House of Lords

Bellinger *v* Bellinger (Lord Chancellor intervening)

[2003] UKHL 21

2003 Jan 20, 21; April 10

Lord Nicholls of Birkenhead, Lord Hope of Craighead, Lord Hobhouse of Woodborough, Lord Scott of Foscote and Lord Rodger of Earlsferry

Husband and wife — Nullity — Capacity to marry — Gender — Wife correctly registered as male at birth — Thereafter living as female and undergoing gender reassignment surgery — Wife seeking declaration of validity of marriage — Whether female or male for purposes of marriage — Whether violations of right to respect for private and family life and right to marry — Matrimonial Causes Act 1973 (c 18), s 11(c) — Human Rights Act 1998 (c 42), s 4, Sch 1, Pt I, arts 8, 12

The petitioner was a transsexual female born in 1946 who had been correctly classified and registered at birth as male but had undergone gender reassignment surgery and treatment. In 1981 she went through a ceremony of marriage with a man who supported her petition for a declaration that the marriage was valid at its inception and subsisting. The judge refused to grant the declaration on the ground that "male" and "female" in section 11(c) of the Matrimonial Causes Act 1973[1] were to be determined by reference to biological criteria and that the petitioner was a male and not a woman for the purposes of marriage. The Court of Appeal dismissed the petitioner's appeal.

On the petitioner's appeal, claiming alternatively a declaration that section 11(c) was incompatible with articles 8 and 12 of Schedule 1 Part I to the Human Rights Act 1998[2]—

Held, (1) dismissing the appeal, that "male" and "female" in section 11(c) of the 1973 Act were to be given their ordinary meaning and referred to a person's biological gender as determined at birth, so that, for the purposes of marriage, a person born with one sex could not later become a person of the opposite sex; that therefore English law did not recognise a marriage between two people who were of the same gender at birth, even if one of them had undergone gender reassignment treatment which altered the anatomical features of the body to give the appearance of those of the opposite gender; that any other conclusion would amount to a major change in the law and would also create anomalies and uncertainties due to the lack of objective criteria by which gender reassignment treatment could be assessed; that such a fundamental change in the law, which would interfere with the traditional concept of marriage and give rise to complex and sensitive issues, should be made only by Parliament after careful deliberation and not by judicial intervention; and that, accordingly, the petitioner having been born male could not be regarded as female as a result of gender reassignment treatment, and therefore the marriage was not valid as the parties were not respectively male and female within the meaning of section 11(c) (post, paras 36–49, 56–58, 62–65, 71, 77, 80–83).

Corbett v Corbett (orse Ashley) [1971] P 83 considered.

[1] Matrimonial Causes Act 1973, s 11(c): "A marriage . . . shall be void on the following grounds only, that is to say . . . that the parties are not respectively male and female . . ."

[2] Human Rights Act 1998, Sch 1, Pt I, art 8: "(1) Everyone has the right to respect for his private and family life, his home and his correspondence."

Art 12: "Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right."

(2) That since there was no provision for the recognition of gender reassignment for the purposes of marriage, section 11(c) was a continuing obstacle to the petitioner entering into a valid marriage with a man and was therefore incompatible with the petitioner's right to respect for her private and family life and with her right to marry pursuant to articles 8 and 12 respectively, and a declaration would be granted to that effect (post, paras 52, 55, 68–71, 79, 80, 81).

Goodwin v United Kingdom (2002) 35 EHRR 447 considered.

Decision of the Court of Appeal [2001] EWCA Civ 1140; [2002] Fam 150; [2002] 2 WLR 411; [2002] 1 All ER 311 affirmed.

The following cases are referred to in the judgments:

Attorney General v Otahuhu Family Court [1995] 1 NZLR 603
Corbett v Corbett (orse Ashley) [1971] P 83; [1970] 2 WLR 1306; [1970] 2 All ER 33
Cossey v United Kingdom (1990) 13 EHRR 622
Goodwin v United Kingdom (2002) 35 EHRR 447
I v United Kingdom (Application No 25680/94) (unreported) 11 July 2002, ECHR
Kevin, In re (Validity of Marriage of Transsexual) [2001] Fam CA 1074; Appeal No EA 97/2001; (unreported) 21 February 2003, Family Court of Australia
M v M (1984) 42 RFL (2d) 55
Marckx v Belgium (1979) 2 EHRR 330
R v A (No 2) [2001] UKHL 25; [2002] 1 AC 45; [2001] 2 WLR 1546; [2001] 3 All ER 1, HL(E)
R v Kansal (No 2) [2001] UKHL 62; [2002] 2 AC 69; [2001] 3 WLR 1562; [2002] 1 All ER 257, HL(E)
R v Lambert [2001] UKHL 37; [2002] 2 AC 545; [2001] 3 WLR 206; [2001] 3 All ER 577, HL(E)
R v Lyons [2002] UKHL 44; [2003] 1 AC 976; [2002] 3 WLR 1562; [2002] 4 All ER 1028, HL(E)
R v Tan [1983] QB 1053; [1983] 3 WLR 361; [1983] 2 All ER 12, CA
Rees v United Kingdom (1986) 9 EHRR 56
S (Minors) (Care Order: Implementation of Care Plan), In re [2002] UKHL 10; [2002] 2 AC 291; [2002] 2 WLR 720; [2002] 2 All ER 192, HL(E)
S-T (formerly J) v J [1998] Fam 103; [1997] 3 WLR 1287; [1998] 1 All ER 431, CA
Secretary, Department of Social Security v SRA (1993) 118 ALR 467
Sheffield and Horsham v United Kingdom (1998) 27 EHRR 163
W v W (1976) (2) SA 308
W v W (Physical Inter-sex) [2001] Fam 111; [2001] 2 WLR 674
Walden v Lichtenstein (Application No 33916/96) (unreported) 16 March 2000, ECHR

The following additional cases were cited in argument:

Fitzpatrick v Sterling Housing Association Ltd [2001] 1 AC 27; [1999] 3 WLR 1113; [1999] 4 All ER 705, HL(E)
R v Secretary of State for Employment, Ex p Seymour-Smith (No 2) [2000] 1 WLR 435; [2000] 1 All ER 857, HL(E)

APPEAL from the Court of Appeal

By leave of the House of Lords (Lord Bingham of Cornhill, Lord Hope of Craighead and Lord Hobhouse of Woodborough) granted on 17 January 2002, the petitioner, Elizabeth Ann Bellinger, supported by the respondent, Michael Jeffrey Bellinger, appealed from a decision of the Court of Appeal (Dame Elizabeth Butler-Sloss P and Robert Walker LJ, Thorpe LJ dissenting) on 17 July 2001 dismissing the petitioner's appeal from a decision of Johnson J on 2 November 2000 refusing to grant a declaration under section 55 of the Family Law Act 1986 that the petitioner's marriage to the

A respondent was valid at its inception and subsisting notwithstanding the fact that the petitioner was born a male.

The facts are stated in the opinion of Lord Nicholls of Birkenhead.

Pamela Scriven QC and *Ashley Bayston* for the petitioner. The fundamental issue in the appeal is whether the court should approve and apply *Corbett v Corbett (orse Ashley)* [1971] P 83 in deciding what B constitutes a man or a woman in the context of the Matrimonial Causes Act 1973. The premise on which the reasoning in that case was based was that the biological factors ascertainable at birth were the only relevant factors. That premise cannot now stand as it ignores the psychological features which are an inbuilt part of gender.

There is no statutory definition of "male" and "female". The court must C now consider "male" and "female" in section 11(c) of the 1973 Act in their broad meaning and not in the narrow and artificially constrained meaning given in the *Corbett* case. The court should not be bound by the classification of gender at the time of the birth but should look at the reality of the situation at the time of the marriage. That involves taking account of matters such as the psychological state and life style of the person concerned. [Reference was made to *Attorney General v Otahuhu Family Court* [1995] D 1 NZLR 603; *In re Kevin (Validity of Marriage of Transsexual)* [2001] Fam CA 1074].

The *Corbett* case was looking at things as they were in 1970. Medical opinion and understanding of human sexuality have moved on, and the *Corbett* criteria for the determination of sex are no longer acceptable. The essential limitation of those criteria lies in the exclusion of the psychological E factors regardless of whether or not further research proves such factors to relate to brain differentiation.

