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**EUROPEAN COMMITTEE OF SOCIAL RIGHTS
COMITE EUROPEEN DES DROITS SOCIAUX**

22 February 2016

Case Document No. 4

Transgender Europe and ILGA-Europe v. Czech Republic
Complaint No. 117/2015

SUBMISSIONS OF THE GOVERNMENT ON THE MERITS

Registered at the Secretariat on 14 December 2015

Observation of the Government of the Czech Republic concerning the collective complaint No 117/2015, submitted against the Czech Republic by organisations Transgender Europe and ILGA EUROPE

A. Subject of the complaint

(1) In their collective complaint, submitted on 30 March 2015, registered under reference number 117/2015, Transgender Europe and ILGA EUROPE (hereinafter: the "Complainant") declare that the Czech Republic (hereinafter: the "Czech Republic") violates article 11 of the European Social Charter adopted in 1961 (hereinafter: the "1961 Charter") in terms of the right to protection of health, in conjunction with the principle of nondiscrimination, as defined in the Preamble of the 1961 Charter, on the grounds of statutory requirement of sterilisation imposed on transgender persons wishing to change their personal identity documents to comply with their gender identity.

B. Grounds of the complaint

(2) According to the Complainant, transgender persons wishing to change their personal identity documents are forced to undergo sex reassignment surgery causing permanent impossibility of reproduction. Allegedly, this procedure is stipulated in the Civil Code¹ as well as in the Act on Specific Health Services² (hereinafter „SHSA “). The Complainant argues that this procedure, as well as informed consent of the transgender person before sex reassignment surgery, is enforced. Furthermore, the Complainant protests against transgenderism being categorised as psychiatric diagnosis and he also considers Czech legislation discriminatory and providing insufficient protection of persons based on their gender.

a) Legislation in Czech Republic

(3) As one of few European countries, Czech legislation has allowed filing applications for sex changes since 1970s. Individual's right to sex reassignment surgery is guaranteed in SHSA. The provisions of the Act on Registries follow on commenced or finalised sex reassignment therapy by stipulating the option (not obligation) to accept neutral name and surname. In case of finalised therapy, it provides the right (not obligation) to change transgender person's name and surname as well as personal identity documents, including birth certificate, which are identical in terms of gender. Pursuant to the Act on Administrative Fees³, transgender persons are exempt from administrative fee for changing his/her name. By defining the sex reassignment surgery, the Civil Code only responds to completed sex change and stipulates the moment of occurrence of this change, while protecting personal and property regimes. As also indicated in the explanatory report, this provision stems from the concept that this change is a matter of fact and its legal effects must be connected with the moment of its medical occurrence. The former Civil Code (Act No 40/1964 Coll., expired on 31 Dec. 2013) did not specify sex changes. New legislation deals with sex changes in section 29 of the new

¹ Act No 89/2012 Coll., Civil Code, as amended.

² Act No 373/2011 Coll., on specific health services, as amended.

³ Act No 634/2004 Coll., on administrative fees, as amended.

Civil Code, while SHSA being *lex specialis* of the new Civil Code. The legislature did not intend to enact a specific regime for medical interventions of this kind in the civil law, but rather to adjust personal rights in general terms, with focus on private-law consequences of sex change, considering personal status, personal and property regimes, duration of matrimony/registered partnership as well as all associated questions. Consequently, Complainant's interpretation of the Civil Code, i.e. stipulating condition of transgender person's permanent loss of fertility, is one-sided, disregarding the context and, hence, misleading.

