

The Transsexual and the Law

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from NEW LAW JOURNAL - July 27th 1984.

Whilst there is a plethora of case law in litigation-minded America, there are few reported decisions in the English Courts on the subject of gender dysphoria or transsexuality as it is better, and more sensationally, known. There is, however, a spectrum of legal problems which confronts a person who changes gender. The case now referred to the Court of Human Rights in Strasbourg¹ makes a suitable starting-point to consider those problems and what may happen if the case is resolved in the dysphoric's favour. Since it is impossible to gauge even the number of post-operative transsexuals in this country let alone the number of pre-operative ones, the number of people affected by the current law cannot be accurately assessed, but there is no doubt that a steady stream of patients are attending psychiatrists either privately or through Gender Identity Clinics with a view to obtaining an operation,² which will physically if not legally change their gender. The problems may affect therefore thousands of people rather than a mere handful.³

A transsexual can for the purposes of this article be described as "a person anatomically of one sex who invincibly believes that he or she is of the other sex. The strength of the belief amounts to an obsession to have the body, appearance and social status revised to conform with that individual's 'proper' gender".⁴ The process is long in terms of years—possibly six or more from first consulting a doctor—and costly in terms financial and social. The principal difficulty in law faced by the dysphoric arises out of the intransigence of the law relating to the person's original birth certificate and this is the question being posed to the European Court. That and the case of *Corbett v Corbett* [1970] 2 WLR 1306 have been the biggest stumbling blocks for transsexuals regarding their re-integration into society in their chosen roles. The Births and Deaths Registration Act 1953, s 29(3) allows only an error of fact which existed at the state of birth to be corrected. The sole reported attempt to challenge this decision seems to have been at the Sheriff Court of Perth and Angus,⁵ when a male to female transsexual sought to change his birth certificate. The court held it had power to correct an entry

erroneous only at the date of entry. The position is not the same worldwide. Many provinces of Canada allow post-operative transsexuals to have a new birth certificate; in West Germany the transsexual belongs to his or her post-operative sex. There is similar legislation in France and in a number of the States of America.

The *Corbett* case, concerning the transsexual model April Ashley, remains the principal case in this country concerning transsexuals. It was heard by Ormrod J, himself a doctor, who seems to have been unsympathetic to Miss Ashley and her "marriage". In his judgment he referred to her as "... increasingly reminiscent of the accomplished female impersonator". The judgment determined that a male who prior to a ceremony of marriage had had a "so-called sex change operation" was not a woman who could validly marry a man. It was in law a marriage between two males and therefore void.

Corbett was followed by the Court of Appeal (Criminal Division) in *R v Tan and others* [1983] 3 WLR 361. This was decided on exactly the principle laid down in *Corbett*. It concerned a case of living off immoral earnings contrary to the Sexual Offences Act 1956, s 30. The short point was whether one of the appellants, a transsexual Gloria Greaves, had become a woman. If so her conviction could not stand. The Court made short work of the argument that Greaves was now a woman. "Commonsense and the desirability of certainty and consistency demanded *Corbett* should apply."

P J Pace in his article "Sexual Identity and the Criminal Law"⁶ mentions that Greaves had been released on bail pending appeal from a women's prison. This of itself is unusual. The transsexual is normally remanded to the prison of her original sex, and may at the discretion of the prison doctor have her hormone treatment discontinued.⁷

There appears to be no recorded case of a challenge to this practice. There are, however, a number of cases current in the American courts concerning the treatment in prison of both pre- and post-operative transsexuals. There appear to be a number of cases in America where both pre and post transsexuals in America have petitioned to be specially treated whilst serving sentences. Notable amongst

these is the case of *Mostyn* who claimed her life would be in danger if she was housed with men. She obtained a preliminary injunction to be kept out of the general male population of any prison. District Judge Raul Ramirez recommended "she be kept in an administrative segregation unit in a hospital setting where she could continue her hormone treatments".⁸

Similarly an inmate of the all-male Iowa State Penitentiary is suing the State to obtain a sex-change operation whilst in prison.⁹ Thomas White alleges it is a "cruel and unusual punishment" for prison officials to deny his sex-change operation. In an unreported decision of the sentence for five years for theft passed on Rickie Bruce by Peoria County Circuit Judge Eagleton, the judge offered to recommend that the Department of Corrections "seriously consider" providing Bruce with a sex-change operation if he requests one". The judge added that he considered the funds for the operation "would be money well spent by the State of Illinois".¹⁰

¹ No 9532/81 v the UK.

² This may be either cosmetic, ie removal of the testes and penis and formation of labia, or full construction of a vagina in the male to female. In the case of the female to male, hysterectomy and masectomy with the possible formation of a penis.

³ It has been suggested to me by a member of SHAFT (Self Help Association for Transsexuals) that 1 in 200 members of the public may be concerned in some form of gender identity problems.

⁴ Manitoba Law Reform Commission, Report on the Revision of Birth Certificates of Transsexual Persons (1976) at p 6.

⁵ R v X 1957 SLT 61 (Sh Ct).

⁶ Criminal Law Review, May 1983, p 317.

⁷ A Handbook for Male to Female Transsexuals (SHAFT) p 26.

⁸ *Mostyn v State of California*; Reported by UPI, April 14, 1983.

⁹ *White v State of Iowa*, reported by UPI, April 4, 1984.

