High Court of Ireland Decisions

Foy v. An t-Ard Chlaraitheoir & Ors [2002] IEHC 116 (9 July 2002)

THE HIGH COURT

1997 No. 131 JR

BETWEEN

LYDIA FOY

APPLICANT

AND

AN T-ARD CHLARAITHEOIR, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

AND

JENNIFER AND CLAIRE FOY

NOTICE PARTIES

JUDGMENT delivered on the 9th day of July 2002 by Mr. Justice William M. McKechnie

INTRODUCTION:

(1) On the 23rd day of June, 1947 there was born, in Athlone in the County of

Westmeath, to one Ernest Mark Foy and one Annice Mary Foy, a child, whose mother as a 'Qualified Informant' had her newborn, with the Registrar of Births, Deaths and Marriages, registered as of the male sex with the chosen Christian name of Donal Mark. Now, more than 50 years later, that person, a dentist by profession and judicially separated from his wife with whom he fathered two children, seeks from this court a finding that at birth he was, and was born female but with a congenital disability which was both unidentified and undiscovered. Pursuant to such a finding, if granted, he seeks an order, in effect correcting the original entry in the Register of Births, to record in column 4, under the heading, *"Sex"* the letter *"F"* for

female instead of *"M"* for male, and in column 3 under the heading, `Name', *"Lydia Annice"* instead of *"Donal Mark"*. In addition to this order rectifying what is claimed to be a fundamental error in the record of his birth, many other reliefs are sought including those reflective of an alleged infringement of constitutional rights, such as the right to privacy, dignity, equality and marriage. The claims as made, both individually and collectively, have been robustly denied and vigorously contested.

The disability referred to, was that, though female, his biological make-up of chromosomes, gonads, & genitalia both internal and external, was that of male. This condition amongst others, is one currently described by the medical profession, as a Gender Identity Disorder.

(2) The first named respondent is the Registrar General of Births, Deaths and Marriages whose office was first established under and by virtue of the Marriage (Ireland) Act of 1844. That Act provided for the registration of civil marriages and for the regulation of all non-Roman Catholic marriages. His office was extended to include births and deaths by The Registration of births and deaths (Ireland) Act, 1863, and to the registration of Roman Catholic marriages by a Private Members Act of the same year. As a result, a complete Irish civil registration system was then in place. That system was affected throughout the latter part of the 19th century and the early part of the 20th century, by additional pieces of diverse legislation. On the marriage side one had the Marriage Law (Ireland) Amendment Acts of 1863 and 1873 and the Matrimonial Causes and Marriage Law (Ireland) Amendment Acts of 1870 and 1871. With regard to births and deaths one had the births and deaths Registration Act (Ireland) 1880 and the Regulations made thereunder, both of which remain to this day highly influential with regard to several matters of substance and detail concerning births and deaths. The system and procedures established under the above legislation has remained

largely unchanged since the beginning of this century although certain amendments have of course been introduced. Many of the more relevant ones will be referred to later in this judgment. However, ending with the Registration of Births Act, 1996 the main structures so established continue to survive with the office of the Registrar playing a pivotal role in the discharge of the duties and responsibilities assigned to it under this body of legislation. In the briefest of descriptions the Registrar General, through the system and mechanism established

by this code, is responsible for the collation and custody of all births, deaths and marriages occurring within the State. The terms of the statutory provisions and the regulations material to this case, are of course, in appropriate detail, hereinafter set forth and recited.

(3) The second named respondent is Ireland and The Attorney General.

(4) By order dated the 14th April, 1997, Laffoy J. granted leave to the applicant to seek by way of an application for judicial review the reliefs sought at paragraph D of the statement grounding the application and she did so on the grounds set forth at paragraph E thereof. When this ex parte leave application was moved, the only parties cited were the respondents above named. At the instigation of Ireland, a motion issued, which resulted in a further order of this court dated the 23rd March, 1998, whereunder the wife of the applicant and the children of their marriage, were joined as notice parties to these proceedings. Having been served with the required documentation, it appears that the offspring of the marriage, namely Jennifer and Claire, obtained legal aid under the Civil Legal Aid Act, 1995, and as a result were, throughout the hearing, represented by both solicitor and counsel. Unfortunately, Mrs. Foy was not so successful in this regard, and though present and indeed a witness in the case, was not legally represented at the hearing. This is to be regretted as the consequences which might flow from any relief granted could have a direct impact on her status and that of her children. At least it could result in considerable legal uncertainty attaching to such status. If,

therefore, in the granting or withholding of legal aid, there was any residual discretion, then in my view this was a case for its favourable exercise. However and notwithstanding this less than satisfactory position, I was satisfied that in proceeding with the case, as we did, no injustice would result to the said Mrs. Foy. Thus the notice parties are the children of Dr. and Mrs. Foy.

(5) In this judgment unless it makes no sense to so do, I will, in deference to the applicant, whenever possible, use the prefix "Dr" or "Miss" or the pronouns "she" or "her", unless the context utterly prohibits.

(6) Before commencing the substance of my decision could I immediately say that prior to the start of this action, my knowledge and therefore my understanding of transsexualism, was, as I now know, utterly uninformative. I suspect, and hopefully not unfairly so, that many members of the general public, who otherwise are educated, knowledgeable and thoughtful are in a similar situation. The evidence in this case, irrespective of legal outcome, shows, without dispute or debate, that this is an established and recognised condition, that present or hoped for societal status is entirely foreign to its existence, that such condition is not influenced by sex orientation or driven by sexual pleasure and that those inflicted suffer greatly, usually for long periods, in relative isolation and frequently without understanding. Any person, reasonable in view and tolerance, would be horrified at the mockery, derision, and downright abuse which such individuals have to endure from time to time. I hope that such days are long gone as are, I sincerely desire, the days of sensational reporting without

the publisher being in any way sincerely interested in the medical tragedy. For tragedy, this is, not only for the person inflicted, who in this case is Dr. Foy, but also for her immediate family, which is Mrs. Foy and their two children. Add in the extended family, friends, colleagues and others and then one can see the scale of personal disruption. Behind this legal

case therefore there is a story of great human proportions which unfortunately this judgment vehicle in a court of law is unable to adequately portray or properly recreate.

BACKGROUND:

(7) Following the birth of the applicant, his parents, in the person of his mother, on the 19th July, 1947, knowing that the newborn had the external genitalia of a male, had their child registered as being of that sex and gave to him the Christian name, Donal Mark. He was one of a family of seven with five brothers, one older, and one sister. He recalls that by his parents he was at all times so reared and by his brothers and sisters so treated as a boy. As such, until age twelve or thirteen, he attended the national school, and received his First Holy Communion and Confirmation as part of the boys' group and dressed accordingly. To those around him, save possibly for a domestic help, he was taken, treated, looked upon and considered as being of the male sex.

(8) However, his evidence during the course of trial, presented a much more intricate and complex picture. According to Dr. Foy, who was the only person to give any evidence of the first 30 years of his life, he was, from early childhood, very different from his brothers, and within that difference was conscious of what clothes he wore, of those which he wanted to wear and of having this feeling of femininity. On the birth of his sister, he remembers having a keen interest in and an attraction to the clothes in which she was dressed. He had as he described it, a secret world, one of dreams, all recurring, all similar and all leading to a desire to act, look like, and be feminine. These feelings he claims, were present from the commencement of his memory and certainly predated his First Holy Communion. That event, for him, as he vividly recalls, was very traumatic. So much so that for a period of time thereafter he had, and even to this very day has, what is virtually a complete memory loss for this time span. He experienced a crisis, a conflict between his subjective identity and the

identity objectively assigned to him. This distinction arose in a very simple but direct way: with what group, either boys or girls, would he receive his First Holy Communion? At the age of seven or eight there was but one answer. It was a tearful experience.

(9) Throughout National School, where classes were a mixture of boys and girls, this uncertainty of position continued. He would envy the girls who unlike him could be themselves and could openly and freely so express themselves. He had little if any interest in participating in boyish activities. He was frequently on his own.

Dr. Foy claims that he associated with the mothers of some of the pupils, effectively as some

form of substitute girlfriends, though whether this could have been a realistic situation at the age of nine or ten is doubtful. There was no one to whom he could talk about his feelings, his emotions or his desires. A lady, doing domestic chores in the family home, was viewed by him as perhaps being slightly indulgent to his less than boyish inclinations.

In any event, he proceeded on to secondary school, at Clongowes, where he was a boarder between September 1960 and 1965. He described the period as like walking on a tightrope. Some boys felt that he was gay. Some on the other hand, acted in a very *"gentlemanly"* way towards him. To no group could he intimately relate and thus had no real relationship with either or any. His feelings on gender continued. He had an *"in world"* and an *"out world",* one quite distinct and separate from the other. In the former, he reflected on who he truly was, on why his feelings were different, on where he was going and on what the future might hold. In holiday time and in the early morning or late evening when otherwise it was safe to so do, he would cross-dress. This was not the first episode or period in his life when this occurred. At home when growing up, he remembers something as perhaps

innocuous as a towel being used by him as a skirt, though when recalling such an incident or incidents, he considers, at least now, that these were a true expression of himself.

(10) By age fifteen or even a little earlier, Dr. Foy first began consciously and with some measure of deliberation to have doubts about his identity. This coincided with the availability of certain books which he explored for information. Confusion rather than clarity resulted however, at least in his mind. For example in the then available edition of Hadfield on Childhood and Adolescence the word "transsexual "was dealt with by referring the reader onwards to the section on "sexual deviancy". This created for him a huge guilt complex. Dr. Foy was in a state of constant questioning; whether he would get better, whether there was any magic cure, whether he was the oldest person in the world with this, as yet in his mind, unidentified condition, and so on.

(11) In 1965, following his Leaving Certificate, he started in Pre-Med in UCD. A year later he started dentistry and on the 21st December, 1971, graduated from the NUI with the Degree of Bachelor of Dental Surgery (B.D.S.). During his period in college he continued to live in a mixed world. He enjoyed general discussions with other students in social studies. His membership of the musical society placed no strain on his identity. His access to books evidently increased but still he found great difficulty in getting any concrete information, of a worthwhile nature, in the pursuit of his undertaking. He had heard about a book written by Jan Morris who was a journalist and who described the availability of some surgical reassignment in Casablanca. However, this was to the applicant inconclusive as was other material, all of which failed to explain or explain fully or in a satisfactory way what a transsexual was. Details of other college activities were sparse.

(12) Following his graduation Dr. Foy took up practice as a dentist. For the period, 1971

to the beginning of 1975, there was little or no evidence as to his gender dysphoria, or as to the interplay between what happened in real life activity and in his private inward life. It is not known in any depth what social or leisure activities were pursued by him during this period or whether, and if so to what extent, his knowledge about the condition intensified. There is no information about the practice or absence of cross-dressing or whether his unease with his biological make-up increased. What is known however is that at some stage prior to meeting Mrs. Foy, he had a relationship, not sexually consummated, with another woman to whom in fact he proposed engagement for marriage.

THE MARRIAGE AND MARRIAGE PERIOD:

(13) In any event at the beginning of 1975, the applicant met Ann Naughton, who was some eight years younger, whilst both were members of a musical society in Mullingar where he practised dentistry. Some weeks later a courtship started. This led to an engagement at Christmas 1976, and resulted in their marriage on 28th September, 1977. Jennifer, their first daughter was born on 16th August, 1978 and Claire on 18th September, 1980. In 1982/1983 Dr. Foy was hospitalised in Mullingar with a physical condition affecting his leg and generally was quite unwell. In November/December 1983 he first went to work in Saudi Arabia, initially for a two year period without his family, though at about quarterly intervals he returned home for a number of weeks. On his second contract, his family joined him for a period of seven or eight months, and at the end all returned to Ireland.

(14) From in or about 1982 onwards the applicant had become increasingly concerned about his condition. The conflict between his external role as a male and his ever increasing feelings of femininity, created considerable pressure and caused a great deal of mental anguish which affected his physical health. He was severely depressed in 1982 and in consultation with a psychiatrist, endeavoured to discuss the problem which he then termed as

a psycho sexual problem. The ongoing intensity of dysphoria was matched only by the pace of his inner intensity to feminism. This caused for Dr. Foy emotional, psychological and physical havoc. Still trying to conform and reconcile outwardly, on the one hand, whilst on the other, necessarily trying to maximise his expressions of femininity, caused much deep and prolonged unhappiness. So much so that he suffered from a number of stress related physical complaints. Some way forward for him had to be found.

(15) The description of the period just covered is fundamentally based on Dr. Foy's evidence but unlike the earlier part of his life, this time span as well as their first meeting and their subsequent married life, was also covered in evidence by Mrs. Foy. In the context of recounting the applicant's condition over this period of time, I am satisfied that the above, though brief, is sufficient to adequately reflect the much larger picture. However, in relation to both the functioning and intimacy of their marriage, the evidence of Mrs. Foy assumes quite a significant role.

(16) In 1989, Dr. Foy was working as a dentist with the Eastern Health Board. A

colleague of hers, a male psychiatric nurse, was concerned about her condition one afternoon in August of that year. He insisted that she should see Dr. Wilson, a psychiatrist, who as it happened had a clinic in the same building on that day. Having seen the patient, Dr. Wilson referred her on to Dr. Frank O'Donoghue who at the time was undoubtedly the most experienced doctor in this area of medicine in this country. Unfortunately however, whilst waiting for her first appointment Dr. Foy collapsed and was admitted to Naas Hospital on the 24th August, 1989. That first appointment eventually took place on the 5th September. Thereafter, through a series of referrals, Dr. Foy was diagnosed as a transsexual and on the 25th July, 1992, underwent gender reassignment surgery. This diagnosis and the resulting gender reassignment will again be referred to, in greater detail later in this judgment.

Medically, surgically and psychologically this major surgery, was for Dr. Foy and continues to be, successful. She is now living in this jurisdiction as a female.

(17) As the aforesaid diagnosis is in issue in this case, it is necessary to refer to the following and where appropriate, to comment, thereon. In the summer of 1989 the applicant informed Mrs. Foy that he was taking female hormones. The reaction on his wife's part was one of disbelief. Naturally she wished urgently to discuss this matter, but despite many attempts to so do, Dr. Foy did not engage with her on this topic. Following on from the initial visit, Dr. O'Donoghue on the 7th November, 1989, held with Mr. and Mrs. Foy both a joint a and separate consultation. When speaking with the latter Dr. O'Donoghue informed Mrs. Foy of the condition known as transsexualism and of such a likely diagnosis on Dr. Foy. The treating psychiatrist went on to discuss the various steps in the regime of treatment, ending up, as it does, potentially with surgery. Mrs. Foy was in utter shock and in total disbelief of what she had been informed. Matters from a family point of view further deteriorated with Dr. Foy vacating the family home probably in April, 1990. A solicitor's letter seeking a separation issued on the 14th June of that year. Proceedings followed. These proceedings were settled and as recorded in the Circuit Court order dated the 13th December, 1991, the husband consented to an order for judicial separation with the wife being granted sole custody of the infants but with access provisions being agreed to, though this was subject to certain terms and conditions. In October, 1993, a barring order was obtained against Dr. Foy in circumstances which she now disputes. On the 20th May, 1994, by way of re-entry, the Circuit Court in addition to confirming the barring order, also made an order prohibiting any access to the children by Dr. Foy and in addition directed the said doctor to transfer into the sole name of Mrs. Foy, her interest in the family home. An appeal was taken but dismissed by order of the High Court on Circuit dated the 14th October, 1994. To this day the applicant feels aggrieved at these orders.

(18) During the course of this hearing, evidence was given by both Mr. Foy and Mrs. Foy as to their courtship, engagement and marriage. Much of this evidence was given in camera, as it was in the family proceedings above mentioned. Whilst it is not necessary in my view to recite such evidence in any detail, nevertheless there may be some importance in setting out

the views which I have reached on many of these issues. In so concluding I should say that where any conflict of materiality exists between the recollection Dr. Foy and that of Mrs. Foy, I prefer the evidence of the latter. Mrs. Foy was an impressive witness who had a good recall of the main events, and who, despite what undoubtedly also for her has been a very traumatic period, did not show any personality or psychological traits or other characteristics, at least which I could see, which would call into question for me the truthfulness and accuracy of her evidence. These conclusions are as follows:-

(a) that throughout two and a half years of courtship and for the first four or five years (approximately) of their married life, Dr. Foy appeared, acted, dressed, behaved and responded, both physically and psychologically, as would any average normal man;

(b) that the sexual intimacy which they shared was frequent and normal with both parties equally instigating mutual contact;

(c) that Dr. Foy fathered and was therefore the male progenitor of the two daughters who were conceived out of that marriage;

(d) that to their children, Dr. Foy acted as a father teaching either one or both of them how to sail, boat, drive, fish etc., and on all occasions manifested himself as a male, depicting appropriate masculinity;

(e) that sometime in 1977, either shortly before or after their marriage, Dr. Foy informed his wife that he liked female clothing which she understood to reflect, and was intended to reflect, on her sense of dress and on her femininity

only, a view which I fully share: there being no scope in my opinion for any canvassed argument that this comment was understood by Mrs. Foy in the context of Dr. Foy's own gender identity;

(f) that sometime in 1982/1983, after undergoing surgery, Dr. Foy told his wife that he was a transvestite and so enjoyed wearing female clothing; to which she responded that she would have nothing to do with such activity, that neither she nor the children were ever to see him so dressed and that he was never to mention it again to her. In fact, it was not so raised again until late 1989;

(g) that whilst in their relationship the frequency of intimacy declined in the early to mid 1980's, nevertheless they continued to live as man and wife, having a sexual relationship, up to and indeed after their return from Saudi Arabia sometime in 1987;

(h) that up to the time of their separation, Mrs. Foy never saw Dr. Foy cross-dressed and that at no time, to the knowledge of his wife, did the applicant ever have her clothing, either her inner or her outer wear;

(i) that Dr. Foy was quite a persistent and determined person and had a forceful resolve as to achievement; this in his family relationship both as to general and specific matters;

(j) that Dr. Foy never informed his wife that he was, either at birth or at anytime throughout his life, in reality to himself, female with feminine instincts, feelings, desires and needs; and finally,

(k) that at no time prior to the summer of 1989 and most probably not until the 7th November of that year, did Mrs. Foy have any reason to believe that the person whom she married and who fathered her children, was anyone other

than a normal member of the male sex.

SEXUAL DIFFERENTIATION:

(19) Sexual differentiation is the process of becoming a man or woman. It involves, with certainty, four stages and possibly a fifth, namely brain differentiation, the existence or non-existence of which is a significant issue in this case. Some commentators merge the third and fourth stages into one and so in their terminology brain differentiation is discussed as a possible fourth stage. The traditional stages occur sequentially and in order. These are as follows:

Stage 1. This starts with the fusion of the egg and the sperm when the chromosomal configuration is established. Normally it contains 46 in number with the last two being XX in the case of a future woman and XY in the case of a future man.

Stage 2. This step involves the production of the gonads, which as a common principle originates exactly the same in future men and future women. The genetic information on the Y chromosome directs the indifferent gonads to become testes. When there are two X chromosomes present the indifferent gonads become ovaries. These gonads or sex glands are sometimes referred to as the primary organs of sex.

Stage 3. This involves the formation of the internal genitalia. In each future boy and girl there are two ductal systems, the Mullerian ducts and the Wolffian ducts, which exist as a paired set of

structures. If the primitive gonad becomes an ovary the Mullerian ducts form the Fallopian tubes, uterus and upper vagina and the Wolffian ducts disappear. On the other hand if the primitive gonad becomes a testis, the Wolffian ducts form the epididymis, vas deferens and seminal vesicle, with the Mullerian ducts degenerating. As with stage 2 there is also a common principle at this level.

Stage 4. After the formation of the internal genitalia there next comes the development of the external genitalia where testosterone is decisive. If this hormone stimulant is not present a male will not develop. With testosterone there follows a penis, the scrotum and the descent of the testes into it. With a female there is a vulva and vagina.

HORMONES IN THE REPRODUCTIVE SYSTEM:

(20) In the case of men, androgens are male hormones. Testosterone, is the main androgen. This causes the primary male sex characteristics early in one's existence, as for example, the prostate, the development of the penis, the sperm, the ducted system and other ducts, and other male parts as well as causing the descent of the testes into the scrotum. Prior to puberty testosterone is produced in small amounts only. However at puberty the amount increases greatly. This causes the secondary male characteristics such as:-

- Enlargement of the penis, testes and other reproductive parts;
- Growth of pubic, underarm, facial and body hair;
- Enlargement of the larynx, causing the voice to break and deepen;
- Increased muscular development;
- Widening of the shoulders;
- Growth spurt (body weight may double);
- Increased secretion of sebum in the skin, and
- Altered attitudes, for example, increased interest in sexuality.

Again at puberty the male pituitary gland produces two hormones, namely FSH (follicle stimulating hormone) which causes the sperm producing cells in the testes to divide by meiosis and produce sperm and secondly, LH (luteinizing hormone) which stimulates the interstitial cells in the testes to produce testosterone.

(21) In the case of females, the ovaries produce the hormones oestrogen and progesterone. The pituitary gland, as with males, also produces the hormones FSH and LH. All have roles in the development of female characteristics as well as a role in the menstrual cycle. At puberty, the hormones oestrogen and progesterone contribute in a significant way to the development of the secondary female characteristics. These include

- The maturing and enlargement of the breasts;
- Widening of the pelvis to allow for birth;
- Increased body fat;
- Growth of pubic and underarm hair;
- Growth spurt (which is also stimulated by testosterone produced by the adrenal glands), and
- Behavioural changes, for example, interest in sexuality.

(22) The stages mentioned at para. 19 above represent .a stepwise process. Normally all steps in the process are concordant. Thus with men there is an XY chromosomal pattern, testes, male internal and external genitalia and exclusive male type behaviour responsive, it is said, of a male brain differentiation. In women there is an XX chromosomal make-up, female genitalia and a female brain differentiation which is the substrate of their desired female type behaviour. With these individuals all the traditional indicators of sex are congruent. However not all are so fortunate. In each of these phases errors can and do occur. At chromosomal level one can have an XXY male as well as an X zero female. The former, who has a total of 47 chromosomes instead of the normal 46, is characterised by the presence of feminine stigmata in an apparent male with small testes. This is known as Klinefelter's Syndrome. In Turner's Syndrome there is a retardation of growth and of sexual development: there is usually only one X-chromosome and the total number is 45. The sex chromatin test is negative. There are also people who are referred to as hermaphrodites who have been born

with double structures, that is with both an ovary and a testis. Later in the process medicine has discovered that sometimes organs are not sensitive or sensitive sufficient to the production of testosterone and therefore, for example, the prostate is deficient or the vas deferens not existing at all. In the final stage it has been known that people with an XY pattern and who have testes and thus produce testosterone, nevertheless end up with the external genitalia of a female, namely a vulva and a vagina. Indeed many of these individuals act and live like females. They marry and only discover this mischance in nature when they are unable to conceive due to the absence of ovaries and an uterus. So at every stage of the process mishaps can and do occur and have been so recorded as occurring.

(23) The steps above described, namely the establishment of a chromosomal pattern, the existence of gonads and the presence of internal and external genitalia, are and have always

been referred to as the biological indicators, or markers or signs of one's sex. Where these sequential happenings have developed normally then the resulting person is either male or female. Where however there is any contradiction within any of these four markers, as where the development in phases 1 and 2 is inconsistent with say the development in phases 3 or 4, or indeed where there is any incongruence within or between any of these stages, then the person in question will have some characteristics of one sex and some of the opposite sex. This condition, suffered by these self innocent but unfortunate individuals, is known and is referred to in general terms as an *"inter sex condition".* An issue of some debate in this case is whether a transsexual person should also be classified and considered as coming within this category of inter sex persons.

