Neutral Citation Number: [2007] IEHC 470

THE HIGH COURT

(THE FIRST SET OF PROCEEDINGS)

1997 No. 131 JR

BETWEEN

LYDIA FOY

APPLICANT

AND

AN tArd-CHLÁRAITHEOIR, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

AND

JENNIFER AND CLARE FOY

NOTICE PARTIES

THE HIGH COURT
(THE SECOND SET OF PROCEEDINGS)

2006 No. 33 SP

IN THE MATTER OF AN APPEAL PURSUANT TO S. 60(8) OF THE CIVIL REGISTRATION ACT, 2004

BETWEEN

LYDIA FOY

PLAINTIFF

AND

AN tArd-CHLÁRAITHEOIR, IRELAND AND THE ATTORNEY GENERAL

DEFENDANTS

AND

ANNE FOY, JENNIFER FOY AND CLARE FOY

NOTICE PARTIES

Judgment delivered by Mr. Justice William McKechnie on the 19th day of October, 2007.

Introduction

1. On 9th day of July, 2002, this Court gave judgment in the first set of proceedings above listed. Therein the applicant, who is and was then a post-operative male to female transsexual, sought a finding that at birth she was born female but suffered from a congenital disability which at that time was neither identifiable nor discoverable. That disability, which is now known as Gender Dysphoria or Gender Identity Disorder, meant that although psychologically female her biological made up of chromosomes, gonads and genitalia, both internal and external, was that of a male person. Pursuant to such a finding if granted, she then sought an order, in effect correcting the original entry in the Register of Births, to record in Column 4, under the heading "Sex", the letter "F" for "female" instead of "M" for "male", and in Column 3 under the heading "Name", "Lydia Annice" instead of "Donal Mark". If however such a finding was not obtainable, she alleged that in the alternative the existing legal regime infringed her constitutional rights to privacy, dignity and equality as well as her right to marry a biological male. In support of her claim she relied, *inter alia*, upon case law from the European Court of Human Rights.

All of the claims so made were strongly resisted not only by the respondents but also by the notice parties who are the daughters of the applicant. In the events which occurred she was unsuccessful and this Court dismissed her cause of action.

Reference should be made to that judgment for a comprehensive outline of the background events and circumstances giving rise to her claim and the submissions made therein.

2. On 30th July, 2002, Dr. Foy filed a Notice of Appeal to the Supreme Court. By the time the appeal came on for hearing, on 8th November, 2005, there had been three significant changes in the legal landscape. Firstly, some short time after the 9th July, 2002, the European Court of Human Rights, in abandoning and indeed in reversing its declared jurisprudence up to then, unanimously held, in the case of a male-to-female post operative transsexual, that by reason of its legal regime (being one comparable to that of this jurisdiction), the United Kingdom was in breach of both articles 8 and 12 of the European Convention of Human Rights, 1950 (see the decisions in the cases of *Goodwin v. United Kingdom* [2002] 35 E.H.R.R. 447 *("Goodwin") and I .v. United Kingdom* [2003] 40 E.H.R.R. 967 ("1")). Secondly, on 31st December, 2003, the rights contained in this International Convention ("The Convention" or "the ECHR") became part of the domestic law of this State via the enactment of the European Convention on Human Rights Act, 2003, ("The Act of 2003" or "the 2003 Act") and thirdly, a new system of Civil Registration was introduced by the Civil Registration Act, 2004, ("The Act of 2004" or "the 2004 Act"); which in the process repealed all existing primary and secondary legislation in this area.

As a result of these events the applicant wished to raise these new issues on her appeal. However since such matters were not, and could not have been, dealt with by this court in July, 2002, the Supreme Court remitted the case back so that a decision could be made at first instance on these points. Hence this second judgment in the first set of proceedings.

3. By letter dated 21st November, 2005, Mr. Michael Farrell, Solicitor wrote to An tArd-Chláraitheoir on behalf of the applicant seeking to have the "mistake" in the record of her birth corrected so as to reflect her "true and actual" female gender as well as changing her name from "Donal Mark" to "Lydia Annice". He also sought the issue of a new birth certificate reflecting these corrections in respect of his client. The case made in support of this application was then outlined and included references to the Act of 2003 and to the "*Goodwin*" and the "*I*" decisions, both of which were delivered in 2002. These cases are referred to later in this judgment, but as the lead decision was *Goodwin*, references to that case can be considered as including the decision in "*I*", as the legal principles in both are essentially indistinguishable. By way of response dated 23rd December, 2005, the first named respondent denied that there had been any "mistake" in the record of Ms. Foy's birth and accordingly refused her application. Being dissatisfied, the applicant exercised her right under s. 60(8) of the Civil Registration Act, 2004 to appeal to this Court from that decision. Hence the second set of proceedings.

4. The First Named Respondent

In the paragraph immediately following under the heading of "Background", there is set out a summary of the relevant events and circumstances pertaining to the applicant, her condition and her family. In this paragraph a brief word is said about An tArd-Chláraitheoir, whom I shall also refer to as either "The first named respondent" or "The Registrar General". The office of An tArd-Chláraitheoir was first established under and by virtue of the Marriages (Ireland) Act of 1844. The scope of this office, which originally

dealt only with the registration of civil marriages, which meant all non Roman Catholic marriages, was later extended to include births and deaths by the Registration of Births and Deaths, (Ireland) Act, 1863, (the "Act of 1863" or "the 1863 Act") and to the registration of Roman Catholic Marriages by a Private Members Act – The Registration of Marriages (Ireland) Act 1863 - of the same year. As a result there was then in place, for the first time in this country's history, a complete Irish civil registration system. That system was the recipient of several pieces of amending legislation in the years which followed, including the Matrimonial Causes and Marriage Law (Ireland) Amendment Acts of 1870 and 1871 (dealing with marriages), and the Births and Deaths Registration Act, (Ireland) Act 1880 (the "Act of 1880" or "the 1880 Act") and the Regulations made thereunder (dealing with births and deaths). The system so created remained largely intact until the enactment of the Civil Registration Act, 2004 which repealed all the primary and secondary legislation which had existed up to then. Section 7 of the 2004 Act, however, continued the office of An tArd-Chláraitheoir and under s. 8 his principal functions included the maintenance of a system of registration in respect of, *inter alia*, births and marriages (s. 8(1)(a)). In short, for the purposes of this case, he continued to be charged with the responsibility of registering all births which occurred within this State and of registering all marriages as well.

The second named respondent is Ireland and the Attorney General.

5. Background
Commencing at para. 7 of the July, 2002 judgment, this Court set out in some detail the background circumstances of the applicant and of her family. As a result, a further recitation of these events is not necessary but a short summary is required so that the current issues can be seen in context.

The applicant was born on 23rd June, 1947, and having the external genitalia of a male was so registered with the Register of Births and Deaths and had the Christian name of "Donal Mark" assigned to him by his parents. She had five brothers and one sister. From early childhood she can recall feeling different from her brothers. Within this "difference", she was conscious of admiring members of her opposite biological sex and of having a feeling of 'femininity'. This continued right throughout primary school and secondary school which she spent as a boarder in Clongowes between 1960 and 1965. Having obtained her Leaving Certificate she started pre-med that year in UCD but changed to dentistry a year later. She graduated with the degree of Bachelor of Dental Surgery (B.D.S) in 1971. She practised as a dentist for a number of years thereafter. In 1975, she met one Anne Naughton who was some eight years her junior. They got engaged at Christmas 1976 and got married on 28th September, 1977. They have two children, Jennifer who was born on 16th August, 1978, and Clare who was born on 18th October, 1980.

6. In the early 1980s the applicant suffered a series of physical and psychological reverses which she has loosely attributed to her condition. Her psychological welfare continued to deteriorate and in August and September 1989, she suffered a total collapse. She was referred to a number of psychiatrists one of whom, a Dr. Frank O'Donoghue who specialised in psychosexual matters, diagnosed her as a "core transsexual" and commenced her on hormone treatment. She subsequently attended two further psychiatrists in England who confirmed the diagnosis of Gender Dysphoria. This is a well recognised and genuine psychiatric condition and has been so classified in several editions of the Diagnostic and Statistical Manual of Mental Disorders (DSM), including DSM – IV (published in 1994) and in the International Classification of Diseases (ICD – 10)). She underwent electrolysis, breast augmentation surgery and had operations on her nose and Adams apple. These steps were part of her overall process of gender readjustment. On 25th July, 1992, she underwent full gender reassignment surgery in England (in so far as that is possible) under Mr. Michael Royle, a Consultant Urologist. That surgery is irreversible. Since then she has lived entirely as a female person.

7. The progressive attachment to and the ultimate assumption of the characteristics which are inherent in this condition, became a matter of great shock to Dr. Foy's wife, who, prior to her first meeting with Dr. O'Donoghue (7th November, 1989), had no inclination whatsoever of the events which were about to unfold. Likewise, of course, with their daughters. The stresses involved proved too great and the marriage did not survive. Dr. Foy vacated the family home, probably in April, 1990, and consented to a judicial separation on 13th December, 1991. As part of the court order Mrs. Foy was given sole custody of the children with conditional access to her husband. This proved unsatisfactory and in May, 1994 the Circuit Court prohibited all access. This decision was affirmed by the High Court on Circuit on 14th October of that year. To the best of my knowledge the notice parties have had no contact with the applicant since then, save in the case of Mrs. Foy who is presently involved in divorce proceedings (not yet determined) with Dr. Foy.

The Proceedings now before me:
8. Unfortunately, the Order of the Supreme Court dated the 8th November, 2005, which remitted the earlier proceedings back to this Court, is general in nature and did not specify what matters or issues should be reconsidered. This has created a certain element of uncertainty which has never quite been resolved. As there were no further pleadings in this case the issues were largely deduced from a notice of motion which issued before the Supreme Court and the submissions made thereon.

9. In the second set of proceedings the applicant claims:-

> (a) An order setting aside the refusal by the first named respondent to rectify the register so as to reflect the applicant's true sex as being female and her true forename as being Lydia Annice;
>
> (b) A declaration that such refusal to amend the "mistakes" complained of, is *ultra vires* the powers of the Registrar General under the Civil Registration Act, 2004 and in particular such powers as contained in ss. 63 and 64 thereof;
>
> (c) A declaration that these statutory provisions, if and insofar as they fail to allow for the corrections as requested, constitute an interference with the applicant's rights to privacy, dignity, to the protection of her person and to her right to marry a person of her opposite biological sex; all in breach of Articles 40.1 and 40.3 of the Constitution and articles 8, 12 and 14 of the European Convention of Human Rights;
>
> (d) A declaration that if and insofar as such provisions fail to allow for the corrections as sought, the same are incompatible with articles 8, 12 and 14 of the European Convention of Human Rights and accordingly a declaration pursuant to s. 5 of the 2003 Act is sought in respect thereof.

10. The generality of these declarations gave rise to a certain amount of ambiguity in that they failed to make clear whether Dr. Foy was seeking to have the original entries obliterated and to have issued to her a new birth certificate, operative from the date of birth, showing her sex as female and her Christian name as Lydia Annice or whether she accepted that if such a certificate issued it would have prospective effect only. If the latter was her adopted position it would then be necessary to identify what the operative date might be, which date it was agreed could not however be earlier than the 25th July, 1992. Moreover, it was also unclear as to whether the reliefs sought by the applicant were intended to or could have some legal effect on the validity of her marriage to Mrs. Foy, or of her parentage to Jennifer and Clare. These difficulties emerged and became clear during the course of a discussion at the

Bar with the result that Mr. Michael Farrell, the applicant's solicitor, wrote an open letter to the other parties on the 23rd April, 2007, attempting to bring clarity to such issues. Therein he said:

> " … The plaintiff's position is that there is and has been an obligation on the State arising from both the Constitution and the European Convention on Human Rights to recognise that, following her successful gender reassignment surgery in 1992, the plaintiff is of the female sex.
>
> We respectfully contend that the obligation on the State and An tArd-Chláraitheoir requires the issue to the plaintiff of a birth certificate stating her date of birth and her female name and giving her sex as female. This recognition of the plaintiff's reassigned gender and sex would have effect, where relevant, from the date of the plaintiff's successful gender reassignment surgery in 1992. It would not invalidate anything done prior to that date to which the plaintiff's sex was relevant and in particular it would not affect the validity of the plaintiff's marriage to Anne Foy or the plaintiff's parentage of Jennifer and Clare Foy.
>
> The recognition sought would not require any alteration or amendment of the birth certificates of Jennifer or Clare Foy or affect or change any obligations to the said Jennifer or Clare Foy or any succession rights accruing to them.
>
> The plaintiff does not seek to alter the original entry concerning her in the Register of Births other than to the extent that it may be necessary for administrative purposes to make a mark in the margin of the said entry to indicate to the staff of the Registry that a new birth certificate has been issued to the plaintiff in her reassigned gender and showing her female names and giving her sex as female.
>
> The plaintiff seeks a declaratory order, pursuant to para. 6 of the Special Summons herein, that the practise of refusing to issue her with a new birth certificate showing her female name and giving her sex as female is *ultra vires* the powers of An tArd-Chláraitheoir under the Civil Registration Act, 2004 and/or is incompatible with articles 8 and/or 12 and/or 14 of the European Convention on Human Rights and/or fails to vindicate the plaintiff's personal rights under the Constitution and European Convention on Human Rights."

11. Despite the well meaning intention of trying to remove the uncertainty inherent in the declarations as originally sought, this letter did not in fact achieve that purpose and was itself the subject matter of ongoing submission and counter-submission as the case proceeded. The correct interpretation, therefore, of the declarations sought remained a matter of controversy, an issue to which I will return to in a later part of this judgment.

Notwithstanding this uncertainty however, it seems to me that arising out of both the remitted action and the s. 60 appeal, there are three main issues for this Court's determination. The first may very broadly be described as the Administrative Law issue, the second as the Constitutional Law issue and the third as the European Convention issue.

