Neutral Citation Number: [2024] EWHC 1456 (Fam)

Case No: FD23P00033

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION
DIVISIONAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18 June 2024

Before :

SIR ANDREW MCFARLANE
PRESIDENT OF THE FAMILY DIVISION

MRS JUSTICE LIEVEN

- -

Between:

AB	**Applicant**
- and -	
Gender Recognition Panel	**Respondent**

- -
- -

Lisa Giovannetti KC, **Allan Briddock** and **Catherine Jaquiss** (instructed by **DAC Beachcroft LLP**) for the **Appellant**

The Respondent did not attend and was not represented

Sarah Hannett KC (appointed by **HM Attorney General**) Advocate to the Court

Hearing date: 8 February 2024

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Approved Judgment

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This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the children and members of their family must be strictly preserved. All persons, including representatives of the media and legal bloggers, must ensure that this condition is strictly complied with. Failure to do so may be a contempt of court.

Sir Andrew McFarlane P:

1. This is the judgment of the court (to which both members have contributed) determining an appeal against a decision, made by the Gender Recognition Panel ['GRP'] on 11 October 2022, refusing the appellant's application for a gender recognition certificate under the Gender Recognition Act 2004 ("GRA 2004"). The appellant, a transgender woman, sought to challenge the GRP's decision on the basis that the Panel erred in law in its conclusion that the appellant did not meet the statutory requirements for a gender recognition certificate on the evidence before it.

2. The appellant filed a notice of appeal on 25 November 2022. Following issues of service, the Secretary of State for Justice and the GRP were re-served with the notice of appeal on 28 December 2023 and 2 January 2024 respectively. Both indicated that they would not be participating in the appeal process.

3. The circumstances in which a person may appeal a decision of the GRP is prescribed by GRA 2004, s 8:

> **'8. – Appeals etc.**
>
> (1) An applicant to a Gender Recognition Panel under section 1(1), 4A, 4C, 5(2), 5A(2) or 6(1)2 may appeal to the High Court, family court or Court of Session on a point of law against a decision by the Panel to reject the application.
>
> (2) An appeal under subsection (1) must be heard in private if the applicant so requests.
>
> (3) On such an appeal the court must–
>
> (a) allow the appeal and issue the certificate applied for,
>
> (b) allow the appeal and refer the matter to the same or another Panel for reconsideration,
>
> or

(c) dismiss the appeal.

> (4) If an application under section 1(1) is rejected, the applicant may not make another application before the end of the period of six months beginning with the date on which it is rejected.'

4. The appeal came before this Court on 8 February 2024 and was heard in private in accordance with the appellant's request under s 8(2). At an earlier hearing in June 2023, Lieven J, having heard submissions from pro bono counsel for the appellant, had adjourned the appeal to be heard by a Divisional Court and had invited the appointment of an advocate to the court. We are very grateful to Sarah Hannett KC, who has taken on this latter role and whose submissions have been of great assistance in our deliberations. We apologise for delay in preparing this judgment.

Background Facts

5. The appellant was assigned to the male gender at birth and began her social transition as a transgender woman in 2011 at the age of 17. On 10 July 2012, the appellant changed her name for the first time by deed poll, adopting a female name. She commenced gender affirming care that same year by way of hormone replacement therapy and testosterone blockers. The appellant has taken these medications since, except for a brief period around 2017 when she ceased taking testosterone blockers to retain capacity for sexual activities. The appellant has not undergone, and does not wish to undergo, gender reassignment surgery. The law does not require her to do so in order to obtain a gender recognition certificate.

6. The appellant was diagnosed with Asperger's syndrome in 2013. The relevance of this diagnosis is that it appears as part of the Panel's reasoning when refusing a certificate and is therefore mentioned here by way of introduction. The appellant left her family home, which she describes as abusive, at the age of 17.

7. The application for a gender recognition certificate seeking formal recognition of the applicant's acquired female gender was first made on 13 May 2022. In support of her application, the appellant relied upon two letters from Dr Longworth of the West of England Specialist Gender Identity Clinic dated 14 March and 9 May 2017 and one letter from Dr Stuart Lorimer, Consultant Psychiatrist and Senior Gender Specialist at the Gender Identity Clinic in London, dated 16 September 2012. The following additional evidence was provided in support of the application:

a) A statutory declaration in the standard GRA 2004 form, dated 7 June 2022, in which the applicant declared that she had transitioned in 2012, had lived as a female for over 10 years and intended to do so for the remainder of her life;

b) Two Deed Polls recording name changes dated 10 July 2012 and 6 January 2015;

c) A letter from an occupational therapist confirming the appellant's diagnosis of Asperger's dated 27 May 2016;

d) A British passport dated 26 September 2016;

e) Bank account statements from selected months across 2013-2017;

f) A Dutch residence card dated 3 March 2021;

g) Three Dutch vaccination certificates dated between 6 July 2021 and 27 January 2022); and,

h) A Dutch letter in relation to the appellant's benefits dated 3 May 2022.

