

# Slipping Quietly into the Crowd – UK Transsexuals Finally out of Exile

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## **Introduction**

On 1 April 2005, the Gender Recognition Act 2004 came into force. This was the culmination of five years' work on the issues facing transsexual people in the United Kingdom ("UK"). The Act brings to fruition the work of the Inter-departmental Working Group on Transsexual People, which the Government established in 1999. It will enable transsexual people, who have taken decisive steps to live fully and permanently in their new gender, to apply for full legal recognition of that gender.<sup>1</sup>

The new legislation will prevent transsexuals from facing embarrassing and humiliating incidents where they were forced to reveal their old gender. Lord Filkin, Minister for the Department for Constitutional Affairs, welcomed the Act, saying that "for too long transsexuals people have been denied the rights and responsibilities appropriate to their acquired gender".<sup>2</sup> Filkin goes on to use this Act as an example of the United Kingdom Government's commitment to securing the rights of minority groups and making a real improvement to the lives of [transsexual] people. The author disagrees with this comment. The United Kingdom had, for in excess of thirty years, denied transsexuals the right to gain full legal recognition, both in the UK courts and the European Court of Human Right ("ECtHR"), citing the margin of appreciation as their right to do this. It was not until the United Kingdom Government was given a stern warning by the Strasbourg judges that they actually endeavoured to do something and set up the Inter-departmental Group on Transsexual People. Even then, little was done and the group was re-convened in 2002 once the ECtHR had finally had enough and determined that the UK was violating the rights of transsexuals by refusing them full legal status in their new gender.

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<sup>1</sup> Department for Constitutional Affairs, 2004. Available at [www.gnn.gov.uk/environment/detail.asp?ReleaseID=121857+News.AreaD=2\\*NavigatedfromDepartment=True](http://www.gnn.gov.uk/environment/detail.asp?ReleaseID=121857+News.AreaD=2*NavigatedfromDepartment=True).

<sup>2</sup> *Ibid.*

## Transsexuals in Legal Exile – The UK Courts

Prior to the Gender Recognition Act, the legal status of both pre- and post-operative transsexuals in the UK was not specifically defined in any legislation. It was left to the UK courts to define what status these people should be given. The position stood for more than three decades after Lord Ormrod, the former family doctor (“GP”) turned justice, gave the now infamous decision in *Corbett v Corbett (otherwise Ashley)*.<sup>3</sup> The case was about matrimonial affairs and the principle was extended to the criminal law shortly afterwards in *R v Tan*.<sup>4</sup>

In 1963 Arthur Corbett (the heir to Lord Rowallen) married April Ashley after a much on-off relationship. Ashley had been born a male but had undergone sex re-assignment surgery enabling her to fulfil the role of female. Corbett was well aware of Ashley's background and in fact brought into the relationship his own cocktail of sexual and emotional difficulties,<sup>5</sup> which included his own world of transvestism. Two months into the marriage Corbett filed for divorce on receiving pressure from his family to do so. At the time a divorce in the UK could only be granted on the grounds of adultery or cruelty if evidenced by proof. Mutual consent was not in issue as Ashley had no desire to be divorced; so, the Rowallen family had to construct an argument to give a basis for ending the marriage whilst simultaneously avoiding any inheritance issues.<sup>6</sup> The case proceeded on the premise that the marriage had never been legal as Ashley had been born a male and, therefore, remained so. Ashley contested this and, in the alternative, petitioned for a divorce on the grounds of incapacity or wilful refusal.

It has long been a principle of marriage in the UK that marriage is a relationship that can be entered into only between one man and one woman. In the words of Lord Penzance, marriage is “the voluntary union for life of one man and one woman”.<sup>7</sup>

This principle has never been denied but there has never been a definition in English law or in any jurisprudence as to the definition of what a man and a woman are. In examining the issues of the *Corbett* case,

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<sup>3</sup> (1970) 2 WLR 1306.

<sup>4</sup> (1983) 2 All ER 12.

<sup>5</sup> S. Edwards, *Sex and Gender in the Legal Process* (Blackstone Press: London, 1996), p.14.

<sup>6</sup> C. Burns, *Campaign Issues* (1998), available at [www.pfc.org.uk/campaign/pfcissu.htm](http://www.pfc.org.uk/campaign/pfcissu.htm).

<sup>7</sup> *Hyde v Hyde* (1866) L.R. 1 P. &D. 130, 135.

Ormrod J. (as he was then) decided he should use his own experience as a former GP to grant the legal world a definition. This he did by laying down a three-tier test. But, before doing so, he commented:

Having regard to the essentially heterosexual character of the relationship which is called marriage, the criteria must in my judgement, be biological, for even the most extreme degree of transsexualism in a male or the most severe hormonal imbalance which can exist in a person with male chromosomes, male gonads and male genitalia cannot reproduce a person who is naturally capable of performing the essential role of a woman in marriage.

He then concluded:

...the law should adopt in the first place, the first three of the doctors' criteria, i.e. the chromosomal, gonadal and genital tests, and if all three are congruent, determine the sex for the purpose of marriage accordingly, and ignore any operative intervention.

The fourth of this criteria, the psychological sex, Ormrod felt was irrelevant in basing a person's sex in law, regardless of the fact that half of the experts heard in the case acknowledged this as an important criteria when determining the sex of an individual.

