Evidence to the House of Commons Women and Equalities Committee on their investigating the Government's response to the Consultation concerning the Gender Recognition Act 2004.

Introduction

1. My name is Paula Gray, and I am a judge of the Upper Tribunal Administrative Appeals Chamber. I am also President of the Gender Recognition Panel. In the latter capacity I have been asked to give evidence before this Committee. Given the remit of the enquiry, and the critical importance of maintaining the separation of powers, I ask the Committee to accept my written evidence: it would be extremely difficult for me to answer questions on the matters under enquiry without making, or appearing to make, comment on the Gender Recognition Act and the way in which it operates. Since I routinely determine applications under that Act, which involves interpreting its provisions and applying them to the application under consideration, it is inappropriate for me to make such comment. I do hope that the Committee understands my position, and that I mean no disrespect to the House. I can understand the wish of the Committee to know something of the workings of the Gender Recognition Panel as, unusually, the Act provides for it to sit in private. I hope that what I say about that will be of assistance.
2. I have been a legal (judicial) member of the Gender Recognition Panel (hereafter the GRP or the Panel) since its inception on 4 April 2005 when the Gender Recognition Act 2004 (hereafter the Act or the GRA) came into force. I was appointed Deputy President in 2009, and President in 2019 following the retirement of Regional Tribunal Judge Jeremy Bennett, who had been President since the retirement of the first President, HHJ Michael Harris in 2009. I combine my GRP responsibilities with my main judicial role in the Administrative Appeals Chamber.
3. As other background, I am a co-author of the Judicial College's Equal Treatment Bench Book (ETBB) and a member of its editorial panel. I sit on the Diversity Steering Committee of the Judges' Council and I am a member of the Diversity Task Force recently set up by the Senior President of Tribunals, Sir Keith Lindblom.

Panel Appointment and composition

4. Appointments to this UK wide panel are made by the Lord Chancellor, with the concurrence of the Lord Chief Justice of England and Wales, the Lord President of the Court of Session and the Lord Chief Justice of Northern Ireland. Schedule 1 to the Act deals with these aspects, and the relevant qualifications for Appointment.
5. The judges and medical members appointed to the Panel have been existing Tribunal Judges and Medical Members who have experience of sitting in an inquisitorial capacity. The medical members vary in their professional speciality, but we have had (there have obviously been retirements over the years) those with specialisms relevant to this field including psychiatrists, urologists, and endocrinologists. The current membership comprises six

judges and four doctors. Like me, they combine the work of the Panel with judicial or other professional commitments.

Administration

6. Under paragraph 7 of Schedule 1 to the Act, the Secretary of State provides facilities to the panel: in practice we are administered by HMCTS through a Team (the Secretariat) based in Leicester, which processes applications as they come in and prepares them so that they are ready for listing, as well as dealing with many telephone enquiries.
7. A word about that Team. We were fortunate from the start to have an extraordinarily helpful Team. Over the years the people have changed, but the original empathetic attitude in their dealings with applicants seems to have become part of the Team's DNA, and I doubt there are many people who have come into contact with them who would give them anything other than praise. The Team has a good working relationship with the judges and members and will ask us for assistance where needed; that may be clarifying an issue that is the subject of an enquiry, or scheduling an extra sitting to deal with an unexpectedly high monthly intake of applications. They know, also, that I will make myself available to deal with other pressing issues.
8. The members of the Secretariat also attend Panel training: we have different roles, but it is important that we all understand the fundamental issues in this specialist field.

Training

9. As to that training, from the outset it was realised that in this specialist area we would benefit from the input of those practising in the field, as well as members of the trans community. The initial Panel induction training included talks by trans people, and we were addressed on the background to the passing of the Act through an academic approach by Prof. Steven Whittle. We have continued to engage with members of that community, and I pick that up in a section on outreach below.
10. By virtue of their main judicial appointments our judges and members are already trained in what we call judgecraft. That is, in this context, a judicial approach to analysing evidence; in the wider context it encompasses court skills, but those are unnecessary in this jurisdiction which is almost exclusively paper-based.
11. Although as judges and panel member we are each judicially independent, we understand the importance of a cohesive approach to avoid random decision making; that is good practice. So, our training is not just on the medical aspects but is as to helpful approaches, exchanging ideas as to framing directions, our options where there is non-compliance and other such issues.
12. Training is generally annual, and as well as hearing from external speakers it is an opportunity for the Panel to get together as a group and talk about any difficult issues both legal and practical. As an example, after one such session it became clear that all Panels were finding that the form of the statutory declaration was confusing to applicants, and that applications often had to be put back until they were re-sworn. That led to the pro forma being re-drafted, and the problem virtually disappeared.

