

Judicial Review

Acknowledgment of Service

Name and address of person to be served

<small>name</small> Secretary of State for Constitutional Affairs
--

<small>address</small> The Treasury Solicitor Queen Anne's Chambers 28 Broadway London SW1H 9JS
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In the High Court of Justice Administrative Court	
Claim No.	CO/746/2005
Claimant(s) <small>(including ref.)</small>	John W. Allman
Defendant(s)	The Secretary of State for Constitutional Affairs
Interested Parties	

SECTION A

Tick the appropriate box

1. I intend to contest all of the claim. } complete sections B, C, D and E
2. I intend to contest part of the claim. }
3. I do not intend to contest the claim. complete section E
4. The defendant (interested party) is a court or tribunal and **intends** to make a submission. complete sections B, C and E
5. The defendant (interested party) is a court or tribunal and **does not intend** to make a submission. complete sections B and E

Note: If the application seeks to judicially review the decision of a court or tribunal, the court or tribunal need only provide the Administrative Court with as much evidence as it can about the decision to help the Administrative Court perform its judicial function.

SECTION B

Insert the name and address of any person you consider should be added as an interested party.

<small>name</small>

<small>address</small>

<small>Telephone no.</small>

<small>Fax no.</small>

<small>E-mail address</small>

<small>name</small>

<small>address</small>

<small>Telephone no.</small>

<small>Fax no.</small>

<small>E-mail address</small>

SECTION C

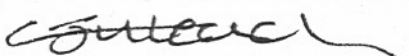
Summary of grounds for contesting the claim. If you are contesting only part of the claim, set out which part before you give your grounds for contesting it. If you are a court or tribunal filing a submission, please indicate that this is the case.

Please see attached

SECTION D

Give details of any directions you will be asking the court to make, or tick the box to indicate that a separate application notice is attached.

SECTION E

<p>*delete as appropriate</p>	<p>*(I believe) (The defendant believes) that the facts stated in this form are true.</p> <p>*I am duly authorised by the defendant to sign this statement.</p>	<p>(if signing on behalf of firm or company, court or tribunal)</p>	<p>Position or office held Solicitor</p>
<p>(To be signed by you or by your solicitor or litigation friend)</p>	<p>Signed </p>		<p>Date 3 March 2005</p>

Give an address to which notices about this case can be sent to you.

If you have instructed counsel, please give their name address and contact details below.

name The Treasury Solicitor	
address Queen Anne's Chambers 28 Broadway London, SW1H 9JS Caseholder: Christopher Leach Ref: LT5/0374E/CYL/D4	
Telephone no. 020 7210 3518	Fax no. 020 7210 3001
E-mail address CLeach@treasury-solicitor.gsi.gov.uk	

name	
address	
Telephone no.	Fax no.
E-mail address	

Completed forms, together with a copy, should be lodged with the Administrative Court Office, Room C315, Royal Courts of Justice, Strand, London, WC2A 2LL, within 21 days of service of the claim upon you, and further copies should be served on the Claimant(s), any other Defendant(s) and any interested parties within 7 days of lodgement with the Court.

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

CO/746/2005

B E T W E E N:

THE QUEEN
on the application of

JOHN ALLMAN

Claimant

and

THE SECRETARY OF STATE FOR CONSTITUTIONAL AFFAIRS

Defendant

SECRETARY OF STATE'S SUMMARY GROUNDS
FOR CONTESTING THE CLAIM

Introduction

1. The Claimant challenges the Secretary of State's implementation of the Gender Recognition Act 2004 ("GRA"). The GRA was implemented by the Gender Recognition Act 2004 (Commencement) Order 2005 of 11 January 2005 (S.I. 2005/54 (C.2)). Under its provisions, the GRA will come fully into force on 4 April 2005.
2. This claim is unarguable because:
 - a. the Claimant is not a "victim" of any breach of Convention rights;

- b. the legislation to which he objects gives effect to a judgment of the European Court of Human Rights ("ECtHR"); it does not give rise to a breach of Convention rights;
- c. the decision to implement an Act of Parliament which gives effect to a judgment of the ECtHR (and the intention of Parliament) cannot be described as irrational.

