IN THE UPPER TRIBUNAL **Case No.** CP/2456/2015
ADMINISTRATIVE APPEALS CHAMBER CP/799/2016

Before Upper Tribunal Judge Rowland

The Secretary of State was represented by Mr Ben Lask of counsel, instructed by the Government Legal Department

The claimants were represented by Mr Brendan McGurk of counsel and Dr Christopher Strothers, solicitor, of Arnold & Porter Kaye Scholer LLP

Order: **Nothing shall be published that is likely to lead members of the public to identify the claimants in these cases.**

Decision: **The Secretary of State's appeals are allowed.**

In the case on file CP/2456/2015, the decision of the First-tier Tribunal dated 12 May 2015 is set aside and there is substituted a decision that the claimant is not entitled to a retirement pension from 6 July 2014 to 6 February 2015.

In the case on file CP/799/2016, the decision of the First-tier Tribunal dated 22 December 2015 is set aside and there is substituted a decision that the claimant is entitled to a Category A retirement pension and graduated retirement benefit amounting in total to £93.11 per week from 20 May 2013 but is not entitled to a retirement pension or graduated retirement benefit before that.

REASONS FOR DECISION

1. These appeals are brought by the Secretary of State against decisions of the First-tier Tribunal whereby, in each case, it allowed an appeal by the claimant from a decision of the Secretary of State relating to an award of retirement pension. The facts and issues in each case are slightly different, but at the heart of both cases is the question whether, in respect of a period before a gender recognition certificate under the Gender Recognition Act 2004 ("the 2004 Act") has been issued, a male-to-female transgender person who has undergone gender reassignment surgery is entitled under European Union law to a retirement person on the basis that she is a woman.

The facts and procedural history of the first case

2. The first claimant, having been registered as male at birth, underwent gender reassignment surgery in 1986. On 10 June 2014, she claimed a retirement pension from 6 July 2014 when, by virtue of Schedule 4 to the Pensions Act 1995 as amended, a women of her age attained pensionable age. The claim was refused by the Secretary of State on 17 June 2014 on the ground that the claimant had not obtained a gender recognition certificate and so her claim fell to be decided on the basis that she was still a man, with the result that the claim was premature as it had been made more than four months before she would reach pensionable age for a man. She applied for revision of the decision on the ground that since 1982 she had been recorded as a woman by HMRC in connection with the collection of tax and National Insurance contributions and that she was recorded as a woman in her passport. The inference to be drawn is that she had been living as a woman since the 1980s but that, if she had been aware at all of the possibility of obtaining a gender recognition certificate when the 2004 Act came into force, she did not understand it to be necessary for her to do so. The application for revision was rejected on 18 November 2014 and the claimant appealed to the First-tier Tribunal. She had by then applied for a gender recognition certificate, which was issued on 6 February 2015, and she made a new claim for a retirement pension, which was awarded from 7 February 2015. I do not have details of the award, but presumably it was an award of Category A retirement pension and possibly a small amount of graduated retirement benefit.

3. The claimant's appeal was therefore concerned only with entitlement from 6 July 2014 to 6 February 2015. For reasons that I will summarise below, the First-tier Tribunal allowed her appeal and held that she was entitled to a retirement pension from 6 July 2014. It subsequently gave the Secretary of State permission to appeal, which he duly did. On 7 December 2015, I stayed the proceedings to await the decision of the Supreme Court on an appeal against the Court of Appeal's decision in *MB* (see below). However, following the Supreme Court's decision to refer questions to the Court of Justice of the European Union, I considered further submissions from the parties and, on 3 November 2016, I refused to make a reference to the Court in the present case but I lifted the stay, broadly on the grounds that it had become apparent that *MB* was distinguishable from the present case and was not sufficiently likely to be determinative of this case to justify a stay and that there was a sufficient body of case law and legislation to make a reference to the Court of Justice unnecessary.

The facts and procedural history of the second case

4. The second claimant, having been registered as male at birth, started living as a woman in about 1983 and underwent gender reassignment surgery in 1988. A gender recognition certificate was issued to her on 3 February 2014, by which time she was already aged 65. On 8 May 2014, she claimed a retirement pension from 17 May 2008, her 60th birthday and therefore the date on which a woman of her age attained pensionable age. I do not know why she applied for a gender recognition

certificate when she did or why she delayed claiming a retirement pension but it seems likely that, if she had been aware at all before she reached the age of 60 of the possibility of obtaining a gender recognition certificate, she did not understand that doing so might entitle her to claim a retirement pension at that age or would affect the amount of a retirement pension that she could claim later.

5. The Secretary of State awarded a Category A retirement pension and graduated retirement benefit totalling £93.11 per week from 20 May 2013, the first Monday after her 65th birthday which was the date on which men of her age attained pensionable age, but refused to award it for any earlier period on the ground that, in respect of any period before the gender recognition certificate was issued, her claim fell to be decided on the basis that she was still a man. An application for revision was rejected on 22 October 2015 and the claimant appealed.

6. Following a hearing, the First-tier Tribunal allowed the claimant's appeal in part, rejecting the argument that she was entitled to a retirement pension before her 65th birthday but holding that the amount of the pension to which she was entitled should reflect a deferment of entitlement to a pension from her 60th birthday. The Secretary of State was refused permission to appeal by the First-tier Tribunal and renewed his application to the Upper Tribunal, where the file seems to have become lost. The case came to life again when the question of lifting the stay in the first claimant's case was raised, because both claimants had the same representatives. The parties were agreed that this case should be heard with that of the first claimant and I so directed on 19 January 2017, granting permission to appeal at the same time.

