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Headnotes

The fundamental right to respect for private life also extends to gender identity. If gender is part of an individual's civil status, which must be recorded in the birth register, the relevant provisions must allow for an entry that reflects an individual's specific gender identity, including the option to omit any such entry in case of a serious mismatch between their perceived gender identity and any binary gender entry.

Summary

1. Under the Civil Status Act 2013 (Personenstandsgesetz 2013), the general civil status data to be entered into the register of births include the individual's gender.
2. The applicant was born in 1991 and is an Austrian citizen. His gender is listed as “male” in the civil register. In March 2021, the applicant sent an email to the registry office, requesting “the deletion of the gender entry in the birth register” on the basis of the Civil Status Act 2013. This application was accompanied by a psychotherapeutic opinion stating that the applicant had experienced lasting discomfort with increasing psychological distress in their own biological sex since early childhood. The opinion indicates that the applicant has a constant desire not to be assigned to one of the binary genders “male” or “female” and that this desire intensified during puberty. However, the registry office dismissed this request, stating that the Civil Status Act 2013 did not provide for a right to have the gender entry deleted. This decision was upheld by the administrative court. The applicant filed a constitutional complaint with the Constitutional Court, claiming that the public authorities' refusal to delete the applicant's gender violated the applicant's right to respect for private life under Article 8 ECHR.
- 3.1. The Constitutional Court noted that, in accordance with accepted scientific knowledge, a distinction should be made between intersexuality (differences of sex development) and transidentity (transsexuality, gender dysphoria, transgender, gender incongruence). Intersexuality is a variant of sex development which, because the sex-differentiating characteristics are marked by atypical development of the chromosomal, anatomical or hormonal sex, does not allow a person to be clearly classified as male or female. By contrast, in the instant case of transidentity, gender determination is beyond doubt but the person concerned does not feel comfortable with this determination or declines any gender determination at all.

3.2. Referring to the case-law of the ECtHR, the Constitutional Court recalled that the concept of "private life" covers the physical and psychological integrity of a person and can sometimes embrace aspects of an individual's physical and social integrity. In particular, gender identification, name and sexual orientation and sexual life fall within the personal sphere protected by Article 8 ECHR. Article 8 ECHR thus guarantees (also) transgender persons the fundamental right to have their individual gender identity respected under civil status law and, accordingly, the right not to have their gender categorised, i.e. in particular not to have to accept a binary gender assignment. A legal obligation to specify a designation of gender for transgender persons in the Civil Registry that contradicts their gender identity constitutes an externally determined state attribution of gender and thus an interference with these persons' right to individual gender identity, which is protected by Article 8 ECHR.

3.3. Under Article 8.2 ECHR, there shall be no interference by a public authority with the exercise of the right to respect for private life except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others. The Constitutional Court accepted that safeguarding the principle of the inalienability of civil status, ensuring the reliability and consistency of civil status records and, more generally, ensuring legal certainty, are in the general interest. However, this general interest cannot justify a rigid restriction to a binary gender entry in civil-status records. Nor is it apparent that it should not be possible to take account of the requirements set out in Article 8 ECHR in a manner that preserves the function of public civil status registers. Even if corresponding changes in civil status law also have an impact on other areas of the legal system and may trigger a need for adjustment there, these possible adjustments do not give rise to difficulties that outweigh, in the interests of public order, the interests of the persons concerned in having their gender identity recognised and in having a legal framework that enables and protects this accordingly. The question of whether, with a view to specific regulations that are linked to gender in the sense of civil status law, restrictions on the rights guaranteed by Article 8 ECHR are necessary in a democratic society must be assessed for the respective area of the legal system. A civil status regulation that would force transgender people to declare themselves as "male" or "female" in civil status law, in particular in the civil status register, in accordance with their genetically and/or anatomically or hormonally unambiguous gender assignment, would not be in line with the requirements of Article 8 ECHR.

3.4. However, against the background of the requirements of Article 8 ECHR as outlined above, the relevant civil status regulations are to be understood as not forcing transgender persons to specify their sex (by assigning them to the binary categories of male or female). The existing legal framework of the Civil Status Act 2013 already includes sufficiently flexible procedural rules that can be interpreted to mean that transgender persons may not disclose their gender for legitimate reasons. In concrete terms, the civil registry authority must examine whether a case of transidentity exists and whether the applicant can therefore, with regard to Article 8 ECHR, apply for a legitimate reason not to have to state their gender and to change or correct an existing binary gender entry in this regard. The proceeding to be carried out by the civil registry authority must comply with the statutory provisions. In doing so, the civil registry authority must assess, taking into account the principle of material truth, whether a person who requests an adjustment or deletion of their gender entry in order to express their gender identity has a corresponding gender incongruence due to a serious mismatch between their perceived gender identity and the gender entered in the official records. To that end, the authority may find it

necessary to obtain and take into account expert opinion, which is in accordance with Article 8 ECHR.

4. As a result, the Constitutional Court decided not to repeal any provision of the Civil Status Act 2013 as unconstitutional, but allowed the constitutional complaint since the administrative court decision had been based on an interpretation violating the applicant's right to respect for private life.

Cross-references

Constitutional Court:

– G 77/2018, 15.06.2018; 2018/2 [AUT-2018-2-003]

European Court of Human Rights:

– *A.P., Garçon and Nicot v. France*, nos. 79885/12, 52471/13, 52596/13, 06.04.2017, *Reports of Judgments and Decisions* 2017;

– *Christine Goodwin v. United Kingdom* (GC), no. 28957/95, 11.07.2002, *Reports of Judgments and Decisions* 2002-VI;

– *Hämäläinen v. Finland*, no. 37359/09, 16.07.2014, *Reports of Judgments and Decisions* 2014;

– *Schlumpf v. Switzerland*, no. 29002/06, 08.01.2009;

– *Van Kück v. Germany*, no. 35968/97, 12.06.2003, *Reports of Judgments and Decisions* 2003-VII;

– *Y.Y. v. Turkey*, no. 14793/08, 10.03.2015, *Reports of Judgments and Decisions* 2015 (extracts).