

Re JG, JG v Pengarah Jabatan Pendaftaran Negara

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HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO
S1-21-34 OF 2003

JAMES FOONG J

25 MAY 2005

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Administrative Law — Remedies — Declaration — Gender status — Application to amend or correct gender status stated in National Registration Identity Card — Sexual re-assignment surgery — Identity of persons having undergone sexual reassignment surgery — Whether to be accorded recognition as per current gender — National Registration Act 1959 s 6(2)(o)

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Constitutional Law — Courts — Jurisdiction of High Court — Application to amend or correct gender status stated in National Registration Identity Card — Identity of persons having undergone sexual reassignment surgery — Whether to be accorded recognition as per current gender — Whether court seized with jurisdiction to grant application — Specific Relief Act 1950

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The plaintiff was born a male. When she became aware of her physical self, she felt more inclined to be a woman except that she was in a man's body. Since then she considered herself a female and lived like one. In 1996, at a hospital in Thailand called Siroros Hospital, she underwent a gender re-assignment. To support this, she enclosed a certificate issued by this hospital signed by doctors to say that she 'got the surgery for changing the sex from male to female completely at Siroros Hospital on 21 May 1996, then she can live like a woman'. After the operation, she applied to the defendant to change her name from that of the former to the present. Accompanying this application was a statutory declaration by her declaring the reason why she was applying for this change of name: It was due to her successful gender re-assignment surgery. The defendant issued to her a new identity card with her new name. The plaintiff then applied for MyKad but was informed that the sex of a person would be stated therein. Since her current identity card carried an odd digit at the end of a line of numbers, she would still be considered a male on the record of MyKad. The plaintiff requested from the court: (1) a declaration that she be declared a female; and (2) that the Registration Department be directed to change the last digit of her identity card to a digit that reflects a female gender.

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Held:

It is generally accepted by the courts following the advice of the medical profession that to assess and determine the sex of a person, four basic criteria must be considered: (1) Chromosomal factor; (2) Gonadal factor (presence of testes or ovaries); (3) Genital factor (including internal sex organs); (4) Psychological factor. In the instant case, the medical men have stated that the plaintiff was female. They had considered the sex change of the plaintiff as well as her psychological aspect. She felt like a woman, lived like one, behaved as one, had her physical body attuned to one,

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A and most important of all, her psychological thinking was that of a woman. In this case, the first prayer was for a declaration which the court had power under the Specific Relief Act 1950 to grant. As for the second prayer, it concerned only an administrative exercise and the defendant was empowered by law under s 6(2)(o) of the National Registration Act 1959 to make a correction and alteration in the register and identity card. All these would give full effect to art 5(1) of the Federal Constitution which states that 'no person shall be deprived of his life or personal liberty save in accordance with law' (see paras 16, 21 and 23).

[Bahasa Malaysia summary

C Plaintiff dilahirkan seorang lelaki. Apabila beliau menyedari keadaan fizikalnya, beliau lebih berperasaan seperti seorang wanita kecuali beliau berada dalam badan seorang lelaki. Sejak itu beliau menganggap dirinya wanita dan hidup seperti seorang wanita. Pada tahun 1996, di sebuah hospital di Thailand bernama Hospital Siroros, beliau menjalani pertukaran jantina. Bagi menyokongnya, beliau telah mengemukakan sijil yang dikeluarkan oleh hospital ini yang telah ditandatangani oleh doktor menyatakan bahawa beliau 'got the surgery for changing the sex from male to female completely at Siroros Hospital on 21 May 1996, then she can live like a woman'. Selepas pembedahan itu, beliau membuat permohonan kepada defendan untuk menukar namanya daripada apa sebelumnya kepada yang sekarang ini. Permohonan ini disertakan satu deklarasi statutori oleh beliau yang mengisytiharkan sebab kenapa beliau memohon untuk menukar namanya: ia disebabkan oleh pembedahan pertukaran jantinaan yang berjaya. Defendan telah mengeluarkan kad pengenalan baru kepada beliau dengan nama barunya. Plaintiff kemudian memohon untuk MyKad tetapi telah dimaklumkan bahawa jantina seseorang akan dinyatakan. Memandangkan kad pengenalan semasa beliau menggunakan angka ganjil di akhir baris nombor, beliau masih dianggap seorang lelaki atas rekod MyKad. Plaintiff memohon daripada mahkamah: (1) satu deklarasi agar beliau diisytiharkan seorang wanita; dan (2) agar Jabatan Pendaftaran diarah menukar angka akhir dalam kad pengenalannya kepada angka yang menggambarkan jantina wanita.

