

CASE STUDY: FLAC

DR LYDIA FOY LITIGATION ON GENDER IDENTITY RECOGNITION

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BACKGROUND

Dr Lydia Foy is an Irish transgender woman. After gender reassignment surgery in 1992, Dr Foy made an application in 1993 to the General Registrar's Office for a birth certificate reflecting her acquired female gender. By 1996, Lydia Foy's request for a birth certificate had been refused on a number of occasions.

Free Legal Advice Centre (FLAC) is an independent human rights organisation based in Ireland that aims to achieve equal access to justice for all. It was established in 1969 by a group of law students who wished to use their legal education and knowledge to support those who could not afford to pay for legal advice. Today, FLAC provides free legal information and advice services to the public and campaigns for reform in a number of core areas of law that most impact people who are experiencing disadvantage and marginalisation: civil legal aid, social welfare law, debt law and consumer credit law. FLAC provides legal representation in a small number of strategic cases each year to people with legal problems who may not otherwise afford the fees associated with asserting or defending their rights, and whose case has the potential of a wider impact beyond the individual involved.

Lydia Foy contacted FLAC in 1996 and proceedings were issued in 1997 to challenge the refusal to provide a birth certificate reflecting her female gender. It was hardly conceived that the proceedings would take two decades to conclude.

STRATEGIC IMPORTANCE

In the 1990s in Ireland, there was limited awareness of transgender issues. The transgender population at that time has been described as *'an invisible minority'* and as one *'lacking a political voice'*. There was no effective non-governmental organisation (NGO) to support transgender people until the establishment in 2005 of the Transgender Equality Network Ireland (TENI).

The significance to Dr Foy of the refusal to provide her with a birth certificate reflecting her female gender was immediately apparent to FLAC, but the scale and significance of the issue was only fully realised as the proceedings unfolded over the following years as the case led to changes in the rights of transgender people in Ireland and greater awareness and respect for issues faced by the transgender community.

BEFORE THE LITIGATION

Before proceedings were issued, Lydia Foy with assistance from FLAC had engaged in correspondence with the Office of the Registrar General to try to obtain a birth certificate that recognised her gender identity. As this proved fruitless, proceedings were issued to challenge the failure to provide a birth certificate.

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In Ireland, as in the United Kingdom, in litigation *'costs follow the event'* meaning that the losing litigant is liable to pay the legal costs of the winning party. FLAC agreed not to charge Lydia if her case did not succeed, but she remained exposed to financial risk through the litigation as losing could expose her to an adverse costs judgement.

THE LITIGATION

Dr Foy's case began in 1997 with proceedings being issued in the High Court claiming that the failure to recognise her female gender was in breach of her rights to privacy and dignity under the Irish Constitution and under the European Convention of Human Rights. The case was heard in 2000 in a 14-day hearing before Mr Justice McKechnie. The case attracted a lot of media attention at the time of the hearing including some highly sensationalist reporting that was very hurtful to Lydia Foy and her family.

Judgement was delivered in 2002 when Mr Justice McKechnie held that Dr Foy was correctly determined to be male at birth; that the Registrar General had no power to change the register or amend birth certificates to reflect gender change and that there had been no breach of Dr Foy's rights under administrative law or the Constitution. Despite the disappointing judgement, the Judge was sympathetic to Dr Foy's case and noted the need for law reform, recording that the issues she had raised were *'of deep concern to any caring society'*, and urged the *'appropriate authorities [to] urgently review this matter'*.

In his judgement, Mr Justice McKechnie had relied substantially on United Kingdom (UK) case law in particular, the decision in the 1970 case of *Corbett v. Corbett*. Mr Corbett, having married a transgender model, sought a legally valid reason for the dissolution for the marriage and argued that his wife was a man, despite her change of gender, and that the marriage was therefore void. The court agreed with Mr Corbett and in reasoning which would be relied on for the next 30 years held that it was not possible to change one's sex or gender as recorded at birth.