12. The Remitted Action: - A brief description of the issues:
In the rather unusual circumstances in which the remitted action is back before this Court it is important to state that certain consequences which flow from the July, 2002 judgment are highly significant to the issues raised. Given the absence of any new evidence in either action, and the fact that the earlier judgment is still under appeal, it appears to me that the parties remain bound by certain findings contained in that judgment. This view in my opinion, has varying effects on the factual and legal findings previously made by this Court. It is clear, I think, that any findings of fact given in July, 2002 remain binding unless and until disturbed on appeal by the Supreme Court. In addition, I cannot see how any of what I might describe as the "new events" (see para. 2 above) could have any effect on such findings. I therefore believe that there is no scope available to alter or review such findings either for the purposes of the remitted action or where relevant or relied upon for the purposes of the statutory appeal. With regard to any previous findings of law which may again be relied upon, I will express my views on the binding nature of such findings as and when these emerge as part of the submission on the three issues now under consideration.

13. Commencing with a letter dated 29th March, 1993, the applicant either alone or through her solicitors, entered into correspondence with the office of the first named respondent with a view to having an amended birth certificate issued showing her corrected sex as "Female" instead of "Male" and her Christian name as "Lydia Annice" instead of "Donal Mark". She claimed that the Registrar General had power to accede to this application by virtue of the 1863 and 1880 Acts and the Regulations made thereunder. Having reviewed the evidence tendered in support of this application, the Office of the Registrar General refused to so do and this refusal was alleged, in the first set of proceedings, to be *ultra vires* the proper and correct interpretation of these statutory provisions. Hence the administrative law issue in those proceedings. For the reasons set out at paras. 110 et seq., of the earlier judgment the applicant was unsuccessful in this regard.

14. In the event of the Court reaching a negative finding on the above point, the applicant then argued that the aforesaid Acts and Regulations were inconsistent with the Constitution and therefore were not carried over by virtue of Article 50 of the Constitution of Ireland, 1937. More accurately, she claimed that if the existing legal regime made no provision by which the requested changes could be effected, then the same failed to respect her rights to equality, dignity, privacy and also her right to marry a person of the male sex. This alternative claim, for the reasons set forth at paras. 132 to 176 of the July, 2002 judgment was also rejected.

15. The third submission dealt with in the earlier judgment involved a consideration of the impact, if any, which the European Convention on Human Rights had in respect of the matters complained and in this respect there was an analysis of the relevant case law which up to then had come from the European Court of Human Rights. As no decision of that Court, (save for one), had ever found in favour of a transsexual either under articles 8, 12 or 14, or otherwise of the Convention, this Court was not persuaded that the European jurisprudence was so influential as would justify the granting of any relief in this regard. Accordingly, the entire action was dismissed.

16. It is the applicant's current submission that the July, 2002 judgment on these issues, can be reviewed in light of the "*Goodwin*" decision of the European Court of Human Rights and also in light of the 2003 Act.

The Statutory Appeal
17. In the second set of proceedings namely those taken under s. 60(8) of the Act of 2004, (which proceedings since the 13th of February, 2007, should be initiated by an originating Notice of Motion), the applicant has likewise raised similar issues, in almost identical fashion to those above detailed. By letter dated 21st November, 2005, she sought from An tArd-Chláraitheoir an amendment to Columns 3 and 4 of her original birth certificate so as to reflect her acquired name and sex. Whilst there is no mention of the Act of 2004 in that letter, it can be taken that she based her claim essentially on the wording of s. 63, and s. 64 and also, but to a lesser extent on s. 65 thereof. She also argued that if these statutory provisions were correctly interpreted by reference to the Act of

2003, particularly in the context of Goodwin, the Registrar General did, in fact, have power under these provisions to issue the certificate as required. However, by letter of the 23rd of December, 2005, the first named respondent rejected all such claims. Consequently, the administrative law issue in the second set of proceedings.

18. Once again, if unsuccessful on this issue, Dr. Foy also raises a constitutional challenge relying on the same rights as she identified in the earlier proceedings.

In addition, and perhaps her principal submission to this Court in either case, is that if the Act of 2004 does not permit her to receive a corrected certificate, then her rights under articles 8 and 12 of the Convention are breached. As a consequence of such a finding, if made, she than prays for a Declaration of Incompatibility under s. 5 of the Act of 2003.

With this short description of both actions I now firstly propose to deal with the remitted proceedings and thereafter with the statutory appeal.

19. The Remitted Action:

The Legislative Framework – Applicable in 2002:
Under s. 30 of the Registration of Births and Deaths (Ireland) Act, 1863 every Registrar was required to inform himself or herself carefully of every birth and death which happened within his or her district and to register, as soon as could be done, the particulars of that birth or death in accordance with Forms (A) or (B) which were annexed to that Act. As a result of the cross reference to Form (A) which dealt with the registration of births, s. 30 required the following particulars to be registered:-

- No. of entry,
- Date and place of birth,
- Name, [that is Christian name] (if any), Sex whether "male" or "female",
- The [Christian] Name, Surname and Dwelling Place of the Father,
- The [Christian] Name and Married Surname of the Mother: then her maiden Surname proceeded by the word "formally",
- The Rank or Profession, [Trade or Calling] of the Father,
- The Signature, Qualification and Residence of the Informant. The Date when Registered,
- The Signature of the Registrar,
- Baptismal Name, if added after Registration of the Birth and Date.

This section of the Act of 1863 was amended by the Registration of Births Act, 1996 in that s1.(1)(a) specified in the schedule thereto what particulars were required to be registered in respect of a person's birth. Whilst the Act did not apply to any birth registered before the commencement of the Act (s. 1(7)), nevertheless it is interesting to note that the "sex" and "name" of a child were amongst the required particulars although in relation to sex the words whether "male" or "female" as contained in s. 30 were in fact deleted.

20. Section 4 of the Births and Deaths Registration Act (Ireland), 1880 was comparable to s. 30 of the Act of 1863 in that it re-emphasised the duty already placed on a Registrar to inform himself carefully of every birth within his district and after such birth to register the same in accordance with the prescribed form and in the prescribed manner. Section 8 of the Act provided that the name of a child may be altered within 12 months after registration, by the parent or guardian of such child or by some other person who is procuring such alteration. Since 1952 such an application could be made "at any time" (Vital Statistics and Birth, Deaths and Marriages Registrations Act, 1952, s. 5). The material required to be submitted in respect of any such change was specified as was the manner in which the alteration was to be effected: this by entering the altered name in the proper column of the register but "without any erasure of the original entry".

21. In addition to s. 4, s. 27 of the 1880 Act must also be noted as it contained the statutory provisions dealing with the alteration of the Register by reason of 'clerical errors' or 'errors of fact or substance'. The relevant provisions of the section read as follows:-

> "27. With regard to the correction of errors in registers of births and deaths it shall be enacted as follows:-
>
> (1) No alteration in any register shall be made except as authorised by this Act.
>
> (2) Any clerical errors, whether they occurred before or after the commencement of this Act, which may from to time be discovered in any such register may be corrected by any person authorised in that behalf by the Registrar General, subject to the prescribed rules.
>
> (3) An error of fact or substance in any such register may be corrected by entry in the margin (without any alteration of the original entry) by the officer having the custody of the register upon payment of the appointed fee, and upon production to him by the person requiring such error to be corrected of a statutory declaration (Form C, Schedule Three), setting forth the nature of the error and the true facts of the case, and made by one or more persons required by this Act to give information concerning the birth or death with reference to which the error has been made, or in default of such persons, then by two credible persons having knowledge of the truth of the case; and it shall be the duty of the registrar, on becoming aware of any error in fact or substance, to send a requisition to the informant informing him to attend and correct the same.
>
> (4) …"

22. These aforesaid statutory provisions therefore, established a duty on persons to register a birth which registration had to contain specified information including the sex, namely, "male" or "female" of the child: s. 30 and Form (A) of the Act of 1863 and s. 4 of the 1880 Act. Under s. 8 of the Act last mentioned, there was power to alter the name by which any child had been registered in the register and under s. 27 there was power for the correction, under subs. (2), of 'clerical errors' and under subs. (3), of 'errors of fact

or substance'. Forms A, B and C of the First Schedule to the Act of 1880 dealt with the change of name under s. 8 and Form C of the Third Schedule dealt with the statutory declaration which s. 27(3) required, so as to correct errors of 'fact or substance'.

23. Pursuant to s. 11 of the Act of 1863, two sets of Regulations were introduced which in matters of detail underpinned and complimented these statutory provisions. The first in point of time was headed "Regulations for the Discharge of the Duties of Registrars of Births, Deaths and Marriages in Ireland and of Assistant Deputy and Interim Registrars" 1880, which shall be referred to as "The Regulations of 1880" or "the 1880 Regulations", and the second was entitled "Regulations for the Duties of Superintendent Registers of Births, Deaths and Marriages made in 1881 ("The Regulations of 1881" or "the 1881 Regulations"). The Regulations of 1880 once again specified what information had to be registered in respect of a birth. In column 3 of the entry, the Christian name of a child had to be inserted (Regulation 64) and in column 4 the "sex", whether 'male' or 'female' had to be entered (Regulation 65).

24. The correction of errors in completed entries was dealt with in paras. 159 to 171 of the 1880 Regulations. Regulation 159 provides:-

> "The Registrar must make no alteration in any completed Entry of a Birth or Death, whether made before or after the commencement of the … (Act of 1880) except in accordance with the provisions here set forth."

Regulation 160 dealt with clerical errors: it read:-

> "Clerical errors. – All accidental Errors and omissions made through want of care in entering the particulars, or signing the entries, or through misunderstanding on the part of the Informant or the Registrar, are to be deemed Clerical Errors. A list of Errors of this nature is given in the Appendix F page 54, and they arranged in two classes, namely (1) those Clerical Errors which may be corrected in the presence of an Informant … and (2) those which may be corrected in the presence of a qualified Informant only".

The method of correcting such an error was by the Registrar;-

> "… drawing his pin through the erroneous words, letters or figures, and by writing what is correct above the word etc. struck out, or by supplying what is deficient when an Error consists of an omission. The Registrar having so made the correction, must note the Clerical Error in the broader margin of the Entry in which it occurs by writing therein the words "Clerical Error in Col. ……Corrected on the …..day of …..by me. … An asterisk (*) should be fixed to the note in the margin and to the word etc. altered or supplied." (Reg. 161).

25. Errors of 'fact or substance' which all errors were, save for those referred to above (reg. 168), were dealt with by regs. 169, 170 and 171.

Regulation 169 stated:-

> "The Registrar must correct an error of fact or substance in a Register Book of which he has the custody, by entering in the margin without any alteration of the original Entry, upon payment to him … and upon production to him by such person of a Statutory Declaration on Form C, Third Schedule, made before a Justice of the Peace, setting forth the nature of the Error and the true facts of the case. The declaration must be made by one or more persons required to give information concerning the Birth or Death with reference to which the Error has been made, or in default of such persons then by two creditable persons having knowledge of the truth of the case."

Regulations 170 and 171 provide:-

> "170. The Registrar is required upon becoming aware of any Error of Fact or Substance to send a Requisition on the proper printed form to the informant requiring him to attend and correct such Error …"
>
> "171. Upon the attendance of such an Informant … and upon the production to him of the Statutory Declaration duly made and signed by the proper person or persons, he must, unless there are reasonable grounds for his declining to so do, make the correction in the broader margin of the Register Book opposite to the erroneous Entry in the manner shown in Appendix F p. 63. If the Error be the insertion of erroneous words or figures in the body of the Entry by affixing an asterisk (*) to such works or figures he must then send …"

26. As is evident from the above, the 1880 Regulations reinforced the relevant statutory provisions, in part simply by supporting such provisions but also by elaborating upon and explaining the workings of such provisions, (s. 30 and Form A of the Act of 1863 and ss. 8 and 27 of the Act of 1880). These inform the reader that the method of correcting a 'clerical error' does not involve any erasure of the original entry but rather is affected by drawing a line through what is sought to be corrected and by a note in the broader margin of the entry explaining and dating such correction. With regard to 'errors of fact or substance' the original entry cannot in any way be altered and the correction must only be made by a marginal entry. When either type of error has been corrected a birth certificate showing the correction in the margin can be obtained pursuant to s. 52 of the Act of 1863 or s. 25 of the Act of 1880. In addition, under the Registration of Births, Deaths and Marriages Regulations, 1987 (S.I. No.234 of 1987), one could obtain a certificate containing the corrected entry only, which certificate would not show the fact of correction or of any other alteration or detail.

27. July, 2002 High Court Judgment:

The Administrative law or ultra vires point:
As part of general correspondence which passed in the 1990s, the then Assistant Registrar General, Mr. Kehoe, outlined the position of the first named respondent by way of a letter dated 17th December, 1993. On 3rd December, 1996, the applicant made a formal application, to have column 4 of the register amended by specifying her sex as "female" instead of "male". She did so on the basis that she was suffering at birth from an undiagnosed congenital disorder and accordingly the entry was an error of 'fact or substances' under Regulation 168 of the 1880 Regulations. Mr. O'Cleirigh, the successor to Mr. Kehoe, replied on 11th February, 1997. In that letter he outlined the position of the Registrar General which was that an entry in the birth register was a record of a particular event which occurred on a particular date, namely the date of birth. Such a register was not intended to record any further significant event(s) which may occur throughout a person's life. He went on say that for the purpose of recording the 'sex' of a new born, which was mandatory under s. 30 of the Act of 1863 and the Schedule thereto, the physical genital characteristics, as observable at birth, were used. These would determine the entry relative to sex. He concluded by stating that notwithstanding the post-operative nature of the applicant, there was in fact no error of 'fact or substance' in the entry and accordingly the application could not be acceded to.

A similar response was made to the application regarding a change of name.

28. In support of her case Dr. Foy called a number of medical witnesses, including Professor Gooren who is a specialist in endocrinology and in particular, in the hormones of men and women which relate to sexual reproduction and sexual differentiation. The respondent called Dr. Green, who is a Professor of Medical Genetics at UCD. Much relevant literature was also identified and relied upon.

