Neutral Citation Number: [2015] EWHC 464 (Admin)

Case No: CO/16949/2013

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27/02/2015

Before :

MRS JUSTICE THIRLWALL DBE

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Between :

MS HELEN CARPENTER	**Applicant**
- and -	
THE SECRETARY OF STATE FOR JUSTICE	**Defendant**

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- -

Mr Rory Brown (instructed by **Debevoise & Plimpton LLP**) for the **Applicant** (both acting pro bono)
Mr Brendan McGurk (instructed by the **Treasury Solicitor**) for the **Defendant**

Hearing date: 15th October 2014

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Approved

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MRS JUSTICE THIRLWALL :

1. In November 2011 the applicant obtained a Gender Recognition Certificate in accordance with the provisions of the Gender Recognition Act 2004. She is a post-operative male-to-female transsexual person. This is her application under Part 18 of the Family Procedural Rules 2010 for an order that:

"Section 3(3) of the Gender Recognition Act 2004 is incompatible with the rights in the European Convention of Human Rights as enshrined in the Human Rights Act 1998".

2. It is the Secretary of State's case that there is no incompatibility.

Procedural background

3. The applicant was born male in September 1950. On 12th May 2011 she applied to the gender recognition panel for the grant of a Gender Recognition Certificate. She submitted medical reports from a psychiatrist and two other doctors. The Panel requested further information, in particular a report from a registered medical practitioner providing details of surgery and treatment she had undergone to change sexual characteristics. In due course a further report was provided by the surgeon. The applicant brought an appeal against what she said was the refusal of the Panel to grant a certificate. The appeal came before Mr Justice Holman on the 3rd October 2012. It was rejected. Holman J concluded that the Panel had not at any stage rejected the application. Her appeal was dismissed.

4. In the meantime a certificate had been granted in November 2011. This freestanding application for a declaration of incompatibility was listed for hearing on 21st November 2012. It was adjourned and eventually came before me on 15th October 2014.

Gender dysphoria

5. Gender dysphoria occurs where a person experiences discomfort or distress as a result of a mismatch between his or her biological sex and the gender with which they identify. Until recently it was considered a psychiatric disorder. The current approach has moved away from categorising it as a disorder and towards a description of its characteristics. Many people who have gender dysphoria choose to live as a member of the sex with which they identify, namely the sex of their acquired gender. Most have counselling or other psychological therapies, usually to assist them in making the transition to living in their acquired gender. A very significant proportion undergo hormone treatment. Some undergo hormone treatment and radical surgery to align their physical and psychological features with their acquired gender. I was told that some people live in their acquired gender and undergo no treatment of any type.

Statutory framework

6. The Gender Recognition Act 2004 (GRA) permits a transsexual person aged at least 18 to apply for a Gender Recognition Certificate. The effect of the certificate is that the person's gender becomes for all purposes the acquired gender. Thus, if the acquired gender is the male gender, the person's gender

becomes that of a man and, if it is the female gender, the person's gender becomes that of a woman (see S9 of the GRA).

7. The GRA was the UK government's response to findings against it in **Goodwin v United Kingdom [2002] 25 EHRR 18**. Mr McGurk produced for the hearing extracts from the debates from the House of Lords in respect of the GRA. Interesting though the debates are I could see no basis upon which their contents were admissible on this application.

8. Since its implementation the GRA has been considered by a number of domestic courts, the European Court of Human Rights and other bodies. In **Grant v the United Kingdom** a decision of the European Court of Human Rights in May 2006 (2007) 44 EHRR1 the applicant, born male, had gender reassignment surgery at the age of 26. When she was approaching her 60th birthday she sought a state pension. This was refused on the grounds that she was, in law, male. At the time her case was before the domestic courts the GRA had not yet been enacted. By the time of the hearing in Strasbourg it was in force. Mr McGurk drew my attention to paragraphs 28-31 of the decision. At paragraph 30:

"the GRA 2004 has been adopted by parliament since the introduction of this application. It received Royal Assent on July 2004. Under the Act, individuals who satisfy certain criteria are able to apply to a gender recognition panel for a Gender Recognition Certificate. From the date of the grant of such a certificate, which is prospective in effect, an individual is afforded legal recognition in their acquired gender. In particular, social

security benefits and the state retirement pension are paid according to the acquired gender."

