Neutral Citation Number: [2014] EWCA Civ 1112

Case No: C3/2013/2907

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM Upper Tribunal (Administrative Appeals Chamber)
Upper Tribunal Judge Wright
CP/2758/2011

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 31/07/2014

Before :

LORD JUSTICE MAURICE KAY (VICE PRESIDENT OF THE COURT OF APPEAL, CIVIL DIVISION)
LORD JUSTICE AIKENS
and
LORD JUSTICE UNDERHILL

- -

Between :

MB	**Appellant**
- and -	
SECRETARY OF STATE FOR WORK AND PENSIONS	**Respondent**

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- -

Ms Kerry Bretherton of counsel (instructed **through the Bar Pro Bono Unit**) and **Dr Christopher Stothers** of **Arnold & Porter LLP** for the **Appellant**
Mr Ben Lask (instructed by **the Solicitor to the Department of Work and Pensions**) for the **Respondent**

Hearing date: 21st May 2014

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Approved Judgment

Lord Justice Underhill :

INTRODUCTION

1. The situation which gives rise to this appeal can be summarised as follows:

   (1) The Appellant is a male-to-female transsexual.[1] She was born on 31 May 1948. In 1974, while she was still a man, she married a woman with whom she still lives. They have two daughters. She began to live as a woman in 1991 and underwent gender reassignment surgery in 1995.

   (2) With effect from the coming into force of the relevant provisions of the Gender Recognition Act 2004[2] on 4 April 2005, the Appellant has had the right to apply for a ñfull gender recognition certificateò. Section 9 (1) of the Act provides that ñwhere a full gender recognition certificate is issued to a person, the personôs gender becomes for all purposes the acquired genderò. However a full certificate cannot be issued to a person who is married (see section 4 (2) and (3)).[3] A married person who has had their gender reassigned is entitled to have the marriage annulled on that basis (see Schedule 2 of the Act, adding gender reassignment to the grounds of voidability under section 12 of the Matrimonial Causes Act 1973); but unless and until they do so their change of gender will not be recognised. The effect of these provisions is common ground and I need not set out their full terms.

   (3) The Appellant does not wish to have her marriage annulled. She and her wife have lived as a married couple for 38 years and do not wish to change. Also, as a Christian she says that she and her wife feel married in the sight of God. Accordingly she has not applied for a gender recognition certificate, and so far as the law is concerned she remains a man.

   (4) On 31 May 2008 the Appellant became 60. She applied for a state pension on the ground that she had reached what was then the pensionable age for a woman. The application was refused on the basis that she was a man and was accordingly not entitled to a pension until the age of 65. The provisions governing pensionable age for men and women are sections 44 and 122 of the Social Security Contributions and Benefits Act 1992 (section 122 incorporating the definition of pensionable age in para. 1 of Schedule 4 to the Pensions Act 1995). Again, their effect is common ground and I need not set them out in full.

2. It is the Appellantôs case that that refusal was unlawful because it was contrary to the principle of equal treatment in the field of social security enshrined in Council Directive 79/7/EEC (ñthe Social Security Directiveò) and/or because it constituted

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1 I will refer to the Appellant as ñsheò, although as appears below she has never applied for a gender recognition certificate.

2 The 2004 Act was enacted in the light of the decision of the European Court of Human Rights in *Goodwin v United Kingdom* [2002] IRLR 664, which held that it was a breach of the human rights of a transsexual not to be able to have their change of gender recognised in law.

3 They can be issued with an interim certificate, but that has no effect unless and until the marriage is annulled ï see section 5.

unlawful discrimination under the Equality Act 2010. She does not advance any claim under the Human Rights Act 1998.[4] Once the relevant provisions of schedule 5 of the Marriage (Same Sex Couples) Act 2013 come into force she will be able to obtain a full gender recognition certificate without having to have her marriage annulled (provided that her wife consents); but those provisions are not retrospective and will not therefore give her any right to a pension from age 60.

3. The Appellant appealed to the First-Tier Tribunal against the initial decision of the Secretary of State. Her appeal was heard by Judge Daly, sitting in Oxford, on 18 November 2009. By a reserved judgment dated 6 January 2010 her appeal was dismissed. She did not appeal at the time; but she was subsequently given permission to appeal to the Upper Tribunal. By a reserved judgment issued on 31 July 2013 ([2013] UKUT 290 (AAC)) Upper Tribunal Judge Wright dismissed the appeal. Lewison LJ gave permission to appeal to this Court on 10 January 2014. He also granted an application for anonymity.

