EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

Press Release
issued by the Registrar of the Court

ECHR 106 (2023)
04.04.2023

Refusal of German authorities to record a transgender parent as mother on birth certificate of child to whom she had not given birth did not violate Convention

In today's **Chamber** judgment[1] in the case of A.H. and Others v. Germany (application no. 7246/20) the European Court of Human Rights held, unanimously, that there had been:

no violation of Article 8 (right to respect for private life) of the European Convention on Human Rights.

The case concerned three applicants, the first of whom is a transgender parent (A.H.), who complained that the civil registration authorities had refused to record the first applicant in the register of births as mother of the third applicant (L.D.H.) on the grounds that A.H. had not given birth to the child – to whom G.H. (the second applicant) had given birth – who had in fact been conceived with A.H.'s sperm.

The Court found that, in line with the intention of the German legislature, the former gender and former forename of a transgender parent had to be indicated not only where the birth had taken place before the recognition of the parent's gender change had become final but also where, as in the present case, the child had been conceived or born after the gender reclassification.

Having regard to the fact that the first applicant (A.H.) was the parent of the third applicant (L.D.H.) had not been called into question, and there were few scenarios where the first applicant's transgender identity could be revealed upon presentation of the child's birth certificate (on which she was recorded as father), also taking account of the discretion ("margin of appreciation") afforded to the respondent State, the Court found that the German courts had struck a fair balance between the rights of the first and second applicants (A.H. and G.H.), the interests of the third applicant (L.D.H.), considerations as to the child's welfare and the public interests at stake.

A legal summary of this case will be available in the Court's database HUDOC (link)

Principal facts

The applicants, A.H., G.H. and L.D.H. are nationals of Germany, Israel and the UK, who were born respectively in 1979, 1976 and 2015, and live in Berlin.

The first applicant, A.H., was born male.

On 19 July 2012 the Schöneberg District Court (Berlin) recognised that she was now reclassified as female.

On 23 March 2015 A.H. acknowledged her maternity of the unborn child (L.D.H., the third applicant) before a notary, with the consent of the second applicant, G.H. On 16 June 2015 G.H. gave birth to the child, who had been conceived using A.H.'s sperm.

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 15 July 2015 the civil registrar informed the applicants that he had entered L.D.H.'s birth in the register of births with G.H. indicated as the child's mother, but that he refused to record A.H.'s acknowledgment of maternity on the ground that it had no legal validity. Under Article 1591 of the Civil Code, G.H., as the child's biological mother, was also his legal mother.

On 28 July 2015 the first and second applicants applied to the Schöneberg District Court seeking to be indicated in the register of births as the child's mothers, with A.H. to be identified under her female forenames.

On 11 January 2016 the District Court rejected the application for A.H. to be indicated in the register of births as a mother of L.D.H. The Berlin Court of Appeal and then the Federal Court of Justice dismissed their appeal.

In its judgment of 29 November 2017 the Federal Court of Justice observed that, in view of the fact that A.H. had contributed to the reproduction by means of her sperm, it was only possible to record her as father.

In the view of the Federal Court of Justice, there was no serious doubt as to the conformity of the legislation with constitutional law. Referring to its judgment of 6 September 2017, which had concerned the parental relationship between a transgender man and the child to whom he had given birth (see *O.H. and G.H. v. Germany*, 53568/18 and 54741/18, 4 April 2023), the Federal Court of Justice had pointed out that the fact that the law on parenthood conferred on a transsexual parent the legal status of parent arising from his or her original sex and related reproductive function did not violate that parent's fundamental rights.

The Federal Court of Justice observed that the Federal Constitutional Court had found that the law provided for an unequivocal legal connection, in accordance with biological circumstances, of every child to a father and a mother. The fact that the legislature maintained the attachment to the parent's former status, despite the legal gender reclassification, corresponded in particular to the child's interest, as protected by law, in knowing the specific contribution of the parent concerned to his or her conception.

On 9 August 2019 the Federal Constitutional Court dismissed the applicants' constitutional complaint.

Complaints, procedure and composition of the Court

Relying on Article 8 (right to respect for private and family life) of the Convention, the applicants complained that the German authorities had refused to record the first applicant in the register of births as the second mother of the third applicant and that they had only offered her one option in terms of establishing a legal parent-child relationship with the child, namely that she acknowledge her paternity and be indicated in the register as the child's father.

The application was lodged with the European Court of Human Rights on 29 January 2020.

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

Gabriele **Kucsko-Stadlmayer** (Austria), *President*,
Tim **Eicke** (the United Kingdom),
Faris **Vehabović** (Bosnia and Herzegovina),
Branko **Lubarda** (Serbia),
Armen **Harutyunyan** (Armenia),
Anja **Seibert-Fohr** (Germany),
Ana Maria **Guerra Martins** (Portugal),

and also Andrea **Tamietti**, *Section Registrar.*

Decision of the Court

Article 8

The Court reiterated that States enjoyed a certain discretion ("margin of appreciation") in implementing their positive obligations under Article 8. That margin was a broad one when the State was required to strike a balance between competing private and public interests or conflicting Convention rights. The Court observed that there was no consensus among European States as to how to indicate in birth registers that one of the parents was transgender. Five States had made provision for an indication of legally recognised gender, but the majority of States continued to designate the person who had given birth to the child as the child's mother and to allow the person whose sperm had contributed to the reproduction to claim paternity.