29. It was submitted on behalf of the applicant that on the medical and scientific evidence available, the Court should declare that there exists a fifth indicator of sexual differentiation, (namely psychological or brain sex), that the same should be recognised as having existed at the date of the applicant's birth and that in the event of conflict, it should take precedence over her biological indicators. Accordingly, it was claimed that the original entry in the register relative to Dr. Foy, (name and sex) (which did not reflect her true sex), was an entry which should be described as an 'error of fact or substance'. That being so the Registrar General was under a duty to make the requisite correction under s. 27 of the Act of 1880.

30. The resolution of this matter in the July, 2002 judgment involved the Court in making a number of findings, including the following:-

> (a) The scientific and medical evidence offered was not sufficient to establish the existence of brain differentiation as a marker of sex; (para. 121)
>
> (b) The use by the Registrar General of the criteria identified in *Corbett v. Corbett (orse. Ashley*) [1970] 2 W.L.R. 1306 (Mr. Justice Ormrod) for the purposes of discharging his duty, was correct: such criteria consisting of the chromosomes, gonads and internal and external genitalia;
>
> (c) The Registrar General was duty bound to register a person as being of the male or female sex; (para. 110)
>
> (d) The entry was a historical record of the decisive event of birth but was not and was not intended to reflect any further or later events, no matter how significant, in a person's life; (para. 170)
>
> (e) The applicant had conforming biological structures at birth, being those of a male; (para. 125)
>
> (f) In such circumstances it could not be said that the relevant entry constituted either an 'error of fact or substance' within the meaning of s. 27 of the1880 Act or the Regulations made thereunder; accordingly the applicant's sex was correctly entered at birth (at para. 124), and finally;
>
> (g) The Registrar General had no power under s. 8 of the Act of 1880 to alter the Christian name of the applicant.

31. The impact of Goodwin on those findings:
Having thus dealt with the administrative issue in this way, the question which now arises is whether this Court should review that part of its 2002 judgment by reason of the *Goodwin* decision and/or the Act of 2003. As previously stated, the evidential findings so made, including those forming part of mixed questions of law and fact, remain binding on the applicant and cannot now be reviewed by this Court. In the absence of any new evidence, as is the situation, I must therefore accept such findings when considering her submissions on this point.

32. The decision in "*Goodwin*", which was given prior to the Act of 2003, was not binding on this Court or on this State. Given the dualist approach which, prior to 2003 this country adopted in respect of the Convention, it would only have been a judgment of the European Court given in proceedings where Ireland was a party that would have been binding on the State. In any event, it is appropriate to point out at the very outset, that the *Goodwin* decision itself was prospective only. This is clear from the overall structure of the judgment, in particular from the way in which the Court dealt with the erosion of the margin of appreciation. In addition, the Orders which it proposed, under both articles 8 and 12 of the Convention (para. 93 and 104) are fully reflective of this view. This conclusion is also supported by *Bellinger v. Bellinger* [2003] 2 W.L.R. 1174, [H L]:[2002] 2 W.L.R. 411 (C.A.), where the judgment described the decision, at p. 1181 of the report, as being "essentially prospective in character". Moreover, in *Chief Constable of West Yorkshire Police v. A. and Another(No. 2)* [2004] 2 W.L.R. 1209, a transsexual had challenged the decision of the respondent who refused to permit her to become a member of the force as he considered her male under English domestic law. A question arose as to whether Council Directive 76/207/EEC of 9th February 1976, on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, (the "Equal Treatment Directive") should be interpreted as if the decision in Goodwin had been the law at that time. Lord Bingham said: (at p. 1214 of the report)

> "There is nothing in the Court's judgment to suggest that the earlier cases of Rees v. United Kingdom (1986) 9 E.H.R.R. 56 …. *Cossey v. United Kingdom* (1990) 13 E.H.R.R. 622 and *Sheffield and Horsham v. United Kingdom* (1998) 27 E.H.R.R. 163 ….the last of these cases decided after the date of the Chief Constable's decision, had been wrongly decided. Rather, the Court recognised that the legal or administrative consensus among Member States, the understanding of transsexuality, and evolving perceptions of individual dignity and freedom, had reached a point where the margin of appreciation accorded to a State could no longer be held to legitimise the denial of formal recognition to an acquired change of gender."

Clearly, therefore, the House of Lords in that case treated the decision in *Goodwin* as being prospective.

Finally, the European Court itself, in the later decision of *Grant v. United Kingdom* ECHR 23/5/2006 (which is further referred to in this judgment) confirmed that the Goodwin decision did not apply at any point in time prior to its delivery, namely the 11/7/2002 (paras. 42 & 43). In fact in *Grant's* case, the Court applied the *Goodwin* decision only from the subsequent date when the authorities again refused to give effect to her claim (5/9/2002). Therefore, I cannot see how the decision in *Goodwin* could have any influence on an application which was made and dealt with in 1996 or 1997.

Furthermore at that time, and indeed when this Court gave judgment in July, 2002, the decision in *Goodwin* had not been delivered and the entire case law of the European Court of Human Rights, when dealing with issues relative to transsexuals, had not up to then (save for *B. v. France* (1992) 16 E H.R.R.1) found any breach of articles 8 or 12 of the Convention in respect of such persons. In addition, *Goodwin* could not be used as an interpretive tool in respect of the Acts of 1863 or 1880 or the Regulations made

thereunder. In fact at the time of hearing all of this legislation was repealed. And finally prior to *Goodwin* it was within each countries margin of appreciation to retain congruent biological factors as the determining criteria for "sex" in the context of both birth and marriage. So in my view *Goodwin* can have no impact on the July, 2002 findings as above set forth.

The impact of the European Convention on Human Rights Act, 2003 on these findings:
33. The European Convention on Human Rights was adopted by this State in 1950 and was ratified in 1953. Apart from the twelfth protocol all optional protocols have also been ratified. There are eleven substantial provisions setting out rights mostly of a civil and political character. A Commission and a Court of Human Rights were established to oversee the Convention's implementation. Because of increasing workload, the Commission was abolished in 1998 when a single permanent Court was established. In all, over forty-seven Member States of the Council of Europe are signatories to the Convention at present. Despite, however, being involved in the first ever case before the Court, *Lawless v. Ireland (No.3)* (1961) 1 E.H.R.R. 15, the Convention rights did not become part of Irish law until 2003. Up until the passing of the European Convention on Human Rights Act, 2003 the position was that Ireland was obliged to accept rulings from the Court in proceedings where it was a party. But otherwise neither it or any emanation of this State had any direct obligations in respect thereof. That changed as and from 31st December, 2003, when by virtue of the 2003 Act and the European Convention on Human Rights Act 2003 (Commencement) Order 2003 (S.I. No. 483 of 2003), the rights outlined in the Convention obtained the force of law in this jurisdiction. It did so at a sub-constitutional level (see the long title) and by reference to what has been described as an 'interpretative model' of incorporation. This means that the Act gave effect to the convention rights in Irish law. In adopting this method the Oireachtas has been strongly criticised for not integrating the Convention at a higher level in our legal order. See (1), "The E.C.H.R. Act 2003; A critical perspective" Donnacha O'Connor, and (2) the "Incorporation of the E.C.H.R.: Some issues of Methodology and Process" Gerard Hogan; in Ursula Kilkelly (ed): E.C.H.R. and Irish Law (Jordan's 2004). Whether such criticism is justified or not is immaterial, as this Court must apply the provisions of the Act in the manner so ordained by the Oireachtas for the Convention's role in our domestic law.

34. Sections 2, 3 and 5 of the 2003 Act, in so far as these are material, read as follows:

> "Section 2(1) In interpreting and applying any statutory provision or rule of law, a court shall, in so far as is possible, subject to the rules of law relating to such interpretation and application, do so in a manner compatible with the State's obligations under the Convention provisions.
>
> (2) This section applies to any statutory provision or rule of law in force immediately before the passing of this Act or any such provision coming into force thereafter.
>
> 3.-(1) Subject to any statutory provision (other than this Act) or rule of law, every organ of the State shall perform its functions in a manner compatible with the State's obligations under the Convention provisions.
>
> (2) A person who has suffered injury, loss or damage as a result of a contravention of *subsection* (1) may, if no other remedy and damages is available, institute proceedings to recover damages in respect of contravention in the High Court (or, subject to subsection (3), in the Circuit Court) and the Court may award to the person such damages (if any) as it considers appropriate.
>
> (3) The damages recoverable under this section in the Circuit Court shall not exceed the amount standing prescribed, for the time being by law, as the limit of that Court's jurisdiction in tort.
>
> 4. …
>
> 5.-(1) In any proceedings, the High Court, or the Supreme Court when exercising its appellate jurisdiction, may, having regard to the provisions of *section 2*, on application to it in that behalf by a party, or of its own motion, and where no other legal remedy is adequate and available, make a declaration (referred to in this Act as 'a declaration of incompatibility') that a statutory provision or rule of law is incompatible with the State's obligations under the Convention provisions.
>
> (2) A declaration of incompatibility –
>
> (a) shall not affect the validity, continuing operation or enforcement of the statutory provision or rule of law in respect of which it is made, and
>
> (b) shall not prevent the party to the proceedings concerned from making submissions or representations in relation to matters to which the declaration relates in any proceedings before the European Court of Human Rights.
>
> (3) The Taoiseach shall cause a copy of any order containing a declaration of incompatibility to be laid before each House of the Oireachtas within the next 21 days on which that House has sat after the making of the order.
>
> (4) Where –
>
> (a) a declaration of incompatibility is made,
>
> (b) a party to the proceedings concerned makes an application in writing to the Attorney General for compensation in respect of an injury or loss or damage suffered by him or her as a result of the incompatibility concerned, and
>
> (c) the Government, in their discretion, consider that it may be appropriate to make an ex gratia payment of compensation to that party ('a payment'),
>
> the Government may request an advisor appointed by them to advise them as to the amount of such compensation (if any) and may, in their discretion, make a payment of the amount aforesaid or of such other amount as they consider appropriate in the circumstances.
>
> (5) In advising the Government on the amount of compensation for the purposes of subsection (4), an adviser shall

take appropriate account of the principles and practice applied by the European Convention of Human Rights in relation to affording just satisfaction to an injured party under Article 41 of the Convention."

35. For the purposes of the remitted action it is necessary firstly to consider whether the Act of 2003 has any retrospective effect, because if it doesn't, the applicant cannot avail of its provisions in trying to review the previously reached non- factual conclusions (para. 30 *supra*) on this administrative law point (para. 27 supra of this judgment).

36. Before I look at the general retrospectivity of the 2003 Act, there is one part of the applicant's submission on this point which should be dealt with. On behalf of Dr. Foy it is claimed that her predicament is one of a continuing nature and therefore, cases involving once-off situations, where acts and events occur at a particular point in time should be differentiated. In other words, decisions such as *Dublin City Council v. Fennell* [2005] 1 I.R. 604 do not deal with the ever present nature of her plight. Therefore, it is said that there is a continuing refusal by the Registrar General to issue a new or amended birth certificate and accordingly since this continued after the passing of the Act of 2003, the provisions of that Act can be applied. In effect if this submission is accepted the question of retrospectivity does not apply.

37. With respect I must reject this submission, for to accept it would be contrary to first principles, would lead to great uncertainty and would place the first named respondent in an impossible position. In any system of law, rights, even those which undoubtedly exist, have to be asserted before a breach can be established, a *fortiori* with the creation of new rights. That was the purpose of Dr. Foy's application to the Register General in late 1996 and early 1997. Without such an application the first named respondent may not even know of the applicant existence, let alone of her desire to obtain a corrected birth certificate. It must be remembered that transsexual people deal with their condition in different ways. For a variety of reasons, some simply live in the opposite sex without any treatment; some of these may than revert to their biological sex; some other group may take hormones, some may not; some may have surgery etc. To seek full legal recognition is therefore a matter of individual choice. Consequently, having dealt with her applications in 1996 and 1997, how could it be said that in the absence of further agitation, the Register General was under a continuous duty, indeed, was continuously in breach of that duty, by not issuing in favour of Dr. Foy the birth certificate as requested. In my view such a proposition is not sustainable.

The situation would have been different if a further application had been made between the 1st of January, 2004, and the date upon which the Civil Registration Act, 2004 took effect. If it had, the old regime would have had to be looked at through the eyes of the 2003 Act. But no such application was made.

38. In addition to the points above made, a court, when adjudicating on any issue, must be in a position to apply legal principles which exist at the time of the dispute. This general proposition is subject only to contrary direction expressly provided for. Accordingly the applicant's cause of action arose in 1997 when the Register General refused her application. The facts and circumstances were established at that time and it could not be said, that at any or at all times hereafter, her cause of action continued. Indeed, the actions of Dr. Foy in making a new application on 21st November, 2005, fully supports this view. I therefore cannot accept that the cause of action could be said to have a form of continuous life traversing the boundary between the pre and post 2003 regime. In *Carmody v. Minister for Justice* [2005] 2 I.L.R.M. 1, the prosecution had yet to be heard in the District Court, although it must be acknowledged that the alleged offences, the charging, the invocation of the District Courts' jurisdiction, the legal aid certificates, and the institution of the High Court proceedings, all pre dated the 31st of December 2003. In fact Laffoy J. held (at p. 15 of her judgment) that retrospection did not arise as in her view the critical issue was whether "as of now" (the date of Judicial Review hearing), s. 2 of the Criminal Justice (Legal Aid) Act, 1962 was compatible with the State's allegations under certain articles of the Convention. That case is therefore clearly distinguishable from the present case. Therefore I do not think that cases such as *Dublin City Council v. Fennell* [2005] 1 I.R. 604 can be distinguished in the above regard. Consequently, in my view, if the Act of 2003 is to apply to the first set of proceedings it must be shown to have retrospective effect.