4. The Appellant has been represented before us by Ms Kerry Bretherton and Dr Christopher Stothers, acting pro bono, and the Secretary of State by Mr Ben Lask. Both counsel also appeared before the Upper Tribunal.

5. I will take the two bases of the Appellantôs appeal in turn.

(1) THE SOCIAL SECURITY DIRECTIVE

6. The relevant provisions of the Social Security Directive are as follows:

> ñ*Article 1*
>
> The purpose of this Directive is the progressive implementation, in the field of social security and other elements of social protection provided for in Article 3, of the principle of equal treatment for men and women in matters of social security, hereinafter referred to as "the principle of equal treatment".
>
> *Article 2*
>
> This Directive shall apply to the working population - including self-employed persons, workers and self-employed persons whose activity is interrupted by illness, accident or involuntary unemployment and persons seeking employment - and to retired or invalided workers and self-employed persons.
>
> *Article 3*
>
> 1. This Directive shall apply to:
>
> (a) statutory schemes which provide protection against the following risks:

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[4] The decision of the European Court of Human Rights in *Hämäläinen v Finland*, to which I refer at para. 15 below, now confirms that such a claim could not have succeeded.

> ...
>
> old age,
>
> é .
>
> (b) é .
>
> 2-3. é .
>
> *Article 4*
>
> 1. The principle of equal treatment means that there shall be no discrimination whatsoever on ground of sex either directly, or indirectly by reference in particular to marital or family status, in particular as concerns:
>
> - the scope of the schemes and the conditions of access thereto,
>
> - é
>
> - the calculation of benefits including increases due in respect of a spouse and for dependants and the conditions governing the duration and retention of entitlement to benefits.
>
> 2. ...
>
> *Article 5*
>
> Member States shall take the measures necessary to ensure that any laws, regulations and administrative provisions contrary to the principle of equal treatment are abolished.ò

7. In *Richards v Secretary of State for Work and Pensions* (C-423/04), [2006] ICR 1181, the European Court of Justice considered the case of a British male-to-female transsexual who had been denied a pension when she reached the age of 60 in 2002. It held (applying principles about the rights of transsexuals established in its earlier decisions in *P v S* (C-13/94) [1996] ICR 795 and *KB v National Health Service Pensions Agency* (C-117/01), [2004] ICR 781) that article 4.1 of the Directive proscribed

> ñé legislation which denies a person who é 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 é ò

(see para. 38, at p. 1197). That wording reflected the position prior to the coming into force of the 2004 Act. The ñlegislationò referred to appears to be the provisions of the Social Security Contributions and Benefits Act 1992 and the Pensions Act 1995. The

Court observed (see para. 43, at p. 1197H) that the coming into force of the 2004 Act ñis liable to lead to the disappearance of [such] disputesò.

8. In *Timbrell v Secretary of State for Work and Pensions* [2010] EWCA Civ 701, [2010] ICR 1369, a male-to-female transsexual who reached the age of 60 in 2001 sought to invoke the Directive, as interpreted in *Richards*, as giving her a right to a pension as from that date. She had first made a claim for a pension in 2002, but it had hung fire until the decision in *Richards*. This Court upheld her claim. Aikens LJ delivered the only substantive judgment. He identified three issues, which he defined as follows (see para. 36, at p. 1379 D-E):

> ñ(1) Should this court consider Ms Timbrellôs rights to a retirement pension without recourse to the provisions of the 2004 Act?
>
> (2) If so, what is the effect of Directive 79/7 in the light of the decision of the European Court of Justice 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 2004 Act) is discriminatory with regard to acquired gender and pension entitlement, what is the consequence for Ms Timbrellôs claim to a pension from her 60th birthday?ò

As to (1), he held that the appellantôs rights had to be considered as at the date that she first applied for a pension, so that the subsequent enactment of the 2004 Act was immaterial (paras. 37-38). As to (2), he held that the ECJ had made it clear in *Richards* that it constituted discrimination contrary to article 4 of the Directive for a transsexual not to be accorded pension rights to which she would be entitled in her acquired gender because of the absence of any means by which that gender could be recognised in law (paras. 39-43). As to (3), he held that the Directive had direct effect so as to entitle her to receipt of pension from age 60 (paras. 44-45).