8. The application was stamped received by the Panel's administrative team on 16 June 2022 following which the appellant was sent a letter inviting her to provide any further information or evidence to put before the Panel. It is accepted that at this stage the appellant did not provide any further evidence, although the categories of document she had provided largely matched those suggested by the administrative team.

9. On that same date, the appellant, rather oddly, received an email stating that her application for a gender recognition certificate had been 'granted' and that clarification was only required as to the name to be used on the certificate. It is clear that the certificate had not been granted on 16 June 2022 because the letter from the administrative team on 16 June 2022 made clear that the application had not yet been submitted to the Panel for consideration. Therefore, the first part of this email must have been an administrative error. As to the second part of the email, the confusion as to the appellant's correct name arose out of an earlier call from the appellant to the administrative team during which she had informed them that she had obtained a third Deed Poll after submitting her application for the certificate, this time changing her surname to that of her current partner. The appellant had apparently telephoned to enquire about the name that she should use, as her most recent change of name did not reflect that used in her application. The administrative team asked whether the appellant had married since submitting her application as GRA 2004, s 3 adds an additional requirement if a person applying for a certificate is married:

> **'3. – Evidence**
>
> (6B) If the applicant is married or a civil partner, and the marriage or civil partnership is a protected marriage or a protected civil partnership, an application under section 1(1) must also include—

(a) a statutory declaration by the applicant's spouse or civil partner that the spouse or partner consents to the marriage or partnership continuing after the issue of a full gender recognition certificate ("a statutory declaration of consent") (if the spouse or partner has made such a declaration), or

(b) a statutory declaration by the applicant that the applicant's spouse or civil partner has not made a statutory declaration of consent (if that is the case).'

10. Some confusion then seems to have ensued between the two correspondents, however it was agreed that the appellant would use the name shown on her application. Ms Giovannetti KC, on behalf of the appellant, informed the court that the appellant's name on the gender recognition certificate application is not the appellant's current legal name but that she was about to change her name back to her family name by deed poll. This step has now been taken and, if granted, the Gender Recognition Certificate will be issued in the family name used in her application.

11. The Panel considered the appellant's application on 11 October 2022. It refused her application for a number of reasons and the two-and-a-half-page decision letter, which was sent to the appellant on 7 November 2022, is the focus of this appeal.

Grounds of Appeal

12. The appellant challenges the Panel's decision on three grounds:

i) The Panel erred in law in adopting a flawed approach to gender dysphoria.

ii) The Panel gave insufficient weight to the evidence before it which demonstrated that the appellant had been living in her acquired gender throughout the two years ending with the date of her application and intended to do so until death for the purposes of GRA 2004, s 2(1)(b) and (c).

iii) Thirdly, and in the alternative, if the Panel was correct to find that the evidence before it did not satisfy s 2(1)(b) and (c), it was procedurally unfair to dismiss the appellant's application without a request for further evidence or without convening a hearing.

The Gender Recognition Act 2004

13. GRA 2004, s 9 provides that where a gender recognition certificate is granted to a person, that person's gender becomes the acquired gender for all purposes: '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'. On that basis, the appellant accepts that the GRA 2004 adopts a binary approach to the issue of gender, with no middle category between that of male or female (see also *Castellucci v Gender Recognition Panel* [2024] EWHC 54 (Admin)).

14. GRA 2004, s 1 provides:

> **'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.'

15. There is a positive obligation on the Gender Recognition Panel to grant an application for a gender recognition certificate where it is satisfied of the four conditions set out in GRA 2004, s 2:

'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.

(2) In the case of an application under section 1(1)(b), the Panel must grant the application if satisfied:

(a) that the country or territory under the law of which the applicant has changed gender is an approved country or territory, and

(b) that the applicant 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.'

16. GRA 2004, s 25 defines terms used in the Act including:

‘25. – Interpretation

In this Act—

“the acquired gender” is to be construed in accordance with section 1(2)

[…]

“gender dysphoria” means the disorder variously referred to as gender dysphoria, gender identity disorder and transsexualism’

17. The statute is prescriptive as to the evidence that must be provided in support of an application for a gender recognition certificate so that the Panel may be satisfied that the application is soundly based:

‘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).

[…]

(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.

[…]

(8) If the Panel which is to determine the application requires information or evidence under subsection (6)(c) it must give reasons for doing so.'

18. The standard application form, as completed by the appellant, attaches titles to the reports required by s 3(1) as follows so that 'Medical Report A' must be one 'provided by a practitioner in the field of gender dysphoria', whilst 'Medical Report B' is not subject to that requirement.

