RECENT DEVELOPMENTS IN FAMILY LAW

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I. INTRODUCTION

This article is based on a paper which I contributed to the Circuit Court Conference held at the Dunraven Arms Hotel on 12th to 14th April 2002. At the conference I dealt with two distinct aspects of family law:

(1) The question of ancillary relief on judicial separation or divorce, and in particular the division of assets in what are colloquially described as "big money" cases.

(2) Developments in the case law of the European Court of Human Rights as related to the nature, definition and rights of the modern family.

Since last April, both in this jurisdiction and in the European Court of Human Rights, new decisions have either already been made, or are anticipated at an early date, which are relevant to both aspects of family law outlined above. Firstly, in the area of division of major assets it is likely that by the time this article is published the Supreme Court will have delivered judgment in the case of *T. v. T.*[1] What I say here, therefore, is subject to the caveat that is written only in the context of the case law as it existed prior to that decision. Secondly, the subject of the rights of transsexual persons, to which I had referred in the original paper, formed the subject matter of a comprehensive and thoughtful recent judgment delivered by McKechnie J. in the High Court on the 9th July 2002 in the case of *F. v. An tÁrd Chláraitheoir, Ireland and the Attorney General*. This was followed by a landmark decision in the European Court of Human Rights on a similar question, in which the Court reversed previous decisions on the matter. This was delivered on the 11th July 2002 in the

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* Judge of the Supreme Court.

[1] This judgment was delivered on Monday 14 October 2002.

case of *I. v. United Kingdom*.[2] I shall, therefore, here refer to both these judgments and to recent English law in the same area.

II. Ancillary Relief – the division of assets

In the years that have elapsed since the enactment of both the Family Law Act, 1995 and the Family Law (Divorce) Act, 1996 the number of cases of judicial separation and divorce in which the parties are possessed of very large assets has considerably increased. Due to the inherent complexity of the financial questions which may arise and to the need for full financial discovery many of these cases are brought in the High Court. However, the Circuit Court and the High Court have concurrent jurisdiction under the present legislation and Circuit Court judges are also required to deal with this type of case on quite a regular basis. In practice many of these cases have been settled, although possibly at a later than ideal stage in the proceedings. The fact that the parties can reach agreement is in itself good. Somewhat less desirable from the point of view of practititioners and the court itself is that there have been relatively few written decisions which might establish guidelines or parameters on the approach of the Irish courts to this type of case.

The same is not true in England, where over the years there has been a line of decisions establishing quite rigid rules as to the amount and proportion of family assets which could be paid over to an applicant spouse – in general to a wife. This situation has, however, recently been altered, and to some extent thrown into confusion, by the decision of the House of Lords in *White v. White*.[3] Some consideration of this judgment is relevant here, if only because it appears to be opened by counsel on a regular basis in so many Irish family law cases – at times regardless of its actual relevance.

As long ago as 1975 the English courts adopted a practice of assessing financial provision having regard to the "reasonable requirements" of the claimant (see *O'Donnell v.*

[2] European Court of Human Rights, unreported, 11 July 2002.

[3] [2001] 1 A.C. 596.

O'Donnell[4]). In a series of cases the English courts developed a principle that the claimant's reasonable requirements should be treated as a determinative and limiting factor on the amount of any award which should be made. The amount of such "reasonable requirements" was calculated in accordance with principles which had their foundation in the case of *Duxbury v. Duxbury*.[5] This calculation was aimed at ensuring that the claimant (in general the applicant wife) was provided with sufficient capital and/or property to provide for a lifestyle which was reasonable in the circumstances of the family until her death. She did not receive any additional assets. As was stated by Lord Nicholls of Birkenhead in *White v. White*:

> The amount of the *Duxbury* fund is calculated on the basis that the capital as well as the income will be used. The calculation assumes that nothing will be left when the wife dies. This was put graphically by Peter Singer Q.C. (now Mr Justice Singer) in a challenging paper presented to the Family Law Bar Association in May 1992. The *Duxbury* fund calculation involves using income and ultimately exhausting the capital at the theoretical point when the wife would down her last glass of champagne and expire as predicted by the life tables.[6]

The *Duxbury* principles were largely applied in what are known as "clean break" cases – where a finite amount of assets is transferred to the applicant spouse at the time of the divorce and he or she can then make no further financial claim on his or her spouse in the future.

