

OPINION OF ADVOCATE GENERAL

JACOBS

delivered on 15 December 2005¹

1. Transsexual people, in the words of the House of Lords, the United Kingdom's supreme court, 'are born with the anatomy of a person of one sex but with an unshakeable belief or feeling that they are persons of the opposite sex'.² The conviction of belonging to the other sex is so profound that the transsexual person is prompted to ask for the corresponding bodily 'correction' to be made,³ by hormone treatment and gender reassignment surgery.⁴ The condition is also known as gender dysphoria or gender identity disorder.

with the woman she had always felt herself to be,⁵ she recounts how 'a courteous functionary from the Ministry ... apologetically explained that the question of my retirement pension would have to be settled nearer the time'.⁶ Over 30 years later, the United Kingdom has enacted the Gender Recognition Act 2004 regulating the civil situation of transsexual persons with regard to, inter alia, pensions.⁷ The Act entered into force on 4 April 2005 and is not retroactive.

2. After Jan (formerly James) Morris, the Anglo-Welsh journalist and travel writer, had had gender reassignment surgery in 1972 to complete the alignment of her appearance

3. The present reference from the Social Security Commissioner, London, made before the Gender Recognition Act 2004 entered into force, raises the question

1 — Original language: English.

2 — *Bellinger v Bellinger* [2003] 2 AC 467, per Lord Nicholls of Birkenhead.

3 — Council of Europe Recommendation 1117 (1989) on the condition of transsexuals, 29 September 1989.

4 — The terminology used tends to differentiate between sex, determined by the physical aspects of the body, and gender, namely the other sex to which transsexual persons are convinced they belong. 'Gender reassignment surgery', and the notion of the 'gender' acquired thereby, are thus perhaps misnomers, but since the terms appear to be generally used I will follow suit.

5 — After eight years of hormone treatment, involving an estimated minimum of 12 000 oestrogen pills (Jan Morris, *Conundrum* (1974, Coronet), p. 102).

6 — *Conundrum*, p. 149.

7 — See points 15 to 16 below.

whether it is contrary to Directive 79/7⁸ for a Member State to refuse to grant a retirement pension before the age of 65 to a male-to-female transsexual where that person would have been entitled to a pension at the age of 60 had she been regarded as a woman as a matter of national law.

7. Article 4(1) provides:

“The principle of equal treatment means that there shall be no discrimination whatsoever on grounds of sex either directly, or indirectly ... , in particular as concerns:

Relevant Community legislation

...

4. Article 1 of Directive 79/7 provides:

“The purpose of this Directive is the progressive implementation, in the field of social security and other elements of social protection provided for in Article 3, of the principle of equal treatment for men and women in matters of social security, hereinafter referred to as “the principle of equal treatment”.

— the calculation of benefits including ... the conditions governing the duration and retention of entitlement to benefits’.

8. Article 7(1) provides:

5. Article 2 provides that the directive is to apply to the working population.

“This Directive shall be without prejudice to the right of Member States to exclude from its scope

6. Article 3(1)(a) states that the directive is to apply to statutory schemes which provide protection against, inter alia, old age.

(a) the determination of pensionable age for the purposes of granting old-age and retirement pensions ...

⁸ — Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security (OJ 1979 L 6, p. 24).

...

**Relevant national legislation before
*Goodwin***

9. In England and Wales, section 1 of the Births and Deaths Registration Act 1953 requires that the birth of every child be registered by the Registrar of Births and Deaths for the area in which the child is born. The sex of the child must be entered on the birth certificate. The 1953 Act provides for the correction by the Registrar of clerical or factual errors; the official position is that an amendment may be made only if the error occurred when the birth was registered. The fact that it may become evident later in a person's life that his or her 'psychological' sex is in conflict with the sex as registered is not considered to imply that the initial entry at birth was a factual error. It is in particular not accepted that there is any error in the birth entry of a person who undergoes medical and surgical treatment to enable that person to assume the role of the opposite sex.

10. The Department for Work and Pensions (formerly the Department of Social Security ('DWP')) registers every British citizen for national insurance purposes on the basis of the information in their birth certificate. A

person's sex for the purposes of pensionable age is thus determined according to biological sex at birth.

