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EUROPEAN COMMISSION
OF HUMAN RIGHTS

Application No. 9532/81

Mark REES
against
UNITED KINGDOM

Report of the Commission

(Adopted on 12 December 1984)

STRASBOURG

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I. INTRODUCTION

1. The following is an outline of the case as it has been submitted to the European Commission of Human Rights by the parties.

A. The substance of the application

2. The applicant is a British citizen, born in 1942 and living in Rusthall, Tunbridge Wells in Kent. He is represented before the Commission by Messrs Winstanley-Burgess, Solicitors, in London.

3. The Government of the United Kingdom are represented by their Agent, Mrs A. Glover, Foreign and Commonwealth Office.

4. The applicant is a transsexual who was registered at birth as a female. Since the age of 16 he sought treatment to have his sex role changed. His outer appearance is now that of a male. In September 1971 he changed his name and has been living as a male since. His efforts to have his birth register corrected accordingly were to no avail.

5. The applicant complains that the United Kingdom law does not confer on him a legal status corresponding to his actual condition. He invokes Arts 3, 8 (1) and 12 of the Convention.

B. Proceedings before the Commission

6. The application was introduced with the European Commission of Human Rights on 18 April 1979 and registered on 29 September 1981. On 15 July 1982 the Commission proceeded to a first examination of the application and decided in accordance with Rule 42 (2)(b) of its Rules of Procedure to give notice of the application to the respondent Government for observations on the admissibility and merits. After extension of the time limit originally fixed for 29 October 1982, the respondent Government's observations were submitted on 7 December 1982 and the applicant's reply was sent on 11 January 1983. The Commission examined the application again on 7 July 1983 and decided to put questions to the parties in order to find out to what extent the applicant was affected in his present situation by the impossibility to have his birth register corrected. After receipt of the parties' answers the Commission decided on 12 October 1983 to hold an oral

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hearing on admissibility and merits. At the hearing, held on 14 March 1984, the applicant was assisted by Mr N. Blake, counsel, and Miss B. Taylor, solicitor. The Government was represented by its Agent, Mrs A. Glover, as well as Mr N. Bratza, counsel, Mr R. Tomlinson, the Home Office, Miss D. Pace, General Register Office, and Mrs G. Kerrigan, Department of Health and Social Security.

7. At the end of the hearing the Commission declared the application admissible. Additional submissions in writing on the merits of the application were not submitted.

8. Having declared the application admissible, the Commission, in accordance with Art 28 (b) of the Convention, placed itself at the disposal of the parties with a view to securing a friendly settlement of the matter. In view of the attitude adopted by the parties, the Commission finds that there is no basis for such a settlement.

C. The present Report

9. The present Report has been drawn up by the Commission in accordance with Art 31 of the Convention, after deliberations and votes in plenary session, the following members being present:

MM. J. A. FROWEIN, Acting President
J. E. S. FAWCETT
E. BUSUTTIL
G. TENEKIDES
S. TRECHSEL
J. A. CARRILLO
A. S. GÖZÜBÜYÜK
J. C. SOYER
H. G. SCHERMERS
G. BATLINER

10. The text of the Report was adopted by the Commission on 12 December 1984 and is now transmitted to the Committee of Ministers in accordance with Art 31 (2) of the Convention.

11. A friendly settlement of the case not having been reached the purpose of the present Report, pursuant to Art 31 of the Convention, is accordingly:

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1. to establish the facts, and
2. to state an opinion as to whether the facts found disclose a breach by the respondent government of its obligations under the Convention.

A schedule setting out the history of the proceedings before the Commission (Appendix I), and the text of the decision on the admissibility of the application (Appendix II) are appended to this Report.

12. The full text of the parties' written and oral submissions and the documents submitted to the Commission are in the Commission's archives and can be made available to the Committee of Ministers on request.

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II. ESTABLISHMENT OF THE FACTS

A. The applicant's situation

13. At the time of his birth the applicant exhibited all physical and biological characteristics of a female infant, and was consequently recorded as a female and given the Christian names of Brenda Margaret. Early in his childhood the applicant was already exhibiting masculine behaviour and was ambiguous in appearance. In 1970 the applicant learned that the transsexual state was a medically recognised condition and sought treatment. Methyl testosterone was prescribed for him and he developed secondary male characteristics. At this point he assumed his appropriate role of a male. In September 1971 the applicant changed his name by deed poll to Brendan Mark Rees (subsequently in September 1977, to Mark Nicholas Alban Rees) and has been living as a male since. His latest passport issued on 3 June 1982, indicates his adopted forenames without the prefix Mr. The applicant's driving licence and national insurance card also contain his present forenames.