Since the *Corbett* case major changes have taken place in society in relation to the institution of marriage and in relation to the understanding of transsexualism. It is the responsibility of the court in the construction of a word or phrase that is reactive or reflective of change to do so in the way stated by Lord Slynn of Hadley in *Fitzpatrick v Sterling Housing Association* F *Ltd* [2001] 1 AC 27, 33.

It is clear from the Hansard records of the parliamentary debates that it was Parliament's intention when passing section 1(c) of the Nullity of Marriages Act 1971 (which subsequently became section 11(c) of the 1973 Act) that "male" and "female" should be left undefined and would be capable of bearing meanings other than those ascribed to them in the G *Corbett* case, and that a person's sex would be a question of fact to be determined in the light of evolving medical evidence and opinion.

Section 11(c) of the 1973 Act, which has not previously been construed by the Court of Appeal or the House of Lords, should be construed in the light of moral, ethical and societal values as they are now rather than as they were at the date of first enactment or subsequent consolidation. Parliament clearly intended some judicial licence. The majority of the Court of Appeal H failed to respond to Parliament's intention.

If, in addition to self-identity, the petitioner has female physical characteristics it must be said that she is female. Post-operative gender reassessment patients are indistinguishable from members of the sex to which they have changed. It is therefore unfair and irrational for the law to

regard them differently. [Reference was made to *Goodwin v United Kingdom* (2002) 35 EHRR 447.] The petitioner has fulfilled all the conditions for surgical realignment and has been in a happy and fulfilling marriage for over 20 years. The court must look at the situation as it was at the time of the marriage. She is entitled to a declaration that she is female and that the marriage was binding.

Alternatively, if the narrow definition in the *Corbett* case still stands, section 11(c) of the 1973 Act should be held to be incompatible with articles 8 and 12 of the European Convention on Human Rights.

Philip Sales and *Kassie Smith* for the Lord Chancellor. By application of the ordinary rules of construction established in domestic law, and apart from the Human Rights Act 1998, the term "female" in section 11(c) of the 1973 Act cannot be construed so as to cover a male to female transsexual person. In 1981 domestic law did not allow transsexual persons to marry in their acquired gender and the same has been true since the Human Rights Act 1998 came into force.

The concepts of "male" and "female" in the context of the 1973 Act are fixed and not changeable. Marriage confers a legal status which affects other legal rights in fields such as contract, crime, pensions and inheritance. Therefore clear objective criteria should apply to determine whether a marriage is valid or not. The psychological criterion is unsatisfactory for the purposes of the legal function which of section 11(c) must fulfil. It does not provide a clear, determinate indication of when a person acquires a different sex from that given by reference to the criteria available at birth. The 1973 Act does not contemplate that marital status should change except by divorce.

Parliament intended that sexual identity should conform with the registration of sex at birth. The only criteria that can be applied to determine a child's sex at birth remain the physiological *Corbett* criteria, which provide a consistent approach and legal certainty. [Reference was made to *Fitzpatrick v Sterling Housing Association Ltd* [2001] 1 AC 27.] The adoption of new criteria is a matter for Parliament and not for the courts. A birth certificate has an on going function and Parliament contemplate there should be stability of sexual identity over time.

Section 11(c) was introduced to reflect the law as decided in the *Corbett* case [1971] P 83. There is an overlap between the religious concepts and the legal concepts of marriage, and the religious background is important in the interpretation of this legislation. The presumption is that marriage is a union between a man and a woman.

The wide range of circumstances considered in *In re Kevin (Validity of Marriage of Transsexual)* [2001] Fam CA 1074, para 330 would be unsatisfactory as a test for determining "male" and "female" for the purposes of section 11(c). It would be unfair that those who have had gender reassignment surgery should have an advantage over those who have similar psychological needs but cannot have surgery. Surgery is only one of a range of medical procedures designed to alleviate psychological gender identity disorder.

In *Goodwin v United Kingdom* 35 EHRR 447 the court was concerned not only with marriage but with a range of domestic laws and policies which failed to recognise a transsexual person's acquired gender. The court

intended that the United Kingdom government should have a reasonable period within which to adjust the law to take account of the court's judgment. During that period there will be objective justification on grounds of legal certainty and the need for principled and coherent reform of the law by the legislature for maintaining and applying section 11(c). [Reference was made to *Marck v Belgium* (1979) 2 EHRR 330; *Walden v Lichtenstein* (Application No 33916/96) (unreported) 16 March 2000 and *R v Secretary of State for Employment, Ex p Seymour-Smith (No 2)* [2000] 1 WLR 435.]

A declaration of incompatibility would serve no useful purpose because it would merely trigger the power of the minister to amend the law under section 10 of the Human Rights Act; but by virtue of the *Goodwin* decision and the terms of section 10 the minister already has those powers.

In principle a declaration of incompatibility should not be granted where the matter is already covered by a judgment of the European Court of Human Rights because it would encourage needless litigation.

Scriven QC replied.

Their Lordships took time for consideration.

10 April. **LORD NICHOLLS OF BIRKENHEAD**

1 My Lords, can a person change the sex with which he or she is born? Stated in an over-simplified and question-begging form, this is the issue raised by this appeal. More specifically, the question is whether the petitioner, Mrs Elizabeth Bellinger, is validly married to Mr Michael Bellinger. On 2 May 1981 Mr and Mrs Bellinger went through a ceremony of marriage to each other. Section 1(c) of the Nullity of Marriage Act 1971, re-enacted in section 11(c) of the Matrimonial Causes Act 1973, provides that a marriage is void unless the parties are "respectively male and female". The question is whether, at the time of the marriage, Mrs Bellinger was "female" within the meaning of that expression in the statute. In these proceedings she seeks a declaration that the marriage was valid at its inception and is subsisting. The trial judge, Johnson J, refused to make this declaration: see [2001] 1 FLR 389. So did the Court of Appeal, by a majority of two to one: see [2002] Fam 150. The majority comprised Dame Elizabeth Butler-Sloss P and Robert Walker LJ. Thorpe LJ dissented.

2 In an alternative claim, advanced for the first time before your Lordships' House, Mrs Bellinger seeks a declaration that section 11(c) of the Matrimonial Causes Act 1973 is incompatible with articles 8 and 12 of the European Convention on Human Rights. The Lord Chancellor has intervened in the proceedings as the minister with policy responsibility for that statutory provision.

3 Mrs Bellinger was born on 7 September 1946. At birth she was correctly classified and registered as male. That is common ground. For as long as she can remember, she felt more inclined to be female. She had an increasing urge to live as a woman rather than as a man. Despite her inclinations, and under some pressure, in 1967 she married a woman. She was then 21. The marriage broke down. They separated in 1971 and were divorced in 1975.

4 Since then Mrs Bellinger has dressed and lived as a woman. She underwent treatment, described below. When she married Mr Bellinger he

was fully aware of her background. He has throughout been entirely supportive of her. She was described on her marriage certificate as a spinster. Apart from that, the registrar did not ask about her gender status, nor did Mrs Bellinger volunteer any information. Since their marriage Mr and Mrs Bellinger have lived happily together as husband and wife, and have presented themselves in this way to the outside world.

The indicia of sex and transsexual people

5 The indicia of human sex or gender (for present purposes the two terms are interchangeable) can be listed, in no particular order, as follows. (1) Chromosomes: XY pattern in males, XX in females. (2) Gonads: testes in males, ovaries in females. (3) Internal sex organs other than the gonads: for instance, sperm ducts in males, uterus in females. (4) External genitalia. (5) Hormonal patterns and secondary sexual characteristics, such as facial hair and body shape: no one suggests these criteria should be a primary factor in assigning sex. (6) Style of upbringing and living. (7) Self-perception. Some medical research has suggested that this factor is not exclusively psychological. Rather, it is associated with biological differentiation within the brain. The research has been very limited, and in the present state of neuroscience the existence of such an association remains speculative.

6 In the vast majority of cases these indicia in an individual all point in the same direction. There is no difficulty in assigning male or female gender to the individual. But nature does not draw straight lines. Some people have the misfortune to be born with physiological characteristics which deviate from the normal in one or more respects, and to lesser or greater extent. These people attract the convenient shorthand description of inter-sexual. In such cases classification of the individual as male or female is best done by having regard to all the factors I have listed. If every person has to be classified as either male or female, that is the best that can be done. That was the course, in line with medical opinion, followed by Charles J in *W v W (Physical Inter-sex)* [2001] Fam 111, 146D–F. That is not the problem arising in the present case.

