Court

High Court of Administration

Date of ruling

27.02.2009

Case reference no.

2008/17/0054

Re:

The High Court of Administration, through the Chairman and President of the Senate Dr. Gruber and the Privy Councillors Dr. Holeschofsky, Dr. Köhler, Dr. Zens and Dr. Zehetner as Judges, in the presence of the Secretary MMag. Gold, has recognised the complaint of M P in W, represented by Dr. Helmut Graupner, Lawyer in 1130 Vienna, Maxingstraße 22-24/4/9, against the decision of the Minister of the Interior dated 16 January 2008, Zl. BMI-VA1300/0006-III/2/2008, concerning the application for an amendment to the Register of Births:

Ruling

The contested decision shall be rescinded on grounds that its content is unlawful.

The Government must reimburse the Complainant for expenses in the amount of EUR 1,286.40 within two weeks on penalty of judicial enforcement.

Grounds

The Complainant with its application dated 2 November 2006 was seeking to amend the certification of its sex entered in the Register of Births from “male” to “female”. She justified this application on the grounds that she was born on 3 January 1959 in Vienna as a person of male sex. She claims that she is a transsexual and has lived for a long time under the compelling perception that she belongs to the female gender, which led her to undergo gender reassignment treatments. Since July 2004 she has been receiving “continuous” psychotherapy; since November 2005 she has been undergoing psychiatric monitoring and treatment and has also been receiving transhormonal therapy since August 2005. The Complainant has already been living under “the changed gender conditions” for many years. In the period from 2003 until the beginning of 2006 she underwent a full beard epilation, firstly via laser treatment and subsequently via needle epilation. By doing this she closely aligned her external appearance to that associated with the opposite gender.

With reference to the attached expert report, the Complainant claims that the treatments that she listed not only resulted in her being able to closely align her appearance to that of a female, as mentioned above, but that it is highly likely that nothing would change in future in terms of her feeling that she belongs to the female gender.

As the Complainant “should from now on be legally classified as female gender”, the certification of sex as entered in the Register of Births as “male” is now incorrect and should therefore be amended to “female”.

The Complainant - as will be explained in more detail below - would also therefore be entitled under basic law to have the certification of her sex corrected in the Register of Births. In this connection, she referred in particular to the fact that as a result of the discrepancy between her external appearance and her personal documents she constantly found herself in situations which violated her human dignity and privacy and which were extremely discriminatory.

The Complainant is unable to proceed with genital reassignment surgery because in her managerial function in an international corporate group, the disclosure of her associated long-term medical condition would undoubtedly result in her losing her job. The Complainant cannot reasonably be expected to run the risk of losing her job and thus the risk of social disintegration.

In a ruling of the Viennese municipal council (registry office) dated 15 March 2007, this application by the Complainant was rejected. As the High Court of Administration stated in the ruling which was

also mentioned by the Complainant, dated 30 September 1997, Zl. 95/01/0061(= VwSlg. 14.748 A/1997), that a person shall be classified as belonging to the sex that corresponds to their external appearance, if they have lived under the compelling perception that they belong to the opposite gender and they have undergone gender reassignment treatments, which have resulted in their being able to closely align their appearance to the external appearance of the opposite gender and that it is therefore highly likely that nothing will change in future in terms of their feeling that they belong to the opposite gender. In this ruling, the High Court of Administration gave more significance to the new gender identity, which the Complainant in that case had managed to achieve through gender reassignment surgery, compared to the "biological sex" determined at the time of their birth. In this case, however, the applicant had not undergone gender reassignment surgery; the treatments carried out had indeed enabled her to closely align her external appearance to that of a woman, but, for the purposes of existing case law, this was not enough to assign female sex to the applicant in question.

In her appeal against this, the Complainant objected to the legal opinion expressed in the ruling by the court of first instance which said that gender reassignment surgery would be necessary; according to the Complainant, neither the law nor existing case law required this.