9. At paragraph 41, having considered the arguments in respect of the matters in issue, the court said "the present applicant's victim status came to an end when the GRA 2004 came into force, thereby providing the applicant with the means on a domestic level to obtain the legal recognition previously denied".

10. The Act was considered by the United Nations Committee on Human Rights. Having considered a report submitted by the United Kingdom under Article 40 of the International Covenant on Civil and Political Rights, the committee welcomed "the adoption of the Civil Partnership Act 2004, the Gender Recognition Act 2004, the Equality Act 2006, and the Sex Discrimination (Amendment of Legislation) Regulations 2008. – see chapter 5 of the report. Mr McGurk relied on the approval given to the Act as support for his submission that there is no incompatibility between the GRA and the rights enshrined in the ECHR. He also relied on the decisions of the domestic courts where the GRA has been challenged. He submitted that it would be extremely surprising were the very Act which was designed to ensure the United Kingdom's compliance with Article 8 should, in fact, have achieved precisely the opposite effect.

11. Whilst the courts have given broad approval of the Act, as has the United Nations Committee, that approval does not preclude a closer analysis of the statute which might lead to a different result. Mr McGurk reminded me that the relevant Minister certified that the Act complied with the UK's duties under ECHR. That means that the government intended to comply and

understood that it had done so. The question for me is whether Section 3(3) of the Act is compatible with the convention.

The Act

12. Section 1 reads, so far as is relevant,

Applications

1(1) A person of either gender who is aged at least 18 may make an application for a gender recognition certificate on the basis of –

(a) living in the other gender…

(2) In this Act "*the acquired gender*", in relation to a person by whom an application under subsection (1) is or has been made, means-

(a) in the case of an application under paragraph (a) of that subsection, the gender in which the person is living…

(3) An application under subsection (1) is to be determined by a Gender Recognition Panel…

Section 2 reads:

Determination of applications

(1) In the case of an application under section 1(1)(a), the Panel must grant the application if satisfied that the applicant-

(a) has or has had gender dysphoria,

(b) has lived in the acquired gender throughout the period of two years ending with the date on which the application is made,

(c) intends to continue to live in the acquired gender until death, and

(d) complies with the requirements imposed by and under section 3…

(2) The Panel must reject an application under section 1(1) if not required by subsection (1) or (2) to grant it…

Section 3

Evidence

(1) An application under section 1(1)(a) must include either-

(a) a report made by a registered medical practitioner practising in the field of gender dysphoria and a report made by another registered medical practitioner (who may, but need not, practise in that field), or

(b) a report made by a registered psychologist practising in that field and a report made by a registered medical practitioner (who may, but need not, practise in that field).

(2) But subsection (1) is not complied with unless a report required by that subsection and made by-

(a) a registered medical practitioner, or

(b) a registered psychologist

practising in the field of gender dysphoria includes details of the diagnosis of the applicant's gender dysphoria.

(3) And subsection (1) is not complied with in a case where-

(a) the applicant has undergone or is undergoing treatment for the purpose of modifying sexual characteristics, or

(b) treatment for that purpose has been prescribed or planned for the applicant,

unless at least one of the reports required by that subsection includes details of it.

(4) An application under section 1(1)(a) must also include a statutory declaration by the applicant that the applicant meets the conditions in section 2(1)(b) and (c)

…

(6) Any application under section 1(1) must include…

(c) any other information or evidence which the Panel which is to determine the application may require,

and may include any other information or evidence which the applicant wishes to include.