(4) Equal treatment and non-discrimination are guaranteed by the Czech law, starting from the Charter of Fundamental Rights and Freedoms⁴, stipulating in its Article 3 section 1: "*Fundamental human rights and freedoms are guaranteed to everybody irrespective of sex, race, colour of skin, language, faith, religion, political or other conviction, ethic or social origin, membership in a national or ethnic minority, property, gender, or other status.*" The provisions in section 1 and 2 of the Anti-Discrimination Act⁵ stipulate, inter alia, the right to equal treatment and prohibition of discrimination with respect to the right to employment and access to an occupation, business and self-employment, employment and service relationship and other paid employment, including remuneration, as well as access to and provision of healthcare. In the legal relationships subject to this Act, any natural person shall have the right to equal treatment and to non-discrimination. Harassment, sexual harassment, victimisation, instruction to discriminate and inciting discrimination shall also be considered to be discrimination. Direct discrimination shall mean any act, including omission, where one person is treated less favourably than another is, has been or would be treated in a comparable situation, on grounds of race, ethnic origin, nationality, sex, sexual orientation, age, disability, religion, belief or worldview. Discrimination on grounds of pregnancy, maternity and paternity and on grounds of sexual identification shall also be considered to be discrimination on the ground of sex. Prohibition of discrimination on the grounds stipulated in the Anti-Discrimination Act is also guaranteed by other regulations, such as the Labour Code⁶ in the area of labour-law relations and the Employment Act⁷.

(5) It follows from the above that the Czech law provides sufficient protection of transgender persons against discrimination, granting them all means of protection, including enforcement of their rights by way of legal proceedings. The Civil Procedure Code⁸ in section 133a governs so called shared burden of proof, where the defendant is obliged to evidence there has not been any violation of the principle of equal treatment.

(6) Pursuant to Civil Code (section 656 para 1 and 2), the **marriage** is a free expression of will of the man and woman to enter into marriage and to create permanent union of a man and woman. Pursuant to the Registered Partnership Act⁹, **registered partnership** is permanent association of two

⁴ Resolution No 2/1993 of the Presidium of Czech National Council of 16 December 1992 enacting the Charter of Rights and Freedoms as component part of constitutional order of the Czech Republic.

⁵ Act No 198/2009 Coll., on equal treatment and on the legal means of protection against discrimination and on amendment to some laws (the Anti-Discrimination Act).

⁶ Act No 262/2006 Coll., Labour Code, as amended.

⁷ Act No 434/2004 Coll., Employment Act, as amended.

⁸ Act No 99/1963 Coll., Civil Procedure Code, as amended.

⁹ Act No 115/2006 Coll., Registered Partnership Act and amendment of some related acts.

persons of the same sex, established in the procedure as stipulated in this Act, based on free expression of will of both persons of the same sex, made by affirmative, free and complete declaration of these persons that they enter into the partnership. For these reasons, the matrimony or the registered partnership ceases to exist after the sex change. Transformation of the matrimony into registered partnership is not possible in the Czech Republic. It is necessary to respect free will of the other spouse, which may be different. On the other hand, not any person having changed his/her sex is precluded from entering into a new registered partnership/matrimony.

b) Consistency of the Czech law with case law of the European Court of Human Rights

(7) All prior case law of the European Court of Human Rights (hereinafter: "ECtHR ") referred to persons who underwent sex reassignment surgery and had to withstand difficulties associated with recognition of the sex change.¹⁰ For the first time, the question of existence of specific conditions of sex change was dealt with in case 14793/08, Y. Y. v. Turkey. However, the subject of this case was sterilisation before the sex reassignment surgery. In its reasoning, the ECtHR recognized that legal recognition of the sex change is subject to surgical intervention in many member states of the Council of Europe (e.g. Belgium, Denmark, Finland, France, Georgia, Italy, Romania, and Slovenia) however, more significant surgical interventions of this kind necessarily result in sterilisation. This requirement has not been explicitly recognized as incompatible with the European Convention on Human Rights. The Czech Republic believes that the Czech legal provisions are consistent with the previous case law of ECtHR, which only implies that the approach to sex reassignment surgery cannot be contingent on the condition of infertility/sterilisation; not that legal recognition of the sex change cannot be subject to prior sex reassignment surgery including sterilisation.

c) Requirement of sterilisation, informed consent, diagnosis of gender identity disorder, maintenance of fertility