39. Moreover, the High Court as of 31st December, 2003, had long completed its involvement with this case and subject to review was in effect *functus officio*. As of that date the instant case was the subject of an appeal to the Supreme Court which had not by then embarked upon the hearing of it. But for the referral back, the point would not even arise. First principles say that unless by express provision or necessary intendment the provisions of an Act should have prospective effect only. Faced with *Fennell* the applicant replies by making a further submission to that above described, which I have already rejected. In addition, it is said that the 2003 Act could have a limited retroactive application and in support of this submission reference was made to the Court of Appeal's decision in *R. (Hurst) v. Northern District Coroner* [2005] 1 W.L.R 3892 which, having distinguished the earlier House of Lords decision in *Wilson v. First County Trust (No. 2*)[2003] 4 All. E.R. 97, held that s. 3 of the English Human Rights Act, 1988 (being similar to s. 2 of the Irish Act of 2003), could have in certain circumstances a retrospective effect. This Court is therefore urged to distinguish *Fennell* and to apply *Hurst.*

40. Because of the High Court's decision in *Lelimo v. Minister for Justice, Equality and Law Reform* [2004] 2 I.R. 178 and in particular because of the Supreme Court's decision in *Dublin City Council v. Fennell* [2005] 1 I.R. 604, a decision directly on the issue of retrospection vis-a-vis the Act of 2003, it is not necessary in my opinion to consider the substantial body of case law which has developed over the years, in both this and the neighbouring jurisdiction, on the question of statutory retrospection. Cases such as *Buckley and Others (Sinn Fein) v. Attorney General* [1950] I.R. 67, *Hamilton v. Hamilton* [1982] I.R. 466, *McKee v. Culligan* [1992] 1 I.R. 260 (also cited as *Sloan v. Culligan*) and *Re Heffernan Kearns Ltd (No.1); Heffernan v. Dublin Heating Co. Ltd* [1993] 3 I.R. 177, could all be referred to. However, as this issue, specific to the 2003 Act, has been reviewed in the two decisions which I have mentioned, any further reference to this general body of case law is not required.

41. In the *Lelimo* decision Ms. Justice Laffoy dealt with a submission that the enforcement of a deportation order would constitute a breach of the applicant's rights under the European Convention on Human Rights Act, 2003. The order had been made on 20th January, 2003, but had not been enforced by the end of that year. It was therefore submitted that the enforcement part of this process was subject to the Act of 2003. At pp. 188 to 190 of the judgment she said:

> "The coming into force of the European Convention on Human Rights Act of 2003 has not altered those obligations [under international law] or the rights and remedies which flow from them…. Counsel for the applicant having, properly in my view, conceded the non-retrospectivity of … The European Convention on Human Rights Act, 2003, the issue which remains is whether the enforcement of the deportation order… [to take effect after 31st December 2003]… could constitute a breach of s. 3(1) if the deportation order was lawfully made.
>
> In my view, it could not. Such authority as any organ of State has to enforce the deportation order, derives solely from the deportation order. The enforcement process cannot be severed from, and has no basis in law distinct from the order itself. The decision to make the deportation order and the order itself both predate the coming into operation of s. 3(1). They are immune from challenge under the Act of 2003."

42. Of more significance however, is the decision of the Supreme Court in *Dublin City Council v. Fennell.* [2005] 1 I.R. 604. In that case, Dublin City Council, under the Housing Act, 1966, made a written letting of No. 146 Balbutcher Lane, Ballymun, Dublin 11, to the respondent in 1996. It was a term of the agreement that neither the tenant nor any occupant of the dwelling house would cause any nuisance, annoyance or disturbance to any third party. In the event of that occurring and possession being obtained, it was further provided that the tenant shall be deemed to have deliberately rendered himself homeless within the relevant statutory provisions. In June 2003, a decision was made by the Local Authority to serve a Notice to Quit, which was duly served demanding possession by the 1st September of that year. On 30th October, proceedings issued under s. 62 of the Housing Act, 1966 claiming possession. On 12th December, the District Court made an order for possession but that was appealed by notice dated 23rd December. On 16th June, 2004, the appeal come on for hearing before the Circuit Court. The respondent tenant sought to argue the applicability of certain provisions of the 2003 Act. Ultimately the Circuit Court stated a case for the opinion of the Supreme Court. The unanimous judgment of that Court was given by Kearns J.

43. In his judgment the learned judge, having identified the critical issue as being whether or not s. 2(2) of the Act of 2003 operates retrospectively, (in the sense described) and having referred to Article 15.5 of the Constitution and to cases such as *McKee v. Culligan* [1992] 1 I.R. 233 (also cited as *Sloan v. Culligan*) and *In Re Heffernan Kearns Ltd (No.1)* [1993] 3 I.R. 177, came to the conclusion that the Constitutional prohibition on creating "acts to the infringement of the law which were not so at the date of their commission" applied equally to civil law as it did to criminal law. Similarly, at the statutory level where s. 21(1) of the Interpretation Act, 1937 gave "the clearest statutory signposts in our jurisdiction pointing against retrospection" (at p. 629). That provision, however, is simply a recitation of the established common law presumptions "that statutes do not operate retrospectively unless a contrary intention appears"(at p. 629). Further support for this proposition appears in *Maxwell Interpretation of Statutes*, 12th Ed. pp. 215 to 216, *Craies on Statute Law* 7th Ed. at p. 398 and *Bennion on Statutory Interpretation* (4th Ed.) section 97, p.p. 265 to 266. At pages 631 to 632 of the Report, when dealing with the Act of 2003, the Court said:

> "On the face of it, the language and terminology of the Act appears to suggest prospective obligations only. None of the sections is directed to backward-looking obligations. No express provision or retrospective application of the Act to past events is anywhere to be found in the Act, other than insofar as s. 2(2) provides that existing legislation is also to be interpreted by reference to Convention principles. However, no additional provision appears in s. 2(2) suggesting that a retrospective application of this section is envisaged.
>
> In a matter of such far-reaching importance it would be a considerable omission on the part of the draftsman not to include a provision for retrospective application to past events if such was the intention. If it was the intention, I have already indicated my view that it would have left the Act of 2003 open to attack on the basis that a retrospective application would infringe Article 15.5 of the Constitution.
>
> A very strong reason for believing that retrospective applications of past events is not intended is to be found. …"

Having then quoted at length from the significant judgment in *Hamilton v. Hamilton* [1982] I.R. 446, Kearns J., continued at p. 637 of the report, by saying:

> "I am satisfied, however, … for all the reasons outlined above, that the Act of 2003, cannot be seen as having retrospective effect or as affecting past events."

The Court therefore answered the case stated in a manner reflective of its judgment.

44. For its reasoning and conclusions the Court drew heavily on, *In Re McKerr* [2004] 1 W.L.R. 807. In that case the House of Lords held that the duty to investigate unexplained deaths, imposed by article 2 of the Convention as an adjunct to the duty to protect life, applied only to deaths occurring after the 2nd October, 2000, the commencement date of the Human Rights Act, 1998. This case was distinguished by the Court of Appeal in the later case of *R (Hurst) v. London Northern District Coroner* [2005] 1 W.L.R. 3892, which held that in limited circumstances s. 3 of the 1998 Act (broadly similar to s. 2 of the 2003 Act) could have partial retrospective effect. In light of the detailed analysis contained in *Hurst*, it may be that what appears to be an absolute bar on any retroactive application of s. 2 of the Act of 2003, may have to be looked at again; or indeed it may not, as the House of Lords reversed the Courts of Appeal decision in its judgment given on the 28th March, 2007 [2007] 2 A.C. 189. In any event, despite some of the passages in *Fennell*, it may arguably be suggested that each section of the Act requires individual treatment. Interestingly enough, the *Carmody* decision, though given in January, 2005 is not mentioned in *Fennell*. Any such review however, is clearly a matter for the Supreme Court and until then, if at all, I am clearly bound by *Fennell.* As I cannot truly distinguish that case from the present one, which also involves sections 2 and 3 of the 2003 Act, it follows that the provisions of this Act can have no impact on either the first set of proceedings or the judgment given therein.

45. The Second Set of Proceedings – The section 60(8) appeal

Administrative Decision

The Civil Registration Act, 2004 came into force on various dates as specified by different statutory instruments. For the purposes of this case, the 5th day of December, 2005 was the appointed date (Civil Registration Act (Commencement) Order 2005 (S.I. No. 764 of 2005)). From that time onwards, the Registration of Births and Deaths (Ireland) Act, 1863, the Births and Deaths Registration Act (Ireland) 1880, and, save for s. 1(4) and (4A) thereof, the Registration of Births Act, 1996 stood repealed. In their place a new system of registration was established with regard to births (and still births), deaths, adoption, decrees of divorce and nullity. Provision was also made for amending the law with regard to marriage but the relevant part of the Act, namely Part 6 is not scheduled for operative application until 5th November, 2007, of this year. (Per Civil Registration Act 2004 (Commencement) Order 2007 (S. I. No. 736 of 2007)). Insofar as are relevant to the issues in this case, the following aspects of the new regime require to be noted:

> (a) The office of An tArd-Chláraitheoir, provided for in s. 4 of the Act of 1863 is continued in existence with the functions of that office being to maintain, manage and control the system of registration established by the repealed legislation in respect of, *inter alia*, births and marriages. For those purposes, and notwithstanding the repealed enactments, the existing system shall continue to apply unless and until modified by the Registrar General (s. 8).
>
> (b) Under s. 13(1)(a) of the Act, a register of all births is required to be maintained, but under subs. (2), a register formally maintained for that purpose under the repealed enactments, may be deemed to be part of the 'appropriate register'.
>
> (c) On being supplied with the "required particulars" of any newborn, the registrar concerned shall register the birth in the manner prescribed or directed by him/her. (s. 19(4)). The "required particulars", which are set out in the Second Schedule

and in Part 1 of the First Schedule, include, *inter alia*, the "sex" of the child and the "forename" and the "surname" of that child.

(d) The registrar in question may alter or change the forename of a child, on application to that effect being made by the parents, surviving parent or guardian of such child (see s. 25), and;

(e) Where a person is dissatisfied with a decision (including a revised decision) of the Registrar General, that person may appeal against it to the High Court. This appeal is available on any question or issue which the Registrar is called upon to decide under the 2004 Act (s. 60(8)).

46. Of particular significance to this case are the provisions of ss. 63 and 64. These read as follows:

"63 – (1) An alteration shall not be made in a register maintained under *paragraph* (a), (b) or (d) of *section* 13(1) otherwise than in accordance with the provisions of this Act.

(2) On the application in that behalf of a person, having an interest in the matter to a Superintendent Registrar in writing, he or she may -

(a) correct in the manner specified by An tArd-Chláraitheoir a clerical error in any register maintained under *section* 13, or

(b) correct an error of fact in a register specified in the said *paragraph (a)* or *(d)* if the person gives to the Superintendent Registrar such evidence as he or she considers to be adequate and a statutory declaration, in a form standing approved by An tArd-Chláraitheoir of the facts concerned made by –

(i) a person required by this Act to give to the register the required particulars in relation to the birth, or death, concerned, or

(ii) if such a person as aforesaid cannot be found, two credible persons having knowledge of the facts concerned.

(3) Where an error of fact …

(4) …

64 – (1) Where a registrar is satisfied that an entry made by him or her or another registrar in the register of births or the register of deaths contains an error of fact, he or she shall notify the Superintendent Registrar of the authority by which the register is employed of the error.

(2) When a Superintendent Registrar of any authority receives a notification under *subsection* (1), the Superintendent Registrar or a registrar of that authority, if so directed by the Superintendent Registrar, shall by notice in writing given to a qualified informant …

(3) When a person complies with *subsection* (2) the Superintendent Registrar, or the registrar, concerned may – …

(c) correct the error concerned in the register of births or …the register of deaths as the case may be, or

(d) request a direction from An tArd-Chláraitheoir in relation to the matter.

(4) Where, pursuant to *subsection* (2), the Superintendent Registrar concerned is satisfied that …

(5) …

(6) …

(7) …"

47. Section 65, which had the earlier commencement date of 1st of October, 2004, (Civil Registration Act, 2004 (Section 65) Commencement Order 2004 (S.I. No.588 of 2004)), has also been referred to as that section confers on the first named respondent power to conduct or cause to be conducted such enquiry as he or she considers necessary to ascertain:-

(a) "Whether a birth … required to be registered under this Act or the repealed enactments in the register maintained under para. (a), (b), (d) or (e), as may be appropriate, of section 13(1) has occurred and if it has –

(i) whether it has been so registered, and

(ii) if it has been whether the particulars in relation to it in the entry in the register concerned are correct and complete." (Section 65(1)(a))

Under subs. (3) if the first named respondent is satisfied that the particulars of an entry relative to birth are incomplete he may correct or complete, or cause to be corrected or completed, the aforesaid entry.

48. On the 21st November, 2005, Mr. Michael Farrell, solicitor, acting on behalf of his client, wrote to the Registrar General and applied to have "the mistake" in the record of her birth corrected so as "to reflect her true and actual gender and her female name". He also sought "the issue to her of a new birth certificate reflecting her actual gender and her female name". In that letter he referred to the European Convention on Human Rights Act, 2003 and to the decision in *Goodwin*, as a justification for seeking what he did. Moreover, he made it clear on behalf of Dr. Foy that such application was not intended "to interfere in any way with the

registration of birth certificates of their daughters". On the 23rd December, the Registrar General replied and at the outset indicated that he was treating the application as a new application and was therefore going to deal with it under the 2004 Act. No objection was taken to this approach. With regard to the request for a change in name, reference was made to s. 25 of that Act, as constituting the foundation therefor but as is evidence from a reading thereof, the applicant did not come within its express terms, and accordingly no alteration in the name could be made. Secondly, the Registrar General denied that in 1947 there had been any "mistake" in the record of the applicant's birth. He felt that as she was born 'male', the entry so reflecting this sex was correct. He relied upon the July, 2002 judgment in support of this argument. In addition, he suggested that the decision in *Goodwin* was materially different from the circumstances of the applicant. In conclusion, he denied that there was any breach of the applicant's rights under article 8 of the Convention and in the process felt that he had no power to issue, and that there were no grounds for issuing, either a new certificate or amending the existing one. The application in its entirety was therefore rejected. Hence the appeal under s. 60(8) of the Act, it being noted that the scope or extent of the appeal was not in issue and thus not debated in these proceedings: see - Rules of the Superior Courts (Statutory Applications and Appeals) (S.I. No. 14 of 2007).

