Press releases

Federal Constitutional Court - Press office -

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Order of 11 January 2011 – 1 BvR 3295/07 –

Prerequisites for the statutory recognition of transsexuals according to § 8.1 nos. 3 and 4 of the Transsexuals Act are unconstitutional

To enter into a marriage, the spouses must be of different genders, while according to § 1 of the Civil Partnerships Act (*Lebenspartnerschaftsgesetz*), it is only possible for persons of the same gender to enter into a civil partnership. What is decisive in both cases is the gender under the law on civil status, i.e. the gender registered in public records.

The Transsexuals Act (*Transsexuellengesetz* – TSG) provides two procedures intended to make it possible for transsexuals to live in their perceived gender. What is known as the "small solution" allows changing one's first name without surgical gender reassignment operations having to take place before. For this, § 1.1 TSG essentially requires that the person, due to his or her transsexual orientation, feels that he or she belongs to the other gender, has been under the compulsion to live according to his or her perceptions for at least three years, and that it can be assumed with a high degree of probability that the person's perceived affiliation to the other gender will not change again. Evidence that these prerequisites are met must be provided by two expert opinions delivered independently of each other.

However, only what is known as the "big solution" according to § 8 TSG results in the perceived gender being recognised under the law of civil status, with the consequence that the rights and obligations of the person concerned that depend on the person's gender will fundamentally depend on the new gender. Apart from the requirements under § 1.1 TSG, the "big solution" additionally requires according to § 8.1 nos. 3 and 4 TSG that the person concerned is permanently infertile (no. 3) and has undergone surgery which has changed his or her external sexual characteristics and which has resulted in clearly approaching the person's appearance to that of the other gender (no. 4). In the case of a male-to-female transsexual, this requires the amputation of the penis shaft and of the testicles and the surgical formation of external primary female genitals; in the case of a female-to-male transsexual, the surgical removal of the uterus, the ovaries and the oviducts and frequently breast reduction surgery are required.

The complainant, who is 62 years old now, was born with male external genitals. However, she perceives herself as belonging to the female gender. Her sexual orientation is that of a female homosexual, and she is living in a partnership with a woman. In accordance with § 1 TSG, she has changed her male first name into a female one. No change of civil status (big solution) has taken place because the necessary surgery has not been performed. Together with her partner, she made an application for the registration of a civil partnership, which was refused by the registrar on the grounds that a civil partnership was exclusively reserved to two parties of the same gender. The Local Court

(*Amtsgericht*) confirmed the decision arguing that the only possibility open to the parties concerned was that of entering into a marriage because the complainant's recognition as a woman under the law of civil status required gender reassignment surgery. Her complaint against this decision before the Regional Court (*Landgericht*) and her further complaint before the Higher Regional Court (*Kammergericht*) were unsuccessful.

By means of her constitutional complaint lodged in December 2007, the complainant essentially challenges a violation of her general right of personality in its manifestation as the right to sexual self-determination. The complainant argues that she wants to enter into a civil partnership as a perceived woman whose partner is a woman. She further argues that it is unreasonable to expect of her to enter into a marriage because as a consequence, she would legally be regarded as a man. Furthermore, her female first name would disclose that one of the two women in the partnership is transsexual, which would make it impossible to live an inconspicuous life free from discrimination in the new role. Due to her age, gender reassignment surgery would involve incalculable health risks.

The First Senate of the Federal Constitutional Court has decided that the prerequisites of the recognition of transsexuals under the law of civil status for entering into a civil partnership as set out under § 8.1 nos. 3 and 4 TSG are not compatible with the right to sexual self-determination pursuant to Article 2.1 in conjunction with Article 1.1 of the Basic Law (*Grundgesetz* – GG) and with the right to physical integrity under to Article 2.2 GG. The provisions are inapplicable until a new legislation has entered into force. As the decisions of the non-constitutional courts, which are indirectly based on § 8.1 nos. 3 and 4 TSG, violate the complainant's fundamental rights, the ruling of the Higher Regional Court has been reversed and referred back there for a new decision.

In essence, the decision is based on the following considerations:

1. The constitutional complaint is admissible. The fact that the complainant has entered into a marriage in the course of the constitutional complaint proceedings because in view of her age and of the length of the proceedings, she did not want to wait any longer to legally secure her partnership does not render her need for legal protection invalid. For it was unreasonable to expect of her and her partner to further disregard their need for mutual protection and support in this respect. Apart from this, even after having entered into a marriage, she continues to be affected with regard to her own perception of her identity as a woman; she is also confronted with the fact that due to the marital union with her partner, her transsexuality has become apparent.

