

Tribunal decision

Case Number 1802020/98

Decision sent to the parties on 18 March 1999, and entered in the register

The Employment Tribunals between

Applicant: A

Respondent: The Chief Constable of the West Yorkshire Police

And decision of the employment tribunal held at Leeds on 22-25 February 1999

Chairman: Mr D R Sneath TD TL

Members: Mrs T L Frost, Mr G Nicol

Representation

For the Applicant: Ms S Harrison

For the Respondent: Mr D Jones

Decision

The unanimous decision of the tribunal is that the respondent has discriminated against the applicant contrary to Part II of the Sex Discrimination Act 1975 by refusing to offer employment in the office of Constable. Determination of remedy is adjourned to a date to be fixed.

Extended reasons

1. The applicant is a male to female transsexual who underwent gender reassignment surgery on 8 May 1996. She applied to join the respondent's police force in 1997. In early 1998 she was told that the respondent would not employ her because she was a transsexual. The practical reason was advice received by the respondent that the applicant could not carry out the full range of duties of a police officer in that she would not be able to conduct searches that went beyond outer clothing.
2. The applicant presented her application on 13 May 1998. The respondent entered an appearance on 6 July 1998 arguing that the applicant was legally male and that legal sex and apparent sex being congruent was a genuine occupational qualification for the job. Following a hearing on 10 September 1998, another tribunal chaired by the Regional Chairman decided that pursuant to Rule 13(1) of schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 1993 nothing should be done by way of publication in any newspaper, periodical or other publication or in any media broadcast or transmission to identify the applicant or which was likely to lead members of the public to identify her as the person affected by the subject matter of these proceedings. Furthermore, it was ordered that the tribunal or the Secretary should omit from the register or any decision, document or record of the proceedings, which was available to the public, any identifying matter which

was likely to lead to identification as aforesaid. That order was to remain in force unless and until it was revoked by an employment tribunal on the application of any party.

3. That decision was promulgated and the applicant's representatives took steps to bring it to the attention of the press. It has not been challenged and remains in force.

4. The applicant was able to bring her claim by virtue of the decision of the European Court of Justice in *P-v-S and Another* (1996) ICR 795. In its judgment the Court of Justice said:

"20. Accordingly, the scope of the Directive (76/207/EEC-[Equal Treatment 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.

"21. 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.

"22. To tolerate such discrimination would be tantamount, as regard such a person, to a failure to respect the dignity and freedom to which he or she is entitled, and which the court has duty to safeguard."

5. The respondent admitted that it had discriminated against the applicant on the ground that she had undergone gender reassignment but relied on [Corbett v Corbett \(otherwise Ashley\)](#) (1970) 2 All E R 33 to plead that the applicant's legal sex was male; she presented as a female; as such she would not be able to carry out the full range of policing functions required of a police officer. The respondent went on to aver that conformity of legal and apparent gender was a genuine occupational qualification for the job of police officer. In submissions, the applicant argued that such conformity was not a genuine occupational qualification within the meaning of section 7 of the [Sex Discrimination Act 1975](#). Alternatively, if it was, then the respondent could make other arrangements without undue inconvenience to accommodate the applicant. The applicant relied on the test of proportionality described by the European Court of Justice in **Johnson v Chief Constable of the Royal Ulster Constabulary** (1987) 1 QB 129.

6. For its part the respondent submitted that the legal test of sex was to establish the sex of the individual at birth. That test applied to the definition of sex in Part IV of the Police and Criminal Evidence Act of 1984 and the Codes promulgated under it. That test in effect precluded the applicant as a legal male from searching female suspects and prisoners. Thus, presenting as a woman and being biologically female at birth were genuine occupational qualifications for the office of constable. Obstacles arising in the fields of criminal law, criminal procedure and tort were such that they overrode the principle of equal treatment. Having regard to section 7 of the Sex Discrimination Act 1975, being a woman was a genuine occupational qualification for the job because it needed to be held by a woman to preserve decency and privacy for the reasons set out in section 7(2)(b).

