

Judgment

Neutral Citation No. [2002] EWCA Civ 1584

Case No: A1/2001/2397

IN THE SUPREME COURT OF JUDICATURE

COURT OF APPEAL(CIVIL DIVISION)

ON APPEAL FROM EMPLOYMENT APPEAL TRIBUNAL

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 5th November 2002

Before :

LORD JUSTICE KENNEDY

LORD JUSTICE BUXTON

LORD JUSTICE KEENE

Between :

'A'

Appellant

- v -

(1) Chief Constable of the West Yorkshire Police

and

Respondents

(2) The Secretary of State for Work and Pensions

Ms Laura Cox QC and Ms Stephanie Harrison (instructed by **David Burgess, Winstanley Burgess, City Road, London**) for the Appellant

Mr David Bean QC and Mr David Jones (instructed by **West Yorkshire Police Solicitors**) for the Respondent (1)

Mr Rabinder Singh QC (instructed by **Treasury Solicitor**) for the Secretary of State for Trade & Industry as Respondent (2) and Intervener.

Hearing dates : 8th & 9th October 2002

JUDGMENT :

APPROVED BY THE COURT FOR HANDING DOWN (SUBJECT TO EDITORIAL CORRECTIONS)

Lord Justice Kennedy:

1. This is an appeal and a cross-appeal from a decision of the Employment Appeal Tribunal which on 2nd October 2001 allowed the appeal of the Chief Constable from a decision of the Employment Tribunal sitting at Leeds, and remitted the matter to the same Employment Tribunal for re-hearing.

History.

2. The appellant is a male to female transsexual. She was registered as male at birth, but in May 1996 underwent gender re-assignment surgery. She changed her identity, moved to a different location, and made new friends who were unaware of her medical history and status. That was considered to be essential to enable her to socialise and become accepted in her community, which was of great importance if her treatment was to have a successful outcome.

3. On 4th January 1997 the appellant applied to become a police constable in the West Yorkshire Police. In a covering letter she raised the question as to whether there would be any problem in a transsexual carrying out searches. She received a reply indicating that the police had considered the point she raised, and were happy to give further consideration to her application. She was assessed and tested in the normal way, and was told that she was successful at each stage. References were taken up, and then on 9th March 1998 she received a letter from the Assistant Chief Constable which stated that since the time of her application the issue of transsexual applicants had been further considered, and it had been decided "that transsexuals will not be appointed to the Force". The letter went on to explain the reason for the decision namely —

"Candidates will not be appointed unless they are capable of performing the full duties of a Police Constable. Unfortunately, as you are already aware, legislation affects the carrying out of searches on persons in custody by transsexuals and, therefore, you would not be able to undertake full duties."

The appellant alleged that she had been discriminated against on the grounds of sex, and in a letter dated 30th April 1998 the police accepted that they did discriminate against her on the grounds of her transsexuality, but asserted that the discrimination was not unlawful.

4. On 12th May 1998 the appellant began these proceedings by submitting her application to the Employment Tribunal complaining of sex discrimination. On 10th September 1998 she applied to the Employment Tribunal for and obtained an order that "nothing shall 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 is likely to lead members of the public to identify her as the person affected by the subject matter of these proceedings." On

21st September 1998 the Tribunal gave its reasons for making the order, which in paragraph 3 gives a description of the appellant's history since being diagnosed transsexual. I have drawn on that paragraph earlier in this judgment, and part of it reads —

"Her ability to find employment, make relationships and integrate with the wider community so that she can live a full life, depends very much on her personal medical details remaining confidential. The social and personal relationships formed since moving to her new community have allowed her to live a normal life as a woman, without fear of assault, abuse or damage to her home and possessions. It has taken her a number of years to get to know people, form friendships, become accepted and valued within the community and to have the confidence to participate in local functions and charity events."

The Tribunal's decision goes on to refer to examples of unpleasant media attention directed at transsexuals, and then refers to the appellant's efforts to prevent disclosure of her identity in these proceedings because "she was concerned that such disclosure might lead to unwarranted attention affecting her private and personal life."

Before the Employment Tribunal

5. Over a period of four days in February 1999 the Employment Tribunal, with the same chairman, heard the appellant's complaint. The Chief Constable admitted that he had discriminated against the appellant on the ground that she had undergone gender re-assignment, but contended that legally she was male although she presented as a female. The Chief Constable contended that in that situation she would not be able to carry out the full range of policing functions required of a police officer. He contended that conformity of legal and apparent gender was, in the words of section 7 of the Sex Discrimination Act 1975 "a genuine occupational qualification" for that job. For the appellant it was argued that such conformity was not a genuine occupational qualification within the meaning of the section, and if it was then the Chief Constable could make other arrangements without undue inconvenience to accommodate the appellant.

