The social security rights of transsexuals under EU law and the

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Abstract: The rights of transsexuals have gained important recognition in recent decisions by the European Court of Justice and the European Court of Human Rights. Yet important conceptual issues remained to be clarified as to the precise implications of these decisions for the rights of transsexuals in areas such as social security and pensions entitlement. This article examines two important recent decisions which further develop the Courts’ caselaw. These cases also highlight the developing—and largely complementary—relationship between the two legal orders.

I. Introduction

Two important recent cases1 develop the position of the rights of transsexuals under both EU law and the European Convention on Human Rights and highlight the growing inter-relationship between the legal systems of the EU and the European Court of Human Rights.2 The Richards case is a further development of the case law of the Court of Justice in relation to the entitlements of transsexuals under EU law on gender equality. Specifically, it looks at the refusal of the UK authorities to grant a retirement pension to a transsexual who had undergone male-to-female gender reassignment surgery because she had not yet attained male pension age. The case was brought under Council Directive

1 Case C-423/04, Richards v Secretary of State for Work and Pensions [2006] ECR 1-000 (27 April 2006);
Grant v. United Kingdom (2007) 44 EHRR 1 (23 May 2005).
79/7/EEC on the progressive implementation of the principle of equal treatment for men and women in matters of social security. This Directive, which came into force in 1984, initially led to a significant number of cases in relation to the direct effect of the Directive, its application to transitional measures, and, subsequently, issues concerning the personal and material scope and indirect discrimination. More recently, however, there has been a falling off in the number of cases referred to the Court under Directive 79/7 and many of these cases have concerned issues relating to Article 7 of the Directive which allows member states to exclude a number of policy measures from its scope including the determination of pension age. The Richards case marks a new development in the Court's case law under Directive 79/7. The Grant ruling, which concerned an identical issue, develops further the jurisprudence of the European Court of Human Rights in this area following the seminal Goodwin decision.

II. Facts

The facts of the two cases were quite simple and were not disputed. Ms Richards had been born in 1942 and her birth certificate registered her gender as male. Subsequently, having been diagnosed as suffering from gender dysphoria she underwent gender reassignment surgery in 2001. She applied for a retirement pension which, under UK

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3 See, for example, case C-303/02 Haackert [2004] I-2195.
law, is payable to a woman at age 60 but to a man at age 65. Her application was refused on the grounds that she had not yet reached the age of 65, i.e. the retirement age for men. On appeal, the issue was referred to the court by the Social Security Commissioner (the expert UK social security court) which asked whether Directive 79/7 prohibited the refusal of retirement pension to a male to female transsexual until she reached the age of 65 where she would have been entitled to such a pension at the age of 60 had she been considered to be a woman under national law.

Ms Grant's birth certificate also showed her as a male. She subsequently had gender reassignment surgery. However, when she applied for state pension in 1997 her claim was refused on the basis that she had not reached the male pension age of 65. In the light of the European Court of Human Rights decision in Goodwin (discussed below) she asked that her case be reopened. Legal proceedings followed but her claim before the national courts was unsuccessful in the light of the House of Lords decision in Bellinger v. Bellinger. The UK supreme court had ruled that a person whose sex was correctly classified at birth could not later become, or come to be regarded as, a person of the opposite sex for the purposes of UK marriage law. The House of Lords judged that such a judicial interpretation would represent a major change in the law, having far-reaching ramifications which raised issues which were pre-eminently matters for Parliament rather than the courts. Accordingly Ms Grant pursued her case before the European Court of Human Rights.

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5 This continuing discrimination on grounds of gender is allowed under Art. 7 of Dir. 79/7.
III. Legal background

These cases are a further development of both courts’ recent caselaw in relation to the rights of transsexuals. This issue was first considered by the Court of Justice, in the context of gender equality law, in the case of *P. v. S.* The case involved the dismissal of a transsexual employee for reasons relating to gender reassignment. In these, somewhat exceptional, circumstances the Court ruled that

> the scope of the [equal treatment] Directive cannot be confined simply to discrimination based on the fact that a person is of one sex or the other sex. In view of its purpose and the nature of the rights which it seeks to safeguard, the scope of the Directive is also to apply to discrimination arising, as in this case, from the gender reassignment of the person concerned.

