[2016] UKSC 53
On appeal from: [2014] EWCA Civ 1112

JUDGMENT

MB (Appellant) *v* Secretary of State for Work and Pensions (Respondent)

before

Lady Hale, Deputy President
Lord Wilson
Lord Sumption
Lord Toulson
Lord Hodge

JUDGMENT GIVEN ON

10 August 2016

Heard on 5 July 2016

Appellant	*Respondent*
Lord Pannick QC Kerry Bretherton QC Christopher Stothers (Instructed by Arnold & Porter)	Jason Coppel QC Ben Lask (Instructed by The Government Legal Department)

LORD SUMPTION: (with whom Lady Hale, Lord Wilson, Lord Toulson and Lord Hodge agree)

Introduction

1. Council Directive 79/7/EEC on the Progressive Implementation of the Principle of Equal Treatment for Men and Women in Matters of Social Security is concerned with state benefits, including old age and retirement pensions. It provides by article 4 that there shall be "no discrimination whatsoever on ground of sex either directly, or indirectly by reference in particular to marital or family status ..." The material provisions of the Directive have direct effect.

2. Article 7.1(a) of the Directive provided that it was to be without prejudice to the right of member states to exclude from its scope the determination of pensionable age for the purpose of granting old age and retirement pensions. The United Kingdom has exercised that right. The combined effect of (i) the Social Security Contributions and Benefits Act 1992, section 44, (ii) the definition of "pensionable age" in section 122 of the Act, and (iii) the Pensions Act 1995, Schedule 4, paragraph 1, is that a woman born before 6 April 1950 becomes eligible for the state retirement pension (referred to in the legislation as a "Category A retirement pension") at the age of 60, and a man born before 6 December 1953 becomes eligible at the age of 65. The pensionable age of younger persons will converge over a period of time and will eventually be the same, but these changes do not affect the present appeal.

3. At the time which is relevant to this appeal, the acquired gender of a transsexual person was not recognised for the purpose of determining the qualifying age for a state pension, if that person was and remained party to a subsisting marriage. The question at issue on this appeal is whether that state of affairs was compatible with the Directive.

The United Kingdom statutory framework

4. Until 2005, the law made no provision for gender reassignment in any of the three jurisdictions of the United Kingdom. A person was for all legal purposes treated as having the gender determined by the application of biological criteria at birth without regard to any psychological characteristics or later surgical intervention. In *Goodwin v United Kingdom* (2002) 35 EHRR 18, the European

Court of Human Rights held that this was incompatible with article 8 of the European Convention on Human Rights and that, so far as it prevented a transsexual from contracting a valid marriage with a person of the same birth gender, it was also incompatible with article 12.

5. In consequence, Parliament enacted the Gender Recognition Act 2004, which received royal assent on 1 July 2004 and came into force on 4 April 2005. Section 1 of the Act provided that a person could apply to a Gender Recognition Panel for a full gender recognition certificate recording a change of his or her birth gender "on the basis of … living in the other gender". The applicant's new gender was referred to as the "acquired gender".

6. Sections 2 and 3 of the Gender Recognition Act deal with the criteria for determining whether a change of gender has occurred. Section 2 provides that the Gender Recognition Panel is required to grant the application if the applicant has or has had gender dysphoria, has lived in the acquired gender for at least two years up to the date of the application, intends to live in the acquired gender until death and satisfies the evidential requirements laid down by section 3. Section 3 requires the Panel to be furnished with a report from two medical practitioners or from a medical practitioner and a psychologist. If the Panel concludes having regard to the evidence required by section 3 that the criteria in section 2 are satisfied, it must grant the application.

7. By section 9 of the Act, where a full certificate is issued, the acquired gender thereafter becomes the person's gender for all purposes. Schedule 5, paragraph 7 of the Gender Recognition Act deals specifically with the effect of a full gender recognition certificate on eligibility for a state pension. It provides that once the certificate has been issued, any question of entitlement to a state retirement pension is to be decided as if the person's gender has always been the acquired gender. Accordingly, where the person was a man immediately before the issue of the certificate but had attained the age at which a woman would have attained pensionable age, she is to be treated as having attained pensionable age upon the issue of the certificate.

