Goodwin & I v. United Kingdom Government: What Does It Mean?

Analysis of the implications of the ECtHR judgments in the cases of *Goodwin v. UK* and *I v UK*

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The decision of the European Court of Human Rights in Goodwin & I v UK Government was clear and to the point.

The 2 applications were on 5 specific points:

- the failure of the UK government to award a pension at the age of 60 to Christine Goodwin
- the refusal of the UK government to issue Christine Goodwin with a new NI number
- the refusal of the UK government to allow Christine Goodwin to marry her male partner
- the requirement of the UK Government that 'I' produce a birth certificate detailing her 'old' sex in order to undertake a nursing course
- the requirement of the UK Government that 'I' produce a birth certificate detailing her 'old' sex in order to obtain a student loan

However, the Court felt able to address the root of these issues rather than confining itself to these matters, which is certainly beneficial to transsexual people.

The decision in Goodwin & I v UK Government held that the government's failure to alter the birth certificates of transsexual people or to allow them to marry in their new gender role was a breach of the European Convention on Human Rights.

There are good reasons to believe the law is already changed by the decision. The Human Rights Act embedded the European Convention on Human Rights into British law. However it does not force the government to act. But if they fail to respond then in effect, we know the conclusions the ECHR are likely to reach in the future.

Currently the government appears to be ignoring the decision, but there is good reason to think that English courts if asked to address any question of legal status recognition or marriage, will interpret English law to follow the ECHR's decision.

Consequently we are encouraging everyone to go ahead now, and take advantage of the wonderful ECHR court victory by claiming their rights.
The government needs to change the law in order to clarify it. Our job as PFC activists is to ensure the law is changed, without delay, in such a way that enhances the rights of all trans people (which is not the same as making legal status recognition available for all trans people or mandatory for trans people who do not wish to have recognition of a new legal status).

PFC's mission statement also means we have a responsibility to ensure that it doesn't remove rights from any other group of people, and if possible it also enhances the rights of others, especially those in oppressed minority groups.

Firstly, I wish to look at exactly what has been said in the decision, and how these points should be interpreted. The court's statements are in *italics*.

Birth Certificates and Other Records

a. The court said:

   "The United Kingdom national health service, in common with the vast majority of Contracting States, acknowledges the existence of the condition and provides or permits treatment, including irreversible surgery. The medical and surgical acts which in this case rendered the gender re-assignment possible were indeed carried out under the supervision of the national health authorities. Nor, given the numerous and painful interventions involved in such surgery and the level of commitment and conviction required to achieve a change in social gender role, can it be suggested that there is anything arbitrary or capricious in the decision taken by a person to undergo gender re-assignment. In those circumstances, the ongoing scientific and medical debate as to the exact causes of the condition is of diminished relevance." Goodwin Para 81

   In this the court sets out the basis for their argument:

   - Proper medical practitioners and authorities provide gender reassignment.
   - Gender reassignment is not easy.
   - As such any argument that it is 'choice' or 'fancy' is no longer viable.
   - **The medical debate on aetiology is of no great importance**.
   - Fundamentally we exist and cause is irrelevant what matters are our human rights.

b. The court said:

   "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" I Para 70

   Simply, post-operative transsexual people can no longer be left with a 'no-sex', 'intermediate sex' or 'both sex' legal status. **n.b.** Nowhere is post-operative defined in the judgement.

c. The court said:

   "a test of congruent biological factors can no longer be decisive in denying legal recognition to the change of gender of a post-operative transsexual. There are other important factors — the acceptance of the condition of gender identity disorder by the medical professions and health authorities within Contracting States, the provision of treatment including surgery to assimilate the individual as closely as possible to the

gender in which they perceive that they properly belong and the assumption by the transsexual of the social role of the assigned gender." I Para 81

The 'Corbett' test for a persons sex is no longer sufficient. Other factors must be taken into account.

d. The court said:

"Where a State has authorised the treatment and surgery alleviating the condition of a transsexual, financed or assisted in financing the operations and indeed permits the artificial insemination of a woman living with a female-to-male transsexual (as demonstrated in the case of X., Y. and Z. v. the United Kingdom, cited above), it appears illogical to refuse to recognise the legal implications of the result to which the treatment leads." Goodwin Para 79

These are the other factors: **the state has permitted the treatment and surgery**. So, sex is determined through chromosomes, gonads and genitals at birth **and** gender reassignment treatment

In other words the state would have to ban all gender reassignment treatment to avoid having to afford the recognition of the 'new' sex of a transsexual person.

Interestingly this paragraph, by commenting on the provision of artificial insemination to the female partner of an ftm trans man has overturned the courts previous decision in X, Y and Z v UK Government (1997) and enables the partners of trans men to ask again for their partners names to be put on their children's birth certificates as the father.

e. The court said:

"No concrete or substantial hardship or detriment to the public interest has indeed been demonstrated as likely to flow from any change to the status of transsexuals" and *"society may reasonably be expected to tolerate a certain inconvenience to enable individuals to live in dignity and worth in accordance with the sexual identity chosen by them at great personal cost."* I Para 71

Thus we are entitled to the dignity that would come from recognising our new legal status. There must be a **real reason** showing a **substantial** detriment to the public interest before any consequence flowing from that legal change could be withheld.

In simple terms, we must be given full legal status recognition unless the government can show very good reason for not providing it.

