

IN THE SEYCHELLES COURT OF APPEAL

[Coram: F. MacGregor (PCA), J. Msoffe (J.A), B. Renaud (J.A)]

Civil Appeal SCA 08/2015

(Appeal from Supreme Court Decision CS 115/2014)

Mervin Jezabel Barbe

Appellant

Versus

Chief Officer of Civil Status

Respondent

Heard: 03 August 2017

Counsel: Ms. Kelly Louise, with Mr. Bernard Georges for the Appellant

Mr. George Thachett for the Respondent

Delivered: 11 August 2017

JUDGMENT

F. MacGregor (PCA)

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Facts

- [1] This is a case in which the Appellant who was born and registered as a male and recorded as such on a birth certificate issued by the Civil Status Officer in Seychelles, in 1972 under the Civil Status Act.
- [2] By a medical surgery operation in 2003 he changed his sex to become a female and was issued with a medical certificate to that effect.
- [3] The Appellant then resident in Italy applied to a Court in Florence, to be recognized as a female. The application was objected by the Civil Authority.

- [4] The court on 19th June 2007 in its judgment made a declaration of the recognition of that change of sex.
- [5] The Appellant also later obtained an identity card from the Italian authority on 2nd October 2007.
- [6] In 2009 the Appellant applied to the Civil Status Office in Seychelles for a change of name of his middle name from Jackson to Jezabel. This was approved in a marginal entry of the person's birth certificate dated 12th April 2010.
- [7] Thereafter the Appellant applied to the Civil Status Office to change the gender record in her birth certificate from male to female. This was refused.
- [8] The Appellant then filed a Plaint in the Supreme Court seeking that change. That was also refused by the Supreme Court declaring that Civil Status Act does not provide for this. She consequently appealed against the judgment of the Supreme Court.

Grounds of Appeal

- [9] 1. The Learned Judge, while correct in his finding that the Civil Status Act makes no specific provision for a person to apply to have an existing entry in respect of the sex or gender of a child to be later amended, erred in failing to consider whether such an application could successfully be made under the wide provisions of the second provision of section 100 of the Civil Status Act.
2. The Learned Trial Judge erred in assimilating the rectification sought by the Appellant with an error at the time of registration of the birth of the Appellant, and in consequence giving the provision in the second provision of section 100 of the Civil Status Act an unnecessary restrictive interpretation.

The Issues

- [10] The Appellant centred his submissions solely on the application and interpretation of Section 100 of the Civil Status Act. Section 100 provides:

“A judge may, upon the written application of the Chief Officer of the Civil Status or any party, order the amendment without any fee, stamp or registration due of any act whenever such judge shall be satisfied that any error has been committed in any such act or in the registration thereof. Nothing herein contained shall prevent any interested person from asking by action before the Supreme Court for the rectification or cancellation of any act.”

- [11] The Appellant cited the case of *In Re An Infant and in Re Civil Status Act [1984] SLR 132, 133* where it was held:-

“although section 100 of the Civil Status Act enabled the rectification of an error in the act of birth or in the registration of birth, it did not prevent any interested party from asking by action before the Supreme Court for the rectification or cancellation of the act of birth.”

It was also held in this case that:-

“it was open for the applicant to have the act of birth rectified if he could prove that the acknowledgement was false or for the husband of the child’s mother to disavow paternity of the child.”

- [12] **Re An Infant** (supra) can be distinguished from the present case as it was concerned with the falsity of birth and its proof whereas the present case is concerned with an uncontested rectification of the gender at birth.
- [13] The present case amplifies the very fact and stream of thought that there has to be an error in order that rectification be effected.
- [14] On further analysis of section 100, there is a distinction between its two provisions;
- a) The first provision refers to a written application to a Judge as opposed to an action before the Supreme Court in the second provision.