7. We heard evidence from the applicant. She called on no other oral evidence but relied also on the affidavits of Stephen Whittle, a senior law lecturer at Manchester Metropolitan University and Professor Gooren, a leading Dutch expert on transsexualism, medicine and the law. She also relied on statistical material to show that the United Kingdom was out of step with other member states of the European Union and the Council of Europe in its treatment of transsexuals. In particular, she referred to cases in the European Court of Human Rights in which the majority in favour of the United Kingdom had considerably narrowed by 1998 on the human rights issue as to whether the United Kingdom's failure to rectify birth registers following gender reassignment was a breach of Article 8 of the European Convention on Human Rights - the right to respect for private life.

8. The respondent called 3 witnesses, Inspector Sheila Spencer whose evidence was based on 23 years of practical policing, Assistant Chief Constable Gregory Wilkinson who initially allowed the applicant's application to join the respondent's force to be processed but then following advice changed his mind and Superintendent George Robinson who also dealt with the practical aspects and difficulties of appointing the applicant to the office of constable.

9. No-one's credibility was significantly in issue. Indeed we are grateful to all the witnesses including the applicant for the straightforward way in which they gave their evidence. Ms Harrison objected to some anecdotal evidence produced by Inspector Spencer based on a straw poll around her sub-division. It was designed to counter academic research suggesting a low incidence of searching required of police constables. We admitted the evidence because it was relevant and might help us on the issue as to whether or not the ability to search was an integral part of being a police officer. Nevertheless, given its anecdotal nature, we have preferred to rely on the statistics produced by the computer of the respondent's force and by applying our own experience to the sort of policing tasks described by the respondent's witnesses.

10. Accordingly, we find the following facts. In 1996 the applicant decided that she wanted a career in the police force. She applied to the respondent's force because it was away from the area in which she lived and yet accessible to it. In order to function normally in society, she needs to conceal the fact that she is a transsexual. She is willing, however, to disclose that fact to those who need to know it for whatever purpose.

11. Over the Christmas period 1996/1997 she received an application form, an occupational health questionnaire and supporting literature. Because the questionnaire warned of the consequences of failing to give an informed and appropriate account of her health history, the applicant telephoned the respondent's occupational health department. She disclosed that she was transsexual. She was put in touch with the respondent's medical officer, Dr Shinn. He said that the force did not mind and that under its equal opportunities policy it was not concerned about her transsexualism. He advised her to answer the questionnaire honestly. For her part, the applicant enclosed a medical report confirming her gender reassignment surgery and that psychiatric assessments had concluded that she had no psychiatric problems and was stable and genuine. Applicants to the police force are not normally subjected to psychiatric assessments.

12. In her letter of 4 January to the respondent's Principal Personnel Officer she said this:

"You will note, from the information provided, I am transsexual. I have discussed my gender and medical history with the force's doctor ... Nevertheless, I have enclosed testimonies from the consultant surgeon and Oldham College with this letter. I have also forwarded a medical report to the Occupational Health Unit.

Finally, I note from your equal opportunities policy that my status should not - without justification - affect my application. However, may I bring to your attention the current situation as I understand it (Corbett v Corbett judgment, 1970), which states transsexual women have to be searched by men, and vice versa for transsexual men ..."

13. On 16 January 1997 the applicant received a reply from Dr Shinn indicating that the respondent had decided to allow the applicant's application to proceed. The matter had been referred to Assistant Chief Constable Wilkinson. He told the Principal Personnel Officer to deal with the application as if it was one from any other female applicant. As far as he was concerned, the applicant was at the time female. He was then unaware of the problem which the applicant herself had anticipated in her letter of 4 January.

14. On 3 February Dr Shinn wrote to the applicant saying that her medical history was somewhat complex. He could not advise the respondent finally until he had had the opportunity to consult the applicant at the proper point in the recruitment process.

15. After some delay on 11 April 1997 Mr Wilks wrote saying that full consideration had been given to the application and the points raised in the applicant's letter of 4 January. He was, however, happy to proceed with her application.

16. The applicant was then invited to attend a recruitment assessment on 11 July 1997. She was presented with a number of role play scenarios. Police officers took the role of actors. They assessed her ability to deal with each situation. One scenario involved dealing with an aggressive and confrontational person; another required her to deal with someone who was mentally ill. Following each incident she was expected to make either a written or oral but accurate account of the events which had taken place. She was later asked to complete another written assessment which involved analysing a number of conflicting witness statements taken following a road traffic accident. The applicant attended with one other woman applicant and 4 men. Her transsexualism was not disclosed.