14. Surgical treatment for physical sexual conversion began in May 1974 with a bilateral mastectomy at Charing Cross Hospital, Fulham, London. The surgical treatment has led to the removal of feminine external characteristics. Hormone treatment has led to the appearance of secondary masculine characteristics. The costs of the medical treatment are supported by the National Health Service. The applicant considers himself a man and is socially accepted as such. He submitted medical reports of Dr C.N. Armstrong dated 13 November 1979 and 7 October 1980.

15. The Report of 7 October 1980 states that the applicant was a transsexual who was neither a normal female nor a normal male at birth, but a case of intersex because transsexualism was, in the doctor's opinion, pre-determined at birth. The criteria of sex were (1) chromosomal sex; (2) gonadal sex: ovaries or testes; (3) apparent sex: external genitalia and body form; (4) psychological sex. Normally all four criteria were of the same sex and intersex should be defined when any of the four criteria were not of the same sex.

16. In cases of intersex the assignment as male or female had to be made by taking into consideration the four criteria of sex and it was obvious from the examples given that criteria (1) and (2) and even (3) might be in contradiction to the developed adult. The appearance at birth might not indicate the correct sex. Therefore, in Dr Armstrong's opinion, psychological sex was the most important as it

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determined the individual's social activities and role in adult life and for the reasons explained is pre-determined at birth but was not evident until later life. Consequently, the applicant's sex should, according to Dr Armstrong, be assigned male. His manner, voice and general appearance was masculine and he had a well-grown beard. At his birth the applicant was neither a normal female nor a normal male but a case of intersex.

B. The legal situation for transsexuals

1. Status

17. In the United Kingdom identity cards are not in use. In other official documents in regular use the sex of a person is not indicated but follows from the person's male or female forenames and the prefix Mr/Mrs/Miss. A change of name can easily be effected and documents like a passport, driving licence, car registration book, national insurance card etc. will without formality be issued on a person's adopted names (s. above para 13). The only exception to this is the birth certificate.

18. The Birth and Death Registration Act 1953 requires the birth of every child born in England or Wales to be registered by the Registrar of births and deaths for the area in which the child is born. An entry in a birth register and a certificate derived therefrom are considered as records of facts at the time of the birth. The particulars concerning a birth to be entered in the birth register are prescribed in regulations made under the 1953 Act.

19. The 1953 Act provides for the correction of clerical errors in registers. The mode of correction is prescribed in regulations. Such errors include the incorrect statement or omission of the year of the birth to which an entry relates. There is also provision for correction of errors of fact or substance in entries in birth registers. Such correction may be made to the entry only where the error was made when the birth was registered (Section 29(3)). A birth certificate being a certified copy of an entry in the register cannot itself be altered but a new certificate may then be issued from the corrected entry.

2. Marriage

20. In English law marriage is defined as a voluntary union for life of one man and one woman to the exclusion of all others. Section 11 of the Matrimonial Causes Act 1973 gives statutory effect to the common law provision that a marriage is void if, inter alia, the parties are not respectively male and female.

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21. According to present case-law a marriage between a transsexual and a person of the transsexual's former sex is not valid. In the leading case of Corbett v Corbett (1970 2 WLR 1306) which concerned the application by a husband for a declaration of nullity of his marriage to a transsexual (male to female) several medical experts in the field of transsexuality were heard. The High Court Judge dealing with the case stated inter alia in the decision:

"It is common ground between all the medical witnesses that the biological sexual constitution of an individual is fixed at birth (at the latest), and cannot be changed either by natural development of organs of the opposite sex, or by medical or surgical means".

