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The Gender Recognition Act: Past, Present, and Future

By Lauren Pursey

|Preamble|

| This article shall focus on the landmark 2004 Gender Recognition Act and associated legal cases. It will explore the legal rulings that lead to the Act being passed, the content of the Act and the impact this had on the transgender community in the UK, including subsequent legal issues. |

The Original Act

The Gender Recognition Act (GRA) 2004 was, for its time, a landmark piece of legislature, which allowed transgender people in the UK to have their true gender recognised by law and addressed their legal rights in regard to marriage, pensions and inheritance.

The original act sets out the application process for a Gender Recognition Certificate (GRC), which, if granted, enables a transgender person to obtain a new birth certificate with their ‘acquired’ gender. Those eligible to apply include ‘a person of either gender who is aged at least 18’ on the basis they are ‘living in the other gender’, or have legal gender recognition in another country.¹ The criteria which an applicant must meet in order to be granted a GRC is as follows: the applicant must have a diagnosis of gender dysphoria, they must have lived in their ‘acquired’ gender for a period of two years prior to their application, and must declare their intention to live in their ‘acquired’ gender until death. The evidence required includes either a report by a registered medical practitioner in the field of gender dysphoria or a chartered psychologist in the same field, in addition to a report by another medical practitioner. These reports must detail the diagnosis of the applicant’s dysphoria and include details of any treatment undergone as part of their transition.² The application is judged by a Gender Recognition Panel comprised of ‘legal members’ and ‘medical members’.³ If an application is successful, then a GRC is issued and the applicant’s gender ‘becomes for all

¹ GRA Section 1

² Section 3

³ Schedule 1

purposes the acquired gender'.⁴ However, if unsuccessful, an applicant may after 6 months make an appeal on a point of law.⁵

Background

The passing of the GRA culminated years of legal disputes surrounding transgender people's rights. I will focus on two key cases, the first of which is *Corbett v. Corbett* 1970. Arthur Corbett filed for a declaration that his marriage to a transwoman, April Ashley, was void as Ashley was legally of male sex.⁶ The case is particularly uncomfortable to read. The judgement conveys transphobic bias and is intensely medicalised. Ashley is sometimes referred to by the wrong pronouns and the report details the invasive medical assessments she underwent for the trial, which involved 'an unusually large number of doctors'.⁷ Judge Ormrod established four criteria to determine the sexual condition of an individual: chromosomal factors, gonadal factors, genital factors, and psychological factors.⁸ The psychological factors were however disregarded, ruling congruent biological criteria as the deciding factor for legal sex. Therefore, the marriage was ruled void as the tests determined Ashley's legal sex as male.⁹ The effects of this judgment were devastating to the transgender community, Ormrod's biological criteria continued as the basis to determine legal sex for over 30 years, preventing full legal gender recognition for all transgender people.

Christine Goodwin v. The United Kingdom is the most significant ruling in regard to the GRA.¹⁰ Christine Goodwin, a transwoman, applied to the European Commission of Human Rights in 1995, alleging violations of Articles 8 and 12, of the European Convention on Human Rights 'in respect to the legal status of transsexuals in the UK and particularly their treatment in the sphere of employment, social security and marriage.' The key complaint was that transgender individuals in the UK for social security, national insurance and employment purposes were recorded as their sex assigned at birth. This meant

⁴ Section (1)

⁵ Section 8

⁶ Press For Change, 'Case Law: Legal Gender Recognition, (*Corbett v. Corbett* pdf)' p. 2, pp. 5-6

⁷ PFC p.7

⁸ PFC p.14

⁹ PFC p.19

¹⁰ *Christine Goodwin v. The United Kingdom*, no.28957/95, ECHR 2002-VI (pdf)

Goodwin was ineligible for a state pension at 60 and the lack of legal recognition for her gender led to discrimination and unjustified difference in treatment.¹¹ The applicant argued that since rapid changes in scientific understanding and social attitude to ‘transsexualism’ were occurring, there was no reason for the UK to avoid implementing gender recognition laws.¹² The court reflected that, in previous cases such as *Rees v. the United Kingdom (1986)*, the UK’s refusal to alter birth certificates was not regarded as violating Article 8. The Working Group Report (April 2000), which highlighted the problems faced by transgender people in the UK and identified a potential solution of granting legal recognition of the ‘acquired’ gender, was evaluated as evidence of social change in the UK.¹³ It was determined that, since Goodwin had undergone gender confirmation surgery through the National Health Service, it appeared ‘illogical to refuse to recognise the legal implications of the result to which the treatment leads’.¹⁴ The court unanimously upheld there was a violation of Articles 8 and 12 of the Convention. This ruling held the UK responsible for implementing a process by which transgender people could change their legal gender, leading to the GRA and disregarded Ormrod’s criteria as determining legal sex.¹⁵