(24) **NOMENCLATURE:**

In the mid 1950's the term "transsexual" emerged, via the medical profession, into public usage as a means of designating a person who aspired to or who actually lived in the

anatomically contrary gender role. This expression applied whether or not the individual in question had been in receipt of hormonal therapy or had undergone surgery. In the decades which immediately followed the psychiatric profession altered this term somewhat by inserting the word *"true"* before transsexual. The *"true transsexual"* was thought to follow a characteristic pattern whose quality of life could be improved by way of a treatment sequence that culminated in genital surgery. It was also thought that this method of identification enhanced the accuracy of the diagnosis. Such persons, who could be of either sex, were thought to have; (a) cross-gender identifications that were consistently expressed behaviourally in childhood, adolescence and adulthood; and (b) minimal or no sexual arousal to cross-dressing and no heterosexual interest relative to their anatomical sex. Other persons, who followed a different path, typically adopting a masculine behavioural pattern, but who nonetheless also arrived at the transsexual door, were distinguished from the former group. This concept however, of the *"true transsexual"*, began to lose favour when the profession realised: (a) that such patients were rarely encountered; (b) that those who requested surgery more commonly had adolescent histories of fetishistic cross-dressing or autogynephilic fantasies without cross-dressing; (c) that patients, undoubtedly transsexual, had not followed the characteristic path of that condition; and (d) that some of the original *"true transsexuals"* had "falsified their histories to make their stories match the earliest theories about the disorder": see p. 19 of the **The Standards of Care for Gender Identity Disorders, (5th ed). (S.O.C.)** issued by the Harry Benjamin International Gender Dysphoria Association. The term "gender dysphoria syndrome" was then adopted in order to designate the presence of a gender problem in either sex.

(25) In the American Psychiatric Association's **Diagnostic and Statistical Manual, (3rd Ed.), (DSM--III)** published in 1980, the diagnosis of "Transsexualism" was introduced for and given to those individuals who demonstrated at least two years of continuous interest in

removing their sexual anatomy and transforming their bodies and social roles. Others with different gender dysphoria were separately characterised. In 1994, the DSM-IV committee, replaced the diagnosis of Transsexualism with Gender Identity Disorder. A distinction as to age was made and so one could be described as having a Gender Identity Disorder of Childhood, Adolescence or Adulthood. For persons who did not meet this criteria Gender Identity Disorder Not Otherwise Specified (GIDNOS) was used. Between 1980 and 1994 the term "transgendered" or "trans-person" began to be used but only informally and in a value free manner. It did not replace the more formal name. Accordingly, as of now, for those who suffer with the applicant's condition the preferred term used by members of the various professions applying supportive assistance is Gender Identity Disorder.

(26) **THE CONDITION OF GENDER IDENTITY DISORDER:**

Gender Identity Disorder, formerly Gender Dysphoria to include Transsexualism has been recognised for at least the past 25 years or more, as a genuine psychiatric medical condition. It was so classified in DSM (Ed. No. 2) published many years ago. The condition, in the most simple descriptive sense, consists of a person having a persistent dislike and discomfort for his or her own outward looking sex and a feeling that such sex is quite inappropriate to his or her inner self. Such a person has an intense feeling of rejection for the behaviour, attributes, attire and stereotype expectations of his or her biological sex. In addition such an individual has a pervasive desire to be, to belong to, to live and be accepted as a member of the opposite sex to that assigned, and many are prepared to undergo a variety of treatments, to achieve for that purpose the desired level of compatibility with the gender of choice. In short, such people have an innate belief that they live in the wrong body, either in whole or in part and that for their inner self fulfillment it is necessary to discard the expected role of them in their biological sex, and to transform into, adopt and pursue the role and commitment expected of the opposite sex. They believe truly and rationally that they are

members of that sex. This condition is indiscriminate as to creed, class, profession, calling or social position. It can affect virtually all age groups from the very young to adults in their sixties. Statistically it is said that of the general population one in 10,000 to 12,000 males and one in 30,000 females, are affected.

(27) It is irreversible with no cure though acceptance of one's altered position can be achieved by stopping at different levels of the treatment sequence which is available. This condition must therefore be one that is and that manifests itself in varying degrees of severity. Presenting symptoms are widespread and differ substantially without any pattern or underlying explanation, at least not one which is obvious. Those most frequently quoted are feelings, often from early childhood, of being and of belonging to the opposite sex, of having a desire to associate and converse with, members of that sex, of wanting to engage in their games and pastimes, of cross dressing and of having an abhorrence of male or female stereotypical activities, including the co-use of toilets, showers, and other facilities frequented by the sex, or at least the ostensible sex of one's birth. The reaction and manner of dealing with this condition, as with its manifestations, vary greatly, with those usually

adopted being those most appropriate to the person's individual though generalised needs. These needs may have to accommodate, not only the gender dysphoria but also the separate pressures imposed by or resulting from the contradiction as between the secrecy of role and yet the obviousness of their societal interaction. Some will suppress it in part or perhaps even in whole, this by conforming to role and expectation. Others suppress it by adopting increased masculine roles whether at work, (e.g. by joining the army or navy) or in social or recreational life. Many totally overcompensate in this way. Some satisfy their condition by cross-dressing in private at safe times, whether on holidays or at other chosen times and locations. Others even marry to, protect the image. Indeed recorded medical history shows, that a number have married several different partners and have fathered children with each of their said partners. Sexual

orientation can cover the entire spectrum of such an outlook. Some can be heterosexual, homosexual, bisexual and indeed during the course of their lives adopt more than one of these preferences. There are however, a number of persons who cannot deal with the condition in such a benign way. Treatment, they feel, is essential. Many therefore resort to the psychiatric and medical professions for help. Some will accommodate the condition by relying only on therapeutic advice. Others however, will add hormonal treatment whilst further groups feel that they have no choice but to undergo surgery. Virtually for all the condition is distressing. It can have a serious impairment in almost every aspect of their lives, can lead to secondary physical complaints and indeed without treatment, the suicide rate, at least as suggested, is not insignificant. It is unquestionably an acknowledged psychiatric condition and for those sufferers who portray any characteristics other than those associated with their biological sex, it can cause great humiliation, ridicule, isolation and outright discrimination. It is on any treatment of the subject, a most serious condition.

(28) **DIAGNOSTIC CRITERIA:**

There are at least two widely used and highly respected nominators which deal with this condition and in particular which set forth and identify the appropriate diagnostic criteria which characterise this condition. **DSM-IV**, published in 1994, is the manual more widely favoured in North America whilst the International Classification of Diseases **(ICD-10)** is slightly more applied in Europe. For practical purposes there is no real or substantial difference between the respective texts when dealing with this condition. In the **DSM** document under the heading, *"Diagnostic Criteria for Gender Identity Disorder",* the following is stated:-

> A. *"A strong and persistent cross gender identification (not merely a desire for any perceived cultural advantages of being the other sex).*
>
> *In children the disturbance is manifested by four (or more) of the following:*

(1) *repeatedly stated desire to be, or insistence that he or she is, the other sex,*

(2) *in boys, preference for cross-dressing, or simulating female attire: in girls insistence on only wearing stereotypical masculine clothing,*

(3) *strong and persistent preferences for cross-sex roles in make-belief play or persistent fantasies of being the other sex,*

(4) *intense desire to participate in the stereotypical games and pastimes of the other sex,*

(5) *strong preference for playmates of the other sex.*

> *In adolescence and adults, the disturbance is manifested by symptoms such as stated desire to be the other, sex, frequent passing as the other sex, desire to live and be treated as the other sex, or the conviction that he or she has the typical feelings and reactions of the other sex.*

B. *Persistent discomfort with his or her sex or sense of inappropriateness in the gender role of that sex.*

> *In children, the disturbance in manifested by any of the following:*
>
> *In boys, the assertion that his penis and testes are disgusting or will disappear or assertion that it would be better not to have a penis, or aversion towards rough and tumble play and rejection of male stereotypical toys, games and activities: In girls the rejection of urinating in a sitting position, assertion that she has or will grow a penis, or assertion that she does not want to grow breasts or menstruate, or marked aversion towards normative female clothing.*

In adolescence and adults, the disturbance in manifested by symptoms such as preoccupation with getting rid of primary and secondary sex characteristics (e.g, request for hormones, surgery, or other procedures to physically alter sexual characteristics to simulate the other sex) or belief that he or she was born the wrong sex.

C. The disturbance is not concurrent with any physical intersex condition.

D. The disturbance causes clinically significant distress or impairment in social, occupational or other important areas of functioning."

At paragraph **F64** of the **ICD** manual gender identity disorders are dealt with in the manner following:- .

"F 64.0 TRANSSEXUALISM

A desire to live and be accepted as a member of the opposite sex, usually accompanied by a sense of discomfort with, or inappropriateness of, *one's anatomical sex and a wish to have hormonal treatment and surgery to make one's body as congruent as possible with the preferred sex.*

Diagnostic Guidelines:

For this diagnosis to be made, the transsexual identity should have been present persistently for at least two years, and must not be a symptom of another mental disorder such as schizophrenia, or associated with any intersex, genetic or sex chromosome abnormality.

F 64.1 DUAL-ROLE TRANSVESTISM

The wearing of clothes of the opposite sex for part of the individual's existence in order to enjoy the temporary experience of membership of the opposite sex but without any desire for a more permanent sex change or associated surgical reassignment. No sexual excitement accompanies the cross-dressing which distinguishes the disorder from fetishistic transvestism."

(29) It appears from the aforegoing:

> (a) that, in essence the condition is a repudiation of once biological sex including one's primary and secondary sex characteristics as well as the disowning of the psychological, physical, personal and societal manifestations of that sex;
>
> (b) that in its place there is to be found a prolonged and compulsive inner feeling of being and of having to belong to the opposite sex and, insofar as treatment, including hormonal and surgical will permit, of having to adopt both the primary and secondary sex characteristics of that sex;
>
> (c) that this cross-gender identification, commands in that person's existence, a need to demonstrate, to have acknowledged and to have accepted, by the world at large including their loved ones this fundamental change and the manifestations of that change;
>
> (d) that this condition cannot be a symptom of any other mental disorder such as schizophrenia; and
>
> (e) that this addictive desire for a new identity is separate and distinct from any intersex condition such as a genetic or sex chromosomal abnormality.

Finally it should be noted that in neither **DMS-IV** or in the **ICD** document, is there any suggestion that the condition is congenital in origin.

(30) **STANDARD OF CARE (SOC):**

Having so diagnosed the existence of this disorder, the next step is to consider the treatment which is available, though in this jurisdiction the third step in the triadic therapeutic sequence, namely surgery, is not. The desired standard for this treatment is now comprehensively articulated in a publication issued under the name of the Gender Dysphoria Association, which is mentioned at para. 24 above. This standard of care, "SOC", also known as the Harry Benjamin Guidelines, is that which is aspired to by each branch of the different professions which has an input into this matter. There is widespread unconditional support for these standards with modifications occurring only where the circumstances do not permit of their strict compliance or where from clinical experience the unit in question, has by itself, imposed a higher standard. However for all purposes these guidelines set the level to which the care of such persons should be measured and implemented.

(31) The following summary expresses the more salient aspects of the guidelines which are of relevance to this case:-

(A) **THRESHOLD**

(i) The clinical threshold for an individual purporting to have this condition, is passed when his or her uncertainties, concerns and questions about gender identity, persist and reach such a level of intensity that these become the consummate part of that person's existence. Such gender dysphoria frequently manifests itself in and from pre-school days and continues to old age. In form it comes about by varying degrees of personal dissatisfaction with sexual anatomy, gender demarcating body characteristics, gender roles, gender identity and with the perception of others.

(ii) When so diagnosed the overarching treatment goal of the specialists, whether they be psychotherapeutic, endocrinal or surgical, is the lasting personal comfort with the gender of choice; this so as to maximise the overall psychological well-being and self fulfillment of the patient.

(iii) The involvement of these professionals covers any and all of the following, namely, diagnostic assessment, psychotherapy, real life experience, hormonal therapy and surgical procedure.

(iv) All such persons must be conscious of the distinction between eligibility and readiness criteria, certainly when considering the administration of hormones or when making a recommendation for the carrying out of surgery. Before a person is eligible to move to the next step in the sequence of treatment, whether that be real life experience, the administration of hormones or the carrying out of surgery, not only must compliance with the specified criteria be documented, but in addition the doctor in question must make a clinical judgment as to whether such person is ready to embark upon that progressive next stage.

(B) DIAGNOSTIC ASSESSMENT:

A diagnosis of this condition can be made only on and if the criteria specified in **DSM-IV** and/or **ICD** is satisfied.

(C) PSYCHOTHERAPY:

The offer of therapeutic help may vary from clinic to clinic. For some patients its availability may by itself be sufficient to satisfy the degree of disability from which that

patient suffers. Most clinics will provide a range of education to deal with matters such as the next phases of treatment, all of which are optional, and with the patient's awareness of the familial, vocational, inter personal, educational, economic and legal consequences of attempting to change one's gender role.

(D) <u>REAL LIFE EXPERIENCE</u>:

The act of fully adopting a new or evolving gender role for the events and processes of every day life is known as the real life experience. Because of the enormous consequences of embarking upon the course of action which is contemplated, it is critical for the clinician, who is concerned with the psychological and psychiatric well-being of the patient, to assess periodically the quality of that person's real life experience in his/her new gender role. Such real life experience involves the legal acquisition of a new name appropriate to the gender of one's choice, the dressing fully and at all times in the clothes of the opposite sex and the engagement in work or study within the community in that role.

(E) <u>HORMONAL TREATMENT</u>:

Prior to the administration of such treatment, the prescribing doctor must be satisfied that the patient *inter alia* has a documented real life experience of not less than three months, or has undergone a period of psychotherapy of not less than that period. At p. 31, para. 5 of the S.O.C. it is stated *"under no circumstances should a person be provided hormones who has"* not fulfilled either of this criteria.

(F) <u>SURGERY</u>:

Six eligibility criteria for surgery exist and these apply equally to biological males and females. They are:

(i) Legal age of majority, in the patient's own country.

(ii) Twelve months of continuous hormonal therapy for those without a medical contraindication.

(iii) Twelve months of continuous full-time real life experience, which must be successful.

(iv) Whilst psychotherapy is not an absolute requirement for surgery for adults, regular sessions may be required by the treating psychiatrist.

(v) Knowledge of the costs, required length of hospitalisation, likely complications and post surgical rehabilitation requirements, and

(vi) An awareness of different competent surgeons.

In addition the patient must demonstrate acceptable progress in consolidating the new gender identity and certainly must demonstrate such progress in dealing with work, family and inter-personal issues resulting in a significantly better and more stable state of mental health.

If surgery becomes an option in a male to female patient, the procedures available may include orchidectomy, penectomy, vaginoplasty, augmentation mammaplasty and vocal cord surgery.

(32) **THE APPLICATION OF STANDARDS:**

As I have previously said, all or virtually all, of the practitioners in this area apply the diagnostic criteria in either **DSM-IV** or **ICD** and aspire to implement the **Guidelines** from the **Harry Benjamin Institute**. For reasons, individual to a given hospital or clinic, some of the specified standards are often modified: rarely if ever by way of relaxation, almost always by may of additive requirement. In this case a number of doctors gave evidence as to how the above mentioned documented data, in practice is implemented in their separate units. Dr. Samuel Dalrymple a consultant psychiatrist with over 20 years experience in this field,

has been attached to the gender identity clinic at Charing Cross Hospital for nine years and for the last four has held the position of lead clinician. This unit deals exclusively with people who have gender identity disorders and does not engage in any other type of psychiatry. He would see about 200 patients per annum of which 50 would be new patients. Approximately 45% to 48% of those who have been diagnosed as transsexuals, proceed through the available range of treatment including surgery. With the appointment of a second surgeon which has recently come about, this clinic will carry out 90 procedures to the year ending April 2002 and thereafter 80 such procedures annually. It is the biggest of any similar clinic in the UK.

(33) The procedures adopted at Charing Cross under Dr. Dalrymple are as follows. At all times, whilst a patient of the clinic, the person in question is under the care of two consultant psychiatrists. Initially there is a first and second assessment with each of these doctors. After that, one of the two takes primary responsibility for the patient but no decision regarding a fundamental change of management is made without those two consultants being in complete agreement as to its appropriateness for that person. The patient is seen approximately four or five times per annum and unless and until there is a documented real life experience the question of prescribing or administering hormones simply does not arise. The real life experience demanded by him involves first, a change of name by legal methods, secondly, dressing in the gender of choice, fully and unequivocally seven days a week 24 hours a day for a period of two years and thirdly a demonstrable ability to work or study full-time for at least one year. Having so embarked upon this experience but subject to clinical direction, the question of hormones can be considered after a number of months, possibly about three. Usually Premarin, which is a conjugated oestrogen and Androcur which is a testosterone suppressant are the hormonal drugs of preference. Having successfully completed this requirement as to real life experience, which is a mandatory prerequisite even

for a consideration of surgical realignment, and having undergone a complete course of `hormonal treatment, at least two clinical opinions within the unit, must then express a view as to whether or not for that patient, surgery would be appropriate. The completion, even successfully, of all previous steps is not an automatic entry to surgery. Following upon such a recommendation, if so made, the patient is then seen by the surgeon who has an independent right to fully reassess the situation. He can conclude positively or negatively. Only if he agrees with the recommendation can the patient undergo surgery.

(34) In Dr. Dalrymple's opinion it would be inconceivable that the course of hormonal treatment could be completed in under eighteen months and in his experience the entire cycle takes between four and five years. This time period is necessary he claims, not only for the patient to commit himself fully both to real life experience and hormonal treatment, but also since surgery is a major step, it allows the consultant psychiatrist to regularly assess the evolving situation so that he or she can be as firm and as definite as possible, with the diagnosis.

(35) Attached to the Newcastle City Health NCH Trust is Dr. Dunleavy who has been a consultant psychiatrist in that health area since 1975. Having a special interest in psycho-sexual medicine including gender dysphoria, he is, and has been for the past number of years, the convenor of the Gender Dysphoria panel under the region's health authority. The system in operation in Newcastle is that following a referral from either a general practitioner or a fellow consultant, the patient is assessed, perhaps on a number of occasions, by Dr. Dunleavy. The patient is then referred on, to one of his colleagues in speech therapy and to an endocrinologist for a full assessment. So in all, three disciplines are involved at this initial stage. A decision is then made as to whether or not such a person is admitted, on to what has been described as "the panel", which according to the evidence is a unique feature

of the particular service available in this area. To admit or not to admit, is the decision of the panel before whom the patient is interviewed and to whom the entire information is copied. On this panel are three consultant psychiatrists, two neurologists, a consultant physician, a nurse from the gynaecological clinic, a social worker, a speech therapist and two lawyers. Having been admitted, the **Harry Benjamin Guidelines** are acted upon with some modifications. There then follows three stages. Stage 1 involves a period of twelve months in role prior to any drugs being considered. During this time the person is seen in the out patients' department, which includes a speech therapist, on probably six occasions. At the end of this one year period, a second interview takes place before the panel. At this meeting it is decided whether or not the patient should proceed with the second stage. This stage involves the administration of hormones and has a duration of approximately one year. At the end of that period a third interview takes place and if a continuation of treatment is thought desirable, the panel will make a decision to refer the patient to the surgeon. In so doing it is expressing no view on surgery, this decision being purely one for the surgeon. The overall period from the time of presentation to the completion of the entire cycle is a

minimum of five years which includes a waiting time of approximately fifteen months.

(36) In Ireland the foremost expert so recognised in this area is Dr. Frank O'Donoghue. This doctor has been a consultant psychiatrist attached to St. Patrick's Hospital since the mid 1970's. In 1979 he became the head of the psycho sexual clinic which is the largest in Ireland. It deals with many disorders including gender identity disorder. It sees approximately 100 patients per annum comprising a mixture of both sexes. For those persons who are transsexual, he runs a clinic purely on a voluntary basis. Whilst primarily a general psychiatrist, nonetheless he is so recognised to the level which I have indicated. Throughout the past 25 years he has seen approximately 30 to 40 people whom he would have diagnosed as having gender identity disorder. Of this number, approximately half, that is fifteen to

twenty, would have been recommended for surgery. Whilst at all times he would have a commitment to the **Harry Benjamin Guidelines**, nevertheless because of several factors, including the limited number of patients involved, the lack of true specialised facilities and the absence of any panel or other professional support group, it has not always been possible to do so. In Ireland there is no surgery available.

(37) **THE LEAD UP TO DR. FOY'S SURGERY:**

At paras. 16 and 17 above there is a brief reference to this period but for the court's decision on the question of diagnosis a further understanding of this time and of relevant events is necessary. These are as follows:-

> (a) In August, 1989 there was for Dr. Foy a crisis imminently unfolding. Being so unwell and having a feeling of profound illness, she was seen by a fellow professional of the Eastern Health Board in August of that year. Dr. Wilson, consultant psychiatrist with the Board saw her as a matter of urgency and with priority when requested to so do. The consultation was brief but pointed. Though it was not suggested that this doctor had any expertise, practice or knowledge of gender identity disorder, nonetheless the information obtained was sufficient for her to realise that a referral onwards to Dr. O'Donoghue was required. Whilst awaiting that appointment Dr. Foy collapsed and was seen at Naas General Hospital on the 24th August, 1989.
>
> (b) On the 5th September, the patient saw Dr. O'Donoghue for the first time. Dr. Foy continued to be his patient until mid September or at the latest the 1st October, 1990, during which period she was seen by him on approximately twelve occasions. The reasons why this termination took place are not highly material though two aspects of it should be noted. First, Dr. O'Donoghue could not under any circumstances be criticised, and had no responsibility for the

ending of this patient and client

relationship. Second it was Dr. Foy's sole choice to leave this practice and she did so because of a resolute insistence on her part that Dr. O'Donoghue should defy the expert opinion of a child psychologist in the context of visitations to her children.

(c) At the first visit Dr. O'Donoghue was informed that the patient had already commenced self-medicating. His recollection was for about one year prior to that visit; Dr. Foy's recollection was for about one week. In any event because of this self-medicating and because of the uncertainty on his part as to the precise nature of the hormonal drugs being used or the dosage thereof, he, the doctor, decided, after two consultations, in the interest of regulating the intake of such drugs, to formally commence Dr. Foy on hormonal treatment. In October or November he prescribed oestrogen and also a testosterone suppressant, the latter at a quantity level, which despite the applicant's claims, was not in my view excessive. On the 7th November he saw both Mr. Foy and Mrs. Foy. To the latter he explained what the condition of gender identity disorder was, what tentative diagnosis he had arrived at and also he outlined the range of treatment, up to and including surgery, upon which Dr. Foy might potentially embark. During that twelve month period a major issue of concern to Dr. Foy and one which she discussed repeatedly with Dr. O'Donoghue was her children and the views, opinions and beliefs held by her with regard to access and visitation. These views were not shared by Mrs. Foy. This difficulty was the subject of constant debate throughout that year. Dr. O'Donoghue wasn't sure if one could say that on the 5th September, Dr. Foy was presenting as a self diagnosed transsexual. Whether she was or not, there was no doubt in his own mind, but that the tentative diagnosis arrived at, early on in their relationship, was correct and that in his opinion Dr. Foy was a transsexual. His patient however, was not in role at any time during this period. She was at all times quite insistent and a very determined person. Dr.

O'Donoghue saw her as an in-patient for the last time, on the 1st October 1990, but it is quite clear that in the previous month, for the reasons given, their relationship had ended.

(d) Being concerned lest his former patient should not be under the care of any psychiatrist, Dr. O'Donoghue wrote on the 19th

September, the 15th November and the 17th December, all of 1990, to Miss. Foy helping to obtain another psychiatrist who might be in a position to assist. Ultimately Dr. Michelle Cahill was identified. This doctor first saw the patient on the 22nd January, 1991. For this almost four month interval there was no evidence that Dr. Foy was under the care of any psychiatrist.