9. I shall have to return to some aspects of the reasoning in *Timbrell* in more detail in due course, but it is convenient to deal with one point here. It was common ground, as recorded by Aikens LJ at para. 17 of his judgment (p. 1374), that the decision of the House of Lords in *Bellinger v Bellinger* [2003] 2 AC 467 concerning the meaning of the terms ñmanò and ñwomanò as used in the Matrimonial Causes Act 1973 applied equally to their use in the statutory provisions relating to pensionable age ï that is, that they referred to ñthe biological gender of a person that had been determined (and registered) at birthò. Ms Bretherton made it clear that she made no such concession in the present case. This was not in fact a fight that she needed to have inasmuch as her case was based on the Directive; but I should say that in my judgment the concession in *Timbrell* was correctly made. In the case of pensions legislation, as much as matrimonial law, there is an evident need to have a definition of gender that is precise and formally recognisable: in the absence of a statutory scheme that recognises gender reassignment, that can only be achieved by reference to a personôs gender as registered at birth on the basis of his or her biological characteristics. And even if this were more debatable than I believe it is, it is put beyond doubt by the enactment of the 2004 Act, which is plainly intended to provide a comprehensive scheme for the recognition of gender reassignment in the context of legal rights that depend on

gender: it is a necessary corollary that except where gender reassignment is recognised in accordance with that scheme a personôs gender must be that which appears on the register.

10. The Appellantôs primary case is straightforward. She contends that the direct effect of the Directive as established in *Richards* and *Timbrell* applies equally in her case. Ms Bretherton acknowledged that the Appellant, unlike Ms Timbrell, had reached the age of 60 after the coming into force of the 2004 Act, but she submitted that that was not a material difference: the Directive continued to have direct effect in cases where the 2004 Act failed to secure that a transsexual was treated in the same way as a person who had been a woman from birth. As she put it in her skeleton argument, ñif the Directive could be directly applied prior to [the 2004 Act] it could and must be directly applied in circumstances where [the Act] did not assistò.

11. In my view this submission does not take proper account of the fundamental difference made by the enactment of the 2004 Act. The reasoning in *Timbrell* was based squarely on the fact that the UK had at the material time no legislation dealing with the rights of transsexuals. At para. 42 of his judgment (pp. 1380-1) Aikens LJ said:

> ñIn short, as I read para 38 in the *Richards* case, 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 personôs acquired gender.ò

He also said, at para. 43 (p. 1381 B-D):

> ñ[Counsel for the Secretary of State] is correct in arguing that the decision in the *Richards* case 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 para 31[5] of the judgment recognised, that is a matter for national law, not for the Court of Justice to determine. But that cannot alter the fact that the case 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.ò

In short, the crucial feature in *Richards* was that there was ñno legislative or other legal means to give recognition to a personôs acquired genderò. (It is a nice point whether that analysis is part of the *ratio* in *Timbrell* so as to be binding on us; but in any event I think that it was plainly right ï the language of para. 38 in the judgment of the Court speaks for itself.)

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[5] The judgment as reported, and as it appears on BAILII, refers to para. 31, but I think that must be a slip for ñ21ò: see para. 13 below.

12. That situation no longer obtains. There has since 4 April 2005 been a legislative framework for the recognition of gender reassignment. Section 9 of the 2004 Act provides that recognition of a personôs acquired gender ï ñfor all purposesò ï depends on the issue of a full gender recognition certificate. (Ms Bretherton in her oral submissions argued that the effect of section 9 was simply to create an irrebuttable presumption: it was not saying that without a full certificate a personôs acquired gender could not be recognised by law. That seems to me, with respect, plainly wrong. It is necessarily implicit in the scheme of the legislation that the acquired gender will not be recognised, for the purpose of legal rights which depend on gender ï which include the provisions as to pensionable age ï unless and until such a certificate has been issued.) Thus what Ms Bretherton has to, and does, say is that the Directive creates a positive, and directly applicable, right for a male-to-female transsexual to be recognised as a woman, for pension purposes, even in circumstances where domestic law has set conditions for such recognition with which she does not comply. That is not impossible in principle, given the primacy of EU law, but it is not a question which is decided, or even addressed, in *Richards.*

13. The starting-point in considering such a case is that in *Richards* the ECJ said in terms, at para. 21 of its judgment (p. 1195C), that ñit is for the member states to determine the conditions under which legal recognition is given to the change of gender of a personò. But I accept that it is not possible to stop there. The Court clearly did not intend that member states should have *carte blanche*: that would be clear as a matter of principle, but the point is in any event made explicitly at para. 103 of the judgment of the Strasbourg Court in *Goodwin v United Kingdom* [2002] IRLR 664 which is the ultimate source[6] of the statement which I have quoted. If the conditions in question were such as to place unjustifiable restrictions on the right to have the acquired gender recognised the Court would no doubt hold that they were unlawfully discriminatory. The question in the present case is whether the requirement in section 4 of the Act that any subsisting marriage be annulled prior to the issue of a full gender reassignment certificate is unjustifiable.

