



Administrative Decisions Tribunal New South Wales

Medium Neutral Citation: *Norrie v Registrar of Births, Deaths and Marriages (GD)* [2011] NSWADTAP 53

Hearing Dates: 26 August 2011

Decision Date: 29/11/2011

Jurisdiction: Appeal Panel - Internal

Before: Magistrate N Hennessy, Deputy President
K Fitzgerald, Judicial Member
J Schwager, Non-Judicial Member

Decision: 1. The appellant's application for leave for the appeal to extend to the merits of the Tribunal's decision is refused.
2. The Tribunal's decision is affirmed.

Catchwords: APPEAL - appeal on question of law - meaning of "change of sex" in Births Deaths and Marriages Registration Act - whether sex can be changed from "male" to "not specified" or whether sex can only be changed from "male" to "female" or from "female" to "male"

Legislation Cited: Administrative Decisions Tribunal Act 1997
Births Deaths and Marriages Registration Act 1995
Interpretation Act 1987

Cases Cited: *Goodricke v Comcare* [2011] FCA 694
OV & OW v Members of the Board of the Wesley Mission Council [2010] NSWCA 155
Craig Williamson Pty Ltd v Barrowcliff [1915] VLR 450
Australian Gas Light Co v Valuer-General (1940) 40 SR (NSW) 126
Collector of Customs v Agfa-Gevaert Ltd (1996) 186 CLR 389
Moyna v Secretary of State for Work and Pensions [2003] 1 WLR 1929
R v Harris (1988) 17 NSWLR 159
IW v City of Perth [1997] HCA 30; (1997) 146 ALR 696
AB v State of Western Australia [2011] HCA 42
Secretary, Department of Social Security v SRA (1992) 118 ALR
R v Harris (1988) 17 NSWLR 159
In Re Kevin (Validity of Marriage of Transsexual) [2001] FamCA 1074
Re M (1924) 26 WALR 115

Texts Cited: DC Pearce & RS Geddes, *Statutory Interpretation in Australia* 6th edition

Category: Principal judgment

Parties: Norrie (Appellant)
Registrar of Births Deaths and Marriages (Respondent)

Representation: Crown Solicitors Office (Respondent)

Counsel
A Abadee (Appellant)
C Spruce (Respondent)

File Number(s): 119024

DECISION UNDER APPEAL

Before: General Division

Date of Decision: 13/05/2011

Medium Neutral Citation: [2011] NSWADT 102

Court File Number(s): 103077

REASONS FOR DECISION

Introduction

- 1 Norrie, who was born a male, underwent a surgical procedure involving the alteration of her reproductive organs. She then applied to the Registrar of Births Deaths and Marriages to register her change of sex from "male" to "not specified". The reason for that request was that Norrie does not identify as either male or female. We use the personal pronouns "she" and "her" with her permission. We also refer to her by her single preferred name, Norrie (or the appellant).
- 2 The Registrar has power to register a person's change of sex or to refuse to register the person's change of sex: *Births Deaths and Marriages Registration Act (BDMR Act)* 1995, s 32DC(1). The Registrar refused Norrie's application saying that he did not have power to register a person's change of sex to "not specified". The only two options were registering a change of sex from male to female or from female to male. Norrie applied to the Tribunal for a review of that decision: *Administrative Decisions Tribunal Act 1997 (ADT Act)*: s 55. The Tribunal affirmed the Registrar's decision: *ADT Act*, s 63. Norrie has appealed to the Appeal Panel on a question of law: *ADT Act*, 113(2)(a). We have found no error of law in the Tribunal's decision.
- 3 After this matter was heard, the High Court handed down a decision in *AB v State of Western Australia* [2011] HCA 42. That case concerned the meaning of the words "gender characteristics" in s 15(1)(b) (ii) of the *Gender Reassignment Act 2000 (WA)*. With the knowledge of the parties, we read that judgment before writing this decision. Nothing in that judgment was directly relevant to an issue in dispute in these proceedings.