Social security legislation

7. As regards domestic legislation governing retirement pensions, it is necessary only to give the briefest summary of three aspects of it. The first is that entitlement unsurprisingly depends on the claimant having reached pensionable age (see section 44(1) of the Social Security Contributions and Benefits Act 1992 in relation to category A retirement pensions) and that the issue that arises in these cases does so because pensionable age for women is currently lower than for men. From 1948 until 2010 it was 60 for women and 65 for men. It is now gradually being increased for women and will reach 65 for them towards the end of 2018 (see Schedule 4 to the Pensions Act 1995). Thereafter, the position of women will be the same as that for men. The second is that entitlement to a retirement pension generally depends on a claim having been made for it and the time for claiming is (to paraphrase the legislation) the day in respect of which the claim is made and the period of 12 months immediately following it, so that, in effect, a claim may be backdated for a year but no longer, although a claim may also be made up to four months in advance (see section 1 of the Social Security Administration Act 1992 and regulations 3, 15 and 19(1) of, and paragraph 13 of Schedule 4 to, the Social Security (Claims and Payments) Regulations 1987 (SI 1987/1968)). The third is that a person may "defer" entitlement to a retirement pension for up to five years after reaching pensionable age and, if he or she does so, the pension becomes payable when the period of deferment ends and does so at an increased rate (see section 55 of, and Schedule 5

to, the Social Security Contributions and Benefits Act 1992). No particular action is required in order to defer entitlement; it is enough simply not to make a claim.

Gender recognition and equal treatment

8. A person's gender is registered at birth and is recorded in his or her birth certificate, which is usually provided as evidence of the gender. In R(P) 2/80, it was held by a Social Security Commissioner that a claimant, born as a man but who had involuntary begun to develop female secondary sexual characteristics and subsequently had undergone surgery and lived as a woman, was to be treated as a man for the purposes of her claim for a retirement pension. The Commissioner followed the approach of the Chief Commissioner in R(P) 1/80, where the issues were considered in more detail but where the claimant had not undergone surgery, and he did not distinguish that decision.

9. In *Goodwin v United Kingdom* (2002) 35 EHRR 447, the European Court of Human Rights ruled that the inability of the applicant, who was a post-operative male-to-female transsexual, to obtain legal recognition in the United Kingdom of her gender re-assignment gave rise to a breach of article 8 and, less relevantly to these cases, article 12 of the European Convention on Human Rights. Parliament's response was to pass the 2004 Act. However, the implication of *Goodwin* was that, in respect of a period before the Act came into force, there arose the question whether the inability of a person to obtain legal recognition of gender reassignment for the purposes of a claim to a retirement pension was a breach of European Union equal treatment law.

10. Retirement pensions fall within the scope of Council Directive 79/7/EEC on the progressive implementation of the principle of equal treatment for men and women in matters of social security, article 4(1) of which provides –

> "The principle of equal treatment means that there shall be no discrimination whatsoever on ground of sex either directly, or indirectly by reference in particular to marital or family status, in particular as concerns:
> – the scope of the schemes and the conditions of access thereto,
> – …
> – …"

Article 5 required any laws contrary to the principle of equal treatment to be abolished and article 8 required compliance with the directive within six years of its notification in December 1978. It is common ground that, in cases like the present that involve a public authority, a citizen may rely on such a directive having direct effect.

11. Article 7(1)(a) provides –

> "This Directive shall be without prejudice to the right of Member States to exclude from its scope:
> (a) the determination of pensionable age for the purposes of granting old-age and retirement pensions …"

It was only by virtue of article 7(1)(a) that the generally preferential treatment of women as regards pensionable age in the United Kingdom has continued to be tolerated. Article 7(2) required derogations permitted under article 7(1) to be kept under review

12. Just after the 2004 Act was passed but before it came into effect, Mr Commissioner Bano referred two questions to the European Court of Justice in a case concerning a transsexual woman who had undergone a gender reassignment operation in 2001 and who had unsuccessfully claimed a retirement pension in 2002. The Secretary of State's argument before the Court of Justice was that the case fell within the scope of article 7(1)(a). Having addressed that argument and rejected it, Advocate General Jacobs concluded his opinion, saying –

> "57. I would add that the question of the stage at which a transsexual person becomes entitled to equal treatment within the meaning of Directive 79/7 with persons of his or her acquired gender was debated at the hearing. There is however no need to resolve that issue in the present case, which concerns a post-operative transsexual person whose entitlement is therefore clear.
>
> 58. I accordingly conclude in answer to the first question that it is contrary to Article 4(1) of Directive 79/7 for a Member State to refuse to grant a retirement pension before the age of 65 to a post-operative male-to-female transsexual where that person would have been entitled to a pension at the age of 60 had she been regarded as a woman as a matter of national law."