"Since marriage is essentially a relationship between man and woman, the validity of the marriage in this case depends ... upon whether the respondent is or is not a woman ... The question then becomes, what is meant by the word "woman" in the context of a marriage ... Having regard to the essentially heterosexual character of the relationship which is called marriage, the criteria must ... be biological, for even the most extreme degree of transsexualism in a male or the most severe hormonal imbalance which can exist in a person with male chromosomes, gonads and male genitalia, cannot reproduce a person who is naturally capable of performing the essential role of a woman in marriage. In other words, the law should adopt in the first place, the first three of the doctors' criteria, i.e. the chromosomal, gonadal and genital tests, and if all three are congruent, determine the sex for the purpose of marriage accordingly, and ignore any operative intervention. The real difficulties, of course, will occur if these three criteria are not congruent. This question does not arise in the present case... but it would seem to follow ... that the greater weight would probably be given to the genital criteria than to the other two. This problem and, in particular, the question of the effect of surgical operations in such cases of physical intersex, must be left until it comes for decision."

22. The production of a birth certificate is not required for the contracting of marriage. The completion of a notice is required in which, however, the person applying for a marriage licence does not have to specify his/her sex, but the person is obliged to make a solemn declaration that he or she believes there is no impediment of kindred or alliance or other lawful hindrance to the said marriage. Deceitful statements could lead to prosecution under the Perjury Act 1911.

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C. The applicant's efforts to obtain recognition of his present status

23. After the adoption of male forenames the applicant requested the issue of a new passport in which, however, the prefix Mr was denied to him (s. above para 13).

Finding that it would be impossible to have his birth certificate altered to show his male sex, the applicant made unsuccessful efforts from 1973 onwards to get MPs to introduce a private members bill into Parliament to resolve the problem of transsexuals.

24. Despite the described legal position he applied on 10 November 1980 formally to have his recorded sex altered on his birth certificate under the 1953 Act. The application was refused on 25 November 1980. The refusal stated that the report by Dr C. N. Armstrong on the applicant's psychological sex was not decisive and that in the absence of any medical report on the other agreed criteria, i.e. the chromosomal sex, gonadal sex and apparent sex of the applicant the General Registrar was unable to concede whether an error was made at birth registration. The medical evidence is that no error was made at birth on the basis of these three criteria.

25. An application was made to the Law Society for legal aid in order to apply for a Judicial Review of the Registrar General's refusal. This application was refused on 18 December 1980. An appeal against refusal of legal aid was rejected on 27 February 1981. The applicant submits that he was thereby deprived of the possibility of pursuing remedies because of lack of funds.

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III. SUBMISSIONS OF THE PARTIES

A. The Applicant

1. On Art 8

26. As regards his complaint under Art 8, the applicant first pointed out that his sexual reassignment was not a capricious or arbitrary decision. His adoption of the male sex was achieved after psychiatric counselling, hormone treatment and surgery with the effects as indicated in the medical reports of Dr C. N. Armstrong dated 13 November 1979 and 7 October 1980, respectively. The treatment was paid for by the State. The United Kingdom, having furthered his sexual reassignment in this way, subsequently failed to recognise the reality of his male sex and in this way has prevented him from achieving complete integration in society. The applicant submitted that the United Kingdom refused to recognise his sex for any social purpose where that became legally relevant. The existence of an unamended birth certificate constituted an unwarranted interference in his privacy and threatened his honour and dignity because it identified him as a female both by his female names and the explicit entry as to his sex. In his opinion there would be no threat to public order if the birth certificate contained the information that reflects his present status while the original would contain all the facts that the Government considered appropriate to record as historical evidence.

27. The applicant contested the statement by the United Kingdom that the birth certificate was simply a record of facts at the time of birth and was not intended to be a record of the current identity of the individual concerned. It was authoritative evidence of present sex wherever that issue became legally relevant. He submitted that individuals frequently were required to produce their birth certificates in a host of situations, eg first request for a passport, securing policies of insurance, places in higher education and by employers. It was perhaps because the United Kingdom did not have civil status certificates or equivalent current identity documents that the birth certificate achieved this status. The birth certificate was therefore in the United Kingdom a matter of public record. Any member of the public could obtain a copy on payment of a requisite fee. The birth certificate would therefore continue to be evidence of present sex of the person to whom it referred. He himself had to produce his birth certificate when he applied for the first time for a passport and when he enrolled at a university. His case therefore was not distinguishable from the Van Oosterwijck case.

