COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

COURT (GRAND CHAMBER)

CASE OF X, Y AND Z v. THE UNITED KINGDOM

(Application no. 21830/93)

JUDGMENT

STRASBOURG

22 April 1997

In the case of X, Y and Z v. the United Kingdom[1],

The European Court of Human Rights, sitting in pursuance of Rule 51 of Rules of Court A[2], as a Grand Chamber composed of the following judges:

Mr R. RYSSDAL, *President*,
Mr R. BERNHARDT,
Mr THÓR VILHJÁLMSSON,
Mr F. MATSCHER,
Mr L.-E. PETTITI,
Mr C. RUSSO,
Mr A. SPIELMANN,
Mr J. DE MEYER,
Mr N. VALTICOS,
Mr I. FOIGHEL,
Sir John FREELAND,
Mr A.B. BAKA,
Mr M.A. LOPES ROCHA,
Mr J. MAKARCZYK,
Mr D. GOTCHEV,
Mr K. JUNGWIERT,
Mr P. KURIS,
Mr U. LOHMUS,
Mr E. LEVITS,
Mr J. CASADEVALL,

and also of Mr H. PETZOLD, *Registrar*, and Mr P.J. MAHONEY, *Deputy Registrar*,

Having deliberated in private on 25 October 1996 and 20 March 1997,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case was referred to the Court on 13 September 1995 by the European Commission of Human Rights ("the Commission") within the three-month period laid down by Article 32 para. 1 and Article 47 (art. 32-1,

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[1] The case is numbered 75/1995/581/667. The first number is the case's position on the list of cases referred to the Court in the relevant year (second number). The last two numbers indicate the case's position on the list of cases referred to the Court since its creation and on the list of the corresponding originating applications to the Commission.

[2] Rules A apply to all cases referred to the Court before the entry into force of Protocol No. 9 (P9) (1 October 1994) and thereafter only to cases concerning States not bound by that Protocol (P9). They correspond to the Rules that came into force on 1 January 1983, as amended several times subsequently.

art. 47) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"). It originated in an application (no. 21830/93) against the United Kingdom of Great Britain and Northern Ireland lodged with the Commission under Article 25 (art. 25) by three British citizens, Mr X, Ms Y and Miss Z, on 6 May 1993.

The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby the United Kingdom recognised the compulsory jurisdiction of the Court (Article 46) (art. 46). The object of the request was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Articles 8 and 14 of the Convention (art. 8, art. 14).

2. In response to the enquiry made in accordance with Rule 33 para. 3 (d) of Rules of Court A, the applicants stated that they wished to take part in the proceedings and designated the lawyer who would represent them (Rule 30).

3. The Chamber to be constituted included ex officio Sir John Freeland, the elected judge of British nationality (Article 43 of the Convention) (art. 43), and Mr R. Bernhardt, the Vice-President of the Court (Rule 21 para. 4 (b)). On 29 September 1995, in the presence of the Registrar, the President of the Court, Mr R. Ryssdal, drew by lot the names of the other seven members, namely Mr Thór Vilhjálmsson, Mr S.K. Martens, Mr F. Bigi, Mr A.B. Baka, Mr M.A. Lopes Rocha, Mr J. Makarczyk and Mr U. Lohmus (Article 43 in fine of the Convention and Rule 21 para. 5) (art. 43). Subsequently, Mr R. Macdonald and Mr N. Valticos, substitute judges, replaced Mr Bigi, who had died, and Mr Martens, who had resigned (Rule 22 para. 1).

4. As President of the Chamber (Rule 21 para. 6), Mr Bernhardt, acting through the Registrar, consulted the Agent of the United Kingdom Government ("the Government"), the applicants' lawyer and the Delegate of the Commission on the organisation of the proceedings (Rules 37 para. 1 and 38). Pursuant to the order made in consequence, the Registrar received the Government's memorial on 2 May 1996 and the applicants' memorial on 3 May 1996.

5. On 21 May 1996 the President granted leave to Rights International, a non-governmental human rights organisation based in New York, to submit written comments (Rule 37 para. 2). These were received on 30 June 1996.

6. In accordance with the President's decision, the hearing took place in public in the Human Rights Building, Strasbourg, on 27 August 1996. The Court had held a preparatory meeting beforehand.

There appeared before the Court:

(a) for the Government

Ms S. DICKSON, Foreign and Commonwealth Office, *Agent*,
Mr D. PANNICK QC,

Mr R. SINGH, *Counsel*,
Ms H. JENN, Department of Health,
Mr W. JENKINS, Office of Population Censuses and Surveys, *Advisers*;

(b) for the Commission
Mr J. MUCHA, *Delegate*;

(c) for the applicants
Mr M. PENROSE, *Solicitor*,
Mr N. BLAKE, *Counsel*.

The Court heard addresses by Mr Mucha, Mr Blake and Mr Pannick, and also replies to questions put by several of its members.

7. Following deliberations on 2 September 1996, the Chamber decided to relinquish jurisdiction forthwith in favour of a Grand Chamber (Rule 51 para. 1).

8. The Grand Chamber to be constituted included ex officio the President and the Vice-President of the Court (Mr Ryssdal and Mr Bernhardt) as well as the other members and the substitute judges (namely Mr A. Spielmann and Mr L.-E. Pettiti) of the Chamber which had relinquished jurisdiction (Rule 51 para. 2 (a) and (b)). On 2 September 1996, in the presence of the Registrar, the President drew by lot the names of the nine additional judges called on to complete the Grand Chamber, namely Mr F. Matscher, Mr B. Walsh, Mr C. Russo, Mr J. De Meyer, Mr I. Foighel, Mr D. Gotchev, Mr K. Jungwiert, Mr P. Kuris and Mr J. Casadevall.

