## Bellinger v. Bellinger (High Court)

A trans woman unsuccessfully sought a declaration from the High Court that her marriage was valid

November 2000

# Foreword

Mrs Bellinger was married in a registry office: the registrar knew of her trans status. She and her husband subsequently adopted his child by a previous marriage.

Knowing that her marriage was open to challenge under the Corbett test, she applied to the High Court for a declaration that her marriage is valid. The application was opposed by the Attorney-General, who said that Mrs Bellinger had never been female as required by law. Mr. Justice Johnson refused the application.

That question of Mrs Bellinger's sex was the central issue at stake in the case, yet it received surprisingly little attention in the judgment. In an unusual and far from rigorous ruling which reads more like a discursive essay on trans rights than the decision of a court, Johnson concludes that "Mrs Bellinger's marriage is valid only if she was then a female. That law was made by Parliament and is of course absolutely binding upon me."

He goes on to say that: "Parliament might have provided a definition of the word female which would have encompassed those such as Mrs Bellinger; but it did not."

Johnson thereby sidesteps the crucial point: that Parliament did *not* provide *any* definition of sex. Instead, it left that matter for the courts to decide. The absence of any definition in statute law is precisely why the matter was considered in such detail 30 years previously by Ormrod in the Corbett case. It is also the reason why Mrs Bellinger applied to the court in this case.

Proceeding from this misunderstanding of the central question, Johnson's reasoning becomes ever more puzzling.

He discusses Ormrod's ruling in the Corbett case, and considers the case law since then, which followed Ormrod — albeit with one noteable exception which he brusquely dismisses as "bizarre", without further explanation.

The curious element of this part of the judgment is the way in which the medical and scientific evidence is cited, but not actually considered. Prof Gooren's evidence of how chromosomes are inadequate as a determinant of sex is neither dismissed nor accepted: it is is simply restated without comment, as if it had no bearing on the outcome of the case. Likewise, Dr Reid's evidence of the likelihood of a multi-factorial cause for transsexualism is cited but not assessed.

In the end, Johnson shies away from stating explicitly whether or not he is reconsidering the Corbett test. If the Corbett test was unchallengeable, the scientific evidence was superfluous and should have been dismissed as such. But on the other hand, if it *was* being reconsidered, the evidence should have been weighed. Yet the closest we come to such consideration is in the conclusion, where Johnson merely notes that "there is agreement amongst the experts".

However, insofar as the experts do agree, they do *not* agree with Corbett. Reid and Gooren both stress the limits of chromosomes as a determinant of sex, as did the surgeon, Mr Terry. No evidence was offered in support of viewing chromosomes as a sole determinant of sex, or even as the primary determinant: to find such a view, Johnson had to refer back to the evidence in Corbett, which was agreed by the experts before his court to be outdated.

Terry also noted that genital surgery "left the chromosomal make-up as the only surviving biological factor of the previous male state and, with the individual taking feminising hormones normally produced by ovaries, the psychological profile would in his view be female". Again, no contrary evidence was offered other than references back to Corbett case.

Johnson summarises the Corbett test as follows: "a person's gender was that which had been determined at birth by reference to three overriding biological factors, chromosomal, gonadal and genital. Simply stated, a female has XX chromosomes, a male XY chromosomes."

Yet the evidence before the court was firstly that the chromosomal test was *not* decisive, even at birth; and secondly that however sex was determined at birth, assessment of Corbett's three factors led to a different conclusion after genital surgery. Thirdly, the experts also agreed on the crucial importance of psychological sex.

Given that evidence, it is perverse that Johnson concludes that "the only criteria for determining the gender of an individual remain those identified in Corbett": the witnesses in his court said otherwise. Insofar as that statement has any truth at all, it is misleading: all the evidence before Johnson disputed Ormrod's insistence on the immutability of the determination made at birth, and all the evidence before him disputed the primacy of chromosomes. On the facts laid out, it is difficult to see a rational basis for this conclusion: the evidence appears to have been simply ignored.

So why did Johnson so blatantly evade the questions before the court?

The only plausible answer lies in his third conclusion, that in reform of the law in this field "potentially there are serious implications to be considered in relation to the law of marriage itself but also for other areas of life, employment and sport to name but two".

