant will suffer a loss in the value of her award if her national currency, the pound sterling, continues to gain strength vis-à-vis the euro. Conversion into national currency first at the day of settlement in contradistinction to a conversion at the day of the judgement will favour applicants from the euro countries and applicants that have national currencies on a par with the euro, or weaker. All other applicants will suffer a loss under the changed policy. This, in my opinion, conflicts with the provisions of Article 14 in combination with Article 41. Moreover, it conflicts with the Court's desire that the awards shall to be as fair as possible, that is to maintain the value of the award as accurately as possible.

The latter objective is also the rationale for changing the Court's previous practice of using the default interest rate in each member State as basis for the Court's decision in individual cases.

The majority is attempting to secure that awards become fair by using varying interest rates as they evolve throughout the period of default. The marginal lending rate used by the European Central Bank (ECB) when lending money overnight to commercial banks plus three percentage points will be used. This will in the present case, as in many other cases, give the applicant a lower default interest rate than the rate previously used by the Court, the national default interest rate.

The marginal lending rate is interest paid by banks to the ECB, when they need quick emergency loans. That is, it is a rate which forms the ceiling for the commercial money market; and of little, if any, practical interest to most of the applicants in the Court. The default interest rates provided for in each of the States parties to the Convention for their part do reflect the situation in the national money markets regarding the rates to be paid by applicants who may have to opt for borrowing money while awaiting payment of an award of just satisfaction. For this reason national default interest rates compensate the individuals in a manner not secured by the new default interest rate opted for by the Court's majority.

Furthermore, I believe that an applicant receiving an award ought to be able to know herself the applicable default interest rate. The marginal lending rate used by the ECB when lending money overnight to commercial banks is not easily available to all applicants in Europe. The rate has been

stable for quite some time but if need be it could be set on a weekly if not even daily basis. Although it will be for the State to prove that it has actually paid the applicant in compliance with the judgment, and for the Committee of Ministers in the Council of Europe to check that this is correct, I find this to be an added bureaucratic procedure which makes it more difficult for applicants to keep track themselves. At all events the basis on which the Court's majority sets the new default interest rate is removed from the actual rate which an applicant, who needs to borrow money on an interim basis while awaiting payment of the award in a judgement, will have to pay. This is not compensated by the new varying interest rate, and this rather abstract search for fairness does not, in my opinion, merit a potentially bureaucratic new procedure.