

Lydia Foy and the Struggle for Gender Recognition

A Case Study in Public Interest Litigation

by Michael Farrell*

In 1993, Dr Lydia Foy, a transgender woman who was registered at birth as a boy, applied for a new birth certificate showing her gender as female. Following a series of refusals, she issued legal proceedings in 1997, represented by Free Legal advice Centres (FLAC). Ten years later, in 2007, a High Court Judge granted the first ever declaration of incompatibility of Irish law with the European Convention on Human Rights (ECHR) in her case.

In 2010 the Government dropped an appeal against the declaration. But at the time of writing, 19 years after Dr Foy first applied to the Registrar General, she still has not got her new birth certificate. And Ireland is now the only country in the European Union that has no provision for recognising transgender persons.

The Foy case is a classic example of public interest litigation: using the law to assert the rights of a group of vulnerable people. But like a lot of public interest legal cases, nobody planned it that way at the start. Very few people in Ireland had even heard of transgenderism (where people are born with physical characteristics of one gender but feel and believe that they really belong to the other gender) when Lydia Foy approached FLAC for help in 1996. Mary Johnson, the FLAC solicitor at the time, had the foresight to see that there was a significant issue involved, but even she had no idea that 16 years later the case would still be going on.

Dr Foy's case was heard over 14 days in the High Court in October 2000, with a great deal of complex medical evidence. It was difficult and distressing for her and for members of her family and some of the media coverage was intrusive and sensationalist. However, it did begin to raise awareness about a previously invisible minority and it got it across that transgenderism was not a 'lifestyle choice' but a real and recognised condition which frequently led to great hardship and suffering for those involved.

* Michael Farrell is the Senior Solicitor in FLAC and has been dealing with the Lydia Foy case since 2005.

Dr Foy had claimed that the failure to recognise her acquired female gender was in breach of her rights under the Constitution and the ECHR but Judge Liam McKechnie felt he was bound by a 1970 decision of the British High Court in the case of *Corbett v Corbett*.¹ Mr Corbett had applied to annul his marriage to a transgender fashion model on the basis that she was still really a man— something that had not bothered him when he married her.

The British Judge had ruled that sex or gender should be determined only by physical sexual organs and chromosomes. He dismissed psychological factors, the individual's own perceived gender identity and the effects of gender reassignment surgery and added, for good measure, that a woman's essential role in marriage was to bear children.

Judge McKechnie was a good deal more sympathetic in Lydia Foy's case but he said he could not find anything in the Constitution or ECHR jurisprudence that would enable him to overrule the *Corbett* decision and recognise Dr Foy as female. He did say, however, that the issues she had raised were 'of deep concern to any caring society', and he 'urge[d] the appropriate authorities to urgently review this matter'.²

The judgment was given on 9 July 2002, almost two years after the hearing and, by an ironic quirk of fate, two days later the European Court of Human Rights delivered a landmark judgment in a transgender case from the UK, *Christine Goodwin v United Kingdom*.³ After a series of negative decisions in UK cases over the previous 15 years or so, the Strasbourg Court suddenly declared unanimously that there was now 'clear and uncontested evidence of a continuing international trend in favour ... of the legal recognition of the new sexual identity of post-operative transsexuals'.

The Court held that the UK had breached Ms Goodwin's rights under the ECHR by failing to allow her to obtain a new birth certificate or to marry in her acquired female gender. The UK quickly passed the Gender Recognition Act 2004, providing for full legal recognition of transgender persons. The law on this issue was virtually the same in Ireland as in the UK, so it seemed clear that the Irish law would be in breach of the ECHR as well.

¹ *Corbett v Corbett* [1970] 2 AER 33.

² *Foy v An t-Ard Chlaraitheoir* [2002] IEHC 116.

³ *Christine Goodwin v UK* (2002) 35 EHRR 447.

Lydia Foy had appealed the High Court decision in her case, but the outcome was not necessarily as straightforward as appeared. The legal doctrine at the time was that a decision of the Strasbourg Court was only binding if it was given in a case against Ireland.

