

INTER-DEPARTMENTAL WORKING GROUP ON GENDER RECOGNITION

CASE-LAW ON THE SRS REQUIREMENT

1. This Annex sets out a summary of some recent overseas case-law on the requirements for transsexual or transgender persons to undergo SRS (ie, sex reassignment surgery, sometimes also referred to as “GRS” (gender reassignment surgery)) and/or sterilisation. The information provided in this Annex is for reference purposes only and the Inter-departmental Working Group on Gender Recognition (“IWG”) does not express any view on the decisions or their reasoning.

Decisions of the Strasbourg authorities under the European Convention on Human Rights (“ECHR”)

2. In *Roetzheim v Germany* (1997),¹ a male-to-female pre-operative transsexual person complained that the requirements under the German Transsexuals Act² for a change of the civil status of transsexuals, namely the inability to procreate and gender reassignment surgery amounted to a violation of his right to respect for his private life under Article 8 of the ECHR. The European Commission of Human Rights, having regard to the remaining uncertainty as to the essential nature of transsexualism and the extremely complex legal situations resulting therefrom at that time, found that Germany had in principle taken appropriate legal measures in this field. It did not find a violation of Article 8 in the circumstances of the case.
3. In *Y.Y. v Turkey* (2015),³ the applicant was registered as female but early on in life felt more like a boy than a girl. However, the Turkish authorities refused to authorize the applicant to undergo gender reassignment surgery on the grounds of not being permanently unable to procreate. The European Court of Human Rights (“ECtHR”) 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

¹ Application no. 31177/96, admissibility decision of 23 October 1997.

² German law at that time offered two possibilities to meet the demands of transsexuals, namely the change of forenames and the rectification of the sex recorded upon birth. The conditions were that the transsexual had been living with these feelings for three years and that there was a high probability that the feeling of belonging to the other sex would not change, and, additionally in case of a request for rectification, that the transsexual was unmarried, was permanently unable to procreate and had undergone gender reassignment surgery.

³ Application no. 14793/08, Chamber judgment of 10 March 2015.

transsexuals enjoyed the right to personal development and to physical and moral security. Serious interference with private life could arise where domestic law conflicted with an important aspect of personal identity. It also 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 held unanimously that there had been a violation of Article 8 of the ECHR in this case.

4. A more recent case about the compatibility of the sterilisation requirement with Article 8 of the ECHR is *A.P., Garçon and Nicot v France* (2017)⁴ where three transgender persons of French nationality wished to change the entries concerning their sex and forenames on their birth certificates, and were not allowed to do so under French law at that time.⁵ The applicants complained, amongst other matters, that the French authorities had infringed their right to respect for their private life by requiring that the change in one's appearance be irreversible in order for requests for amendments to the sex entry on birth certificates to be granted. The ECtHR noted that the disputed requirement implied undergoing an operation or medical treatment involving a high probability of sterility. It also noted that making recognition of the sexual identity of transgender persons conditional on undergoing an operation or sterilising treatment to which they did not wish to submit amounted to making the full exercise of one's right to respect for private life conditional on relinquishing full exercise of the right to respect for one's physical integrity. The Court held, by six votes to one, that there had been a violation of Article 8 of the ECHR in this regard.⁶

United Kingdom

5. In *Bellinger v Bellinger* (2003),⁷ the House of Lords noted that the point at which a change of gender should be recognised is not easily ascertainable. The point at which people feel they have achieved their change of gender varies enormously. It is questionable whether the successful completion of some sort of surgical intervention should be an essential prerequisite to the recognition of gender reassignment. If it were, individuals may find themselves coerced into major surgical operations they otherwise would not have. But the aim of the surgery is to make the individual feel more comfortable with his or her body, not to "turn a man into a woman" or vice versa.⁸ With regard to the criteria by

⁴ Application nos. 79885/12, 52471/13 and 52596/13, Chamber judgment of 6 April 2017. See "The requirement to undergo sterilisation or treatment involving a very high probability of sterility in order to change the entries on birth certificates was in breach of the right to respect for private life", ECHR 121 (2017), 6 April 2017.

⁵ French law at that time provided, among other things, that the rectification of one's sex entry on birth certificate was made conditional upon the irreversibility of the change in one's appearance. However, the law was changed since January 2017 to allow for legal gender recognition without surgical requirements.

