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The Long Road to Change – The Case of Lydia Foy

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I have been asked to talk about the Lydia Foy case as a case study of the use of the European Convention on Human Rights 2003, and particularly the provision for a Declaration of Incompatibility with the Convention, as tools for protecting the rights of marginalised communities.

But first of all I would like to go back a good bit further in time to October 1962, the month I started as a student in Queens University, Belfast, and a story that made a deep impression on me at the time. For that month another student was enrolling in another university 5000 miles away. James Meredith was the first black student to enrol in the University of Mississippi in the rigidly segregated deep South of the United States.

A federal court had ordered that Meredith should be admitted to the university but a huge crowd of white segregationists gathered to stop him and President Kennedy had to send in the National Guard and regular troops to control the situation.

That was eight years after the most famous public interest law case of them all, *Brown v The Board of Education*[1], where the US Supreme Court ordered the desegregation of schools in Topeka, Kansas. And it was long after 1962 before US schools and colleges were fully integrated – to the extent that they are even today.

I mention this story just to make the point that while winning court battles is an important and sometimes crucial step in securing legal and social change, it is

[1] US Supreme Court, *Brown v Board of Education*, 347 U.S. 483 (1954)

often not the end of the road and a lot of other work may have to be done to implement or enforce hard-won court decisions.

I want to go back now to the Lydia Foy case – and I do hope that our new poet President, who is being inaugurated today, will not have to call out the Army to enforce the judgment in that case.

The Lydia Foy Case

Dr. Lydia Foy is a transgender woman who underwent gender reassignment surgery in 1992 – 19 years ago – and then applied for a new birth certificate in her acquired female gender in 1993. The birth certificate was important for both practical and symbolic reasons. Practically it is, of course, used as an unofficial sort of identity document in many areas of life and to have to produce an identity document that shows you as the opposite gender to how you appear and to your deeply felt identity is embarrassing and humiliating. And symbolically, a new birth certificate would signify official and legal recognition.

The General Register Office refused her request and she came to FLAC for assistance in 1996. It is a tribute to the then FLAC solicitor, Mary Johnson, that, at a time when very few people knew the first thing about transgender issues, she recognised that there was an important issue at stake here and agreed to take on the case.

There was a long and fruitless correspondence with the Chief Registrar and eventually legal proceedings were issued in 1997 and came to hearing in 2000. It was a difficult case. There was no Irish jurisprudence on this issue so the courts were likely to rely on the jurisprudence in the UK, which was distinctly unhelpful. It was based on a case called *Corbett v Corbett*[2] which had been decided in 1970. A wealthy individual called Arthur Corbett had married April Ashley, a transgender woman who was a model for Vogue magazine. He was fully aware of her background when they married but when they quarrelled he sought to have the marriage annulled on the basis that she was not really a woman, presumably to avoid paying alimony.

[2] *Corbett v Corbett* [1970] 2 W.L.R. 1306

The judge in the *Corbett* case had held that marriage could only be between a man and a woman, and the woman's essential role in the marriage was to have children. Gender could be determined only by physical indicators and internal and external sexual organs – even if some of those were missing. He dismissed arguments about psychological factors and personal sense of gender identity and ruled that Ms Ashley was still a man and the marriage was null and void.[3]

That was the legal precedent when Lydia Foy's case came to be heard 30 years later. It ran for 14 days in the High Court, and her legal team called international medical experts to demonstrate that transgenderism was a recognised condition where someone's psychological sense of gender did not conform to their physical make-up. They argued that the Registrar General should be able to amend the Register of Births and issue a new birth certificate in Dr Foy's acquired gender. And if that could not be done, then they argued that the legislation was in breach of her constitutional rights to privacy, dignity, etc.

Mr Justice Liam McKechnie delivered his judgment some two years later, in July 2002. He followed the decision in *Corbett v. Corbett* and held that biological factors alone should continue to determine sex; that Dr Foy was correctly determined to be male at birth; and that the Registrar General had no power to change the Register of Births or amend birth certificates to reflect gender change[4].

He went on to say that: "*Despite advances in surgery a male to female transsexual can never shed entirely that person's male biological characteristics, and likewise can never acquire, in many material respects, vital characteristics of the female sex*".

While acknowledging "*some inconvenience*" for transgender persons under the existing law, he found there was no breach of Dr Foy's rights under administrative law or the Constitution.