It was therefore somewhat ironic that, just two days later, the European Court of Human Rights found in favour of a transgender woman, Christine Goodwin, in a case against the UK that effectively overturned Corbett. The judgement in Goodwin held that Ms Goodwin's convention rights had been breached by denying her the right to obtain a new birth certificate or to marry in her acquired female gender. As a result of the Goodwin judgement, the UK Parliament passed the Gender Recognition Act 2004 which provided for legal recognition of transgender persons and the right to obtain a new birth certificate.

An appeal was lodged in the Foy case and in 2003 the European Convention on Human Rights (ECHR) Act 2003 was enacted, bringing aspects of the ECHR into Irish law. Lydia's legal team applied to amend her appeal to include the new Act but the Supreme Court sent the Foy appeal back to the Irish High Court for consideration of the ECHR issue before being considered by the Supreme Court. The Foy lawyers correctly anticipated that the appeal might be challenged on the basis that the new legislation could not apply to the original complaint. It was therefore decided to lodge a fresh application for a birth certificate for Dr Foy, which was refused. Fresh litigation to challenge the decision was brought referring to the Goodwin decision and the 2003 ECHR Act. Ultimately the appeal from the 2002 judgement and the new proceedings were consolidated and remitted back to Judge McKechnie for hearing in the High Court.

On 19th of October 2007, Judge McKechnie gave judgement in the case. In so far as Irish legislation failed to provide for legal recognition of transgender persons and actually prevented recognition, it was held that existing law was incompatible with the European Convention. Materially, Judge McKechnie announced his intention to make the first-ever declaration of incompatibility under Section 5 of the ECHR Act 2003. On 14th of February 2008, a declaration was made that the relevant sections of the Civil Registration Act 2004 were incompatible with the State's obligations under the Convention *'by reason of their failure to respect the private life of [Dr Foy] as required by Article 8 of the said Convention in that there are no provisions which would enable the acquired gender identity of the applicant to be legally recognised in this jurisdiction.'*

While the declaration of incompatibility was appealed by the Government in 2008, the state made a commitment in October 2009 to introduce legislation recognising the acquired gender of transgender people. In June 2010, the Government dropped its appeal to the Supreme Court, which had the effect of making the declaration of incompatibility final. Despite this, by January 2013 there was still no provision for the issuing of a new birth certificate to Dr Foy.

It was therefore decided to issue yet more proceedings to seek relief for the failure of the Irish state to provide Dr Foy with an effective remedy for the breach of her convention rights. By this stage, Ireland was the only country in the European Union with no provision for the legal recognition of transgender persons.

In November 2014 the Irish state pledged to introduce a Gender Recognition Bill and agreed to pay financial damages and her legal costs to Dr Lydia Foy. The legal proceedings were thereby concluded in January 2015 when a Gender Recognition Bill was introduced into the Irish Parliament, but at the time of writing this case study (March 2015), the Bill has not yet been passed and Lydia Foy remains without the birth certificate she began seeking in 1993.

FOLLOW UP

Aside from the litigation, many other strategies were employed to raise awareness of the issues, harness support and assist in the litigation. At the time of the successful judgement in 2007, FLAC had become increasingly engaged in lobbying international human rights agencies including the UN Human Rights Committee and the Council of Europe Human Rights Commissioner's Office in the hope of applying further pressure on the Irish Government. FLAC also worked with the Transgender Equality Network Ireland (TENI), founded in 2005 to encourage the state to drop its attempt to overturn the successful 2007 decision in the Foy case.

When the state eventually did drop its appeal in 2010, a working group was established to begin drafting the Heads of a Bill. FLAC remain disappointed in some of the terms of the bill which includes a requirement for married transgender people to divorce before being able to have their relationship recognised. FLAC has continued, working together with TENI, to exert pressure on the government and to draw attention to weaknesses in the proposed legislation.

At the time of the first hearing in 2000, the proceedings were reported by many newspapers in a sensationalist manner which was difficult and intrusive for Lydia Foy and her family and as the litigation progressed, FLAC consciously worked to raise awareness and support through developing briefing notes and engagement with other agencies and organisations. Building on the experience of the initial litigation in 2000, FLAC implemented a deliberate strategy of media and public relations work to raise awareness about the case and to *'de-sensationalise the issue and avoid the sort of lurid and painful reporting indulged in by some of the media at the time of the first hearing in 2000'*. FLAC had already prepared and circulated to the media a detailed briefing note on Dr Foy's case and the relevant issues shortly before the High Court hearing in 2007 and prepared subsequent briefing notes, which were very successful in setting out the issues in the case. This strategy proved successful, and there was a transformation in the tone of media comment, which was noted to be informed and rather more sympathetic than had been the case in 2000.