Not a "victim"

- 3. The Claimant's complaint is that at some unspecified time in the future he may wish to verify the gender of a potential sexual or marriage partner, or potential employee within his home (Statement of Facts, paras 3 and 4), and be unable to do so by means of official records, and that accordingly he runs the risk of unwittingly having a sexual relationship with, or even marrying, a transsexual person who was previously a male. (In fact, transsexual people are already able to obtain many forms of official identification, for example passports and driving licences, in their acquired gender. However the Gender Recognition Act will also enable them, for the first time, to obtain a birth certificate in their acquired gender.)
- 4. Only a person who is a "victim" of an unlawful act may bring proceedings against the relevant public authority pursuant to s 7(1) of the Human Rights Act 1998. Article 34 of the European Convention on Human Rights ("ECHR"), (formerly Article 25) adopts the same test for individual standing:

"The Court may receive applications from any person ... claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention ..."

- 5. In *Klass v Germany* (1978) 2 EHRR 214 para 33 the ECtHR made clear that this test excludes applications of the present kind:

“Article 25 requires that an individual applicant should claim to have been actually affected by the violation he alleges. Article 25 does not constitute for individuals a kind of *actio popularis* for the interpretation of the Convention; it does not permit individuals to complain against a law *in abstracto* simply because they feel it violates the Convention. In principle, it does not suffice for an individual applicant to claim that the mere existence of a law violates his rights under the Convention; it is necessary that the law should have been applied to his detriment.”

6. The Claimant in this case complains against the implementation of the GRA “*in abstracto*” and in the absence of any application of the law to his detriment. Moreover, the risk that the Claimant would suffer (what he would consider to be) any detriment on account of this law is a highly remote one: it is not sufficiently “real and immediate” to render him a victim: *Campbell and Cosans v United Kingdom* (1982) 4 EHRR 293 para 26.
7. Nor does the Claimant “run the risk of being directly affected by the GRA”: *Norris v Ireland* (1989) 13 EHRR 186 para 31. In that case, the applicant, who was a practising homosexual, successfully claimed that Irish legislation penalising certain homosexual acts in private between consenting males violated his Article 8 rights. In the present case, the Claimant’s concerns are far more remote from the operation of the allegedly offending legislation.

The judgment in *Goodwin*

8. The GRA reflects Parliament’s intention that transsexual persons should be free to obtain full legal recognition of a change of gender. It thereby gives effect to the judgment of the Strasbourg Court in *Goodwin v United Kingdom* (Application No. 28957/95, 11 July 2002) as the United Kingdom is required to do under Article 46(1) of the ECHR.
9. The applicant in *Goodwin* was a post-operative male to female transsexual. She complained about the absence of any mechanism whereby legal recognition could

be given to her change of gender. In particular, she complained about her inability to obtain a change to her birth certificate. The ECtHR ruled (para 93):

“Since there are no significant factors of public interest to weigh against the interest of this individual applicant in obtaining legal recognition of her gender re-assignment, it reaches the conclusion that the fair balance that is inherent in the Convention now tilts decisively in favour of the applicant. There has, accordingly, been a failure to respect her private life in breach of Article 8 of the Convention.”

10. The Court went on to consider the Applicant’s complaint that her right to marry, protected by Article 12, had been violated because “she and her partner could not marry because the law treated her as a man”: para 95. The Court concluded that there was “no justification for barring the transsexual from enjoying the right to marry under any circumstances”: para 104.
11. The GRA gives effect to this judgment by providing for a person’s change of gender to be legally recognised for all purposes. Legal recognition of a change of gender will be achieved through the issue of a full gender recognition certificate following assessment by the Gender Recognition Panel, whose members must possess certain prescribed legal, medical or psychiatric qualifications. From 4 January 2005, the Secretariat to the Gender Recognition Panel has been in operation and able to receive applications. The Gender Recognition Panel will legally come into existence on 4 April 2005 and will be able to begin granting applications from that date.
12. The short answer to the Claimant’s arguments under the Convention, therefore, is that the decision to implement an Act of Parliament which itself gives effect to a judgment of the European Court of Human Rights cannot itself give rise to any breach of the Convention. The Convention protects the right of transsexual persons to change their gender, not the proposed right of third parties to enquire into their birth gender.