8. At the time that the Gender Recognition Act was passed a valid marriage could subsist in law only between a man and a woman. This had always been the law, but had been confirmed by the Matrimonial Causes Act 1973, section 11(c). For this reason, the 2004 Act made special provision for married applicants, whose change of legally recognised gender would otherwise have resulted in their being married to a person of the same gender as themselves. This will be referred to below as the "marriage condition". By section 4(2) an unmarried applicant who satisfied the criteria for gender recognition in sections 2 and 3 was entitled to a full gender

recognition certificate, whereas by section 4(3) a married applicant who satisfied the same criteria was entitled only to an interim gender recognition certificate.

9. Unlike a final gender recognition certificate, an interim gender recognition certificate did not itself effect any change in the applicant's legally recognised gender. It merely entitled a married applicant to apply to have the marriage annulled by a court. The Matrimonial Causes Act 1973 (as amended), section 12(g), provided that upon the issue of an interim gender recognition certificate the applicant's marriage became voidable. By section 13(2A) of the same Act, the court was then bound to grant a decree of nullity, provided that proceedings to that end were instituted within six months from the date of issue of the interim gender recognition certificate, and subject to certain other conditions which are irrelevant for present purposes. Only when this had been done did the applicant become entitled to a full gender recognition certificate. The court granting the decree of nullity was required by section 5(1) of the Gender Recognition Act to issue the full certificate.

10. Shortly after the Gender Recognition Act was passed, Parliament passed the Civil Partnership Act 2004, which received royal assent on 18 November 2004 and came into force on 5 December 2005. The Act provided for the legal recognition of same-sex partnerships upon registration. A civil partnership was not a marriage but had substantially the same legal consequences as a marriage. Once the Civil Partnership Act had come into force, a married person to whom an interim gender recognition certificate had been issued could, after obtaining the annulment of the marriage, enter into a civil partnership with his or her former spouse.

11. These statutory arrangements were changed by the Marriage (Same Sex Couples) Act 2013, which came into full force on 10 December 2014. The Act of 2013 provided for same sex couples to enter into a marriage. Schedule 5 amended section 4 of the Gender Recognition Act 2004 so as to provide that a Gender Recognition Panel must issue a full gender recognition certificate to a married applicant if the applicant's spouse consents. The Act of 2013 does not apply retrospectively and does not affect the present appeal.

12. The relevant statutory provisions are attached.

The situation of MB

13. MB (the initials have been used in these proceedings to protect her anonymity) was born on 31 May 1948 and was registered at birth as a man. MB was married on 21 September 1974. In 1991 she began to live as a woman and in 1995

underwent sex reassignment surgery. MB has not applied for a gender recognition certificate since the coming into force of the Gender Recognition Act. This is because she and her wife continued and still continue to live together and wish to remain married. For religious reasons, they are unwilling to see their marriage annulled, even if it can be replaced by a civil partnership.

14. On 31 May 2008 MB attained the age of 60. On 28 July 2008, she applied for a state retirement pension, backdated to 31 May 2008, on the footing that she was a woman. The application was rejected on 2 September 2008 on the ground that in the absence of a full gender recognition certificate, she could not be treated as a woman for the purpose of determining her pensionable age. That decision was subsequently upheld by the First-tier Tribunal (18 November 2009), the Upper Tribunal (13 September 2013) and the Court of Appeal (31 July 2014). Permission to appeal was granted by the Supreme Court of the United Kingdom on 11 March 2015.

The arguments

15. The principal arguments for MB may be summarised as follows:

(1) The Court of Justice has already recognised that the prohibition in article 4(1) of the Directive of discrimination on grounds of sex extends to discrimination between persons of a given birth gender and persons who have acquired the same gender by later reassignment: *P v S and Cornwall County Council* (Case C-13/94) [1996] ECR I-2143, para 20; *Richards v Secretary of State for Work and Pensions* (Case C-423/04) [2006] ECR I-3585, paras 24, 29-30.

