

Gender Reassignment – the legal saga continues

Secretary of State for Work and Pensions v HY (RP) [2017] UKUT 303 (AAC) (“HY”)

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References in square brackets are to paragraphs of the Upper Tribunal judgment in *HY*.

Summary

In the latest round of judicial scrutiny of the legislation governing gender reassignment, the Upper Tribunal (“UT”) has held that the Gender Recognition Act 2004 is compatible with EU anti-discrimination law. Next up, the Court of Justice of the European Union (“CJEU”) will consider a similar question on a reference from the Supreme Court in *MB v Secretary of State for Work and Pensions* [2016] UKSC 53.

HY concerned the rights of male-to-female transgender people to claim a state retirement pension at the lower pensionable age applicable to women. The UT held that the UK legislative scheme, which requires a male-to-female transgender person to hold a gender recognition certificate before claiming retirement pension on the basis that they are a woman, was compatible with EU law. Its conclusions turned on its interpretation of the equal treatment principle in Council Directive 79/7/EEC on equal treatment for men and women in matters of social security, and on the CJEU’s seminal judgment in Case C-423/04 *Richards v Secretary of State of Work and Pensions*.

The facts

Both claimants had been registered as male at birth and underwent gender reassignment surgery in the 1980s. Both of them claimed their state retirement pensions from the date on which they attained the pensionable age for women. Since, however, they did not hold gender recognition certificates, granting legal recognition of their acquired genders, at the relevant time, the Secretary of State refused their claims. This was on the basis that, in the absence of such certificates, their claims had to be determined on the basis that they were still men.

The legislative background

Three pieces of legislation form the legislative context for the case.

Council Directive 79/7/EC

Council Directive 79/7/EC ("Directive 79/7") aims at the progressive implementation of the principle of equal treatment for men and women in matters of social security. Article 4(1) prohibits discrimination in matters of social security.

Domestic pension legislation

The issue in these cases arose because the pensionable age for women was (and remains) lower than the pensionable age for men. From 1948 until 2010, pensionable age was 60 for women and 65 for men. Female pensionable age is gradually being increased so that pensionable age will be the same for both genders (see Schedule 4 to the Pensions Act 1995). For these claimants, however, the pensionable ages for women remained lower. Whether they were treated as men or women for the purposes of their pension claims therefore determined the date from which they were able to claim their state pensions.

Gender Recognition Act 2004

The Gender Recognition Act 2004 made it possible for a person to apply to a Gender Recognition Panel for a "gender recognition certificate" to record a change of his or her birth gender. The new gender is referred to in the legislation as the acquired gender. The 2004 Act was enacted in response to the European Court of Human Rights' decision in *Goodwin v United Kingdom* (2002) 35 EHRR 18 that the inability of a transgender person to obtain legal recognition of their gender reassignment in UK law gave rise to a breach of Articles 8 and 12 ECHR.

Under the 2004 Act, in order to claim retirement pension in the acquired gender, a person must hold a gender recognition certificate: see section 9 and Schedule 5, paragraph 7.

Richards and subsequent cases

The present case turned, in part, on the CJEU's decision in *Richards*, which interprets Directive 79/7. *Richards* concerned a male-to-female transgender person who underwent gender reassignment surgery in 2001. In 2002 – when

there was still no mechanism in UK law for recognising a change of gender – she applied for a retirement pension to be paid on the basis that she had reached the pensionable age for a woman. Her application was refused on the basis that she was eligible for retirement pension only when she reached 65, the pensionable age for a man.

The CJEU held that it is “for the Member States to determine the conditions under which legal recognition is given to the change of gender of a person” (paragraph 21). However, “national legislation which precludes a transsexual, in the absence of recognition of his new gender, from fulfilling a requirement which must be met in order to be entitled to a right protected by Community law must be read as... incompatible with the requirements of Community law” (paragraph 31). The CJEU concluded that Directive 79/7 precludes legislation “which denies a person who, in accordance with the conditions laid down in national law, has undergone male-to-female gender reassignment, entitlement to a retirement pension on the ground that she has not reached the age of 65, when she would have been entitled to such a pension at the age of 60 had she been held to be a woman as a matter of national law” (paragraph 38).