In the case of *White v. White* the House of Lords for the first time comprehensively reviewed the principles applied by the English courts to the grant of ancillary financial relief in divorce cases. The Court set out a number

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[4] [1975] 2 All E.R. 993; [1976] Fam. 83.

[5] [1990] 2 All E.R. 77; [1992] Fam. 62.

[6] [2001] 1 A.C. 596 at 609-610.

of broad principles. The Court was of the view that the history and text of the relevant statutory provisions in England was such as to make it clear that no presumption of equal division arose in regard to the distribution of assets. Lord Nicholls, giving the main judgment of the Court, stated:

> A presumption of equal division would be an impermissible judicial gloss on the statutory provision. That would be so, even though the presumption would be rebuttable. Whether there should be such a presumption in England and Wales, and in respect of what assets, is a matter for Parliament.[7]

However the Court was of the view that the concept of equality was relevant to the exercise to be carried out. Equality could be used as a yardstick against which the fairness of the proposed division of assets could be judged. Nicholls stated:

> More often, having looked at all the circumstances, the judge's decision means that one party will receive a bigger share than the other. Before reaching a firm conclusion and making an order along these lines, a judge would always be well advised to check his tentative views against the yardstick of equality of division. As a general guide, equality should be departed from only if, and to the extent that, there is good reason for doing so. The need to consider and articulate reasons for departing from equality would help the parties and the court to focus on the need to ensure the absence of discrimination.[8]

But the House of Lords made it clear that there was no place for discrimination between husbands and wives in regard to the distribution of assets. Lord Nicholls points out:

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[7] [2001] 1 A.C. 596 at 606.

[8] [2001] 1 A.C. 596 at 605.

> But there is one principle of universal application which can be stated with confidence. In seeking to achieve a fair outcome, there is no place for discrimination between husband and wife and their respective roles … If, in their different spheres, each contributed equally to the family, then in principle it matters not which of them earned the money and built up the assets. There should be no bias in favour of the money-earner and against the home-maker and the child-carer.[9]

As far as financial needs were concerned their Lordships were of the view that there was nothing in the relevant legislative provisions nor in principle which required financial need to be a determinative factor in deciding the amount of an award. Lord Nicholls stated:

> ... I can see nothing, either in the statutory provisions or in the underlying objective of securing fair financial arrangements, to lead me to suppose that the available assets of the respondent become immaterial once the claimant wife's financial needs are satisfied … On the facts of a particular case there may be a good reason why the wife should be confined to her needs and the husband left with a much larger balance. But the mere absence of financial need cannot, by itself, be a sufficient reason. If it were, discrimination would be creeping in by the back door.[10]

This portion of the judgment would appear to constitute the death knell of "the *Duxbury* principles" as a determinative or limiting factor in regard to how much may be awarded to a claimant. However, the financial needs of the claimant continue to be a relevant factor which should be taken into account in assessing what is fair in each case.

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[9] [2001] 1 A.C. 596 at 605.

[10] [2001] 1 A.C. 596 at 608.

What, then, is the relevance of *White v. White* to the division of assets on separation or divorce in this jurisdiction? As was stated by Gerard Durcan S.C. in a recent lecture:

> Overall viewed from the perspective of an English family practitioner *White v. White* was a seismic change in approach in emphasis. Viewed, however, from the perspective of an Irish family lawyer the decision is not as significant since Irish law had never put the same degree of emphasis on financial need, see the judgment of McGuinness J. in *D. v. D.* [1997] 3 IR 64. *White v. White* heralded a return by the English Courts to the concept of simply seeking to do what was fair in all the circumstances, in particular having regard to all the factors set out in the relevant legislation, without giving one factor such as financial need such an unduly important and determinative role.[11]

It seems to me also important to remember that the rules and principles in *Duxbury* were designed in the context of a "clean break" on divorce. Under our divorce legislation it is virtually impossible for the Court, or even for the parties by agreement, to reach a true clean break situation. *Duxbury*-type calculations simply do not work in the Irish legislative context. In practice, the approach of the Irish Courts has been much nearer to that set forth by Lord Nicholls in *White v. White*. The emphasis has been on fairness, as measured in the light of the factors set out in section 20 of the Family Law (Divorce) Act, 1996. This is set out in the course of the Supreme Court decision in *K. v. K.*[12] It was there stated (at page 16):

> The concept of a single capital payment to the wife to meet her 'reasonable requirements' for

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[11] Durcan, "Ancillary Relief Update", lecture given at the Family Law in Ireland Conference 2002 organised by Jordans.

