

# Article 8 and the Realisation of the Right to Legal Gender Recognition

## Introduction

The legal landscape as regards the recognition of the preferred gender identity of transgender people underwent a seismic shift as a result of the decision of the European Court of Human Rights in *Goodwin v UK* (2002).<sup>1</sup> In that case the Court found that the refusal of gender recognition amounted to a violation of the applicant's right to respect for her private life contrary to Article 8 of the European Convention of Human Rights. This chapter explores the trajectory of Strasbourg jurisprudence prior to *Goodwin* and then traces the impact of that decision on the evolution of Irish law.

The evolution of case law before the Strasbourg Court on the right to gender recognition is particularly interesting. In the early cases canvassed here the Court did not dispute the existence of such a right, however, the ability of plaintiffs to secure its realisation was frustrated by the doctrine of the margin of appreciation. A close reading of the dissenting judgments reveals both the growth of judicial support for a vindication of the recognition claims of transgender people and an explicit explanation for the denial of the exercise of the right.<sup>2</sup>

## Initial Judicial Response

The first case to come before the Court on this issue was *Van Oosterwijck v Belgium* (1980).<sup>3</sup> Here a female-to-male transgender person sought to have his birth certificate altered to reflect his acquired gender. At domestic level his application had been refused on the basis

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<sup>1</sup>*Goodwin v UK* [2002] ECHR 583.

<sup>2</sup>*B v France* [1992] 16 EHRR 1

<sup>3</sup>*Van Oosterwijck v Belgium* (1980) 3 EHRR 557.

that there was no error in the birth certificate and no legal provision to enable recognition of 'artificial changes to an individual's anatomy.'<sup>4</sup> The Court upheld a preliminary objection on the part of the Belgian government that the applicant had failed to exhaust domestic remedies. The majority reached this decision by 13 votes to 4, despite the fact that there was no indication that domestic remedies could in any way resolve the problems faced by Van Oosterwijck as was pointed out in the joint dissenting opinion.<sup>5</sup> In ruling thus the majority of the Court did not engage with the substantive issue: whether the recognition of transgender identity brings ensuing protection for rights violations. In his partly concurring judgment, the Belgian Judge Gansof Van Der Meersch stated that:

'A man or woman who is unable to obtain recognition of his or her sexual identity, an aspect of status which is inseparable from his or her person will be unable to play his or her full role in society. As has been said, the right to such recognition is a general principle of law.'<sup>6</sup>

Here we see a judge acknowledging that gender and legal status are indivisible, that the latter flows from the former and that unless the law can recognise the gender of an individual, it cannot enable that person to participate fully in society. Secondly, the judge confirms that the right to recognition as a gendered being is a general principle of law. In other words, the existence of a right to be recognised in one's preferred gender is accepted as fundamental. Since the majority found that the applicant had failed to exhaust domestic remedies it did not examine the merits of the case; such analysis was to occur some six years later.

### Tentative Steps towards Vindication

The Court actually engaged with the issue of recognition in *Rees v UK*(1986).<sup>7</sup> This case concerned a post-operative female-to-male transgender person whose Article 8 complaint

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<sup>4</sup>*Supra* n3, at 562.

<sup>5</sup>*Supra* n3.

<sup>6</sup>*Supra* n3, at 577.

<sup>7</sup>*Rees v UK* (1986) 9 EHRR 56.

centred around a failure to obtain a copy of his birth certificate indicating his male status due to the historical nature of the information recorded in the register of births.<sup>8</sup>

Rees contended, and in this argument he was supported by the European Commission on Human Rights, that as he had been socially accepted as a man and that it followed from Article 8 that the change in his gender/sexual identity should be given full legal recognition.<sup>9</sup> The question of balancing countervailing interests or of the State's margin of appreciation should not affect the State's obligation to afford recognition but only the choice of necessary measures aimed at securing realisation of the right. The Government argued the question of recognition was of itself a matter of striking a balance between the competing interests of the individual and society as a whole.<sup>10</sup> The Court distinguished between interferences with the right to privacy, which unless justifiable under Article 8(2), are prohibited; and positive obligations which are inherent in an effective respect for private life. It considered that "mere refusal to alter the register of births or to issue birth certificates whose contents and nature differ from those of the birth register cannot be considered as interferences".<sup>11</sup> The parameters of States' positive obligations were not "clear-cut".<sup>12</sup> Furthermore the Court noted that while several states had introduced various methods of legal gender recognition other states had not and the lack of common ground resulted in a wide margin of appreciation in this area.<sup>13</sup> On this basis the Court held by a majority that there had been no violation of Article 8.<sup>14</sup>

*Rees* is interesting in that a close reading reveals a focus on the body and the necessity for surgical intervention and bodily change to ground a claim of genuineness of transgender identity. The dissenting judgment made much of the pain and anguish that Rees had

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<sup>8</sup> In *Corbett v Corbett* [1970] 2 All ER 33 it was held that legal gender was determined, as a matter of law, by the congruence of the chromosomes, gonads and genitals at birth and cannot subsequently be altered.

<sup>9</sup> *Supra* n7, at 63.

<sup>10</sup> *Supra* n7, at 63.

<sup>11</sup> *Supra* n7, at 63.

<sup>12</sup> *Supra* n7, at 63.

<sup>13</sup> *Supra* n7, at 64.

