UPPER TRIBUNAL JUDGE GRAY

PRESIDENT

GENDER RECOGNITION PANEL

Second Response to the Women and Equalities Committee regarding the inquiry into the Reform of the Gender Recognition Act.

I write in response to your letter asking certain questions, which I deal with below. I am also now able to supply the statistics I referred to in my first report. The link is to the figures from the Panel inception in 2005. Applications came in following the introduction of the Act in 2004, but the Panel began to decide them from April 2005.

https://www.gov.uk/government/statistics/tribunal-statistics-quarterly-july-to-september-2020

The link takes you to the Tribunal Statistic Quarterly July to September 2020 page. These are general statistics, and the GRP statistics are at the third document, Main Table (July to September 2020). If you scroll down and click on GRP there are 5 tabs at the bottom of the page which show tables named GRP1-GRP5.

GRP1 applications received and disposals by outcome from 2004/05

GRP2 applications received by type and track from 2009

GRP3 applications by track and outcome from 2009

GRP4 gender at birth/year of birth (by spreads)/marital status for full certificates granted

GRP5 interim certificates converted to full

All these statistics are, and have been, in the public domain. In brief they show the following picture over the whole period:

6699 applications

5745 full certificates granted

220 interim certificates granted. 164 were made into full certificates by a court following divorce (but see Tab 5 and the footnote with a qualification as to the accuracy of that figure which will be corrected in the next available statistics.)

292 applications refused

139 withdrawn

38 not progressed because the fee was not paid

14 registered in error (registered on the wrong track and dealt with, but they are termed a statistical error)

6448 total disposals (out of 6699 intake)

251 shortfall which are the 'live' applications i.e. awaiting decisions. These may not have been before a Panel, or they may have had one or more Panel directions.

Perhaps of note given my previous evidence

The above figures refer to the total applications and include:

215 overseas route applications of which

140 granted

36 refused

22 withdrawn (the remainder dealt with under the standard route).

40 "alternative route" applications: post-2014 where married with spousal consent, and having lived six years in the acquired gender, only one medical report is required.

These are only the headline figures which I thought might be helpful to collate.

As to fee remission, I am told that the GRP does not keep these statistics, but the fee is remitted where an applicant is in receipt of a qualifying Social Security benefit.

I now turn to the questions you asked in your letter of 21 January. I set out the relevant question or questions in bold before my answer.

Appointments to the Panel
The Gender Recognition Act requires only a "relevant legal qualification" and does not specify judicial appointment. Do you consider that other legal professionals might be suitable for appointment, and if so, which ones?

The judges on the Panel do come from a variety of legal backgrounds, but this is not their first judicial appointment: the limited requirements of this small jurisdiction have been met by capacity within those already appointed to judicial office, and who continue to sit in other jurisdictions which maintains their general judicial skills. Assignment of existing judges and expert tribunal members is common practice within the judiciary. It both satisfies a need and provides career development opportunities for sitting judges. The judicial capability is necessarily small: it must be able to cope with the intake within a reasonable time, allowing each panel member to sit sufficiently often to keep up a good skill base. The process is, as is usual for an assignment, based on Expressions of Interest made in response to an internal advertisement. They are then sifted by existing Panel Members, and interviews are held. You are aware of the Statutory procedure as to the Appointment that follows selection.

Whilst it is not specified in the legislation, in practice, is it a requirement for Panel members from both the legal and medical professions to have

any knowledge or understanding of transitioning or the process of legally transitioning, prior to their appointment?

The background of those applying is considered, and experience within the area, or personal experience is thought to be helpful, although is not a requirement. Some of our medical members, both current and retired, have practised in the field. Their professional experience informs our training as well as their own sittings. It would be inappropriate, given the small number of members, for me to detail any personal experience.

Decision-making powers of the Panel

Your letter specifically mentions training. Does any written guidance exist to assist panel members in making decisions on applications?

I append the President's Guidance Document. This was not written to guide the judiciary, but as a public facing document. It has judicial approval, as I detail in my previous response (see *HW* and *Carpenter*). The approach set out in those cases, as legal precedent, must be followed by the Panel.

Judicial training is not prescriptive, given judicial independence, but it emphasises that the Panel has always adopted an approach which gives applicants time to provide the documents required.

As you point out, schedule 1, paragraph 6 (4) of the GRA states that "A Panel must determine applications without a hearing unless the Panel considers that a hearing is necessary". In your written evidence you highlight that since commencement, the Panel has "held only two oral hearings". While we appreciate that whether such a hearing is necessary in any given case is a matter for judicial discretion, what factors would the Panel take into account in deciding whether an oral hearing is necessary?

In using the word "necessary" the Act sets a high bar before an oral hearing can be directed: the default statutory position is a hearing in private and on the papers alone. The existence of an important factual issue is likely to determine the need for an oral hearing. For example, some applicants have had a number of names other than their birth name, and, unusually, where somebody is unable to establish their identity by means of a paper trail of such names, oral evidence may be required.

