Bellinger v. Bellinger (Appeals Court, 2001)

A trans woman unsuccessfully appealed against the refusal of the High Court to grant her a decalration that her marriage was valid

July 2001

Judgment

Case No: B1/2000/3493
Neutral Citation no: [2001] EWCA Civ 1140

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE FAMILY DIVISION
(MR JUSTICE JOHNSON)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17th July 2001

B e f o r e :

THE PRESIDENT
LORD JUSTICE THORPE
and
LORD JUSTICE ROBERT WALKER

ELIZABETH ANN BELLINGER — Appellant

- and -

MICHAEL JEFFREY BELLINGER — Respondent

Miss L. Cox QC and Miss A. Bayston (instructed by Law for All for the Appellant)
Mr A. Moylan QC and Mr T. Amos (instructed by the Attorney General as Intervenor)

JUDGMENT : APPROVED BY THE COURT FOR HANDING DOWN (SUBJECT TO EDITORIAL CORRECTIONS)

Dame Elizabeth Butler-Sloss, President and Robert Walker LJ:

1. This is an appeal, with leave of the Court of Appeal, by the appellant, Mrs Bellinger, from the refusal of Johnson J on the 2nd November 2000 to grant her petition for a declaration that the marriage celebrated between Mr Bellinger and herself was valid at its inception and is subsisting. The reason for the judge's refusal to grant the declaration was that the appellant was at the time of the marriage ceremony, and still remains, male. Mr Bellinger was the respondent to the petition, which he did not oppose. The Attorney General intervened, filed an answer and opposed the granting of the declaration.
2. Behind those bare facts lies a human problem, which deeply affects a small minority of the population. In considering the difficult medical and legal issues facing this Court, admirably encapsulated in the written and oral submissions of Miss Cox QC for the appellant and Mr Moylan QC for the Attorney General, we are very much aware of the plight of those who, like the appellant, are locked into the medical condition of transsexualism, within the group described as gender dysphoria or gender identity disorder.

The History

3. The appellant was born on the 7th September 1946 and was at birth correctly classified as male. However, from as long as she could remember, she felt more inclined to be female. Despite her inclinations, and under some pressure, at the age of 21 she married a woman. The marriage broke down and they divorced in 1971. After the divorce she began to dress as and live as a woman. She went through the various stages of treatment (which are set out below), and finally underwent gender reassignment surgery which was completed in 1981. On the 2nd May 1981 she went through a ceremony of marriage with Mr Bellinger, a widower. He was at all times aware of the appellant's background and was entirely supportive of her. The appellant was described on her marriage certificate as a spinster but apart from that she was not asked by the Registrar of Marriages, nor did she volunteer any information, about her gender status. The couple have lived together ever since as husband and wife. The appellant petitioned for the declaration under section 55 of the Family Law Act 1986. The Attorney General intervened under the provisions of section 59(2) of the same Act.

Medical Condition of the Appellant

4. There is no suggestion now that the appellant was incorrectly assigned to be male at birth, nor that she falls within the group described as inter-sexed. From the medical evidence it is clear that the appellant was correctly assigned at birth as male. The appellant felt an increasing urge to live as a woman rather than as a man. She first consulted Dr Randall, a consultant psychiatrist at the Charing Cross Hospital, with special expertise in this area of medicine. She had a long course of counselling and hormonal treatment and in February 1981 she underwent reconstruction surgery, which involved the removal of her testicles and penis and, as Johnson J expressed it:

"…the creation of an orifice which can be described as an artificial vagina, but she was still without uterus or ovaries or any other biological characteristics of a woman."

5. The report on a chromosomal test, dated the 8th April 1999, showed her to have a Karyotype: 46, XY pattern, an apparently normal male Karyotype. She clearly comes within the diagnosis of gender identity disorder and she is a transsexual. She has completed the four stages of change from male to female.
6. The background to the issue raised by the appellant is the current understanding of the meaning of 'marriage'. Lord Penzance, in *Hyde v Hyde* (1866) L.R. 1P&D 130, gave, at page 133, the classic definition of a Christian marriage:

   "I conceive that marriage, as understood in Christendom, may for this purpose be defined as the voluntary union for life of one man and one woman, to the exclusion of all others."

7. Although that definition can no longer be taken as correct in all particulars, since those married can now bring their marriages to an end during their lifetime, Ormrod J in *Corbett v Corbett* [1971] P 83 said that sex was an essential determinant of marriage, because:

   "it is and always has been recognised as the union of man and woman."

8. In refusing to make the declaration sought by the appellant, Johnson J considered extensive written medical evidence from three distinguished experts in the field of gender identity disorder. They were largely in agreement and no oral evidence was given. The judge accepted that, since *Corbett* in 1970, there has been a marked change in social attitudes to problems of those in the situation of the appellant. He concluded:

   "There is now a distinct possibility that were it possible to do so, examination of the brain of a living individual would reveal further indications of gender. But that is not yet possible and the practical reality is that whatever may ultimately emerge from advances in medical science, the only criteria for determining the gender of an individual remain those identified in *Corbett.*"

9. He therefore decided that the medical criteria, set out by Ormrod J in *Corbett*, remained equally valid today, and that under those criteria the appellant was unable to marry Mr Bellinger. He dismissed her petition.

Corbett v Corbett

10. The facts in *Corbett* have some similarities to the present case. The respondent had been registered at birth in 1935 as male, and had served in the Merchant Navy, which he left after taking an overdose of tablets. After taking hormonal treatment for some years and working as a female impersonator, he underwent, in 1960 in Casablanca, reconstruction surgery, and thereafter changed his name and lived as a woman. In September 1963, the respondent went through a ceremony of marriage with the petitioner, a man, who knew the respondent's background. The 'marriage' was not a success and in December 1963 the petitioner petitioned for nullity based on the ground that the respondent was male. The judge granted a decree of nullity.

11. Nine medical experts gave evidence at the hearing and the judge said at page 100:

    "All the medical witnesses accept that there are at least four criteria for assessing the medical condition of an individual. These are:

    a. Chromosomal factors.
    b. Gonadal factors (i.e. presence or absence of testes or ovaries).
    c. Genital factors (including internal sex organs).
    d. Psychological factors.

    Some of the witnesses would add:

    e. Hormonal factors or secondary sexual characteristics (such as distribution of hair, breast development, physique etc, which are thought to reflect the balance between the male and female sex hormones in the body).

    It is important to note that these criteria have been evolved by doctors, for the purposes of systematising medical knowledge and assisting in the difficult task of deciding the best way of managing the unfortunate patients who suffer, either physically or psychologically, from sexual abnormalities. As Professor Dewhurst observed, "we do not determine sex - in medicine we determine the sex in which it is best for the individual to live." These criteria are, of course, relevant to, but do not necessarily decide, the legal basis of sex determination."

12. Earlier in his judgment, Ormrod J considered the aetiology of transsexualism and at page 99 he referred to:

    "…the alternative view is that there may be an organic basis for the condition. This hypothesis is based upon experimental work… which suggests that the copulatory behaviour of the adult animals may be affected by the influence of certain sex hormones on particular cells in the hypothalamus…At present the application of this work to the human being is purely hypothetical and speculative… The use of such phrases as 'male or female brain' in this connection is apt to mislead owing to the ambiguity of the word 'brain'…In my judgment these theories have nothing to contribute to the solution of the present case."

13. He said at page 104:

    "It is common ground between all the medical witnesses that the biological sexual constitution of an individual is fixed at birth (at the latest), and cannot be changed, either by the natural development of organs of the opposite sex, or by medical or surgical means. The respondent's operation, therefore, cannot affect her true sex. The only cases where the term "change of sex" is appropriate are those in which a mistake as to sex is made at birth and subsequently revealed by further medical investigation."

14. The finding by Ormrod J that the biological sexual constitution of an individual was fixed at birth is said by Miss Cox no longer to reflect the true position.
15. Ormrod J concluded at page 106:

"Since marriage is essentially a relationship between man and woman, the validity of the marriage in this case depends, in my judgment, upon whether the respondent is or is not a woman. I think, with respect, that this is a more precise way of formulating the question than that adopted in paragraph 2 of the petition, in which it is alleged that the respondent is a male. The greater, of course, includes the less, but the distinction may not be without importance, at any rate, in some cases. The question then becomes, what is meant by the word "woman" in the context of a marriage, for I am not concerned to determine the "legality" of the respondent at large. Having regard to the essentially hetero-sexual character of the relationship which is called marriage, the criteria must, in my judgment, be biological, for even the most extreme degree of transsexualism in a male or the most severe hormonal imbalance which can exist in a person with male chromosomes, male gonads, and male genitalia cannot reproduce a person who is naturally capable of performing the essential role of a woman in marriage. In other words, the law should adopt in the first place, the first three of the doctors' criteria, ie. the chromosomal, gonadal and genital tests, and if all three are congruent, determine the sex for the purpose of marriage accordingly, and ignore any operative intervention. The real difficulties, of course, will occur if these three criteria are not congruent. This question does not arise in the present case and I must not anticipate, but it would seem to me to follow from what I have said that the greater weight would probably be given to the genital criteria than to the other two. This problem and, in particular, the question of the effect of surgical operations in such cases of physical inter-sex must be left until it comes for decision. My conclusion, therefore, is that the respondent is not a woman for the purposes of marriage but is a biological male and has been so since birth. It follows that the so-called marriage of September 10, 1963, is void."

The Legislation

16. The judgment of Ormrod J was not appealed and its conclusions were put on a statutory basis in the Nullity of Marriage Act, 1971, section 1 of which stated:

    "A marriage which takes place after the commencement of this Act shall be void on the following grounds only, that is to say-

    a. ……
    b. …….
    c. that the parties are not respectively male and female."

17. Section 1(c) was re-enacted in section 11(c) of the Matrimonial Causes Act 1973, which applies to the present proceedings.

Male and Female - Gender

18. The words 'male and female' have not been interpreted either in the statute or in subsequent decisions of the courts. Miss Cox at one stage suggested that the words 'male' and 'female' were deliberately left undefined so that they were capable of being interpreted more broadly than 'man' and 'woman', and 'female' might, therefore, encompass the position of the appellant. There was some slight support for that proposition in the judgments of Ward LJ and Sir Brian Neill in *S-T v J* [1997] 3 WLR 1287. Ward LJ said at page 1305:

"It is suggested that the Act has made a subtle but perhaps important change to the terminology. What governed Ormrod J's decision in Corbett's case, based as it was on ecclesiastical principles, was whether the parties were " a man and a woman". It may be - but I express no view about it - that the choice "male and female" has left the way open for a future court, relying on the developments of medical knowledge, to place greater emphasis on gender than on sex in deciding whether a person is to be regarded as male or female. There is a body of very respectable academic opinion making that point: see, for example, *Cretney and Masson Principles of Family Law, 5th ed* (1990) pp 46-48; S Poulter "The Definition of marriage in English Law" (1979) 42 M.L.R. 409, 421-425 and A. Bradney, "Transsexuals and the Law" [1987] Fam. Law 350."

19. Sir Brian Neill said, at page 1332:

"It is not necessary for the purpose of this appeal to consider whether the decision of Ormrod J in *Corbett v Corbett* … requires re-examination in the light of modern medical advances and in the light of decisions in other jurisdictions, or whether it is distinguishable because the words used in section 11(c) of the Act of 1973 are 'male' and 'female' which, I suppose, it might be argued, indicate a test of gender rather than sex."

20. Allowing for the possibility of some ambiguity in the use of the words 'male' and 'female' in section 1(c), both Johnson J and this Court were invited to look at the relevant extract from Hansard during the passage of the Nullity of Marriage Bill through the House of Commons, (Hansard 2nd April 1971 pages 1827-1831). This did not seem to us to elucidate the meaning of the words, but it did demonstrate that the decision to include the issue of gender within the law governing nullity, rather than to provide for it by way of a declaration as to status, was a humane one designed to provide for the possibility of applications for financial relief by either party to the nullity decree. This approach was of some significance in the light of the definition in Jackson, *The Formation and Annulment of Marriage* 2nd ed (1969), at page 131:

"If two persons of the same sex contrive to go through a ceremony of marriage, the ceremony is not matrimonial at all: it is certainly not a void marriage, and matrimonial principles have no application to such a 'union'."