Ormrod's judgement has been criticised constantly since and it is the present author's view that he erred when suggesting that a male to female transsexual cannot perform the essential role of a woman in marriage, without actually defining what this essential role is. If we are to assume that the essential role of a woman in marriage is the ability to give birth then this was both an archaic and draconian attitude to take, even in 1970. There are many women who cannot reproduce who are entitled to marry and the inability to give birth is and never has been a ground for divorce. The judgement was also criticised for Ormrod's constant mixing of the notions of "male and female" with those of "man and woman" as well as arguing that marriage is based on sex rather than gender.<sup>8</sup>

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<sup>8</sup> S. Whittle, "An Association for as Noble a Purpose as any", *New Law Journal*, March 15, 1996, p.366. Whittle further comments (at p. 367): "...so he [Ormrod J] really needed to consider her a 'man' yet almost certainly Ormrod was faced with a dilemma that arose from his being unable to define the person in front of him as a man, yet he felt unable, in law and because of the test he had devised, to call her a woman. The sailors who wrote to April Ashley for pin-ups for their mess room walls had no doubts ..."

Although the Corbett decision has been criticised for being responsible for the way the UK deals with transsexuals, it cannot be forgotten that it only relates to family law and marriage, in particular. *R v Tan and Others* extended the principle made by Ormrod J to the criminal law and sexual offences, especially. It is, therefore, submitted that this case is just as responsible for the way the law stood. The judgement of Parker J in the Crown Court extended the Ormrod dictum on sex beyond the immediate confines of the marriage question to determining sex for the question of criminal liability.<sup>9</sup> Commentary up until this decision had declared the *Corbett* judgement as being fully responsible for bringing all the legal development of the issue in this country to a shuddering halt.<sup>10</sup> This is not disputed but it has to be contended now that it only did so completely with the help of the *Tan* judgement. *Tan and others* dealt with two sections of the Sexual Offences Act 1956. The first, Section 31,<sup>11</sup> states:

It is an offence for a woman for the purposes of gain to exercise control, direction or influence over a prostitute's movement in any way which shows she is aiding, abetting or compelling her prostitution.

The second, Section 30(1),<sup>12</sup> provides: "It is an offence for a man knowingly to live wholly or in part on the earnings of a prostitute."

Gloria Greaves was a male to female transsexual engaged in leasing premises to prostitutes. Tan was one of these prostitutes who used the premises for acts of sexual perversion with 'clients'. Greaves was charged, *inter alia*, under Section 30(1) of the Sexual Offences Act 1956, which was a 'male' only offence. Greaves argued that as she was a woman she could not be charged under this section. Furthermore, Brian Greaves, Gloria's husband was charged under Section 7 of the same act for living off the immoral earnings of male prostitution. Edwards makes the point that, had Gloria Greaves been charged in her postoperative sex, she could have been charged under s.31 of the Act, which applies to women

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<sup>9</sup> Edwards, *op. cit.*, p.31.

<sup>10</sup> Armstrong and Walton, "Transsexuals and the Law," (1990) *New Law Journal*, 140 (6474), 1384, 1389-1390.

<sup>11</sup> Formerly the Criminal Law Amendment Act 1912, s7 (4).

<sup>12</sup> Formerly The Vagrancy Act (1898) s1 (1) (a).

exercising control over prostitutes.<sup>13</sup> Brian Greaves argued that, as Gloria was a woman, he could not be charged with living off the earnings of a male prostitute. Parker J delivered the judgement of the court thus:

In our judgement, both common sense and the desirability of certainty and consistency demand that the decision in *Corbett v Corbett* should apply for the purpose not only of marriage but also a charge under section 30 of the Sexual Offences Act 1956 or section 5 of the Sexual Offences Act 1967. The same test would apply also if a man indulged in buggery with another biological man. That *Corbett v Corbett* would apply in such a case was accepted on behalf of the appellant. It would, in our view, create an unacceptable situation if the law were such that a marriage, such as Gloria Greaves and another man, was a nullity, on the ground that Gloria Greaves was a man; that buggery to which she consented was such that another person could live on the earnings of a female prostitute without offending against section 30 of the Act of 1956 because for that purpose he/she was not a man and that the like position would arise in the case of someone charged with living on the earnings as a male prostitute.<sup>14</sup>

Therefore, the court was extending the principle enunciated by Ormrod to the area of the criminal law. Both April Ashley and Gloria Greaves, regardless of any medical intervention, were, for the purpose of UK law, men. The judgement by Parker was widely criticised.<sup>15</sup> It is interesting to note that Gloria Greaves was released on bail pending appeal from a women's prison.<sup>16</sup>

Although the UK Courts heard numerous cases (mainly within the areas of family and criminal law) involving transsexuals, the position remained the same. For the purposes of English law, a transsexual was deemed to be of the gender born rather than the acquired gender, regardless of the hurt and humiliation this attitude would or could cause. However, in 1986, Mark Anthony Rees, a UK female to male transsexual,

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<sup>13</sup> Edwards, *op cit.*, p.31.

<sup>14</sup> *Ibid.*, p.32.

<sup>15</sup> See the dissenting judgement of Martens J in *Cossey*.