Those considerations may indeed be important, although it is surprising that Johnson was apparently unaware that employment issues have already been decided by parliament, through secondary legislation: the The Sex Discrimination (Gender Reassignment) Regulations 1999. Nonetheless, whatever their importance, those matters were not in question before the High Court. Their intrusion into the judgment provides a further basis for a higher court to reassess the dismissal of Mrs Bellinger's application for the recognition of her marriage.

*Claire McNab, February 2001*

# Judgment

**In the High Court of Justice**
**Family Division**

Case No. 69 of 1999

Thursday, 2nd November, 2000

Before: MR JUSTICE JOHNSON

# Bellinger -v- Bellinger

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## Appearances:

For the Applicants: Ashley Bayston, instructed by Law for All

For the Attorney General: Andrew Moylan QC, instructed by the Treasury Solicitor

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## Ruling

**Thursday, 2nd November, 2000**

Mr JUSTICE JOHNSON: Mrs Bellinger seeks a declaration that in the eyes of English law she is validly married to the man she regards as her husband and who regards her as his wife. I refer to her as Mrs Bellinger out of respect and because that is the way she is known and wants to be known, although calling her Mrs Bellinger does perhaps beg the question.

That question is whether at the time of their marriage she was female. The court is not asked to decide whether she is to be so regarded generally but simply for the purpose of Section 11 of the Matrimonial Causes Act 1973:

'A marriage celebrated after 31st July 1971 shall be void on the following grounds only, that is to say -

(c) that the parties are not respectively male and female.'

Mr and Mrs Bellinger were married in a Register Office in England on 2nd May 1981. She submits, supported by Mr Bellinger, that she was then female. The Attorney General intervenes in these proceedings to enable the issue to be properly resolved, and submits that she was not. The submission on Mrs Bellinger's behalf is that a previous case determining the matter was wrongly decided or should be reconsidered in the light of changed social conditions and improved medical knowledge.

That case of course is Corbett v Corbett [1971] P 83. Judgment was given thirty years ago, on 2nd February 1970, after a hearing lasting 17 days during which the court heard evidence from distinguished medical experts and submissions from distinguished leading counsel. The

essence of that decision was that for the purpose of determining the validity of a marriage, a person's gender was that which had been determined at birth by reference to three overriding biological factors, chromosomal, gonadal and genital. Simply stated, a female has XX chromosomes, a male XY chromosomes. Gonadal factors relate to the presence or absence of testes or ovaries. Genital factors include internal as well as external sex organs.

**The History**

At birth Mrs Bellinger was registered as male but there was ambiguity about her upbringing in childhood and it seems her mother had wanted her to be a girl and in fact dressed her as such. When she was 20 Mrs Bellinger married a woman. At that time, according to the Corbett criteria, Mrs Bellinger was undoubtedly male. Her chromosomes were XY, she had testicles and she had a penis. She certainly did not have a vagina, a uterus or ovaries. She and the woman she had married had a sexual relationship capable of producing a child. The marriage lasted about 4 years and was eventually dissolved by decree absolute of divorce.

Throughout her life Mrs Bellinger had felt an increasing urge that she should be living as a woman rather than as a man. This she now began to do. In 1973 she consulted Dr Randell, a consultant psychiatrist at the Charing Cross Hospital. He had given evidence before Ormrod J who said of him that he had 'made a special study of individuals with abnormal psychological attitudes in sexual matters, particularly transvestites and transsexuals'.

After a long course of counselling and medical treatment, in February 1981 Mrs Bellinger underwent surgery that involved the removal of her testicles and penis and 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.

Mr and Mrs Bellinger were married on 2nd May 1981 and have lived together ever since, outwardly as man and wife. But their life together has been over-shadowed by uncertainty as to the true status of Mrs Bellinger in English matrimonial law and, supported by her husband, Mrs Bellinger has campaigned actively for recognition of herself, and others in a like situation, as female.

**The Plight of the Transsexual**

In Corbett Ormrod J said:

'the transsexual has an extremely powerful urge to become a member of the opposite sex to the fullest extent which is possible. They have a history dating back to early childhood of seeing themselves as members of the opposite sex which persists in spite of their being brought up normally in their own sex. This goes on until they come to think of themselves as females imprisoned in male bodies, or vice versa, and leads to intense resentment of, and dislike for, their sexual organs which constantly remind them of their biological sex.'