21. The requirement that the issue, as to whether a person was male or female, was to be decided within the framework of the law of nullity was made crystal clear by section 58(1)(a) of the Family Law Act 1986, which stated that no court may make a declaration:

"…that a marriage was at its inception void."

22. The words 'male' and 'female' are obviously broader than 'man' and 'woman', since they encompass the entire animal world. Among humans, it includes those who are not yet adults. It does not, however, appear to us necessary to delve deeper into the extended meaning of 'male and female' in this judgment, since Miss Cox does not now seek to rely strongly upon it.
23. The words 'sex' and 'gender' are sometimes used interchangeably, but today more frequently denote a difference. Miss Cox submitted that gender was broader than

sex. Her suggested definition was that 'gender' related to culturally and socially specific expectations of behaviour and attitude, mapped on to men and women by society. It included self-definition, that is to say, what a person recognised himself to be. See also Sir Brian Neill in *S-T v J* at page 1332 (above). It would seem from the definition proposed by Miss Cox, with which we would not disagree, that it would be impossible to identify gender at the moment of the birth of a child.

The Medical Evidence

24. The aetiology of the condition of transsexualism appears to be uncertain. Professor Green, consultant psychiatrist and Research Director of the Gender Identity Clinic at the Charing Cross Hospital, identified transsexualism as follows:

"Gender Dysphoria is discontent with being a person of the sex to which one was born and discontent with living in the gender role consistent with that birth sex. Gender Dysphoria when profound is popularly known as transsexualism. In the current version of the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders IV, this condition is known as gender identity disorder."

25. Ormrod J in *Corbett* described the condition at page 1308:

"The transsexual…has an extremely powerful urge to become a member of the opposite sex to the fullest extent which is possible…This goes on until they come to think of themselves as females imprisoned in male bodies, or vice versa…"

26. Three eminent consultants provided reports to the Court, Professor Gooren, Professor Green and Mr Terry.

Professor Gooren

27. The evidence of Professor Gooren, Professor of Endocrinology at the Free University Hospital, Amsterdam, was provided in a report on transsexualism, dated 20th June, 1999, an undated affidavit, a medical report on the appellant dated the 18th February, 2000 and a subsequent letter of the 11th October 2000. He was clear that transsexualism was a medical condition:

"Traditionally it is assumed that sexual differentiation, the process of becoming man or woman is completed with the formation of the external genitalia, the criterion used to assign a new born child to the male or female sex. From the beginning of this century it became clear in laboratory animals that this is not the endpoint of the sexual differentiation process but that the brain undergoes a sexual differentiation process into male and female, largely predicting/correlating with future sexual and non-sexual behaviour. The process of sexual differentiation takes place in distinct steps, first the chromosomal configuration is established, next gonadal differentiation, next differentiation of the internal and external genitalia and finally the differentiation of the brain into male or female. Normally all steps in the process of sexual differentiation are concordant (in men: an XY chromosomal pattern, testis, male internal and external genitalia and a male brain differentiation being the substrate of male-type behaviour; in women an XX chromosomal pattern, ovary, female internal and external genitalia and a female brain differentiation being the substrate of female-

type behaviour). Nature is not free of errors and the process of sexual differentiation is no exception. There are human beings in which not all the traditional criteria of sex are concordant. They may have some biological characteristics of one sex and some of the others, a condition known as inter-sexed.

The human condition requires that newborn children be assigned to one sex or the other. The social and legal systems have left no room for inter-sexed subjects. If a new born child presents with an inter-sexed condition a medical decision must be made to assign this baby to the male or female sex. It is now a generally accepted medical practice to assign an inter-sexed new born child to that sex in which the unlucky creature, on the basis of medical expertise and reasonable expectation, will function best. It is of note that biological characteristics are not imperative in this decision process. The decision is based on prognosticated future sexual and non-sexual functioning. The legal system registers these newborn children in accordance with the medical decision. So it is no longer tenable to claim the genetic or gonadal criterion determines one's status as male or female. Some of our fellow human beings live lives of women with a male-type XY chromosomal pattern or testis or vice versa.

…Sexual and non-sexual brain differentiation is now accepted as part of the process of becoming male or female of the mammalian species to which humans belong. In animal experimentation it is easily possible to induce a female type of sexual and non-sexual behaviour in animals that have, up to that final stage of sexual differentiation, a completely male pattern and vice versa. Depending on the type of manipulation applied in the animal experiment, in-between types of behaviour can also be observed. On the basis of the findings of these experiments it has been hypothesised that in human subjects with gender identity problems the sexual differentiation of their brains has not followed the pattern predicted by their earlier steps in the sexual differentiation process (such as chromosomes, gonadal, genitalia) but has followed a pattern typical of the opposite sex in the final stage of that differentiation process; as indicated above, a situation that can be induced in laboratory animals by experimental manipulation.

…The validity of extrapolation of the sexual differentiation process of the brain in other mammals to the human has been corroborated by findings of anatomical and functional brain differences between males and females, including the human species."

28. Professor Gooren said that the findings based on research into the human brain structure carried out post mortem showed that a biological structure in the brain distinguished male-to-female transsexuals from men (see Zhou, Swaab, Gooren & Hofman, *Nature* 1995):

"In conclusion: there is now reason to believe that transsexualism is a disorder of sexual differentiation, the process of becoming man or woman as we conventionally understand it. Like other subjects afflicted with errors in this process, these subjects need to be medically rehabilitated so that they can live acceptable lives as men or women. This decision is not essentially different from the one made in inter-sexed children where assignment takes place to the sex in which they in all likelihood will function best. In them the decision most of the times takes place shortly after

birth…similarly it is the case in transsexualism, since there is evidence that the sexual differentiation of the brain in human occurs (also) after birth. As such it is unavoidable that in subjects with errors of the sexual differentiation of the brain, sex reassignment takes place after birth, sometimes much later in their lives since it requires a large amount of life experience to discover the predicament of being born in the wrong sex, in other words having sexual and non-sexual brain patterns that are in contradiction with the other sex characteristics.

The established diagnostic and therapeutical approach to transsexuals is that it is a stepwise procedure: the decision to treat hormonally is contingent upon the outcome of the psycho-diagnostic process, the decision to recommend surgery is contingent upon the successful outcome of hormone treatment and the real life test. If both appear to resolve the subject's gender problems, it is imperative to recommend sex reassignment surgery."

29. In his paper he made it clear that there are significant health risks in refusal of sex reassignment to those who qualify for it as a result of careful and thorough psycho-diagnostic process. The risks include suicide as not uncommon.
30. In his letter of the 11th October, Professor Gooren said:

"The process of becoming man or woman is not complete with the formation of the external genitalia, the common criterion to label someone male or female and extremely expeditious in that regard. But the brain is also sex-dimorphic, and is an organ that becomes sex-dimorphic in the course of normal female/male development.

Both the paper in *Nature* and *Journal of Clinical Endocrinology* substantiate the hypothesis that transsexuals are inter-sexed at brain level and deserve the same medical care as other inter-sexed patients…"

Professor Green

31. Professor Green made a report to the Treasury Solicitor of the 5th October 1999, followed by letters of the 12th October and 2nd November 1999 and a further report of the 20th December 2000.
32. In his 5th October report he said:

"Over the past four decades, gender identity disorder, or transsexualism, has been acknowledged as a psychiatric disorder requiring unique therapeutic interventions.

Severe gender dysphoria cannot be alleviated by any conventional psychiatric treatment, whether it be psycho-analytic therapy, eclectic psychiatric treatment, aversion treatment, or by any standard psychiatric drugs. Consequently, the strategies of therapeutic intervention include, firstly, clinical exploration of the extent of the patient's gender dysphoria. When it is considered that a transition to living in the other sex and gender role could result in a better psychological, psychosocial and psychosexual functioning, an extended trial transition period is initiated. Treatment stages include reversible steps before those that are irreversible. Thus, early on, there may be name change, and clothing style change. This is followed by cross-sex hormone administration. If during the next one to two years the individual can demonstrate to self and health care professionals that life is more successful in the

new gender role, consideration can be given for referral for sex reassignment surgical intervention."

"The onset of gender dysphoria is typically dated by patients to the earliest years of life. It is reported to have begun "as far back as I can remember".

"The criteria for designating a person as male or female are complex. They are not simply an outcome of chromosomal configuration, genital configuration, or gonadal."

33. He set out a number of situations in which the patient's chromosomal pattern did not fit the gender assignment given to the patient. This applied both to those within the male grouping and female grouping. In such cases the criteria set out in *Corbett* are not concordant with their designation. Such patients are inter-sexed. Professor Green instanced the condition of Androgen Insensitive Syndrome. Those with that condition are psychologically female and appear to be normal women, but two of their three sexual criteria under *Corbett* are male.
34. Professor Green then said:

"The *Corbett* criteria are too reductionistic to serve as a viable set of criteria to determine sex. They also ignore the compelling significance of the psychological status of the person as a man or a woman."

35. Miss Cox placed great reliance on that passage as showing that the advances in medical knowledge made the *Corbett* criteria dated and inadequate. Mr Moylan, however, pointed to the previous passages of Professor Green's report which were dealing with those who came within the definition of inter-sexed and not transsexuals.
36. Professor Green referred to the research relied upon by Professor Gooren:

"In recent years there has been a widely publicized finding from The Netherlands indicating, in a small series of male-female transsexuals studied post-mortem, that the bed nucleus of the stria terminalis region of the brain was similar in size to that of typical females and different in size from typical male. The interpretation of this finding is that it provides evidence of a biological central nervous system basis for male transsexualism. Because of the difficulties in replicating such a study which must be conducted after death this report remains neither refuted nor confirmed."

37. In his letter of the 12th October, Professor Green agreed that the Zhou et al paper on sexual differentiation of the brain should not be considered a preliminary report but he underlined that the research was conducted on a small sample of male transsexuals. In his letter of the 2nd November 1999, Professor Green wrote in a reply to a request to consider the *Corbett* criteria:

"The four criteria, even the potential fifth criterion of hormonal factors or secondary sexual characteristics, noted by medical experts nearly thirty years ago, are derived from the landmark studies of the anatomically intersexed, the work of Dr John Money and additionally Drs John and Joan Hampson in the 1950s at The John Hopkins Hospital. There has been no substantive alteration in considering these criteria during the intervening years. There are medical experts who would value the psychological factor as the most important criterion particularly when psychological factors, or the person's gender identity, is at variance with any of the other factors. In fact, in the

pioneering studies of the anatomically inter-sexed the psychological factor was most commonly the overriding one in determining psychosexual development of the individual."

38. In his final report of the 20th December 2000, he answered specific questions asked by the Treasury Solicitor. He set out the criteria applied to determine the sex of a child at birth and the problems in assigning the sex of an inter-sexed individual. He said:

"Psychological factors cannot be considered at birth because they do not yet manifest. They may become an overriding consideration subsequently as the individual develops. Physical differences in the brain are as yet not measurable at birth, if at all later in life. They may ultimately override all other criteria. Thus, though not apparent at birth, this would influence the ultimate developmental outcome with respect to a new-born."

39. In the management of those who are born inter-sexed he said:

"…there is considerable sentiment for delaying any surgical modification of the genitalia which had been thought to help pre-set the evolving gender identity. Now there is more of a wait and see approach until the individual is old enough to express its own wishes…

"There is growing acceptance of findings of sexual differences in the brain that are determined prenatally. They are seen as influencing sex-typed and sexual behaviours. I do not know how much of an international consensus there is on this or just what a reasonable body of medical opinion would constitute here. However, there is a growing momentum in that direction."

40. He was asked how the sex of the petitioner's brain could be determined during her lifetime:

"At present there is probably no method within neuroscience to make such a determination. Rather it may be best to abide by the person's gender identity, which is the psychological manifestation as mediated by the brain…

"If a biological sexual condition of an individual is conceptualised to include psychological sex, perhaps reflective of brain sex differentiation, this status does not express itself until several years postnatally. Therefore it is not possible to say that the biological sexual condition of an individual is fixed at birth in that not all of the bases of the biological sexual condition can be determined at birth….