- b) The first provision refers to the application of the Civil Status Officer or **any party** whereas the second provision refers to an interested party.
 - c) The first provision deals with an amendment as opposed to a rectification or cancellation of any act, in the second provision.
 - d) That amendment is effected without costs in the first provision whereas no such provision is allowed for in the second provision.
- [15] These distinctions do not indicate that the second provision ought to have a wider or more liberal application. On the contrary the first provision appears to be wider and less formal than the second provision being more formal in requiring an action before the Supreme Court compared to a written application to a Judge, and limiting applicants to interested person compared to any person in the first provision.
- [16] We note that some jurisdictions will recognize gender change officially without disturbing the official birth certificate.
- [17] Countries like South Africa, Ireland and UK have enacted specific legislations to provide for change of gender in the civil status record. In South Africa the legislation is called 'Alteration of Sex Status and Sex Description Act No 49 of 2003'. Ireland and UK have a Gender Recognition Act to govern claims such as these.
- [18] The varying authorities and comparisons are listed herein for the benefit of research and analysis.
- [19] In America, most states in the U.S. will issue either amended or new birth certificates for persons who want a name change or a change in sex designation on their birth certificates. An amended birth certificate is one that notes the change in sex or name but does not replace the original birth certificate.
- [20] The state of Alabama will issue an amended birth certificate noting the change in sex and name but will not issue a new birth certificate replacing the old one. Louisiana will change both name and sex designation on a birth certificate by issuing a new one.

- [21] In contrast, Idaho will not change sex on the birth certificate. The Idaho legislature rejected a bill to allow amendment of the birth certificate for change in sex designation but it will allow changing the name on the birth certificate. Tennessee and Ohio also will not change sex on birth certificates, but an individual in Ohio can change the sex designation on an Ohio driver's license with a letter from the SRS surgeon. Florida and Mississippi will issue an amended birth certificate but will not erase the old name and sex designation; Mississippi will simply insert the new name and sex designation in the margin.
- [22] In France it has always been possible to update birth certificates throughout the life of the person concerned and indeed numerous courts ordered the relevant authorities to change the information.
- [23] The first case to consider legal gender change in the U.S. was *Mtr. of Anonymous v. Weiner 50 Misc 380(1966)*, in which a post-operative transgender woman in New York City wished to change her name and sex on her birth certificate. The New York City Health Department denied the request. She took the case to court, but the court ruled that the New York City Health Code didn't permit the request, which only permitted a change of sex on the birth certificate if an error was made recording it at birth.
- [24] In *K. v. Health Division 277 O.R 371(1977)*, the Oregon Supreme Court rejected an application for a change of name or sex on the birth certificate of a post-operative transgender man, on the grounds that there was no legislative authority for such a change to be made.
- [25] In *Republic v Kenyan National Examination Council & Another Ex-Parte Audrey Mbugua Ithibu [2014] eKLR*, a judicial review application was sought for an order of mandamus to compel the Kenya National Examination Council to carry out its statutory mandate by changing the particulars of name as well as removing the gender mark on the Kenyan Certificate of secondary Education awarded to the applicant. It was found that according to their rule 9 (3) the Council could withdraw a certificate for amendment or for any other reason where it considered necessary. Therefore, it had the legal backing to

allow the Applicant's request and in instances where it failed to do so, it was held that the court could issue an order of mandamus to compel it to perform its duty.

[26] It is evident that the law in this regard is very much unsettled and thus one needs to be prudent on which path to tread. At present, Seychelles does not have any statutory or administrative guideline or regulation in respect of the change of gender, its recognition or to cater for the consequence of the legal change of gender including the manner for consequential rectification of the act of Civil Status.

[27] In the Appellant's Heads of Argument, at paragraph 10, the Appellant states:-

"It has never been in dispute that at the time of birth the Appellant's gender was male. However, due to a change in circumstances, and not due to any error in the Appellant's entry in the Register of Births, there is now a need to make the necessary rectification to the Appellants entry"

[28] Counsel for the Appellant clearly admits that the record of the birth of the Appellant as a male was not an error. There was therefore nothing to rectify or amend in accordance with that provision of the law.