14. As to that, we need first to identify the purpose of that requirement. That is straightforward: the purpose is plainly to avoid the anomaly whereby in the case of gender reassignment the law recognised a marriage between two people of the same sex when such a marriage was not otherwise permissible. It was not argued before us that the limitation of the definition of marriage in this way, prior to the introduction of the 2013 Act, was contrary to the European Convention of Human Rights or for any other reason unlawful; but the question is whether the position should be different in the special case of a marriage between persons of different sexes where one of them then changes gender.

15. When the appeal was being argued before us in May, Strasbourg had not yet definitively spoken on that question, although in the admissibility decision of *Parry v United Kingdom* (42971/05) it had held that section 4 of the 2004 Act involved no breach of article 12. But we now have the decision of the Grand Chamber in *Hämäläinen v Finland* (no. 37359/09) promulgated on 16 July 2014 (following an earlier decision of the Fourth Section of the Court ï *H v Finland* – promulgated on 13 November 2012). The facts are very close to those of the present case. Finnish law does not recognise same-sex marriage; and, like the 2004 Act, it makes the

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6 *Via* para. 35 of the judgment of the ECJ in *KB* (above) ï see at p. 804H.

recognition of gender reassignment conditional on the dissolution of a subsisting marriage ï though the marriage can be converted into a ñregistered partnershipò, which is closely analogous to a civil partnership in English law. The applicant was a married male-to-female transsexual who wished to be legally recognised as a woman but was not prepared, for religious and other reasons, to divorce her wife. The Grand Chamber, by a 9-3 majority, held that there was no breach of her rights under articles 8, 12 or 14 of the Convention. I need not set out the reasoning in great detail. At paras. 73-76 of its judgment the majority says:

> ñ73. From the information available to the Court é it appears that currently ten member States allow same-sex marriage. Moreover, in the majority of the member States not allowing same-sex marriage there is either no clear legal framework for legal gender recognition or no legal provisions specifically dealing with the status of married persons who have undergone gender reassignment. Only in six member States which do not allow same-sex marriage does relevant legislation on gender recognition exist.[7] In those States either the legislation specifically requires that a person be single or divorced or there are general provisions stating that after a change of sex any existing marriage is declared null and void or dissolved. Exceptions allowing a married person to gain legal recognition of his or her acquired gender without having to end a pre-existing marriage seem to exist in only three member States é .ò[8]
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> 74. Thus, it cannot be said that there exists any European consensus on allowing same-sex marriages. Nor is there any consensus in those States which do not allow same-sex marriages as to how to deal with gender recognition in the case of a pre-existing marriage. The majority of the member States do not have any kind of legislation on gender recognition in place. In addition to Finland, such legislation appears to exist in only six other States. The exceptions afforded to married transsexuals are even fewer. Thus, there are no signs that the situation in the Council of Europe member States has changed significantly since the Court delivered its latest rulings on these issues.
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> 75. In the absence of a European consensus and taking into account that the case at stake undoubtedly raises sensitive moral or ethical issues, the Court considers that the margin of appreciation to be afforded to the respondent State must still be a wide one (see *X, Y and Z v. United Kingdom*, [22 April 1997], § 44). This margin must in principle extend both to the Stateôs decision whether or not to enact legislation concerning legal recognition of the new gender of post-operative

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[7] Until the 2013 Act the UK would have been a seventh.

[8] There is a fuller analysis of the position in the member states of the Council at paras. 31-33 of the judgment. We had previously been supplied with a schedule prepared by the Ministry of Justice in 2011 which sets out the law about gender recognition in a number of European and other jurisdictions; but it did not focus on the issues of particular interest in this appeal, and in any event what matters for present purposes is the exercise done by the Strasbourg court.

