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Citation: Hamilton, Frances (2019) Development of EU Law before the Grand Chamber of the EU to Benefit Transpersons. *International Labor Rights Case Law*, 5 (3). pp. 335-339. ISSN 2405-6901

Published by: Brill

URL: <https://doi.org/10.1163/24056901-00503017> <<https://doi.org/10.1163/24056901-00503017>>

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International Labor Rights Case Law_Template for Commentaries

Author Name:	Frances Hamilton
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Decision-making body:	Grand Chamber of the Court of Justice of the European Union (CJEU) acting on a preliminary reference from the Supreme Court of the United Kingdom
Date of Decision:	26 June 2018
Case/Decision name:	<i>MB v Secretary of State for Work and Pensions</i> , Case C-451/16
Primary legal issues:	Key words: transpersons, UK Gender Recognition Act 2004, conditions for gender recognition in acquired gender, state pension age and nondiscrimination.
Applicable legal provisions:	<p>EU Law</p> <p>Art 3, 4(1) and 7(1)(a) of Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security (OJ 1979 L6 p24).</p> <p>Article 2(1)(a) of the Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (OJ 2006 L 204 p23)</p> <p>United Kingdom Law</p> <p>Section 44 of the Social Security Contributions and Benefits Act 1992 read in conjunction with section 122 of that Act and with Schedule 4 paragraph 1 of the Pensions Act 1995</p> <p>Sections 1, 2, 3, 4(2) and 5 of the Gender Recognition Act 2004 ('the GRA')</p> <p>Schedule 5, paragraph 7 GRA</p> <p>Section 11(c) of the Matrimonial Causes Act 1973</p> <p>The Marriage (Same Sex Couples) Act 2013</p>
Hyperlink to case:	https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62016CJ0451
Related cases, if any:	<p>CJEU, <i>K.B. v. National Health Service Pensions Agency and Secretary of State for Health</i>, Case C-117/01, 7 January 2004</p> <p>CJEU, <i>Sarah Margaret Richards v. Secretary of State for Work and Pensions</i>, Case C-243/04, 27 April 2006</p> <p>ECtHR, <i>Christine Goodwin v. The United Kingdom</i>, Application no. 28957/95, 11 July 2002</p> <p>ECtHR, <i>Hamalainen v. Finland</i>, Application no. 37359/09, 16 July 2014</p>

	<p>ECtHR, <i>Schalk and Kopf v. Austria</i>, Application no. 30141/04, 24 June 2010</p> <p>ECtHR, <i>Oliari v. Italy</i>, Applications nos. 18766/111, 36030/11, 31 July 2015</p> <p>CJEU, <i>Relu Adrian Coman, Robert Clabourn Hamilton, Asociația Accept v. Inspectoratul General pentru Imigrări, Ministerul Afacerilor Interne</i>, C-673/16, 5 June 2018</p> <p>ECtHR, <i>AFFAIRE S.V. c. Italie</i>, Application no. 55216/08 11 October 2018</p>
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Paragraph/page numbers to be extracted from decision/case:	Paras. 37i53
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<p>Summary of decision: facts/arguments of the parties/ final decision/ motivation (approx. 250 words; opinions about the judgment must be avoided):</p>	<p>This case—<i>MB v. Secretary of State for Work and Pensions</i>—concerned a transperson who was born male and subsequently married a woman in her birth sex. Seventeen years after the marriage, the applicant underwent sex reassignment surgery but never received a full gender recognition certificate because the UK’s Gender Recognition Act 2004 (GRA) required married applicants to annul their marriage in order to obtain more than an interim certificate. Because MB did not wish to annul her marriage, she never received the full gender recognition certificate. When she subsequently sought to claim her state pension at the age of sixty, which applicable to women, her claim was rejected because the UK government still officially classified her as a male.</p> <p>The argument made on behalf of the UK Secretary of State for Work and Pensions was that it should be for Member States “to determine the conditions under which a person’s change of gender may be legally recognised.” This, it was argued, should relate not only to physical and psychological criteria, but also to criteria relating to marital status and that this should be within the scope of the UK’s discretion. The Grand Chamber of the Court of Justice of the European Union determined that the requirement to annul an existing marriage in order to obtain a full gender recognition certificate, subsequently entitling the applicant to access her state pension at the younger age applicable to women, contravened Article 4 Council Directive 79/7/EEC on the basis of sex discrimination.</p>
Title of Commentary:	Development of EU Law Before the Grand Chamber of the EU to Benefit Trans Persons