In its ruling that was contested before the High Court of Administration, the relevant authority that had become competent by way of devolution rejected the Complainant's appeal. After reiterating the arguments of the party in question and the administrative actions, the authority stated, by way of justification, that the Complainant had not provided "sufficient evidence" that the treatments that she had undergone had enabled her to closely align herself to the opposite gender. A beard epilation is not a treatment that should primarily be evaluated as a measure for closely aligning a person's external appearance to that of the opposite gender; instead it is a treatment which is carried out for cosmetic or aesthetic reasons, where there is strong hair growth or in the area of sport without effecting a change of gender or sex classification. Furthermore, it is important not to forget that some men cannot naturally grow beards or have less pronounced facial hair growth, but their sex classification is never called into question. Although the treatments carried out (hormone treatment by a doctor as well as the full removal of beard through needle epilation, etc.) did enable her to closely align her appearance to that of the female gender, this was not deemed significant or intensive enough to be able to permanently classify the Complainant as being of female sex. Above all, these measures were not enough to sufficiently prove the determination to becoming permanently, irrevocably and irreversibly classified as the opposite sex.

Contrary to the Complainant's testimony, the relevant authority was perfectly convinced that the external appearance of female persons is not primarily felt or perceived according to the appearance of the (at least partially) clothed persons and/or their (social) presence in everyday life, but on the basis of their sex characteristics. The term Geschlecht [sex/ gender] is understood to mean "the primary difference between two living creatures, in other words their genetic (chromosomal), gonadal or hormonal and genital (somatic) make-up". In a binary gender system, in which only two genders are accepted, gender is synonymous with gender identity, gender role and sexual orientation.

A distinction is made between primary sex characteristics (the innate sex characteristics), secondary sex characteristics (the physical sex characteristics that develop later) and tertiary sex characteristics (the psychological and culture-specific social sex characteristics that manifest themselves through behaviour).

In order to clear up any ambiguity with the German term "Geschlecht" (sex/gender), the English terms "Sex" and "Gender" were referred to; Sex denotes the physical sexual characteristics as well as the resulting bodily functions, in other words the practical exercise of sexuality. Gender, by contrast, denotes on the one hand the social gender role or the social sex characteristics, in other words, everything which is seen as being typical for a particular gender in general culture (clothing, profession, etc.). It does not, however, directly indicate the physical sex characteristics.

In the case of the Complainant, there were transgender characteristics, in other words only the social sex characteristics that would be seen as typical for the female gender, however not the physical sex characteristics, which is why the entry in the Register of Births cannot be corrected. The primary physical sex characteristics of the Complainant do not permit any such correction.

No discrimination between male-to-female transsexuals and female-to-male transsexuals can be seen here. Although it is true that in the second case the construction of a phallus is not "compulsorily" required, in both cases, however, the removal of the primary sex characteristics is a condition for gender reassignment, in order to exclude any reproduction in the "former" gender that is no longer wanted.

Transsexuals feel that it is precisely the removal of the primary sex organs, which is necessary in order to really become the desired gender. In view of this, the objections that the surgery could not be carried out for occupational reasons are not conclusive. Although the authority, essentially taking into account the social, economic and professional situation, provides an autonomous decision-making framework (cf. Art. 8 ECHR), it is not objectively verifiable why, however, the Complainant gave preference to financial progress over such a long period of time, starting from the age of reaching maturity as the point in time where she has the full ability to take decisions, as experience shows that transsexuals see it as their life's ambition or a strong need to align their external appearance with their internal feelings as quickly as possible. This means that it is highly likely that nothing would change in future in terms of the applicant's feeling that she belonged to the female gender, something which the High Court of Administration did request in its ruling dated 30 September 1997 as mentioned above.

Moreover, any correction of a certification should only be carried out if it is subsequently found to be incorrect after the original entry has been made; as the Complainant did not create any new gender identity for herself, in the case in question the conditions for correcting the sex entry in the Register of Births from “male” to “female” do not pertain.

The Complainant is contesting this ruling before the High Court of Administration on grounds that its content is unlawful and on grounds of unlawfulness based on a violation of procedural regulations.

The relevant authority submitted the files to the administration proceedings, but refrained from submitting a reply.

The High Court of Administration weighed up the complaint as follows:

The Federal law dated 19 January 1983 concerning the regulation of civil status matters, including registration procedures (Civil Status Act - PStG), BGBl. [Federal Law Gazette] No. 60/1983 as detailed in BGBl. I No. 100/2005, states in Section 1(1), that civil status registers are used for certifying the births, marriages and deaths of persons and their civil status. According to Section 2(1) leg. cit., any civil status event that arises within the home country, including birth, must be entered in the civil status registers. Each registry office must maintain a Register of Births, a Register of marriages and a Register of Deaths in accordance with Section 3 PStG; furthermore, the City of Vienna is required to maintain a register of declared deaths.