However, the implications of this decision for other issues concerning transsexuals remained unclear. In particular, the case concerned obviously adverse action by an individual employer rather than the general social policy approach of a member state.

The position in this area was fundamentally altered by a decision of the European Court of Human Rights in relation to the rights of transsexuals under the Convention. In a number of previous decisions, the Court of Human Rights had ruled that the extent to which states recognised transsexuals fell within the margin of discretion allowed under

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7 Case C-13/94 *P. v. S.* [1996] ECR I-2143
the Convention. However, in the case of Goodwin v. United Kingdom\(^8\) the Court altered its approach and ruled that the failure by the United Kingdom to allow legal recognition of the applicant’s gender re-assignment was in breach of Article 8 of the ECHR (right to privacy in relation to private life) and that the respondent Government could no longer claim that the matter fell within its margin of appreciation, save as regards the appropriate means of achieving recognition of the right protected under the Convention.\(^9\)

In relation to a further claim that the fact that the applicant was not able to marry (under Article 12) the Court also ruled that

> it is artificial to assert that post-operative transsexuals have not been deprived of the right to marry as, according to law, they remain able to marry a person of their former opposite sex. The applicant in this case lives as a woman, is in a relationship with a man and would only wish to marry a man. She has no possibility of doing so. In the Court’s view, she may therefore claim that the very essence of her right to marry has been infringed.\(^{10}\)

This decision had important implications when the Court of Justice again addressed the issue of the rights of transsexuals in K.B. v. NHS Pensions Agency.\(^{11}\) In that case the claimant was a woman who worked for the respondents and was a member of their pension scheme. She had shared a relationship for a number of years with a person who

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\(^9\) Paragraph 93 of the judgement.
\(^{10}\) Paragraph 101 of the judgment.
had been born as a woman but who, following gender reassignment surgery, had, in the words of the Court, become a man. However, under UK law, it was not possible at that time to amend the birth certificate to reflect this change. As a result of this inability and of the fact that the UK law does not allow same-sex marriage, the couple had been unable to marry. As a result, the NHS Pensions Agency informed the claimant that if she were to pre-decease her partner he would not be able to receive a widower's pension as that pension was payable only to a surviving spouse. The Court, broadly following the opinion of the advocate general, ruled that Article 141 EC, in principle, precluded legislation which, in breach of the European Convention for the protection of human rights and fundamental freedoms, prevented a couple from fulfilling the marriage requirement which was necessary to be able to benefit from part of the pay (i.e. the occupational pension) of the other. The Court went on to rule that it was for the national court to determine whether in such a case a person could rely on Article 141 EC to gain recognition of a right to nominate her partner as the beneficiary of a survivor's pension.

IV. Richards

The advocate general's opinion

In the Richards case advocate general Jacobs stated that it was clear that the principle of equal treatment in Directive 79/7 had the same scope and effect as that in the Directive on equal treatment with regard to working conditions (Directive 76/207). He pointed out that Ms Richards was denied her pension in circumstances where, had she been registered

12 Opinion of the advocate general, para. 37.
as female at birth, she would have been entitled to it. Accordingly the discrimination alleged lay in the United Kingdom's failure to recognise the transsexual person's acquired gender on equal terms with persons recorded as of that gender at birth.\textsuperscript{13}

The advocate general went on to discuss the appropriate comparator.\textsuperscript{14} He pointed out that the Court in \textit{P v S} had stated that where a person is dismissed on the grounds that he or she has or intends to undergo gender reassignment, he or she is treated unfavourably by comparison with persons of the sex to which he or she was deemed to belong before undergoing reassignment. If that approach were applied in the instant case, the correct comparator would be with male pension claimants who were not entitled to a pension until the age of 65. Therefore, there would be no discrimination. However, the advocate general agreed with the submission of the EC Commission that the reasoning to be used in applying gender discrimination law to transsexual persons should differ from the classical model based on a straightforward comparison between men and women. He pointed out the \textit{P v S} case was a particularly clear case of discrimination and that the result would have been the same whether the comparator was a man who was not proposing to have gender reassignment surgery or a woman who had not had such surgery. In \textit{K. B.}, the Court of Justice had compared the couple concerned to a heterosexual couple where neither party's identity was the result of gender reassignment surgery and the couple was, therefore, able to marry. The advocate general argued that the correct comparator in the case of a female to male transsexual was, therefore, with the person whose identity was not the result of gender reassignment surgery. He argued that

\textsuperscript{13} Opinion of the advocate general, para. 38.
\textsuperscript{14} Opinion of the advocate general, para. 39-45.
that seemed to be the correct basis of comparison for Ms Richards and that the correct comparator concerning a male to female transsexual was a female person whose identity was not the result of gender reassignment surgery.