(2) MB accepts that in principle it is for member states to determine by their domestic law the conditions on which a person's change of gender may be legally recognised: *KB v National Health Service Pensions Agency and Secretary of State for Health* (Case C-117/01) [2004] ECR I-541, para 35; *Richards v Secretary of State for Work and Pensions* (Case C-423/04) [2006] ECR I-3585, para 21. But she submits that the power to impose conditions is confined to conditions relating to the objective physical or psychological characteristics which determine whether an applicant is a man or a woman: see *Richards*, at para 38 (and cf the opinion of Advocate General Jacobs at para 57). It may not be used to impose conditions relating to such matters as marital status which have nothing to do with the determination of an applicant's gender.

(3) Since the holder of an interim gender recognition certificate must have satisfied the physical and psychological criteria for gender recognition, the imposition of a further condition for obtaining a full certificate which applies to married applicants only constitutes unlawful discrimination.

(4) Even if it were legitimate to impose the marriage condition for the purpose of protecting the status of marriage as a relationship between a man and a woman, that could not justify imposing the same condition on eligibility for a state retirement pension, to which marital status is likewise irrelevant.

(5) Although MB's primary case is that the Gender Recognition Act directly discriminates against her on grounds of sex, she also contends that it discriminates indirectly, because the evidence is that the great majority of persons who have undergone gender reassignment have been reassigned from male to female. For the above reasons, it cannot be justified.

16. The principal arguments for the Secretary of State may be summarised as follows:

(1) The decision of the Court of Justice in *Richards* was concerned with discrimination arising from the absence at the relevant time of any provision in English law for recognising gender reassignment. That lacuna has been filled in the United Kingdom since 2005. The decision is of limited relevance to the conditions on which gender reassignment may lawfully be recognised under a comprehensive legislative scheme for recognition.

(2) At the time when *Richards* was decided, the Court of Justice had already recognised in *KB* that it was for member states to determine those conditions, and it reaffirmed that principle in *Richards* itself: see para 15(2) above. A corresponding principle is applied under the European Convention on Human Rights: *Goodwin v United Kingdom*, para 103.

(3) The United Kingdom may properly make the recognition of gender change dependent on a process of registration or certification, as the Gender Reassignment Act does. Under the Act, a person born a man is not a woman merely by virtue of establishing that she has the qualifying social, physical and psychological characteristics. A full certificate must have been issued.

(4) There is no reason why the conditions for the issue of that certificate should be limited to satisfaction of the social, physical and psychological criteria of gender. Gender reassignment has significant social implications which the law may also regulate. The conditions may therefore properly reflect criteria such as the status of marriage, which are legitimate social considerations not regulated by EU law. In acknowledging, as para 103 of *Goodwin* does, that it was for national law to determine the conditions for recognising gender reassignment, the European Court of Human Rights acknowledged that they may include conditions "under which past marriages cease to be valid". This was implicitly accepted by the Court of Justice in *Richards*, when it adopted the principle thus stated at para 21.

(5) Since the decision in *Goodwin*, the European Court of Human Rights has upheld the marriage condition as being in itself compatible with the Human Rights Convention (*Parry v United Kingdom* (Application No 42971/05)) as well as a similar condition in corresponding legislation in Finland (*Hamalainen v Finland* (2014) 37 BHRC 55). The reason was that, although the Convention requires states to recognise the acquired gender of transsexual persons, it does not require them to allow marriages between same sex couples. In the absence of such a requirement, a state which does not recognise same-sex marriages has a legitimate interest in maintaining the traditional concept of marriage between a man and a woman. That interest justified the imposition of the marriage condition in the Finnish legislation. The proviso could not be regarded as disproportionate given that a civil partnership was available to same sex couples as an alternative to marriage.

(6) No question of indirect discrimination arises. Even on the footing that most gender reassignments are male to female, there is no reason to regard it as any more difficult for a male to female transsexual to qualify for a full gender recognition certificate than it is for a female to male transsexual.

The Supreme Court's conclusion

17. The Supreme Court is divided on the question, and in the absence of Court of Justice authority directly in point considers that it cannot finally resolve the appeal without a reference to the Court of Justice.

The question

18. The question referred is whether Council Directive 79/7 EEC precludes the imposition in national law of a requirement that, in addition to satisfying the physical, social and psychological criteria for recognising a change of gender, a person who has changed gender must also be unmarried in order to qualify for a state retirement pension.