How do you feel you can make an informed decision about applications if you do not meet the candidates personally?

Many legal cases are determined without an oral hearing. Panel members are used to this. We generally have detailed medical evidence which gives us a full picture of the applicant, frequently from their early years, and often applicants expand on the evidence from professional sources by writing us letters. Although GRP cases have an intensely personal element, the decision-making aspect is based upon whether the provisions of the Act are met, and the Act is prescriptive in what needs to be shown to obtain a certificate. It is not a matter of discretion, and therefore arguments do not need to be persuasive; we simply need to examine the written evidence that the Act demands.

Some of the written evidence we have received argues that the Panel goes beyond the powers given to it in the GRA, as it requires applicants to use the Panel's own list of "approved medics and rejects reports from those who are not on their current list"? It appears from your evidence that this is not the case.

I confirm that it is not the case, and the information on the website says that. I explain more about the List below, and the circumstances in which it may be consulted, but the starting point as to medical evidence is section 3 of the GRA, which reads:

(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.

The Panel must identify one medical report as coming from either a registered medical practitioner (a doctor) or a registered psychologist practising in the field of gender dysphoria. The List is an aide memoire so the Panel, when sitting, can know at a glance whether a report by a practitioner whose name they don't recognise from prior experience, comes from a practitioner within the field. If a name is not on the list the Panel will check by other means. If necessary, the Secretariat will contact the clinic or the practitioner directly to ask if they practice in the field. In those circumstances the Secretariat might suggest that they contact us to ask to be put on the List, but there is no obligation to do so.

Sometimes applicants tell us that they are unable to provide the required reports from practitioners in the field. That is typically because their transition occurred many years ago and they no longer have records.

Another situation concerns those who apply under the overseas route. Some cannot establish legal gender change abroad. In such cases the Panel may suggest that it treats the application as made under section 1(1)(a). If that is requested, they are told what medical evidence must be produced.

Under UK law "registered medical practitioner" means a fully registered person within the meaning of the Medical Act 1983 who holds a licence to practise under

that Act, and "registered psychologist" refers to registration by the Health Care Professionals Association, so reports from overseas practitioners not so registered do not satisfy the evidence requirement under section 3; neither will reports from other professionals, and I cover that point in more detail in my answer to the next question. Some people have operations to change their sexual characteristics abroad and produce reports from overseas clinicians which do not satisfy the evidence requirements.

The Secretariat may point an applicant to the List to provide a starting point for a medical professional to consult in relation to the application. There is certainly no requirement to use a practitioner on the List, and it is a misunderstanding if anyone has thought so.

Is it common for the Panel to reject reports, and if so, on what grounds?

The Panel would never wholly reject a report, even from an overseas practitioner because even though cannot provide the medical evidence needed under section 3 it may provide useful background evidence. However, in addition to the registration issues that I mention above, some UK reports that we are given may not satisfy the evidence requirements of the Act; for example, they may come from a member of a Team in a Gender Identity Clinic who is neither a doctor nor a registered psychologist. A specialist nurse, a psychotherapist or a counsellor may have been involved in the patient's care, but a report from such a person is not the evidence required under the Act. In those circumstances we would make Directions explaining the problem and asking for a report that is compliant.

An otherwise compliant report may lack the detail that the Act and the caselaw require. Directions would also be made in those circumstances. Ultimately if compliant reports are not provided an application might have to be rejected, but, as the figures show, that is unusual.

Can you elaborate on how many practitioners are on your list and what criteria the Panel uses to assess the suitability of those practitioners once the CV and letter from a colleague are submitted?

I am attaching a copy of the List, which is also hyperlinked on the website. There are no criteria: the Act simply says that the person must be practising in field. I refer letters to the Chief Medical Member Dr Jane Rayner who is in a better position to assess that than am I. I am not aware of any refusals during my tenure as President, save those submitted by other members of the team in a Clinic who do not satisfy the criteria as I explain above.

The operation of the Panel

How often does the Panel meet to review applications and how is this timetable decided?

Although listing is a judicial function, in practice the frequency is decided by administrative colleagues who have targets to aim for. I believe that the current target in relation to GRP cases is that they should go before a Panel within 20 weeks of receipt. This target is not only routinely met but frequently bettered. Because it depends upon the number of applications waiting to be decided the number will vary,

but generally there are two sittings a month. If an additional session is required, the Team schedule it.

How many Panel members will review applications processed via the 'Standard Route'?

Two. A judge and a medical member sit on all panels except those under the overseas route: whether formal gender change is shown in an Approved Country is a legal issue without medical aspects. If the application subsequently becomes a standard route application (see the circumstances I refer to above) and medical evidence needs to be considered, then we would convene as a two-person panel.

How frequently would the whole Panel meet, and what matters would require a meeting of the whole Panel?