7 Transsexual people are to be distinguished from inter-sexual people. Transsexual is the label given, not altogether happily, to a person who has the misfortune to be born with physical characteristics which are congruent but whose self-belief is incongruent. Transsexual people are born with the anatomy of a person of one sex but with an unshakeable belief or feeling that they are persons of the opposite sex. They experience themselves as being of the opposite sex. Mrs Bellinger is such a person. The aetiology of this condition remains uncertain. It is now generally recognised as a psychiatric disorder, often known as gender dysphoria or gender identity disorder. It can result in acute psychological distress.

8 The treatment of this condition depends upon its severity and the circumstances of the individual. In severe cases conventional psychiatric treatment is inadequate. Ultimately the most that medical science can do in order to alleviate the condition is, in appropriate cases, to rid the body of its intensely disliked features and make it accord, so far as possible, with the anatomy craved. This is done by means of hormonal and other treatment and major surgery, popularly known as a "sex change" operation. In this regard medical science and surgical expertise have advanced much in recent years. Hormonal treatment can change a person's secondary sexual

A characteristics. Irreversible surgery can adapt or remove genitalia and other organs, external and internal. By this means a normal body of one sex can be altered so as to give the appearance of a normal body of the other sex. But there are still limits to what can be done. Gonads cannot be constructed. The creation of replica genital organs is particularly difficult with female to male gender reassignment surgery. Chromosomal patterns remain unchanged. The change of body can never be complete.

B **9** Surgery of this nature is the last step in what are typically four steps of treatment. The four steps are psychiatric assessment, hormonal treatment, a period of living as a member of the opposite sex subject to professional supervision and therapy (the "real life experience"), and finally, in suitable cases, gender reassignment surgery. In February 1981 Mrs Bellinger, having been through the previous stages of treatment, successfully underwent this C form of surgery. This involved removal of her testes and penis and, in the words of Johnson J, "the creation of an orifice which can be described as an artificial vagina, but she was still without uterus or ovaries or any other biological characteristics of a woman." A chromosomal test, dated 8 April 1999, showed her to have a karyotype 46XY pattern, an apparently normal male karyotype.

D **10** For completeness I should mention in passing that a transsexual person is to be distinguished from a homosexual person. A homosexual is a person who is attracted sexually to persons of the same sex. Nor should a transsexual person be confused with a transvestite. A transvestite is a person who, usually for the purpose of his or her sexual gratification, enjoys dressing in the clothes of the opposite sex.

E *The present state of the law*

11 The present state of English law regarding the sex of transsexual people is represented by the well known decision of Ormrod J in *Corbett v Corbett (orse Ashley)* [1971] P 83, 104, 106. That case, like the present one, concerned the gender of a male to female transsexual in the context of the validity of a marriage. Ormrod J held that, in this context, the law should F adopt the chromosomal, gonadal and genital tests. If all three are congruent, that should determine a person's sex for the purpose of marriage. Any operative intervention should be ignored. The biological sexual constitution of an individual is fixed at birth, at the latest, and cannot be changed either by the natural development of organs of the opposite sex or by medical or surgical means.

12 In *R v Tan* [1983] QB 1053, 1063–1064, the Court of Appeal, G comprising May LJ and Parker and Staughton JJ, applied the *Corbett* approach in the context of criminal law. The court upheld convictions which were dependent on Gloria Greaves, a post-operative male to female transsexual, still being in law a man. In *S-T (formerly J) v J* [1998] Fam 103, 122, a case of a female to male transsexual, the correctness of the decision in *Corbett* seems not to have been challenged. But Ward LJ suggested that the decision would bear re-examination.

H **13** The decision in *Corbett* has attracted much criticism, from the medical profession and elsewhere. The criteria for designating a person as male or female are complex. It is too "reductionistic" to have regard only to the three *Corbett* factors of chromosomes, gonads and genitalia. This approach ignores "the compelling significance of the psychological status of

the person as a man or a woman". Further, the application of the *Corbett* approach leads to a substantially different outcome in the cases of a post-operative inter-sexual person and a post-operative transsexual person, even though, post-operatively, the bodies of the two individuals may be remarkably similar.

14 In overseas jurisdictions *Corbett* has not been universally followed. It was followed, for instance, in South Africa in *W v W* (1976) (2) SA 308 and in Canada in *M v M* (1984) 42 RFL (2d) 55. But more recently the trend has been in the opposite direction. Thus, for instance, in New Zealand and Australia post-operative transsexuals' assigned sex has been recognised for the purpose of validating their marriages. In New Zealand in *Attorney General v Otahuhu Family Court* [1995] 1 NZLR 603, 630, Ellis J noted that once a transsexual person has undergone surgery, he or she is no longer able to operate in his or her original sex. He held there is no social advantage in the law not recognising the validity of the marriage of a transsexual in the sex of reassignment. An adequate test is whether the person in question has undergone surgical and medical procedures that have effectively given the person the physical conformation of a person of a specified sex.

15 In Australia Chisholm J reached a similar conclusion in *In re Kevin (Validity of Marriage of Transsexual)* [2001] Fam CA 1074, a case decided after the decision of the Court of Appeal in the present case. Chisholm J's extensive judgment contains a powerful critique of the existing law and a useful review of international developments. Having regard to the view I take of this case, it is not necessary for me to elaborate on his views. Suffice to say, his conclusion was that there is no "formulaic solution" to determining the sex of an individual for the purpose of the law of marriage. All relevant matters need to be considered, including the person's life experiences and self-perception. Post-operative transsexual people will normally be members of their reassigned sex.

16 This decision was the subject of an appeal. Very recently, on 21 February 2003, the full court of the Federal Family Court dismissed the appeal: Appeal No EA/97/2001 (unreported). The judgment of the full court contains an invaluable survey of the authorities and the issues. The court concluded that in the relevant Commonwealth marriage statute the words "man" and "woman" should be given their ordinary, everyday contemporary meaning. Chisholm J was entitled to conclude, as a question of fact, that the word "man" includes a post-operative female to male transsexual person. The full court left open the "more difficult" question of pre-operative transsexual persons.

The decisions of the courts below

17 The trial judge, Johnson J, recognised there has been a marked change in social attitudes to problems such as those of Mrs Bellinger since *Corbett v Corbett (orse Ashley)* [1971] P 83 was decided in 1970. The law on this matter in this country is, or is becoming, a minority position, at least so far as Europe is concerned. But the law is clear, and as a judge he had to accept the law as it is. What is also clear is that this is no simple matter. Potentially there are serious implications to be considered in relation to the law of marriage and other areas of life: see [2001] 1 FLR 389, 402.

18 Likewise, the majority of the Court of Appeal, having considered up to date medical evidence, adhered to the *Corbett* approach. The three

A criteria relied upon by Ormrod J remain the only basis upon which to decide upon the gender of a child at birth. There is, in informed medical circles, a growing momentum for recognition of transsexual people for every purpose and in a manner similar to those who are inter-sexed. This reflects changes in social attitudes as well as advances in medical research. But recognition of a change of gender for the purposes of marriage would require some certainty regarding the point at which the change takes place. This point is B not easily ascertainable. 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 which he or she was correctly assigned at birth? This is a question for Parliament, not the courts: see [2002] Fam 150, 176–178, paras 97–109.

19 In his dissenting judgment Thorpe LJ questioned whether it was C right, particularly in the context of marriage, to make the chromosomal factor conclusive, or even dominant. It is an invisible feature of an individual, incapable of perception other than by scientific test. In the context of the institution of marriage as it is today it is right to give predominance to psychological factors and to carry out the essential assessment of gender at or shortly before the time of marriage rather than at the time of birth: [2002] Fam 150, 190–191, para 155.

D

The European Court of Human Rights

20 This issue has been before the European Court of Human Rights on several occasions in the last 20 years. During this period the development of human rights law on this issue has been remarkably rapid. Until very recently the court consistently held that application of the *Corbett* criteria, E and consequent non-recognition of change of gender by post-operative transsexual persons, did not constitute a violation of article 8 (right to respect for private life) or article 12 (right to marry): *Rees v United Kingdom* (1986) 9 EHRR 56, *Cossey v United Kingdom* (1990) 13 EHRR 622, and *Sheffield and Horsham v United Kingdom* (1998) 27 EHRR 163. It is to be noted, however, that in the latter case the court was critical of the United F Kingdom's apparent failure to take any steps to keep this area of the law under review. There is, the court said, an increased social acceptance of transsexualism and an increased recognition of the problems which post-operative transsexual people encounter. The court reiterated that this area "needs to be kept under review by contracting states": paragraph 60.