In accordance with Section 19 clause 3 PStG, the sex of a child must be entered in the Register of Births.

In accordance with Section 15(1) leg. cit., a certification must be corrected if it is already incorrect at the time that the entry is made. The party in any proceedings for correction, based on Section 15(7) clause 1 leg. cit., is the person to whom the entry relates. If a certification cannot be corrected by the registry office itself, the district administration authority will have to decide on the correction upon application by a party or ex officio (Section 15(3) PStG).

In accordance with Section 16 PStG, the registry office must amend a certification if it is subsequently found to be incorrect after the entry is made.

The High Court of Administration in its ruling, as mentioned several times above, dated 30 September 1997, Zl. 95/01/0061, concluded, among other things, that the Austrian legislative order and the social life are based on the principle that each person has either female or male gender; no provision has so far been established governing the sex classification of post-operative transsexuals.

Furthermore, no explicit, legal provision governing transsexuality has been established since that time.

The High Court of Administration referred to this in its ruling concerning administrative practice, as mentioned above, and a decree by the Federal Minister of the Interior dated 18 July 1983, modified by a decree dated 27 November 1996. According to the above ruling/decrees, for those cases in which surgical procedures and other concomitant medicinal treatments have been carried out for the purpose of aligning a person's appearance to the opposite gender, it should be possible, on the basis of Section 16 PStG, to add a marginal note concerning the change of sex. When establishing whether or not these conditions pertained in this case, the authority called upon to make a decision did not settle for merely examining the documents submitted, but ex officio obtained an expert report from the Institut für gerichtliche Medizin [Institute of Forensic Medicine] at the University of Vienna, an institution which is particularly familiar with the issues surrounding transsexualism. This expert report was supposed to prove that the applicant had lived for a long period of time under the compelling perception that they belonged to the opposite gender, which prompted them to undergo gender reassignment treatments. As a result of these treatments, the person's external appearance should have been closely aligned to that of the opposite gender and it should be highly likely that nothing would change in future in terms of the person's feelings that she belonged to the opposite gender.

Finally, the High Court of Administration came to the view, taking into consideration the established case law of the European Court of Human Rights and the European Court of Justice as well as

regulatory developments in Europe, that for an area of Austrian civil status law as well, and, in any event, in cases where a person has lived under the compelling perception that they belong to the opposite gender and has undergone gender reassignment treatments, which have enabled them to closely align their external appearance to that of the opposite gender and that it was highly likely that nothing would change in future in terms of her feeling that they belonged to the opposite gender, the person concerned should be classified as the sex corresponding to their external appearance. Any opposing view would be incompatible with the Human Rights Convention which is specified in the Austrian constitutional order. Under Art. 8 of the above law, any person has the right to respect of their private and family life. The term "private life" here refers to a person's private sphere, in which they pursue their specific interests and tendencies, which constitute the expression of their personality; these also included relationships with other persons, in particular relationships of a sexual nature. Under the law, the right to respect of private life includes the freedom of an individual to live according to their sexual orientation.

In a ruling dated 8 June 2006, V 4/06 (= VfSlg. 17.849) the Austrian Constitutional Court rescinded Points 2 and 3 of the decree issued by the Federal Minister of the Interior dated 27 November 1996, Z 36.250/66-IV/4/96, concerning the position of transsexuals under civil status law ("Transsexual Decree") as unlawful.

As grounds for its ruling, the Austrian Constitutional Court stated, among other things, that the rescinded provisions were part of a decree that should have been announced in the Federal Law Gazette. Furthermore, however, the contents of Point 2.4, according to which a marginal note regarding the change in sex may only be added if the applicant is unmarried, lack any legal basis. The Civil Status Act does not stipulate any separate provision in a case where a person changes their gender and/or sex. Section 44 AGBG [Austrian Civil Code] does indeed maintain that a marriage contract should be concluded between two persons of different sex. It is not clear, however, why a person's change of sex, which renders the certification of their sex in the civil status register incorrect (because Section 16 PStG is based on subsequent inaccuracy as a result of a later change in a person's certified circumstances), should only result in a change to the certification if this person is unmarried; the certification of a person's sex cannot be prevented by the existence of a marriage. Whether, by the same token, any homosexuality that arises as a result of the change of gender of the former spouse would affect the continuing existence of the marriage or would lead to, necessitate or enable its dissolution, should not in any case be judged in conjunction with the change in the Register of Births maintained by the relevant registry office. This means that the question in this context should not be addressed by the Austrian Constitutional Court. In any case, point 2. 4. of the decree is not legally covered by any provision of the legislative order.