"As a psychiatrist I am biased towards psychological factors. I would argue that with a transsexual the psychological sex has been contrary to other somatic factors for many years, if not the great majority of the person's life. Taking that position gender reassignment treatment and surgery would align the somatic features with the psychological features…

"By the standards applied at the time of the patient's birth it would be considered that the infant was male. However, current considerations with respect to determining the correct sex of an individual at birth, such as psychological and brain sex, might render

that designation less certain…the hormonal sex and genital sex have been changed by medico-surgical intervention. Gonadal factors have been modified in that they have been eliminated. Chromosomal factors have not been altered so far as XX or XY is concerned, but within the chromosomes there may be genes that determine that the petitioner was psychologically female.

"At present the patient is functioning as a woman, not as a man. From that perspective the petitioner's sex could be judged to have changed."

Mr Terry

41. Mr Terry, consultant urological surgeon at the Leicester University Hospitals, which have a Gender Identity Disorder Group, provided a report dated 21st October 1999 to the Treasury Solicitor and a letter of the 14th March 2000 to Professor Green. He supported the reports of Professor Gooren and Professor Green. He referred to the Harry Benjamin International Gender Dysphoria Association Standard of Care which, in its 5th version classified gender identity disorder either under the ICD-10 (the international classification of diseases-10) or the DSM-IV (diagnostic and statistical manual of mental disorders — 4th Edition). He set out the required stages before a patient was accepted for genital reconstructive surgery: the patient had to be over 18, having had 12 months of continuous hormonal therapy, 12 months of successful, continuous full-time real life experience, and full understanding of the consequences of surgery and the possibilities available. He was aware of the study of the interaction between the developing brain and sex hormones in Zhou et al. He said:

"This study, although composed of small numbers of patients, shows a significant difference in the size of the central subdivision of the bed nucleus of the stria terminalis between groups of men and women and male to female transsexuals. This paper therefore lends credence to the view that the formation of external genitalia which is currently the criteria to assign a new born child to the female or male sex is not the end point of sexual differentiation and that sexual differentiation of the brain may be more important in predicting or correlating future sexual and non sexual behaviour…"

"With further research into the neuro-anatomy/neuro-pharmacology of brains of transsexual patients the pathogenesis of transsexualism may become more clearly understood."

42. In an addendum to his report he said:

"The psychological profile of male to female transsexuals is female by medical definition. The only biological factor which has not changed in such individuals is their chromosomal makeup. The paper reported in Nature in 1995 would suggest this in itself may be irrelevant in the sexual development of transsexuals. Accepting that transsexualism is a medically recognised condition and that such patients undergo appropriate medical and surgical treatment to achieve their chosen sexual orientation it seems to me irrelevant to consider the chromosome makeup of an individual as the critical factor when determining the rights of that individual in the in the society in which he/she lives."

Conclusions on the Medical Evidence

43. In our judgment the gender assignment at birth of a transsexual in accordance with the Corbett criteria cannot be challenged. There are at present no other criteria that can be applied to a newborn child.
44. The next question is whether the assignment made at birth is immutable, other than for those with uncertain sexual characteristics, or whether there is a point at which it can be said that the gender which was correct at birth is no longer applicable.
45. The significant difference between the three consultants, despite their general agreement, was their approach to the classification of the diagnosis of transsexualism. Professor Gooren was clear that it was a medical condition with an organic basis, 'a disorder of sexual differentiation' and, based upon the research described in the paper of Zhou et al, went so far as to say that the research substantiated 'the hypothesis that transsexuals are inter-sexed at brain level'.
46. Both Professor Green and Mr Terry considered that the Zhou et al research was important, but based upon a small sample, and its findings could not at present be refuted nor confirmed - it has not been so far widely accepted. Professor Green placed transsexualism within the category of psychiatric disorder, as did Mr Terry who referred to its categorisation by the Harry Benjamin International Gender Dysphoria Association, within the manual of mental disorders.
47. Transsexualism is, therefore, according to the present accepted medical knowledge, recognised as a psychiatric condition, coming within gender dysphoria or gender identity disorder. There is the possibility that it is a medical condition with a biological basis by reason of sexual differentiation of the brain after birth. Another disorder within the same group is the condition called inter-sex, which has certain similarities to transsexualism but is recognised as a distinct disorder. An inter-sexed person is someone whose biological criteria at birth are not congruent, and is, therefore, of uncertain sex and, as Professor Gooren and Professor Green described (above), would be assigned to the sex the medical profession considered most appropriate for psychological reasons rather than biological reasons. By contrast the transsexual would be born with congruent biological criteria and would be appropriately assigned to one sex, but would become seriously discontented with that 'label' as he/she grew up. At some stage a transsexual would be likely to seek medical advice. As Professor Gooren said, it would be a stepwise procedure.
48. The identification and treatment of transsexualism can be divided into four stages:
    a. psychiatric assessment
    b. hormone treatment
    c. a period of the real life test (living as a member of the opposite sex)

    and, in suitable cases,

    d. gender reassignment surgery.
49. After diagnosis, the purpose of the treatment is to deal as effectively as possible with the psychological problems of being born into the gender with which the person is profoundly unhappy. The diagnosis, as Mr Moylan pointed out, is based upon the correct assignment at birth, determined by the existing biological criteria which subsequently turns out to be psychologically incorrect.
50. The three possible additional factors not taken into account by Ormrod J in Corbett are:
    d. psychological

e. secondary sexual characteristics
f. brain differentiation.

a) Psychological

51. Ormrod J, of course, recognised the psychological factor and disregarded it for the purpose of assignment of the biological sex of the baby. If he was correct that assignment of sex has to be fixed at birth for all whose biological criteria are congruent, then the psychological factor has to be disregarded. For those who are inter-sexed, since the assignment is uncertain, provision is made for redefinition, see e.g. *W v W* (below). Professor Green considered that psychological factors might become an overriding consideration as the individual developed. Those factors would clearly have to be recognised at a later stage in the life of the individual.

b) Secondary Sexual Characteristics

52. None of the medical evidence suggested that the secondary criteria should be a primary factor in assignment or reassignment.

c) Brain Differentiation

53. Professor Gooren's evidence on the recent research on animals, and post-mortem on the brains of transsexuals, shows the developments in medical science since this hypothesis was dismissed by Ormrod J in *Corbett*. The size of the brain in men is significantly larger than in women and in the group of post-mortems on transsexual male to females the size of the brain corresponded to the gender assumed. The research may potentially be of great significance in guiding the medical profession and the courts in a reassessment of the correct gender of transsexuals.
54. There are, however, at present, a number of formidable obstacles. The research is on a limited basis. It has not yet been generally accepted, and clearly more research will have to be carried out to demonstrate that the biological factor which causes brain sexual differentiation in men and women is to be found congruent with the transsexual's preferred gender.
55. A much larger obstacle is the present impossibility of recognition of brain differentiation in living people. The possible psychological or other signs of such brain differentiation are at such an early stage that, in our judgment, a court could not accept them as clear indications. No one in this case has asked us to do so. Consequently, the work on brain sexual differentiation, which may become of great significance in the future, cannot at present be one of the relevant criteria for the purpose of assignment of the sex of a transsexual in court.
56. There was no medical evidence, other than the psychological, upon which the Court could come to a conclusion different from the criteria set out by Ormrod J. Although the psychological factor was strongly relied upon by Professor Green, he did not suggest a clear point at which the psychological changes had reached a stage, with or without hormonal treatment and reassignment surgery, at which a person should be seen to have become a member of the sex into which he/she was not born.

The Case Law

57. There has been no decision, since *Corbett,* on the validity of the marriage between a transsexual and a person of the same sex as that in which he/she was assigned at birth. *Corbett* was a decision of first instance and this Court is not, therefore, bound by its conclusions, but it undoubtedly has much persuasive authority. There are only a few English cases which can throw any light upon the modern position. None of them departs to any marked extent from the approach of Ormrod J in *Corbett*.
58. In *R v Tan* [1983] QB 1053, the criteria in *Corbett* were applied to the criminal law. The Court of Appeal rejected a submission that if a person had become philosophically or psychologically or socially female, that person should be held not to be a man. In the judgment of the Court, Parker J said at page 1064:

    "In our judgment both common sense and the desirability of certainty and consistency demand that the decision in *Corbett v Corbett* should apply for the purpose not only of marriage, but also for a charge under section 30 of the Sexual Offences Act 1956 or section 5 of the Sexual Offences Act 1967."

59. In *S-T v J* (above), the defendant was born female but lived as a male. He underwent reconstructive surgery. He met and married the plaintiff without informing her of his history. Upon discovering the truth, the plaintiff obtained a decree of nullity and, upon the defendant applying for ancillary relief, she challenged his right to do so upon the ground of public policy, in that the defendant had committed an offence under the Perjury Act 1911. Hollis J dismissed the defendant's claim.
60. In this Court, Ward LJ reviewed the position of transsexuals and the matrimonial law. He considered decisions from other jurisdictions, and was impressed by the reasoning of Judge Aubin in the New Zealand Family Court, and of Ellis J in the Supreme Court of New Zealand in *M v M* [1991] N.Z. F.L.R. 337, neither of whom followed the criteria in *Corbett*. Each held that there was no lawful impediment to the marriage of a transsexual (see below). Ward LJ said at page 1303:

    "Hollis J did not find this "persuasive authority." For my part, I find myself unable lightly to dismiss it. Taken with the new insight into the aetiology of transsexualism, it may be that *Corbett's* case…would bear re-examination at some appropriate time."

61. He pointed out, however, that the correctness of the decision in *Corbett* had not been challenged in the Court of Appeal (see also Sir Brian Neill at page 1332 (above)). In our view, this Court in *S-T v J* raised the question as to whether the developments in medical knowledge provided the basis for a reconsideration of the criteria in *Corbett*. We agree with them that it is appropriate to review those criteria, but are not persuaded that the judgments of Ward LJ and Sir Brian Neill did more than put down a marker for a future Court to reconsider the whole issue as we are now doing.
62. In *W v W (physical inter-sex)* [2001] Fam. 111, Charles J had to decide whether the respondent was male or female at the date of the marriage on a petition for nullity by the petitioner. It is clear from the tragic facts that the respondent's sex at birth was uncertain, and that the parents chose to register her as a boy.
63. As a child and a young woman she dressed as, appeared as, and acted as female. At 17, she finally ran permanently away from home and thereafter lived as a woman. Charles J held that he was not concerned with a transsexual. He was concerned with a case in which the biological test set and applied in *Corbett* was not satisfied, and did not provide the answer to the question as to whether the respondent was a female for the purposes of marriage. The judge found that there was a correct diagnosis of the

respondent of partial androgen insensitivity, with ambiguous external genitalia, and came within the convenient shorthand definition of physical inter-sex.