OUTCOME / STRATEGIC IMPACT

This case was resoundingly successful. The state abandoning its appeal of the declaration of incompatibility 14 years after the Foy litigation commenced meant that for the first time Irish law had been declared to be incompatible with the ECHR.

The litigation has led to the current Gender Recognition Bill, which will change the legal rights of transgender people in Ireland, allowing their gender identity to be recognised under the law and permitting legal marriage. No less remarkable is the groundswell of public support for the issues from a baseline of almost none when litigation began.

The Gender Recognition Bill as drafted is not without its flaws as married transgender persons will be required to divorce if they want official recognition. FLAC further feel that the bill does not cater sufficiently for children under 16. However, concessions have already been made to some aspects of the bill by the government including a commitment to review the legislation after two years and to repeal the requirement for people to have *'single status'* if a forthcoming referendum to allow same-sex marriage is carried.

REFLECTIONS ON THE LITIGATION

The environment that exists now in Ireland in respect of transgender people contrasts significantly with the more hostile environment in which this litigation was commenced.

The 22-year battle that Lydia Foy has engaged in underlines the importance of determination and perseverance in using litigation to bring about social change. It also demonstrates some of the challenges of using litigation, not least the potentially long, drawn-out nature of the campaign and the level of personal sacrifice involved for the individual litigant. The litigation acted as a trailblazer in relation to the issue and, as a consequence, the need for public relations work, lobbying and awareness raising was identified as the litigation progressed.

The key success of the Foy case is its procurement of the ground-breaking High Court decision in 2007 that the lack of legal recognition for transgender people was incompatible with the European Convention on Human Rights.

This case helped to catalyse the transgender community, raise the profile of the issues and the right to gender recognition for transgender people in Ireland. The fact of the case itself created interest in the transgender community, and it contributed to greater organisation among transgender people and to the establishment of TENI.

Tabloid media carried sensationalist and at times cruel reporting of the issue in the first litigation. In contrast, the later litigation was characterised by much more sympathetic reporting considering the factual and legal issues at play and bringing these to a wider audience. The litigation and the publicity surrounding it thereby served to educate the public in relation to the issues and assisted in changing public opinion.

A central lesson from the Foy case, in common with other strategic litigation is the need to be able to resource and sustain follow-up work to implement a successful judgement. Without such follow-up work, the declaration of incompatibility secured in 2008 would have had no practical effect on the rights of transgender people to obtain a birth certificate in Ireland.

Collaboration with the community affected by the issues, in this case the transgender community to ensure that the legal strategies employed are informed by their needs has been identified by FLAC as an important feature of any strategic litigation. In the early days of this litigation, the lack of an effective and resourced transgender organisation made this engagement and collaboration more challenging. However, over time and in particular with the establishment and resourcing of TENI, capacity has greatly increased and coordination and cooperation with members of the transgender community and with TENI has been a key strategy.

The existence of a harsh costs environment for undertaking strategic litigation could act as a barrier to further strategic litigation. A protective costs environment in Ireland is at the very earliest stages of development and strategic litigants therefore remain very vulnerable to adverse costs judgements if the litigation is lost.

FURTHER INFORMATION / LINKS

2002 Judgment

<http://www.bailii.org/cgi-bin/markup.cgi?doc=/ie/cases/IEHC/2002/116.html&query=lydia+and+foy&method=boolean>

The 2007 Judgment

<http://www.bailii.org/ie/cases/IEHC/2007/H470.html>

FLAC Briefing Note

http://www.flac.ie/download/pdf/foy_case_briefing_note_feb_20131.pdf

Between 2004 and 2014, The Atlantic Philanthropies provided funding to organisations in the Republic of Ireland and Northern Ireland to use the law to secure social change. To read a summary report about the lessons Atlantic grantees learned in doing this work, [click here](#).