11. National insurance contributions are made by way of deduction from an employee's pay by the employer and then by payment to the Inland Revenue (for onward transmission to the DWP). Employers at present will make such deductions for a female employee until she reaches the pensionable age of 60 and for a male employee until he reaches the pensionable age of 65. The DWP operates a policy for male-to-female transsexuals whereby they may enter into an undertaking with the DWP to pay direct to the DWP any national insurance contributions due after the transsexual has reached the age of 60 which have ceased to be deducted by the employer in the belief that the employee is female. In the case of female-to-male transsexuals, any deductions which are made by an employer after the age of 60 may be reclaimed directly from the DWP by the employee.⁹

12. Paragraph 1 of Schedule 4 to the Pensions Act 1995 provides that a man attains pensionable age when he attains the age of 65; paragraph 2 of that schedule provides that a woman born before 6 April 1950 attains pensionable age when she attains the age of 60.¹⁰

9 — This and the preceding paragraphs are taken more or less verbatim from paragraphs 23, 25, 28, 37 and 40 of the judgment of the European Court of Human Rights in *Goodwin v United Kingdom* (2002) 35 EHRR 447, set out by the national court in the order for reference as a summary of the relevant legislation.

10 — A woman born on or before 5 April 1950 attains pensionable age at 60 and a woman born on or after 6 April 1955 at 65. There is a sliding scale for women born between those dates.

***Goodwin* and the Gender Recognition Act 2004**

no justification for barring transsexuals from enjoying the right to marry in their assigned gender in all circumstances.¹²

13. On 11 July 2002 the European Court of Human Rights delivered its judgment in *Goodwin*.¹¹ The applicant in that case, a post-operative male-to-female transsexual, had alleged violations of the European Convention on Human Rights in respect of the legal status of transsexuals in the United Kingdom and particularly their treatment in the sphere of employment, social security, pensions and marriage.

15. The legislative solution adopted by the United Kingdom to give effect to the judgment in *Goodwin* is the Gender Recognition Act 2004, which came into force on 4 April 2005. That Act permits transsexual persons (whether they have had gender reassignment surgery or not) to apply for a 'gender recognition certificate' which, in the words of the referring court, 'provides the key to near complete recognition of his or her acquired gender'.

14. The European Court of Human Rights ruled that there had been a violation of Articles 8 (respect for private life) and 12 (right to marry). With regard to Article 8, the Court referred to the lack of legal recognition given to the applicant's gender reassignment and noted in particular that the fact that the applicant remained a male for legal purposes had effects on her life 'where sex is of legal relevance and distinctions are made between men and women, as, inter alia, in the area of pensions and retirement age'. With regard to Article 12, the Court found

16. Specifically, the act provides for the setting up of a Gender Recognition Panel. Section 2 of the act provides that the Panel must grant a gender recognition certificate if it is satisfied that the applicant:

'(a) has or has had gender dysphoria,

11 — Cited in footnote 9.

12 — Paragraphs 71, 76 and 103.

- (b) has lived in the acquired gender throughout the period of two years ending with the date on which the application is made,
- (b) has not attained the age of 65,

the person is to be treated ... as attaining pensionable age when it is issued'.¹³

- (c) intends to continue to live in the acquired gender until death'

The facts and the main proceedings

and complies with certain requirements as to the provision of sufficient evidence set out in section 3 of the Act.

18. The applicant was born in 1942; her sex at birth was recorded as male.

17. Section 13 of and Schedule 5 to the Gender Recognition Act 2004 regulate access to social security benefits and pensions. Paragraph 7(3) of Schedule 5 provides:

19. Having been diagnosed as suffering from gender dysphoria, the applicant underwent gender reassignment surgery on 3 May 2001. She is accordingly described by the referring court as a post-operative male-to-female transsexual.

'if (immediately before the certificate is issued) the person –

20. In February 2002, the applicant applied for a retirement pension to be paid from her 60th birthday.

- (a) is a man who has attained the age at which a woman of the same age attains pensionable age, but

¹³ — Paragraph 7(2) contains a mirror-image provision dealing with the position of female-to-male transsexual persons.