64. He held that she was a female for the purposes of her marriage to the petitioner. He said at page 145 that, on the true construction of the Matrimonial Causes Act, greater emphasis could be placed on gender rather than sex. Although we respectfully agree with the judgment in *W v W,* Charles J made it entirely clear that he was dealing with a different disorder within gender dysphoria, and not with a transsexual.
65. Miss Cox argued that the appellant and Mrs W were, after surgery, physiologically the same. That similarity does not change the essential fact that Mrs W was, at birth, of uncertain sex, and assigned by the choice of her parents to male, whereas the appellant was indisputably male at birth. We cannot see how *W v W* helps the appellant's case.
66. In *Fitzpatrick v Sterling Housing Association Ltd* [2001] AC 27 the House of Lords grappled with the consequences of the death of one partner in a longstanding homosexual relationship, upon the right of succession to a statutory tenancy under schedule 1 to the Rent Act 1977. The House of Lords held that the extended meaning of the word 'spouse' in paragraph 2(2) of schedule 1 did not apply to same sex partners. By a majority the House held that a same sex partner was capable of being a member of the original tenant's family for the purpose of paragraph 3 of the same schedule. The House of Lords was, therefore, considering a situation, which was in all respects entirely different from the present question before this Court. Nonetheless, Miss Cox relies on observations made by Lord Slynn of Hadley in his speech, and seeks to apply them by analogy. One passage is relevant to the broader issue faced by this Court. Lord Slynn said at page 33

    "It has been suggested that for your Lordships to decide this appeal in favour of the appellant would be to usurp the function of Parliament. It is trite that that is something the courts must not do. When considering social issues in particular judges must not substitute their own views to fill gaps. They must consider whether the new facts 'fall within the parliamentary intention' (see *Royal College of Nursing of the UK v Department of Health and Social Security* [1981] 1 All E.R. 545 at page 565; [1981] A.C.800 at page 822 per Lord Wilberforce). Thus in the present context if, for example, it was explicit or clear that Parliament intended the word 'family' to have a narrow meaning for all time, it would be a court's duty to give effect to it whatever changes in social attitudes a court might think ought to be reflected in the legislation. Similarly, if it were explicit or clear that the word must be given a very wide meaning so as to cover relationships for which a court, conscious of the traditional views of society might disapprove, the court's duty would be to give effect to it. It is, however, for the court in the first place to interpret each phrase in its statutory context. To do so is not to usurp Parliament's function; not to do so would be to abdicate the judicial function. If Parliament takes the view that the result is not what is wanted it will change the legislation."

67. In *Fitzpatrick* the House of Lords gave a broad interpretation to the word 'family'. In the present case, no help seems to be gained from the context of section 11 of the Matrimonial Causes Act 1973. We have to look at the medical evidence and see whether the present state of the medical knowledge, in the absence of statutory interpretation, permits the Court to give the word 'female' the meaning advanced by Miss Cox. The decisions in the English cases have not, so far, proceeded beyond the

decision in *Corbett*, other than to recognise the unsatisfactory present situation and the need for reconsideration of the legal position of a transsexual.

Overseas authorities

68. In their well-researched submissions counsel referred not only to English authorities but also to some decisions of the European Court of Human Rights and to other cases in which the legal position of transsexuals has been considered by foreign courts. In view of the Human Rights Act 1998 it is the Strasbourg decisions which call for the fullest treatment. But it is convenient to take all the overseas authorities in chronological order, since many of the cases emphasise the need for the law to respond to developments in scientific knowledge and in society's attitudes.
69. The earliest overseas authority referred to in counsel's submissions was the decision of the Appellate Division of the Superior Court of New Jersey in *MT v JT* (1976) 335 A 2nd 204. That decision and a decision in 1978 of the West German Bundesverfassungsgericht (49 BVerfGE 286) were summarised in the dissenting judgment of Judge Martens in *Cossey v United Kingdom* (1990) 13 EHRR 622, 647:

    "Both judgments - and their similarity is the more striking because they come from different legal traditions - make the same essential points. Both judgments may be summarised as taking the view that the change of sexual identity which results from successful reassignment surgery should be deemed a change of sex for legal purposes."

70. The German decision led to a change of law in West Germany in 1980, following changes in Sweden and Denmark in 1972 and 1975 respectively. There have been more recent changes in many other member states of the Council of Europe.
71. The earliest Strasbourg decision which calls for mention is *Van Oosterwijck v Belgium* (1980) Series A No.4. The case was brought by a Belgian female-to-male post-operative transsexual who wished to have his birth certificate altered. This case failed before the European Court of Human Rights on the ground of failure to exhaust local remedies, but the European Commission on Human Rights took the view that there had been a violation of both Article 8 and Article 12. The Commission's report is discussed at some length in Lord Reed's paper 'Splitting the Difference: Transsexuals and Human Rights Law' presented to the Anglo-German Family Law Judicial Conference in Edinburgh in September 2000. In relation to Article 8 the Commission regarded the concept of respect for private life as going beyond the right to privacy and as approximating to self-determination under the German basic law. The Commission was much more divided about Article 12. Lord Reed has commented,

    "The diversity of views in relation to Article 12, and the greater reluctance to find a definite right to marry on the part of transsexuals, has remained a feature of the case law under the Convention."

72. *Rees v United Kingdom* (1986) 8 EHRR 56, Series A No.106, was a complaint under Articles 8 and 12 by a female-to-male post-operative transsexual (whose medical and surgical treatment had been provided by the National Health Service). In 1980, six years after the gender reassignment surgery, the applicant's solicitor applied to the Registrar General under s.29(3) of the Births and Deaths Registration Act 1953 for

alteration of his birth certificate on the ground of mistake. The Court recognised in its majority judgment that the United Kingdom did not require citizens to have identity cards, and that a transsexual could readily obtain a driving licence and a passport with a new gender prefix. But birth certificates were regarded as records of historical facts.

73. The Court recognised that although the essential purpose of Article 8 is to protect the individual against arbitrary interference by the state, the requirement of respect for private life may also impose positive obligations on the state. But in relation to the rights of transsexuals there was a marked lack of uniformity between member states (para 37):

    "It would therefore be true to say that there is at present little common ground between the contracting states in this area and that, generally speaking, the law appears to be in a transitional stage. Accordingly, this is an area in which the contracting parties enjoy a wide margin of appreciation."

74. The Court considered the complex issues which would have to be covered by amending legislation in the United Kingdom. It concluded (para 44):

    "Having regard to the wide margin of appreciation to be afforded to the state in this area and to the relevance of protecting the interests of others in striking the requisite balance, the positive obligations arising from Article 8 cannot be held to extend that far."

75. The Court dealt with Article 12 much more shortly and simply, concluding (para 49) that the right to marry guaranteed by the article "refers to the traditional marriage between persons of opposite biological sex". The decision on Article 12 was unanimous. The decision on Article 8 was reached by a majority of twelve to three. The views of the minority appear from the joint dissenting opinion:

    "There is obviously no question of *correcting* the registers by concealing the historical truth or of claiming that Mr Rees has *changed sex* in the biological sense of the term. The idea is merely (as already happens in the United Kingdom in other cases - for example, with adoption) to mention a development in the person's status due to changes in his apparent sex - what we have called his sexual identity - and to give him the opportunity to obtain a short certificate which does not disclose his previous status. This would better reflect the real situation and to that extent would even be in the public interest."

76. Four years later in *Cossey v United Kingdom* (1990) 13 EHHR 622, Series A No.184, the European Court of Human Rights reached the same conclusions, but only by majorities of ten to eight in relation to Article 8, and fourteen to four in relation to Article 12. The applicant was a male-to-female transsexual who had received reassignment surgery in 1974. In 1984 she complained of the Registrar General's refusal to alter her birth certificate. While the complaint was pending she went through a marriage ceremony at a London synagogue in 1989 but she later obtained a decree that the marriage was void. The Commission concluded, surprisingly in view of *Rees*, that there had been no violation of Article 8 but that there had been a violation of Article 12.
77. The Court, in its majority judgment, asked itself whether it should follow *Rees*. Its general practice was to follow precedent, but a departure might be warranted to reflect

scientific and societal developments. But there was no evidence of significant scientific advances and (despite some changes in the laws of member states of the Council of Europe) this was still an area in which there was a wide margin of appreciation. Nevertheless the Court (para 42)

" … is conscious of the seriousness of the problems facing transsexuals and the distress they suffer. Since the Convention always has to be interpreted and applied in the light of current circumstances, it is important that the need for appropriate legal measures in this area should be kept under review."

78. Again, the majority judgment dealt quite shortly with Article 12 (despite the contrary view taken by the Commission).
79. In *Cossey* there were several dissenting opinions, most notably the long and eloquent opinion of Judge Martens. The whole opinion merits study, but its central thesis appears from para 2.7:

"The principle which is basic in human rights and which underlies the various specific rights spelled out in the Convention is respect for human dignity and human freedom. Human dignity and human freedom imply that a man should be free to shape himself and his fate in the way that he deems best fits his personality. A transsexual does use those very fundamental rights. He is prepared to shape himself and his fate. In doing so he goes through long, dangerous and painful medical treatment to have his sexual organs, as far as is humanly feasible, adapted to the sex he is convinced he belongs to. After these ordeals, as a post-operative transsexual, he turns to the law and asks it to recognise the *fait accompli* he has created. He demands to be recognised and to be treated by the law as a member of the sex he has won; he demands to be treated, without discrimination, on the same footing as all other females, or as the case may be, males. This is a request which the law should refuse to grant only if it truly has compelling reasons."

80. *Rees* and *Cossey* were distinguished in *B v France* [1992] 2 FLR 249, in which the only complaint was under Article 8. The applicant, a French national born in Algeria, was a male-to-female post-operative transsexual who complained of the French court's refusal to make an order rectifying her birth certificate or declaring that she should bear female forenames. Although it was argued that in *Cossey* the Court had erred in discounting scientific and societal developments, the decision in *B v France* seems to have turned on the different functions and importance (as between the United Kingdom and France) of civil registration.
81. The next case in chronological sequence is a decision of the High Court of New Zealand, *Attorney-General v Otahuhu Family Court* [1995] 1 NZLR 603. In applying s.23 of the New Zealand Marriage Act 1955 Ellis J declined to followed *Corbett v Corbett* and preferred the reasoning in the New Jersey decision in *MT v JT* and the New Zealand decision in *M v M* [1991] NZFLR 337. The essential point of the decision appears at p.606:

"Some persons have a compelling desire to be recognised and be able to behave as persons of the opposite sex. If society allows such persons to undergo therapy and surgery in order to fulfil that desire, then it ought also to allow such persons to function as fully as possible in their reassigned sex, and this must include the capacity to marry. Where two persons present themselves as having the apparent genitals of a

man or a woman, they should not have to establish that each can function sexually … There is no social advantage in the law not recognising the validity of the marriage of a transsexual in the sex of reassignment. It would merely confirm the factual reality."

82. *P v S and Cornwall County Council* (1996) ECR I-2143 is a decision of the Court of Justice of the European Communities on a reference by the Truro Industrial Tribunal raising a question on the Equal Treatment Directive (76/207/EEC). P was a manager employed by the County Council at an educational establishment. In 1992 P told S, the principal of the establishment of her intention to undergo male-to-female reassignment surgery. At first S was supportive, but while P was on sick leave after the surgery she was dismissed. The question referred by the industrial tribunal was whether the directive's prohibition of sex discrimination extended to dismissal of a transsexual on account of gender reassignment. The Court of Justice answered that question in the affirmative (para 21-2):

    "Such discrimination is based, essentially if not exclusively, on the sex of the person concerned. Where a person is dismissed on the ground that he or she intends to undergo, or has undergone, gender reassignment, he or she is treated unfavourably by comparison with persons of the sex to which he or she was deemed to belong before undergoing gender reassignment.

    To tolerate such discrimination would be tantamount, as regards such a person, to a failure to respect the dignity and freedom to which he or she is entitled, and which the Court has a duty to safeguard."

83. *P v S and Cornwall County Council* led to the Sex Discrimination (Gender Reassignment) Regulations 1999 (No.1102) enacted under s.2(2) of the European Communities Act 1972. These regulations have amended the Sex Discrimination Act 1975.
84. The most recent of the line of cases in the European Court of Human Rights is *Sheffield and Horsham v United Kingdom* (1998) 27 EHRR 163. The two applicants were both male-to-female transsexuals who had undergone surgery for gender reassignment. Miss Sheffield put forward detailed evidence of the embarrassment which she had suffered, especially in connection with legal proceedings, in having to disclose her original gender. Miss Horsham described herself as living in exile in the Netherlands because she could not (if domiciled in England) marry her male partner in any jurisdiction.
85. The Court held, by a majority of eleven to nine, that there had been no violation of Article 8; and by a majority of eighteen to two, that there had been no violation of Article 12. As to Article 8, the main majority judgment noted the applicants' contention that there was new scientific evidence, especially in the work of Professor Gooren (although his thesis does not seem to have been correctly summarised in paragraph 43 of the judgment). It also referred to *P v S and Cornwall County Council* and to what the pressure group Liberty called "an unmistakably clear trend in the Member States of the Council of Europe towards giving full recognition to gender reassignment". But the Court regarded the scientific evidence as inconclusive and noted (para 57) that Liberty's survey

    "does not indicate that there is yet any common approach as to how to address the repercussions which the legal recognition of a change of sex may entail for other areas

of law such as marriage, filiation, privacy or data protection, or the circumstances in which a transsexual may be compelled by law to reveal his or her pre-operative gender."

