Foreword to Liberty's amicus brief in the Sheffield+Horsham case

Integrating Transsexual And Transgendered People

An analysis to accompany the Amicus Brief from Liberty

October, 1997

Introduction



The ECHR building in Strasbourg

By Christine Burns of Press for Change.

Some months ago we circulated a plea for assistance from Ceri Edwards of Liberty on UKPFC-News, seeking details of how different governments around the world treat and legislate for trans people's lives.

Liberty is one of the leading civil liberties and human rights organisations in the United Kingdom, and has had an active interest in the UK's deplorable treatment of transsexual people for some time, working very closely with Press for Change and the Parliamentary Forum on key cases, with the cooperation of some of the most experienced barristers in the field.

Ceri's project was to prepare a so-called "Amicus Brief" to the European Court of Human Rights, in advance of February's hearing of the case being brought by Rachael Horsham and Kristina Sheffield (names which are going to become very well known in the next few months). An "Amicus Brief" is the legal equivalent of a friendly word in the judges' ears.

In this case Liberty, as a third party not directly involved with the two sides in the case, was setting out to make sure that the judges considering Rachael and Kristina's case properly understood the contextual background to the womens' claim that the UK government's refusal to correct their birth certificates constititutes a violation of articles 8, 12, 13, and 14 of the European Convention for the Protection of Human Right and Fundamental Freedoms.

The point about the Sheffield and Horsham case is that it inevitably revisits issues previously examined to an extent by the Mark Rees case, a decade ago, and the Caroline Cossey case, in 1990. Both these litigants lost their cases, of course, though with an increasingly narrow margin in favour of the government and a great deal of written dissent in the second case. In both instances, the court also considered it important to provide for the issues to be revisited at a later juncture, recognising that this is a field where scientific knowledge and social perceptions are both rapidly evolving.

Yet as recently as April of this year, the court astonished many observers when it ducked out of the opportunity to return a favourable verdict on the XY and Z case (involving our very own Stephen Whittle's family) on the grounds that non genetic paternal rights were not universal in Europe and the way in which states treated transsexual people was so varied that a "wide margin of appreciation" should be given to each country.

Of course, even international judges are prone to mistake assumption for fact. It's a mistake made famously on many occasions down the centuries, and mankind never seems to quite rid itself of the problem ..

It seems "obvious", if you're not any wiser, that the world is flat, and that the stars and planets revolve around us. It seems "obvious" that heavy things will fall faster than light ones. It seems "obvious" that … well, fill in your own contemporary examples.

Unfortunately, it also seems "obvious" that there isn't a consensus about dealing sensibly with the legal status (and marriageability) of trans people who've notified the state that their gender was incorrectly recorded at birth. That, in effect, was one of the main things that the ECHR judges were saying about Stephen's case in April…

The trouble is, however, that unless you LOOK, you're never going to find …

The seminal value of Liberty's piece of research has been to show, however, that not only is there a very broad and favourable consensus among the 39 member states of the Council of Europe, in correcting the birth records and legal status of trans people after reassignment treatment, but that the United Kingdom stands out with the Irish Republic, Albania and Andorra, at the top of the list of rights offenders.

All in all, it is a splendid piece of research. An eye-opener. And it doesn't stop at having surveyed the Council of Europe. The research, conducted through contact with the governments concerned or their embassies, also took in the major commonwealth countries too, and countries around the world.

A total of fifty-one different societies, in fact.

And in the overwhelming majority of cases, the report shows that the world possesses a sympathy and respect for trans people which has so far eluded the one country where you might have expected it to have begun … the UK.

Moreover, the report also shows a fast developing trend, seen from the way in which countries have altered their positions in growing numbers over the last few years. In short, the world is moving rapidly towards the day when the UK and Ireland really ARE the only places left where psychological harm is inflicted upon transsexual people by a state unhealthily obsessed with the importance of its' ledgers above all else.

Hopefully we can soon publish the full report that's in front of me on the PFC web site. In the meantime, however, I've scanned the important part … the professional analysis that heads up the report, contributed by the well-known QC's Laura Cox and Stephanie Harrison.

