Non-remit

IN THE UPPER TRIBUNAL **Appeal No: CP/2758/2011**

ADMINISTRATIVE APPEALS CHAMBER

Before: Upper Tribunal Judge Wright

DECISION

The Upper Tribunal dismisses the appeal of the appellant.

The decision of the First-tier Tribunal sitting at Oxford on 18.11.09 under reference 048/09/007683 did not involve a material error on a point of law. The decision of the tribunal stands.

This decision is given under section 11 of the Tribunals Courts and Enforcement Act 2007

REASONS FOR DECISION

Introduction

1. This is an appeal by the claimant from a decision of the Oxford First-tier Tribunal (SEC) dated 18.11.09. I will refer to this from now on as "the tribunal". The tribunal dismissed the claimant's appeal from the Secretary of State for Work and Pension's decision of 2.09.08. Stripped to its bare essentials, the Secretary of State's decision was to the effect that the claimant (who I will refer to from now as "the appellant") was not entitled to a state retirement pension for the period 31.05.08 to 30.05.13.

2. The reason for this – again shorn to its essentials – was that the appellant had been born a man, she did not have a Gender Recognition Certificate to show for relevant legal purposes that she was now a

woman, and therefore her entitlement to a state retirement pension had to be assessed as if she was a man and thus, because of the higher state retirement age for men, she could not qualify for the pension until 31.05.13. Had the law recognised her as a woman then she would have qualified for a state retirement pension on reaching the age of 60 on 31 May 2008.

3. The key feature of this appeal, however, is the reason why the appellant did not have a Gender Recognition Certificate (which I will refer to from now on as "GRC"). This was because she had married, while still a man, a woman in 1974, and remains married to her. Further, due to her religious beliefs she is opposed to divorce and has no intention of ending her marriage. The appellant's subsisting marriage means, however, at least as far the Gender Recognition Act 2004 (the "GRA") and its onward effect in respect of entitlement to the state retirement pension under the Social Security Contributions and Benefits Act 1992 (the "SSCBA") is concerned, that the appellant could not be awarded a full GRC (see section 4(3) of the GRA), and thus could not be a "woman" for the purposes assessing entitlement to the state retirement pension under the SSCBA.

4. None of these issues of fact are in dispute. Nor is it disputed that the GRA had the above effect in terms of UK domestic law (absent the Equality Act 2010). The issue to be decided is whether the above legislative effect is contrary to either Council Directive 79/7 (EEC) and/or the Equality Act 2010.

Background

5. It is perhaps useful to begin with the analysis of the tribunal. The appellant's case before the tribunal focused on two matters: (a) Directive 79/7, and (b) the fact that the appellant's religious belief and convictions prevented her from ceasing to be married. In rejecting the appeal the appeal the tribunal relied heavily on the European Court of

Human Rights' ("ECtHR") decision in *Parry –v the UK* (Application No. 42971/05) and the Tribunal of Commissioner's decision in *R(P)1/09*.

6. *Parry* was relied on by the tribunal as showing that the ECtHR had held that the UK's gender recognition scheme under the GRA in respect of facts similar to the appellant's case – Wena Parry's complaint was that having to annul her marriage to the woman she had married when she (Wena Parry) was a man in order to get a full GRC offended against her and her wife's religious beliefs – did not breach any provision of the European Convention on Human Rights ("the Convention"), including, importantly, Article 14 and its anti-discrimination provision. The tribunal laid particular emphasis on the fact that the ECtHR found "Wena Parry's complaint based on Article 12 of the Convention (concerned with the "right to marry") manifestly ill-founded because it concluded:

> **"that the matter falls within the appreciation of the Contracting State as how to regulate the effects of the change of gender in the context of marriage..... It [i.e. the UK] cannot be required to make allowances for the small number of marriages where both partners wish to continue notwithstanding the change in gender of one of them"**

7. *R(P)1/09* was concerned with a male-to-female transsexual who attained the female pension age of 60 in 2002, when she was still living as a man. The GRA came into effect in April 2005. The clamant obtained a full GRC in December 2006 and she was awarded retirement pension (as a woman) from 25.12.06. The issue was whether she could qualify for this pension for any period prior to her obtaining the GRC. The Tribunal of Commissioners held she could not. The tribunal relied on three aspects of its reasoning.

   (a) First, its view on section 3 of the Human Rights Act 1998 and human rights arguments, that

> **"The meanings of "man" and "woman" in the legislation are well established and we do not consider it possible to distort them in either primary or subordinate provisions so as to treat a person as having changed his or her gender in United Kingdom law otherwise than by the mechanism provided by its own primary legislation in the Gender Recognition Act"** (paragraph 37).

(b) Second, its conclusion that

> **"nothing we were shown has persuaded us that the conditions now laid down in the Gender Recognition Act for when the process is to be recognised in law as complete are themselves inconsistent with either the Human Rights Convention.....or the requirements of [Directive 79/7]"** (para. 40).

