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Being transgender: human variation or disorder?

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INTRODUCTION

Eekelaar describes the area of law, in which people transition to a different gender, as an 'evolving understanding of reality',[1] a helpful lens through which to view the present case. The judgment in the case of *Re JR111*[2] asserts that being transgender is neither a mental illness nor a disorder and, as such, addressed why a diagnosis of gender dysphoria[3] remains a requirement to secure a gender recognition certificate (GRC) under the Gender Recognition Act 2004 (the 2004 Act). Undeniably, safeguards are important because changing gender significantly alters one's legal status,[4] granting a successful GRC applicant new legal documentation such as a birth certificate reflecting the acquired legal gender.[5] The requirement for a gender identity disorder diagnosis 'irrationally requires transgender people to say that their understanding of their gender is caused by a mental disorder rather than a normal function of human variation',[6] stigmatising transgender people.[7]

FACTS

The applicant, who had lived in Northern Ireland as a woman since 1999, sought a GRC for legal recognition of her acquired gender. Under the 2004 Act, applicants must provide a report from a registered medical practitioner or registered psychologist practising in the field of gender dysphoria, including details of the diagnosis of the applicant's gender dysphoria. The applicant stated that this requirement, in legal

1 J Eekelaar, 'The law, gender and truth' (2020) 20(4) Human Rights Law Review 797, 808.
2 [2021] NIQB 48.
3 Defined in the 2004 Act as 'the disorder variously referred to as gender dysphoria, gender identity disorder and transsexualism'.
4 *JR111, Re Application for Judicial Review* [2021] NIQB 48, [31].
5 Ibid [32].
6 Ibid [16].
7 Ibid.

and medical terms, equated the transition from one gender to another with a recognised mental disorder, gender dysphoria, and made her feel she was 'pathological and disordered'.[8] The applicant, anonymised by court order, initially brought a wide application for judicial review against the Department of Health in Northern Ireland, but early on in the proceedings an order was made substituting the Government Equalities Office (GEO), which was responsible for the 2004 Act.[9] The Northern Ireland High Court chose to deal first with her claim that the requirements of the 2004 Act breached her right to private life under articles 8 and 14 of the European Convention on Human Rights (ECHR) – the right to respect for private and family life and the right to protection from discrimination, respectively. The High Court ruled that the requirement for an applicant to prove they have had a mental 'disorder' was incompatible with article 8, although the general requirement for a diagnosis in support of an application for a GRC was within Parliament's discretion.[10]

ISSUES

Scoffield J, delivering the judgment, addressed the following two Convention-compatibility issues; firstly, the requirement to provide a medical diagnosis and, secondly, that diagnosis being of gender dysphoria.[11] The impugned provisions of the 2004 Act were challenged as breaching the applicant's rights under articles 8 and/or 14 of the ECHR.[12]

JUDGMENT ANALYSIS

Outlining the applicant's submissions

The applicant submitted that the requirement for a gender dysphoria diagnosis was unnecessary as the remaining criteria in section 2(1) of the 2004 Act – living as one's acquired gender for two years and making a statutory declaration – amply demonstrate that a person has taken decisive steps to live fully and permanently in their acquired gender.[13] Scoffield J rejected this argument as he viewed the process through a

8 Ibid [21].
9 Ibid [17].
10 K Flood, 'Northern Ireland High Court: requirement to show medical "disorder" for gender recognition certification held incompatible with ECHR' (*Scottish Legal News*, 21 May 2021)
11 *JR111* (n 4 above) [17].
12 Ibid [19].
13 Ibid [120].