9. Mr Walsh was unable to take part in the further consideration of the case and was replaced by Mr E. Levits.

10. Having taken note of the opinions of the Government's Agent, the applicants' representatives and the Commission's Delegate, the Grand Chamber decided on 25 October 1996 that it was not necessary to hold a further hearing following the relinquishment of jurisdiction by the Chamber (Rule 38 taken together with Rule 51 para. 6).

11. Subsequently Mr Macdonald was unable to take part in the further consideration of the case.

AS TO THE FACTS

I. CIRCUMSTANCES OF THE CASE

12. The applicants are British citizens, resident in Manchester, England.

The first applicant, "X", was born in 1955 and works as a college lecturer. X is a female-to-male transsexual and will be referred to

throughout this judgment using the male personal pronouns "he", "him" and "his".

Since 1979 he has lived in a permanent and stable union with the second applicant, "Y", a woman born in 1959. The third applicant, "Z", was born in 1992 to the second applicant as a result of artificial insemination by donor ("AID"). Y has subsequently given birth to a second child by the same method.

13. X was born with a female body. However, from the age of four he felt himself to be a sexual misfit and was drawn to "masculine" roles of behaviour. This discrepancy caused him to suffer suicidal depression during adolescence.

In 1975, he started to take hormone treatment and to live and work as a man. In 1979, he began living with Y and later that year he underwent gender reassignment surgery, having been accepted for treatment after counselling and psychological testing.

14. In 1990, X and Y applied through their general practitioner ("GP") for AID. They were interviewed by a specialist in January 1991 with a view to obtaining treatment and their application was referred to a hospital ethics committee, supported by two references and a letter from their GP. It was, however, refused.

15. They appealed, making representations which included reference to a research study in which it was reported that in a study of thirty-seven children raised by transsexual or homosexual parents or carers, there was no evidence of abnormal sexual orientation or any other adverse effect (R. Green, "Sexual identity of 37 children raised by homosexual or transsexual parents", American Journal of Psychiatry, 1978, vol. 135, pp. 692-97).

In November 1991, the hospital ethics committee agreed to provide treatment as requested by the applicants. They asked X to acknowledge himself to be the father of the child within the meaning of the Human Fertility and Embryology Act 1990 (see paragraph 21 below).

16. On 30 January 1992, Y was impregnated through AID treatment with sperm from an anonymous donor. X was present throughout the process. Z was born on 13 October 1992.

17. In February 1992, X had enquired of the Registrar General (see paragraph 22 below) whether there was an objection to his being registered as the father of Y's child. In a reply dated 4 June 1992 to X's Member of Parliament, the Minister of Health replied that, having taken legal advice, the Registrar General was of the view that only a biological man could be regarded as a father for the purposes of registration. It was pointed out that the child could lawfully bear X's surname and, subject to the relevant conditions, X would be entitled to an additional personal tax allowance if he could show that he provided financial support to the child.

18. Nonetheless, following Z's birth, X and Y attempted to register the child in their joint names as mother and father. However, X was not permitted to be registered as the child's father and that part of the register was left blank. Z was given X's surname in the register (see paragraph 24 below).

19. In November 1995, X's existing job contract came to an end and he applied for approximately thirty posts. The only job offer which he received was from a university in Botswana. The conditions of service included accommodation and free education for the dependants of the employee. However, X decided not to accept the job when he was informed by a Botswanan official that only spouses and biological or adopted children would qualify as "dependants". He subsequently obtained another job in Manchester where he continues to work.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Definition of gender in domestic law

20. English law defines a person's sex by reference to biological criteria at birth and does not recognise that it can be changed by gender reassignment surgery (Corbett v. Corbett [1971] Probate Reports 83 and R. v. Tan [1983] Queen's Bench Reports 1053 (Court of Appeal)).

As a result of this principle, a female-to-male transsexual is not permitted to marry a woman and cannot be regarded as the father of a child.

B. Children conceived by artificial insemination

21. The Human Fertility and Embryology Act 1990 ("the 1990 Act") provides, inter alia, that where an unmarried woman gives birth as a result of AID with the involvement of her male partner, the latter, rather than the donor of the sperm, shall be treated for legal purposes as the father of the child (section 28 (3)).

C. Registration of births

22. Section 1 (1) of the Births and Deaths Registration Act 1953 ("the 1953 Act") requires that certain prescribed details concerning the birth of every child born in England and Wales, including the names of the parents, be entered in a register. The Registrar General is the official ultimately responsible for the administration of this scheme.

23. If the child's father (or the person regarded by law as the father - see paragraph 21 above) is not married to the mother, his name shall not

automatically be entered on the register in the space provided for the father. However, it will be entered if he and the mother jointly request that this be done (section 10 of the 1953 Act, as amended by the Family Law Reform Act 1987).

24. A birth certificate takes the form either of an authenticated copy of the entry in the register of births or an extract from it. A certificate of the latter kind, known as a "short certificate of birth", is in a prescribed form and contains such particulars as are prescribed by regulations made under the 1953 Act. These particulars are the name, surname, sex and date and place of birth of the individual concerned. Under English law, a child may be given any first name or surname as the parents see fit, and may change his or her name or surname at any time, without restriction.

D. Parental responsibility

25. "Parental responsibility" in respect of a child automatically vests in the mother and, where she is married, in her husband. It may, additionally, be granted to certain other persons (see paragraphs 26-27 below).

"Parental responsibility" means all the rights, duties, powers, responsibility and authority which by law a parent of a child has in relation to the child and his or her property (section 3 of the Children Act 1989 - "the 1989 Act").

It does not, without more, confer on the child any rights in the property of the person granted parental responsibility, such as the right to inherit on intestacy or to financial support. Similarly, it does not entitle the child to benefit through that person from the transmission of tenancies pursuant to certain statutory provisions, from nationality and immigration measures or from rights accruing from that person’s citizenship in the European Union.

26. The father of a child who was not married to the mother at the time of the birth may apply for a court order granting him parental responsibility or may attain it by virtue of an agreement, in a prescribed form, with the mother (section 4 of the 1989 Act).

