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**Sex change pension
rights prove too difficult
for UK courts to sort out**

*MB v. Secretary of State for Work and Pensions
[2016] UKSC 53*

Article by David Bowden

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The Supreme Court of the United Kingdom has been unable to resolve a dispute about a transsexual's pension rights. The case concerned a male to female transsexual who was given the initials 'MB' to protect anonymity. MB remained married to the lady MB had married when MB was a man. When MB reached the age of 60 years of age MB sought to claim a state retirement pension that is ordinarily available to women of that age. MB was unable to obtain a gender recognition certificate whilst MB remained married. The Supreme Court has been unable to agree on how best to dispose of this case and whether to over-rule or uphold the rulings of the 3 courts and tribunals below. Instead it has decided to refer the case to the Court of Justice of the European Union in Luxembourg to give its opinion.

MB v. Secretary of State for Work and Pensions
[2016] UKSC 53 10 August 2016
Supreme Court of the UK (Lady Hale DPSC, Lords Wilson, Sumption, Toulson & Hodge JJSC)

What are the facts?

MB was registered at birth as a man but has lived as a woman since 1991. MB underwent gender reassignment surgery in 1995. MB has not applied for a full gender recognition certificate ('GRC') because MB remains married to the woman MB married when MB was a man. MB wishes to remain married to that lady. MB does not wish to have the marriage annulled either. MB and the woman MB married have lived as a married couple for over 40 years and do not wish to change. Finally MB says that as a Christian MB says that MB (and MB's wife) feel married in the sight of God. Without a GRC, the legal position is that MB remains a man.

On 31 May 2008, MB reached the age of 60. In July 2008 MB applied for a state retirement pension backdated to MB's 60th birthday. The Department of Work and Pensions ('DWP') rejected that application on 2 September 2008. The DWP said that in the absence of a GRC, MB could not be treated as a woman for the purposes of pension eligibility and would instead become eligible at 65, as if MB had remained a man.

What is the legal position for transsexuals in this country?

There were major changes made when the Gender Recognition Act 2004 was enacted. www.legislation.gov.uk/ukpga/2004/7/pdfs/ukpga_20040007_en.pdf. The 2004 Act introduced a new system so that transsexuals could obtain a GRC in their new identity when they had been living in their new gender. An advantage of having a GRC would be that transsexuals could obtain a driving licence or passport in their new gender.

Schedule 5 part 2 of the 2004 Act deals with retirement pensions and provides:

- '8(1) Any question whether the person is entitled to—*
- (a) a Category B retirement pension (under section 48A, 48B, 48BB or 51 of the 1992 Act), or*
 - (b) an increase in a Category A retirement pension under section 51A or 52 of the 1992 Act (increase in Category A retirement pension by reference to amount of Category B retirement pension),*
- for any period after the certificate is issued is (in accordance with section 9(1)) to be decided as if the person's gender were the acquired gender (but subject to sub-paragraph (4)).*
- (4) But a person who is a man (immediately before the certificate is issued) is not entitled to a Category B retirement pension under section 48B of the 1992 Act for any period after it is issued if the person—*
- (a) attains (or has attained) the age of 65 before 6th April 2010, and*
 - (b) would not have been entitled to a Category B retirement pension under section 51 of the 1992 Act for that period if still a man'*

What EU law is relevant to this case?

To add an additional layer of complexity all the courts and tribunals that have looked at MB's case have had to have regard to the relevant overarching EU rules. The most important one being the Directive on the progressive implementation of the principle of equal treatment for men and women in matters of social security ('the ETD') **79/7/EEC**. Article 4 of this 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 ETD is 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.

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What are the relevant ages at which a state retirement pension ('SRP') is paid?

In the UK:

- a woman born before 6 April 1950 is eligible for the SRP at the age of 60, but
- a man born before 6 December 1953 is only eligible at the age of 65.

What happened when the case came before the First Tier Tribunal?

There was a hearing and judgement was given on 18 November 2009. The reason in a nutshell was that MB:

- had been born a man,
- did not have a GRC to show for relevant legal purposes that MB was now a woman, and
- MB's entitlement to a SRP had to be assessed as if MB was a man.

The First Tier Tribunal accordingly ruled that because of the higher state retirement age for men, MB could not qualify for the SRP until 31 May 2013.

What happened on the 1st appeal to the Upper Tribunal?

Upper Tribunal Judge Wright dismissed MB's appeal on 18 June 2013: **[2013] UKUT 290 (AAC)**. He dismissed all grounds of appeal relating to the interpretation of the ETD as well as additional grounds based on submissions relating to the Equality Act 2010 and Articles 8&9 of the European Convention on Human Rights. He also regarded himself as bound by 2 previous decisions – one of the English Court of Appeal in *Timbrell* and the other of the CJEU in *Richards*.

What happened on the 2nd appeal in the Court of Appeal?