wider lens, finding several other criteria to be of equal importance.[14] The applicant particularly objected to what she maintained was the outdated and derogatory requirement of a diagnosis expressly defined to be a disorder.[15] Applicants comfortable with their transgenderism would be presented with the dilemma of either lying to obtain a diagnosis or not meeting the diagnostic criteria for gender dysphoria. Moreover, since an applicant for a GRC need only show that they, at some point, *had* gender dysphoria, the requirement lacked immediate relevance to the consideration of the applicant's circumstances at the time of the application.[16] The applicant emphasised inconsistency in the government's position, having expressed repeatedly that being transgender does not equate to being mentally ill, yet jettisoning any effort at reform to enact such sentiments.[17]

Outlining the respondent's submissions

The respondent submitted that the Joint Committee on Human Rights neither recommended the term 'gender dysphoria' cease being used, nor ruled out use of a medical element to issue a GRC. The respondent justified maintaining the requirement for a diagnosis of gender dysphoria as providing certainty and protecting the rights of others, highlighting concern over giving 'legal recognition to lifestyle changes'.[18] The criteria operate as a barrier to applicants making precipitous applications for a GRC and against 'cheating' the process,[19] as more leniency might create additional scope for abuse, particularly against vulnerable women. Although Scoffield J emphasised that in the potential, but *rare*, cases where this is done nefariously, the correct response should be to deal with the perpetrator.[20] Also, Sharpe contends that issues concerning the process of transitioning and access to single-sex spaces are unconnected, favouring the 'de-pathologisation' of legal recognition, denouncing 'bogeyman' arguments as fearmongering directed against a minority.[21] However, Nicol advocates, particularly in reference to women's single-sex spaces, that it draws in competing human rights, particularly articles 2 and 3, the right to life and

14 Ibid [134].
15 Ibid [121].
16 Ibid [122].
17 Ibid [124].
18 Ibid [126].
19 Ibid [127].
20 Ibid [130].
21 A Sharpe, 'Will gender self-declaration undermine women's rights and lead to an increase in harms?' (2020) 83(3) Modern Law Review 539, 541.

freedom from inhuman and degrading treatment.[22] He asserts that more evidence is required that harm would not be caused and denotes opposing arguments as 'theoretical and illusory', although evidence on either position is scarce.

The Government's considerations for reform of the 2004 Act

The court noted recommendations for reform of the process established in the 2004 Act which emerged in the 2016 House of Commons Women and Equalities Committee Report,[23] supporting gender self-identification and noting other countries' use of 'more enlightened' models.[24] The Committee criticised the 2004 Act's 'medical approach' and 'pathologisation' (treating transgender identities as a disease or disorder) for causing significant offence and distress for some transgender people.[25] It drew parallels to homosexuality, which was similarly classified by the World Health Organization (WHO) International Classification of Diseases (ICD) as a mental disease until 1992.[26] The ICD has now been revised regarding both homosexuality and transgenderism. The ICD-10 replaced categories of 'gender dysphoria' with 'gender incongruence' and moved the categories from the 'Mental and behavioural disorders' chapter into a new chapter entitled, 'Conditions related to sexual health'.[27] Gender incongruence is defined as being 'characterised by a marked and persistent incongruence between an individual's experienced gender and the assigned sex, which often leads to a desire to "transition", in order to live and be accepted as a person of the experienced gender'.[28] The fifth edition of the Diagnostic and Statistical Manual of Mental Disorders (DSM-5), published by the American Psychiatric Association in 2013,[29] took a similar approach, indicating international support for this change in terminology. Scoffield J utilised this in rejecting the respondent's argument that clinicians and other relevant practitioners would be unable to adapt to a terminology change.

Addressing stigmatisation, in 2020 the LGBT Health Adviser recommended that the issue of stigma be contextualised within the overall process, not only one criterion. He considered the diagnosis

22 D Nicol, 'Are trans rights human rights? The case of gender self-ID' (2021) Public Law 480, 482.

23 House of Commons Women and Equalities Committee, *Transgender Equality* (Report, HC 390, 2016).

24 *JR111* (n 4 above) [36].

