

AS TO THE ADMISSIBILITY OF

Application No. 31177/96
by Theodor (Dora) ROETZHEIM
against Germany

The European Commission of Human Rights (First Chamber) sitting
in private on 23 October 1997, the following members being present:

Mrs J. LIDDY, President
MM M.P. PELLONPÄÄ
E. BUSUTTIL
A. WEITZEL
C.L. ROZAKIS
L. LOUCAIDES
B. CONFORTI
N. BRATZA
I. BÉKÉS
G. RESS
A. PERENIC
C. BÎRSAN
K. HERNDL
M. VILA AMIGÓ
Mrs M. HION
Mr R. NICOLINI

Mrs M.F. BUQUICCHIO, Secretary to the Chamber

Having regard to Article 25 of the Convention for the Protection
of Human Rights and Fundamental Freedoms;

Having regard to the application introduced on 5 December 1995
by Theodor (Dora) ROETZHEIM against Germany and registered on
25 April 1996 under file No. 31177/96;

Having regard to the report provided for in Rule 47 of the Rules
of Procedure of the Commission;

Having deliberated;

Decides as follows:

THE FACTS

The applicant, born in 1956, is a German national and resident
in Mülheim.

A. Particular circumstances of the case

The facts of the case, as submitted by the applicant, may be
summarised as follows.

I. On 8 April 1994 the Mülheim District Court (Amtsgericht)
dismissed the applicant's request for rectification of his birth
certificate. The Court found that the legal conditions under S. 8 of
the 1980 Transsexuals Act (Transsexuellengesetz) were not met. In this
respect, the Court noted that the applicant was of male somatic sex and
that he was the father of a child. Moreover, he had not undergone
surgical treatment and was still able to procreate. The Court finally
rejected the applicant's argument that S. 8 of the Transsexuals Act was
objectionable from a constitutional point of view.

On 14 November 1994 the Düsseldorf Regional Court (Landgericht) dismissed the applicant's appeal (Beschwerde). The Regional Court confirmed the District Court's reasoning. The Court further examined the applicant's contention that surgical treatment was not necessary and S. 8 of the Transsexuals Act unconstitutional. The Court considered that the legal requirement of a surgical treatment might irritate the applicant, however, there was no violation of his right to the free development of his personality under Article 2 of the Basic Law (Grundgesetz). A person's sex was, inter alia, determined by the outward genital factors and the determination of sex under S. 8 of the Transsexuals Act could, therefore, depend upon the requirement of surgical treatment regarding the outward genital factors.

On 26 April 1995 the Düsseldorf Court of Appeal (Oberlandesgericht) dismissed the applicant's further appeal.

The Court of Appeal noted that the applicant, born in 1956, had been married since 1985 and was the father of a child born in 1990. Divorce proceedings were pending. Since July 1992 the applicant has adopted a female role. While considering himself psychologically of the female sex, the applicant refused any gender reassignment surgery. The Court observed that the applicant himself did not deny that the conditions under S. 8 of the Transsexuals Act were not met, taking into account his marriage, his ability to procreate and the refusal of surgical treatment regarding the outward genital factors.

As regards his contention that the existing legislation was unconstitutional, the Court of Appeal recalled that this legislation had been introduced following a decision of the Federal Constitutional Court (Bundesverfassungsgericht) of 1978 according to which the sex of transsexuals should be rectified in birth certificates in, according to medical science, irreversible cases and after gender reassignment surgery. The legal requirement of such surgical treatment could not, therefore, be unconstitutional. The existing legal and moral order as well as social life were based on the principle that a person was either of male or female sex. Sex was not, therefore, freely at disposal irrespective of the person's physical appearance, but was determined by the existing psychological and physical factors. The Constitution did not require that, in defining sex and recording it in public registries, the psychological tendencies of the person concerned should be given priority over the existing physical factors.

