Judicial Communications Office

13 May 2021

COURT DELIVERS JUDGMENT ON GENDER RECOGNITION

Summary of Judgment

Mr Justice Scoffield, sitting today in the High Court, found that the requirement for an applicant for a gender recognition certificate to prove that she is suffering, or has suffered from, a "disorder" is incompatible with her rights under the ECHR.

The applicant, who has been living as a transgender woman since 1999, wishes to apply for a gender recognition certificate ("GRC") under the Gender Recognition Act 2004 ("the 2004 Act")[1]. In receiving a full GRC she will become, in the eyes of the law, a person of her acquired gender, which means she can obtain a new birth certificate and passport showing her recognised legal gender. In order to be granted a GRC a person such as the applicant must, in accordance with the 2004 Act, provide two reports:

- One from a registered medical practitioner or registered psychologist practising in the field of gender dysphoria, which includes details of the diagnosis of the applicant's gender dysphoria.
- A second from a registered medical practitioner who may, but need not, practise in the field of gender dysphoria and could, for instance, be the applicant's GP.

Gender dysphoria is defined in section 25 of the 2004 Act as meaning "the disorder variously referred to as gender dysphoria, gender identity disorder and transsexualism". The effect of the 2004 Act is that the applicant must provide medical evidence that she has or has had a "disorder" before she may obtain a GRC. The applicant claims that the requirement under the 2004 Act to provide a diagnosis of gender dysphoria is not compatible with her rights under Article 8 ECHR and/or Article 14 ECHR (in conjunction with Article 8). Her challenge included two limbs:

- A challenge to the requirement in principle; and
- A challenge to the mechanism by which the requirement is to be discharged, namely the provision of specialist medical evidence.

The consideration given to amending the 2004 Act

Much of the evidence before the court in this case related to proposals and plans to amend the 2004 Act to make it easier for a person in the position of the applicant to obtain a GRC, including removal of the impugned requirement to provide supporting medical reports. The court in paragraphs [35] to [89] summarised the key developments from 2016 to September 2020. These included:

[1] The court outlined the relevant provisions of the 2004 Act in paragraphs [22] to [32] of its judgment. It also set out in paragraph [33] the guidance issued by the President of Gender Recognition Panels on the evidential requirements for applications under the 2004 Act.

- The report by the House of Commons Women and Equalities Committee entitled "Transgender Equality", published in January 2016, which criticised the medical approach in the 2004 Act;
- The 11th edition of the International Statistical Classification of Diseases and Related Health Problems ("ICD-11") which was published in 2018. This replaced "transsexualism" and "gender identity disorder of children" with "gender incongruence of adolescence and adulthood" and "gender incongruence of childhood" respectively. ICD-11 also moved gender incongruence out of the "mental and behavioural disorders" chapter into a new chapter entitled "conditions related to sexual health". The court also considered the 5th edition of the Diagnostic and Statistical Manual of Mental Disorders published earlier by the American Psychiatric Association ("DSM-5") in 2013, which removed the term "disorder", replacing it with "gender dysphoria";
- The Government consultation on reforms to the 2004 Act published in July 2018 which considered the option of the removal of the requirement of a medical diagnosis in order to achieve legal recognition of an acquired gender. It was stated that by requiring a diagnostic report, the process in the 2004 Act "perpetuates the outdated and false assumption that being trans is a mental illness".
- The Government Equalities Office ("GEO") post-consultation equality impact assessment for the 2004 Act published in April 2019. The document noted that 64% of respondents to the consultation thought the requirement for a diagnosis of gender dysphoria should be removed and 80% said the requirement for a medical report detailing treatment received should be removed.

GEO officials wrote to the GEO Minsters in April 2019 recommending that they "agree to remove the medical aspects of the process; the need for diagnosis of gender dysphoria and the second medical report". However, Mr Oliver Entwistle OBE, the Deputy Director of LGBT Policy and Operations within the GEO gave evidence to the court that, following the general election on 12 December 2019, "the new government indicated that it was not minded to dispense with the need for a medical assessment under GRA because it provides a safeguard, ensuring people do not embark unadvisedly on the process of legally changing their gender identity, but that it would actively explore the possibility of removing the term "dysphoria" from the legislation." Mr Entwistle gave evidence of exchanges between GEO officials, the Secretary of State (who was also Minister for Women and Equalities) and the Minister and officials in the Department of Health and Social Care during March – June 2020. This culminated in a submission of 2 July 2020, prepared for the Secretary of State by GEO officials which noted that "[the Secretary of State] and No. 10 have agreed the following response to the GRA consultation: (i) Keep the current legislation as it stands …"

The court said it was unclear on the evidence whether a decision was taken in principle that no change to any aspect of the 2004 Act was appropriate, from which it followed that the legislation simply did not require to amended and would not be; or whether a decision was taken that the legislation was not going to be amended, so that the changes which might otherwise have been thought to be a good idea would simply have no mechanism to be brought forward. It referred to the evidence from Mr Entwistle which averred that it was his understanding that the government's decision not to change the gender dysphoria requirement was primarily a result of a wider decision not to move forward with any reform of the 2004 Act, as well as being informed by engagement with clinical experts. On 22 September 2020, the Secretary of State published a Written Ministerial Statement confirming that "it was the Government's view that the balance struck in the 2004 Act was correct, in that there are proper checks and balances in the system and also support for people who want to change their legal sex".