⁶ With regard to the other complaints by the applicants concerning the requirements for medical diagnosis of gender identity disorder and medical examination in order to change the sex entry on birth certificates, the Court held by a majority that there had been no violation of Article 8 in that connection.

⁷ [2003] 2 AC 467, [2003] UKHL 21.

⁸ Para 41.

which gender reassignment is to be assessed, the House of Lords considered that there must be some objective and publicly available criteria and there must be an adequate degree of certainty. However, where the line should be drawn was far from self-evident, nor was there uniformity among the member States of the European Union which afforded legal recognition to a transsexual person's acquired gender at that time.⁹ Subsequently, the UK Government introduced the Gender Recognition Act 2004 which does not require the completion of SRS as a pre-condition for legal gender recognition.

Australia

6. In the earlier case of *R v Harris & McGuinness* (1988),¹⁰ the issue before the New South Wales Criminal Court of Appeal was whether the accused persons were male within the meaning of a particular statute that made certain conduct, if performed by a male person, an offence. One of those accused was a transsexual person who had undergone full SRS from male to female, and the other was a pre-operative transsexual person. The Court, by a majority, decided that the transsexual accused person who had undergone SRS was a female but the other accused person remained a male. The ruling on the position of a pre-operative transsexual person in *R v Harris & McGuinness* was followed by the Federal Court of Australia in *Secretary, Department of Social Security v "SRA"* (1993).¹¹
7. The question of whether pre-operative transsexual persons should be able to marry a person who they regard as a person of the opposite sex was considered by the Full Court of the Family Court of Australia in *Re Kevin (Validity of marriage of transsexual) (No 2)* (2003).¹² The Court posed the rhetorical question: if Kevin had always perceived himself to be a man, then why must he subject himself to "*radical and painful surgery*" to establish this fact? The Court also noted that the efficacy of surgical intervention is more problematic where the transition is from female-to-male.¹³ Nonetheless, the Court observed

⁹ Paras 42-43.

¹⁰ (1988) 17 NSWLR 158.

¹¹ (1993) 43 FCR 299; followed in *Scafe v Secretary, Department of Families, Housing, Community Services & Indigenous Affairs* [2008] AATA 104. In *SRA* case, the question was whether a person living as a woman but who had not undergone SRS was entitled to a wife's pension on the basis that she was cohabiting with a male invalid pensioner. The Court held that a line had to be drawn somewhere and the interests of society and the individual must be balanced. Drawing the line by reference to "a sex change operation" in circumstances that bring external genital features into general conformity with the person's psychological sex was appropriate. The SRS requirement also had the benefit of society acknowledging that an irreversible medical decision has been made, confirming the person's psychological attitude. The Court noted that there was an increasing awareness of the importance of the right to privacy and growing tolerance of a person's identity. However, where the psychological sex and the anatomical sex of a person do not conform to each other, the sex of a person must be determined by the anatomical sex.

¹² [2003] FamCA 94, at paras 382-388.

¹³ Senior Counsel for the Human Rights and Equal Opportunity Commission of Australia submitted: "... in the circumstances of this case, it is worth accepting that surgical intervention in relation to the removal of gonads maybe relatively straight forward, surgical intervention for a male to female transsexual person in relation to the construction of a vagina may be common place, surgical intervention which requires the construction of a penis is much more

that this case did not require a ruling on the position of pre-operative transsexual persons and in all of the decided cases to which it had referred their position had been distinguished from post-operative transsexual persons and comments had been made to the effect that this was a matter for parliament to determine.