(c) Third, its albeit *obiter* view that it was not

> **"persuaded that [Directive 79/7] (any more than the Human Rights Convention: cf *Parry*, cited above) is infringed by the requirement in section 4 of the [GRA] for a subsisting marriage to be properly brought to an end before a change to the other can be legally recognised as complete. Legal marriage has consequences in the pension field for more parties than one, and the Directive does not in our view require the creation of the fresh inconsistencies and legal uncertainties that could result from the same individual having to be treated simultaneously for pension purposes as a single woman and also as still legally married as a man to another"** (para. 42).

8. These are powerful authorities. However, as we shall see, the appellant's case seeks to step away from them and argue that matters have moved on since these two decisions were made.

9. Permission to appeal to the Upper Tribunal was initially refused by Judge Cole on 9.023.10. However, on 28 August 2012 Upper Tribunal Jupp extended time for the renewed application for permission to appeal to be brought to the Upper Tribunal and gave permission to appeal.

10. Permission to appeal was given on the basis of the appellant's argument that the Court of Appeal's decision in *Timbrell –v-SSWP* [2010] EWCA Civ 701; [2011] AACR 13 had, as the appellant put it in the UT1 form, altered the law and clarified the position. In a skeleton argument filed on her behalf by Ms Bretherton of Counsel, instructed by the Bar Pro

Bono Unit and Law Works, on 23.08.12 (thus before Judge Jupp gave permission to appeal), the essence of the appellant's argument was that the tribunal had not appreciated that Directive 79/7 could be applied directly and that, following *Timbrell*, it was "**clear that where the national legislation does not provide for recognition of an acquired gender ...a person may rely directly upon the Directive**" (para. 52 of the Ms Bretherton's submissions on page 61).

11. In giving permission to appeal Judge Jupp said the following.

> **"My present view is that the decision in *Timbrell –v Secretary of State for Work and Pensions* [2010] EWCA Civ 701 does not assist the appellant. In *Timbrell* it was held that the rights of the claimant in that case were to be judged on the basis of the law and the legislation in force at the time the claimant reached 60 (2001 in her case). The provisions of the Gender Recognition Act 2004 came into force on 4 April 2005, and have no relevance to the law or events prior to its passing or the date when it came into effect. The earlier decision in *Richards –v- Secretary of State for Work and Pensions* [2006] CMLR 49 was also in respect of a claimant who reached 60 prior to 4 April 2005.**
>
> **The appellant did not reach 60 until 31 May 2008, by which time the provisions of the Gender Recognition Act were in force. In *Parry*..... the applicant complained that the provisions of the Gender Recognition Act which required an applicant to divorce before obtaining a full gender recognition certificate were discriminatory; the European Court of Human Rights held that this application was manifestly ill-founded"**

As will appear below, I agree with Judge Jupp, as did the Secretary of State in his submission of 19.09.12.

12. In a note in reply from Ms Bretherton of 12.11.12, the appellant agreed that *Parry* was authority to the effect that the provisions in the GRA concerning the need for the person not be married before she could obtain a full GRC were not discriminatory under the Convention. However she contended that this was not the issue in her case. The issue was, she argued, that Directive 79/7 had direct effect in relation to her case and she was entitled to succeed under it. *Timbrell*, it was argued, was an application of the principle of Directive 79/7's direct effectiveness because the GRA was not in force. The appellant's case

was an application of the general principle "**in circumstances in which no provision is made in UK legislation**". As for the Equality Act 2010, the appellant's argument was that it merely served to reinforce her argument that Directive 79/7 can be directly enforced in circumstances not met by the GRA.

13. Judge Jupp then passed the appeal to me for consideration and decision. On 29.11.12 I directed that there be an oral hearing of the appeal. In so doing, I said:

> **"A key issue at the hearing will be how EU Directive 79/7 may afford a remedy to the appellant where the effect of such a remedy would be, on one analysis, to disregard the detailed (and comprehensive?) code laid down under the Gender Recognition Act 2004. Put another way, is it correct to argue, as [the appellant] does (see paragraph 2 of her counsel's Reply of 12.11.12), that "*no provision*" is made in UK legislation for her situation, or is it rather that the appellant's circumstances fall outside the specific UK provision (i.e. the Gender Recognition Act 2004)?".**

14. The oral hearing took place at Field House in London in March of this year. The appellant attended and was represented, as before, by Ms Bretherton of counsel. Mr Lask of counsel represented the Secretary of State. I am grateful to both advocates for their submissions.

Equality Act 2010

15. I will deal with the Equality Act 2010 first. I confess that I struggled through Ms Bretherton's submissions to understand its relevance to this appeal. On the appellant's own case as stated in the reply document of 12.11.12 it "**merely [served] to reinforce the Appellant's argument that the Directive can be directly enforced in circumstances not met by the [GRA]**". As I understood Ms Bretherton's submission to me on this issue, that remained the case. In other words, no stand-alone challenge to the tribunal's decision arose under the Equality Act 2010.

But if that is the case then the appeal has to stand or fall on Directive 79/7.

16. However, in so far as a discrete argument was being made as to the lawfulness of the Secretary of State's entitlement decision of 2.09.08 or the tribunal's decision of 18.11.09 under the Equality Act 2010 it is, in my judgment, replete with difficulties.

