

The Lydia Foy Case

Briefing Note on background to the case and Transgender cases generally

21 June 2010

Introduction

Transgender, transsexual, or trans persons¹ are people whose psychological sex/gender, or sense of their own innate gender identity is different from their physical sexual characteristics. They feel that they are women trapped in men's bodies or vice versa. This is a recognised medical condition called Gender Dysphoria or Gender Identity Disorder.

"Gender identity is one of the most fundamental aspects of life", said a report issued by Council of Europe Commissioner for Human Rights Thomas Hammarberg last year.² Gender identity affects people's upbringing, social environment and interaction, family life and sense of who they are. A small proportion of people are born with the external characteristics of one gender but feel profoundly unhappy in that gender role and want to escape from what they feel is a cage or a prison. They want to claim or re-claim what they feel is their true gender.

Some transgender people experience this trauma from an early age. Others try hard to conform to their apparent physical gender and even marry and have children, but the pain and confusion eventually become too much for them. Some become suicidal³ and their medical advisors believe the only way they can be at peace with themselves is by gender reassignment or "sex change", which involves hormone treatment and radical surgery to give them the physical characteristics of the gender they want to be.

Medical science has advanced a lot in recent years and gender reassignment or 'sex change' surgery is much more common than before, but it is still a long drawn-out, difficult and painful process and people do not undertake it lightly. Being transgendered is not a lifestyle choice but a hard and difficult reality.

Because the general public have known very little about gender dysphoria until fairly recently, transgender people were subjected to prejudice, discrimination, ridicule and even outright hostility and many found it very difficult, if not impossible, to "come out". That has made it hard to estimate the number of transgender people in society. Some estimates put the figure at one in every 10,000 of the population but others put it higher, pointing out the significant numbers who are undeclared.

¹ In this Briefing Note we will use the term "transgender" so that e.g. a transgender woman means a male to female trans person or a person who was registered at birth as male but transitions to female. Many trans persons prefer the term 'transgender' to 'transsexual' but the European Court of Human Rights still uses the term 'transsexual'.

² *Human Rights and Gender Identity*, Issue Paper by Thomas Hammarberg, Council of Europe Commissioner for Human Rights; Comm DH/Issue Paper (2009) 2, Strasbourg 29 July 2009.

³ *Supporting LGBT Lives: a study of the mental health and well-being of lesbian, gay, bisexual and transgender people*, published by GLEN and BeLonG To Youth Service, Dublin 2009. Research for this Report found that 26% of transgender people in Ireland had attempted suicide at least once; see Report, page 95

Transgender People and the Law

In previous times, some transgender people seem to have survived by moving to cities, assuming a new identity and trying to live a sort of underground existence in their chosen gender. But in an increasingly regulated society, where proof of identity is required for even routine transactions, that does not work. Transgender people trying to live in their chosen gender have to constantly produce documents that contradict their appearance and their gender identity, thereby having to endure embarrassment and suspicion, if not worse.

As a result, a major issue for the transgender community is obtaining official recognition in their 'new' gender and obtaining new birth certificates showing their acquired gender identity. Some want to be able to marry legally or enter into civil partnerships in their 'new' identity. And most want formal legal recognition of their gender identity to affirm their own dignity and self-respect.

For years the legal position for transgender people in the common law world was dominated by a decision in the British High Court in a celebrity case called ***Corbett v. Corbett***.⁴ A wealthy member of a titled family called Arthur Corbett had married April Ashley, a transgender woman who had become a fashion model for Vogue magazine. The couple quarrelled and rather than seeking a divorce, Arthur Corbett sought a declaration that the marriage was invalid all along on the grounds that Ms Ashley was really a man, although he had known from the beginning that she was transgendered.

The judge dismissed arguments about psychological sex or gender identity and held that the criteria for determining sex or gender were entirely physical, chromosomes and internal and external sexual organs. He said that marriage could only take place between a male and a female and the essential role of a woman in marriage was to have children. On that basis, he held that Ms Ashley was still a man and that the marriage was void.

For more than 30 years the ***Corbett*** decision was relied on by common law courts around the world to reject claims for recognition by transgender people – and bids by gays and lesbians to have their partnerships recognised. It was referred to again in the High Court here in 2005 when the court rejected a claim by Katherine Zappone and Ann Louise Gilligan to have their Canadian same-sex marriage recognised.⁵

The European Court of Human Rights

A series of transgender cases were taken to the British courts in the decades following the ***Corbett*** case. All of them failed and a number of the applicants went on to make complaints to the European Court of Human Rights in Strasbourg.

