



## Requiring a change of marital status for a transsexual to be recognised as a woman did not breach her human rights

In today's Grand Chamber judgment in the case of **Hämäläinen v. Finland** (application no. 37359/09), which is final<sup>1</sup>, the European Court of Human Rights held, by a majority,

that there had been **no violation of Article 8 (right to respect for private and family life)** of the European Convention on Human Rights;

that there was **no need to examine the case under Article 12 (right to marry)** of the Convention; and,

that there had been **no violation of Article 14 (prohibition of discrimination) taken in conjunction with Articles 8 and 12.**

The case concerned the complaint of a male-to-female transsexual that she could only obtain full official recognition of her new gender by having her marriage turned into a civil partnership.

The Court found that it was not disproportionate to require the conversion of a marriage into a registered partnership as a precondition to legal recognition of an acquired gender as that was a genuine option which provided legal protection for same-sex couples that was almost identical to that of marriage. The minor differences between these two legal concepts were not capable of rendering the current Finnish system deficient from the point of view of the State's positive obligation under Article 8. In addition, such a conversion would not have any implications for the applicant's family life as it would not affect the paternity of the applicant's daughter or the responsibility for the care, custody, or maintenance of the child.

### Principal facts

The applicant, Heli Hämäläinen, is a Finnish national who was born in 1963 and lives in Helsinki. Ms Hämäläinen was born a male and married a woman in 1996. The couple had a child in 2002. In September 2009 Ms Hämäläinen underwent male-to-female gender reassignment surgery.

Although she changed her first names in June 2006, she could not have her identity number changed to indicate her female gender in her official documents unless her wife consented to the marriage being turned into a civil partnership, which she refused to do, or unless the couple divorced. The couple preferred to remain married as a divorce would be against their religious convictions and they considered that a civil partnership did not provide the same security as marriage for them and their child. Ms Hämäläinen's request to be registered as female at the local registry office was therefore refused.

Ms Hämäläinen brought administrative proceedings before the national courts which, in May 2008 and February 2009, rejected her appeal against the refusal to register her as a female. The courts found in particular that legislation on confirming the gender of transsexuals in Finland did not intend

<sup>1</sup> Grand Chamber judgments are final (Article 44 of the Convention).

All final judgments are transmitted to the Committee of Ministers of the Council of Europe for supervision of their execution. Further information about the execution process can be found here: [www.coe.int/t/dghl/monitoring/execution](http://www.coe.int/t/dghl/monitoring/execution)

to change the fact that only a man and a woman could currently marry under Finnish law. The Supreme Administrative Court refused her extraordinary appeal in August 2010.

## Complaints, procedure and composition of the Court

Ms Hämäläinen complained that making the full recognition of her new gender conditional on the transformation of her marriage into a civil partnership violated her rights under Article 8 (right to respect for private and family life), Article 12 (right to marry) and Article 14 (prohibition of discrimination).

The application was lodged with the European Court of Human Rights on 8 July 2009.

In its Chamber judgment of 13 November 2012, the Court held that there had been no violation of Article 8 of the European Convention. It further held that there had been no violation of Article 14 read in conjunction with Article 8 and that there was no need to examine the case under Article 12. It found in particular that a fair balance had been struck in the Finnish judicial system between, on the one hand, Ms Hämäläinen's right to respect for her privacy by obtaining a new female identity number and, on the other hand, the State's interest in keeping intact the traditional institution of marriage. Notably, it was not disproportionate to require the applicant's marriage to be turned into a civil partnership as it was a real option which provided same-sex couples and their children with almost identical legal protection to that of married couples.

The case was referred to the Grand Chamber of the Court under Article 43 (referral to the Grand Chamber) at the request of the applicant and on 29 April 2013 the panel of the Grand Chamber accepted that request<sup>2</sup>.

Amnesty International and Transgender Europe were authorised to intervene as third parties (under Article 36 § 2 of the Convention) in the written procedure.

Judgment was given by the Grand Chamber of 17 judges, composed as follows:

Dean **Spielmann** (Luxembourg), *President*,  
Josep **Casadevall** (Andorra),  
Guido **Raimondi** (Italy),  
Ineta **Ziemele** (Latvia),  
Mark **Villiger** (Liechtenstein),  
Isabelle **Berro-Lefèvre** (Monaco),  
Khanlar **Hajiyev** (Azerbaijan),  
Danutė **Jočienė** (Lithuania),  
Päivi **Hirvelä** (Finland),  
András **Sajó** (Hungary),  
Linos-Alexandre **Sicilianos** (Greece),  
Erik **Møse** (Norway),  
Helen **Keller** (Switzerland),  
André **Potocki** (France),  
Paul **Lemmens** (Belgium),  
Valeriu **Grițco** (the Republic of Moldova),  
Faris **Vehabović** (Bosnia and Herzegovina), *judges*,

and also Johan **Callewaert**, *Deputy Grand Chamber Registrar*.