The Application

13. This application focuses on the requirement in section 3(3) that those who have undergone treatment for the purposes of modifying sexual characteristics or who plan to have such treatment or for whom such treatment has been prescribed, **must** (my emphasis) provide to the Panel considering their application details of the treatment they have undergone. Mr Brown put the case in three ways:-

(i) the requirement to provide this medical information is incompatible with the applicant's Article 8 right to respect for her privacy;

(ii) the requirement discriminates unlawfully against the applicant and other transgender people who have undergone surgery and is incompatible with Article 14 of the European Convention of Human Rights, in the context of Article 8 (and Articles 6, Article 1 Protocol 1). Mr Brown did not pursue the complaints in respect of Articles 6 and 1. They were unarguable.

(iii) the requirement discriminates unlawfully against the applicant on the grounds of sex and is thus incompatible with Article 14 in the context of Article 8.

Justiciability

14. During oral submissions Mr McGurk submitted for the first time that the application was not justiciable. This had not been foreshadowed in any

skeleton argument. He submitted that the court could not interfere with the criteria selected by the state to determine applications for a Gender Recognition Certificate unless it were the case that the Act was a dishonest attempt to give effect to the decision in **Goodwin**. He relied on the observations of Baroness Hale at paragraph 53 of the decision of the House of Lords in **A v Chief Constable of West Yorkshire [2004] UKHL,** 21 where she recorded that the European Court of Human Rights in **Goodwin** had "held that the refusal of domestic law to recognise the reassigned gender 'no longer falls within the United Kingdom's margin of appreciation'. But it would be for the United Kingdom to decide how to fulfil its obligation to secure to trans people their right to respect for their private life and their right to marry." Mr McGurk relied on the view expressed by Judge Nicholas Paines as to the effect of paragraph 53 of **A** in the Tax Tribunal at **M v HMRC [2010] UKFTT 356**. The judge said, "I do not consider that the Human Rights Court intended the adequacy of a State's criteria for recognising gender to be a justiciable matter unless, perhaps, the criteria were so deficient as not to amount to an honest attempt to devise appropriate criteria". Mr McGurk correctly submits that what is asserted here falls far short of an allegation of a dishonest attempt to give effect to the decision in **Goodwin**. Mr Brown accepts that the government intended to, and believed they had, devised appropriate criteria but in the event have devised a process which is incompatible with the convention. That question must be justiciable, he submits. He relied on the decision of the Court of Appeal in **MB v SS for Work and Pensions [2014]** EWCA Civ 1112. This was a discrimination claim arising out of the refusal of the Secretary of State to pay a pension to a

male to female transsexual person who had lived for decades as a woman and who was married to a woman. She had not applied for a Gender Recognition Certificate because she did not wish her marriage to be brought to an end. She relied on the Social Security Directive and on the jurisprudence in the European Court of Justice. At paragraph 13 Underhill L J said:

> "The starting-point in considering such a case is that in *Richards* the ECJ said in terms, at para. 21 of its judgment (p.1195C), that "it is for the member states to determine the conditions under which legal recognition is given to the change of gender of a person". But I accept that it is not possible to stop there. The Court clearly did not intend that member states should have *carte blanche*: that would be clear as a matter of principle, but the point is in any event made explicitly at para. 103 of the judgment of the Strasbourg Court in *Goodwin v United Kingdom* [2002] IRLR 664 which is the ultimate source[6] of the statement which I have quoted. If the conditions in question were such as to place unjustifiable restrictions on the right to have the acquired gender recognised the Court would no doubt hold that they were unlawfully discriminatory. The question in the present case is whether the requirement in section 4 of the Act that any subsisting marriage be annulled prior to the issue of a full gender reassignment certificate is unjustifiable."

Whilst this was not a claim under the Human Rights Act, the same principles must apply here. I am satisfied that the application is justiciable.

Article 8

15. It was the Secretary of State's position in two skeleton arguments that the applicant's Article 8 rights were not engaged. Mr McGurk abandoned that point at the hearing. The Article 8 right to respect for private life is plainly engaged in an application for a certificate to recognise an acquired gender. The requirement to provide medical reports also engages Article 8. It is not necessary to refer to authority for these two propositions.

16. The effect of the grant of a Gender Recognition Certificate is profound and far reaching for the individual and the state. The state must adjust to the

citizen's new status and treat him or her accordingly for all purposes. There are changes to entitlement to benefits, pensions, health care services. A citizen's place in the criminal justice system is affected and so on.

