

Briefing note on the Lydia Foy case & Transgender Issues in Ireland

by Michael Farrell, FLAC Senior Solicitor

February 2013

Introduction

Alone among European countries, Ireland has no provision for legal recognition of transgender persons. This is despite an unchallenged decision by the High Court in the Lydia Foy case in 2007 that the State is in breach of the European Convention on Human Rights (ECHR) on this issue. The current Irish Government and its predecessor both promised to change the law, but we are still waiting for even draft legislation more than five years after the decision by the courts. Because of the Government's failure to respond to the High Court decision, Dr Lydia Foy, who took the ground-breaking case that led to that decision, has now issued new legal proceedings to try to get the Government to end the violation of her rights due to the failure to recognise her female gender identity.

The Lydia 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. She had applied to the Registrar of Births in March 1993 seeking a new birth certificate in her female gender. After several years of fruitless correspondence she began legal proceedings in 1997, represented by Free Legal Advice Centres (FLAC).

The High Court ruled against her in July 2002. Ironically, 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 birth certificates.¹ The law in the UK was the same as the law in Ireland but the UK quickly amended it following the ECHR judgments.

The ECHR 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 Strasbourg Court.

On 19 October 2007, the High Court gave its judgment. It found 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. It still held that Dr Foy had no remedy under Irish law but the judge granted a declaration under the new Act that Irish law was incompatible with the ECHR because of its failure to provide for recognition of transgender persons. The judge said that on this issue "*Ireland as of now is very much isolated within the member states of the Council of Europe*".² 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 **Goodwin** decision in the Strasbourg Court.

The then Government appealed this decision 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 of the acquired gender of transsexuals*".³

¹ *Christine Goodwin v. UK* 35 EHR 447; *I v. UK* [2002] ECHR 592

² *Foy v. An t-Ard Chlaraitheoir & Others* [2007] IEHC 470

³ *Department of An Taoiseach: Renewed Programme for Government, 10 October 2009, page 19*

In June 2010 the Government finally withdrew its appeal to the Supreme Court and the declaration of incompatibility with the ECHR became final. However, the declaration of 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”.⁴ The GRAG was made up solely of officials of various Government Departments likely to be affected by a change in the law and did not include any transgender persons. It was based in the Department of Social and Family Affairs, now the Department of Social Protection, which has responsibility for the office of the Registrar General of Births and Marriages.

The GRAG invited submissions from the public and held meetings with FLAC, Transgender Equality Network Ireland, the Irish Human Rights Commission, the Equality Authority and other interested organisations

A new Government

There was a general election in Ireland in February 2011 and a new coalition Government was formed, made up of the Fine Gael and Labour parties, which had previously been in opposition. The new administration issued a programme for a “Government of National Recovery 2011-2016”,⁵ which said: “We will ensure that transgender people will have legal recognition and extend the protections of the equality legislation to them”.

The GRAG Report

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

It also proposed that married transpersons must get a divorce before they could be recognised in their acquired gender – to avoid the possibility of having same-sex marriages. This had been opposed by all the submissions that had dealt with this issue and was particularly onerous in Ireland where, to obtain a divorce, couples must have been separated for a minimum of four years and must demonstrate that their marriage has broken down irretrievably. The Constitutional Courts of Germany and Austria have both ruled that similar preconditions in their transgender legislation infringed the applicants’ fundamental rights⁶.

⁴ Letter from Oliver Ryan, Chair of the Gender Recognition Advisory Group to Des Hogan, Irish Human Rights Commission, 26 May 2010

⁵ Department of Social Protection: ‘Gender Recognition – Public Consultation’, 4 August 2010 page 54

⁵ The Labour Party: ‘TOWARDS RECOVERY – Programme for a National Government 2011-2016’, page 54

⁶ German Federal Constitutional Court, 1 BvL 10/05 (27 May 2008); Austrian Constitutional Court, Verfassungsgerichtshof B947/05 (21.06.2006)

⁷ The Equality Tribunal: EE/2008/04 - DEC-E2011-066, Hannon v. First Direct Logistics Ltd.