2. It is a violation of the general right of personality in its manifestation as the right to sexual self-determination pursuant to Article 2.1 in conjunction with Article 1.1 GG that to legally secure their partnership, transsexuals with a homosexual orientation either have to enter into a marriage or undergo gender reassignment surgery that results in infertility for their perceived gender to be recognised and for themselves to be able to enter into a registered civil partnership that corresponds to their relationship, which they perceive as a homosexual one.

a) It is unreasonable to refer a transsexual person with a homosexual orientation who merely complies with the requirements for a name change according to § 1 TSG to the possibility of entering into a marriage to secure a partnership. On the one hand, marriage as a union of partners of different genders assigns this person, from the legal perspective and externally visible, a gender role which contradicts the one perceived by him or herself. This infringes the constitutional precept of the recognition of the gender identity perceived by a person him or herself. On the other hand, entering into a marriage makes it apparent that the person him or herself or the partner he or she has married is

transsexual because the person's name change and his or her outer appearance, which has been approached to the perceived gender, reveals the homosexual nature of the relationship. This means that the protection of the person's intimate sphere against unwanted disclosure, which is protected by constitutional law, is not ensured.

b) Furthermore, it is not compatible with the right to sexual self-determination and physical integrity that to secure a same-sex partnership, transsexuals can only enter into a registered civil partnership if they have been recognised under the law of civil status because they have undergone gender reassignment surgery and are permanently infertile.

It is constitutionally unobjectionable that the legislature deems the gender which has been recognised under the law of civil status the relevant criterion for the access to a registered partnership also in the case of transsexuals with a homosexual orientation, and that it makes the gender determination under the law of civil status contingent on objectifiable prerequisites in order to render the civil status permanent and unambiguous and to avoid a divergence of biological and legal gender affiliation. The legislature can therefore specify, even beyond the prerequisites set out in § 1.1 TSG, how evidence of the stability and irreversibility of transsexual persons' perception and life in the other gender is to be provided. However, by unconditionally and without exception requiring them under § 8.1 nos. 3 and 4 TSG to undergo surgery that modifies their genitals and leads to infertility, the legislature places excessive demands on such evidence which are unreasonable to expect of the persons concerned.

Gender reassignment surgery constitutes a massive impairment of physical integrity, which is protected by Article 2.2 GG, and it involves considerable health risks and side effects for the person concerned. However, according to the current state of scientific knowledge, it is not always indicated even in the case of a diagnosis of transsexuality that is certain to a large extent. The permanent nature and irreversibility of transsexual persons' perceived gender cannot be assessed against the degree of the surgical adaptation of their external genitals but rather against the consistency with which they live in their perceived gender. The unconditional prerequisite of a surgical gender reassignment according to § 8.1 no. 4 TSG constituted an excessive requirement because it requires of transsexual persons to undergo surgery and to tolerate health detriments even if this is not indicated in the respective case and if it is not necessary for ascertaining the permanent nature of the transsexuality.

The same applies with regard to the permanent infertility which is required under § 8.1 no. 3 TSG for the recognition under the law of civil status to the extent that its permanent nature is made contingent on surgery. By this prerequisite, the legislature admittedly pursues the legitimate objective to preclude that persons who legally belong to the male sex give birth to children or that persons who legally belong to the female sex procreate children because this would contradict the concept of the sexes and would have far-reaching consequences for the legal order. Within the context of the required weighing, however, these reasons cannot justify the considerable impairment of the fundamental rights of the persons concerned because the transsexual persons' right to sexual self-determination safeguarding their physical integrity is to be accorded greater weight. Here, it has to be taken into account that in view of the fact that the group of transsexual persons is small, cases in which the legal gender assignment and the role of procreator, or person bearing a child, diverge will only rarely occur. Furthermore, this predominantly affects the existing children's assignment to their father and mother. In this context, however, it can be ensured by the law that the children concerned will, in spite of a parent's legal gender reassignment, always be legally assigned a father and a mother. § 11 TSG provides that the relationship of legally recognised transsexuals to their descendants shall remain unaffected; this provision can be interpreted in such a way that it also applies to those children who are born only after the gender reassignment of a parent under the law of

civil status has taken place.

This press release is also available in the original german version.

Zum ANFANG des Dokuments