19. It is clear that GRA 2004, s 3(6)(c) and (8) give the Panel power to request further information or evidence.

20. By GRA 2004, Sch 1 para 6(4), a 'Panel must determine an application without a hearing unless the Panel considers that a hearing is necessary'. A Panel thus has power to convene a hearing if that is necessary.

21. The process of gender recognition under the GRA 2004, rather than being based on self-recognition, is one of expert diagnosis followed by scrutiny by a specialist panel. There is, however, no requirement under the law for an applicant to have progressed beyond diagnosis to any form of medical treatment, let alone surgery.

22. In December 2005 the President of the Gender Recognition Panel issued *President's Guidance No. 1: Evidential requirements for applications under section 1(1)(a) of the Gender Recognition Act 2004* describing the type and quality of medical evidence that a Panel would ordinarily require to support an application for a certificate. Each case will turn on its own facts, but the Panel will require more than a simple statement of diagnosis of gender dysphoria. Details of the process followed and the evidence relied upon over a period of time should be given, but, on the other hand, there is no need for the doctor to set out every detail. At paragraph 6, the *Guidance* sets out what a doctor is expected to provide at paragraph 11 of the standard report template:

> 'Under paragraph 11 the Panel should see:
>
> a. the diagnosis,
>
> b. details of when and by whom the diagnosis was made,
>
> c. the principal evidence relied on in making the diagnosis,
>
> d. details of the non-surgical (eg hormonal) treatment to date (giving details of medications prescribed, with dates) and an indication of treatment planned, and
>
> e. date of referral for surgery, or, if no referral, the reasons for nonreferral.'

23. Drawing matters together, the structure of the statutory scheme and guidance, as Ms Giovannetti herself readily submitted, does not simply rely upon there being a diagnosis of gender dysphoria. The Panel must be able to understand and follow the essential evidence relied upon in reaching the diagnosis. She referred to, and relied

upon, the formulation adopted by Baker LJ (sitting in the High Court) in *Jay v Secretary of State for Justice* [2018] EWHC 2620 (Fam):

> 'I agree with Ms McCann's central submission that the GRA is a statute designed to facilitate gender recognition, that the statutory regime is permissive rather than restrictive, and that the evidential requirements are ancillary to the statutory criteria and any directions made by the panel must not be elevated to a status which sideline or undermine the statutory criteria or frustrate the process.'

The medical evidence

24. This appeal essentially turns upon the medical evidence adduced by the applicant and the Panel's approach to it. It is therefore helpful to set out the relevant aspects of that evidence in some detail at this stage.

25. The applicant put forward Dr Jan Longworth's report as 'Medical Report A' on her application form, being a report from a registered medical practitioner 'practising in the field of gender dysphoria'.

26. Dr Longworth's report, which is dated 14 March 2017, recorded that the applicant had completed 'treatment on the gender dysphoria care pathway' at the local clinic and provided a summary of her care and recommendations for long-term management. Dr Longworth stated that the applicant 'has a stable feminine non-binary gender identity and has lived in a congruent social role since at least 2015'. Feminising hormonal treatment had started in 2012 and was continuing. Dr Longworth, who noted the applicant's lack of permanent accommodation, described her as vulnerable, but advised that she should continue to be treated medically as a woman and should not need referral back to a gender clinic unless there were to be a resurgence in symptoms of gender dysphoria.

27. The applicant also submitted a further letter from Dr Longworth, dated May 2017. That letter recorded the applicants 'goals' for treatment as being:

a) To achieve a gynaecoid body shape, including adult female breast development;

b) To achieve a reduction in facial and body hair; and

c) To retain the capacity to have a functional penis, with capacity for erection and genital sexual response.

Dr Longworth's letter explained that there was a basic biological incompatibility between the first two goals and the third. If the applicant were to discontinue hormone treatment, as she had attempted in the past, in order to achieve goal (c), then her gender dysphoria symptoms would be likely to return. If, however, she were to continue with hormone treatment the long-term effect would be reduction in sex drive and the development of erectile dysfunction. Dr Longworth advised that it was for the applicant 'to decide what takes priority'.

28. The applicant put forward a report from Dr Stuart Lorimer, a consultant psychiatrist specialising in gender therapy dated September 2012 as 'Medical Report B' on her application form, being a report from a registered medical practitioner 'who does not have to be practising in the field of gender dysphoria'. The report is an account of a one-off assessment undertaken privately, but which Dr Lorimer described as being essentially the same as a 'first opinion' that he would undertake in his NHS practice. The report, which runs to three closely typed pages, is largely taken up with a detailed account of Dr Lorimer's interview with the applicant. He describes her as having been

‘a natally-assigned male, but whose presentation today was straightforwardly feminine’. His ‘opinion’ was:

> ‘On the basis of this assessment, I would tend to see [the applicant] as an individual with a history of gender dysphoria in the sense that she was clear from an early age that she did not identify as male. More recently she has moved into a stable female social role, consolidating this with official name change documentation, and, in my view, she would fit criteria for ICD10 F64.0 Male to Female Transsexualism.’