13. The Claimant contends that the GRA goes “considerably further than the judgment” in *Goodwin*. That is not accepted: *Goodwin* requires the legal recognition of a change in gender of transsexual persons and the GRA achieves it.
14. In any event, the precise scope of the GRA was a matter for Parliament, not the Secretary of State who was charged with its implementation.
15. As to the particular Articles of the Convention relied upon by the Claimant:
 - a. *Article 8*: Article 8 does not entitle the Claimant to any form of information as to a prospective sexual partner or spouse (or employee), still less does it extend to a right to obtain information about the birth gender of a transsexual person. As *Goodwin* makes clear, Article 8 protects the right of a transsexual person to *withhold* that information.
 - b. *Article 9*: Nor does the right to “manifest one’s religion” extend to a right to obtain information about the birth gender of a transsexual person. This is not a protected form of “manifestation”. The GRA does not prevent the Claimant from marrying any person of his own choosing. On the other hand, the Convention does protect the right of a transsexual person to have official records of their birth gender altered to reflect their acquired gender.
 - c. *Article 10*: Article 10 protects freedom of expression. The right to “receive information” covers only information which others are *willing* to impart, and does not extend to a right to access to information from the State: *Leander v Sweden* (1987) 9 EHRR 433 para 74. Still less does it require the State to make available records as to the birth gender of a transsexual person who has obtained a gender recognition certificate.

- d. *Article 12*: The Claimant is not precluded from marrying anyone he wishes by the GRA. Moreover, as *Goodwin* makes clear, the United Kingdom is *obliged* by the Convention to allow transsexual persons to marry in their acquired gender. In any event, Schedule 4 paras 5 and 6 to the GRA amend sections 12 and 13 of the Matrimonial Causes Act 1973 to ensure that a marriage will be voidable if a spouse had changed their legal gender under the GRA prior to the date of the marriage and the petitioner was ignorant of that fact.
- e. *Article 14*: the Claimant is not subject to discrimination on grounds of “sex, religion and opinion”: insofar as the complaint is that the provisions of the GRA prevent the Claimant from obtaining information, it has that effect irrespective of his sex, religion or opinions. The Claimant also argues (paragraph G) that the GRA will increase discrimination against transsexual persons. But the effect of the GRA is to entitle transsexual persons to full legal recognition of their gender reassignment, not to further discrimination against them.
16. Even if it could be successfully argued that the GRA causes any interference with the Claimant’s Convention rights, any such interference would be proportionate to the legitimate aim of protecting the rights of transsexual persons, as recognised in *Goodwin*. Articles 8, 9 and 10 relied upon by the Claimant specifically permit limitations upon the rights they protect “for the protection of rights and freedoms of others.” Similarly Article 12 specifically makes it clear that the right to marry is exercisable in accordance with national law, and this has been held to permit states to impose proportionate restrictions on the right to marry in pursuit of legitimate aims. Discrimination under Article 14 may of course also be justified. (Insofar as the Claimant’s argument is that a breach of his Convention rights is caused by the Secretary of State’s decision to *implement* the GRA, any such interference would also be justified by the weight to be afforded to the intention of Parliament in adopting the GRA, and the need to comply with the judgment in *Goodwin*.)

The Freedom of Information Act 2000

17. The Claimant alleges no breach of the Freedom of Information Act 2000. Section 44 of that Act in any event provides an exemption from freedom of information requirements where disclosure is prohibited by or under any enactment (as it is, for example, under section 22 of the GRA).

Wednesbury unreasonableness

18. The decision of the Secretary of State to implement an Act passed by Parliament cannot be *Wednesbury* unreasonable, especially where, as in the present case, the Act of Parliament gives effect to the United Kingdom's international treaty obligations.

TIM WARD

MONCKTON CHAMBERS

1 MARCH 2005