17. On 15 July 1997 Mr Wilks told her that she had successfully completed the first assessment. She was then invited to take the Police Initial Recruitment Test. To this end she attended Police Training School on 5 September 1997. There she was subjected to tests designed to measure her ability to spell words and construct sentences; check information quickly and correctly; solve numerical problems; and reason logically when given facts about events. She also undertook a Police Physical Fitness Test. There were about twenty-four people in her group evenly divided between the sexes. She was accepted as a woman by the other potential recruits. She was assessed against the physical fitness criteria for women. She used the women's communal changing facilities. She had no difficulty interacting with the group.

18. On 11 September 1997 Mr Wilks told her that she had passed both tests. He advised her to maintain her level of fitness during the remaining stages of the recruitment process. He said that he would continue to process her application and contact her in due course.

19. Thereafter the respondent took up the applicant's references but after 9 October 1997, the applicant heard nothing. On 2 November she wrote to Mr Wilks and said this:

"Having recently completed the Recruit Assessment, Fitness and Entrance Tests, I will be grateful if you can provide me with further information. My specific concern is the Police and Criminal Evidence Act which, I understand, requires police officers carrying out body searches to be the same sex as the suspect."

Mr Wilks replied by letter dated 12 November but failed to answer the question raised by the applicant. By January 1998 she had still not received an answer. Anticipating a problem, she spoke by telephone to the respondent's Equal Opportunities Officer on 19 January 1998. She was led to believe that transsexuals were able to serve as police officers but that they could not carry out the full duties because they would not be allowed to search women.

20. Having heard nothing more, the applicant wrote again on 23 February and on 9 March, Assistant Chief Constable Wilkinson wrote to her saying that, since her initial application to join the respondent's force, the issue of transsexual applicants had been further considered and that a decision had been made that transsexuals would not be appointed to the force. He went on to say that the decision had been made on the basis that candidates would not be appointed unless they were capable of performing the full duties of a police constable. He then gave as the reason legislation affecting the carrying out of searches on persons in custody by transsexuals.

21. The applicant believed that, because a new Chief Constable had taken up his appointment on the day on which that letter was written, he had changed the policy. We accept that that was not the case. Instead, because the applicant got through the initial assessments, the Assistant Chief Constable had decided as a matter of caution to seek legal advice on the propriety of recruiting a transsexual to the office of constable. That advice was negative; hence the decision to terminate the applicant's application.

22. Both Inspector Spencer and Assistant Chief Constable Wilkinson accepted that, if the applicant could be treated as a woman, then she would be able to undertake the full range of duties of a police constable. They were advised, however, that she was still legally male. The police have a power to stop and search, for example, where the officer has reasonable grounds for suspecting that articles unlawfully obtained or possessed are being carried. Once someone has been lawfully arrested, the officer has a right to conduct a search of that person. Overall, as a matter of policy, policing is done as far as possible by consent. Thus, some searches are done with the consent of the suspect; others are done coercively. There is a whole range of situations in which an officer might be required to search an individual. In the street persons are searched for possession of controlled drugs. These are often hidden within undergarments. Persons may be searched because the officer suspects that they are going equipped for theft or burglary. The maintenance of public order requires skilful policing of events which attract large crowds. These include football matches and pop concerts. Large numbers of young people come out onto the streets in the small hours of the morning following the closure of night clubs. At football matches there can be intense rivalry between supporters of the opposing teams. Offensive weapons are sometimes concealed

about the person and may include such unusual objects as coins whose edges have been sharpened. Many of those who emerge from night clubs will have been drinking. Some may be in violent mood. It is necessary for police officers in such situations to act quickly in order to stop trouble before it breaks out.

23. An underlying principle in Code A, being the code of practise for the exercise by police officers of statutory powers of stop and search, is that every reasonable effort must be made to reduce to a minimum the embarrassment that a person being searched may experience. Searching of outer garments can be done by opposite sex officers. As a matter of policy, however, male police officers do not even conduct outer garment searches of women. For any touching might be misunderstood either mistakenly or deliberately in order to manipulate the situation to the suspect's advantage.