Outreach

13. The Panel has a User Group, comprising those who advise or represent within the field, as well as practising clinicians and other interested parties. Members of the Panel, usually the President, Deputy President, and the Chief Medical Member, and some of the Secretariat attend. It is understood that we cannot answer questions about individual cases. Until the Covid 19 pandemic the Group met annually both in London and in either Scotland or the North of England (usually Newcastle). We had made enquiries about varying that in 2020 to accommodate a meeting in Nottingham (where there is a specialist gender clinic), but they were put on hold when it became clear that such a meeting was not going to be possible. I remain optimistic as to those arrangements being reinstated following the current difficulties.

Routes to a GRC, and Panel Composition

14. Initially section 27 of the Act provided for two versions of a fast track process. The first was a procedure whereby for applications made during the first six months of the Act's operation, those who were able to show that they had lived in their acquired gender for a period of six years were entitled to Gender Recognition Certificate (GRC) without establishing any medical criteria. A single judge was able to decide an application under that process: the presence of a medical member on the Panel was not necessary because no medical evidence was required.
15. For an initial two-year period, applications from those who could establish both a six-year transition and who had had undergone surgery to alter their sexual characteristics, were able to be granted on more limited evidence than under section 1(1)(a) (the usual route). Medical members sat together with judges on these cases.
16. Although that process ended after two years, a similar provision was brought in from 10 December 2014 by an amendment in respect of those applying from within a protected marriage or civil partnership, following the coming into force of the Marriage (Same Sex Couples) Act 2013 (the Alternative route under section 3A *et seq*).
17. It may be helpful at this stage if I set out some relevant parts of the Act. I do that in italics, to separate it from my commentary.

Section 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 the

(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.

Section 2 (as is relevant)

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.

(4) In this Act "approved country or territory" means a country or territory prescribed by order made by the Secretary of State after consulting the Scottish Ministers and the Department of Finance and Personnel in Northern Ireland.

Section 3 (as is relevant)

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).

(5) An application under section 1(1)(b) must include evidence that the applicant has changed gender under the law of an approved country or territory.

18. Section 1 (1)(a), "living in the acquired gender", is the main route of applications to the Panel by a considerable margin. Under that route there are certain evidential requirements that must be met (see section 3): the applicant must show that they have lived for a period of at least two years in what the Act calls their acquired gender, and that they intend to do so for the rest of their lives; they must produce two medical reports to establish that they have been diagnosed with gender dysphoria, and one of those reports must contain details of that diagnosis, and of any treatment planned or already undertaken. Clearly, these factors combine legal and medical issues, and the Panel composition is a judge and a medical member (Schedule 1 (4)(5)).
19. I pause to observe at this point that the Act provides for a Certificate to be granted following a documented change from what might be termed the birth gender to what the Act describes as "the acquired gender": that is to say from male to female, or female to male. Non-binary options and gender fluidity do not feature. I express no view about that, but it should be understood that the

Panel applies the Act as it was passed into legislation (including, of course, any amendments).

20. In the case of an application under section 1 (1) (b), "the overseas route" there is no need to produce medical reports; it is necessary only to show a legal change of gender in an approved country or territory. The matter is purely a legal one and may be dealt with by a judge sitting alone (Schedule 1 (5)).
21. The Act (schedule 1 (4)) does not explicitly provide for the number of Panel Members who may sit on applications, save that, as I have explained above, certain applications require both a judge and a doctor. There is, therefore, the possibility that the Panel may be composed of more Members. This has not yet occurred; in a case which involved particular legal or medical difficulty, it would be available.
22. I will return to issues that may involve looking at the wording of the Act again below.