[29] Appellant's Counsel later submitted that he would be happy with a marginal entry in the birth certificate to record the change of sex. This was however not before the court below and therefore that court could not be faulted for not dealing with that particular issue. It may however be considered in another application to the Civil Status Office or a Judge.

[30] We find it imperative to state that this area of law in Seychelles and some other jurisdictions is not settled. Seychelles does not have a Gender Recognition Act like some other jurisdictions nor do the laws provide for a case such as this one. Our legal system does not permit such rectification of birth certificate in order to acknowledge a new sexual identity.

[31] Despite this, we acknowledge the plea and plight of the Appellant to have his change of gender recognised. To that extent we recommend to the Legislature to consider whether

in the Seychelles of today there is a justification for the recognition of gender change, at least in conformity with the Charter of Human Rights in our Constitution.

[32] Article 27(1) provides for equal protection under the law and in particular 27(2) states:-

“clause (1) shall not preclude any law, programme or activity which has as its object the amelioration of the conditions of disadvantaged persons or groups”.

[33] The Appellant may also consider pursuing the matter in the Constitutional Court along those lines and/or in the alternative in terms of the breach of her inherent right to the respect of her private life and dignity.

[34] The case of *Christine Goodwin v UK (2002) 35 EHRR 447*, was the legal precedent in Europe regarding gender recognition.

[35] The European Court of Human Rights, hereinafter referred to as (ECtHR) in a unanimous decision, stated that there was now:

“clear and uncontested evidence of a continuing international trend in favour not only of increased social acceptance of transsexuals but of legal recognition of the new sexual identity of post-operative transsexuals”.

[36] It added that:

“the very essence of the [European] Convention is respect for human dignity and human freedom. Under Article 8 of the Convention in particular, where the notion of personal autonomy is an important principle underlying the interpretation of its guarantees, protection is given to the personal sphere of each individual, including the right to establish details of their identity as individual human beings”.

[37] It concluded that:

“the unsatisfactory situation in which postoperative transsexuals live in an intermediate zone as not quite one gender or the other is no longer sustainable”.

[38] The ECtHR found that the UK was in breach of both Articles 8 and 12 of the Convention of Human Rights because of its failure to provide Ms Goodwin, a transgender woman, with a new birth certificate or to allow her to marry in her acquired female gender.

[39] It would appear that initially there was an acceptance that people would suffer from being born into the 'wrong' body. However it has since been left to each jurisdiction to make its own decision. As times, thinking, and medical procedures have progressed, there has also been an element of acceptance of transgender people and their rights as citizens to be treated equally.

[40] The Gender Recognition Act was passed in the UK providing for the change of gender, in order to allow transgender persons to apply to have their gender altered to reflect their surgical procedures.

[41] An alternative route for the Appellant might be in the consideration of the following sections of the Civil Status Act:-

Section 10 provides as follows;

"The Chief Officer of the Civil Status shall register or cause to be registered all births, marriages and deaths and all other acts connected with the civil status in the Republic of Seychelles." (Emphasis Ours)

[42] That section seems to be much broader in its interpretation than Section 100 of the Civil Status Act. Perhaps, this application would have been successfully entertained under that section rather than on the second provision of Section 100 of the Civil Status Act which is very limited in the strict sense of the word used.

[43] Also Acts of the Civil Status drawn up abroad may be considered under s.29 of the Civil Status Act.

[44] Based upon the provisions on which the original case and the appeal were brought, this court finds that there is no merit and therefore dismiss the appeal, with no order as to costs.

F. MacGregor (PCA)



I concur:.


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J. Msoffe (J.A)

I concur:.


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B. Renaud (J.A)

Signed, dated and delivered at Palais de Justice, Ile du Port on 11 August 2017