The Court noted, further, that the German authorities had been obliged to weigh up a number of private and public interests against various conflicting rights: first, the rights of the first two applicants; next, the third applicant's fundamental rights and interests, namely his right to know his origins and his interest in having a stable legal attachment to his parents; lastly, the public interest; which lay in the coherence of the legal system and the accuracy and completeness of the civil registration records.

In those circumstances, the Court considered that the German authorities enjoyed a wide margin of appreciation. It reiterated that whenever a child was concerned, his or her best interests had to be paramount.

The Court noted that, as had been the intention of the German legislature, the original sex and former forename of the transgender parent had to be indicated not only in the case of a birth which had taken place before the parent's gender change recognition became final, but also where, as in the present case, the child was conceived or born subsequent to the gender reclassification.

On the one hand, the Federal Court of Justice had acknowledged that the fact that the first applicant could be entered in the register of births as the applicant's parent only under her original sex was capable of undermining the legal recognition of her gender identity. On the other, the Federal Court had also pointed out that the right to the development of one's personality was limited, *inter alia*, by Articles 1591 and 1592 of the Civil Code and by the first sentence of section 11 of the Law on the name and sex of transgender persons (*Transsexuellengesetz* (TSG)), as interpreted in its judgment of 6 September 2017. In that judgment the Federal Court had held, a few weeks before ruling in the applicants' case, that the rights of the transgender parent in the case before it had to be weighed up against, first, public interests, in particular the consistency of the legal order and the keeping of complete and accurate civil registration records, and second the rights and interests of the child, in particular the right to know his or her origins, the right to receive care and education from both parents and the interest in having a stable legal attachment, based on biological reproductive functions, to a mother and a father from birth. In that context, it had emphasised that motherhood and fatherhood, as legal categories, were not interchangeable and differed in terms of both the preconditions attached to their respective justification and the legal consequences arising therefrom. The Court pointed out that the public interests relied on by the Federal Court of Justice were also those recognised by its own case-law.

As regards the rights of the child, the Court noted the applicants' assertion that their interests were closely interrelated and that, accordingly, the limitations imposed on the first two applicants' rights could not be justified by the allegedly opposing interests of the third applicant. That being said, the Court noted that in its judgment of 6 September 2017 the Federal Court of Justice had examined whether the attribution to parents of a legal status unrelated to their biological reproductive function was such as to infringe the child's fundamental rights. In the present case, the conflict between the interests of the first two applicants and those of the child had naturally arisen after the birth of the child, when it had become necessary to determine what information should be entered

in the register of births, at a time when the third applicant's welfare could not be examined individually on account of his young age. Moreover, the Federal Court of Justice had considered, as was apparent from its leading decision of 6 September 2017, that the child's interests coincided to a certain extent with the general interest in ensuring the reliability and consistency of civil registers and legal certainty. The Court noted that the child's right to know his or her origins, as emphasised by the Federal Court of Justice in its judgment of 6 September 2017, was also protected by the Convention and included, in particular, the right to establish details of one's descent.

As regards the indication of the first applicant's former forenames in the register of births, the Court inferred from the findings of the Federal Court of Justice in its judgment of 6 September 2017 that the entry in question corresponded to the aim pursued by the sole possibility provided for by law, namely the recording of the first applicant in the register of births as father, and that it also served to prevent the child from having to disclose his parent's transgender identity.

The Court reiterated that the choice of the means calculated to secure compliance with Article 8 of the Convention in the sphere of the relations of individuals between themselves was in principle a matter that fell within the Contracting States' margin of appreciation. The Court further observed that if the first applicant had been recorded as the applicant's father in the register of births, the presentation of a copy of the applicant's birth certificate might indeed have revealed his transgender identity, but that the Federal Court of Justice had indicated in its judgment of 6 September 2017 that it was possible to obtain a birth certificate without any mention of the parents. It further specified that only a limited number of individuals, who would generally be aware of the transgender identity of the person concerned, were entitled to request a full copy of the birth certificate, since any other person had to show a legitimate interest in obtaining one. The Court observed that such precautions had the effect of reducing any inconvenience to which the first applicant might otherwise be exposed when obliged to prove her parental status *vis-à-vis* her son.

Since the fact that the first applicant was the parent of the third applicant had not been called into question, and there were few scenarios where the first applicant's transgender identity could be revealed upon presentation of the child's birth certificate (on which she was recorded as father), and also in view of the margin of appreciation afforded to the respondent State, the German courts had struck a fair balance between the first and second applicants' rights, the third applicant's interests, considerations relating to the child's welfare and the public interests.

The Court concluded that there had been no violation of Article 8.

The judgment is available only in French.

Press contacts
echrpress@echr.coe.int | tel.: +33 3 90 21 42 08

We would encourage journalists to send their enquiries via email.

Denis Lambert (tel.: + 33 3 90 21 41 09)
Tracey Turner-Tretz (tel.: + 33 3 88 41 35 30)
Inci Ertekin (tel.: + 33 3 90 21 55 30)
Neil Connolly (tel.: + 33 3 90 21 48 05)
Jane Swift (tel.: + 33 3 88 41 29 04)

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.