24. Once a search goes below the outer garments, then it must be conducted by an officer of the same sex as the suspect or prisoner. Once a person is in custody in a Police Station, it is considered desirable for a female gaoler to be responsible for female prisoners. Failing that, the requirement is that two male officers carry out the periodic checks of a female prisoner so that any allegation of misconduct can be countered. Even that is insufficient where a female prisoner has special needs relating to personal hygiene when only a female officer will be an appropriate point of contact. Searches involving the removal of outer garments must be conducted by an officer of the same sex and may not be made in the presence of the opposite sex unless the person being searched specifically requests it. There is also provision for intimate searching which again must be carried out by a constable of the same sex as the person being searched. Finally, there is a policy requirement that a woman police officer is present during any medical examination of a woman has complained of rape or indecent assault.

25. Statistics provided by the respondent showed that the incidence of stop and searches had increased dramatically between 1996 and 1998. The increase reflected both better data recording and increased police activity. In 1996 the respondent's force recorded 12,710 persons having been searched against their will of whom 746 were women. Another 1447 gave consent of whom 69 were women. Those figures rose to 21,025 and 1,351 without consent in 1997 and 2,462 and 108 with consent in the same year. By 1998 the numbers had risen to 28,893 of whom 1,723 were women. 3,315 persons gave their consent of whom 141 were women. Thus in 1998, of all the persons stopped and searched consensually or otherwise 5.78% were women.

26. During 1997/1998 there were 96,367 arrests within the respondent's force area. All those persons arrested would have been subjected to a search. Of those searched 82,356 were known to be male and 13,934 female so that women represented nearly 17% of those whose sex was properly recorded.

27. This is to be compared with the number of police constables available to carry out searches. As at 22 February 1999 there were in Inspector Spencer's Division 2,177 police constables assigned to operational duties of whom 1,705 were male and 472 were female, a proportion of 21.68%. Inspector Spencer's own experience is that, although a supervising officer, she has been called upon to search female prisoners on behalf of male officers because no woman police officer was available. Inspector Spencer is a uniform patrol inspector working out of Weetwood Police Station from which a sub-division of the respondent's police force is commanded. That sub-division has a total establishment of 242

officers of whom 201 are male and 38 are female. Of the 38 female officers, 29 are employed on uniform patrol duties divided between 4 rotas and 2 police stations. Of those 29, 5 are employed on a part-time basis. The consequence is that there is on occasions a shortage of women police officers to conduct searches and carry out the other operational tasks for which being a woman is an occupational qualification. Sometimes a woman police officer has to be brought in from another Division in order to fulfil a search or related task.

28. Taking as their premise the fact that the applicant is legally male, the respondent's witnesses point out that she cannot search suspects and prisoners where the same sex is a requirement. Furthermore, presenting as a woman, she cannot search male suspects and prisoners. Thus, whilst the applicant might as a police officer be able to do a search of the outer garments of a woman suspect for a knife or some other offensive weapon, if she found nothing and still suspected that such an article was concealed about the person, she would have to call for another woman officer to conduct the search. That would inevitably draw attention to her transsexualism. The suspect and others in her company might well ask why it was necessary for an apparently female officer to have to call on the help of another woman officer. That might lead to a confrontation. Evidence might meanwhile be lost. An opportunity to manipulate the situation to the suspect's advantage would arise. The opportunity for quick action to prevent trouble might have been lost.

29. A police constable costs the respondent about £40,000 per annum in pay and other overheads. About four hundred of the respondent's 5,100 police officers are currently on restricted duties. They are either expected to improve so that they can fulfil the full range of duties or they are expected to retire on ill health grounds, failing improvement. It would not be economic for the respondent to engage as a police officer someone who would immediately be on restricted duties and potentially on those duties for the full 30 years span of a police career. Having said that, however, according to figures quoted in P -v- S, in Europe one in 30,000 males seeks to change sex by means of surgery. Given a European population in excess of 200 million, the proportion of transsexuals to the general population is exceedingly small. The respondent has drawn our attention to one other transsexual applicant 'M' who took her case to an Industrial Tribunal in October 1996. She had undergone gender reassignment surgery in 1994 and in August 1995 applied to join the West Midlands Police. She too passed the initial test and was waiting to be admitted to the extended test when her application was rejected. Her claim before the industrial tribunal failed and, as far as we know, she did not appeal.