[12] Supreme Court, unreported, 6 November 2001.

> the remainder of her life has never in fact formed a part of Irish family law. There are two main reasons for this. Firstly, such a capital payment is inevitably part of a 'clean break' settlement in divorce proceedings. In this jurisdiction the legislature has, in the Family Law (Divorce) Act 1996, laid down a system of law where a 'clean break' solution is neither permissible nor possible. Secondly, the approach of the Irish Courts, in accordance with both Article 41.2 of the Constitution and the statutory guidelines, has been to give full credit to the wife's contributions through her work in the home and as a mother of her children. (see, for example, *JD v. DD* [1997] 3 IR 64). In this jurisdiction the overriding requirement of a fair outcome is governed by section 20(5) of the 1996 Act:
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> > The Court shall not make an order under a provision referred to in sub-section (1) unless it would be in the interests of justice to do so.

It is, of course, also of crucial importance that in Article 41.3.2° it is stated that on granting a decree of divorce the Court must be satisfied that "proper provision" has been made for both spouses and for the children of the marriage.

Similar questions in regard to the division of large capital assets arose in the case of *T. v. T.* in which Lavan J. gave judgment on 28th November 2001. Since at the time of writing this article judgment of the Supreme Court is awaited in the appeal in this case it would be improper for me to comment on the case here. For the sake of completeness, however, I should mention the case of *W. v. W.,* an *ex tempore* judgment of McKechnie J. delivered on 17th December 2001. The total assets in that case had a value of approximately £16.5 million to £17.5 million consisting very largely of cash which had accrued from the sale of a farm which had been granted planning permission as development land. The lands had been owned by the respondent husband's

parents and had been in due course transferred to him. The wife had, to some limited degree, been involved in the family farm and had been primarily responsible for the rearing of the children. A business enterprise had been pursued on the lands by the husband with some assistance from the wife following the separation. The applicant wife was anxious to receive a lump sum out of which she would make provision for herself for the rest of her days. McKechnie J. held on the facts that if such provision was made for her by lump sum it was highly unlikely that the wife would make any further application in regard to proper provision. He held therefore that it was an appropriate case in which proper provision should be made by lump sum, and having regard to all the facts he awarded the wife a lump sum of £4.7 million and allowed her to retain the sum of £220,000 which she had already received from the proceeds of sale. In his judgment McKechie J. accepted the principles set out in *White v. White*, *K. v. K.* and *T. v. T.* However, he pointed out that in his view the guidance which could be obtained from such cases was of limited benefit since each of them in the end stressed the need to do what was fair in all the circumstances.

Finally, while all the cases to which I have referred above were big money cases, one might ask whether the principles applicable in these cases have any relevance for cases where the assets are modest. It seems to me that they do insofar as they deal with the proper approach to be adopted by the Court. They indicate that the crucial test in all cases must be to achieve a division of assets which is fair in all the circumstances and in particular having regard to the factors set out in section 20 of the 1996 Act. There is no reason to believe that this overall approach is any less valid in regard to those of modest means rather than the rich.

III. The European Convention on Human Rights and the Family

Under the Belfast Agreement the Irish Government pledged to take steps to strengthen further the protection of human rights in its jurisdiction and to consider the incorporation of the European Convention into Irish law. Although Ireland was among one of the first countries to

ratify the Convention and was the first to allow the right of individual petition (in 1953), it has not as yet incorporated the Convention into domestic law.

