CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

FOURTH SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 35748/05
by R. and F.
against the United Kingdom

The European Court of Human Rights (Fourth Section), sitting on 28 November 2006 as a Chamber composed of:

Mr J. CASADEVALL, *President*,
Sir Nicolas BRATZA,
Mr G. BONELLO,
Mr K. TRAJA,
Mr S. PAVLOVSCHI,
Mr L. GARLICKI,
Ms L. MIJOVIĆ, *judges*,
and Mr T.L. EARLY, *Section Registrar*,

Having regard to the above application lodged on 30 September 2005,

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicants,

Having deliberated, decides as follows:

THE FACTS

The first and second applicants, R. and F., are British nationals who were born in 1977 and 1974 respectively and live in Scotland. They are represented before the Court by Miss M Dyker, a lawyer practising in Edinburgh.

A. The circumstances of the case

The facts of the case, as submitted by the parties, may be summarised as follows.

The applicants met in October 1997 and started a relationship. They were married in October 1998 and have been living as a married couple since, jointly owning their home and having a joint mortgage.

The second applicant, F., was born male, but underwent gender reassignment surgery (funded by the National Health Service) in November 2003, after a consultation process which began in 1998. The first applicant, R., was involved in this process throughout, attending appointments with the relevant medical professionals, and providing both practical and emotional support. The applicants contend that F.'s treatment and surgery have not affected either the emotional or physical aspects of their relationship, and they have left open the possibility of having children in the future.

F wishes to have her new gender recognised. In particular, she wishes to have a birth certificate upon which her gender is recognised as female. By the provisions of the Gender Recognition Act 2004 ('GRA 2004'), provision is made for those who have acquired a new gender to apply for a full Gender Recognition Certificate ('GRC'). This in turn entitles the holder to obtain what is, to all outward intents and purposes, a new birth certificate recognising their new gender.

However, it is a condition of the issue of a full GRC that the recipient not be married. As she is married, F. is entitled to apply for an interim gender recognition certificate ('GRC') to allow her female status to be officially recognised, but she would only be able to obtain a full GRC if she and R. divorce, something to which they are deeply opposed.

Divorce would necessarily incur costs of GBP 120 together with solicitors' costs of approximately GBP 500. Their representative before this Court also notes that, in the event that R. and F. were required to divorce, she would have to advise them to take independent legal advice with a view to coming to an agreement as to how they should divide their matrimonial property to protect their financial positions. The applicants contend that a failure to take such advice and divide the property accordingly would lead to R., in particular, losing rights. Taking independent legal advice and drawing up a minute of agreement (even if it were not contentious) would

cost in the region of GBP 3,525 for each party. There would also be costs associated with any resulting transfers of property for purposes of division: a sale of their property would incur legal costs of approximately GBP 1,500.

As of 5 December 2005, when the relevant sections of the Civil Partnership Act 2004 entered into force, the applicants are entitled to enter a civil partnership. However, they do not consider such a partnership a full substitute for marriage. They highlight both what they contend is the different social standing attached to such civil partnerships and also the fact that they do not provide identical legal protection to that enshrined in statutes governing marriage. Entry into a civil partnership would also necessarily incur costs of in the region of GBP 93.50.

B. Relevant domestic law and practice

1. Gender Recognition Act 2004

The Gender Recognition Act 2004 ('GRA 2004') provides a mechanism whereby transsexuals may have their new genders recognised. Section 2 provides that a Gender Recognition Panel must grant an application if it is satisfied that the applicant: (1) has, or has had, gender dysphoria; (2) has lived in the acquired gender throughout the preceding two years; and (3) intends to continue to live in the acquired gender until death.

By section 3, an application must include a report from a registered medical practitioner, or a chartered psychologist, either of whom must be practising in the field of gender dysphoria. This report must include details of diagnosis. A second report must also be included, which need not be from a medical professional practising in the field of gender dysphoria, but could be from any registered medical practitioner. At least one of the reports must include details of any treatment that the applicant has undergone, is undergoing or that is prescribed or planned, for the purposes of modifying sexual characteristics.

