

Briefing note on the Lydia Foy case

**The case that won recognition for Ireland's
transgender community**

Foy v An t-Ard Chláraitheoir & Ors

FLAC (Free Legal Advice Centres)

October 2015

Overview

Until very recently, Ireland had no provision for legal recognition of transgender persons in their true gender. This was changed as a result of landmark legal proceedings taken by Dr Lydia Foy, which resulted in the passing of Ireland's first ever Gender Recognition legislation in July 2015. Dr Foy began her legal case in 1997 and it was finally settled in November 2014, when the Government committed to publish a long awaited Gender Recognition Bill and to have it enacted as soon as possible in 2015. In May 2015, after detailed discussion in the Oireachtas (parliament) the Government amended the Gender Recognition Bill to remove a requirement for medical evidence as a condition for legal recognition of transgender persons and the Bill was passed without any opposition on 15 July 2015.

Ireland now has one of the most progressive and inclusive transgender recognition laws in the world. The first Gender Recognition Certificate was issued to Lydia Foy in September 2015, and she finally obtained the birth certificate showing her female gender that she had first requested 22 years earlier.

The Foy Case

Dr Lydia Foy, a transgender woman, took the first legal case in Ireland seeking a new birth certificate and legal recognition in her female gender. After applying to the Registrar of Births, Marriages & Deaths in March 1993, and following several years of fruitless correspondence, she began legal proceedings in 1997, represented by FLAC (Free Legal Advice Centres), a human rights NGO that provides free legal information and advice and campaigns for social change.

The High Court ruled against Lydia Foy in July 2002. Two days later, the European Court of Human Rights held that the UK had violated the rights of two transgender women who had also been refused new birth certificates. The law in the UK was the same as the law in Ireland but the UK quickly introduced a Gender Recognition Act following the European judgments.

The European Convention on Human Rights did not have direct effect in Ireland at that time, but it was given greater domestic effect by the European Convention on Human Rights Act in 2003 (the ECHR Act). Lydia Foy then issued new proceedings relying on the ECHR Act and the recent transgender judgments by the European Court of Human Rights.

On 19 October 2007, the High Court gave its judgment, finding that the failure to recognise Dr Foy's female gender was a violation of her rights under Article 8 of the European Convention on Human Rights. Though it held that Dr Foy had no remedy under Irish law, the court granted a declaration under the new Act that Irish law was incompatible with the Convention because of its failure to provide for the recognition of transgender persons. This was the first declaration of incompatibility made under the ECHR Act. The judge stated that "*Ireland as of now is very much isolated within the member states of the Council of Europe*". He also expressed considerable frustration at the failure of the Government to take any steps to assist transgender persons in the five years since the European Court's rulings on the UK cases.

The Irish Government appealed to the Supreme Court, but public opinion was changing on this issue and in its *Renewed Programme for Government* in October 2009, the Government promised to introduce legal recognition for transgender persons. In June 2010 the Government finally withdrew its appeal to the Supreme Court and the declaration of incompatibility with the European Convention became final. However, the declaration itself

did not change the law. It was still up to the Government to do so.

The Gender Recognition Advisory Group

In May 2010 the Government had set up a Gender Recognition Advisory Group (GRAG) *“to advise the Minister ... on the legislation required to provide for legal recognition by the State of the acquired gender of transsexuals”*. The Advisory Group was made up solely of officials of various Government Departments likely to be involved in any change in the law and did not include any transgender persons. It invited submissions from the public and held meetings with FLAC, Transgender Equality Network Ireland (TENI), the Irish Human Rights Commission, the Equality Authority and other interested organisations.

A new Government

Following a general election in February 2011 a new Fine Gael/Labour Coalition Government pledged that *“We will ensure that transgender people will have legal recognition and extend the protections of the equality legislation to them”*.

The Gender Recognition Advisory Group Report

The Advisory Group report was published in July 2011 and while it did call for legislation and advised against making gender reassignment surgery a pre-condition for recognition, it was otherwise very cautious and conservative. It proposed a psychiatric diagnosis of “Gender Identity Disorder” as a basic condition for recognition, despite the fact that transgender persons felt this suggested that they were mentally ill or disordered, which they are not.