More recently, albeit in an opinion dissenting on a point of law, Judge Martens, in the European Court of Human Rights in Cossey v United Kingdom 1990 13 EHRR 622 described the situation of the transsexual:

’2.1 The applicant is a transsexual, that is she belongs to that small and tragic group of fellow men who are smitten by the conviction of belonging to the other sex, this conviction being both incurable and irresistible.

2.2 If a transsexual is to achieve any degree of well-being, two conditions must be satisfied:

(1) by means of hormone treatment and gender reassignment surgery his (outward) physical sex must be brought into harmony with his psychological sex; and

(2) the new sexual identity that she has thus acquired must be recognised not only socially but also legally.

2.4 As to the second of the above conditions, it should be stressed that (medical) experts in this field have time and again stated that for a transsexual the ’re-birth’ 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 legal recognition is part of the transsexual’s plight. That explains why so many transsexuals, after having suffered the medical ordeals they have to endure, still must have the courage to start and keep up the often long and humiliating fight for a new legal identity’.

One of the medical witnesses described the condition as “unimaginable and inconceivable to those who do not have it”. Suicide commonly occurs.

**The Decision to Operate**

The decision to attempt at least a partial solution by way of surgery is not one that is arrived at lightly. As was the case with Mrs Bellinger, attempts are made to alleviate the suffering by means of psychotherapy and hormonal therapy. In many cases the patient does not progress to surgical intervention. I do not have figures from the English experience but by way simply of illustration Professor Gooren’s experience in Holland is that of about 150 new patients each year between 80 and 90 progress to surgery.

An important element in the treatment that may, in appropriate cases, lead to surgery is what is called the Real Life Test. The object is to enable the patient to live in the role of the opposite sex for a period of at least a year so as to be able to decide, with the assistance of psychiatrists and other professionals, that he or she does truly feel more comfortable in that role rather than in that of his or her birth gender.

The likely course of treatment is described by Professor Green:

’Severe gender dysphoria cannot be alleviated by any conventional psychiatric treatment, whether it be psychoanalytic 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 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 Medical Evidence**

It was agreed by counsel that nothing was to be gained by the oral examination and cross-examination of the medical witnesses; a broad consensus existed between them.

In considering that medical evidence it is important to have in mind that, like Corbett, this case is not concerned with persons who are regarded as 'inter-sexed' ie those who, usually at birth, exhibit signs suggestive of inconsistent gender. Here, as in Corbett, the three biological criteria, chromosomal, gonadal and genital, were all congruent ie indicative of the same gender, namely male.

It was agreed between counsel that the judgment of Charles J in W v W of 10th October 2000 had no bearing on the decision I have to make, it being concerned with a person who was inter-sexed ie the biological factors were not congrument and Corbett was not challenged.

Professor Louis Gooren of the Free University of Amsterdam is an acknowledged expert in the field of Gender Identity Disorder.

As Professor Gooren explains, although traditionally the process of becoming a man or a woman is said to be completed with the formation of the external genitalia, laboratory experimentation with animals had begun to indicate that it was possible that in humans the end-point of sexual differentiation is not the formation of the external genitalia and that the brain contributes to the process. More recently there is research evidence from Holland based on examination of the brains of dead persons which suggests that there may indeed be identifiable differences in the brain. On this basis the process of sexual differentiation would take place in distinct steps, first the chromosomal configuration being established, then the gonadal differentiation, then the differentiation of the internal and external genitalia and, finally, the differentiation of the brain into male or female.

Professor Richard Green, a consultant psychiatrist, is the Research Director of the Gender Identify Clinic at the Charing Cross Hospital, probably the largest of its kind in the world. In relation to the Dutch research, Professor Green considers that the origins of gender identity disorder still remain unsettled. That research is based on a small series of male-to-female transsexuals studied post-mortem. The finding was said to be that the bed nucleus of the stria-terminalis region of the brain was smaller in size than that of typical males and similar in size to that of typical females. Whilst Professor Green regards the interpretation of those findings as being neither refuted nor confirmed, he does accept that the criteria for designating a person as male or female are complex and very probably not simply an outcome of chromosomal, genital or gonadal configuration. He agreed that there is what he called a growing momentum in the direction of acceptance of the existence of sexual differences in the brain that are determined pre-natally and that influence sex-type and sexual behaviours. However for practical purposes the identification of these supposed differences in the brain can still be made only postmortem.