6. The relevant part of section 7 reads —

"(1) in relation to sex discrimination —

(a) section 6(1) (c) [which renders it unlawful to discriminate by refusing to offer employment] does not apply to any employment where being a man is a genuine occupational qualification for the job

(2) being a man is a genuine occupational qualification for a job only where —

(b) the job needs to be held by a man to preserve decency or privacy because —

(i) it is likely to involve physical contact with men in circumstances where they might reasonably object to its being carried out by a woman, or

(ii) the holder of the job is likely to do his work 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.

(3)

(iv) paragraph ... (b) ... of sub section (ii) does not apply in relation to the filling of a vacancy at a time when the employer already has male employees —

(a) who are capable of carrying out the duties falling within that paragraph, and

(b) whom it would be reasonable to employ on those duties, and

(c) whose numbers are sufficient to meet the employer's likely requirements in respect of those duties without undue inconvenience."

Section 2 of the 1975 Act provides that the provisions relating to sex discrimination against women are to be read as applying equally to the treatment of men, and for that purpose have effect with such modifications as are requisite. It follows that if this were a case of a man other than a transsexual alleging discrimination against him in circumstances where discrimination was admitted but section 7 was relied upon the word "man" would have to be replaced by the word "woman" in those parts of the section which I have quoted.

7. Having given careful consideration to the evidence presented to it, the Employment Tribunal in its decision of 8th March 1999 found "that searching is an intergral part of being a police constable" and further "that it would objectively be unreasonable to require the (Chief Constable) to employ the (appellant) as a police constable if in law and fact she could not carry out the full range of a police constable's duties".

8. The Employment Tribunal then examined the relevant statutory and case law material, including section 54(9) of the Police and Criminal Evidence Act 1984 which has been in the forefront of the submissions made to us on behalf of the Chief Constable and which, under the section heading "Searches of Detained Persons" reads —

"(9) the constable carrying out a search shall be of the same sex as the person searched".

For the Chief Constable it was argued that failure to comply with that obligation would give rise to serious consequences, and that as the appellant was still legally a man she could not take part in searching women. In relation to section 7(2)(b) there was evidence from a senior police officer 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". The Employment Tribunal recorded that evidence, and continued—

"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. While respecting those 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 (Chief Constable) to disclose to anyone that the (appellant) is transsexual. The (Chief Constable) employs a transsexual as a civilian worker. It would be a violation of her right for the (Chief Constable) 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."

After a reference to the employment of homosexuals the Employment Tribunal continued —

"Thus we have in the (appellant) 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 (Chief Constable) will have to manage the situation".

In paragraphs 35 and 36 of its extended reasons the Employment Tribunal dismisses as negligible the risk of the Chief Constable facing civil or criminal proceedings if the appellant were to carry out a search, or of evidence obtained as a result of a search by her being excluded from a criminal trial, and in paragraph 37 the Employment Tribunal said —

"We return then 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 (Chief Constable) in permitting the (appellant) 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 (appellant) access to the office of constable would be wholly disproportionate to the denial of the (appellant's) fundamental right to equal treatment."

After the Tribunal Decision.

9. On 1st May 1999 the Sex Discrimination (Gender Re-Assignment) Regulations 1999 came into force. Those regulations introduced new material into the 1975 Act, including section 7B(2)(a). At a hearing in November 1999 the Employment Tribunal, under the same chairman, found that section 7B(2)(a) was not consistent with the European Communities Equal Treatment Directive (207/76). Thus in July 2001 the Employment Appeal Tribunal had before it two appeals relating to the appellant, and the Secretary of State was represented in relation to the second appeal. As to the second appeal the Employment Appeal Tribunal held that section 7B(2)(a) is not inconsistent with the Directive, and before us there has been no challenge to that decision, but the existence of the second appeal does account for the fact that the Secretary of State has been represented before us.

Before the Employment Appeal Tribunal.