<sup>14</sup> *Supra* n7, at 66 - 67.

undergone to acquire a male body and that this evidenced 'how real and intense was his desire to adopt a new sexual identity as far as possible.'<sup>15</sup> Recognising the genuineness of his desire, it calls for the annotation in the register he requested and the issuing of a short birth certificate which would indicate this new sexual identity,<sup>16</sup> and stressed that 'there is obviously no question of correcting the registers by concealing the historical truth ...'<sup>17</sup> Sharpe criticises this judgment for inexorably linking 'authenticity' of transgender identity to bodily change.

'[T]hose unwilling and/or unable to undergo surgical procedures are depicted as 'inauthentic' and therefore undeserving. In other words, surgical intervention is important not only for the bodily change it effects in the present but also for what it signifies about the past.'<sup>18</sup>

Ten years later these issues were reconsidered in *Cossey v UK* (1990).<sup>19</sup> Cossey was a male-to-female transgender person whose complaints were similar to those in the *Rees* case. The Court concluded that there was no material difference between her claim and that advanced in the *Rees* case, but nonetheless considered whether it should depart from the latter judgment. By the slimmest of margins (10 to 8), the Court ruled there was no violation of Article 8 citing the continuing lack of common ground between states and the wide margin of appreciation states enjoy in this matter.<sup>20</sup>

In their dissenting opinion Judges Bindschedler-Robert and Russo, reiterated their dissent in the *Rees* case to the effect that a just balance could have been struck between the individual and public interests without upsetting the present system of recording civil status.<sup>21</sup> In their

<sup>15</sup>*Supra* n7, at 69.

<sup>16</sup>*Supra* n7, at 65.

<sup>17</sup>*Supra* n7, at 70.

<sup>18</sup> Sharpe, A., *Transgender Jurisprudence. Dysphoric Bodies of Law*. (London, UK: Cavendish Publishing, 2002), at 54.

<sup>19</sup>*Cossey v UK* [1990] 13 EHRR 622.

<sup>20</sup>*Supra* n19, at 641.

<sup>21</sup>*Supra* n19, at 643.

dissenting judgment, Judges MacDonald and Spielmann stated there had been clear developments in the law on this issue in member states since the *Rees* case.

‘We are therefore of the opinion that, although the principle of the States’ “wide margin of appreciation” was at a pinch acceptable in the *Rees* case, this is no longer true today.’<sup>22</sup>

In his separate dissenting judgment, Judge Martens cited approvingly the approach adopted by the New Jersey Superior Court in a 1976 gender recognition case.<sup>23</sup> He criticised the *Rees* case for focusing on technicalities to the detriment of the essential principles at stake.<sup>24</sup>

‘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.’<sup>25</sup>

Martens stated that recognition of preferred gender was a request which the law should refuse only if it had ‘truly compelling reasons’,<sup>26</sup> in the absence of such reasons, as in this case, such a refusal ‘can only be qualified as cruel’.<sup>27</sup> He opined that such a refusal is inconsistent with the principles of privacy and human dignity.

## The First Finding of a Violation of Article 8

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<sup>22</sup>*Supra* n19, at 644.

<sup>23</sup>*Supra* n19, at 674, referring to *MT v JT* [1976] 140 NJ Super 77 where the Court held that in cases of discord between bodily sex and gender identity, once this had been harmonised through interventions the preferred gender identity of a person ought to be recognised.

<sup>24</sup>*Supra* n19, at 649.

<sup>25</sup>*Supra* n19, at 648.

<sup>26</sup>*Supra* n19, at 648

<sup>27</sup>*Supra* n26.

Some 18 months later the Court revisited the issue and found that failure to recognise the preferred gender of a transgender person did indeed violate Article 8 in *B v France* (1992).<sup>28</sup> The applicant in this case was a male-to-female transgender person who had petitioned the courts in France for a declaration that she was of the female sex in order that she might marry. That request was refused and she brought her claim to the Strasbourg Court. B claimed that the situation for transgender people in France differed from the situation for those in the UK. Unlike the applicants in the *Rees* and *Cossey* cases, under French law a person could not legally assume names other than those on their birth certificate. Additionally, French law provided for the updating of entries in the civil status register by marginal annotation, such as in the case of adoption, marriage or divorce, access to which was strictly regulated. Furthermore, the first digit of the National Institute for Statistics and Economic Study (INSEE) number denotes sex, 1 is for males and 2 for females. This number is used for social insurance purposes and appears in the national identification register of natural persons. Therefore the number always indicated that the birth sex of B differed to her apparent gender and this was obvious to potential employers and anyone else who needed to use this number.

The Court considered it undeniable that attitudes had changed, that science had progressed and increasing importance is attached to the problem of transgenderism.<sup>29</sup> It was held by a majority (15 to 6) that there had been a violation of Article 8. Some of the dissenting judgments criticise that of the majority for not outlining specifically the factors that gave rise to a violation of Article 8.<sup>30</sup> The Court merely stated, referring to the three points made by B (outlined in the preceding paragraph), “that the inconveniences complained of by the applicant in this field reach a sufficient degree of seriousness to be taken into account for the purposes of Article 8.” It concluded that she found “herself daily in a situation which, taken as a whole, is not compatible with the respect due to her private life. Consequently, even having regard to the State’s margin of appreciation, the fair balance which has to be struck between the general interest and the interests of the individual...has not been attained...”<sup>31</sup>

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<sup>28</sup>*B v France* [1992] 16 EHRR 1.