Interim GRC’s and Subsequent Cases

The GRA is illustrative of the intersection of LGBTQ+ rights. Since same sex marriage was not yet legal in the UK, a transgender person who was married would have to choose between full legal recognition of their gender or their marriage. A successful married applicant would be issued an Interim GRC and was required to obtain a divorce in order to be issued with a full GRC.¹⁶ This issue was brought before The European Court of Human Rights in 2006 in the cases *Parry v. The United Kingdom* and *R. and F. v. The United Kingdom*. In the first case, the applicants had been married for over 40 years and stated their wish to remain as ‘a loving married couple.’¹⁷ One of the applicants had

¹¹ pp. 2-5

¹² p.18

¹³ p.12

¹⁴ p.23

¹⁵ p.29

¹⁶ GRA Section 4(3), Section 5 (a)

¹⁷ *Parry v. The United Kingdom*, no.42971/05, ECHR 2006-XV (pdf)

successfully applied for a GRC in 2005 but had only been issued with an Interim Certificate. In the second case, the applicants had married in 1998 and the second applicant wished to obtain a full GRC in order to have her gender legally recognised.¹⁸ In both cases, the applicants complained under Article 8 of the Convention that the GRA represented an unlawful interference with private and family life, and under Article 12 that it violated their right to marry. They also complained under Article 14 that the provisions requiring divorce were discriminatory¹⁹ and that they did not view a civil partnership, available under the Civil Partnership Act 2004, as a full substitute for marriage.²⁰

Both applications were declared inadmissible, despite admittance that the applicants ‘must, invidiously, sacrifice her gender or their marriage’. In those terms, there is a direct and invasive effect on the applicants’ ‘enjoyment of their right to respect for their private and family life’.²¹ The court emphasised that Article 12 stated particularly ‘men and women’ have the right to marry ‘according to the national laws governing the exercise of this right’. Therefore, Parry’s marriage was void under Section 11 of the *Matrimony Causes Act 1973* and F’s marriage would be void due to Section 5 of the *Marriage (Scotland) Act 1977*, since the legislations held marriage could only be between members of the opposite sex.²² Additionally, it was ruled that, in regard to Article 8, a fair balance had been struck as, although the applicants had to divorce, they could still under the Civil Partnership Act acquire legal status for their relationships.²³

Recent Developments

Following the legalization of same-sex marriage, the GRA has been amended so that transgender people who are already married can obtain a GRC without having to divorce. However, a controversial amendment was made requiring evidence of a statutory declaration by the applicant’s spouse that they consent

¹⁸ R. and F. v. The United Kingdom, no.35748/05,ECHR 2006 (pdf)

¹⁹ Parry pp.5-6, R p. 7

²⁰ Parry p.9, R p. 3

²¹ Parry p.10 , R p.12

²² Parry p.5, R. p .5

²³ Parry p.10, R p. 14

to the continuation of the marriage after a full GRC is issued.²⁴ If the spouse does not consent, then only an Interim GRC will be granted.²⁵

In 2018, the Government ran a consultation on reforming the GRA as, since 2004, only 4,910 people had legally changed their gender despite estimations that around 200,000 to 500,000 people in the UK are transgender.²⁶ Results showed many transgender respondents had not applied because they found the current process ‘too bureaucratic, too expensive and too intrusive’.²⁷ 64.1% of respondents stated they felt ‘there should not be a requirement for a diagnosis of gender dysphoria’ and 80.3% of the respondents favoured the removal of the requirement of a medical report detailing all treatment received.²⁸ Reasons given for this include that these elements perpetuate ‘the outdated and false assumption that being transgender is a mental illness’.²⁹ Additionally, 78.6% were in favour of removing the requirement for evidence of living in the acquired gender for 2 years and 64.7% thought changes needed to be made to the GRA to accommodate those who are non-binary. The Government announced in September 2020 very minimal changes, not in line with the above responses, which uphold the current requirements of the GRA. However, the application fee, which 58.5% of respondents were in favour of removing³⁰, will be significantly reduced and the process digitised.³¹

To conclude, I hope this exploration of the GRA has not only shown how far the UK has come in regard to transgender people’s rights but has also drawn attention to how far it still has to go. While one would hope we have moved beyond the obvious bias of the *Corbett v. Corbett* ruling, much of the language used in today’s legislation still seems somewhat outdated. The focus on the medical elements of the transition process is still predominant in legislature, despite transgender people expressing the barriers and stigma this creates, and the law still excludes those whose identities are not accounted for within traditional gender binaries. I would in particular like to draw comparison

²⁴ GRA section 3 (6B)

²⁵ GRA section 4 (3)

²⁶ Consultation p.1, 10

²⁷ Consultation p.11

²⁸ Analysis, p.8

²⁹ Consultation p.21

³⁰ Analysis P.9, 12

³¹ Government Equalities Office. ‘Statement’.

between the changes enabled by The Working Group Report and its impact in the Goodwin v. UK case and the recent government consultation which yielded much less progressive results, revealing how transgender people's voices in the UK are still being overlooked in relation to the legislation which most impacts their lives.

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