10. As to the first appeal, in the light of the concessions already made the Employment Appeal Tribunal accepted that under the unamended Act discrimination on the grounds of transsexualism was discrimination on the grounds of sex, and that the police did discriminate against the appellant on the grounds of transsexualism. Subject to section 7 there was therefore discrimination which was unlawful, and, as was pointed out, it is not easy to discern how section 7(2)(b)(i) is to be read on the premise that the unamended Act contemplated discrimination on the grounds of transsexualism.

11. The Employment Appeal Tribunal went on to point out that the Employment Tribunal never answered the question of whether in law the appellant is male. The Employment Appeal Tribunal gave careful consideration to the authorities in relation to that issue up to and including the decision of this Court in Bellinger v Bellinger [2002] 2 WLR 411, and concluded that as the domestic authorities speak with one voice and no decision of the European Court of Justice bound the Employment Appeal Tribunal to ignore those domestic authorities the appellant had to be recognised as male in law. That gave rise to the question of whether the Chief Constable could properly hold out such a person to act as a constable as if

she were female. The Employment Appeal Tribunal found that it would be wrong to do so, and went on to consider whether the Chief Constable would "get away with it". That involved some consideration of police powers, beginning with section 54(9) of the Police and Criminal Evidence Act, and other provisions relating to searching. The Employment Appeal Tribunal found that the provisions were concerned with what was the police constable's sex at law, and went on to reject the suggestion that the Chief Constable, knowing that a police constable was in law male, could condone a system under which she was held out as female. If the Chief Constable gave instructions that a transsexual police constable was not to conduct searches of the kind that would normally be undertaken by a female police constable that would become obvious to her immediate colleagues and, as the Employment Appeal Tribunal said, it would be likely to come out that the appellant was not what she seemed. The Employment Appeal Tribunal continued —

"The destructive effect that would have on her private and social life does not need to be imagined as affidavits sworn in connection with her applications to ensure the anonymity of these proceedings make it plain."

So the Employment Appeal Tribunal rejected the Employment Tribunal's conclusion that if the appellant were to be held out to be a woman no one would be any the wiser on the grounds that it would either involve the Chief Constable in deception or destroy her privacy. The Employment Tribunal had recorded that the appellant is willing to disclose the fact of her transsexualism "to those who need to know it for whatever purpose" but the Employment Appeal Tribunal continued —

"Read consistently with the evidence adduced on her part at earlier stages of the proceedings, that cannot be understood to mean that she could tolerate her work-a-day colleagues or, still less, persons who she searches or declines to search, should know of her transsexualism. The (appellant) cannot be heard to blow hot and cold as to the need for her transsexualism being kept secret barring the few in senior police circles who would inevitably need to know of it."

The Employment Appeal Tribunal therefore allowed the appeal, but was not confident that there was no unlawful discrimination so it remitted the matter to the Employment Tribunal for further consideration of section 7(2)(b) on the basis —

1. That the religious, cultural or moral objections which they held that many would have cannot be dismissed without careful study and without full reasons being given:
2. That in relation to searches it would not be open to the police to hold out the appellant as a female police constable:
3. That if proportionality falls to be considered it must be considered against the background that at least in relation to searches a concealment of the appellant's transsexuality as a constable would be neither proper nor practicable.
4. Consideration needs to be given to section 7(4), which the Employment Tribunal had not directly addressed.

After the EAT Decision.

12. Since the Employment Appeal Tribunal delivered judgment in October 2001 there have been two developments of considerable significance to this case. First, on 11th July 2002 the European Court of Human Rights gave judgment in Goodwin v UK [2002] 35 EHRR 447 and, secondly, but only in the course of submissions made by Ms Laura Cox QC in reply, it has been made clear on behalf of the appellant that she is prepared to risk her transsexuality becoming known to colleagues and possibly to others if that is an inevitable consequence of her service as a police constable, something which was not fully understood by the Employment Appeal Tribunal, nor by this court until a late stage in the hearing.

The Primary Question.

13. I agree with the Employment Appeal Tribunal that in order to decide this case it is necessary to decide first what is the appellant's legal gender. The Employment Appeal Tribunal considered the domestic authorities and came to the conclusion that they spoke with one voice. That is right, but in the light of Goodwin it is necessary to consider whether the voice can still be heard in the field of employment law. So what needs to be ascertained is the appellant's legal gender in that field.

The Authorities.

14. In Corbett v Corbett [1971] P 83 Ormrod J held that a marriage between a male and a male to female transsexual was void on the basis that in law the gender of the latter remained as it had been at birth, but the judge was careful in the way in which he articulated the question which he had to decide, saying at 106 C —

"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."