## Decision of the Court

### Article 8

It was not disputed between the parties that there had been an interference with the applicant's right to respect for her private life in that she had not been granted a female identity number. While the Chamber examined the case from that point of view, the Grand Chamber found that the question was whether respect for the applicant's private and family life entailed a positive obligation on the State to provide an effective and accessible procedure allowing her to have her new gender legally recognised while remaining married.

The Court reiterated that the Convention did not impose an obligation on States to allow same-sex marriage. Nor did it require special arrangements for situations such as the present one. The Grand Chamber also noted that there had been no significant changes in Europe since the Court had delivered its latest rulings on these issues. Indeed, the majority of the member States did not have any kind of legislation on gender<sup>3</sup>. In such absence of a consensus, and given the sensitive moral and ethical issues at stake, Finland had to be given a wide room for manoeuvre ("margin of appreciation"), both in deciding on legal recognition of the new gender of post-operative transsexuals and in the way to balance competing public and private interests.

Finnish law currently provided the applicant with several options. Leaving aside those of maintaining the status quo or divorcing, the complaint in question was primarily directed at the possibility to convert marriage into a civil partnership, with the consent of the applicant's wife. According to the Government, the aim of the relevant legislation was to unify the varying practices applied in different parts of the country and to establish coherent requirements for legal gender recognition. If the spouse's consent was received, it provided both for legal recognition of the new gender and legal protection of the relationship. The Court found that this consent was an elementary requirement designed to protect each spouse from the effect of unilateral decisions taken by the other. In addition, the differences between a marriage and a registered partnership did not involve an essential change in the applicant's legal situation, except for the establishment of paternity, adoption outside of the family and the family name, exceptions that were only applicable in case those issues had not been settled beforehand, which was not the applicant's case. One example showing that those who converted to civil partnership continued to enjoy the same level of legal protection was the calculation of the official relationship's length – relevant for instance for widower's pensions – which was determined from the date on which the marriage had been contracted and not from the change to a civil partnership. Therefore, the Court could not uphold the applicant's complaint that the conversion of a marriage into a registered partnership would be comparable to a "forced" divorce.

Turning to the family-life aspects of the case, the Court observed that the civil partnership would not affect the paternity of the applicant's daughter as it had already been validly established during the marriage. Nor did the gender reassignment have any legal effects on the responsibility for the care, custody, or maintenance of the child, as responsibility in Finland was based on parenthood, irrespective of sex or form of partnership. Consequently, the change to a civil partnership would have no implications for the applicant's family life.

While it was regrettable that she was inconvenienced on a daily basis by her incorrect identity number, the applicant had a genuine possibility of changing that state of affairs via the conversion, at any time, of her marriage into a registered partnership with the consent of her spouse. In the

<sup>3</sup> In addition to Finland, such legislation appears to exist in only six other States. 24 member States have no clear legal framework for legal gender recognition or no legal provisions to deal with the status of married persons who have undergone gender reassignment. Only Austria, Germany and Switzerland allow a married person to gain legal recognition of his/her acquired gender without having to end a pre-existing marriage.

Court's view, it was not disproportionate to require such a conversion, as a precondition to legal recognition of an acquired gender, as that was a genuine option which provided legal protection for same-sex couples that was almost identical to that of marriage. The minor differences between these two legal concepts were not capable of rendering the current Finnish system deficient from the point of view of the State's positive obligation. The Court concluded that the current Finnish system as a whole was not disproportionate in its effects on the applicant and that a fair balance had been struck between the competing interests in the present case. Therefore there had been no violation of Article 8.

### Other articles

The Grand Chamber found, like the Chamber, that the applicant's complaint under Article 12 had already been examined under Article 8.

Concerning the applicant's complaint that all those who are not transsexuals, who had obtained legal gender recognition automatically at birth and whose marriages, according to her, did not run the risk of "forced" divorce in the way that hers did, the Grand Chamber agreed with the Chamber that their situations were not sufficiently similar to be compared to each other. Consequently, it concluded that there had been no violation of Article 14 taken in conjunction with Article 8 or Article 12.

### Separate opinions

Judge Ziemele expressed a concurring opinion and Judges Sajó, Keller and Lemmens, a joint dissenting opinion. These opinions are annexed to the judgment.

*The judgment is available both in English and in French.*

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