13. In *Richards v Secretary of State for Work and Pensions* (C-423/04) [2006] I.C.R. 1181 (also reported as R(P) 1/07), the Court of Justice reached the same conclusion and also rejected the Secretary of State's argument. It referred at [21] to *KB v National Health Service Pensions Agency* (C-117/01), summarised the effect of that decision at [31] and stated its conclusion on the first question before it at paragraph [38] –

> "21. First of all, it should be noted that it is for Member States to determine the conditions under which legal recognition is given to the change of gender of a person (see to that effect *K.B.*, paragraph 35)."
>
> "31. The Court has already found that national legislation which precludes a transsexual, in the absence of recognition of his new gender, from fulfilling a requirement which must be met in order to be entitled to a right protected by Community law must be regarded as being, in principle, incompatible with the requirements of Community law (see *K.B.*, paragraphs 30 to 34)."
>
> "38. It is clear from the foregoing that Article 4(1) of Directive 79/7 must be interpreted as precluding legislation which denies a person who, in accordance with the conditions laid down by national law, has undergone male-to-female gender reassignment entitlement to a retirement pension on the ground that she has not reached the age of 65, when she would have been entitled to such a pension at the age of 60 had she been held to be a woman as a matter of national law."

It ruled accordingly, holding –

> "Article 4(1) of Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security is to be interpreted as precluding legislation which denies a person who, in accordance with the conditions laid down by national law, has undergone male-to-female gender reassignment entitlement to a retirement pension on the ground that she has not reached the age of 65, when she would have been entitled to such a pension at the age of 60 had she been held to be a woman as a matter of national law."

Mr Commissioner Bano subsequently allowed the claimant's appeal by consent, awarding her a retirement pension from her 60th birthday (CP/428/2004).

14. Insofar as is material, the 2004 Act provided at the time material to the present cases –

> "**1. Applications**
> (1) A person of either gender who is aged at least 18 may make an application for a gender recognition certificate on the basis of—
> (a) living in the other gender, or
> (b) having changed gender under the law of a country or territory outside the United Kingdom.
> (2) In this Act "the acquired gender", in relation to a person by whom an application under subsection (1) is or has been made, means—
> (a) in the case of an application under paragraph (a) of that subsection, the gender in which the person is living, or
> (b) in the case of an application under paragraph (b) of that subsection, the gender to which the person has changed under the law of the country or territory concerned.
> (3) An application under subsection (1) is to be determined by a Gender Recognition Panel.
> (4) Schedule 1 (Gender Recognition Panels) has effect.
>
> **2. Determination of applications**
> (1) In the case of an application under section 1(1)(a), the Panel must grant the application if satisfied that the applicant—
> (a) has or has had gender dysphoria,
> (b) has lived in the acquired gender throughout the period of two years ending with the date on which the application is made,
> (c) intends to continue to live in the acquired gender until death, and
> (d) complies with the requirements imposed by and under section 3.
> ….
> (3)The Panel must reject an application under section 1(1) if not required by subsection (1) or (2) to grant it.
> …
> **3. Evidence**
> (1)An application under section 1(1)(a) must include either—
> (a) a report made by a registered medical practitioner practising in the field of gender dysphoria and a report made by another registered medical practitioner (who may, but need not, practise in that field), or
> (b) a report made by a registered psychologist practising in that field and a report made by a registered medical practitioner (who may, but need not, practise in that field).

(2) But subsection (1) is not complied with unless a report required by that subsection and made by—

(a) a registered medical practitioner, or

(b) a registered psychologist,

practising in the field of gender dysphoria includes details of the diagnosis of the applicant's gender dysphoria.

(3) And subsection (1) is not complied with in a case where—

(a) the applicant has undergone or is undergoing treatment for the purpose of modifying sexual characteristics, or

(b) treatment for that purpose has been prescribed or planned for the applicant,

unless at least one of the reports required by that subsection includes details of it.

(4) An application under section 1(1)(a) must also include a statutory declaration by the applicant that the applicant meets the conditions in section 2(1)(b) and (c).

(5) An application under section 1(1)(b) must include evidence that the applicant has changed gender under the law of an approved country or territory.

(6) Any application under section 1(1) must include—

(a) a statutory declaration as to whether or not the applicant is married or a civil partner,

(b) any other information or evidence required by an order made by the Secretary of State, and

(c) any other information or evidence which the Panel which is to determine the application may require,

and may include any other information or evidence which the applicant wishes to include.

…

4. Successful applications

(1) If a Gender Recognition Panel grants an application under section 1(1) it must issue a gender recognition certificate to the applicant.

…

9. General

(1) Where a full gender recognition certificate is issued to a person, the person's gender becomes for all purposes the acquired gender (so that, if the acquired gender is the male gender, the person's sex becomes that of a man and, if it is the female gender, the person's sex becomes that of a woman).

(2) Subsection (1) does not affect things done, or events occurring, before the certificate is issued; but it does operate for the interpretation of enactments passed, and instruments and other documents made, before the certificate is issued (as well as those passed or made afterwards).

(3) Subsection (1) is subject to provision made by this Act or any other enactment or any subordinate legislation."

By virtue of section 13, Schedule 5 has effect as regards social security benefits. Paragraphs 1, 7 and 10 of that schedule provide –

"1 This Schedule applies where a full gender recognition certificate is issued to a person."

"*Category A retirement pension*

7(1) Any question—

(a) whether the person is entitled to a Category A retirement pension (under section 44 of the 1992 Act) for any period after the certificate is issued, and

(b) (if so) the rate at which the person is so entitled for the period,

is to be decided as if the person's gender had always been the acquired gender.