<sup>29</sup>*Supra* n28, at 29.

<sup>30</sup> See *supra* n28, at 36.

<sup>31</sup>*Supra* n28, at 33.

Perhaps the most notable feature of the dissenting judgments in *B v France* is the re-emergence of the concern over the 'authenticity' of transgender identity. Pettiti J talks of 'genuine' transgender people deserving understanding but in effect questions the validity of B's case for recognition as '[t]he existence of transsexualism was not verified in accordance with the medical practice statement and the operation took place abroad under unknown conditions.'<sup>32</sup> Matscher is of the opinion that B undertook the sex reassignment surgery 'lightly'.<sup>33</sup> Judge Pinheiro Farinha stated that surgical operations do not change an individual's real sex, but only alter the outward signs and morphology of sex. He further, in contrast to all the other judges, refused to refer to the applicant using feminine pronouns as 'I do not know the concept of social sex and I do not recognise the right of a person to change sex at will'.<sup>34</sup> According to Judges Valticos and Loizou the change in question in this case is 'in reality incomplete, artificial and voluntary'.<sup>35</sup> They stressed the importance of ensuring as an essential condition that the change which has occurred is sufficiently marked to be of no physiological doubt.

'One cannot accept dubious hermaphrodites and ambiguous situations. ... If that were so, there would be no real criteria or boundaries and there would be a risk of arbitrariness. Stability of social life would certainly be compromised thereby.'<sup>36</sup>

From the judgments, particularly the dissents of Pinheiro Farinha, Valticos and Loizou, it is possible to ascertain that the concern with 'authenticity' shrouds a preoccupation with or a fear of homosexuality.<sup>37</sup> Although the majority decision does refer to B's 'noticeably homosexual' behaviour while in military service,<sup>38</sup> Valticos and Loizou express concern that to recognise her acquired gender would court 'a risk of encouraging such acts ... and what is

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<sup>32</sup>*Supra* n28, at 40.

<sup>33</sup>*Supra* n28, at 36.

<sup>34</sup>*Supra* n28, at 38.

<sup>35</sup>*Supra* n28, at 43.

<sup>36</sup>*Supra* n35, at 43.

<sup>37</sup> See Sharpe, *supra* n18, at 54 – 55.

<sup>38</sup>*Supra* n28, at 4.

more, of seeing as a consequence half- feminised men claiming the right to marry normally constituted men, and then where would the line have to be drawn?’<sup>39</sup>

### Re-Emergence of the Margin of Appreciation as a Limiting Factor

What is clear from the judgments in the *B* case is that recognition does not exist in a vacuum, but brings with it ramifications for the rights both of the individual in question and for others. This was starkly revealed in *X, Y and Z v UK* (1997)<sup>40</sup> where the failure to recognise the preferred gender of X, a female-to-male transsexual, resulted in his inability to register himself as the father on the birth certificate of his child Z. The case reveals an inconsistency in the law’s approach to the question of X’s gender. In order to access the assisted human reproduction technologies by which his child was conceived the hospital ethics committee asked X to identify himself as the father of the child within the meaning of the Human Fertility and Embryology Act, 1990.<sup>41</sup> The Court noted that a residence order under the Children Act, 1989 would vest parental responsibility in X.<sup>42</sup> Thus the Court found that the legal consequences of non recognition ‘would be unlikely to cause undue hardship.’<sup>43</sup> Given the lack of certainty as to how the best interests of a child in Z’s position are to be best protected, the Court held that Article 8 cannot be taken to imply an obligation on the state to formally recognise as the father of a child someone who is not the biological father.<sup>44</sup> Yet in their separate dissenting opinions Judges Thor Vihjalmasson and Foighel both emphasised how the HFEA Act 1990, establishes a just such a scheme permitting the register of births to contain statements which are not in conformity with biological facts but are based on legal considerations.<sup>45</sup> Their judgments focus on the lived reality of social relationships within families rather than the specific biological characteristics of the members of that family. Thus

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<sup>39</sup>*Supra* n35, at 43

<sup>40</sup> *X, Y and Z v UK* [1997] 24 EHRR 143.

<sup>41</sup> Hereinafter HFEA. Under s28(3) of the HFEA Act, 1990, ‘where a man, who is not married to the mother, is party to the treatment which results in the sperm being placed in the woman, he shall be deemed to be the father of the child’.

<sup>42</sup> Although X could not apply for this order directly, he could nonetheless obtain it on foot of an order obtained jointly with Y.

<sup>43</sup> *Supra* n40, at 170 - 171.

<sup>44</sup> *Supra* n40, at 171 - 172.

<sup>45</sup> *Supra* n40, at 178.



the HFEA Act can enable an embodied understanding of families, as it did in the instant case. However, what is clear from the case is that although the law may employ such an embodied perspective in certain circumstances, as in the HFEA Act 1990, it does not in other circumstances such as birth registration. Thus it is apparent that the law has a haphazard approach to recognition, which can depend on the specific legislative lens applied to any given situation.