21 In its most recent decision the court has taken the view that the sands of time have run out. The United Kingdom's margin of appreciation no G longer extends to declining to give legal recognition to all cases of gender reassignment. This was the decision of the court, sitting as a grand chamber, in the case of *Goodwin v United Kingdom* (2002) 35 EHRR 447. Judgment was given in July 2002, that is, after the Court of Appeal gave its judgment in the present case. Christine Goodwin was a post-operative male to female transsexual. The court held unanimously that the United Kingdom was in breach of articles 8 and 12. H

22 The court's judgment was wide-ranging. As it happens, this was not a "marriage" case. Christine Goodwin had married as a man and later been divorced. Her complaint was that in several respects she, as a post-operative transsexual person, was not treated fairly by the laws or practices of this country. She was unable to pursue a claim for sexual harassment in an

employment tribunal because she was considered in law to be a man. She was not eligible for a state pension at 60, the age of entitlement for women. She remained obliged to pay the higher car insurance premiums applicable to men. In many instances she had to choose between revealing her birth certificate and forgoing advantages conditional upon her producing her birth certificate. Her inability to marry as a woman seems not to have been the subject of specific complaint by her. But in its judgment the court expressed its views on this and other aspects of the lack of legal recognition of her gender reassignment.

23 Some of the main points in the judgment of the court can be summarised as follows. In the interests of legal certainty, foreseeability and equality before the law the court should not depart, without good reason, from precedents laid down in previous cases. But the court must have regard to changing conditions within the respondent state and within contracting states generally. The court must respond to any evolving convergence on the standards to be achieved: paragraph 74. A test of congruent biological factors can no longer be decisive in denying legal recognition to the change of gender of a post-operative transsexual: paragraph 100. With increasingly sophisticated types of surgery and hormonal treatments the principal unchanging biological aspect of gender identity is the chromosomal element. It is not apparent that this must inevitably be of decisive significance: paragraph 82. The court recognised that it is for a contracting state to determine, amongst other matters, the conditions under which a person claiming legal recognition as a transsexual establishes that gender re-assignment has been properly effected. But it found "no justification for barring the transsexual from enjoying the right to marry under any circumstances": paragraph 103.

24 This decision of the court was essentially prospective in character. The court made this plain. Until 1998, the date of the decision in *Sheffield and Horsham v United Kingdom* 27 EHRR 163, the court had found that the United Kingdom's treatment of post-operative transsexual people was within this country's margin of appreciation and that this treatment did not violate the Convention. By the *Goodwin* decision the court found that "the situation, as it has evolved, *no longer* falls within the United Kingdom's margin of appreciation": paragraphs 119–120 (emphasis added).

Developments since the Goodwin decision

25 This decision of the European Court of Human Rights prompted three developments. First, in written answers to the House of Commons on 23 July 2002, the Parliamentary Secretary to the Lord Chancellor's Department noted that the Interdepartmental Working Group on Transsexual People had been reconvened. Its terms of reference include re-examining the implications of granting full legal status to transsexual people in their acquired gender. The minister stated that the working group had been asked to consider urgently the implications of the *Goodwin* judgment.

26 The second development has an important bearing on the outcome of this appeal. On 13 December 2002 the Government announced its intention to bring forward primary legislation which will allow transsexual people who can demonstrate they have taken decisive steps towards living fully and permanently in the acquired gender to marry in that gender. The

A legislation will also deal with other issues arising from the legal recognition of acquired gender. A draft outline Bill will be published in due course.

27 The third development was that before your Lordships' House counsel for the Lord Chancellor accepted that, from the time of the *Goodwin* decision, those parts of English law which fail to give legal recognition to the acquired gender of transsexual persons are in principle incompatible with articles 8 and 12 of the Convention. Domestic law, including section 11(c) of
B the Matrimonial Causes Act 1973, will have to change.

Gender reassignment

28 The distinction between male and female exists throughout the animal world. It corresponds to the different roles played in the reproductive process. A male produces sperm which fertilise the female's
C eggs. In this country, as elsewhere, classification of a person as male or female has long conferred a legal status. It confers a legal status, in that legal as well as practical consequences follow from the recognition of a person as male or female. The legal consequences affect many areas of life, from marriage and family law to gender-specific crime and competitive sport. It is not surprising, therefore, that society through its laws decides what objective
D biological criteria should be applied when categorising a person as male or female. Individuals cannot choose for themselves whether they wish to be known or treated as male or female. Self-definition is not acceptable. That would make nonsense of the underlying biological basis of the distinction.

29 This approach did not give rise to legal difficulty before the advent of gender reassignment treatment. This was noted by Lord Reed in his article "Splitting the difference: transsexuals and European Human Rights law"
E (September 2000). Gender identity disorder seems always to have existed. But before the advent of gender reassignment treatment a claim by a transsexual person to be recognised in his or her self-perceived gender would have been hopeless. The anatomy of his or her body of itself would have refuted the claim.

30 The position has now changed. Recognition of transsexualism as a
F psychiatric disorder has been accompanied by the development of sophisticated techniques of medical treatment. The anatomical appearance of the body can be substantially altered, by forms of treatment which are permissible as well as possible. It is in these changed circumstances that society is now facing the question of how far it is prepared to go to alleviate the plight of the small minority of people who suffer from this medical condition. Should self-perceived gender be recognised?

G **31** Recognition of gender reassignment will involve some blurring of the normally accepted biological distinction between male and female. Some blurring already exists, unavoidably, in the case of inter-sexual persons. When assessing the gender of inter-sexual persons, matters taken into account include self-perception and style of upbringing and living. Recognition of gender reassignment will involve further blurring. It will
H mean that in law a person who, unlike an inter-sexual person, had all the biological characteristics of one sex at birth may subsequently be treated as a member of the opposite sex.

32 Thus the circumstances in which, and the purposes for which, gender reassignment is recognised are matters of much importance. These are not easy questions. The circumstances of transsexual people vary widely. The

distinction between male and female is material in widely differing contexts. The criteria appropriate for recognising self-perceived gender in one context, such as marriage, may not be appropriate in another, such as competitive sport.

33 Stated very shortly, this is the setting for the legal issues arising on this appeal, to which I now turn.

Gender and marriage: part of a wider problem

34 My Lords, I am profoundly conscious of the humanitarian considerations underlying Mrs Bellinger's claim. Much suffering is involved for those afflicted with gender identity disorder. Mrs Bellinger and others similarly placed do not undergo prolonged and painful surgery unless their turmoil is such that they cannot otherwise live with themselves. Non-recognition of their reassigned gender can cause them acute distress. I have this very much in mind.

35 I also have in mind that increasingly, in the more compassionate times in which we live, there is an international trend towards recognising gender reassignment and not condemning post-operative transsexual people to live in what was aptly described by the European Court of Human Rights in the *Goodwin* case 35 EHRR 447 as an intermediate zone, not quite one gender or the other. And in this country gender reassignment has already received legal recognition for some purposes, for example, for the purpose of the discrimination legislation, in section 2A of the Sex Discrimination Act 1975. This section was introduced into the statute by the Sex Discrimination (Gender Reassignment) Regulations 1999 (SI 1999/1102).

36 Despite this, I am firmly of the view that your Lordships' House, sitting in its judicial capacity, ought not to accede to the submissions made on behalf of Mrs Bellinger. Recognition of Mrs Bellinger as female for the purposes of section 11(c) of the Matrimonial Causes Act 1973 would necessitate giving the expressions "male" and "female" in that Act a novel, extended meaning: that a person may be born with one sex but later become, or become regarded as, a person of the opposite sex.

37 This would represent a major change in the law, having far reaching ramifications. It raises issues whose solution calls for extensive enquiry and the widest public consultation and discussion. Questions of social policy and administrative feasibility arise at several points, and their interaction has to be evaluated and balanced. The issues are altogether ill-suited for determination by courts and court procedures. They are pre-eminently a matter for Parliament, the more especially when the government, in unequivocal terms, has already announced its intention to introduce comprehensive primary legislation on this difficult and sensitive subject.

38 Given this latter circumstance, intervention by the courts would be peculiarly inappropriate when the change being sought in the law raises issues such as the following.