30. On those facts and applying our own experience as a former practising advocate and citizens, we find that searching is an integral part of being a police constable. It is what the respondent describes as a core competency and one importantly taken into account when, pursuant to health and safety legislation, the respondent conducts risk assessments relating to particular operational situations. Further, we find that it would objectively be unreasonable to require the respondent to employ the applicant as a police constable if in law and fact she could not carry out the full range of a police constable's duties. Having said that, we observe that to give effect to the respondent's view of the law would preclude transsexuals from ever becoming police constables and might have a similar effect in those other occupations and the training leading thereto where close personal interaction is a prerequisite for the job. We have in mind those who work in the field of caring for others which includes medical practitioners themselves.

31. We set out below the legislation and case law which we have applied to the facts of this case:

i. Under section 2 of the European Communities Act 1972 all such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties, and all such remedies and procedures from time to time provided for by or under the Treaties, as in accordance with the Treaties are without further enactment to be given effect or used in the United Kingdom, shall be recognised and available in law, and be enforced, allowed and followed accordingly; and the expression “enforceable Community right” and similar expressions should be read as referring to one to which that sub-section applies.

ii. Article 2 of the Council Directive 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 provides that the principle of equal treatment should mean that there should be no discrimination whatsoever on grounds of sex either directly or indirectly by reference in particular to marital or family status. The Directive should be without prejudice, however, to the right of Member States to exclude from its field of application those occupational activities and, where appropriate, the training leading thereto, for which, by reason of their nature or the context in which they are carried out, the sex of the worker constitutes a determining factor.

iii. Article 3 provides that the application of the principle of equal treatment means that there should be no discrimination whatsoever on grounds of sex in the conditions, including selection criteria, for access to all jobs or posts, whatever the sector or branch of activity, and to all levels of the occupational hierarchy. To that end, Member States should take the measures necessary to ensure that any laws, regulations and administrative provisions contrary to the principle of equal treatment should be abolished. Further those laws, regulations and administrative provisions contrary to the principle of equal treatment when the concern for protection which originally inspired them is no longer well founded should be revised.

iv. Under section 1 of the Sex Discrimination Act 1975 a person discriminates against a woman in any circumstances relevant to the purposes of any provision of the Act if on the ground of her sex he treats her less favourably than he treats or would treat a man. Section 6(1) renders it unlawful for a person, in relation to employment by him at an establishment in Great Britain, to discriminate against a woman in the arrangements he makes for the purpose of determining who should be offered that employment or by refusing or deliberately omitting to offer her that employment.

Under section 7(1), however, being a man is a genuine occupational qualification for a job only where, as argued in this case, the job needs to be held by a man to preserve decency or privacy because it is likely to involve physical contact with men in circumstances where they might reasonably object to it being carried out by a woman or the holder of the job is likely to do his job in circumstances where men might reasonably object to the presence of a woman because they are in a state of undress or are using sanitary facilities. Although the Sex Discrimination Act 1975 preceded the Equal Treatment Directive, the United Kingdom regarded that statute as discharging its obligations to approximate national laws under its Directive obligations.

v. We have already referred in part to the case of P -v- S. In order to understand the judgment of the court, it is necessary also to look at the opinion of Advocate General Tesouro. At paragraph 17 he rejected the idea of transsexualism giving rise to a third sex. He said:

“The argument just put forward, attractive as it is, requires a redefinition of sex which merits deeper consideration in more appropriate circles. Consequently, that is not the path that I propose that the court should follow. I fully realise that from time immemorial a person’s sex has merely been ascertained without need of the law to define it. The law dislikes ambiguities and it is certainly simpler to think in terms of Adam and Eve.

Having said that, I regard as obsolete the idea that the law should take into consideration, and protect, a woman who has suffered discrimination in comparison with a man or vice versa but denies that protection to those who are also discriminated against, again by reason of sex, merely because they fall outside the traditional man/woman classification.”

At paragraph 19 he said this:

“In the present case, what is required is at least a rigorous application of the principle of equality so that, therefore, any connotations relating to sex and/or sexual identity cannot be in any way relevant. Moreover, in trying to justify their relevance, it would be very hard to argue, and in any event it has not been claimed, that the abilities and roles of the person in question were adversely affected by her change of sex.