<sup>16</sup> Pace, "Sexual Identity and the Criminal Law," (1983) *Crim L. R.* 317-321, at 317.

took his case to the European Court of Human Rights, laying claim that the reluctance of the UK Government to recognise transsexuals as being of their acquired gender for legal purposes was a violation of his rights under the European Convention on Human Rights (the 'Convention').

### **The European Court of Human Rights**

Although Mark Rees was the first UK transsexual to apply to the ECtHR, the first transsexual to make an application under the Convention was a Belgian lawyer, Van Oosterwijck (*Van Oosterwijck v Belgium* (1980) 3 EHRR 557). This case is responsible for identifying the problems that so many transsexuals faced when a state refused to recognise the new gender on birth certificates. Van Oosterwijck argued that, as Belgian law forced him to carry legal identification everywhere, his rights were being violated under Articles 8 and 12, respectively.

Article 8 states:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as 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.

Van Oosterwijck was born a girl and his civil status card reflected this. He applied to have his birth certificate amended to reflect the new gender as he daily had to disclose to third parties the fact that he was born female. Prior to this, several transsexuals had had their birth certificates amended in Belgium. Van Oosterwijck found himself being refused an amendment, the authorities stating medical reasons as justification. As a lawyer, Van Oosterwijck was aware of the Convention and made an application. He also alleged that, by refusing an amendment to his birth certificate, they were violating his right to marry and found a family as his sex change had ensured he could no longer marry a man.

Article 12 of the Convention provides: "Men and women of marriageable age have the right to marry and to found a family, according

to the national laws governing the exercise of this right.” Before the European Commission (“the Commission”), speaking on his own behalf, Van Oosterwijck stated some of the difficulties he had encountered, such as what name would appear on his certificate for graduating in law from the University of Brussels and, once he had entered into the bar, what name was going to appear on the list. He informed those before him that he was struggling for his life:

... I became aware of the existence of this problem when I was five. I appear before you today at the age of thirty-five. Not to overturn case law, but for the right to lead a normal life.<sup>17</sup>

The Commission found that Van Oosterwijck's rights under Article 8 had been violated and, in also finding a violation of Article 12, stated:

Although marriage and the family are in fact associated in the convention and in domestic legal systems, there is nothing to support the conclusion that the capacity to procreate is an essential condition of marriage or even that procreation is an essential purpose of marriage.

Apart from the fact that a family can always be founded by the adoption of children, it should be noted in this connection that, although impotence is sometimes considered a ground for nullity, this is not generally the case as regards sterility.<sup>18</sup> However, the court refused to hear the case on its merits, as Van Oosterwijck had not exhausted all domestic remedies.

The comment on Article 12 by the Commission was noted because six years later Mark Anthony Rees presented the ECtHR with virtually the same facts. The application was, *inter alia*, under Article 12. Ignoring the Commission's views in Van Oosterwijck, the ECtHR found no violation and astonishingly was unanimous in its opinion.

*Rees v UK*<sup>19</sup> was heard in the Strasbourg court in October 1986. The decision handed down from the Commission in the *Van Oosterwijck* case had given him the encouragement to take his own case. Rees argued that

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<sup>17</sup> *Van Oosterwijck* (1980), cited in Edwards, *op. cit.*, 1995 p.41.

<sup>18</sup> *Van Oosterwijck* (1980), cited in D. Gornien *et al*, *Law and Practice of the European Convention on Human Rights and the European Social Charter* (Council of Europe Publishing: Strasbourg, 1996), p.256.

<sup>19</sup> (1987) 9 EHRR 56.

his own case was indistinguishable from Van Oosterwijck as he, too, was facing embarrassment in that production of his birth certificate was needed in a wide variety of situations and that, furthermore, without amendment to his birth certificate, he was forced to disclose private information to third parties, i.e., the fact that he was born a female, effectively constituting a violation of Article 8. On the subject of Article 12, *Rees* argued that although he was free to marry a person of the sex opposite to that assigned to him at birth, he was "...psychologically, biologically and socially unable to do so".<sup>20</sup>

Although the court accepted that the UK did owe a duty to Rees with respect to Article 8, it noted that Rees' life as a transsexual had already been facilitated to some extent by official action. His treatment and surgery had been obtained under the National Health Service and some of his official documents had been issued in his new name with an indication of his post-operative sex. The Court held that the refusal to alter a birth certificate could not be considered an interference with private life and, as there was no general consensus amongst the Member States of the Council of Europe, the UK enjoyed a wide 'margin of appreciation'.

But, Rees sought, not only an amendment to his birth certificate but also, a provision that any amendment be kept secret from third parties. The court held that Article 8 could not be interpreted so widely as to require the UK to introduce detailed legislation to cover this kind of situation. With regard to Article 12, the court also found no violation, stating that marriage refers to the traditional notion of marriage between two persons of opposite biological sexes and that Article 12 was mainly concerned with protecting marriage as a basis of family life. Furthermore the court accepted, impliedly, the reasoning in *Corbett* that biological sex is determined at birth. The court dismissed Rees' argument that he was not in the position to marry a man<sup>21</sup> and concluded that he was in fact free to do just that.

Although this dealt a bitter blow for transsexuals, some academics in the UK were positive, believing that legislative reforms would be in place shortly.<sup>22</sup> Four years later both the UK and European courts were given the opportunity to evaluate the position of transsexuals in UK law.