Sitting arrangements

23. I have explained that the Panel sits in Private. This is mandatory: Schedule 1 paragraph 6 (3). I have also said that the jurisdiction is almost exclusively paper-based. Paragraph 6 (4) of the same Schedule provides that applications shall be decided without a hearing unless the Panel considers that one is necessary. Since commencement we have held only two oral hearings. Most cases can be decided on the papers supplied, together with other evidence which the Panel directs to be produced. Only rarely will an issue arise upon which a Panel believes that oral evidence must be heard and probed. That is a matter of judicial discretion exercised by an individual panel, and as such I cannot be prescriptive about the circumstances in which oral hearing might be necessary; however, it may be thought that the extremely low level of such hearings suggests appropriate reticence.
24. The Secretariat prepares a list for hearing by collating the evidence supplied into a bundle for the Panel. In doing so the Team, using its considerable experience, may notice absences or errors in the evidence put forward. In such cases it will hold the case back and write to an applicant to request further information, and frequently that is then forthcoming; thus, the intervention of the Secretariat at that stage may save considerable judicial time in avoiding initial judicial directions and in enabling another case to be listed. The Secretariat notifies the applicant of the date their case will be put before a Panel. Case papers are sent to Panel members over secure judicial email; should further evidence come in prior to the hearing, it is provided to the Panel members.
25. Currently the Panel will "meet" to discuss its list on a secure digital platform. This has been the arrangement since the Covid 19 pandemic. Prior to this Panel members met physically, in Tribunal premises. It remains to be seen whether the current sitting arrangements are considered preferable and continued indefinitely. That may be, ultimately, a matter of personal preference for individual Panels. In a whole Panel online meeting just prior to the Christmas break, which was convened to take soundings about such matters, members were unanimous in their view that the online meetings work particularly well in the context of this jurisdiction.

26. A case may be listed for a first consideration, or it may have been before a Panel previously and directions given for further evidence. Each case on the list will be discussed in turn. The applications generally fall into those which can be granted on the current evidence, and those in which directions (or further directions) are required. My own practice is to make notes about each case as they are discussed, and to write up the various decisions or directions together, following the deliberations. The Determinations and Directions are emailed back to the Team, who issue them to the applicants.

Other aspects of the process, including Directions

27. Sometimes, eliciting the correct documentation to permit the grant of a Gender Recognition Certificate is a long process; Panels may give Directions as to what is required on a number of occasions, and applications are only rarely rejected. When they are, it is, in my experience, generally due to a sustained lack of co-operation with directions to produce relevant documents.
28. This is a judicial process, and judges don't write letters to litigants as the Secretariat does. We communicate by way of Directions which can perhaps look over formal, although we try to word them in a user-friendly way. For example, my own practice is to make Directions in the first person, and state clearly that if there is anything that is difficult to understand, the Secretariat will assist: the Secretariat knows that it can contact judges directly if it has any queries.
29. The Act states (section 3) that an applicant must produce at least one report from a doctor or clinical psychologist practising in the field of gender dysphoria. One of my duties as President is to maintain a List of Specialists. The first President began the List with the assistance of the Chief Medical Member Dr Jane Rayner; under paragraph 6 (5) of Schedule 1 the President is empowered to make directions about the practice and procedure of the Panel. Of course new people move into this field of medicine, as with any other, and the List is not exhaustive, but is for the practical assistance of Panels when sitting: it is a convenient check to see if somebody who, by the report they have written seems to be practising in the field, is. If they are not on the List, we can make enquiries of the GMC register or the Clinic itself, and reports can be accepted from someone who is practising the field but is not on the List. We encourage practitioners in the field to write to us with a CV and a letter from a colleague, and, where appropriate, on the advice of the Chief Medical Member I will arrange to have them placed on the List. There is a reference to the List on the GRP website https://www.gov.uk/apply-gender-recognition-certificate for the convenience of those applying, together with the caveat that it is not exhaustive.

Applications under section 1 (1)(b): "the overseas route"

30. Section 1 (1)(b) of the Act provides for the recognition of gender change abroad. Under what is known as "the overseas route" there is no need for the applicant to produce medical reports; it is necessary only to show a legal change of gender in an approved country or territory. The matter is purely a legal one and it may be dealt with by a judge sitting alone (GRA schedule 1 (4)(5))

31. I have said above that rejection of applications is unusual, save where applicants continually fail to produce required documents. The other circumstance in which applications fall be rejected is due to a misunderstanding on the part of many applicants under the overseas route about what constitutes gender change in another country.
32. Firstly, as is the case in the UK, it is possible in many other countries for those transitioning to obtain documents, including passports, in their acquired gender. This does not necessarily constitute legal gender change. We often see overseas applications where a person has effected social change, and has documentary evidence to that effect, but has not undergone the processes in that country to effect formal legal change.
33. Further, the GRA does not recognise all legal gender change abroad. There is provision within the Act for an Order indicating the countries where, if legal gender change has occurred, that is recognised for the purposes of the overseas route under the GRA. The Order referred to is a UK Statutory Instrument, The Gender Recognition Approved Country and Territory Order 2011 SI 2011/1630 (hereafter the Order). The current Order revoked, remaking with amendments, an earlier similar Order, made in 2005.
34. A country is not an approved country or territory unless it appears in the Order, and the contrary applies. In amendments to the Order certain countries have been added to the approved list, and others removed from it. The Gender Recognition Panel works within the statutory framework, which means it applies the Act and the current Order even where countries mentioned in the order change their gender recognition processes. [Any change to the Order is under the affirmative resolution procedure].