17. Once a certificate is obtained it is recorded on the Gender Recognition Register and forms the basis of the new birth certificate to which the certificate holder is entitled. The Registrar informs HMRC and others of the existence of the certificate unless the certificate holder wishes to do so. It is compulsory to do so. HMRC have a specialist team who deal with such cases. Other public bodies must amend their records in accordance with the certificate as must employers. It is a criminal offence to disclose protected information (ie information in respect of the person's change of status) save in specified circumstances – see Section 22 of the Act.

18. The state is entitled to establish the criteria upon which a certificate may be granted. Mr Brown takes no issue with the three substantive criteria namely: i) the existence or previous existence of gender dysphoria ii) the requirement to live in the acquired gender for 2 years and iii) the requirement for an intention to live in the acquired gender for life. These are all matters of substance which must be proved by all applicants. As to the evidence criteria in section 3 he does not argue that a requirement for medical reports is incompatible with Article 8 per se. His attack is directed to the requirement that where treatment to modify sexual characteristics has been planned or undergone one of the reports must set out the details of that treatment. NB treatment includes but is not restricted to surgery.

19. Mr Brown submits that details of treatment (in this case surgery) are irrelevant and so unnecessary because a Panel must grant a certificate where it is satisfied that the applicant

- has or has had gender dysphoria;
- has lived in the acquired gender throughout the period of two years ending with the date on which the application is made; and
- intends to continue to live in the acquired gender until death

(see section 1(1) above).

20. Thus, Mr Brown submits, someone who has had no treatment (and in respect of whom treatment is not planned or prescribed) may obtain a certificate. This is true, provided the applicant has medical reports setting out the diagnosis of gender dysphoria and can satisfy the Panel of the other requirements in subsection 2(1). I suspect this is not easily done in the absence of any treatment to modify sexual characteristics but the Act allows for a certificate to be granted in such a case. It follows therefore, Mr Brown submits, that details of treatment (here surgery) cannot be necessary to the decision to grant a certificate. Thus the requirement to provide details of the surgery is an unjustifiable interference with the applicant's Article 8 rights.

21. Mr Brown accepts that there is a legitimate aim, namely recognition in law for all purposes for people who have (I would add - or have had) gender dysphoria and wish to live in their acquired sex for the rest of their lives. He also accepts that the state must ensure that certificates are not granted when they should not be. I would add that the state must ensure that certificates are not refused

when they should be granted. He submits that it cannot be necessary or proportionate to that legitimate aim to require the provision of the details of surgical procedures when a certificate must be granted to those who have undergone no treatment to change their sexual characteristics provided they satisfy the statutory criteria.

22. I have already recorded that many transsexual persons wish to (or feel compelled to) and do undergo surgery. Where a person no longer has gender dysphoria because he or she now lives comfortably in their acquired gender as a result of surgery or other treatment, his or her application will rely on the second part of section 2(1)(a). (As a person who 'has had' gender dysphoria), gender dysphoria is no longer present because the treatment has rendered the gender dysphoria part of his or her history.

23. Undergoing or intending to undergo surgery for the purposes of modifying sexual characteristics is overwhelming evidence of the existence now or previously of gender dysphoria and of the desire of the applicant to live in the acquired gender until death. No competent, conscientious medical practitioner could produce a report on gender dysphoria (past or present) which did not refer to treatment received.

24. Section 3 of the Act, read as a whole, provides the mechanism whereby all evidence relevant to the criteria in section 2(1) is put before the Panel. Some because it is mandatory to do so, some because the Panel may ask for it and some because the applicant wishes the Panel to have it (see section 3(6) above). Where an applicant has not undergone treatment that fact is before the Panel. Mr McGurk informed me that where an applicant has not