Section 4 sets down the consequences of an application being successful. It reads in material part as follows:

> "(1) If a Gender Recognition Panel grants an application under section 1(1) it must issue a gender recognition certificate to the applicant.
>
> (2) Unless the applicant is married, the certificate is to be a full gender recognition certificate.
>
> (3) If the applicant is married, the certificate is to be an interim gender recognition certificate.
>
> (4) Schedule 2 (annulment or dissolution of marriage after issue of interim gender recognition certificate) has effect [this amends section 1(1) of the Divorce (Scotland) Act 1976 so that a party can apply to the courts for a divorce on the basis of the issue of an interim gender recognition certificate to either party to the marriage].

Section 5 governs the situation where an interim certificate has been granted. It reads in relevant part as follows:

> "(1) A court which -
>
> ...
>
> (b) (in Scotland) grants a decree of divorce on that ground,
>
> must, on doing so, issue a full gender recognition certificate to that party and send a copy to the Secretary of State.
>
> (2) If an interim gender recognition certificate has been issued to a person and either-
>
> (a) the person's marriage is dissolved or annulled (otherwise than on the ground mentioned in subsection (1)) in proceedings instituted during the period of six months beginning with the day on which it was issued, or
>
> (b) the person's spouse dies within that period,
>
> the person may make an application for a full gender recognition certificate at any time within the period specified in subsection (3) (unless the person is again married).
>
> (3) That period is the period of six months beginning with the day on which the marriage is dissolved or annulled or the death occurs.
>
> (4) An application under subsection (2) must include evidence of the dissolution or annulment of the marriage and the date on which proceedings for it were instituted, or of the death of the spouse and the date on which it occurred.
>
> (5) An application under subsection (2) is to be determined by a Gender Recognition Panel.
>
> (6) The Panel –
>
> (a) must grant the application if satisfied that the applicant is not married, and
>
> (b) otherwise must reject it.
>
> (7) If the Panel grants the application it must issue a full gender recognition certificate to the applicant."

The only function of an interim gender recognition certificate is therefore to provide a document which can be used to obtain a divorce.

The other provisions of the GRA 2004 only apply where a full gender recognition certificate is concerned. These include, for instance, section 9, which provides that:

> "(1) Where a full gender recognition certificate is issued to a person, the person's gender becomes for all purposes the acquired gender (so that, if the acquired gender is the male gender, the person's sex becomes that of a man and, if it is the female gender, the person's sex becomes that of a woman)."

By Paragraph 14 of Part 2 of Schedule 3 to the GRA 2004, the issue of a full gender recognition certificate obliges the Registrar General for Scotland to make an entry in the (new) Gender Recognition Register for Scotland and to mark the original entry in the register of births referring to the birth (or adoption) of the transsexual person to show that the original entry has been

superseded. Paragraph 15 makes provision for an extract to be made of any entry in the GRR. An abbreviated certificate of birth compiled from the GRR must, by Paragraph 16, not disclose that it is compiled from the GRR. Both copies of and abbreviated certificates therefore look the same as any other birth certificates; they therefore act, to all outward intents and purposes, as new birth certificates.

Not all provisions of the GRA 2004 require status or situations existing prior to gender recognition to be changed or dissolved. For instance, provisions as to parenthood (section 12), succession (section 15) and peerages (section 16) explicitly provide that the person's gender has become the acquired gender does not effect their status or rights flowing therefrom.

2. Marriage in Scots Law

Section 5(4)(e) of the Marriage (Scotland) Act 1977 provides that there is a legal impediment to a marriage in Scots law where the parties "are of the same sex." The Scots position is considered to be broadly similar to that in England, where the relevant provision is contained in section 11(c) of the Matrimonial Causes Act 1973, which provides that a marriage is void unless the parties are "respectively male and female."

In the English case of *Corbett v Corbett* [1971] Probate Reports 83 it was held that marriage could only be between a woman and a man, determined on genital, gonadal and chromosomal factors, and should not take into account the party's psychological beliefs, however genuine and profound.

Section 11(c) of the Matrimonial Causes Act 1973 and *Corbett v Corbett* have recently been reconsidered by the House of Lords in *Bellinger v Bellinger* [2003] UKHL 21. Their Lordships considered that the words "male" and "female" were to be given their ordinary meaning and referred to a person's biological gender as determined at birth so that, for purposes of marriage, a person born with one sex could not later become a person of the opposite sex. They therefore held that it was not possible under English (and by analogy Scots) law for a person to marry another person who was of the same gender at birth, even if one of them had undergone gender reassignment surgery. They did, however, issue a declaration that Section 11(c) of the 1973 Act represented a continuing obstacle to the ability of the (male to female) transsexual petitioner to enter into a valid marriage with a man, and that it was therefore incompatible with her rights under Articles 8 and 12 of the Convention.