The Panel’s Decision

29. In its decision letter, the Gender Recognition Panel explained the reasons for its decision to refuse the application for a gender recognition certificate over the course of 17 paragraphs.

30. The Panel accepted that the appellant had a form of gender dysphoria but reminded itself that this fact alone was not enough for the grant of a certificate.

31. In order to be satisfied that the appellant had lived in the acquired gender for two years ending at the date of application the appellant was required to show that she had been living as a woman between 16 June 2020 to 16 June 2022. The Gender Recognition Panel did not consider that the appellant had done so. In particular, the Panel cast doubt on the medical evidence relied upon provided by Dr Longworth and Dr Lorimer.

32. In the reports of Dr Longworth, the Panel considered that the detail relied upon to reach a diagnosis of gender dysphoria was lacking and that the language used in the letter describing the appellant as ‘non-binary’ contradicted her assertion that she was a transgender woman. The Panel concluded that this did not accord with the binary approach required by the GRA 2004. The Panel was also troubled by the period during which the appellant had ceased taking testosterone blockers and they

considered that Dr Longworth's report highlighted the appellant's incompatible treatment goals, namely wishing to retain male sexual function whilst seeking female gender affirming hormone treatment, thereby undermining the appellant's overall aim of being recognised as a woman.

33. As to the report of Dr Lorimer, the Panel accepted that there were some details supporting a diagnosis of gender dysphoria but considered the diagnosis to be unusually worded: 'she has a history of male-female transsexualism in the sense that she does not identify as male.' On the appellant's case, this is a misquotation of Dr Lorimer's opinion which was stated as, 'On the basis of this assessment, I would tend to see Ms X as an individual with a history of gender dysphoria in the sense that she was clear from an early age that she did not identify as male.'

34. In light of these concerns, the Panel concluded that it would have needed updating reports to support the appellant's application, to clarify the history of hormone treatment, and to explain whether any gender affirming surgery had taken place and if not, why not.

35. The Panel was also troubled by a letter from the applicant's occupational therapist in 2016, in support of an application for disability benefit, which confirmed a diagnosis of Asperger's syndrome. The written reasons suggest that the Panel considered this to be inconsistent with the reports of Dr Lorimer and Dr Longworth which made no mention of such a diagnosis.

36. The Panel was unsatisfied that there was sufficient evidence before it to satisfy s 2(1)(b). In its reasons for decision, the Panel failed to mention the appellant's statutory declaration that she had been living as a woman for the relevant period and intended to do so until death in accordance with s 3(4).

37. The Panel raised concerns about the appellant having submitted documents in Dutch in support of her application. Further, the appellant adopted a signature in foreign characters which the Panel considered should have been translated for the purposes of the application.

38. The Panel also considered the email correspondence between the appellant and the administrative team as to her marital status. The Panel, which was not satisfied that the appellant had been forthcoming about whether or not she was married, also weighed this factor in favour of refusing the application.

The role of this court on appeal

39. In addition to the need for any appellate court to exercise caution when considering a first instance decision, in a case such as this, there is an additional need to consider the unique position that a specialist panel holds. In *SSHD v AH (Sudan)* [2007] UKHL 49, dealing with the Asylum and Immigration Tribunal, Lady Hale said at [30]:

> 'This is an expert tribunal charged with administering a complex area of law in challenging circumstances. *To paraphrase a view I have expressed about such expert tribunals in another context, the ordinary courts should approach appeals from them with an appropriate degree of caution; it is probable that in understanding and applying the law in their specialised field the tribunal will have got it right*: see Cooke v Secretary of State for Social Security [2001] EWCA Civ 734, [2002] 3 All ER 279, para 16. They and they alone are the judges of the facts. It is not enough that their decision on those facts may seem harsh to people who have not heard and read the evidence and arguments which they have heard and read. *Their decisions should be respected unless it is quite clear that they have misdirected themselves in law. Appellate courts should not rush to find such misdirections simply because they might have reached a different conclusion on the facts or expressed themselves differently***.**' [Emphasis added].

The Appellant's case

40. In presenting the appellant's case Ms Giovannetti, whilst accepting that the legislation requires a diagnosis of gender dysphoria, supported by a detailed explanation, which

is then scrutinised by an expert panel, stressed that there was no requirement that an applicant should have undertaken medical treatment, let alone surgery.

41. Turning to the four elements that must be satisfied under GRA 2004, s 2(1), Ms Giovannetti correctly submitted that the Panel had accepted that the first, namely that the applicant 'has or has had gender dysphoria', had been met.