27. Parental responsibility cannot vest in any other person, unless a "residence order" in respect of the child is made in his or her favour.

A residence order is "an order settling the arrangements to be made as to the person with whom the child is to live" (section 8 of the 1989 Act). Any person may apply for such an order (although individuals outside certain defined categories must first seek the leave of the court in order to apply).

Where the court makes a residence order in respect of any person who is not the parent or guardian of the child, that person is automatically vested with parental responsibility for the child as long as the residence order remains in force (section 12 (2) of the 1989 Act).

28. Thus, although the first applicant could not apply directly for parental responsibility of the third applicant, he could apply with the second

applicant for a joint residence order which would have the effect of giving him parental responsibility while it remained in force. On 24 June 1994, Mr Justice Douglas-Brown in the Manchester High Court made a joint residence order in favour of two cohabiting lesbian women in respect of the child of one of them (unreported).

PROCEEDINGS BEFORE THE COMMISSION

29. In their application to the Commission of 6 May 1993 (no. 21830/93) as declared admissible, the applicants complained that, contrary to Article 8 of the Convention (art. 8), they were denied respect for their family and private life as a result of the lack of recognition of the first applicant's role as father to the third applicant and that the resulting situation in which they were placed was discriminatory, in violation of Articles 8 and 14 taken together (art. 14+8).

30. On 1 December 1994, the Commission declared admissible the complaints under Articles 8 and 14 of the Convention (art. 8, art. 14), and declared inadmissible complaints under Articles 12 and 13 (art. 12, art. 13). In its report of 27 June 1995 (Article 31) (art. 31), it expressed the opinion that there had been a violation of Article 8 of the Convention (art. 8) (thirteen votes to five) and that it was not necessary to examine whether there had been a violation of Article 14 in conjunction with Article 8 (art. 14+8) (seventeen votes to one). The full text of the Commission's opinion and of the five separate opinions contained in the report are reproduced as an annex to this judgment[3].

FINAL SUBMISSIONS TO THE COURT

31. At the hearing on 27 August 1996 the Government, as they had done in their memorial, asked the Court to hold that there had been no violation of Articles 8 or 14 of the Convention (art. 8, art. 14).

On the same occasion, the applicants requested the Court to reach a finding of violation and to award them just satisfaction under Article 50 (art. 50).

[3] Note by the Registrar: for practical reasons this annex will appear only with the printed version of the judgment (in Reports of Judgments and Decisions 1997-II), but a copy of the Commission's report is obtainable from the registry.

AS TO THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION (art. 8)

32. The applicants, with whom the Commission agreed, submitted that the lack of legal recognition of the relationship between X and Z amounted to a violation of Article 8 of the Convention (art. 8), which provides:

> "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 for the protection of the rights and freedoms of others."

The Government denied that Article 8 (art. 8) was applicable and, in the alternative, claimed that there had been no violation.

A. The existence of "family life"

33. The applicants submitted that they had shared a "family life" within the meaning of Article 8 (art. 8) since Z's birth. They emphasised that, according to the jurisprudence of the Commission and the Court, social reality, rather than formal legal status, was decisive. Thus, it was important to note that X had irrevocably changed many of his physical characteristics and provided financial and emotional support to Y and Z. To all appearances, the applicants lived as a traditional family.

34. The Government did not accept that the concept of "family life" applied to the relationships between X and Y or X and Z. They reasoned that X and Y had to be treated as two women living together, because X was still regarded as female under domestic law and a complete change of sex was not medically possible. Case-law of the Commission indicated that a "family" could not be based on two unrelated persons of the same sex, including a lesbian couple (see the Commission's decisions on admissibility in X and Y v. the United Kingdom, application no. 9369/81, Decisions and Reports 32, p. 220, and Kerkhoven and Others v. the Netherlands, application no. 15666/89). Nor could X be said to enjoy "family life" with Z since he was not related to the child by blood, marriage or adoption.

At the hearing before the Court, counsel for the Government accepted that if X and Y applied for and were granted a joint residence order in respect of Z (see paragraph 27 above), it would be difficult to maintain that there was no "family life" for the purposes of Article 8 (art. 8).

35. The Commission considered that the relationship between X and Y could not be equated with that of a lesbian couple, since X was living in society as a man, having undergone gender reassignment surgery. Aside from the fact that X was registered at birth as a woman and was therefore under a legal incapacity to marry Y or be registered as Z's father, the applicants' situation was indistinguishable from the traditional notion of "family life".

36. The Court recalls that the notion of "family life" in Article 8 (art. 8) is not confined solely to families based on marriage and may encompass other de facto relationships (see the Marckx v. Belgium judgment of 13 June 1979, Series A no. 31, p. 14, para. 31; the Keegan v. Ireland judgment of 26 May 1994, Series A no. 290, p. 17, para. 44; and the Kroon and Others v. the Netherlands judgment of 27 October 1994, Series A no. 297-C, pp. 55-56, para. 30). When deciding whether a relationship can be said to amount to "family life", a number of factors may be relevant, including whether the couple live together, the length of their relationship and whether they have demonstrated their commitment to each other by having children together or by any other means (see, for example, the above-mentioned Kroon and Others judgment, loc. cit.).

37. In the present case, the Court notes that X is a transsexual who has undergone gender reassignment surgery. He has lived with Y, to all appearances as her male partner, since 1979. The couple applied jointly for, and were granted, treatment by AID to allow Y to have a child. X was involved throughout that process and has acted as Z's "father" in every respect since the birth (see paragraphs 14-16 above). In these circumstances, the Court considers that de facto family ties link the three applicants.

It follows that Article 8 is applicable (art. 8).

