Πηγή:

http://sim.law.uu.nl/SIM/CaseLaw/hof.nsf/1d4d0dd240bfee7ec12568490035df05/29e1f399bc99b3a1c12568bf0033c72c?OpenDocument

Summary:

Whether respondent State has a positive obligation to recognise for legal purposes new sexual identities of applicants, both male to female post-operative transsexuals. The first applicant, Miss Kristina Sheffield. At birth the applicant was registered as being of the male sex. Prior to her gender reassignment treatment she was married. In 1986 the first applicant began treatment at a gender identity clinic in London and, on a date unspecified, successfully underwent sex reassignment surgery and treatment. She changed her name by deed poll to her present name. The change of name was recorded on her passport and driving licence. Miss Sheffield refers to the difficulties which she has encountered as a result of her decision to undergo gender reassignment surgery and her subsequent change of sex. She states that she was informed by her consultant psychiatrist and her surgeon that she was required to obtain a divorce as a precondition to surgery being carried out. Following the divorce, the applicant's former spouse applied to the court to have her contact with her daughter terminated. The applicant states that the judge granted the application on the basis that contact with a transsexual would not be in the child's interests. The applicant has not seen her daughter since then, a period of some twelve years. Since she continues under United Kingdom law to be regarded as male she was obliged to give her sex as male. The applicant maintains that her decision to undergo gender reassignment surgery has resulted in her being subjected to discrimination at work or in relation to obtaining work. She is a pilot by profession. She states that she was dismissed by her employers in 1986 as a direct consequence of her gender reassignment and has found it impossible to obtain employment in the respondent State in her chosen profession. She attributes this in large part to the legal position of transsexuals in that State.

The second applicant, Miss Rachel Horsham, is a British citizen born in 1946. She has been living in the Netherlands since 1974 and acquired Netherlands citizenship by naturalisation in September 1993. The second applicant was registered at birth as being of the male sex. She states that from an early age she began to experience difficulties in relating to herself as male and when she was twenty-one she fully

understood that she was a transsexual. She left the United Kingdom in 1971 as she was concerned about the consequences of being identified as a transsexual. Thereafter she led her life abroad as a female. On 24 August 1992 Miss Horsham obtained an order from the Amsterdam Regional Court that she be issued a birth certificate by the Registrar of Births in The Hague recording her new name and the fact that she was of the female sex. The birth certificate was issued on 12 November 1992. In the meantime, on 11 September 1992 and on production of the court order, the British consulate issued a new passport to the applicant recording her new name and her sex as female. On 15 November 1992 the second applicant requested that her original birth certificate in the United Kingdom be amended to record her sex as female. By letter dated 20 November 1992, the Office of Population Censuses and Surveys (OPCS) replied that there was no provision under United Kingdom law for any new information to be inscribed on her original birth certificate. Miss Horsham states that she is forced to live in exile because of the legal situation in the United Kingdom. She has a male partner whom she plans to marry. She states that they would like to lead their married life in the United Kingdom but has been informed by the OPCS by letter dated 4 November 1993 that as a matter of English law, if she were to be held to be domiciled in the United Kingdom, she would be precluded from contracting a valid marriage whether that marriage "took place in the Netherlands or elsewhere".

The European Court of Human Rights observes that it is common ground that the applicants' complaints fall to be considered from the standpoint of whether or not the respondent State has failed to comply with a positive obligation to ensure respect for their rights to respect for their private lives. The Court reiterates that the notion of "respect" is not clear-cut, especially as far as the positive obligations inherent in that concept are concerned: having regard to the diversity of the practices followed and the situations obtaining in the Contracting States, the notion's requirements will vary considerably from case to case. It is to be noted that in applying the above principle in both the Rees and Cossey cases, the Court concluded that the same respondent State was under no positive obligation to modify its system of birth registration in order to allow those applicants the right to have the register of births updated or annotated to record their new sexual identities or to provide them with a copy birth certificate or a short-form certificate excluding any reference to sex at all or sex at the time of birth. The Court notes that in its Cossey judgment it considered that there had been no

noteworthy scientific developments in the area of transsexualism in the period since the date of adoption of its Rees judgment which would compel it to depart from the decision reached in the latter case. As to legal developments occurring since the date of the Cossey judgment, the Court in the B. case stated that there was, as yet, no sufficiently broad consensus among the member States on how to deal with a range of complex legal matters resulting from a change of sex. 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.