(38) Dr. Cahill is a consultant psychiatrist with the Eastern Health Board and has been practising in adult psychiatry since 1987. She has a interest in psycho-sexual medicine but according to her evidence has no particular expertise or qualification in gender identity disorder. She recalls receiving a telephone call from Dr. O'Donoghue about this patient sometime prior to the first visit but otherwise was not in receipt of any notes, records or documentation with regard to the patient's history, condition or treatment. Having written a letter to the London based Dr. Russell Reid on the 2nd December, 1991, Dr. Cahill did not see and did not have any professional contact with Miss. Foy since that date. The basis upon which Dr. Cahill agreed to see this patient and agreed to get involved is not in my view capable of dispute. The evidence, unchallenged, demonstrates quite clearly the reasons for accepting the referral and the role played by her in this period. These are as follows:-

(i) the referral occurred only because of the breakdown between the patient and Dr. O'Donoghue and given the existence of a volatile situation. Dr. Cahill saw her role as maintaining the applicant's position but no more:

(ii) this doctor therefore acted in a "stop gap" capacity (to use her own words) and at all times to the knowledge of Lydia Foy, intended to refer the patient onwards;

(iii) her value was in therapeutic support which she could provide, by being available, without being critical or judgemental, and by talking with and listening to the applicant;

(iv) she was not a treating doctor;

(v) she would not and never had (or has) prescribed hormones for people with gender identity disorders and as such had no view, and therefore expressed none, on the hormonal medication prescribed by Dr. O'Donoghue;

(vi) she was not advising the patient regarding her treatment, that simply was not her role and neither was it to make any clinical decision regarding surgery - a position which she made known to Dr. Foy;

(vii) she had no reason to doubt the diagnosis made by Dr.

O'Donoghue but that given his pre-eminence in this area and the accepted reversal of their respective roles (normally she would refer patients to him), she did not independently make any separate diagnosis of the applicant's condition; and finally,

(viii) in her said letter to Dr. Russell, when she speaks of seeking a second opinion on sexual reassignment, the prior opinion to which she was referring, was that of Dr. O'Donoghue and not her own.

(39) Dr. Cahill gave evidence which I accept that Miss. Foy had been in role since March, 1991 and was coping well. She also informed the court that Lydia Foy herself, had sourced Dr. Reid and virtually from the start had wanted a referral to him. This, as is evidenced by the said letter of the 2nd December, Dr. Cahill agreed to so do.

(40) There was no evidence given by Dr. Reid although three letters from him, all dated ... the 7th January, 1992, and addressed to Miss. Foy, Mr. Michael Royale and to Dr. Cahill respectively, were produced in evidence.

(41) From the letters last mentioned, it would appear that Dr. Reid saw Miss. Foy on the 3rd January, 1992, for what he described as *"a second opinion regarding gender reassignment".* Apparently he had met her about six months prior to that also in England. This was probably a little earlier as Dr. Foy was in England between the 25th February and the 9th April of 1991. In any event, subject to a number of reservations, Dr. Reid expressed a view that *"she is genuinely transsexual and would benefit from gender reassignment surgery".* The reservations included a concern about her mental stability and about the fact that she should have been, but was not in fact working as part of her real life experience. A letter containing a report of this assessment, was, together with a covering letter, sent to Mr. Michael Royle, who was the lead surgeon of the medical team which ultimately performed the operation on the 25th July 1992.

(42) In the context of an application dated the 5th January, 1992, to the Eastern Health Board for financial assistance in respect of the surgery then contemplated, Dr. Foy wrote to Dr. O'Donoghue on the 28th January, of that year. In requesting assistance with her application, she said *"Dr. Michelle Cahill and Dr. Russell Reid have now agreed with your advice that I should go ahead towards surgery. I have been referred to Mr. Royle, surgeon, in Hove and will see him on Monday."* Such assistance was indeed forthcoming, this by way of letters dated the 13th March and the 1st April, 1992. In the latter Dr. O'Donoghue stated *"Miss Foy is now under the care of Dr. Michelle Cahill who I am sure would be the most appropriate person, to approach regarding referral to Charing Cross".* No contact was made

by the Health Board with Dr. Cahill but an internal memorandum from the Board contains a recommendation dated the 19th March, 1992, that *"the necessary arrangements be made for her to have to have an operation at Charing Cross Hospital, London".* In the events which

happened a sum of approximately £3,000 was made available in respect of this surgery. However, this did not take place, as would appear to have been indicated, at Charing Cross but rather at the private clinic of the operating surgeon at Hove in England. This change of location was brought about by what Dr. Foy described as the urgency of her situation. However it is quite unclear to me as to when this decision was made or by whom. It certainly was not that of Dr. Cahill. The correspondence with Mr. Royle from Dr. Russell on the 7th January, 1992 would appear to indicate that a decision had at that stage been taken to have the operation carried out in Hove. In the internal memorandum just mentioned the Health Board was of the view as late as March 1992 that the operation was to be carried out at Charing Cross. Someone at some stage altered that. Whilst nothing of any great significance turns on this, it is however indicative of what I think was the applicant's utter determination to drive on with surgery at any cost.

(43) Miss. Foy was not seen by Dr. Reid at any time after the 3rd January, 1992. On the 3rd February of that year she was seen by Mr. Royle. It is unclear as to what precisely transpired at that meeting but evidently there was a continuing movement towards surgery.

(44) Following a request from the operating surgeon, Dr. Foy was seen and examined by Dr. Dalrymple, the consultant psychiatrist above mentioned, on the 9th July, 1992, some three weeks prior to surgery. The purpose of that examination *"was to determine from the psychiatric viewpoint the patient's fitness to proceed with gender reassignment surgery".* The report of that visit concluded that *"she is suffering from gender dysphoria and is in fact a*

> *male to female transsexual. From the psychiatric viewpoint it is appropriate for her to proceed to gender reassignment surgery".*

(45) On the 24th July she signed the necessary consent form and on the day following, under the care of Mr. Royle, Miss. Foy underwent a gender reassignment operation. This included the removal of her penis and testicles and the creation of a vagina. Breast augmentation was also involved as of course were other procedures so as to permit a functioning vagina. She was in hospital for ten days. Her recuperation was, I am sure, from a personal point of view, slow and painful but medically was unremarkable. From a physical point of view the operation was as successful as one could have hoped. In the weeks, months and years which have elapsed since then, she has lived as a female and in her new gender role has experienced a quality of life significantly better than that formally enjoyed. She has no regrets and thoroughly believes herself to be female.

(46) In many respects the challenge made in these proceedings to the diagnosis of Dr. Foy lacks reality given the time period involved and the undoubted success, for the applicant, of her changed circumstances. However though the issue is so circumscribed, in this case, the general question of diagnosis is of course highly significant as is the prescribing of treatment, in particular hormonal and surgical. Therefore, despite the limited value of embarking upon this issue in the present circumstances, nevertheless I do so in the belief that it is both appropriate and worthwhile for this court to express a view thereon.

(47) In the case of Miss. Foy's journey through her illness there were, in the period September 1989 to July 1992, many unusual features with several of the principles contained in the guidelines and practised by the consultants not being adhered to. The following are but examples:-

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(i) The applicant was self-medicating when first seen by Dr. O'Donoghue on the 5th September 1989. This fact is not in dispute though the period of such intake is.

(ii) She had I am quite satisfied, a firm view of her condition which in its essential form was that of a transsexual, a view which, when the opportunity arose, she expressed and implemented forcibly.

(iii) She was prescribed hormones without having any or any documented real life experience. Understandable in the circumstances this may have been, nonetheless this was clearly in breach of the Guidelines and of the practice at both Charing Cross and at Newcastle.

(iv) Dr. Foy never worked or engaged in occupation on a full-time basis within the community in her new gender of choice.

(v) She had one and only one treating doctor, namely Dr. O'Donoghue. This means that from October 1990 right throughout 1991 and up to July 1992, she was not under the care of any training psychiatric consultant.

(vi) She was not seen by any consultant between October 1990 and January 1991, when she saw Dr. Cahill for the first time. Dr. Cahill was not treating Miss. Foy for transsexualism,

(vi) Neither Dr. Reid nor Dr. Dalrymple had overall responsibility for Miss. Foy's health with both doctors seeing and examining the applicant on one occasion only,

(viii) If, as I believe, the first psychiatric recommendation for surgery was that of Dr. Russell Reid in January 1992, it follows that the applicant was in real life experience for a period of ten months only, which period again falls short, indeed in part significantly short, of the published material and the practice in the aforesaid clinics, and finally,

(9) The entire cycle was completed in under three years.

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(48) There is one other significant point of concern. This emerges from the literature as well as from the evidence of the psychiatrists who were witnesses in this case. It is this, the absolute necessity for at least one consultant psychiatrist (in Charing Cross there are two) to take overall responsibility for the health of the patient and to do so by way of examination and observation over a prolonged period of time. This doctor should have a hands on role and should actively participate in the patient's progress through the various stages of treatment. That there should be such a person in place, is critical not only to the patient but also to the psychiatrist who is asked for a second opinion; this is because as a matter of practice, that psychiatrist will see the patient almost certainly on one occasion only. He is therefore utterly dependent on the treating psychiatrist.

(49) In this case Dr. O'Donoghue could not have made a recommendation for surgery, as by September/October 1990, Miss. Foy did not have the requisite real life experience and therefore could have none so documented. So a recommendation could not and was not so made. When the patient left his practice there was, I believe, a telephone call between Dr. O'Donoghue and Dr. Cahill. Nothing else, no material, no records. This from the doctors' point of view was understandable given what Dr. Cahill intended to do. With Dr. Reid a similar situation occurred. The only medical information given was the letter of the 2nd December 1991. It was explained in evidence that when asked for a second opinion, the doctor in question would assume that all material information had been copied to him. He is heavily dependant on this communication for relevant history. Indeed the foundation of his involvement is contingent on another consultant having previously made such a recommendation. In this case there was a breakdown at several strategic points along the way. Some I have already mentioned. Certainly Dr. Reid in my belief was giving a first opinion and not a second. That was not his function and his involvement could not lend itself to it. Likewise with Dr. Darlymple. In fact this doctor felt that that the treating psychiatrist was

Dr. Cahill and that as such the applicant was under her care, for at least two years. So for him, with the back-up expertise which he thought the system had produced, a single one hour consultation, with only Dr. Cahill's letter of 2nd December 1991, was quite sufficient. So it would appear that there was never a recommendation from the only treating doctor, namely Dr. O'Donoghue, which in my view is a significant omission in the process. The consequences in this case, thankfully are not of significance but they could be and given the irreversible nature of the late stages of treatment, it is essential in my respectful view that no voids should be allowed to exist at any step of the process. Indeed Dr. Darlymple recalled a situation at Charing Cross where two individuals, some fifteen or twenty years ago inappropriately went through the system, and later regretted it. He felt that a repeat situation could not now occur. No matter how impressive a system may look, it is only as good as its implementation. In this case it is not necessary at this remove in point of time to search for and identify why this breakdown occurred, but it seems to me that it was largely attributable to the absence of a treating doctor taking overall responsibility for the patient and in his place the applicant herself effectively adopting this role.

(50) There are two further remarks which I would like to make in this context. The first relates to the views of Dr. Darlymple when asked to express an opinion on the incomplete adherence to the guidelines. Though now satisfied that their non-compliance was not critical, nevertheless these views I measure against the benefit of hindsight and in the knowledge of the applicant's progress throughout the years. Guidelines have been established for certain and definite reasons and according to the evidence command worldwide respect. Any departure from them would have to be thoroughly justified and medically underlined. The second point relates to what might be interpreted as being either an express or implied criticism of Dr. Foy. This in particular in relation to any conflict between her evidence and that of Mrs. Foy and also in the paragraph immediately preceding. It should be noted as a

matter of evidential fact, that all psychiatrists who gave evidence in this case accepted as a medical record and as a matter of personal knowledge from transsexual patients, that a characteristic among patients with this condition is a tendency to rigorously press on with their desired treatment, even if, in the process, accuracy and sometimes truthfulness are the victims. Against that, and so, subject of course to the particular comments previously made, I should also like to say that I have found Dr. Foy utterly genuine, honourable and committed, and I do accept her repeatedly expressed conviction of having no choice in her search for treatment.

(51) **THE FIFTH INDICATOR OF SEXUAL DIFFERENTIATION - THE MEDICAL EVIDENCE**

A number of eminent consultants gave evidence in this case and each dealt with or touched upon the existence or non-existence of this alleged fifth indicator. In addition to Doctors O'Donoghue, Darlymple, and Dunleavy, mentioned above, the court also heard the evidence of Professor Gooren and Professor Green.

(52) **PROFESSOR GOOREN:**

Professor Gooren is a specialist in endocrinology, in particular in the hormones of men and, women which relate to sexual reproduction and sexual differentiation. This doctor is and for several years past, has been attached to the Free University Hospital in Amsterdam. In 1988 he was appointed Professor in Hormonal Diseases with special interest in the conditions of intersex and transexualism. As Professor of Transsexuology he has worked for over twenty years at the gender clinic in that hospital. He has lectured widely, written a number of books and has been responsible for several publications. He has provided evidence to various courts in different jurisdictions including the European Court of Human Rights. He has attended

conferences and taken part in many of the more major debates on this condition throughout the years. He is undoubtedly pre-eminent in his field.

In his evidence he described what transsexualism was and did so in a manner which is reflected at paras. 26 and 27 above. He said, rather surprising perhaps, that to some degree the condition effects one in 12,000 males and one in 30 to 40,000 females from the overall public pool of persons. He confirmed that sexual differentiation is the process of becoming man and woman and that, as earlier mentioned its four sequential steps, are, first, the fusion of the egg and sperm from which the chromosomal pattern is determined, secondly the production of the gonads, thirdly the formation of the internal genitalia and lastly the establishment of external genitalia. These have always been known as the biological markers or indicators of sex. Though the process is stepwise, nature is not perfect and at all stages errors can and do occur. As a result for a very small number of people but nonetheless a number forming a very definite group in society, there is a lack of congruence between one or more of these indicators. Specific examples of where nature has gone wrong are given at para. 22 above. This resulting condition, when it exists, is referred to by the medical profession as an intersex condition.

The above indicators were traditionally thought to be self inclusive and therefore to be a complete set of markers in determining the sex of a human person. Whilst acknowledging that the acceptance of this has worked well for millions of years in respect of the vast majority of people, nevertheless the Professor argues that this long established view must now be reassessed in light of the present medical and scientific evidence. When it is he alleges, that this court should conclude that there is a fifth indicator of sex which is of course the brain indicator. In his opinion at birth every boy and girl is born with a part of their brain being pre-programmed as either a *"male"* brain or a *"female"* brain. This part fills out or

evolves between two and four years of life and generally it follows the other markers of sex, namely the biological markers. Hence all indicators are concordant. However in the case of the transsexual this is not the situation. A person with such a condition usually, but not always, has a full set of what might be described as the normal biological criteria of the male or female sex, but his or her brain totally refutes that sex which by those indicators society would assign to him. A transsexual therefore suffers from this condition because his or her psychological sex has not followed adult markers. In this way it differs from an inter sex condition. With the latter there exists a contradiction within stages 1 to 4, but with transsexualism, these stages are normally congruent but in their totality are out of step with the psychological brain.

(53) There is no dispute but that over the past several decades gender identity disorder, which includes transsexualism, has been acknowledged as a psychiatric condition requiring unique therapeutic treatment. Over the last number of years the exclusivity of the psychiatric home as a basis for this disorder has become an issue with some consultants, including Professor Gooren, holding the view that this heretofore accepted foundation may not be correct. His belief is that there is a neuro-scientific basis for the condition. He draws support for this conclusion from recent interrelated studies the first of which was reported, in 1995, in the distinguished publication "Nature" with the second appearing in the May 2000 edition of the *Journal of Clinical Endocrinology and Metabolism.* This piece of research which had

42 subjects, sought to examine a part of the hypothalamus of each individual, which part, it is accepted, regulates biological functions such as hunger, appetite, sleep, respiration, the cardiac system, and sex. The group under review consisted of *"normal"* males and females and also persons with a number of different medical conditions, including at least six who were male to female transsexuals. The survey shows first that in relation to the hypothalamus there is a difference in the relevant part as between both *"normal"* males and females. The

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shape and size of that part in the male brain is larger than the corresponding part in the female brain. Secondly when that part of the hypothalamus was examined, in the male to female transsexual, the result was that in terms of shape and size the relevant part fell within the limits of the *"normal"* female and not within the limits of the *"normal"* male. Hence the alleged presence, via these studies, of support for the view that there is a neurological explanation for the condition of transsexualism.

These are however, in my view, several limitations with these studies and as a result there exists a certain number of difficulties with both the conclusion which is sought to be made based on them and the extrapolation which is sought to be taken from them. These difficulties are outlined later in this judgment.

(54) Professor Gooren is of the view that the applicant's condition should now be brought within the family of *"intersex"* conditions. He so believes because in his opinion there is no real distinction between a contradiction within stages 1 to 4 and a contradiction involving brain differentiation. In support he adds in the common practice which the professionals apply to both conditions. This practice has, as its aim and result, the well-being of the patient. The approach adopted is neither governed nor dictated by the pattern of chromosomes, gonads or genitalia. The medical solution in the case of an intersex person is to assign to that individual the sex which readily can best fit with professional advice and natural expectations. For the transsexual the medical solution is the offer of the appropriate level of treatment so that the patient's preferred gender can be accommodated in the best lifestyle that is available. In outlining this approach the Professor emphasised that he was *"not talking about legal principles but medical principles. In medicine you find solutions that make provision for* a *person to live a decent life."*

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(55) **PROFESSOR GREEN:**

Dr. Green is the Professor of Medical Genetics at U.C.D. He is a fellow of several colleges and faculties, is the Director of the National Centre for Medical Genetics at Our Lady's Hospital for Sick Children in Crumlin as well as being a consultant at that hospital and at Temple Street. He has written and published widely and is an authoritative expert in his field. Though not an endocrinologist or a psychiatrist, his practice involves the diagnosis and treatment of intersex persons many of whom have a genetic base. And so in both his own and in the court's view, Professor Green was qualified to give the evidence which he did

during the course of the hearing.

First, he referred to an analysis which was carried out on Dr. Foy in Crumlin Hospital on the 22nd July 1999. The purpose was to analyse the chromosomal compliment of the applicant, to determine whether that was male or female and to detect the presence of any chromosomal abnormality, if that should exist. Whilst this analysis was done by Dr. Stallings, the report of the latter and the witnesses' views thereon, were admitted without objection. This test showed a perfectly normal *"chromosomal"* pattern applicable to a male, as well as a normal genetic profile, again applicable to such a person. Within the remit of the test there was no indication of any abnormality in the make-up of the person under review. In addition knowing as one does that Dr. Foy fathered two children it is clear that at the relevant time he was fertile which is confirmatory of the absence of certain disorders.

(56) Professor Green agreed, without dispute, that there is of course at least four indicators of sex, called the biological indicators. The research from Holland raised, in his view, a question as to whether, in addition, there was a neuro-biological basis for sex differentiation. He felt that there was some data to support such a basis but that a new hypothesis was required to explain its foundation. He instanced the SRY gene and its

identification and development as an illustration of what he meant. He felt that uncertainty existed as to whether the difference between the male and female brain was an independent event or was reliant, either in whole or part, upon other forces. He pointed out that because of hormonal factors, facial hair and particular bodily characteristics occur. He therefore postulated whether the difference in the respective brains of males and females, which he acknowledged, could similarly relate to some other earlier stage of human sex development. The process is a sequential one. A following step cannot occur without the previous one. This could equally apply to the brain which should not be taken in isolation. More research was needed, he said; a fact acknowledged itself by one of the studies above mentioned. The process of falsification was important. As of now he did not think that there was sufficient evidence to establish a fifth independent factor. In his opinion, a transsexual male to female as here, was male at birth and equally remained male prior to any gender reassignment surgery. Post that surgery, if the appearance of the transsexual was that of the preferred gender and if the individual wished to be regarded as of that gender, he would so regard that individual. He would in a post-operative situation respect a person's wishes even though, chromosomially and in several other structural ways, that person could never fully become a female. He recognised that there was a difference between biological sex and gender. Gender is how a person feels in terms of sex about themselves.

Professor Green told the court that human life depends on there being a progenitor.

He concluded by indicating that, in his opinion, transsexualism was not an intersex condition as by definition the latter involved an abnormality in stages one to four. He was satisfied to follow the DMS-IV and the Guidelines. He also freely acknowledged that Gender Identity Disorder was a recognised psychiatric condition.

(57) **DR. DARLYMPLE:**

In addition to his evidence on the practice and procedure at Charing Cross Hospital, and on his examination of the applicant on the 9th July 1992, Dr. Darlymple also expressed views of a more general nature. In the context of relevance to the issue presently under discussion, he was of the opinion that transsexualism was a recognised psychiatric disorder and had been so recognised as such a disorder for several years. He was satisfied with the DSM-IV and the ICD documents. Therefore, subject to the following observation, he agreed that transsexualism was not concurrent with any other physical intersex condition, that it was not a symptom of any other mental disorder such as schizophrenia and likewise that it was not associated with any genetic or sex chromosome abnormality. The observation mentioned was that though intersex was different, he felt that perhaps some future research might show a linkage between that condition and transsexulism, which conditions of course could conceivably exist simultaneously in the same person. Dr. Darlymple re-emphasised the approach of the psychiatric profession which was one focused on and directed towards psychiatric health and not biological status. In the post-surgical reassignment situation, he would have no doubt but that the patient should be regarded as of the female gender for all intents and purposes but no further would he go. He was not making a statement about biological set up or about brain sex differentiation. Within his discipline therefore his understanding was that this condition was psychiatrically based and that the post-operative individual should and was entitled to be regarded as of his or her preferred gender.

(58) **DR. DUNLEAVY:**

Like his colleague from the Charing Cross Clinic, Dr. Dunleavy informed the court that transsexualism was not concordant with any other physical intersex condition which condition was biological in origin. Neither was it, part of any other psychiatric illness or part

of a genetic or chromosomal abnormality. It was and has been recognised for decades as a psychiatric illness. In treating such patients the advice of the psychiatrist is directed towards the happiness and well-being, physiologically; of that person. It is no part of the doctor's brief to address the biological issues which in any event in his opinion would be impossible to change. If a person had a normal chromosomal profile, normal hormonal profile, genitalia properly formed and had fathered two children, then, that individual was at birth male. Surgery, and in particular post reassignment surgery, if successful, would lead to a new gender. If hormones were stopped or significantly reduced then there was every likelihood of a regression, by this he meant in the case of a male to female transsexual, that hair growth and other former characteristics would re-emerge. He saw at present no reason to change from the published criteria based view that this was not an intersex condition or a condition of the brain.

(59) **DR. FRANK O'DONOGHUE:**

Dr. O'Donoghue was, in all material respects, in agreement with the other consultant psychiatrists who gave evidence before me. He did not consider that this was a congenital abnormality and was satisfied that it was separate from an intersex condition. It was psychiatrically based but he said that because of the recent publications some people might move closer to the line of thinking that there may be some neuro hormonal basis for the condition. He relied upon and supported **DSM-IV** and **ICD.** It was not possible in his opinion to assess gender dysphoria in the newborn but some differences did emerge between age three and four. At four to five the concept of gender became an issue. The purpose of surgery in his view was to reassign a person's biological body with a person's psychological self-identity. In his opinion Dr. Foy was at birth and prior to surgery a male but post-operatively was only partially a male. There was in his view a clear distinction between sex

and gender, gender being the psychological component of sex. Post July 1992, Dr. Foy was of the female gender.

(60) **DOCTOR'S DALY AND MOLONEY-QUINN:**

Dr. Daly, who at the relevant time was Master of the Coombe Hospital in Dublin, performed an ultrasound scan on Miss. Foy on the 11th August 1999. The scan evaluated the pelvic anatomy. As to be expected the result of the scan showed no uterus or cervix. Thus there was no evidence of ovarian tissue. The vagina had a normal appearance as did the bladder and bowel loops. There was no sign of any female reproductive organs.

Dr. Quinn who is a general practitioner in Athy, Co. Kildare, has seen the applicant on a number of occasions throughout the years. She gave evidence of Miss. Foy's external appearance after July 1992 and commented favourably on the end result including breast augmentation.

(61) The above therefore is the state of both the medical and scientific evidence on this, the alleged fifth indicator of sexual differentiation. A finding on such evidence, is of course essential. However, in order to put my views on this topic into context and in order to convey a greater understanding of where it impacts on the legal issues, it would I think be more preferable if first I was to outline the precise reliefs sought and the legislative in which these are based, and then secondly to set forth the submissions made in respect thereof. Having done that I then propose to revert to the evidence and to set out my conclusions thereon.