(2) Accordingly, if (immediately before the certificate is issued) the person—

(a) is a woman entitled to a Category A retirement pension, but

(b) has not attained the age of 65,

the person ceases to be so entitled when it is issued.

(3) And, conversely, if (immediately before the certificate is issued) the person—

(a) is a man who has attained the age at which a woman of the same age attains pensionable age, but

(b) has not attained the age of 65,

the person is to be treated for the purposes of section 44 of the 1992 Act as attaining pensionable age when it is issued.

(4) But sub-paragraph (1) does not apply if and to the extent that the decision of any question to which it refers is affected by—

(a) the payment or crediting of contributions, or the crediting of earnings, in respect of a period ending before the certificate is issued, or

(b) preclusion from regular employment by responsibilities at home for such a period.

(5) Paragraph 10 makes provision about deferment of Category A retirement pensions.

…

Deferment of pensions

10(1) The person's entitlement to—

(a) a Category A retirement pension,

(b) a Category B retirement pension, or

(c) a shared additional pension,

is not to be taken to have been deferred for any period ending before the certificate is issued unless the condition in sub-paragraph (2) is satisfied.

(2) The condition is that the entitlement both—

(a) was actually deferred during the period, and

(b) would have been capable of being so deferred had the person's gender been the acquired gender.

…

Paragraph 12 enables consequential provision to be made in respect of graduated retirement benefit.

15. It is part of the background of some of the cases to which I shall refer that sections 4 and 5 provided for full gender recognition certificates to be issued to unmarried applicants and for interim gender recognition certificates to be issued to married applicants. Interim certificates could be replaced by full certificates in the event of the marriage being dissolved or annulled or ended by death of the other party. The details of those provisions and the substantial amendments made to them in 2014 in the light of legislation permitting same-sex marriages need not be considered here. It should also be noted that section 27 modified sections 2 and 3 where applications were made under section 1(1)(a) within two years of the Act coming into force, but the modifications would not have affected the present claimants' rights to gender recognition certificates had they made applications then.

16. In R(P) 1/09, the claimant, who had reached the age of 60 in 2002, underwent gender reassignment surgery in December 2005 but was initially unsuccessful in obtaining a gender recognition certificate because the gender recognition panel was

not satisfied that she had lived as a woman before 1 December 2004. (In fact, it appears from *MD* (see below), that she withdrew her application after the panel had given an indication of its thinking.) She subsequently made a fresh application for a gender recognition certificate on 1 December 2006, which resulted in a certificate being issued on 21 December 2006. The Tribunal of Social Security Commissioners held that she had been rightly awarded a retirement pension only from the latter date and that the claimant was not entitled to an increased pension based on deferment because she had no entitlement to defer until then.

17. However, in R(P) 2/09, the same Tribunal of Commissioners held that a person who had been born a man but who had lived as a woman since 1994, shortly before she had reached the age of 60, and been paid a pension from 1999, when she had reached the age of 65, and who, upon hearing of the decision in *Richards* in 2006, had asked for her pension to be backdated, was not entitled to have her pension backdated because she was out of time but was entitled to have her pension paid at an increased rate from the date her 2006 request was received, on the basis that the letter was an application for supersession and she was to be taken as having deferred entitlement from 1994 until 1999, the date from which the period of deferment started being determined as though the 2004 Act had been in force.

18. In *Timbrell v Secretary of State for Work and Pensions* [2010] EWCA Civ 701; [2010] 3 CMLR 42; [2011] AACR 13, the Court of Appeal considered the case of another claimant born a man who had undergone gender reassignment surgery. She was married and had claimed retirement pension in 2001. The Upper Tribunal had followed R(P) 2/09 and held that the claimant could not be treated as a woman because she was married (*CT v Secretary of State for Work and Pensions* [2009] UKUT 49 (AAC)). However, the Court of Appeal held that her entitlement to a retirement pension during the period before the 2004 Act came into force had to be determined on the basis of the law as it then stood so that, in the light of *Richards*, she was entitled to a retirement pension in respect of that period because there had been a failure properly to implement Council Directive 79/7/EEC and the claimant was entitled to rely on its direct effect. At [43], Aikens LJ, with whom Thorpe and Moore-Bick LJJ agreed, said –

> "43. [Counsel for the Secretary of State] is correct in arguing that the decision in *Richards* does not indicate what kind of national legislation should be in place or what sort of conditions ought to be satisfied for the recognition of an acquired gender by means of gender re-assignment. That is because, as [31] of *Richards* recognised, that is a matter for national law, not for the ECJ to determine. But that cannot alter the fact that *Richards* effectively held that a total lack of any kind of legislative or legal framework in UK law to enable acquired gender to be recognised so as to enable a person who has acquired a new gender to exercise the rights to obtain a retirement pension according to existing legislation constituted discrimination within Article 4(1) of Directive 79/7."

Aikens LJ recorded at [35] that the Secretary of State made a concession to the effect that, if the claimant were successful as regards the period before the 2004 Act came into effect, he would not argue that her position changed after the Act came into force and the case was clearly decided on that basis. He also expressly held at [38] that, insofar as the Upper Tribunal had in that case followed R(P) 2/09 and

considered the law applicable before the 2004 Act came into force "through spectacles that are coloured by the subsequent enactment of the [2004 Act] and the terms of its provisions", it had been wrong to do so.