Mr Terry is a consultant urological surgeon experienced in this field. He too agreed that the Dutch research lended credence to the view that the formation of external genitalia which is currently the criteria for assigning a new born child to the female or male sex is not the

endpoint of sexual differentiation and that sexual differentiation of the brain may be more important in predicting or correlating future sexual and nonsexual behaviour. In his view further research based on examination of the brains of transsexual patients may lead to a clearer understanding of transsexualism. Although recognising the limitations of the Dutch research, he too believed that it diminished the view that chromosomal make-up is the critical factor in determining the sexual orientation or behaviour of an individual.

Speaking of post-operative male-to-female transsexuals he pointed out that the removal of the external genitalia left the chromosomal make-up as the only surviving biological factor of the previous male state and, with the individual taking feminising hormones normally produced by ovaries, the psychological profile would in his view be female.

In a paper delivered as part of a Colloquy on European law in Amsterdam in 1995 Dr Russell Reid, a consultant psychiatrist said: 'At present nether psychology/psychiatry nor the biosciences can provide a conclusive or even a satisfactory explanation of the etiology of gender identity disorders. There are known biological factors in the history of transsexuals which distinguish them from non-transsexuals. So far some psychological elements in the post-natal 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'.

**English Law**

The traditional view of marriage as expressed in Hyde v Hyde 1866 LR 1 PD 130 was that it is something more than simply a religious or civil contract. It certainly creates mutual rights and obligations, as do all contracts, but beyond that it confers a status. So in the words of the classic definition:

'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'.

Before coming to Corbett itself I refer to the earlier decision of the Court of Appeal in SY v SY 1963 P 37. The court had to consider a petition for nullity based on the incapacity of the wife to consummate the marriage. The wife's vagina was less than an inch in length but it was possible by surgery for that to be extended to permit full penetration. Willmer LJ rejected the husband's argument that such an operation would not create a vagina but only an artificial cavity. He would have reached the same conclusion in a case in which the wife had no natural vagina at all. 'I find it difficult to see why the enlargement of a vestigial vagina should be regarded as producing something different in kind from a vagina artificially created from nothing'.

So to Corbett. The crucial findings of fact were:

'the respondent has been shown to have XY chromosomes and, therefore, to be of male chromosomal sex; to have had testicles prior to the-operation and, therefore, to be of male gonadal sex; to have had male external genitalia without any evidence of internal or external female sex organs and, therefore, to be of male genital sex; and psychologically to be a

transsexual socially, by which I mean the manner in which the respondent is living in the community, she is living as, and passing as a woman, more or less successfully'.

As to the medical evidence, based on the state of medical knowledge 30 years ago, the central and determinative conclusion was summarised by Ormrod J as follows:

'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'.

Accordingly, for the purpose of Section 1 of the Nullity of Marriage Act 1971, which was in the same terms as the 1973 Act, the marriage of the petitioner and the respondent was void.

Ormrod J regarded sex as an essential determinant of the relationship called marriage which was and always had been recognised as the union of man and woman, in which the capacity for natural heterosexual intercourse was an essential element.

'the question then becomes, what is meant by the word 'woman' in the context of the marriage, for I am not concerned to determine the 'legal sex' 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 inbalance 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 question had been asked, what was the respondent's sex immediately before the operation?

'if the answer is that it depends on 'assignment' then if the decision at that time was female, the respondent would be a female with male sex organs and no female ones. If the 'assignment' to the female sex is made after the operation, then the operation has changed the sex. From this it would follow that if a 50 year old male transsexual, married and the father of children, underwent the operation, he would then have to be regarded in law as a female and capable of 'marrying' a man. The results would be nothing if not bizarre'.

With respect to Ormrod J this would be, in my view, only one of a number of permutations or situations in which the result could be described as bizarre. To take but one, in the present case the submission on behalf of the Attorney General is that Mrs Bellinger remains male for the purpose of the 1973 Act and capable of contracting a marriage with a woman that would be valid. That would of course be subject to the right of that woman to petition thereafter for nullity on the basis that the marriage was voidable (not void) because of incapacity to consummate.

In a ringing conclusion, Ormrod J held that:

'marriage is a relationship which depends on sex and not on gender'.

Corbett fell to be considered by the Court of Appeal in R v Tan [1983] QB 1053. The case concerned convictions under the Sexual Offences Acts and depended on whether the defendant was a man.

'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'.