Generally the whole Panel only comes together for training sessions, which are used as opportunities to exchange views on any matters that might crop up or be up of interest; however, at the end of 2020 we held a virtual meeting, largely to exchange views about the way in which the sittings were working remotely.

How has the COVID-19 pandemic impacted the Panel's ability to review applications, other than moving the review process to a digital platform?

There has inevitably been some effect due to staff shortages. At the outset HMCTS needed to enable administrative staff to work from home. This was accomplished surprisingly quickly. The Leicester team also deal with work from other tribunals, and with staff spread more thinly in all areas there were some delays; however, the system continues to work well at this difficult time.

You mention that the Panel are keen to continue reviewing applications via a digital platform in future. Will the Government's decision to move the process online affect the way in which this works?

I don't think so. I have been in preliminary discussions through GEO with those who are looking at the design of the new process, and obviously use by the judiciary will be a factor in that. The purpose of digitalisation is to make things easier for applicants, and I am told that (in common with much other digitalisation in legal proceedings) provision will be made for those who cannot or prefer not to use a digitalised process. Currently the paper documents sent in with the application are scanned by the Team into an electronic bundle. I imagine the Panel will continue to receive "the papers" in that digital form and send our decisions or directions back to the Leicester team by secure (judicial) email.

Outreach

In your written evidence, you mention the Panel's User Group. How do you choose those who are part of this User Group and what is the purpose of the Group?

User Groups are quite usual in the legal arena. It was set up so that people who were not just single users could tell us what practical steps might be taken to improve the process. Of course, this could not include any dilution of the evidence requirements under the Act. The Secretariat had a list of representative groups at the time, and they were invited to send delegates. Sometimes those groups have suggested others who may have useful views. Treating clinicians in the major clinics are also invited. There is always an explanation at the beginning of the meeting that individual cases or situations can't be discussed. The Panel President is generally in attendance, along with the Chief Medical Member. I sometimes attended when I was Deputy President. Members of the administrative team also come and are frequently the best people to answer questions about the process and any practical difficulties. Sometimes the judges have been able to clarify misunderstandings that have arisen about general legal issues, much as I have tried to do here. I recall particular queries and concerns at the time of the changes to the Act surrounding protected marriages. It is of course a gathering that needs to be limited for practical reasons, and it is only useful for organisations or representatives because we deal with systemic rather than individual matters.

As highlighted above, transparency of the Panel is a major concern that has been raised to us in written evidence. Written evidence also highlights it is one of the main reasons some trans people are discouraged to apply for a GRC. What, if anything, is the Panel doing to make itself less opaque?

The Panel's work is of the utmost sensitivity and we are subject to two important statutory duties which are to (a) sit in private; and (b) keep the information that we consider, which is highly personal and involves confidential medical detail, private. The seriousness which Parliament places on this duty is shown by the fact that the Panel and its members would be subject to criminal sanction for revealing details that might lead to somebody being identified. It is simply not possible for the Panel to be as public facing as courts are in some jurisdictions, for example in a criminal court.

The website, however, is transparent. It hosts the application forms and sets out a full explanation of the application process and procedure with Guidance which provides a road map through the various routes to a Certificate. It has a direct email link to the Leicester Team enquiries and the telephone number. There are links to the relevant documents including the Approved Countries List, and the List of medical professionals that we know to be practising in the field (together with an explanation that reports from other professionals in the field are acceptable). Rights of appeal from a Panel decision are set out.

It has been said that we do not give reasons for our decisions. That is wrong. When an application is granted detailed reasons are unnecessary: the application is granted because it meets the statutory requirements, and that is stated. When an application is refused, detailed reasons are given: the right of appeal on a point of law could not be effective without them. Reasons are only supplied to the parties and not published, because of the privacy imperative.

Evidential requirements

What evidence does the Panel require in order for an applicant to prove they have lived in their 'acquired gender'?

The Act requires that the applicant has lived in their acquired gender throughout the period of two years ending with the date the application is made, so we ask for documentary evidence which spans that period. It may be correspondence addressed to the applicant in their acquired gender (for example, Miss Jane Smith, rather than simply J. Smith), documents such as passports and driving licences on which those who transition have generally changed their name, correspondence from HMRC, DWP or other bodies, payslips, utility bills, academic certificates and the like. Not all these documents are needed, just a selection. Examples such as these are set out on the website.

The cost of the application
Are you able to clarify what the application fee is used for and whether it reflects the true administrative costs of an application? Are there circumstances in which applicants can get a refund?

I'm afraid that these questions are outside my remit, although I understand that if an application is withdrawn the fee is refunded. There is a fee remission scheme, but it is not specifically a GRP scheme and the statistics are not kept. The fee is remitted if the applicant is in receipt of a qualifying (means tested) Social Security benefit.

I hope the above is of assistance,

Paula Gray

February 2021