B. Compliance with Article 8 (art. 8)

1. The arguments as to the applicable general principles

38. The applicants pointed out that the Court had recognised in its Rees v. the United Kingdom judgment (17 October 1986, Series A no. 106, p. 19, para. 47), that the need for appropriate legal measures affecting transsexuals should be kept under review having regard in particular to scientific and societal developments. They maintained that there had been significant development since that decision: in particular, the European Parliament and the Parliamentary Assembly of the Council of Europe had called for comprehensive recognition of transsexual identity (Resolution OJ 1989 C256 and Recommendation 1117 of 29 September 1989 respectively); the Court of Justice of the European Communities had decided that the dismissal of a transsexual for a reason related to gender reassignment amounted to discrimination contrary to Community Directive 76/207 (P. v.

S. and Cornwall County Council, C-13/94, 30 April 1996); and scientific research had been published which suggested that transsexuality was not merely a psychological disorder, but had a physiological basis in the structure of the brain (see, for example, "Biological Aspects of Transsexualism" by Professor L.J.G. Gooren, Council of Europe document no. CJ-DE/XXIII (93) 5, and Zhou, Hofman, Gooren and Swaab, "A sex difference in the human brain and its relation to transsexuality", Nature, 2 November 1995, vol. 378, p. 68). These developments made it appropriate for the Court to re-examine the principles underlying its decisions in the above-mentioned Rees case and in Cossey v. the United Kingdom (27 September 1990, Series A no. 184), in so far as they had an impact on the present problem. The Court should now hold that the notion of respect for family and/or private life required States to recognise the present sexual identity of post-operative transsexuals for legal purposes, including parental rights.

However, they also emphasised that the issue in their case was very different from that in Rees and Cossey, since X was not seeking to amend his own birth certificate but rather to be named in Z's birth certificate as her father. They submitted that the margin of appreciation afforded to the respondent State should be narrower in such a case and the need for positive action to ensure respect much stronger, having regard to the interests of the child in having her social father recognised as such by law.

39. The Government contended that Contracting States enjoyed a wide margin of appreciation in relation to the complex issues raised by transsexuality, in view of the lack of a uniform approach to the problem and the transitional state of the law. They denied that there had been any significant change in the scientific or legal position with regard to transsexuals: despite recent research, there still remained uncertainty as to the essential nature of the condition and there was not yet any sufficiently broad consensus between the member States of the Council of Europe (see, for example, the Report of the Proceedings of the XXIIIrd Colloquy on European Law, Transsexualism, Medicine and the Law, Council of Europe, 1993, and S.M. Breedlove, "Another Important Organ", Nature, 2 November 1995, vol. 378, p. 15). The judgment of the Court of Justice of the European Communities in P. v. S. and Cornwall County Council (cited at paragraph 38 above) did not assist the applicants because it was not concerned with the extent to which a State was obliged to recognise a person's change of sex for legal purposes.

Like the applicants, the Government stressed that the present case was not merely concerned with transsexuality. Since it also raised difficult and novel questions relating to the treatment of children born by AID, the State should enjoy a very broad margin of appreciation.

40. The Commission referred to a clear trend within the Contracting States towards the legal recognition of gender reassignment. It took the view

that, in the case of a transsexual who had undergone gender reassignment surgery in the Contracting State and who lived there as part of a family relationship, there had to be a presumption in favour of legal recognition of that relationship, the denial of which required special justification.

2. The Court's general approach

41. The Court reiterates that, although the essential object of Article 8 (art. 8) is to protect the individual against arbitrary interferences by the public authorities, there may in addition be positive obligations inherent in an effective respect for private or family life. The boundaries between the State's positive and negative obligations under this provision (art. 8) do not always lend themselves to precise definition; nonetheless, the applicable principles are similar. In both contexts, regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole, and in both cases the State enjoys a certain margin of appreciation (see, for example, the above-mentioned Rees judgment, p. 14, para. 35, and the above-mentioned Kroon and Others judgment, p. 56, para. 31).

42. The present case is distinguishable from the previous cases concerning transsexuals which have been brought before the Court (see the above-mentioned Rees judgment, the above-mentioned Cossey judgment and the B. v. France judgment of 25 March 1992, Series A no. 232-C), because here the applicants' complaint is not that the domestic law makes no provision for the recognition of the transsexual's change of identity, but rather that it is not possible for such a person to be registered as the father of a child; indeed, it is for this reason that the Court is examining this case in relation to family, rather than private, life (see paragraph 37 above).

43. It is true that the Court has held in the past that where the existence of a family tie with a child has been established, the State must act in a manner calculated to enable that tie to be developed and legal safeguards must be established that render possible, from the moment of birth or as soon as practicable thereafter, the child's integration in his family (see for example the above-mentioned Marckx judgment, p. 15, para. 31; the Johnston and Others v. Ireland judgment of 18 December 1986, Series A no. 112, p. 29, para. 72; the above-mentioned Keegan judgment, p. 19, para. 50; and the above-mentioned Kroon and Others judgment, p. 56, para. 32). However, hitherto in this context it has been called upon to consider only family ties existing between biological parents and their offspring. The present case raises different issues, since Z was conceived by AID and is not related, in the biological sense, to X, who is a transsexual.

44. The Court observes that there is no common European standard with regard to the granting of parental rights to transsexuals. In addition, it has not been established before the Court that there exists any generally shared approach amongst the High Contracting Parties with regard to the

manner in which the social relationship between a child conceived by AID and the person who performs the role of father should be reflected in law. Indeed, according to the information available to the Court, although the technology of medically assisted procreation has been available in Europe for several decades, many of the issues to which it gives rise, particularly with regard to the question of filiation, remain the subject of debate. For example, there is no consensus amongst the member States of the Council of Europe on the question whether the interests of a child conceived in such a way are best served by preserving the anonymity of the donor of the sperm or whether the child should have the right to know the donor's identity.

Since the issues in the case, therefore, touch on areas where there is little common ground amongst the member States of the Council of Europe and, generally speaking, the law appears to be in a transitional stage, the respondent State must be afforded a wide margin of appreciation (see, mutatis mutandis, the above mentioned Rees judgment, p. 15, para. 37, and the above-mentioned Cossey judgment, p. 16, para. 40).