Diputuskan:

Adalah diterima secara amnya oleh mahkamah berikutan nasihat profesyen perubatan bahawa untuk menilai dan menentukan jantina seseorang, empat kriteria utama hendaklah diambil kira: (1) faktor kromosom; (2) faktor gonadal (kehadiran testis atau ovari); (3) faktor alat kelamin (termasuklah organ seks dalaman); (4) faktor psikologi. Dalam kes semasa, pakar perubatan menyatakan bahawa plaintiff adalah seorang wanita. Mereka telah menimbang pertukaran jantina plaintiff dan juga aspek psikologinya. Beliau berperasaan seperti seorang wanita, hidup seperti seorang wanita, berperangai seperti seorang wanita, mempunyai badan secara fizikalnya seperti seorang wanita, dan yang paling pentingnya, pemikiran psikologinya seperti seorang wanita (lihat perenggan 16, 21 dan 23).]

Notes

For cases on declarations, see 1 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 420-486.

For cases on jurisdiction of High Court, see 3(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 1684–1692.

For jurisdiction of courts, see 2 *Halsbury's Laws of Malaysia* paras [20.066]–[20.073].

Cases referred to

AG for the Commonwealth v Kevin & Ors (2003) FAM CA 94 (refd)

Bellinger v Bellinger [2002] 1 All ER 311 (refd)

Bellinger v Bellinger [2003] 2 All ER 593 (refd)

Cortett v Corbett [1970] 2 All ER 33 (refd)

Wong Chiou Yong (p) v Pendaftar Besar/Ketua Pengarah Jabatan Pendaftaran Negara [2005] 1 MLJ 551 (refd)

Legislation referred to

Federal Constitution art 5(1)

National Registration Act 1959 s 6(2)(o)

Registration Act 1960 reg 14

Specific Relief Act 1950

John Clark Sumugod (Sidek Teoh Wong & Dennis) for the plaintiff.

Azizah bte Hj Nawawi (Senior Federal Counsel, Attorney General's Chambers) for the defendant.

James Foong J:

Introduction

[1] The plaintiff is requesting from this court:

- (1) a declaration that she or he (but for ease of reference, I shall use the female gender to describe him or her in this entire judgment) be declared a female;
- (2) that the Registration Department be directed to change the last digit of her identity card to a digit that reflects a female gender.

Decision

[2] After reading the relevant affidavits filed in this case and considering the oral and written submissions presented by both parties, I allowed both prayers requested by the plaintiff. Before I proceed to give my reasons the following facts, which are not disputed, must be disclosed.

Plaintiff's history

[3] The plaintiff was born a male by the name of BGHL on 8 November 1974 in Penang. When she became aware of her physical self, she felt more inclined to be a woman except that she was in a man's body. Since then she considered herself a female and lived like one. In 1996, at a hospital in Thailand called Siroros Hospital, she underwent a gender re-assignment. In layman's term, she had a sex change. To support this, she enclosed a certificate issued by this hospital signed by doctors to say