(62) **PROCEEDINGS AND RELIEFS SOUGHT:**

The applicant seeks an order of certiorari by way of an application for judicial review to quash the decision taken by the first named respondent refusing to correct the entry relating to the applicant's sex, at column 4 in the Register of Births, by changing it from *"male"* to

"female." She also seeks a similar order in relation to the refusal of the first

named respondent to correct the entry relating to the her name, at column 3 in the Register of Births, by changing it from "Donal Mark" to "Lydia Annice."

(63) The third order sought is one of *mandamus,* again by way of an application for judicial review, requiring the first named respondent to correct the sex appearing in column 4 of the applicant's birth register entry, by changing it from *"male"* to *"female"* and, as a corollary, to correct the name appearing in column 3 of the entry, by changing if from "Donal Mark" to "Lydia Annice." In addition Dr. Foy seeks a declaration that the practice of the Registrar General, whereby biological indicators existing at the time of birth are used to determine sex for the purpose of registration in column 4 of the birth register, is ultra vires the Registration of Births and Deaths (Ireland) Act 1863 as amended, and the 1880 Regulations made thereunder, which regulations, *inter alia,* set forth the duties of registrars of births, deaths and marriages.

(64) In the alternative, a declaration is sought that the Act of 1863 as amended, and the Regulations of 1880, are unconstitutional insofar as they fail to allow for correction to column 4 and column 3 of the birth register entry relating to the applicant by way of the deletion of the original incorrect entry, and are consequently in breach of the applicant's constitutional rights to dignity and privacy.

(65) Finally, and in the further alternative, Dr. Foy seeks a declaration that the said Registration of Births and Deaths (Ireland) Act 1863 as amended, and the said 1880 Regulations made thereunder, breach the applicant's right to equality guaranteed by article 40.1 of the Constitution and the applicant's constitutionally protected right to marry, to

privacy and to dignity insofar as they do not allow for the correction of column 3 and column 4 of the applicant's entry in the birth register.

(66) On behalf of the respondents a full defence has been filed. This includes a general denial of the claims being made on behalf of Dr. Foy as well as some positive assertions on a number of the reliefs sought. For example, it is claimed that an entry in the register may only be corrected or amended if there is a clerical error or an error as to fact or substance neither of which category apply to the amendment application made by Dr. Foy. Secondly, having exercised a constitutional right to marry on the 28th September 1977, which marriage has not been annulled or dissolved, there is, it is argued, no right or capacity in the applicant to contract any further marriage in this State. And finally it is said that the approach of the first named respondent is valid and is in accordance with law, and that the asserted infringement of several constitutional rights is without foundation.

The notice parties have also filed a defence.

The pleadings in this way have thus been closed.

(67) **THE LEGISLATIVE FRAMEWORK:**

In para. 2 of this judgment there is a very brief overview of this framework. It commences in respect of births with the Registration of Births and Deaths (Ireland) Act, 1863, which set up in this country, for the first time, a structure with personnel, to carry out and perform the duties and responsibilities assigned to it. Section 4 of the Act established a General Register Office and provided for the appointment of a fit and competent person, to be known as the Registrar General, to take charge of that office. The titles of both the office and its occupant were changed, by section 3 of the Vital Statistics and Births, Deaths and Marriages

Registration Act, 1952, to Oifig an Ard-Chlaraitheora and to An tArd-Chlaraitheoir, respectively. That office holder, with the consent of the Lord Lieutenant in Council, was given the power to alter the forms annexed to that Act and the right to appoint an assistant to be known as the Assistant Registrar General. In Part II, districts, to be known as the Superintendent Registrar's Districts and the Registrar's Districts were provided for, as well as the personnel to fill and operate these posts. Other administrative supports including the provision of register books and forms were put in place. Under s.30 every registrar was required to inform himself carefully of every birth and death which happened within his district and to learn and register, as soon after the event as conveniently could be done, in one of the said register books the particulars required to be registered according to the annexed forms (A) or (B) whichever was appropriate. As a result of the cross-reference to form (A), which dealt with the registration of births, s.30 required the recording of the sex of the child which was to be made in column 4 of form (A).

(68) The particulars therefore required to be registered, as set out in form (A) were as follows:-

> No. of entry,
>
> Date and Place of Birth,
>
> Name, that is Christian Name (if any), Sex, whether *"male"* or *"female",*
>
> The Christian Name, Surname and Dwelling Place of the Father,
>
> The Christian Name and Married Surname of the Mother: then her maiden Surname preceded by the word "formally",
>
> The Rank, Profession, Trade or calling of the Father,
>
> The Signature, Qualification and Residence of the Informant, The Date when Registered,

The Signature of the Registrar,

Baptismal Name, if added after Registration of the Birth and Date.

Section 30 of the Act of 1863 was amended by s. 4 of the Registration of Births Act, 1996 :-

(a) by the substitution for *"Forms (A) and (B) hereunto annexed respectively"* of *"Form (B) hereunto annexed, in respect of deaths "* and

(b) by the deletion of Form (A), annexed thereto"

(69) With the deletion of Form A it was necessary to set out what particulars were required to be registered. Section 1 of the 1996 Act and the Schedule thereto specified this information. The list of particulars which must now be registered as a result of s.1 are as follows:-

Number of entry.

Date and Place of Birth.

Sex of Child.

Forename(s) and Surname of the Child.

Mother's Forename and Surname, Address and Occupation.

Any former Surname(s) of Mother.

Father's Forename and Surname, Address and Occupation.

Any former Surname(s) of Father.

Signature, Qualification and Address of Informant:

Date of Registration and Signature of Registrar:

Forenames(s) of Child, if added after Registration of Birth and Date thereof.

Section 1 of the Act of 1996 does not apply to the registration of any birth registered before the commencement of that Act: - s.1 (7) thereof. However and notwithstanding this, it is interesting to me that the "sex" and "name" of a child must still be specified though in relation to sex, the words" *"whether 'male' or 'female'"* have been deleted.

(70) **BIRTHS AND DEATHS REGISTRATION ACT (IRELAND) 1880:**

Under s.1 of this, the 1880 Act, it is the duty of certain identified or identifiable persons (qualified informants) to give to the registrar, within 42 days of birth, information of the particulars required to be registered concerning such birth and in the presence of the registrar to sign the register. In order of priority, this duty is placed on the father and mother of the child, in default on the occupier of the house where the child was born, in default on each person present at the birth and lastly on the person having charge of the child.

Under the section next following, if within this period of time the required information was not forthcoming from these informants, the registrar could by notice in writing require any of these persons to supply such information and to do so not later than three months from the date of birth, and furthermore could require such persons to attend and sign the register in the presence of the registrar.

(71) After the expiration of three months, but not later than twelve months after the birth, the registrar could not register such a birth except in accordance with and pursuant to the provisions of section 5.

If after the expiration of twelve months the birth of any child had not been registered, then the written authority of the Registrar General was required and due compliance with prescribed rules was necessary.

(72) Section 4 of the Act of 1880 is comparable to s.30 of the 1863 Act and in that way re-emphasises the duty which is placed on the registrar to inform himself carefully of every birth within his district, and forthwith to register that birth in accordance with the prescribed form and manner. Section 8 of the Act provides that the name of a child may be altered by the parent or guardian of such child or by some other person who is procuring such alteration. The application for any such change originally had to be made within twelve months after the registration of the birth, but by virtue of s.5 of the Vital Statistics and Birth, Deaths and Marriages Registration Act, 1952, can since then be made *"at any time"*. The material which is required to be submitted is specified as is the manner in which the alteration is to be affected; this by entering the altered name in the proper column of the register but *"without any erasure of the original entry "*.

(73) In addition to s.4, the other most important section of this Act, for the purpose of this case, is undoubtedly section 27. In its material form it reads as follows:-

Correction of Errors

> *"27. With regard to the correction of errors in registers of births and deaths it shall be enacted as follows:-*
>
> (1) *No alteration in any register shall be made except as*

authorised by this Act.

(2) Any clerical errors, whether they occurred before or after the commencement of this Act, which may from time to time be discovered in any such register may be corrected by any person authorised in that behalf by the Registrar General subject to the prescribed rules.

(3) An error of fact or substance in any such register may be corrected by entry in the margin (without any alteration of the original entry) by the officer having the custody of the register upon payment of the appointed fee, and upon production to him by the person requiring such error to be corrected of a statutory declaration

(Form C, Schedule Three), setting forth the nature of the error and the true facts of the case, and made by one or more persons required by this Act to give information concerning the birth or death with reference to which the error has been made, or in default of such persons, then by two credible persons having knowledge of the truth of the case; and it shall be the duty of the registrar, on becoming aware of any error in fact or substance, to send a requisition to the informant requiring him to attend and correct same.

(4) .....

And whenever such correction shall have been made in any entry of birth or death subsequently to the transmission to the General Register Office of the return of certified copies containing such entry, such declaration or certificate of coroner shall be forthwith sent through the post office to the Registrar General, who shall cause such correction to be made in the certified copy, and such addition shall be held to be good as if part of the original entry."

(74) As can therefore be seen there is a statutory duty to register a birth, which registration must contain specified information, including the sex, namely *"male"* or "*female"* of the child: s.30 and Form (A) of the Act of 1863 and s.4 of the 1880 Act. Under s.8 of the Act last mentioned, there is power to alter the name by which any child has been registered in the register and under s.27 power for the correction, under subsection (2) - of clerical errors and under subsection (3) - of errors of fact or substance. With the latter type of error a statutory declaration in prescribed form must be submitted and if and when so satisfied the appropriate officer may correct the error by entry in the margin but without any alteration of the original entry.

Forms A, B, and C of the First Schedule to the Act of 1880 deal with the change of name under s.8 and Form C of the Third Schedule with the statutory declaration required under s.27 (3) to correct errors of fact or of substance.

(75) **OTHER RELEVANT STATUTORY PROVISIONS.**

Section 6 (1) of the aforesaid Act of 1952, allows the Minister to make regulations for the issue, *inter alia,* of birth certificates containing such items as may be specified in the regulations. This resulted in S.I. 215/1953 which instrument is headed *"Short Birth Certificate Regulations, 1953. "* Paragraph 3 defines a *"short birth certificate"* as meaning in respect of an entry in the register of births, a certificate of the items set out in Part I of the Schedule endorsed in the manner set out in Parts II, III or IV of the said Schedule. Part I includes the name and surname of the person as well as the *"sex"* of that person. In passing I should say that I do not read para. 5 of this statutory instrument in the same way as has been suggested on behalf of the respondents. I believe that para. 5 deals with *"the application"* for such a certificate and not with the particulars which should be contained in that certificate.

In any event, in addition to this statutory instrument the Vital Statistics Regulations (S.I. 280/1954), require the recorded particulars to be made available to the Central Statistics Officer. The particulars to be supplied have also been laterally supplemented in relation to stillbirths by S.I. 427/1994.

Section 22 of the Adoption Act, 1952, as later amended, requires the establishment and maintenance of an Adopted Children's Register, with the Minister again being given power by regulation to provide for the short form birth certificate and in particular for which items should be contained therein.

(76) A further change was made to the Act of 1880 by s.49 of the Status of Children Act, 1987. This section repealed the original s.7 and in its place substituted a new s.7 and s.7A of the Act. The new s.7 deals with the registration of a father where the parents of that child are not married. Section 7A provides for the re-registration of the birth of a child of unmarried parents where no father's name has been entered on the register. The section and S.I.

123/1988 provide a number of different ways in which that can be done and the mechanism by which it can be achieved.

(77) **REGULATIONS**

Section 11 of the Registration of Births and Deaths (Ireland) Act, 1863, gives to the Lord Lieutenant, or with his consent to the Registrar General, power to make regulations for the management of the General Register Office and for the discharge of the duties of the Registrar General, officers, clerks and servants of the said office and of the superintendent registrars and registrars and their respective deputies.

A complimentary power was also conferred on the Lord Lieutenant, or with his consent on the Registrar General, under s.34 of the Act of 1880. Under this section either of these office holders, could by order, alter or amend any existing forms and could prescribe new forms as well as making regulations for *"prescribing any matters authorised by this Act to be prescribed, and to revoke and alter such regulations ".*

(78) Pursuant to these enabling provisions two sets of regulations were introduced. The first and by far the most important to this case were those headed *"Regulations for the Discharge of the Duties of Registrars of Births, Deaths and Marriages in Ireland and of Assistant, Deputy, and Interim Registrars,"* which regulations in this judgment are referred to as *"the 1880 Regulations ".* The second were the Regulations for the Duties of

Superintendent Registrars of Births, Deaths and Marriages made in 1881 *("the 1881 Regulations ").*

(79) Regulation 22 obliges every registrar to keep himself carefully informed of every birth and death which happens within his district and to register such event promptly, this being described as his most important duty. He must however, before making any such entry, satisfy himself that the event, whether it be birth or death, occurred within his district, that the legal time for registration has not lapsed and that the *"Informant"* is legally qualified to sign the register: reg. 33. For the purposes of his duties, an *"Informant", is* any one or more of the persons mentioned in s.1 of the 1880 Act. Paragraphs 45 to 99 inclusive of the Regulations deal with the registration of births and contain in considerable detail information about the structure which had been set up by the Acts of 1863 and 1880 and how best that structure could be given effect to. Taking as an example, a registration time of three months as being typical, regs. 62 to 72 inclusive, set out what information must be entered, in respect of such a birth, in the proper columns of the register book. A list of the required particulars is given at para. 68 of this judgment. Columns 3 and 4 in the said regulations are commented upon in the following way:

> *"Column .3. The name (commonly known as the Christian name), if any, which shall have been given to the child in baptism, or otherwise. The surname must not be inserted in this column. ... (Reg 64).*

Column 4. The Sex, whether "male" or "female". (Reg 65)

Similar information is required where the birth is registered after three months and indeed after twelve months.

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The correction of errors in completed entries is dealt with in paras. 159 to 171. Regulation 159 provides:-

"The Registrar must make no alteration in any completed Entry of a Birth or Death, whether made before or after the commencement of the ... (Act of 1880) except in accordance with the provisions here set forth."

Regulation 160 deals with clerical errors: it reads:-

"Clerical errors. - All accidental Errors and omissions made through want of care in entering the particulars, or signing the entries, or through misunderstanding on the part of the Informant or the Registrar, are to be deemed Clerical Errors. A list of Errors of this nature is given in the Appendix F page 54, and they are arranged in two classes, namely (1) those Clerical Errors which may be corrected in the presence of an Informant ... and (2) those which may be corrected in the presence of a qualified Informant only ".

The method of correcting such an error is by the Registrar

"drawing his pin through the erroneous words, letters, or figures, and by writing what is correct above the word etc. struck out, or by supplying what is deficient when an Error consists of an omission. The Registrar having so made the correction; must note the Clerical Error in the broader margin of the Entry in which it occurs by writing therein the words "Clerical Error in Col. Corrected on the day of by me. ... An asterisk (*) should be fixed to the note in the margin and to the word etc. altered or supplied. " (Reg. 161)

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(80) Errors of fact or substance which all errors are, other than there referred to above

(reg 168) are dealt with by regs 168, 169, 170 and 171.

Regulation 169 states:-

> *"The Registrar must correct an error of fact or substance in a Register Book of which he has the custody, by entering in the margin without any alteration of the original Entry, upon payment to him ... and upon production to him by such person of a Statutory Declaration on Form C, Third Schedule, made before a Justice of the Peace, setting forth the nature of the Error and the true facts of the case. The declaration must be made by one or more persons required to give information concerning the Birth or Death with reference to which the Error has been made, or in default of such persons then by two creditable persons having knowledge of the truth of the case. "*

(81) Regulation 70 provides:-

> *"170. The Registrar is required upon becoming aware of any Error of Fact or Substance to send a Requisition on the proper printed form to the Informant requiring him to attend and correct such Error....."*

(82) Regulation 171

> *"Upon the attendance of such an Informant ..... and upon the production to him of the Statutory Declaration duly made and signed by the proper person or persons, he must, unless there are reasonable grounds for his declining to so do, make the correction in the broader margin of the Register Book opposite to the erroneous Entry in the manner shown in Appendix F p. 63. If the Error be the insertion of erroneous words or figures, the Registrar must indicate such words or figures in the body of the Entry by affixing an asterisk (*) to such works or figures, he must then send ..."*

(83) And finally, for the sake of completion, I should mention that in reg. 38, provision is made for an addition to or alteration of what has been inserted provided such alteration or addition is carried out before the entry is completed. Of course that is not the situation in this case.

(84) As is evident from the above, the 1880 Regulations reinforce the relevant statutory provisions, by in part underpinning and complimenting such provisions and by in part elaborating upon and explaining the workings of such provisions, especially for our purpose: s.30 and Form A of the Act of 1863 and ss. 8 and 27 of the Act of 1880. They inform the reader that the method of correcting a clerical error does not involve any erasure of the original entry but rather is affected by drawing a line through what is sought to be corrected and by a note in the broader margin of the entry explaining and dating such correction. With regard to errors of fact or substance the original entry cannot in any way be altered but the correction is made by a marginal entry. When either type of error has been corrected a birth certificate showing the correction in the margin can be obtained pursuant to s.52 of the 1863 Act or s.25 of the Act of 1880 Act. In addition under the Registration of Births, Deaths and Marriages Regulations, 1987 (S.I. 234/1987) one can obtain a certificate containing the corrected entry only, which certificate would not show the fact of correction or any other alteration or detail.

(85) **SUBMISSIONS - ON BEHALF OF THE APPLICANT:**

On behalf of the applicant it is submitted that this court should now conclude from the most recent medical and scientific evidence available, first, that there exists this alleged fifth indicator of sexual differentiation, secondly, that where such indicator is inconsistent with biological markers then the former should be given precedence over the latter, and thirdly, that when in existence, this conflict is present no later than at birth and accordingly the person

who suffers from this condition, is at birth, of a sex contrary to his or her anatomical structures. This being the true position, as the argument goes, any entry in column 4 of the register which does not reflect this, is an entry containing an error of fact or substance and accordingly the Registrar General under s.27 of the Act of 1880, has not only the power but also the duty to correct it. Certainly he must do so, at least where the affected individual has undergone gender reassignment surgery. This proposition has at its core a claim that the biological criteria, as fixed by the court in *Corbett v. Corbett* [1970] 2 W.L.R. 1306, should not be applied or followed in circumstances like the present.

(86) In the event of the applicant failing to succeed on this, the administrative law or judicial review point, it is then argued on her behalf that the appropriate Acts and Regulations, by their failure to permit the correction as sought, are and constitute a breach of several of her constitutional rights, in particular the right to privacy, dignity, equality and the right to marry. It is said, as part of this submission, that Dr. Foy wishes to assert her guaranteed constitutional rights in a manner which does not interfere with the rights of her family members. She is not seeking, as Mr. Rees did, a prohibition from public inspection of the Register of Births. Moreover it is claimed that her rights would be vindicated by being able to obtain a corrected version of her birth certificate without any reference to such corrections; whilst at the same time any member of the public; including her family, could by inspecting the register observe what the original entry was. In addition she says that she

will not seek to amend in any way the birth certificates of her daughters, though if in time and of their own volition, they themselves sought such an amendment she would think this to be appropriate. In support of these legal propositions cases were referred to from the domestic courts of foreign jurisdictions as well from the European Court of Justice and in particular from the European Court of Human Rights.

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(87) Commencing with *Van Oosterwijk v. Belgium* (1981) 3 EHRR 557, which was the first case involving a transsexual to proceed through the Commission to the European Court of Human Rights, relying upon *Handyside v. The United Kingdom* (1979-80) 1 E.H.R.R. 737 to explain the margin of appreciation doctrine, and then calling in aid the progressively more favourable views of the court, as is evident from its judgments in *Rees v. United Kingdom.* (1987) 9 EHRR 56, *Cossey v. United Kingdom* (1991) 13 EHRR 622, *B v. France* (1993) 16 EHRR 1 and *Sheffield and Horsham v. U.K* (1999) 27 EHRR 163, counsel on behalf of the applicant submits strongly, that though the court of Human Rights, did not in any of these cases, save for B v. *France, (supra)* hold that there was a violation of either article 8 or article 12 of the Convention, nevertheless by a combination of the ever increasing number of judges in support of their plight and of some powerful dissenting opinions, this court, in the case of Lydia Foy, should now incorporate, by way of legal recognition, the existence of this fifth indicator of sexual differentiation. In any event it should by analogy on the constitutional point, hold that there has been a violation of article 40.3.1 and article 40.3.2 of the Constitution of Ireland, 1937.

> *Corbett -v- Corbett* [1970] 2 W.L.R. 1306 it is said, is now outdated and it is urged that to follow it would constitute, a failure to recognise and reflect modern scientific, medical and societal practises.

(88) Under the constitutional argument, reference was made to *Norris -v-Attorney General* [1984] IR 36, *Kennedy -v- Ireland* [1987] I.R. 587 and In re: *A Ward of Court* [1996] 2 I.R. 79, as cases establishing and/or acknowledging and/or confirming the rights of privacy and dignity. The right to marry is of course recognised in *McGee -v-Attorney General* [1974] IR 284. The right of equality is expressly contained in article 40.1, the only issue being its applicability to the case. So under this limb of the claim, it is submitted that if

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the legislative framework denies to the applicant a birth certificate of choice and thus prevents her from being perceived as being of the sex which represents her real sex (in terms of psychological sex) and her chosen sex (in terms of anatomical change), then such a prohibition constitutes an unjustified interference with the rights herein mentioned.

(89) **SUBMISSIONS - ON BEHALF OF THE RESPONDENTS:**

On behalf of the respondents the first submission, dealt with the principles of interpretation which should apply to the relevant Acts and Regulations made thereunder. A distinction is of

course made between pre 1937 Statutes and post 1937 Acts of the Oireachtas. This, in the context of the presumption of constitutionality, of the double construction rule and of the

principles of constitutional justice with regard to proceedings, procedures, discretions, and adjudications which are permitted, provided for or prescribed by post 1937 Acts. Since, quite evidently, the Acts in question pre-date the Constitution there is, on that account only, no presumption as to constitutionality. However relying on *ESB v. Gormley* [1985] I.R. 129 it is suggested that by virtue of s.15 (2) of the Vital Statistics and Births, Deaths and Marriages Registration Act, 1952 and s.5 of the Births, Deaths and Marriages Registration Act, 1972, the appropriate Acts and Regulations are deserving of this presumption. Even however if this be incorrect, it is submitted that in accordance with judicial dicta, an example of which is the. *State (Kennedy) v. Little* [1931] I.R.39*,* the courts, even with pre-1922 statutes, should be quite slow and quite reluctant to declare any such a Act, inconsistent with the Constitution unless it is evidently so contrary. In any event it is pointed out that the onus of establishing inconsistency rests with the person who challenges the continuing validity of the provision in question. As between the effect of a presumption and this onus, it is stated in *Kelly, The Irish Constitution (3rd ed.)* at p. 455 that *"one would be hard put to identify a real distinction between this requirement and the presumption of constitutionality itself".*

(90) In testing the constitutionality of a pre 1937 statute, Walsh J. in the State *(Quinn) v. Ryan* [1965] I.R. 70 at p. 130 adopted what is said to be the true test which test subsequently has been described as the "intra vires test". In *Garvey -v-Ireland* [1981] I.R. 75 as in Norris v. *the Attorney General* [1984] IR 36 the principal approach to a pre-1937 statute, was based on the wording itself of article 50.1 of the Constitution.

On these principles as well as on what Gannon J. said in *Osheku v. Ireland* [1986] I.R. 733, about the manner in which a discretion should be exercised by a Minister, it is submitted on behalf of the respondents that even in the absence of a presumption and where none of its corollaries apply, the Acts of 1863 and 1880 and the Regulations made thereunder, remain valid in terms of the Registrar General's interpretation thereof and to this case, his application thereto. Accordingly it is said that in applying established case law to article 50 of the Constitution, the result for the provisions impugned, is that they withstand the challenge and continue to have full force and effect.