19. In *MD v Secretary of State for Work and Pensions*, an unreported decision of the First-tier Tribunal, the claimant was the same person as the claimant in R(P) 1/09. It is not immediately obvious to me on what basis the First-tier Tribunal considered itself to have jurisdiction to re-determine the issue that had already been decided in R(P) 1/09 in respect of the very same period but, in any event, it held R(P) 1/09 to have been overruled by *Timbrell* and further held that the reasoning in *Richards* and *Timbrell* had the effect that the claimant was entitled to have her retirement pension paid from the date on which she had had gender reassignment surgery because, in breach of Council Directive 79/7/EEC, she had been unable to obtain a gender recognition certificate earlier than 1 December 2006 due to the requirement of section 2(1)(b) that the applicant have lived in her acquired gender for two years. The First-tier Tribunal recognised that the dates introduced an additional element of complication. It found the claimant to have been living exclusively as a woman since 1 December 2004 which was before the Act came into force – there is clearly a typing error in paragraph [24] of the decision, where "2005" should be read as "2004" (see paragraph [15]) – but she had had gender reassignment surgery only after it had come into force.

20. In *MB v Secretary of State for Work and Pensions* [2014] EWCA Civ 1112, the Court of Appeal considered the case of a claimant who was born a man in 1948 and was married in 1974. She began living as a woman in 1991 and underwent gender reassignment surgery in 1995 but she and her wife did not want their marriage dissolved or annulled and so she could not obtain a full gender recognition certificate when the 2004 Act came into force. Her claim for a retirement pension in 2008 was rejected and it was held by the Court of Appeal that it had been rightly rejected, since the amendments made in 2014 in the light of same-sex marriage legislation were not in force. The claimant relied on *Richards* and *Trimbell*, but Underhill LJ, with whom Aikens and Maurice Kay LJJ agreed, said –

> 11. … the crucial feature in *Richards* was that there was "no legislative or other legal means to give recognition to a person's acquired gender". (It is a nice point whether that analysis is part of the *ratio* in *Timbrell* so as to be binding on us; but in any event I think that it was plainly right – the language of para. 38 in the judgment of the Court speaks for itself.)
>
> 12. That situation no longer obtains. There has since 4 April 2005 been a legislative framework for the recognition of gender reassignment. Section 9 of the 2004 Act provides that recognition of a person's acquired gender – "for all purposes" – depends on the issue of a full gender recognition certificate. (Ms Bretherton in her oral submissions argued that the effect of section 9 was simply to create an irrebuttable presumption: it was not saying that without a full certificate a person's acquired gender could not be recognised by law. That seems to me, with respect, plainly wrong. It is necessarily implicit in the scheme of the legislation that the acquired gender will not be recognised, for the purpose of legal rights which depend on gender – which include the provisions as to pensionable age – unless and until such a certificate has been issued.) Thus what Ms Bretherton has to, and does, say

> is that the Directive creates a positive, and directly applicable, right for a male-to-female transsexual to be recognised as a woman, for pension purposes, even in circumstances where domestic law has set conditions for such recognition with which she does not comply. That is not impossible in principle, given the primacy of EU law, but it is not a question which is decided, or even addressed, in *Richards.*"

The Court of Appeal then rejected the argument that the claimant did have a right under European Union law to be treated as a woman for the purpose of her claim to a retirement pension. On a further appeal, the Supreme Court has effectively referred that issue to the Court of Justice of the European Union, asking "whether Council Direction 79/7/EEC precludes the imposition in national law of a requirement that, in addition to satisfying the physical, social and psychological criteria for recognising a change of gender, a person who has changed gender must also be unmarried in order to qualify for a state retirement pension" (*MB v Secretary of State for Work and Pensions* [2016] UKSC 53).

The First-tier Tribunal's reasoning in each case and the parties' arguments in summary

21. In the first case before me, the First-tier Tribunal considered that in *Richards* "a person who had undergone male-to-female gender reassignment was envisaged by the ECJ without more as entitled to a State pension at the appropriate age for her gender and that restriction by the imposition of the additional requirement of a GRC which was prospective only in effect was thus precluded". It relied on *Richards* and *Timbrell* and accepted an argument that *MB* was not binding because it was inconsistent with European Union law and therefore held that the claimant had been entitled to a retirement pension from the date on which women of her age reached pensionable age.

22. In the second case, the First-tier Tribunal followed *MB* and held that the claimant's inability to satisfy the conditions of entitlement to a retirement pension from the age of 60 arose from both her failure to make a claim then and her failure to apply for a gender recognition certificate then. It rejected the claimant's argument that *Timbrell* had overruled R(P) 1/09 and R(P) 2/09 and so held that the claimant had been entitled to a retirement pension only when the gender recognition certificate had been issued to her. However, without any further reasoning, it held that she was entitled to an increased rate of pension based on deferment from her 60th birthday.

23. The Secretary of State submits to me that, as to the question of the date from which a retirement pension is payable, the First-tier Tribunal was right in the second case but not the first, because the claimants were not precluded from obtaining recognition of their acquired gender before they reached the age of 60 and for that reason these cases are distinguishable from *Richards* and *Timbrell*. However, he submits that the First-tier Tribunal erred in the second case in finding that the claimant was entitled to an increased rate of retirement pension because the period

after her 60th birthday fell wholly after the date on which the 2004 Act came into force.