¹⁰ Reported by UPI, Peoria, Illinois, June 24, 1983.

The transsexual in or out of prison, because of the *Corbett* and *Tan* decisions, is placed in the position where legally she cannot be raped. There is no doubt that a charge of assault would lie—probably it would not reflect the gravity of the attack. If for example the post-operative transsexual submitted to the attack out of fear, then possibly only a charge under Offences Against the Person Act 1861, s 42, or under Sexual Offences Act 1956, s 15 would lie.

Finally on the criminal aspect of the law involving the transsexual, P J Pace argues that a transsexual who whilst married contracts another marriage, would still be guilty of bigamy even though the marriage itself is void. That may well be a somewhat academic proposition. There appears also, to be a case of a transsexual who, having consummated a marriage, was charged with the offence of misleading a public register (Perjury Act 1911, s 2). What is clearly of more importance is that of the post-operative transsexual who is charged under the Sexual Offences Act 1956, s 32, ie a man to solicit persistently or importune in a public place for immoral purposes. This section is all the more anomalous because the person may well have been arrested only days earlier and charged as a female for soliciting for the purposes of prostitution.

The second major area in which the transsexual would appear to be at a substantial disadvantage is in the question of custody and access to children of a pre-operative marriage. There appear to be no recorded cases depriving a parent of access on the grounds of the transsexuality of that parent.

Similarly there seems to be no recorded cases of the grant of custody to a transsexual parent. There can be, however, little doubt that the dysphoric finds herself at a disadvantage in such a situation. "She forfeited and gave up her rights as a parent the day she had the operation."¹¹ The American experience would appear to be somewhat different. In *Christian v Randall*,¹² Silverstein J held that "the fact that the former wife was going through a transsexual change from female to male, had changed her name, had married a woman, and had earlier suffered financial reverses, did not justify change of custody to the father in view of the high quality of environment and home life of the former wife and children, and in the absence of showing that the mother's relationship with the children had been adversely affected or that their emotional development had been impaired."

The other major area in which the

transsexual may well be at a disadvantage is in that of his or her work. Again applying *Corbett*, a post-operative male to female transsexual is not entitled to a state pension until she has reached the age of 65.

The only reported case involving gender dysphoria in cases under the Sex Discrimination Act appears to be *E A White v British Sugar Corporation* [1977] IRLR 121. The claimant, a female to male dysphoric, had been offered a job before it was known there had been a sex change operation. The tribunal ruled that the claimant was a woman and therefore there had been no discrimination. In its decision it seems to have followed *Corbett*.

The dysphoric has correspondingly had a hard time in the American Courts. The majority of recent court decisions at District and Appellate Court levels have ruled that title VII of the Civil Rights Act of 1964 as amended by the Equal Employment Opportunity Act of 1972 which prohibits discrimination on the basis inter alia of sex, does not apply to transsexuals.¹³ The decision therefore of Judge John Grady in *Ulane v Eastern Airlines*¹⁴ must be viewed with some scepticism. It must be doubtful whether it will be upheld on appeal. The decision to fire *Ulane* was not for legitimate safety reasons, but because the Airline was concerned about the image of having a transsexual flying its aircraft. Grant dealt with the defence in strong terms, suggesting the airline had adopted an "ostrich-like attitude". Only time will tell whether this first instance decision will be a breakthrough for the transsexual in the American courts. Even if it is, it is doubtful whether it will be of any help to the British transsexual. David Pannick in his article "Homosexuals and the Sex Discrimination Act"¹⁵ argues that the *White* case provides some protection under the 1975 Act and quotes a Standing Committee debate reply by Dr Shirley Summerskill: "Clearly people who have legally changed sex will be covered by the Bill, under whatever sex they have legally changed to".¹⁶

Whether this is so will remain to be seen. Until, however, there is another look at the decision in *Corbett*, now some fifteen years old, and, as Pannick says, Ormrod J was "not concerned to determine the legal sex of the respondent at large", there will continue to be a good deal of injustice to the transsexual. Perhaps the case now before the European Court can be the basis for a change in attitude and one which will bring the English courts more in line with our

European partners and many other countries. o

¹¹ *Access to Children and the Court; Rachel of Brixton Shaft Newsletter, Vol 2, No 2.*

¹² *546 Pacific Reporter 2d Series, p 132.*

¹³ *Voyle v Ralph K Davies Medical Center 403 F Supp 456 (ND Cal, 1975) (inter alia).*

¹⁴ *28 FEP Cases 1438 (1982).*

¹⁵ *Homosexuals and the Sex Discrimination Act (Public Law, Summer 1983).*

¹⁶ *Standing Committee B, Second Sitting, April 24, 1975, cols 102-103.*

Pension Lawyers

There has recently been considerable publicity about pensions and pensions legislation. A group of lawyers who deal with pension work will be holding a meeting to see if there is enough support for the foundation of an Association of Pension Lawyers. We believe that one of the first tasks of such an Association will be to try and co-ordinate the views of pension lawyers on the new legislation which, we think, will be put before Parliament in the autumn.

The meeting will be at 21 Holborn Viaduct, London EC1A 2DY on Tuesday, August 14, 1984, at 5.30 pm. Could those who want to attend, let us know.

If anyone is interested, but cannot attend the meeting, he or she should write to Lovell, White & King, 21 Holborn Viaduct, London EC1, for information.