Legislative scheme

- 4 The Tribunal set out the relevant provisions of the *BDMR Act* at [20] to [35]. Part 5A of the *BDMR Act*, which comprises s 32A to s 32J, is headed "Change of Sex". As the Tribunal notes, Part 5A (not including sections 32DA - 32DD) was inserted into the Act by the *Transgender (Anti-Discrimination and Other Acts Amendment) Act 1996* on 3 October 1996. The Second Reading Speech stated that the purpose of the Bill was "to provide for the legal recognition of post-operative transgender persons": Hansard, Legislative Assembly, Minister Yeadon, 1 May 1996.
- 5 The Registrar must maintain a register or registers of "registrable events": s 43(1). A registrable event includes a change of sex: s 4. The objects of the *BDMR Act* include "the recording of changes of sex": s 3(c).
- 6 Because Norrie's birth was not registered in New South Wales, she applied for her sex to be registered, rather than for an alteration to the register. Sections 32DA and s 32DB of Part 5A contain the pre-requisites for such an application. Before applying for the registration of a person's sex in the Register, the person must have undergone a "sex affirmation procedure": s 32DA(1)(c). That procedure is defined in s 32A:

"sex affirmation procedure" means a surgical procedure involving the alteration of a person's reproductive organs carried out:

- (a) for the purpose of assisting a person to be considered to be a member of the opposite sex, or
- (b) to correct or eliminate ambiguities relating to the sex of the person.

- 7 Certain documents must accompany an application to register a change of sex, namely:
 - (a) statutory declarations by 2 doctors, or by 2 medical practitioners registered under the law of another State, verifying that the person the subject of the application has undergone a sex affirmation procedure, and
 - (b) such other documents and information as may be prescribed by the regulations.

- 8 The critical provision for the purpose of these proceedings is s 32DC(1). It provides as follows:

32DC Decision to register change of sex

- (1) The Registrar is to determine an application under section 32DA by registering the person's change of sex or refusing to register the person's change of sex.

Tribunal's decision

Factual findings

- 9 The relevant findings of fact which the Tribunal made, and which were not in dispute, were as follows:
 - (1) Norrie's application for a change of sex was accompanied by the necessary supporting documentation;
 - (2) on the "Statutory Declaration to Register a Change of Sex" dated 26 November 2009, Norrie records her sex at birth as "male" and applies to register a change of sex as "Non Specific". This statutory declaration is in the form

approved by the Registrar under section 32DA of the Act;

- (3) statutory declarations sworn by Drs Kearley and Schultheiss in support of Norrie's application to register a change of sex both support the registration of a change of sex showing the sex to be "Non Specific" and declare that Norrie has undergone a sex affirmation procedure. These statutory declarations are in the form approved by the Registrar under section 32DB of the Act;
- (4) the Respondent does not dispute that the Applicant has undergone a surgical procedure and there is medical evidence before the Tribunal that establishes that the Applicant would meet the legislative requirements to register a change of sex from male to female; and
- (5) the Applicant does not identify as either male or female but as "non specific".

Identification of issue

- 10 In its broadest sense the task of the Tribunal was to determine whether the Registrar had made the "correct and preferable decision" by refusing to register Norrie's change of sex to "non-specific" or "not specified": *ADT Act*, s 63. The Tribunal identified that as the issue in [2] and went on to say that it must first consider the preliminary issue of whether the Registrar has power under s 32DC of the *BDMR Act* to register a change of sex to "non specific" or "not specified". That is, whether or not the Registrar can register a "change of sex" from male to "not specified" or whether he can only register a change from male to female or female to male

Tribunal's reasoning

- 11 The Tribunal set out the parties' submissions as to the meaning of the word "sex" in s 32DC by reference to both the ordinary meaning of the word in context and the interpretation given to that word and related words and phrases in other statutes such as the *Social Security Act 1947* (Cth) and the *Crimes Act 1900*.
- 12 At [48] to [54] the Tribunal summarised the opposing submissions on the ordinary meaning of "sex" and came to a conclusion at [54]:

48 In the absence of a statutory definition, words must be given their natural and ordinary meaning, having regard to their context and the objects and purposes of the Act. The determination of the ordinary meaning of the word "sex" is a question of fact that falls to the Tribunal to determine. In this task, the Tribunal may be assisted by reference to dictionary definitions.