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28. Referring to several publications on the problem of transsexualism, the applicant submitted that these publications and the changes in law in Europe and elsewhere reflected a greater acceptance of the transsexual and the preparedness to accept him or her in the new sexual identity. He alleged that even in the United Kingdom transsexuals had in some cases succeeded in having their birth register changed. But in general recognition of the status of a transsexual was not secured. The decision in the case Corbett v Corbett had been followed on a number of occasions and for purposes other than the determination of sex for the purpose of marriage. In 1980 there were two decisions of the National Insurance Commissioner concerning transsexuals (reported in the 1980 volume of National Insurance Commissioner Decisions under RP/1 and RP/2). Both cases involved male to female transsexuals who, for the purpose of the social security legislation and the determination of sex for retirement age, were held still to be men. And an Industrial Tribunal had in a case White V British Super (1977 Industrial Relations Law Reports p 121) decided that sex was determined by the biological criteria and by the reproductive capacity and function of persons. That case implied that misleading an employer as to sexual identity would be good grounds for dismissal.

2. On Art 12

29. As regards the alleged violation of Art 12 of the Convention the applicant submitted that he was psychologically, biologically and socially unable to marry a man. It was also extremely unlikely that any normal man would wish to marry a woman who exhibited male secondary sexual characteristics, or had a confirmed psyche and a male name. It was the law which barred him from marrying a woman. Although it was not necessary to produce a birth certificate in order to marry, his marriage to a woman would, under the present law, be invalid and he had no intention of exposing himself or a wife to the problems which would result were his situation revealed to the authorities. It was his desire to stay within the law. It was also his desire to lead a full male life. He had not previously allowed liaisons to develop beyond friendship for the reasons set out. The consequences of his inability to contract a legal marriage with a woman were, according to the applicant, considerable. He would be unable to adopt children, as an unmarried couple could not together adopt a child. His partner would be subject to comparable indignities. Much of the protective legislation in respect of tax, insurance, social security, security of tenure and the ability to sponsor the settlement of a non-citizen under the Immigration Law would be unavailable. The medical opinion relied on in Corbett v Corbett was scarcely recent. He contested that in the present state of medical knowledge and of English society the treatment of sexual conversion could not be considered as having conferred on the applicant the male sex in the full sense of that term so that he could marry a woman. Insofar as the respondent Government

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relied on the judgment given in the case Corbett v Corbett the applicant pointed out that the medical evidence in that case was given at the end of 1969, some thirteen years ago. Transsexual operations had continued throughout the world since then. There was a radically increased transsexual population for society to respond to. There had also been considerable legal changes and there had been considerable social adjustment to the transsexual.

30. Advances in medical science and the identification of possible chemical basis for psychiatric sex had strengthened the evidence of Dr N. C. Armstrong that transsexuality was a case of physical intersex. The Corbett Case drew a distinction between sex and gender and suggested that it was sex that was important for marriage, but there would be no compelling reason why gender should not predominate for social classification. The reasoning that sex was the necessary classification for marriage was itself derived from an outdated conception of marriage as an institution for biological reproduction, as opposed to a means of self-expression and the development of intimate human relationships. There was a logical inconsistency because English law recognised that physical inability to procreate was not a bar to marriage in non-transsexual cases. Finally, the applicant alleged that the Corbett decision had not been followed by several other judicial authorities in other countries, including apparently a decision of the Supreme Court of New Jersey, which shared with England and Wales a common foundation in the Common Law.

B. The respondent Government

1. On Art 8

31. With regard to the alleged violation of Art 8, the respondent Government admitted that this provision might oblige States to take a positive action for the protection of private life. However, this principle should not be pressed too far. There were limits to the extent to which a State was obliged to undertake positive action. The Convention required the striking of a balance between the competing interests of the individual and of society as a whole. The legal and administrative system which prevailed in the United Kingdom did not upset the fair balance which was required to be struck. Far from prohibiting or opposing the applicant's sexual reassignment, the extensive operations and treatment were carried out under the National Health Service. The respondent Government pointed out that individuals in the United Kingdom were not required to have or to carry documents of identification or any documentation relating to their civil status. Whilst it was the case that the applicant would nevertheless possess documents relating to his identity, such as a passport or a driving licence, he himself acknowledged that documentation that related to him had been changed to reflect his new name. As practice has changed recently he could also apply to have

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the prefix "Mr" added before his name. Express recognition was thus given to the applicant's new sexual identity by the issue of official documents which were, in all respects, consistent with his adopted identity and which reduced to a considerable extent the opportunity for third persons to obtain knowledge of the changes which had occurred.