On 11 October 1995 the Federal Constitutional Court refused to entertain the applicant's constitutional complaint (Verfassungsbeschwerde).

The Constitutional Court found that his submissions did not raise any question of fundamental importance. The legislator was not required to treat a person, who, according to physical factors, still belonged to the original sex and was still able to procreate as a member of this sex, in every respect as a member of the other sex, corresponding to their psychological situation, including even permitting the person to enter into a marriage with another person of the same biological sex. The Constitutional Court recalled that marriage was the community of a man and a woman. Finally, the Constitutional Court observed that, in the context of the applicant's case, it was not called upon to decide whether the legal possibilities under S. 1 of the Transsexuals Act were sufficient to protect persons who did not want to undergo gender reassignment surgery against a disproportionate interference with their personality rights.

II. On 17 July 1996 the Düsseldorf Court of Appeal, upon the appeal of the applicant's divorced wife, amended the first instance judgment of the Mülheim District Court of 29 November 1995 and ordered the applicant to pay maintenance for his child born in 1990, namely monthly payments of DEM 480 for the period between 1 January 1995 and 30 September 1996 and DEM 600 as from 1 October 1996.

In its reasoning, the Court of Appeal found that, taking into account the relevant provisions of the Civil Code (Bürgerliches Gesetzbuch) and on the basis of a notarial agreement concluded in 1992, the applicant was obliged to pay maintenance to his child born in wedlock. There were no changes in the relevant circumstances warranting a reduction of the sums which he had accepted to pay.

The Court of Appeal considered in particular that the applicant's argument that he had given up his previous profession and, as a transsexual, had meanwhile been working as a cosmetician with a considerably lower income, did not disclose any relevant change in the circumstances. In this respect, it recalled that for maintenance purposes the financial ability of a person liable to pay maintenance was determined not merely by his actual income, but also by his earning capacity. Thus a person liable to pay maintenance was under an obligation to perceive a reasonable income, otherwise he was treated as if he had in fact the income which he could earn with good will. Giving up his original profession on account of his transsexual tendencies could not reduce his maintenance obligations. In this context, the Court considered that the applicant did not meet the conditions under the Transsexuals Act, in particular since he had remarried a woman in 1994 and was the father of a further child. He could therefore reasonably be expected to take up his former profession, if need be in male clothing.

On 25 September 1996 the Federal Constitutional Court refused to entertain the applicant's constitutional complaint.

B. Relevant domestic law

The German Transsexuals Act (Gesetz über die Änderung der Vornamen und die Feststellung der Geschlechtszugehörigkeit in besonderen Fällen - Transsexuellengesetz) of 1980, as amended, provides transsexuals with two solutions, namely the change of forenames without gender reassignment surgery (SS. 1-7) and the amendment of public registries following such surgical treatment (SS. 8-12).

As to the conditions for the change of forenames, S. 1 para. 1 provides that the forenames of a person who, on account of a transsexual state, no longer feels himself or herself to belong to the sex recorded upon birth, but to the opposite sex and has been for three years under constraint of living with these feelings, shall be changed by the court, upon request of the person concerned, if, inter alia, there is a high probability that the feeling of belonging to the other sex will not change.

As to the conditions for the change of civil status, S. 8 para. 1 provides that, upon request of a person who, on account of a transsexual state, no longer feels himself or herself to belong to the sex recorded upon birth, but to the opposite sex and has been for three years under the constraint of living with these feelings, shall be changed by the court, upon request of the person concerned, if the conditions of S. 1 para. 1 are met and if the person concerned is unmarried, is permanently unable to procreate and has undergone gender reassignment surgery with the consequence that the outer appearance resembles closely the phenotype of the opposite sex.

COMPLAINTS

The applicant complains that the requirements under the German Transsexuals Act for a change of the civil status of transsexuals, namely the inability to procreate and gender reassignment surgery amount to a violation of his right to respect for his private life under Article 8 of the Convention.