39 First, much uncertainty surrounds the circumstances in which gender reassignment should be recognised for the purposes of marriage. The present case concerns one individual and her particular condition and circumstances. Although some of the evidence produced is of a general nature, the evidence before the House is focused on the facts of this case. So were the arguments. In particular, Miss Scriven submitted that wherever the

A line marking the transition from one sex to the other is to be drawn, Mrs Bellinger is on the reassigned gender side of the line.

40 I do not consider this would be a proper or, indeed, a responsible basis on which to change the law. Surgical intervention takes many forms and, for a variety of reasons, is undertaken by different people to different extents. For men it may mean castration or inversion of the penis to create a
B false vagina. For women it may mean a mastectomy, hysterectomy, or creation of a false penis by phalloplasty. There seems to be no "standard" operation or recognised definition of the outcome of completed surgery. Today the case before the House concerns Mrs Bellinger. Tomorrow's case in the High Court will relate to a transsexual person who has been able to undergo a less extensive course of surgery. The following week will be the case of a transsexual person who has undergone hormonal treatment but
C who, for medical reasons, has not been able to undergo any surgery. Then there will be a transsexual person who is medically able to undergo all or part of the surgery but who does not wish to do so. By what criteria are cases such as these to be decided?

41 But the problem is more fundamental than this. It is questionable whether the successful completion of some sort of surgical intervention
D should be an essential prerequisite to the recognition of gender reassignment. If it were, individuals may find themselves coerced into major surgical operations they otherwise would not have. But the aim of the surgery is to make the individual feel more comfortable with his or her body, not to "turn a man into a woman" or vice versa. As one medical report has expressed it, a male to female transsexual person is no less a woman for not having had surgery, or any more a woman for having had it: see *Secretary,*
E *Department of Social Security v SRA* (1993) 118 ALR 467, 477.

42 These are deep waters. Plainly, there must be some objective, publicly available criteria by which gender reassignment is to be assessed. If possible the criteria should be capable of being applied readily so as to produce a reasonably clear answer. Parties proposing to enter into a marriage relationship need to know whether their marriage will be valid.
F Other people need to know whether a marriage was valid. Marriage has legal consequences in many directions: for instance, housing and residential security of tenure, social security benefits, citizenship and immigration, taxation, pensions, inheritance, life insurance policies, criminal law (bigamy). There must be an adequate degree of certainty. Otherwise, as the majority of the Court of Appeal observed, the applicability of the law to an
G individual suffering from gender identity disorder would be in a state of complete confusion: see [2002] 2 Fam 150, 177, para 104.

43 Your Lordships' House is not in a position to decide where the demarcation line could sensibly or reasonably be drawn. Where this line should be drawn is far from self-evident. The antipodean decisions of *Attorney General v Otahuhu Family Court* [1995] 1 NZLR 603 and *In re Kevin (Validity of Marriage of Transsexual)* [2001] Fam CA 1074 and
H Appeal No EA 97/2001 have not identified any clear, persuasive principle in this regard. Nor has the dissenting judgment of Thorpe LJ in the present case. Nor has the decision of the European Court of Human Rights in *Goodwin v United Kingdom* 35 EHRR 447. Nor is there uniformity among the 13 member states of the European Union which afford legal recognition

to a transsexual person's acquired gender. The preconditions for recognition vary considerably.

44 Further, the House is not in a position to give guidance on what other preconditions should be satisfied before legal recognition is given to a transsexual person's acquired gender. Some member states of the European Union insist on the applicant being single or on existing marriages being dissolved. Some insist on the applicant being sterile. Questions arise about the practical mechanisms and procedures for obtaining recognition of acquired gender, and about the problem of people who "revert" to their original gender after a period in their new gender role.

45 Secondly, the recognition of gender reassignment for the purposes of marriage is part of a wider problem which should be considered as a whole and not dealt with in a piecemeal fashion. There should be a clear, coherent policy. The decision regarding recognition of gender reassignment for the purpose of marriage cannot sensibly be made in isolation from a decision on the like problem in other areas where a distinction is drawn between people on the basis of gender. These areas include education, child care, occupational qualifications, criminal law (gender-specific offences), prison regulations, sport, the needs of decency, and birth certificates. Birth certificates, indeed, are one of the matters of most concern to transsexual people, because birth certificates are frequently required as proof of identity or age or place of birth. When, and in what circumstances, should these certificates be capable of being reissued in a revised form which does not disclose that the person has undergone gender reassignment?

46 Thirdly, even in the context of marriage, the present question raises wider issues. Marriage is an institution, or relationship, deeply embedded in the religious and social culture of this country. It is deeply embedded as a relationship between two persons of the opposite sex. There was a time when the reproductive functions of male and female were regarded as the primary raison d'être of marriage. The Church of England Book of Common Prayer of 1662 declared that the first cause for which matrimony was ordained was the "procreation of children". For centuries this was proclaimed at innumerable marriage services. For a long time now the emphasis has been different. Variously expressed, there is much more emphasis now on the "mutual society, help and comfort that the one ought to have of the other".

47 Against this background there are those who urge that the special relationship of marriage should not now be confined to persons of the opposite sex. It should be possible for persons of the same sex to marry. This, it is said, is the appropriate way to resolve problems such as those confronting Mrs Bellinger.

48 It hardly needs saying that this approach would involve a fundamental change in the traditional concept of marriage. Here again, this raises a question which ought to be considered as part of an overall review of the most appropriate way to deal with the difficulties confronting transsexual people.

49 For these reasons I would not make a declaration that the marriage celebrated between Mr and Mrs Bellinger in 1981 was valid. A change in the law as sought by Mrs Bellinger must be a matter for deliberation and decision by Parliament when the forthcoming Bill is introduced.

Declaration of incompatibility

50 Mrs Bellinger advanced a further, alternative claim for a declaration that in so far as section 11(c) of the Matrimonial Causes Act 1973 makes no provision for the recognition of gender reassignment it is incompatible with articles 8 and 12 of the Convention. Her claim is advanced on the footing that, although she and Mr Bellinger celebrated their marriage long before the Human Rights Act 1998 came into force, and although the *Goodwin* decision 35 EHRR 447 dealt with the human rights position as at the date of the judgment (July 2002), the non-recognition of their ability to marry continues to have adverse practical effects. The statute continues to prevent them marrying each other.

51 Mr Sales advanced several arguments on why such a declaration should not be made. There is, he submitted, no present incompatibility between the statute and the Convention. The European Court of Human Rights, in its decision in *Goodwin*, envisaged that the government should have a reasonable period in which to amend domestic law on a principled and coherent basis. The court said it "will be for the United Kingdom Government *in due course* to implement such measures as it considers appropriate to fulfil its obligations": see 35 EHRR 447, 483, para 120 (emphasis added).

52 I cannot accept this submission. It may be that, echoing the language of the European Court of Human Rights in *Marckx v Belgium* (1979) 2 EHRR 330, 353, para 58, the principle of legal certainty dispenses the United Kingdom government from re-opening legal acts or situations which antedate the judgment in *Goodwin*. But that is not the present case. In the present case section 11(c) of the Matrimonial Causes Act 1973 remains a continuing obstacle to Mr and Mrs Bellinger marrying each other.

53 It may also be that there are circumstances where maintaining an offending law in operation for a reasonable period pending enactment of corrective legislation is justifiable. An individual may not then be able, during the transitional period, to complain that his rights have been violated. The admissibility decision of the court in *Walden v Liechtenstein* (Application No 33916/96) (unreported) 16 March 2000 is an example of this pragmatic approach to the practicalities of government. But the question now under consideration is different. It is more general. The question is whether non-recognition of gender reassignment for the purposes of marriage is compatible with articles 8 and 12. The answer to this question is clear: it is not compatible. The European Court of Human Rights so found in July 2002 in *Goodwin*, and the Government has so accepted. What was held to be incompatible in July 2002 has not now, for the purposes of section 4, become compatible. The government's announcement of forthcoming legislation has not had that effect, nor could it. That would make no sense.