> transsexuals and, having intervened, to the rules it lays down in order to achieve a balance between the competing public and private interests.ò

Against that background, it turns to consider whether the Finnish legislation strikes the appropriate balance. At paras. 87-88 it concludes:

> ñ87. While it is regrettable that the applicant faces daily situations in which the incorrect identity number creates inconvenience for her, the Court considers that the applicant has a genuine possibility of changing that state of affairs: her marriage can be converted at any time, *ex lege*, into a registered partnership with the consent of her spouse. If no such consent is obtained, the possibility of divorce, as in any marriage, is always open to her. In the Courtôs view, it is not disproportionate to require, as a precondition to legal recognition of an acquired gender, that the applicantôs marriage be converted into a registered partnership as that is a genuine option which provides legal protection for same-sex couples that is almost identical to that of marriage (see *Parry v. the United Kingdom* é). The minor differences between these two legal concepts are not capable of rendering the current Finnish system deficient from the point of view of the Stateôs positive obligation.
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> 88. In conclusion, the Court considers that the current Finnish system as a whole has not been shown to be disproportionate in its effects on the applicant and that a fair balance has been struck between the competing interests in the present case.ò

As regards discrimination the majority held that the applicantôs situation was materially different from that of a cissexual and no question of discrimination could accordingly arise (see para. 112).

16. In my view that reasoning is equally applicable to the position in English law at the date with which we are concerned, though I consider at para. 19 below one possible distinction advanced by Ms Bretherton. I see no chance that the Court of Justice of the European Union would hold differently. On matters of this kind it is likely to regard the Strasbourg jurisprudence as highly persuasive: the principles of the Convention are now of course general principles of the law of the EU (see article 6 (3) of the Treaty on European Union). It follows that the effect of section 4 of the 2004 Act does not give rise to discrimination contrary to the principle of equal treatment in the Social Security Directive.

17. Ms Bretherton in a helpful note submitted following the judgment in *Hämäläinen* advanced three points by way of answer.[9] These to some extent reflect submissions which she had already made orally by way of response to Mr Laskôs reliance on *Parry* (and indeed on the decision of the Fourth Section of the Court in *Hämäläinen* itself).

18. First, she emphasises that the Appellantôs case is not concerned as such with her right to be formally recognised as a woman: it is a claim to be entitled to be treated as a

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[9] The note is in fact the work of Dr Stothers as well as Ms Bretherton, but I hope he will forgive me if in order to avoid clumsiness in the drafting I refer to it simply as hers.

woman for the purpose of determining her entitlement to a pension. Putting the same point another way, it is not a human rights claim but a claim under the Directive as interpreted by the ECJ in *Richards*. That is true as far as it goes, but it does not address the essential point. No doubt in general terms the effect of the principle of equal treatment enshrined in the Directive is that a person who has become a woman by gender reassignment must be accorded the same right to a pension as any other woman; but the question is at what point she becomes a woman. Parliament has now answered that question: by section 9 of the 2004 Act she becomes a woman at the point when a gender reassignment certificate is issued to her. If, as I believe, the conditions for the issue of such a certificate are in conformity with the principle of equal treatment the Directive has nothing more to say. The fallacy in Ms Brethertonôs approach is to treat the Directive and/or the ECJ in *Richards* as having prescribed some less restrictive conditions for recognition which the Appellant satisfies and which must trump the conditions prescribed by Parliament. She did not, however, say what those conditions were or where they were to be found and restricted herself to assertions that the Appellant is incontrovertibly a woman: that is not helpful in a context which necessarily depends on legal status.

19. Secondly, she pointed out the importance attached by the majority in *Hämäläinen* to the fact that if the applicant went through the formal procedures to be recognised as a woman her marriage would as a matter of law be ñconvertedò, subject only to obtaining the consent of her wife, into a registered partnership (see para. 87 of the judgment). It is clear from earlier passages in the judgment (see in particular paras. 82-86) that the partnership relationship would be regarded as continuous with the previous marriage, with, as the majority puts it (see para. 84), ñonly a change of title and minor changes to the content of the relationshipò. That is, Ms Bretherton submits, different from the position in England ñwhich requires divorce é and merely the possibility of entering into a separate, later civil partnershipò. That is not strictly accurate, since under the 2004 Act the dissolution of the marriage occurs by way of annulment rather than divorce. Nor is it the whole picture as regards the availability of civil partnership: Schedule 3 to the Civil Partnership Act 2004 provides for a special procedure in the case of parties whose marriage has been annulled by reason of the issue of an interim gender recognition certificate, under which the ñwaiting timeò otherwise required for would-be civil partners is dispensed with. I do not believe that such differences as may remain between the positions in Finland and in England and Wales are of such significance as to justify a different conclusion about the justifiability of making the dissolution of a subsisting marriage a condition of the issue of a full gender recognition certificate. It is also important to recall that a similar point arose in *Parry*, which was concerned specifically with the English legislation. The Court said:

> ñIn 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.ò

That was evidently the passage to which the majority in the Grand Chamber referred with approval at para. 87 of its judgment in *Hämäläinen.* Of course I can understand that to some people there may be an important symbolic difference between marriage and civil/registered partnership and that it is distressing to have to terminate an existing marriage, even if it is done by way of annulment rather than divorce. But the majority in the Grand Chamber held, and I agree, that in a context where same-sex marriage is not permitted those consequences have to be accepted.