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- 003 A that she 'got the surgery for changing the sex from male to female completely at
73]. Siroros Hospital on 21 May 1996, then she can live like a woman'.
- B [4] After the operation, she applied to the defendant to change her name from that
of the former to the present — JG. Accompanying this application is a statutory
declaration by her declaring the reason why she is applying for this change of name:
it is due to her successful gender re-assignment surgery. Obviously accepting this, the
defendant issued to her a new identity card with her new name.
- C [5] The plaintiff then applied for MyKad but was informed that the sex of a person
would be stated therein. Since her current identity card carries an odd digit at the end
of a line of numbers, she would still be considered a male on the record of MyKad.
- D [6] The plaintiff then elaborated that since her operation she worked as a model
and from a further affidavit it is disclosed that she is much sought after as one. But
on many occasions she was embarrassed when she had to disclose her identity card
number in some assignments which implicated her as a male.
- E [7] The plaintiff then disclosed that she has a boy friend for 10 years now and they
both have plans to get married legally. Again this incomplete change of identification
of her gender may prevent this.
- F Medical evidence
- G [8] Supporting this plaintiff's application are three local medical consultants.
- H [9] The first is Dr Rabin Gonzaga, a consultant psychiatrist from Gleneagles Intan
Medical Centre, Kula Lumpur. He certifies that the plaintiff 'does not suffer from any
mental illness/psychological disability at present' and that she 'lives a full and
satisfying life as a woman and has done so for the last eight years following her
surgery'.
- I [10] The second is Dr Chia Wee Van, a consultant surgeon in paediatric surgery
and paediatric urology. He confirmed that he has examined the plaintiff and found
that since 'her surgery eight years ago she has been a complete female in every sense
of the word; ie not only from the mental and psychological perspective, but also the
physical sense with reference to both her genitalia and body structure'.
- [11] The third is Dr Wong Kok Kien, a consultant in obstetrics, gynaecology and
oncology with Gleneagles Intan Medical Centre. He said that he has examined the
plaintiff and confirmed 'she has undergone a sex change operation from male to
female'. He added that she 'now got female genitalia with reconstructed labia and a
virginal... she is now FEMALE'.
- The defendant's stand
- [12] In the only affidavit of the defendant, no challenge is mounted against the
assertions of the plaintiff particularly relating to the gender reassignment and the
findings of all the medical consultants mentioned. The only ground in opposing this
application is that the record on the sex of a person cannot be changed; it has to
follow that as stated in the person's birth certificate and, in this case, the plaintiffs
birth certificate indicates that she is a male.

[13] As to the plaintiff's successful change of name in the identity card, the defendant explained that such change is permitted under reg 14 made under the Registration Act 1960 but this relates only to a name change rather than a gender change.

Analysis/Reasons

[14] During the hearing of this application, I was informed that another court of concurrent jurisdiction has rejected an application of a similar kind as this case. But unfortunately, the grounds of judgment in that case was not made available or published when decision in this case was delivered. However before writing these grounds, I have the good fortune to read the very commendable, well written and reasoned judgment of my learned brother VT Singham J in the case of *Wong Chiou Yong (p) v Pendaftaran Besar/Ketua Pengarah Jabatan Pendaftaran Negara* [2005] 1 MLJ 551. The facts there are very similar to this instant case except that VT Singham J has to deal with a female who wants to be a male whilst I have to deal with the direct opposite. Nonetheless, as reminded by VT Singham J, though such matters are sensitive in nature the courts would 'not abdicate and shrink from its duty and will endeavour to confine its reasoning and decision within the limits and contexts of the application'.

[15] Most of the cases cited in *Wong Chiou Yong* are being referred to by the parties in their submissions to me. I do not intend to repeat them. And basically from these authorities, two schools of thoughts surface: The traditional and the progressive. These are just indicative terms to represent the approach taken by the courts in the Commonwealth as well as those by the European Union and has no bearing to suggest preference.

[16] If I may classify solely for the purpose of distinction, *Wong Chiou Yong* followed the tradition approach as set out in the celebrated case on this subject: *Cortett v Corbett* [1970] 2 All ER 33. It is generally accepted by the courts following the advice of the medical profession that to assess and determine the sex of a person, four basic criteria must be considered:

- 1 Chromosomal factor
- 2 Gonadal factor (presence of testes or ovaries);
- 3 Genital factor (including internal sex organs);
- 4 Psychological factor.