But then came the European Convention on Human Rights Act 2003 (ECHR Act 2003), which brought the Convention more directly into Irish law. It created an obligation on public bodies to comply with the ECHR and provided that where there was a breach of the Convention and there was no remedy available under Irish law, a court could grant a declaration of incompatibility with the ECHR. It would then be up to the Government to change the law.

Lydia Foy applied again to the Registrar General, this time citing the new obligation for him to comply with the ECHR and referring to the *Goodwin* decision. The Registrar refused again and Dr Foy issued new proceedings in January 2006, this time seeking *inter alia* a declaration of incompatibility under the 2003 Act.

The case had now taken on another dimension. FLAC and Lydia Foy were now using a brand new legal mechanism in the hope that it would not only help Dr. Foy in her quest for gender recognition, but would also test the potential of the ECHR Act to protect the rights of others as well.

We did not want to rely solely on the *Goodwin* decision, however, so we also scoured the internet for decisions in other transgender cases in Strasbourg, before the European Court of Justice (the EU Court), and in other common law countries like the US, Australia and New Zealand. We found quite a few, certainly enough to confirm that there was a growing trend towards transgender recognition, both in Europe and elsewhere.

And conscious that if the High Court made a declaration of incompatibility, that would leave it up to the Government and the Oireachtas to introduce the necessary legislation, we began to produce press releases and media briefings to try to increase awareness about the issue and create a climate that would support new legislation.

Judgment was given on 19 October 2007 by Judge McKechnie.⁴ Both sides had agreed to ask him to hear the new application as it would avoid the need to re-hear the lengthy medical

⁴ *Foy v An t-Ard Chlaraitheoir* [2007] IEHC 470.

evidence given in the first case. From our client's point of view, although he had held against her five years earlier, he was clearly fair and open-minded and this time we had the decision of the Strasbourg Court on our side.

Judge McKechnie again rejected the arguments on constitutional and administrative law grounds, but he went on to say that the *Goodwin* decision had 'changed dramatically and irreversibly the position of transsexuals under the Convention'.

Clearly frustrated at the Government's failure to take any action on the issue in the five years since his previous judgement, and since the *Goodwin* decision, he added:

It is very difficult to see how this Court, even still allowing for some "margin of appreciation", in this sensitive and difficult area, could now exercise further restraint, grant even more indulgence, and afford yet even more tolerance to this State ... [I]n my humble opinion, this Court cannot with any degree of integrity, do so. Consequently I must conclude that by reason of the absence of any provision which would enable the acquired identity of Dr Foy to be legally recognised in this jurisdiction, the respondent State is in breach of its positive obligations under article 8 of the convention.

He made a declaration that the relevant sections of the Civil Registration Act 2004 were incompatible with the ECHR.

This was the first declaration of incompatibility to be made under the 2003 Act and it had a further significance as well. The State had argued that a declaration should be issued only in relation to legislation that actively deprived someone of her/his rights, not where the legislation failed to protect those rights. Judge McKechnie firmly rejected that argument, thus broadening the scope of the new provision.

He also made clear that he expected the Government to respond positively to the declaration. He said, '[A]s such a declaration can only issue from a constitutional court, such a court can have a reasonable expectation that the other branches of Government ... would not ignore the importance or significance of the making of such a declaration'.

The State appealed. And perhaps this is where public interest litigation begins to depart from private legal practice. Faced with a possible wait of up to four years for a hearing in the

Supreme Court, FLAC began to lobby and campaign to get the State to drop its appeal, which made no sense anyway as the ECHR jurisprudence was by now very clear and if the case ever reached the Strasbourg Court, the State seemed bound to lose.

We contacted the Council of Europe Commissioner for Human Rights, Thomas Hammarberg, the EU's Fundamental Rights Agency, and the UN Human Rights Committee, all of whom called on the Government to change the law.⁵ And by now the transgender community had begun to make its own voice heard through the Transgender Equality Network Ireland (TENI).