In this ruling, the Austrian Constitutional Court did not consider Point 1 of the "Transsexual Decree" to be part of the legislative order. This states as follows (quotation as reproduced by the Austrian Constitutional Court):

"1. Applications by transsexuals to change their entries in the Register of Births or to approve changes in first names were the subject of the statement by the Federal Ministry of the Interior in conjunction with the Chancellor's Office - Constitutional Division and the Federal Ministries of Health and Environmental Affairs (now the Federal Ministry of Health and Consumer Protection) and the Ministry of Justice and also in consultation with medical experts. The result of this was that the discussion of the medical side of transsexualism did not lead to a roughly consensual view, even in diagnostic terms.

This, together with the fact that the legislative measures agreed varied considerably for individual states, resulted in the view of all federal ministries concerned that a legislative initiative would not be practicable in Austria as it clearly only involves a few cases. Similarly, there is consensus that at least those cases in which surgical procedures and other concomitant medicinal treatments have already been carried out for the purpose of aligning a person's external appearance at least to that of the opposite gender, should be corrected.

This assessment which was made at the start of the 80's remains applicable."

In terms of the legal situation outlined above, the High Court of Administration in its ruling, as mentioned several times above, dated 30 September 1997, Zl. 95/01/0061, stated that for the area covered by Austrian civil status law, in any event, in cases where a person who has lived under the compelling perception that they belong to the opposite gender and who have undergone gender reassignment treatments, which have enabled them to closely align their external appearance to that of the opposite gender and where it was highly likely that nothing will change in future in terms of their feeling that they belong to the opposite gender, the person concerned should be classified as belonging to the sex corresponding to their external appearance. If these conditions should be found to pertain, the registry office must amend the certification of sex in the Register of Births as it is subsequently found to be incorrect after the original entry was made.

This legal position is undisputed between the parties in the proceedings before the High Court of Administration. What remains solely disputed is whether the surgical procedures corresponding to these conditions, such as the removal of the primary sex characteristics are a necessary condition for reclassifying the sex.

In respect of the Austrian legal position, the High Court of Administration assumes that a severe surgical procedure, such as the removal of the primary sex characteristics as required by the relevant authority, is a necessary condition for aligning a person's external appearance to that of the opposite gender. The High Court of Administration in its ruling, as mentioned several times above, dated 30 September 1997, referred to the (psychological) components of the feeling of belonging to the opposite gender. If this feeling of belonging is in all likelihood irreversible and has been expressed in external terms by the person closely aligning their appearance to the external appearance of the opposite gender, no impediment may be derived from the Austrian legislative order that would prevent the relevant gender-specific appearance of a person that is relevant for the general public being taken into consideration from the point of view of civil status law.

The relevant authority - based on a legal view not shared by the High Court of Administration - failed to examine whether the Complainant (even without any severe surgical procedure) had managed to closely align her external appearance to that of the opposite gender and that it is therefore highly likely that nothing will change in future in terms of the Complainant's feeling that they belong to the opposite gender (for more details about the development of the opinion of medical science see, for instance, the overview set out in the decision of the Federal Constitutional Court dated 6 December 2005, I BvI 3/03). However, this question, which in general can only be clarified by obtaining an expert report, is, as has been argued above, relevant to the decision.

In accordance with Section 42(2) clause 1 VwGG [Constitutional Court Act], the contested decision should therefore have been rescinded on grounds that its content was unlawful.

The decision on the apportionment of costs is based on Sections 47 et seq. VwGG in conjunction with VwGH [High Court of Administration] Cost Reimbursement Decree 2008, BGBl. II No. 455, in particular Section 3(2) of said decree.

Vienna, on 27 February 2009