⁴ *Corbett v. Corbett* [1970] 2 All ER 33

⁵ *Zappone & Gilligan v. Revenue Commissioners* [2006] IEHC 404

In 1986, in *Rees v. United Kingdom*,⁶ a transgender man claimed that the failure by the UK government to issue him with a new birth certificate or to allow him to marry a female was in breach of his rights under Article 8 (protection of private and family life) and Article 12 (the right to marry) of the European Convention on Human Rights (ECHR).

The Court of Human Rights was sympathetic to his position. It said that it was “conscious of the seriousness of the problems facing [transgendered] persons and the distress they suffer”. But it added that there was no consensus among European states about this issue and it must be left to each state to deal with such matters in its own way. It warned the UK Government, however, that “the need for appropriate legal measures should therefore be kept under review”.

In three more cases over the next 16 years, the Strasbourg Court rejected complaints against the UK, but its patience was wearing thin. Eventually, in the case of *Christine Goodwin v. UK*⁷ in July 2002, the Court, in a unanimous decision, said that there was now “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”.

The judgment added that

“the very essence of the [European] 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”. It concluded that “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”.

The Strasbourg Court found the UK in breach of both Article 8 and Article 12 of the Convention because of its failure to provide Ms Goodwin, a transgender woman, with a new birth certificate or to allow her to marry in her acquired female gender.

In the intervening period, courts in Germany, Italy, Australia, New Zealand and some US states⁸ had begun to recognise transgender persons and permit them to marry in their ‘new’ gender. And in *P v. S and Cornwall County Council*⁹, another case from the UK, the European Court of Justice (the EU Court),

⁶ *Rees v. UK* 9 EHRR 56

⁷ *Christine Goodwin v. UK* 35 EHRR 447

⁸ *BVerfGE* 49, 286, *Transsexual Case*, German Constitutional Court, 1978; *Sentenza N. 161/1985*, Judgment on Constitutionality in Interlocutory Appeal, Italian Constitutional Court, 6 May 1985; *Re: Kevin* [2001] Fam CA 1074, Australia; *Attorney General for the Commonwealth v. ‘Kevin and Jennifer’* [2003] Fam CA 94, Australia; *Attorney General v. Family Court at Otahuhu* [1995] 1 NZLR 603, New Zealand; *In the Matter of Anonymous*, 57 Misc. 2d 813, Civil Court of City of New York, 18 September 1968; *M. T. v. J. T.* 355A 2d 204, Supr. Court, New Jersey, App. Div. 1976.

⁹ *P v. S & Cornwall County Council (Case-13/94)* [1996] IRLR 347

whose rulings are binding on EU member states, had held in 1996 that the dismissal of a transgender woman from a school in Cornwall constituted illegal gender discrimination.

The UK Gender Recognition Act

In the UK another transgender case, *Bellinger v. Bellinger*,¹⁰ came before the House of Lords in April 2003. Transgender woman Elizabeth Bellinger was seeking recognition of the marriage she had already entered into with her husband, Michael Bellinger. The Law Lords were, of course, aware of the *Goodwin* decision given the previous year. In a humane and sympathetic judgment, Lord Nicholls said they were *“profoundly conscious of the humanitarian considerations underlying Mrs Bellinger’s claim. Much suffering is involved for those afflicted with gender identity disorder. Mrs Bellinger and others similarly placed do not undergo prolonged and painful surgery unless their turmoil is such that they cannot otherwise live with themselves. Non-recognition of their re-assigned gender can cause them acute distress”*.

But the Law Lords held that they could not simply strike down the UK legislation that prevented the recognition of Mrs Bellinger’s marriage. Instead they used the provisions of the new UK Human Rights Act¹¹ to declare that the existing law was incompatible with the European Convention on Human Rights because of its failure to recognise Mrs Bellinger’s acquired gender and her right to marry. This put the onus on the British government and parliament to change the law to bring it into line with the Convention.

A year later, the UK Gender Recognition Act, 2004 was passed. It allowed transgendered persons to legally change their gender, obtain new birth certificates and other official documents in their acquired gender, and marry persons of what was now the opposite sex to theirs. They could also enter into civil partnerships with persons of their former gender.

