R v Registrar General for England and Wales, Ex parte P and G

Full text of the 1996 High Court judgment in the case where two trans women unsuccessfully sought judicial review of the Registrar-General's refusal to alter their birth certificates.

Constitution:
Kennedy L.J.
Forbes J.

R v Registrar General for England and Wales Ex parte P & G

KENNEDY L.J. :-

1. We have before us two applications for Judicial Review of decisions of the Registrar General. Each concerns an occasion when the Registrar general refused to alter an entry in the Register of Births which recorded the sex of the applicant at the time of registration as "boy". Both applicants are now adults and each had undergone "gender re-assignment" surgery before seeking correction of the register. The sole issue raised in each application is therefore whether the Registrar General was entitled to decide as he did in the case of P on 29th September 1994, and in the case of G on 20th June 1995. Neither side has contended that any distinction can be drawn between these two applications, which have been listed and argued together.

2. Relevant Statutory Provisions

Section 1(1) of the Births and Deaths Registration Act 1953 requires that the birth of every child born in England and Wales be registered by entering in a register "such particulars concerning the birth as may be prescribed". The current provisions as to the particulars which must appear in the register are to be found in the Registration of Births and Deaths Regulations 1987, regulation 7 and form 1 of Schedule 2, and it is common ground that at all material times the particulars required have included the sex of the child. The statute specifies who must provide the information, and requires that it be provided within 42 days from the date of birth. Those requirements were complied with in each of the cases with which we are concerned, so in the case of P the entry in the register was completed on 20th June 1950, and in the case G in 1962.

Section 29 of the Act has the side heading "correction of errors of registers". Subsection (1) prohibits unauthorised alterations of registers. Subsection (2) permits the correction of clerical errors, but we are not dealing with errors of that sort. For present purposes the material part of the section is subsection (3) which, so far as relevant, reads:-

"An error of fact or substance in any .. register may be corrected by entry in the margin (without any alteration of the original entry) by the officer having the custody of the register …. upon production to him by that person of a statutory declaration setting forth the nature of the error and the true facts of the case made by two qualified informants of the birth … with

reference to which the error has been made, or in default of two qualified informants then by two credible persons having knowledge of the truth of the case."

So the question at issue in each application, as Miss Laura Cox, Q.C., for applicants rightly said, is whether the Registrar General when asked to make the alteration was entitled to conclude that no error of fact or substance had been made. Regulation 58 of the 1987 Regulations sets out the procedure to be followed when it is accepted that there has been an error, but we do not need to look at that in any detail in this case.

It is clear from the statutory provisions to which I have just referred, and has been accepted on both sides before us, that the Register of Births is a historical record. It is not, and does not purport to be, a statement of current identity, so, as Mr Pannick, Q.C., for the respondent pointed out, post registration surgery is of itself irrelevant. It may be evidence of a pre-existing condition, but no more than that.

3. The English Authorities.

In Corbett v Corbett (1971) P 83 Ormrod J. had to consider the capacity to marry of a respondent registered at birth as a male and who had subsequently undergone surgery before going through a ceremony of marriage with the male petitioner. At page 106 C the judge posed the question of what is meant by the word woman in the context of marriage and continued:-

"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 produce 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 doctor's criteria, i.e., 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."

Miss Cox accepts that the three criteria were congruent in each of the cases with which we are concerned, but she contends that medical research has moved on since 1971 to such an extent that in 1994 and 1995 the Registrar General should no longer have regarded those criteria as providing sufficient information to identify the sex of a child. In R *v* Tan and others (1983) 1 QB 1053 one appellant, registered at birth as male, had undergone surgery and when charged with living on the earnings of a prostitute contended that he was not a male, and so could not be convicted of the statutory offence. Reference was made to the decision in Corbett's case, and it was contended that if a person had become a philosophically or psychologically or socially female that person should be held not to be a man for the purposes of the statute. At page 1064 B Parker J., giving the judgment of the Court of Appeal, Criminal Division said:-

"We reject this submission without hesitation. In our judgement both common sense and the desirability of certainty and consistency demand that the decision in Corbett *v* Corbett should apply for the purposes 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. The same test would apply also if a man had indulged in buggery with another biological man. That Corbett *v* Corbett would apply in such a case was accepted on behalf of the appellant.