It was that question which he answered when he said at 106 F —

"My conclusion, therefore, is that the respondent is not a woman for the purposes of marriage but is a biological male and has been so since birth."

15. In R v Tan [1983] QB 1053 the Court of Appeal Criminal Division held at 1064 that Corbett v Corbett should apply for the purposes not only of marriage but also to a charge under section 30 of the Sexual Offences Act 1956 or section 5 of the Sexual Offences Act 1967 (both offences concerned with living on the earnings of prostitution). Giving the judgment of the court Parker J said at 1064 —

"It would in our view create an unacceptable situation if the law were such that a marriage between Gloria Greaves (one of the appellants) and another man was a nullity, on the ground that Gloria Greaves was a man; that buggery to which he consented with such other person was not an offence for the same reason; but that Gloria Greaves could live on the earnings of a female prostitute without offending against section 30 of the Act of 1956 because for that purpose he/she was not a man and that the like position would arise in the case of someone charged with living on his earnings as a male prostitute."

16. More recently in Bellinger v Bellinger [2002] 2 WLR 411 in this court a male to female transsexual who had gone through a ceremony of marriage with a man who supported her was refused a declaration that the marriage was valid. In the majority judgment of the President and Robert Walker LJ it was said at paragraph 105 —

"It seems to us that two questions arise. The first question is for the court. What is the status of the petitioner? Is she male or female? That question should, in our judgment be answered by assessing the facts of an individual case against the clear statutory framework. The second question is for Parliament. At what point would it be consistent with public policy to recognise that a person should be treated for all purposes, including marriage, as a person of the opposite sex to that to which he/she was correctly assigned at birth? The second question cannot be properly decided by the court."

The court then referred to the importance of courts not deciding matters which Parliament should resolve. We understand that an appeal against the decision of this court in Bellinger is soon to be heard by the House of Lords. But at present the position in domestic law of transsexuals in relation to marriage and in relation to certain criminal offences is clear.

17. Turning now to employment, the Sex Discrimination Act 1975 was quickly followed by, and is said by the UK Government to give effect to its obligations under, the Equal Treatment Directive (76/207/EEC). The Directive required Member States to give effect to the principle of equal treatment but Article 2(2) provided —

"This Directive shall be without prejudice 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."

18. In Johnston v Chief Constable of the Royal Ulster Constabulary [1987] QB 129 the European Court of Justice considered the decision to arm only police officers who were male, thus reducing the demand for women police officers. It pointed out at page 151 that Article 2(2) "being a derogation from an individual right laid down in the Directive must be interpreted strictly" but accepted that "the context of certain policing activities may be such that the sex of police officers constitutes a determining factor for carrying them out." In such a case there was a need for periodic monitoring of the need to maintain the derogation, and the principle of proportionality had to be observed.

19. In Webb v EMO Air Cargo (UK) Ltd [1993] 1 WLR 49 the House of Lords considered the Sex Discrimination Act 1975 and the Equal Treatment Directive in the context of a temporary employee dismissed because she was pregnant. At page 59 Lord Keith of Kinkel said —

"The Directive does not have direct effect upon the relationship between a worker and an employer who is not the state or an emanation of the state, but nevertheless it is for a United Kingdom court to construe domestic legislation in any field covered by a Community Directive so as to accord with the interpretation of the Directive as laid down by the European Court of Justice, if that can be done without distorting the meaning of the domestic legislation."

20. In P v S [1996] ICR 795 the European Court of Justice considered the position of a manager of an educational establishment who was dismissed when he gave notice of and underwent gender re-assignment. At page 807 the Advocate General said —

"It is necessary to go beyond the traditional classification and recognise that, in addition to the man/woman dichotomy, there is a range of characteristics, behaviour and roles shared by men and women, so that sex itself ought rather to be thought of as a continuum. From that point of view, it is clear that it would not be right to continue to treat as unlawful solely acts of discrimination on grounds of sex which are referable to men and women in the traditional sense of those terms, while refusing to protect those who are also treated unfavourably precisely because of their sex and/or sexual identity."

At page 810 he said —

"First, transsexuals certainly do not constitute a third sex, so it should be considered as a matter of principle that they are covered by Directive (76/207/EEC),

Secondly, I note that the Directive is nothing if not an expression of a general principle and a fundamental right. Here I would point out that respect for fundamental rights is one of the general principles of Community law, the observance of which the court has a duty to ensure, and that 'there can be no doubt that the elimination of discrimination based on sex forms part of those fundamental rights'."