Read it .. and remember that this is authoritative advice being given to the judges of the European Court of Human Rights by two very experienced senior lawyers in the run-up to the hearing which will take place at the end of next February, barely ten weeks from now.

Read it .. and pass it on. Make sure everyone you talk to in the next ten weeks understands the importance of the report's findings .. and the fact that a Labour government still, currently, plans to contest this case.

And ask yourself, WHY ?

Christine Burns
Press for Change

Analysis

Integrating Transsexual and Transgendered People

An Analysis by Liberty on transsexuality and the law

Laura Cox QC and Stephanie Harrison QC

Published by Liberty, 21 Tabard Street, London SE1 4LA, England
Email: liberty@gn.apc.org

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 a way that he deems best fits his personality. A transsexual does use those very fundamental rights".
Judge Martens dissenting in Cossey v UK [1990] 13 E.H.R.R. 622 pg 64.8 para 2.7.

"It is not the body alone which determines a persons sex, it is also his soul……..",
2/7/1945 Swiss first instance judge.

Introduction

1. These quotations, separated by almost half a century, and certainly two generations, encapsulate a humanitarian sentiment that would accord to those diagnosed and treated for the medical condition of gender identity dysphoria (commonly called and hereafter referred to as transsexuals) full legal recognition of the gender reassignment, ensuring thereby a civil status congruent with the persons physical and psychological identity and making a social reality a legal fact.
2. The medical research into the etiology of Transsexualism, although by no means complete, leaves little room for dispute that the quest for and desire of full legal recognition of the gender reassignment by transsexuals is an issue involving the

fundamental interest in the context of private life, and to the capacity of the individual to determine his/her identity. It incorporates an individual's right to self determination both as a private and a public person.

3. It is also clear that no other group in contemporary society undergoes such a long, painful, and sometimes dangerous process, often involving dislocation of all personal and social relationships, in order to achieve that personal identity.
4. The transsexual person looks to the state, which has facilitated and sanctioned that process, through the availability and the funding of treatment and surgery, now to provide the legal recognition of the full consequences of that process and to confer on every individual the legal status to that newly acquired identity.
5. Attention is focused upon the means of achieving the aim of full legal recognition of the gender reassignment, namely a change to the civil register of births. In this respect it must first be recognised that, in the UK, it is not primarily the refusal to alter the birth register that denies full legal recognition to the gender reassignment but the adoption of the test for legal sex laid down in 1970 in the case of Corbett v Corbett [1970] 2 All ER 33, since this forms the basis for the legal inalienability of civil status. The reasoning of Ormerod J. is well-rehearsed. However, as the Court observed in both Rees (pg 67-68 para. 47) and Cossey (pg 641 para. 42) it needs to be regularly revisited because it is the continuing attachment to this legal analysis of sex (chromosomal, gonadal and genital) excluding any notion of the psychological (soul) and ignoring entirely the physical consequences of the reassignment, which presents the primary obstacle in the UK to permitting change to the birth register.
6. In reviewing the Court's considerable jurisprudence on the legal rights of transsexuals over the past twenty years and particularly since the decision in Rees v UK [1986] 9 EHRR 56 it is apparent that there has been an increasing recognition of the arguments in favour of affording transsexuals congruent civil status. This is reflected in the diminishing margin of the majority between the judgements of the Court in Rees and Cossey (12:3 and 10:8 respectively) and in the number of the Member States of the Council of Europe ('Member States') where legal recognition of the gender reassignment through change to the birth register was made possible. In Rees the Court proceeded on the basis that there were five such Member States, by the time of Cossey 14 such states were identified by Judge Martens. However, in all previously decided cases involving the UK, including the most recent X, Y & Z v UK Application No.21830/93 22 April 1997 the Court gave its judgement on the basis that the available information did not reveal a "common standard" amongst the member states with regard to the legal rights of transsexuals but rather concluded there exists "a diversity of practice" and "little common ground" [Cossey (pg 641 para 40), XYZ para 52 of judgement].
7. It is in this context and with regard to the importance, in this area of decision making, of reflecting social development and current circumstances, that the organisation Liberty, at the invitation of the Court, commissioned a comparative study of national law and practice in recognising transsexual rights in Europe, the Commonwealth and other common law jurisdictions. The study is funded by the Equal Opportunities Commission (EOC).
8. This authoritative research is the first of its kind to be available to the Court. It provides a comprehensive and reliable review of the current state of development in this area and in these comparative jurisdictions. It is hoped that the Court will find it of considerable assistance.