86. Nevertheless the majority noted that the United Kingdom had failed to legislate in this area, despite previous observations by the Court, and it repeated the same warning in stronger language (para 60):

    "Even if there have been no significant scientific developments since the date of the *Cossey* judgment which make it possible to reach a firm conclusion on the aetiology of transsexualism, it is nevertheless the case that there is an increased social acceptance of transsexualism and an increased recognition of the problems which post-operative transsexuals encounter. Even if it finds no breach of Article 8 in this case, the Court reiterates that this area needs to be kept under review by Contracting States."

87. On Article 12 the majority did not move perceptibly from *Rees* and *Cossey*. The concurring opinion of the United Kingdom judge, Sir John Freeland, said that he had concurred in the vote on Article 8 only "after much hesitation and even with some reluctance". Of the various dissenting opinions the most notable is that of Judge Van Dijk which follows on from that of his predecessor, Judge Martens. He too emphasised that the individual's right of self-determination is an important part of the content of the rights enjoyed under Article 8.
88. The most recent overseas decision cited to the court is the decision of the Court of Appeals of Texas in *Littleton v Prange* (1999) 9 SW 3d 223, in which a transsexual who had gone through a marriage ceremony was held not to be the deceased partner's surviving spouse for the purpose of a wrongful death and survival statute. The majority judgment referred to *MT v JT*, *Corbett v Corbett* and the New Zealand case of *M v M*. It decided the issue as essentially one of statutory construction, commenting (at p.231) that

    " … courts are wise not to wander too far into the misty fields of sociological philosophy."

89. The dissenting judgment of Lopez J pointed out that gender was determined at birth in a summary and not always accurate manner:

    "The declaration [of the obstetrician or midwife after a quick visual inspection] is then memorialised by a certificate of birth, without an examination of the child's chromosomes or an inquiry about how the child feels about its sexual identity."

90. In the European Court of Human Rights The United Kingdom Government is more severely criticised for its failure to respond to earlier criticisms of its approach to potential breaches of Article 8 than of Article 12, but there is a momentum for change increasingly recognised in the Court at Strasbourg and articulated in judgments critical of the whole approach of the English law to the present position of transsexuals. Decisions of other countries show a marked divergence of opinion over the proper treatment of transsexuals in the law.

The Report of the Inter-Departmental Working Group on Transsexual People

91. As a result, no doubt, of the criticisms made by members of the European Court of Human Rights in the cases referred to above, the Home Secretary set up an Inter-Departmental Working Group with the terms of reference:

    "to consider, with particular reference to birth certificates, the need for appropriate legal measures to address the problems experienced by transsexual people, having due regard to scientific and societal developments, and measures undertaken in other countries to deal with this issue."

92. The Report of the Working Group was completed and presented to Ministers in April 2000. It is a careful and comprehensive review of the medical condition, current practice in other countries, the present state of English law in all aspects of the life of an individual including marriage, the position with regard to birth certificates. It contains various annexes, including details of the practice in Common Law states and European countries.
93. In its conclusions the Working Group identified three options for the future:
    a. to leave the current situation unchanged;
    b. to issue birth certificates showing the new name and possibly, gender; and
    c. to grant full legal recognition of the new gender subject to certain criteria and procedures.
94. The Working Group concluded:

    "We suggest that before taking a view on these options the Government may wish to put the issues out to public consultation."

95. The Report was published in April 2000. We enquired of Mr Moylan, on behalf of the Attorney-General, what steps were being taken by any government department, to take forward any of the recommendations of the Report, or to prepare a consultation paper for public discussion.
96. To our dismay, we were informed that no steps whatsoever have been, or to the knowledge of Mr Moylan, were intended to be, taken to carry this matter forward. It appears, therefore, that the commissioning and completion of the Report is the sum of the activity on the problems identified both by the Home Secretary in his terms of reference, and by the conclusions of the members of the Working Party. That would seem to us to be a failure to recognise the increasing concerns and changing attitudes across Western Europe which have been set out so clearly and strongly in judgments of Members of the European Court at Strasbourg, and which in our view need to be addressed by the United Kingdom.

General Conclusions

97. It is clear that the three criteria relied upon by Ormrod J in *Corbett* remain the only basis upon which to decide upon the gender of a child at birth. It is, as Professor Gooren and others have pointed out, necessary to chose the gender of a child immediately. There are obvious reasons for assigning the sex of the child and among those reasons is the matter of status. Other than in the case of a person who is inter-sexed, the biological criteria point at that stage conclusively to a decision whether the child is male or female. At birth therefore the *Corbett* criteria remain valid today.
98. Miss Cox suggested that there was no reason to fix the gender of a person immutably at birth. On the present state of medical knowledge the only possible criterion to be

added to the existing three criteria would be the psychological factor. The possibility of brain sexual differentiation is, for reasons already set out above, not yet possible to take into account. The medical evidence in this case show the enormously increased recognition of, and reliance upon, the psychological factor in the assessment of a person diagnosed as suffering from gender disorder. There is, in informed medical circles, a growing momentum for recognition of transsexuals for every purpose and in a manner similar to those who are inter-sexed. The current approach recognises changes in social attitudes as well as advances in medical research. Those social changes are well exemplified in the recent judgments of the Court at Strasbourg and in the lecture given by Lord Reed (above). They cannot be ignored.

99. How are the social changes to be given legal recognition? In matters other than marriage, the Report of the Working Party sets out steps which have been taken. This Court is not concerned with the question whether those steps meet the criticisms levelled by members of the European Court at Strasbourg. We are however concerned with legal recognition of marriage which, like divorce, is a matter of status and is not for the spouses alone to decide. It affects society and is a question of public policy. For that reason, even if for no other reason, marriage is in a special position and is different from the change of gender on a driving licence, social security payments book and so on. Birth, adoption, marriage, divorce or nullity and death have to be registered. Each child born has to be placed into one of two categories for the purpose of registration. Status is not conferred only by a person upon himself; it has to be recognised by society. In the absence of legislation, at what point can the court hold that a person has changed his gender status?

100. The point at which a change of gender should be recognised is not easily to be ascertained. The line could be drawn at a number of different points from the initial diagnosis of gender disorder to the completion of reconstructive surgery. It is clear from the Report of the Working Party that the point at which people feel they have achieved their change of gender varies enormously. From the research it can be seen how much more difficult it is to undergo successful female to male reconstructive surgery than the male to female but the self-identification in the preferred male gender can be as strong as in a post-operative male to female transsexual.

101. Miss Cox submitted that, since the surgery at the fourth stage was irreversible unlike the previous stages, it would be correct to recognise the appellant as reassigned to the opposite sex once she became a post-operative male to female transsexual, or presumably vice versa. Mr Moylan asked why the court should arbitrarily chose the point of completion of the fourth stage of treatment by successful gender reconstruction surgery.

102. We agree with Mr Moylan that the fourth stage, although irreversible, is the completion of the last stage of the treatment. The diagnosis of gender disorder is not revised after the successful completion of any part of the treatment. The successful completion of all stages of the treatment permits the transsexual to live in his/her preferred gender role. To chose, however, to recognise a change of gender as a change of status would require some certainty and it would be necessary to lay down some pre-conditions which would inevitably be arbitrary. So, on Miss Cox‘s hypothesis, for instance, if a patient started but failed to complete such surgery for whatever reason, he/she would remain in the birth registered gender, whereas further surgery would permit him/her to be recognised for the purposes of section 11(c) as having changed his/her gender.

103. Annex 3 of the Report of the Working Party sets out with clarity the problems of gender re-registration. The German approach, for example, in its legislation

provides for recognition by a court of acquired gender under certain conditions. The requirements are

i. a person has lived for three years as belonging to the sex the person feels he or she belongs to;
ii. the person is unmarried;
iii. of age;
iv. permanently sterile;
v. has undergone an operation by which clear resemblance to the other sex has been achieved.

104. The propriety of requiring pre-conditions, such as these, are matters for public policy and, no doubt, public consultation, not for imposition by the courts on the public. The absence of pre-conditions would leave the applicability of the law to an individual diagnosed as suffering from gender disorder in complete confusion.

105. It seems to us that two questions arise. The first question is for the Court. What is the status of the appellant? Is she male or female? That question should, in our judgment be answered by assessing the facts of an individual case against a clear statutory framework. The second question is for Parliament. At what point would it be consistent with public policy to recognise that a person should be treated for all purposes, including marriage, as a person of the opposite sex to that to which he/she was correctly assigned at birth? The second question cannot properly be decided by the court.

106. As Lord Slynn said in *Fitzpatrick*, when considering social issues in particular judges must not substitute their own views to fill gaps. In *re F (In Utero)*[1998] Fam 122, [1988] 2FLR 307 the Court of Appeal (in a wholly different context), had to consider the legal position of the foetus in a wardship application designed to make the unborn child a ward of court. Balcombe LJ said at page 144 or325:

"If the law is to be extended in this manner, so as to impose control over the mother of an unborn child, where such control may be necessary for the benefit of the child, then under our system of parliamentary democracy it is for Parliament to decide whether such controls can be imposed and, if so, subject to what limitations or conditions."

107. Those observations, we would respectfully suggest, are equally apposite to the present appeal.

108. We would therefore dismiss the appeal.

109. We would add however, with the strictures of the European Court on Human Rights well in mind, that there is no doubt that the profoundly unsatisfactory nature of the present position and the plight of transsexuals requires careful consideration. The recommendation of the Inter-Departmental Working Party for public consultation merits action by the Government Departments involved in these issues. The problems will not go away and may well come again before the European Court sooner rather than later.

Thorpe LJ:
The Judgment Below

110. I have had the advantage of the judgment in draft of My Lady and My Lord. Although I differ from them in my conclusion I gratefully adopt their summary of the relevant facts.

111. Two criticisms are made of the judgment below, the first of which is in my opinion insubstantial. At page 9 Johnson J seems to conclude that the decree in *Corbett v Corbett* was pronounced under section 1 of the Nullity of Marriage Act 1971 rather than under the common law. But that is a chronological confusion of no importance.

112. However of more significance is his erroneous citation of Professor Green at the conclusion of his judgment to support the proposition that the three *Corbett* factors remain 'the only criteria for determining the gender of an individual'. The words that Johnson J relied on were not a statement of opinion but only the summary of a question for his opinion posed by the Treasury Solicitor in his letter of 29 October. In reality Professor Green's position was that the three *Corbett* factors were in present times 'too reductionistic'. Despite Johnson J's skilful summary of the expert evidence at pages 6-7 of his judgment, his ultimate conclusion that the medical opinion that guided Ormrod J remained unchanged might be said to erode the validity of the conclusion.

113. However, overall Johnson J's judgment is characteristically careful and understanding. In my opinion the key to this appeal lies not so much in a scrutiny of his judgment as in a fresh appraisal of the extent to which the passage of 30 years requires the revision of the propositions of law, of medical science and of social policy upon which Ormrod J founded his judgment in *Corbett v Corbett*.

114. The decision of Charles J in *W v W* coincidentally emerged during the hearing before Johnson J. In those circumstances it is not surprising that it did not receive much attention, particularly since counsel before Johnson J agreed that it had no bearing on his decision. However since the issues considered in these judgments are so inter-related I have found it helpful to reflect on both judgments in attempting to resolve the difficult issues raised by this appeal.

115. Although Johnson J found support from my judgment in *Dart v Dart* for his conclusion that the issues raised by the petitioner were better left to parliament, I differ from him on this issue for reasons which I will explain later in this judgment.

