

AB v. STATE OF WESTERN AUSTRALIA & ANOR (P15/2011)
AH v. STATE OF WESTERN AUSTRALIA & ANOR (P16/2011)

Court appealed from: Court of Appeal of the Supreme Court of Western Australia
[2010] WASCA 172

Date of judgment: 2 September 2010

Date special leave granted: 8 April 2011

Each appellant applied (in 14 November 2007 and 11 April 2008, respectively) to the second respondent, the Gender Reassignment Board of Western Australia (“the Board”), for the issue of certificate pursuant to section 15 of the *Gender Reassignment Act 2000 (WA)* (“the Act”) recognising the reassignment of their gender from female to male. The Board refused both applications, concluding that neither appellant was able to satisfy the second limb of the requirement in s15(1)(b)(ii) of the Act, which requires that the person “has the gender characteristics of a person of the gender to which the person has been reassigned”. The Act in section 3 defines “gender characteristics” to mean “the physical characteristics by virtue of which a person is identified as male or female”. Both appellants had undergone subcutaneous bilateral mastectomies and were receiving testosterone therapy. Both retained their female reproductive system but were rendered effectively infertile while they continued the testosterone therapy. The Board concluded that neither could be identified as male because the fact of having a female reproductive system was inconsistent with being male.

The State Administrative Tribunal (“the Tribunal”) set aside these decisions. The Attorney-General intervened in those proceedings and the Board submitted to the Tribunal’s jurisdiction. The Tribunal concluded that the presence of female reproductive organs alone, in circumstances in which there was no longer a capacity to bear children and no real prospect of that changing in the future, did not outweigh the other physical characteristics by virtue of which each appellant is identified as male.

The Court of Appeal by majority (Martin CJ and Pullin JA, Buss JA dissenting) allowed the appeals, set aside the Tribunal’s decisions and ordered that the decision of the Board to refuse the applications for certificates be reinstated. Martin CJ and Pullin JA, in separate reasons, concluded that because the appellants possess none of the genital and reproductive physical characteristics of a male, and nearly all of the normal external characteristics and internal reproductive organs of a female, they would not be identified, according to accepted community standards and expectations, as members of the male gender. Buss JA in dissent held that “physical characteristics” (in the definition of “gender characteristics” and “reassignment procedure”) are confined to external physical characteristics and do not include internal physical characteristics. His Honour observed that parliament could have, but did not, stipulate that permanent sterility/infertility was a requirement for reassignment, nor that phalloplasty (for female to male reassignment) was required, merely that the procedure “alter” the genitals.

The Australian Human Rights Commission has sought leave to intervene in the proceedings.

The grounds of appeal include:

- Whether the majority of the Court of Appeal erred in finding that the determination pursuant to s15(1)(b)(ii) of the *Gender Reassignment Act* (“has the gender characteristics of a person of the gender to which the person has been

reassigned”) is made by reference to both external genitalia and internal reproductive organs;

- Whether the majority of the Court erred in failing to find that the appellants had sufficient of the gender characteristics of the male gender to satisfy s15(1)(b)(ii) of the Act.