3. Divorce in Scots law

The Divorce (Scotland) Act 1976, as amended by the Gender Recognition Act 2004, reads in relevant part as follows:

"Section 1

(1) In an action for divorce the court may grant decree of divorce if, but only if, it is established in accordance with the following provisions of the Act that –

...

(b) an interim gender recognition certificate under the Gender Recognition Act 2004 has, after the date of the marriage, been issued to either party to the marriage."

The Divorce (Scotland) Act 1976 does not provide for any defence to divorce where it is sought on the basis of the issue of an interim gender recognition certificate. The Act is to be amended by a Bill currently before the Scottish Parliament, but it does not appear that any amendments that may be made by the Bill are material to this section.

The financial consequences of divorce are set out in the Divorce (Scotland) Act 1976 and the Family Law (Scotland) Act 1985. The rights on divorce are broadly speaking that the parties are each entitled to half of the property referable to the period of the marriage, regardless of the name in which the property in question is formally held. Where no application is made for financial provision under the Family Law (Scotland) Act 1985, then the general law of property applies, such that parties may lose rights – for instance, property will continue to be held by the person in whose name it is held, even if that results in one person having more property than another.

Other consequences of divorce include the loss of spousal rights under the Succession (Scotland) Act 1964, the loss of rights in relation to the matrimonial home under the Matrimonial Homes (Family Protection) (Scotland) Act 1981, tax consequences such as the loss of spousal exemptions, and the loss of entitlement to pension or other benefits contingent on parties being married (e.g. widow's benefits under the Social Security Contributions and Benefits Act 1992). It may also lead to an inability to recover damages if the ex-spouse dies due to somebody else's fault by operation of Schedule 1 to the Damages (Scotland) Act 1976 (although this provision has not been the subject of judicial scrutiny since the passage of the Human Rights Act 1998). Finally, certain rules of evidence, for instance that a spouse is not generally a compellable witness against another spouse (under sections 143 and 348 Criminal Procedure (Scotland) Act 1995), cease to have effect.

4. Civil Partnership Act 2004

This Act (the CPA 2004) came into force on 5 December 2005. It has the effect of allowing same sex couples to acquire a legal status for their relationships, with legal rights and responsibilities. The Act is to be amended with respect to Scotland by the Family Law (Scotland) Bill, currently before the Scottish Parliament; this will have the effect of

increasing the rights of same sex cohabitants in Scotland over and above those in force in England and Wales.

The provisions in the CPA 2004 (as amended as per the Family Law (Scotland) Act 2006) do not exactly mirror those applicable to marriages. For instance, the provisions for formation of civil partnerships do not entirely match those for civil (i.e. not religious marriages) contained in the Marriage (Scotland) Act 1977 and subordinate legislation: there is, for instance, no equivalent to section 23A of the 1977 Act, which preserves the validity of marriages which in their formation failed to comply with one of the formal requirements imposed by that Act.

On dissolution of a civil partnership, the Act does not contain any provision requiring property relating to periods of marriage prior to civil partnership to be taken into account (other than property bought for use as a family home or furniture or plenishings for the home, by an amendment to the Family Law (Scotland) Act 1985).

COMPLAINTS

The second applicant, F., complained under Article 8 that the GRA 2004 represented an unlawful interference with her family life, because it required her to divorce the second applicant, R., before she could obtain a full gender recognition certificate, which she required to access rights to further her personal development. To the extent necessary, she contended that the State's positive obligations under Article 8 were engaged, both to respect her marriage and to recognise her new gender legally; she complained that it breached those obligations to require as a condition for gender recognition that parties to a marriage obtain a divorce where they are unwilling.

Both applicants complained under Article 12 that to force them to divorce would be to make their right to marry enshrined in the Article devoid of content.

The applicants complained under Article 13 that they had no effective remedy in respect of the other violations of their rights of which they complain.