24. The claimants argue that *Richards* was concerned not just with whether claimants were precluded altogether from having their acquired gender recognised but also whether they were precluded from having it recognised on equal terms with a person whose gender was the same as his or her gender at birth and that the additional hurdle that a transgender person has of obtaining a gender recognition certificate that can only be prospective by virtue of section 9 of, and paragraphs 7 and 10 of Schedule 5 to, the 2004 Act gives rise to unequal treatment when, as in these cases, it precludes the backdating of an award or deferment. They do not seek to defend the First-tier Tribunal's decision in respect of deferment in the second case if, contrary to their argument, it was right that the claimant was not entitled to a retirement pension before her 60th birthday.

25. The Secretary of State replies that the provisions having the effect that a gender recognition certificate can only be prospective do not give rise to unequal treatment and that *Richards* was not concerned with issues that might arise under the 2004 Act.

Discussion

26. It seems to me that there are three separate issues arising in these cases and that the parties have tended to elide them in their arguments.

27. The first issue is whether the claimants in these cases were precluded by national legislation from obtaining recognition of their acquired gender before they reached the age of 60 so as to be able to claim retirement pensions on the basis that they were women. Clearly, on the facts of these cases, they were not. Some years – about nine in the first case and three in the second – elapsed between the coming into force of the 2004 Act and the dates on which they respectively reached the age of 60 and they could, had they been aware of a necessity to do so, have obtained gender recognition certificates in good time. There is nothing in the background of their cases to suggest that either of them might have had any difficulty in obtaining a certificate. On that ground alone, these cases are therefore not on all fours with *Richards* or *Timbrell*.

28. The second issue is whether, nonetheless, *Richards* is authority for the proposition that these claimants were entitled to be treated as women without having to obtain gender recognition certificates because they had undergone gender reassignment surgery. In my judgment, it clearly is not. I respectfully agree with the analysis of *Richards* in *MB* and so it is unnecessary for me to consider the claimants' argument that I am not bound by the Court of Appeal's decision, which argument seems to me anyway to have been undermined by the Supreme Court's decision to refer the question it has to the Court of Justice of the European Union. *Richards* determines how a case is to be decided in the absence of a scheme for recognising the acquisition of a new gender; it does not purport to consider what the terms of such a scheme might permissibly be and paragraph [38] of its judgment and its ruling have to be read in that light rather than being read literally.

29. Thus, in *MB* itself, the question whether the provisions of the 2004 Act that were in force until 2014 relating to married applicants gave rise to a breach of Council Directive 79/7/EEC was not determined by *Richards* but is a separate issue that is now to be considered by the Court of Justice. Similarly, the question whether the requirement that an applicant who has undergone gender reassignment surgery must also have lived in the acquired gender throughout the period of two years ending with the date on which the application is made gives rise to such a breach was not determined by *Richards*. That was the issue that was in effect considered in *MD* and therefore potentially was an issue in R(P) 1/09. In my judgment, quite apart from the jurisdictional issue, *MD* was wrongly decided to the extent that the First-tier Tribunal considered that *Richards*, *Timbrell* and other cases required it to reach the conclusion it did when the claimant in that case had only undergone gender reassignment surgery after the 2004 Act had come into force. However, I need not express any view on the separate question whether the two-year test is nonetheless capable of giving rise to a breach of the Directive in a case where a person has undergone gender reassignment surgery, because that issue does not arise in these cases. The claimants in these cases had undergone gender reassignment surgery and had been living as women since the mid-1980s. The issue that does arise in these cases is whether there is a breach of the Directive arising out of the requirement that the claimant obtain a gender recognition certificate that is prospective only.

30. In support of their argument that *Richards* determines the present cases in their favour, the claimants rely on *Francovitch v Italy* (Joined Cases C-6/90 and C-9/90), where the Court of Justice said that –

> "17. … the right of a State to choose among several possible means of achieving the result required by a directive does not preclude the possibility for individuals of enforcing before the national courts rights whose content can be determined sufficiently precisely on the basis of the provisions of the directive alone."

They submit that, since the Court will do no more than insist on the minimum that is required – they refer to *HMRC v British Film Institute* (Case C-592/15) – it is implicit that the Court of Justice considered in *Richards* that any scheme for recognising the acquisition of a gender had to ensure that any claimant who had acquired a new gender following gender reassignment surgery was entitled to a retirement pension on the same basis as a person who had had that gender since birth.

31. In my judgment, there are two objections to that argument. First, the issue was not directly addressed in *Richards*, there apparently being no dispute that the claimant in that case should be recognised as having acquired a new gender were it necessary to do so. As the Secretary of State points out, the Court of Justice in Richards founded its decision on the narrower ruling in *KP* and the only live issue in Richards was concerned with the scope of the derogation in Article 7(1) of Council Directive 79/7/EEC. Secondly, the proposition is in any event put too broadly. The most that could arguably be inferred from *Richards* is that any scheme of recognition should be capable of recognising as a woman a person in precisely the same position as Ms Richards. There is no indication in the Advocate General's opinion or

the judgment of the Court of Justice that, for instance, she was married or as to precisely how long she had lived as a woman before she claimed her retirement pension. It can be as unrealistic to read judgments or rulings of the Court of Justice literally in the context of cases arising on different facts as it is to read judgments of United Kingdom courts like statutes or, indeed, as it sometimes is to read legislation literally.