17. First, the decision of the Secretary of State was made on 2.09.08. The effect of section 8(2)(b) of the Social Security Act 1998 ("SSA 1998") was that the Secretary of State's decision-maker was obliged to decide the claim for retirement pension on the basis of the circumstances obtaining at the time of the 2.09.08 decision. This flows from the terms of section 8(2) of the SSA 1998 which provides:

> **"(2) Where at any time a claim for a relevant benefit is decided by the Secretary of State –**
> **(a) the claim shall not be regarded as subsisting after that time; and**
> **(b) accordingly, the claimant shall not (without making a further claim) be entitled to the benefit on the basis of circumstances not obtaining at that time."**

Unsurprisingly, there is a parallel provision in Section 12(8)(b) of the SSA 1998, which is concerned with appeals to the First-tier Tribunal. This provides:

> **"In deciding an appeal under this section, the First-tier Tribunal ...(b) shall not take into account any circumstance not obtaining at the time when the decision appealed against was made".**

In other words, the Secretary of State's decision has to be judged on the basis of the circumstances in place at the time the decision was made and not any later change in circumstances.

18. It was common ground before me that the Equality Act 2010 did not have retrospective effect, and indeed that would seem to have been made explicit by the legislature in para. 15 of the Equality Act 2010

(Commencement No. 4, Savings, Consequential, Transitional, Transitory and Incidental Provisions and Revocation) Order 2010 (SI 2010/2317. However, the Equality Act 2010 only came into force as an Act on and after 8 April 2010. It therefore was not, and could not have been, a circumstance obtaining at the time the Secretary of State made the decision under appeal here, nor was any entitlement decision made after 2009. Accordingly, whatever reach the Equality Act 2010 may have, it cannot in my judgment act to invalidate as erroneous in law a decision made in September 2008.

19. Second, both the state retirement pension provisions (and the reference to different pensionable ages for men and women) in Part II of the Social Security Contributions and Benefits Act 1992 and the requirement in section 4 of the GRA that a GRC can only be provided to a person who is unmarried (and the onward effects of the issuing of a full GRC in terms of state pension entitlements mapped out through sections 9 and 13 and paragraph 7 of Schedule 5 to the GRA), are all found in Acts of Parliament, and I can find nothing in the Equality Act 2010 that impliedly repeals these provisions or by necessary implication cuts down on them. They therefore remain unaffected by the Equality Act 2010: see, to similar effect, the view of Judge Levenson in paragraph 11 of *CIS/108/2012*.

20. Third, like the predecessor Acts that, to some extent at least, the Equality Act 2010 amalgamated, the anti-discrimination service and public function provisions in Part 3 of the Act in respect of the protected characteristics identified in section 4 of the Act (which includes "gender reassignment"), are not contravened if the step in dispute is required by an Act of Parliament: per paragraph 1 of schedule 22 to the Equality Act 2010. Accordingly, in so far as the decision (a) not to grant the appellant a full GRC, and (b) not to award her a state retirement pension from her 60th birthday, may amount to discrimination in the provision of a service or the exercise of a public

function, such decisions are insulated from such challenges by virtue of the said schedule 22.

21. Fourth, any reliance on Part 2 of the Equality Act 2010 is, in my judgment, misconceived as that Part of the Act is concerned only with fleshing out the "Key Concepts" that inform how the causes of action identified elsewhere in the Act are to be worked out. It is more like a definitions section or an interpretation section of an Act; but of itself it gives rise to no cause of action. If any cause of action does arise in respect of the Secretary of State's decision-making here it must be under Part 3 of the Equality Act 2010 (which I have addressed in paragraph 20 above).

22. Fifth, section 149 of the Equality Act 2010 only imposes on the Secretary of State for Work and Pensions, as a "public authority", a duty to have *due regard to* the need eliminate discrimination and advance quality of opportunity when exercising his functions. I cannot, however, see how that limited duty can compel him to ignore the clear and mandatory words in the SSCBA and the GRA concerning when a woman first qualifies for a state retirement pension and when a full GRC may be granted.

Directive 79/7

23. In my judgment the argument on Directive 79/7 has to fail. The reasons for this, put very shortly, are because the appellant became 60 (and thus could first have been entitled to a retirement pension) on 31 May 2008, that date was well after the date the GRA had come into effect, in order for her to legally have acquired the female gender she had to comply with the terms of the GRA (and section 4 in particular) and she could not, and those terms of GRA do not breach Directive 79/7. Put another way, and contrary to the argument of the appellant, *Timbrell* says and changes nothing about entitlement to a retirement pension that falls after the GRA.

24. Before working out these short form reasons further, I should address two areas of the law relevant to this appeal that are both uncontroversial and uncontested.

25. First, as matter of domestic law the appellant could not qualify for a state retirement pension at the age of 60 because legally, for these purposes at least, she was not a woman and thus did not meet the pensionable age for women. This is the clear effect of domestic legislation.

(a) The starting point is section 4(1) of the GRA, which provides that:

> **"[i]f a Gender Recognition Panel grants an application under section 1(1) it must issue a gender recognition certificate to the applicant".**

(b) However, and in this case crucially, under section 4(3) of the GRA:

> **"[i]f the applicant is married....the certificate is to be an interim gender recognition certificate".**

(c) Section 9(1) of the GRA then provides that:

> **"Where a <u>full</u> gender recognition certificate is issued to a person, the person's gender becomes for all purposes the acquired gender (so that, if the required gender is the male gender, the person's sex becomes that of a man and, if it is the female gender, the person's sex becomes that of a woman)"** (my underlining added for emphasis).

