

1 April 2010

FOURTH SECTION

Application no. 37359/09
by H
against Finland
lodged on 8 July 2009

STATEMENT OF FACTS

THE FACTS

The applicant is a Finnish national.

A. The circumstances of the case

The facts of the case, as submitted by the applicant, may be summarised as follows.

The applicant was born in 1963 as a male. She always felt that she was a female in a male body but decided to cope with the situation. In 1996 she married a woman and in 2002 they had a child.

As the applicant started feeling worse in 2004, she decided in 2005 to seek medical help. In April 2006 she was diagnosed as a transsexual. Since that time, she has lived as a woman. On 29 September 2009 she underwent gender re-assignment surgery.

On 7 June 2006 the applicant changed her first names and renewed her passport and driver's licence but she could not have her identity number changed. The identity number still indicates that she is male. Also, her passport still indicates that she is male.

Proceedings concerning the changing of the identity number

On 12 June 2007 the applicant requested the Helsinki City Administrative Court (*maistraatti, magistraten*) to confirm her as being female and to change her male identity number to a female one as it no longer corresponded to reality.

On 19 June 2007 the Helsinki City Administrative Court refused the applicant's request. It found that, according to Sections 1 and 2 of the Act on Confirmation of the Sex of a Transsexual (*laki transseksuaalin sukupuolen vahvistamisesta, lagen om fastställande av transsexuella personers könstillhörighet*), the confirmation required that the person was not married or that the spouse gave his or her consent. As the applicant's wife did not give her consent to the transformation of their marriage into a civil partnership (*rekisteröity parisuhde, registrerat partnerskap*), the applicant's new gender could not be introduced in the population register.

On 6 July 2007 the applicant appealed to the Helsinki Administrative Court (*hallinto-oikeus, förvaltningsdomstolen*) complaining, *inter alia*, that her wife's decision not to give consent, to which she was perfectly entitled as they both preferred to remain married, meant that the applicant could not be registered as a female. A divorce would be against their religious convictions. A civil partnership did not provide the same security as a marriage, and this would mean, among other things, that their child would be put into a different situation *vis-à-vis* children born within wedlock.

On 5 May 2008 the Helsinki Administrative Court rejected the applicant's appeal on the same grounds as the Helsinki City Administrative Court. Moreover it found, *inter alia*, that the impugned decision of 19 June 2007 was not contrary to Article 6 of the Constitution as same-sex partners had a possibility, by registering their relationship, to benefit from family law protection in a manner partially comparable to a marriage. Similarly, Sections 1 and 2 of the Act on Confirmation of the Sex of a Transsexual did not violate the constitutional rights of the applicant's child.

On 8 May 2008 the applicant appealed to the Supreme Administrative Court (*korkein hallinto-oikeus, högsta förvaltningsdomstolen*), reiterating the grounds presented before the City Administrative Court and the Administrative Court. She also asked that the court make a request for a preliminary ruling to the Court of Justice of the European Communities, in particular on the interpretation of Article 8 of the European Convention on Human Rights. Referring to Articles 8 and 14 of the Convention, the applicant claimed that the State should not tell her that a civil partnership was the right identity for her, especially when it required that her wife turn into a lesbian. Their sexual identity was a private matter which could not be a condition for the confirmation of gender. Transsexualism was a medical condition falling within the scope of private life. The State was violating her right to privacy every time the male identity number revealed her to be a transsexual. Moreover, she claimed that if her marriage were turned into a civil partnership, it would mean that she could no longer be a legal father to her child nor his mother, as a child could not have two mothers.

On 3 February 2009 the Supreme Administrative Court refused the applicant's request for preliminary ruling and rejected her appeal. It found that by adopting the Act on Confirmation of the Sex of a Transsexual the legislator did not mean to change the fact that only a man and a woman could marry and that same-sex partners could have their relationship judicially confirmed by registering it. The European Court had found under Article 12 of the Convention that there were no acceptable grounds to deny transsexuals their right to marry but that the margin of appreciation in this respect was large. It was not possible under Finnish law for persons of the same sex to marry but, in such a case, it was a question of a civil partnership. As to its juridical and economical consequences, a civil partnership was essentially comparable to a marriage. The question of transforming the marriage institution into a gender-neutral one was connected to significant ethical and religious values and it was to be solved by an act enacted by the Parliament. The current state of law was within the margin of appreciation given to the State by the European Convention.

On 29 October 2009 the applicant lodged an extraordinary appeal with the Supreme Administrative Court, requesting it to annul its previous decision of 3 February 2009. She stated that she had undergone gender reassignment surgery on 29 September 2009 and that she could no longer prove that she had been a male, as indicated by her identity number and passport. Even though, for marriage purposes, she would still be considered as a male, the fact remained that she should not be discriminated against due to her sex.

These proceedings are apparently still pending.

Proceedings concerning reimbursement of medical costs

On 29 August 2007 the applicant applied for reimbursement of the costs of some hormonal medicine which was part of her treatment.