The Gender Recognition Act was carefully drafted to protect the rights of children and former spouses of transgender persons as well. It did not invalidate marriages entered into by transgender persons in their former gender. Instead it made gender reassignment a ground for divorce. It protected inheritance and maintenance rights. And the issuing of a new birth certificate did not erase the original entry in the Register of Births with the result that children could still obtain birth certificates showing their parents’ original gender.

In a recognition that some transgender persons are unable for health or other reasons to undergo the traumatic and invasive surgery involved in full-scale gender reassignment, the Act went further than the Court of Human Rights had done and did not restrict recognition of gender change to post-operative transgender persons. Instead it provided for recognition of people who have been diagnosed with

¹⁰ *Bellinger v. Bellinger* [2003] UKHL 2

¹¹ The Human Rights Act 1998 brought most of the provisions of the European Convention on Human Rights into UK law. Though it was passed in 1998, the Act did not come into force in most of the UK until October 2000.

gender dysphoria, have lived continuously in their acquired gender for two years and intend to continue doing so.

The Gender Recognition Act also applies in Northern Ireland, potentially raising issues about the recognition of transgender persons, some of them Irish citizens, who move from Northern Ireland to the Republic and seek recognition of their legal status and of marriages entered into in their 'new' gender.

Meanwhile recognition of transgender persons has become very generally accepted in the rest of Europe. In September 2007, the European Court of Human Rights held that Lithuania, an EU member state, had breached Article 8 of the Convention by failing to implement an earlier transgender law. The Court set out the obligations of member states of the Council of Europe on this issue:

*"States are required ...to implement recognition of the gender change in post-operative transsexuals through, inter alia, amendments to their civil status data with ensuing consequences"*¹².

Ireland was by then the only state in the European Union that made no legal provision for recognising transgender persons.

The Lydia Foy case

Dr Lydia Foy is a transgender woman. She was born in Athlone and was registered at birth as a boy. Growing up she was confused about her gender identity but tried to live as a male. She went through university and qualified as a dentist and then got married and had two children. Gradually, however, she became more and more unhappy in her male role. She was diagnosed with Gender Identity Disorder in 1990.

It was a very difficult time for her. Her marriage broke up and she lost her job. She began the process of gender reassignment and had surgery in England in 1992. Since then she has lived entirely as a woman.

Dr Foy applied for a new birth certificate in her female gender in March 1993 but was refused by the Registrar General's office. She changed her name by deed poll and was able to obtain a driving licence and a passport in her female name and giving her gender as female. She wanted a birth certificate, however, because birth certificates are constantly required as proof of identity and because it would be an official recognition of her as a woman.

Correspondence with the Registrar General's office went on without success until April 1997, when she started High Court proceedings to compel the Registrar to issue her with a new birth certificate. She was represented by Free Legal Advice Centres (FLAC).

The case came to court in October 2000 and was heard over 14 days in the High Court by Mr Justice Liam McKechnie. Dr Foy argued that she was mentally and physically a female and should be recognised

¹² *L v. Lithuania, Application No. 27527/03, 11 September 2007*

as such. A number of medical specialists gave evidence on her behalf. Judgment was reserved and was eventually delivered in July 2002.

Judge McKechnie rejected Dr Foy's claim. Like the UK court in *Corbett v. Corbett*, he held that physical and biological indicators should be used to determine sex/gender. The European Court of Human Rights had not yet delivered its *Goodwin* decision and he found nothing in Irish or UK law that led him to overturn the existing jurisprudence. He was sympathetic to Dr Foy's position, however. He said that the issues raised in the case "*touch the lives in a most personal and profound way of many individuals and are also of deep concern to any caring society*".¹³

He called on the Government and the Oireachtas to deal with the position of transgender persons, concluding his judgment by saying: "*Could I adopt what has repeatedly been said by the European Court of Human Rights and urge the appropriate authorities to urgently review this matter*".

In an unfortunate piece of timing the Strasbourg Court gave its definitive judgment in the *Goodwin* case just two days later on 11 July 2002.

Appeal and new hearing

Lydia Foy appealed to the Supreme Court. Before the appeal came on for hearing, however, the European Convention on Human Rights Act 2003 (the ECHR Act) was passed, bringing the European Convention into Irish law. It was the equivalent of the UK's Human Rights Act and was modelled on that Act.

Section 3 of the ECHR Act provided that all organs of the State had to carry out their functions compatibly with the European Convention unless prevented from doing so by Irish law. If Irish legislation did prevent a public body from complying with the Convention, the High Court could declare that the legislation in question was incompatible with the Convention, just as the House of Lords had done in the *Bellinger* case in 2003. The Taoiseach would then have to report the decision to the Oireachtas and the Government would have to decide what to do about it.