(d) Section 13 of the GRA provides that Schedule 5 (entitlement to benefits and pensions) has effect. Paragraph 1 of that Schedule 5 limits its application to **"where a full gender recognition certificate is issued to a person"**. Paragraph 7(1) of Schedule 5 then sets out that the question of whether a

person is entitled to a Category A state retirement pension under section 44 of the SSCBA after the full GRC is issued "**is to be decided as if the person's gender had always been the acquired gender**", and sub-paragraphs (2) and (3) of paragraph 7 explain that the person will attain his or her (acquired) pensionable age on the date the GRC is issued.

26. Absent the not being married provision in section 4 of the GRA, it seems clear that had the appellant applied for a GRC she would have been issued with a full GRC and thus been entitled to a Category A state retirement pension from her 60th birthday on 31.05.08. To that extent at least the appellant's case may be seen as a challenge to the provisions of the GRA (and section 4 in particular) on the basis that the GRA did not properly transpose into national law the requirements of Directive 79/7.

27. Second, the UK state retirement pension is covered by Article 3(1)(a) of Directive 79/7 (*Timbrell* at para. [40]), and the appellant falls within those persons covered by Article 2 of that Directive. Therefore, in principle at least, she is entitled to rely on Article 4(1) of the Directive and the principle of equal treatment on the grounds of sex set out therein in challenging before the UK courts and tribunals whether the refusal to award her a pension at age 60 breached the Directive: see *R(P)1/09* at para. [19].

28. Also relevant is something which, although I would hesitate to call it an agreed principle of law, is a relevant legal consideration to which some considerable weight out to be attached. This is the growing perspective that on areas of common concern or overlap the ECtHR and the Court of Justice of the European Union ("CJEU") ought, if not to speak with one voice, afford considerable deference and weight to the view of the other Court.

29. The growth of this perspective may be seen in the view of the ECtHR in paragraph 58 of its final judgment in *Stec* (2006) 43 E.H.R.R. 47 at page 1030. *Stec* was in effect an appeal from the ECJ's (as it then was) decision in *Hepple –v- Chief Adjudication Officer* (Case C-196/98); *R(I)2/00*, or at least a re-run of the argument Mrs Hepple had lost at the ECJ on Directive 79/7 and the differing (pensionable) ages at which men and women lost their reduced earnings allowance. The argument in both *Hepple* and *Stec* was based on sex discrimination (in *Stec* under Article 1 of the First Protocol and Article 14 of the Convention). The Grand Chamber in *Stec* said (at para. [58]) that:

> **"...the ECJ was called upon, in deciding whether the case fell within the Ar.7 exception, to make a judgment as to whether the discrimination in the REA scheme arising from the link to differential pensionable age was objectively necessary in order to ensure consistency with the pension scheme. In reaching a conclusion on this issue which, while not determinative of the issue under Art.14 of the Convention, is nonetheless of central importance, particular regard should be had to the strong persuasive value of the CJ's finding on this point".**

30. Likewise, though with the relationship the other way around, Articles 6(1) and (2) of the Treaty on European Union set out that the member states of the European Union (including the UK) "**shall accede to the [Convention]**" and that the fundamental rights as guaranteed by the Convention "**shall constitute general principles of the Union's law**". Some "opt-out" has been afforded to the UK by Protocol No.30 (though it would seem to be of limited effect (see Grand Chamber of CJEU in *NS –v- SSHD* (Case C-411/10), 21.12.2011 at paragraphs [116]-[122])), however the opt-out is in respect of the Charter of Fundamental Rights only and does not apply to the Convention.

31. The precise detail and boundaries of this common legal perspective, and the extent to which it may not be common, will no doubt need working out over time. However, I consider that what can be taken from it at present is the consideration that the CJEU in considering arguments concerning sex discrimination under Directive 79/7 would

be slow to depart from reasoned authority of the ECtHR on the same issue.

32. I turn now to consider the relevant case-law. I need only consider two decisions of the ECJ/CJEU: *Richards –v- SSWP* (Case C-423/04) [2006] ECR I-3585; *R(P)1/07* and *Timbrell*. Before addressing them, however, it is worthwhile reiterating two points: (i) first, the earliest the appellant could have qualified for a state retirement pension as a woman was 31.05.08 and thus falls well after the GRA was fully in effect; (ii) second, the appellant's main argument was that *Timbrell* altered the law in a way favourable to her.

33. *Richards* laid the ground for future gender discrimination challenges by holding that the words "sex discrimination" in Article 4(1) of Directive 79/7 could not be confined simply to discrimination based on the fact that a person is of one or other sex but also apply "**to discrimination arising from gender reassignment**" (para. [24]). That was discrimination that Ms Richards had suffered as even after her gender reassignment surgery in May 2001 the UK state pension scheme denied her a pension as a woman when she reached the age of 60 on 28.02.02 (i) because she had been at birth (and remained) registered as male, and (ii) because the UK at the time provided no legal means by which Ms Richards could "**have the new gender which she acquired following surgery recognised with a view to the application of [state retirement pensions law]**" (para. [28]). As this unequal treatment (unequal because women who had not undergone gender assignment could qualify for a pension at age 60) arose from her gender reassignment, the unequal treatment to which Ms Richards was subject was discrimination precluded by Article 4(1) of Directive 79/7: para. [30].