8. A year later in *Re Alex: Hormonal Treatment for Gender Identity Dysphoria* (2004),¹⁴ Nicholson CJ considered it “*a matter of regret*” that a number of Australian jurisdictions required surgery as a pre-requisite to the alteration of a transsexual person’s birth certificate in order for the record to align a person’s sex with his/her chosen gender identity, noting that this was of little help to someone who is unable to undertake such surgery. He considered that a requirement of surgery to be “*a cruel and unnecessary restriction upon a person’s right to be legally recognised in a sex which reflects the chosen gender identity*”. He urged the various State and Territory Legislatures that make surgery a pre-requisite for a change in birth certificates to reconsider their position and in his view, a scheme for the change of birth certificates which requires a Magistrate or a Board to make a finding of fact but does not make surgery a pre-requisite is more consistent with human rights and therefore preferable in comparison with an administrative scheme wherein the applicant must have had surgery to be eligible for the changed birth certificate.¹⁵
9. In *AB and AH v Western Australia* (2011),¹⁶ both applicants were registered as female at birth but were diagnosed as suffering from gender dysphoria. They underwent testosterone therapy and a bilateral mastectomy but did not contemplate any further surgical procedures. Each applied under the Gender Reassignment Act 2000 (WA) to the Gender Reassignment Board for the issue of a recognition certificate recognising the reassignment of their gender from female to male. Their applications were refused because they retained a female reproductive system. The Board said that there would be adverse social and legal consequences should the applicants be issued a recognition certificate whilst they have the capacity to bear children. The applicants appealed to the State Administrative Tribunal which directed that recognition certificates be granted to the applicants but the Tribunal’s decision was subsequently set aside by a majority of the Court of Appeal.
10. On appeal, the High Court preferred the approach of Buss JA, the minority in the Court of Appeal¹⁷ and noted that the Act did not require that the person

problematic and even where it takes place may or may not give rise to something which would be readily accepted as a penis of a sexual kind which has a particular sexual function.”

¹⁴ [2004] FamCA 297, para 234.

¹⁵ [2004] FamCA 297, paras 237, 239-241.

¹⁶ [2011] HCA 42.

¹⁷ Buss JA considered that the physical characteristics by which a person was identified as male or female were confined to external physical characteristics, for the purposes of the Act. He noted there are obvious limitations to the extent to which a person’s physical characteristics could be altered. The purpose of the Act was to alleviate the condition of persons suffering from gender dysphoria, by providing a legislative mechanism which would enable their reassigned gender to be legally recognised. The disconformity inherent in gender dysphoria was between the person’s psychiatric condition (namely, the rejection of his/her assigned gender combined with a strong and persistent desire to have the body of the opposite gender and to be regarded by others as a member of the opposite gender) on the one hand, and the

undertake every procedure to remove every vestige of the gender which the person denies, including all sexual organs. The object of the Act was to remove impediments to the way in which a person lives within the society. The Board should approach from a social perspective by reference to what other members of society would perceive the person's gender to be. In conclusion, the Court decided that for the purposes of the Act, the physical characteristics by virtue of which a person was identified as male or female were confined to external physical characteristics. Hence recognition certificates should have been issued to the applicants.

New Zealand

11. In *Attorney-General v Otahuhu Family Court* (1995),¹⁸ the New Zealand Attorney-General sought a ruling as to whether a transsexual person may enter into a valid marriage with a person of the opposite gender to his or her re-assigned gender. The High Court of New Zealand noted that once a transsexual person has undergone surgery, he or she is no longer able to operate in his or her original sex. The Court considered that the completion of surgical and medical procedures that have effectively given a person the physical conformation of a person of a specified sex was an adequate test formulated on the basis of the undisputed evidence that persons who had undertaken such procedures would have already had the social and psychological disposition of the chosen sex.
12. In *Michael v Registrar-General of Births, Deaths and Marriages* (2008),¹⁹ the Family Court at Auckland held that it was not necessary in all cases for an applicant to have undergone full SRS in order to obtain a declaration for recognising change in gender. As regards how much surgery a transgender person would need to have had, it was a question to be determined on a case by case basis by reference to the evidence in the particular case, including that of the medical experts.²⁰ The Court endorsed the approach of the New Zealand Human Rights Commission that “*the distinction as to whether a transgender person is pre- or post-operative should not be determinative of the gender the law should regard the person as having*”, stating that the law needs to keep pace with medical research and be applied in a manner that achieves justice for those concerned.²¹

person's external physical characteristics, on the other. It is the latter to which the Act was directed because a person's external (not internal) physical characteristics are apparent to other people, and most apparent to the person in question. See [2010] WASCA 172, paras 200-203. [1995] 1 NZLR 603.

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FAM-2006-004-002325, 9 June 2008.