Judge McKechnie was not unsympathetic to Dr Foy's position, however. He acknowledged that before the hearing he had known virtually nothing about transgender persons and he expressed his horror at the "mockery, derision and

[3] Ironically when the Gender Recognition Act was passed in Britain in 2004, April Ashley was officially recognised as female shortly afterwards.

[4] *Foy v An t-Ard Chláraitheoir* [2002] IEHC 116

downright abuse" they had to endure. But he could not quite transcend the traditional rigid and immutable division into male and female. Nevertheless, he called on the Government to urgently review the situation and take measures to improve the position of transgender persons.

The European Court of Human Rights and the ECHR Act, 2003

Ironically, on 11th July 2002, just two days after Judge McKechnie's decision, the Grand Chamber of the European Court of Human Rights unanimously upheld a complaint against the UK by transgender woman Christine Goodwin.[5] This followed a series of cases over the previous 20 years where similar complaints had been rejected by ever narrower majorities. The circumstances and the legislation complained about were similar to those in the Foy case, but the Strasbourg Court cut through the sterile medical debate about the causes of transgender syndrome. It recognised that this was a well-documented condition and noted that there was now "*clear and uncontested evidence of a continuing international trend in favour of … legal recognition of the new sexual identity of post-operative transsexuals*".

The Court held that Article 8 of the European Convention, protecting private life, included the right for each person to establish details of her/his identity as individual human beings.

The *Goodwin* decision was very helpful but it was not an instant solution. As Judge McKechnie put it later, in his judgment in the second leg of the Foy case:

> "*The decision in "Goodwin" which was given prior to the Act of 2003, was not binding on this Court or this State. Given the dualist approach which, prior to 2003, this country adopted in respect of the Convention, it would only have been a judgment of the European Court given in proceedings where Ireland was a party that would have been binding on the State*"[6].

Lydia Foy appealed the High Court decision, though the *Goodwin* ruling by itself was not going to be enough to overturn it. But then the ECHR Act, 2003 was passed, bringing the European Convention into Irish law, even if in a very

[5] *Christine Goodwin v UK,* 35 EHRR 447
[6] *Foy v An t-Ard Chláraitheoir* [2007] IEHC 470

watered down fashion. It appeared to provide a vehicle for bringing the *Goodwin* decision before the Irish courts with more weight than the 'persuasive but not binding' formula that applied up to then.

We[7] applied to the Supreme Court to amend our appeal so as to include the new Act, but in November 2005 that Court remitted the case back to the High Court to consider the issue. And, just to be on the safe side, we made a new application to the Registrar General and then appealed his refusal in case the High Court would find – as it did – that the ECHR Act could not apply to the original complaint.

The new application became the 'Foy No. 2' case and we applied for the two sets of proceedings to be consolidated and heard by Judge McKechnie. That was a calculated risk. He had held against our client in the original case but it would avoid the need to re-hear the 14 days of evidence given in 2000 since the judge was familiar with it already, and we felt he had been sympathetic to Dr Foy's position but the law as it stood had left him no room to find in her favour. This time we hoped that the combination of the *Goodwin* decision and the ECHR Act might tip the balance.

Other Jurisprudence

In the meantime, favourable jurisprudence was beginning to build up elsewhere. Following the *Goodwin* decision in the Strasbourg Court, the UK House of Lords had ruled in 2003 that the British law preventing transgender persons getting married was incompatible with the European Convention on Human Rights[8]. The UK government had brought in a Gender Recognition Act[9] in 2004 to formally recognise transgender persons and issue them with new birth certificates. Meanwhile the Australian courts had firmly rejected the *Corbett v Corbett* decision and formally recognised transgender persons in 2003[10] and both the Strasbourg and the EU Courts, had held in favour of transgender applicants in a number of other cases.[11]

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[7] By this time I had joined FLAC and was working on the case
[8] *Bellinger v Bellinger* [2003] 2 A.C. 467
[9] Gender Recognition Act, 2004
[10] *Attorney General for the Commonwealth v Kevin and Jennifer* [2003] Fam CA 94
[11] *Van Kuck v Germany* [2003] ECHR 285; *Linda Grant v UK* [2006] ECHR 548; *L v Lithuania* [2007] ECHR 725; *KB v National Health Service Pensions Agency* [2004] EU ECJ C-117/01

We in FLAC trawled the internet looking for judgments or legislation providing for recognition of transgender persons. Luckily I was able to use contacts I had made in human rights commissions in other countries and we turned up decisions from around the world – Germany, Italy, Australia, New Zealand, Malaysia, Korea, South Africa, and the US - and filled up six lever arch files with legal authorities before the case was heard in April 2007, ten years after the first proceedings had been issued.

