



Refusal to authorise transsexual to have access to gender reassignment surgery breached right to respect for private life

In today's **Chamber** judgment¹ in the case of **Y. Y. v. Turkey** (application no. 14793/08) the European Court of Human Rights held, unanimously, that there had been:

a violation of Article 8 (right to respect for private and family life) of the European Convention on Human Rights

The case concerned the refusal by the Turkish authorities to grant authorisation for gender reassignment surgery on the grounds that the person requesting it, a transsexual, was not permanently unable to procreate.

The Court reiterated that the possibility for transsexuals to have full enjoyment of the right to personal development and physical and moral integrity could not be regarded as a controversial question. It considered that, even supposing that the denial of the applicant's initial request for access to such surgery had been based on a relevant ground, it was not based on a sufficient ground. The resulting interference with the applicant's right to respect for his private life could not be considered "necessary" in a democratic society.

In denying the applicant, for many years, the possibility of undergoing such an operation, the State had breached the applicant's right to respect for his private life.

Principal facts

The applicant, Y.Y., is a Turkish national who was registered at the time of the application as being of the female sex.

Early on in life Y.Y. became aware of feeling more like a boy than a girl, regardless of anatomical features.

On 30 September 2005 Y.Y. applied to the Mersin District Court for authorisation to undergo gender reassignment surgery. The court sent a request for information to the head doctor of the hospital where the applicant had been treated in the psychiatric department, to find out whether the patient was transsexual and whether the sex change was necessary for the preservation of the latter's mental health. The court also asked whether Y.Y. was permanently unable to procreate.

On 23 February 2006 a psychiatric report from the hospital concluded that Y.Y. was transsexual and that, from a psychological viewpoint, it would be better for the patient to live as a male. Another report established that Y.Y. was of a female phenotype and was transsexual. However, the court found that neither of those reports answered its questions, namely whether the sex change was necessary for the preservation of the individual's mental health and whether the latter was permanently unable to procreate. One of the directors of the hospital stated in April 2006 that Y.Y. was not permanently unable to procreate.

1. Under Articles 43 and 44 of the Convention, this Chamber judgment is not final. During the three-month period following its delivery, any party may request that the case be referred to the Grand Chamber of the Court. If such a request is made, a panel of five judges considers whether the case deserves further examination. In that event, the Grand Chamber will hear the case and deliver a final judgment. If the referral request is refused, the Chamber judgment will become final on that day. Once a judgment becomes final, it is transmitted to the Committee of Ministers of the Council of Europe for supervision of its execution. Further information about the execution process can be found here: www.coe.int/t/dghl/monitoring/execution.

On 27 June 2006 the District Court rejected Y.Y.'s application for gender reassignment authorisation on the grounds of not being permanently unable to procreate, and therefore not satisfying one of the requirements laid down in Article 40 of the Civil Code.

The applicant appealed on points of law against the judgment.

The Court of Cassation upheld the District Court's judgment and the applicant's lawyer requested the rectification of that judgment, but that request was also rejected by the Court of Cassation.

On 5 March 2013, relying on Article 40 of the Civil Code, Y.Y. lodged a fresh application with the Mersin District Court for authorisation to undergo gender reassignment surgery. On 21 May 2013 that court granted the application and authorised the requested surgery, finding it established that Y.Y. was transsexual, that protection of the applicant's mental health required a change of gender, and that witness testimony had shown that the applicant lived as a man in every respect and suffered from the situation, such that the conditions laid down in Article 40 § 2 of the Civil Code were met and the request should be granted.

Complaints, procedure and composition of the Court

Relying in particular on Article 8 (right to respect for private and family life), the applicant complained of a breach of his right to respect for his private life. He alleged that the discrepancy between his perception of himself as a man and his physical constitution had been established by medical reports and he complained of the refusal by the domestic authorities to put an end to that discrepancy on the grounds that he was still able to procreate. He criticised the terms of Article 40 of the Civil Code on the ground that its biological requirement of reproductive sterility could only be met by voluntarily undergoing sterilisation surgery. The inability for the persons concerned to have access to such surgery permanently deprived them of any possibility of gender reassignment.

Relying on Article 6 § 1 (right to a fair hearing) the applicant also complained that the Court of Cassation had not examined the merits of the case and had failed to give reasons for its decisions.

The application was lodged with the European Court of Human Rights on 6 March 2008.

Judgment was given by a Chamber of seven judges, composed as follows:

Guido **Raimondi** (Italy), *President*,
Işıl **Karakaş** (Turkey),
Nebojša **Vučinić** (Montenegro),
Helen **Keller** (Switzerland),
Paul **Lemmens** (Belgium),
Egidijus **Kūris** (Lithuania),
Robert **Spano** (Iceland),

and also Abel **Campos**, *Deputy Section Registrar*.

Decision of the Court

[Article 8 \(right to respect for private and family life\)](#)

The present case raised the question of the prerequisites for the process of gender reassignment that could be imposed on transsexuals and whether such requirements complied with Article 8 of the Convention.