In this case, the applicant was a female-to-male transgender person. He sought a declaration that he was a male and for birth certificates issued to record his male name, Michael. The applicant did not consider it necessary to undergo full SRS in order to feel that he had altered his gender to that of a male. Upon considering the circumstances of the applicant's case and taking into account the observations made by courts overseas (such as *Bellinger, Re Alex* and *Re Kevin*) and the expert opinion that further surgery was not recommended for the applicant, the Court held that the applicant was not required to undergo surgery in order to obtain a new birth certificate.

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Paras 110-112, referring to Human Rights Commission of New Zealand, *To Be Who I Am: Report of the Inquiry into Discrimination Experienced by Transgender People* (2008), paras

Canada

13. In *XY v Ontario (Minister of Government and Consumer Services)* (2012),²² the transgender applicant was required to have two doctors certify to the respondent that she had had “transsexual surgery”²³ and that the sex designation on her birth registration should be changed to female as a result, pursuant to section 36 of the Vital Statistics Act. The applicant argued that such requirements infringed her right to equal treatment without discrimination on the basis of sex and/or disability with respect to services contrary to sections 1 and 11 of Ontario’s Human Rights Code. The Human Rights Tribunal of Ontario held that the applicant was “demeaned” by the fact that it fell to her family doctor to determine whether the applicant’s gender would be recognized as valid based on the manner in which her body had been altered by “transsexual surgery”. The Tribunal also found that making “transsexual surgery” a prerequisite for obtaining a change in sex designation is discriminatory against transgender persons because “it perpetuates the disadvantage, prejudice and stereotyping experienced by them”. The Tribunal agreed that the surgical requirement perpetuated disadvantage among transgender persons because it requires them to undergo “inherently painful, invasive, and risky surgical procedures” in order to obtain birth certificates that accord with their gender identity, though recognizing that some transgendered persons wish to have surgery and regard it as beneficial.²⁴ In conclusion, the Tribunal ordered the respondent to cease requiring transgender persons to have “transsexual surgery” in order to obtain a change in sex designation on their registration of birth.

14. The decision of the Ontario Human Rights Tribunal in *XY* was later followed by the Court of Queen’s Bench of Alberta in *CF v Alberta (Vital Statistics)* (2014)²⁵ where the applicant was a transgender woman who had not had surgery to change her anatomical sex structure. After finding that her self-identification as a female was real and that her intention to live the rest of her life as a female was genuine, the Court held that the Vital Statistics Act infringed her right to equal protection and benefit of the law under the Canadian Charter of Rights and Freedoms in that it did not permit the issuance to her of a birth certificate which recorded her sex as female unless her anatomical sex structure was surgically changed from male to female.

8.16 and 8.44.

²² [2012] OHRTD No 715, 2012 HRTO 726, 74 CHRR D/331, Fil No 2009-01326-1, decided on 11 April 2012.

²³ The terms “transsexual surgery”, “anatomical sex structure” and “sex” were not defined in the VSA.

²⁴ Para 176.

²⁵ (2014) ABQB 237.

India

15. In *National Legal Services Authority v Union of India* (2014),²⁶ the Supreme Court of India (Civil Original Jurisdiction) granted the petition made on behalf of the transgender community seeking a declaration that non-recognition of their gender identity violated their rights of equality and equal protection before the law under articles 14 and 21 of the Constitution of India. The Court considered that “no one shall be forced to undergo medical procedures, including SRS, sterilization or hormonal therapy, as a requirement for legal recognition of their gender identity.”²⁷ It upheld transgender persons’ right to decide their self-identified gender and directed the Central and State Governments to grant legal recognition of their gender identity as male, female or third gender. It also held that any insistence for SRS for declaring one’s gender was “immoral and illegal”.

Other jurisdictions

16. Apart from the jurisdictions discussed above, the courts and tribunals in Austria,²⁸ Germany,²⁹ Italy,³⁰ Switzerland³¹ and Sweden³² have recently held

²⁶ [2014] 4 LRC 629.

²⁷ Para 20. The Court stressed at para 76 that gender identity forms the core of one’s personal self, based on self-identification, not on surgical or medical procedure.