During the period of office of the last Government the European Convention on Human Rights Bill 2001 was introduced before the Oireachtas; it proposed to effect the incorporation of the Convention. This Bill went as far as Committee Stage but fell with the dissolution of the Dail and as yet the present Government has not introduced any similar proposed legislation. Given the terms of the Belfast Agreement, and the fact that all the United Kingdom jurisdictions have some time ago incorporated the Convention into their domestic law, one would expect that the present Government will introduce proposed legislation in this area.

Under the 2001 Bill section 2(1) provided that in interpreting and applying any statutory provision or rule of law the Court should do so in a manner compatible with the State's obligations under the Convention provision insofar as was possible, subject to the rules of law relating to such interpretation and application. Under section 4 in interpreting the provisions of the Convention judicial notice was required to be taken of any declaration, decision, advisory opinion or judgment of the European Court of Human Rights, any decision or opinion of the European Commission and any decision of the Committee of Ministers established under the statute of the Council of Europe. The Court when applying and interpreting the Convention provisions should take due account of the principles laid down by those declarations, decisions, advisory opinions and judgments. This approach may (or may not) be reproduced in any new legislation. In the meantime courts in this jurisdiction face the difficulty that, while at present the Convention does not form part of domestic law, reference is made from time to time both in submissions and in judgments to decisions of the European Court of Human Rights. This must also be seen in a context where the decisions of the European Court of Human Rights are assuming greater importance in the jurisprudence of the European Court of Justice. It is, I think, notable that in his

recent judgment in *F. v. An tÁrd Cláraitheoir and Others*[13] McKechnie J. fully surveyed the decisions of the European Court of Human Rights to that date on the question of transexuality and took them into account in making his decision. Despite the present uncertain situation, therefore, I think it is useful to look at some of the decisions under the Convention which deal with the protection of families which fall outside the traditional definition of the unitary family based on marriage. As can be seen from the *F. v. An tÁrd Cláraitheoir* case, it would be a mistake to believe that such cases will not arise in Irish Courts.

The main source of protection for the family under the European Convention is contained in Article 8 which provides:

> (1) Everyone has the right to respect for his private and family life, his home and his correspondence.
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> (2) There should be no interference by a public authority with the exercise of this right except such as 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.

In addition Article 12 guarantees the right to marry and found a family, and the important role played by parents in the education of their children is recognised in the second sentence of the education provision in Article 2 of the First Protocol to the Convention. Further express protection is offered to the family by Article 5 of the Seventh Protocol which guarantees equality between spouses as regards their children both during marriage and in the event of its dissolution.

In their examination of Article 8 the Commission and the Court generally consider whether "family life" within the

[13] High Court, unreported, 9 July 2002.

meaning of the Convention exists. As a second step they consider any possible violation of rights by reference to (a) the concept of failure to "respect" that family life or (b) the existence of an "interference" with that family life. In the latter case the Strasbourg organs consider whether such interference is "in accordance with the law", has a "legitimate aim" and is "necessary in a democratic society".

Notably Article 8 of the Convention protects "family life" rather than the family as a unit and this means that the existence of family relationships is not always sufficient to attract the protection of Article 8. The Court and the Commission have maintained a flexible approach to the interpretation of "family life", bearing in mind the diversity of family arrangements, the implications of divorce and medical advances. Generally the existence of family life depends on whether there are close personal ties between the parties. An increasing number of family relationships enjoy the automatic protection of Article 8.

The case of *Marckx v. Belgium* extended the application of Article 8 to the family outside marriage. The Court stated that:

> ... 'family life', within the meaning of Article 8, includes at least the ties between near relatives, for instance, those between grandparents and grandchildren, since such relatives may play a considerable part in family life.[14]

However unmarried parents and their children do not always benefit from a presumption of family life. In the case of *Johnston v. Ireland*[15] the Court found that the relationship between two adults who live together, but were unable to marry due to the lack of divorce in Irish law at the time, and their daughter deserved the protection of Article 8. The Court was persuaded by the stable nature of their relationship and the fact that it was otherwise indistinguishable from the family based on marriage. Therefore parents who live

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[14] 2 E.H.R.R. 330 at 348.