34. Three linked features of this decision are relevant for the purposes of this appeal.

(a) First, Ms Richards' claim for a state retirement pension at age 60 arose *before* the GRA came into effect in the UK. It thus arose in a context where she had no ability under UK law to have her changed gender recognised for the purposes of entitlement to the state benefit(s) that Directive 79/7 sought to afford equal treatment in respect of.

(b) Second, the ECJ emphasised in this context that it was for the UK to "**determine the conditions under which legal recognition is given to the change of gender of a person**": (para. [21]).

(c) Third, the ECJ was plainly aware of the GRA (see paras. [8]-[13]) and was of the view that "**the entry into force of the [GRA] on 4 April 2005 is liable to lead to the disappearance of disputes such as that which gave rise to the case in the main proceedings**". That view of the court was part of the *ratio* of its decision as it was that view of the effect of the GRA that led the ECJ not to time limit the effects of its judgment. In other words, as I see it, the ECJ took the view that no time limit was needed as the GRA was likely to lead to "recognition" challenges from those of a changed gender falling away. In effect, the ECJ seems satisfied that the GRA was likely to amount to an effective transposition into UK law of Directive 79/7 requirements in respect of person who had changed gender, at least as far as equal treatment in entitlement to state retirement benefits is concerned.

35. Although it is true that *Richards* was not concerned with an argument, as here, about the nature of the UK laws recognition of a changed gender for state pension purposes, I can find nothing in it that supports the appellant and, indeed, the features identified in the immediately preceding a paragraph stand against her argument.

36. The Court of Appeal's decision in *Timbrell* concerned a claimant who was born a male and who had married in the 1960's. Ms Timbrell had then undergone gender reassignment surgery in October 2000. She remained married after that surgery. A year after reaching her 60th birthday in July 2001, she applied for a state retirement pension as a woman. The claim was refused and it was that refusal the Court of Appeal was concerned. The Upper Tribunal had upheld the refusal of benefit for then period prior to Ms Timbrell's 65th birthday because it ruled, as had R(P)2/09 at para. [49], that the test to be applied was one as if the GRA was in force from, here, the date of Ms Timbrell's applied for the pension when she was 61, and as she was still married she could not meet that test. The Court of Appeal overturned this approach, ruling, at paras. [37]-[38], that when Ms Timbrell made her claim for the pension aged 61 (in August 2002):

> **"The GRA had, obviously, not reached the statute book. Its provisions are not retrospective, save to the limited extent provided for in Schedule 4, paragraph 7, noted above. Indeed, section 9(2) states expressly that even the grant of a full gender recognition certificate does not affect things done or events occurring before the certificate is issued. The issue of the certificate only affects the interpretation of statutes and laws (even if passed prior to the issue) that are relevant after the issue of the certificate.**
>
> **Therefore, it seems to me, the issue of Ms Timbrell's rights, or lack of them, as from 6 August 2002 to 4 April 2005, have to be judged on the basis of the law and the legislation in force at the time. It is not correct to look at the law applicable at that time through spectacles that are coloured by the subsequent enactment of the GRA and the terms of its provisions. They have no relevance to the law or events prior to its passing or the date when it came into effect. Insofar as the Upper Tribunal took a different view on this issue, it was wrong to do so"** (underlining added for emphasis).

37. The words I have underlined in the passage from *Timbrell* are important. They make it clear that the Court of Appeal was not concerned with, and was not looking at, how *Richards* and Directive 79/7 impacted (if at all) on the position post the GRA. If further proof of this is needed it comes from the two immediately preceding paragraphs. In paragraph [35] the Court of Appeal recorded an important point accepted by the Secretary of State, namely:

> **"that if we acceded to Ms Timbrell's arguments so that we concluded that she was entitled to a retirement pension from her 60th birthday, then the Secretary of State would not argue that Ms Timbrell's position changed after the GRA came into force on 4 April 2005. In other words, the SSWP would not insist that, as from that date, Ms Timbrell had to comply with all the conditions laid down in that Act before she would be entitled to a retirement pension for the period after 4 April 2005".**

This was a concession of the Secretary of State. It was not repeated before me. More importantly, the passage above contains no ruling of the Court of Appeal that a woman who has acquired that gender through gender reassignment but who remains married to a woman ought to qualify for a state retirement pension notwithstanding the terms of s.4 of the GRA. In fairness, Ms Bretherton did not seek to make such an argument.

38. That the Court of Appeal was careful not to trespass on the position post the GRA is made clear from what it said in paragraph 36, where it addressed the issues it had to decide.

