

Press and Information Division

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Judgment of the Court of Justice in Case C-117/01

K.B. v National Health Service Pensions Agency and Secretary of State for Health

**NATIONAL LEGISLATION WHICH, IN FAILING TO RECOGNISE
TRANSSEXUALS' NEW SEXUAL IDENTITY, DENIES THEM THE RIGHT TO
MARRY, IS CONTRARY TO COMMUNITY LAW IF ITS EFFECT IS TO
DEPRIVE THEM OF ANY ENTITLEMENT TO A SURVIVOR'S PENSION**

The fact that certain benefits are restricted to married couples cannot be regarded per se as discrimination on grounds of sex. However, there is inequality of treatment when, in breach of human rights, a person is prevented from satisfying a condition upon which the award of a benefit protected by Community law depends

K. B., a nurse, has worked for the National Health Service (NHS) for twenty years and during that time has contributed to the NHS Pension Scheme, which provides that a survivor's pension is payable to a surviving spouse ("spouse" being taken to mean the person to whom the scheme member is married).

K.B. has shared an emotional and domestic relationship for a number of years with R., who has undergone female-to-male gender reassignment surgery. K.B. wishes R. to have the right to the widower's pension. However, United Kingdom legislation prevents transsexuals from marrying in their acquired sex, since a birth certificate, on which a person's original sex is recorded, cannot be amended. Furthermore, the law deems void any marriage to which the parties are not respectively male and female. Therefore, contrary to their wishes, K.B. and R. have not been able to marry and R. is thus prevented from receiving a survivor's pension.

K.B. brought proceedings before the United Kingdom courts, since she considered herself to be a victim of discrimination on grounds of sex in relation to pay. She submits that the term “widower” must be interpreted as also encompassing the surviving member of a couple, who would have acquired the status of widower had his sex not resulted from surgical gender reassignment. The Court of Appeal is seeking a ruling from the Court of Justice on this issue.

As a preliminary point, the Court of Justice states that a survivor’s pension paid under an occupational pension scheme falls within the scope of the Treaty provisions prohibiting all discrimination on grounds of sex in relation to pay.

The Court finds that the decision to restrict certain benefits to married couples, while excluding all persons who live together without being married, cannot, of itself, be regarded as prohibited by Community law as discriminatory on grounds of sex. For the purpose of awarding the survivor’s pension, it is irrelevant whether the claimant is a man or a woman.

However, the Court finds that there is inequality of treatment which, although it does not directly undermine enjoyment of a right protected by Community law, affects one of the conditions for the grant of that right. In the situation in question, the inequality of treatment relates to the capacity to marry, where marriage is a necessary precondition for the award of a widower’s pension. By comparison with a heterosexual couple where neither partner’s identity is the result of gender reassignment surgery and the couple are therefore able to marry, a couple such as K.B. and R. are unable to satisfy the marriage requirement. The fact that it is impossible for them to marry arises from the United Kingdom rules on marriage and birth certificates.

Thus, the Court of Justice, recalling that the European Court of Human Rights has already held that the fact that it is impossible for transsexuals to marry in their acquired gender constitutes an infringement of their right to marry under Article 12 of the ECHR¹, finds that the legislation concerned must be regarded as being, in principle, incompatible with Community law.

Since, however, it is for the Member States to determine the conditions under which legal recognition is given to change of gender, the Court finds that it is for the national court to determine whether a person in K.B.’s situation can rely on Community law in order to nominate his or her partner as the beneficiary of a survivor’s pension.

¹ Judgments of 11 July 2002 *Christine Goodwin v United Kingdom* and *I. v United Kingdom*.

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The full text of the judgment can be found on the internet(www.curia.eu.int).

In principle it will be available from midday CET on the day of delivery.

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