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. As to legal developments in this area, the Court has examined the comparative study which has been submitted by Liberty. However, the Court is not fully satisfied that the legislative trends outlined by amicus suffice to establish the existence of any common European approach to the problems created by the recognition in law of post-operative gender status. The Court is accordingly not persuaded that it should depart from its Rees and Cossey decisions and conclude that on the basis of scientific and legal developments alone the respondent State can no longer rely on a margin of appreciation to defend its continuing refusal to recognise in law a transsexual's post-operative gender. For the Court, it continues to be the case that transsexualism raises complex scientific, legal, moral and social issues, in respect of which there is no generally shared approach among the Contracting States. It cannot be denied that the incidents alluded to by Miss Sheffield were a source of embarrassment and distress to her and that Miss Horsham, if she were to return to the United Kingdom, would equally run the risk of having on occasion to identify herself in her pre-operative gender. At the same time, it must be acknowledged that an individual may with justification be required on occasion to provide proof of gender as well as medical history. This is certainly the case of life assurance contracts which are uberrimae fidei. It may possibly be true of motor insurance where the insurer may need to have regard to the sex of the driver in order to make an actuarial assessment of the risk.

The Court observes also that the respondent State has endeavoured to some extent to minimise intrusive enquiries as to their gender status by allowing transsexuals to be issued with driving licences, passports and other types of official documents in their new name and gender, and that the use of birth certificates as a means of identification is officially discouraged. Having reached those conclusions, the Court cannot but note that despite its statements in the Rees and Cossey cases on the importance of keeping the need for appropriate legal measures in this area under review having regard in particular to scientific and societal developments, it would appear that the respondent State has not taken any steps to do so. The fact that a transsexual is able to record his or her new sexual identity on a driving licence or passport or to change a first name are not innovative facilities. They obtained even at the time of the Rees case. Even if there have been no significant scientific developments since the date of the Cossey judgment which make it possible to reach a firm conclusion on the aetiology of transsexualism, it is nevertheless the case that there is an increased social acceptance of transsexualism and an increased recognition of the problems which post-operative transsexuals encounter. Even if it finds no breach of Article 8 in this case, the Court reiterates that this area needs to be kept under review by Contracting States.

For the above reasons, the Court considers that the applicants have not established that the respondent State has a positive obligation under Article 8 ECHR to recognise in law their post-operative gender. Accordingly, there is no breach of that provision in the instant case. The Court recalls that the right to marry guaranteed by Article 12 refers to the traditional marriage between persons of opposite biological sex. This appears also from the wording of the Article which makes it clear that Article 12 is mainly concerned to protect marriage as the basis of the family. Furthermore, Article 12 lays down that the exercise of this right shall be subject to the national laws of the Contracting States. The limitations thereby introduced must not restrict or reduce the right in such a way or to such an extent that the very essence of the right is impaired. However, the legal impediment in the United Kingdom on the marriage of persons who are not of the opposite biological sex cannot be said to have an effect of this kind.

The Court recalls further that in its Cossey judgment it found that the attachment to the traditional concept of marriage which underpins Article 12 ECHR provides

sufficient reason for the continued adoption by the respondent State 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. In light of the above considerations, the Court finds that the inability of either applicant to contract a valid marriage under the domestic law of the respondent State having regard to the conditions imposed by the Matrimonial Causes Act 1973 cannot be said to constitute a violation of Article 12 ECHR. The Court is not persuaded that Miss Horsham's complaint raises an issue under Article 12 which engages the responsibility of the respondent State since it relates to the recognition by that State of a post-operative transsexual's foreign marriage rather than the law governing the right to marry of individuals within its jurisdiction. Furthermore, it cannot be said with certainty what the outcome would be were the validity of her marriage to be tested in the English courts. The Court concludes that there has been no violation of Article 12.

The Court reiterates that Article 14 affords protection against discrimination in the enjoyment of the rights and freedoms safeguarded by the other substantive provisions of the Convention. However, not every difference in treatment will amount to a violation of this Article. Instead, it must be established that other persons in an analogous or relevantly similar situation enjoy preferential treatment, and that there is no reasonable or objective justification for this distinction. Contracting States enjoy a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment in law. The Court notes that it has already concluded that the respondent State has not overstepped its margin of appreciation in not according legal recognition to a transsexual's post-operative gender. In reaching that conclusion, it was satisfied that a fair balance continues to be struck between the need to safeguard the interests of transsexuals such as the applicants and the interests of the community in general and that the situations in which the applicants may be required to disclose their pre-operative gender do not occur with a degree of frequency which could be said to impinge to a disproportionate extent on their right to respect for their private lives. Those considerations, which are equally encompassed in the notion of "reasonable and objective justification" for the purposes of Article 14 ECHR, must also be seen as justifying the difference in treatment which the applicants experience irrespective of the reference group relied

on. The Court concludes therefore that no violation has been established under this head of complaint.