On 5 October 2007 the Social Insurance Institution (*Kansaneläkelaitos, Folkpensionsanstalten*) refused her application as she was deemed to be entitled to the reimbursement only after she had been given a new identity number.

By letter dated 11 October 2007 the applicant appealed to the Social Security Appeal Board (*Sosiaaliturvan muutoksenhakulautakunta, Besvärsnämnden för social trygghet*) claiming, *inter alia*, that she had been discriminated against.

On 21 January 2010 the Social Security Appeal Board accepted the applicant's appeal and changed the decision of 5 October 2007 by the Social Insurance Institution, finding that the applicant was entitled to the reimbursement.

It is not known whether this decision has been appealed against.

Other proceedings

On an unspecified date the applicant also filed a complaint with the Ombudsman for Equality (*Tasa-arvovaltuutettu, Jämställdhets-ombudsmannen*), complaining about the wrong identity number as well as the reimbursement of medical costs.

On 30 September 2008 the Ombudsman for Equality stated that she could not take a stand on the identity number issue as the matter had already been dealt with by the Administrative Court and the Ombudsman was not competent to supervise the courts. Moreover, the matter was pending before the Supreme Administrative Court. As to the reimbursement of medical costs, the Ombudsman found that the fact that the reimbursement was conditional on the identity number and not on medical grounds placed transsexuals in a different position to other persons receiving the same treatment. She recommended that the Social Insurance Institution change its practice in this respect in order to prevent discrimination against transsexuals.

B. Relevant domestic law

Article 6 of the Constitution (*Suomen perustuslaki, Finlands grundlag*; Act no. 731/1999) provides the following:

“Everyone is equal before the law.

No one shall, without an acceptable reason, be treated differently from other persons on the ground of sex, age, origin, language, religion, conviction, opinion, health, disability or other reason that concerns his or her person. Children shall be treated equally and as individuals and they shall be allowed to influence matters pertaining to themselves to a degree corresponding to their level of development.

Equality of the sexes is promoted in societal activity and working life, especially in the determination of pay and the other terms of employment, as provided in more detail by an Act.”

Section 1 of the Act on Confirmation of the Sex of a Transsexual (*laki transseksuaalin sukupuolen vahvistamisesta, lagen om fastställande av transsexuella personers könstillhörighet*; Act no. 563/2002) provides that it shall be established that a person belongs to the opposite sex to the one noted in the population register if he or she:

“1) provides medical clarifications that he or she permanently feels that he or she belong to the opposite sex and lives in the corresponding sexual role as well as that he or she has been sterilised or is for some other reason incapable of reproducing;

2) is above 18 years of age;

3) is not married or in a civil partnership; and

4) is a Finnish citizen or has residence in Finland.”

Section 2 of the same Act provides for exceptions from the marital status requirement. A marriage or a civil partnership does not prevent the confirmation of the sex if the spouse or the partner personally gives his or her consent to it before a city administrative court. When belonging to the opposite sex is confirmed, a marriage is turned *ex lege* into a civil partnership and a civil partnership into a marriage. This modification shall be noted in the population register.

COMPLAINTS

The applicant complains under Article 3 of the Convention that by complicating the juridical side of changing gender the Finnish authorities have made themselves guilty of torture.

She complains under Article 8 of the Convention that her right to private and family life has been violated.

She also complains under Article 14 of the Convention that she has been discriminated against as she has been denied reimbursement of certain medical costs to which other persons are entitled. She has been treated differently to any other person receiving medical treatment. Moreover, her wife is being placed in an unequal position *vis-à-vis* other spouses. She also claims that by refusing to give her a female identity number, which corresponds to the actual state of affairs, the State is discriminating against her. The fact that she has been denied a female identity number reveals the confidential information that she is a transsexual as she, contrary to any other person, has to explain this difference on every occasion when the identity number is required.

Finally, the applicant complains under Article 2 of the Protocol No. 4 that, due to the wrong indication of sex in her passport, her freedom of movement is compromised.

QUESTIONS TO THE PARTIES

1. Has there been an interference with the applicant's right to respect for her private and family life, within the meaning of Article 8 § 1 of the Convention? If so, was that interference necessary in terms of Article 8 § 2? In particular, is the requirement that the applicant's marriage, which is a long-term and stable relationship, be turned into a civil partnership as a condition of her obtaining recognition of her change of gender, proportionate?

2. Has there been a violation of the applicant's right to marry, contrary to Article 12 of the Convention? In particular, what are the differences in protection provided, on the one hand, by a marriage and, on the other hand, by a civil partnership, taking into account that the applicant has a minor child? Would any prejudice that might flow from the transformation *ex lege* of a marriage into a civil partnership be addressed?

3. Has the applicant suffered discrimination in the enjoyment of her Convention rights on the ground of her sex, contrary to Article 14 of the Convention?

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