The Court referred to its previous findings to the effect that it had been widely recognised at an international level that transsexualism was a medical condition justifying treatment for the purpose of helping the persons concerned.

The Court found that the District Court's decision of 27 June 2006 had been based on Article 40 of the Civil Code. It observed that Turkish law granted transsexuals meeting the statutory requirements the right not only to change gender but also to obtain legal recognition of their new gender by the amendment of their civil status. Article 40 of the Civil Code, however, subjects that possibility to a permanent inability to procreate – a condition not satisfied in the present case, thus leading to the denial of the applicant's request.

The Government had argued that the regulation of gender reassignment surgery fell within the protection of the general interest and sought to prevent such surgery from becoming commonplace or from being improperly used by the sex industry. The Court was not convinced by those arguments. However, it did not doubt that in adopting such legislation, the Government had pursued the legitimate aim of protecting the health and interests of the individuals concerned, having regard to the risks incurred by such operations for physical and moral security.

The Court observed that the proceedings in the national courts had directly concerned the applicant's freedom to establish his gender – a freedom which was an essential part of the right to self-determination. The Court had stated on many occasions that it was aware of the seriousness of the problems encountered by transsexuals and had emphasised the importance of permanently examining the need for appropriate legal measures. It was crucial that the Convention should be interpreted and applied in a manner which rendered guarantees practical and effective. Should the Court fail to maintain a dynamic and evolutive approach, it might obstruct any reform or improvement.

As the Court had previously found, it attached less importance to the lack of evidence of a common European approach to the resolution of the legal and practical problems posed, than to the clear and uncontested evidence of a continuing international trend in favour of increased social acceptance of transsexuals and of legal recognition of the new sexual identity of post-operative transsexuals. It reiterated that the right of transsexuals to personal development and to physical and moral security, in the full sense enjoyed by others in society, could not be regarded as a matter of controversy. In that connection it emphasised that, in the appendix to Recommendation CM/Rec(2010)5, the Committee of Ministers of the Council of Europe had stated that prior requirements for legal recognition of gender reassignment should be regularly reviewed in order to remove abusive requirements. Moreover, the Parliamentary Assembly of the Council of Europe had, in particular, called upon the member States to guarantee the rights of such persons to official documents reflecting their chosen gender identity, without any prior obligation to undergo sterilisation or other medical procedures such as gender reassignment surgery or hormonal therapy.

The Court further observed that certain member States had recently amended their legislation or practices in matters of access to gender conversion treatment and legal recognition thereof, by removing the requirement of infertility or sterility.

The Court reiterated that serious interference with private life could arise where the state of domestic law conflicted with an important aspect of personal identity. Moreover, given the numerous and painful interventions involved in such surgery, it could not be suggested that there was anything capricious in a decision taken by a person to undergo gender reassignment.

The Court observed that the domestic courts had justified their initial refusal to uphold the applicant's request by finding that he was not unable to procreate. The Court could not understand why an inability to procreate would have to be established – for a person wishing to change gender – before the physical sex change process could be undertaken. It did not see how, except by undergoing sterilisation, the applicant could have satisfied the requirement of permanent infertility.

In any event, the Court did not find it necessary to rule on the question of the applicant's access to medical treatment which would have enabled him to satisfy that requirement. The Court took the view that the principle of respect for the applicant's physical integrity precluded any obligation for

him to undergo treatment aimed at permanent sterilisation. The Court took the view that, even supposing that the rejection of the initial request for access to sex change surgery was based on a relevant ground, it was not based on a sufficient ground. The resulting interference with the applicant's right to respect for his private life could not therefore be considered "necessary" in a democratic society. The change of approach of the Mersin District Court which, in May 2013, had granted the applicant authorisation to undertake surgery, even though he still had the ability to procreate, supported that finding.

In denying the applicant, for many years, the possibility of undergoing such an operation, the State had breached the applicant's right to respect for his private life. The Court thus found that there had been a violation of Article 8.

Article 6 § 1 (right to a fair hearing)

The Court reiterated that Article 6 § 1 did not require that the grounds given by a court should address all the points that one of the parties considered fundamental for his or her arguments. Moreover, it found that the Court of Cassation had given reasons for its decisions and that it had endorsed the grounds given by the court below. This complaint was thus manifestly ill-founded and had to be rejected.

Article 41 (just satisfaction)

The Court held that Turkey was to pay the applicant 7,500 euros (EUR) in respect of non-pecuniary damage.

The judgment is available only in French.

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Press contacts

echrpess@echr.coe.int | tel.: +33 3 90 21 42 08

Denis Lambert (tel: + 33 3 90 21 41 09)

Tracey Turner-Tretz (tel: + 33 3 88 41 35 30)

Céline Menu-Lange (tel: + 33 3 90 21 58 77)

Nina Salomon (tel: + 33 3 90 21 49 79)

The European Court of Human Rights was set up in Strasbourg by the Council of Europe Member States in 1959 to deal with alleged violations of the 1950 European Convention on Human Rights.