We reckoned we were not going to succeed on the medical evidence. Instead, we hoped that, like the Strasbourg Court in the *Goodwin* case, the judge would be convinced by the steadily growing acceptance across the world of the reality of transgender lives and the growing respect for transgender people's integrity and right to determine their own gender identity.

The Second Hearing and the Declaration

The case was heard over seven days in April 2007. Judgment was given in October[12] and Judge McKechnie acknowledged that "*The decision in Goodwin changed dramatically and irreversibly the position of transsexuals under the Convention*". Nonetheless, he held that decisions of the Strasbourg Court were not retrospective in their effect and so *Goodwin* changed nothing in relation to the original case.

In the second set of proceedings, dating from Dr Foy's new application to the Registrar in November 2005, the Judge rejected the argument that under Sections 2 and 3 of the ECHR Act, the Registrar could have used his existing power to correct *mistakes* in the Register of Births in order to change Dr Foy's recorded sex or gender and issue her with a new birth certificate. Section 3 requires organs of State to act in conformity with the European Convention and Section 2 requires Courts to interpret statutory provisions compatibly with the Convention. But Judge McKechnie held that it would stretch the meaning of '*mistake*' too far to read it as allowing change in the recorded gender.

He also rejected Dr Foy's claim that her Constitutional rights had been violated, but then he turned to the argument that not only did Irish legislation not provide for legal recognition of transgender persons, but that it actually prevented it.

[12] *Foy v An t-Ard Chláraitheoir* [2007] IEHC 470

And on that basis he held that the existing law was incompatible with the European Convention.

He had already stated that the *Goodwin* decision had totally changed the position in relation to transgender persons. He added that the 'margin of appreciation' allowed to Member States on sensitive issues where there was no consensus among the states had been fundamentally eroded on this issue. And he expressed considerable frustration that five years after the *Goodwin* decision and after his own plea to the Government to urgently review the situation, nothing had been done.

Judge Mc Kechnie granted the first Declaration of Incompatibility with the European Convention made under Section 5 of the ECHR Act. Modelled on a provision in the UK Human Rights Act, this was intended to deal with a situation where no other remedy was available. It had been criticised when it was introduced in the UK because it does not change the offending law but essentially puts it up to the legislature to do so. However, it has proved quite effective in the UK and out of 19 declarations that have been finalised since the Act commenced, all but one have led to some change in the law[13].

Of course the effectiveness of the mechanism depends greatly on the willingness of the Government and the courts to make it work, and the UK authorities have, at least until recently, shown more enthusiasm for implementing the European Convention than their counterparts in this jurisdiction.

The declaration made some legal history. It was a great step forward for Lydia Foy and the transgender community but, as the euphoria began to wear off, it became clear that the struggle was not yet over.

The Struggle Continues

Judge Mc Kechnie did not finalise the declaration until February 2008 and the State promptly appealed the decision. On enquiring from the Supreme Court office we were told it could take three and a half years for the appeal to be heard and then, of course, it might take another while to get a decision.

[13] Ministry of Justice, Responding to human rights judgments. Report to the Joint Committee on Human Rights on the Government's response to human rights judgments, 2010-11

The State's appeal seemed to make very little sense. The list of authorities we had submitted to the Court showed how widespread recognition of transgender persons had become and Judge Mc Kechnie had commented that "*Ireland, as of now, is very much isolated within the Member States of the Council of Europe*".

We had already prepared a detailed Briefing Note on the Transgender question and Dr Foy's case shortly before the High Court hearing in 2007 and had circulated it to the media to try to explain and de-sensationalise the issue and avoid the sort of lurid and painful reporting indulged in by some of the media at the time of the first hearing in 2000. It was quite successful and most of media comment was respectful and sympathetic. And we had also done quite a lot of media work before and after the hearing to raise awareness about the case.

But now we were in a different phase. Ireland was clearly in breach of the European Convention. It was unacceptable that our client and all transgender persons would have to wait another four years to have that confirmed by the Supreme Court. Without taking a very conscious decision about it, we found that we were moving into a phase of trying to get the declaration implemented by getting the State to drop its appeal and by preparing the ground for legislation thereafter.

Campaigning

As the case had gone on, the tiny, almost invisible, transgender community had become organised through TENI (Transgender Equality Network Ireland) and was beginning to make its voice heard. And the Human Rights Commission and a number of NGOs had taken up the issue. We had also built a network of contacts in the international human rights community as a result of our search for useful jurisprudence for the case and we were systematically updating the domestic media, sympathetic politicians and our international contacts about developments in Ireland. We even updated entries on Wikipedia about the case and the position of transgender persons in Ireland.