Relevant authority from the European Court of Human Rights

The court examined the relevant decisions of the European Court of Human Rights ("ECtHR") in paragraphs [90] to [110]. In a range of decisions the ECtHR had established that Article 8 rights required the legal recognition of an acquired gender on the part of a transgender individual in certain circumstances. The leading authority of relevance to the applicant's case is *AP, Garçon and Nicot v France*[2] which held that a requirement to demonstrate the existence of a gender identity disorder in order to secure legal gender recognition was not a violation of Article 8; nor was a requirement to undergo a medical examination. The ECtHR had no difficulty concluding that Article 8 was engaged but noted that in implementing the positive obligations under Article 8 Member States enjoy a certain margin of appreciation. In the course of the judgment the ECtHR undertook a comparative review of the system for legal gender recognition across the Council of Europe member states, which identified that a psychiatric diagnosis was among the pre-requisites for legal recognition of transgender identity in a majority of those countries. The respondent relied heavily on this authority in order to demonstrate that there is no European consensus on the inappropriateness of requiring a psychiatric diagnosis as a condition for gender recognition.

Convention scrutiny by domestic courts within the margin of appreciation

However, the UK Supreme Court has held that where the ECtHR has left a matter to a state's margin of appreciation, then domestic courts have to decide what the domestic position is, what degree of involvement or intervention by a domestic court is appropriate, and what degree of institutional respect to attach to any relevant legislative choice in the particular area. It then went on to consider what the proper approach for it to take was. The court said it will normally be very cautious about making a decision that legislation infringes a Convention right within the member state's margin of appreciation. The parties were agreed, consistent with the ECtHR authority, that the ultimate test in this case was whether the impugned provisions of the 2004 Act strike a fair balance between the competing interests of the individual and the community as a whole.

Has a fair balance been struck by the impugned provisions?

The applicant's primary case in relation to the requirement for a diagnosis of gender dysphoria was simply that it is unnecessary in light of the remaining criteria in section 2(1) of the 2004 Act (i.e. that the applicant has lived in the acquired gender for two years, intends to continue to live in the acquired gender until death). The applicant further objected to the requirement to provide a diagnosis as an out-of-date notion and "needlessly derogatory and offence towards transgender people" which she submitted was a view shared by the GEO in the 2018 consultation and subsequent consideration of reform. The court noted that the current version of the General Guide for applicants under the 2004 Act published by the HM Courts & Tribunals Service which was produced in 2020 appears to shy away from the definition in the 2004 Act as a "disorder", instead describing gender dysphoria as a "recognised medical condition" and "an overwhelming desire to live in the opposite gender to that which a person has been registered at birth".

The respondent submitted that the requirement for medical reports serves the broad aim of ensuring that the decision to change gender is taken in a fully informed and considered manner and with a proper basis. It also submitted that it was appropriate for the State to regulate the acquisition of a

[2] (2017) (App Nos 79885/12, 52471/13 and 52596/13)

new identity in order to act as a barrier to applicants making ill-thought out or precipitous applications and also against "cheating" the process.

Conclusion on fair balance – the requirements for a diagnosis

The court was satisfied that the requirement that a relevant diagnosis be provided in support of an application for a GRC was and remains within the discretionary areas of judgment available to Parliament. It added that the requirement that a medical report be provided by a specialist in the relevant area is a corollary of the requirement that a diagnosis must be obtained as part of the statutory criteria for the grant of a GRC. The court said that in reaching this conclusion it was mindful of the approach adopted by the ECtHR in the *AP, Garçon and Nicot* case, where it was stated that the conditions under which legal gender recognition must be afforded to transgender persons is left to Member States to determine given the sensitive, moral and ethical issues which this entails. It said there was no consensus within the Council of Europe member states as to when gender recognition must be granted but noted that a trend may be starting to emerge of moving away from a requirement of a medical diagnosis. The court said that it therefore did not consider this to be an appropriate case to forge ahead of the ECtHR jurisprudence and require recognition to be granted in the absence of a relevant specialist diagnosis.

In this general respect, the court did not consider that the 2004 Act fails to strike a fair balance between the needs of the applicant (or other individuals seeking gender recognition) and the community as a whole. It said the material exhibited by Mr Entwistle demonstrated that the present Government wishes to retain a medical element to the process with the continued involvement of gender specialist practitioners, partly in order to deter vexatious applications or abuse of the GRC process, and partly in order to provide appropriate support, advice and safeguards for applicants. It said this is consistent with the recognition by the ECtHR in *AP, Garçon and Nicot* that a requirement for a mental health diagnosis could be of utility and important in assessing the appropriateness of a legal change in gender identity as a means of safeguarding an applicant's own interests and in the interests of legal certainty for the community more generally.