20. Thirdly, Ms Bretherton refers to the fact that, as set out in the minority judgment in *Hämäläinen* (see para. 16), the Constitutional Courts of Austria, Germany and Italy have ï in 2006, 2008 and 2014 ï ñoverturned decisions requiring the dissolution of pre-existing marriages as a precondition for the legal acknowledgment of acquired genderò. She acknowledges that at least in the case of Germany and Italy this was because ñthe domestic regulation provided no possibility of continuing the relationship in another formò (see n. 8 to the judgment of the minority)[10]; but she says that that is so in the UK too. But that is the same point, slightly re-packaged, as I have considered at para. 19 above, and I believe that it is wrong for the reasons already given.

21. I would accordingly reject the Appellantôs case based on the Social Security Directive. I have given my reasons without referring to the judgments in either of the Tribunals below. That reflects the fact that we are concerned essentially with a pure point of law, and also that in some respects the argument has moved on because of the decision in *Hämäläinen*. But in fact my essential reasoning is similar to that of Judge Wright in the Upper Tribunal, and I would pay tribute to the careful way in which he dealt with the issue.

(2) THE EQUALITY ACT 2010

22. Ms Bretherton was a little equivocal before us, as she seems to have been before the Upper Tribunal, about whether she was advancing a free-standing claim under the 2010 Act or merely relying on the fact that gender reassignment is one of the protected characteristics prescribed by section 4 as being in some way a ñreinforcingò consideration. She did, however, eventually submit that the Appellant had a free-standing claim under the Act as from 1 October 2010, being the date on which the Act came into force.

23. I remain rather uncertain precisely how the claim is formulated. Ms Bretherton referred in her skeleton argument to Part 3 of the 2010 Act, and I assume that she would rely on section 29 (6), which prohibits a person from doing anything that constitutes discrimination in the exercise of a public function: the discriminatory act complained of would no doubt be the denial to the Appellant of a pension at age 60 because she is a person who has undergone gender reassignment. She also refers to the public sector equality duty enacted by section 149 of the Act, though this at least cannot be intended as a free-standing claim since section 156 of the Act provides that a breach of the duty ñdoes not confer a cause of action in private lawò.

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[10] And in fact in the case of Austria the reasoning was peculiar to Austrian conditions ï see n. 8.

24. Mr Lask in his skeleton argument submitted that the case under the 2010 Act could add nothing because, as he succinctly put it, (1) if the Appellant succeeded on ground 1 ground 2 would be otiose; and (2) if the Respondent succeeded on ground 1 it would be because section 4 of the 2004 Act was not discriminatory, in which case no claim under the 2010 Act could arise. I see no answer to that, and Ms Bretherton was able to provide none. On my conclusions on ground 1, given above, the requirement that the Appellantôs marriage be annulled as a condition of her being entitled to a full gender recognition certificate, and thus to being treated as a woman for pension purposes, does not contravene the principle of equal treatment and is accordingly not discriminatory.

CONCLUSION

25. I would therefore dismiss this appeal. It is a real misfortune for the Appellant that the changes in the law brought about by the 2013 Act have occurred too late for her to benefit from them; but that in turn reflects the pace of the change in social attitudes, and it is alas in the nature of such changes that they will come too late for some. I appreciate that that may seem a rather hollow point in the particular circumstances of this case, given that Ms Timbrell, and other male-to-female transsexuals who reached the age of 60 before 5 April 2005, have established a right to a pension as at that age. But that is only because Parliament had failed to engage earlier with the issue of recognition of gender reassignment, so that the Courts were constrained by the EU legislation to step into the gap; and the resulting discrepancy is in that sense Ms Timbrellôs good fortune rather than any injustice to the Appellant ï but I fear it will not feel that way to her.

Aikens LJ:

26. I agree with the conclusion of Underhill LJ for the reasons that he has given.

Maurice Kay LJ:

27. I also agree.