The advocate general argued that the discrimination lay in the United Kingdom’s failure to recognise the transsexual persons in their acquired gender on equal terms with persons recorded as of that gender at birth.\(^{15}\) He was, therefore, of the view that it was contrary to Article 4 of the Directive for a member state to refuse to grant retirement pension before the age of 65 to a male to female transsexual where that person would have been entitled to a pension at age 60 had she been regarded as a woman as a matter of national law.

Judgment of the Court of Justice

The Court pointed out that it was for the member states to determine the conditions under which legal recognition is given to the change of gender of a person.\(^{18}\) However, it also pointed out that Directive 79/7 is the embodiment in the field of social security of one of the fundamental principles of Community law, i.e. the principle of equal treatment of men and women.\(^{19}\) It recalled that the right not to be discriminated against on grounds of sex is one of the fundamental human rights. Referring to its earlier case law, it argued that the scope of Directive 79/7 could not, therefore, be confined simply to discrimination based on the fact that a person is of one or other sex but must also apply to

\(^{15}\) Opinion of the advocate general, para. 45.  
\(^{18}\) Opinion of the advocate general, para 21  
\(^{19}\) Judgment of the court, para. 22-4.
discrimination arising from the gender reassignment of the person concerned. The Court ruled that the unequal treatment at issue, arising from the fact that Ms Richards was not allowed to obtain a retirement pension until she reached the age of 65, was based on her inability to have her acquired gender recognised for the purposes of entitlement to pension. The Court, following the approach of the advocate general, compared Ms Richards to "women whose gender is not the result of gender reassignment surgery" who could receive a retirement pension at the age of 60.\footnote{Judgment of the court, para. 28-30.} It ruled, therefore, that the unequal treatment to which she was subject must be regarded as discrimination precluded by Directive 79/7. The Court dismissed the argument that the discrimination was allowed under Article 7.\footnote{Judgment of the court, para. 35-7.} It also ruled that there was no need to limit the temporal effect of its judgment.

V. Grant

\textbf{Judgment of the European Court of Human Rights}

By the time of the \textit{Grant} case had come to hearing before the Court of Human Rights, the UK legislature had adopted the Gender Recognition Act, 2004. Under this legislation individuals who satisfy certain criteria can be granted a gender recognition certificate.

\footnote{The United Kingdom government had argued that the facts giving rise to the dispute arose from the choice made by the national legislature to prescribe different pension ages for men and women, a choice allowed under Article 7 of Directive 79/7. However, the Court pointed out that Article 7 only allowed member states to maintain temporarily advantages accorded to women with respect to retirement in order to enable them progressively to adapt their pension systems without disrupting their complex financial equilibrium. As such exemptions had to be interpreted strictly, the Court stated that the relevant provision must be interpreted as relating only to the determination of different pension ages for men and for women, an issue which was not concerned in the proceedings in question.}
Under such a certificate, which is prospective in effect, a person is afforded legal recognition of their acquired gender. The legislation also sets out specific rules in relation to entitlement to social security benefits which are paid on the basis of the acquired gender.

The applicant claimed *inter alia* that the decision to deny her a retirement pension at age 60 was in breach of Article 8 of the Convention (right to respect for private life). The UK government argued that the *Goodwin* judgment had indicated that it was for the government to implement measures to rectify its breach of the Convention and that a reasonable period was to be allowed for such changes to be implemented. In relation to the temporal effect of the *Goodwin* judgment, Ms Grant argued that that judgment did not include any reference to being limited in time and that even if there was a temporal limitation it should not apply to her as she had already made a claim and instituted legal proceedings to assert her rights. The government, in contrast, argued that the Goodwin decision did not apply to the past or overrule previous judgments and was clearly of prospective effect only.