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<sup>20</sup> *Rees v UK* (1986) EHRR Series A no. 106.

<sup>21</sup> See above.

<sup>22</sup> E.g., see Bradney, *op. cit.*, p.351.

*Cossey v UK*<sup>23</sup> raised identical issues to *Rees*. Caroline Cossey was a male to female transsexual who was enjoying a successful career as model/actress. Cossey claimed that, as a consequence of the UK not allowing an amendment to her birth certificate, she was prevented from marrying a man. Cossey claimed this was an infringement of her rights under the Convention and made an application under Article 8, 12 and 14. The court once again held that there had been no violation but there was an increase in the dissenting judges. *Rees* had lost by 12 votes to 3 on Article 8 and unanimously on Article 12. *Cossey* lost by 10 to 8 on Article 8 and 14 to 4 on Article 12.

The court accepted that it was not bound by its previous judgements and that, although it generally did follow its own decisions, where there were cogent reasons for departing from those decisions, they would do so. But, the court concluded that this was not the case on the basis of examination of scientific and societal changes. They were of the opinion that there was nothing in this case to distinguish it from *Rees*.

Concerning Article 8 and the altering of the birth certificate, the court held that regard must be had to the fair balance between the general interests of the community and the interests of the individual. Furthermore, it was held that sex re-assignment surgery did not amount to a complete change of sex and, therefore, any alteration to the birth certificate would be incorrect.

With regard to Article 12, the Court noted that the right to marry was not impeded so much as to undermine its existence. Although some states allowed marriages between two people of the same biological sex, this was not consistent enough to warrant deviation from the traditional notion of marriage.

The dissenting judgements are of particular interest. Judge Martens for example, while acceding to the fact that *Cossey* was indistinguishable from *Rees*, opined that the Court in *Rees* got it wrong. He suggested that the Court should rectify this error in the present case. Martens noted the long, dangerous and painful treatment transsexuals were put through in order to adapt to the sex they were convinced they belonged to. For the law to refuse to acknowledge its change for legal purposes was “simply cruel”. Commenting on the margin of appreciation given to the UK in both *Rees* and *Cossey*, he stated that this was not a matter of right, but of judicial restraint. Additionally, where individual rights were violated, then

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<sup>23</sup> (1991) 13 EHRR 622.

no margin of appreciation should be given other than on how and in what form measures should be taken to rectify the infringement.

The dissenting judgement of Judge Palm gave reference to the Resolutions that had taken place. The European Parliament on 12 September 1989<sup>24</sup> and the Parliamentary Assembly of the Council of Europe<sup>25</sup> had both adopted Resolutions recommending the re-classification of the sex of the post-operative transsexual and calling upon Member States:

...to enact provisions on Transsexuals' right to change sex by endocrinological, plastic surgery and cosmetic treatment, on the procedure, and banning discrimination against them.<sup>26</sup>

If we add the above resolutions to the fact that, at the time of *Cossey*, the number of member states, which recognised, for legal purposes, re-assignment of sex, had increased to fourteen,<sup>27</sup> then it is clear that important societal developments had taken place.

A note has to be made regarding Caroline Cossey's position and the UK's insistence that the birth certificate is the retainer of historical facts and should not be amended unless the facts prove to be wrong. In reality the birth certificate remains a tool of everyday life. Prospective employers, life assurance companies, motor insurance companies, both the civil and criminal courts and pension providers all request sight of birth certificates. Even though the UK Government stresses that the birth certificate should not be used as identification, the reality is that life insurance and motor insurance companies will want to see it to check age and gender for actuarial purposes. The courts, whether you are a defendant or claimant, will require it to establish your age and gender. Pension companies require it to check for retirement dates. If Caroline Cossey worked a 9-5 job, will she not be faced daily with embarrassment when she has to continue work for a further five years upon reaching the age of 60? What is more, the Government contradicts itself by saying that it is not a form of identity and yet uses it as such when, for example, a death certificate is being drawn up. So, in reality the birth certificate is a daily tool if stating a gender

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<sup>24</sup> OJ C256/33 (9 October 1989).

<sup>25</sup> Recommendation 1117 (1989).

<sup>26</sup> Cited in Edwards, 1996 p. 41.

<sup>27</sup> Walton, "A Measure of Appreciation," (1992) *New Law Journal*, 142 (6566), 1202-1204, at 1203.

opposite to that of the person holding it will cause daily distress. These points are as relevant today as they were then.

Yet, the court was not addressed with these points and *Cossey*, therefore, remained "good law", at least as far as transsexuals in the UK were concerned. It was another six years before the ECtHR was given the opportunity to end the humiliation and distress caused to UK transsexuals. Although technically distinguishable from *Rees* and *Cossey*, *X, Y and Z*<sup>28</sup> involved Stephen Whittle, a law lecturer and Vice President of Press For Change,<sup>29</sup> his wife and their first child. The case was of high profile and it was expected that this time transsexuals would at last win and the UK would be forced to adopt measures granting them full legal status in the gender chosen.

### ***X, Y and Z v UK***

Stephen Whittle (X), a female to male transsexual, and Sarah Rutherford (Y), have been living together as a couple since 1979. They have four children born from Artificial Insemination by Donor ("AID"). The case concerned the request of X to be registered as the father on the birth certificate of their eldest daughter (Z). X has been living and working as a man since 1975 although he did not have sex re-assignment surgery until 1979.