32. The sole exception to this rule was the birth certificate. Demands of public or general interest were opposed to a change of this document. The system of civil registration of births, deaths and marriages provided and was intended to provide a legal and archival proof of events and served the important public purpose not only of providing accurate and authentic evidence of the events themselves, but also of establishing the connection of families for purposes related to succession, legitimacy and the distribution of property. In addition to this primary function as a legal record, the registration records formed the basis for a comprehensive range of vital statistics and constituted an integral and essential part of the statistical study of population and its growth, medical and fertility research and the like. For this reason, considerable importance was attached to maintaining the strict accuracy of these records.

33. In the absence of an error made at the original entry, the making of an alteration to the birth register would constitute a falsification of the facts which are contained in the register. The present case was distinguishable from the case Van Oosterwijck. In that case a change of forenames was not easily effected for the applicant, who furthermore possessed an identity card indicating his original forenames and not the ones adopted after the change of sex. Furthermore, it was pointed out, the occasions on which disclosure of the change of sex was inevitable in Belgium by production of a current identity card or birth certificate were numerous and varied while in the United Kingdom the occasions on which such a disclosure risked occurring were very limited. Admittedly the birth register and the birth certificate did not reflect the applicant's adopted forenames but they were no documents of current identity. However a birth certificate was not required by law to be produced for any purposes at all. Although in practice there might be occasions where a particular institution or a particular employer may require the production of the birth certificate, this was by no means an invariable practice. For example, birth certificates were never required by insurance companies for the issue of motor or household policies nor, in general, for the issue of a life insurance policy. Even in the case of pensions or annuity policies, a birth certificate was not invariably required, some companies requiring merely a passport or not even that.

34. It was also true that the birth register was easily accessible to the general public, but a person wanting to inspect another person's birth register would have to know not merely the name with which the person concerned was born, but also the date or approximate date of birth, the place of birth and the registration district.

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2. On Art 12

35. As regards the alleged violation of Art 12 the respondent Government submitted that the applicant's inability to marry a woman stemmed exclusively from the substantive and fundamental principle of law that a valid marriage can only be contracted between a man and a woman, i.e. between persons of the opposite sex. It could not fairly be said of the United Kingdom that the question of the proper criteria of sexual identity in the context of marriage had not been fully or thoroughly examined.

36. In the case of Corbett v Corbett, the High Court heard evidence and argument for a period of some 18 days concerning this very issue. Inter alia Dr C. N. Armstrong was heard as medical expert. But his view was not universally shared. It was sufficient to say that advice received from Professor Dewhurst, who also submitted an expert opinion in the case Corbett v Corbett, contradicted Dr Armstrong's view. Even if the latter's view represented the modern trend of opinion it could not be found that the criteria adopted in British case-law were so outmoded or so out of touch with modern opinion as to be arbitrary and unreasonable.

37. It was not correct that the applicant could not adopt a child. As regards adoption the court had to decide in every case whether an adoption can take place. The court had to give first consideration to the need to safeguard and promote the child's welfare. But subject to that there was no objection to a person who has gone through a sex reassignment adopting a child.

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OPINION OF THE COMMISSION

38. The points at issue in the present application are:
- a) whether the non-recognition for all legal purposes of the applicant's present status amounts to a violation of the applicant's right to respect for his private life as guaranteed by Art 8 (1) of the Convention;
 - b) whether the above non-recognition results in depriving him of the right to marry and found a family as guaranteed by Art 12 of the Convention.

A. On Art 8

39. The applicant complains that the United Kingdom law does not confer on him a legal status corresponding to his actual condition. He invokes Art 8 of the Convention which reads as follows:

"1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

40. The object of this Article is "essentially" that of protecting the individual against arbitrary interference by the public authorities. Nevertheless, it does not merely compel the State to abstain from such interference; in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective respect for private life (cf Eur Court HR, judgment of 13.6.1979, Vol 31, para 31).

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41. The Commission has already expressed the opinion in its Report concerning the Van Oosterwijck case (N° 7654/76, 1.3.1979, Publ of the Eur Court HR Series B, Vol 36, p 26, para 52) that a State which refused to recognise the new status of a transsexual after medical treatment resulting in a change of sex failed to respect private life (cf also Meissner v Federal Republic of Germany, N° 6699/74, Comm. Report of 11.10.1979, DR 17, 21; Dec. N° 9420/81, 38 Transsexuals v Italy, 5.10.1982, unpublished).