The Court, having summarised its findings in *Goodwin*, held that Ms Grant, who was in an identical situation to the applicant in the *Goodwin* case, could also claim to be a victim of a breach of the right to respect for private life under Article 8 of the Convention. In relation to the temporal effect of that judgment, the Court held that while it was correct that the government had to take steps to implement the judgment, this process could not be regarded as in any way suspending the applicant's victim status. The Court held that
Ms Grant’s victims status did not come to an end until the Gender Recognition Act, 2004 came into force thereby providing her with the means to obtain legal recognition of her acquired gender. However, the Court also ruled that its judgment in Goodwin had effect only from the date of that judgment.

Ms Grant argued that the refusal to pay for a state pension at age 60 was in violation of Article 1 of Protocol No. 1 of the Convention either alone or in conjunction with Article 14. The Court noted that under domestic law as it stood at the relevant time, Ms Grant had no right to be paid a state pension at age 60 and suggested that "it may well be that no proprietary right arose capable of engaging Article 1 of Protocol No 1 taken alone.” However, the Court did not consider it necessary to decide this point as it considered that the case essentially involved an article 8 matter and that no separate issue arose for the purposes of article 1 of Protocol 1.

VI. Comment

**Relationship between the European Courts of Justice and Human Rights**

The two cases noted here are interesting examples of the growing relationships between the decisions of the two European courts. The approach of the European Court of Justice in *K.B.* and *Richards* was very much predicated on the judgment of the Strasbourg Court.

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22 Art. 1 of Protocol 1 of the ECHR provides that ‘every natural or legal person is entitled to the peaceful enjoyment of his possessions…’. Art. 14 provides that the enjoyment of rights set out in the Convention is to be secured without discrimination on a number of grounds.

23 Judgment of the court, paragraph 50.
in Goodwin. Equally, it is interesting to note that the applicants in both cases arrived at the same outcome in both courts.\textsuperscript{24} This is an interesting example of a broader trend as in recent years a number of social security issues – particularly concerning equal treatment – have been considered by both Courts. However, the relationship between the Courts remains somewhat unclear.

In the period since 1997, reference has been made to human rights in about 50 judgments of the European Court of Justice and opinions of the advocate generals concerning social security matters (in a broad sense).\textsuperscript{25} However, in a number of these cases the references to human rights arise simply from the referring Court itself or from the arguments of the Commission, and the European Court and the advocate general make no, or only a passing, reference to human rights issues.

As we have seen, the Court of Justice’s caselaw in relation to transsexual persons has relied heavily on human rights concepts. One other area where human rights have been referred to by the Court of Justice in a consistent manner has been in relation to the implications of Article 8 of the Convention for free movement of workers.\textsuperscript{26} However, the Court does not appear to have referred to the importance of human rights in other areas concerning the free movement of persons such as, in particular, social security for migrant workers and regulation 1408/71 nor (with the important exception of the

\textsuperscript{24} See also the decisions of the two courts in Case C-196/98 Hepple [2000] ECR I-3701 and Stec v United Kingdom (2005) 41 EHRR SE 295 where the outcomes (this time unsuccessful) were again the same.

\textsuperscript{25} In most of these cases (but not all) reference to human rights is made specifically to or includes reference to the European Convention.

\textsuperscript{26} Case 249/86 Commission v. Germany [1989] ECR 1263, paragraph 11. This approach was recently restated by the court in case C-413/99 Baumbast [2002] ECR I-7091at paragraph 72.
transsexual cases) in relation to equal treatment. Perhaps surprisingly, the issue of human rights has not been referred to in a central way in the Court's developing caselaw on European citizenship.

Judgments of the European Court of Justice have been cited in about 15 recent decisions by the European Court of Human Rights in the area of social security. In a number of cases, these are simply passing references to the fact that the case has, for example, been referred to the Court of Justice, without any reference to the findings of that Court. However, there have been more substantial references in the area of equal treatment – including the rights of transsexuals. It would appear that the primary influence in this area has been from the Court of Human Rights to the Court of Justice rather than vice versa. As discussed by Douglas-Scott, although the Court of Human Rights did in Goodwin (and other cases) refer to the Court of Justice decision in P.S., the purpose of that reference was less than clear and did not particularly advance the judgment of the Court of Human Rights.