20. I must add that, for the purposes of this case, sex is important as a convention, a social parameter. The discrimination of which women are frequently the victims is not of course due to their physical characteristics but rather to their role, to the image which society has of women. Hence the rationale for less favourable treatment is the social role which women are supposed to play, and certainly not their physical characteristics. In the same way it must be recognised that the unfavourable treatment suffered by transsexuals is most often linked to a negative image, a moral judgement which has nothing to do with their abilities in the sphere of employment.

Such a situation is still less acceptable when the social change and the scientific advances made in this area in recent years are taken into consideration. Whilst it is true, as I have already said, transsexuals are in fact not very significant in statistical terms, it is equally true that for that very reason it is vital that they should have at least a minimum of protection. On this view to maintain that the unfavourable treatment suffered by the applicant was not on the grounds of sex because it was due to her change of sex, or else because in such a case it is not possible to speak of discrimination between the two sexes, would be quibbling formalistic interpretation and a betrayal of the true essence of that fundamental and inalienable value which is equality.”

vi. We believe that the judgment of the court reflects the opinion of the Advocate General. We are bound as a European tribunal as well as a national one to give effect, insofar as we can, to the inalienable value which is equality embedded in the Directive and the decision in P -v- S.

vii. What might be described as “the European approach” is given authority by the House of Lords in **R v Secretary of State for Employment ex parte Equal Opportunities Commission and Another** (1994) ICR 317 at 325 paragraph D et seq.

viii. In **Chessington World of Adventure Ltd v Reed** (1998) ICR 97 the Employment Appeal Tribunal (EAT) held that, since the employer in that case was not an emanation of the State, the applicant could not rely directly on the Directive. Of course, in this case the respondent is an emanation of the State. The EAT went on to say, however, that it was equally clear that the Sex Discrimination Act 1975 must be construed consistently with the Directive in order to achieve the purpose of the Directive, if such a construction was possible: see **Marleasing S A v La Comercial Internacional de la Elementacion S A** 1990 ECR I-4135.

ix. In **Johnston v Chief Constable of the Royal Ulster Constabulary** cited above the European Court of Justice was concerned with a reserve police officer whose contract was not renewed as a consequence of the respondent’s decision not to arm policewomen. One of the reasons given for that decision was that the carrying of firearms by a policewoman might create additional risks of their being assassinated. In that connection the court at paragraph 38 said this:

“It must also be borne in mind that, in determining the scope of any derogation from an individual right such as the equal treatment of men and women provided for by the Directive, the principle of proportionality, one of the general principles of law underlying the Community Legal Order, must be observed. That principle requires that derogations remain within the limits of what is appropriate and necessary for achieving the aim in view and requires the principle of equal treatment to be reconciled as far as possible with the requirements of public safety which constitute the decisive factor as regards the context of the activity in question.”

For the purposes of this case we propose to adopt the second sentence in that passage substituting for the words “*the requirements of public safety*” the words “*the requirement that a police constable shall be able to carry out the full range of duties including the searching of suspects and prisoners of the same sex*”.

x. **Corbett v Corbett** cited above was matrimonial case. Ormrod J in giving his Judgment at page 48 said:

“The question then becomes what is meant by the word “woman” in the context of a marriage, for I am not concerned to determine the “legal sex” of the respondent at large”

He then went on to lay down that sex for that purpose was determined by ascertaining chromosomal, gonadal and genital sex at birth.

xi. In **R v Tan and Others** (1983) 1QB 1053, the appellant was convicted under section 30 of the Sexual Offences Act 1956 of living off the immoral earnings of a prostitute. He was a transsexual and it was argued on his behalf that he was not a man for the purposes of that section. He was convicted and on appeal the Court of Appeal rejected that argument without hesitation. The court said that both common sense and the desirability of certainty and consistency demanded that the decision in **Corbett v Corbett** should apply for the purpose not only of marriage but also for a charge under section 30 of the 1956 Act. Given that that

was decision in the field of criminal law and we are concerned here with criminal procedure, we find that the combined effect of **Corbett v Corbett** and **R v Tan** is that Parliament meant that the same test should be used to determine sex where that word appears in the relevant provisions of the Police and Criminal Evidence Act 1984 and Codes promulgated under it.