To Sum Up on Birth certificates and Other Records:

Whilst treatment is available and permitted in the UK, whether on the NHS or not, then the 'new' sex of post-operative transsexuals must be recognised for all legal purposes, (though see below for a question mark in the area of marriage), unless the government can show substantial detriment to the public interest. Even if such detriment is shown, the sex may not be recognised in that area **only**.

Post-operative is to be judged by current and appropriate medical knowledge, so it would appear to be dependant upon:

- What is available and possible under current medical knowledge
- What is appropriate to that particular person

Thus trans people who 'fit' the following requirements:

- Are permanently living full time in their new gender role
- Have had gender reassignment surgery
    - Which is appropriate to them, bearing in mind current medical knowledge

should be able to have their new sex recognised on all documentation and in relevant service provision in the following areas:

- Driving licence
- Passport
- Medical Records (provisional upon their medical history remaining intact, for medical purposes only)
- Student Records
- Inland revenue and National Insurance Records
- Birth Certificate

The last 2 of these are of course the one's which have been consistently refused since 1970

N.B. The court's endorsement of the rights of 'post-operative' transsexual people is the minimum line behind which the government cannot retreat. It must provide legal registration for these people. HOWEVER, it is perfectly possible for the government, when implementing legislation, to go one step further and to make legal recognition available to those who are post-treatment and thus include those trans people who for health, disability or other reason are unable to undergo surgical intervention. This is the position that PFC urges the government to take.

Marriage

a. The Court said:

   "It is true that the first sentence refers in express terms to the right of a man and woman to marry. The Court is not persuaded that at the date of this case it can still be assumed that these terms must refer to a determination of gender by purely biological criteria (as held by Ormrod J. in the case of Corbett v. Corbett,)" I Para 80

   They are referring to the Matrimonial Causes Act 1973, which was enacted after the Corbett v Corbett decision in 1970, which states that a marriage is void if it is not between a man and a woman.

   Simply, these terms 'man' and 'woman' do not mean men and women whose sex is determined only by biology, but also includes men and women whose sex is determined by gender reassignment.

b. The court said:

"it is artificial to assert that post-operative transsexuals have not been deprived of the right to marry as, according to law, they remain able to marry a person of their former opposite sex." … In the Court's view, (they) may therefore claim that the very essence of (their) right to marry has been infringed." I Para 81

Thus pos-operative transsexual people must have the right to marry a member of the opposite gender i.e. someone of the same recorded birth sex.

c. The court said:

"Reviewing the situation in 2002, the Court observes that Article 12 secures the fundamental right of a man and woman to marry and to found a family. The second aspect is not however a condition of the first and the inability of any couple to conceive or parent a child cannot be regarded as per se removing their right to enjoy the first limb of this provision." Goodwin Para 98

People do not have to be fertile and able to conceive children in order to enjoy the right to marry.

d. The court said:

"it is for the Contracting State to determine inter alia the conditions under which a person claiming legal recognition as a transsexual establishes that gender re-assignment has been properly effected or under which past marriages cease to be valid and the formalities applicable to future marriages (including, for example, the information to be furnished to intended spouses)" I Para 83

If a transsexual person wishes to marry in their new gender role, then they must first claim legal recognition in their new sex. The UK Government then has the right to determine the conditions under which transsexual people have the right to marry. These might be:

- Post-operative status
- A requirement in which future spouses are told of the transsexual status

Thus the conditions required to obtain a valid marriage to a member of the opposite gender may well be stricter than the requirements required to have birth certificates changed.

Finally, if these requirements, or others, are met former marriages could cease to exist.

To Sum Up on Marriage:

The validity of a marriage between a transsexual person and a member of the opposite gender group is no longer based upon the Corbett criteria. Infertility cannot be used as a reason to declare a marriage void. The new criteria are:

- Post-operative status (which is again undefined) and is to be determined by conditions set down by government.
- Any other conditions laid down by government

At the time these conditions are met, and the right to future marriage claimed, (which would be after a new legal status has been claimed) former marriages may cease to be valid (dependant upon the government's conditions).

These are obviously **potentially** tougher requirements than those required for the changes in legal status in other areas, though that in itself may cause other legal problems. It is clear that valid marriage will not necessarily flow from birth certificate change, but on the other hand it may. **It is for the government to decide**.

Examples (all should be presumed to be permanently living in their new gender role)

i. Unmarried FTM Trans man who has undergone mastectomy

   As mastectomy is viewed as gender reassignment surgery, and phalloplasty is still experimental and not easily available, this person should be able to get their birth certificate and other documentation changed to reflect their status as a man. As for marriage, validity will be dependant upon the conditions laid down by government.

ii. Unmarried MTF trans woman who has only received hormone therapy

   As there has been no gender reassignment surgery undertaken, the government may decide that this person's birth certificate and other documentation need not be changed. They will retain the right to marry a person of their birth sex but not someone of the same birth sex. However, the government could choose to enable this person to obtain legal recognition through primary legislation. PFC would argue that this must be the case for those unable to undergo surgical intervention for any reason.

iii. Married FTM Trans man who has undergone mastectomy

   If the trans man is married to a man, then if the trans man has his new legal status recognised (as he is post-operative) he may discover that his former marriage ceases to exist. However, he may also discover that that does not necessarily enable him to meet the requirements for a new marriage to a woman. This would raise the very issues the court has condemned in its ruling on Article 12. That is he would be left unable to marry anyone.

This is the case scenario which could be used, by the government to prevent trans men who have not had phalloplasty having their birth certificates changed or it could be used by PFC to ensure that there were not excessive surgical conditions laid down on trans men (or trans women) for valid marriages.