The court accepted the respondent's submission that the legal change in a person's gender is a significant and formal change in their status with potentially far-reaching consequences for them and for others, including the State:

> "It is not easily undone. The State is entitled, in my view, to require that an applicant for a GRC provide evidence from an appropriately qualified medical practitioner – who will not only be an expert in the field but also subject to both a duty of case to the applicant and exacting professional standards in the public interest – which sets out why the applicant is seeking a legal change of gender and provides a measure of reassurance that this has been discussed with an independent expert and reflected upon carefully by the applicant."

The court said it was emphatically not its role to judge whether this is the best or most appropriate way to provide for gender recognition. It commented that Parliament was and is entitled to require some additional evidence about the background to, and reasons for, an application for a GRC by way of medical evidence which addresses the basis and context for the application. It also considered that there was force in the submission that the government was entitled to take into account a desire to maintain consistency of approach across the legal and medical processes for ender transition with specialist medical input in each.

Conclusion on fair balance – the required diagnosis

The court reached a different conclusion on the question of what it is that the required first medical report must demonstrate. As the 2004 Act stands, it is incumbent on an applicant for a GRC to show that they have, or have had, a "disorder". The court said this requirement is imposed on them in circumstances where the Government does not now contend that a transgender person necessarily has, or has ever had, a disorder: "indeed, its public-facing documents say the opposite". The court added that the requirement on an applicant to prove that they have or have had a disorder is "an unnecessary affront to the dignity of a person applying for gender recognition through the legal process set out for that purpose by Parliament".

The court noted that the 2004 Act provides that transgender persons are entitled to obtain a GRC changing their gender in law to that of their acquired gender without gender reassignment surgery in order to respect and give effect to this aspect of their private life, bearing in mind the principle of autonomy. This system is designed to give effect to rights within the Article 8 sphere and plainly engages them; but applicants for a GRC therefore face a quandary: "In order to assert their legal rights to gender recognition they must denigrate that aspect of their identity which the 2004 Act is in principle designed to vindicate".

The court said the only real basis put forward by the respondent to defend retention of the present definition of gender dysphoria (as opposed to gender incongruence) as the required diagnosis and the statutory definition of that condition as a "disorder" was the suggestion that medical practitioners were familiar with that diagnosis and that a change in practice may present difficulties. The court did not find this at all convincing, saying that it was difficult to accept that specialists could not readily become familiar with any change in approach and that the ICD-11 and DSM-5 have already made the necessary changes:

> "In summary, the Government's decision to continue to require supporting medical evidence and a specific diagnosis before a Gender Recognition Panel is obliged to grant a GRC may be viewed as part of the "proper checks and balances" which the State, in its judgment, is entitled to adopt and passes Convention muster; but the requirement that the diagnosis be one which is specifically and expressly defined as a "disorder" is not."

How can the identified incompatibility be addressed?

The court went on to consider how the incompatibility identified in the judgment could be addressed and, in particular, whether it could be addressed through the obligation to interpret the 2004 Act compatibly with Convention rights under section 3(1) of the Human Rights Act 1998 ("the HRA") or whether a declaration of incompatibility should be issued under section 4 of the HRA. The court determined that the parties should be given a further opportunity to make submissions on this issue.

> "How best this might be done (subject of course to the question of appeal of this judgment) and whether or not removal of the identified incompatibility can be achieved consistently with the limits of the court's function under section 3 of the HRA, and without straying into impermissible judicial legislation, is a matter on which I propose to hear the parties further."

Conclusion

- The applicant failed in her claim that, in principle, the general requirement for a diagnosis set out in a specialist report under sections 2(1)(a) and 3(1) of the 2004 Act is a breach of her Article 8 rights. Parliament's determination that an applicant for a GRC must provide a report with specialist medical input in support of their application strikes a fair balance between her interests and those of the community having regard to the discretionary area of judgment available to Parliament on this issue and the aims which that requirement is designed to pursue;
- The applicant succeeded in her claim insofar as the 2004 Act imposes a requirement that she prove herself to be suffering from, or to have suffered from, a "disorder" in order to secure a GRC. The court said that that specific requirement is now unnecessary and unjustified, particularly in light of diagnostic developments, and fails to strike a fair balance between the interests of the applicant and those of the community generally.

The court will hear the parties further on the question of remedy as to the identified incompatibility and how it may properly be addressed. It will also hear submissions on the proper way to proceed in respect of the practical difficulties cited by the applicant in obtaining a specialist medical report, which is a further aspect of the applicant's claim which was previously stayed pending determination of the issues of principle addressed in the court's judgment today.

NOTES TO EDITORS

1. This summary should be read together with the judgment and should not be read in isolation. Nothing said in this summary adds to or amends the judgment. The full judgment will be available on the Judiciary NI website (https://judiciaryni.uk).

ENDS

If you have any further enquiries about this or other court related matters please contact:

Alison Houston
Judicial Communications Officer
Lord Chief Justice's Office
Royal Courts of Justice
Chichester Street
BELFAST
BT1 3JF

Telephone: 028 9072 5921
E-mail: Alison.Houston@courtsni.gov.uk