If they did nothing, it would be open to the applicant to complain to the European Court in Strasbourg, relying on the declaration of incompatibility by the Irish court.

Lydia Foy made a new application to the Registrar General in November 2005, pointing out his obligation under the ECHR Act to comply with the requirements of the European Convention. He refused once again and she issued new proceedings in the High Court, this time seeking a declaration under the ECHR Act that the Irish legislation on registration and the issue of birth certificates was incompatible with the European Convention.

¹³ *Foy v. An t-Ard Chlaraitheoir & Others [2002] IEHC 116*

The case came before the High Court in April 2007, exactly 10 years after Dr Foy began her legal challenge in 1997 and nearly five years after Judge McKechnie’s plea to the Irish authorities “*to urgently review this matter*”. Nothing had been done in the meantime.

The case was again heard by Judge McKechnie because he was already familiar with the facts and the medical evidence given seven years earlier.¹⁴ Much of the six-day hearing was taken up with outlining the new position of the European Court of Human Rights following the *Goodwin* judgment and the dramatic shift towards legally recognising transgender persons across Europe and in the other common law countries, most notably the UK.

Mr Justice McKechnie gave his judgment on 19 October 2007.¹⁵ He expressed great frustration at the failure of the Irish Government to take any action following his urgent plea in 2002. He said that on this issue, “*Ireland as of now is very much isolated within the Member States of the Council of Europe ... [and] must be even further disconnected from mainstream thinking*”.

He concluded 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 [Ireland] is in breach of its positive obligations under Article 8 of the Convention*”. And he added for good measure that he would have found a breach of the right to marry under Article 12 of the Convention as well if that had been open to him.

As there was no remedy available under Irish law, he declared, pursuant to Section 5 (1) of the ECHR Act, 2003, that the relevant sections of the Civil Registration Act, 2004 were incompatible with the European Convention. This was the first declaration of incompatibility to be made under the ECHR Act.

The State promptly appealed to the Supreme Court, which had the effect of putting a stay on the operation of the declaration of incompatibility.

Subsequent developments

In the 2^{1/2} to 3 years since Judge McKechnie’s second judgment, Ireland has come in for criticism from international human rights sources over its failure to afford legal recognition to transgender persons. In April 2008, in his report on a fact-finding visit to Ireland, Council of Europe Commissioner for Human Rights Thomas Hammarberg specifically commented on Judge McKechnie’s finding in the Foy case that Ireland was in breach of its obligations under Article 8 of the European Convention. He recommended that the Government “*change the law on birth registration in such a way that transgender persons can obtain a birth certificate reflecting their actual gender*”.¹⁶

¹⁴ The Supreme Court had also referred part of Dr Foy’s appeal dealing with the ECHR Act back to the High Court and the referred case was joined with the new application and heard at the same time.

¹⁵ *Foy v. An t-Ard Chlaraitheoir & Others (No. 2) [2007] IEHC 470*

¹⁶ *Report by Commissioner Thomas Hammarberg on his visit to Ireland, 26-30 November 2007, Council of Europe CommDH (2008)9*

In July 2008, the United Nations Human Rights Committee, which monitors states' compliance with the International Covenant on Civil and Political Rights, issued its Concluding Observations on a report by Ireland about its human rights record. The UN Committee stated bluntly that *"The State party should also recognise the right of transgender persons to a change of gender by permitting the issuance of new birth certificates"*.¹⁷

In an issue of his regular *Viewpoint* in January 2009, Human Rights Commissioner Hammarberg again referred specifically to the Foy case before going on to make a general call for legal recognition of transgender persons. He said: *"There is no excuse for not immediately granting this community their full and unconditional human rights"*.¹⁸

And the Irish Human Rights Commission in September 2008 also urged the Government to amend existing legislation to protect the rights of transgender persons under Articles 8 and 12 of the European Convention.¹⁹

In the meantime, earlier in 2008, a new Passports Act had been passed which provided for the issue to transgendered persons of passports in their acquired gender, giving rise to a situation where a person could have a passport showing one gender and a birth certificate showing the opposite gender.²⁰

Eventually, in its Renewed Programme for Government issued in October 2009 the Government promised to *"introduce legal recognition of the acquired gender of transsexuals"*.²¹

And now, of course, the Government has finally dropped its appeal against the decision of Judge McKechnie that Ireland is in breach of Article 8 of the European Convention on Human Rights and that our legislation on the registration of births is incompatible with the Convention because of its failure to provide for the issuing of new birth certificates to transgender persons. Lydia Foy has also withdrawn her appeal against the decision in the original case as it is no longer necessary.