undergone any treatment it is the Panel's usual procedure, pursuant to section 3(6), to require the second report to explain why this is the case. He also submitted, reasonably, that people who have had surgery will want this information to be before the Panel. Mr Brown says that this should be a matter of choice for the applicant for a certificate, not a matter of compulsion. I cannot agree. Surgery is, for that applicant, an essential and irreversible step in the transition to his or her acquired gender. Were the provision to the Panel of such information to be dependent on the wishes of the applicant and the applicant were to withhold it (and persuade a doctor to do so), a Panel would be making a decision on partial information in respect of the required criteria in that applicant's case. The far-reaching effects of the decision to grant (or to refuse) require that it is made on the basis of full information in respect of each applicant (whether he or she has undergone surgery, other treatment or not). Where an applicant has undergone surgery, or plans to do so, that fact is highly relevant, if not central, to his or her application. It is plainly necessary to the Panel's consideration of the criteria in section 2(1) (a)-(c).

25. In her statement in support of the application the solicitor who was then acting for the applicant asserts that section 3(3) GRA "… requires the disclosure of applicant A's medical history including specific details of the most intimate of surgical procedures". That is not correct. Section 3(3) is satisfied (as it was in this case) by the provision of the name of, or a list of the names of, the procedure/s. There is no question, as was asserted in the written submissions, of a Panel "raking over" details of the treatment nor of "the government" becoming aware of the intimate details of surgery. The information is

provided to a small Panel set up by but independent of government. It does not go beyond the Panel.

26. I accept that there are people living in their acquired gender who do not wish others to know that they were formerly of the opposite sex. That wish cannot sensibly apply to the Panel whose function is to recognise and certify, where appropriate, an acquired gender. It is inherent in the process that an applicant has a birth gender which is different from the acquired gender. The Panel has to know.

27. Many people who have undergone surgery do not wish that fact to be widely known but it is not a secret; the many medical and nursing professionals involved in the therapy, surgery and after care, are aware of it. The notes about it form part of the NHS records. Health care professionals are bound not to disclose such information by their professional codes of practice. The very sensitive information provided to the Panel may be used only for the purposes of the application. There are, as I have already said, criminal sanctions for anyone who discloses protected information.

28. Given that this information is necessary to the decision to be taken, that its dissemination beyond the Panel is prohibited, I am satisfied that the provision of the information required in paragraph 3(3) is necessary and proportionate to the legitimate aim. There is no incompatibility with Article 8.

The Secondary Case

29. Mr Brown's submission is this: the GRA sets a higher evidential burden for transsexuals who plan to undergo or have undergone gender reassignment surgery than it does for transsexuals who do not or have not. This distinction is, he submits, incompatible with Article 14.

Article 14

30. Article 14 provides:

"The enjoyment of the rights and freedoms set forth in this convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status".

31. The Article 14 right is not freestanding; it prohibits discrimination in the context of the enjoyment of other convention rights. Here the discrimination alleged is in respect of Articles 8, 6 and Article 1 Protocol 1.

32. In this part of his case Mr Brown alleges discrimination on the ground of "other status", namely the status of being a post-operative transsexual person. Mr McGurk submits that whilst being a transsexual person could constitute "other status" it is not permissible further to subdivide that status. He pointed out that there is no case in which such a status is recognised. Since the categories of "other status" are not closed that point has limited value. Mr Brown relies on the speech of Lord Neuberger in **R (on the application of RJM (FC)) v Secretary of State for Work and Pensions** (Respondent) [2008] UKHL 63 at paragraphs 42-45. Lord Neuberger observes that a

generous interpretation is to be given to the words "other status" and it may go beyond the conventionally accepted personal characteristic. In that case the House of Lords concluded that homelessness did constitute "other status". The Court of Appeal had come to the opposite conclusion. This demonstrates that identifying what is meant by other status is not straightforward. The question of choice in the context of homelessness was considered in **R and RJM** but when dealing with a person who has undergone radical surgery to deal with gender dysphoria considerations of choice are neither helpful nor informative. What matters is the status not by what route the applicant achieved it. I have been referred to a number of different situations where a litigant has achieved the required status, including a dog owner, a flat owner. With some hesitation I take a generous approach to the interpretation of "other status" and accept that being a post-operative transsexual person does constitute "other status" within Article 14.