After living together for 11 years, X and Y decided they wanted to start a family. They applied for AID and were initially refused. However, in November 1991 a hospital ethics committee agreed to provide the treatment requested for X, and Y underwent extensive counselling and, after the doctors had decided that it was appropriate and in the best interests of any child born, X was asked to acknowledge himself as the legal and social father of the child within the meaning of the Human Fertility and Embryology Act 1990. That Act provides, *inter alia*, that, where an unmarried woman gives birth as a result of AID with the involvement of her male partner, the latter, rather than the donor of the sperm, shall be treated for legal purposes as the father of the child.<sup>30</sup>

On 13 October 1992 Z was born. X and Y then attempted to register the child in their joint names as father and mother, respectively. They were prevented from registering X as the father on account of him being

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<sup>28</sup> Judgement of 22 April 1997, Reports of judgements and Decisions – II (1997) 24 EHRR 238.

<sup>29</sup> A campaign group to promote the rights of transsexuals.

<sup>30</sup> Section 28(3).

assigned a female on his own birth certificate. That part of the register was left blank although they allowed Z to be given the surname of X.

The family made an application to Strasbourg on behalf of themselves and Z, arguing that the prevention of X being named on the birth certificate of Z was a violation of the right to privacy under Article 8. Furthermore, they argued that the refusal stigmatised the whole family and Z in particular, and removed basic parental rights from X. Y claimed that the action infringed her right to choose the father of her child under Article 12. X also claimed that he was discriminated against under Article 14 in conjunction with Article 8 by virtue of sex.

A grand chamber of 20 judges heard the case. Maybe it was an omen, but, just before the case was heard, Judge Martens, long an advocate of transsexual rights, was taken ill and replaced by the Greek Judge, Valticos, who unfortunately, had decided against the transsexual in every case he had heard.

The UK Government contended in the first place that no family ties existed between the applicants. However, the court unanimously held that Article 8 was applicable in this case as they considered *de facto* family ties did exist between the applicants. The notion of family life could include different relevant factors that covered a couple who had demonstrated their commitment to each other by having children together or by any other means.

Once the family had been established, the court then distinguished the present case from *Rees* and *Cossey* in that it raised different problems such as granting parental rights to transsexuals, particularly, in the form of AID. However, they proceeded on the basis that there was little common ground amongst the Member States of the European Council as regards parental rights and, in particular, as to whether any non-biological father should be recorded on the birth certificate of a child born from AID. As a result of this, the UK was to be given a wide margin of appreciation. They, therefore, held by a majority of 14 to 6 that the UK had not contravened Art. 8 and, furthermore, that it was not necessary to examine the same issues under Article 14.

At first sight the judgement seems a sensible one. There is in fact no general consensus on parental rights within Europe. It is a reasonable argument that a community will have a large interest in maintaining a coherent system of family law that places the best interests of the child as paramount. But, the court went on to say that any change in the system might have undesirable or unforeseen ramifications on a child, placed in the position of Z, and could not be accepted without further elaboration.

Neither the court nor the UK Government offered any example of this. It is, therefore, difficult to see how Z could have suffered from having X as her father on her birth certificate.

The court commented that any amendments may have other implications. For example, family law might be a shambles if, on the one hand, it recognised X as the father of Z on her birth certificate, whilst simultaneously barring him from marriage to Y on account of only being recognised as of the sex assigned on his birth certificate, i.e. female. However, it is felt that the court missed the real point here because any ambiguity in the law would have been caused by the UK's constant refusal to recognise X as a man for legal purposes. In other words, if the UK Government had not been so inflexible but had admitted that they were wrong in denying a transsexual the right to be recognised in any new gender chosen, then that chosen gender would have been the applicable one for the whole of the law, thereby preventing any ambiguity.

The dissenting judgements were probably the correct ones. Judges Casadevall, Russo and Makarczyk argued that, as the UK Government, firstly, allowed X to have sex re-assignment surgery and, secondly, allowed Y to have fertility treatment for which X was obligated to acknowledge paternity, they are obligated to take all measures necessary, without discrimination, to allow the applicants to live a normal life. Unfortunately, they failed to take account of Article 14 after implying that X was discriminated against. The rest of the dissenters, however, did not dismiss article 14. Judges Thor Vilhjalmsson, Foighel and Gotchev, in three separate dissents, all found a violation of both Articles 8 and 14.

Thor Vilhjalmsson took cognisance of the fact that, had X been born a man, he would have been allowed to register himself as the father of Z. Yet, as a result of him being a transsexual and assigned the role of female, he was not allowed.

Foighel made reference to *Cossey*, where he also dissented, in that the court in that case commented that it must follow any future medical, social and moral developments in the area. He correctly pointed out that the majority ignored these.

Gotchev approached the case from a different angle, arguably the most reasonable. He argued that the welfare of the child was paramount and that the UK Government was under an obligation to the child to ensure integration into the family, which would surely include recognising X as the father of Z on the child's birth certificate.