It also proposed ‘compulsory divorce’ – that married trans persons must divorce before they can be recognised in their true gender – to avoid the possibility of same-sex marriages. This had been opposed by all submissions dealing with this issue and was particularly problematic in Ireland, given the exacting conditions to be satisfied when seeking a divorce. The Constitutional Courts of Germany and Austria had both ruled that similar preconditions in their transgender legislation infringed the applicants’ fundamental rights.

Launching the Advisory Group report in July 2011, Social Protection Minister Joan Burton TD committed to introducing legislation and promised to give it high priority. Speaking at a conference of Transgender Europe in Dublin a year later, in September 2012, Minister Burton repeated her promise to give high priority to the proposed gender recognition legislation and said she would refer a draft of the Bill to a parliamentary committee for discussion within the next few months.

Given the long delay in implementing the High Court ruling in Lydia Foy’s case, FLAC had begun to prepare new legal proceedings to seek to enforce the court’s decision. By January 2013 there was still no sign of a draft Bill. Consequently, FLAC and Dr Foy returned to court in February 2013 seeking a declaration that the Government had a legal obligation to provide her with a new birth certificate and that the failure to do so after all these years amounted to degrading treatment and a breach of her right to an effective remedy under the European Convention on Human Rights and the Irish Constitution. Eventually in July 2013, the Government introduced its draft Bill but it was moving very slowly in the Oireachtas. The new case was due for hearing in November 2014, when it was with a Government commitment to publish the final version of the Bill by the end of the year and enact it as soon as possible in 2015. Seven years after the High Court decision that the failure to recognise

transgender persons in Ireland was in breach of the ECHR, and 21 years after Dr Lydia Foy first requested a new birth certificate in her female gender, the Bill was published in December 2014 and the Gender Recognition Act was passed in July 2015.

The Gender Recognition Act

Following much debate and amendment, the Gender Recognition Bill successfully passed through all stages in the Oireachtas and was passed on 15 July 2015. The requirement for supporting evidence from a psychiatrist or endocrinologist was removed. It was replaced by a self-declaration approach, whereby formal legal recognition of the person's preferred gender is given through a Gender Recognition Certificate, issued by the Department of Social Protection. This ensures that an applicant's preferred gender is recognized by the State in all circumstances. The Gender Recognition Certificate can then be used to seek a new Birth Certificate showing the applicant's true gender. The first Gender Recognition Certificate was issued to Dr Lydia Foy in September 2015 and she received her new birth certificate just over a week later.

The Gender Recognition Act, as passed, included a requirement that applicants for Gender Recognition Certificates must be single, with the result that married transgender persons would have to divorce to secure recognition. The reason given for this was to avoid the creation of same sex marriages. Following a clear 'Yes' vote in a referendum on Marriage Equality in May 2015, the Government committed to dropping this requirement and when the Gender Recognition Act was commenced in September 2015, that section of the Act was not included. It will be repealed by a Marriage Bill that is currently (October 2015) going through the Oireachtas.

Conclusion

The introduction of the Gender Recognition Act 2015 was a huge step forward for the transgender community. With the removal of the requirement to produce a medical certificate before transgender persons can be recognized in their preferred gender and the forthcoming repeal of the 'compulsory divorce' provision, Ireland now has one of the most progressive regimes for legal recognition of transgender persons.

However, although progressive, the Act is not perfect. It does not adequately provide for transgender children under 16 years old, and those aged between 16 and 17 must undergo an onerous process to achieve legal recognition, which involves obtaining medical reports from two doctors, parental consent and a court order.

Dr Lydia Foy has in recent times had her enormous sacrifice and courageous determination to bring about change recognised by a variety of organisations, individuals and bodies, including the European Parliament, the Tánaiste (Deputy Prime Minister) and Minister for Social Protection, and Trinity College Dublin. As a legal rights body that seeks to use law in the public interest, FLAC is extremely proud to have been part of this historic, ground-breaking case and to be associated with this remarkable woman.

**FLAC is an independent, not-for-profit organisation which promotes
the fundamental human right of equal access to justice for all.**

FLAC, 13 Lower Dorset Street, Dublin 1

Tel Admin/policy: +353-1-887 3600 | LoCall Info Line: 1890 350 250 | Fax: +353-1-874 5320

Web: www.flac.ie | fb.me/FLACIreland | [@flacireland](https://twitter.com/flacireland)