Nonetheless, the Court again cited the margin of appreciation afforded to contracting states as its reason for finding no violation of the Convention in *Sheffield and Horsham v UK* (1999).<sup>46</sup> The applicants were both male-to-female transsexuals who alleged that the UK had failed to comply with its positive obligations under Article 8 by failing to take positive steps to modify the existing system of law.<sup>47</sup> The Court found that the applicants had not adduced sufficiently conclusive scientific evidence on the causes of transsexualism or of the effectiveness of surgery as a treatment,<sup>48</sup> and that the lack of a common approach to the issue did not give rise to a positive obligation on the UK to legally recognise their acquired gender.<sup>49</sup> Thus the Court held by a slim majority (11 to 9) that there had been no violation of Article 8. However the Court drew attention to its statement in the *Rees* case that this area of the law would have to be kept under review. It noted that documents such as driving licences were issued in the preferred gender at the time of *Rees*.<sup>50</sup> In his concurring opinion Judge Freeland warned that ‘continued inaction on the part of the respondent State, taken together with further developments elsewhere, could well tilt the balance in the other direction.’<sup>51</sup>

In their joint dissenting opinion Judges Bernhardt, Thór Vilhjálmsson, Spielmann, Palm, Wildhaber, Makarczyk and Voicu stated that since *Rees* there have been many important developments in this area and drew attention to the fact that UK law had remained at a

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<sup>46</sup>*Sheffield & Horsham v UK* [1999] 27 EHRR 163.

<sup>47</sup>*Supra* n46, at 181.

<sup>48</sup>*Supra* n46, at 192.

<sup>49</sup>*Supra* n46, at 192 - 193.

<sup>50</sup>*Supra* n46, at 193 - 194.

<sup>51</sup>*Supra* n46, at 200.

'standstill' in this regard.<sup>52</sup> Furthermore the minority noted the developments in medical and scientific understanding of transsexualism. They argued that the inability of science to agree on the exact aetiology of transsexuality was of secondary importance: '[r]espect for privacy rights should not, as the legislative and societal trends referred to above demonstrate, depend on exact science.'<sup>53</sup>

For Judge Van Dijk, the core of this case involved the issue of the fundamental right to self determination.<sup>54</sup> According to him, this right is not expressly enunciated in the ECHR, but

'is at the basis of several of the rights laid down therein, especially the right to liberty under Article 5 and the right to respect for private life under Article 8. Moreover, it is a vital element of the "inherent dignity" which, according to the Preamble to the Universal Declaration of Human Rights, constitutes the foundation of freedom, justice and peace in the world.'<sup>55</sup>

Throughout the case law in the dissenting opinions a tension is manifest between judges who employ an embodied approach, focusing on the lived experience of the applicants before them, and those who focus specifically on bodily characteristics. That this conflict ended and that the Court spoke with one voice makes the judgment in *Goodwin v UK* (2002)<sup>56</sup> particularly significant.

## Vindicating the Right to Legal Recognition

The applicant in *Goodwin v UK* was a male-to-female transsexual. She complained of a violation of her rights under Articles 8, 12, 13 and 14. These alleged violations included the refusal of the state to allow her birth certificate be altered, being denied a state pension and

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<sup>52</sup>*Supra* n46, at 201.

<sup>53</sup>*Supra* n52, at 201

<sup>54</sup>*Supra* n46, at 207.

<sup>55</sup>*Supra* n54, at 207.

<sup>56</sup>*Goodwin v UK* [2002] ECHR 583.

a bus pass at the age retirement age for woman,<sup>57</sup> and the refusal of the Department of Social Services to issue her with a new National Insurance number.

The Court found that although it might be desirable in the interests of legal certainty, foreseeability, and equality before the law, it was not formally bound to follow its own precedents.<sup>58</sup> Furthermore the Court found that failure to maintain a dynamic and evolutive approach would risk rendering the ECHR a bar to reform or improvement. Thus the Court found unanimously that the failure of the UK to recognise the applicant's acquired gender breached her rights under Article 8.

[T]he very essence of the Convention is respect for human dignity and human freedom. Under Article 8 ... the notion of personal autonomy is an important principle underlying the interpretation of its guarantees ... In the twenty first century the right of transsexuals to personal development and to physical and moral security in the full sense enjoyed by others in society cannot be regarded as a matter of controversy ... In short, the unsatisfactory situation in which post-operative transsexuals live in an intermediate zone as not quite one gender or the other is no longer sustainable.<sup>59</sup>

Of particular persuasive importance for the Court was the growing consensus and 'unmistakable trend'<sup>60</sup> among Contracting States towards legal recognition of the acquired gender of transsexuals. Against this background, the UK could no longer claim that the matter fell within its margin of appreciation.<sup>61</sup>

Whittle sums up the effect of *Goodwin* as follows: that where gender assignment surgery is available and permitted in a State the 'new' sex of the post-operative transsexual must be recognised for all legal purposes unless the government can show substantial detriment to

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<sup>57</sup> In the UK the retirement age for women and hence access to free travel in London is 60, for men it is 65.

<sup>58</sup>*Supra* n56, at para 74.

<sup>59</sup>*Supra* n56, at para 90.

<sup>60</sup>*Supra* n56, at para 55

<sup>61</sup>*Supra* n56, at para 93.

the public interest. Where such is shown, the acquired sex may not be recognised in that area only.<sup>62</sup>

It is suggested that an even more fundamental issue is addressed by the case. The Court used the language of human dignity and human rights. Thus the Court acknowledged that the right to recognition by the law is grounded in a person's status as a human being, rather than in a person's status as a gendered being. The exercise of other rights, such as that of X in *X, Y and Z* to be legally acknowledged as the father of Z was contingent upon the prior recognition as being of a particular gender biologically. This is not the case with legal recognition of preferred gender, which under *Goodwin* does not require than an intermediate criterion be satisfied.