To the same general effect is the decision of the Divisional Court in Re P and G (Transsexuals) [1996] 2 FLR 90. The applicants sought Judicial Review of the refusal of the Registrar General to alter the entries in registers of births which recorded their sex as 'boy'. Both applicants had undergone gender reassignment surgery. Their case included the contention that the Registrar General's decisions were irrational in that they failed to take into account developments in medical knowledge since earlier cases and in particular since Corbett. Knowledge of those developments had not been available to the Registrar General at the time of his decision but, in the words of the head note, had in any event still not been brought to a definitive conclusion either in the opinion of medical science or in case-law in the UK and in Europe.

Corbett was again considered by the Court of Appeal in S-T (formerly J) v J [1988] Fam 103. A female-to-male transsexual had married a female. A decree of nullity had been granted and was not challenged in the appeal which related only to ancillary relief. Ward LJ referred to the possibility that advances in medical knowledge might have left the way open for a court in a future case 'to place greater emphasis on gender than on sex in deciding whether a person is to be regarded as male or female'. However Potter LJ said:

'for the purpose of determining whether a particular human being is of a particular sex, the criteria are biological…… while it may be that the advance of medical science may lead to a shift in the criteria applied by the English courts, it is plain that, at present, the position is that laid down in Corbett'

I was referred also to the decision of the House of Lords in Fitzpatrick v Sterling Housing Association [1999] 4 All ER 705 which considered the entitlement of a homosexual partner to succeed to a statutory tenancy. Their Lordships considered the meaning of 'spouse' and 'husband and wife.' Lord Nicholls of Birkenhead said:

'marriage, spouse, husband and wife are all terms connoting a relationship between a man and a woman, that is, between two persons of the opposite sex. A husband is a man and a wife a woman'.

Lord Clyde said:

'the language here plainly indicates a biological distinction between the sex of the original tenant and that of the successor'.

Lord Hutton said:

'a person can only live with a man as his wife when that person is a woman the essential characteristic of living together as husband and wife, in my judgment, is that there should be a man and a woman'.

Finally in relation to English judicial authority, I was referred to a ruling made by Hooper J sitting in the Reading Crown Court on 28th October 1996. The defendant was charged with rape, the victim being a male-to-female transsexual whose artificial vagina had allegedly been raped by the defendant. It was held that, as a matter of law, penile penetration of that vagina was rape. This decision was of course based upon the provisions of the relevant criminal legislation but, pace Ormrod J, it may be a result that will be thought by some to be bizarre.

**Overseas Decisions**

A powerful criticism of Corbett is to be found in the judgment of Ellis J of the High Court of New Zealand in Attorney General v Otahuhu Family Court [1995] 1 NZLR 603. The decision is summarised in the head note as follows:

'2. in determining the essential role of a man and a woman in marriage the ability to procreate or to have sexual intercourse are not essential. The law in New Zealand had changed to recognise a shift away from sexual activity and more emphasis was being placed on psychological and social aspects of sex, sometimes referred to as gender issues.

3. For the purpose of Section 23 of the Marriage Act 1955 where a person had undergone surgical and medical procedures that had effectively given that person the physical conformation of a person of the specified sex, there was no lawful impediment to that person marrying as a person of that sex'.

The need for change is put authoratively in the judgment.

'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 fulfill 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.

Once a transsexual has undergone surgery, he or she is no longer able to operate in his or her own original sex. A male-to-female transexual will have had the penis and testes removed, and have had a vagina-like cavity constructed, and possibly breast implants, and can never appear unclothed as a male, or enter into a sexual relationship as a male, or procreate. A female-to-male transsexual will have had the uterus and ovaries and breasts removed, have a beard growth, a deeper voice, and possibly a constructed penis and can no longer appear unclothed as a woman, or enter into a sexual relationship as a woman, or procreate. 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.'

Giving yet another example of the seemingly bizarre consequence of the present law Ellis J said:

'if the (UK) law insists that genetic sex is the predeterminant for entry into a valid marriage, then a male-to-female transsexual can contract a valid marriage with a woman and a female-to-male transsexual can contract a valid marriage with a man. To all outward appearances, such would be same sex marriages'.

Ellis J emphasised that for gender reassignment to be recognised for the purpose of marriage under the law of New Zealand:

'there must be as complete a transformation as is possible before that person can qualify as a person of his or her chosen sex for the purpose of marriage. In the case of a male-to-female transsexual that will require the adoption of psychological and social identification with the female sex plus a modification of the genitals to a female appearance. It will also include the removal of the male gonades. Therefore, in effect, the only factor which identifies the person as male thereafter is the chromosomal evidence and the lack of uterus and ovaries'.