It is the present author's opinion that the court erred here on two grounds. Firstly, this case should not have been distinguished from *Rees*

and *Cossey*. The reason for the case being brought was that X was not being recognised on his own birth certificate as a male. Had he been recognised in his new gender, no case would have arisen. This case, therefore, should be deemed an extension of *Rees* and *Cossey*. *X, Y and Z* illustrated more circumstances where the UK's refusal to amend birth certificates was causing problems in addition to those shown by *Rees* and *Cossey* earlier. Secondly, the court should take another look at the use of Article 14. Is there really any reason to have to use it in conjunction with a substantive Article? Even if one was to accept that there was no violation of Article 8, the fact remains that X was discriminated against on grounds of sex because, had he been assigned a male at birth, he would have been allowed to register himself as the father; yet, as a result of his birth certificate showing him to be a female at birth, he was prevented from doing so. This is a clear violation of rights and is, thus, questionable.

Although the decision dealt a bitter blow to UK transsexuals, one of the applicants, Stephen, remained positive and believed the dissenting judgements gave hope.<sup>31</sup> Not all transsexuals were as positive, though. Christine Burns was particularly scathing:

...Stop and think for a moment about X's position if Y were to die or merely become incapacitated...and then think how any parent would feel to live in the shadow of that uncertainty. Remember that X is unable to marry Y either...and think of the effects which that has on both his and the children's financial security...Think about ... everyday consequences too. In law X has no legal right to an interest in his children's education. If the children require hospital treatment there is a question mark over whether he can give consent to drugs or surgery. Every direction he turns in is a cruel reminder that his role as both a father and as a man is under question.<sup>32</sup>

She added the following scathing words for the UK government:

What sorts of monsters insist on perpetuating this kind of mental cruelty? Well curiously, they say they're concerned for the

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<sup>31</sup> Whittle, *ECHR fails to take on board transsexuals issues* (1997); available at [www.pfc.org.uk/legal/echrnal.htm](http://www.pfc.org.uk/legal/echrnal.htm).

<sup>32</sup> Burns, *op. cit.*

future of “the family”. But if that’s the case then they have a strange and warped way of expressing that concern.<sup>33</sup>

It was not long before the Strasbourg court was given the opportunity to hear the next application from the transsexual community.

***Sheffield and Horsham v UK***<sup>34</sup>

This case differed again from all those before it, but only on the circumstances. It was the first transsexual case before the court involving two transsexuals, both male to female. It also differed in that one of the applicants had dual nationality. Rachael Horsham had been born in the UK, but had lived in Holland for nearly three decades during which time she received citizenship and entered into a valid marriage in Holland. It was also the first time the court was faced with a transsexual applicant claiming violation of Article 13 as well as Articles 8, 12 and 14.

Article 13 reads:

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.

Kristina Sheffield was born in 1946 and registered at birth a male. *Sheffield* differed from *Rees* and company in that, as a male, she had been married and fathered a child. Her occupation at the time was that of pilot. In 1986 Sheffield underwent sex re-assignment surgery, but not before having the marriage dissolved. The applicant's former spouse successfully applied to have Sheffield's contact with her daughter terminated and Sheffield had not seen her since, some 12 years ago.

Rachael Horsham, too, born in 1946, was registered a male at birth. She left the UK in 1971, in fear of being identified as a transsexual, to live in Holland.<sup>35</sup> In 1992 Horsham underwent sex re-assignment surgery at the Free University Hospital in Amsterdam.

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<sup>33</sup> *Ibid.*

<sup>34</sup> Judgement of 30 July 1998, *Reports and Decisions of 1998* (1999) 27 EHRR 163.

<sup>35</sup> It would be interesting to discover whether the media attention to April Ashley around the same time had anything to do with this.

A full chamber of twenty judges heard the case. They once again found that the UK had not violated Article 8, but this time by the slimmest of majorities: 11-9. They also ruled by a majority of 18-2 that no violation of Article 12 had taken place, with a unanimous ruling against violation of either Article 13 or Article 14.

The court held that the applicants had not shown that since the *Cossey* case there had been enough medical findings to settle conclusively the aetiology of transsexualism. They also dismissed the research report, proffered by Liberty Amicus, stating (at para. 57):

...the Court is not fully satisfied that the legislative trends outlined by amicus suffice to establish the existence of any common European approach to the problems created by the recognition in law of post-operative gender status. In particular, the survey does note that there is not as yet any common approach as to how to address the repercussions which the legal recognition of a change of sex may entail.

The court accepted that the incidents illustrated by *Sheffield* and *Horsham* were embarrassing enough to cause distress. However, they stressed that there must be occasions which would justify proof of gender as well as medical history. Nevertheless, they went on to say (at para.59):

...apart from these considerations the situations in which the applicants may be required to disclose their pre-operative gender do not occur with a degree of frequency which could be said to impinge to a disproportionate extent on their right to respect for their private lives.

They did, however, find it necessary to criticise the UK government for their lack of action in this area. On this issue they reiterated the point, made by the court in both *Rees* and *Cossey*, about the importance of keeping the need for appropriate legal measures under review, having regard, in particular, to scientific and societal development. The court noted that the UK government had made no attempts to follow those instructions. They further pointed out that, although a UK transsexual is able to record his/her new sexual identity on certain documents such as passports and driving licenses or change their name at will, these were not innovative facilities as they were able to be done even at the time of *Rees*, some eleven years previously.