xii. In [Sheffield and Horsham v The United Kingdom](#) in which the Judgment of the European Court of Human Rights was given on 30 July 1998, the essence of the applicants' case concerned the authorities' continuing insistence on determination of gender according to biological criteria and their refusal to annotate or update information inscribed on the Register of Births to take account of post-operative gender status. In the Court's view there had been no scientific or legal developments in the area of transsexualism since an earlier judgment which would persuade it to depart from its decision in that and other earlier cases. The United Kingdom was still entitled to rely on a margin of appreciation to defend its refusal to recognise in law transsexuals' post-operative sexual identity. For the court, it continued to be the case that transsexualism raised complex, scientific, legal, moral and social issues in respect of which there was no generally shared approach among contracting states. Although we found a review of the ECHR decisions instructive, they did not help us because we are not here dealing with margin of appreciation. There is none. The respondent has admitted breach of the principle of equal treatment. The question is whether or not the respondent has justified the derogation from it. We note, however, the strong dissenting voice in that Court and the narrowing of the majority vote to 11 to 9. We note also the relative isolation of the United Kingdom in both the European Union and the Council of Europe in this regard.

xiii. Section 1(2) of the Police and Criminal Evidence Act 1984 empowers a constable to search any person or vehicle and anything which is in or on a vehicle for stolen or prohibited articles. Part IV of the Act deals with the questioning and treatment of persons by the police. Section 54 empowers the police to search a person who is in custody at a police station or is otherwise in police detention in order to ascertain whether he has anything which he can use for such purposes as interfering with evidence or assisting him to escape. Section 54(9) requires that the constable carrying out a search shall be of the same sex as the person searched. Section 55 lays down the conditions for intimate searches and provides that a constable may not carry out an intimate search of a person of the opposite sex. Section 66 empowers the Secretary of State to issue Codes of Practice in connection with the exercise by police officers of, inter alia, the power to search a person without first arresting him and the detention, treatment, questioning and identification of persons by police officers. Section 67(10) provides that a failure on the part of a police officer to comply with any provision of such a Code shall not of itself render him liable to any criminal or civil proceedings.

xiv. Code A deals with the statutory powers of stop and search. Paragraph 3.1 provides that every reasonable effort must be made to reduce to the minimum the embarrassment that a person being searched may experience. Paragraph 3.5 provides that searches in public must be restricted to superficial examination of outer clothing. There is no power to require a person to remove any clothing in public other than an outer coat, jacket or gloves. Where on reasonable grounds it is considered necessary to conduct a more thorough search (eg by requiring a person to take off a T-shirt or head gear), this should be done out of public view, for example in a police van or police station if there is one nearby. Any search involving the removal of more than outer coat, jacket, gloves, head gear or footwear may only be made by an officer of the same sex of the person searched and may not be made in the presence of anyone of the opposite sex unless the person being searched specifically requests it.

xv. Section 78 of the 1984 Act provides that in any proceedings the Court may refuse to allow evidence on which the prosecution has to rely to be given if it appears to the Court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the Court ought not to admit it. The greatest use of section 78 has been in the field of confessions. It has been applied in conjunction with breaches of the important and detailed provisions on interviewing suspects set out in Code C. A breach of that Code may lead to the exclusion of a confession under section 78 but not every breach would trigger exclusion.

xvi. It is an indictable offence for any person to make an indecent assault on a woman. In the case of a woman of sixteen years of age or over, consent is a defence unless it is vitiated, for example by fraud as to the nature of the act. A girl under sixteen cannot in law give any consent which would prevent an act being an indecent assault. To constitute the offence, there must be an assault, that is a hostile act, compulsion, a threatening gesture or a threat to use violence. Further, that assault must be committed in circumstances of indecency.

xvii. An assault per se is also a criminal offence at common law. An assault can also give rise to a civil action. In tort an assault is described as an intentional offer of force or violence to the person of another. There is an assault if there is a menace of violence, with a present ability to commit it. An assault may be accompanied by a battery whereby the defendant directly and either intentionally or negligently causes some physical contact with the person of the plaintiff without the plaintiff's consent.