¹⁷ *Concluding Observations of the Human Rights Committee on Ireland CCPR/C/IRL/CO/3, 30 July 2008*

¹⁸ *"Discrimination against transgender persons must no longer be tolerated"*, Commissioner for Human Rights Viewpoints 5 January 2009. Available at the Commissioner's website at www.commissioner.coe.int.

¹⁹ *"Submission to Government concerning the protection of the rights of transgendered persons"*, Irish Human Rights Commission, September 2008.

²⁰ Passports Act, 2008, Section 11.

²¹ *Renewed Programme for Government*, 10 October 2009, www.taoiseach.gov.ie/eng/Publications_2009/Renewed_Programme_for_Government/

Dr Lydia Foy has at last been vindicated but it has taken 13 years since she commenced her High Court proceedings in 1997 and 17 years since she first applied for a new birth certificate in 1993. It is an indictment of our legal system that it can take so long for a citizen to obtain her rights.

What happens next?

The declaration of incompatibility with the European Convention was the first to be granted in this State. It is now the first declaration to have been finalised. That is a ground-breaking legal development and it is all the more significant because it is about a positive obligation on the State to establish rights that were not recognised up to now, rather than to stop an infringement of a right that was already there.

Because this is the first declaration to have been finalised there is no precedent for what happens next. The declaration does not strike down the existing law or invalidate decisions already made. But the ECHR Act requires that the Taoiseach should notify the Houses of the Oireachtas within the next 21 sitting days about the making of the declaration by the High Court.

After that it is not clear what has to happen next but doing nothing is not an option. The Council of Europe and the UN Human Rights Committee have already called for a change in the law and there is a clear and unchallenged decision by the High Court that the State has violated Dr Foy's rights under the European Convention. Yet she cannot obtain a new birth certificate until the law is changed. Every day that the law continues unchanged, the violation of Dr Foy's rights continues and it would be open to her at any time to lodge a complaint with the European Court of Human Rights, relying on the decision of the High Court.

The UK has recognised its obligation to act upon declarations of incompatibility made under its Human Rights Act – the model for our ECHR Act. So far out of more than 20 declarations of incompatibility that have been finalised, the British government has acted upon almost all of them and has committed itself to act upon the others.

Hopefully, the Irish Government will follow that example. The Government has already set up an inter-departmental working group “*to advise the Minister for Social Protection on the legislation required to provide for legal recognition by the State of the acquired gender of transsexuals*”.²² The group began meeting on 6 May. This is a welcome development and hopefully it will not take the group too long to report as they already have a readymade template for legislation in the UK's Gender Recognition Act, which was in turn changing and amending legislation very similar to the legislation here.

There are a few flaws in the UK legislation that have become apparent over the last six years since it was enacted and we now have the opportunity to improve it, but there should be no delay. Successive governments failed to act after the clear warning by Judge McKechnie in his judgment in 2002 and after

²² *Inter-Departmental Committee on the Legal Recognition of Transsexuals. Proposed Terms of Reference* Department of Social and Family Affairs, May 2010.

the European Court of Human Rights had made clear that Member states' obligations under the European Convention required action to protect the rights of transgender persons.

This small and marginalised community has suffered for far too long. To repeat what Commissioner Hammarberg said in January 2009: *"There is no excuse for not immediately granting this community their full and unconditional human rights"*.

Conclusion

This has been a long, difficult and painful struggle for Dr Lydia Foy but she has achieved a great step forward for the transgender community. Her legal case helped to educate judges, lawyers and the general public about the hurt and anguish of all too many transgender people and it is, hopefully, about to change the law for her sisters and brothers in that community. It is a great tribute to Lydia Foy's courage, endurance and perseverance over the last 17 years.

This has also been a landmark case for the European Convention on Human Rights Act, 2003. It has demonstrated, in the teeth of considerable scepticism, that the incorporation of the European Convention into Irish law can add value to the human rights protections that are already there and can fill in gaps in our human rights provisions.

How the Government responds to the declaration of incompatibility in this case will be a test of the seriousness of its commitment to the European Convention on Human Rights and of how effective a mechanism for the protection of human rights the ECHR Act will be.

21 June 2010