21. That application was refused on the ground that it had been made more than four months before the applicant reached 65, which is the pensionable age for men in the United Kingdom.

22. The applicant appealed to the Social Security Appeal Tribunal. The appeal, which proceeded on the basis of domestic law alone, was dismissed.

23. On further appeal to the Social Security Commissioner, the applicant argued that the denial of her pension at the age at which any other woman would be eligible for a pension amounted to unlawful discrimination contrary to Directive 79/7.

24. It is common ground that the applicant is within the personal scope of Directive 79/7 and that the State pension scheme in question is within the material scope of that directive.

25. The Social Security Commissioner has accordingly stayed the proceedings and referred the following questions to the Court:

‘1. Does Directive 79/7 prohibit the refusal of a retirement pension to a male-to-female

transsexual until she reaches the age of 65 [if she] would have been entitled to such a pension at the age of 60 had she been held to be a woman as a matter of national law?

2. If so, from what date should the Court’s ruling on question 1 have effect?’

26. Written observations have been lodged by the applicant, the United Kingdom Government and the Commission, all of whom were represented at the hearing.

The Court’s case-law on transsexuals and discrimination

27. The Court has delivered judgment in two cases in which a transsexual claimed to have been discriminated against on the ground of sex. Both cases were references from the United Kingdom.

28. In *P v S*¹⁴ the Court was asked essentially whether dismissal of a transsexual employee for a reason related to a gender reassignment was discrimination on grounds of sex within the meaning of the Equal Treatment Directive.¹⁵

grounds of sex is one of the fundamental human rights whose observance the Court has a duty to ensure

29. The Court responded to the call of Advocate General Tesaro to make a 'courtageous' decision. It ruled as follows:

Accordingly, the scope of the directive cannot be confined simply to discrimination based on the fact that a person is of one or other sex. In view of its purpose and the nature of the rights which it seeks to safeguard, the scope of the directive is also such as to apply to discrimination arising, as in this case, from the gender reassignment of the person concerned.

"The principle of equal treatment "for men and women" to which the directive refers in its title, preamble and provisions means ... that there should be "no discrimination whatsoever on grounds of sex".

Such discrimination is based, essentially if not exclusively, on the sex of the person concerned. Where a person is dismissed on the ground that he or she intends to undergo, or has undergone, gender reassignment, he or she is treated unfavourably by comparison with persons of the sex to which he or she was deemed to belong before undergoing gender reassignment.

Thus, the directive is simply the expression, in the relevant field, of the principle of equality, which is one of the fundamental principles of Community law.

Moreover, as the Court has repeatedly held, the right not to be discriminated against on

To tolerate such discrimination would be tantamount, as regards such a person, to a failure to respect the dignity and freedom to which he or she is entitled, and which the Court has a duty to safeguard.'¹⁶

14 — Case C-13/94 [1996] ECR I-2143.

15 — Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (OJ 1976 L 39, p. 40).

16 — Paragraphs 17 to 22.

30. The Court accordingly concluded that the directive precluded dismissal of a transsexual for a reason related to a gender reassignment.

constituted ‘pay’ within the meaning of Article 141 EC and the Equal Pay Directive, ruled as follows:

31. The applicant in *KB*¹⁷ was a woman who lived with, but was unable lawfully to marry, a female-to-male transsexual R. KB was informed that, if she were to pre-decease R, R would not be entitled to a widower’s pension under KB’s pension scheme, since that pension was payable only to a surviving spouse and national law did not recognise a person as a ‘spouse’ in the absence of a lawful marriage. KB brought proceedings alleging sex discrimination; the question before the Court was whether by so excluding a person in R’s situation the pension scheme discriminated on grounds of sex contrary to Community law.¹⁸

‘Article 141 EC, in principle, precludes legislation, such as that at issue before the national court, which, in breach of the ECHR, prevents a couple such as KB and R from fulfilling the marriage requirement which must be met for one of them to be able to benefit from part of the pay of the other. It is for the national court to determine whether in a case such as that in the main proceedings a person in KB’s situation can rely on Article 141 EC in order to gain recognition of her right to nominate her partner as the beneficiary of a survivor’s pension.’¹⁹

The first question

32. The Court, having found that a survivor’s pension paid under an occupational pension scheme such as that in question

33. By its first question the referring court asks whether it is contrary to Directive 79/7 for a Member State to refuse to grant a retirement pension before the age of 65 to a male-to-female transsexual where that person would have been entitled to a pension at the age of 60 had she been regarded as a woman as a matter of national law.