(91) On the judicial review point it is claimed that the Register of Births is a historical document specifically focusing on and recording the events of a person's birth. For that purpose, it is necessary at the date of birth to determine the sex of a child so that the appropriate entry can be made. In carrying out this exercise it is reasonable to rely on the biological criteria determined by Ormrod J. in *Corbett v. Corbett*, [1970] 2 W.L.R. 1306. Support for the correctness of this reliance is drawn from other cases where that same test has been followed certainly in the U.K. It is pointed out that notwithstanding what might be seen as a shift in judicial support within the European Court of Human Rights in favour of the applicant's claim to revisit her birth certificate, from 1986 to the present time there has been no court majority, apart from *B v. France*, (1993) 16 EHRR 1 which has found a

violation of either Articles 8 or 12 of the Convention. Accordingly it is submitted to this court that when requested to make the appropriate alteration, the first named respondent was entitled to

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conclude that there had been no error of fact or substance in the original registration of the birth and accordingly his refusal to accede to that request was objectively justified and legally sustainable.

On the constitutional issue the existence of the rights to, dignity, to privacy and equality has been acknowledged. It is said that such rights are not absolute and must be considered in the context of the rights of others, including family members, the general public and society itself. Whilst it is recognised that this may cause some inconvenience to a transsexual, nonetheless the State by its positive acts, has arrived at a situation where a fair balance now exists between the rights of persons like the applicant and the rights of others and society who would be affected by any such change.

With regard to an alleged infringement of the applicant's constitutional right to marry it is accepted that such a personal right exists under Article 40.3. of the Constitution: see *McGee v. The Attorney General* [1974] IR 284. Marriage, however, is between man and woman and since the applicant remains biologically male and not female she cannot in accordance with law remarry a male person; even if she had the capacity to do so. Finally in respect of the equality argument it is submitted that there is no evidence to suggest that the applicant is not being held equal before the law as the Registrar General would treat any transsexual in the same way.

(92) **SUBMISSIONS - ON BEHALF OF THE NOTICE PARTIES:**

These submissions on behalf of the daughters of Dr. and Mrs. Foy, cover some of the grounds already mentioned in the preceding recitation, and therefore I don't propose to further repeat what is already set out elsewhere in this judgment. In principle however the submissions of behalf of the Notice parties were focused, correctly in my view, on the consequences for

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them, which would follow if the reliefs sought were granted. It was pointed out that if there was an alteration of the historical document to record the applicant as having been born female then the resulting marriage of Dr. Foy to Mrs. Foy would be void, the consequences of which would have a profound effect on the status not only of Mrs. Foy but also of the children of that marriage. The law relating to nullity in Ireland is governed by the Matrimonial Causes and Marriage, Law (Ireland) Amendment Act, 1870. A distinction must be made between a decree of dissolution of marriage and a decree of nullity. *Griffith v. Griffith* [1944] I.R. 35 was cited in support of this distinction, as was *Shatter's Family Law* (4th ed.) at p. 182. Based on what Haugh J. said in *Griffith, (supra)* and on what the textbook refers to as the law, it is claimed by the notice parties that if persons of the same biological

sex enter into a contract of marriage then that marriage is void. Accordingly, if the amendment as to sex is granted, the notice parties would be deprived of their status as members of a constitutional family. Mrs. Foy would never have been the wife of Dr. Foy and so the orders of both the Circuit Court and the High Court on Circuit, which are referred to above, would be set at naught or at least placed in serious jeopardy. These orders, some of which have the effect of regulating property rights are of great importance even to this day. In many other spheres, for example in areas such as taxation, social welfare, etc. the resulting consequences are unknown and at a minimum great uncertainty would arise. Moreover the birth certificates of the children would be open to review and alteration. In all it is claimed that to permit the amendments as sought would be to gravely interfere with the established rights of the notice parties and their mother.

(93) Article 40.1., 40.3.1, 40.3.2 and Article 41.1.1, of the Constitution have been referred to in support, as have several cases including *Western Health Board v. An Bord Uchtala* [1995] 3 I.R. 178, TF v. *Ireland* [1995] 1 IS 321, and The *State (Nicolaou) v. An Bord Uchtala* [1966] I.R. 567. In all it is strongly urged that if this court should have to

consider the question of constitutionality, then the balancing result should favour the rights of the notice parties over and above that of the applicant.

(94) The submissions it should be said also went on to deal with, in some detail, the case law from the European Court of Human Rights when dealing with the constitutional arguments. They also referred to other relevant statutory provisions including Part IV of the Civil Liability Act, 1961. Any failure on my part to .recite the entirety of such submissions should not in any way be seen as a reflection on their substance. I refrain from doing so only because, at least in broad terms, they are covered by what is recorded as being the submissions of the first named respondent.

(95) **ISSUE NO. 1:**

The first major issue in this case is whether on the correct interpretation of the relevant provisions of the Acts of 1863 and 1880 and the Regulations made thereunder, the Registrar General, in his application of these provisions to the facts of this case, was or was not legally correct in relation to the original entry and his refusal to amend. His views and the basis for such views, must therefore be examined. Having done that, the issue then demands an evidential decision on the fifth indicator of sexual differentiation.

(96) **THE CORRESPONDENCE WITH THE FIRST NAMED RESPONDENT**:

Commencing with her letter dated the 29th March 1993, the applicant entered into correspondence with the Registrar and the General Register Office with a view, initially, to obtaining an amended birth certificate showing her corrected name and what she claimed was her corrected sex. Throughout the summer and autumn of 1993 that correspondence continued. On the 17th December of that year the Assistant Registrar General, Mr. Kehoe, replied to Mr. James Houlihan, solicitor who was then appearing on behalf of the applicant.

He pointed out that an entry in the birth register is a record of an event and thus is confined to the relevant facts then in existence with regard to that birth. The entry is not intended to be a personal record which could be updated from time to time. The format of that entry requires the sex of the child to be specified in column 4. Though he understood that Dr. Foy had undergone gender reassignment surgery, this fact in his opinion had no bearing on the relevant entry. He regretted that the first named respondent could not accede to the request for the corrections as sought.

In the following number of years further correspondence passed between the parties from time to time. On the 17th January 1996, Mr. Kehoe's successor, Mr. O'Cleirigh, wrote to Dr. Foy and effectively repeated the position of the Registrar General as previously outlined in the said letter dated the 17th December 1993. On the 3rd December of that year, Miss Johnson, who was then representing Dr. Foy, wrote to Mr. O'Cleirigh formally seeking to have the original entry in column 4 of the Register, with regard to her client, amended by specifying as her sex "*female"* instead of *"male".* The basis of this application, which was made pursuant to regulation 168 of the 1880 Regulations, was that at birth Dr. Foy was a female but was suffering from a disability which had not been diagnosed. In addition in that letter it was claimed that any negative response would constitute a breach of the applicant's constitutional rights to privacy, dignity, equality and the right to marry.

(97) The response from the Assistant Registrar General was dated the 11th February 1997. It was written in the following terms:-

> " ... I *would like to explain that an entry in the birth* register *is a record of a particular event: which occurred on a particular date. It is therefore confined to the facts relating to the circumstances of birth at the time of the birth in question. In this*

> *case it relates to a birth of Donal M. Foy which occurred on the 23rd of June 1947 in St. Mary's Home, Athlone. I must also explain that a birth entry is not, nor did the law intend it to be, a personal record which is to be constantly updated to take account of every significant change in the life history of the subject.*
>
> *The format of the entry in the register of births in prescribed by law, in particular s.30 of the Births and Deaths Registration (Ireland) Act, 1863 and the Schedule to that Act, and it requires the recording of the sex of the child in column 4. The physical evidence of the genital characteristics of the child at birth would*

be used to determine sex, for registration purposes and a determination on this basis would be reflected in column 4 of the relevant birth entry.

I am aware from the correspondence on the file that Miss Foy has undergone gender reassignment surgery, related hormone and other treatments. While I fully accept the significance of this for her as a person, I must explain that it has no bearing on the facts of the birth and accordingly there would not appear to be any possibility for an amendment to birth entry in question. For this reason even if a statutory declaration was completed for the amendment you requested, which would be the procedure in the case of an amendment of an error of fact or substance, An t-Ard Chlaraitheoir would not be in a position to grant authorisation for such an amendment. "

(98) On the 19th March of that year, Miss Johnson again wrote and formally requested an amendment to column 3, this by changing the inserted name of *"Donal Mark"* to *"Lydia Annice "*. In the reply dated the 2nd April 1997, Mr. O'Cleirigh in effect repeated the stance and position as adopted by the office and asset out in his said letter of the 11th February.

(99) The reference, in Mr. O'Cleirigh's said letter of the 11th February 1997, to the practise of relying upon the genital characteristics of a child at birth for the purposes of determining that child's sex, so as to record the relevant particulars in column 4, has its modern foundation in Corbett -v- Corbett (otherwise Ashley) [1970] 2 W.L.R.1306. In that case, which will again be referred to, Mr. Justice Ormrod, held, at p. 1325 that for the purposes of marriage, "the law should adopt in the first place, the first three of the doctor's criteria, that is the chromosomal, gonadal and genital test and if all three are congruent, determine the sex for the purpose of marriage accordingly and ignore any operative intervention." Though, as previously stated, this was a case dealing with marriage, nonetheless the judge's findings in this regard have subsequently been adopted in law for many other purposes, including the purpose of determining the sex of a child for the appropriate entry in column 4.

(100) **THE EVIDENCE OF SEAMUS O'CLEIRIGH**

In July 1994, Mr. O'Cleirigh succeeded Patrick J. Kehoe as the Assistant Registrar General in the General Office dealing with births, deaths and marriages. Subject to the direction and supervision of An tArd-Chlaraitheoir, who at the relevant time was Mr. Anthony Enright, an assistant secretary in the Department of Health and Children, this witness is effectively in charge of the Office of the Registrar General.

He explained that a civil system of registration was first introduced in this country by the Marriage (Ireland) Act, 1844, under which all marriages, save for those involving Roman Catholics, had to be registered. This omission was corrected by the Registration of Marriages (Ireland) Act, 1863. In the same year a similar system with regard to births and deaths was also provided, this by virtue of the Act of 1863. Under this legislation, as previously noted, a General Register Office was established, and provision was made for its staffing and support, with the offices of Registrar General, Assistant Register General and many others, also being

created. To facilitate the system the country was divided into almost 800 districts with a registrar for each district. In the years since, many such districts have been merged with the result that there is now approximately 250 district registrars. Each of these registrars has the duties and responsibilities referred to above and in particular at paras. 70, 71, 72 and at 78 to 83, inclusive.

Part of their function is to make quarterly returns to the Registrar General. This is affected through the district's Superintendent Registrar, who looks for, and if found, corrects any errors therein. These returns comprise an exact copy of each entry which is originally made in the register.

The particulars required to be registered, in respect of a birth, have remained unchanged from the commencement of the system until the coming into force of the Act of 1996. The amendments affected by this piece of legislation were intended to and did introduce an equality of recorded information as between a child's mother and a child's father. Save for this, the information is the same. In particular column 4 remains unaltered with column 3 being amended only by the addition of the child's surname to the already existing requirement of the child's forename.

(101) In Mr. O'Cleirigh's opinion the register is a historical document recording facts and events particular, not even to the date of registration but to the date of birth itself. It is intended to reflect such matters at a given time and is not seen as a document capable of recording later events in one's existence, such as marriage or death, or any other event irrespective of its importance. It is not an identity document. It is confined to the recording of particulars specified in and mandated by statute. Whilst in practice he concedes that, as

with a variety of other documents, it may have some uses in the obtaining of services, nevertheless its legal status is and remains that as described by him.

(102) Under s.8 of the Act of 1880, as amended by s.5 of the Act of 1952, column 3 of any entry in the register, which is headed *"name"*. can be amended in the circumstances therein outlined with the aid of Form A, Form B, and Form C, of the First Schedule to that Act. This means, in the opinion of the Registrar General, that when dealing with a baptised person, the name of that child cannot be changed under s.8 unless the recorded name is different from that given to him or her in Baptism. In addition the practice in the office is that

this statutory provision can be availed of only during the *"childhood"* of that person, and certainly has never been available after such person has reached the age of majority.

(103) There is, however, another method by which column 3 may be altered. Whenever an alleged error or omission in the recording of the name can be accurately described as either a class 1 or a class 2 clerical error, then in accordance with the regulations and in particular regs. 160 to 162 that error or omission can be remedied. Whether a similar correction as an error of fact or substance is available under s.27 (3) of the Act of 1880, was not, by his evidence, fully resolved.

(104) Section 8 is not available in relation to the correction of errors in column 4 of the entry. Subject to the applicability of s.27(3), (see para 124 of this judgment) any rectification under the heading of *"sex"* falls to be corrected as clerical errors under s.27 (2) of the Act of 1880. Accordingly where there is such an error or where the apparent and genital sex of the child has been wrongly identified, either as a class 1 or more probably as a class 2 error, this may be corrected: Appendix F, p. 56 of the 1880 Regulations.

(105) The method of correcting any such error is to follow the detailed guidelines contained in regulations 160 to 171. In essence where there is a clerical error the Registrar draws his pin through the erroneous words, letters or figures and above such words, letters or figures writes in the correct entry. Having made his correction he must then make a note in the broader margin to the effect that there existed a clerical error in a certain column, that it was corrected on a certain date, by him giving his title, in the presence of another officer, say a superintendent registrar. An asterisk should be affixed to the note in the margin and to the word which was altered or supplied. In the case of errors of fact or substance the correction is by entry in the margin without any alteration of the original entry, again supplemented by the use of an asterisk, to identify the error and to indicate when and by whom corrected and witnessed. The corrections as so made, though dated when executed, are nevertheless intended to have effect from the date of the original entry. For example if the applicant was successful in this case a marginal note would, inter alia, say

> "In Column 4 read 'female' for 'male' with a likewise reference in Column 3. If so made though prospectively dated, nevertheless such a corrected entry would indicate in Mr. O'Cleirigh's view that Ms. Foy had been born female with the name Lydia Annice. So the last paragraph of Section 27 where it is stated that any such alteration `shall be held to be good as if part of the original'. "

(106) The relevant registers, kept by the office holders, are open to public inspection. A person can see and obtain a birth certificate from the Office of the Registrar General or from the office at which the register is kept, which could be the Office of the District Registrar or the Office of the Superintended Registrar who has possession of the completed original register of entry books. Where the original entry has not been altered, a birth certificate, in long form, can be obtained showing precisely the original entry. Where any correction has

correction, or else a certificate displaying the amended particulars without indicating that a correction has taken place. In addition there is available a short form certificate, which contains the particulars identified at para. 75 above. As I understand the evidence where a correction has taken place, this form can be produced in like manner to the long form birth certificate again where corrections have taken place.

(107) The Assistant Registrar General confirmed by his evidence what is apparent from the substantive replies given by both himself and his predecessor to Dr. Foy: see the letters dated the 17th December 1993 and the 11th February 1997. Though neither the Acts nor the Regulations define "sex" for the purposes of the relevant entry, it has always been and so remains the practice of the system to determine that sex by the use of biological criteria and none other. In reality this equates to the external genitalia. The fact that it becomes evident later in life that a person's "psychological sex" is at variance with those biological criteria is not considered to imply that the initial entry was a factual error and so capable of rectification. A similar view is taken even if such a person undergoes medical and surgical treatment to enable him or her to assume the role of the opposite sex. In other words where the biological markers are congruent that fact determines the sex of the child for registration purposes which of course means that even with gender reassignment surgery the Registrar does not accept that the original entry was in any way erroneous.

(108) The witness was also asked about the system of dealing with an intersex condition. To his recollection his office never dealt with any such condition though on inquiry from a major maternity hospital, the registrar thereat, did remember, one perhaps two such cases in the past twenty years. Accordingly the witness was speaking hypothetically. When pressed to offer a view, his advice to any registrar in such circumstances would be to leave the

neighbouring jurisdiction the practice in similar circumstances was to enter in column 4 "sex not determined " or "indeterminate sex ". Whilst acknowledging that there was no scope within the Acts or Regulations for facilitating this, his preferred choice, he emphasised that he had never to deal with such a case and that no precedent existed to determine how it would be handled.

(109) Finally, he stated, as is the situation, that the applicant is a qualified informant for the purposes of her marriage certificate and of her daughters' birth certificates. If, therefore, her own certificate was amended in the manner requested it could indeed have implications for the relevant entries to the Register of Marriages and to the Register of Births in so far as her spouse and children respectively, were concerned.

DECISION ON ISSUE:

(110) As previously noted there is an obligation on every registrar, by virtue of s.30 of the Act of 1863, s.4 of the Act of 1880, and reg. 22 of the Regulations made thereunder, to register all births by recording in the register books the particulars required to be registered

according to the appropriate forms annexed to such legislation. Since the commencement of the system the specified particulars, set forth in Form A of the Act of 1863, require, inter alia, the sex and Christian name of the child to be recorded.

Though Form A has now been replaced by s.1 of the Act of 1996 and the Schedule thereto, nevertheless these two requirements as to sex and name continue to form part of the mandatary notation in respect of every birth. The sex to be specified, notwithstanding the absence of the words *"male"* and *"female"* from the Schedule to the Act of 1996, must be either that of "male" or "female", there being no suggestion that it could be otherwise. So

in the execution of his duties and responsibilities, the Registrar must, as of the date of birth, record the sex of the new-born child and must do so as either being male or female.

(111) That this is so I believe, follows inevitability from the wording of the aforesaid sections and regulations. Both s.30 and s.4 are plain and unambiguous as are Form A and regulations 22, 64 and 65. No matter what principle of construction is applied the result, in my view, is the same. There is no scope within this framework for any other type of original entry or for leaving columns 3 and 4 without an entry. Therefore every registrar is duty bound to make the required entry, so as to reflect the relevant particulars material at the date of birth.

(112) Obviously there is no difficulty with the Christian name. A child cannot itself choose itself such a name. Therefore it is given one. The resulting name is told to the registrar by the informant and is so recorded. The position as to the sex of a child is not quite as straightforward. Some means must be identified so that a determination as to sex can be made. The means as adopted by the Registrar General in this and in the neighbouring jurisdiction, has always been to my knowledge, based on biological factors where such factors are consistent one with the other. This has worked extremely well for a long period of time. It is now suggested that for a small group of people, who suffer from transsexualism, this method is inappropriate because it fails to recognise the existence of an alleged fifth indicator of sex, namely brain sex. Accordingly it is claimed that the Registrar General, and through him the local registrar, was both factually and legally incorrect with the entry which was made in column 4 of the register, in respect of the applicant's birth.

(113) As stated above there is no statutory criteria or other guidelines for determining sex for the purposes of the relevant entry. In their absence a practice has developed to use

exclusively the biologically criteria for making such a determination, or, more accurately, the external genitals, if in appearance and structure these are normal. Where the chromosomal, gonadal and internal and external genitalia of the person are congruent then that is conclusive as to the resulting entry. These biological criteria are generally said, to have derived by way of formal categorisation from the decision of Ormrod J. in Corbett -v- Corbett (supra.) even though that was a nullity case. In it the petitioning husband sought a declaration that a

ceremony of marriage, between him and the respondent on the 10th September 1953, in Gibraltar, was null and void and of no effect on the ground that at the time of its celebration the respondent was a person of the male sex. In the alternative he alleged that a similar result should follow as it was claimed that the marriage was never consummated owing to the incapacity or wilful refusal of the respondent to so do. This second ground is not relevant to the issues in the present case. However and notwithstanding the differences in the legislative codes between Corbett and Foy, the decision of Ormrod J. on the first issue is and remains highly material.

(114) The respondent (otherwise Ashley), was born in 1939 as a male and was so registered. It was never suggested at any time during the currency of that case that a mistake had been made about her sex at the time of her birth. In the years following she developed a womanish appearance and had little bodily or facial hair. She expressed on several occasions an intense desire to be a woman and indeed had such a feeling from childhood. In 1956 she began taking oestrogen. On the 11th May, 1960 she had what was then described as a *"sex change operation"* which involved the removal of her penis and scrotum and the creation of an artificial vagina. She returned from Casablanca to live in London.

(115) Some six months after her operation she met the petitioner who was an unhappily married man with two children. Having separated from his wife he developed a relationship with

the respondent and with his assistance she changed her name to April Ashley, though the superintendent registrar refused to effect a comparable change in her birth certificate. After going through the marriage above mentioned, the parties for a variety of different and complicated reasons, not here relevant, remained together for a period of fourteen days only. There then followed the petition launching Corbett -v- Corbett.

(116) The primary issue before the court was the validity of the marriage which in turn depended upon the true sex of the respondent. The secondary issue, namely one of incapacity, is, as I have said, immaterial. Having received the evidence of several medical experts, Mr. Justice Ormrod spoke about the *"anomalies of sex"* which he divided into two broad divisions, namely cases which were primarily psychological, and those which were sourced in developmental abnormality. He reviewed what was said about transsexuals and as an aside commented that as a group they tended to be *"selective historians",* stressing events which fitted with their ideas and suppressing those which did not. He dealt with the intersex condition and then passed judgment on the evidence which he had heard about the aetiology or causation of transsexualism. It was either physiologically based or alternatively had some organic foundation. In respect of the latter, at p. 1319 he said:-

> "This hypothesis is based on experimental work by Professor Harris and others on immature rats and other animals, including rhesus monkeys, which suggests that the copulatory behaviour of the adult animals may be affected by the influence of certain sex hormones

> on particular cells in the hypothalmus, a part of the brain closely related to the pituitary gland, in early infancy. At present the application of this work to the human being is purely hypothetical and speculative. Moreover the extrapolation of these observations on the instinctual or reflex behaviour of animals to the conscious motives and desires of the human being seems to me, at best, hazardous. The use of such phrases as "male or female brain" in this connection is

apt to mislead owing to the ambiguity of the word "brain ". In the present context it refers to a particular group of nerve cells, but not to the seat of consciousness or of the thinking process. In my judgment these theories have nothing to contribute to the solution of the present case. On this part of the evidence my conclusion is that the respondent is correctly described as a male transsexual ..... "

(117) All the medical witnesses in that case agreed that there were at least four criteria for assessing the sex of an individual. These were:-

> (i) Chromosomal factors,
>
> (ii) Gonadal factors (i.e. presence or absence of testes or ovaries),
>
> (iii) Genital factors (including internal sex organs) and
>
> (iv) Psychological factors

In addition apparently some of the witnesses would add as a fifth, hormonal factors or secondary sexual characteristics (such as distribution of hair, breast development, physique etc). As with all of the doctors in the Foy case, the medical experts in Corbett emphasised at p. 1319 that these criteria had been evolved for the purposes

> "of systematising medical knowledge and assisting in the difficult task of deciding the best way of managing the unfortunate patients who suffer, either physically or psychologically, from sexual abnormalities. As Professor Dewhurst observed: 'we do not determine sex - in medicine we determine the sex in which it is best for the individual to live'."

The learned trial judge then commented that these *"criteria are, of course, relevant to, but do not necessarily decide, the legal basis of sex determination. "*

(118) Mr. Justice Ormrod then looked at the evidence particular to the respondent, Ashley. He concluded that this evidence had shown her to have X Y chromosomes and therefore to be

of male chromosomal sex: to have had testes prior to the operation and therefore to be of male gonadal sex and to have had male external genitalia without any evidence of internal or external female sex organs. As a result the learned trial judge was of the view that she was of male genital sex but psychologically was a transsexual.

(119) Concentrating on the issue of marriage which was central to the decision in Corbett and having stated that the institution essentially involved a relationship between man and woman, at p. 1324 - 1325 of the judgment he then said:-

> *"The question then becomes, what is meant by the word "woman " in the context of a marriage, for I am not concerned to determine the "legal sex" of the respondent at large. Having regard to the essentially hetero-sexual character of the relationship which is called marriage, the criteria must, in my judgment, be biological, for even the most extreme degree of transsexualism in a male or the most severe hormonal imbalance which can exist in a person with male chromosomes, male gonads and male genitalia cannot reproduce a person who is naturally capable of performing the essential role of a woman in marriage. In other words, the law should adopt in the first place, the first three of the doctors' criteria, i.e. the chromosomal, gonadal and genital tests. and if all three are congruent, determine the sex for the purpose of marriage accordingly, and ignore any operative intervention. "*

The conclusion, by applying this criteria, was that the respondent was not a woman for the purposes of marriage but was a biological male and had been so since birth. The ceremony was therefore void.

