

I v United Kingdom

[2002] 2 FLR 518

11/07/2002

Barristers

Michael Sternberg OBE KC
Private: David Williams QC

Court

European Court of Human Rights

Facts

Although the applicant had undergone gender re-assignment surgery and lived in society as a woman, she remained for legal purposes a male. She was unable to obtain a birth certificate that showed her status as female and had been required on a number of occasions to submit her original birth certificate. This had effects on her life where sex was of legal relevance – for example in relation to an application for a nursing course, employment in a prison and a student loan. The applicant claimed that the refusal to give legal recognition to her gender re-assignment was a violation of her right to respect for her private life under Art 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950, a violation of her right to marry under Art 12, and a violation of her right to enjoy Convention rights without discrimination under Art 14. Specifically she contended that changes to the birth registration system were possible and would not affect the rights of third parties or burden society as a whole. The Government submitted that a fair balance had been struck between the rights of the individual and the general interest of the community and that to the extent that there were situations where a transsexual might face limited disclosure of their change of sex, those situations were unavoidable and necessary. The Government also submitted that the right to marry did not extend to marriage between persons of the same biological sex. Evidence established an emerging consensus within Contracting States in the Council of Europe on providing legal recognition following gender re-assignment and a continuing international trend towards such legal recognition.

Held

Held – that there had been violations of Arts 8 and 12, and no separate issue arising under Art 14 –

(1) Article 8 gave protection to the personal sphere of each individual, including the right to establish details of their identity as individual human beings, and the unsatisfactory situation in which post-operative transsexuals lived in an intermediate zone as not quite one gender or the other was not longer sustainable. No concrete or substantial hardship or detriment to the public interest had been demonstrated as likely to flow from any change to the status of transsexuals, and, as regards other consequences, society might reasonably be expected to tolerate a certain inconvenience to enable individuals to live in dignity and worth in accordance with the sexual identity chosen by them at great

personal cost. The UK Government, having failed to respond to earlier warnings by the court that the relevant legal measures should be kept under review, could no longer claim that the legal status of post-operative transsexuals fell within their margin of appreciation. There had been a failure to respect the applicant's right to private life in breach of Art 8 (see paras [70], [71], [72], [73]).

(2) It was artificial to assert that post-operative transsexuals had not been deprived of the right to marry because they were able to marry a person of their former opposite sex - the applicant lived as a woman and would only wish to marry a man, but had no way of doing so. The applicant was entitled to claim that the very essence of her right to marry had been infringed. While it was for the Contracting State to determine, inter alia, the conditions under which a person claiming legal recognition as a transsexual established that gender re-assignment had been properly effected and the formalities applicable to future marriages, including, for example, the information to be furnished to intended spouses, there was no justification for barring the transsexual from enjoying the right to marry under any circumstances. There had therefore been a breach of Art 12 (see paras [81], [83], [84]).

(3) The lack of legal recognition of the change of gender of a post-operative transsexual lay at the heart of the applicant's complaints under Art 14, and had been examined under Art 8. No separate issue arose under Art 14 of the Convention, and no separate finding would be made (see para [88]).

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