This chapter now turns to an examination of how this evolving jurisprudence impacted upon the development of jurisprudence and legislation on the question of gender recognition in Ireland.

## **Realising the Right to Legal Gender Recognition in Ireland**

### **Recognition Before the Courts**

The first judicial statement on legal gender recognition in Ireland was handed down in 2002, a mere two days before the decision of the Strasbourg Court in *Goodwin* changed the legal landscape completely. The plaintiff in *Foy v an tArd Chiaraitheoir and Ors (No 1)* (2002)<sup>63</sup> was a male-to-female transsexual and she contended that the refusal of the Registrar General to alter her birth certificate to reflect her acquired gender amounted to a breach of her constitutional rights to equality, dignity and privacy, as well as infringing her constitutionally protected right to marry. Having rejected arguments advanced suggesting there is a scientific

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<sup>62</sup> Whittle, S., *Respect and Equality. Transsexual and Transgender Rights*. (London, UK: Cavendish Publishing, 2002), at 155.

<sup>63</sup> *Foy v An tArd Chiaraitheoir (No 1)* [2002] IEHC 116.

basis to transsexuality,<sup>64</sup> the Court adopted into Irish law the tripartite test for legal gender recognition first formulated by Ormrod J in *Corbett v Corbett (otherwise Ashley)* (1970).<sup>65</sup> According to this test, legal gender is determined by the congruence of the chromosomes, gonads and genitals at birth.<sup>66</sup> In light of the then jurisprudence of the Strasbourg Court on the issue, Justice McKechnie concluded that confining the determining criteria to those which are biological was consistent with the ECHR.<sup>67</sup> Consequently, he found that when responding to Dr Foy's request, the Registrar General had no alternative but to refuse to issue an amended birth certificate.<sup>68</sup> Yet, he called on the Oireachtas to review urgently these matters.<sup>69</sup>

Following the ground breaking decision in *Goodwin* which changed entirely the approach of the Strasbourg Court to the issue of the recognition rights of transgendered persons, *Foy (No 1)* was appealed to the Supreme Court. By the time the appeal was heard, the domestic legal landscape had further altered by the introduction of the European Convention on Human Rights Act, 2003 and the Civil Registration Act, 2004 which established a new system of civil registration and repealed all previous legislation on the issue. As these developments had not been considered as part of the original hearing, the Supreme Court remitted the case back to the High Court.

Unusually, by agreement of the parties, the remitted action was again heard by Justice Liam McKechnie. Given the absence of any new evidence, the Court found that the principle of *res judicata* applied.<sup>70</sup> McKechnie J then had to consider what impact, if any, the *Goodwin* judgment might make on his original findings. He found that as the decision in *Goodwin* predated the incorporation of the ECHR into the domestic legal framework and that it was

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<sup>64</sup>*Supra* n63, at para 52 – 54, evidence of Professor Gooren.

<sup>65</sup>*Corbett v Corbett* [1970] 2 All ER 33.

<sup>66</sup>*Supra* n65, at 48.

<sup>67</sup>*Supra* n63, at para 122.

<sup>68</sup>*Supra* n63, at para 125.

<sup>69</sup>*Supra* n63, at para 177.

<sup>70</sup>*Foy v An tArdChlaraitheoir&Ors(No 2)* [2007] IEHC 470, at para 12.

prospective in nature,<sup>71</sup> the decision was not binding on the Irish courts. The question of whether the 2003 Act might have retrospective effect had been considered in two previous cases where the courts had concluded that it did not apply in such circumstances.<sup>72</sup> Thus the Court held that the 2003 Act did not impact on either the original proceedings or the judgment rendered therein.<sup>73</sup> Consequently Dr Foy lost the remitted action. This was not the end of events, however, as a new action was heard alongside the remitted proceedings.

Under the Civil Registration Act, 2004, Dr Foy made a fresh application for an amended birth certificate to the Registrar General. This was refused and a second set of proceedings before the High Court was instigated. The plaintiff's Convention-based argument was that if the 2004 Act did not permit the sought after amendments to her birth registration, this amounted to an infringement of her rights under Articles 8, 12 and 14 of the ECHR. Of all the arguments advanced by the plaintiff, it was those based on the European Convention on Human Rights Act, 2003 that the Court found most convincing.

In examining this argument, Justice McKechnie analysed the current Irish law on gender recognition. He re-iterated his finding from *Foy (No 1)* that legal sex is determined by the biological temporal test outlined in *Corbett*, and found this was reinforced under the 2004 Act.<sup>74</sup> He re-confirmed that a determination of legal gender at birth is a matter of law and is immutable despite subsequent trans identity.<sup>75</sup> Justice McKechnie then traced the evolution of the case law before the Strasbourg Court. He identified two issues to be resolved: whether there is a right to recognition of preferred gender under Article 8 and, if so, whether the Irish State enabled the realisation of same.

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<sup>71</sup> The Strasbourg Court in *Grant v UK* [2006] ECHR 548, at para 42-43, endorsed the view that the *Goodwin* decision did not apply at any point in time prior to the 11/7/2002.

<sup>72</sup> *Lelimo v Minister for Justice, Equality and Law Reform* [2004] 2 IR 178 and more significantly *Dublin City Council v. Fennell* [2005] 2 ILRM 228.