25 Ibid [37].

26 Ibid [38].

27 Ibid [42].

28 Ibid [43].

29 Ibid [44].

categorisation (whether under mental or sexual health) irrelevant, as it remained a diagnosis,[30] diminishing the impact both individually and socially of such categorisation. The Department of Health and Social Care concurred, further stating that the department 'don't believe there is any stigma attached' to a diagnosis of gender dysphoria.[31] This was an unusual stance for government officials to take given statistics revealed by the government consultation on reforms to the 2004 Act conducted two years prior revealing that 64 per cent supported removing the requirement for a diagnosis of gender dysphoria.[32] The consultation identified that the number of successful applicants for GRCs was unexpectedly low; since the system's introduction only 4910 trans people had obtained a GRC, out of an estimated UK trans population of 250,000.[33] GEO officials had addressed a submission to the Secretary of State (SoS)[34] suggesting an alternative safeguard to align the medical requirement with current WHO guidelines, by utilising the term 'gender incongruence', which is internationally understood and less stigmatised.[35] However, the SoS replied that such a change would create 'confusion and uncertainty amongst clinicians',[36] and that a medical element to the GRC process ensured appropriate checks and support for applicants. However, the SoS also recognised 'gender dysphoria' as a pathologising term and asserted a keenness to move away from this.[37] The 'final' draft government response to the consultation proposed removing the requirement for a diagnosis of gender dysphoria, replacing it with gender incongruence.[38] However, in September 2020, the SoS back-pedalled, publishing a written Ministerial Statement that the correct balance is struck in the 2004 Act, citing proper checks and balances. Crispin Blunt, a Conservative MP, described this as a 'crushing disappointment' to trans people.[39] Similarly, Marsha de Cordova, Shadow Secretary of State for Women and Equalities, stated that the Government had 'disgracefully let the trans community down'.[40]

30 Ibid [81(a)].
31 Ibid [82].
32 Government Equalities Office, *Reform of the Gender Recognition Act – Government Consultation* (Consultation Paper 2018).
33 *JR111* (n 4 above) [53].
34 Ibid [61].
35 Ibid [62].
36 Ibid [66].
37 Ibid [68].
38 Ibid [71].
39 'Crispin Blunt criticises government trans rights stance' (*BBC News*, 24 September 2020).
40 'GRA: De Cordova and Truss on care for trans people' (*BBC News*, 23 September 2020).

Whittle stated that, when the 2004 Act was drafted, it was an offer that the trans community could not refuse as their options were 'something or nothing'.[41] However, as Hilsenrath highlights, modernising, reviewing and simplifying the process in light of contemporary attitudes is important.[42] Scoffield J assessed materials provided to him regarding Scotland's consideration of a new model of self-declaration for the process of obtaining a GRC. However, as COVID-19 placed the planned reforms on hold, the judge derived little assistance from these, given that the final proposals and outcome remain unknown.[43]

Strasbourg and domestic authority

The court noted that no European consensus exists on the inappropriateness of requiring a psychiatric diagnosis as a condition for gender recognition.[44] Whilst the Parliamentary Assembly adopted Resolution 2048 (2015) on discrimination against transgender people in Europe, calling on member states to, among other things, abolish a mental health diagnosis as a legal requirement to recognise a person's gender identity, member states were permitted wide discretion.[45]

Scoffield J examined pertinent cases in this area, noting the 2004 Act was a response to the European Court of Human Rights (ECtHR) judgment in *Goodwin v United Kingdom*.[46] This case decreed that, as no significant factors of public interest existed to weigh against the interest of the individual applicant in obtaining legal recognition of their gender re-assignment, the fair balance, inherent in the Convention, favoured the applicant, recognising a failure to respect her right to private life in breach of article 8.[47] However, *Goodwin* was a different case because the applicant transitioned after surgery. A more significant hurdle for the present applicant's case emerged from Scoffield J's consideration of the ECtHR decision in *AP, Garçon and Nicot v France*.[48] It was held, *inter alia*, that a requirement to demonstrate the existence of a gender identity disorder in order to secure legal gender recognition did not

41 S Whittle, 'The opposite of sex is politics – the UK Gender Recognition Act and why it is not perfect, just like you and me' 15(3) (2007) Journal of Gender Studies 267, 269.