It would, in our view, create an unacceptable situation if the law was such that a marriage between G and another man was a nullity, on the ground that G was a man; that buggery to which she consented with such other person was not an offence for the same reason; but that G could live on the earnings of a female prostitute without offending against section 30 of the Act of 1956."

4. The Decisions under Consideration.

On 21st August 1994 the applicant P wrote to the Registrar General in these terms:-

"I wish for my Birth Certificate to be corrected. At birth, I was mistakenly identified as male; since then I have been diagnosed as transsexual and treated successfully with the medication and surgery appropriate to gender reassignment. I should be grateful, therefore, if you would inform me as to the procedure for correcting my Birth Certificate to show my sex at birth as 'girl' rather than 'boy'".

The Registrar General's reply of 26th September 1994 made the point that a birth certificate is "a document revealing not the current situation but historical facts only". The letter continued:-

"Legislation does provide for the correction of errors in a birth registration, but an amendment to the statutory record can be carried out only if an error was made when the birth was registered, for example, where the person concerned was not, at birth, of the sex recorded. Where a person undergoes gender reassignment surgery the historic information contained in the birth entry cannot be said to be incorrect and no amendment can be made. It follows from this that a revised or annotated birth certificate may not be issued to show a change of sex."

The Registrar General's response to G's application was very similar, but said in relation to section 29(3) of the 1953 Act:-

"The criteria for determining individual's sex, for this purpose are biological, and are the same as those laid down for the purposes of marriageability in the legal case of Corbett *v* Corbett in 1970. If you have any evidence that these criteria were incorrectly determined at birth we will be happy to consider any medical evidence concerning the alleged error."

5. Main Criticisms.

Miss Cox attacks the decisions of the Registrar General in three ways. First, she contends that the decisions were irrational and failed to have regard to relevant considerations because they did not take into account the present state of medical knowledge in relation to gender identity dysphoria. Second she contends that the decisions constituted a breach of Articles 8 and 14 of the European Convention of Human Rights, and thirdly she contends that the policy adopted by the Registrar General constituted discrimination against the applicants on grounds of sex contrary to section 1(1)(a) and section 29 of the Sex Discrimination Act 1975. I turn therefore to look first at the allegation of irrationality.

6. Irrationality.

(a) European Decisions

In addition to the two English authorities to which I have already referred, there are some relevant decisions of the European Court of Human Rights. In Rees *v* U.K. (1986) 9 EHRR 56 an applicant was registered at birth as female and subsequently underwent medical and surgical treatment. He alleged that the refusal to alter his birth certificate was a violation of Articles 8 and 12 of the Convention. Article 8, so far as is material, provides that:-

"1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law… ."

Article 12 guarantees the right to marry. The Court held that neither Article had been violated. There was found to be little common ground between contracting states in their response to the demands of transsexuals, and the law was said to be "in a transitional stage", where states enjoyed a wide measure of appreciation. The distress suffered by transsexuals themselves was acknowledged, and the need to keep the situation under review "having regard particularly to scientific and societal developments", so it is perhaps not surprising that the Court was soon asked to look at the problem again. In Cossey *v* UK (1990) 13 EHRR 622 the facts were for all practical purposes the same as in the case of Rees and the Court reached the same conclusion. Obviously there is some difficulty in construing a refusal to alter a register as an interference with the right to respect for private life, and the Court said that in determining whether or not a positive obligation exists to make such an alteration a fair balance has to be struck between the general interests of the community and the interests of the individual.

The problem surfaced again in B *v* France (1992) 16 EHRR 1 where the applicant was, after gender re-assignment surgery, living as a woman. In paragraph 48 of its judgment the court noted that attitudes had changed, science had progressed, and (I quote selectively):-

"There still remains some uncertainty as to the essential nature of transsexualism …. the legal situations which result are … extremely complex; … the legal consequences, retrospective or otherwise, of such a change (rectification of civil status documents); … confidentiality of documents and information mentioning the change; … and so on. On these various points there is as yet no sufficiently broad consensus between the Member States of the Council of Europe to persuade the Court to reach opposite conclusions to those in its Rees and Cossey judgments."