Eventually, in October 2009 the then Government committed itself to introduce Gender Recognition legislation. And in June 2010 it finally withdrew its appeal against the declaration of incompatibility. The Government also set up an inter-Departmental group to advise on the proposed legislation. And again, this saw a difference between the role of the public interest litigator and that of most lawyers in private practice; if only because most private solicitors could not afford to, and do not have the structures or experience to enable them to carry on advocacy and lobbying when the legal process has concluded.

FLAC had both research and advocacy as well as legal practice roles and experience and made submissions on legal issues to the Advisory Group, stressing that transgender recognition was not a policy option for Government but a binding legal obligation under the ECHR. And TENI was able to convey to the group the humiliation, suffering and pain experienced by the transgender community.

The Advisory Group did not report until June 2011, one year after the Government had dropped its appeal and the declaration of incompatibility had become final. The report was underwhelming. It did clearly recommend legal recognition for transgender persons and the right to marry in their acquired gender, but otherwise it was excessively cautious and

⁵ *Report by Commissioner for Human Rights on his visit to Ireland, November 2007*(Comm DH 2008), Council of Europe, 30 April 2008) 9; EU Agency for Fundamental Rights, *Homophobia and Discrimination on Grounds of Sexual Orientation in the EU Member States: Part 1 – Legal Analysis* (June 2008); UN Human Rights Committee, *Concluding Observations on Ireland* (CCPR/C/IRL/CO/3, 30 July 2008); Council of Europe Commissioner for Human Rights, 'Discrimination against transgender persons must no longer be tolerated', (Viewpoint , 5 January 2009).

conservative, and included an unnecessary and unworkable requirement that married transgender persons must divorce as a precondition of recognition.

The Department of Social Protection then set up a working group to draft the heads of the Gender Recognition Bill but they got bogged down in the 'compulsory divorce' proposal and some other matters and referred them to the Attorney General's office. FLAC made more representations, even getting a FLAC volunteer to translate key decisions of the German and Austrian Constitutional Courts and sending them to the Attorney General.

The German and Austrian courts had struck down similar 'compulsory divorce' provisions. The German Court had said it was in breach of the Constitution and the ECHR to require someone to give up one fundamental right (the right to stay married) as a precondition for obtaining another (recognition in her/his acquired gender).

At the time of writing, it is five years since Judge McKechnie declared that Ireland was in breach of the ECHR for failing to provide for gender recognition. And it is two years since the Government dropped its appeal against the declaration, acknowledging the breach and the obligation to change the law.

And that has added another significance to this case: it has now become a test of the effectiveness of the ECHR Act 2003. If the Government fails to respond to the very first declaration of incompatibility made under the Act, it will fundamentally undermine a crucial piece of human rights legislation and put a question mark over the State's commitment to the European Convention.

Meanwhile, Lydia Foy and FLAC are preparing, if necessary, to go back to the courts to seek an order requiring the Government to introduce Gender Recognition legislation, or a new declaration that Irish law is incapable of providing an effective remedy for this breach of the ECHR. And we have again begun going the rounds of the European and UN human rights institutions asking them to put pressure on the Government to honour its obligations under the ECHR.

The Foy case has been almost a textbook example of public interest litigation in all its forms: legal action, research, advocacy, cooperation with non-legal NGOs in the area, and use of international human rights standards and mechanisms. It also involved using new legislation designed to protect human rights and testing its effectiveness. And it has demonstrated again

that struggles for legal change do not end at the door of the court. There may be a long road ahead trying to get the court's decision implemented.

But behind it all in this case, there is the tragic story of one transgender woman and the hardships she has suffered over the last 19 years and more, and of many other transgender persons whose hopes are resting on the final outcome of her case.

FLAC could not have taken the Foy case without the assistance over the years of a very committed team of barristers as well: Bill Shipsey SC, Gerard Hogan SC (now Mr Justice Hogan), Eileen Barrington BL, (now SC) and Siobhan Phelan BL.