49. As previously stated, this Court in the July, 2002 judgment, decided as a matter of fact that the evidence addressed was not sufficient to add psychological sex as a fifth indicator of sex. It further held that as the applicant was born with conforming sexual indicators, he was, as of then, correctly registered as being of the male sex. There had, therefore, been no mistake in the register. These findings of fact continue to bind Dr. Foy. She therefore cannot possibly succeed in her submission that the Registrar General has acted unlawful in not correcting her birth certificate on the grounds of mistake. Her only argument, which I take she is making and which I am about to deal with, is that the aforesaid statutory provisions are sufficiently wide as would justify the issue of such a certificate to a transgendered person. In the alternative they are incompatible with Convention rights.

50. As above stated the European Convention of Human Rights became law, in the manner in which it did, as of the 31st December, 2003. Under s. 2 of the Act, this Court:

> "In interpreting and applying any statutory provision or rule of law …, a court shall insofar as is possible, subject to the rules of law relating to such interpretation and application, do so in a manner compatible with the State's obligations under the Convention provisions."

In addition, under s. 3(1), every organ of the State shall perform its functions, subject to any statutory provision or rule of law, in a manner which is compatible with the State's obligations under the Convention. Relying on these sections it is submitted on behalf of Dr. Foy, that the Registrar General is an organ of the State and is thus subject to the provisions of s. 3 so that he must perform his function in a Convention compatible manner. There is no dispute but that in principle this is correct. It is claimed as I have said that by applying the provisions of s. 2 to the Act of 2004, the Registrar General does in fact have the power to grant the applications as sought and to issue a new certificate or amend the existing certificate in the manner requested. By not so doing, it is submitted that he has failed to honour the State's obligations under the Convention. Accordingly, the administrative law issue.

51. To succeed on this ground the applicant must establish that by applying the interpretative provisions of s. 2 of the Act of 2003, to ss. 63, 64 and 65 of the 2004 Act, (and in fact also to s. 25) this Court should conclude that the Registrar General was vested with the power as suggested above. This submission involves the application of the relevant principles of interpretation; giving predominance to Convention compatibility if that 'is at all possible'.

52. The principles of interpretation which governed the earlier legislation are not relevant to this case as both the Act of 1863 and 1880 pre-dated the Constitution. Being a post 1937 statute, the Civil Registration Act, 2004 has attached to it the presumption of constitutionality and as a corollary of that, there is the further presumption that "the Oireachtas intended that proceedings, procedures, discretions and adjudications which are permitted, provided for, or prescribed by an Act of the Oireachtas are to be conducted in accordance with the principles of constitutional justice". See *East Donegal Co-operative Livestock Mart Ltd v. The Attorney General* [1970] I.R. 317 at 341. As a further corollary there is a principle of interpretation known as "the double construction rule". That is, where two or more constructions of a statutory provision are reasonably open, one of which is constitutional and the other or others of which are not, it must be presumed that the Oireachtas intended only the constitutional construction, and accordingly the court when so adjudicating, should favour such a construction. See *McDonald v. Bord na gCon (No. 2)* [1965] I.R. 217 at p. 239. This principle however applies only where the suggested construction is one that is reasonably open on the wording of the section in question; this to be looked at in the context of the Act as a whole. If it is therefore "possible" to construe sections 25, 63, 64 and 65 as having sufficient breadth to enable the requested amendments to be made, then in compliance with s.2 of the 2003 Act, this Court should so construe such provisions.

53. The first point to note is that these provisions both in substance and in materiality are virtually the same as those contained in the 1880 Act. The phraseology used is very similar and in some instances almost identical. Expressions such as "clerical errors" and "errors of fact" are common to both. The only difference is that the phrase used in the 1880 Act was "an error of fact or substance" whereas that used in the 2004 Act is simply "an error of fact". It is unlikely in my view that this minor alteration was intended to affect the proper meaning of that phrase. It is therefore reasonable to believe that the Oireachtas in 2004 intended that common phrases should have a common meaning; subject of course to the overriding duty now imposed on the courts by virtue of s.2 of the Act of 2003.

54. There is no doubt in my mind but that the mistake alleged in this case could never be classified as a "clerical error" and indeed it has not been so argued. Equally so with regard to the phrase "error of fact". At all times it has been the Registrar General's position that the purpose of a birth entry is to record a historical fact at a given point in time and that there is a legitimate and vested public interest in having an operational and functioning system in that regard. Since the commencement of the original system the Registrar General has always relied upon the observable characteristics of the newborn, and if such biological indicators were in conformity one with the other, then those were determinative of the entry under column 4. In such circumstances, if the entry so made was correct at the time, it remained correct throughout a person's life. The fact that such a person may subsequently assert a psychological sex, different to that of his original biological sex, was never regarded as constituting an "error of fact or substance" in the entry. That situation has pertained for over a hundred and fifty years. Given the absence of any definition of "sex" in the Act or any indication of an intention to ascribe to the phrase "error of fact", any meaning different to that which has been historically used, I can only conclude that it was the intention of the Oireachtas to maintain the status quo with regard to both the entry and the powers correcting such entry.

55. This in itself however, does not end this point. Consistent with domestic rules of interpretation, is it "possible" to construe any of the above sections of the Act of 2004, so as to permit or even mandate a result different from that given by the Registrar General?

In conducting this exercise it must be noted that s. 2 of the Act of 2003, is not free from doubt, in particular where it uses the expression "…in so far as possible…". Less wide ranging phrases such as in so far as is "reasonable" or "practicable" or some other

such similar wording is not used. Therefore, in my view, the Oireachtas intended the courts to go much further than simply applying traditional criteria, such as e.g., the purposeful rule or giving ambiguous words a meaning which accords with convention rights; something like the double construction test. This type of restrictive approach was rejected by the House of Lords in *R. v. A.* [2001] 3 All E.R., 1 when dealing with the identical phrase contained in s. 3 of the Human Rights Act, 1998. In many respects it is easier to describe when s. 2 applies than to establish its outer limits of application. And fortunately for the purpose of this case it is not necessary to do so. Indeed I would be most reluctant to go further than what is absolutely required, particularly as this precise point was not heavily underpinned by submissions.

56. Within these restrictions I think it is safe to say that the section cannot extend to producing a meaning which is fundamentally at variance with a key or core feature of the statutory provision or rule of law in question. It cannot be applied *contra legum* nor can it permit the destruction of a scheme or its replacement with a remodelled one. In addition, a given legal position may be so well established that it becomes virtually immutable in the landscape. It seems to me that to apply the section in any of these circumstances, which are but examples, would be to breach the threshold, even one set as expansively as this one is. When the court finds itself so restricted the only remedy is a declaration of incompatibility. See *Ghaidan v. Mendoza* [2004] 3 All E.R. 411; and in particular the speech of Lord Steyn (paras. 45-50, pp. 426-429) where he suggests that this phraseology ("in so far as is possible") has it roots in community law. *Marleasing SA v. Lla Commercial Internacional de Alimentacíon SA*: [1990] ECR 1-4135 (para. 8). This view is one which, respectfully, I fully agree with.

57. In my view, the practice and legal position in this case i.e. the use of consistent biological factors to determine the sex of a child for entry purposes, and the refusal to subsequently alter that entry in the case of a transsexual person, is so well settled and so rigidly fixed that the provisions of s. 2, in themselves, do not allow ss. 25, 63, 64 and 65 of the 2004 Act to be read as the applicant would suggest. It seems to me that no matter what method of interpretation is used to reach a contrary conclusion would involve the creation of a new or fundamentally altered scheme. This I feel I cannot do. Accordingly, I believe that the Registrar General was correct in his application of these sections and therefore, the applicant cannot succeed on this ground.

58. Constitutional Claim
In view of this Court's finding that there is no sustainable basis for challenging the decision of the first named respondent in refusing to rectify the Register on the administrative law or *ultra vires* point, the applicant submits in the alternative that the above mentioned provisions of the Civil Registration Act, 2004 are inconsistent with the Constitution. She does so, not necessarily by reference to any specific offensive provision, but rather from the failure of the Oireachtas to make any provision whereby post-operative transgender persons are entitled to have the Register amended to reflect his or her acquired identity. Relying upon Articles 40.1, 40.3.1 and 40.3.2 of the Constitution it is asserted that this failure is inconsistent with the applicant's confirmed rights of equality, privacy, dignity, protection of the person and also her right to marry a male person. The facts which she relies upon and the submissions which she makes in this regard are, subject to one variation, virtually identical to those previously advanced and dealt with in the July, 2002 judgment. Whilst this Court at that time, both acknowledged and affirmed the applicant's right to equality, to privacy, to dignity and to freedom, it nevertheless concluded for the reasons set out, that the statutory provisions then applicable did not breach any of these rights. In addition at para. 175 of the judgment, the Court considered whether the prohibition on persons of the same biological sex from marrying each other could be said to be inconsistent with the Constitutional right to marry. For the reasons again set forth in that judgment it concluded that such a prohibition did not violate any right of the applicant in this regard. Such findings, insofar are the same are applicable to the Act of 2004, remain binding on the applicant.

59. In my view, and as previously stated, the statutory regime created under the Civil Registration Act, 2004 is in all material and substantial respects the same as that which pre-dated the Act. I cannot therefore see how this Court, even if it was free to so do, could come to any conclusion on the constitutional issue different from that as previously expressed. It seems to be that *Goodwin*, at the international level of the Convention rights, remains persuasive only. The European Convention on Human Rights Act, 2003 can have no impact, as whatever rights were created thereunder, were incorporated into our domestic law at a sub-constitutional level. Moreover, no new facts have been put in evidence and apart from a single judgment of the German Federal Constitutional Court, all the case law quoted in support of this challenge was equally quoted during the earlier proceedings. On this issue, therefore, I do not believe that subject to this sole exception, there is any justification for arriving at a conclusion different, or even partially different, from that previously arrived at.

60. In a case which is referred to as the "*Transsexual* case", (49 BVerfGE 286 (1979)) the Federal High Court of Justice was required to consider the legality of the "State's" refusal to alter the birth certificate of a male to female transsexual. The Court found in her favour and held that the failure to permit such a change amounted, to a violation of the human dignity and personality right contrary to Article 1(1) and 2(1) of the Basic Law.

61. In my view, this case can be considered as having been decided under German law which in several respects is quite different to Irish law. The right which the applicant asserted was to the "free development of the personality", it being subject only to moral law. If such a comparable right exists in Irish law, being one derived from Article 40.3.2 of the Constitution, it would not only be subject to moral factors. Rather, considerations of what would or would not constitute an "unjust attack" and "an injustice" would have to considered and dealt with. Moreover, on the factual side it should be noted that the applicant in the Transsexual case, could not bear a Christian name normally associated with the female sex. This was because in German law, civil status was based on a premise that a person's first name should reveal the sex of its bearer. That is, of course, not the situation in this jurisdiction where a person can freely bear a name normally associated with the opposite sex if he or she so wishes. Accordingly, I do not believe that this case has any direct relevance and in any event does not in my opinion carry such weight as would justify this Court in seriously reviewing the constitutional issue. Moreover, it was of course well decided prior to 2002. As a result, I do not believe that the applicant can succeed on this issue.

The European Convention claim:
62. In my view, this is by far the most substantial argument advanced on behalf of the applicant in either set to proceedings. In essence, it is alleged that if the statutory regime does not permit the amendments as sought, then this legal structure, by its failure to so allow, infringes the applicant's rights under articles 8, 12 and 14 of the Convention. If such a finding can be made then in accordance with the only relief available, (damages under section 3(2) of the Act being prayed for but not being actively sought), it is suggested that a declaration of incompatibility should be made under s. 5 of the Act of 2003.

63. Article 8 of the Convention reads:

> "8.1. Everyone has the right to respect for his private … life, …
>
> 8.2 There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic

well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

Article 12 says:

"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." and;

Article 14, which is headed 'Prohibition of Discrimination' reads:

"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."

64. Domestic law and practice:
The following is a brief summary of the prevailing domestic situation as it touches the applicant:

(1.) There is nothing in the domestic law of this country which requires compliance with any legal formalities before a person can undergo gender reassignment surgery. In fact the local Health Board defrayed the costs of Dr. Foy's surgery in July, 1992.

(2.) Equally so, there is no prohibition on a person adopting such names, either first name or surname, which he or she wishes to be known by. There are a limited number of exceptions to this, all of which are based on practice, such as where the acquired name may be subject to certain formality as in some professions. To remove any uncertainty in this regard a person may validly change her name by Deed Poll. This Dr. Foy did on the 16th November, 2003, having previously also changed her name in the UK on the 15th February of that year. Any new name(s) is or are valid for identification purposes with the result that for many years Dr. Foy has been described as 'female' bearing her chosen name of Lydia Annice in documents such as her passport, driving licence, car registration records, medical card, medical card records and tax and social security documents. On the Electoral Roll she is entered in her acquired sex and name. However, whether legally entitled to or not, there are occasions, although few and infrequent, in which she is still asked for her birth certificate. Since 2002, I have been informed by her counsel that this has happened six times. In addition there remains some uncertainty as to how she would be treated if she had to endure a prison sentence or how insurance companies would react to a claim, given that where relevant, her cover is based on being female. The position with regard to social security and pension is not clear cut. Whilst the evidence on these issues is somewhat loose, and whilst undoubtedly the applicant has been facilitated greatly by administrative decisions to live, be seen as and act like a female, nevertheless I am satisfied that they are still a limited number of occasions on which she has been asked to produce her birth certificate. This causes her distress and embarrassment and in the process she suffers a loss of dignity and privacy.

(3.) There are no civil status certificates or equivalent identity documents required for the general population of this country. When identification is required a passport or driving licence is almost always an acceptable form of identity.