Application for sex reassignment surgery, maintenance of fertility

(8) In the Czech Republic, sex reassignment surgery is made upon application submitted by the transgender person. According to the Bulletin of the Ministry of Health of the Czech Republic No 8/2012, any surgery resulting in sex change can only be carried out in patients with documented ability of living in the opposite sex role during at least 12 months and having taken relevant hormonal preparations for at least 12 months. The application for sex reassignment surgery transformation will be examined by the expert commission (7 persons) which meets 3 months after the date of filing the application by the patient at the latest. **Having considered the application, the expert commission will issue a statement in writing whether all conditions for the sex change have been complied with or not; at the same time, it will specify the expiration date of the statement, with due regard for urgency of the medical intervention. Currently, validity of expert commission's opinions is two years.** Within this period, surgical interventions resulting in sex change must be commenced. After expiration of the opinion, a new application can be filled with the Ministry of Health.

(9) The real sex reassignment surgery can only be made after the consent given by the relevant transgender person **in writing**. According to medical specialists dealing with transgender persons for

¹⁰ See particularly judgement of the European Court of Human Rights No 28957/95, Christine Goodwin v. United Kingdom; No 7525/76, Dudgeon v. United Kingdom; No 37359/09 Hämäläinen v. Finland; No 27527/03, L. v. Lithuania; No 33985/96 and 339/96, Smith and Grady v. United Kingdom.

a long time, **overwhelming majority of sex reassignment surgeries** take place within 2 years after commencement of the therapy. Consequently, there is any support for Complainant's contention that the sex change takes approximately 7 years.

(10) Male-to-female change

According to information provided by medical experts dealing with transgender patients for a long time, it has been established that orchiectomy and reshaping male genitals belong to the most frequent surgical interventions required by the patient applying for male-to-female change, for aesthetic but, particularly, hormonal reasons, since the testes produce male hormones causing various undesirable attributes, such as stronger vocal cords, growing beard and hairs, androgenic alopecia, muscle growth and/or broad shoulders. Other procedures to remove the testicles (e.g. their transposition into the abdominal cavity) is not ethical from medical point of view, and particularly for two reasons. The first of them is fertility disorder and the second (and also more serious) reason is **high risk of testicular cancer**.

(11) Female-to-male change

The most frequently required surgical intervention for the purpose of female-to-male change is reproductive mammoplasty. It will be conducted together with hysterectomy or subsequently. According to some sources, hysterectomy is also appropriate for reasons of health, since hormonal therapy causes absence of menstruation, which may result in hypertrophy of uterine mucosa, with **possible occurrence of neoplasms**. The ovaries can be removed together with the uterus, since they produce undesirable hormones, but also for the purpose of **prevention of cancer**.

(12) Transgender persons are not restricted in their rights to reproduction. Firstly, some transgender persons already had own children before sex change, and secondly, they can **preserve their embryonic stem cells** before the sex reassignment surgery¹¹.

Informed consent

(13) Pursuant to Article 5 of the Convention on Human Rights and Bio Medicine¹², any healthcare intervention can only be carried out upon free and informed consent given by the relevant person, duly informed on the purpose and nature of the healthcare intervention as well as on its consequences and risks. The relevant person can withdraw his/her consent any time. Details of provision of health services to patients based on informed consent are stipulated in the Healthcare Services Act¹³.

(14) The objective of patient's informed consent is, primarily, comprehensive information of the patient about his/her health, therapy options, consequences and risks associated with individual

¹¹ Act No 296/2008 Coll., regulating Safeguarding the Quality and Safety of Human Tissues and Cells Intended for Use in Man and on Amendments to Related Acts (Act on Human Tissues and Cells), as amended.

¹² The Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine, promulgated under No 96/2001 Coll., valid in the Czech Republic from 1 October 2001.

¹³ Act No 372/2011 Coll., regulating Health Services and Terms and Conditions for Providing of Such Services (Healthcare Services Act), as amended.

therapy options; the information must be sufficient, intelligible, considering patient's lack of professional knowledge and experience.