Such then was the background of case law against which it fell to the Registrar General to make each of the decisions with which we are concerned, but there was also, as Mr Pannick accepts and asserts, information available as to developments in medical science, and to that I now turn.

(b) 23rd Colloquy on European Law

In April 1993 the 23rd Colloquy On European Law was held at Amsterdam, and considered transsexualism, medicine and law. A report was presented by Dr Russell Reid, consultant psychiatrist, of the Hillingdon Hospital, London part of which reads:-

"At present neither psychology/psychiatry nor the bio sciences can provide a conclusive or even a satisfactory explanation of the etiology of gender identity disorders. There are no known biological factors in the history of transsexuals to distinguish them from non-transsexuals. So far some psychological elements in the postnatal formation of gender identity and its disorders have been identified, but it remains obscure to what degree they have contributed to the development of transsexualism. It would seem that unfavourable psychological factors in the gender identity development process must coincide with a certain biological predisposition to end in transsexualism, but much has still to be learnt."

Professor Doek of Amsterdam said in his General Report that transsexualism is less of a mystery than it was "but there are still aspects of the phenomenon which are difficult to explain. Transsexualism remains an enigmatic problem, not only for biologists (See Gooren's memorandum) but also for legal professionals (judges, legislators, lawyers)." A little later Professor Doek said:-

"Studies conducted in transsexuals (see Professor Gooren's memorandum) point to brain functions different from their control groups. But the relation with abnormal pre natal endocrine milieu has been difficult to establish as an explanation for this phenomenon. It is questionable whether hormonal events play an important role in the establishment of gender identity. In conclusion; it seems that biological factors do not (yet) provide us with a satisfactory explanation for cross-gender identity development. Further research is necessary to identify the factors causing the sex difference in brain functions and the abnormal pattern in transsexuals."

So Mr Pannick contends, and I accept, that at any rate in April 1993 there was still uncertainty in scientific circles as to the cause of transsexualism - such uncertainty that the Registrar General was fully entitled to adhere to the tests for ascertaining the sex of a child which had been approved by the court in Corbett and R *v* Tan.

(c) Recent Scientific Developments.

Miss Cox, however, contends that since April 1993 medical science has moved on. No doubt that is right, but the first problem she faces is that none of the post-1993 material upon which she now relies could reasonably be expected to be available to the Registrar General in September 1994 and June 1995 when he was making the decisions challenged in this case.

In February 1995 Dr Russell Reid was the leading author of a paper on "Transsexualism: the Current Medical Viewpoint". It was produced as part of the work of the UK Parliamentary Forum on Transsexualism. Part of paragraph 7.2 of that paper reads:-

"Current medical knowledge recognises that an absolute etiology for transsexualism is not available although the present weight of evidence is in favour of a biologically-based, multifactorial causality. It is considered, therefore, that scientific knowledge of transsexualism has progressed considerably since Corbett v Corbett and that the evidence presented there is no longer reliable."

In November 1995 the results of a study in Holland were published in the magazine Nature. Its authors say "Our study is the first to show a female brain structure in genetically male transsexuals and supports the hypothesis that gender identity develops as a result of an interaction between the developing brain and sex hormones". It is to that study that Dr

Russell Reid refers in his report of 19th January 1996 in a passage which, Miss Cox told us, encapsulates the challenge brought by these two applicants. Dr Russell Reid there states:-

"This research indicates quite clearly that, medically, the sex of an individual must be regarded as being decided by the construction of the brain; it is not an issue of 'psychological sex' but of physiological differentiation".

He may be right, but as the respondent points out, the same issue of Nature contains a commentary on the study by Mr Marc Breedlove of the University of California, which suggests that the research goes only a little way, and leaves unanswered many questions which have to be answered before it can be said with confidence what is the cause of transsexualism.

A recent letter from Professor Doek also points to the recent research to which Dr Russell Reid has referred, and says that it "provides us with important new information and makes transsexualism better understandable". No doubt, but from the point of view of the Registrar General that is hardly the issue.

(d) Conclusions re irrationality.