(4.) Marriage in this jurisdiction as understood by the Constitution, by statute and by case law, refers to the union of a biological man with a biological woman. Re-echoing *Hyde v. Hyde* [1866] L.R. 1 P&D 130, Costello J. in *B. v. R.* [1996] 3 I.R. 549 defined marriage (at p. 554) as "… the voluntary and permanent union of one man and one woman to the exclusion of all others for life." As a result of the 15th amendment of the Constitution Act 1995, and the Family Law (Divorce) Act, 1996, the 'permanency' aspect of marriage no longer applies. In *T.F. v. Ireland* [1995] 1 I.R. 321 at 373 the Supreme Court approved the following definition of marriage, as given by the Court in *Murray v. Ireland* [1985] I.R. 532 at pp. 535-536:-

> "…the Constitution makes clear that the concept and nature of marriage, which it enshrines, are derived from the Christian notion of a partnership based on an irrevocable personal consent, given by both spouses which establish a unique and very special lifelong relationship."

(5.) In this jurisdiction (following *Corbett v. Corbett* (1970) 2 W.L.R. 1306) it is crucial for legal purposes that the parties to an intending marriage should be of the opposite biological sex. Unless so, they cannot now marry under s. 2(2)(e) of the Civil Registration Act, 2004.

(6.) As can be seen from an earlier part of this judgment, the system of birth registration, which pre-dated the 2004 Act, was largely governed by the Acts of 1863 and 1880 and the Regulations thereunder. Whilst there was some later amending legislation this did not change the integrity of the system. The current system in existence stems from the 2004 Act. The particulars of a birth which must be registered under either regime, includes the "sex" of the child and the christian name of the newborn. For the former purpose biological indications, if compatable, are used. The fact that later in a person's life, his or her psychological sex may be at variance with his or her biologoical sex, is not a ground for altering this entry or for issuing a corrective birth certificate.

(7.) Under s. 8 of the Act of 1880, a child's Christian name could be amended and under s. 27 of that Act, errors of fact or substance could also be corrected. The comparable provision to s. 8, is now s. 25 of the Act of 2004, with s. 27 being replaced by ss. 63 and 64 of the same Act. In practice, and certainly for the purposes of this case, there is no material difference between the pre and post 2004 regime, with regard to what matters might constitute errors for the purposes of rectification by the Registrar.

(8.) The purpose of the birth register is to record certain required particulars of all persons who are born in the State. The particulars are relative to the fact and event of birth and apart from permitted corrections, the entry is never thereafter altered or adjusted. It is therefore a snapshot of events occurring on a particular day. It is a record of historical fact. It is not intended to and does not record any other major event in a person's existence or even in death. In particular it is not intended to be a document of current identity although in practice this has not always been the case.

65. Case Law from the European Court of Human Rights:
The first transsexual case ever to came before the European Court of Human Rights was *Van Oosterwijck v. Belgium* (1979), 3 E.H.R.R. 581. That case involved a challenge to Belgium legislation, which prohibited the making of any change in one's birth certificate and which failed to provide any alternative means of changing a person's status. This case started a gradual process of transgender persons applying to the European Court of Human Rights for relief under articles 8, 12 and 14 of the Convention. In almost all such cases, the applicants sought a new or amended birth certificate showing his or her acquired sex and change of name and also asserted a right to marry a person of his or her biological sex. Save for one exception in 1992, *B. v. France* (1992) 16 E.H.R.R. 1, the Court in Strasbourg never held in favour of such an applicant until the *Goodwin* case. One notable feature however, of virtually every judgment was the Court's constant reiteration of the State's obligation to keep the difficulties of transsexuals under review, and by reference to the growing number of dissenting judgments, it became ever so clear that the defence of the 'margin of appreciation' was being steadily eroded. Still, the *Goodwin* decision came as a surprise to many, not only because the majority supported the applicant but in particular, because the judgment of the Court was in fact unanimous. That was decided over five years ago as was the first set of proceedings involving Dr. Foy in this jurisdiction.

66. In view of that judgment and in light of the Act of 2003, the applicant's entire argument under this heading of complaint must be reassessed. Such a review best takes place by first looking at the case law up to *Goodwin* and thereafter to the present day.

67. Up to Goodwin:
In many of the judgments which follow, there are several references to cases before the court where the relevant domestic law was that of England and Wales. Insofar as articles 8 and 12 are concerned, it can be taken that the then system of registration and the power of correction under UK law, were in substance the same as those which exist in this country. In addition biological indicators were used to determine "sex", both for the purposes of entries in the birth register as well as for marriage. As a result, such judgments of the court involving English law, are most pertinent to the State's obligations under the Convention.

68. *Rees v. United Kingdom* (1987) 9 E.H.R.R. 56

Mr. Rees, who was born in 1942 with the biological features of a female, underwent surgery in 1974 to reflect as much as possible his desire to live as a man. Being subject to the law of the UK relating to the registration of births and marriages, he alleged a violation of articles 8 and 12 of the Convention. In particular he complained that his birth certificate, which described him as 'female', constituted an 'irrefutable description' of his sex and also revealed, quite evidently, the discrepancy between his legal sex and his apparent sex. This caused him great embarrassment and humiliation.

69. In its judgment the court held:

> (a) That although the essential object of article 8 is to protect the individual against arbitrary interference by public authorities, there may also be positive obligations inherent in an effective respect for private life, albeit subject to a State's margin of appreciation. (para. 35)
>
> (b) The mere refusal to alter an original entry or to issue a new birth certificate in corrected terms, cannot be regarded as such an interference. (para. 35)
>
> (c) The 'notion' of respect, particularly with regard to positive obligations is not clear cut, and having regard to the diversity of practices throughout the Contracting States, the 'notions' requirements will vary from case to case. (para. 37)
>
> (d) This diversity of practice is evidenced by the fact that, via legal, judicial and/or administrative practices, many States have a system whereby transsexuals can align their personal status with their acquired status. However the conditions under which this can be done are also quite variable. As a result there is little common ground in this area and so the 'margin of appreciation' is wide; and finally; (para. 37)
>
> (e) In deciding whether or not a positive obligation exists, regard must be had to the fair balance which must be struck between the general interest of the community and the interest of the individual. (para. 37)

70. The court then, by reference to the domestic structure in the UK, outlined what steps a transsexual could take to more fully integrate into his or her chosen sex. As against that, the UK had no system of civil status certificates or its equivalent. Therefore birth certificates were sometimes relied upon to prove identity. Where so required a copy of, or an extract from, the entry was the only way to produce an authenticated birth certificate. Immediately, the inconsistency between person and certificate would become apparent. Moreover the law of the UK did not recognise Mr. Rees as a man for all purposes; for example he was regarded as a female for marriage and pension purposes.

71. In rejecting a violation of article 8 the court did not think that it was justified in asking the UK to adopt a system of registration, which in principle would be the equivalent of a new system recording civil status. It felt that the authorities had endeavoured to meet the needs of the applicant in a reasonable way and that whilst further incidental adjustments were required, an alteration to the very basis of the system itself was not necessary.

72. In reaching this conclusion however, the court reminded the United Kingdom that it remained conscious of the seriousness of the problems afflicting transsexuals, and as the Convention was a living document, to be interpreted and applied in light of current circumstance, it highlighted for the Government the need to keep appropriate measures under review.

73. On the alleged violation of article 12, the court held that the right to marry as given in that article reflected the traditional view of marriage, that is between persons of the opposite biological sex (at para. 49). There was therefore no violation of article 12.

74. The court so held against the applicant on both claims. It decided by a majority of 12 to 3, that there was no violation of article 8 and held unanimously that there was no violation of article 12.

75. Cossey v. United Kingdom (1991) 13 E.H.R.R. 622
Four years later this issue was revisited in *Cossey*, where the applicant, who was a male to female post operative transsexual wished to marry an Italian man but on enquiry was told that such a marriage would be void. She then unsuccessfully applied for a birth certificate to show her sex as female. In her complaint she alleged a violation of Articles 8 and 12 in that the law of the United

Kingdom would not permit a marriage between a male to female transsexual and a male person. As it happened she did not marry the Italian in question, but subsequently "purported" to marry a Mr. "X" in 1989. That marriage, which was short lived, was later pronounced void as the parties were not male and female.

76. The European Court of Human Rights picked up on Rees and followed that judgment, as the facts of both cases could not be materially distinguished. As a result it again repeated much of what is quoted at para. 69 above. In addition however, it said that even if an amended certificate could be obtained, that in itself could not achieve what the applicant desired. This is because any notation to the birth register could only be prospective and therefore could not mean that she had acquired all of the bodily characteristics of the other sex. Moreover, without a fundamental modification of the entire system, any change or annotation could not be kept secret from third parties and accordingly the present system could not be an effective safeguard for the integrity of her private life. To achieve that, a totally new model would be required and the imposition of such a requirement on the respondent State, could not at that point in time, be justified.

77. Whilst the court noted some developments since Rees, these were not such as to reveal any real common ground on the issue between Contracting States. A considerable diversity of practice still existed. In such circumstances a departure from its decision in *Rees* would not be justified.

78. In rejecting her claim under article 12 it pointed out that the criteria adopted in the UK, on right to marry, was in conformity with article 12 itself, and accordingly it could not be said that her inability to marry stemmed from domestic law. By a majority of 10 to 8, the court voted against the applicant on the article 8 point with the majority being 12 to 4 on the article 12 point.

79. B. v. France (1992) 16 E.H.R.R. 1
This was the only case up to *Goodwin*, where the court found an article 8 violation in the case of a male-to-female transsexual or indeed any transsexual. That judgment however can clearly be distinguished on its facts from both *Rees* and *Cossey.* Firstly, the French national system was quite different to that pertaining in the UK; for example a court had power to bring about an annotation in a person's birth certificate, which would bring that document up to date and thus reflect a person's current position. Secondly, the applicant was not by law allowed to change her forename. Thirdly, she experienced great difficulties on a daily basis by reason of her sex being stated on official documents. So whilst it was the first successful case dealing with a transsexual, it nevertheless failed to have the widespread or general application as many first thought.

80. Sheffield and Horsham v. United Kingdom (1999) 27 E.H.R.R. 163
Twelve years after *Rees*, another such case came before the Court. In that case, Ms. Sheffield successfully underwent gender reassignment surgery in the late 1980s and thereafter lived as a female with a Christian name of Kristina. Prior to this surgery she was married and had fathered a daughter. The marriage was dissolved. In her application she made the following complaint:

> (1) That as a pre-condition to surgery she was required to obtain a divorce. This led to her former spouse getting court approval to deny her all access to her daughter whom she had not seen for twelve years.
>
> (2) Although she had a passport and driving licence in her acquired name, various documents, such as police and social security records, continued to detail her former identity. In addition she may encounter difficulties when applying for a visa to the US.
>
> (3) In 1992 she attended court to stand surety, only to discover that she had to disclose her pervious name. This experience dissuaded her from acting as an alibi witness in a later case, and finally;
>
> (4) She experienced difficulty when applying under the Data Protection Act, 1984 and when insuring her car as a female.

81. Ms. Horsham, who held both British and Dutch citizenship, had been living in Holland since 1974. She wished to return to the United Kingdom and had sought an appropriate amendment to her original birth certificate, as well as indicating a desire to marry her male partner. As neither were available to her under UK law, she claimed that she was being forced to live in exile as a result.

82. The issues before the court centred on whether or not the UK had failed to comply with its positive obligations under article 8 of the Convention; this to ensure respect for the private lives of the applicants. No argument was based on para. 2 of article 8.

Relying heavily on the judgments in *Rees* and *Cossey*, the court held, that contrary to the applicants submissions and notwithstanding the research of Professor Gooren, there had been no significant developments in the area of medical science in the previous ten years, which would justify a departure from their previous decisions. In particular the refusal of the United Kingdom to accept brain sex as a critical determinant of gender could not be criticised as unreasonable. (at para. 56)

The court then reviewed the legal developments which had occurred since 1990 and noted that transsexuals raised complex scientific, legal, moral and social issues in respect of which there was no generally shared approach amongst the Contracting States (at para. 58). Moreover, the detriment suffered by the applicants as a result of the State's failure to offer recognition was not such as to override the respondent's margin of appreciation. Therefore there was no breach of article 8.

When dealing with the article 12 claim, the court adhered to its original view as to the scope of that article and pointed out that limitations, in respect of the right to marry, could be introduced under domestic law. These would be valid subject only to the requirement that any such restriction could not impair the very essence of the right itself.

The court therefore also rejected the complaints under that article.

83. What was significant in both of these cases was the growing number of judges who gave dissenting opinions. The margin of appreciation was being rapidly exhausted. Whilst it is not necessary to discuss such opinions here, it is however interesting to note that on the article 8 ground, the votes were 11 in favour to 9 against and on the article 12 claim, it was 18 to 2.

84. This last mentioned case was the most recent one available at the time of the July, 2002 judgment from this Court. Quite unknown to the parties at that time, the European Court on Human Rights was about to deliver a landmark judgment, again in this area, later that month. The decision in *Goodwin*, changed dramatically and irreversibly, the position of transsexuals under the Convention. The applicant in this case relies very heavily on this judgment together with the European Convention on Human Rights Act, 2003, as being the justification for a positive finding on the Convention issue.

85. Goodwin v. United Kingdom (2002) 35 E.H.R.R. 447

The applicant was a post-operative male-to-female transsexual who prior to surgery was married to a woman with whom she fathered four children. That marriage ended in divorce but Ms. Goodwin continued to have "the love and support of her children".

The factual complaints grounding her application, related to sexual harassment at work, to the ability of a new employer to trace her original identity through the Department of Social Security, to the refusal of that Department to grant her a pension at aged sixty like all other biological females, and to the fact that whilst it was helpful to have her file marked "sensitive" nevertheless her records continued to state her sex as being male.