¹⁷ — Case C-117/01 [2004] ECR I-541.

¹⁸ — Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women (OJ 1975 L 45, p. 19) (‘the Equal Pay Directive’).

¹⁹ — Paragraph 36 and operative part.

34. The applicant and the Commission submit that that question should be answered in the affirmative; the United Kingdom Government takes the contrary view.

35. The applicant and the Commission refer to *P v S*²⁰ and *KB*²¹ in support of their submissions.

36. In *P v S*, the Court ruled essentially that dismissal ‘for a reason related to a gender reassignment’ amounted to discrimination on grounds of sex contrary to Article 5(1) of the Equal Treatment Directive.²²

37. It is clear that the ‘principle of equal treatment’ which finds expression in Article 4(1) of Directive 79/7 in matters of social security has the same scope and effect as the ‘principle of equal treatment’ which finds expression in Article 5(1) of the Equal Treatment Directive with regard to working conditions. Article 4(1) of Directive 79/7 states that that principle precludes in particular direct or indirect discrimination on grounds of sex concerning inter alia the conditions governing the duration of entitlement to benefits under statutory old-age pension schemes.

38. The applicant in the present case is denied her pension in circumstances where, had she been registered as female at birth, she would have been entitled to it. The alleged discrimination accordingly lies in the United Kingdom’s failure to recognise a transsexual person in their acquired gender on equal terms with persons recorded as of that gender at birth.

39. The Court stated in *P v S* that, where a person is dismissed on the ground that he or she intends to undergo, or has undergone, gender reassignment, he or she is treated unfavourably by comparison with persons of the sex to which he or she was deemed to belong before undergoing gender reassignment.²³

40. If that approach were applied in the present case, the correct comparator for the applicant would thus be ‘persons of the sex to which he or she was deemed to belong before undergoing gender reassignment’. That class would comprise male pension claimants, who are not entitled to a pension until they reach the age of 65, so that there would be no discrimination.

20 — Cited in footnote 14.

21 — Cited in footnote 17.

22 — Cited in footnote 15.

23 — Paragraph 21.

41. I agree with the Commission however that the reasoning to be used in applying sex discrimination law to the case of transsexual persons should differ from the classical model which is always based on a straight-forward comparison between men and women.

42. *P v S* was a particularly clear case of discrimination, since it was accepted that the dismissal was 'for a reason related to a gender reassignment'. Whether the comparator was a man who was not proposing to have gender reassignment surgery or a woman who had not had such surgery, the result would have been the same: in comparison with such a person, the applicant had been disadvantaged.

43. The same can be said of the decision of the House of Lords in *A v Chief Constable of West Yorkshire Police*,²⁴ where in determining the correct comparator the approach of the Court of Justice in *P v S* was followed.²⁵ That case also concerned direct discrimination because of gender reassignment.

44. In *KB* the situation was different. In arriving at its conclusion that the exclusion of the female-to-male transsexual partner of a female member of the National Health Service Pension Scheme constituted sex discrimination contrary to Article 141 EC, the Court compared the couple to 'a heterosexual couple where neither partner's identity is the result of gender reassignment surgery and the couple are therefore able to marry'.²⁶ The correct comparator in the case of the female-to-male transsexual was therefore a male person whose identity was not the result of gender reassignment surgery.

45. In the present case also that seems to me to be the correct basis of comparison. The applicant is denied her pension in circumstances where, had she been registered as female at birth, she would have been entitled to it. The alleged discrimination accordingly lies in the United Kingdom's failure to recognise a transsexual person in their acquired gender on equal terms with persons recorded as of that gender at birth, precisely the issue in *KB*. I consider therefore that the correct comparator in the present case concerning a male-to-female transsexual

24 — [2005] 1 AC 51.

25 — See the opinion of Baroness Hale, and in particular paragraphs 56 to 58.