> **"there are three issues for decision in this court. (1) Should this court consider Ms Timbrell's rights to a retirement pension without recourse to the provisions of the GRA? (2) If so, what is the effect of Directive 79/7 in the light of the decision of the ECJ in the *Richards* case? (3) If Directive 79/7 applies to the facts of this case and it is held that the UK legislation and case law (prior to the GRA) is discriminatory with regard to acquired gender and pension entitlement, what is the consequence for Ms Timbrell's claim to a pension from her 60th birthday".**

None of those issues touches on the position post the GRA. Moreover, the court's issue (1) has to be read in context: it is considering the position without recourse to the GRA in respect of claims for retirement pension arising *before* the GRA came into effect.

39. Moreover, in its consideration of its issue (2) the Court of Appeal makes it plain that it is considering the effect of Directive 79/7 in the light of *Richards* for the period before the GRA came into effect. It is in that context that the court says:

> **"It seems to me that the critical question is whether Directive 79/7, in particular Article 4, applies to a situation where, as was the case prior to the GRA, English law and legislation had no means at all of giving legal recognition to a change of gender of a person who had successfully undergone gender reassignment for the purposes of seeing whether that person has reached retirement age for the purposes of obtaining a retirement pension. Was the UK bound to ensure that, with regard to those who had acquired a different gender, there would be no discrimination whatsoever, either direct or indirect, on the ground of sex, with regard either to the scope of the Category A pension scheme or the conditions of access to that scheme?**
>
> **I think that the wording of paragraph 38 in the ECJ's decision in *Richards* provides a clear and definitive answer. Paragraph 38 states in terms that Article 4(1) of Directive 79/7 is to be interpreted as precluding legislation which denies a person who has (legally) undergone gender reassignment surgery from entitlement to a retirement pension because she has not reached the age of 65, when that person (who had become a woman by the gender reassignment surgery) would have been entitled to that pension at the aged of 60 had she been held to be a woman as a matter of national law. In short, as I read paragraph 38 in *Richards*, Article 4(1) precludes (on the grounds that it is either directly or indirectly discriminatory) a situation where there is no legislative or other legal means to give recognition to a person's acquired gender. The decision also established that the exceptions laid down in Article 7(1) did not apply because the issue in the case was not the fact that the UK legislation provided for different pensionable ages for men and women, but that the UK legislation did not deal with the situation where a person had acquired a different gender and wished to exercise legal rights according to that acquired gender (see paragraphs 32–37).**
>
> **[The Secretary of State] is correct in arguing that the decision in *Richards* does not indicate what kind of national legislation should be in place or what sort of conditions ought to be satisfied for the recognition of an acquired gender by means of gender reassignment. That is because, as paragraph 31 of *Richards* recognised, that is a matter for national law, not for the ECJ to determine. But that cannot alter the fact that *Richards* effectively held that a total lack of any kind of legislative or legal framework in UK law to enable acquired gender to be recognised so as to enable a person who has acquired a new gender to exercise the rights to obtain a retirement pension according to existing legislation constituted discrimination within Article 4(1) of Directive 79/7"** (underlining added again for emphasis).

40. I find nothing in that passage which "alters" the pre-existing law or does otherwise than to re-state the effect of *Richards* for the period prior to the GRA having effect. Moreover, the conclusions of the court, on its issue (3), further emphasises that it has nothing to say on the position post the GRA.

41. Returning then to the appellant's argument on Directive 79/7, as I hope will be clear from the caselaw set out above and my comments thereon, I cannot see on what basis it can be argued that *Timbrell* "altered the law" either at all or, more importantly, in respect of the post GRA period that, here, affects the appellant's entitlement to a retirement pension. Judge Jupp's initial view when refusing permission to appeal was entirely correct, in my view: *Timbrell* does not assist the appellant.

42. I also do not consider that *Timbrell* assists Ms Bretherton's formulation of the argument beyond, if I may say so, what is now with the benefit of *Richards* and *Timbrell* the trite legal proposition that where there is simply no legal means by which a person may have his or her changed gender recognised for the purposes of entitlement to state pensions they may rely on Directive 79/7 directly. This, however, begs the very question in issue on this appeal: does the GRA provide the legal means for such recognition? *Timbrell* has nothing to say on this as it did not rule on the GRA.

43. That then leaves the question for me rule on. The appellant's case is, in effect, that for her the GRA provides no legal means for her gender change to be recognised for pension entitlement purposes because it requires her to cease to be married and that is a step she is not prepared to take. However, that cannot, in my judgment, be characterised as meaning that the UK (still) has no legal means by which a person who has changed her gender can have her new gender recognised under UK law for pension purposes. The GRA provides a detailed scheme whereby such a person can have her changed gender so recognised.

44. As I see it the issue instead has to be a more focused one of whether the requirement not to be married in section 4 of the GRA means that the UK gender recognition scheme still breaches Directive 79/7 by not providing equal treatment for those who have changed gender but wish to remain married. In short, the appellant's argument has to be that

section 4 of the GRA is in breach of the equal treatment provisions of Directive 79/7. She cannot get home on this argument, in my judgment, for the following reasons.

45. Firstly, it would perhaps be an odd result to arrive at given the ECJ's decision in *Richards* and its view that changed gender challenges were liable to fall away under Directive 79/7 for the period falling after the introduction of the GRA. I appreciate that the court in *Richards* was not giving a ruling on each individual part of the GRA and Ms Richards was not married, but on the other hand it had considered the GRA's terms in coming to its conclusion on whether its decision ought to be time limited.