49 Ms Spruce has referred me to The Oxford English Dictionary for an a historical view of various definitions of the term "sex", when used as a noun and The Macquarie English Dictionary (Revised 3rd ed), which is a dictionary of current Australian English. The Macquarie English Dictionary defines "sex" as follows:

"1, the character of being either male or female; persons of different sexes. 2. The sum of the anatomical and physiological differences with reference to which the male and female are distinguished, or the phenomena depending on these differences. 3. The instinct or attraction drawing one sex towards another, or its manifestation in life and conduct 4. Men collectively or women collectively: the fair sex 5. Colloquial sexual intercourse 6. Sexually stimulating or suggestive behaviour: there is too much sex on TV - (verb) (t) 7. To ascertain the sex of. - phrase 8. Have sex Colloquial to have sexual intercourse."

50 Ms Spruce submitted that the ordinary meaning of the word sex, used in the relevant sense, is "the character of being either male or female", as per the Macquarie Dictionary.

51 Mr Shoebridge submitted that section 32A of the Act is explicit in recognising that sex is not simply binary. 32A(b) of the Act confirms that there exist "ambiguities relating to the sex of the person". He argued that if there are ambiguities in a person's sex that are amenable to surgical intervention, then it must logically follow that a person's sex can be ambiguous.

52 He points to the various Macquarie dictionary definitions of "ambiguous" and submits that the most relevant is that of: "lacking clearness of definiteness; obscure; indistinct."

53 In other words, he argues, a person's sex may be "non-specific".

54 I agree with Mr Shoebridge's submission that the Act recognises that a person's sex can be ambiguous. However, in my view it does not necessarily follow that the Act permits the registration of a person's sex as "non-specific".

- 13 After reviewing all the submissions, the Tribunal concluded at [93] that ". . .Parliament did not intend that "sex" in Part 5A of the Act would allow a more expansive meaning than "male" or "female". Putting it another way, the Tribunal found that ". . . the Act is predicated on an assumption that all people can be classified into two distinct and plainly identifiable sexes, male and female. It does not allow a person to choose to have an unspecified sex recorded". That conclusion was said to be consistent with both the ordinary meaning of the word "sex" and with the fact that courts when interpreting various statutory provisions have regarded the sex of an individual to be a choice between two categories - male or female: *Secretary, Department of Social Security v SRA* (1992) 118 ALR 467 per Black CJ at 469-470 and Lockhart J at 481; *R v Harris* (1988) 17 NSWLR 159 per Matthews J at 194; *In Re Kevin (Validity of Marriage of Transsexual)* [2001] FamCA 1074 at [119] and [135].