(120) Though Ormrod J. was dealing with a case of marriage and though he was careful to point out that he was not, and was not purporting to define sex for any other legal purpose his decision has attracted widespread attention, some favourable, some unfavourable, both in the

U.K. and elsewhere and this not only in the field of marriage law but also in the context of other legal relations between person and person and person and institution. Given the passage of time from its delivery and the advances in knowledge and understanding since that time, the questions now are, whether or not a continuing adherence to this criteria for the purposes of the original entry is valid, and secondly whether the test adopted for the

correction of errors is likewise valid and still within the aforesaid Acts and Regulations? Or, on her representation of the evidence, should what the applicant argues for now be in place, in particular with regard to the correction of errors? And if so can such Acts and Regulations be read in such a way as to accommodate this viewpoint? In the first instance this, in my opinion, requires a decision by this court on the expert evidence offered to it, on the fifth indicator of sexual differentiation.

(121) **CONCLUSION ON THE MEDICAL EVIDENCE:**

The present issue in respect of which the surrounding evidence was given, which is summarised above, is whether or not for the purposes of the registration of a birth, the law should hold that the criteria in determining sex should not be confined to the biological markers but should also include a fifth indicator namely brain differentiation. In my view having considered the totality of this evidence I cannot agree that the approach of the Registrar was either incorrect or incomplete. I am of the opinion that the evidence to date is insufficient to establish the existence of brain differentiation as a marker of sex and accordingly I do not believe that this court in such circumstances could give to it the legal recognition which is sought. My conclusions on this aspect of the case are based on the following:-

> (i) In the article published in *"Nature "* it is stated that *"the possible psychogenic or biological aetiology of transsexuality has been the subject of debate for many years",* a situation which in my view continues to the present time.

> (ii) In that article the main concentration was on a particular part of the hypothalamus, the central subdivision of the bed nucleus of the stria terminalis (BSTc), which part is responsible for biological functions such as hunger, appetite, respiration, cardiac system, sexual activity and sexual behaviour. It was shown that the (BSTc) was larger in *"normal men "* than in *"normal women ",* and also shown that in the six male to female transsexuals looked at, the size of their (BSTc) was found to be within the female range acrid not within the male range.

> (iii) Fundamental to the value of this study was that the BST plays an essential role in masculine sexual behaviour and in the regulation of gonadotrophin release, as shown by studies in the rat. However this assumption was heavily qualified by the study itself where for example at p. 4 of the *"Nature"* publication, it is stated that *"there has been no direct evidence that the BST has such a role in human*

sexual behaviour but our demonstration of a sexually dimorphic pattern in the size of the human BSTc, ... indicates that this nucleus may also be involved in human sexual or reproductive functions." Though Professor Gooren now says that the word *"may ",* is too loose and should be replaced by the word *"likely"*, nevertheless the qualifications stated largely remain.

(iv) It has not been possible to segregate or assign to any one of the aforesaid individual functions, a nerve cell or a collection of nerve cells which is or are particular to that function. Consequently one cannot say which nucleus is responsible for sexual behaviour and sexual function.

(v) The small number of subjects viewed must be noted.

(vi) The fact that for statistical purposes there is no soundly based evidence as to what the size of the BST is, in a male to female transsexual should also be noted,

(vii) In rat studies, it had been suggested that the neurochemical sex differences in the rat BST, may be due to the effects of the sex hormones on the brain during development

and in adulthood. In considering this as a possible explanation for the results found in the six male to female transsexuals reviewed, the study looked at the effect of testosterone, the effect of the lack of oestrogen, the effect of high levels of oestrogen and the effect of the lack of androgen. The subjects involved, in each of these categories, which were relied upon to distance the suggested human explanation from the rat experiments, were limited in number and restrictively confined.

> (viii) The findings in the animal studies, of the effects of such hormones, were based on a belief, which had been established, that within the BST of rats there were oestrogen and androgen receptors and consequently such rats could receive hormonal signals. It has not been established whether or not there exists such receptors in human beings, a piece of information which would be highly valuable.

(ix) As is evident from the studies and from the evidence, Professor Gooren sought to extrapolate into the human situation certain findings determined in the rat experiments. However he was most reluctant to and quite reserved in agreeing to a like extrapolation in

the context of the studies findings that the volume of the BST in the rat can be changed by the administration, post-natally, of exogenous hormones - in effect the male rat can be induced to have a lower volume and a female rat a higher volume.

> (x) Investigations of genetics, gonads, genitalia and hormone levels of transsexuals have failed to produce any results which would explain their status,

(xi) One does not know the dynamics of why the nucleus is larger in men than in women,

(xii) One cannot say that this difference in size is because a person is a transsexual,

(xiii) One cannot say when this difference in size occurs or over what period it develops,

(xiv) One cannot say that this difference exists at birth,

> (xv) One cannot say how the volume is affected over the developing life of the brain as brain function and structures are not immutable,

(xvi) One cannot say as a result whether this is congenital or not,

(xvii) In a Council of Europe Colloquy on Transsexualism Professor Swaab referred to three male to female transsexuals, details of which he was familiar with. These persons did not come within the group of six above mentioned. In two of the cases sexual dimorphic nucleus of the brain was similar to the female brain pattern but in the third this was not so found,

(xviii) These studies which have been analysed, as well as, of course the May 2000 article in the Journal of Clinical Endocrinology and Metabolism, have undoubtedly added to the debate and have laid a platform or foundation for further investigation but of themselves have not established and/or not established sufficiently the existence of this fifth indicator.

(xix) There is no fully established consensus with regard to the presence of this factor. In the same November 1995 edition of *"Nature "*, Dr. Breedlove published an article responding to the research of **Zhou** et al. Whilst it is unnecessary to detail that report in this judgment, it can be said that scientific reservations were

expressed about the acceptance at that time, and on the evidence then available, of the existence of a fifth indicator. That uncertainty and lack of consensus continue to the present time. An example of the ongoing debate is an article headed *"A brain sexual dimorphism controlled by adult circulating androgens ",* researched by Cooke et al, and published in 1999. In that article it was suggested that a possible confounding variable, in

the explanation *inter alia*, for the difference in size between male and female brains and the male to female transsexual brain, was the concentration of circulating hormones seen in these groups in adulthood. At p. 1 under the heading *"Abstract",* the study says *"We now report a sexual dimorphism in the volume of a brain nucleus in rats that can be completely accounted for by adult sex differences in circulating androgen. ... This report demonstrates that adult hormone manipulations can completely reverse a sexual dimorphism in brain regional volume in a mammalian species".* Whilst such studies were in rats and whilst considerable caution must as a result exist, nevertheless the learned authors were of the view that a sufficient linkage existed which justified the publication of this research as part of the ongoing debate about the reasons why the volume of the BST is different;

(xx) Finally, the views and reservations of Professor Green are also noted.

For the above reasons therefore, I believe that the four biological indicators should continue to act as the governance in the determination of sex for the purposes of this case and that, though transsexualism is undoubtedly a recognised psychiatric disorder, it cannot, at least as of now, found its existence in neuro science. Some day with further research this may be the case but in my view from the evidence adduced, that stage has not as yet been reached. Perhaps the proof sought is substantial but so too is the change.

(122) As against the conclusion which I have arrived at, on the medical and scientific evidence, I have also considered the several judgments from the European Court of Human Rights which are referred to at para. 87 above. I have done this, notwithstanding the fact that a court of trial must deal with a presenting case on the evidence offered to it, because though not binding, any views or conclusions which that court had come to, purely on the medical

and scientific evidence, would of course be highly interesting to the conclusion reached. In Rees v. United Kingdom [1987] 9 EHRR 56 there was Dr. Armstrong's opinion which, whilst deserving of the greatest respect, was not supported by any research findings or publications.

In 1990 when Cossey v United Kingdom [1991]13 EHRR 622 was decided there was not, at least for the majority in this regard, any significant change. Indeed, the dissenting opinion of Martens J. was based largely on his views that the issues raised in the case were essentially human rights issues, and that since there had been significant societal developments, he would have departed from the court's decision in Rees (supra.) and held with Ms Cossey on her Article 8 violation. He did not however, insofar as I can see from the report, draw any definite conclusions on the medical and scientific evidence as it changed in the preceding four years. The situation had undoubtedly altered when the court gave its decision in Sheffield and Horsham v United Kingdom [1999] 27 EHRR 163. By that date there was a good deal more scientific evidence in the public arena. This was considered by the court but in its evaluation thereof, it concluded that the aetiology of transsexualism had not been settled conclusively and that the research and views of Professor Gooren, as they were, did not enjoy universal support in the medico-scientific profession. In fact, in all of the dissenting opinions which are outlined later in of this judgment, the various judges who subscribed thereto, did not challenge the majority view on such evidence, but rather addressed the problem on the basis that once this aspect of gender dysphoria was recognised as a medical condition then, other reasons in their opinion, justified a favourable finding on the Article 8 violation. Thus, in my respectful view, there is nothing fundamental in this influential line of authority which would persuade this court to arrive at a conclusion contrary to that which is outlined earlier in the judgment. Whilst it is undoubtedly true that in the most recent case, a greater number of judges expressed a willingness to find a violation of Article 8, nevertheless I cannot identify in any of these cases a judicial consensus that the evidence available at any time, on the existence of the fifth indicator. was sufficiently

accepted or agreed to, within the scientific community, which would coerce this court into making a positive determination in that regard. Though I acknowledge that the European Court has expressed the view that at some future occasion, there may well be sufficient evidence available which would enable the court to legally recognise the existence of brain differentiation, that evidence to the level required is not, as of now, so available.

Consequently I do not in any way see that the conclusions which I have reached on the evidence, are inconsistent with the decision, at least the majority decision, of the court in any of the cases which I have referred to.

(123) Apart from the original entry, the legislation also provides for certain amendments to the register with the regulations specifying the manner by which such amendments may be executed. As we have already seen s.8 of the 1880 Act, as amended, provides the basis upon which the name of a child may be altered, changed or indeed inserted. In its original form any application for such a change had to be made within twelve months after the registration of the birth, but by the 1952 amendment an application since then can be made *"at any time"*. In the submissions made on behalf of the applicant, it was suggested that this statutory provision provided a means by which her name could be changed on the birth certificate. Even if correct, such an amendment, under s.8, could by itself, have no effect on column 4, which unquestionably, not only on the pleadings but also on the evidence, on the run of the

case and on the submissions, was the predominant focus of the applicant's attention. Accordingly I do not believe that this case can be resolved by an interpretation, even a favourable one, of s.8 of the Act of 1880. If however it was necessary to express a view thereon, I would hold, by looking at the wording of the section itself and by a consideration of the forms contained in the annexed schedule, that the mechanism of change as so provided is not available to the applicant. Rather I believe that the correct interpretation of the section is reflected in the manner in which it is implemented by the Registrar General

(124) Section 27 of the Act of 1880, is of course quite different and by its terms provides for the alteration of the register but only where so authorised by that Act. Subsection (2) deals with clerical errors and subsection (3) with errors of fact or substance, both of which subsections are set forth at para. 73 of this judgment. The section must be looked at and considered in conjunction with the 1880 Regulations. Having precluded the Registrar from making any alteration save in accordance with the provisions thereof (reg. 159), the regulations which then follow, deal with Clerical Errors which, as previously outlined, are divided into classes namely class 1 and class 2. Appendix F of the Regulations, commencing at p. 54, gives a list of what might be regarded as clerical errors, arranged in the respective classes just mentioned. Both reg. 160 and the commencement of the said appendix inform the reader that *"accidental errors occasioned by a want of due care in entering the particulars or signing the entries, or through misunderstanding on the part of either the Registrar or the informant, are deemed clerical errors. "* Those falling within class 1 are less serious than those in class 2. In the examples of clerical errors given in class 1 there is no reference whatsoever to the *"sex"* of the child but there is, in class 2. The example, at p. 56 reads:-

> *"Sex - the omission of the Sex.*

An error in the Sex, if the Sex as stated is inconsistent with the name, the Rank, Profession or Occupation.....

> *An alleged error in the Sex which is proved to be an error on the production of satisfactory documentary evidence. "*

Apart from this entry, I cannot find any other material reference in the appendix to errors in column 4 which might be classified as clerical errors. However and notwithstanding Appendix F, it is clear, that irrespective of the court's finding on the medical and scientific

evidence, the error alleged by the applicant could not, under any circumstances, be described as a clerical error. If otherwise a basis existed for its foundation, it would have to be considered as an error coming within, section 27(3) of the Act of 1880 and thus properly described as an error of fact or substance. This is perfectly consistent with reg. 168 which states that all errors other than clerical errors must be regarded as errors of fact or substance:

see also the judgment in R v. Registrar General, ex parte P and G, [1996]2 FLR 90 hereinafter referred to. Accordingly it is this statutory framework of Births, Deaths and Marriages which the registrar General and through him each registrar must operate, in the discharge of their respective duties and responsibilities.

(125) Given the findings which I have made on the medical and scientific evidence, it seems to me that logically, it must follow that in my opinion Dr. Foy, at birth, was a male with conforming biological structures. It also follows from my interpretation of the relevant sections and regulations made thereunder, that the Registrar General was correct in the entry which he made in column 4 of the register in respect of the applicant. No other entry was available to him. It could not therefore be said that he or his officers in any way acted ultra vires or outside the scope of the legislative framework. In addition it likewise follows that there was not any error of fact or substance in that entry which would enable a correction if otherwise permissible now to be made under s. 27 (3) of the Act of 1880. As the entry could not be said to be erroneous these correcting provisions cannot now in my view be invoked. Therefore, it is my opinion that the position adopted by the Registrar General, in the correspondence with the applicant and in the evidence given by Mr. O'Cleirigh, was entirely in accordance with the relevant provisions, and that even if minded to so do, he had no power or authority under such provisions to make the correction in column 4 as requested.

(126) This view is not I feel in any way compromised by recent developments in the European Court of Justice (E.C.J.) or in the courts of the United Kingdom.

In P v. S & Cornwall County Council [1996] E.C.R: (Case C - 13/94) the European Court of Justice was called upon to express an opinion on the scope and implementation of Council directive 76/207/EC. This was concerned with the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training, promotion, and working conditions. In April 1991, P was taken on as a manager of an educational establishment operated by Cornwall County Council. Sometime later she informed the principal and chief executive of that establishment, that she intended to undergo gender reassignment surgery. That was to change, insofar as possible, her biological sex (male) to suit her sexual identity (female). It was suggested on her behalf, that predominantly if not exclusively, her subsequent dismissal was related directly to her condition and to her intention of undergoing such surgery, and as a result it was claimed that both S and the County Council violated the principle of equal treatment in its dealing with her. The opinion of the Advocate General was supportive of P as was the subsequent ruling of the court. In its judgment the court concluded that the scope of the directive *"cannot be confined simply to discrimination based on the fact that a person is of one or other sex. In view of its purpose and the nature of the rights which it seeks to safeguard, the scope of the directive is also such as to apply to the discrimination arising, as in this case, from the gender reassignment of the person concerned. "* Accordingly it ruled that the dismissal of P was contrary to Article 5 (1) of the directive and that as the same could not be justified under Article 2 (2), her dismissal was unlawful.

As is evident from this brief summary of the case, the decision was given in the context of a particular directive and as such is, in the context of a transsexual, authority for the interpretation of that particular directive only. The purpose and intention of the directive, its scope, and the underlying rationale which led the court to make the decision which it did,

must all be considered in context, which context is entirely distinguishable from the factual and legal matrix which surrounds the present case. Whilst therefore noting the importance of that decision for transsexuals in the workplace, I do not believe that it would be correct or proper to extrapolate from P v. S (supra.) any broad principle which would have a significant influence in this court's decision in Dr. Foy's circumstances.

(127) **U.K. Decisions:**

The Court of Appeal in 1982 gave judgment in R v. Tan & Ors [1983] Q.B. 1053. In the Crown Court the first named respondent, Tan, and Gloria Greaves were convicted inter alia, of keeping a disorderly house with Greaves, in addition, on count 3 being convicted of living on the earnings of a prostitute contrary to s.30 of the Sexual Offences Act, 1956. On count 5 Mr. Brian Greaves was also convicted of living on the earnings of male prostitution contrary to s.5 of the Sexual Offences Act, 1967. Several issues arose on, and were dealt with, in the appeal judgment. One such issue, relevant to this case, related to the offences charged on counts 3 and 5, an essential ingredient of each being that Gloria Greaves was a man. The judgment records an acceptance that Gloria Greaves was born a man and remained biologically a man, even though *"he"* had undergone both hormonal treatment and gender reassignment surgery. Corbett v. Corbett (supra) was referred to as determining, which undoubtedly was the case, that for the purposes of marriage one of the parties had to be a biological male. However, it was submitted on behalf of the accused persons that for the purposes of the relevant sections of the Acts of 1956 and 1967, another test should apply, namely that if a person had become philosophically, psychologically or socially female, then that was and should be the sex of the person for the purposes of the charges levelled against him. At p. 1064 of the judgment Parker J., in giving the court's response to this submission, said as follows:

> *"We reject this submission without hesitation. In our judgment, both common sense and a desirability of certainty and consistency demand that the decision in Corbett v. Corbett should apply for the purpose, not only of marriage, but also for a charge under s.30 of the Sexual Offences Act 1956 or s.5 of the Sexual Offences Act 1967. The same test would apply also if a man had indulged in buggery with another biological man. That the Corbett v. Corbett decision would apply in such a case was accepted on behalf of the appellant.*

> *It would, in our view, create an unacceptable situation if the law were such that a marriage between Gloria Greaves and another man was a nullity on the ground that Gloria Greaves was a man: that buggery to which she consented with such other person was not an offence for the same reason: but that Gloria Greaves could live on the earnings of a female prostitute without offending again s.30 of the 1956 Act because for that purpose he/she was not a man and that the like position would arise in the case of someone charged with living on his earnings of a male prostitute."*

As with P v. S & Cornwall County Council, *(supra)* this Court of Appeal's judgment was concerned, *inter alia*, with two particular statutory provisions and so was essentially concerned with the correct interpretation of such sections. However unlike P v. S, *(supra)* the court was dealing not only with domestic legislation, but also in the absence of a statutory definition, with what criteria it would apply in order to determine whether Gloria Greaves was or was not a *"man"* for the purposes of the sections in question. It is evident from the judgment that the court, had no hesitation in applying Corbett v. Corbett *(supra.)*. Whilst I fully appreciate that the resulting views of the court were given in the context of a criminal offence and were delivered prior to both Rees *(supra)* and Cossey *(supra),* nonetheless the judgment was a clear endorsement of Ormrod J. and an extension, by way of application, of these principles into this limited area of the criminal law.

(128) More recently the precise issue which arises in the present case was also the subject matter of a decision by Kennedy L.J. in R v. *Register General, ex parte P & G* [1996] 2 F.L.R. 90. In that case both P and G were born with the essential bodily characteristics of males. Both applicants subsequently underwent gender reassignment surgery and sought from the Registrar General a correction of their respective birth certificates so far as the entry under the heading of *"sex"* was concerned. The applications were made under s.29 (3) of the Births and Deaths Registration Act, 1953*,* which as I have previously said, is in identical form to s.27 (3) of the Act of 1880. The case proceeded by way of judicial review on a number of matters some of fact and some of law. Certain points were conceded and accepted by the court. The first was that, even if a correction was possible, it could not be classified as a clerical error and therefore could not be achieved under subsection (2). The second was an acknowledgement, in line with many other cases, that the Register of Births is a historical document and is not a statement of current identity and thirdly there was an acceptance on behalf of both P. & G. that the biological criteria in each case were congruent.

(129) The Registrar General's decision, which was similar to that given by Mr. O'Cleirigh in this case, was attacked on the basis, *inter alia,* of being irrational. This criticism was founded on a submission that medical research had since 1971 moved significantly and by the mid 1990's had reached a stage where the Registrar General should no longer be satisfied with the biological criteria as providing sufficient information to identify the sex of a child.

In support *Rees*, *Cossey* and *B v. France (supra.)* were referred to. As was the 23rd *Colloquy on European Law* at which Dr. Russell Reid and Professor Doek of Amsterdam entered reports. It was also based on the article published in *"Nature "* and the research which gave rise to its publication. At pp. *96 - 97* of the report Kennedy L.J. said:-

> *"Even if, as Doctor Russell Reid contends, it is now quite clear that medically the sex of an individual must be regarded as being decided by the construction of the brain (and I consider that, without being any way unreasonable, the Registrar General could continue to have reservations about that) problems remain as to:*
>
> *(1) What ought to be written in the register of births at a time when, as 1 understand the medical evidence, the unusual construction of the brain, is not apparent;*
>
> *(2) Whether the Registrar General must amend the entry once the unusual construction of the brain is brought to his attention. What evidence is there that all of those which such brains do become transsexuals? And even if they do become transsexuals, what evidence is there that all of them want to be reclassified."*

(130) In rejecting the argument that the Registrar General had acted irrationally by his refusal to amend in the manner sought, the learned judge went on to make the observation that reliance upon the practice of other government or academic authorities, carried little weight with him as the Register is quite a separate and distinct document, having as previously indicated, a historical framework and no other. Consequently he refused the orders as sought. This I believe is a direct authority in support of the conclusion previously reached in this judgment.

(131) The last English case which I wish to refer to is *S - T (formally) J v. J* [1998] 1 All ER 431. That case I mention essentially because it formed part of the submissions in the instant case. Though it dealt with a female to male transsexual, the issues were completely different to those arising in this case and on a close reading of the judgments of Ward L.J. and Potter L.J. , no statement of principle can be identified which could be used as a general

precedent,, in the case of transsexuals, for birth certificates. The court was dealing with an appeal on a preliminary issue as to whether the defendant transsexual was debarred from continuing his claim for ancillary relief following a decree of nullity on the grounds that it was contrary to public policy. In essence the infringement alleged was the making of a false declaration which enabled him to marry his plaintiff wife, a biological female. In part of his

judgment Ward L.J. deals with transsexuals and the matrimonial law and having referred to many of the relevant decisions, including *Rees* and *Cossey (supra)* and what he described as *"a new insight into the aetiology of transsexualism ",* he suggested that *"it may be that Corbett v. Corbett would bear re-examination at some appropriate time. "* That re-examination however was not conducted either by him or his fellow judges. In fact Potter L.J. at p. 470 of the report reasserted the biological criteria as being that used for determining sex. He suggested that perhaps the advances in medical science may lead to a shift in the criteria but that at present the position in the English courts was that as laid down in *Corbett v. Corbett (supra).* Accordingly I do not believe that any assistance from the applicant's point of view is derived from this case.

My conclusion therefore remains that which is set forth above commencing at paragraph 121.

(132) **ISSUE NO. 2 - THE CONSTITUTIONAL CHALLENGE:**

Having concluded as I have:-

(1) On the medical and scientific issue as to the fifth indicator of sexual differentiation;

(2) On the correctness of the Registrar General's use of the biological indicators to determine sex for entry purposes;

(3) On the non-applicability of s.8 to affect the requested change in column 3 of that entry;

(4) On the unavailability of either s.27(2) or s.27(3) to affect the suggested change in column 4 of the same entry; and

(5) In the absence of any other statutory provision enabling such a change to take place,

the applicant then, as an alternative submission, claims that the aforesaid Acts and Regulations are inconsistent with the Constitution and therefore, subject to precise identification, have not been carried over into Irish domestic law by Article 50 of the Constitution of Ireland, 1937.

More accurately put, the claim is not that such Acts and Regulations are unconstitutional because of a specific prohibition but rather that their infirmity results from such Acts and Regulations having no provision by which the rectification sought may be achieved. This failure, which precludes the fact of correction and its retrospective application to the 23rd June, 1947, means, that on a number of occasions, Dr. Foy is placed in a situation of either having to reveal her anatomical sex and in the process suffer embarrassment, humiliation and distress, or else as having to falsify what the law denies to her and in preferring that option,

to expose herself to sanction, even criminal sanction, as well as to suffer the anger, frustration and disappointment which such a contradiction places upon her. In addition as the law of marriage presently stands she cannot legally marry a biological man. In consequence it is alleged that this existing state of the legal process constitutes both an unwarranted and unjustified interference with her rights of privacy, of dignity, of equality as well as her right to marry.