That began to have its effect shortly after the declaration of incompatibility was finalised. In April 2008, the Council of Europe Commissioner for Human Rights, Thomas Hammarberg, issued a report on a recent visit to Ireland. He

referred specifically to the Foy decision and pointedly said he expected to see legislation enacted very soon[14].

By a happy coincidence the UN Human Rights Committee was also due to review Ireland's performance under the International Covenant on Civil and Political Rights in July 2008. Well informed by the Human Rights Commission and a coalition of NGOs including FLAC, the Committee recommended that Ireland "*should also recognise the right of transgender persons to a change of gender by permitting the issue of new birth certificates*"[15].

And later in 2008, a major report by the EU Fundamental Rights Agency highlighted the Foy case and the lack of any transgender legislation in Ireland[16], while in January 2009 Commissioner Hammarberg referred again to the Foy case in an article on discrimination against transgender persons[17]. The declaration of incompatibility was proving to be a valuable rallying and campaigning tool. As a declaration from the Irish courts, it was straightforward and authoritative. It stated clearly that Ireland was in breach of the Convention and international bodies could feel sure of their ground in referring to it.

Eventually, in October 2009, the Fianna Fáil/Green Party Government published a "*Renewed Programme for Government*" which stated: "*We will introduce legal recognition of the acquired gender of transsexuals*"[18]. It was two years since the McKechnie judgment but it was still not the end of the road.

Nine months later, in June 2010, the State dropped its appeal against the declaration of incompatibility and the Government set up a Gender Recognition Advisory Group on proposed legislation which was supposed to report within six months. FLAC, TENI, the IHRC and other groups made submissions to the Group.

The Advisory Group reported in June of this year but the result, though important, was underwhelming[19]. It did clearly and unequivocally recommend recognition of transgender persons and acceptance of their right to marry in their

[14] Report by the Commissioner for Human Rights on his visit to Ireland 26-30 November 2007 Comm DH (2008) 9, Strasbourg, 30 April 2008
[15] Human Rights Committee, Concluding Observations on Ireland, CCPR/C/IRL/CO/3, 30 July 2008
[16] EU Agency for Fundamental Rights: Homophobia & Discrimination on Grounds of Sexual Orientation in the EU Member States, Part 1 – Legal Analysis, 2008
[17] "Discrimination against transgender persons must no longer be tolerated", Viewpoint, Council of Europe Commissioner for Human Rights, 5 January 2009
[18] Proposed Renewed Programme for Government, 10 October 2009
[19] Department of Social Protection, Report of the Gender Recognition Advisory Group, 15 June 2011

acquired gender, but its proposals were cautious and restrictive and it included a quite unnecessary requirement for married transgender persons to divorce before they could get formal recognition.

Conclusion

Four months later, more than 15 years after FLAC took on Lydia Foy's case, and four years after the declaration of incompatibility, Dr Foy has still not got a new birth certificate and transgender persons are still not legally recognised in their acquired gender.

The lesson learned all those years ago from the James Meredith case is just as true today – if you want to bring about significant legal and social change, winning a major court decision is only half the battle. It is likely to be followed by a long, slow, and at times very frustrating, struggle to implement it.

But that is not to disparage legal action. On the contrary, *Brown v The Board of Education* was crucially important in the United States because it gave hope to a whole generation of black activists and campaigners who carried on the struggle for de-segregation.

And winning a declaration of incompatibility in the Foy case in its own, much smaller way, gave hope to the beleaguered transgender community and many others who want to see a more tolerant and diverse society in this country.

It also, I believe, demonstrated that the ECHR Act and the provision for declarations of incompatibility provide a valuable additional tool for seeking social change where neither the ordinary law nor the Constitution can provide a remedy.

We are surely on the last lap of this race now and I do not doubt the willingness of the Minister for Social Protection, Joan Burton, who has responsibility for this area, to introduce transgender legislation. However, I would like to finish by, in the words of Judge McKechnie in his 2002 judgment, "*gently and firmly, but also as a matter of urgency remind[ing] the State of the ever growing seriousness of the situation*".

If the Government delays any longer in acting on the declaration of incompatibility and granting legal recognition to transgender persons, it will find

itself totally isolated in Europe and severely criticised by international human rights bodies and it will seriously undermine the credibility of the mechanism it has put in place for giving its own citizens access to the protection of the European Convention on Human Rights.

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