



10 August 2016

PRESS SUMMARY

MB (Appellant) v Secretary of State for Work and Pensions (Respondent) [2016] UKSC 53
On appeal from: [2014] EWCA Civ 1112

JUSTICES: Lady Hale (Deputy President), Lord Wilson, Lord Sumption, Lord Toulson, Lord Hodge

BACKGROUND TO THE APPEAL

This case concerns Council Directive 79/7/EEC on the Progressive Implementation of the Principle of Equal Treatment for Men and Women in Matters of Social Security (“the Directive”). Article 4 of the Directive provides that there shall be “no discrimination whatsoever on ground of sex either directly, or indirectly by reference in particular to marital or family status”. Article 7(a) provides that the Directive (which has direct effect) was to be without prejudice to the right of Member States to exclude from its scope the determination of pensionable age for the purpose of granting old age and retirement pensions. The United Kingdom has exercised that right.

Under United Kingdom law, a woman born before 6 April 1950 is eligible for the state retirement pension at the age of 60, and a man born before 6 December 1953 is eligible at the age of 65. For people born after those dates, the ages will converge over a period of time. At the time relevant to this appeal, the acquired gender of a transgender person was not recognised for the purpose of determining their qualifying pension age, if they were married.

So far as MB was concerned, she was registered at birth as a man but has lived as a woman since 1991 and underwent gender reassignment surgery in 1995. She has not applied for a full gender recognition certificate because she and her wife are married and wish to remain so, a situation at that time precluded by the conditions for obtaining a full gender recognition certificate [13]. On 31 May 2008, MB turned 60. In July of that year, she applied for a state retirement pension, backdated to her 60th birthday. That application was rejected on 2 September 2008 because, in the absence of a gender recognition certificate, MB could not be treated as a woman for the purposes of pension eligibility and would instead become eligible at 65, as if she were a man. The First-tier Tribunal, Upper Tribunal and Court of Appeal all agreed with that approach [14]. The appellant challenged the compatibility of that approach with the Directive.

JUDGMENT

The Supreme Court refers the question to the Court of Justice of the European Union. Lord Sumption gives the reasons for the referral, with which the rest of the Panel agree.

REASONS FOR THE REFERRAL

The question referred is whether the Directive precludes the imposition in national law of a requirement that, in addition to satisfying the physical, social and psychological criteria for recognising a change of gender, a person who has changed gender must also be unmarried in order to qualify for a state retirement pension [18].

Before 2005, the position under UK law was that a person was treated for all legal purposes as having the gender determined by their biological characteristics at birth. In 2002, the European Court of Human Rights deemed that to be incompatible with Article 8 of the European Convention on Human Rights (the right to private and family life) and, in so far as it prevented a transgender person from marrying a person of the same gender, incompatible with Article 12 (the right to marry and found a family) [4]. The Gender Recognition Act 2004 (which came into force on 4 April 2005) amended the situation such that a person's acquired gender would be legally recognised if they satisfied certain criteria. If a full certificate of gender recognition was issued to a person, their entitlement to a state retirement pension would be decided according to the rules that apply to the acquired gender [7]. If, however, a person was married, because same-sex marriages were not at that time recognised, they received only an interim gender recognition certificate which did not change their legally recognised gender but, first, entitled them to have their marriage annulled after which a full gender recognition certificate would follow [8-9]. Once the Civil Partnership Act 2004 came into force in December 2005 a married person who changed their gender could have their marriage annulled and subsequently enter a civil partnership with their former spouse [10].

In 2014, that situation was changed by the entry into force of the Marriage (Same Sex Couples) Act 2013. The Gender Recognition Act 2004 was amended so that a full gender recognition certificate could, from then on, be issued to a married applicant with the consent of the applicant's spouse [11].

MB has argued that the CJEU has recognised that article 4(1) of the Directive prohibits discrimination between persons of a particular birth gender and people who have acquired that gender and, although it is for member states to determine the conditions by which someone may acquire a gender, that only applies to physical or psychological characteristics and not to marital status [15(1)-(2)]. The imposition of a marital status criterion on a person who satisfies the state's physical and psychological criteria must therefore be unlawful, and cannot appropriately affect eligibility for state retirement pension [15(3)-(4)]. MB therefore argues that the Gender Recognition Act 2004 discriminates against her directly on the grounds of sex, and indirectly because the great majority of people who have undergone gender reassignment have been reassigned from male to female [15(5)].

The Secretary of State argues that the UK procedure by which, for a person's acquired gender to be recognised, a gender recognition certificate must be obtained, is lawful [16(1)-(3)]. There is no reason that the conditions for the acquisition of a gender should be limited to satisfaction of physical and psychological criteria. Conditions may properly reflect social factors such as the status of marriage, which may include a definition of marriage as between a man and a woman [16(4)-(5)]. No question of indirect discrimination arises [16(6)].

The Supreme Court is divided on the correct answer to the question and, since there is no CJEU authority directly in point, it refers the question for their guidance [17].

References in square brackets are to paragraphs in the judgment

NOTE

This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at:

<http://supremecourt.uk/decided-cases/index.html>