Lord Justice Lewison granted permission to appeal and made an anonymity order that the transsexual pension applicant be referred to only as 'MB' and noting that these are not necessarily MB's actual initials. Following a hearing, Lord Justice Underhill handed down a reserved judgment in which he too dismissed MB's appeal: **[2014] EWCA Civ 1112**. However it is clear that Underhill LJ had some sympathy for MB's predicament and at the end of his judgment he said this:

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

What is the relevance of the *Timbrell* case?

In *Timbrell*, Lord Justice Aikens handed down the reserved judgment of the Court of Appeal in another case where a transsexual was seeking a SRP. The judgement dated 22 June 2010 is here: **[2010] EWCA Civ 701**. *Timbrell* was born a man on 17 July 1941, in her twenties she met Joy, they were married and had two children. In the late 1990s *Timbrell* took advice from a consultant psychiatrist and was treated for gender dysphoria. In October 2000 *Timbrell* underwent gender reassignment surgery decided to continue to live together with Joy as a married couple. On 17 July 2001 *Timbrell* became 60. On 6 August 2002 *Timbrell* applied to HMRC to receive a SRP and requested that this be back-dated to *Timbrell*'s 60th birthday.

It has to be noted that *Timbrell*'s claim for a SRP at 60 predated the enactment of the Gender Recognition Act 2004. Aikens LJ ruled that the critical question is whether the ETD applies where prior to the 2004 Act English law had no means of giving legal recognition to a change of gender. He said that the CJEU's ruling in *Richards* provided a clear and definitive answer. This meant that the ETD had to 'preclude (on the grounds that it is either directly or indirectly discriminatory) a situation where there is no legislative or other legal means to give recognition to a person's acquired gender'

Aikens LJ went on to rule that the

'UK failed to implement Directive 79/7 within the time permitted so far as concerned acquired gender and rights to pensions, in the way set out at [38] of Richards. Contrary to Article 5 of the Directive,

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the UK had, in this regard, failed (within the time allowed) to take the necessary measures to implement the Directive to ensure that any UK national laws, regulations and administrative provisions that are contrary to the principle of "equal treatment", as defined in Article 4(1) and interpreted in Richards, are abolished.'

On this basis Timbrell's appeal to have a SRP at 60 was allowed.

What were the issues before the Supreme Court?

The issues were whether the different retirement ages for men and women discriminated against MB on the grounds of her sex. Did the 2004 Act indirectly discriminate against MB as the evidence shows the great majority of transsexuals who have undergone gender reassignment surgery have been from male to female?

Are there any prior authorities of any relevance?

In addition to *Timbrell* there are only 2 other relevant authorities:

Goodwin v. United Kingdom [2002] 35 EHRR 18 (European Court of Human Rights)
It is incompatible with Articles 8 & 12 of the European Convention of Human Rights for UK law to prevent a transsexual from contracting a valid marriage with a person of the same birth gender.

Richards v. Secretary of State for DWP [2006] ECR I-3585 (CJEU)
Prohibition of discrimination on grounds of sex extends to discrimination between persons of a given birth gender and persons who have later acquired the same gender by later reassignment. It is for an EU member state to determine the conditions on which gender reassignment may be lawfully recognised.

What ruling did the Supreme Court give?

In a brief but frank ruling, Lord Sumption JSC in giving the judgment of all 5 members said:
'17. The Supreme Court is divided on the question, and in the absence of Court of Justice authority directly in point considers that it cannot finally resolve the appeal without a reference to the Court of Justice.'

What will happen next with this case?

The case will now be referred to the CJEU in Luxembourg to give its ruling on the ETD. Lord Sumption JSC has framed the question as follows:

'The question referred is whether Council Directive 79/7 EEC 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.'

The parties will have the opportunity to put in further written submissions on this question to the CJEU. It may be that governments of other EU member states may make submissions too or that others seek to intervene. After this the case will then await an opinion from an Advocate General. It will then proceed to a hearing in Luxembourg and the CJEU will give its opinion on the referred question having regard to its Advocate-General's opinion. After that the case will be sent back to the Supreme Court in London to apply the CJEU ruling. This is likely to take until at least 2018/19. At that point MB will be over 70.

There is also a very small number of people affected so the DWP cannot roll out the usual floodgates argument. The statistics for 2016 issued by HM Courts and Tribunals Services are here: www.gov.uk/government/uploads/system/uploads/attachment_data/file/528233/tribunals-commentary.pdf

These state that

'A total of 89 applications were received by the Gender Recognition Panel (GRP) in January to March 2016down 9% on the same period last year. Overall the number of applications received in 2015/16 was 374, up 9% on 2014/15.'

In the CJEU the DWP will need to justify a rational basis for those seeking a GRC to first of all being divorced. There is muddled thinking on this. The DWP cannot seriously believe that transsexuals who have undergone reassignment surgery would cut all their previous family ties. Even if MB is ultimately successful, MB will have had to have waited for a very long time to get the SRP due.

10th August 2016