**Basis of discrimination**

One important issue is the basis upon which the courts will find discrimination against transsexuals. The European Court of Justice in Richards followed (albeit without

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27 Unfortunately, the lack of the classification of the decisions of the Court of Human Rights by subject matter makes it extremely difficult to be definitive about this issue.

28 Douglas-Scott ‘A Tale of two courts: Luxembourg, Strasbourg and the growing European human rights acquis’ (2006) CMLRev 43, 629. Although more broadly see Stec v United Kingdom (2005) 41 EHRR SE 295 in which the Court of Human Rights showed considerable deference to the Court of Justice and arrived at the same conclusion so that differences in benefits on grounds of gender were allowed under both EU law and the ECHR.
discussion) the approach of the advocate general who has argued that the approach to be adopted in applying gender discrimination law to the case of transsexual persons should differ from the “classical model” based on a straightforward comparison between men and women. Rather, in the instant case, Ms. Richards should be compared to a female person whose identity was not the result of gender reassignment surgery.29 Thus the case involved direct discrimination but as between two women rather than between a man and a woman. It does not appear to have been suggested that the concept of indirect discrimination had a role in such cases. Direct discrimination between men and women (unlike indirect discrimination) normally cannot be justified. However, although the issue did not arise in this case, it may well be that a difference in treatment between female persons whose identity did and did not result from gender reassignment surgery might not always be considered to amount to discrimination.

Implications of the judgments

It was already clear from the two preceding cases concerning transsexuals that EU law on gender equality applies not only to the status of being a man or woman but also to the national legislation by which a person is recognised as acquiring that status. Accordingly, the Richards case did not raise any significant new issues and simply involves the extension of the Court's existing case law to the area of gender discrimination in social security. It does, as discussed above, provide helpful guidance on the approach to analysing discrimination in such cases including the appropriate

29 Opinion of the advocate general, paras. 41 and 45. See judgment of the Court, para. 29.
31 Opinion of the advocate general, Para 63.
comparator. Similarly, the Grant case was a reasonably straightforward application of the Goodwin decision, the main effect of which was to clarify the temporal effect of that judgment. It does not appear that the ruling in the these cases itself will have significant financial implications. The number of transsexual persons in the United Kingdom is, in overall terms, extremely small. In 2000 it was estimated at some 5000 people out of a population of nearly 60 million. Although a number of other European countries have also retained different pension ages for men and women, it would appear from the judgment of the European Court of Human Rights in Goodwin that the United Kingdom and Ireland (which does not have different pension ages) are the only EU member states of the Council of Europe which did not then allow amendment of birth records after gender reassignment surgery (with Albania and Andorra).

However, there are perhaps some broader implications of this line of caselaw in the social security area. In the Richards case, the only issue in dispute in relation to entitlement to the retirement pension concerned the gender of the claimant. Once it was accepted that Ms. Richards was of the female gender, she then qualified for a retirement pension under UK law. However, the earlier K.B. judgment suggests potential implications in relation to survivor's pensions in at least the United Kingdom and Ireland. As outlined above, the Court ruled in K.B. that Article 141 EC precluded legislation which prevented a couple from fulfilling a marriage requirement which was necessary for one of them to be entitled to an occupational pension. In that case, because of the fact that occupational pensions fall within the definition of pay, the issue concerned the EC Treaty. In relation to social security survivor's pensions, it would appear that this issue does not arise under EU law.
as Article 3(2) of Directive 79/7 provides that it “shall not apply to the provisions concerning survivors’ benefits…”. However it is possible that such a claim could be brought under the European Convention on Human Rights.

This would involve a reconsideration of the approach taken by the Court of Justice in the K.B. case. In order for the Court to come to a favourable ruling for the applicant in that case, the Court had to make three important steps. Firstly it had to clarify that its ruling in P v S meant that the principle of equal treatment applied not simply to the gender status of an individual but also to the acquisition (or recognition of the acquisition) of that status. Secondly it had to extend that approach, as a result of the Court of Human Rights’ decision in Goodwin, to general social policy rules regarding recognition of acquired gender. Thirdly, however, the Court also had to make a further important step in that case. Unlike the situation in Richards, a simple recognition of the acquisition of a new gender was not sufficient, in itself, to gain entitlement to the occupational pension at issue. An unmarried man and woman (neither of whom had undergone gender reassignment surgery) would also not qualify for a survivor's pension. The Court had to link the failure to recognise the acquisition of gender to entitlement to pay under Article 141 EC. It did so by ruling that the failure to recognise the acquisition of the new gender, which was in breach of the European Convention on Human Rights, prevented the couple from fulfilling a marriage requirement which was a precondition of entitlement to pay. It is, perhaps, a somewhat artificial construction to describe a marriage requirement as being a precondition of entitlement to pay.32