That was echoed by the judgment of the court, which states at page 814 —

"The scope of Directive (76/207/EEC) 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 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 re-assignment of the person concerned."

There was found to be no material before the court to justify the dismissal under Article 2(2).

21. In Chessington World of Adventures Ltd v Reed [1998] ICR 97 the Employment Appeal Tribunal considered the situation of an applicant who was harassed by fellow employees after announcing a proposed change of gender from male to female. The employers knew of the harassment but failed to act. On their behalf it was argued that the Sex Discrimination Act could not be read consistently with P v S without doing impermissible violence to the language. The Employment Appeal Tribunal rejected that submission, and accepted at page 104 counsel for the respondent's submission that it was possible to distinguish "legal sex" in the context of marriage.

22. Sheffield and Horsham v UK [1998] 27 EHRR 163 I need only mention in passing. In that case the applicants were male to female postoperative transsexuals who relied on Articles 8,12 and 14 of the European Convention on Human Rights to support their complaint that the respondent refused to give legal recognition to their status as women. The European Court of Human Rights did not find any violation of the Articles relied upon.

23. In the context of the present case it is important to recognise that the Human Rights Act 1998, which incorporated the European Convention on Human Rights into English law did not come into effect until October 2000, long after the decision of the Chief Constable which is now complained of.

24. That brings me to the decision of the European Court of Human Rights in Goodwin, to which I have already referred. The applicant was a postoperative male to female transsexual, who experienced considerable difficulties as a result of the respondent government's refusal formally to recognise her postoperative state. Paragraphs 90 to 91 of the judgment in part read —

"In the 21st Century the right of transsexuals to personal development and to physical and moral security in the full sense enjoyed by others in society cannot be regarded as a matter of controversy requiring the lapse of time to cast clearer light on the issues involved. In short, the unsatisfactory situation in which post-operative transsexuals live in an intermediate zone as not quite one gender or the other is no longer sustainable.... the Court does not underestimate the difficulties posed or the important repercussions which any major change in the system will inevitably have, not only in the field of birth registration, but also in the areas of access to records, family law, affiliation, inheritance, criminal justice, employment, social security and insurance."

But the Court was not persuaded that the change should not be made, and in paragraph 93 it said —

"The Court finds the respondent Government can no longer claim that the matter falls within their margin of appreciation, save as regards the appropriate means of achieving recognition of the rights protected under the Convention. Since there are no significant factors of public interest to weigh against the interests of this individual applicant in obtaining legal recognition of her gender re-assignment, it reaches the conclusion the fair balance which is inherent in the Convention now tilts decisively in favour of the applicant. There has, accordingly, been a failure to respect her right to private life in breach of Article 8 of the Convention."

The Court also found that there was a breach of article 12, and in paragraph 120 it said —

"It will be for the United Kingdom Government in due course to implement such measures as it considers appropriate to fulfil its obligations to secure the applicant's, and other transsexuals' right to respect for private life and right to marry in compliance with this judgment."

The Submissions.

25. In the light of those authorities Ms Cox submits that although the European Convention on Human Rights was not incorporated into English Law at the material time it was indirectly effective because the Sex Discrimination Act gave effect to the Equal Treatment Directive, which in turn had to be read consistently with the Convention. It was clear from P v S that transsexuals cannot be treated as a third sex, and is now clear from Goodwin that a postoperative male to female transsexual is entitled to be regarded for all purposes as female. In the field of employment law the matter cannot simply be left until Parliament decides how

to react to the decision in Goodwin because through the medium of the Directive and the 1975 Act that decision has direct effect.

26. For the respondent Chief Constable Mr David Bean QC supported by Mr Rabinder Singh QC for the Secretary of State, submits that we should focus on the police powers of search, and in particular on section 54(9) of the Police and Criminal Evidence Act. The Chief Constable, we were told, does not, at any rate now, seek to exclude recruitment of all transsexuals, but only of undisclosed transsexuals, and the reason for excluding those is that in domestic law a male to female transsexual remains male (see Corbett, Tan and Bellinger), so section 54(9) prevents her from searching a woman, and her appearance makes it in practice impossible for her to search a man. Furthermore any attempt to leave searching to others would result in disclosure of her transsexuality. Mr Bean submits that Corbett, Tan and Bellinger are clear authority as to the appellant's legal gender, and the legal gender of a person cannot be different in relation to different areas of the law. Furthermore both Tan and the Police and Criminal Evidence Act are concerned with the criminal law, and in domestic law for the purposes of the criminal law the appellant remains a male.