26 — Paragraph 31.

person is a female person whose identity is not the result of gender reassignment surgery.

46. On that basis, I am of the view that it is contrary to Article 4(1) of Directive 79/7 for a Member State to refuse to grant a retirement pension before the age of 65 to a male-to-female transsexual where that person would have been entitled to a pension at the age of 60 had she been regarded as a woman as a matter of national law.

47. The United Kingdom Government submits however that Article 4(1) of Directive 79/7 is not applicable since the United Kingdom has chosen to make use of the option conferred by Article 7(1)(a) to exclude from the scope of the directive its provisions concerning the determination of pensionable age.

48. The applicant and the Commission counter that the applicant is not complaining that there are different pensionable ages for men and women but that she, as a woman, is prevented from receiving her pension at the appointed age solely because the United Kingdom will not recognise her acquired gender.

49. I agree that in the present case Article 7(1)(a) is not relevant.

50. The Court has stated that discrimination which is in principle contrary to Article 4(1) falls within the scope of the derogation in Article 7(1)(a) only if it is necessary in order to achieve the objectives which the directive is intended to pursue by allowing Member States to retain a different pensionable age for men and women.²⁷

51. That is not the subject-matter of the present case, in which the applicant is essentially challenging the basis on which the United Kingdom categorises a person as belonging to a given sex for the purpose of then determining whether that person has attained pensionable age. The derogation in Article 7(1)(a) covers legislation concerned with determining the different pensionable ages of men and women. It does not cover legislation concerned with the separate question of determining the sex of the person concerned.

52. The United Kingdom Government submits that the applicant cannot argue on the one hand that sex discrimination for the

²⁷ — See Case C-9/91 *Equal Opportunities Commission* [1992] ECR I-4297, paragraph 13.

purposes of Article 4(1) includes discrimination on grounds of gender reassignment and on the other hand that the United Kingdom's derogation from the prohibition on 'discrimination ... on grounds of sex' in Article 7 does not apply to the form of discrimination which she alleges.

examples of contexts in which discrimination is prohibited, namely the scope of statutory social security schemes, the conditions of access thereto, the obligation to contribute, the calculation of contributions, the calculation of benefits and the conditions governing the duration and retention of entitlement to benefits.

53. It does not however seem to me that that position is, as the United Kingdom Government describes it, 'inherently flawed'. Contrary to the submission of that government, a matter can both fall within a general prohibition on discrimination and fall outside a specific derogation from that prohibition.

55. In contrast, the Court has ruled that, in view of the fundamental importance of the principle of equal treatment, the exception to the prohibition of discrimination on grounds of sex provided for in Article 7(1)(a) must be interpreted strictly.²⁹ As explained above, that provision permits the maintenance of a specific instance of different treatment of men and women, namely in the determination of pensionable age for the purposes of granting old-age and retirement pensions and the possible consequences thereof for other benefits. That type of sex discrimination is not in issue in the present case.

54. It is clear from its terms that the prohibition on discrimination in Article 4(1) of Directive 79/7, which states 'that there shall be no discrimination whatsoever on grounds of sex either directly, or indirectly by reference in particular to marital or family status', is intended to be all-encompassing. The Court has ruled that the provision 'precludes, generally and unequivocally, all discrimination on grounds of sex'.²⁸ Article 4(1) mentions some specific

56. In the present case the conduct complained of falls within the general prohibition in Article 4(1) of the Equal Treatment Directive and outside the derogation therefrom in Article 7(1)(a).

28 — Case 71/85 *Federatie Nederlandse Vakbeweging* [1986] ECR 3855, paragraph 18.

29 — Case C-328/91 *Thomas* [1993] ECR I-1247, paragraph 8.

57. I would add that the question of the stage at which a transsexual person becomes entitled to equal treatment within the meaning of Directive 79/7 with persons of his or her acquired gender was debated at the hearing. There is however no need to resolve that issue in the present case, which concerns a post-operative transsexual person whose entitlement is therefore clear.

should be any temporal limitation on the Court's ruling on the first question.