Questions of law

- 14 An appeal can be made "on any question of law": *ADT Act*, s 113. That means that the subject matter of the appeal is limited to the questions of law identified by Norrie's lawyers. The Appeal Panel's role is not to re-hear and re-determine the question that was before the Tribunal. The importance of identifying the "question of law" to be resolved on appeal has been emphasised by both federal and state courts: *Goodricke v Comcare* [2011] FCA 694 at [15] - [16]; *OV & OW v Members of the Board of the Wesley Mission Council* [2010] NSWCA 155 at [19] to [22].
- 15 The questions identified in the Notice of Appeal were as follows:
- (1) Whether, for the purposes of deciding (under s 32DC) application to register a change of sex brought under s 32DA of the Births Deaths and Marriages Registration Act, the registrar is prohibited from registering the change as being from "male" to "non-specific";
 - (2) If the answer to question (sic) is "no", then for the purposes of deciding an application pursuant to s 32DC (and subject to s 32DC(2) and (3)) was the registrar obliged to register the change of sex in accordance with the description of the sex contained in the appellant's application (namely "non-specific") made pursuant to s 32DA of the Births Deaths and Marriages Registration Act?
- 16 These questions are not questions of law arising from the Tribunal's decision. Rather, they are an attempt re-state the issues that were before the Tribunal at first instance. The respondents noted, and the appellant ultimately conceded, that these questions were not the questions identified or determined by the Tribunal. The first question identified by the Tribunal was whether the Registrar has power under s 32DC of the *BDMR Act* to register a change of sex from male to "non-specific" or "not specified."
- 17 Norrie's lawyers submitted that the Tribunal should not have determined the application as involving a preliminary issue relating to the scope of the Registrar's powers in s 32DC. Instead, the Tribunal should have made findings about whether the pre-requisites in s 32DA and s 32DB had been met and, in particular, Norrie's subjective intention in undergoing a "sex affirmation procedure".
- 18 During the course of oral submissions, the appellant's lawyer re-formulated the questions of law as follows:
- (1) Did the Tribunal err by following an incorrect procedure that is, by failing to determine as a question of fact the appellant's subjective purpose in undergoing the surgical procedure defined in the Act as a "sex affirmation procedure"?
 - (2) Did the Tribunal misconstrue s 32DC when it found that the powers of the Registrar when registering a person's change of sex under that provision are limited to recording "male" or "female" in the sex field?

Subjective purpose in undergoing surgery

- 19 Norrie submitted, both at first instance and on appeal, that her circumstances come within the second limb of the definition of "sex affirmation procedure" (s 32A(b)) because she undertook the surgery to eliminate the ambiguity in relation to her sex. That ambiguity was said to be that she was born with male reproductive organs but identified as having a non-specific gender identity. She described this variously as being 'intersex' or 'androgynous'. She said that by removing her male reproductive organs, the ambiguity in relation to her sex was eliminated. According to Norrie's lawyers, the Tribunal erred by failing to find that that was her subjective purpose.
- 20 The Tribunal's failure to make a finding about Norrie's subjective intention in undergoing a sex affirmation procedure is not an error of law. The Tribunal asked itself the right question, that is, assuming the pre-requisites to exercising the power under s 32DC had been met, whether the scope of that power included registering a person's sex as "not specified". The Tribunal was determining a preliminary issue, namely the scope of the power in s 32DC. Having decided that the scope of that power was limited to registering a change of sex from male to female or from female to male, it followed that the Registrar had made the correct, indeed the only available, decision.
- 21 Definitions, such as that in s 32A, are not to be treated as substantive provisions: *Gibb v FCT* (1966) 118 CLR 628 at 635 per Barwick CJ, McTiernan and Taylor JJ. That principle, and the fact that the Tribunal was determining a preliminary question as to the scope of the power in s 32DC, makes the appellant's submission as to the meaning of s 32A superfluous. However, for completeness, we will address it.
- 22 Norrie's lawyers submitted that the word "sex" in s 32A(a) means male or female, whereas the word "sex" in s 32A(b) could mean neither male nor female. One reason that that was said to be the case was that otherwise s 32A(b) would imply that everyone wants to identify as either male or female. This interpretation of s 32A is contrary to a basic tenet of statutory construction - that where the legislature uses the same word ("sex"), especially in a single provision, it should be given the same meaning: *Craig Williamson Pty Ltd v Barrowcliff* [1915] VLR 450 at 452 per Hodges J.

23 The interpretation of s 32A put forward by the appellant is also contrary to the plain meaning of the words in the provision. When interpreted in context, s 32A(a) refers to surgery performed on a person who is male or female for the purpose of that person being considered to be a person of the opposite sex. The word "opposite" suggests that gender is binary - there are only two alternatives - male or female. Section 32A(b) refers to surgery performed on a person who is not unambiguously male or female (sometimes referred to as androgynous or intersex) and who wishes to correct or eliminate that ambiguity by being considered to be either male or female. The purpose of the surgery is to "correct or eliminate" the ambiguity in relation to their sex. Read in context, s 32A(b) means that the surgery is carried out to alter the person's reproductive organs so that the person can more definitively be regarded as either male or female.