Appeals

35. There is a right of appeal from decisions refusing an application. Although we sit more naturally within Tribunals, appeals, rather than being to the Upper Tribunal, are to the High Court, or in Scotland the Court of Session. The appeals are only on a point of law (Section 8); that means they must involve more than just disagreement with the facts that the Panel finds. I believe there have been only three appeals.
36. The Panel has been aware of the disquiet expressed by some trans people about the need to show a diagnosis of gender dysphoria and details of it, and details of surgery undergone or planned; however, the Panel is a judicial, not an administrative process, and as such we need to assess the evidence in light of the statutory provisions.
37. Two cases have confirmed this interpretation of the GRA, and the Panel's procedure on these issues. *Re HW (HW v Gender Recognition Panel)* [2008] CSIH 6 and *Carpenter v Secretary of State for Justice* [2015] EWHC 464 (Admin)).
38. An appeal to the Court of Session in Scotland in *Re HW* accepted the then GRP President's Guidance document (issued under paragraph 6 (5) of Schedule 1 and published on the GRP website) as to what medical reports needed to contain (on interpretation of the Act). The Court said:

"The provisions of the Act to which we have referred make it clear that Parliament did not intend the Panel to carry out a rubber-stamping exercise involving the

unquestioning acceptance of the diagnosis provided. The Panel's task is to scrutinise applications, and it is for the Panel to decide what information it requires in order to do so, (see section 3(6)(c)). The requirement imposed by section 3(2) is clearly intended to mean more than the provision of a mere statement of the diagnosis. Its purpose is to enable the members of the Panel to satisfy themselves from the details given in the medical report that the diagnosis of the applicant's gender dysphoria is soundly based."

39. In a freestanding application to the High Court of England and Wales in *Carpenter,* where a GRC had been granted following medical details being provided, Dame Kate Thirlwall decided that Ms Carpenter's human rights to privacy were not infringed by having to put such information before the Panel; neither was she discriminated against under the European Convention of Human Rights in having to provide such details. In the course of her judgment she said at [25]

The far-reaching effects of the decision to grant (or to refuse) require that it is made on the basis of full information in respect of each applicant (whether he or she has undergone surgery, other treatment or not). Where an applicant has undergone surgery, or plans to do so, that fact is highly relevant, if not central, to his or her application. It is plainly necessary to the Panel's consideration of the criteria in section 2(1) (a)-(c).

40. Members of the Committee will know that there have been a number of High Court cases with transgender elements, for example in respect of a decision of the Passport Office as to its having a binary approach to gender stated on passports, and whether a trans man who has had a baby can be registered as the father rather than the mother of the child. It is important to recognise that these are not appeals against Panel decisions, but freestanding cases brought under the jurisdiction of the High Court, which do not touch upon the work of the Panel, save that some of those involved may have made applications for a GRC.

Granting a Gender Recognition Certificate

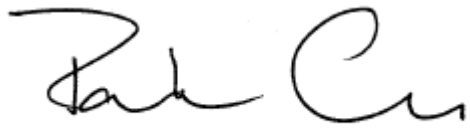
41. The purposes and effects of a GRC are set out in the Act between sections 9 and 21. I do not repeat them here.
42. Where an applicant is party to a subsisting marriage or civil partnership which is not "protected", only an interim certificate can be granted, the purpose of which is to provide grounds for the dissolution of that legal relationship. I discuss that above. The Court dealing with the dissolution then has the power to grant a full certificate (sections 5 and 5A).
43. Following the Panel determining that a GRC should be granted, the decision is communicated to the applicant by the Leicester office, and, if the applicant wishes, HMRC is notified of the formal change. The Certificate itself is then prepared. This is a physical document which is sent out via registered (and unidentifiable) post. It carries a Watermark/Hallmark so that it can be identified as genuine.

Statistics

44. GRP statistics are published quarterly, together with HMCTS Tribunal statistics. In preparing this document I had asked the Secretariat to put together a broader statistical picture than is available from the three-month figures. I heard just today that the Team leader who would have done that is off sick. In the circumstances I have extrapolated the GRP figures from the most recent quarterly document [available at https://www.gov.uk/government/publications/tribunal-statistics-quarterly-july-to-september-2020/tribunal-statistics-quarterly-july-to-september-2020.] I will provide further figures, I hope in annualised form over a few years so that comparisons may be made, as soon as I am able.

Other issues

If there are any other issues about which I may be able to assist, do please contact me. Your Clerk has my personal judicial email address.



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