Richards was followed by the Court of Appeal in *Timbrell v Secretary of State for Work and Pensions* [2010] EWCA Civ 701. The claimant in that case was registered as male at birth and underwent gender reassignment surgery. She claimed retirement pension in 2001, before the 2004 Act came into force. The Court of Appeal held that, because the United Kingdom had failed to put in place a legal framework for the recognition of gender reassignment in the period before the entry into force of the 2004 Act, the Secretary of State was obliged by the Directive to recognise the claimant as a woman and pay her a retirement pension from the age of 60. However, the Court of Appeal in *Timbrell* stated that *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” (paragraph 43).

In *MB v Secretary of State for Work and Pensions* [2014] EWCA Civ 1112 the claimant had again been registered as male at birth and had undergone gender reassignment surgery. Whilst the 2004 Act was by now in force, one of the conditions for recognition of an acquired gender was that the applicant be unmarried. (This condition applied at a time when same sex marriages were prohibited. Since the legalisation of such marriages, the condition has been removed). Since MB remained married, she was precluded from being recognised as a woman and thus from claiming her pension from the pensionable age for women. The Court of Appeal distinguished the case from *Richards* on the basis that, unlike in *Richards*, there now existed a legislative framework for the recognition of gender reassignment. It held that *Richards* did not address the question of whether the Directive creates a right for a male-to

female transgender person to be recognised as a woman for pension purposes in circumstances where domestic law has set conditions for such recognition with which she does not comply. It further held that the marriage condition which lay at the heart of MB's case did not contravene the Directive. That question has since been referred to the CJEU by the Supreme Court in *MB v Secretary of State for Work and Pensions* [2016] UKSC 53. The CJEU's judgment in that case remains pending.

The First Tier Tribunal decisions

In the first case, the First Tier Tribunal ("FTT") concluded that EU law requires a person to be recognised in their acquired gender for the purposes of assessing entitlement to state pension if, and from the moment that, he or she undergoes gender reassignment surgery. The relevant provisions of the 2004 Act were therefore contrary to EU law, which precluded the additional requirement of a gender recognition certificate. In reaching that conclusion the FTT relied on *Richards* and *Timbrell*, and disregarded *MB* as inconsistent with EU law.

In contrast, in the second case, the FTT followed *MB* and upheld the Secretary of State's view that the claimant was not entitled to a retirement pension before reaching pensionable age for a man. Somewhat inconsistently with this, however, the FTT allowed the claimant's appeal in part, holding that the amount of pension to which she was entitled should reflect a deferment of entitlement to a pension from her 60th birthday.

The Secretary of State appealed both cases to the UT.

The Upper Tribunal decision

The UT considered that the case raised the following three issues.

First issue: Richards and the possibility of recognition

The first issue was whether the claimants were precluded by national legislation from obtaining recognition of their acquired gender before they reached the age of 60 so as to be able to claim retirement pensions on the basis that they were women. This would have been contrary to the CJEU judgment in *Richards*.

On this issue, the UT concluded that the claimants were clearly not precluded by national legislation from obtaining such recognition. The UT noted that the claimants could have obtained gender recognition certificates before they

reached the age of 60, given that a number of years had passed between the entry into force of the 2004 Act and the date both claimants turned 60. For this reason, the UT considered that the cases were not on all fours with *Richards* or *Timbrell* [27].

Second issue: Richards and the conditions for recognition

The claimants argued that *Richards* was concerned not just with the possibility of recognition of acquired gender, i.e. the first issue, but also with whether the conditions for recognition were compatible with the Directive. In particular, the claimants argued that they were precluded from having their acquired gender recognised on equal terms with a person whose gender was his or her birth gender, due to the requirement to obtain a gender recognition certificate, and that violated the Directive as interpreted in *Richards*.