54 Then Mr Sales submitted that a declaration of incompatibility would serve no useful purpose. A declaration of incompatibility triggers the ministerial powers to amend the offending legislation under the "fast track" procedures set out in section 10 and Schedule 2 of the Human Rights Act 1998. But the minister's powers have already been triggered in the present case under section 10(1)(b), by reason of the decisions of the European Court of Human Rights in the *Goodwin* case and the associated case of *I v United Kingdom* (Application No 25680/94) (unreported) 11 July 2002. Further, the Government has already announced its intention to bring

forward primary legislation on this subject. For this reason also, counsel submitted, making a declaration of incompatibility would serve no useful purpose.

55 I am not persuaded by these submissions. If a provision of primary legislation is shown to be incompatible with a Convention right the court, in the exercise of its discretion, may make a declaration of incompatibility under section 4 of the Human Rights Act 1998. In exercising this discretion the court will have regard to all the circumstances. In the present case the government has not sought to question the decision of the European Court of Human Rights in *Goodwin* 35 EHRR 447. Indeed, it is committed to giving effect to that decision. Nevertheless, when proceedings are already before the House, it is desirable that in a case of such sensitivity this House, as the court of final appeal in this country, should formally record that the present state of statute law is incompatible with the Convention. I would therefore make a declaration of incompatibility as sought. I would otherwise dismiss this appeal.

LORD HOPE OF CRAIGHEAD

56 My Lords, my noble and learned friend, Lord Nicholls of Birkenhead, has explained the nature of the condition from which Mrs Bellinger has been suffering from as long as she can remember and the profound changes which she has undergone, both physically and socially, to give effect to her wish to live her life as a woman rather than as a man. Her courage and that of Mr Bellinger, who has supported her constantly throughout their marriage, deserve our respect and admiration. If there was a legitimate way of solving their problem and making the declaration which Mrs Bellinger seeks, I would of course wish to take it. But I agree with my noble and learned friend that the expressions "male" and "female" in section 11(c) of the Matrimonial Causes Act 1973 are not capable of being given the extended meaning that would be needed to accommodate her case, and that we have no option but to dismiss this appeal.

57 The essence of the problem, as I see it, lies in the impossibility of changing completely the sex which individuals acquire when they are born. A great deal can be done to remove the physical features of the sex from which the transsexual wishes to escape and to reproduce those of the sex which he or she wishes to acquire. The body can be altered to produce all the characteristics that the individual needs to feel comfortable, and there are no steps that cannot be taken to adopt a way of life that will enable him or her to enter into a satisfactory and loving heterosexual relationship. But medical science is unable, in its present state, to complete the process. It cannot turn a man into a woman or turn a woman into a man. That is not what the treatment seeks to do after all, although it is described as gender reassignment surgery. It is not just that the chromosomes that are present at birth are incapable of being changed. The surgery, however extensive and elaborate, cannot supply all the equipment that would be needed for the patient to play the part which the sex to which he or she wishes to belong normally plays in having children. At best, what is provided is no more than an imitation of the more obvious parts of that equipment. Although it is often described as a sex change, the process is inevitably incomplete. A complete change of sex is, strictly speaking, unachievable.

58 It is tempting to regard the fact that a complete sex change is unachievable as a mere technicality when this is compared with everything else that can be achieved in the case of post-operative transsexuals. But the law of marriage exists in order to define the circumstances in which the public status that follows from a valid marriage may be acquired. There is much to be said for the view that the words "male" and "female" should each be given a single, clear meaning that can be applied uniformly in all cases. That was achieved by the decision in *Corbett v Corbett (orse Ashley)* [1971] P 83, which predated the re-enactment of section 1(c) of the Nullity of Marriage Act 1971 in section 11(c) of the 1973 Act. Any enlargement of the meaning of those words to accommodate the problems faced by transsexuals would raise questions of fact and degree which are avoided by the use of the words chosen by Parliament.

59 I do not overlook the fact that Mrs Bellinger's consultant urologist, Michael Royle, declared in a letter dated 5 January 1999 that she underwent gender reassignment surgery on 21 February 1981 and that "she is physically female". But it seems to me that this is an incomplete statement of the facts. The wording of section 11(c) demands that they be subjected to a more rigorous assessment. In *Secretary, Department of Social Security v SRA* (1993) 118 ALR 467 it was held that the respondent, who was a pre-operative male to female transsexual, did not fall within the ordinary meaning of the word "female" as her anatomical sex and her psychological sex had not been harmonised. One of the medical reports referred to by Lockhart J in the Federal Court of Australia, at p 477, explained very clearly what the surgery seeks to achieve, and what it cannot do:

> "Genetically, and anatomically she is a 'male', however, she dresses and behaves as a woman. She considers herself as a woman. It is not for me to decide what the court or the Department of Social Security chooses to consider someone—but I do not think of, and treat [the respondent] as a woman. The fact that she has not had surgery to me is irrelevant. The aim of the surgery is to make somebody feel more comfortable with their body, not to 'turn them into a woman'. The surgery does not supply the patient with a uterus, nor with ovaries. It is purely and simply an attempt to allow the person's body to approximate to how they feel within themselves."

60 Lockhart J said in the *SRA* case, at p 480, that the common understanding of the words "woman" and female" and the phrase "opposite sex", which were ordinary English words, was a question of fact and that the crucial question was whether different conclusions were reasonably possible as to whether the facts or circumstances fell within their ordinary meaning. In *In re Kevin (Validity of Marriage of Transsexual)* [2001] Fam CA 1074 Chisholm J held that the ordinary contemporary meaning of the word "man" according to its Australian usage included post-operative female to male transsexuals, and that no good reasons had been shown why the ordinary meaning of the word should not apply in the context of marriage law: paragraph 327. He went on to say that there was no formulaic solution for determining the sex of an individual for this purpose, that all relevant factors had to be considered including the person's biological and physical characteristics at birth, the person's life experiences, the extent to which the person has functioned in society as a man or woman, any hormonal, surgical

or other medical sex reassignment treatments the person has undergone and the consequences of such treatment and that it was clear from the Australian authorities that post-operative transsexuals will normally be members of their reassigned sex: paras 328–329. He held that a marriage which "Kevin" had entered into with "Jennifer" on 21 August 1999 was a valid marriage under Australian law.

61 In *In re Kevin (Validity of Marriage of Transsexual)* (unreported) Appeal No EA 97/2001, 21 February 2003, the Full Court of the Family Court of Australia, after a comprehensive review of the authorities including the decision of the Court of Appeal in this case (see [2002] Fam 150), agreed with the approach of Chisholm J. The essence of that decision is to be found in the following paragraphs:

> "110. The definition of 'marriage' is essentially connected with the term 'man'. In these circumstances, for the reasons stated by the trial judge as amplified by our reasons that appear subsequently, we take the view that the words 'marriage' and 'man' are not technical terms and should be given their ordinary contemporary meaning in the context of the Marriage Act.
>
> "111. In our view, it thus becomes a question of fact as to what the contemporary, everyday meanings of the words 'marriage' and 'man' are respectively.
>
> "112. It is then a question of law for this court to determine whether, on the facts found by the trial judge, it was open to him to reach the conclusion that he did, namely that at the relevant time, Kevin was a man and that the marriage was therefore valid. As it was in *SRA* (supra) so, too, it is that the answer to that question is '*at the heart of the present case*'."

62 I need hardly say that I entirely agree with the Australian judges that the words "male" and "female" in section 11(c)of the 1973 Act, which is the provision with which we are faced in this case, are not technical terms and that they must be given their ordinary, everyday meaning in the English language. But no evidence was placed before us to suggest that in contemporary usage in this country, on whichever date one might wish to select—23 May 1973 when the 1973 Act was enacted, 2 May 1981 when Mr and Mrs Bellinger entered into their marriage ceremony or the date of this judgment, these words can be taken to include post-operative transsexual persons. The definition of "male" in the *New Shorter Oxford English Dictionary* (1993) tells us that its primary meaning when used as an adjective is "of, pertaining to, or designating the sex which can beget offspring". No mention is made anywhere in the extended definition of the word of transsexual persons. The word "transsexual" is defined as "having the physical characteristics of one sex but a strong and persistent desire to belong to the other". I see no escape from the conclusion that these definitions, with which the decision in *Corbett v Corbett (orse Ashley)* [1971] P 83 and the views of the majority in the Court of Appeal in this case are consistent, are both complete and accurate. The fact is that the ordinary meaning of the word "male" is incapable, without more, of accommodating the transsexual person within its scope. The Australian cases show that a distinction has to be drawn, even according to the contemporary usage of the word in Australia, between pre-operative and post-operative transsexuals. Distinctions of that kind raise questions of fact and degree

which are absent from the ordinary meaning of the word "male" in this country. Any attempt to enlarge its meaning would be bound to lead to difficulty, as there is no single agreed criterion by which it could be determined whether or not a transsexual was sufficiently "male" for the purpose of entering into a valid marriage ceremony.