60. The referring court appears to have been prompted to refer the second question by a submission in the proceedings before it on behalf of the Secretary of State for Work and Pensions, summarised in the order for reference as follows:

58. I accordingly conclude in answer to the first question that it is contrary to Article 4(1) of Directive 79/7 for a Member State to refuse to grant a retirement pension before the age of 65 to a post-operative male-to-female transsexual where that person would have been entitled to a pension at the age of 60 had she been regarded as a woman as a matter of national law.

'If ... the Court of Justice should conclude that Community law precludes the discrimination of which the appellant complains, the Secretary of State will invite that Court to limit its temporal effect following its judgment in Case C-262/88 *Barber v Guardian Royal Exchange Assurance Group* [1990] ECR I-1889, paragraphs 40 to 44, and to rule that its judgment in this case may not be relied upon in order to claim entitlement to a pension with effect from a date prior to that of its judgment, except in the case of those who, with effect from a date prior to that of the Court's judgment[,] have ... initiated legal proceedings or raised an equivalent claim under the applicable national law.'

The second question

59. The referring court's second question arises if the first question is answered as I suggest in point 58 above. In that case, the referring court asks in effect whether there

61. In fact, however, the United Kingdom Government states in its written observations, and repeated at the hearing, that it does not seek any temporal limitation upon the effect of the Court's judgment.

62. In any event, it is clear from the Court's case-law that a temporal limitation will be imposed only in very specific circumstances which include the existence of 'a risk of serious economic repercussions owing in particular to the large number of legal relationships entered into in good faith on the basis of rules considered to be validly in force'.³⁰

63. In the present case there are several factors the combined effect of which is to minimise the economic repercussions from a judgment in the present case which answers the referring court's first question in the affirmative. First, the number of transsexual persons in the United Kingdom is, on that Government's own figures, small: in 2000 it was estimated at some 2 000 to 5 000³¹ (which of course includes transsexual persons of all ages) out of a population of nearly

60 million. Second, the United Kingdom is currently phasing out the difference in pensionable ages between men and women for all persons born after 5 April 1955.³² Third, a male-to-female transsexual person who has been issued with a gender recognition certificate under the Gender Recognition Act 2004 and who has attained the age at which a woman of the same age is entitled to a pension is treated as attaining pensionable age when the certificate is issued. It is therefore evident that the number of persons in the applicant's position will not be liable to create a risk of serious economic repercussions in the United Kingdom. Such repercussions will be even less significant in the European Union as a whole, given that many Member States already provide for men and women to retire at the same age and for transsexual persons to have full legal recognition in their acquired gender.³³

64. I accordingly consider that, if the Court answers the referring court's first question in the affirmative, there is no need for it to limit the temporal effects of the judgment.

30 — See most recently Case C-209/03 *Bidar* [2005] ECR I-2119, paragraph 69.

31 — See the United Kingdom Home Office Report of the Interdepartmental Working Group on Transsexual People (April 2000), referred to in *Goodwin*, paragraph 87.

32 — See footnote 10.

33 — According to the MISSOC (Mutual information system on social protection) tables *Social Protection in the Member States of the European Union, of the European Economic Area and in Switzerland* (2004) published by the Commission, in Cyprus, Denmark, Finland, France, Germany, Hungary, the Netherlands, Ireland, Luxembourg, Portugal, Spain and Sweden the retirement ages for men and women are the same. Advocate General Ruiz-Jarabo in his Opinion in *KB* notes that before the 2004 enlargement all the Member States apart from the United Kingdom and Ireland permitted amendment of birth records after gender reassignment surgery (see point 28 of the Opinion). The European Court of Human Rights in *Goodwin*, cited in footnote 9, noted that out of 37 Member States of the Council of Europe only four did not permit such amendment (see paragraph 55 of the judgment). Those four are Albania, Andorra, Ireland and the United Kingdom.

Conclusion

65. For the reasons given above I am of the view that the questions referred by the Social Security Commissioner, London, should be answered as follows:

- (1) It is contrary to Article 4(1) of Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security for a Member State to refuse to grant a retirement pension before the age of 65 to a post-operative male-to-female transsexual where that person would have been entitled to a pension at the age of 60 had she been regarded as a woman as a matter of national law.

- (2) It is not necessary to limit the temporal effects of a judgment to that effect.