However he recognised the difficulty of identifying the point at which the law should recognise such a change in gender. He spoke of the difficulty in drawing the line. Responding perhaps to the assertion of Ormrod J that marriage was about sex not gender he said:

'it is acknowledged that a marriage requires persons of the opposite sex and that this may require a genital appearance which is consistent with the person of the opposite sex to the marriage partner. In the case of a male-to-female transsexual, this requires a constructed vagina; and in the case of a female-to-male transexual, this requires a penis. It is submitted that neither constructed organ needs to be fully sexually functional for the purposes of a valid marriage. There are many forms of sexual expression possible without penetrative sexual intercourse.'

**The European Convention on Human Rights**

Challenges to Corbett have been made before the European Court of Human Rights based on Articles 8 and 12. Article 8 provides that:

1. Everyone has the right to respect for his private and family life……

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 and is necessary in a democratic society …. for the protection of health or morals or for the protection of the rights and freedoms of others'.

Article 12 provides that:

'Men and women of marriagable age have the right to marry and to found a family, according to the national laws governing the exercise of this right'.

In Rees v UK [1986] 9 EHRR 38 a biological female had undergone certain hormonal and surgical treatment. The allegation was that UK law violated Article 12 in preventing her from contracting a valid marriage with a woman. She claimed to have become a male. The court held that: '….the right to marry guaranteed by Article 12 refers to the traditional marriage between persons of Opposite biological sex. This appears also from the wording of

the article which makes it clear that Article 12 is mainly concerned to protect marriage as the basis of the family. Furthermore, Article 12 lays down that the exercise of this right shall be subject to the national laws of the Contracting States. The limitations thereby introduced must not restrict or reduce the right in such a way or to such an extent that the very essence of the right is impaired. However, the legal impediment in the United Kingdom on the marriage of persons who are not of the opposite biological sex cannot be said to have an effect of this kind'.

In Cossey v UK 1990 13 EHRR 622 the applicant was a biological male who had undergone gender reassignment surgery. Her marriage to a man had been the subject of a decree of nullity on the basis that the marriage was void, the parties not being 'respectively male and female'. On the basis of the medical evidence tendered the ECHR held that:

'the court has been informed of no significant scientific developments that have occurred in the meantime gender reassignment surgery does not result in the acquisition of all the biological characteristics of the other sex'.

The complaint of a violation of Article 12 was dismissed but by a majority of 14 to 4, the latter including Judge Martens. The majority accepted that the adoption of biological criteria for the purpose was 'in conformity with the concept of marriage to which the right guaranteed by Article 12 refers'.

In Sheffield and Horsham v UK [1998] 2 FLR 928 the challenge was by two male-to-female transsexuals who had wanted their birth certificates and other public documents amended to reflect their changed role. The court ruled that this refusal did not violate the right to private and family life but did so by a majority of only 11 votes to 9. However the supposed violation of Article 12 was rejected by 18 votes to 2. The decision of the court was made on the 30th July 1998 and the court observed 'that the UK had not kept the need for appropriate legal measures in this area under review'.

I have already referred to the dissenting judgment of Judge Martens in Cossey. The other three dissentients had said:

'transsexuals have, however, not been very successful in their demands that their new status be accepted by the legislature and by the courts. The negative attitude -towards transsexuals is based on deeply rooted moral and ethical notions which, nevertheless, seem to be slowly changing in European societies. There is a growing awareness of the importance of each person's own identity and of the need to tolerate and accept differences between individual human beings. Furthermore, the right to privacy and the right to live, as far as possible, one's own life undisturbed are increasingly accepted. These new, more tolerant attitudes are also reflected in modern legislation as well as administrative and court practices. Several European states have accepted the possibility of recognising a change of sex on the part of transsexuals and have, subject to certain conditions, acknowledged their right to marry'.

Quoting again from Judge Martens:

'to be condemned to live, as far as that identity is concerned, in opposition to and thus 'outlawed' by their country's legal system must therefore cause permanent and acute personal distress to post-operative transsexuals in the United Kingdom'.