Context

In *MB v. Secretary of State for Work and Pensions*, the Grand Chamber of the European Court of Justice (CJEU) determined that the UK's Gender Recognition Act 2004 was discriminatory under Article 4 Council Directive 79/7/EEC in its requirement for a transperson to annul an existing marriage in order to gain access to a full gender recognition certificate and related state pension benefits in their acquired sex.¹ This case demonstrates the CJEU's commitment to nondiscrimination in state pension provisions.

The case in hand considered the relevant provisions of UK state pension provisions, which prior to pension reform had different age requirements for each sex regarding access to state pensions, with women accessing pensions from age sixty and men from age sixty-five.² According to Schedule 5, paragraph 7 GRA, state pension eligibility is determined by a full gender recognition certificate.³

The 2002 European Court of Human Rights (ECtHR) judgment in *Christine Goodwin v. UK* found a violation of Article 8 (right to a private life) and Article 12 (right to marry) under the European Convention on Human Rights (European Convention) when contracting states did not give legal rights to transpersons in their new sex, including a right to marry.⁴ The judgment, however, allowed contracting states to place strict access conditions on obtaining legal gender recognition in their acquired sex.

The UK Gender Recognition Act 2004 (GRA) included onerous requirements that transpersons needed to annul an existing marriage in order to obtain the full gender recognition certificate.⁵ The basis for this requirement was that at the time the UK had legislated only for civil partnership, not same-sex marriage.⁶ If transpersons were not required to annul their existing marriage, they would otherwise have been in an illegal same-sex marriage. However, for transpersons the requirement is a "painful and sensitive decision."⁷

In *MB*, the applicant had been married for seventeen years before gender reassignment surgery and never obtained a full gender recognition certificate because she did not wish to annul her marriage. Subsequently, when she came to claim her state pension in 2008, she could not do so because she did not have a full gender recognition certificate.⁸ Had she been legally recognized in her acquired gender, she would have been able to access her state pension beginning at age sixty. Following the legalization of same-sex marriage by the Marriage (Same Sex Couples) Act of 2013, transpersons can now remain married and still obtain a full gender recognition certificate and thus access to the state pensions at the age of their acquired gender providing their spouse consents.⁹ However, the Marriage (Same Sex Couples) Act of 2013 is not applicable to the dispute in *MB* because the applicant was seeking to claim her pension in 2008, prior to this vital law reform.

Importance of the Decision

¹ CJEU, *MB v. Secretary of State for Work and Pensions* Case, Case C-451/16, 26 June 2018.

² Section 44 of the Social Security Contributions and Benefits Act 1992 read in conjunction with section 122 of that act and with Schedule 4 paragraph 1 of the Pensions Act 1995

³ Schedule 5, paragraph 7 GRA.

⁴ ECtHR, *Christine Goodwin v. The United Kingdom*, Application no. 28957/95, 11 July 2002.

⁵ Sections 4 and 5 GRA.

⁶ For example, then Minister for Women and Equality Jacqui Smith stated, "I recognise that Hon. Member son both sides of the House understand and feel very strongly about specific religious connotations of marriage" (see Hansard, HC, 12 October 2004, col. 177). **[need more information: full name of Hansard, publication identification and full detail]** NB – This is a full reference to a Parliamentary debate – Hansard is the name of the recording body of Parliament debate.