Limits of the power in s 32DC

Introduction

24 In addition, Norrie's lawyers submitted that the Tribunal had misconstrued s 32DC by limiting the scope of the Registrar's powers under that section. The Tribunal expressed the view at [48] that, "The determination of the ordinary meaning of the word "sex" is a question of fact that falls to the Tribunal to determine." Although there is authority for the proposition that the meaning of an ordinary English word or phrase used in a statute is a question of fact, the scope of the power in s 32DC, which is to be found by construing the words in that provision in context, is a question of law: *Australian Gas Light Co v Valuer-General* (1940) 40 SR (NSW) 126 at 137; *Collector of Customs v Agfa-Gevaert Ltd* (1996) 186 CLR 389 at 395; *Moyna v Secretary of State for Work and Pensions* [2003] 1 WLR 1929 at 1935.

25 The ways in which it was said that the Tribunal misconstrued the meaning of the words in s 32DC included that:

- (1) the fact that other legislation or the common law is premised on a binary classification of sex does not assist in the construction of Part 5A;
- (2) the Registrar was obliged to Register a change of sex to "non-specified" once it was satisfied that the pre-conditions in s 32DA had been met;
- (3) the contention that the appellant's construction has "significant legal and practical implications" does not assist in the construction of Part 5A;
- (4) the Tribunal mistakenly understood Norrie to be requesting the Registrar to register a "third legal sex" whereas she was requesting registration reflecting the fact that she does not identify as either male or female;
- (5) the effect of the Tribunal's decision is that it has "read in" words which are not in the provision, namely "from male to female" or "from female to male"; and
- (6) the Tribunal failed to interpret the *BDMR Act* beneficially.

Reliance on other legislation and the common law

26 At [36] to [39] the Tribunal set out the respondent's submission as to the meaning the word "sex" and related words and phrases in other legislation. The Tribunal then noted the submission from Norrie's lawyer that "whatever the common law may say on the matter, the task before the Tribunal is to consider the terms of the statute in light of its purposes and in its statutory context." The Tribunal concluded at [40] that:

While I agree with that submission to the extent that I agree that the task of the Tribunal is to construe the word "sex" in the Act, I do not agree that the common law is irrelevant to that task. As the full High Court observed in *Balog v Independent Commissioner Against Corruption* [1990] HCA 28; (1990) 169 CLR 625 at 635-6 "where two alternative constructions of legislation are open, that which is consonant with the common law is to be preferred". In my view, the Respondent's authorities do provide some assistance in the exercise that must be undertaken.

27 The Tribunal was correct when it said that judgments interpreting words such as "man", "male person", "woman" and "wife" in other legislation might be of some assistance when interpreting the word "sex" in the *BDMR Act*. However, the Tribunal gave the wrong reason for coming to that view. The decision of *Balog*, to which the Tribunal referred, upheld the doctrine that legislation is presumed not to override common law rights or doctrines. In that case the common law doctrine concerned was that only courts can make findings of guilt in relation to an alleged criminal offence. In this case, the reason for regarding other cases interpreting related words or phrases as persuasive is simply so that there is consistency in our understanding and application of ordinary English words. Correctly applying a particular legal principle, for the wrong reason, does not amount to an error of law.

Power or duty?

28 According to Norrie's lawyers, once the Registrar receives an application which demonstrates that the pre-requisites

to a change of sex have been met, he must register the change of sex that the applicant has requested. In other words, at that stage, the Registrar has a duty to register the change of sex rather than a discretion to register or not register the change. Although the following example taken from DC Pearce & RS Geddes, *Statutory Interpretation in Australia* 6th edition at 332, was not relied on, it is apposite:

In *Re M* (1924) 26 WALR 115 it was held that a provision stating that the Registrar-General of Births, Deaths and Marriages *may* correct errors in the Register of Births, Deaths and Marriages on supply of proper proof imposed an obligation on the Registrar to correct the register where such proof was provided, and this notwithstanding the fact that the provision was couched in discretionary terms. The purpose of the Act was to ensure the accuracy of the register and the making of corrections to it could not be left to the whim of the Registrar.