(133) Article 40 of the Constitution reads as follows:-

> Article 40
>
> *1. All citizens shall, as human persons, be held equal before the law.*
>
> -99-
>
> *This shall not be held to mean that the State shall not in its enactments have due regard to differences of capacity, physical and moral, and of social function.*
>
> *2. .....*
>
> 3. *1° The State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen.*
>
> > *2° The State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name, and property rights of every citizen. "*
> >
> > *3 °.....*
> >
> > *4° .....*

Article 41 reads:-

> Article 41
>
> 1. 1° *The State recognises the Family as the natural primary and fundamental unit group of Society, and as a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law.*
>
> > *2° The State, therefore, guarantees to protect the Family in its constitution and*

authority, as the necessary basis of social order and as indispensable to the welfare of the Nation and the State.

2. .....

3. .....

Article 50 of the Constitution reads as follows:-

Article 50

1. Subject to this Constitution and to the extent to which they are not inconsistent therewith, the laws in force in Saorstat Eireann immediately

prior to the date of the coming into operation of this Constitution shall continue to be of full force and effect until the same or any of them shall have been repealed or amended by enactment of the Oireachtas.

2. Laws enacted before, but expressed to come into force after, the coming into operation of this Constitution, shall, unless otherwise enacted by the Oireachtas, come into force in accordance with the terms thereof.

(134) **PRINCIPLES OF INTERPRETATION:**

As the Acts and Regulations in question were passed and made in the last century, there can not be, subject to the *ESB v. Gormley* case [1985] I.R. 129, any presumption as to constitutionality. In *Educational Company v. Fitzpatrick (No. 2)* [1961] I.R. 345, Budd J. stated (at p. 368):-

"It is suggested that there is some presumption that (the Trade Disputes Act 1906) is constitutional. Such a presumption may well apply to Acts of the Oireachtas, since the legislative body must be deemed to legislate with a knowledge of the Constitution and presumably does not intend by its measures to infringe it. There is no logical basis for such a presumption in the case of Acts of the late United Kingdom Parliament. The legislature then had no knowledge of the Constitution

to be and could never be said to have legislated with any regard to it. "

In the *ESB* case, the Supreme Court held that if a pre 1937 statute had been re-enacted by the Oireachtas, then that fact was sufficient to confer on the statute the presumption in question. It also held that if the Oireachtas had amended a statute, in such a way as to *"effectively"* re-enact it, then likewise such a presumption would follow. In this case I cannot agree that *s. 15 (2)* of the *1952* Act or s. *7 of* the *1996* Act have that effect. Both sections simply permit the earlier acts to be construed as one with those acts. Likewise with s.5 of the 1972 Act.

This gives the Minister power to make regulations under s.30 of the 1863 Act. None of this activity by the Oireachtas is in my view in any way sufficient to confer on the earlier acts any such presumption. Therefore in these circumstances the normal onus of proof, without any presumption, rests on the applicant. Secondly on either the intra vires test or on what O'Higgins C.J. said in the Norris (supra) case, it is perfectly clear that Article 50 cannot be invoked as a vehicle for incorporating into our law any statutory provision which not only is inconsistent with the Constitution but also which does not respect and reflect that Constitution. Thirdly where there are two reasonable interpretations open, than in the case of conflict that which is constitutional should be preferred to that which is not. And fourthly, wherever it becomes necessary to consider more than one section of the Constitution, it behoves the court in such circumstances to adopt an approach which harmonises all such sections unless it is not possible to do so. If this occurs then the hierarchy of such rights must be considered.

The above are only some of the more general rules of interpretation. This is because I have considerable reservations as to how relevant these principles are. If the attack was based on the existence of a statute or of a provision thereof, their relevance would immediately be apparent. In the instant case this is not the position. The allegation is that of failure rather than commission.

(135) **RIGHT OF PRIVACY:**

There is no doubt but that the personal rights referred to in Article 40.3.1 of the Constitution are not confined to those mentioned in Article 40.3.2 thereof. *Ryan v. The Attorney General* [1965] IR 294 so established. In terms of fundamental rights, it is clear that the right to privacy is not expressly mentioned in the Constitution but equally it is clear that its existence is not now in doubt and that it is one of the unenumerated rights contained

in Article 40.3.1 of that declaration. *McGee v The Attorney General [1974] IR 284* established such a right of privacy in a marriage for married couples. Norris v *The Attorney General [1984] IR 36* considered, in a different context, that such a right inheres in each citizen by virtue of his human personality, by virtue of his individualism as a citizen and *"in his capacity as a vital human component of the social, political and moral order posited".*

Immediately following that statement, at p. 71 of the report Mr. Justice Henchy continued:-

> *"Amongst those basic personal rights is a complex of rights which vary in nature, purpose and range (each necessarily being a facet of the citizen's core of individuality within the constitutional order) and which may be compendiously referred to as the right of privacy ... A constitutional right to marital privacy was recognized and implemented by this court in McGee v. The Attorney General; the right there claimed and recognized in effect, the right of a married woman to use contraceptives ... There are many other aspects of the right of privacy, some yet to be given judicial recognition. It is unnecessary for the purpose of this case to explore them. It is sufficient to say that they would all appear to fall within a secluded area of activity or non-activity which may be claimed as necessary for the expression of an individual personality, for purposes not always necessarily moral or commendable, but meriting recognition in circumstances which do not engender considerations such as State security, public order or morality, or other essential components of a common good. "*

Again in the same case Mr. Justice McCarthy at p. 100 of the report said:-

> *"The Constitution does not guarantee or, in any way, expressly refer to a right of privacy - no more, indeed, then does the United States Constitution, with which our Constitution bears so many apparent similarities ....*
>
> *In our Constitution a right of privacy is not spelled out ...*

> *How then, to identify the nature of the personal right* of *privacy? The right to privacy has been called by Brandeis J. of the United States Federal Supreme Court "the right to be let alone " - a quotation cited by the Chief Justice in this case and by Mr. Justice Walsh in his dissenting judgment as a member of the Court of Human Rights in Dudgeon v United Kingdom (1981) 4 EHRR 149. By way of definition it has brevity and clarity and I would respectfully adopt it as accurate*

and adequate for my purpose but, to a degree, the very definition begs the question. The right to privacy is not in issue, the issue is the extent of that right or the extent of the right to be let alone. "

(136) Both McGee and Norris were relied upon by Hamilton P., as he then was, in *Kennedy v. Ireland* [1987] I.R. 587 where, having reviewed these authorities, the then President said (at p. *592):*-

"Though not specifically guaranteed by the Constitution, the right of privacy is one of the fundamental personal rights of the citizen which flow from the Christian and democratic nature of the State. "

He then went on to state that there were many aspects of the right to privacy and that one such aspect included, within that right, an entitlement to have phone conversations without any unjustified interference therewith or intrusion thereon. In that case the learned President had no doubt but that servants of the State who listened to such conversations without justification infringed that right.

(137) Accordingly it is beyond dispute that, in our constitutional law, there is by virtue of Article 40.3.1 an unenumerated right of privacy, which falls to be respected, vindicated, and protected under s. 3 of that Article. What calls for consideration in this case, is whether, as a

birth certificate, she can obtain one with her sex and name corrected in the manner in which she claims.

(138) She does not seek, as an aspect of this right, that following correction, the law should be such that there should, be no record of the original entry, and no record of the fact that the correction was made or that members of the public, to include herself and the family, should not have access to it. If such a point had formed any part of the applicant's submissions I would have had to reject it, as the same would involve such a fundamental alteration of the present system that even, if I had the power to impose such an obligation on the State, to do so would be wholly disproportionate to the ongoing difficulties which this group of people, including the applicant still suffer: see paras. 149 and 168 supra.

(139) This right of privacy was also extensively commented upon in - *In Re Ward of Court (withholding medical treatment) (No. 2)* [1996] 2 I.R. 79. In virtually all of the judgments, the existence of this right was expressly acknowledged and was so in an aspect which related to a person's right to refuse medical treatment and her right to have such treatment discontinued even if that resulted in certain death. It was said that the giving or withholding of consent for such treatment formed part of this right of privacy: Hamilton C.J. at p. 125 of the report and Denham J. at p. 162 of the report. So it is beyond dispute that such a right exists and accordingly in principle it may be called upon by any applicant if the individual circumstances of his or her case so permits.

(140) **RIGHT TO DIGNITY**

In addition to the allegation that Dr. Foy's right of privacy has been breached, it is also claimed that there exists a right to dignity which has also been invaded, again without just cause or excuse. As with the right to privacy this right of human dignity is not specified as a

fundamental right but is expressly referred to in the Preamble of the Constitution. Whether the basis of this right is to be found in that part of the Charter or is sourced in a manner similar to the right of privacy is not relevant here. Its existence undoubtedly is acknowledged. In re: *Article 26 Offences Against the State (Amendment) Bill* [1940] I.R. 470, and in re *Philip Clarke* [1950] I.R. 235 the courts have stated that the dignity of an individual is a value to be pursued. Hederman J., in *McKinley v. the Minister for Defence* [1992] 2 I.R. 333 said (at p. 349):-

> *"It seems clear to me that Articles 40 and 41 should be construed in accordance with the statement contained in the Preamble to the Constitution that the People gave to themselves the Constitution in order that amongst other objectives 'the dignity and freedom of the individual might be assured'. "*

More recently Denham J., in re A *Ward of Court,* (supra) at p. 163 of the report stated as follows:

> *"An unspecified right under the Constitution to all persons as human persons is dignity - to be treated with dignity. "*

Accordingly the State must accord to that right the same entitlement as it must give, *inter alia* to the right of privacy.

(141) **RIGHT OF EQUALITY**

This right is expressly mentioned in Article 40.1 of the Constitution. Under this heading it is alleged that the applicant, whether by way of administrative or executive decision or by way of legislative provision or court judgment should be afforded both the same entitlement and the same treatment as that available to a person who is biologically female.

(142) **THE RIGHT TO MARRY**

> *In Donovan v. Minister for Justice* [1951] 85 I.L.T.R. 134 Kingsmill Moore J. averted to what position the right to marry had within the Constitution. In *Ryan v. the Attorney General* [1965] IR 294 Kenny J. suggested that this right was one

of the citizen's personal rights. An adjunct to this right, was also the right to beget children which likewise was a , personal right protected by Article 40.3.1 of the Constitution: see *Murray v. The Attorney General* [1985] I.R..532. As with similar such rights this right to marry is not an absolute one and its exercise may be prescribed by legal restrictions, though such restrictions must be reasonable, an example of which would be those which are sustainable in the public interest. Most of Irish domestic law has concerned itself not so much with this right to marry but with rights stemming from the concluded marriage contract. As the law presently stands an adult person, otherwise free of capacity restraints, can marry, but only a person of the opposite biological sex. This according to Dr. Foy is an infringement of her right to many.

(143) Save for this right of marriage, it is convenient to deal with the constitutional challenge to privacy, dignity and equality together, as many of the relevant arguments overlap. Firstly however a consideration of the cases from the European Court of Human Rights which cases on the more confined topic of the medical and scientific issue, have already been referred to earlier in this judgment.

(144) **EUROPEAN COURT OF HUMAN RIGHTS:**

The first case involving a person who was a transsexual, to proceed to the European Court of Human Rights, was Van *Oosterwijck -v-Belgium* (1981) 3 EHRR 557. In that case the applicant, a female to male transsexual, and one who went through the various stages of treatment, sought to challenge a refusal by the Belgian authorities to allow a change in his birth certificate. Domestic legislation did not permit of any means of changing civil status.

The Commission decided that this refusal violated the applicant's right, *inter alia*, to privacy as guaranteed by article 8 of the Convention. The court did not express any view on either the facts or the law as in its opinion the applicant had not exhausted domestic remedies. So what emerged from this case was a view from the Commission but not from the court.

(145) *Rees v. United Kingdom* (1986) 9 E.H.R.R. 56 was a case in which the court did give a decision on an alleged violation of both article 8 and article 12. At birth, in 1942, Mr. Rees possessed all the physical and biological characteristics of a child of the female sex and was so registered in the register of births. In the years following he exhibited masculine behaviour and was ambiguous in appearance. Having sought treatment he was prescribed testosterone and in 1971 changed his name to Brendan Mark Rees. Since then he has lived as a male. In 1974 he had a bilateral mastectomy which led to the removal of feminine external characteristics. In November 1980 he formally requested the Registrar General to correct the original entry in his birth certificate and did so by relying upon the English equivalent of s.27 of the 1880 Act. In support of this application he submitted medical evidence which added to the biological criteria for determining sex as identified in *Corbett*: (1970) 2 All E.R. 654 one's psychological sex which it was claimed was the most important factor as it determined the individual's social activities and role in adult life. Doctor Armstrong's view was that this

most influential marker was predetermined at birth though not evident until later in life. As the applicant's psychological sex was male he should therefore be assigned to that sex. The Registrar General in applying Corbett refused the request and hence the complaint.

(146) On the factual side Mr. Rees complained primarily of the constraints which the original entry had upon his full integration into social life and also that a certificate based on that entry was effectively an irrebuttable description of his sex whenever sex was a relevant

he claimed a violation of his rights under articles 8 and 12 of the European Convention on Human Rights.

(147) The Articles last mentioned read as follows:-

> Article 8.
>
> "1. *Everyone has the right to respect for his private and family life, his home and his correspondence.*
>
> *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 the protection of the rights and freedom of others. "*
>
> Article 12:
>
> *"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. "*

(148) The judgment of the court firstly dealt with the interpretation of article 8 and secondly with whether or not it had been complied with in the instant case. On the construction of that article it held that a mere refusal to alter the register or a refusal to issue a birth certificate not in conformity with the original entry, could not be said to be an interference within s.2 of the article. Accordingly the case had to be considered within s.1 which was sufficiently broad to incorporate a positive obligation if such was necessary for the effective respect for private life which was demanded by that section. *"Respect"* was not a clear cut concept and neither was its application. In several Contracting States either through legislation or by means of legal interpretation or by administrative practice, transsexuals were

given the option of changing their personal status to fit their newly gained identity. Where such provision was made the exercise of this option was subject to conditions of varying strictness and many states retained a number of express reservations, an example of which would be previously incurred obligations. In other states no such option was given, not even one which was heavily circumscribed. Accordingly the court held that each contracting party enjoyed a wide margin of appreciation in how it dealt with the issue before it.

(149) When dealing with the allegation of non compliance with article 8 the court reviewed the condition of transsexualism and commented both on the system of civil status legislation in the UK and on the advances in assimilation which had been made within the existing system. Having contrasted that with the drawbacks which continued to exist, it then formulated the alleged lack of respect, as coming down *"... to a refusal to establish a type of documentation showing, and constituting proof of, current civil status "*. It was satisfied that a valid distinction existed between what the applicant sought and what was available for adopted and legitimated persons. It also pointed out that under the present system any correction would be in the margin by way of annotation and since the register was open to the public such an annotation could not, without more, constitute an effective safeguard for ensuring *"the integrity of the applicant's private life, as it would reveal his change of sexual identity "*. To overcome this, the response of Mr. Rees was to ask that the change be kept secret from third parties. This the court felt itself unable to do as it would involve a major change to the present system. It concluded therefore that there was no breach of article 8 in the circumstances then existing.

(150) At para. 47 of the judgment there is a passage which is relied upon by Doctor Foy in this case. It reads

> *"That being so, it must for the time being be left to the respondent state to determine to what extent it can meet the remaining demands of transsexuals. However, the court is conscious of the seriousness of the problems affecting these persons and the distress they suffer. The Convention has always to be interpreted and applied in the light of current circumstances. The need for appropriate legal measures should therefore be kept under review having regard particularly to scientific and societal developments. "*

It is forcibly submitted on behalf of the applicant in this case that since the judgment in Rees, the nature, significance and importance of the scientific and societal developments make a review of the Corbett principles mandatory, certainly with regard to birth entries.

(151) To complete the judgment in Rees, the court held that article 12 referred to a traditional marriage between persons of the opposite biological sex and did not cover the case of transsexuals. Moreover, it was pointed out that the right to marry and to found a

family as contained within that article was expressly subject to national laws governing the exercise of this right. However any limitation so imposed could not encroach upon the very essence of this right. A domestic law prohibiting marriage between persons not of the opposite biological sex could not, in the court's view, amount to an impairment of the very essence of the right itself and accordingly there was no violation of article 12.

(152) As can be seen from Rees the court did not have before it, and therefore could not in any depth analyse what scientific or medical evidence existed which could create a legitimate doubt about the continuing applicability of Corbett, with Dr. Armstrong's evidence, at least from the report, adding nothing new to what was already in the public domain. Whilst undoubtedly the doctrine of the margin of appreciation played a role, perhaps a significant

role, in its ultimate decision, nevertheless the court was not proposing to offer, through its own jurisprudence, a view which substantially differed from the original or traditional view. In addition it was not of course dealing with an applicant who was married and who had a family. It did issue a word of warning however by cautioning the Contracting States to keep the matter under review particularly in light of any new scientific or societal developments. It is in the light of what is considered to be some major advances that the applicant in this case particularly relies. This submission remains a live one notwithstanding my conclusion on the medical evidence.

(153) Four years later the same court gave judgment in Cossey v. United Kingdom (1991) 13 EHRR 622. In 1954 the applicant was born biologically male and was so registered. At age fifteen or sixteen she had a feeling of psychologically belonging to the female sex. In 1972 there was a name change and thereafter she lived appropriately as a female. Some two years later, having taken hormones, she underwent gender reassignment surgery including breast augmentation which left her with the external anatomy nearer to that of her female role. As a post operative transsexual she was capable of having sexual intercourse with a man. In 1983 she wished to marry an Italian national but was advised that unless a change was made to her birth certificate such a marriage would be void. That change was unsuccessfully sought. Subsequently she did purport to marry a Mr. X at a London synagogue. After the relationship terminated the High Court granted a decree nisi pronouncing that marriage to have been void. On her complaint of a violation of articles 8 and 12 the court first considered whether or not the case was distinguishable on its facts from the Rees decision and concluded that it was not. It then considered whether it should depart from its own decision in Rees and once more declined to so do. Commenting on its stated position that the Contracting States should keep the position under review it said at para. 40 of the judgment "*The court has been informed of no significant scientific developments that*

> *have occurred in the meantime; in particular, it remains the case - as (sic) was not contested by the applicant - that gender reassignment surgery does not result*

in the acquisition of all the biological characteristics of the other sex. " Whilst some developments since 1986 had taken place these were not such as to be described as significant or such that would merit a departure from its earlier decision. Once more however it reiterated its observations about the need for continuous review. Hence there was no breach of article 8. With regard to the alleged violation of article 12 it acknowledged that some Contracting States would now regard as valid a marriage between a post operative transsexual and a person of the opposite biological sex. However there was no evidence before it of any general abandonment of the traditional concept of marriage. An attachment to that concept it said *"... provides sufficient reason for the continued adoption of biological criteria for determining a person's sex for the purposes of marriage, this being a matter encompassed within the power of the Contracting States to regulate by national law the exercise of the right to marry. "* Hence there was also no breach of article 12.

(154) 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 a 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 post operative transsexual in the recognition of their fundamental rights.

(155) The case of X, Y and Z v. United Kingdom (1997) 24 EHRR 143, is also of interest though the applicant in that case was not seeking a correction of his own birth certificate. X, born in 1955, had a female body and was so registered. Early on in life he felt drawn to masculine roles of behaviour. In the mid 1970's he started on hormonal treatment

and began to live and work as a man. In 1979 he underwent gender reassignment surgery and in the same year established a stable and permanent union with the second named applicant Y, a biological female who was born in 1959. In 1992 Z was born to Y as a result of artificial insemination by donor (AID). The three lived together with X acting as and adopting a fatherly role. X applied to the Registrar General to have his name shown as the father of the child on the child's birth certificate. The reply was that only a biological man could be regarded as a father for the purpose of registration. Hence the challenge and the alleged infringements of article 8 and of article 14, the latter in the context of the exercise, without discrimination, of the rights and freedoms therein contained. The court had before it, when considering its decision, certain submissions and material relevant to the suggested medical and scientific advances in the area of transsexuality and in particular as to its aetiology. Included was the article headed, *"A sex difference in the human brain and its relation to transsexuality"* by Zhou, et al, (the 1st of the 2 studies relied upon by Prof. Gooren: see para. 121 above) published in the 1995 edition of *"Nature"* as well as the Report of the Proceedings of the XXIII rd Colloquy on European Law, Transsexualism, Medicine and the Law, Council of Europe 1993 and Doctor Breedlove's article *"Another Important Organ",* again published in the November 1995 edition of *"Nature ".*

(156) There is no doubt but that the case of X Y and Z is clearly distinguishable from cases like Rees and Cossey in a number of respects. Firstly that case was not simply about transsexuals or their desire to have their own birth certificates changed or indeed an allegation that domestic law failed to recognise a transsexual's change of identity. Rather X Y and Z was more focused on the problems created by AID and the overriding welfare of children born as a result. And secondly the court considered the complaint in the context of the "family life" part of article 8 rather than the "privacy part" of that article. Nevertheless even so circumscribed the essential issue in the case was whether relief could be obtained against

the decision of the Registrar General who took the view that only a biological male could be named as "father" in a child's birth certificate. In para. 52 of the judgment the court concluded as follows:- *"given that transsexuality raises complex scientific, legal, moral and social issues, in respect of which there is no generally shared approach amongst the Contracting States, the court is of the opinion that article 8 (art. 8) cannot, in this context, be taken to imply an obligation for the respondent State formally to recognise as the father of a child a person who is not the biological father. That being so, the fact that the law of the United Kingdom does not allow special legal recognition of the relationship between X and Z does not amount to a failure to respect family life within the meaning of that provision. (art. 8) "* Accordingly as of March 1997 the court held by fourteen votes to six that there had been no violation of article 8 and having also considered article 14 found by a majority of seventeen to three that it was not necessary to make any independent on the alleged breach of that article.

(157) A number of essential issues involved in the present case, common to both the judicial review point and the constitution argument, were once more raised before the European Court of Human Rights in the case of Sheffield and Horsham v. United Kingdom (1999) 27 EHRR 163. In that case Ms. Sheffield was born in 1946 with male genitalia and was so registered. Subsequently she married, fathered one child but later that marriage was dissolved. In 1986 she began treatment at a gender identity clinic in London and on some unspecified date thereafter, underwent gender reassignment surgery. In her case to the court she alleged a number of continuing instances where English domestic law still treated her as a male and refused to give full legal recognition to her altered status. She claimed breaches of several articles including articles 8 and 14.

The second applicant Ms. Horsham, born in 1946, was correctly registered as a male. By 21 she fully understood herself to be transsexual and left the United Kingdom to live in Holland where at the date of the case she was still residing. She received psychotherapy and hormonal treatment and finally underwent gender reassignment surgery in May 1992 at the Free University Hospital of Amsterdam. She had a male partner whom she wished to marry. She could not do so under the laws of the United Kingdom where she and her partner wished to return and live as a married couple. Corbett v. Corbett applied. Again she alleged several

breaches of the Convention.

(158) The submissions made on behalf of both applicants, in brief terms, can be summarised as follows:-

> (1) Both Ms. Sheffield and Ms. Horsham, it was claimed, continued to suffer prejudice as a result of the State's laws still treating them, for certain purposes, as male rather than as female, being the gender of their choice;
>
> (2) That in so doing the domestic law continued to apply the restrictive biological approach which in their view was outdated; this was because there was now, in their opinion, convincing evidence from Professor Gooren and his team, that brain differentiation should also be considered as an indicator of a person's gender, indeed as the decisive indicator; and finally
>
> (3) That being the situation, the earlier decisions of Rees (*supra*) and Cossey *(supra),* should now be subject to a major review, and if so undertaken, should lead to this court concluding that such persons for all purposes should have legally recognised their psychological gender.