42. The present applicant is, as has not been contested by the respondent Government, a transsexual having undergone hormone and surgical treatment to change his sex from female to male. His appearance is that of a man, he considers himself as a man and has been living as a male since about 1971 being socially accepted as such. According to the medical expert opinion of Dr C.N. Armstrong the applicant's sex should be assigned male. The respondent Government have, at least for the purposes of Art 8, not contested this. They have referred to the medical opinion of Professor Dewhurst, who was heard as an expert in the case Corbett v Corbett. This case concerned the problem of nullity of a marriage and was decided in 1969. Even if at the time Professor Dewhurst did not agree with Dr C.N. Armstrong's opinion on transsexualism the respondent Government have not shown that in the light of the most recent medical knowledge psychological sex may not be a factor of overriding importance for the determination of a person's status.

43. The Commission accepts the applicant's view that sex is one of the essential elements of human personality. If modern medical research into the specific problems of transsexualism and surgery as effected in the present case has made possible a change of sex as far as the normal appearance of a person is concerned Art 8 must be understood as protecting such an individual against the non-recognition of his/her changed sex as part of his/her personality. This does not mean that the legal recognition of a change of sex must be extended to the period prior to the specific moment of change. However, it must be possible for the individual after the change has been effected, to confirm his/her normal appearance by the necessary documents.

44. In this context the Commission notes that several member States of the Council of Europe have meanwhile recognised the possibility of a change of sex of transsexuals and, subject to certain conditions, acknowledge their right to marry a person of their former sex (see eg the Swedish Act of 21 April 1972 on acknowledgement of sex in certain cases - Lag om fastställande av könstillhörighet i vissa fall - SFS 1972: 119; decision of the Federal Constitutional Court of 11 October 1978, BVerfGE 49, 286 and the German Act on Transsexuals of 10 September 1980, BGBI 1980, I, p 1654; the Italian Act of 4 May 1982 on Correction of Sexual Status - Norme in materia di rettificazione di attribuzione di sesso - Legge 14 aprile 1982, n 164 in Gazz Uff N° 106

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of 19 April 1982 p 2879; in Switzerland the courts recognise a change of sex and allow a corresponding entry in the birth register with effect *ex nunc*; in Norway change of sex is acknowledged by ministerial measures - see Michael R. Will, *Geburt eines Menschenrechts, Geschlechtsidentität im europäischen Recht*, in: *Rechtsvergleichung, Europarecht und Staatenintegration*, 1983, p 911 et seq, at p 916 note 16 and 19).

45. The respondent Government argue that sufficient recognition was given to the applicant's status by the issue of official documents (mentioned above in para 13) to be consistent with his adopted identity. To that extent the case was also distinguishable from the Van Oosterwijck case.

46. The Commission notes however that in the Van Oosterwijck case the legislation and administrative practice of the respondent State, Belgium, also made it possible to reduce to a considerable extent the opportunity for third persons to obtain knowledge of the contradiction existing between the applicant Van Oosterwijck's appearance and his civil status as recorded in his birth certificate. In particular the applicant Van Oosterwijck had the possibility to change his forenames to correspond to his (changed) sex and thus render his identity documents conform to his new identity (*loc cit*, para 47). It was mainly the impossibility to have his birth register, being a document needed to perform certain legal transactions, changed which was the decisive factor for the Commission's opinion as to a violation of Art 8 (*loc cit*, paras 49 et seq).

47. In the present case the respondent Government have admitted that while the law does not prescribe the use of a birth certificate for any kind of legal transactions in practice there might nevertheless be occasions where a particular institution or a particular employer may require the production of a birth certificate. Also, the birth register is easily accessible to the general public. According to the applicant's uncontested statements he himself had to produce his birth certificate when he applied for the first time for a passport and when he enrolled at a university and there were a host of other situations in which a birth certificate was required, eg securing insurance policies, applying for places in higher education or with private employers. In this respect the present case can consequently not be distinguished from the Van Oosterwijck case. The Commission also notes that when the applicant changed his forenames and requested the issue of a passport indicating his adopted forenames it had not been possible for him to obtain the prefix Mr in this document.