32. It has to be recognised that a court, which must focus on the facts of an individual case, is not well suited to the determination of complicated issues of policy that may raise different issues in different cases. It may have to deal with such issues in relation to the particular facts of the case before it, but the parties are not expected to put arguments before the court that are not material to that case but may be material in others. A ruling may therefore require some qualification in a case where there are materially different circumstances. The Court of Justice has no inhibitions in qualifying its previous rulings, even if it often does so somewhat obliquely, and a national court that is not a court of last instance is, in my judgment, entitled to take the same approach when it is clear that the Court of Justice did not have in mind the issues that arise in the case before the national court.

33. There are arguments against making surgery a determinative issue in gender reassignment, as is plain from the speeches in *Bellinger v Bellinger* [2003] UKHL 21; [2003] 2 A.C. 467, where the House of Lords declined to anticipate gender recognition legislation and confined itself to making a declaration in the light of *Goodwin* that there had been a breach of the petitioner's rights under the European Convention of Human Rights. In particular, Lord Nicholls of Birkenhead said –

> "40. … Surgical intervention takes many forms and, for a variety of reasons, is undertaken by different people to different extents. … Today the case before the House concerns Mrs Bellinger. Tomorrow's case in the High Court will relate to a transsexual person who has been able to undergo a less extensive course of surgery. The following week will be the case of a transsexual person who has undergone hormonal treatment but who, for medical reasons, has not been able to undergo any surgery. Then there will be a transsexual person who is medically able to undergo all or part of the surgery but who does not wish to do so. By what criteria are cases such as these to be decided?
>
> 41. But the problem is more fundamental than this. It is questionable whether the successful completion of some sort of surgical intervention should be an essential prerequisite to the recognition of gender reassignment. If it were, individuals may find themselves coerced into major surgical operations they otherwise would not have. But the aim of the surgery is to make the individual feel more comfortable with his or her body, not to 'turn a man into a woman' or vice versa. As one medical report has expressed it, a male to female transsexual person is no less a woman for not having had surgery, or any more a woman for having had it: see *Secretary, Department of Social Security v SRA* (1993) 118 ALR 467, 477.
>
> 42. These are deep waters. Plainly, there must be some objective, publicly available criteria by which gender reassignment is to be assessed. If possible the criteria should be capable of being applied readily so as to produce a reasonably clear answer. Parties proposing to enter into a marriage relationship need to know whether their marriage will be valid. Other people need to know whether a marriage

> was valid. Marriage has legal consequences in many directions: for instance, housing and residential security of tenure, social security benefits, citizenship and immigration, taxation, pensions, inheritance, life insurance policies, criminal law (bigamy). There must be an adequate degree of certainty. …"

It seems likely that considerations such as these lie behind the 2004 Act's provisions.

34 . What is of particular relevance to the present cases is that the Court of Justice did not have to consider whether a system of recognition of an acquired gender that was prospective only without would be liable to give rise to a breach of Council Directive 97/7/EEC if the claimant claimed a retirement pension. That issue could not arise in the absence of any system at all.

35. However, that *Richards* does not determine these cases in the claimants' favour is not the end of the matter. The third issue that arises in these cases is whether, without relying on the precise terms of the ruling in *Richards*, it can be said that there has been a breach of Council Directive 79/7/EEC in each case because *KP* and *Richards* do at least require a person who has acquired a gender to be treated no less favourably than people of the same gender who have been registered in that gender since birth. This was not addressed in great detail in the parties' written submissions, perhaps because the claimants recognised that their case was stronger if they could rely on the literal terms of the Court of Justice's ruling, but the principles and issues are clear enough and the arguments were developed at the hearing before me.

36. It is argued by the claimants that the Secretary of State's decisions had the effect that they were treated less favourably than women who had been registered as female at birth would have been had they made claims at the same time as the claimants did. In the first case, a woman registered as female at birth would have been awarded a retirement pension from her 60th birthday, which was less than 12 months before the claim for a retirement pension was made. In the second case, a woman registered as female at birth would not have been awarded a retirement pension from her 60th birthday, because the claim was made too late, but she could have chosen to have it awarded from 12 months before the date of her claim and would have been entitled to an increased pension, based on deferment until either her 65th birthday or, if she chose to receive the pension from an earlier date, that date.

37. The claimants accept that it is for a Member State to design a system for recognising an acquired gender and that, in doing so, it may establish conditions for recognition and lay down procedural requirements and rules. However, they submit that such procedural rules may not include a rule that recognition will be only prospective in a case where the claimant satisfied the conditions for recognition throughout a past period material to a claim for a retirement pension because, they submit, that results in a breach of the principle of equal treatment guaranteed by article 4(1) of Council Directive 79/7/EC. Alternatively, legislation may not make it a condition of entitlement to a retirement pension that a claimant provide a certificate of recognition that has only prospective effect.