Method

9. The information was obtained over a two month period between July and September 1997. Essentially it took the form of responses to Questionnaire, with follow-up by telephone for detail or clarification. Responses were received from government sources at Ministerial, departmental and consular level, from non-governmental organisations, and academics. The extent of the responses both from the number of countries and from the various sources exceeded expectation and was marked by spontaneity, co-operation and a genuine willingness to contribute.

10. The remit of the study was broad but the priority was in obtaining information with regard to :
(i) availability of gender reassignment surgery.,
(ii) means of recognition of the reassignment through changes in the birth register;

11. Whilst it was recognised, as referred to above, that in the UK it is not primarily the refusal to alter the birth register that denies full legal recognition to the gender reassignment but the adoption of the test for legal sex in C~, the study did not seek to establish the exact legal test for determining sex but assumed that where change to the birth register was possible, the test was other than chromosomal, gonadal and genital at birth.
The aim was to identify the existence of any mechanism for the change of civil status, whether that be administrative, judicial or legislative. No specific distinction was made as to the means of recognition, though explanations were sought as to how the process was completed.

12. The research is in two parts firstly in statistical form showing the analysed data obtained; and, secondly, country by country with annotation of the responses.

13. Of the 37 member states 23 permit change of the birth certificate in one form or another to reflect the reassigned sex of the person. Only Albania, Andorra and Ireland join the UK in positively prohibiting such a change. Albania and Andorra, however, exclude themselves from the study to the extent that gender reassignment itself is not permitted. 10 states have no clear position. The majority in this category are states of the former Eastern Block, 3 of which are Balkan states whose legal systems are generally in a flux following the civil war in former Yugoslavia (Figure I and 2).

14. It is only the UK and Ireland of the member states where gender reassignment is legal and publicly funded but the State will not give full legal recognition to the new gender identity (Figure 7).

15. Outside of Europe there is a very similar pattern with Canada, Australia, New Zealand and 50 of the 52 states of the United States of America, all making provision for full legal recognition of the gender reassignment. It has been permissible in South Africa by legislation since 1974. In other states such as Namibia, India, Pakistan, Egypt despite a greater divergence of cultural and social norms, none have a positive prohibition on the full legal recognition of the change of gender identity equivalent to that in the UK

16. The statistics, therefore, show that, over the decade since the Court decided Rees there has been a 30% increase in member states giving full legal recognition of the assignment and conversely a 37% reduction in those member states who refuse to give such recognition. The consequence is that 59% of the members states make positive provision and in only 10% of states is there an unequivocal law preventing change to the birth certificate (Albania, Andorra, Ireland, UK) (Figure 4 and 5).

Observations

17. A number of observations can be made in respect of the results of the study:
i) there is a body of states that have had in place for over a decade the means of

conferring congruent civil status to transsexuals Denmark Switzerland (1945), Sweden (1972), Belgium (1979), Germany (1980), Italy (1982), the Netherlands (1985), Luxembourg (1985), Spain (1987), and no adverse consequences, legal, administrative, or social have been documented. Transsexuals have been apparently fully legally integrated into these civil societies with little or no controversy of note.

ii) Despite the expansion of the membership of the Council of Europe and a greater diversity of legal traditions and social norms the trend of recognition has continued and strengthened in the 1990's.

iii) In those member states who deny legal recognition, it is on the basis of fundamental moral objections to Transsexualism and not for reasons of administrative convenience and consistency, since in those states gender reassignment itself is prohibited (Albania and Andorra). Even in Ireland where it is not prohibited, the reassignment is not actually carried out in practice.

iv) Despite the complex maze of issues that Transsexualism has given rise to and the controversy that is said to attach to them there is a remarkable consistency in approach that has been rapidly achieved since the 1980's. And that it can be inferred that, with the awareness of these issues, not least through the litigation in the European Court, attitudes have been surprisingly swift to adapt and action taken to fully integrate the legal rights of transsexuals.