86. The judgment followed the usual format:

> (a) It looked at the position under domestic law and touched on topics like names, marriage and the definition of gender, birth certificates and the legal registration system, social security, employment and pensions as well as the prison rules and the crime of rape.
>
> (b) It noted that a working group on transsexual people had been established in April, 1999 and had reported one year later. At para. 5 of that report, the concerns of such persons were noted and a number of options and recommendations were made. Though presented to Parliament in July, 2000, no real implementing measures had taken place although the Government did issue a further document in January, 2002.
>
> (c) It also referred to the then recent Court of Appeal's decision in *Bellinger v. Bellinger* [2002] 2 W.L.R. 411 (C.A.) and [2003] 2 W.L.R.. 1174 (H.L.) (at para. 52) of its judgment, a decision also mentioned by this Court in its July, 2002 judgment. In that case, the Court by a majority, upheld the traditional position of applying *Corbett v. Corbett* [1970] 2 W.L.R. 1306, to the birth registration system and to marriage law. The Strasbourg Court then recited in its judgment the dismay expressed by the Court of Appeal judges, when informed that no action had been taken on foot of the report of the working group. Dame Butler Sloss, the President of the Family Law Division commented on this failure, in *Bellinger*, at para. 96 (p. 434), [The Court of Appeal Judgment] by stating:
>
> "That would seem to us to be a failure to recognise the increasing concerns and changing attitudes across Western Europe which have been set out so clearly and strongly in judgments of Members of the European Court at Strasbourg, and which in our view need to be addressed by the UK…."

The Court seemed impressed by the dissenting opinion of Lord Justice Thorpe in the *Bellinger* case.

> (d) "Liberty" (The National Council for Civil Liberties in the U.K.) was permitted to intervene before the European Court and in its submission, recorded that over the previous ten years, there had been an unmistakeable trend across Member States of the Council of Europe towards the granting of full legal recognition to gender reassigned people (at para. 55 of the judgment). This organisation had information on thirty seven Member States and only four (including the UK and Ireland) did not permit any change of any type to a person birth certificate. In Member States where gender reassignment surgery was legal and publicly funded, only Ireland and the UK maintained this position.

87. At paras. 74 to 75 of the judgment the court said:-

> "However, [when referring to its previous case law] since the Convention is first and foremost a system for the protection of human rights, the Court must have regard to the changing conditions within the respondent State and within Contracting States generally and respond, for example, to any evolving convergence as to the standards to be achieved… It is of crucial importance that the Convention is interpreted and applied in the manner which renders its rights practical and effective, not theoretical and illusory. A failure by the Court to maintain a dynamic and evolutive approach would indeed risk rendering it a bar to reform or improvement… In the present context the Court has, on several occasion since 1986, signalled its consciousness of the serious problems facing transsexuals and stressed the importance of keeping the need for appropriate legal measures in the area under review…The Court proposes therefore to look at the situation… "in the light of present day conditions…".

88. The court noted (at para. 87) that exceptions had already been made to the historical sanctity of the birth certificate and cited as two examples; legitimisation and adoption. It asked why transsexuals could not be added to the list and felt that such a move would not pose a threat to the overall integrity of the system.. It was not satisfied that complications in the area of family and succession law, criminal justice, employment, social security and insurance, etc., were such as to create a real and definite prejudice if changes had to be made to that system. In achieving a fair balance between the interests of society as a whole and that of the individual, the Court cautioned that one should not underestimate the need to respect a person's human dignity and personal autonomy. (At para. 90)

89. It concluded, on the article 8 issue (at para. 93) by saying:-

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

90. Dealing with the right to marry, the Court pointed out that the second aspect of article 12, namely the right to beget a family, was not conditional on the first aspect, namely the right to marry (at para. 99). Although restrictions can be applied to the exercise of this right under national laws, such restrictions cannot impair the very essence of the right itself. The question therefore was whether the allocation of sex at birth, determined by congruent biological factors, was a limitation which impaired the very core of that right. Having reviewed the counter arguments, the Court refused to permit the margin of appreciation to create an effective bar on the exercise of the right to marry. It could therefore find no justification for barring transsexuals from enjoying "the right to marry under any circumstances". (See para. 103 of the judgment). As a result by unanimous vote the Court found a violation of article 12 as well as a violation of article 8.

91. There is one further judgment from the Strasbourg Court which I should refer to and that is the case of *Grant v. United Kingdom* (APPL:No. 32570/03, judgment of 23rd May, 2006). That case raised the question as to what age a male-to-female transsexual should be entitled to a pension under U.K. law. The European Court, in following *Goodwin*, had no difficulty in concluding that the

applicant would have to be treated like all other biological females in this regard. The age, therefore, was that which applied to all females, namely 60. Accordingly, the relevant provisions of domestic law breached article 8 of the Convention. (See also para. 32 *supra* where *Grant* has already been discussed).

92. As part of the very extensive submissions made, counsel on behalf of Dr. Foy referred this Court to many authorities from a variety of other courts and jurisdictions. These included decisions from Switzerland, Germany, Italy, New Zealand, South Africa and many States of the United States of America. In my view, as interesting as these decisions might be, they do not bring any additional value to the issues presently under discussion. They are however, three cases worthy of being referenced, the first of which is a decision from the Family Court of Australia entitled *Attorney General for the Commonwealth v. "Kevin and Jennifer"* [2003] 172 F.L.R. 300. For present purposes it is sufficient to say that in upholding the trial judge, the appeal court having extensively reviewed *jurisprudence* from other jurisdictions, including that established by the European Court of Human Rights, concluded, that for the purposes of marriage the decision in *Corbertt v. Corbertt* no longer represented Australian law. The second and third cases, which I should mention, are decisions from the European Court of Justice, dealing respectively with Council Directive 75/117/EEC of the 10th February, 1975 on the approximation of the laws of Member States relating to the application of the principle of equal pay for men and women (the Equal Pay Directive) and Council Directive 79/7/EEC of the 19th December, 1978 on the progressive implementation of the principle of equal treatment for men and women on matters of social security (the Social Security - Equal Treatment Directive). In *K.B. v. National Health Service Pensions Agency and Another*, [2004] E.C.R. I-541, the court held that the domestic legislative provisions at issue, which in breach of the Convention on Human Rights prevented a couple, such as K.B. (a woman) and her partner (a female-to-male transsexual) from marrying each other, a pre-condition to obtaining a benefit from the pay of the other (a pension), must be regarded as incompatible with Article 141 of the E.C. Treaty dealing with equal pay (at para. 34). In the process the E.C.J. expressly referred, with approval, to the decision in *Goodwin* (see paras. 33 and 35 of its judgment). In *Richards v. The Secretary of State for Work and Pensions* [2006] E.C.R. 1 - 3585, the court relied on article 4(1) of the relevant Directive, in condemning legislation which denied a person, (who in accordance with the conditions laid down by national law had undergone male to female gender reassignment), an entitlement to a retirement pension unless she had reached the age of 65; when in fact she would have been entitled to such a pension at age 60 had she been held to be a woman as a matter of national law.

In essence, therefore, those cases form part of an expanding base of broad judicial opinion supporting the fundamental claims of transsexual persons.

93. In light of the *Goodwin* decision and in view of the other cases above mentioned what is the current position in Irish law on this Convention issue? It will be recalled that as and from the 31st December, 2003, the rights contained in the Convention became part of Irish law. It is a misleading metaphor to say that the Convention was incorporated into domestic law. It was not. The rights contained in the Convention are now part of Irish law. They are so by reason of the Act of 2003. That is their source. Not the Convention. So it is only correct to say, as understood in this way, that the Convention forms part of our law.

The method employed by the Oireachtas was the interpretive method. Section 2 of the 2003 Act, compels this Court to interpret and apply any and every statutory provision and rule of law, insofar as is possible (see paras. 34 and 55 to 57 inclusive) in a manner compatible with Ireland's obligation under the Human Rights Convention. Obviously such obligations include those contained in articles 8 and 12 thereof.

94. In the case of article 8, this State as we have above seen, (see para. 69) may also have a positive obligation to ensure that there exists a means or method by which the right thereby conferred, that is to respect a person's private life, is effective and meaningful. In the instant case that raises two questions. Does Dr. Foy's desire to have her acquired gender legally recognised constitute a right under article 8? And if so, has the State provided an effective means to uphold that right?

95. If this Court should in principle be prepared to follow *Goodwin*, then unless distinguishable from the instant case, the answer to the first question must be in the affirmative. The applicant would therefore have such a right. In this regard the respondent State makes a number of submissions all designed for the purposes of persuading this Court to differentiate the *Foy* case from the *Goodwin* decision. These submissions pointed out that the European Court had not dealt with the necessity to balance rights between a transsexual and his children, and as in the instant case, his wife to whom the applicant remains validly married. It is said that this country's 'margin of appreciation' continues to apply, particularly in Ireland, where there are Constitutional rights underpinning the institution of marriage. It is also pointed out that *Christine Goodwin's* exposure to offensive situations was far greater than that which Dr. Foy ever had to confront. In such circumstances the decision in *Goodwin* should be confined to the individual facts of that case.

96. With respect to these submissions I cannot see how individually or collectively it can be said that these constitute such distinguishing features as would either justify or compel this Court to leave *Goodwin* aside and preserve the previous status quo. In the first instance, the legal regime in the United Kingdom at the relevant time was virtually identical, under all major headings, to that which still pertains in this jurisdiction. Secondly, the same observations can be made with regard to the ameliorating measures which are available through practice, and administrative and executive decisions. Thirdly, whilst it is true to say that no major debate took place within the Court on the necessity to accommodate conflicting rights, nevertheless it is not correct to suggest that the Court ignored the position of affected third parties. At para. 91 of its judgment in Goodwin, it expressly referred to these difficulties, (access to records, family law, affiliation, inheritance, criminal justice, employment, social security and insurance) but nonetheless was quite convinced that these problems were "far from insuperable". Accordingly it did give consideration to the "fair balancing aspect" of article 8. As the domestic framework which afflicted *Christine Goodwin* was so strikingly similar to the framework which impacts upon *Dr. Foy*, it can be taken that the decision of the court in *Goodwin* is highly influential in the Irish context. Consequently in my view that decision, subject to the margin of appreciation doctrine now reflects the current legal position in this jurisdiction.

97. On the margin of appreciation, it is of considerable interest to note what the response of the United Kingdom Government was to the court's decision in *Goodwin*. It will be recalled (see para. 86 above) that in July, 2000, the Government presented to Parliament the report of a working group established in April, 1999 to examine the difficulties facing transsexuals. Apart from presenting a further document to Parliament in January, 2002, the Government of the United Kingdom had taken no further steps with regard to transsexuals prior to July of that year.

98. In direct response to *Goodwin*, the Parliamentary Secretary to the Lord Chancellor's Department announced on 23rd July, 2002, the reconvening of the working group and enlarged its terms of reference. In particular, it was asked as a matter of urgency to consider the implications of *Goodwin and I.* On the legislative front, Parliament passed the Gender Recognition Act, 2004 which could only be seen as a significant piece of social reform. Under the provisions of that Act, and subject to specified safeguards, a transsexual person could obtain a gender recognition certificate which thereafter constituted legal proof of that person's acquired gender or sex. If successful in obtaining such a certificate, consequential provisions then offer one type of solution to the birth certificate issue as well as establishing a method by which any competing rights of the person's children, or ex-spouse, could be dealt with. In addition, there were several other provisions which dealt with a variety of other matters which were of concern to

transsexuals. Accordingly, within two years of the *Goodwin* decision, the United Kingdom Government had responded by establishing a working scheme, underpinned by legislation, to resolve matters of concern not only to transsexuals but also to all those who might be directly affected by that person's change of gender.

99. On the judicial front, the House of Lords delivered its judgment on the appeal in *Bellinger v. Bellinger* on 10th April, 2003 [2003] 2 W.L.R. 1174. The House, in reversing the Court of Appeal, and in giving practical effect to the decision in Goodwin, held that the provisions of s. 11(c) of the Matrimonial Causes Act, 1973, which made no provision for the recognition of gender reassignment in case of marriage, were incompatible with articles 8 and 12 of the Convention. Rather than issuing a declaration that the marriage between Mr. and Mrs. Bellinger was valid, the House, in deference to the significance of the decision, issued a declaration, under s. 4 of the Human Rights Act, 1998, that the relevant provisions of the Act of 1973 were incompatible with articles 8 and 12 of the Convention. Accordingly, there was virtually an immediate response, both judicially and legislatively, in the United Kingdom to the European Court of Human Rights' decision in *Goodwin.*

100. The position in this jurisdiction is strikingly different from that which I have outlined above. Indeed it could be legitimately argued that Ireland's right to stand on the margin of appreciation, is as of today, significantly more tenuous than the position of the United Kingdom was at the time of the *Goodwin* decision. This State, which is personally charged with the responsibility of appropriately responding to *Goodwin*, has failed or declined to produce evidence of any movement, even at an initiating, debating or investigative level, on the plight of transsexual persons in this country. Given the silence of the Government on this issue, an issue which it must have known would be legally critical on the Convention point, one can only conclude that it has taken no steps of any significance to redress the undoubted difficulties which continue to exist. Noting the absence of any express provision in the Civil Registration Act, 2004, a legislative vehicle most suitable for this purpose, it must be seriously questioned whether the State has deliberately refrained from adopting any remedial measures to address the ongoing problems. In this regard, Ireland as of now is very much isolated within the Member States of the Council of Europe. This is clearly demonstrated by the investigation conducted by Liberty (see para. 86) which only covered the situation as it was more than five years ago. Ireland, as of now, must be even further disconnected from mainstream thinking.

101. In addition, this Court in the final para. of its 2002 judgment, gently and firmly but also as a matter of urgency reminded the State of the ever growing seriousness of this situation. At para. 177 of the judgment I said that those proceedings:

> "…involve complex social, ethical, medical and legal issues. In my respectful view, such inter related and inter dependent matters are best dealt with the legislative. The Oireachtas, as a forum, could fully debate what changes, if any, are required and then, if necessary, the scope and scale of such changes. All those who might be impacted by any such change could have their interests fully considered and reputably debated. Accordingly could I adopt what has been repeatedly said by the European Court of Human Rights and urge the appropriate authorities to urgently review this matter".