32. In his submissions to the tribunal, the respondent argued that to have committed the applicant to undertake searches of women would have exposed the respondent to:

a) potential civil actions in assault and trespass to the person. In those cases in which searches were in breach of the provisions of the 1984 Act as opposed to the Codes, the respondent would have no defence to any such claim;

b) potential criminal allegations of assault and indecent assault;

c) the criticism that senior police officers were condoning illegal actions;

d) attacks on admissibility or weight of evidence relating to such searches by defence advocates in criminal prosecutions;

e) charges of aiding and abetting disciplinary offences under the Police (Discipline) Regulations 1985.

33. The tribunal also explored with Counsel for the respondent the meaning and extent of the expression "might reasonably object" where it appears in section 7(2)(b) of the Sex Discrimination Act 1975. Inspector Spencer told us that a Muslim woman prisoner assisted with shower or toilet facilities by a transsexual would be offended if she discovered that the officer in question was such. We accept that and acknowledge that there are many people in our society who would have religious, cultural or moral objections to being searched by a transsexual. Whilst respecting these objections, we do not think that they are contemplated by the expression "might reasonably object". Instead we think that is a reflection of the embarrassment which many people feel in the circumstances outlined in section 7(2)(b). It is

embarrassment to which Code A makes express reference. Given the application of the principle of equal treatment, we cannot see that there is any obligation upon the respondent to disclose to anyone that the applicant is transsexual. The respondent employs a transsexual as a civilian worker. It would be a violation of her right for the respondent to disclose that she is a transsexual. For it would expose her to curiosity and from some quarters even opprobrium and yet have nothing to do with her conduct or her ability to do her job. The respondent also employs officers who are known to be homosexual. Any prejudice against such officers is regarded by the respondent as a management problem. Again, there are persons who for cultural or moral reasons might object to being searched by a homosexual. The common factor in such an objection is knowledge, something of which the suspect or prisoner is rightly deprived.

34. Thus we have in the applicant a person who presents as a woman. If she is treated, as she wishes, in all respects as a woman, nobody will be any the wiser. We do not ignore the possibility that in particular circumstances the fact of her transsexualism may come out into the open. In those circumstances, the respondent will have to manage the situation. Thus it may be proper to arrange for another woman police officer to undertake the care of a Muslim woman in custody where that person has discovered and objected to the applicant's transsexualism. If objection was made to a senior police officer by a community leader following a stop and search in the street, then that leader may well accept the explanation of operational necessity, just as medical necessity may be accepted where a male doctor has had to examine a Muslim woman. If exceptionally, the problem reached such proportions that public order was threatened, then the applicant might have to be moved to another part of the force area. That would be an exceptional circumstance and far removed from solving the problem by denying her access to the job in the first place.

35. As for criminal allegations of assault and indecent assault and civil actions for assault and battery, we regard the risk of the respondent having to face such proceedings as negligible. The Crown Prosecution Service as an emanation of the State, should not in principle initiate criminal proceedings against the applicant. A private prosecution is unlikely to happen and is more likely to fail. As for indecent assault, we think that the circumstances of indecency are lacking in any operational scenario involving the applicant as a police officer. The respondent is free to treat the applicant normally and not as one whose transsexualism is misconduct in respect of which disciplinary procedure must be invoked.

36. Finally, the essence of section 78 of the 1984 Act relates to fairness and the rule of law. We doubt that a criminal tribunal would rule out the evidence of, for example, a controlled drugs find, if the only circumstance was that the officer who found the drugs following a search of the underwear of a woman was a transsexual.

37. We return to the principle of proportionality. We are required to reconcile the principle of equal treatment as far as possible with the requirement of full operational policing. In our judgment, the risks to the respondent in permitting the applicant as a transsexual to carry out the full range of duties including the searching of women are so small that to give effect to them by denying the applicant access to the office of constable would be wholly disproportionate to the denial of the applicant's fundamental right to equal treatment.

38. Finally, we wish to record our thanks to Counsel for their hard work in the preparation and presentation of this case and for their helpful submissions to which we hope that we have done justice. We would also repeat a view expressed earlier that the respondent and his subordinates have behaved honourably in this case. Its outcome must not be taken as an adverse reflection on any of them.

Decision sent to the parties on 18 March 1999, and entered in the register

Transcribed and proof read by Mairi MacDonald

» by [Claire McNab](#)