[15] 9 E.H.R.R. 203.

together with their children as a family are especially likely to enjoy the automatic protection of Article 8. Co-habitation however is not the *sine qua non* of family life irrespective of the parents marital status. Traditionally where the father was neither married to nor co-habiting with the mother and their child, he did not enjoy the protection of Article 8 unless he could prove that in addition to a blood link he enjoyed close personal ties with his child by reference to emotional or financial commitment. There is evidence, however, that this perspective is changing. In later cases the Court has made it clear that the child/parent relationship starts from a different point: family life exists and the tie cannot be broken save in exceptional circumstances.

In *Keegan v. Ireland*[16] where the applicant's daughter was placed for adoption by the child's mother without his consent or knowledge, depriving him of the opportunity to establish close personal ties with her, the Court found that the potential family life between father and child meant that the relationship fell within the scope of Article 8, notwithstanding that they had met on only one occasion. The Court pointed to the nature of the relationship between the child's parents – they planned the pregnancy and intended to marry – in finding that potential family life existed between them.

This flexible approach to the existence of family life has enabled the Commission and the Court to adapt the concept to the challenges brought by modern family arrangements of an unconventional kind. This was highlighted in the case of *X., Y. and Z. v. United Kingdom*.[17] Here the Court considered the relationship between a female to male transsexual (X) and his child Z born by artificial insemination by donor to Y the partner of X. X was not permitted in the United Kingdom to be registered as the father of Y. The British Minister of Health took the view that only a biological man could be regarded as the father for the purposes of registration. The relationship between them was found to be family life within the meaning of Article 8 of the

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[16] 18 E.H.R.R. 342.

[17] 24 E.H.R.R. 143.

Convention. The Court noted that X was a transsexual who had undergone gender reassignment surgery. He lived with Y to all appearances as her male partner since 1979 and the couple were granted treatment by AID through the National Health Service to allow Y to have a child. X was involved throughout that process and had acted as Z's "father" in every respect since the birth. In those circumstances the Court considered that a de facto family life existed between the three applicants. This approach places emphasis on the social rather than on the biological reality of the situation. However the Court concluded that respect for the relationship of family life between the transsexual father and the child born to his partner by AID did not require its formal legal recognition. The Court observed that the community as a whole had an interest in maintaining a coherent system of family law which placed the best interests of the child at the forefront. The Court noted that while it had not been suggested that the amendments to the law sought by the applicant would be harmful to the interests of the child Z or of children conceived by AID in general it was not clear that it would necessarily be to the advantage of such children. The Court concluded that in these circumstances the State might justifiably be cautious in changing the law.

Article 8 of the Convention has frequently been used with varying degrees of success in cases within the context of immigration. In particular it has been invoked where parents and/or their children are being deported from a Convention State or where they are refused entry for the purposes of family reunification. An example of this is the case of *Berrehab v. The Netherlands*.[18]

The considerable publicity given to the decision of the High Court in *F. v. An tÁrd Cláraitheoir and Others* has directed attention in this jurisdiction to the legal and social difficulties experienced by transsexuals. To date the main legal questions which have arisen are the right of a transsexual person to have his or her birth registration altered to reflect his or her new sexual identity, and the right to

[18] 11 E.H.R.R. 322. For those who wish to read further on this topic there is an interesting article by Jane Liddy entitled "The Concept of Family Life under the ECHR" to be found at (1998) 3 E.H.R.L.R. 15.

marry. In English law the established position was that set out in *Corbett v. Corbett (otherwise Ashley)*.[19] In that case the respondent had been registered at birth as a male and had served in the Merchant Navy, which he left after taking an overdose of tablets. After taking hormonal treatment for some years he underwent, in 1960, in Casablanca reconstruction surgery and thereafter changed his name and lived as a woman. In September 1963 the respondent went through a ceremony of marriage with the petitioner, a man, who knew the respondent's background. The marriage was not a success and in December 1963 the petitioner petitioned for nullity based on the ground that the respondent was male. The judge granted a decree of nullity. There was considerable medical evidence before the Court which was surveyed by Ormrod J. In his judgment having considered both the evidence and the law the learned judge held that the law should adopt the chromosomal, gonadal and genital tests of sex, and if all three were congruent the law should determine the sex for the purpose of marriage accordingly and ignore any operative intervention. He concluded that the respondent was not a woman for the purposes of marriage but was a biological male and had been so since birth. It followed that the so called marriage of 10th September 1963 was void.