Even if, as Dr Russell Reid contends, it is now quite clear that medically the sex of an individual must be regarded as being decided by the construction of the brain (and I consider that, without being in any way unreasonable, the Registrar General could continue to have reservations about that) problems remain as to:-

1. What ought to be written in the Register of Births at a time when, as I understand the medical evidence, the unusual construction of the brain is not apparent;
2. Whether the Registrar General must amend the entry once the unusual construction of the brain is brought to his attention. What evidence is there that all of those with such brains do become transsexuals? And even if they do become transsexuals, what evidence is there that all of them want to be re-classified?

Nothing that I have said is intended to indicate any lack of sympathy for those like these two applicants who clearly feel very deeply that something should be done about their entries in the Register of Births. They may well be right, and it is within our knowledge that an attempt has recently been made to introduce legislation. It is not for us to say if that is the right route. Suffice to say that in my judgment the desired result cannot be achieved by showing that the Registrar General has in relation to these two applications acted irrationally, without regard to material considerations, or having regard to considerations which he should have found to be immaterial.

Alterations to records made by other government or academic authorities seem to me to be of very little weight, because, as I have indicated, the Register of Births is a historic register kept by the Registrar General within a particular statutory framework. Similarly I was unable to derive any assistance from the few alterations to the Register of Births to which our attention was invited. Three alterations in the early part of the century were said to concern transsexuals, but the evidence is slender, and anyway, as Mr Pannick pointed out, if a few inappropriate alterations were made over 70 years ago that cannot even start to show that the Registrar General is behaving irrationally in declining to make more alterations now. Some

entries in relation to hermaphrodites have been amended by reference to traditional biological criteria, but that is of no assistance to the applicants in the present case.

Mr Pannick's first submission, was I believe, a little bold, namely that it would be impossible to say that the actions of the Registrar General were irrational or perverse when he was following the decisions of the English courts in Corbett and Tan. I acknowledge as. a possibility that for which Miss Cox was contending, namely a situation in which for the purposes of the Registrar General the Corbett criteria used on their own have become so out of date that to continue to use them would be irrational, but for the reasons I have attempted to explain, she has, in my judgment, failed to make good that case.

7. The European Convention.

Miss Cox contends that the Registrar General's refusal to amend the Register in relation to each of these applicants constituted a breach of their rights under Article 8 of the Convention (the right to a private life) and Article 14 (the duty to secure the enjoyment of the rights set forth in the Convention without discrimination). In fact, as Miss Cox recognised, Article 14 adds nothing to Article 8 in the context of this case, so I say no more about it, and the decisions of the ECHR in Rees, Cossey, and B *v* France make it difficult for Miss Cox to place much reliance on Article 8. She is driven to contend that today those cases would not be decided the same way, and that this court can therefore look at Article 8 for guidance in relation to the allegedly ambiguous wording in section 29(3) of the 1953 Act (see R v S.S. Home Department Ex parte Brind (1991) AC at 747 H per Lord Bridge). That line of reasoning simply cannot be sustained. There is no relevant ambiguity in section 29(3) which Article 8 can help to resolve, and the cases so far decided in the European Court are indicative of that fact. In reality, as Mr Justice Forbes said during the course of argument, the European Convention argument adds nothing to the submissions in relation to irrationality.

8. Sex Discrimination.

Section 1(1)(a) of the Sex Discrimination Act 1975 provides that:-

"a person discriminates against a woman in any circumstances relevant for the purposes of any provisions of this Act if on the ground of her sex he treats her less favourably than he treats or would treat a man."

There is no evidence that the Registrar General treated either applicant less favourably than he would treat a man (who at birth at been registered as a girl). There is therefore, as Miss Cox recognises, no possibility of establishing direct discrimination under section 1. She invited our attention also to section 29, which deals with discrimination in the provision of goods, facilities or services, but that, as it seems to me, adds nothing to the argument in relation to section 1.

Miss Cox then drew our attention to the opinion of the Advocate-General Tesauro in the case of P and S *v* Cornwall CC which concerns an alleged contravention of the Equal Treatment Directive 76/207. We are not considering any matter falling within the scope of that Directive and I find myself unable to derive any assistance from an opinion in relation to the Directive in a case where a judgment as yet to be given.

9.Conclusion.

I would therefore dismiss the applications.

FORBES J.:

I agree.