42. With regard to s 2(1)(b), that she 'has lived in the acquired gender throughout the period of two years ending with the date on which the application is made', the Panel had concluded that this element was not satisfied as 'there is very little evidence that you are living in real life as a female'. Ms Giovannetti pointed to the fact that the appellant had complied with the Guidance (page 12) by giving July 2012 as the date on which she had started to live as a woman and she drew attention to the request (page 13) not to submit large quantities of documentation. The appellant had submitted her UK Passport, issued in 2016, which stated her sex as 'F' for female. She had provided the two Deed Polls of 2012 and 2015, by which the appellant had adopted female names, together with a Dutch Residence Card dated 2021 (in both Dutch and English) showing her sex as 'F' and two Dutch Covid Vaccination Cards displaying her female names. She had also provided bank statements from 2013 to 2015 with her female name prefixed by 'Miss'. None of these documents, which demonstrated consistent female presentation, had been referred to in the decision letter.

43. Ms Giovannetti submitted that, in addition to the consistent record provided by the official documents submitted to the Panel, the fact that, but for a short period, the appellant had been taking hormone replacement and testosterone blocking medication for a decade was plainly relevant to the question of whether she had been living in the

acquired gender for at least the preceding two years, yet this was ignored by the Panel.

44. With respect to the requirement in s 2(1)(c) and the need to be satisfied that an applicant 'intends to continue to live in the acquired gender until death', as the Panel were not satisfied with regard to s 2(1)(b) they could not be satisfied in relation to this element although there was no separate consideration of the point in the decision letter.

45. Ms Giovannetti's overarching submission was that, when the evidence before the Panel is looked at as a whole, the decision not to be satisfied in relation to s 2(1)(b), and hence (c), was not sustainable.

46. For completeness, there was no issue that s 2(1)(d) regarding compliance with the evidential requirements in s 3 had been met.

47. In addition to her substantive submissions, Ms Giovannetti, relying on the statutory power given to a Panel to request further information and/or to hold a hearing, argued that, if the Panel were dissatisfied with the evidence, or had 'difficulty' or 'problems' with the material that had been submitted, then the requirements of procedural fairness should have led them to exercise those powers and call for more evidence or hold a hearing.

48. Finally, Ms Giovannetti referred to paragraph 10 of the decision letter, in which the Panel pointed to the fact that the OT report referred to a diagnosis of Asperger's Syndrome, yet this had not been mentioned in either of the medical reports. In paragraph 10 the Panel appear to have concluded that the appellant had in some way misled the OT by claiming to have been diagnosed with Asperger's in order to obtain

benefit, yet neither psychiatrist 'considered [her] to be other than mentally competent and able to cope with [her] affairs'. Ms Giovannetti submitted that such a conclusion was not open to the Panel and, if the point was to be taken up, the applicant should have been asked to clarify the position first by further evidence or at a hearing or both.

Advocate to the court's submissions

49. Ms Hannett's submissions as to the structure and approach of the GRA 2004, which were not controversial, are reflected in the earlier parts of this judgment. In keeping with her role, Ms Hannett helpfully teased out the legal requirements and the relevant evidence with respect to each of the appellant's specific criticisms of the Panel's decision. Again, it is not necessary to reproduce those submissions here.

50. Ms Hannett drew particular attention to the description of the GRA 2004 scheme by Baker LJ in *Jay v Secretary of State for Justice* as 'permissive rather than restrictive'. That observation is to be seen in the context of the scheme discharging the UK's obligations under ECHR, Art 8 for transgender individuals to gain appropriate legal recognition of gender re-assignment in order to comply with the ECtHR's ruling in *Goodwin v UK* (2002) 35 EHRR 18. During her submissions, the court questioned whether 'permissive' was the most appropriate word to describe the procedure given the statutory requirements for the submission of detailed evidence followed by scrutiny from a specialist Panel, and 'facilitative' was suggested as being more apt.

51. Finally, if this court were to allow the appeal and consider re-taking the decision on recognition itself, Ms Hannett drew attention to a further aspect of the judgment of Baker LJ in *Jay* in which, at paragraph 100 he applied the test in *Ladd v Marshall*

[1954] 1 WLR 1489 in determining whether additional evidence should be considered by the High Court in the course of re-taking the decision.

Discussion

Grounds One and Two

52. By way of preliminary observation, it is necessary to record that the decision letter suffers from a lack of structure. The listed requirements in GRA 2004, s 2(1) provide ready-made headings under which a Panel may draw together its findings and conclusions. The decision letter in this case is not so structured and, by way of further difficulty, some of the Panel's findings lack clarity by being preceded by phrases such as 'let us assume' or 'assuming for the sake of argument'. In the circumstances, rather than taking grounds one and two separately, it is necessary to consider these two central criticisms together in relation to each sub-section within s 2(1).