38. The Secretary of State points out that the 2004 Act deliberately does not make surgery a determining factor for recognition of gender reassignment and that in those circumstances there are good reasons for not making a gender recognition certificate retrospective because there can be a considerable degree of uncertainty as to from what date a person should be taken to have acquired a new gender. He submits that certainty is essential given the legal consequences. In answer to the claimants' submission that it would have been possible to have retrospective certificates for people in the position of these particular claimants specifically for the purpose of claiming retirement pensions, but not necessarily for other purposes, he submits that a consistent approach is desirable and that it would be unsatisfactory to have people recognised in one gender for some purposes and the other gender for other purposes. In answer to the claimants' submission that it would have been possible for gender for the purposes of pension entitlement to be determined by the Secretary of State without reference to a gender recognition certificate issued by a gender recognition panel, the Secretary of State submits that Parliament is entitled to consider it to be preferable for gender to be decided by a specialist body. Moreover, he points out, if gender could be determined retrospectively for retirement pension purposes, whether through a retrospective certificate or by the Secretary of State, there would be difficulties for female-to-male transgender people because there would be the possibility of pensions paid to them on the basis that they were women being clawed back. He does not submit that it would have been completely impossible to devise a scheme that resulted in retrospective recognition of the claimants as women but he submits that it is not necessary for him to do so and it is enough that the scheme that exists is within the margin of appreciation allowed to Member States.

39. In my judgment, it would have been possible to devise a scheme that would have enabled the present claimants to be recognised retrospectively in their acquired gender. On the facts of their cases, there is no reason to doubt that they satisfied the conditions for recognition before they respectively reached the age of 60 and, since they only needed to prove that they were women for the purpose of seeking the advantage of the lower pensionable age of women that is only tolerated by virtue of article 7(1) of Council Directive 79/7/EEC, it would have been permissible to make provision for retrospective recognition only in the case of women seeking such an advantage.

40. On the other hand, I accept the Secretary of State's submission that article 4(1) of Council Directive 79/7/EEC does not require the United Kingdom to have introduced such a provision. Once there is a system for recognition of an acquired gender, what a claimant has to provide in order to make a claim in that gender is proof that they have been recognised in that gender in respect of the relevant period. Proving to the social security authorities that they would have met the conditions for recognition in respect of that period had they made an application, or an earlier application, to a gender recognition panel for a gender recognition certificate is not enough. Because it is necessary for claimants to prove that they are recognised as women if they wish to take advantage of the lower pensionable age for women, it is necessary for the United Kingdom to have legislation that

enables them to do so before they reach pensionable age. The 2004 Act did that in these cases.

41. I have on previous occasions commented on the difficulties that can arise in relation to claims for benefits because decisions as to status are generally only prospective (see R(IS) 6/08 and *RM v Secretary of State for Work and Pensions (IS)* [2010] UKUT 238 (AAC), the latter decision having been subject to appeals to the Court of Appeal and the Supreme Court without anything being said on this issue), but those comments were made in connection with immigration status and entitlement to income-related benefits that may need to be claimed unexpectedly. Retirement pensions can only be claimed from pensionable age and everyone knows when they will reach a certain age even if they do not necessarily know that that is pensionable age. In these cases, the claimants had time between the coming into force of the 2004 Act and their respectively reaching pensionable age in which to obtain gender recognition certificates. There was no need to make special provision so as to enable the claimants in their position to make last-minute applications for gender recognition certificates or to make claims without them. Considerations of certainty, consistency and, indeed, simplicity militated against such special provision. In my judgment, the provisions of the 2004 Act are, at least in respect of these claimants, based on objectively justifiable factors that reflect, and are suitable for attaining, legitimate aims of social policy and that are unrelated to any discrimination on grounds of sex. Requiring the claimants to obtain gender recognition certificates under the Act when such certificates were not retrospective did not amount to unequal treatment on the ground of sex.

42. In truth, as the First-tier Tribunal held in the second case, the claimants were unable to obtain retirement pensions from the date on which they reached pensionable age for women is that they did not appreciate the need to obtain a gender recognition certificate before then. It is true that that would not have been a difficulty if the certificate had been retrospective, but that does not make the lack of retrospectivity unlawful. Lots of claimants fail to claim benefits in time due to misapprehensions about the law or simply not realising that there is anything to claim. These cases may suggest that the Government may have been unduly sanguine as to the extent to which there is a transgender "community" with a good understanding of the implications of the 2004 Act but I am not persuaded that they show any breach of the principle of equal treatment guaranteed by article 4(1) of Council Directive 79/7/EEC.

Conclusion

43. In the first case, the First-tier Tribunal erred in law in law in holding that the claimant was entitled to be treated as a women in respect of a period before the gender recognition certificate was issued. I set aside its decision and substitute a decision reinstating the Secretary of State's original decision.

44. In the second case, the First-tier Tribunal was correct to conclude that the claimant was not entitled to a retirement pension before she reached her 65th birthday but erred in law in deciding that she was entitled to an increased pension based on deferment of entitlement during a period before a gender recognition

certificate was issued. It may have misunderstood R(P) 2/09, which was only decided as it was because the period between the claimant's 60th and 65th birthdays fell before the 2004 Act came into force and *Richards* applied in respect of that period. As was pointed out in R(P) 1/09, the conditions of entitlement other than the making of a claim have to be satisfied during the relevant period for it to be possible to find that entitlement has been deferred. *Timbrell* does not affect the authority of those decisions on that point. In this case, as the First-tier Tribunal correctly decided, the claimant did not satisfy the condition of having reached pensionable age before her 65th birthday. Accordingly, she was not entitled to an increased pension based on deferment. I set aside the First-tier Tribunal's decision and substitute a decision reinstating the Secretary of State's original decision.

Mark Rowland
19 July 2017