3. Whether a fair balance was struck in the instant case

45. The applicants, with whom the Commission agreed, argued that a number of consequences flowed from the lack of legal recognition of X's role as father. Perhaps most importantly, the child's sense of security within the family might be undermined. Furthermore, the absence of X's name on her birth certificate might cause distress on those occasions when a full-length certificate had to be produced, for example on registration with a doctor or school, if an insurance policy was taken out on her life or when she applied for a passport. Although Z was a British citizen by birth and could trace connection through her mother in immigration and nationality matters, problems could still arise if X sought to work abroad. For example, he had already had to turn down an offer of employment in Botswana because he had been informed that Y and Z would not have been recognised as his "dependants" and would not, therefore, have been entitled to receive certain benefits (see paragraph 19 above). Moreover, in contrast to the position where a parent-child relationship was recognised by law, Z could not inherit from X on intestacy or succeed to certain tenancies on X's death. The possibility of X obtaining a residence order in respect of Z (see paragraph 27 above) did not satisfy the requirement of respect, since this would entail the incurring of legal expense and an investigation by a court welfare officer which might distress the child.

In their submission, it was apparent that the legal recognition sought would not interfere with the rights of others or require any fundamental reorganisation of the United Kingdom system of registration of births, since the Human Fertility and Embryology Act 1990 allowed a man who was not a transsexual to be registered as the father of a child born to his female partner by AID (see paragraph 21 above).

46. The Government pointed out that the applicants were not restrained in any way from living together as a "family" and they asserted that the concerns expressed by them were highly theoretical. Furthermore, X and Y could jointly apply for a residence order, conferring on them parental rights and duties in relation to Z (see paragraph 27 above).

47. First, the Court observes that the community as a whole has an interest in maintaining a coherent system of family law which places the best interests of the child at the forefront. In this respect, the Court notes that, whilst it has not been suggested that the amendment to the law sought by the applicants would be harmful to the interests of Z or of children conceived by AID in general, it is not clear that it would necessarily be to the advantage of such children.

In these circumstances, the Court considers that the State may justifiably be cautious in changing the law, since it is possible that the amendment sought might have undesirable or unforeseen ramifications for children in Z's position. Furthermore, such an amendment might have implications in other areas of family law. For example, the law might be open to criticism on the ground of inconsistency if a female-to-male transsexual were granted the possibility of becoming a "father" in law while still being treated for other legal purposes as female and capable of contracting marriage to a man.

48. Against these general interests, the Court must weigh the disadvantages suffered by the applicants as a result of the refusal to recognise X in law as Z's "father".

The applicants identify a number of legal consequences flowing from this lack of recognition (see paragraph 45 above). For example, they point to the fact that if X were to die intestate, Z would have no automatic right of inheritance. The Court notes, however, that the problem could be solved in practice if X were to make a will. No evidence has been adduced to show that X is the beneficiary of any transmissible tenancies of the type referred to; similarly, since Z is a British citizen by birth and can trace connection through her mother in immigration and nationality matters, she will not be disadvantaged in this respect by the lack of a legal relationship with X.

The Court considers, therefore, that these legal consequences would be unlikely to cause undue hardship given the facts of the present case.

49. In addition, the applicants claimed that Z might suffer various social or developmental difficulties. Thus, it was argued that she would be caused distress on those occasions when it was necessary to produce her birth certificate.

In relation to the absence of X's name on the birth certificate, the Court notes, first, that unless X and Y choose to make such information public, neither the child nor any third party will know that this absence is a consequence of the fact that X was born female. It follows that the applicants are in a similar position to any other family where, for whatever

reason, the person who performs the role of the child's "father" is not registered as such. The Court does not find it established that any particular stigma still attaches to children or families in such circumstances.

Secondly, the Court recalls that in the United Kingdom a birth certificate is not in common use for administrative or identification purposes and that there are few occasions when it is necessary to produce a full length certificate (see paragraph 24 above).

50. The applicants were also concerned, more generally, that Z's sense of personal identity and security within her family would be affected by the lack of legal recognition of X as father.

In this respect, the Court notes that X is not prevented in any way from acting as Z's father in the social sense. Thus, for example, he lives with her, providing emotional and financial support to her and Y, and he is free to describe himself to her and others as her "father" and to give her his surname (see paragraph 24 above). Furthermore, together with Y, he could apply for a joint residence order in respect of Z, which would automatically confer on them full parental responsibility for her in English law (see paragraph 27 above).

51. It is impossible to predict the extent to which the absence of a legal connection between X and Z will affect the latter's development. As previously mentioned, at the present time there is uncertainty with regard to how the interests of children in Z's position can best be protected (see paragraph 44 above) and the Court should not adopt or impose any single viewpoint.

52. In conclusion, given that transsexuality raises complex scientific, legal, moral and social issues, in respect of which there is no generally shared approach among 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).

It follows that there has been no violation of Article 8 of the Convention (art. 8).

II. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION TAKEN IN CONJUNCTION WITH ARTICLE 8 (art. 14+8)

53. In addition, the applicants complained of discrimination contrary to Article 14 of the Convention (art. 14), which provides:

> "The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language,

religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

54. The applicants did not develop this complaint in their memorial, since they adopted the findings of the Commission (see paragraph 55 below). However, at the hearing before the Court, their counsel referred in particular to the fact that had X been born a man he could have been registered as Z's father under the provisions of the Human Fertility and Embryology Act 1990 (see paragraph 21 above).

55. The Government submitted that no separate issue arose in connection with Article 14 (art. 14). In view of its finding of a violation of Article 8 of the Convention (art. 8), the Commission did not find it necessary to examine this complaint.

56. The Court considers that the complaint under Article 14 (art. 14) is tantamount to a restatement of the complaint under Article 8 (art. 8), and raises no separate issue. In view of its finding in respect of the latter provision (art. 8) (see paragraph 52 above), there is no need to examine the issue again in the context of Article 14 (art. 14).