53. With respect to s 2(1)(a), the Panel accepted that the appellant had gender dysphoria and that sub-section was therefore satisfied in this case.

54. By s 2(1)(b), the Panel needed to be satisfied that the appellant had 'lived in the acquired gender throughout the period of two years' prior to 16 June 2022. Having referred in terms to this requirement, the decision letter then immediately turns to analyse the medical reports of Dr Longworth and Dr Lorimer over the course of 8 paragraphs before stating, at paragraph 11:

> 'The Panel was also dissatisfied with the evidence that you have given it regarding living in the acquired gender for the two years down to the date of the application. There is very little to confirm that you are living in real life as a female.'

The letter then proceeds, without further reference to the s 2(1)(b) requirement, to make adverse observations about reliance upon documents in a foreign language without translation (paragraph 12), the use of a signature in foreign characters (paragraph 13), confusion in correspondence with the Panel's administrative team on the question of marriage (paragraphs 14 to 16) before a shortly stated conclusion at paragraph 17:

> 'Given the extent of the Panel's concerns, we reject the current application. You may, of course, apply again with appropriate supporting evidence.'

55. It follows that, apart from the short statement at paragraph 11, the decision letter does not contain any reference to, let alone analysis of, the s 2(1)(b) requirement. Insofar as the Panel criticised reliance upon documents in a foreign language that had been submitted without a translation, the 2021 Dutch residence card was bi-lingual in Dutch and English, showed the appellant's 'sex' as 'F' and related directly to the two year period, as did the two Dutch Covid vaccination cards which were also bi-lingual Dutch/English and showed the appellants 'Surname(s) and First Name(s)' as feminine.

56. More generally, the Panel did not refer at all to the current UK passport, the two Deed Polls or series of bank accounts, all of which demonstrated consistent presentation as a female person over a period of years preceding and including the relevant two year period. In the light of this material, and without any explanation of their reasoning, it is difficult to understand the Panel's dissatisfaction with this evidence or that it amounted to 'very little' confirmation that the appellant was living as a female. In the circumstances we do not consider that the Panel's rejection of the application on the basis of a failure to satisfy s 2(1)(b) is sustainable.

57. There is no express reference in the decision letter to the next requirement, under s 2(1)(c), that the applicant intends to live in the acquired gender until death. The applicant's supportive evidence with respect to s 2(1)(b) was also of relevance to s 2(1)(c), but the primary evidence in this regard was her Statutory Declaration which clearly stated that it was her wish to live in the female gender until her death, yet the Statutory Declaration was not mentioned in the decision letter.

58. It was, however, to s 2(1)(d), requiring that the medical evidence must comply with s 3, that the Panel afforded its primary focus. The first criticism that the Panel raised was that the two 'Medical Report A' reports from Dr Longworth, whilst confirming gender dysphoria, describe the appellant as living in a 'non-binary' state, having declined to undergo surgery and, in 2017, coming off hormone treatment for a time in order to have a functioning penis. The panel was also concerned that the incompatible treatment goals identified in Dr Longworth's second letter were further evidence of the non-binary nature of the appellant's presentation. The Panel did not see the doctor's reports as 'bolstering' her application, which was based on living in the binary, female gender for the rest of her life.

59. The Panel's second criticism of the appellant's medical evidence appears to be that, in its view, none of the further medical reports that had been submitted complied with s 3(1) in that there was no 'Medical Report B'. At paragraph 8 the Panel rightly states that the report must be from a registered medical practitioner or a registered psychologist and that the reports submitted from the appellant's psychotherapist and the occupational therapist did not comply with this requirement:

> 'Neither of these is qualified under the Act to give Medical Report B, and it will be necessary for you to obtain one.'

60. At paragraph 9 the decision letter continues:

> ‘Even if Dr Lorimer’s report could be considered as Report A, and Dr Longworth’s as B, the Panel would have required up-to-date reports in light of their significant conflicts. There have clearly been major changes since Dr Lorimer’s report in 2012 and very possibly Dr Longworth’s in 2017. It is now 2022 and, given the uncertainties these report have thrown up, the Panel would have required up-dated reports that firmly confirmed your application. The Panel certainly require clarification regarding the continuation or stopping of female hormones, whether any surgery for modification of sexual characteristics has taken place, and if not why not.’