The UT rejected this argument. Agreeing with the Court of Appeal in *MB*, the UT said that *Richards* determines only how a case is to be decided in the absence of a scheme for recognising the acquisition of a new gender. It does not purport to consider what the terms of such a scheme might permissibly be [28]. In particular *Richards* did not determine whether a system of recognition that was prospective only, such as the scheme for gender recognition certificates under the 2004 Act, would be liable to give rise to a breach of Directive 79/7 [29], [34].

Third issue: the principle of equal treatment in Article 4 of the Directive

The third issue was whether, *Richards* aside, there was a breach of the principle of equal treatment in Article 4 of Directive 79/7 on the basis that the claimants had been treated less favourably than women registered as female at birth would have been treated, had they made claims at the same time as the claimants.

In this regard the claimants submitted that the procedural rules for recognising acquired gender could not include a rule that recognition would be prospective only, or a requirement that a claimant provide a certificate of recognition that has only prospective effect [37].

The Secretary of State put forward various reasons for not making gender recognition certificates retrospective, including the uncertainty which would arise as to when a person acquired the new gender. He also pointed to the risk that, if gender was determined retrospectively for pension purposes, female-to-male transgender people might face pensions they had received as women being retrospectively clawed back [38].

The UT considered that the Secretary of State could have devised a scheme that would have enabled the claimants to be recognised retrospectively in their acquired gender [39]. Critically, however, Article 4 of Directive 79/7 did not require the UK to introduce such a scheme. This was because it was necessary only for the UK to have legislation that enabled claimants to prove that they ought to be recognised as women before they reach pensionable age. The 2004 Act did that, and did so based on objectively justifiable factors that reflected legitimate aims of social policy [41].

The UT's conclusion

In light of the above, the UT set aside the decision of the FTT in the first case, finding that it had erred in law in holding that the claimant was entitled to be treated as a woman in respect of a period before the gender recognition certificate was issued. As to the second case, the UT ruled that the FTT had been correct to conclude that the claimant was not entitled to a retirement pension before she turned 65, but wrong to conclude that she was entitled to an increased pension thereafter based on deferment. In both cases, the UT set aside the FTT's decisions and reinstated the Secretary of State's original decisions.

Comment

- The need for legal certainty as to the date of recognition of a change of gender is an important factor in the judgment (e.g. at [38] and [41]). Indeed this seems to be the driving factor behind the UT's decision that the prospective recognition scheme of the 2004 Act is lawful, notwithstanding that the scheme can have detrimental effects on those (such as the claimants) who live in their acquired gender for many years without appreciating the need to apply for a gender recognition certificate.
- Although the UT distinguished the present case from *MB*, which concerns the specific "marriage condition" in the 2004 Act, the CJEU's judgment in *MB* can be expected to shed further light on the requirements of equal treatment under Directive 79/7 in the context of transgender pension rights more generally. In particular, if the claimants in *HY* were, contrary to the UT decision, correct that gender reassignment surgery should be sufficient under EU law for recognition as a woman for pension purposes, then the marriage condition at issue in *MB* will presumably be deemed unlawful.

- The UT's decision contains the following interesting comments at **[31]** – **[32]** about the approach lower courts should take to interpreting CJEU judgments. Insofar as CJEU judgments retain persuasive force after Brexit, these comments will remain of interest to those involved in litigation concerning EU-derived law:

“It can be as unrealistic to read judgments or rulings of the Court of Justice literally in the context of cases arising on different facts as it is to read judgments of United Kingdom courts like statutes or, indeed, as it sometimes is to read legislation literally

The Court of Justice has no inhibitions in qualifying its previous rulings, even if it often does so somewhat obliquely, and a national court that is not a court of last instance is, in my judgment, entitled to take the same approach when it is clear that the Court of Justice did not have in mind the issues that arise in the case before the national court”

The full judgment is available [here](#).

Ben Lask was instructed by the Government Legal Department for the Secretary of State for Work and Pensions. Brendan McGurk was instructed by Arnold & Porter Kaye Scholer LLP for the claimants.

The comments made in this case note are wholly personal and do not reflect the views of any other members of Monckton Chambers, its tenants or clients.