On behalf of the government of the United Kingdom it was argued that Professor Gooren's research findings were not conclusive on the issue that a person's psychological sex was a

marker much less the definitive marker, it being claimed that further verification was required, and secondly that, as of then, no sufficient consensus existed amongst the experts within this field which would justify such a major shift. Dr. Breedlove's article in *"Nature"* was referred to in support. Thirdly every Contracting State enjoyed a margin of appreciation but did so particularly where the positive obligation aspect of article 8 was in issue, when, in such circumstances this doctrine should be fully respected by the deciding court.

(159) The court, as it did in Rees and Cossey, reiterated its belief that the notion of *"respect"* in article 8 was not clear cut, and in particular given the diversity of practices followed by the Contracting States, this was so when one was considering the positive aspect of s.1 of that article. Secondly it pointed out, again following earlier precedent, that a state was under no positive obligation, under this article, to change its existing practices so that the register of births could be continuously updated or annotated or to provide a birth certificate the nature and contents of which did not accurately reflect the original entry. Thirdly the court then referred to the fact that the claim of the applicants in Sheffield and Horsham was broader and wider than the claim of either Mr. Rees or Ms. Cossey in that in the case under consideration the complaint was a failure of the domestic law to give legal recognition, in general and unrestricted terms, to the post operative transsexual. Having so identified the case being made, the court then reduced the essence of the point to the United

Kingdom's government's continued insistence in following only biological criteria to determine gender and then to treat as immutable that gender information once it had been entered on the register of births.

(160) In Cossey, decided four years after Rees, and in B v. France (1993) 16 EHRR 1 decided in 1992, the court in each of the latter cases noted that there had been no significant advances in medical or scientific terms since 1986. Of particular relevance to Doctor Foy's

submission in Sheffield and Horsham. v UK (1999) 27 EHRR 163 is the court's conclusion as to the state of that evidence in July 1998. Para. 56 is worth quoting in full, it reads:-

> *"In the view of the court, the applicants have not shown that since the date of adoption of its Cossey judgment in 1990 there have been any findings in the area of medical science which settle conclusively the doubts concerning the causes of the condition of transsexualism. While Professor Gooren's research into the role of the brain in conditioning transsexualism may be seen as an important contribution to the debate in this area (see paragraph 43, above), it cannot be said that his views enjoy the universal support of the medico-scientific profession. Accordingly; the non acceptance by the authorities of the respondent state for the time being of the sex of the brain as a crucial determinant of gender cannot be criticised as being unreasonable. The court would add that, as at the time of adoption of the Cossey judgment, it still remains established that gender reassignment surgery does not result in the acquisition of all the biological characteristics of the other sex despite the increased scientific advances in the handling of gender reassignment procedures. "*

Accordingly the court was not persuaded to depart from Rees and Cossey and was not satisfied on the basis of the scientific and legal developments opened to it that the respondent country could no longer rely on the margin of appreciation in its continuing defence of the exclusive use of the biological criteria.

When dealing with article 12 the court repeated its view that "the right to marry", as contained therein, is a reference to marriage between persons of the opposite biological sex and secondly that in any event such a right is subject to the national laws of each Contracting State: see further at para. 151 above. Accordingly there was no breach of article 12.

(161) There are three further points which ought to be noted about the court's decision in Sheffield and Horsham. Firstly it is recorded in the judgment that "Liberty ", a non governmental organisation based in London was given leave to make written submissions which it did, and in those it pointed out that of the 37 countries analysed, only four, being Albania, Andorra, Ireland and the United Kingdom, refused to permit any change in any form to be made to a transsexual's birth certificate so as to reflect the post operative situation. Secondly once again the court reiterated its belief that each Contracting State must keep under review the legal position of transsexuals and indicated with explicit concern that since Rees and Cossey, certainly in the case of the respondent country, no new or innovative steps had been taken in the field of legal measures to ease the situation of transsexual. And thirdly even if there had been no advances scientifically or by way of societal acceptance, that need on a continuous basis would continue to exist.

(162) There is one further case from that court which I should mention. It is B v. France (1993) 16 E.H.R.R. I. I make reference to it only because B's case was a transsexual case. The court held that her routine situation under the law of her country was totally different from that applicable to Rees and Cossey, in that on a daily basis the relevant legal process had a continuous and most damaging impact on Ms. B. As a result there was in the court's view a violation of article 8. This conclusion was, as is evident, not based on any review of the jurisprudence of the court but on a consideration of French domestic law which was greatly more prejudicial than its counterpart in the UK (or in Ireland) in that in virtually every aspect of Ms. B's life it considerably disadvantaged her. Consequently though a positive finding was made in B's case, that decision cannot be regarded in anyway as applicable to the instant case or otherwise offered in support thereof.

(163) So, as can be seen, in neither of the three cases above mentioned did the applicants succeed in getting a majority of the court to favour a violation of either article 8 or of article 12. In Rees as I have said the majority on article 8 was twelve to three with the court being unanimous on article 12. In Cossey the majority was ten to eight on article 8, and fourteen to four on article 12 whilst in Sheffield and Horsham the majority was eleven to nine on the first article and eighteen to two on the second article. The Commission in Rees and in Sheffield and Horsham took the view that there had been a breach of article 8.

The increasing number of judges who are now prepared to hold a violation of article 8 has been used by Mr. Shipsey SC on behalf of the applicant, as a foundation to argue that this progressive trend should have a powerful influence on this court when arriving at its decision on both the issues facing it. Though referring to a number of dissenting opinions in each case he particularly relies on the views of Judge Martens delivered in Cossey and those of Judge Van Dijk pronounced in Sheffield and Horsham. Judge Martens was of the view that the issues raised in Cossey should be considered as a human rights issues. If having brought one's physical sex, insofar as one can, into harmony with his or her psychological sex, the judge reasoned that the other requirement for the transsexual, in order to achieve any degree of well-being, was for that person to have his new sexual identity not only socially but also legally recognised, that is to be fully and in all respects honoured by law. The learned Judge

referred to the view of the German Constitutional Court and at para. 2.7 of his dissenting opinion continued *"The principle which is basic in human rights and which underlies the various specific rights spelled out in the Convention is respect for human dignity and human freedom. Human dignity and human freedom imply that a man should be free to shape himself and his fate in the way that he deems best fits his personality. A transsexual does use those very fundamental rights. He is prepared to shape himself and his fate. In doing so he goes through long, dangerous and painful medical treatment to have his sexual organs, as far*

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> *as is humanly feasible, adapted to the sex he is convinced he belongs to. After these ordeals, as a post-operative transsexual, he turns to the law and asks it to recognise the fait accompli he has created. He demands to be recognised and to be treated by the law as a member of the sex he has won; he demands to be treated without discrimination, on the same footing as all other females or, as the case may be, males. This is a request which the law should refuse to grant him only if it truly has compelling reasons, for.... such a refusal can only be qualified as cruel. But there are no such reasons "*

(164) He then sets out in some detail why he believed that the decision in Rees was wrong and why the court in Cossey should have departed from it. He said *"Sexual identity is not only a fundamental aspect of everyone's personality but, through the ubiquity of the sexual dichotomy, is also an important societal fact. For post operative transsexuals, sexual identity has, understandably, a very special and sensitive importance because they acquired theirs deliberately, at a high cost in mental and bodily suffering. To be condemned to live, as far as that identity is concerned, in opposition to and thus "outlawed" by their country's legal system must therefore cause permanent and acute personal stress to post operative transsexuals in the United Kingdom. That is to say nothing of the lifelong dread to which the BSD system condemns them, by obliging them, every time that their sex is legally relevant, to make the painful choice between either-hiding what-legally is "the truth" with all the legal consequences of such untruthfulness, such as making themselves liable to a criminal charge, dismissal or a demand for nullification of the legal act in question - or revealing that legal "truth " and facing at least the possibility of very humiliating or even hostile reactions. "*

He continued by commenting upon the ever growing awareness of the essential importance of one's identity and of the growing tolerance and understanding of inter alia those who suffer

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from transsexualism. He would have decided in terms of article 8, the Rees case differently and as would obviously follow would have also decided the Cossey case differently.

(165) From the numbers previously given it is clear that there were several dissenting opinions from the court's majority ruling under article 8 in Sheffield and Horsham.

Seven of the nine judges who voted in favour of a violation of article 8 joined together to present what was headed a partially dissenting opinion. These judges were impressed by the fact that even in 1990, fourteen States from the Council of Europe had affected, admittedly in diverse ways, certain changes to help alleviate the distress and suffering of the post operative transsexual. They were equally impressed with the submission of "Liberty" in the instant case. Contrasting those developments with the lack of any action in the United Kingdom over the same period was a source of considerable regret to them. Though hesitating to accept the court's description as to the difference in medical science between that which existed at the time of Rees and in 1998, (see para. 160 above where para. 56 of the judgment is cited), their main quarrel however was not centred on the court's reluctance to accept as definitive the research of Professor Gooren but rather

> *"the court's approach fails to take into account the acceptance by the medical profession of gender dysphoria as a recognised medical condition that can be improved by gender reassignment surgery. "*

This development they claimed led to a much greater societal tolerance towards individuals who suffered from this condition, a conclusion which they felt was endorsed by the willingness of doctors to recommend and carry out surgery and by many national health services underwriting the cost of such treatment. This main concern of theirs did not for its

existence, depend on there being a consensus or an agreement within the scientific community or on the fact that surgery cannot lead to a complete change in the biological sex. In their opinion respect for privacy rights should not depend on exact science. They were satisfied in light of the evolution of attitudes in Europe, towards the legal recognition of the post operative transsexual, that the respondent state in Sheffield and Horsham could not rely on the margin of appreciation as a continuing defence of existing laws. They therefore concluded that under article 8 the United Kingdom was obliged to amend its laws, so that, as they put it, the *"post operative transsexuals no longer run the risk of public embarrassment and humiliation by being required to produce a birth certificate which records their original sex. "*

(166) Judge Casadevell also partially dissented. He felt that both Rees and Cossey should have been departed from. In so saying however he expressly conceded that *"the applicants have not shown ... that since Cossey v. UK there have been findings in the field of medical science which settle conclusively the doubts concerning the causes of transsexualism (a very difficult thing to require them to do). "* However this judge was highly influenced by the consensus which did exist within the medical profession namely that *"gender dysphoria "* was an identifiable medical condition. In support of his opinion that article 8 had been breached he felt that Ms. Sheffield and Ms. Horsham were in much the same situation as Miss B, in B v. France, (supra) and therefore, inter alia, for legal consistency he felt the court should have followed its 1992 decision in that regard.

(167) The last dissenting opinion was that of Judge Van Dyke. He felt that what was truly at stake was the fundamental right to self determination, that is if a person feels that he belongs to a sex other than the one originally registered to him and has undergone treatment to obtain the features of that other sex to the extent medically possible, then he is entitled to

legal recognition of the sex that in his conviction best responds to his identity. He went on to say that the right to self determination is the basis of several of the rights laid down in the Convention especially those under article 5 and under article 8. In addition this right was in his opinion a vital element of the *"inherent dignity*" which, according to the Preamble of the Universal Declaration constitutes the foundation of freedom, justice and peace in the world. He too highly regretted that the court had not used this latest opportunity to review Rees and Cossey and conclude positively in favour of a breach of article 8.

(168) Though previously stated in this judgment it is important to recognise precisely the change which the applicant seeks and which is fundamental to her case. She requires the original entry to be altered and that alteration to take effect from the date of her birth. This she claims is necessary not only to give full effect to her post surgical gender but also in order to prevent any further exposure to embarrassment or humiliation when her normal integration in society calls for the production of a birth certificate.

At present the domestic position and in that context the situation of the applicant appears to be as follows:-

Under Irish law a birth certificate is a document recording historical facts and events and is not available or designed for any other purpose. Secondly in this country there is no official system of *"identity documents "* or *"civil status documents "* which contain a record, capable of updating a person's current civil status or identity. Thirdly in our jurisdiction a person is entitled to change their christian and surnames as they wish and subject to some restrictions, which emanate essentially from the requirements of some professions, they can, without prohibition or formality, use their preferred names for all purposes. Proof of such a change is usually grounded on a statutory declaration or on a deed poll which is filed in the Central Office of the High Court. These acquired names are valid for all the purposes of legal

identification. Fourthly in the case of the applicant the following steps have been taken and achieved by her. On the 18th March, 1991, by way of statutory declaration she changed her christian name. On the 26th April of that year she received confirmation from the NUI that the following is an exact translation of the Testimonium of the conferring of her BDS on the 21st December, 1971, - it reads:-

> *"The National University of Ireland,*
>
> *This is to certify that the degree of Bachelor of Dental Surgery was conferred on Lydia Annice Foy of*

University College, Dublin, one of the constituent colleges of the University, at a meeting of the University to confer degrees held in Dublin on the 21st of December 1971. "

On the 30th April and on the 30th May, 1991 she received a general medical services card and driving licence, respectively, in her preferred name and showing her preferred gender. On the 23rd August of that year she received a passport in like form from the U.K. authorities and though she undoubtedly had some difficulties in obtaining a similar passport from the Irish immigration office, nonetheless she achieved such a passport, valid for 10 years in February of 1993. Her entitlement to vote reflects on the polling card her current preferred identify. So whilst there remains a number of circumstances which require the production of a birth certificate these are now quite confined and are extremely limited. Examples were given in evidence that for a conferring in 1995, St. Patrick's College in Maynooth required details of her christian name as stated in her birth certificate and also when applying for a FAS course a copy of her birth certificate was demanded. It is quite difficult to understand the latter and of course it would be far more preferable if the former and all similar situations did not arise. Nevertheless in her daily interaction with persons, with services, with society generally and with the law, there remains only a limited number of circumstances in which a choice in this regard has to be made.

(169) Rights to privacy, dignity and equality are not in their term or implementation absolute rights. The obligation of the State under Article 40.3.1 refers to a vindication *"as far as possible "* and under Article 40.3.2 to a protection *"as best it may from unjust attack "*. Therefore when considering how the State has discharged its responsibilities and met its obligations to honour the applicant's constitutional rights, one must not only view the situation of Dr. Foy but one must also view those individual members of society who by relationship or impact would be affected by such a decision as well as being conscious of society as a whole. Such an approach is fully justified given the competing interests of person to person and person to institution in the matters which are central to this case.

(170) I have no hesitation in immediately coming to the conclusion that the State on behalf of society has a legitimate interest in having in place and in operating a system of registration dealing, *inter alia*, with births which occur within this jurisdiction. Every modern society must be entitled to have a means of obtaining and thereafter recording vital particulars which surround the birth of its citizens and all others born in its country. The resulting register is a document of historical value, being current only at the date of birth and not beyond. It is no more than that. It is not a continuum record of one's travels through life or even of the most important and most significant events of that journey. It is, it has been said *"a snap shot"* of matters on a particular day and does not purport to be otherwise. Its value to society is crucial in the several areas mentioned earlier in this judgment. The recording of the *"sex of a person "* is, in my opinion, a vital element of society's legitimate interest in a registration system. Marriage and succession rights, rights of motherhood are but examples of its importance. There are many others. I therefore cannot conclude that it is

unreasonable for the domestic law of this State to have in place a system of registration which includes an entry as to *"sex"*.

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(171) Indeed I do not understand the applicant in principle to argue against this proposition. Instead, it is claimed that some special provision should be made for that small group of people which would enable the desired effect to be achieved. In my view in the context of what a birth certificate truly is, the absence of such a provision does not undermine the applicant's rights. At birth an entry of either "male" or `female" must be made; certainly where the structures are present and consistent. It cannot be otherwise save for an intersex condition which by all traditional teaching and understanding this is not. When a sex has been assigned to the child the entry is then complete. It cannot rationally be suggested that for this category of person no entry at all should be made. That would render the entire system inoperable. One could not know at birth whether in later life any given child would suffer from this condition. Therefore since every new-born could potentially be a transsexual there could be no system in operation. In any event many transsexuals never have gender reassignment surgery and even those who have had this procedure may not always want to assert the alteration now being sought. Moreover why should such surgery be the critical step? In all the circumstances I cannot agree that for the transsexual any entry should be conditional or that the appropriate column in the register should be left blank. Equally so given the view of the evidence which I have taken I cannot agree that there was any error in the original entry in the appropriate column. Therefore it follows that the absence of a provision which enables an amendment to be made, at an unspecified time in adult life to take effect from the date of birth, cannot in my view amount to a breach of the applicant's rights of either privacy or dignity. I believe that due to a legitimate interest, the State is entitled to have a functioning system in operation, reasonable in reach and response which criteria in my view the current system satisfies.

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This latter observation is not in any way intended to communicate an opinion that the legislature is not free to enact such provisions in this area of law which are within its power to so do.

(172) The applicant's position is further complicated by the fact that she is and remains lawfully married within the State and that she is the father of two children from that marriage. If her birth entry was now changed to indicate as a matter of a law that she was born female then that would have serious implications for her family members. It could, on one view, mean that her original marriage to Mrs. Foy was void on the basis that such a ceremony was between two female persons. Whether this be correct or not, on any submission at least great uncertainty would at least ensue. Such a change could also impact upon the status of the children of that marriage. On a certain level it could be said that they had no father which of course is demonstrably impossible and therefore false. It could be that a person, in a similar situation to the applicant, could attempt as a *"qualified informant"* to alter the birth certificates of her offspring. Whilst I appreciate Dr. Foy's views in this regard,

that no attempt would be made to so do nevertheless, this serious mixed issue of law and fact cannot proceed upon a concession which may later be withdrawn. Article 41 of the Constitution protects the institution of marriage and the family, (which Dr. and Mrs. Foy and their two daughters undoubtedly constitute; (see The State (Nicolaou) v. An Bord Uchtala [1966] I.R. 567) based on that marriage. The spouses and children of the applicant, if the alteration was permitted, would have these rights very considerably eroded and could be said to become children of a non marital union. Accordingly in such circumstances save for the most compelling reason, I would find great difficulty in seeing how the inalienable and imprescriptible nature of those rights could be maintained in the light of such a correction.

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(173) The State's obligations under Articles 40.3.1 and 40.3.2 of the Constitution are circumscribed in that under the former section the law must respect *"as far as possible "* the rights in question and under the latter section must *"by its laws protect as best it, may"* from unjust attack the right to life, person, good name and property rights of every citizen. When one therefore considers whether the existing situation represents a fair, reasonable and just balance, between the rights of those persons affected via their legal relationship with a transsexual and the rights of the latter, as asserted and sought to be vindicated in the manner requested in this case, I am of the view that it does. Of course I acknowledge that some inconvenience is still caused to the transsexual but I feel that this has been ameliorated very considerably in the past decade. A continuation of the applicant's unease has to be viewed as against competing constitutional rights and the State's entitlement to act for the benefit of the common good. I am therefore of the opinion that the degree of intrusion on the human dignity and privacy of the applicant is not so excessive or disproportionate in the circumstances outlined as would breach either of these constitutional rights.

(174) Most of the above observations have also an application to the alleged infringement of Article 40.1 of the Constitution. That Article it will be recalled provides equality before the law for citizens *"as human persons"* . The Article does not guarantee absolute equality for all citizens in all circumstances because if it did it would in effect, where citizens circumstances are different, be self-defeating. Rather, the object of the Article is to prevent what the courts have variously described as arbitrary, unreasonable, unjust or invidious discrimination: see O'B. v. S. [1984] I.R. 316 at 355. Walsh J., in de Burca and Anderson . v. The Attorney General [1976] I.R. 38 at 68 said *"... Article 40 does not require identical treatment of all persons without recognition of differences in relevant circumstances but it forbids invidious or arbitrary discrimination. It imports the Aristotelian concept that justice demands that we treat equals equally and unequals unequally". The same judge in O'B v.*

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S. (supra), put the purpose of the Article in this way (at p. 335) *"... the object and the nature of the legislation concerned must be taken into account, and that the distinctions or discriminations which the legislation creates must not be unjust, unreasonable or arbitrary and must, of course, be relevant to the legislation in question "*. Finally it is also worth noting how Henchy J. described

the article in Dillane v. Attorney General [1980] I.L.R.M. 167, where at 169 he said:

> *"When the State, whether directly by statue or mediately through the exercise of a delegated power of subordinate legislation, makes a discrimination in favour of, or against, a person or a category of persons, on the express or implied ground of a difference in social function, the courts will not condemn such discrimination as being in breach of Article 40.1 if it is not arbitrary, or capricious, or otherwise not reasonably capable, when objectively viewed in the light of the social function involved, of supporting the selection or classification complained of. "*

In light of these authorities and given the views expressed in the paragraphs immediately preceding, I am of the opinion that any difference of treatment between the applicant and a biological female is not in my view either unjust; invidious or arbitrary. Despite advances in surgery a male to female transsexual can never shed entirely, that persons male biological characteristics and likewise can never acquire, in many material respects, vital characteristics of the female sex. A difference therefore between a male to female transsexual and a biological male unquestionably exists. This difference in my view in the context of the core issues in this case justifies what is I feel claimed incorrectly to be an inequality of treatment with regard to birth registration as between such individuals. What difference of treatment there is, it should be pointed out, does not apply within male to female transsexuals as a group, or within female to male transsexuals as a group. In either of these groups if the post surgical transsexual was to seek the same rectification as the applicant does, the Register

General would respond in precisely the same way. Therefore I do not believe there is any breach of this article.

(175) **THE RIGHT TO MARRY**

Once again many of the relevant considerations which arise under this heading are similar to those which have been raised in relation to the rights of privacy, dignity and equality. However there are some important additional factors when dealing with this right to marry. At present the applicant is legally married to a living female and has not sought a divorce or an annulment of that marriage. Therefore in accordance with existing law she does not have the capacity to remarry. It is this impediment rather than the absence of a corrected birth certificate which precludes her re-marriage. However I would not like to decide this constitutional point in such a way. It seems to me that marriage as understood by the Constitution, by statute and by case law refers to the union of a biological man with a biological woman. Re-echoing Hyde -v- Hyde Law Reports 1856, Mr. Justice Costello in B -

v- R (1995) 1 I.L.R.M. 491 defined marriage as *"... the voluntary and permanent union of one man and one woman to the exclusion of all others for life."* As the result of Fifteenth Amendment of the Constitution Act 1995 and the Family Law (Divorce) Act 1996 the permanency aspect of marriage no longer applies. In T.F. -v-Ireland (1995) 1 I.R. 321 at 373 the court, in approving of the earlier definition of marriage given by Costello J. in Murray -v- Ireland [1985] I.R. 532 at pages 535-536 said .... *"the Constitution makes it clear that the concept and nature of marriage which it enshrines are derived from the christian notion of a partnership based on an irrevocable personal consent given by both spouses which establishes a unique and very special lifelong relationship. "* In this and in the neighbouring jurisdiction, (see Corbett -v- Corbett, supra) it is crucial for legal purposes that the parties should be of the opposite biological sex. Indeed article 12 of the European Convention on Human Rights is equally so predicated. All of its judgments above mentioned

confirm this. Accordingly in my view there is no sustainable basis for the applicant's submission that the existing law, which carries the impugned provision which prohibits the applicant from marrying a party who is of the same biological sex as herself, is a violation of her constitutional right to marry.

Finally and in any event, as with the other rights as asserted, this right to marry is not absolute and has to be evaluated in the context of several other rights including the rights of society. When so looked at I believe that for the purposes of marriage the State can legitimately hold the view which is espoused by and is evident from its laws.

(176) Accordingly for the reasons above outlined I refuse the relief sought.

(177) In conclusion could I say that many of the issues raised in this case touch the lives, in a most personal and profound way, of many individuals and also are of deep concern to any caring society. These proceedings involve complex social, ethical, medical and legal issues. In my respectful view such inter related and inter dependent matters are best dealt with by the legislature. The Oireachtas, as a forum could fully debate what changes, if any, are required and then, if necessary the scope and scale of such changes. All those who might be impacted by any such change could have their interests fully considered and reputably debated. Accordingly could I adopt what has been repeatedly said by the European Court of Human Rights and urge the appropriate authorities to urgently review this matter.