61. The statutory basis for the grant of a gender recognition certificate is that the applicant is ‘living in the other gender’ [s 1(1)(a)] . By s 2(1)(a) the Panel ‘must grant the application’ if satisfied that the applicant has, or has had gender dysphoria and ‘has lived’ in the acquired gender for the past two years (and intends so to live for the rest of their lives). In addition the evidential requirements of s 3 must be complied with. In order to be satisfied that an applicant has lived, and will continue to ‘live’ in the acquired gender, a Panel must take account of all of the available and relevant evidence. The medical evidence required by s 3 from a registered doctor or psychologist practising in the field of gender dysphoria must include ‘details of the diagnosis of the applicant’s gender dysphoria’. Whilst information in any medical report will sit alongside all of the other evidence in the case which must be considered on the question of whether the applicant has been ‘living in the other gender’ [s 1(1)(a)], that issue, in contrast to the diagnosis of gender dysphoria, is not to be determined by considering the medical evidence alone.

62. In the present case, both Dr Longworth and Dr Lorimer were clear in their diagnosis of gender dysphoria and the Panel accepted that the medical evidence was sufficient to establish that diagnosis. In the circumstances, s 3(2) was satisfied. The Panel, however, fell into error when it went on to consider the medical evidence on its own in relation to the central issue of ‘living in the other gender’. The statutory responsibility of a Gender Recognition Panel is to determine whether any given

applicant is, or is not, 'living in the other gender'. In the case of this appellant, the Panel had to be satisfied or not that the appellant was living in the female gender. The medical evidence was but one part of the body of evidence before the Panel on this central issue and it fell to be assessed on that basis and not in isolation.

63. At paragraph 7 of the decision letter, the Panel states: 'Even if [Dr Longworth's] reports are accepted as confirmation of gender dysphoria for the purposes of the Gender Recognition Act 2004, they are far from providing a firm **diagnosis**' [emphasis added]. That statement is at odds with the clear conclusions of both Dr Longworth and Dr Lorimer, who were both clear that the appellant was suffering from gender dysphoria and that was their diagnosis. It is not the role of the medical witness to go further and to 'diagnose' whether or not an individual is 'living in the other gender', that is a matter of fact for the Panel on the basis of the totality of the evidence. Whilst what is said in a medical report may detract from a finding that a person is living in one gender or another, that is not a matter for medical diagnosis as the Panel's statement appears to suggest.

64. Further, by focussing on Dr Longworth's use of the phrase 'non-binary' the Panel failed to take notice of the longer statement of the doctor's assessment in which that phrase was placed: 'has a stable feminine non-binary gender identity and has lived in a congruent social role since at least 2015'. In terms of evidence of whether the appellant had been living in the female gender, that assessment was clearly supportive of her application, rather than one that failed to bolster it.

65. Moving on, the Panel made a specific finding that the appellant had failed to submit a 'Medical Report B' report and held that 'it will be necessary for you to obtain one'. That finding is not sustainable in circumstances where reports had been submitted

from two registered medical practitioners (Dr Longworth and Dr Lorimer) and were both 'practising in the field of gender dysphoria' [s 3(2)] at the time of their reports. Dr Longworth was a speciality doctor with the West of England Gender Identity Clinic and Dr Lorimer was a consultant psychiatrist working in the NHS and for Gender Care. The requirements of s 3(1)(a) were plainly met, indeed by having two specialists they were exceeded, and the Panel's conclusion to the contrary is plainly wrong.

66. Drawing the various elements of grounds one and two together, we find that the Panel erred as a matter of law when determining whether the appellant was 'living in the other gender' [s 1(1)(a)] by:

a) Dismissing the Dutch documentation as having been submitted in a foreign language without a translation, when the documents were in fact bi-lingual Dutch/English;

b) Failing to have regard to all of the relevant evidence of the appellant's consistent presentation as female since 2012, including Deed Polls in 2012 and 2015, a 2016 British Passport, the Dutch documentation, bank accounts and her 2022 Statutory Declaration;

c) Elevating the use of the phrase 'non-binary' in Dr Longworth's reports so as to hold that it did not support the appellant's case that she was living as a female, when the doctor's full description of the appellant in 2017 was that she had 'a stable **feminine** non-binary gender identity' [emphasis added];

d) Failing to evaluate Dr Longworth's use of the phrase 'non-binary' against the other evidence before the Panel demonstrating that the appellant was living as a female;

e) Holding that the appellant had failed to submit a 'Medical Report B' report.

67. The evidence before the Panel, when taken as a whole, presented a clear and consistent picture of a person who had lived as female for over a decade. Her decision, for a limited time, to come off hormone treatment and her contemplation in 2017 of retaining some male sexual function, were matters which might have indicated a degree of ambivalence, but there was no evidence that she had once again stopped hormone treatment. All of the other material, including important official documentation from the UK and Dutch authorities, indicated a consistent course of conduct in living her life as female.

Ground Three

68. Separately, we are satisfied that ground three is made out on the basis that it was procedurally unfair for the Panel to dismiss the application without either making a request for further information or convening a hearing.