(15) The surgical gender reassignment is carried out only to patients who agree to the sex reassignment surgery based on his/her application, which also includes informed consent, thus documenting the patient has been adequately informed on the risks of the surgery, irreversibility of the preceding status, possibility of post-surgical complications, impossibility of guaranteeing perfect appearance and function of genitals, need of further hormonal therapy, since the body will not produce sufficient quantity of own hormones, and also regular medical surveillance. At the sessions of the expert commission, the applicants for sex changes do not regret termination of their reproductive function. Moreover, some applicants for female-to male change cannot imagine being pregnant at all.

(16) In the light of above facts, it is not possible that sex reassignment surgery is conducted against the will of the relevant person. Transgender persons are not even forced to undergo official sex change in the Czech Republic, as claimed by the Complainant. In view of the above, we emphasize again that Czech law allows remaining in any of "non-complete" stages of the change. **Many transgender persons live and are comfortable in this sexually indifferent role for a long time, with neutral names, while hormones are applied.**

(17) The fact of impossibility of transgender person being forced to sex reassignment surgery by physicians against their will is also confirmed by the article of TransFusion Company dated 18 August 2015, which contains the following comments on the statement of transsexual women claiming this fact:

„That is absurd. Currently, the system is secured by itself to the extent that such cases are virtually impossible. Several conditions must be complied with before the surgery can be conducted: You must have medical examinations, appear at 7-member commission of the Ministry of Health which will examine your health status any you also undergo various psychological tests. In order to be allowed to change your sex and undergo the surgery, you must provide evidence you are mentally healthy. „

As follows from this article, the diagnosis is one thing, but the decision is up to the individual.

Hence, we reject Complainant's claims that transgender persons are forced to undergo an inconsiderate and painful procedure for the purpose of official sex change.

Diagnosis of transsexualism

(18) The diagnosis of transsexualism, as used in the Czech Republic, is based on the International Classification of Diseases of the World Health Organisation, defining transsexualism as sexual identification disorder. Consequently, it is not a specific Czech characteristics or intentional stigmatisation of transgender persons. This definition implies the wish to live and be accepted as a member of the opposite sex and, as a rule, it is associated with a feeling of dissatisfaction with individual's anatomic sex and/or its inappropriateness as well as the wish of surgical and hormonal intervention so that individual's body – as far as possible – corresponds to the preferred sex. The desire to be free of original anatomic sex and to live as a member of the opposite sex leads the patients to persistent applications for medical assistance. **Hence, any change in terms of re-classification of the diagnosis must be made internationally.**

(19) Medical interventions resulting in sex reassignment surgery are financially covered by public health insurance. Medical examinations, psychological consultations and/or attendance by other specialists, e.g. urology and gynaecology, are also covered. After the sex change, the relevant health insurance company pays life-long contributions for hormonal therapy to transgender persons. Should sex reassignment surgery be based on self-determination, it logically means exemption of transsexualism from the classification of diseases. **In this case, the costs of the sex reassignment surgery and hormonal therapy would be borne by transgender persons.**

c) Change of identity documents (Section 72 para 5; Section 82 Subsec. 1 of the Registries Act)

(20) Relevant legislation¹⁴ only responses to commenced and/or finalised sex change therapy by regulations concerning change of the national identity number as well as name and surname of the natural person who is undergoing or has already undergone the therapy.

(21) The registry allows any natural person being on sex change therapy to use neutral name and surname. This permission will be granted upon application for change of the name, submitted by the transgender person, and confirmation of the relevant medical centre where the therapy is being administered. Neutral names are so-called dual-gender names, i.e. they have the same format for male and female name and surname. Allowed change will be marked in the appropriate register and the registrar will issue a new birth certificate to the natural person. In this case, the sex as recorded will not be changed.