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48. It is true that the applicant was, as the respondent Government have further pointed out, even granted free medical assistance for the medical treatment necessary to adapt his appearance to his psychological sex. The Commission considers however that this medical recognition of the necessity to assist the applicant to realise his identity must also be regarded as a further argument for the legal recognition of the change in the applicant's sexual identity. In refusing to consider an entry in the birth register reflecting the applicant's change of sex the respondent Government treats the applicant as an ambiguous being. The applicant has cited an example of what annoying consequences this situation may have. According to his uncontested statements, English case-law implied that an employer who would be "misled" by a transsexual as to the "real" (ie former) sexual identity of the latter had good ground for a dismissal.

49. The refusal to amend the birth register cannot be justified by any reasons of public interest. The respondent Government have pointed out that the birth register was intended to provide authentic evidence of the events and also to establish the connection of families for the purposes related to succession, legitimacy and the distribution of property. However, none of these purposes will be affected by an entry in the birth register to the effect that at a particular moment a person has changed sex. Nor does such an entry affect the statistical value of birth registers. On the contrary it helps to give a statistical picture corresponding to the actual situation.

50. The Commission considers that the failure of the United Kingdom to contemplate measures which would make it possible to take account in the applicant's civil status of the changes which have lawfully occurred, amounts to a veritable failure to recognise the respect due to his private life within the meaning of Art 8 (1) of the Convention.

51. The Commission, therefore, unanimously concludes that Art 8 has been violated in the instant case.

B. On Art 12

52. The applicant submits that by refusing to give legal recognition to his sexual reassignment the United Kingdom is also violating his right to marry and found a family as guaranteed by Art 12 of the Convention.

53. The Commission unanimously concludes that there is no violation of this provision. The Commission is however divided as to the reasons for this conclusion and the two lines of reasoning are set out below separately.

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OPINION OF MM. FROWEIN, BUSUTTIL, TRECHSEL,
CARRILLO and SCHERMERS

54. Art 12 of the Convention provides:

"Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right".

It is true that as things stand the applicant is legally not entitled to marry a woman. This is, however, not the result of a specific act on the part of the respondent Government. It results directly from the fact that the applicant is not recognised as 'a man', a matter of which account has already been taken in connection with Art 8 of the Convention. There is no reason to believe that once this obstacle has been removed the applicant is still not able to marry. Both from the applicant's point of view and that of the respondent Government the applicant's complaint based on an alleged violation of Art 12 of the Convention is thus in the last analysis identical with that raised under Art 8. What he is complaining of is only a necessary consequence of the violation of Art 8.

We conclude that there is no separate violation of Art 12.

OPINION OF MM FAWCETT, TENEKIDES, GOZUBUYUK, SOYER
and BATLINER

55. We do not consider that a violation of Art 8 automatically implies in the instant case a violation of Art 12 or (expressed affirmatively) that the same right which entitles a person under Art 8 of the Convention to be recognised and registered in the births register as "a man" includes in the present case the right to marry under Art 12 of the Convention. On the contrary, we consider that the application of Art 12 must here be separated from the application of Art 8.

1. The two Articles are drafted on a different plan.

Art 8 starts by conferring a right on "everyone" (to respect for his private and family life). Only then does it lay down the limitations which may be imposed on this right by the national law.

Art 12 proceeds differently. The right it mentions (to marry and found a family) is guaranteed "according to the national laws governing the exercise of this right". Certainly, the national laws are by no means free arbitrarily to restrict the right to marry and to found a family - otherwise Art 12 of the Convention would be devoid of sense - but the tenor of this Article is couched in a way which is manifestly less rigid than for instance Art 8. In our view the national laws may submit the exercise of the right to marry and to found a family to limitations which are neither unreasonable nor

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arbitrary according to the natural, fundamental institutions of marriage and the family which form part of the deep-rooted tradition of the member States.

The protection of private life includes in principle the public recognition and the recognition with respect to the social environment in general of a person's civil status as a man or a woman (and consequently the right to registration as a man or a woman or to the amendment of the registration in the birth register, on identity cards etc) but the national laws can clearly require men and women protected by Art 8 of the Convention to satisfy specific requirements in order to marry and found a family with respect to the formalities required for contracting a marriage or as regards age (physical and psychological maturity), and may also exclude certain specified categories of men and women (eg cases of mental disorder, close relatives, adoption or, as is done by some member States of the Convention, physical incapacity to procreate).