The Expert Evidence

116. Since the expert evidence at the trial was all agreed none of the three experts was called to give oral evidence. It follows that this Court is in as good a position as the trial judge to assess its impact. Clearly the parties sought advice from experts of the greatest distinction. Dr Louis Gooren is Professor of Endocrinology at the Free University Hospital of Amsterdam. His unit serves 95% of a Dutch population of 15M. His experience extends over 23 years. Over this period his clinic has treated an average of 150 new patients per annum, approximately 60% of whom proceed through the various stages of treatment to genital re-assignment. Professor Richard Green is the Research Director of the Gender Identity Clinic at the Charing Cross Hospital. It is perhaps the largest such clinic in the world. As well as offering treatment it conducts research into the origins of transsexualism. Mr T R Terry is Consultant Urological surgeon at Leicester University Hospitals where he specialises in the surgical treatment of male to female gender dysphoric patients. Since each of these three experts agreed with the written opinions offered by the others and since some provided supplemental answers to specific questions raised by the lawyers, their

attendance at trial became unnecessary. I would therefore draw from their reports the opinions and conclusions which I have found particularly influential:

i. There are various stages in the development of the sex of the human being, some pre-natal and some post-natal. As Professor Gooren put it:

"The process of sexual differentiation takes place in distinct steps, first the chromosomal configuration is established, next gonadal differentiation, next differentiation of the internal and external genitalia and finally the differentiation of the brain into male or female. …. this process of brain sexual differentiation takes place after birth …. one brain structure, that is different between men and women, becomes only sex-dimorphic between the ages of two and four years …."

To the same effect is Professor Green who wrote:

"If a biological sexual condition of an individual is conceptualised to include psychological sex, perhaps reflective of brain sex differentiation, this status does not express itself until several years post-natally. Therefore it is not possible to say that the biological sexual condition of an individual is fixed at birth …."

ii. Since 1970 there has been some research into brain differentiation. Professor Gooren was co-author of a paper published in 1995 (*Nature:* J Zhou et al) that demonstrated that in one of the human brain structures that is different between men and women, a totally female pattern was encountered in six male - to - female transsexuals. In Professor Gooren's words:

"These findings showed that a biological structure in the brain distinguishes the male - to - female transsexuals from men."

I also cite Professor Green's evaluation of this research. He says:

"The interpretation of this finding is that it provides evidence of a biological central nervous system basis for male transsexualism"

Because the finding is based upon a small sample and because research can only be conducted post mortem the finding remains neither confirmed nor refuted. A subsequent publication in April 2000, of which Professor Gooren was again a co-author, provided only slight corroboration since it relied largely on the original sample. Because of the obvious difficulties in examining the brain for differentiation Professor Green has conducted research on four proxies which might reflect pre-natal biological influences associated with transsexualism. The research has shown significant differences which Professor Green evaluates tentatively:

"These indirect measures may reflect differences in pre-natal brain organisation leading to manifestations of gender dysphoria beginning in early childhood and culminating in the need for sex re-assignment surgery."

Whilst scientific proof for the theory is far from complete Professor Green's assessment is that there is a growing acceptance of findings of sexual differences in the brain that are determined pre-natally. Mr Terry in his commentary on Professor Green's opinion said:

"Although the current scientific literature arguing for a biological causation in the development of gender dysphoria is not irrefutable, it is certainly compelling to my mind."

iii. It follows from the preceding paragraph that medical opinion no longer accepts the three *Corbett* factors for the determination of sex. Professor Gooren states:

"It is no longer tenable to claim that the genetic or gonadal criterion determines one's status as male or female."

More specifically Professor Green, rejects the *Corbett* criteria stating:

"The *Corbett* criteria are too reductionistic to serve as a viable set of criteria to determine sex. They also ignore the compelling significance of the psychological status of the person as a man or as a woman."

He also states:

"The criteria for designating a person as male or female are complex. They are not simply an outcome of chromosomal configuration, genital configuration, or gonadal configuration."

iv. The essential limitation of the *Corbett* criteria lies in the exclusion of psychological factors, whether or not further research will prove such factors to be mediated by brain differentiation. As Professor Green put it:

"Psychological factors cannot be considered at birth because they do not yet manifest. They may become an overriding consideration subsequently as the individual develops."

Later in his opinion Professor Green succinctly expresses his position:

"As a psychiatrist I am biased towards psychological factors. I would argue that with a transsexual the psychological sex has been contrary to other somatic factors for many years, if not the great majority of the person's life. Taking that position, gender reassignment treatment and surgery would align these somatic features with the psychological element. The correct designation of sex would be the outcome."

Professor Green also shows that these psychological factors cannot be averted by psychoanalytic or other therapies. Nor can outcomes be achieved by consistent psychological socialisation as male or female from very early childhood. He therefore states in relation to inter-sex patients:

"More evidence is available for a pre-natally determined biological bias towards maleness or femaleness in gender identity that may overrule efforts at contrary socialisation as female or male. There is considerable current sentiment for delaying any surgical modification of the genitalia which had earlier been thought to help pre-set the evolving gender identity. Now there is more of a wait and see approach until the individual is old enough to express its own wishes."

v. The three experts reflect their huge understanding of transsexualism in their compassionate feelings for transsexuals. Professor Gooren wrote:

"One of the serious obstacles to understanding gender dysphoria is that it is an unimaginable and inconceivable problem to those who do not have it. This distinguishes it from other forms of human suffering for which it is much easier to generate empathy and sympathy."

More specifically on the issue raised by this appeal Mr Terry speaks for these experts when he writes:

"To argue that in the case of a male to female gender dysphoric patient who has undergone rigorous psychological and psychiatric counselling, prolonged hormone treatment and usually several major surgical procedures and who has successfully adapted to a female existence both socially and professionally should not be allowed a legal marriage seems to me brutally insensitive and is diametrically opposed to what we as clinicians, who manage gender dysphoria, are trying to achieve."

The Law

117. In my opinion the focus must be upon the development of our domestic law. The decisions of the Strasbourg court and of judges in other jurisdictions have been comprehensively reviewed by My Lady and My Lord in their judgment. As far as the Strasbourg decisions are concerned, all the evolution has been in the appraisal of the rights under Article 8. I accept Mr Moylan's submission that, since the right to marry is the very subject of Article 12, it is impermissible to introduce the right to marry as an ingredient of Article 8 rights. The consistent judgments of the Court in relation to Article 12 do not demonstrate the same evolution in approach as do the judgments in relation to Article 8. Member states are accorded a wide latitude in defining the right to marriage and it remains permissible for states to restrict the definition to the conventional union between man and woman. In my opinion the judgments in the Strasbourg cases only assist the appellant to the extent that they may demonstrate shifts in social attitudes and values.

118. In domestic law the landmark decision is, of course, the judgment of Ormrod J in *Corbett v Corbett*. Few judgments in family law have had a longer reign. It defined the common law. It informed the subsequent statutory codification of the law of nullity. The statutory provision has since been consistently interpreted and applied in accordance with the decision in *Corbett*. It has been followed in allied fields: see *R v Tan* [1983] QB 1053 and *Re P&G (Transsexuals)* [1996] 2 FLR 90. However recently judicial comments have questioned its continuing legitimacy. Thus a fundamental question raised by this appeal is whether this court in 2001 should

approve and apply the reasoning in *Corbett.* To answer the question it is first necessary to analyse the propositions on which Ormrod J founded his conclusion. I will therefore emphasise those passages of his judgment that seem to me to be critical to the question. Note first that in his review of the phenomenon of transsexuality Ormrod J at 98E-99A describes sex reassignment surgery at what now seems a comparatively early stage of development. Equally his summary of the expert evidence as to the aetiology or causation of transsexualism from 99H-100C reveals the comparatively significant extent to which medical knowledge has progressed in the last 30 years. However all the experts were agreed that there were:

"At least four criteria for assessing the sexual condition of an individual. These are:

i. chromosomal factors;
ii. gonadal factors (ie presence or absence of testes or ovaries);
iii. genital factors (including internal sex organs); and
iv. psychological factors."

119. Of these Ormrod J held at the conclusion of the following paragraph:

"These criteria are, of course, relevant to, but do not necessarily decide, the legal basis of sex determination." (My emphasis added)

120. Another area of expert agreement was recorded at 104D:

"It is common ground between all the medical witnesses that the biological sexual constitution of an individual is fixed at birth (at the latest), and cannot be changed, either by the natural development of organs of the opposite sex, or by medical or surgical means."

121. The essential rationale for Ormrod J's conclusion is from 105H-106D where he said:

"The fundamental purpose of law is the regulation of the relations between persons, and between persons and the state or community. For the limited purposes of this case, legal relations can be classified into those in which the sex of the individuals concerned is either irrelevant, relevant or an essential determinant of the nature of the relationship…. On the other hand sex is clearly an essential determinant of the relationship called marriage because it is and always has been recognised as the union of man and woman. It is the institution on which the family is built, and in which the capacity for natural heterosexual intercourse is an essential element. It has, of course, many other characteristics, of which companionship and mutual support is an important one, but the characteristics which distinguish it from all other relationships can only be met by two persons of opposite sex….

Since marriage is essentially a relationship between man and woman, the validity of the marriage in this case depends, in my judgment, upon whether the respondent is or is not a woman. I think, with respect, that this is a more precise way of formulating the question than that adopted in paragraph two of the petition, in which it is alleged that the respondent is a male. The greater, of course, includes the less but the distinction may not be without importance, at any rate, in some cases. The question then becomes, what is meant by the word 'woman' in the context of a marriage, for I

am not concerned to determine the 'legal sex' of the respondent at large. Having regard to the essentially heterosexual character of the relationship which is called marriage, the criteria must in my judgment, be biological, for even the most extreme degree of transsexualism in a male or the most severe hormonal imbalance which can exist in a person with male chromosomes, male gonads and male genitalia cannot reproduce a person who is naturally capable of performing the essential role of a woman in marriage. In other words, the law should adopt in the first place, the first three of the doctors criteria, ie the chromosomal, gonadal and genital tests, and if all three are congruent, determine the sex for the purpose of marriage accordingly, and ignore any operative intervention."

122. In this rationale it is to be noted that Ormrod J rejected the last of the four criteria agreed by all the experts to determine sex medically, namely psychological factors.

123. In rejecting submissions on behalf of the respondent he enunciated another proposition thus at 106H-107B:

"I have dealt, by implication, with the submission that because the respondent is treated by society for many purposes as a woman, it is illogical to refuse to treat her as a woman for the purpose of marriage. The illogically would only arise if marriage were substantially similar in character to national insurance and other social situations, but the differences are obviously fundamental. These submissions, in effect, confuse sex with gender. Marriage is a relationship which depends on sex and not on gender."

124. So let me question each of the four following propositions drawn from the passages that I have cited:

i. 'The biological sexual constitution of an individual is fixed at birth (at latest)'
ii. 'The relationship called marriage …. is and always has been recognised as the union of man and woman.'
iii. 'The law should adopt …. the first three of the doctors criteria …. and …. determine the sex for the purposes of marriage accordingly.'
iv. 'Marriage is a relationship which depends on sex and not on gender.'

125. The first is a scientific proposition then agreed by all the experts but which, 30 years on, is rejected by the three experts in the present case: see my review of the expert evidence at paragraph 116 above.

126. The second is an echo of 18th and 19th century authority. In *Lindo v Belisario* [1795] 1 Hag Con 216 at 230, Sir William Scott rejected the classification of marriage as either a civil or a sacred contract, holding:

"It is a contract according to the law of nature, antecedent to civil institution, and which may take place to all intents and purposes, wherever two persons of different sexes engage, by mutual contracts, to live together."

127. In the second half of the 19th century in *Hyde v Hyde & Woodmansee* [1866] LR 1 PD 130 at 133 the Judge Ordinary, later Lord Penzance, said:

"The position or status of 'husband' and 'wife' is a recognised one throughout Christendom: the laws of all Christian nations throw about that status a variety of legal incidents during the lives of the parties, and induce definite rights upon their

offspring. What, then, is the nature of this institution as understood in Christendom? Its incidents vary in different countries, but what are its essential elements and invariable features? If it be of common acceptance and existence, it must needs, (however varied in different countries in its minor incidents) have some pervading identity and universal basis. I conceive that marriage, as understood in Christendom, may for this purpose be defined as the voluntary union for life of one man and one woman, to the exclusion of all others."