F. complained under Article 14 (read together with Articles 8, 12, 17, and Article 1 of Protocol 1) that the provisions of the Gender Recognition Act 2004 requiring her to divorce are discriminatory.

F. complained under Article 17 that the effect of the GRA 2004 would cause her either to suffer a violation of her right to personal development if she elected or a violation of the rights of both F. and R. under Articles 8, 12, 14 and Article 1 of Protocol 1 if she elected to dissolve the marriage and access legal recognition of her new gender.

R. complained under Article 1 of Protocol 1 as to the interference with her possessions which will follow as a matter of course if she was required to divorce F, both as regarded the direct financial costs of divorce and the loss of property rights contingent thereupon. Although she acknowledged that many of the legal rights lost on divorce might be reacquired if the two entered into a civil partnership under the CPA 2004, she contended that the CPA was insufficient, both because it was not yet in force and because it did not provide the same protection on divorce as did the statutes governing conventional marriages.

THE LAW

I. THE GOVERNMENT'S PRELIMINARY OBJECTION

The Government submitted that the applicants had failed to exhaust domestic remedies under Article 35 § 1 of the Convention as they had made no attempt to pursue a claim in the domestic courts that their Convention rights have been violated, in particular by seeking a declaration of incompatibility under section 4 of the Human Rights Act 1998.

The applicants argued that a remedy which was not enforceable or which was dependent on the discretion of the executive fell outside the concept of effectiveness notwithstanding that it might furnish adequate redress where it had a successful outcome. They refuted the notion that a declaration of a violation by the Strasbourg Court was the same as a finding of incompatibility by the domestic courts, as *inter alia* the findings were fundamentally different in nature and the Strasbourg Court could give pecuniary and non-pecuniary relief.

The Court reiterates that the rule of exhaustion of domestic remedies referred to in Article 35 § 1 of the Convention obliges applicants to use first the remedies that are normally available and sufficient in the domestic legal system to enable them to obtain redress for the breaches alleged. The existence of the remedies must be sufficiently certain, in practice as well as in theory, failing which they will lack the requisite accessibility and effectiveness. Article 35 § 1 also requires that the complaints intended to be brought subsequently before the Court should have been made to the appropriate domestic body, at least in substance and in compliance with the formal requirements laid down in domestic law, but not that recourse should be had to remedies which are inadequate or ineffective (*e.g. Akdivar and Others v. Turkey*, no. 21893/93, §§ 65-67, ECHR 1996-IV; *Aksoy v. Turkey*, no. 21987/93, §§ 51-52, ECHR 1996-VI).

Insofar as the Government argue that the applicants should be required under Article 35 § 1 to seek a declaration that the legislation is incompatible

with the Convention, this is an argument that has been raised in a number of recent cases (see *e.g.. B. and L. v. the United Kingdom*, no. 36536/02, (dec.) 29 June 2004). To date however, the Court has found that a declaration of incompatibility issued by the domestic courts to the effect that a particular legislative provision infringed the Convention cannot be regarded as an effective remedy within the meaning of Article 35 § 1. As stated in *Hobbs v. the United Kingdom*, no. 63684/00, (dec.) 18 June 2002):

> "In particular, a declaration is not binding on the parties to the proceedings in which it is made. Furthermore, by virtue of section 10(2) of the 1998 Act, a declaration of incompatibility provides the appropriate minister with a power, not a duty, to amend the offending legislation by order so as to make it compatible with the Convention. The minister concerned can only exercise that power if he considers that there are 'compelling reasons' for doing so."

Similar reasoning was applied in *Walker v. the United Kingdom* (no. 37212/02 (dec.), 16 March 2004, and *Pearson v. the United Kingdom* (no. 8374/03 (dec.), 27 April 2004).

It remains the case that there is no legal obligation on the minister to amend a legislative provision which has been found by a court to be incompatible with the Convention. It is possible that at some future date evidence of a long-standing and established practice of ministers giving effect to the courts' declarations of incompatibility might be sufficient to persuade the Court of the effectiveness of the procedure. At the present time, however, there is insufficient material on which to base such a finding.

The Court does not consider that these applicants could have been expected to have exhausted, before bringing their application to Strasbourg, a remedy which is dependent on the discretion of the executive and which the Court has previously found to be ineffective on that ground.

Consequently, the Government's preliminary objection is rejected.