Accordingly, it is not necessary to consider this complaint.

FOR THESE REASONS, THE COURT

1. Holds unanimously that Article 8 of the Convention (art. 8) is applicable in the present case;

2. Holds by fourteen votes to six that there has been no violation of Article 8 (art. 8);

3. Holds by seventeen votes to three that it is not necessary to consider the complaint under Article 14 of the Convention taken in conjunction with Article 8 (art. 14+8).

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 22 April 1997.

Rolv RYSSDAL
President

Herbert PETZOLD
Registrar

In accordance with Article 51 para. 2 of the Convention (art. 51-2) and Rule 53 para. 2 of Rules of Court A, the following separate opinions are annexed to this judgment:

(a) concurring opinion of Mr Pettiti;

(b) concurring opinion of Mr De Meyer;

(c) partly dissenting opinion of Mr Casadevall, joined by Mr Russo and Mr Makarczyk;

(d) dissenting opinion of Mr Thór Vilhjálmsson;

(e) dissenting opinion of Mr Foighel;

(f) dissenting opinion of Mr Gotchev.

R. R.
H. P.

CONCURRING OPINION OF JUDGE PETTITI

(Translation)

I voted with the majority for the finding that there was no violation of Article 8 of the Convention (art. 8). However, I consider that the impact of the judgment could have been strengthened by expanding the reasoning and adopting different wording in a number of places.

The text adopted seems to me to be based too much on the personal demands of X and Y alone, which are specific to their individual situations, and on a weighing of the practical and social advantages and disadvantages which might result from changing, or not changing, Z's civil status. As this is the first case in which the European Court has had to deal with both transsexualism and the problem of a child's right to know his biological origins, it should, in my opinion, have given more thought to the assessment of family life within the meaning of Article 8 (art. 8) and to the conflict of interests between parents and children.

Moreover, the instant case concerned a couple, X and Y, composed of a post-operative transsexual and a woman who had produced the child Z as a result of artificial insemination by anonymous donor.

Did X, Y and Z form a family? A family, in general, cannot be a mere aggregate of the individuals living under one roof. The ethical and social dimension of a family cannot be ignored or underestimated. If there was a family, as there appears to have been in the case before the Court, can the object sought by X be imposed on Z?

Studies have shown that not all transsexuals have the same aptitude for family life (after an authorised operation) as a non-transsexual (see the joint research by Alby et al., International Freudian Association, "Sexual identity and transsexuals", and the study by L. Pettiti, "Les transsexuels", Que sais-je?, Presses universitaires de France).

The X, Y and Z case touched upon the conflict between the demand of a female-to-male transsexual (X) to be registered as the father of his female cohabitee's child and the demand which could in due course be made by Z, who might sooner or later come to consider that her own interest lies in finding out who her biological father was. The Court should therefore also have assessed the conflict between family law, the law of filiation and the direct effect of the United Nations Convention on the Rights of the Child, to which it did not refer.

Should there be another case like this one, it would no doubt be desirable for the Commission and the Court to suggest to the parties that a lawyer be instructed specifically to represent the interests of the child alone.

The growing number of precarious and unstable family situations is creating new difficulties for children of first and second families, whether legitimate, natural, successive or superimposed, and will in the future call

for thoughtful consideration of the identity of the family and the meaning of the family life which Article 8 (art. 8) is intended to protect, taking into account the fact that priority must be given to the interests of the child and its future. In the particular case of X, Y and Z, the consequences of finding a violation could already be gauged, namely the ambivalent situation which could result from a female-to-male transsexual being registered as a father while being considered under British law to be of female sex and registered as such in the register of births, marriages and deaths (see paragraph 47 of the judgment).

In the Cossey v. the United Kingdom and B. v. France cases, the Court, and its judges in their separate opinions, emphasised the civil-law problems raised by transsexualism and the knock-on effects of a change of civil status on the right to marriage, divorce, the law of succession, the law of adoption, etc.

The Court's conclusions (see paragraphs 47, 51 and 52 of the present judgment) were therefore justified and prudent, but could in my opinion have been supplemented by a legal, sociological and ethical examination of the whole problem and the diversity of the rights and values to be attributed to each of the persons who go to make up a family.

CONCURRING OPINION OF JUDGE DE MEYER

I. Applicability of Article 8 (art. 8)

I would observe that, as far as X is concerned, this case should have been dealt with from the point of view of private, rather than family, life.

There is certainly family life between Y and Z. However, between X and the two other applicants there is only the "appearances" of "family ties"[1], which, of course, concern the private life of the three applicants.

II. Compliance with Article 8 (art. 8)

There was no reason to refer, once again, to a so-called "margin of appreciation" enjoyed by the State[2]. It was enough to recognise that, in not allowing X to be registered as Z's father, the respondent State had not "acted arbitrarily or unreasonably or failed to strike a fair balance between the respective interests" involved[3].

There was also no need to consider that, on the issues at stake, there is no "common European standard", or no "common ground", "generally shared approach", or "consensus amongst the member States of the Council of Europe", or that these issues "remain the subject of debate", or that the law of member States concerning them "appears to be in a transitional stage"[4]. Nor was it helpful to remark that something "is impossible to predict", or that "there is uncertainty with regard to" a certain question[5]. Nothing of that kind was relevant. All we had to do was to identify the principles which, in our view, had to be applied and the rules to be observed.

These principles and rules are quite simple. Indeed, it is self-evident that a person who is manifestly not the father of a child has no right to be recognised as her father.

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[1] Paragraphs 33 and 37 of the judgment.
[2] Paragraphs 41 and 44 of the judgment. See also section III of my opinion in the recent case of Z v. Finland, judgment of 25 February 1997, Reports of Judgments and Decisions 1997-II.
[3] Velosa Barreto v. Portugal judgment of 21 November 1995, Series A no. 334, p. 12, para. 30.
[4] Paragraphs 44 and 52 of the judgment.
[5] Paragraph 51 of the judgment.