46. Secondly, as both *Richards* and *Timbrell* emphasise, it is for the Member States to determine the conditions under which legal recognition is given to the change of gender of a person. Moreover, in so doing and addressing sensitive societal areas such as marriage, the Member States are to be afforded a margin of appreciation or a discretionary area of judgment in constructing that scheme (see discussion on *Parry* and *R(P)1/09* below) Ignoring the issue of marriage, however, and the requirement in s.4 of the GRA, I find it difficult to see how the GRA does not properly afford substantive and appropriate recognition for persons of changed gender for pension purposes.

47. Thirdly, and perhaps most crucially, I struggle to see the basis on which sex discrimination based on gender is here made out. The test, as is made plain by para. [29] of *Richards*, is to compare a woman who has acquired her gender as a result of gender reassignment surgery and a woman whose gender is not the result of gender reassignment. But there is, as far as I can see, no relevant difference for either woman in terms of entitlement to a state retirement pension. Each can apply for the pension at the pensionable age for women but neither may be married to another woman. The comparators are thus in a relevantly

identical situation. The contrary case, as I see it, would effectively place women whose gender has been acquired in a superior position to those whose gender has not been acquired because in the former they can remain married to another woman and obtain a woman's state pension whereas in the latter they cannot do so.

48. Fourthly, in my judgment the, albeit *obiter*, view of the Tribunal of Commissioners in para. [42] of *R(P)1/09* remains correct, whatever doubt *Timbrell* may have been cast on the reasoning in that decision and its parallel decision of *R(P)2/09* on the application of the GRA criteria to periods before the GRA came fully into effect. I need do no more, I consider, than to set out, and emphasise by underlining, the reasoning in paragraph [42] of *R(P)1/09*, and say I agree with it.

> **"By the same token, though it is not directly material on the facts before us, we were not persuaded that the Directive (any more than the Human Rights Convention: cf Parry, cited above) is infringed by the requirement in section 4 of the Gender Recognition Act for a subsisting marriage in one gender to be properly brought to an end before a change to the other can be legally recognised as complete. Legal marriage has consequences in the pension field for more parties than one, and the Directive does not in our view require the creation of the fresh inconsistencies and legal uncertainties that could result from the same individual having to be treated simultaneously for pension purposes as a single woman and also as still legally married as a man to another. We were told that the claimant in Richards may in fact not have completed her divorce until after the date from which she was held entitled to pension, and it was urged that this should be treated as a precedent for holding section 4 inconsistent with the Directive, but we decline to do so. Whether or not this was brought clearly to the attention of either the ECJ or the Commissioner, we were not persuaded that the terms of the ECJ ruling or the consent order subsequently made provide us with any assistance or binding authority on the point, which was put in issue before us in a way it seems not to have been in that case".**

49. The very sensitivity of the status of marriage in society is further evidenced by the (ongoing) passage of the Marriage (Same Sex Couples) Bill through Parliament. I make no comment on the merits or otherwise of the Bill. I was, however, informed by Mr Lask for the Secretary of State that it contains provision, under Schedule 5 to the Bill, to enable a person who has changed gender to remain married and

be issued with a full GRC. However, I consider I can take account of the Bill, and the opposing views which have been expressed on it, as showing that the legal concept of marriage, and changes to it, is an area of especial sensitivity and legislative complexity (e.g. in working out the pension rights of parties to the marriage); and one which classically is likely to fall within the margin of appreciation or discretionary area of judgment afforded to Member States.

50. That, it seems to me, is only underscored by the view the ECtHR in *Parry*. I recognise that that decision was not concerned with a direct challenge to the UK's pension rules and the inability of a gender changed woman who was still married to a woman to access state pension entitlement at the pensionable age for women. However, it did address whether the particular rule in the GRA – section 4 – offended against Article 8 (respect for family and private life) and Article 12 (right to marry), and expressed general views thereon, as well as considering the impact of that rule under Article 1 Protocol 1 and Article 14. It therefore was considering the same areas that arise on the appellant's challenge here: see comments in paras. [28]-[31] above.

51. The relevant passages from *Parry* are as follows. I have underlined those which are particularly relevant to this appeal.

In rejecting the Article 8 argument the ECtHR said:

> **"In the present case, the Court notes that the requirement that the applicants annul their marriage flows from the position in English law that only persons of the opposite gender may marry; same-sex marriages are not permitted. Nonetheless it is apparent that the applicants may continue their relationship in all its current essentials and may also give it a legal status akin, if not identical to marriage, through a civil partnership which carries with it almost all the same legal rights and obligations. It is true that there will be costs attached to the various procedures. However the Court is not persuaded that these are prohibitive or remove civil partnership as a viable option.**
>
> **The Court concludes, as regards the right to respect for private and family life, that the effects of the system have not been shown to be disproportionate and that a fair balance has been struck in the circumstances".**

It follows that this part of the application must be rejected as manifestly ill-founded pursuant to Article 35 of the Convention".