⁷ For discussion, see comment by Sarah Matthews in "Divorce for Gender Change" *The Journal*, 19 October 2019, URL. <http://www.journalonline.co.uk/Magazine/54-10/1007115.aspx>.

⁸ Schedule 5, paragraph 7 of the GRA.

⁹ Schedule 5, GRA.

Ultimately, the CJEU determined that the GRA was discriminatory on the basis of sex and contrary to Article 4 of Council Directive 79/7/EEC. The UK Secretary of State for Work and Pensions had argued that it should be within the Member States' discretion to determine all matters relating to a change of gender, including not only physical and psychological criteria, but also that relating to marital status.¹⁰ The CJEU responded by asserting its authority to determine that although Member States did have discretion over the legal recognition of change of gender, the CJEU had power to consider the question of nondiscrimination in regard to the administration of state pension schemes, even when this concerned a transperson's right to obtain a state pension in their acquired gender.¹¹ In concluding that Council Directive 79/7/EEC did preclude legislative requirements such as those stated by the GRA, the CJEU has made a benchmark statement in international and EU labor law and the treatment of GLBT persons and their rights to state retirement pensions on a nondiscriminatory basis. This reverses the previous position determined in cases such as *KB* and *Richards*.¹²

Analysis

In terms of the wider implications of the *MB* judgment, one of the key questions to determine is to what extent the CJEU will preserve discretion for individual Member States, in questions concerning recognising legal change of gender. As set out above this was one of the important arguments set forth by the UK in *MB*.¹³ In this context, the UK government relied upon previous case law from the CJEU to support its position that a wide area of discretion should be given to contracting states. Reference was made by the UK government to *K.B. v. National Health Service Pensions Agency and Secretary of State for Health* and *Sarah Margaret Richards v. Secretary of State for Work and Pensions* where it was upheld that Member States had power to determine conditions regarding legal change of gender.¹⁴ The *MB* judgment case therefore represents a departure from this previous line of cases.

This judgment also demonstrates the willingness of the CJEU to extend the reach of nondiscrimination requirements in EU law. Previous case law demonstrated that sexual orientation would not fall within a sex discrimination ground.¹⁵ This corresponded with a strict view that only recognized traditional family formats, and stressed subsidiarity concerning recognition of LGBTQ+ families.¹⁶ The *MB* judgement demonstrates that CJEU now clearly recognizes transpersons as being able to benefit from the progressive implementation of the principle of equality between sexes in matters of social security.¹⁷ Other recent EU legislation also clearly seeks to protect LGBTQ+ persons. Of prominence here is

¹⁰ *MB*, para. 23.

¹¹ *MB*, para. 27

¹² CJEU, *K.B. v. National Health Service Pensions Agency and Secretary of State for Health*, Case C-117/01, 7 January 2004, and CJEU, *Sarah Margaret Richards v. Secretary of State for Work and Pensions*, Case C-423/04, 27 April 2006.

¹³ *MB*, para. 23.

¹⁴ *Richards*, para. 21; *KB*, para. 35.

¹⁵ See, for example, *Grant v. South West Trains*, Case C-249/96, (1998) 1 CMLR 993. This decision was heavily criticized. For discussion, see Dimitri Kochenov, "On Options of Citizens and Moral Choices of States: Gays and European Federalism," *Fordham International Law Review* 33(1)(2009): 156, 175 referring to Nicholas Bamforth, "Sexual Orientation Discrimination after *Grant v South-West Trains*," *Modern Law Review* 63 (2000): 720.