Other developments

Launching the report of the Gender Recognition Advisory Group in July 2011, Social Protection Minister Joan Burton committed herself to introducing legislation and promised to give it high priority, and a working group was set up in her Department to draft the Heads of the proposed Bill. But by March 2012, when FLAC had a meeting with the working group, there had been little progress and they had referred the question of 'compulsory divorce' for married transpersons to the Attorney General for legal advice.

In the meantime there had been some other developments that made clear that the issue of gender identity would not go away. In March 2011, the Equality Tribunal, which deals with complaints of discrimination, held that a transgender woman had been unlawfully discriminated against and dismissed from her job on the basis of her transgender status.⁷

And in December 2011, the Irish registration authorities effectively recognised the acquired gender of a transgender woman from another EU country when, after representations from FLAC, she was allowed to enter into a civil partnership with her female partner in circumstances where the Irish civil partnership legislation specifically stated that such partnerships could only be established by two persons of the same gender.

Under EU law, the Irish authorities were obliged to accept the applicant's gender as determined by her state of origin, whereas a transgender Irish citizen would not be allowed to enter into a civil partnership in her/his acquired gender. It was clear that the longer the State delayed legislating, the more anomalies and contradictions were likely to arise.

The Attorney General's advice

Preliminary advice from the Attorney General's office was not received by the Department of Social Protection working group until August 2012. The advice has not been published but it appears to support the 'compulsory divorce' proposal and it also advised that the Department of Justice and Equality should be brought into the discussion to deal with the effect of the proposed legislation on divorce, civil partnership and other family law issues.

All this could and should have been done months, if not years, previously. Speaking at a conference of Transgender Europe in Dublin in September 2012, Minister Burton repeated her promise to give high priority to the proposed Gender Recognition legislation and said she would refer the Heads of the Bill to a parliamentary committee for discussion within the next few months.

FLAC, as Lydia Foy's representatives, had prepared new legal proceedings to seek to enforce the decision of the High Court in her case, but in the circumstances, it was decided to hold off for a while to await the promised referral of the Heads of the proposed Bill to the parliamentary committee. However, by January 2013 there was still no sign of even Heads of a Bill.

Bearing in mind that Lydia Foy first applied for a new birth certificate in March 1993, 20 years ago, it is deeply frustrating and depressing for her that, after winning her case in the High Court in 2007 and after the State's withdrawal of its appeal in 2010, she has still not received that birth certificate.

The Foy case also led to greater confidence and hope in the small and vulnerable transgender community, but the long delay in changing the law is beginning to produce demoralisation and despair.

The ECHR dimension

There is also another aspect to this saga. The decision of the High Court in 2007 in Lydia Foy's case was the first declaration of incompatibility with the European Convention on Human Rights to be made under the ECHR Act, 2003. That Bill was introduced as a way of strengthening human rights protection in this State by giving people a mechanism for vindicating their rights without the long delays involved in taking a case to the European Court of Human Rights. It was also a way of helping to reduce the huge backlog of cases coming before that court.

It is now more than five years since the declaration of incompatibility was made in the Foy case. The failure to act on that declaration is seriously undermining the credibility of the 2003 Act as an effective mechanism, and it also puts a question-mark over the Irish Government's commitment to make a contribution to reducing the unsustainable caseload of the Strasbourg Court.

Conclusion

It is quite unacceptable that no action has been taken to remedy the acknowledged breach of Lydia Foy's rights under the ECHR after more than 5 years. Dr Foy was left with no option but to take further action to try to secure her rights and recognition of the female gender she has lived in for the last 21 years.

After due warning to the authorities, Lydia Foy has begun new legal proceedings in the High Court. She is seeking a declaration by the Court that the Government has a legal obligation to provide her with a new birth certificate and that the failure to do so after all these years amounts to degrading treatment and a breach of her right to an effective remedy under the ECHR and the Constitution.

Alternatively, she will ask the Court to declare that the ECHR Act itself is incompatible with the Convention on Human Rights because it cannot deliver an effective remedy for breaches of the Convention.

It is disappointing that the very first declaration of incompatibility made under the ECHR Act should have been treated with so little respect and seriousness by successive governments. The ECHR Act was seen by many people as an important addition to the mechanisms for protecting their human rights. The record so far has been distinctly unimpressive.

27 February 2013