69. We have already noted that GRA 2004, s 3(6)(c) gives a Panel power to request the provision of any other information or evidence which it may require to determine the application, and that GRA 2004, Sch 1 para 6(4) gives a Panel power to convene a hearing if it considers that that is necessary. In its decision letter, the Panel identified the following aspects of the evidence which, in its view, required the submission of further material or required additional explanation from the appellant:

a) The need for a ‘Medical Report B’ report;

b) The need for an updated medical report to supplement those from 2012 and 2017;

c) Clarification of whether the appellant had stopped or continued to take hormones and whether any surgery had taken place, and if not, why not;

d) The need for more evidence that the appellant was living as a female ‘in real life’;

e) The need for documents in a foreign language to be translated into English;

f) The need for the appellant to explain her signature using characters from a foreign language;

g) The need for the appellant to explain whether or not she had married.

70. In dismissing the application, the Panel stated that the appellant ‘may of course apply again with appropriate supporting evidence’.

71. In terms of fairness, it is important to take note of the fact that the appellant, who was acting in person, was described as ‘vulnerable’ in the medical and occupational therapy documentation.

72. At no stage in the decision letter is there any reference to the Panel’s powers to require the submission of further information or evidence and/or to hold a hearing. In circumstances where the Panel’s decision was very largely, if not entirely, driven by

its apparent dissatisfaction with the evidence that had been submitted, but where the diagnosis of gender dysphoria was accepted, formal consideration should have been given to adjourning the application for the submission of further evidence and/or a hearing. Not to consider doing so, and not to do so, was, in all the circumstances, unfair.

Conclusion

73. For the reasons that we have given, the appellant has succeeded in her appeal on all three grounds and the Panel's decision to refuse her application must be set aside.

74. It is therefore necessary to consider whether the application should be sent back to a Gender Recognition Panel for redetermination, or whether this court should determine the matter itself.

75. Whilst it is right for due respect to be afforded to the expert nature of a specialist tribunal established for a bespoke statutory purpose, in the present case we have allowed the appeal, in part, on the basis that the Panel erred by failing to determine the issue by taking account of all of the evidence which, we have held, established a consistent account of the appellant living a female over the course of a decade. It is also of note that, by s 8(3)(a), express provision is made for the appellate court to 'allow the appeal and issue the certificate applied for'. In the circumstances, we consider that it is unnecessary, and in terms of cost and time, disproportionate, to remit the matter back to a Panel for redetermination.

76. In support of her appeal, the appellant has submitted further evidence for the court to consider in the event that her appeal were to succeed. That evidence includes:

a) References from previous employers covering the period 2016 to 2020 describing the appellant using female pronouns and using her female name;

b) The appellant's British passport showing her gender as female issued in 2022 (the passport shows her signature in foreign characters);

c) Notification dated in 2022 from a Dutch GP that the appellant is receiving hormone treatment for gender dysphoria;

d) Photographs of hormone medication prescribed in the appellant's name in 2023.

In addition, the appellant submitted a statement in support of her appeal, dated November 2022, in which she confirms that she has lived as a female since 2012 to the extent that she believes that many of her friends and acquaintances would not know that she had been born male. She confirms that she has continued to take hormone treatment. She explains that any question of marriage arose from the Panel administrators misunderstanding her later name change, and she confirms that she has never married. The appellant explains that, as she no longer resides in the UK, it is difficult, if not impossible, for her to obtain an up to date opinion from a medical practitioner or psychologist who is registered in England and Wales to supply contemporary Medical Reports A and B.

77. As we have noted at paragraph 51, in *Jay* Baker LJ applied the test in *Ladd v Marshall* in determining whether additional evidence should be considered by the High Court in the course of redetermining the application. Much of the material that has now been submitted by the appellant would fail the *Ladd v Marshall* test. With all

proper respect for the decision of Baker LJ, sitting as a High Court judge, whilst we agree that the *Ladd v Marshall* test is applicable at the stage at which an appellate court is deciding the appeal itself, having considered the matter we do not agree that it continues to apply where an appellate court moves on to re-take the original decision. At that, later, stage, the court is standing in the shoes of the Panel at a rehearing and may consider any admissible and relevant evidence that could have been placed before the Panel if the application had been remitted to them. We have therefore taken account of the new material that has been submitted.

78. On the basis of the totality of the material that is now before the court, and on the basis that both of the submitted medical reports establish that the appellant has had gender dysphoria [s 2(1)(a)], we are satisfied that she has lived in the female gender consistently since 2012, including the period of two years before her application, and, on the basis of that evidence and her Statutory Declaration, that she intends to continue to live in that gender until death [s 2(1)(b)+(c)]. We are also satisfied that the evidential requirements of s 3 have been complied with [s 2(1)(d)].

79. The decision of the court is, therefore, that the appeal is allowed and a Gender Recognition Certificate is to be issued to the appellant confirming her gender as female.