The judgment of Ormrod J. was not appealed and its conclusions were put on a statutory basis in the Nullity of Marriage Act 1971, section 1, which stated:

> A marriage which takes place after the commencement of this Act shall be void on the following grounds only, that is to say…
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> (c) that the parties are not respectively male and female.

This was re-enacted in the Matrimonial Causes Act, 1973.

The decision in *Corbett v. Corbett* was comprehensively reconsidered by the English Court of

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[19] [1971] P. 83; [1970] 2 All E.R. 33.

Appeal in the case of *Bellinger v. Bellinger*.[20] In that case the appellant, B. was correctly classified at birth as a male but underwent gender reassignment surgery which was completed in 1981. In that year B went through a ceremony of marriage with a man who was at all times aware of her background and was entirely supportive of her. The couple had thereafter lived together as husband and wife. B subsequently petitioned the Court for a declaration, opposed by the Attorney General but not by her husband, that the marriage was valid at its inception and was subsisting. The judge, following *Corbett v. Corbett*, refused to grant the declaration, holding that B was male at the time of the marriage ceremony and remained so. On appeal the Court of Appeal held by a majority (Dame Elizabeth Butler-Sloss P. and Robert Walker L.J.) that although it was for the Court to determine whether a person was male or female by assessing the facts of the individual case against a clear statutory framework, it was for Parliament to determine the point at which it would be consistent with public policy to recognise that a person should be treated for all purposes, including marriage, as a person of the sex opposite to that which has been correctly assigned to that person at birth. The legal recognition of marriage, like divorce, was a matter of status and was not for the spouses alone to decide. It affected society and was a question of public policy. The Court therefore refused the declaration sought by B. However there was a strongly argued dissenting judgment by Thorpe L.J., a judge with wide experience of family law matters. At page 193 of his judgment he cited a paper by Lord Reed as follows:

> The law needs to respond to society as it is. Transsexuals exist in our society, and that society is divided on the basis of sex. If a society accepts that transsexualism is a serious and distressing medical problem, and allows those who suffer from it to undergo drastic treatment in order to adopt a new gender and thereby improve their quality of life, then

[20] [2002] Fam. 150; [2002] 1 All E.R. 311.

> reason and common humanity alike suggest that it should allow such persons to function as fully as possible in their new gender…
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> Thorpe L.J. went on to conclude:
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> That citation formulates and clarifies the essential issue for decision in this appeal. The range of rights claimed by transsexuals falls across the divisions of our justice systems. The present claim lies most evidently in the territory of the family justice system. That system must always be sufficiently flexible to accommodate social change. It must also be humane and swift to recognise the right to human dignity and to freedom of choice in the individual's private life. One of the objectives of statute law reform in this field must be to ensure that the law reacts to and reflects social change. That must also be an objective of the judges in this field in the construction of existing statutory provisions. I am strongly of the opinion that they are not sufficiently compelling reasons, having regard to the interests of others affected or, more relevantly, the interest of society as a whole, to deny this petitioner legal recognition of her marriage. I would have allowed the appeal.

As I have pointed out earlier the first major judgment to deal with the problem of transsexualism in this jurisdiction is that of McKechnie J. in *F. v. An tÁrd Cláraitheoir*.[21] In his extremely comprehensive and careful judgment McKechnie J. reviews the very considerable medical evidence that was before the Court and also the law, including the English law and the law of the European Court of Human Rights. He noted the gradual change in the approach of the European Court of Human Rights to transsexual cases and commented on such cases as *Van Oosterwijk v. Belgium*,[22] *Rees v. United*

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[21] High Court, unreported, 9 July 2002.

[22] (1981) 3 E.H.R.R. 557.