63 In *Goodwin v United Kingdom* 35 EHRR 447, 474, paras 82–83 the European Court of Human Rights noted that it remains the case, as the court held in *Sheffield and Horsham v United Kingdom* 27 EHRR 163, that a transsexual cannot acquire all the biological characteristics of the assigned sex. It went on to say that it was not apparent in the light of increasingly sophisticated surgery and hormonal techniques that the chromosomal element, which is the principal unchanging biological aspect of gender identity, must inevitably take on decisive significance for the purpose of legal attribution of gender identity for post-operative transsexuals. So it was not persuaded that the state of medical science or scientific knowledge provided any determining argument as regards the legal recognition of transsexuals on grounds of social and legal policy. But this approach is not at all inconsistent with the view which I would take of the facts. The question which the court was asking itself was not whether the applicant, who was of the male sex when she was born, was now female. Post-operative transsexuals were assumed to fall into a distinct category. The question was whether it was a breach of their Convention rights for legal recognition to be denied to their new sexual identity.

64 Of course, it is not given to every man or every woman to have, or to want to have, children. But the ability to reproduce one's own kind lies at the heart of all creation, and the single characteristic which invariably distinguishes the adult male from the adult female throughout the animal kingdom is the part which each sex plays in the act of reproduction. When Parliament used the words "male" and female" in section 11(c) of the 1973 Act it must be taken to have used those words in the sense which they normally have when they are used to describe a person's sex, even though they are plainly capable of including men and women who happen to be infertile or are past the age of child bearing. I think that section 5(4)(e) of the Marriage (Scotland) Act 1977, which provides there is a legal impediment to a marriage in Scots law where the parties "are of the same sex", has to be read and understood in the same way. I do not see how, on the ordinary methods of interpretation, the words "male" and "female" in section 11(c) of the 1973 Act can be interpreted as including female to male and male to female transsexuals.

65 What then are we to make, in this case, of the decision in *Goodwin v United Kingdom* 35 EHRR 447? If it could be said that the use of the words "male" and "female" in section 11(c) of the 1973 Act was ambiguous, it would have been possible to have regard to that decision in seeking to resolve the ambiguity. But, for the reasons which I have given, I do not think that there is any such ambiguity. Then there is section 3(1) of the Human Rights Act 1998, which places a duty on the courts to read and give effect to legislation in a way that is compatible with the Convention rights if it is possible to do so. But we are being asked in this case to make a declaration about the validity of a marriage ceremony which was entered into on 2 May 1981, and section 3(1) of the 1998 Act is not retrospective: *R v Lambert* [2002] 2 AC 545; *R v Kansal (No 2)* [2002] 2 AC 69; *R v Lyons* [2003] 1 AC

976, 996, per Lord Hoffmann, and 1002, para 63, per Lord Hutton. The interpretative obligation which section 3(1) provides is not available.

66 But I do not think that it would be right to leave the issue there. If, as I would hold, the 1981 ceremony cannot be held to be a valid marriage ceremony, that is not an end of the matter. It would be open to Mrs Bellinger to try again some other day. It must be emphasised that this is not what she wants to do, as she regards herself as having been happily married since 1981. But we have been asked to say whether the provisions of section 11(c) are incompatible with her Convention rights and, if we find that they are incompatible, to make a declaration of incompatibility. I agree that it is proper that we should undertake this exercise, although neither of these steps can have any effect on the validity or otherwise of the 1981 ceremony.

67 We cannot proceed to the making of a declaration of incompatibility under section 4(2) of the Human Rights Act 1998 without examining the question which section 3(1) of the Act treats as the logically prior question, which is whether the legislation can be read and given effect in a way which is compatible with the Convention rights. As Lord Steyn put it in *R v A (No 2)* [2002] 1 AC 45, 68D–E, para 44, a declaration of incompatibility is a measure of last resort. But the word "must" which section 3(1) uses is qualified by the phrase "so far as it is possible to do so". As I said in *R v Lambert* [2002] 2 AC 545, 585B–D, para 79, the obligation, powerful though it is, is not to be performed without regard to its limitations. The obligation applies to the interpretation of legislation, which is the judges' function. It does not give them power to legislate: see also *In re S (Minors) (Care Order: Implementation of Care Plan)* [2002] 2 AC 291, 313B–D, paras 38–39, per Lord Nicholls of Birkenhead.

68 If the only problem of interpretation had been one of timing, on the view that section 11(c) regards "male" and "female" as something that cannot be changed after birth whereas other provisions in the same section such as section 11(b) relate to the position at the time the marriage is entered into, I would have been prepared to read the words "at the time of the marriage" in to section 11(c) so as to give that provision a meaning which was compatible with the article 12 Convention right. If the only obstacle was that the parties' sex at the time when they were born had been assumed wrongly to be immutable, it could be overcome by disregarding the niceties of language and finding a compatible construction by reading these words in. But that would only have solved the problem for the future if it could indeed be said that Mrs Bellinger had completely changed her sex since birth and that she was now female. That, for the reasons I have sought to explain, is not a possible view of the facts.

69 Her problem would be solved if it were possible for a transsexual to marry a person of the same sex, which is indeed what the European Court of Human Rights has now held should be the position in *Goodwin* 35 EHRR 447. The court noted in para 100 of its judgment that article 9 of the Charter of Fundamental Rights of the European Union had departed "no doubt deliberately" from the wording of article 12 of the Convention in removing the reference to "men and women of marriageable age". Article 9 of the Charter states simply that "the right to marry" shall be guaranteed. The note to article 9 says that it neither prohibits nor imposes the granting of the status of marriage to unions between people of the same sex. It appears that the European Court saw that article as opening up the

possibility of transsexuals marrying persons of the opposite sex to their post-operative acquired gender, as it rendered arguments about whether they were in fact of the opposite sex irrelevant. By this route, which bypasses the physical problems which are inherent in the notion of a complete sex change, legal recognition can be given to the acquired gender of post-operative transsexuals. But it is quite impossible to hold that section 11(c) of the 1973 Act treats the sex of the parties to a marriage ceremony as irrelevant, as it makes express provision to the contrary. In any event, problems of great complexity would be involved if recognition were to be given to same sex marriages. They must be left to Parliament. I do not think that your Lordships can solve the problem judicially by means of the interpretative obligation in section 3(1) of the 1998 Act.

70 So I too would dismiss the appeal. But I too would make a declaration that section 11(c) of the Matrimonial Causes Act 1973 is incompatible with Mrs Bellinger's right to respect for her private life under article 8 and with her right to marry under article 12 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

LORD HOBHOUSE OF WOODBOROUGH

71 My Lords, I agree with my noble and learned friends, Lord Nicholls of Birkenhead and Lord Hope of Craighead, that the appeal should be dismissed but that a declaration of incompatibility should now be made under section 4 of the Human Rights Act 1998.

72 The parties went through a ceremony of civil marriage before a registrar of marriages under the Marriage Act 1949 on 2 May 1981. At that date the Act which governed the legal validity of a purported marriage under English law was section 11 of the Matrimonial Causes Act 1973: "A marriage celebrated after 31 July 1971 shall be void on the following grounds only, that is to say . . . (c) that the parties are not respectively male and female . . ." The appellant gave her name to the Registrar of Marriages as Elizabeth Ann Wilkinson describing herself as a "spinster". Like your Lordships I will use the words "she" or "her" in relation to the appellant without begging the question in issue whether she was in truth female at the time she married Mr Bellinger in 1981.

73 At that date and, indeed, until the judgment of the European Court of Human Rights in the case of *Goodwin v United Kingdom* 35 EHRR 447, it was the authoritative view that a refusal by domestic law to recognise "transsexual" marriages (a term to which I will have to revert) did not contravene article 12 of the Convention. The judgment in *Goodwin* expressly recognised that this had been the result of the earlier cases of *Rees v United Kingdom* 9 EHRR 56, *Cossey v United Kingdom* 13 EHRR 622, and *Sheffield and Horsham v United Kingdom* 27 EHRR 163: see paragraphs 73–75 and 97–104 of the judgment. Until the delivery of the *Goodwin* judgment the appellant would have had no basis for any attack upon the propriety of section 11 of the 1973 Act.