PARTLY DISSENTING OPINION OF JUDGE CASADEVALL, JOINED BY JUDGES RUSSO AND MAKARCZYK

(Translation)

1. The majority did not see fit to depart from the Court's existing case-law, in particular the Rees and Cossey judgments (notwithstanding the B. v. France judgment). Although the underlying problem remains the same (sexual dysphoria and sex changes), I consider that the present case has important distinguishing features which could justify a decision that there has been a violation of Article 8 (art. 8) taken separately without that decision entailing a complete reversal of the Court's case-law.

2. The subject is certainly a sensitive one and it raises numerous moral and ethical problems. But it is no less certain that more and more States (at present nearly half the members of the Council of Europe) are taking steps to adapt and harmonise their legislation with a view to full legal recognition of the new identity of those who have had sex-change operations (in accordance with the relevant regulations and under the supervision of medical and ethical committees) so as to alleviate, as far as possible, the distress some human beings are suffering (see the resolution adopted by the European Parliament on 12 September 1989 and the recommendation of the Parliamentary Assembly of the Council of Europe of 29 September 1989).

3. Equally certainly, every State has a legitimate right to regulate such matters according to the aspirations of its people and its legal system, and in doing so has a "margin of appreciation" which varies from field to field. That means that it must not go beyond the limits imposed by respect for the fundamental rights guaranteed by the Convention.

4. The considerations set out in Judge Martens's dissenting opinion in the Cossey case remain wholly applicable to the present case. When a person has undergone gruelling medical treatment, hormone therapy and dangerous surgery, and when his physiological sex has been brought into harmony, as far as possible, with his psychological sex, it is right and proper for his new identity to be recognised not only by society but also in law. "... refusal [of such recognition] can only be qualified as cruel."

5. I think the present case is more complex than the earlier Rees and Cossey cases (i) because it concerns three people, (ii) because it is as much about private life as family life for the purposes of Article 8 (art. 8), and (iii) having regard to the following facts:

(a) After suffering since childhood from sexual dysphoria X underwent hormone therapy in 1975 and began to live and work as a man (see paragraph 13 of the judgment).

(b) Four years later he began to live with a woman, Y, and was then after going through the required procedure and undergoing psychological tests, given permission to have a sex-change operation. According to the applicants, the operation may be financed by the United Kingdom National Health Service.

(c) After an initial refusal and appeal the hospital ethics committee gave the go-ahead and X and Y were given permission for treatment with a view

to artificial insemination by anonymous donor (see paragraph 15 of the judgment).

(d) Previously, X had been asked to make an acknowledgment of paternity pursuant to section 28 (3) of the Human Fertility and Embryology Act 1990, which provides: "where a man, who is not married to the mother, is party to the treatment which results in the sperm being placed in the woman, he shall be deemed to be the father of the child".

(e) X gave his agreement and his support, Y was impregnated and Z was born in 1992; Z has lived since then with X and Y, who act as her parents (see paragraphs 16-19 of the judgment).

(f) In reply to the registration request, the Minister of Health informed X that only a biological male could be regarded as the father for the purposes of registration (see paragraph 17 of the judgment).

6. I accordingly summarise the problem in two essential points, on which I base my opinion.

The first concerns the concept of "family life". It seems to me undeniable that the relationship which binds the three applicants together, in their own experience and as perceived by society (Y is Z's mother and X publicly assumes the roles of male partner and father), permits the finding that they enjoy real family life, which, according to the Court, "... is not confined solely to marriage-based relationships and may encompass other de facto 'family' ties where the parties are living together outside of marriage" (see the Keegan v. Ireland judgment of 26 May 1994, Series A no. 290, p. 17, para. 44).

It should be noted that when, at the hearing, Judge Makarczyk asked Mr Pannick, the Government's counsel, if the Government would have changed its position on the question of family life if the applicants had requested and obtained a joint residence order, he was given the following answer: "... it would be very difficult indeed for the United Kingdom then to submit to this Court that there is no family life for the purposes of Article 8 (art. 8)" (see the verbatim record of the hearing, p. 30).

The second point - having regard to the facts of the case and the principle of legal certainty and even foreseeability - is that since the State permitted X to undergo hormone treatment and then, after he had gone through the required procedure and undergone psychological tests, permitted and even financed irreversible surgery, issued documents mentioning his new sexual identity and authorised Y (after an acknowledgment of paternity prescribed by law had been obtained from X) to undergo artificial insemination which led to the birth of Z and a second child since, it must accept the consequences and take all the measures needed to enable the applicants to live normal lives, without discrimination, under their new identity and with respect for their right to private and family life.

7. For these reasons, I conclude that there has been a violation of Article 8 of the Convention (art. 8).

DISSENTING OPINION OF JUDGE THÓR VILHJÁLMSSON

Article 8 (art. 8) is applicable in this case. On this point I share the opinion of the Court which is set out in the judgment.

As stated in paragraph 21 of the judgment, the 1990 Act provides that in the United Kingdom the male partner of a woman who gives birth to a child as a result of AID shall be treated for legal purposes as the father of the child. This rule was not applied in the present case because the partner of the mother is a female-to-male transsexual. Had X been born a man, he would have been registered as the father of the child Z.

The case at hand differs from the Cossey case and the Rees case, and for me it is an important difference that the State is not in this case requested to change entries in the register that were correct when they were made. Under United Kingdom law it is now possible for the register to contain statements that are not in conformity with biological facts but are based on legal considerations (see paragraph 21). For this reason I have not found it difficult to come to the conclusion that X had, under Article 8 of the Convention (art. 8), a right to be registered as the father of Z. This was not accepted in the United Kingdom. I am of the opinion that this showed lack of respect for the applicants' family life. This is, I find, just as true in respect of Z as of X and Y. In a country where it is laid down by legislation that the partner of a mother who gives birth to a child as a result of AID can be registered as the father, it is obviously accepted that the family ties between all concerned are of importance. I fail to see why this should be otherwise in the case before the Court, where the partner is a transsexual. Accordingly, I have come to the conclusion that there has been a violation of Article 8 (art. 8).