Conclusion.

27. In my judgment as we are dealing with a complaint of sex discrimination in the context of employment the focus has to be on section 7(2)(b) of the 1975 Act, and not on section 54(9) of the Police and Criminal Evidence Act, although we cannot of course ignore the consequences of our decision upon the duties spelt out in the latter statute. For the reasons given by Ms Cox it seems to me that in the light of Goodwin it is no longer possible, in the context of employment, to regard the appellant as being other than female, except perhaps in circumstances where, as was said in Goodwin, there are —

"..significant factors of public interest to weigh against the interests of the individual applicant in obtaining legal recognition of her gender re-assignment ".

I have considered whether Goodwin changed the law to such an extent that it could be said that the decision under challenge in the present litigation was right at the time it was made in March 1998. I am not satisfied that can be said, but that decision, and the decision of the Employment Appeal Tribunal in this litigation, might well have been different if Goodwin had been decided earlier. Mr Bean submitted that Goodwin could be distinguished on the basis that it relates to ongoing complaints, whereas the present case relates to a decision at a fixed point in time. Although that distinction can be drawn it does not, to my mind, effect the applicability of the reasoning in Goodwin.

28. If when dealing with the appellant's application for employment the Chief Constable was bound to treat her as female, then it was not open to him to discriminate against her on the basis that she was transsexual, and no possibility of invoking section 7 could arise. That may be why not all Chief Constables appear to have taken the same stance as the respondent in the present case, but the information as to the practice elsewhere is of limited value because we know little about what has really happened. In particular we do not know how transsexuals who have been employed have been deployed, or to what extent they have sought to prevent their transsexualism from being disclosed. In some cases, as explained by Buxton LJ in his judgment, there may be factors of public interest to weigh against the interests of the individual applicant which would entitle a Chief Constable to refuse employment to a

transsexual, particularly one who wanted his or her transsexualism to remain undisclosed, but that is not this case.

29. At this stage, and in the context of this case, it seems possible to say that were the appellant to be employed as a police constable no particular problem should arise in relation to section 54(9) of the Police and Criminal Evidence Act not only because of the implementation of the Human Rights Act, but also because if the appellant is not required to search females on the basis that for the purposes of the criminal law she remains a male, and if that leads to the disclosure of her transsexuality, that is something which she is prepared to accept. But, as Ms Cox rightly points out, that is not a matter in relation to which we need express a concluded view. All that needs to be said is that in the light of Goodwin it is now clear that the respondent's attempt to invoke section 7 of the 1975 Act cannot succeed.

30. I would therefore allow this appeal and dismiss the cross appeal. As this is a sensitive and difficult matter I should like to record our indebtedness to counsel for the way in which the litigation has been conducted, and emphasise that although in the end the decision has gone against the respondent that should not be taken to be any criticism of him, or of those who have been advising him. Plainly he has been doing his best to satisfy conflicting demands in the context of evolving law.

Lord Justice Buxton :

31. I gratefully adopt the account of the history and of the statutory provisions set out in the judgment of Kennedy LJ. I agree with him that the appeal should be allowed and the cross-appeal dismissed. Since the case raises some potentially difficult issues, I venture to add some few words of my own.

32. The case was transformed by the information, vouchsafed for the first time in this court, that Miss A had no difficulty in her work colleagues, and members of the public with whom she dealt, knowing of her transsexuality. The Chief Constable's argument was that he could not discharge his obligations under section 54(9) of PACE if searches were made by transsexuals; and that he could not sensibly avoid the problem, by exempting Miss A from searching duties, without revealing the reason for the exemption. If the facts had remained as the Chief Constable reasonably believed them to be, with Miss A as an undisclosed transsexual, then I am by no means certain that, even after *Goodwin*, Miss A would necessarily have succeeded. It would, however, be wholly artificial to decide the case other than on the correct facts; and for that reason I agree that the Chief Constable cannot in law maintain his resistance to considering Miss A for employment.