In his subsequent submissions, the applicant also submits that

the Düsseldorf Court of Appeal, in obliging him to seek employment even in a male appearance, further violates his rights as a transsexual.

THE LAW

The applicant complains that the refusal to recognise his female sexual identity violates his right to respect for his private life, as guaranteed by Article 8 (Art. 8) of the Convention.

This provision provides as follows:

"1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

The Commission recalls that the notion of "respect" enshrined in Article 8 (Art. 8) is not clear-cut. This is the case especially where the positive obligations implicit in that concept are concerned, as in the instant case (cf. Eur. Court HR, *Rees v. the United Kingdom* judgment of 17 October 1986, Series A no. 106, p. 14, para. 35; *Cossey v. the United Kingdom* judgment of 27 September 1990, Series A no. 184, p. 15, para. 36; *B. v. France* judgment of 25 March 1992, Series A no. 232-B, p. 47, para. 44), and its requirements will vary considerably from case to case according to the practices followed and the situations obtaining in the Contracting States. In determining whether or not such an obligation exists, regard must be had to the fair balance that has to be struck between the general interest and the interests of the individual (Eur. Court HR, *Cossey* judgment, loc. cit., p. 15, para. 37; *B. v. France* judgment, loc. cit.).

The Commission further observes that transsexualism is not a new condition, but that its particular features have been identified and examined only fairly recently. The developments that have taken place in consequence of these studies have been largely promoted by experts in the medical and scientific fields who have drawn attention to the considerable problems experienced by the individuals concerned and found it possible to alleviate them by means of medical and surgical treatment. The term "transsexual" is usually applied to those who, whilst belonging physically to one sex, feel convinced that they belong to the other; they often seek to achieve a more integrated, unambiguous identity by undergoing medical treatment and surgical operations to adapt their physical characteristics to their psychological nature. Transsexuals who have been operated upon thus form a fairly well-defined and identifiable group (Eur. Court HR., *Rees* judgment, op. cit., pp. 15-16, para. 38).

In the above-mentioned cases, the Convention organs were faced with complaints brought by post-operative transsexuals, while the present case relates to a transsexual refusing gender reassignment surgery.

The Commission notes that German law offers two possibilities to meet the demands of transsexuals, namely the change of forenames pursuant to S. 1 of the Transsexuals Act and the rectification of the sex recorded upon birth in accordance with S. 8 of the Transsexuals Act. The conditions are that the transsexual concerned has been living with these feelings for three years and that there is a high probability that the feeling of belonging to the other sex will not change, and, additionally in case of a request for rectification, that

the transsexual concerned is unmarried, is permanently unable to procreate and has undergone gender reassignment surgery.

The Commission, having regard to the remaining uncertainty as to the essential nature of transsexualism and the extremely complex legal situations which result therefrom, finds that the respondent State has in principle taken appropriate legal measures in this field.

In the present case, the Mülheim District Court dismissed the applicant's request for acknowledgment as a woman on account of his refusal to undergo gender reassignment surgery and his continuing ability to procreate as a man. The Federal Constitutional Court, in its decision of 11 October 1995, considered in particular that the legislator was not required to treat persons, who, according to physical factors, still belonged to the original sex and were still able to procreate as member of this sex, in every respect as members of the other sex, corresponding to their psychological situation.

The Commission also notes that, following the dissolution of his first marriage, the applicant married again in 1994 and had another child.

In these circumstances the Commission finds that the German court decisions refusing the applicant's request for acknowledgment as being of female sex, and rejecting legal arguments drawn from his transsexualism, do not disclose any appearance of a breach of his rights under Article 8 (Art. 8) of the Convention.

It follows that the application is manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

For these reasons, the Commission, unanimously,

DECLARES THE APPLICATION INADMISSIBLE.

M.F. BUQUICCHIO
Secretary
to the First Chamber

J. LIDDY
President
of the First Chamber