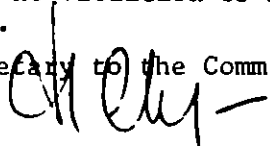
11. More specifically having regard to its social purpose (finalité sociale) Art 12 includes the physical capacity to procreate. This follows from the text of Art 12 "Men and women of marriageable age have the right to marry". These references to marriageable age and to the different sex of the spouses are obviously intended to refer to the physical capacity to procreate. This is confirmed by the preparatory documents for Art 16 (1) of the United Nations Declaration of Human Rights from where the words "âge nubile" in the French version of Art 12 of the Convention were taken which make it clear that the institution of marriage, whose essential purpose is the foundation of a family, requires in principle the capacity to procreate (Summary Record of the (Humanitarian and Social) Committee of the General Assembly, A/C.3/SR.124, Meetings of 21 September - 8 December 1948, Official Records of the Third Session of the General Assembly, p 363; see also A. Verdoodt, Naissance et Signification de la Déclaration Universelle des Droits de l'Homme, Louvain 1964, p 167 - 169; N. Robinson, The Universal Declaration of Human Rights, New York 1958, Art 16, annotation 2, p 125).

It follows that a Contracting State must be permitted to exclude from marriage persons whose sexual category itself implies a physical incapacity to procreate either absolutely (in the case of a transsexual) or in relation to the sexual category of the other spouse (in the case of individuals of the same sex).

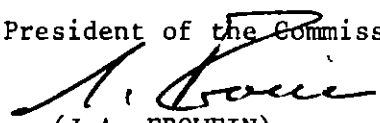
Such situations whose legal recognition might appear to the national legislator as distorting the essential nature of marriage and its social purpose (finalité sociale) justify allowing the State to refuse the right to marry.

For the above reasons we are of the opinion that there has been no violation of Art 12 of the European Convention in the instant case.

Secretary to the Commission


(H.C. KRUGER)

Acting President of the Commission


(J.A. FROWEIN)

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APPENDIX I

History of the Proceedings

Item	Date	Note
Introduction of the application	28 April 1979	
Registration of the application	29 September 1981	
First examination of the application by the Commission and decision to communicate it for observations on admissibility and merits	15 July 1982	MM Nørgaard Sperduti Frowein Fawcett Busuttli Tenekides Trechsel Kiernan Melchior Carrillo Gözübüyük Weitzel Schermers
Receipt of Government observations dated 7 December 1982	10 December 1982	
Receipt of applicant's observations in reply	11 January 1983	
Further examination of the application by the Commission and decision to put questions to the parties	7 July 1983	MM Nørgaard Sperduti Frowein Fawcett Tenekides Trechsel Kiernan Melchior Sampalo Carrillo Gözübüyük Weitzel Soyer Schermers Danellus

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Commission grants the
applicant legal aid

15 July 1983

MM Nørgaard
Sperduti
Frowein
Trechsel
Kiernan
Melchior
Weitzel
Soyer
Schermers
Danelius

Receipt of Government's and
applicant's replies to the
questions put by the Commission

9 September 1983

Further examination of the
application by the Commission
and decision to hold an oral
hearing on the admissibility
and merits of the application

12 October 1983

MM Frowein
Nørgaard
Sperduti
Fawcett
Jörundsson
Tenekides
Trechsel
Kiernan
Melchior
Sampaio
Weitzel
Soyer
Schermers

Hearing on admissibility and
merits and decision to
declare the application
admissible

14 and
15 March 1984

MM Frowein
Fawcett
Busuttill
Tenekides
Trechsel
Melchior
Sampaio
Gözübüyük
Weitzel
Soyer
Schermers
Danelius
Batliner

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Commission takes note that
no result was reached in the
friendly settlement negotiations

6 October 1984

MM Nørgaard
Sperduti
Ermacora
Busuttil
Jörundsson
Tenekides
Trechsel
Kiernan
Carrillo
Gözübüyük
Soyer
Schermers
Danelius
Batliner
Anton
Campinos
Vandenberghe
Mrs Thune

Commission's deliberations on
the merits and adoption of
the Report under Art 31

12 December 1984

MM Frowein
Fawcett
Busuttil
Tenekides
Trechsel
Carrillo
Gözübüyük
Soyer
Schermers
Batliner