128. But the world that engendered those classic definitions has long since gone. We live in a multi-racial, multi-faith society. The intervening 130 years have seen huge social and scientific changes. Adults live longer, infant mortality has been largely conquered, effective contraception is available to men and women as is sterilisation for men and women within marriage. Illegitimacy with its stigma has been legislated away: gone is any social condemnation of cohabitation in advance of or in place of marriage. Then marriage was terminated by death: for the vast majority of the population divorce was not an option. For those within whose reach it lay, it carried a considerable social stigma that did not evaporate until relatively recent times. Now more marriages are terminated by divorce than death. Divorce could be said without undue cynicism to be available on demand. These last changes are all reflected in the statistics establishing the relative decline in marriage and consequentially in the number of children born within marriage. Marriage has become a state into which and from which people choose to enter and exit. Thus I would now redefine marriage as a contract for which the parties elect but which is regulated by the state, both in its formation and in its termination by divorce, because it affects status upon which depend a variety of entitlements, benefits and obligations.

129. Of course the changes which I trace are most dramatically drawn by a contrast between the age of high Victorian moral confidence and our uncertain present. But even in the last 30 years there has been some shift in the status of marriage within our society that has some relevance to the question of whether a minority group should be denied the election to marry.

130. Because of its close relationship to the second proposition it is convenient to consider next the fourth, namely marriage depends on sex not gender. The proposition seems to me to be now of very doubtful validity. The scientific changes to which I have referred have diminished the once cardinal role of procreative sex. The reluctance of Ormrod J to acknowledge the validity of the sexual relationship between a man and a post-operative male to female transsexual is at odds with the decision of this court in *SY v SY (orseW)* [1963] P 37 which Ormrod J avoided on the grounds that the most relevant passages were obiter. Within any marriage there may be physical factors on either or both sides that require acknowledgement and accommodation in the sexual relationship of the parties. But that accommodation does not rob the result of its essential characteristic, namely the sexual dimension of the couple's relationship. Acknowledging that it is a dimension of cardinal importance, I would nevertheless conclude that in cases such as the present it is sufficiently fulfilled. Beside the question of whether the post-operative male to female has the legal capacity to consummate, gender rather than sex has steadily increased as a defining characteristic of an individual's core since its first recognition in the 1950s. The *Oxford English Dictionary* notes under the use of the word gender as an alternative to sex, a second and modern usage thus:

"A euphemism for the sex of a human being, often intended to emphasise the social and cultural, as opposed to the biological, distinction between the sexes."

131. The first usage in this sense is recorded in 1963. So does Ormrod J's rejection of the developing concept of gender hold good 30 years on? In my opinion plainly not.

132. Perhaps the third proposition has the most direct bearing on the outcome of the appeal. Can the legal definition of what constitutes a female person be determined by only three of the criteria which medical experts apply? Are judges entitled to leave out of account psychological factors? For me the answers do not depend on scientific certainty as to whether or not there are areas of brain development differentiating the male from the female. In my opinion the test that is confined to physiological factors, whilst attractive for its simplicity and apparent certainty of outcome, is manifestly incomplete. There is no logic or principle in excluding one vital component of personality, the psyche. That its admission imports the difficulties of application that may lead to less certainty of outcome is an inevitable consequence. But we should prefer complexity to superficiality in that the psychological self is the product of an extremely complex process, although not fully understood. It is self-evident that the process draws on a variety of experiences, environmental factors and influences throughout the individuals development particularly from birth to adolescence, but also beyond.

133. In summary, therefore, the foundations of Ormrod J's judgment are no longer secure. It remains as a monument to his mastery of complex scientific evidence and to his clarity of thought and lucidity of expression. It served its time well but its time has passed. Recently it has been criticised, particularly by commentators in other jurisdictions, for the insensitivity of its language. That criticism risks injustice to a judge of exceptional humanity and understanding. The language reflects the era in which it was written rather than the writer. But his judgment does not bind us and, for reasons upon which I will endeavour to expand later, should not in my opinion now be followed.

134. However I would first like to consider in some detail the recent decision of Charles J in *W v W* [2001] 1 FLR 324. Although not directly in point, since the case deals with an inter-sex male to female and not a male to female transsexual, there are obviously such clear areas of common ground that it is important to consider the modern approach in that territory. I will focus on the essential conclusions but it is necessary first to note the judge's findings at 334E-335G as to the respondent, who contested her husband's nullity petition in which he asserted that at the date of the marriage she had not been female. Whilst finding that Mrs W was correctly labelled 'physical inter-sex', he found that at birth:

i. her chromosomal sex was male;
ii. her gonadal sex was male;
iii. her genital sex was ambiguous, but more male than female; but that subsequently
iv. her psychological development was female.

135. Although different medical labels are attached to Mrs W and Mrs Bellinger, their subsequent state post-operatively is remarkably similar. It is principally in the detail and degree of surgery that their paths to that state have differed.

136. On those findings Charles J ruled that Mrs W was female at the date of marriage. In reaching that conclusion he applied six factors at 363C, namely:

"(i) chromosomal factors;

(ii) gonadal factors (ie presence or absence of testes or ovaries);

(iii) genital factors (including internal sex organs);

(iv) psychological factors;

(v) hormonal factors, and

(vi) secondary sexual characteristics (such as distribution of hair, breast development, physique etc).

Doctor Conway had regard to all those factors. Another way of putting this is that the decision as to whether the person is male or female for the purposes of marriage can be made with the benefit of hindsight looking back from the date of the marriage or if earlier the date when the decision is made."

137. This last consideration he had amplified in the preceding paragraph when he said:

"As Doctor Conway explained, and I accept, people with partial androgen insensitivity can develop physically and socially in a range of ways. Their assignment to a sex or gender in which they are to be brought up and live is a difficult one and it seems to me that in such cases (and in other cases where a decision as to the sex or gender in which a child should be brought up falls to be made by doctors and others) there is considerable force in the argument that it would be best to 'wait and see'. How long it would be appropriate to wait, and what tests would be appropriate, would vary from case to case."

138. It is also relevant to note his finding that Mrs W post-operatively had the capacity to consummate the marriage as a female and that that was 'a factor (although not a decisive factor) in considering whether that person is male or female for the purposes of marriage'.

139. These findings and conclusions are in my opinion sound and are relevant in the sense that it would be hard to justify a significantly different approach and outcome for the post-operative physical inter-sex male to female and the post-operative male to female transsexual.

140. Those being the most relevant decisions in the Family Division, it remains to consider the statutory provisions and their development. The Marriage Act 1949 established the prohibited degrees within which a marriage is void, the minimum age which the parties must have attained in order to contract a valid marriage and what constitutes a valid ceremony. The Supreme Court of Judicature (Consolidation) Act 1925 had established three other grounds of nullity:

i. Prior existing marriage.
ii. Insanity at the time of marriage.
iii. Lack of consent.

141. That was the state of the statutory provisions in relation to void marriages at the date that the Law Commission issued for consultation its working paper of 14 June 1968. The view of the Law Commission expressed in the working paper was

that there was no case for extending those grounds. However in its subsequent 1970 report on Nullity of Marriage (Law Com No 33) the Law Commission considered two possible additional grounds of nullity in the light of the responses which it had received to the working paper. The first was parties of the same sex. However again the Law Commission concluded that that would be an unnecessary addition. Impliedly rejecting Ormrod J's preference for a decree of nullity rather than a declaration as to status, the Commission considered that the only consequence of the decision would be to allow or to bar applications for financial relief. It left to parliament the decision as to whether the draft bill proffered with the report should be extended to include same sex parties as a ground of annulment.

142. An amendment to add as a ground of annulment 'that the parties are not respectively male and female' was moved by Mr Lyon MP, the promoter of the bill. He did not propose any statutory definition of 'male' or 'female'. In Hansard's report of the debate on 2 April 1971 Mr Lyon is recorded as follows:

"The way that a judge decides the sex of a particular person is and always will remain a question of fact. It will be a question of fact which will change with the change in medical opinion which will ensue in the coming years. If medical opinion were that the mere sex change operation was enough to change a person from a man to a woman or a woman to a man, that would be the end of the case; but because the medical evidence is not so clear cut the judge in the *Corbett* case took the view which he did and courts will continue to take the course which he took.

I urge upon those who have written to me and are concerned about the matter to appreciate that this is not a matter about which parliament can legislate. In the final analysis it must depend upon the state of medical opinion. If in the end medical opinion is able to state with greater certainty who is male and who is female on tests which were not applied in the *Corbett* case then some new court can apply those tests because the evidence will have changed and the question of fact, therefore, will also have changed.

If the amendment is accepted we shall not be making a rule about how one determines who is male and who is female. All we are saying is that once one has come to the conclusion that the parties are not respectively male and female, then one can grant a decree of nullity."

143. Thus emerged section 1(c) of the Nullity of Marriage Act 1971, subsequently consolidated as section 11(c) of the Matrimonial Causes Act 1973.

Conclusions

144. The arguments for the Attorney General might be summarised into three principal propositions:

i. Expert medical evidence does not demonstrate that Mrs Bellinger is and always was female or that her medical treatment has changed her from male to female.

ii. The complexity of the issues surrounding transsexualism demand that the legislature bears the responsibility for introducing change rather than the judges.

iii. To accede to this petition would create enormous difficulties, even in the context of the transsexual's right to marry.

145. I will begin to express my conclusions on the present appeal by reviewing those three propositions.

146. The first may only be made good if regard is restricted to biological factors and physiological criteria. But in my view such a restricted approach is no longer permissible in the light of scientific, medical and social change. Leaving aside the possibility that one area of the appellant's brain may not be congruent with the other three biological factors that established her original sex, there can be no doubt that she suffered from gender identity disorder (within the DSM-IV and ICD-10 classifications) and has for many years been a psychological female. Her only remaining male feature is chromosomal. Post-operatively she has functioned sexually as a female having the capacity to consummate within the definition of sexual intercourse established by this court in *SY v SY (orsW)* [1963] P 37. My approach reflects the views expressed in the sections above devoted to the expert evidence and the judgment of Ormrod LJ.

147. The second proposition demands a fuller response both because I have not touched on the point in earlier sections of this judgment and because it is in any event a point of real substance.

148. Of course judges must not usurp the function of parliament. Johnson J when citing from my judgment in *Dart v Dart* [1996] 2 FLR 286 at 301 acknowledged that my words were written in a very different context. But the context is all important in deciding on which side of the boundary line that divides the permissible from the impermissible a particular development of law falls. In *Dart v Dart*, and more recently in *Cowan v Cowan*, I acknowledged that new mechanisms for redistribution of assets could not be introduced by judicial reinterpretation of section 25 of the Matrimonial Causes Act. But here we are asked to construe section 11(c), not previously construed (and so untrammelled by previous judicial effort) and to be construed in the light of moral, ethical and societal values as they are now rather than as they were at the date of first enactment or subsequent consolidation. Indeed the case rests on the construction of the single word 'female'. That parliament intended some judicial licence seems clear to me from the absence of any definition within the statute and from the preceding debate, particularly the passage cited at paragraph 33 above. (In my opinion nothing turns on the fact that parliament adopted the words 'male' and 'female' instead of 'man' and 'woman' which the common law applied.)