42 R Hilsenrath, 'Reform of the Gender Recognition Act' (Equality and Human Rights Commission, 16 July 2020).

43 *JR111* (n 4 above) [89].

44 Ibid [97].

45 Ibid [98].

46 [2002] 2 FLR 487.

47 *JR111* (n 4 above) [93].

48 [2017] ECHR 338.

violate article 8.[49] Despite aspects of the government's argument being 'not wholly persuasive', Scoffield J accepted that the requirement for a gender identity diagnosis was aimed at safeguarding the interests of those concerned.[50] Citing the wide margin of appreciation afforded to member states, Scoffield J described this as a powerful submission.[51] He noted Lord Mance's assertion, in *D v Commissioner of Police of the Metropolis,*[52] that there are cases 'where the English courts can and should, as a matter of domestic law, go with confidence beyond existing Strasbourg authority'.[53] Such Convention scrutiny by domestic courts was undertaken in *Carpenter v Secretary of State for Justice*.[54] On the surface, this hindered the applicant as it was held that providing a medical report detailing treatment was not incompatible with the ECHR. However, Scoffield J found from this case that the adequacy of the state's criteria for recognising gender was a justiciable matter. The test then was whether the impugned provisions of the 2004 Act struck a fair balance between the competing interests of the individual and the community as a whole.[55]

Assessment of the fair balance

Requirement for a diagnosis

Scoffield J was satisfied that requiring a relevant diagnosis in support of an application for a GRC remained within the discretionary area of judgment available to Parliament[56] and that, ultimately, this case was not an appropriate platform to '*forge ahead*' of Strasbourg jurisprudence,[57] demonstrating, as Masterman has observed, that British courts are hesitant to develop the meaning of Convention rights.[58] In addressing whether the 2004 Act strikes a fair balance between the needs of the applicant and the community, the judge favoured the respondent's motivations in deterring vexatious applications or abuse of the GRC process, and to provide appropriate support and safeguards for applicants, overall being more consistent with the ECtHR's ruling in *AP, Garçon and Nicot*.[59]

49 *JR111* (n 4 above) [90].
50 Ibid [108].
51 Ibid [110].
52 [2018] UKSC 11.
53 *JR111* (n 4 above) [113].
54 [2015] EWHC 464.
55 *JR111* (n 4 above) [118].
56 Ibid [131].
57 Ibid [132] (emphasis added).
58 R Masterman, T*he Separation of Powers in the Contemporary Constitution* (Cambridge University Press 2011) 203.
59 *JR111* (n 4 above) [133].

Scoffield J accepted the respondent's submission that the legal change in a person's gender is a significant change in their status with potentially far-reaching consequences for them and others, including the state.[60] He agreed that the court's role is not to assess whether the current process is the best or most appropriate way to provide for gender recognition, but noted the 'woefully low' uptake of the GRC process as an indication that the present system is not serving well those it was devised to benefit.[61] However, he maintained that the possible impacts of de-coupling the medical from the legal transition process are matters not well suited to judicial adjudication. Nicol supports this, asserting that courts ought not to compel Parliament if it does not wish to introduce a less stringent process for obtaining a GRC.[62] Scoffield J favoured recognising that there is plainly a medical aspect to some elements of gender transition, at least for some individuals, and, thus, requiring some medical diagnosis is fair.[63]