Kingdom,[23] *Cossey v. United Kingdom*,[24] *B. v. France*[25] and *Sheffield and Horsham v. United Kingdom*.[26] At pages 106 to 123 of his judgment he surveys all of these cases in detail. In general the European Court of Human Rights in these cases held that there was no violation of Article 8 on account of the failure to change birth registration or recognise marriage in regard to transsexuals but the size of the majority of judges so holding declined considerably over the years. In a number of the cases it was held that only the margin of appreciation which was allowed to individual States prevented the Court from holding against the respondent State. As was pointed out by McKechnie J. at page 112 of his judgment:

> In *Rees* the court had held by twelve votes to three that there was no violation of Article 8 and held unanimously on Article 12. Four years later the challenge to Article 8 was defeated only by ten votes to eight with fourteen votes to four votes holding against the violation of Article 12. This pattern of voting is relied upon as showing even in that short period of time a view progressively more favourable to the postoperative transsexual in the recognition of their fundamental rights.

McKechnie J. considers these cases and the various submissions made to him by the applicant in the light of the Irish Constitution. It is clear from his judgment that he showed considerable understanding and sympathy for the difficulties experienced by the applicant but in his conclusions he refused to grant the order sought by the applicant correcting the original entry regarding sex in the register of births.

Two days after Mr Justice McKechnie's judgment the European Court of Human Rights delivered judgment in *I. v.*

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[23] (1987) 9 E.H.R.R. 56.

[24] (1991) 13 E.H.R.R. 622.

[25] (1993) 16 E.H.R.R. 1.

[26] (1998) 27 E.H.R.R. 163.

United Kingdom.[27] This was a judgment of a Grand Chamber of the Court.

The applicant, a United Kingdom citizen, was a post-operative male to female transsexual. She applied for a course for the Enrolled Nurse (General) qualification but was not admitted when she refused to present her birth certificate. She also applied for a student loan and applied to be an administrative assistant in a prison which application required her to submit her original birth certificate. Under domestic law, the sex of a child had to be entered on the birth certificate and amendment could only be made if a clerical or factual error occurred when the birth was registered. The fact that it might become evident later in a person's life that his or her "psychological" sex was in conflict with the biological criteria was not considered to imply that initial entry of birth was a factual error. She complained to the European Court of Human Rights contending, *inter alia*, that her right to private life under Article 8 and her right to marry under Article 12 had been breached as there was no legal recognition of her post-operative sex.

The Court held unanimously that there had been a violation of both Article 8 and Article 12 of the Convention. It held that the finding of violation constituted in itself sufficient just satisfaction for the non-pecuniary damage sustained by the applicant but awarded her her costs. In the headnote to the judgment it is stated:

> The unsatisfactory situation in which post-operative transsexuals lived in an intermediate zone as not quite one gender or the other was no longer sustainable. That was not to underestimate the difficulties posed or the important repercussions which any major change in the system would inevitably have, not only in the field of birth registration, but also in other areas, but those problems were far from insuperable. Exceptions were already made to the historic basis of the birth register system. To make a further exception in the

[27] [2002] E.C.H.R. 25680/94.

> case of transsexuals would not pose the threat of overturning the entire system…The need to uphold rigidly the integrity of the historic basis of the birth registration system did not take on the same importance in the current climate as it had previously. Society might reasonably be expected to tolerate a certain inconvenience to enable individuals to live in dignity and work in accordance with the sexual identity chosen by them at great personal cost.[28]

The Court also held that there was no justification for barring the transsexual from enjoying the right to marry under any circumstances. Article 12 secured the fundamental right of a man and woman to marry and to found a family. The second aspect was not, however, a condition of the first and the inability of any couple to conceive or parent a child could not be regarded as per se removing the right to enjoy the first limb of this provision. The exercise of the right to marry gave rise to social, personal and legal consequences and was, therefore, subject to national laws of the contracting States, but the limitation thereby introduced had not to restrict or reduce the right in such a way or to such an extent that the very essence of the right was impaired.

Thus, in *I. v. UK*, the European Court of Human Rights has fundamentally changed its approach in this type of case. It may well be said that in the earlier cases the Court was moving in the direction of such a decision, but it is interesting that *I. v. UK* is an unanimous decision of the Grand Chamber which, incidentally, included both a British and an Irish judge.

I hope that this brief discussion will encourage those who are interested to consult the judgments to which I have referred and, in particular, to read the full judgment of McKechnie J.

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[28] Headnote to [2002] E.C.H.R. 25680/94 *Butterworths Human Rights Cases* at http://bannerman.butterworths.co.uk/human_rights/.