II. ARTICLE 8 OF THE CONVENTION

The applicant, F., argued that the recognition of her assigned gender was conditional on her divorce, invoking Article 8 of the Convention which provides as relevant:

> "1. Everyone has the right to respect for his private and family life...
>
> 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."

A. The parties' submissions

The Government accepted that the decision to require a person to end his or her marriage before that person could obtain a full gender recognition certificate engaged the Article 8 right to respect for private life but not that concerning family life as the right to marry was governed by Article 12. They submitted that the effect on past marriages of a change in gender was left within the margin of appreciation as had been expressly mentioned in *Christine Goodwin v. the United Kingdom* ([GC], no. 28957/95, ECHR 2002-VI, § 103). This was entirely appropriate given the different approaches taken by Contracting States to the treatment of same-sex relationships and, even more so, to the recognition of same-sex marriages. It appeared that only three Contracting States permitted the latter while 11 allowed only for civil partnerships. Furthermore a substantial majority of Contracting States that allowed transsexuals to change their legal gender required such persons to bring any existing marriage to an end.

The Government submitted that the law of marriage in Scots law referred to marriage between different sexes and was a sensitive area with profound cultural and religious connotations. It was thus legitimate for the Government to have regard to social, religious, ethical and cultural views within a society when introducing legislation such as the GRA 2004. During the passage of the legislation they and the legislature had been well aware of the concerns now expressed by the applicants for preservation of existing marriages after a change of gender by one of partners but decided that it was appropriate for a clear 'bright line' rule to be maintained, reserving marriage for couples of different sexes. This was a proportionate response bearing in mind that the Civil Partnership Act 2004 permitted transsexuals to enter into a civil partnership with their former spouses, thereby enabling them to enjoy the same financial and other legal benefits associated with marriage. Indeed it permitted persons in the applicants' position to enter such a partnership only one day after the court granted the decree of divorce and the full GRC. They considered that there were only a few, very modest costs associated with the divorce (some GBP 62 for a simplified procedure), civil partnership processes and any drawing up new wills (some GBP 200 for a couple).

The applicant, F., submitted that there had been an interference with both her private life and family life, the latter clearly compassing the relationship that arose from a lawful and genuine marriage. Indeed interferences which split families up were interferences of a very serious nature (*e.g. Sezen v. the Netherlands*, no. 50252/99, 31 January 2006). She did not accept that marriage as a union between man and woman required special protection and argued that the Government had not explained how allowing the applicants' marriage to continue would offend against morality. There was

no moral objection to their original marriage and there was similarly no objection to same sex unions by virtue of the CPA 2004.

The applicant further submitted that allowing subsisting marriages to continue would have no effect on a prohibition of persons of the same sex entering into marriage which was covered by the GRA 2004. The highly exceptional circumstances of the applicants (only two-three dozen of some 75-100 marriages involved partners who wished to continue in marriage after gender change) did not support a floodgates argument or threaten other existing marriages. Requiring the applicants to divorce was not necessary for the aim of protecting marriage between men and women in their view.

The applicant argued that the *Christine Goodwin* case did not support the Government's view, as in context the passage relied on was concerned with striking down a bar on marriage and was taking into account the position of third parties, as for example, where an existing spouse does not wish to continue the marriage. She submitted that it was not decisive that there was no uniformity in approach between Contracting States, as diversity was not surprising. There was however a continuing international trend for equal treatment of opposite and same-sex couples, more countries moving towards same-sex marriages or civil partnerships, with a majority now recognising such unions. Finally, the applicant contended that there would be significant financial costs if they divorced, claiming that in order to protect their financial positions *vis-à-vis* property rights under the existing marriage regime they would either have to opt for a divorce with financial provision (more costly than the simplified divorce procedure as involving affidavits and an agreement) or draw up a minute of agreement in lieu of a court order, which in either case would cost over GBP 2,000. She pointed out that F.'s pensions fund granted rights to spouses on death; under the scheme's rules, it became discretionary. Entering into a civil partnership would not address the prejudice, as it lacked the historic and social value attaching to marriage, did not take into account the emotional repercussions of being required to divorce against their wishes and entailed differences in rights and responsibilities *e.g.* the position as regards pensions was difficult and uncertain).