32 See Bell op cit. fn. 10 at p. 227.
In the case of an unmarried couple, in a relationship, the fact that the surviving partner is not entitled to a survivor’s pension arises directly from the fact that, in UK law, an entitlement to a survivor’s pension is confined to married persons. However, the Court of Human Rights has (so far) ruled, on a number of occasions, that this limitation is not in breach of the European Convention on Human Rights. Only more indirectly is the failure to qualify for a survivor’s pension due to the fact that (a) under UK law marriage is confined to persons of the opposite sex, and/or (b) the fact that UK law did not then allow for the recognition of a person’s acquired gender. Insofar as national law allowed either of these options, the couple would then have to marry (and satisfy any other relevant rules) in order to qualify for a survivor’s pension.

In the K.B. case, the advocate general considered this issue pointing out that the discrimination at issue did not directly affect enjoyment of a right protected by the Treaty but rather one of the preconditions of such enjoyment. He argued, however, that that difference could not in itself lead to a different solution. He suggested a comparison with a hypothetical national rule which excluded women from entering into a particular legal relationship.

33 In Shackell v. United Kingdom admissibility decision of 27 April 2000 in relation to unmarried heterosexual couples and in Mata Estevez v. Spain admissibility decision of 10 May 2001 in relation to homosexual couples. The European Court of Justice has also held that the denial of benefits to a member of a homosexual couple is not in breach of EU law: Case C-249/96 Grant [1998] ECR I-621; Joined cases C-122/99P and C-125/99P D and Sweden v Council [2001] ECR I-4319.

34 The English High Court has recently ruled that this limitation is not in breach of the ECHR: Wilkinson v. Kitzinger [2006] EWHC 2022 upholding a refusal to recognise a Canadian marriage of a lesbian couple—an approach recently followed by the Irish courts in Zappone v Revenue Commissioners, High Court, 14 December 2006. The UK, by way of the Civil Partnership Act, 2004, has introduced the concept of a ‘civil partnership’ for such couples which has certain implications for social security entitlements. For decisions in other (non-European) jurisdictions to the same effect see Samuels v New York State Health Department 811 N.Y.S.2d 136; Li v Oregon 338 Or 376 (2005); Andersen v Kings County 2006 WL 2073138. For decisions which have come to the contrary conclusion see Goodridge v. Department of public health 440 Mass. 309, 798 NE2d 941 (2004); Halpern v. Canada (2003), 65 O.R. (3d) 161; and Minister of Home Affairs v. Fourie 2006 (1) SA 524 (CC).

35 Opinion of the advocate general, para 74.
arrangement or from obtaining a qualification which was a necessary precondition for earning money and argued that such a limitation, unless justified, would amount to direct discrimination contrary to Article 141 EC.\textsuperscript{36}

The Court, having recalled that survivor’s pension fell within the definition of pay, held that a decision to restrict certain benefits to married couples while excluding persons who lived together without being married is either a matter for the legislature to decide or a matter for the national courts as to the interpretation of domestic legal rules and that individuals could not claim that there is discrimination on grounds of sex prohibited by Community law arising from such a restriction.\textsuperscript{37} However, the Court ruled that in circumstances such as that involved in K. B. there \textit{was} inequality of treatment. Following the advocate general, the Court ruled that the inequality related to a necessary precondition for the grant of pension.

Under UK law, some statutory \textit{survivors’} benefits, such as widowed parent’s allowance, are payable only where a person has been legally married. In Ireland, all \textit{survivors’} benefits are payable only on this basis. As mentioned above, Article 3(2) of Directive 79/7 would appear to rule out a challenge to these provisions under EU law. However, a transsexual person in a relationship who is or was unable to marry under national law could claim that the failure to provide entitlement to a \textit{survivor’s} pension was in breach of the ECHR. In Ireland such a claim could be made currently. In the UK it would appear that such a claim could only be made (if not barred by passage of time) in the period from

\textsuperscript{36} Although one might suggest that such a condition would fall rather under directive 76/207.