On Article 12 the court said:

> **"Article 12 secures the fundamental right of a man and woman to marry and to found a family. The exercise of the right to marry gives rise to social, personal and legal consequences and Article 12 expressly provides for regulation of marriage by national law. Given the sensitive moral choices concerned and the importance to be attached in particular to the protection of children and the fostering of secure family environments, this Court must not rush to substitute its own judgment in place of the authorities who are best placed to assess and respond to the needs of society (B. and L., cited above, § 346). The matter of conditions for marriage in national law cannot, however, be left entirely to Contracting States as being within their margin of appreciation. This would be tantamount to finding that the range of options open to a Contracting State included an effective bar on any exercise of the right to marry. The margin of appreciation cannot extend so far. Any limitations introduced must not restrict or reduce the right in such a way or to such an extent that the very essence of the right is impaired (see Rees v. the United Kingdom, judgment of 17 October 1986, Series A no. 106, § 50; F. v. Switzerland, judgment of 18 December 1987, Series A no. 128, § 32).**
>
> **In the present case, the Court notes that the applicants were lawfully married under domestic law. They wished to remain married. Though there were children to the marriage, there is no suggestion that they, or any other individual, would be adversely affected if they did so. In seeking to comply with the Court's judgment in Christine Goodwin v. the United Kingdom (cited above) in which it had been found that the biological criteria governing the capacity to marry imposed an effective bar on transsexuals' exercise of their right to marry, the legislature have now provided a mechanism whereby a transsexual can obtain recognition in law of the change and thus be able, for the future, to marry a person of the new opposite gender. The Court observes that the legislature was aware of the fact that there were a small number of transsexuals in subsisting marriages but deliberately made no provision for those marriages to continue in the event that one partner made use of the gender recognition procedure.**
>
> **In domestic law marriage is only permitted between persons of opposite gender, whether such gender derives from attribution at birth or from a gender recognition procedure. Same-sex marriages are not permitted. Article 12 of the Convention similarly enshrines the traditional concept of marriage as being between a man and a woman (Rees, cited above, § 49). While it is true that there are a number of Contracting States which have extended marriage to same-sex partners, this reflects their own vision of the role of marriage in their societies and does not, perhaps regrettably to many, flow from an interpretation of the fundamental right as laid down by the Contracting States in the Convention in 1950.**
>
> **The Court cannot but conclude therefore that the matter falls within the appreciation of the Contracting State as how to regulate the effects of the change of gender in the context of marriage**

> **(Christine Goodwin, cited above, § 103). It cannot be required to make allowances for the small number of marriages where both partners wish to continue notwithstanding the change in gender of one of them. It is of no consolation to the applicants in this case but nonetheless of some relevance to the proportionality of the effects of the gender recognition regime that the civil partnership provisions allow such couples to achieve many of the protections and benefits of married status. The applicants have referred forcefully to the historical and social value of the institution of marriage which give it such emotional importance to them: it is however that value as currently recognised in national law which excludes them.**
>
> **It follows that this part of the application is manifestly ill-founded pursuant to Article 35 §§ 3 and 4 of the Convention".**

And on Article 9, Article 1 of Protocol 1 and Article 14 the ECtHR said:

> **"The applicants also complained under Article 9 that the requirement to dissolve their marriage interfered with strongly held religious beliefs; under Article 1 of Protocol 1 concerning costs flowing from their change in status; under Article 14 that the provisions of the GRA 2004 requiring their marriage to end were discriminatory under Article 14 (together with other provisions invoked); and under Article 13 that they had no effective remedy in respect of the other violations of which they complain.**
>
> **The Court notes, firstly, as regards Article 9, that the provisions do not purport to regulate marriage in any religious sense and that it depends on each particular religion the extent to which they permit same-sex unions. The manner in which the State chooses to grant its own formal legal recognition to relationships does not, in the circumstances of this case, engage its responsibility under this provision.**
>
> **As regards Article 1 of Protocol No. 1 to the Convention, insofar as there would be financial repercussions following from any nullity or partnership procedures, any interference with the right to peaceful enjoyment of possessions would be lawful and disclosing a fair balance between the conflicting interests of the individual and society as a whole. The Court doubts that the applicants can, for the purposes of Article 14 of the Convention, claim that they are in a comparable position to others who are unaffected by the new legislation but to the extent that any possible issue of difference of treatment arises, this is justified on the same grounds identified above in the context of Articles 8 and 12 of the Convention.....**
>
> **It follows that this part of the application is manifestly ill-founded as a whole and must also be rejected pursuant to Article 35 §§ 3 and 4 of the Convention".**

52. This reasoning of the ECtHR, it seems to me, and as I have said above, gives added force to the argument that section 4 of the GRA does not breach Directive 79/7.

53. I should record that I was addressed by both parties on the doctrine of direct effect and adequate (if that is the correct word) transposition of EU law – here Directive 79/7 - into UK law. However, in the final analysis the argument here focuses on the same issue as the arguments above, namely whether the GRA (and its section 4 in particular) transposed Directive 79/7 properly into UK domestic law as far as pension rights and persons of changed gender are concerned. For the reasons given above, I consider that it has.

54. It is for all of these reasons that the appeal failed.

(Signed) S. M. Wright
Judge of the Upper Tribunal

Dated 18th June 2013