Conclusions from the Study

18. Over the last decade there has been an unmistakably clear trend in the Member States towards giving full legal recognition to gender reassignment. The cumulative effect is that the majority of member states now make provision for such recognition. The developed consensus is now firmly in favour of frill recognition and the diversity of approach limited by that fact.

19. Both the trend and the consensus identified in Europe prevails in other common law jurisdictions including those upon which the impact of European jurisprudence is most keenly felt and vice versa, namely the USA, Canada and Australia. It transcends an extremely wide variety of cultural and social norms.

20. This significant and enduring development in the practice, of states reflects a general and increasing societal recognition of the importance of the transsexuals right to congruent personal identity and the need for tolerance of a different mode of human behaviour, affording respect for the dignity of the transsexual person and the protection of his/her private life.

Development in European Community Law

21. The social developments in the practice of the member states identified in this study was both reflected and underscored by the decision of the European Court of Justice (ECJ) in P v S and Cornwall County Council C-13/94, 30 April 1996 in which the Advocate-General (without the benefit of dedicated study) observed "a clear tendency, especially since the early 1980's towards ever greater recognition of transsexuality and by judicial decision". For his part and in the context of construing the equality provisions of the Community (Equal Treatment Directive 76/207/EEC), he observed "there is no doubt……. the principle of alleged immutability of civil status has been overtaken by events" (para 9). The powerfully worded opinion, it is submitted, gives renewed force to the arguments of transsexuals in the Human Rights Court, which would normally be expected to be leading the way in these matters. The Advocate-General has added a new urgency to the need for law to reflect a changed social reality, warning that : "the law cannot cut itself off from society as it actually is and must not fail to adjust as quickly as

possible. Otherwise it risks imposing outdated views and taking a static role" (para 9).

22. The ECJ took the courageous step suggested to them by the Advocate General and did so placing at the fore "respect [for] the dignity and freedom" of the transsexual if they were denied the equal protection from discrimination afforded to other men and women within the member states (para 22).

23. The refusal to afford full legal recognition to the gender reassignment and, thereby, deprive transsexuals of a congruent civil status by denying the legal recognition of the current gender identity in the view of the authors, therefore, goes to the heart of the guaranteed right to respect for private life and the central obligation in Article 8 ECHR to ensure the protection of personal identity.

24. There are very real and recurrent practical consequences resulting from the lack of an integrated and congruent civil status. and the continuation of the Corbett test may deprive transsexuals in the UK, of whatever nationality, the "dignity and freedom" inherent in the equality provision of the European Community. This will also extend to contexts as wide ranging as criminal justice, to financial services, and aspects of social life such as membership of clubs. Indeed in any sex specific aspect of civil life the transsexual person is exposed to the indignity, humiliation and social embarrassment of revealing their past gender identity, and necessitates public consumption of matters of a most intimate nature, which are intrinsic to a transsexual person’s private 1ife

25. Added to this social stigma is the process of marginalisation whereby the risk of being identified as transsexual acts as a deterrent to fully engaging in society : in being prepared to participate in the legal system in particular as a complainant but also as a witness, to apply for jobs in the police force, in the armed services, maybe even the prison service and nursing, to obtain insurance or a private pension or to engage in single sex social activities by joining sports or other social clubs.

26. The absence of full reconciliation of the physical, psychological and social identity and the legal person, therefore, in principle and in practice for transsexuals in the UK perpetuates the difficulties and anguish inherent in the transsexual situation. The denial of a congruent civil status is a daily infringement of the right to respect for the private life of the transsexual person in the same way that potential criminal liability of consenting adults for homosexual acts has been found to be by the Court. Dudgeon v United Kingdom (1981) 4 EHRR 149, para 64 and Norris v Ireland (1991) 13 EHRR 186 at para. 38.

27. The material before the Court showing the social developments and current circumstances in the rest of Europe and in much of the international community would appear to undermine a claim to "the margin of appreciation" in respect of this issue. Very serious questions are raised by the UK Government’s continued denial of a congruent civil status and personal identity for transsexual people.

Dated: 24th day of October 1997

Laura Cox QC & Stephanie Harrison QC