Although the court dismissed the view that there had been enough scientific development in the aetiology of transsexualism, they did accept that there had been an “increased social acceptance of transsexualism and an increased recognition of the problems post-operative transsexuals encounter”.<sup>36</sup>

The British judge, Sir John Freeland, although voting in favour of the UK, accepted that *Sheffield* and *Horsham* had illustrated a wider range of situations in which difficulty and embarrassment were caused to post-operative transsexuals in the UK than had been illustrated in *Rees* and *Cossey*. Admitting that he hesitantly ruled in favour of his home state, he implied that next time the UK Government might find themselves in violation of the Convention.

Judges Bernhardt, Thor Vilhjamsson, Spielman, Palm, Wilhaber, Makarczyk and Voicu disagreed with the majority and were of the opinion that important developments had taken place with regards to both medical and societal learning but the UK had stood still, refusing to even review the situation. Referring to the Liberty Amicus Brief, they were convinced that the research conducted illustrated that the problems of transsexuals were being addressed in a dignified and respectful way by a large number of Member States. Furthermore, they suggested that the court should not wait until every Member State had amended its law on transsexuals before deciding that Article 8 should give rise to a positive obligation to introduce reform.

Pointing to the report drawn by Liberty, illustrating that the UK was then one of only four Member States to have done nothing on the issue, the dissenters said:

... how can we expect uniformity in such a complex area where legal change will necessarily take place against the background of the States’ traditions and cultures? However, the essential point is that in these countries, unlike in the United Kingdom, change has taken place – whatever its precise form – in an attempt to alleviate the distress and suffering of the post-operative transsexual and that there exists in Europe a general trend which seeks in differing ways to confer recognition on the altered sexual identity.<sup>37</sup>

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<sup>36</sup> Para. 60 of the judgement, *ante*.

<sup>37</sup> See joint, partly dissenting opinion of Judges Bernhardt, Thor Vilhjamsson, Spielman, Palm, Wilhaber, Makarczyk and Voicu.

The judgement gave much hope to UK transsexuals<sup>38</sup> and it seemed clear that the court was making headway towards their goal. But, one cannot help but feel that the applicants should have won this case in any event. It must be noted that the court, in its own judgement, “moved the goalposts”. The UK was given a wide margin of appreciation in *Rees* and *Cossey* as a result of there being no general trend in Member States on legislation for transsexuals. Yet, when there was finally evidence of this, as the report by Liberty illustrated, the majority then claimed that there was no consensus on *how* the States approached the area. This, in agreement with the minority, is not the point. The fact is that there is a growing trend, as shown by *Cossey* and *Rees* and, so, it is felt that the majority erred on this point.

The Strasbourg court was given yet another opportunity to resolve the desperate plight of UK transsexuals in 2002. Sixteen years after hearing the humiliation caused to Mark Anthony Rees, the Strasbourg judges finally decided “enough was enough”. *Goodwin v UK*<sup>39</sup> (and the parallel case of *I v United Kingdom*<sup>40</sup>) represented a historical landmark for UK transsexuals.

### ***Goodwin v United Kingdom***

Christine Goodwin was a post-operative male to female transsexual. Like many of the previous transsexual applicants, she provided evidence of an array of situations, where the UK’s refusal to grant full legal status to a transsexual in their new gender was causing distress. Some of these, although existing hypothetically in the earlier cases, had not been presented to the court before. Issues such as pensions, retirement age, etc., had been cited before the court on previous occasions, but one issue identified a great travesty not heard in any of the previous cases by the court in relation to transsexuals. In 1992 Ms Goodwin had claimed she was being sexually harassed and was ultimately dismissed, she argued, as a result of her transsexuality. She tried to pursue the case in the Industrial Tribunal (as it was then), but claimed she was unsuccessful because she was considered in law to be a man. It is the author’s contention that, facing

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<sup>38</sup> See below.

<sup>39</sup> 28957/95 [2002] I.R.L.R. 664 (ECHR).

<sup>40</sup> Application No. 25680/94 July 11, 2002.

the numerous embarrassing situations cited is one thing, but being denied access to justice as a result of being transsexual is another.

This time, the ECtHR were not lenient with the UK Government and found that there had been a violation of Article 8, determining that the Government had failed to comply with its positive obligation to guarantee the applicant's right to respect for her private life, in particular, by failing to give legal recognition to her gender re-assignment.

Although the decision is a welcome one, it must be stated that there was no reason why the court could not have come to their conclusions earlier. For example, the court pointed out that, as the United Kingdom authorised the treatment and surgery needed to alleviate the condition of gender dysphoria, it would be illogical to refuse full legal recognition of this. However, this was the position for Mark Rees in 1986. Treatment was available on the NHS then and continues to be available. Why did the Strasbourg court take 16 years to determine that providing the surgery and then denying a legal recognition of that surgery was illogical?

The ECtHR again used the services of Liberty as they had done in *Sheffield* and *Horsham*. The Amicus Brief provided by Liberty showed no change in Europe since its previous report and yet the court attached great importance to "the clear 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". However, this growing trend was illustrated in 1998 in *Sheffield and Horsham*.

The Court also took the view that there were no significant factors of public interest to weigh against the interest of the applicant in obtaining full legal recognition in her new gender. Again, it is difficult to see how this was different from previous cases. As in all previous applications, the UK had argued that this issue fell within the margin of appreciation. On each of the other occasions the Court accepted that. However, this time the court found the opposite: that the UK Government could no longer claim that the matter fell within their margin of appreciation.