<sup>73</sup> *Supra* n70, at para 44.

<sup>74</sup> *Supra* n70, at para 64 (4, 5).

<sup>75</sup> *Supra* n70, at para 64 (6 – 8).

On the first issue, he found unless the instant case was distinguishable from that in *Goodwin* he was obliged to follow the latter decision and acknowledge the existence of a right to recognition. He concluded that the legal situation in the UK at the time of the *Goodwin* was virtually identical to that currently in Ireland.<sup>76</sup> He also rejected arguments advanced on behalf of the State that the Strasbourg Court had failed to address the issue of the balance of conflicting rights between a trans person and children born prior to transition.<sup>77</sup> McKechnie J concluded that the two domestic legal frameworks were so ‘strikingly similar’ that the *Goodwin* decision should be considered highly influential in the Irish context.<sup>78</sup>

McKechnie noted that within two years of the *Goodwin* judgment, the UK had responded both judicially and legislatively to the decision. In *Bellinger v Bellinger*(2003)<sup>79</sup> the House of Lords gave practical effect to *Goodwin* by declaring s11(c) of the Matrimonial Causes Act, 1973 incompatible with Articles 8 and 12 of the Convention. The Gender Recognition Act, 2004 established a scheme to enable recognition of preferred gender identity. By contrast, the Irish State had failed to respond in even the most exploratory manner to this issue. Concluding that Ireland was ‘disconnected from mainstream thinking’<sup>80</sup> and that the State’s margin of appreciation in this area was ‘thoroughly exhausted’<sup>81</sup>, Justice McKechnie issued the first ever Declaration of Incompatibility under section 5 of the 2003 Act.

Initially the State appealed the case to the Supreme Court but this was dropped in June 2010 following the establishment of the Gender Recognition Advisory Group (GRAG). This chapter now turns to an examination of the evolving legislative framework on legal gender recognition.

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<sup>76</sup>*Supra* n70, at para 96.

<sup>77</sup>*Supra* n70, at para 96.

<sup>78</sup>*Supra* n70, at para 96.

<sup>79</sup>*Bellinger v Bellinger* [2003] UKHL 21

<sup>80</sup>*Supra* n70, at para 100.

<sup>81</sup>*Supra* n70, at para 102.

## Towards a Legislative Framework for Gender Recognition

The GRAG was established to advise the Minister for Social Protection on the introduction of gender recognition legislation in Ireland. It reported in June 2011.<sup>82</sup> The report proposed establishing a scheme whereby a person whose birth is registered in Ireland, is at least 18 years of age, has a clear and settled intention to live in the preferred gender permanently and has lived in that gender for at least two years can apply to be legally recognised. In addition to these criteria the applicant must supply evidence of diagnosis of gender identity disorder (GID), or evidence of having undergone gender reassignment surgery, or evidence of legal recognition of preferred gender identity by another jurisdiction. Furthermore persons in an existing valid marriage or civil partnership are excluded from the scheme. The scheme received a critical reception from commentators and trans community members alike.<sup>83</sup>

The two main criticisms of the GRAG scheme to emerge centred on what became known as the medical issue and the marriage issue. The first concerned the requirement that applicants supply evidence of diagnosis or surgical treatment for GID. The requirement was a direct import from the UK Gender Recognition Act, 2004. When introduced it was almost universally welcomed as dispensing with the need to undergo surgery and opening the possibility of recognition to those who could not undergo treatments.<sup>84</sup> Given the absence of a legislative definition of GID, manuals such as the Diagnostic and Statistical Manual of Mental Disorders have been used to define the parameters of the diagnosis.<sup>85</sup> The five criteria for diagnosis include the requirement that 'must be evidence of clinically significant distress or impairment in social, occupational, or other important areas of functioning'. Thus the diagnosis model

<sup>82</sup>Report of the Gender Recognition Advisory Group (Dublin: Department of Social Protection, 2011) available online at <http://www.welfare.ie/en/Pages/Report-of-the-Gender-Recognition-Advisory-Group.aspx>.

<sup>83</sup> See Ní Mhuirthile, T. 'Legal Recognition of Preferred Gender Identity in Ireland: An Analysis of Proposed Legislation' in Kiely, E., & Leane, M., (eds.) *Sexualities and Irish Society: A Reader* (Dublin, Orpen Press, 2014) Chapter 5; Ní Mhuirthile, T., (ed) *Blog Carnival: 5th Anniversary of decision in Foy v An tArdChlaraitheoir (No 2) [2007] IEHC 470* Available online at [www.http://humanrights.ie](http://humanrights.ie) (posted 19/10/12).

<sup>84</sup>Sandland, R. 'Feminism and the Gender Recognition Act 2004.' (2005) 13 *Feminist Legal Studies* 43; Cowan, S. "'Gender is No Substitute for Sex": A Comparative Human Rights Analysis of the Legal Regulation of Sexual Identity.' (2005) 13 *Feminist Legal Studies* 67; Sharpe, A. 'A Critique of the Gender Recognition Act 2004' (2007) 4 *Bioethical Inquiry* 33.