(22) After completion of the sex change therapy, subsequent record on sex change will be made in the birth register, based on confirmation issued by the health service provider. The date of the sex change will be the day indicated in the confirmation. The Registry will record the name of the natural person corresponding to his/her new sex in compliance with grammar rules of the Czech language, unless the natural person applies for change of his/her name and surname after completion of the therapy and/or uses neutral name and surname. In this case, the name will not be recorded. The Registry will inform the court on this fact. After completion of the sex change therapy, the Registry will ask the Ministry of Interior to change national identity number in compliance with the Register of Population Act. The new national identity number will be delivered to the natural person by mail. After recording the change of the national identity number in the relevant register, the Registry will send verbatim abstract to the Ministry of Interior for the purpose of guaranteeing data correctness and it will also issue the new birth certificate to the natural person.

(23) The sex change is regulated by the provisions in Section 17 of the Register of Population Act. Pursuant to Subsection 2 d), the change of the name will be made, inter alia, in case of sex change. After completion of the sex change therapy and issuing the birth certificate by the Registry, the new identity card and, as the case may be, also the new passport will be issued for the natural person. **All administrative actions are exempt from fees and, hence, free of charge for the natural person.** These steps will only be implemented after commenced or already completed therapy. Complainant's statement that the health documentation of the transgender person will be passed to the court for approval of the birth certificate is not true. The health documentation will only be passed to the court in case of patients with limited legal capacity.

¹⁴ Act No 133/2000 Coll., on Register of Population and Birth Numbers, and on Amendments of Certain Acts. Act No 301/2000 Coll., regulating Registries, Names and Surnames and Amendment of Some Acts, as amended.

d) Sterilization and chemical castration

(24) Sterilization of some persons carried out in the past as well as therapeutic castration made upon request submitted by the persons with deviation, who committed violent and sexually motivated crime, do not apply to the transgender persons. Hence, these issues are not covered in this Statement of the Government of the Czech Republic.

C. CONCLUSION

(25) As documented above, transgender persons are treated with due respect and efforts to make their everyday life in the Czech Republic as easy as possible, and the Government of the Czech Republic will continue this trend in future. Since 2009, the Committee for Sexual Minorities has been working with the Government Council for Human Rights. This Committee includes representatives of governmental authorities, leading experts and representatives of nongovernmental non-profit organisations protecting the rights of LGBT. The Committee for Sexual Minorities continues the activities of the Working Group for Questions of Sexual Minorities, established on occasion of the European Year of Equal Opportunities for All in 2007. The Working Group has conducted comprehensive analysis of the situation of LGBT (gay, lesbian, bisexual and transgender) minorities in the Czech Republic. This analysis defines specific steps to improve the status of the LGBT minority in the Czech Republic. These steps (proposals) are considered recommendations in legislative (amendments of acts, decrees and/or other legal provisions) and nonlegislative (e.g. education) sector.

(26) Any Government of the Czech Republic respects mandatory provisions of the 1961 Charter, does not see any connection between the right of any person intending to apply for sex reassignment surgery based on his/her own decision and the provisions of Article 11 of the 1961 Charter. Also, ECSR has not linked sex change issues with this Article so far, which is identical with the point of view of the Czech government, since the subject of the complaint belongs *de facto* to the area of personal status and registries, which are not dealt with in Article 11 of the 1961 Charter, consequently, it cannot be deemed denial of the right to health. Furthermore, there exist not any unambiguous human right standards in this area. We can see different trends in other countries as well as in the recommendations provided by international organisations. Consequently, each country should have the possibility to go on its own way. Compared with other countries, the Czech Republic guarantees high standards of aid to the transgender persons, which is also documented by the fact that the Czech healthcare sector and its services as well as leading experts are sought by foreign residents. In any case, the Czech Republic is continually addressing the questions associated with the rights of transgender person and also cooperates with the Committee for Sexual Minorities and nongovernmental non-profit organisations.

(27) In the light of the above facts, the Czech Republic believes that the criteria as set in article 11 of the 1961 Charter are met in accordance with the requirements and that Czech law is fully in compliance with this Article.