\textsuperscript{37} Judgment of the court, para. 28.
the Goodwin judgment in July 2002 to the implementation of the Gender Recognition Act, 2004.\(^{38}\)

In order to make out such a claim a person would have to show that the failure to provide an entitlement to a survivor’s pension was in breach of a relevant provision of the Convention. It is clear that the non-recognition of acquired gender is in breach of the ECHR after Goodwin and Grant. However, the key question is whether the non-payment of pension is a breach of one of the specific provisions of the Convention taken alone or in conjunction with Article 14. The Court in Grant queried whether the claim for retirement pension involved a property right within the meaning of Article 1 of Protocol 1 of the Convention. It is submitted that, in fact, the applicant's claim in Grant did fall within the scope of Article 1 of Protocol 1. However, it is suggested, on the basis of the Court's case law, that a claim for a survivor's pension would not be sufficiently direct to fall within the scope of that Article. The Court of Human Rights in Van Den Bouwhuijsen v Netherlands\(^ {39}\) distinguished between, on the one hand, cases where the applicants complied with statutory conditions and were thus eligible for benefit and where the sole reason those benefits were denied them was because they were discriminated against on grounds, for example, of nationality or gender.\(^ {40}\) Such cases fell within the scope of Article 1 of Protocol 1. On the other hand, the Court identified those cases where the

\(^{38}\) See Grant v United Kingdom 13 June 2006

\(^{39}\) Admissibility decision of 16 December 2003. Similarly in Stec, the Court held that in the case concerning a complaint under Article 14 taken with P1-1 that the applicant had been denied all or part of a particular benefit on a discriminatory ground covered by Article 14, the relevant test is “whether, but for the condition of entitlement about which the applicant complains, he or she would have had a right, enforceable under domestic law, to receive the benefit in question”.

claimant did not have any entitlement to the benefit under national law and fell outwith Article 1 of Protocol 1 (as in *Van Den Bouwhuijsen*). In a case involving survivor's pension, an unmarried claimant who successfully argued that a failure to recognise his or her gender reassignment was in breach of the Convention would still not qualify for a survivor's pension and would, it is submitted, fall into the second category of cases.

However, it might also be argued that a failure to pay a survivor's pension fell within the scope of Article 8. In the *Grant* case the Court of Human Rights did not hold that payment of social security benefits automatically fell within the scope of Article 8. Rather it ruled that "in so far as the applicant makes specific complaint about the refusal to accord her the pension rights applicable to women of biological origin she may claim to be a victim of this aspect of the lack of legal recognition". The question would arise, therefore, as to whether the failure to pay a survivor's pension to an unmarried transsexual person who wished to but was unable to marry due to non-recognition of his or her acquired gender was sufficiently linked to this non-recognition (which is a precondition of entitlement rather than a condition in itself as in *Richards*).

While such a case would raise interesting legal points, it should be pointed out that the financial impact would again be quite limited given the numbers (and in the case of the United Kingdom, the temporal period) involved.

In conclusion, one can say that the outcome of this line of caselaw is clearly a positive development for transsexual persons and represents a significant development in the case

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*41* Judgment of the court, paragraph 43.
law of both courts. However, as noted by a number of commentators, both courts have taken a somewhat restrictive approach to the issue of national laws on gender of marriage. Both have generally upheld discrimination against unmarried couples in relation to social security and pay and, interestingly, the Court of Justice has not examined whether such discrimination has given rise to a disproportionate impact on grounds of gender and, if so, whether it is justified but has rather ruled it out on principle. The Court of Justice has in the past been criticised for interpreting gender equality law in such a manner that it applies principally where women behave like men.\(^{42}\) In their recent caselaw, the Court of Justice and the Court of Human Rights have interpreted European law so as to improve the rights of those transsexual couples who are able to and wish to get married in a "traditional" manner (and only those).

\(^{42}\) An important exception to this is in some of the Court's decisions in relation to pregnancy.