33. I should perhaps add that in any event I consider that this case must be determined according to the law as set out in *Goodwin*. I was not persuaded by Mr Bean's argument that the state of the law as perceived in *Goodwin* should be held to apply only from the date of that ruling by the Strasbourg court, and that therefore the Chief Constable's decision, which predated the ruling in *Goodwin*, should be adjudicated upon according to the pre-*Goodwin* law. That the law at the time at which he made his decision was uncertain is of course another factor that goes towards acquitting the Chief Constable of any actual fault, an aspect of the case that my Lord has already emphasised. However, as a matter of human rights law the court has to apply the law as it is now developed by the Convention organs. And I am fortified in that view by the consideration that, as set out below, the Convention jurisprudence enters domestic law in this case because of its status in Community law. It has always been

assumed in Community jurisprudence that decisions on the meaning of the treaties apply *ex tunc*, that is, from the date of the treaty and not from the date of the decision; the much controverted decision to the contrary in Case 43/75 *Defrenne v Sabena* [1976] ECR 455 [69]-[75] being the exception that proves that rule.

34. All that said, however, it remains necessary to explain why Miss A's attitude to disclosure made so much difference; and because of the singular way in which the case before us developed I wish also to say something about how the point on which the appeal is resolved emerged, and why the Chief Constable, in my view wholly understandably, continued until a late stage in the appeal to think that he was confronting a case based on *undisclosed* transsexuality.

35. It is quite true that the Chief Constable's original reaction to A's application to become a constable was that transsexuals, understood as a general category, could not be considered. It is also true that the finding of the EAT, at §28 of its Judgment, was that

"the job A sought did need to be held by other than a transsexual to preserve decency or privacy because it was likely to involve physical contact with men or women in circumstances where they might object to its being carried out by a transsexual."

But, importantly, the EAT went on to find that that difficulty could not, operationally, be avoided by not using A for such searches, because of what the EAT understood to be A's imperative wish that her transsexuality should not be disclosed. The EAT said:

"The Tribunal's second escape-that if the Police held out A as female no one would be any the wiser and hence no one would raise objections- was not open as it would involve the Police in a deception and in any event, if it were sought to mitigate that deception by the giving of special instructions as to searches by A, so far from preserving privacy, it would destroy that of A."

These conclusions were based upon a clear understanding of A's position as explained by the EAT in §§ 24-26 of its judgment, the essential part of which has been set out by my Lord in §11 above.

36. It was nowhere said in the Grounds of Appeal; in the Appellant's 19 page skeleton; or in Miss Cox's opening before this court; that, as we are now assured to be the case, the EAT had simply got the facts wrong, and that A was perfectly willing for her colleagues at large, and if needs be the members of the public with whom she dealt, to know of her transsexuality: the necessity of any disclosure to be determined by the Chief Constable. That this was, or might be, A's position only started to emerge in Miss Cox's reply, when she submitted, as I understood it, that the Chief Constable's argument, by limiting itself to undisclosed transsexualism, conceded that there had been unwarranted discrimination, because A had indeed been "open" when applying for the office of constable. That openness had, however, been only with the senior officers assessing her application, as the EAT observed in the passage set out by my Lord in §11. The findings of the EAT therefore directly contradicted Miss Cox's submission. Miss Cox responded to this difficulty by submitting that the view and approach of the EAT had not been available to it, because there was no or no sufficient evidence to support it. In particular, it had been quite unreasonable to use affidavits sworn for the purposes of anonymity in these proceedings, necessarily conducted in public, to draw conclusions as to A's future attitude within the workplace.

37. Miss Cox explained the failure to raise that objection earlier by saying that no issue raised by the Chief Constable required the matter to be addressed. I am perfectly prepared to accept that the nature and thrust of the anonymity point may well not have been as apparent in the proceedings below as it was to us after we had had the benefit of hearing Mr Bean on it; and it was unfortunate that it did not feature in Mr Bean's skeleton argument in this court. But, that said, it is plain from the parts of the EAT's judgment that I have already cited that they had rejected the ET's rebuttal of the practical objections relied on by the Chief Constable under section 7(2)(b) at least in part because A's insistence on anonymity precluded the making of special arrangements in her case. If there was a short answer to that, to the effect that there was no evidence to support the assumption that A insisted on anonymity, then it is difficult to understand why that answer was not immediately given.

38. However, the argument as to lack of evidence having been produced, I am afraid that I was completely unpersuaded by it. In the absence of any other and contradictory material, the overwhelming impression left by the earlier anonymity proceedings was that it was fundamental to A's privacy and ability to function within society that her transsexualism should not be known. And, quite apart from that, it could not possibly be right, in a matter as delicate as the present, for the court to proceed on the basis of a factual case that rested on procedural arguments about the state of the evidence rather than on the real facts. We therefore insisted that Miss Cox took direct instructions on the point from her client, who was present in court. We were told that those instructions were unequivocally in the terms that I have reproduced in the first sentence of 36 above.