33. Mr Brown submits that the evidential burden imposed by the Act on the applicant is greater than the burden on a transsexual person who has not undergone surgery and does not intend to do so.

34. As I observed earlier, the requirement to provide the detail is not restricted to surgery; it is a requirement to provide the details of treatment for the purposes of modifying sexual characteristics. This includes those who have undergone hormone treatment as well as those who have undergone or intend to undergo surgery. The evidential burden is the same in each case.

35. In any event I do not accept the primary submission. The burden is the same for those who have and have not had treatment (including surgery). Each

must provide two medical reports. Where treatment has been undergone, or is proposed, one of the reports must contain the detail of the treatment (surgery or otherwise). I do not accept that this somehow makes it more difficult for a transsexual person who has undergone surgery to obtain a certificate than the transsexual person who has not undergone surgery. Undergoing gender reassignment surgery is physically and psychologically intrusive. It involves long term preparation and hormone treatment and then radical surgery, the purpose of which is to change fundamentally the appearance of a person so that the physical (and psychological) characteristics are those of the acquired gender. The state does not require anyone to undergo this. What the state does require is that the second report includes the name of or a list of the procedures undergone. An applicant who has not undergone surgery is required by the panel to explain his or her reasons. It might be thought that such a requirement is at least as intrusive as the requirement for the provision of the details of treatment.

36. I do not accept that there is any discrimination against the applicant in her enjoyment of her Article 8 rights by reason of her status as a post surgery transsexual person. The secondary case must fail.

The Tertiary Case

37. Here again the applicant relies on Article 14. This time it is alleged that the applicant has been discriminated against on the grounds of sex in respect of her enjoyment of Articles 8. Mr Brown sought to develop an argument that the applicant was discriminated against on account of her womanhood – which I understood to be the fact of being a woman as a result of surgery and other

treatment. This is effectively a re-run of the secondary case about which my findings are above. At paragraph 18 of his skeleton argument Mr McGurk submits "The GRA …imposes the same evidential requirements on applicants for gender recognition irrespective of sex. So if a biological male or a biological female applies for a certificate, they will each have to meet the requirements of section 3 irrespective of their biological sex. If either has had, is having or plans to have "treatment for the purposes of modifying sexual characteristics" each will have to meet the requirements in s3(3). In other words, sex is irrelevant". I agree.

38. Mr Brown submits that this approach fails to recognise the shifts in society's attitudes to gender, the move away from rigid categories to a more fluid approach. The insuperable difficulty for Mr Brown is that in law a person's sex remains the one recorded on the Birth Certificate, ie his or her biological sex, the sex at chromosome level until the grant of a certificate recognising a different gender. Therefore at the time the application is made the male to female transitioning transsexual person is, in the eyes of the law, male. The evidence required of all those who have undergone surgery (and indeed any treatment) to modify their sexual characteristics is the same whether the applicant is male or female. There is no sex discrimination here. The tertiary case fails.

39. Accordingly this application is dismissed.

Post Script

40. A number of amendments were made to the GRA by the Marriage (Same Sex Couples) Act 2013 which came into force on 10th December 2014. The new provisions in section 3A(5) and 3B(2)(3) and (4) provide an alternative route to a Gender Recognition Certificate (for those in protected marriages and civil partnerships) which distinguishes between applicants who have or have had gender dysphoria and those who have had **surgery** to modify sexual characteristics. The requirement to provide a report with details of **treatment** to modify sexual characteristics remains (see section 3B(4), which mirrors section 3(3)(1)). That sits uneasily with the provisions of section 3A(5)(b). I invited the parties to make any submissions they wished to in respect of the new provisions. They did so. They agreed, unsurprisingly, that the amendments could not affect the outcome of the application. Mr Brown pointed to the inconsistency between the new section 3A(5) and section 3(B)(4). I considered whether I could usefully make some observations about that. On reflection I decided not to do so. Such questions may await the appropriate case. In a helpful additional skeleton Mr Brown said that the key point remained that the state does not require details of surgery to grant an application. I have dealt with that matter in the judgment.