**The Way Forward**

The submission on behalf of the Attorney General was that incremental development of English Law by a series of judge-made decisions would not provide an adequate or properly comprehensive change which would provide solutions to all the problems that arise in making law in the light of changing social attitudes. The submission was that this is an area of law in which reform needs to be comprehensive and should be left to Parliament. In the words of Thorpe LJ in a wholly different context:

'if a fundamental change is to be introduced, it is for the legislature and not the Judges to introduce it. Not only is the legislative process the democratic process but it enables the route of future change to be surveyed in advance of adoption by extensive research and consultation': Dart v Dart [1996] 2 FLR 286 @ 301.

Prompted no doubt by the observation of the ECHR previously quoted, in April 1999 the United Kingdom Government set up an inter-departmental working group with representatives from 12 Government departments or agencies. It reported in April 2000. The report seems to me to be a major contribution to can understanding of the manifold problems that exist for transsexuals but also of the considerable number of problems that would need to be solved if reform were to be effective.

The report suggests that in this country there are between 1,300 and 2,000 male-to-female transsexual people and between 250 and 400 female-to-male transexual people.

In 1997/8 there were 44 male-to-female gender reassignment operations in the NHS and 4 female-to-male operations. In the same year in the private sector there were 104 such operations.

As to the validity of marriages such as is the subject of this judgment, the report suggests that such marriages would be valid in Austria, Belgium, Denmark, Finland, France, Germany, Italy, the Netherlands, Portugal and Sweden but not in Greece, the Republic of Ireland, Spain and probably not in Luxembourg.

In a paper delivered recently to a meeting of European lawyers in Edinburgh by Lord Reed, a Judge of the Court of Session and High Court of Justiciary in Scotland, 4 major issues are identified which would need to be addressed.

One concerns the stage at which a change of gender should be recognised: whether legal recognition should be given to postoperative transsexuals only, or extended to transexuals who have undergone partial surgery or none at all. There is a continuum between, cat one end, the transsexual who identifies with the opposite gender but has received no treatment, to the transsexual who has successfully undergone full reconstructive surgery and is socially accepted as a member of the desired gender.

A second issue concerns the subject of pre-conditions to be satisfied for legal recognition, possible examples being sterilisation and dissolution of any existing marriage.

Thirdly, should legal recognition be granted for all purpose' or confined to specific areas of law?

Fourthly are the problems of confidentiality in relation to previous gender and other matters.

Lord Reed concluded his lecture with words which one would hope would be echoed by all who have knowledge of this subject:

'generally, what emerges is the need, if a change of gender is to be legally recognised, for the issues to be addressed with sensitivity to the different questions arising in particular circumstances, but also with a general commitment to resolving those issues in a manner which treates transsexuals with compassion and with respect for their dignity. Human Rights Law expresses, and underpins, that commitment'.

**Conclusions**

1. In this judgment I have quoted extensively from judgments of other Judges to demonstrate my acceptance that there is force in the submission made on Mrs Bellinger's behalf that there has indeed been a marked change in social attitudes to problems of those like her since Corbett in 1970. Indeed it seems that what I have described as the plight of the transsexual has been recognised not only in judgments in courts around the world but by legislatures too. In Europe at least the law on this matter in England and Wales, is or is becoming, a minority position. However as a Judge I have to accept the law as it is and apply it to the facts as I find them to be.

2. The law is clear. It is that Mrs Bellinger's marriage is valid only if she was then a female. That law was made by Parliament and is of course absolutely binding upon me. As appears to have been the case with some other legislatures, Parliament might have provided a definition of the word female which would have encompassed those such as Mrs Bellinger; but it did not.

3. Whether the time has come for Parliament to reconsider the position of Mrs Bellinger and those like her is not a matter on which I offer any comment. What is clear, and I have in mind particularly the report of the interdepartmental working party, is that this is no simple matter. Potentially there are serious implications to be considered in relation to the law of marriage itself but also for other areas of life, employment and sport to name but two. The observation of Thorpe LJ which I quoted earlier seems particularly apt in relation to reform in this area of the law.

4. <u>The facts</u> are equally clear and, as in Corbett, there is agreement amongst the experts. 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. In the words of Professor Green those criteria 'would still be those agreed to by medical experts of the day'.

5. Conscious as I am of the significance of my decision for Mrs Bellinger and others in her situation, the law and the evidence I have of the present state of medical knowledge lead inexorably to my dismissing her petition.

» by Claire McNab