74 The judgment in *Goodwin* is, if I may say so, thoughtful and appreciates the complexity of the problems created for many aspects of the law by a novel recognition of the concept of a voluntary *change* of gender. The new approach may reflect new social attitudes to questions of sexuality but the more specific changes in society and the law which should follow

from the recognition of the new attitudes are much more difficult to evaluate and provide for. For example, in the present context, to what extent do you change the fundamental concept of marriage? What new criteria do you apply? Once you make this change, how do you, in a non-discriminatory way, deal with mere cohabitees or with homosexuals of the same gender? The judgment refers in paragraph 91 and the preceding paragraphs to the report of the UK Interdepartmental Working Group on Transsexual People (April 2000) and the very substantial difficulties which it identified but also pointed out that they were not considered to be insuperable. The court also observed in paragraph 103 that "though there is widespread acceptance of the marriage of transsexuals, fewer countries permit the marriage of transsexuals in their assigned gender than recognise the change of gender itself". However the court concluded that there had been a breach of, inter alia, article 12 because, although the member states must be given a reasonable opportunity to decide how to revise their national legislation and make the appropriate changes, there came a time when the United Kingdom's continued failure to do so amounted to a denial of the right to marry protected by article 12: see paragraphs 52, 53, 102–104, and 120.

75 The present case concerns a "transsexual", that is to say, someone who wishes to change her existing gender and assume the opposite gender. This case is not concerned with gender mis-assignment nor with mixed or "intersex" gender. The appellant was born a male with all the characteristics of a male. She was correctly assigned the male gender at birth and in her birth certificate. In 1967, when 21, she married a woman. (She did not disclose this fact to the registrar in 1981.) But the marriage was childless and did not last; they were divorced in 1975. She assumed the female gender dressing and living as a woman. In February 1981, following hormone treatment from a specialist, she underwent gender reassignment surgery as described by my noble and learned friend, Lord Nicholls. This was irreversible in the sense that thereafter she could never be fully restored so as to be an anatomically complete male.

76 Gender reassignment is an established medical procedure in various stages involving both diagnoses by the specialist and informed choices being made by the patient. There was uncontested expert evidence given about this at the trial. Conveniently, it is also summarised in the judgment in *Goodwin* 35 EHRR 447. The condition of dissatisfaction with one's sexuality at a level justifying medical intervention is a medically recognised mental disorder (DSM-IV). It reflects a pathological degree of dissatisfaction with one's existing gender. The specialist has to study the patient over a period of time and confirm the diagnosis and ascertain that the patient is definitely willing to take the next steps. Firstly the patient must become used to living as a member of the opposite sex. Then the patient will be given courses of hormone treatment to change his/her hormonal make-up to that of the preferred sex. This reinforces the social changes already undertaken. Finally various degrees of gender reassignment surgery are undertaken. It is not until this last stage that the changes may become anatomically irreversible. At any previous stage the patient may change his/her mind and decide that he/she does not want to make the change or not go any further. In the present case the appellant was steadfast in her intentions and went as far as she could, given the considerable limitations of gender reassignment. But the question of transsexualism includes

definitional questions of how far the person must go in order to qualify as a transsexual. Is merely assuming the life and clothing of a woman enough or must it include irreversible gender reassignment? Or something in between? There are cogent arguments against adopting any specific criterion. A further question which arises is referred to in paragraph 50 of the *Goodwin* judgment 35 EHRR 447, noting: "Many people revert to their biological sex after living for some time in the opposite sex and some alternate between the two sexes throughout their lives." All this underlines the novelty of the idea of gender by choice and how great a departure it represents from the pre-*Goodwin* human rights law and the previous understanding of what the words "respectively male and female" meant. Similar fundamental novelties and changes in the use of language, culturally controversial, are involved in giving effect to the European Court of Human Rights's interpretation of the word "marry" in article 12.

77 The appellant's primary claim was for a declaration under section 55 of the Family Law Act 1986 that her marriage to Mr Bellinger in 1981 was "at its inception a valid marriage". For the reasons given by my noble and learned friends and for the additional reasons I have given and those to be given by my noble and learned friend, Lord Rodger of Earlsferry, the claim must fail and the appeal be dismissed. The 1981 wedding was not valid.

78 But that still leaves the question whether the House should make a declaration of incompatibility under section 4 of the Human Rights Act 1998. The threshold question is whether, by applying section 3, it is possible, as a matter of interpretation, to "read down" section 11 (c) of the 1973 Act so as to include additional words such as "or two people of the same sex one of whom has changed his/her sex to that of the opposite sex". This would in my view not be an exercise in interpretation however robust. It would be a legislative exercise of amendment making a legislative choice as to what precise amendment was appropriate. Counsel for the Lord Chancellor on behalf of the Government did not argue otherwise. Counsel also did not argue that *Goodwin* was wrongly decided nor that the UK was not under a treaty obligation to comply with it. But, effectively repeating arguments made unsuccessfully in Strasbourg, submitted that the House should not exercise its discretion under section 4 having regard to the difficulty of deciding upon new policies and drafting new legislation. These difficulties exist but much time has elapsed; the Working Group reported in April 2000; the Court of Appeal commented as strongly as it was proper for them to do so at the lack of progress in July 2001 and the European Court of Human Rights has made its decision in *Goodwin* on the basis that the permitted time for compliance has expired. The argument for further time is now itself incompatible with the rights conferred by the Convention.

79 But counsel also argued that, in view of his concession that *Goodwin* bound the United Kingdom, any declaration would be academic and its purpose was merely to confer a power to expedite legislation under section 10. These arguments must be rejected. The appellant and Mr Bellinger in exercise of their rights under article 12 would wish to enter into a valid marriage as soon as the UK legislation enables them to do so. Others may wish to do the same. The Government cannot yet give any assurance about the introduction of compliant legislation. There will be political costs in both the drafting and enactment of new legislation and the

legislative time it will occupy. The incompatibility having been established, the declaration under section 4 should be made.

LORD SCOTT OF FOSCOTE

80 My Lords, I have had the great advantage of reading in advance the opinions on this case of my noble and learned friends, Lord Nicholls of Birkenhead and Lord Hope of Craighead. I find myself in complete and admiring agreement with their analysis of the issue arising in the case and with their conclusions on that issue. I cannot improve on what they have said or add anything useful. I would dismiss the appeal for the reasons they have given and make the proposed declaration of incompatibility.

LORD RODGER OF EARLSFERRY

81 My Lords, I have had the privilege of considering the speeches of my noble and learned friends, Lord Nicholls of Birkenhead, Lord Hope of Craighead and Lord Hobhouse of Woodborough, in draft. I agree with them and, for the reasons they give, I too would make the declaration of incompatibility which they propose but would otherwise dismiss the appeal. I add a point about the language of the relevant legislation.

82 The submissions for Mrs Bellinger presuppose that, in relation to marriage, English law envisages that a person's gender can alter. The form of section 11(c) of the Matrimonial Causes Act 1973 indicates that this is not so.

83 Section 11(c) is a re-enactment of section 1(c) of the Nullity of Marriage Act 1971 which was passed shortly after the decision in *Corbett v Corbett (orse Ashley)* [1971] P 83. Section 11(c) contains one in a series of grounds of nullity. By section 11(b) a marriage is void if "at the time of the marriage either party was already lawfully married". The reference to the situation at the time of the marriage is necessary because a person may have been lawfully married at an earlier time and may be lawfully married at a later time. The situation is one that can change. For purposes of nullity the critical consideration is what the situation was "at the time of the marriage" in question. Similarly, section 11(d) provides that a polygamous marriage entered into outside England and Wales is void if "either party was at the time of the marriage domiciled in England and Wales". Again, when dealing with domicile which can change, Parliament uses the past tense and specifies the time of the marriage. Section 11(c) is different in both respects: a marriage is void if "the parties are not respectively male and female". Both the present tense and the omission of any reference to the time of the marriage indicate that, in relation to the validity of marriage, Parliament regards gender as fixed and immutable.

Appeal dismissed.

Declaration that section 11(c) of the 1973 Act is incompatible with the petitioner's right to respect for her private life and with her right to marry.

The Lord Chancellor to pay half the petitioner's costs before the House of Lords.

Solicitors: Law for All, Brentford; Treasury Solicitor.

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