The Strasbourg court also deemed that the applicant's rights had been violated under Article 12, opining that the reference to "men and women" in Article 12 could not be assumed to refer exclusively to the birth gender of individuals. Dismissing the UK Government's claim that this matter also fell within the margin of appreciation, the Court implied that there was no justification for barring a transsexual from marriage under any circumstances.

## Conclusion

It is apparent, therefore, that the Strasbourg Court has now abandoned its cautious approach and rightly held the view that the lack of legal recognition of transsexuals by the UK Government no longer falls under the umbrella of a margin of appreciation. However, is it a failure of the ECtHR to take 16 years to remove the protection afforded to the UK?

When Mark Anthony Rees became the first UK transsexual applicant to present a case before the ECtHR in 1986, very little was known about transsexualism and it is understandable that Ormrod's criteria, as set out in *Corbett v Corbett* in 1970, was used as the backbone to afford the UK leniency. Additionally, it will be remembered that, at the time, the Court pointed out that the UK did already facilitate the position of transsexuals by allowing both treatment and surgery under the National Health Service and allowing a change of name on certain documents, for example, on passports. However, it must be contended that even at that point the UK Government had confused matters by allowing Gloria Greaves to spend time on remand in a women's prison after insisting that legally she was still a man under UK law.

By the time Caroline Cossey appeared before the Court in Strasbourg in 1991, the rest of Europe had started to wake up to the plight of transsexuals. Both scientific and social changes were being discovered, but not enough, according to the ECtHR, to warrant a departure from *Rees*.

Caroline Cossey had raised identical issues to Mark Rees. However, it was apparent that a number of the Strasbourg judges were uncomfortable with the *Rees* decision. The UK government had won by the smallest of margins possible in the case (10-8). Although there still appeared no real general consensus on the issue amongst member states, the European Parliament and the Parliamentary Assembly of the Council of Europe had passed Resolutions urging member states to enact provisions on transsexual rights and to ban discrimination against them. The ECtHR failed UK transsexuals by not placing more emphasis on the Resolutions.

Although *X, Y and Z* was technically distinguishable from *Rees* and *Cossey*, it must be submitted that, in reality, the principle remained the same. All that this case illustrated by way of difference, was that Stephen Whittle argued different circumstances, where the UK's refusal to acknowledge legal recognition of a transsexual's new gender was causing a detriment to the transsexual. However, in the case it was not just the transsexual who was affected, but also his family, including a young child who wanted to have a legally recognised father on her birth certificate. The

present author believes this to be ironic as UK family law has, for several years now, placed the interests of children as paramount. The ECtHR's reasoning, that a change in the law would provide ambiguity in UK law, was weak in that they failed to recognise that an ambiguity would be caused only by the UK's refusal to acknowledge Whittle as a man.

Whilst it is accepted that the absence of a general consensus in Europe on a particular issue can grant the member state concerned a margin of appreciation, surely the court was under an obligation to respect any consensus as negating the right to afford the member state its margin. In *Sheffield and Horsham*, Liberty provided a report illustrating that only four member states did not provide some type of mechanism allowing the transsexual to be legally recognised in their chosen gender: Albania, Andorra, Ireland and the UK. However, it is contended that again the Court failed by insisting on any consensus illustrating a similar approach in how provisions were implemented. This was not something that the court had insisted on previously; to have expected similarity in how Member States implemented provisions seemed ludicrous, given the social and cultural differences between the states. It should only have been necessary to show that provisions were made. The form and method should have been entirely up to the state. The report was produced for a second time in the case of Christine Goodwin and, although nothing had actually changed, the court, this time, took a different view.

*Goodwin v UK*, it can be argued, added very little to the cases heard before, other than highlighting even more situations where the UK's refusal to legally recognise a transsexual in their new gender was causing distress. The situations, that Goodwin presented to the ECtHR, were present even in *Rees* and *Cossey*. However, although the court could only deal with the evidence put before it, one must wonder why the lawyers, acting on behalf of Rees and Cossey, did not address these issues. They were obvious enough, even in 1986 and 1991. Returning to the Amicus brief presented by Liberty to the court in *Sheffield and Horsham*, the report was updated and presented in *Goodwin*. However, as far as Europe was concerned, there was absolutely no change. This time, though, the report also covered states that were not a party to the Convention. Furthermore, in condemning the UK for lack of action, the ECtHR erred as the UK had, indeed, put together the Inter-departmental Working Group on Transsexuals' Rights after *Sheffield and Horsham* (although the group did little before re-convening after the decision in *Goodwin*).

All in all, very little was presented to the ECtHR in *Goodwin* that had not been argued before, even if only in principle. With such weak

jurisprudence coming from the ECtHR, it must be concluded that the court had decided enough was enough and, after the stern warning, handed out by Sir John Freedland in *Sheffield and Horsham*, the UK Government could not seriously have hoped to win this case.

It took 34 years, numerous cases in the UK courts, seven cases in Strasbourg and the introduction of the Gender Recognition Act 2004 for UK transsexuals, finally, to win the rights and freedom they had fought so persistently for: the right to be legally recognised in their chosen gender and the freedom, like everyone else, to slip quietly into the crowd.

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