As already stated, X was not in the same position as other partners who had the right to be registered as fathers. This is in my opinion discrimination on the ground of sex. Accordingly, I find that there was a violation of Article 14 taken in conjunction with Article 8 (art. 14+8).

DISSENTING OPINION OF JUDGE FOIGHEL

1. Article 8 (art. 8) expressly states that "Everyone has the right to respect for his private and family life ..." (emphasis added). In my view this includes transsexuals.

2. As in the Cossey case, I find that a government's failure to ensure that full legal recognition is given to a transsexual's change of sex following successful gender reassignment surgery amounts to a violation of Article 8 of the Convention (art. 8).

3. In our joint dissenting opinion in the Cossey case, Judges Palm, Pekkanen and I referred to the view expressed in earlier judgments that "the law appears to be in a transitional state" and that "[t]he need for appropriate legal measures should be kept under review having regard particularly to scientific and societal developments".

This important and relevant statement underlines the fact that, with regard to the status of transsexuals, legal solutions must necessarily follow medical, social and moral developments.

4. While the present complaint differs in some aspects from the earlier cases involving transsexuals, it is a fact that X, like Cossey, Rees and many other individuals, is convinced that he does not truly belong to the sex the biological characteristics of which he had at birth. The central issue here is that the law should fully take account of his gender reassignment. This is not primarily a case concerning the welfare of a child; instead, it is about the respect to be afforded to a transsexual taking part in family life.

I cannot therefore accept the majority's argument in paragraphs 47 and 51 that the recognition of X as father could be harmful to the child, especially since it is stated in paragraph 47 that it is "not clear" whether this recognition would be to the advantage of the child or would instead be harmful to her.

5. Paragraph 38 lists the most recent developments in the field of recognition of transsexuality. These changes underline the point made seven years ago in the above-mentioned joint dissenting opinion, that "[t]here is a growing awareness of the importance of each person's own identity and of the need to tolerate and accept the differences between individual human beings. Furthermore, the right to privacy and the right to live, as far as possible, one's own life undisturbed are increasingly accepted." These developments are not reflected in the view of the majority.

6. It is part of our common European heritage that governments are under a duty to take special care of individuals who are disadvantaged in any way. That the United Kingdom Government to a certain extent share this view is demonstrated by the fact that the State made it possible for X to undergo the surgery which brought his physiology into conformity with his psychology. Similarly, the authorities agreed to allow X and Y to have a

child through AID. Furthermore, the couple could probably obtain a joint residence order in respect of the child which would further normalise their family life.

I am of course aware that in some countries and some circles there exist negative attitudes towards transsexuals, based on deeply rooted moral and ethical notions. However, such attitudes seem slowly to be changing in European societies. As I have mentioned, the Government did not demonstrate such attitudes at the time of X's operation or when X and Y were granted permission to undergo AID treatment.

7. It is the Court's task to balance the rights of the individual against the interests of society as a whole. However, the Government have not adduced any convincing arguments with regard to these competing interests. Moreover, they have made no attempt to justify their failure to help X further by ensuring that his change of sex receives legal recognition, recognition which would benefit him and harm no one.

8. I find Article 8 (art. 8) violated in this case.

9. The Human Fertility and Embryology Act 1990 provides that where an unmarried woman gives birth as a result of AID with the involvement of her male partner, the latter, rather than the donor of the sperm, shall be treated for legal purposes as the father of the child (section 28 (3) - see paragraph 21 of the judgment). According to the Births and Deaths Registration Act 1953, the child's father (or the person regarded by law as the father) can have his name entered in the register if he and the mother jointly request that this be done (section 10 of the 1953 Act, as amended by the Family Law Reform Act 1987 - see paragraph 23 of the judgment). Had the present applicant been a biological man from birth, albeit not the biological father of the child, this rule would certainly have been applied. X, however, because he was a transsexual, was denied this right.

10. Article 14 (art. 14) says "... without discrimination on any ground such as sex, race, colour ... birth or other status". These characteristics are all "nature-given". A transsexual is someone who has been born different from others, someone who has been born with a "defect". The English law puts transsexuals in a special category and discriminates against them.

This, I find, is a clear violation of Article 14 taken in conjunction with Article 8 (art. 14+8).

DISSENTING OPINION OF JUDGE GOTCHEV

To my regret, I cannot agree with the majority in the present case, for the following reasons.

I agree that, according to the constant case-law of the Court, the relationships between X, Y and Z can be regarded as "family life" (see paragraph 37 of the judgment). Since it was established that de facto family ties of the kind protected by Article 8 of the Convention (art. 8) existed between the applicants, I consider that the State was under a duty to act in a manner calculated to enable those ties to be developed and to establish legal safeguards to render possible, from the moment of birth or as soon as practicable thereafter, the child's integration into the family (see the case-law cited at paragraph 43 of the judgment). In my view, this obligation entails the possibility for X to be recognised in law as Z's father.

It is true that there is no common standard among the Contracting States with regard to the parental rights of transsexuals and I agree with the conclusion that States must therefore be allowed a wide margin of appreciation in this area (see paragraph 44 of the judgment). It is nonetheless necessary for the Court to establish whether the present situation under English law, whereby the transsexual "father" of a child conceived by AID was denied the possibility to be recognised as such in law, struck a fair balance between the individual's right to respect for family life and any countervailing general interest. In striking this balance, the welfare of the child should be the prevailing consideration, irrespective of the manner of his or her conception or the transsexuality of the "social father".

For these reasons, I find violations of Articles 8 and 14 of the Convention (art. 8, art. 14).