The required 'disorder' diagnosis

Scoffield J ultimately found the gender dysphoria diagnosis requirement an unnecessary affront to the dignity of a GRC applicant.[64] He cited the English Court of Appeal decision in *R (Elan-Cane) v Home Secretary*,[65] which held that little can be more central to an individual's private life than gender. No reason provided by the respondent adequately explained why recognition should be conditional on proving the existence of a disorder, particularly in light of the development of the international classifications. Scoffield J emphasised that the changes in ICD-11 had not occurred, and thus were not considered by the ECtHR in *AP, Garçon and Nicot*.[66] Further, he found difficulty accepting that specialists could not readily adapt to a similar amendment in the 2004 Act.[67] A 2020 GEO briefing note supported this, stating that the change in terminology 'is largely symbolic and will not interfere with existing clinical processes'.[68] Scoffield J stated that the importance of such symbolism should not, however, be underestimated.[69] The government's analysis of the 2018 consultation responses also noted that, 'a diagnosis of gender dysphoria *or incongruence* is also required

60 Ibid [135].
61 Ibid [137].
62 Cf Nicol (n 22 above) 480.
63 *JR111* (n 4 above) [139].
64 Ibid [140].
65 [2020] 3 WLR 386, [46]–[47].
66 *JR111* (n 4 above) [141].
67 Ibid [144].
68 Ibid.
69 Ibid [145].

in order to access NHS treatment'.[70] This shows gender incongruence is a term known and used by relevant practitioners.[71] A 2018 position statement published by the Royal College of Psychiatrists, specifically recommended 'at the earliest opportunity, de-classify[ing] any terms ... to describe transgender as a mental health disorder'.[72] Pertinently, this professional medical body is responsible for many practitioners likely to provide diagnoses for GRC applications. Scoffield J remarked that the decision to leave the Act untouched appeared to originate from something beyond concern about clinicians coping with a terminology change. Hilsenrath credits this partly to the divisive nature of current debate in this area of law, causing some to withdraw from engaging with discussions.[73] Ultimately, the requirement that diagnosis specifically and expressly be defined as a 'disorder' was ruled not to amount to 'proper checks and balances'.[74] Parliament has been inactive in this area since 2004, and, with today's rapid changes in values militating against an unduly restrictive approach, Scoffield J chose to note that, while the legislature exists to reflect the democratic will of the majority, the judiciary exists to protect minority interests. Parliament is not an expert on the particular diagnostic classifications involved but should be viewed as the arbiter of what safeguards ought to be in place.[75]

Scoffield J concluded that, while the submissions under article 14 added little to the applicant's claims under article 8, the specific requirement of a disorder diagnosis is now unnecessary, unjustified and breached the applicant's article 8 rights. Even with Parliament's discretionary area of judgment and the legitimate aims which the requirement for medical input pursues, the requirement fails to strike a fair balance between the interests of the applicant and those of the community generally.[76] The court held that it would hear further submissions from the parties regarding an appropriate remedy following the decision. This was specifically in relation to the question of whether the legislation could be 'read down' under section 3 of the Human Rights Act 1998, or a declaration of incompatibility would have to be issued under section 4.

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70 Daniel King, Carrie Paechter and Maranda Ridgway, *Gender Recognition Act: Analysis of Consultation Responses* (Government Equalities Office, CP 284 2020) 41 (emphasis added).

71 *JR111* (n 4 above)[144].

72 Royal College of Psychiatrists, *Supporting Transgender and Gender-Diverse People* (Position Statement, PS02/18, 2018).

73 Cf Hilsenrath (n 42 above) 2.

74 *JR111* (n 4 above) [146].

75 Ibid [147].

76 Ibid [157].

CONCLUSION

In summation, this judgment has significant implications for the process by which transgender people have their acquired gender recognised and marks a step towards better respecting the integrity of transgender people in the UK, tackling one area where they continue to face stigma. Despite what may superficially seem a minor change in terminology from 'gender dysphoria' to 'gender incongruence', as Scoffield J emphasised, the symbolism should not be underestimated, as one word and definition can shift an entire narrative about what it means to be transgender, an aspect of human variation, not a disorder.