102. As I have said there is nothing in the evidence to indicate any activity on the part of the Government or the Oireachtas in this area. Of course it is the matter for both bodies as to what approach, if any, they should take by way of response to *Goodwin* and *Foy*. However, there is an independent obligation on a court, when an issue is raised upon which it is obliged to adjudicate, to reach its decision in a manner which reflects the law, and to do so if possible, by providing a resolution to the complaints litigated by the parties. Accordingly, it is very difficult to see how this Court, even still allowing for some 'margin of appreciation' in this sensitive and difficult area, could now exercise further restraint, grant even more indulgence, and afford yet even more tolerance to this State, some five years after both the decision in *Goodwin* and the July, 2002 judgment. In fact in my humble opinion this Court cannot, with any degree of integrity, so do. Consequently I must conclude that by reason of the absence of any provision which would enable the acquired identity of Dr. Foy to be legally recognised in this jurisdiction, the respondent State is in breach of its positive obligations under article 8 of the Convention. Its margin of appreciation has been thoroughly exhausted save as regards the appropriate means of achieving recognition of the applicant's article 8 rights.

103. The second major aspect of the Convention argument is an alleged violation of article 12 of the Convention. That article provides:

> "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".

The grounds of this challenge are self evident, in that under the domestic law, a marriage will only be recognised if the celebrating parties are a biological man and biological woman (see para 64 above). Unless therefore, Dr. Foy is recognised as a "woman" she does not have the right to marry within this jurisdiction. That being the accepted law she claims that this constitutes a violation of her article 12 rights.

104. There is no doubt but that the provisions of article 12 can be regulated by "national laws". One such law in this jurisdiction, the legality of which is beyond challenge, is that a person cannot marry whilst validly married to another person. Dr. Foy is in this position. Her marriage to Ann Foy remains valid and subsisting as the divorce proceedings have not yet been determined. Accordingly on that ground she is not free to marry. There is therefore in existence a legal impediment to her remarriage which is unrelated to her complaints regarding gender identity. That being the situation she is strictly speaking not in a position to assert a breach of article 12. Given the significant consequences of making a finding under article 12, and potentially of issuing a s. 5 declaration in respect thereof, I do not propose to do either, for the reasons above given. However, lest the State be in any doubt, I would have found the article 12 rationale in Goodwin equally compelling if I had been free to consider the applicant's complaints under that article. It seems to me that notwithstanding Articles 41 and 42 of the Constitution, if this Court is correct in following the decision of Goodwin under article 8, it is almost axiomatic that the reasoning of the European Court of Human Rights under article 12 should also apply. Indeed, many people would forcibly argue that the use of gender rather than sex, in the marriage (or remarriage) of a post-operative transsexual is far more compelling than that which exists relative to the article 8 argument. Whether or not that is so, must, however, remain for another day.

In conclusion, in view of Dr. Foy's current marital status, I do not propose to make any finding on the article 12 complaint.

105. As the principal arguments advanced on behalf of the applicant relate to both articles 8 and 12 of the Convention, it is my opinion that no separate issue arises under article 14 thereof.

Declaration of Incompatibility

106. Section 5 of the European Convention on Human rights Act, 2003 is a section which confers jurisdiction on both the High Court and the Supreme Court to issue, in certain circumstances, what is termed a declaration of incompatibility. Insofar as relevant, the

provisions of that section read as follows:

> "5-(1) In any proceedings, the High Court, or the Supreme Court when exercising its appellate jurisdiction, may, having regard to the provisions of *section* 2, on application to it in that behalf by a party, or of its own motion, and where no other legal remedy is adequate and available, make a declaration (referred to in this Act as 'a declaration of incompatibility') that a statutory provision or rule of law is incompatible with the State's obligations under the Convention provisions.
>
> (2) A declaration of incompatibility –
>
> (a) shall not affect the validity, continuing operation or enforcement of the statutory provision or rule of law in respect of which it is made, and
>
> (b) shall not prevent the party to the proceedings concerned from making submissions or representations in relation to matters to which the declaration relates in any proceedings before the European Court of Human Rights.
>
> (3) The Taoiseach shall cause a copy of any order containing a declaration of incompatibility to be laid before each House of the Oireachtas within the next 21 days on which that House has sat after the making of the order.
>
> (4) … …
>
> (5) … …"

The phrase "rule of law" is described in s. 1 as including "common law".

107. During the course of the case it was submitted on behalf of the State that no findings should be made in respect of articles 8 or 12 of the convention and no declaration of incompatibility should issue under s. 5 of the 2003 Act. The reasons relied upon, *inter alia*, were that the applicant could not identify any particular provision(s) which prohibited the exercise of these rights. In other words since the applicant's case was firmly based on the State's failure to enact appropriate legislation, rather than in condemning an existing piece of legislation, she could not successfully seek these said remedies. With regard to the "findings" argument, first principles inform me that this cannot be correct; for if it was, it would mean that the Government, purely by inactivity, could circumvent virtually at will, any and all Convention rights, and for that matter constitutional rights. The State, therefore in such circumstances, would be far better off legally by adopting a policy of total denial or inactivity rather than one of endeavour, even if inadequate to meet its obligations. Again in such circumstances the powers of the constitutional courts of this jurisdiction, which are the ultimate custodians of constitutional, convention, legal and other rights, would be rendered sterile and reduced to futility. That cannot be correct and I entirely reject such a proposition.

108. In my view the failure by the State, through the absence of having any measures to honour the convention rights of its citizens, is every bit as much a breach of its responsibility as if it had enacted a piece of prohibited legislation. On a daily basis the High Court sees constitutional actions being successfully taken by reason of the State's failure to have in place for example, proper educational facilitates for its minors. Moreover in many of the cases dealt with by the European Court of Human Rights, and which are referred to above, that court has considered (and found) violations of articles 8 and 12 expressly on the grounds of the respondent's State's failure to have in place a system of law affording to a transsexual person proper respect for his or her Convention rights. I therefore do not believe that this submission is well founded.

109. This particular submission may perhaps have more relevance to the s. 5 argument which speaks of a "statutory provision or rule of law". In response, the applicant has suggested that if her preferred interpretation of ss. 25, 63 and 64 of the Civil Registration Act, 2004 is not accepted, then these provisions constitute a bar to the effective recognition of her article 8 (and 12) rights in this jurisdiction. She points out that as these provisions are the only substantive ones dealing with the power to correct or vary the original entry in her birth certificate, then the same are rationally connected with the subject matter of this submission. In that way it can be said that these statutory provisions have been affirmatively identified as constituting a barrier to full recognition of her acquired name and sex. In my view she is correct in this regard. These provisions permit some corrections and do not permit others. The applicant's complaints fall within the latter. These are therefore an obstacle to the legal recognition of her article 8 rights.

This argument does not even arise with regard to her article 12 rights as there undoubtedly exists a rule of law prohibiting her, even if she was otherwise free to do so, from marrying a biological male.

Consequently in my view the applicant comes within s. 5 of the Act of 2003.

110. In further opposing the grant of a declaration of incompatibility under s. 5 of the 2003 Act, the State submits that given the provisions of s. 5(2) thereof, the same would be of no value to the applicant and therefore should not issue. In my view this submission is not well founded. Whilst it is correct to say that a declaration of incompatibility does not affect the validity, continuing operation or enforcement of the existing law, nevertheless it does have consequences and may be of value to an applicant. In the first instance the Taoiseach is obliged to lay a copy of an order, containing such a declaration, before each House of the Oireachtas within the next twenty one days on which that House sits. Secondly, as such a declaration can only issue from a constitutional court, such a court can have a reasonable expectation that the other branches of government (Article 6 of the Constitution) would not ignore the importance or significance of the making of such a declaration. Thirdly, a party in whose favour such a declaration is made, can apply to the Government through the Attorney General for an "*ex gratia*" payment under ss. 4 of s. 5 of the Act. And finally, the granting of such a declaration may have implications for the courts discretion with regard to the costs of proceedings.

Finally, it is noteworthy to record that the State has never made the case that the system of registration would collapse in the event of affording protection to transsexuals.

I am therefore firmly of the view that where otherwise justified, this Court should in the appropriate circumstances issue such a declaration.

111. In s. 5(1) of the 2003 Act, it is stated that the court may "…where no other legal remedy is adequate and available…" issue such a declaration. A problem arose in *Carmody v. Minister for Justice, Equality and Law Reform, Ireland and the Attorney General* [2005] 2 I.L.R.M. 1, as to which of two remedies, one seeking a declaration of unconstitutionality and the other seeking a declaration of

incompatibility, should be dealt with first. No such difficulties arise in the present case given the findings of this court on the Constitutional issues which are outlined in both the July, 2002 judgment and in an earlier part of this judgment. Consequently I would prefer not to express any view on the correct meaning of s. 5(1) of the 2003 Act, insofar as it touches upon this issue.

112. In considering the making of such a declaration could I revert back for a moment to the uncertainty of Dr. Foy's precise claim which I have previously mentioned (para. 10 *supra*). This, as one may recall, results from the conflicting position as outlined in the pleadings, (at least in part), and the attempted clarification by Mr. Farrell through his letter dated 23rd of April, 2007. This uncertainty has continued throughout the case and has never, as such, been clarified. It remains unclear therefore whether Dr. Foy in essence is seeking to have the original entry in the birth register deleted and in its place to have inserted her acquired sex and name with the same being effective from June 1947; or whether she is satisfied to obtain a new birth certificate, operative from some later date, containing these entries.

113. It seems to me that the proper interpretation of the letter written by Mr. Farrell, is that it is no longer part of Dr. Foy's case that the original entry in 1947 should be obliterated, and that following a de novo correction, a new birth certificate as and from that date should issue showing her as a female with the name of Lydia Annice. In my view what the applicant is now seeking is the issue of a new or amended birth certificate to take effect from the date of her gender reassignment surgery in July, 1992. Even that, however, presents difficulties as I do not believe that such a commencement date is sustainable under the *Goodwin* decision, as by its express wording and as interpreted in the *Bellinger* decision and as confirmed by the European Court of Human Rights in the *Grant* decision, the obligations arising thereunder are perspective in character only and not otherwise. That decision therefore has no retrospective effect.

114. On the other hand even if there still remains room for doubt about the precise operative date for any such legal recognition, it seems to me, that from the view point of this Court, it can only arise in the second set of proceedings, and most probably not earlier than 23rd December, 2005, when the first respondent rejected Dr. Foy's second application. In any event it is not necessary in my view to be any more precise than what I have been in this regard. Equally so with regard to the nature of the relief being sought. This is so because in essence the finding made by this Court is that the existing regime, by reason of its failure to respect the private life of the applicant, constitutes a breach of the State's article 8 obligations under the Convention. In one important respect however, but not otherwise, the State continues to enjoy a margin of appreciation and that is in the design of the required remedial measures to vindicate her rights. Accordingly because of this, if there should remain any uncertainty either about the relevant date or the precise relief being claimed, the same is not critical.

115. As Dr. Foy cannot obtain from this Court any relief other than a declaration of incompatibility, I propose to issue such a declaration as in my opinion the circumstances of this case entirely justify it. Moreover, I am firmly of the view that this is by far the most suitable remedy because, as I have already said, the respondent State still retains a margin of appreciation as to the most appropriate method by which the applicant's rights can be vindicated. In so doing I see no reason why the State, consistent with upholding such rights, cannot also make provision for the accrued rights of others, meaning those who have been or are affected, impacted, or touched by this decision. Whilst in particular I have in mind the position of Mrs. Foy and the two children of their marriage, there is a wider community also involved. I said very much the same in the last para. of the July, 2002 judgment. (see para. 101 *supra*). Therefore the precise model which might be used in still very much a matter for the Oireachtas and not this Court. In this context the Gender Recognition Act, 2004 was England's legislative response to the *Goodwin* decision. Of course there must be many other such responses with the choice thereof being reserved to the Oireachtas. For these reasons, therefore, it seems to me, that the intended declaration is particularly appropriate to meet the diverse circumstances of this situation.

116. Finally, could I say that in this Court's earlier judgment, a good deal was said about the condition of gender dysphoria or gender identity disorder. To fully understand the consequences for those who are driven by this need, reference should be made to that judgment. Those who suffer from this disorder have an incurable and irresistible conviction of belonging to the other sex. As a group, this condition is dealt with in many different ways. Some live in the opposite sex without any treatment, others are satisfied with hormonal treatment so as to obtain some of the characteristics of their chosen sex, whilst a small but very definite number cannot stop there. They have to undergo surgical procedures to the maximum extent available, so as to conform their bodies, as much as medical science will allow, to that of their acquired gender. This is frequently undertaken at great personal cost, but notwithstanding this, virtually all would say that such sacrifices are inescapably worth it.

117. It is of course not only those persons who suffer in such circumstances. This case demonstrates that other lives are also profoundly affected. Mrs. Foy, at a young age, has lost a husband and her children, a father. To grow through adolescence, into young adulthood and thereafter into mature persons, is a process fraught with difficulty in itself. It is therefore entirely accurate to say that the effects and consequences of these events are everlasting and irreversible. So there is therefore nothing fanciful in saying that this is a living tragedy for many people.

118. For those persons affected with this condition, and in particular those who have undergone gender reassignment surgery, there seems to be a burning desire to have their new sexual identity recognised, not only socially but also legally. This urge to have that identity fully and in all respects accepted by the law is at the core of the transsexuals plight. This explains why so many, often after painful surgical procedures, are still driven to publicly embark on a fight for legal identity which frequently is humiliating and unsuccessful. Those at the forefront of such a quest many years ago, faced a public and a legal system which was much less sympathetic and must less understanding than hopefully what it is today. Everyone as a member of society has the right to human dignity, and with individual personalities, has the right to develop his being as he sees fit; subject only to the most minimal of State interference being essential for the convergence of the common good. Together with human freedom, a person, subject to the acquired rights of others, should be free to shape his personality in the way best suited to his person and to his life.

All persons by virtue of their being are so entitled.