<sup>85</sup>American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (4<sup>th</sup>edn) (Text Revision) (Arlington VA: American Psychiatric Publishing, 2000)



reinforces the connection between trans identity and mental disorder, and so unless an applicant is willing to be labelled or stigmatised as mentally ill, recognition will not be forthcoming. Another criteria which causes tension is that which states that a person cannot have a physical intersex condition and experience gender identity disorder. Adopting this diagnostic test ensures that intersex people (those born with bodies which combine male and female biological traits) are deliberately excluded from a gender recognition process and consequently the exercise of rights accessible exclusively thereby. Consequently, the Committee of Minister of the Council of Europe has recommended depathologisation of gender identity,<sup>86</sup> and the Council's Commissioner for Human Rights has called for depathologisation of access to legal gender recognition mechanisms.<sup>87</sup> In 2012, the Senate of Argentina passed a Gender Identity law that specifically states that '[i]n no case will it be needed to prove that a surgical procedure for total or partial genital reassignment, hormonal therapies or any other psychological or medical treatment has taken place [for recognition to be granted]'.<sup>88</sup> Most recently, on June 11, 2014, Denmark introduced a gender recognition law which requires neither diagnosis nor sterilisation prior to recognition.<sup>89</sup>

The second source of critique is the marriage issue. The GRAG proposal requires that all applicants be single at the moment of application. Therefore any applicant in a valid subsisting marriage or civil partnership would be excluded from the ambit of the legislation. The perceived need for such a criterion rests in a concern to avoid the introduction of same sex marriage. However, there may be real Constitutional difficulties with importing this criterion into the Irish context. In essence such a requirement demands that happily married couples, where one spouse subsequently transitions, would be required to divorce or to annul their marriage prior to the trans spouse seeking gender recognition. The conflict between the

<sup>86</sup>Recommendation CM/Rec(2010)5 of the Committee of Ministers to Member States on Measures to Combat Discrimination on Grounds of Sexual Orientation or Gender Identity  
<https://wcd.coe.int/ViewDoc.jsp?id=1606669>

<sup>87</sup>Commissioner for Human Rights '*Discrimination on Grounds of Sexual Orientation and Gender Identity in Europe*' (2<sup>nd</sup>ed) (Strasbourg: Council of Europe Publishing, 2011).

<sup>88</sup>Global Action for Trans Equality (GATE), (2012) *English Translation of Argentina's Gender Identity Law as approved by the Senate of Argentina on May 8, 2012*, available from:  
<http://globaltransaction.files.wordpress.com/2012/05/argentina-gender-identity-law.pdf> , Article 4.

<sup>89</sup> Amnesty International, '*World Must Follow Denmark's Example After Landmark Transgender Law*' available online at <http://www.amnesty.org/en/en/news/denmark-transgender-law-2014-06-12>

exercise of the rights to recognition and marry are clear. From the perspective of the supportive spouse this provision seems particularly injurious.<sup>90</sup> Under Article 41.3.2 to be granted a divorce, the spouses must have lived apart from one another for a period of at least four years prior to the commencement of proceedings and there must be no reasonable prospect of reconciliation between the spouses. Whether the courts could grant a dissolution of a 'trans' marriage in such circumstances is doubtful. It has been argued that gender recognition legislation could be introduced without such a requirement.<sup>91</sup> This argument focuses on the marriage moment as definitive. It contends that as both parties to the marriage presented, and were legally recognised, as of the opposite sex when the marriage was entered into it remains a validly constituted 'heterosexual' marriage despite the subsequent alternation in legal gender of one spouse.<sup>92</sup> In this way, the concerns about the possible introduction of same sex marriage as a consequence of the introduction of gender recognition legislation are assuaged.

In July 2013, the Minister for Social Protection published a Heads of Bill for the Gender Recognition Act 2013. This took on board some of the critiques which had been made concerning the scheme outlined in the GRAG report. The scheme maintains the requirement to be single, yet it also dispenses with the overt diagnostic criterion and seems to institute a self-declaration model in the mode of the Argentinian law.<sup>93</sup> Such a supposition is immediately undermined by the next evidentiary requirement which obliges applicants to produce a 'statement from [their] primary treating physician, in a form to be prescribed by the Minister, which confirms that the person has transitioned / is transitioning to their acquired gender and that [the treating physician] is satisfied that the person fully understands the consequences of [their] decision to live permanently in the acquired gender'. In essence, applicants need a letter from a consultant treating gender identity disorder confirming they are being, or have been, treated for a medical condition and understand the consequences of

<sup>90</sup> Ryan, F., 'Ryan on Gender Recognition and Marriage' Blogpost (19/10/12) <http://humanrights.ie/children-and-the-law/ryan-on-gender-recognition-and-marriage/>

<sup>91</sup> See Ryan, *supra* n90 and Ní Mhuirthile, *supra* n83.

<sup>92</sup> *Supra* n83, at 136.

<sup>93</sup> General Scheme of the Gender Recognition Bill, 2013, Head 6 <http://www.welfare.ie/en/downloads/Gender-Recognition-Bill-2013.pdf>

an application under this legislation. This is diagnosis in disguise. Yet it goes further than merely confirming diagnosis, as the doctor is also required to state that applicants have sufficient mental capacity to fully appreciate the consequences of an application. In this way, the proposed legislation not only maintains the diagnostic criterion but also obliquely reinforces the prejudice that trans people suffer from a mental disorder.