¹⁶ Citizenship Directive 2004/38 Article (2(2)) provides that family member means "(b) the partner with whom the Union citizen has contracted a registered partnership on the basis of the legislation of a Member State if the legislation of the host Member State treats registered partnerships as equivalent to marriage and in accordance with the conditions laid down in the relevant legislation of the host Member State." Commentary on Article 9 of the Charter of Fundamental Rights of the European Union provides that "There is, however, no explicit requirement that domestic laws should facilitate such marriages. International courts and committees have so far hesitated to extend the application of the right to marry to same-sex couples." The position is now transformed following the high profile case of *Relu Coman* (CJEU, Case C-673/16, 5 June 2018).

¹⁷ See *MB*. **[need paragraph in MB or strike note altogether]** This is my summary comment on the case and not a specific reference to a paragraph number. Readers may like to look up the MB case, which is why I put in a general reference to the case overall. If you do not like this approach, please delete this note altogether.

Article 21 of the Charter of Fundamental Rights of the European Union 2000, which specifically includes sexual orientation as a protected ground of discrimination.¹⁸ Opportunities for growth of nondiscrimination rights in this area are clear, some academics arguing that this amounts to a rights revolution.¹⁹

Repercussions are also possible for EU family law generally. In *MB*, although the CJEU confined its decision to nondiscrimination in state pension age,²⁰ its actions suggest a willingness to go beyond the traditional area of discretion awarded to Member States.²¹ This follows the recent high profile case of *Relu Coman and Others v. Inspectoratul General pentru Imigrari and Others*, when the CJEU extended the rights of residence of non-EU citizen same-sex spouses to allow them the right of permanent residence when their EU citizen spouse relocates to a different state in the EU.²² This applies even when the country they are moving to does not recognize same-sex marriage. The *MB* judgment also makes it clear that the CJEU is prepared to go beyond arguments made on the basis of the European Convention on Human Rights before the ECtHR. The ECtHR continues to award a large memorandum of agreement (MoA) to Member States in sensitive issues of family law where LGBT persons are concerned.²³ In consideration of the specific challenge around the legal recognition of acquired gender being conditional upon annulment of that person's marriage, the ECtHR has continued to allow contracting states an MoA (see, e.g., *Hamalainen v. Finland*).²⁴

Conclusions

The CJEU ruling in *MB* is a strong judgment on the rights of transperson citizens to state pensions in their acquired gender. It also demonstrates future implications for EU labor law as well as within the wider field of EU family law. Nondiscrimination provisions are increasingly being interpreted widely and being given greater prominence in EU legislation and in EU labor law cases. Of prominence here is the EU Charter of Fundamental Rights, in which discrimination on the grounds of sexual orientation is specifically listed as a protected ground of discrimination.²⁵ Understanding of the role which the CJEU is prepared to play in relation to EU family law cases is also widening. Alongside the *Coman* judgment, the *MB* case represents a further intervention by the CJEU in the development of rights for LGBTQ+ individuals.

¹⁸ Charter of Fundamental Rights of the European Union 2000/C 364/01, Article 21(1).

¹⁹ For discussion, see Mark Dawson, Elise Muir, and Monica Claes, "Enforcing the EU's Rights Revolution; the Case of Equality," *European Human Rights Law Review* 3 (2012): 276.

²⁰ *MB*, para. 27.

²¹ See Frances Hamilton, "*MB v. Secretary of State for Work and Pensions* [Case C-451/16] Further Development from the European Court of Justice of Rights for LGBTQ Persons' (2019 Jan) *Fam Law* 54-56 **[what publication or website? need to cite] Further details included**

²² CJEU, *Relu Coman and Others v. Inspectoratul General pentru Imigrari and Others*, Case C-673/16, 5 June 2018, para. 56.

²³ See ECtHR, *Oliari v Italy*, Applications nos. 18766/11 and 36030/11, 31 July 2015, para. 174. ECtHR, *Schalk and Kopf v Austria*, Application no. 30141/04, 24 June 2010, para. 105.

²⁴ ECtHR, *Hamalainen v Finland*, Application no. 37359/09, 16 July 2014.

²⁵ See Charter of Fundamental Rights of the European Union 2000/C 364/01, Article 21(1).