149. The role, and indeed the responsibility, of the Court in the construction of a word or phrase in a way that is reactive to or reflective of change is very clearly stated by Lord Slynn of Hadley in *Fitzpatrick v Sterling Housing Association Limited* [2001] 1 AC 27 at 33F-H:

"It has been suggested that for your lordships to decide this appeal in favour of the appellant would be to usurp the function of parliament. It is trite that that is something the courts must not do. When considering social issues in particular judges must not substitute their own views to fill gaps. They must consider whether the new facts 'fall within the parliamentary intention' (see *Royal College of Nursing of the UK v Dept of Health and Social Security* [1981] 1 All ER 545 at 565, [1981] AC 800 at 822 per Lord Wilberforce). Thus in the present context if, for example, it was explicit or clear that parliament intended the word 'family' to have a narrow meaning for all time, it would be a court's duty to give effect to it whatever changes in social attitudes a court might think ought to be reflected in the legislation. Similarly, if it were

explicit or clear that the word must be given a very wide meaning so as to cover relationships for which a court, conscious of the traditional views of society might disapprove, the court's duty would be to give effect to it. It is, however, for the court in the first place to interpret each phrase in its statutory context. To do so is not to usurp parliament's function, not to do so would be to abdicate the judicial function. If parliament takes the view that the result is not what is wanted it will change the legislation."

150. I did not take any encouragement from Mr Moylan's response to questions from the court. I surmise, I think not unfairly, that the inter-departmental working group set up in April 1999 was convened in reaction to mounting pressure from the Strasbourg Court. After all criticism reached its culmination in the judgment of the court in *Sheffield and Horsham v The United Kingdom* delivered on 30 July 1998. Furthermore the focus of the inter-departmental working group was not on the right of transsexuals to marry but upon their right to re-register (see terms of reference: 'To consider, with particular reference to birth certificates, the need for appropriate legal measures ….'). The report when delivered in April 2000 identified in paragraph 5.5 three options for the future (a. - no change, b. - re-issue birth certificates with new name and gender, c. - full legal recognition of the new gender) and continued:

"We suggest that before taking a view on these options the government may wish to put the issues out to public consultation."

151. However although the report has been made available by publication, Mr Moylan said that there has since been no public consultation. Furthermore when asked whether the government had any present intention of initiating public consultation or any other process in preparation for a parliamentary bill, Mr Moylan said that he had no instructions. Nor did he have any instructions as to whether the government intended to legislate. My experience over the last ten years suggests how hard it is for any department to gain a slot for family law reform by primary legislation. These circumstances reinforce my view that it is not only open to the Court but it is its duty to construe section 11(c), either strictly alternatively liberally, as the evidence and submissions in this case justify.

152. I turn to Mr Moylan's third proposition, namely that any relaxation of the present clear-cut boundary would produce enormous practical and legal difficulties. I grant at once that to give full legal recognition to the transsexual's right to acquire (perhaps not irreversibly) his or her psychological gender gives rise to many wide ranging problems, some profoundly difficult. That territory is surveyed by the Inter-Departmental Working Group in their report as well as in a most distinguished paper written by Lord Reed and subsequently presented to the Anglo-German Family Law Judicial Conference in Edinburgh in September 2000. Indeed in reality such a development would almost certainly throw up additional problems as yet unforeseen. But we are not contemplating or empowered to contemplate such a fundamental development. That indeed can only be for parliament. All we consider is whether the recognition of marriage should be denied to a post-operative male to female transsexual applying the decision in *Corbett v Corbett*. In that context difficulties are much reduced. We need concern ourselves only with those that arise from recognising marriages already celebrated and permitting the future celebration of marriages between parties one of whom is a transsexual seeking to satisfy the requirements of section 11(c) in his or her post-operative gender. The principal

difficulty seems to me to stem from the emphasis that such a person will inevitably place on his or her psychological gender. If that, the fourth factor in the *Corbett* classification, is admitted to the decision making process, does it immediately become the trump factor? If so, why does it not operate immediately and without the reinforcement of medical treatment? Whilst conceding that any line can be said to be arbitrarily drawn and to lack logic, I would contend that spectral difficulties are manageable and acceptable if the right is confined by a construction of section 11(c) to cases of fully achieved post-operative transsexuals such as the present appellant. In assessing how formidable are the difficulties postulated by Mr Moylan, we can surely take some comfort from the knowledge that within wider Europe many states have recognised the transsexual's right to marry in the acquired gender. Although different jurisdictions have adopted a widely differing range of responses (as to which see Lord Reed's paper at 18-20) there seems to be no evidence that they have encountered undue difficulty in applying liberalised provisions. Furthermore we have the example of a common law jurisdiction, New Zealand, which has often legislated innovatively in the family law field. In his judgment in *AG v Otahuhu Family Court*, Ellis J confined the right of marriage in the acquired gender to a transsexual who 'has undergone surgical and medical procedures that have effectively given that person the physical conformation of a person of a specified sex'. He continued:

"Submissions were directed to the practical aspects of any declaration, when the registrar may be in doubt. In such cases a medical examination can be arranged and opinions obtained to enable the registrar to reach his own conclusion."

153. In our family justice system declarations as to existing marriages would be the subject of the existing statutory procedures provided by sections 55 and 59 of the Family Law Act 1986. In the case of an intended marriage, if the Registrar were not satisfied on the medical evidence submitted by the parties, then an application would have to be issued in the Family Division in advance of the ceremony for a declaration that the transition had been fully achieved by all available medical treatments.

154. My responses to Mr Moylan's submissions partially express my conclusion that this appeal should be allowed. But in view of the importance of the appeal, not only to the appellant but also to the minority in similar circumstances, I wish to amplify the reasons for my conclusion.

155. Ormrod J's monumental judgment in *Corbett v Corbett* was undoubtedly right when given on 2 February 1970. It is only subsequent developments, both medical and social, that render it wrong in 2001. The major relevant medical developments are:

i. In 1980 DSM-III introduced the diagnosis of transsexualism for gender dysphoric individuals who demonstrated at least two years of continuous interest in removing their sexual anatomy and transforming their bodies and social roles. In 1994 the DSM-IV committee replaced the diagnosis of transsexualism with gender identity disorder, denoting those with a strong and persistent cross-gender identification and a persistent discomfort with his or her sex or a sense of inappropriateness in the gender role of that sex. A similar classification is to be found in ICD-10. Gender identity disorder is a mental disorder, that is to say a behavioural pattern resulting in a significant adaptive disadvantage to the person causing personal mental suffering. The use of the formal diagnosis is an important step in offering relief, providing health insurance coverage, and generating research to provide more effective

future treatments. All the above is derived from, and in the main directly quotes, the current version of the Standards of Care for Gender Identity Disorders produced by the Harry Benjamin International Gender Dysphoria Association and provided for us in the Attorney General's bundle.

ii. The research of Professor Louis Gooren published in 1995 and 2000 suggests that gender dysphoria is not a purely psychological condition. His research suggests, but does not prove, that gender dysphoria has a physiological basis in the structure of the brain. The expert evidence in the present case suggests that support for the premise is growing in specialist medical circles.

Mr Terry in his report says of the 1995 *Nature* study:

"In my opinion this medical report diminishes the view that chromosomal makeup is the critical factor in determining the sexual orientation/behaviour for any individual …. Accepting that transsexualism is a medically recognised condition and that such patients undergo appropriate medical and surgical treatment to achieve their chosen sexual orientation it seems to me irrelevant to consider the chromosome make-up of an individual as the critical factor when determining the rights of that individual in the society in which he/she lives."

To make the chromosomal factor conclusive, or even dominant, seems to me particularly questionable in the context of marriage. For it is an invisible feature of an individual, incapable of perception or registration other than by scientific test. It makes no contribution to the physiological or psychological self. Indeed in the context of the institution of marriage as it is today it seems to me right as a matter of principle and logic to give predominance to psychological factors just as it seems right to carry out the essential assessment of gender at or shortly before the time of marriage rather than at the time of birth.

156. The major relevant social developments are:

i. For the purposes of this appeal we consider only gender identity disorder within the context of the right to marry. Accordingly it is necessary to recognise changes to the institution of marriage over the last 30 years. I have addressed that issue at paragraphs 117 - 120 above.

ii. There have been highly significant developments throughout Europe since the year 1970. Sweden led the way in 1972 by legislation enabling transsexuals to change their legal sex and to marry a person of their former sex. In the mid 1970s Denmark followed suit followed by West Germany in 1980, Italy in 1982 and the Netherlands in 1985. Of course the legislative provisions varied from state to state. In other jurisdictions similar results were achieved through administrative or court practice. The transsexual's right to legal recognition to some extent had been achieved in at least 23 of the member states of the Council of Europe, according to the judgment of the court in the most recent case of *Sheffield and Horsham v United Kingdom* in 1998. In the same judgment it is also said that the only member states whose legal systems do not recognise a change of gender are the United Kingdom, Ireland, Andorra and Albania. Furthermore in 1989 the Parliamentary Assembly of the Council of Europe and the European Parliament adopted resolutions recommending that reclassification of the sex of a post-operative transsexual be made legally possible. In 1998 we introduced the Human Rights Convention into our law.

The Convention is founded upon the concepts of human dignity and human freedom. Human dignity and human freedom are not properly recognised unless the individual is free to shape himself and his life in accordance with his personality, providing that his choice does not interfere with the public interest. In 1990 Judge Martens, in his dissenting judgment in *Cossey v United Kingdom,* expressed social developments as he then saw them in these words:

"There is an ever growing awareness of the essential importance of everyone's identity and of recognising the manifold differences between individuals that flow therefrom. With that goes a growing tolerance for, and even comprehension of, modes of human existence which differ from what is considered 'normal'. With that also goes a markedly increased recognition of the importance of privacy, in the sense of being left alone and having the possibility of living one's own life as one chooses. The tendencies are certainly not new, but I have a feeling that they have come more into the open especially in recent years."

157. Of course social developments are scarcely capable of proof but judges must be sensitive to these developments and must reflect them in their opinions, particularly in family proceedings, if the law is to meet the needs of society. It is also, in my opinion, important that in this field law and medicine should move together in recognising and responding to disorder. In 1990 in his dissenting judgment in *Cossey* Judge Martens summarised medical perception in these words:

"Medical experts in this field have time and again stated that for a transsexual the 'rebirth' he seeks to achieve with the assistance of medical science is only successfully completed when his newly acquired sexual identity is fully and in all respects recognised by law. This urge for full recognition is part of the transsexuals plight."

158. Is there not inconsistency in the state which through its health services provides full treatment for gender identity disorder but by its legal system denies the desired recognition? As Judge Van Diijk pointed out in his dissenting judgment in *Sheffield and Horsham v United Kingdom*:

"Among the member states of the Council of Europe which allow the surgical re-assignment of sex to be performed on their territories, the United Kingdom appears to be the only state that does not recognise the legal implications of the result to which the treatment leads."

159. I would like to conclude by adopting this passage from Lord Reed's paper at page 50. I could not equal its clarity of thought and language:

"In those societies which do permit it, it seems to me to be difficult to justify a refusal to recognise that successful gender reassignment treatment has had any legal consequences for the patient's sexual identity, although the context in which, and conditions under which, a change of sexual identity should be recognised is a complex question. But for the law to ignore transsexualism, either on the basis that it is an aberration which should be disregarded, or on the basis that sex roles should be

regarded as legally irrelevant, is not an option. The law needs to respond to society as it is. Transsexuals exist in our society, and that society is divided on the basis of sex. If a society accepts that transsexualism is a serious and distressing medical problem, and allows those who suffer from it to undergo drastic treatment in order to adopt a new gender and thereby improve their quality of life, then reason and common humanity alike suggest that it should allow such persons to function as fully as possible in their new gender. The key words are 'as fully as possible': what is possible has to be decided having regard to the interests of others (so far as they are affected) and of society as a whole (so far as that is engaged), and considering whether there are compelling reasons, in the particular context in question, for setting limits to the legal recognition of the new gender."

160. That citation formulates and clarifies the essential issue for decision in this appeal. The range of rights claimed by transsexuals falls across the divisions of our justice systems. The present claim lies most evidently in the territory of the family justice system. That system must always be sufficiently flexible to accommodate social change. It must also be humane and swift to recognise the right to human dignity and to freedom of choice in the individual's private life. One of the objectives of statute law reform in this field must be to ensure that the law reacts to and reflects social change. That must also be an objective of the judges in this field in the construction of existing statutory provisions. I am strongly of the opinion that there are not sufficiently compelling reasons, having regard to the interests of others affected or, more relevantly, the interests of society as a whole, to deny this appellant legal recognition of her marriage. I would have allowed this appeal.