B. The Court's assessment

The Court recalls that the Grand Chamber judgment in *Christine Goodwin v. the United Kingdom* (cited above) found that there was a breach of Article 8 in the failure of the United Kingdom to provide legal recognition for post-operative transsexuals. Following that judgment, the United Kingdom have introduced a system whereby transsexuals may apply for a gender recognition certificate. The applicant, may, if she wishes to obtain legal recognition, apply for such a certificate. In her case, however, she must as a precondition divorce her spouse R.

The legislation clearly puts F. in a quandary – she must, invidiously, sacrifice her gender or her marriage. In those terms, there is a direct and invasive effect on the applicant's enjoyment of her right to respect for both her private and family life. It would be artificial, and unduly pedantic, to exclude the latter, when the process of divorce would in and of itself affect the status of the family life which the applicant currently enjoys as part of a married couple. However, it must be taken into account, as the Government have asserted, that Article 12 is the *lex specialis* for the right to marry.

It therefore falls to be examined whether the respondent State has failed to comply with a positive obligation to ensure the rights of the applicant through the means chosen to give effect legal recognition to gender re-assignment. In this context, the notion of "respect" as understood in Article 8 is not clear cut, especially as far as the positive obligations inherent in that concept are concerned: having regard to the diversity of practices followed and the situations obtaining in the Contracting States, the notion's requirements will vary considerably from case to case and the margin of appreciation to be accorded to the authorities may be wider than that applied in other areas under the Convention. In determining whether or not a positive obligation exists, regard must also be had to the fair balance that has to be struck between the general interest of the community and the interests of the individual, the search for which balance is inherent in the whole of the Convention (*Cossey v. the United Kingdom* judgment of 27 September 1990, Series A no. 184, p. 15, § 37).

In the present case, the Court notes that the requirement that the applicant divorce flows from the position in Scots law that only persons of the opposite gender may marry; same-sex marriages are not permitted. Nonetheless it is apparent that the applicant may continue her relationship with F 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.

The Court concludes, as regards the right to respect for private and family life, that the effects of the system have not been shown to be disproportionate and that a fair balance has been struck in the circumstances.

It follows that this part of the application must be rejected as manifestly ill-founded pursuant to Article 35 §§ 3 and 4 of the Convention.

III. ARTICLE 12 OF THE CONVENTION

The applicants complained that they were required to obtain a divorce, invoking Article 12 of the Convention which 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."

A. The parties' submissions

Referring also to their arguments above, the Government submitted that the right of a man and a woman to marry was confined to marriage between persons of a different sex (*e.g. B. and L. v. the United Kingdom*, no. 36536/02, § 34, 13 September 2005). This principle applied equally to the consideration whether there was any right to remain married where the gender of one of the parties to the marriage changed. In any event, they submitted that Article 12 rights were not interfered with by the GRA 2004 as the applicants were not required to bring an end to their marriage. It was a matter of choice for the second applicant as to whether to obtain a full GRC. Furthermore, the right under Article 12 was subject to the operation of 'national laws' which in the United Kingdom provided that marriage was a relationship between persons of the opposite sex. This rule did not impair or restrict the very essence of their rights to marry as they would both be free to marry a person of the opposite gender once a full GRC had issued.

The applicants submitted that the Government could not argue that F had deliberately caused her transsexuality or that she could by an act of will stop following her identity; there was no element of choice, or proper, choice involved. However, even if there was, this did not prevent the interference violating their rights. The existing case-law of the Court which limited the applicability of Article 12 to unions between opposite sex couples related to the entering into marriage. The applicants however were not in that position but a couple lawfully married who wished to remain so and no Court case covered that situation. They referred to their arguments above as to the growing international trend and submitted that the very essence of their right was restricted as in order to access rights under the GRA 2004 the applicants would be required to bring their marriage to an end.

B. The Court's assessment

Article 12 secures the fundamental right of a man and woman to marry and to found a family. The exercise of the right to marry gives rise to social, personal and legal consequences and Article 12 expressly provides for regulation of marriage by national law. Given the sensitive moral choices concerned and the importance to be attached in particular to the protection of children and the fostering of secure family environments, this Court must not rush to substitute its own judgment in place of the authorities who are best placed to assess and respond to the needs of society (*B. and L.*, cited above, § 346). The matter of conditions for marriage in national law cannot, however, be left entirely to Contracting States as being within their margin

of appreciation. This would be tantamount to finding that the range of options open to a Contracting State included an effective bar on any exercise of the right to marry. The margin of appreciation cannot extend so far. Any limitations introduced must not restrict or reduce the right in such a way or to such an extent that the very essence of the right is impaired (see *Rees v. the United Kingdom*, judgment of 17 October 1986, Series A no. 106, § 50*; F. v. Switzerland*, judgment of 18 December 1987, Series A no. 128, § 32).