²⁸ Administrative High Court, No. 2008/17/0054, judgment of 27 February 2009. In this case, the Administrative High Court of Austria held that mandatory SRS, as a condition for legal recognition of gender identity, was unlawful. The claimant sought to amend the sex entry in the Register of Births from “male” to “female”. She underwent treatments such that her external appearance closely aligned to that associated with the female gender. However, she was unable to proceed with SRS because the disclosure of her associated long-term medical condition would undoubtedly result in her losing her job in her managerial function in an international corporate group. The Court held that the relevant authority had failed to examine whether the claimant (even without any severe surgical procedure) had managed to closely align her external appearance to that of the opposite gender and that it was therefore highly likely that nothing would change in future in terms of the claimant’s feeling that she belonged to the opposite gender.

²⁹ Bundesverfassungsgericht [Federal Constitutional Court], BVerfG, 1 BvR 3295/07, 11 January 2011. In this case, the Constitutional Court of Germany struck down as unconstitutional the provisions of the Transsexuals Act which required permanent infertility and genital surgery for the purposes of legal gender recognition. The claimant, a 62-year-old transgender woman, complained about not being able to enter a registered partnership with her female partner. Due to her age, gender reassignment would involve incalculable health risks. Entering marriage as a man was not an option either, as she had already changed her name to a female name and would thus face the risk of constant public disclosure of her gender identity. The Court noted that the impugned legislation constituted “a massive impairment of physical integrity”. Although it served a legitimate purpose, namely that changes sought would be irreversible, that could not be assessed solely “against the degree of the surgical adaptation of their external genitals but rather against the consistency with which they live in their perceived gender.” See also Press release No. 7/2011 of 28 January 2011, available at: <http://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2011/bvg11-007.html>.

³⁰ *Sentenza 5896/2011*, Tribunal of Rome, Italy (11 March 2011). In this case, the applicant was identified male at birth but manifested since childhood a typically feminine psychological nature and behaviour. Over the years, the applicant adopted a female physical appearance. After diagnosed with gender identity disorder, she obtained an interlocutory judgment authorizing SRS. The applicant then underwent breast augmentation and hormone therapy.

that the requirement of mandatory SRS or sterilisation, as a condition for legal recognition of gender identity, was unlawful or unconstitutional. All these cases were decided in the past 10 years or so.

Important Notices:

- (1) This Annex includes references to materials contributed by other parties and hyperlinks to other websites for the convenience of users. The IWG expressly states that it has not approved nor endorsed the materials contributed by others referred to in this Annex or the information contained in or in connection with the websites stated in this Annex.
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³¹ Whilst awaiting the development of further interventions, the applicant requested to have her sex marker and name changed in all civil records without further surgery. The Rome Civil Tribunal held that SRS should not be a pre-condition of granting gender recognition. Case 12/1217, Regional Court of Bern-Mittelland, Switzerland, 12 September 2012. In this case, the Regional Court of Bern-Mittelland held that in the case of a transgender woman seeking legal gender recognition, any form of mandatory medical intervention, either surgical or hormonal treatment, violated the personal or physical integrity of the person and was highly problematic for legal reasons. The psychosocial aspects are more important than the question of infertility in the legal gender recognition process. Hence no proof of infertility was required. The Court based its reasoning on the opinion of experts in transsexuality that the surgical procedure could not be a necessary prerequisite for a lasting and visible change in a person's gender identity. See also Richard Kohler, Alecs Recher and Julia Ehrh, *Legal Gender Recognition in Europe: Toolkit*, Transgender Europe, December 2013, page 43.

³² Mål nr 1968-12, Kammarrätten i Stockholm, Avdelning 03; "Swedish Court repeals Sterilization Requirement", <http://www.tgeu.org/book/export/html/379>. In this case, the Administrative Court of Appeals of Stockholm held that the requirement in the Swedish Law on Legal Gender Recognition that a person wishing to change gender marker must undergo sterilisation violated the Swedish Constitution as well as the right to private and family life and non-discrimination under Articles 8 and 14 of the ECHR. It held that the mandatory sterilisation requirement intruded into a person's physical integrity, not medically necessary and could not be seen as voluntary. In July 2013, the Swedish Parliament passed a law abolishing the requirement of sterilisation. The Court was quoted as saying: "*The person needs to go through an extensive procedure, which results in sterilization, which is not medically necessary and often not wished by the person concerned.*" See *Torture in Healthcare Settings: Reflections on the Special Rapporteur on Torture's 2013 Thematic Report* (2014), Washington College of Law, Center for Human Rights & Humanitarian Law, page 75.