- 29 While the same argument could be made in relation to s 32DC, the issue here is not whether the pre-requisites for the exercise of the power have been fulfilled. The issue is the scope of the power. Neither the applicant, by making the application, nor a medical practitioner, by completing a statutory declaration, can require the Registrar to perform an act that is beyond that scope.

Consequences of a particular construction

- 30 The Tribunal concluded at [97] that, "The construction urged by the Applicant has very significant legal and practical implications." That was said by the appellant to be "not proven" and irrelevant.
- 31 Firstly, in this case the consequences of a particular construction is a question of law, not a question of fact, therefore it does not have to be proven. Secondly, by referring to the consequences of a particular construction, the Tribunal was merely applying the purposive approach to statutory construction as mandated by s 33 of the *Interpretation Act* 1987:

In the interpretation of a provision of an Act or statutory rule, a construction that would promote the purpose or object underlying the Act or statutory rule (whether or not that purpose or object is expressly stated in the Act or statutory rule or, in the case of a statutory rule, in the Act under which the rule was made) shall be preferred to a construction that would not promote that purpose or object.

Third legal sex

- 32 At [93] the Tribunal acknowledged the submission from Norrie that the reference to "sex" in the *BDMR Act* is not just a reference to male or female but also to intersex people, who are neither male nor female. According to Norrie, people in that category have been given various labels including "neuter, androgynous, eunuch, third sex and non specific sex." However, in the context of the *BDMR Act*, the Tribunal accepted the proposition put by the respondent that there is no "third sex" recognised at common law: *R v Harris* (1988) 17 NSWLR 159 per Matthews J at 194. Furthermore, the Tribunal concluded at [93] that Parliament would not have intended that the enactment of Part 5A would create a "third legal sex" with the result that persons so registered would fall outside the legislative provisions that are premised on a binary division between the sexes into "male" and "female".
- 33 It is clear from this passage, and from the Tribunal's reasons as a whole, that it understood that by using the words "not specified" or "not specific" Norrie meant that she did not wish to be identified as either male or female. The term "third sex" was a term Norrie's representatives used on occasions to describe that situation.

Reading in words

- 34 The assumption made in this submission is that the Tribunal needed to "read in" words in s 32DC to reach its conclusion. The words which have purportedly been "read in" are added in italics:

(1) The Registrar is to determine an application under section 32DA by registering the person's change of sex *from male to female or from female to male*.

- 35 The Tribunal did not "read in" those words. Rather, the Tribunal interpreted the words "change of sex" in context and concluded that their ordinary meaning was a change from male to female or vice versa.

Beneficial legislation

- 36 We accept that the *BDMR Act* is beneficial legislation and must be construed liberally. But, as the High Court said in *IW v City of Perth* [1997] HCA 30; (1997) 146 ALR 696:

... the task remains one of statutory construction. Although a provision of the Act must be given a liberal and beneficial construction, a court or tribunal is not at liberty to give it a construction that is unreasonable or unnatural.

- 37 The Tribunal did not err by reaching the conclusion that it did, despite the fact that the *BDMR Act* can be regarded as beneficial legislation.

Extension of appeal to the merits

- 38 During the hearing Norrie's lawyer applied for leave for the appeal to extend to a review of the merits of the Tribunal's

decision: *ADT Act*, s 113(2)(1). The respondent objected because no prior notice had been given of that application. We accepted the respondent's submission at the hearing that it should not be entertained. However, there is another reason why the appellant's application should be rejected. The Tribunal was determining a preliminary legal issue. It did not reach the stage of making a decision about the merits of the application.

Further information included in Register

- 39 The respondent noted that s 43(2)(b) of the *BDMR Act* allows the Registrar to include in the register "such further information as the Registrar considers appropriate for inclusion". Norrie may wish to request that the Registrar include the information that she was born male, that she had a "sex affirmation procedure" and that she does not identify as either male or female.

Order

1. The appellant's application for leave for the appeal to extend to the merits of the Tribunal's decision is refused.
2. The Tribunal's decision is affirmed.

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