In the present case, the Court notes that the applicants were lawfully married under domestic law. They wished to remain married. Nor were there any children or other individuals identified whose interests might arguably conflict with those of the applicants in this case. In seeking to comply with the Court's judgment in *Christine Goodwin v. the United Kingdom* (cited above) in which it had been found that the biological criteria governing the capacity to marry imposed an effective bar on transsexuals' exercise of their right to marry, the legislature have now provided a mechanism whereby a transsexual can obtain recognition in law of the change and thus be able, for the future, to marry a person of the new opposite gender. The Court observes that the legislature was aware of the fact that there were a small number of transsexuals in subsisting marriages but deliberately made no provision for those marriages to continue in the event that one partner made use of the gender recognition procedure.

In domestic law marriage is only permitted between persons of opposite gender, whether such gender derives from attribution at birth or from a gender recognition procedure. Same-sex marriages are not permitted. Article 12 of the Convention similarly enshrines the traditional concept of marriage as being between a man and a woman (*Rees v. the United Kingdom*, cited above, § 49). While it is true that there are a number of Contracting States which have extended marriage to same-sex partners, this reflects their own vision of the role of marriage in their societies and does not, perhaps regrettably to many, flow from an interpretation of the fundamental right as laid down by the Contracting States in the Convention in 1950.

The Court cannot but conclude therefore that the matter falls within the appreciation of the Contracting State as how to regulate the effects of the change of gender in the context of marriage (*Christine Goodwin*, cited above, § 103). It cannot be required to make allowances for the small number of marriages where both partners wish to continue notwithstanding the change in gender of one of them. It is of no consolation to the applicants in this case but nonetheless of some relevance to the proportionality of the effects of the gender recognition regime that the civil partnership provisions allow such couples to achieve many of the protections and benefits of married status. The applicants have referred forcefully to the historical and social value of the institution of marriage which give it such emotional

importance to them; it is however that value as currently recognised in national law which excludes them.

It follows that this part of the application is manifestly ill-founded pursuant to Article 35 §§ 3 and 4 of the Convention.

IV. REMAINING COMPLAINTS

The applicants also complained under Article 13 that they had no effective remedy in respect of the other violations of their rights of which they complain; F. complained that the provisions of the Gender Recognition Act 2004 requiring her to divorce were discriminatory under Article 14 (together with Articles 8, 12, 17, and Article 1 of Protocol 1) and in breach of Article 17; while R. complained under Article 1 of Protocol 1 as to the interference with her possessions which would follow if she was required to divorce F., both as regarded the direct financial costs and the loss of property rights contingent thereupon.

The Court finds, firstly, as regards Article 1 of Protocol No. 1 to the Convention, that insofar as there would be financial repercussions and an effect on property rights following from any divorce any interference with the right to peaceful enjoyment of possessions would be lawful and disclosing a fair balance between the conflicting interests of the individual and society as a whole. It doubts that the applicants can, for the purposes of Article 14 of the Convention, claim that they are in a comparable position to others who are unaffected by the new legislation but to the extent that any possible issue of difference of treatment arises, this is justified on the same grounds identified above in the context of Articles 8 and 14 of the Convention. It perceives no issue arising under Article 17 of the Convention in the circumstances of this case. Lastly as regards Article 13 of the Convention, it has found no arguable claim arising of a breach of one of the other rights of the Convention and consequently Article 13 is not engaged (*Boyle and Rice v. the United Kingdom*, judgment of 27 April 1988, Series A no. 131, § 52).

It follows that this part of the application is manifestly ill-founded as a whole and must also be rejected pursuant to Article 35 §§ 3 and 4 of the Convention.

For these reasons, the Court unanimously

Declares the application inadmissible.

T.L. EARLY
Registrar

Josep CASADEVALL
President