The 2013 scheme proposed that recognition be confined to those who are 18 years of age or older. This criterion does not respect the dignity of young trans or intersex people. It is important to note that currently such a person can, independently, give legal consent to undergo gender reassignment procedures under s23 of the Non Fatal Offences Against the Person Act, 1997. To grant young trans people the authority to decide to alter permanently their bodies in this way while refusing to recognise legally the result of that alteration is inconsistent from a policy perspective. Furthermore, it may be offensive to the newly inserted Article 42A of the Constitution on children's rights for failing to respect the right of children to form their own views and to have these views respected in line with their age and maturity. Where such decisions are supported by parents or guardians to continue to refuse recognition is even less sound from a legal perspective and may breach Article 42 of the Constitution.<sup>94</sup>

Following publication of the Heads of Bill, the scheme was sent to the Joint Oireachtas Committee for consideration. That Committee conducted public hearings in October 2013 and issued its report in January 2014.<sup>95</sup> The Committee recommended reducing the age requirement to 16 years of age,<sup>96</sup> dispensing with the requirement that applicants be single,<sup>97</sup> and ensuring that the evidentiary requirement should be worded such as to avoid

<sup>94</sup>*North Western Health Board v HW and CW* [2001] 3 IR 622. In this case the Supreme Court confirmed its obligation to prevent breaches of the Constitutional rights of children where parents have failed for physical or moral reasons, in their duty to their child. This authority is limited to exceptional circumstances and does not arise where parental opinion differs from a professional opinion or the State considered that the parents were wrong in a decision.

<sup>95</sup> Joint Oireachtas Committee on Education and Social Protection, *Report on the Gender Recognition Bill 2013* (Dublin: Stationary Office, 2014) available online at <http://www.oireachtas.ie/parliament/media/committees/educationandsocialprotection/Report-on-Gender-Recognition-Bill.pdf>

<sup>96</sup>*Supran*95, at para 5.2.

<sup>97</sup>*Supran*95, at para 5.3.

stigmatisation of applicants.<sup>98</sup> These recommendations, were they accepted would bring any gender recognition scheme into line with international best practice and European human rights norms.

In response to this report, on June 19<sup>th</sup> 2014, the Minister for Social Protection published a revised General Scheme for the Gender Recognition Bill 2014.<sup>99</sup> Under Head 5(e) the 2014 Scheme maintains the requirement to be single, it also retains the evidential requirement for a supporting statement by the applicant's primary treating physician critiqued above.<sup>100</sup> The main innovation of the 2014 Scheme is the opening thereof to applicants between the ages of 16 and 18, where the application is supported by proof of parental consent and a court order exempting the applicant from the minimum age of 18 requirement. The process has been complicated by the need to underline this parental consent by court confirmation of same. Under the revised 2014 Scheme, the process is to be informal, attract no court fee and may be determined *in camera*.<sup>101</sup> Yet for the under 18s the process has been complicated as the scheme requires in documentary form (i) proof of parental consent; (ii) evidence that the person's treating physician is satisfied that the person has attained a sufficient degree of maturity to make the decision to apply for gender recognition, that the applicant is aware of and has considered all the consequences and the physician is satisfied that the applicant's decision was freely made without duress and without the undue influence of any person; and (iii) evidence that an independent physician support the treating physician's opinion.<sup>102</sup> Thus the underage applicant may need three different doctors statements: one from the primary treating consultant that the applicant is undergoing or has undergone treatment, a second from the primary treating consultant that the applicant has the mental capacity to make this decision to request a change of gender of legal recognition and a third statement from an independent consultant that concurs with the opinion of the primary treating consultant. This

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<sup>98</sup>*Supra* n95, at para 5.4.

<sup>99</sup> Revised General Scheme of the Gender Recognition Act 2014, available online at <http://www.welfare.ie/en/downloads/Revised-General-Scheme-of-the-Gender-Recognition-Bill-2014.pdf>

<sup>100</sup>*Supra* n99, Head 6(a)(VI)

<sup>101</sup>*Supra* n99, Head 7(2)(a-c).

<sup>102</sup>*Supra* n99, Head 7(2)(d).

is a burdensome requirement for those who are underage and may act as a barrier to accessing recognition.

## Conclusion

Through the dissenting opinions in the trans cases before the Strasbourg the emergence of the realisation of the right to recognition as an intrinsic part of the inherent human dignity which we all enjoy is evident. This, together with the developments in discourse pushing for a rights based approach to recognition, has helped to move the conversation on the introduction of gender recognition legislation in Ireland. Although twelve years after the decision in both *Foy (No 1)* and *Goodwin* there is still no legislation on the issue, the effect of the transformative power of the latter judgment is manifest in the evolving shape of the scheme for gender recognition in Ireland. The most recent proposals in the revised 2014 Scheme are firmly framed by a respect for the inherent dignity and freedom of all people, regardless of their gender identity. This is evident in the introduction of the statutory declaration of gender and the extension of the scheme to those under 18 years of age. Both these innovations acknowledge that the individual person is best placed to determine their own gender for legal purposes. The more recent schema attempt to shift towards a depathologised conception of recognition, as is evident in the move away from the requirement for medical and / or surgical intervention in s11 of the Passports Act, 2008, and the overt need for a diagnosis as a prerequisite to recognition as per the GRAG report. Nonetheless, the sceptre of the specialist medical practitioner looms large. As of yet the proposed legislation does not divorce access to legal rights from medical treatment pathways. Where some sort of 'supporting statement' remains a prerequisite to recognition the ability to exercise that right will be limited.