39. That revelation transformed the case. Although understandably Mr Bean did not receive instructions to concede the point whilst appearing before us, in opening his argument he had made it clear that the Chief Constable's concern was not in relation to the employment of transsexuals as such, but only in relation to the operational difficulties caused by undisclosed transsexuality. But why the point mattered so much deserves some explanation.

40. I start from the observation that it is a fallacy to contend, as did the Chief Constable, that a person must in law be a man or a woman for all purposes. The question, rather, is whether the individual meets the criteria of the particular rule of law in issue. That approach, and in particular the recognition that it is not for the court to determine criteria upon which a person should be treated as being of one sex or the other for all purposes, is with respect to be found clearly stated in the judgment of this court in *Bellinger v Bellinger* [2002] Fam 150, at §105, a passage already cited by my Lord.

41. In that context, it is important to be clear that *Goodwin* decides that it will be a breach of article 8, in cases "where there are no significant factors of public interest to weigh against the interest of this individual applicant in obtaining legal recognition of her gender re-assignment", to refuse to recognise that re-assigned gender [*Goodwin*, §93]. Accordingly, in any case to which the Human Rights Act 1998 [the HRA] applies, it will in future be necessary to consider whether a failure or refusal to treat a post-operative transsexual as being of the reassigned gender involves a breach of Article 8. Since the application of article 8 is case-specific, and does not confer absolute rights, the court will have to consider in every case whether the subject's interest in achieving respect and recognition for her gender re-assignment is outweighed by countervailing considerations of the public interest.

42. In the present case we have to add the fact that, because of the date at which the acts complained of took place, the Convention jurisprudence is introduced into domestic law not by the medium of the HRA, but by the medium of the Equal Treatment Directive [ETD]. That means that not only is any case subject to the considerations of balance already referred to, but also that the ETD, and thus the potential breach of article 8, does not, as it would under the HRA, potentially arise in connexion with every issue arising in domestic law, but rather only applies in relation to the employment field to which the ETD is limited.

43. Accordingly, even if the Chief Constable is, after *Goodwin*, under the regime of the ETD at peril of committing a breach of article 8 if he does not treat A as a woman for the purposes of assessing her suitability for employment, it does not follow that in making the assessment appropriate to article 8 the court is precluded as a matter of law from giving weight to difficulties perceived by the Chief Constable as arising from A's transsexualism. That consideration is reinforced by the fact that where, as in the present case, the issue is one of Community law, it seems plain that the decision of the European Court of Justice in Case C-13/94 *P v S* [1996] ICR 795 that discrimination on grounds of transsexuality amounts to discrimination on grounds of sex for the purposes of the ETD carries with it the corollary that "sex" in article 2(2) of the ETD must also be read as including transsexuality: so, just as the Chief Constable cannot discriminate against transsexuals, equally he can potentially rely on considerations specific to transsexuality under article 2(2).

44. The issue however remains one of balance. Even if the Chief Constable, whether under the ETD or under the HRA, can potentially take into account difficulties perceived as arising from A's transsexualism in relation to section 54(9), any such issues of balance are likely to be conclusively determined by the obligation of the Chief Constable to manage his force in such a way as to avoid situations arising under section 54(9) that would threaten the individual's article 8 interests. If an individual were to insist that her transsexuality remained undisclosed, the Chief Constable might not be able to take such steps. If the transsexuality can be disclosed to colleagues, and thus an explanation be given of why it may be prudent for A not to conduct section 54(9) searches, that difficulty falls away.

45. Accordingly, once it had been made clear that Miss A has no objection to colleagues generally and, if needs be, members of the public with whom she deals knowing of her transsexuality, that destroyed the Chief Constable's defence of genuine occupational qualification based on the difficulties of complying with section 54(9) of PACE if an *undisclosed* transsexual was a member of the force. There was therefore effectively no issue before us. It was not satisfactory that we were not aware until comparatively late in the proceedings that that was so.

46. I have ventured to explain this point in some detail not only because of its inherent importance but also because Miss A and those advising her may wish to take note of the importance, in connection with her wish to be considered for the office of constable, of her willingness that her transsexuality should be disclosed.

Lord Justice Keene:

47. I agree with both judgments and have nothing to add.