

Buller, 157
[Signature]

CP/3485/2003

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. This is an appeal by the Claimant, brought with my permission, against a decision of the Stevenage Appeal Tribunal made on 22 May 2003. For the reasons set out below that decision was in my judgment erroneous in law and I set it aside. In exercise of the power in s.14(8)(a)(i) of the Social Security Act 1998 I substitute for the decision of the Tribunal the decision which on its findings of fact it should in my judgment have made, namely as follows:

The Claimant's appeal against the decision of the Secretary of State made on 19 December 2002 is allowed. Subject to satisfying the other conditions of entitlement, the Claimant is entitled to retirement pension from 11 August 2002. Any issues as to whether the other conditions of entitlement (i.e. other than the Claimant being treated for this purpose as a woman and having made a claim on 11 November 2002) were satisfied, and as to the amount of pension entitlement, are remitted for decision by the Secretary of State.

2. The Claimant was born a male on 14 February 1939. The Tribunal found that she suffers from gender dysphasia and that she had since December 2000 been attending the gender identity clinic at Charing Cross Hospital. She had received hormone therapy and had lived in the female role. According to her claim form, signed on 26 October 2002, she had lived in the female role for more than 2 years by that time. At the date of the decision under appeal (19 December 2002) she was awaiting a placement on the list for gender reassignment surgery. By the date of the Tribunal's decision (22 May 2003) she was on the list, but no surgery had taken place.

3. The claim for retirement pension was made on 11 November 2002 (her 60th birthday having occurred on 14 February 1999). The claim was refused on the ground that the Claimant was a male and had not attained the age of 65. The Tribunal dismissed the Claimant's appeal against that decision.

4. Decision of this case has been stayed to await the outcome in CP/428/2004, in which Mr. Commissioner Bano held, following a reference by him to the Court of Justice of the European Communities, that the claimant in that case, who was a post operative male to female transsexual, had become entitled to retirement pension from the date of her 60th birthday. The ruling of the ECJ on the issue referred to it (see *Richards v Secretary of State for Work and Pensions* (27 April 2006 – C-423/04) was as follows:

“Article 4(1) of Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security is to be interpreted as precluding legislation which denies a person who, in accordance with the conditions laid down by 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.”

5. As the Secretary of State accepts, the only possible distinction between that case and the present one is that in the present case the Claimant had not by the date of the decision

under appeal undergone gender reassignment surgery. The Secretary of State submits that that should make no difference, on the facts of the present case. I agree.

6. In para. 21 of its decision in *Richards* the ECJ had said 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." The ECJ's ruling in *Richards* refers to a person who "in accordance with the conditions laid down by national law, has undergone male-to-female gender reassignment." That wording is at first sight somewhat puzzling, because as at 2002 the Gender Recognition Act 2004 had not of course been passed, and as I understand it there were no conditions laid down by English law for gender reassignment.

7. What I understand that part of the ruling to mean is that, in the absence of statutory provision, it is for the national court in a case of doubt to determine whether, and if so when, gender reassignment took place. Thus, in *A v Chief Constable of West Yorkshire Police* [2004] UKHL 21 Baroness Hale said (at para. 60):

"Until the matter is resolved by legislation, there will of course be questions of demarcation and definition. Some of these, for the reasons explained in *Bellinger*, will be sensitive and difficult. That is presumably why the Court of Justice in *KB* acknowledged the role of the national court in deciding whether the principle did in fact apply in the particular case. One can well envisage a person who claims to have gender dysphoria but who has not successfully achieved the transition to the acquired gender. (One could also envisage a relationship which was not as close to marriage as the relationship in that case.) The Gender Recognition Bill provides a definition and a mechanism for resolving these demarcation questions. But until then it would be for the Employment Tribunals to make that judgment in a borderline case."

8. In determining whether the Claimant had achieved the transition it seems to me to be appropriate to apply by analogy the conditions now laid down in the Gender Recognition Act 2004. By s.1(1)(a) of that Act a person who is aged at least 18 may make an application for a gender recognition certificate on the basis of living in the other gender. By s. 2(1) the Gender Recognition Panel must grant a certificate if it is satisfied that the applicant (a) has or has had gender dysphoria (b) has lived in the acquired gender throughout the period of 2 years ending with the date on which the application is made (c) intends to continue to live in the acquired gender until death and (d) complies with certain requirements as to the provision of sufficient evidence.

9. In my judgment, on the Tribunal's findings of fact which I referred to in paragraph 2 above, for present purposes the Claimant had by 11 August 2002 achieved the transition to the female gender.

10. I therefore make the decision set out in paragraph 1 above.

(signed on the original)

Charles Turnbull
Commissioner
12 February 2007