[17] For a brief description of chromosomal, it is essentially a nucleus of individual cells of the body on which the genes of a person are carried. This, in turn, are the mechanism by which hereditary characteristics are transmitted from parents to off-springs. A normal female would have a pair which is described as XX. And for a normal male there would be a pair described as XY. These indicators do not change. In short, the biological sexual constitution of a person is fixed at birth and cannot be changed.

[18] And according to Ormrod J, who presided over *Corbett v Corbett*, 'the law should adopt, in the first place, the first three of the doctors' criteria, ie the

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- A chromosomal, gonadal and genital tests, and, if all three are congruent, determine the sex for the purpose of marriage accordingly, and ignore any operative intervention⁷.
- [19] Such restriction of course drew some contrasting views in judgments over almost similar factual situation some 30 years later when the social policy has changed and medical science has advanced, particularly in the area of the gender reassignment. This led Lord Justice Thorpe in *Bellinger v Bellinger* [2002] 1 All ER 311, in the Court of Appeal to give a dissenting judgment where he felt, like I do, that the psychological factor has not given much prominence in the determination of this issue. He was of the view that psychological factor cannot be considered at birth because they do not yet manifest, they may become an overriding consideration subsequently as the individual develop. This view, in England at least, remain a minority view when the House of Lords upheld the majority decision of the Court of Appeal in *Bellinger v Bellinger* [2003] 2 All ER 593.
- [20] However on the other side of the globe, in Australia, as well as the European continent under the European Court of Justice, a more liberal approach is adopted. In *AG for the Commonwealth v Kevin & Ors* (2003) FAM CA 94 the full Court of Appeal of the Family Court declined to follow *Corbett v Corbett* and declared, 'we should also treat biological factors as entirely secondary to psychological ones'. It went further to say, 'In other words, where a person's gender identification differs from his or her biological sex, the former should in all cases prevail. It would follow that all transsexuals would be treated in law according to the sex identification, regardless of whether they had undertaken any medical treatment to make their bodies conform with that identification'; thus upholding the principle that: 'we do not determine sex; in medicine we determine sex in which it is best for the individual to live'.
- [21] Of course, there are fears of uncertainty and the lack of 'a clear coherent policy' as well as criteria or pre-conditions to be satisfied before legal recognition can be given to alter the sex of a person. These are comprehensively set out by Lord Nicholls in the judgment of the House of Lords in *Bellinger v Bellinger* when confirming the continuing adherence to the test as set out in *Corbett v Corbett* to determine the sex of a person. And in the end, like in most of these cases favouring the *Corbett v Corbett* test, the garnet is thrown back at legislative body to make the necessary laws for the court to follow if Parliament so wishes. But then again, the legislative body would depend on the medical opinions. And here, in this instant case, the medical men have spoken: the plaintiff is FEMALE. They have considered the sex change of the plaintiff as well as her psychological aspect. She feels like a woman, lives like one, behaves as one, has her physical body attuned to one, and most important of all, her psychological thinking is that of a woman.
- [22] In practically, all authorities cited and considered, those courts that followed the principles enunciated in *Corbett v Corbett* (including *Corbett v Corbett*) had expressed sympathy with the victim trapped in such predicament and regretted that they could not assist. But surely for reasons as discussed, when it is based on medical evidence then the courts should play its part and grant relief where justice is due.
- [23] In this case, the first prayer is for a declaration which this court has power under the Specific Relief Act 1950 to grant. As for the second prayer, it concerns only an administrative exercise and the defendant is empowered by law under s 6(2)(o) of

the National Registration Act 1959 to make a correction and alteration in the register and identity card. All these would give full effect to art 5(1) of the Federal Constitution which states that 'no person shall be deprived of his life or *personal liberty* save in accordance with law'. (Emphasis added.)

Order accordingly.

Reported by Peter Ling



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