

**EUROPEAN COMMITTEE OF SOCIAL RIGHTS  
COMITÉ EUROPÉEN DES DROITS SOCIAUX**



**Confidential<sup>1</sup>**

**Transgender Europe and ILGA-Europe v. the Czech Republic**

Complaint No. 117/2015

**REPORT TO THE COMMITTEE OF MINISTERS**

Strasbourg, 15 May 2018

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<sup>1</sup> It is recalled that pursuant to Article 8§2 of the Protocol, this report will not be made public until after the Committee of Ministers has adopted a resolution, or no later than four months after it has been transmitted to the Committee of Ministers, namely 1 October 2018.



## Introduction

1. Pursuant to Article 8§2 of the Protocol providing for a system of collective complaints (“the Protocol”), the European Committee of Social Rights, a committee of independent experts of the European Social Charter (“the Committee”) transmits to the Committee of Ministers its report<sup>2</sup> on Complaint No. 117/2015. The report contains the Committee’s decision on the merits of the complaint (adopted on 15 May 2018); the decision on admissibility (adopted on 9 September 2015) is appended.
2. The Protocol came into force on 1 July 1998. It has been ratified by Belgium, Croatia, Cyprus, the Czech Republic, Finland, France, Greece, Ireland, Italy, the Netherlands, Norway, Portugal and Sweden. Furthermore, Bulgaria and Slovenia are also bound by this procedure pursuant to Article D of the Revised Social Charter of 1996.
3. The Committee’s procedure was based on the provisions of the Rules of 29 March 2004 which it adopted at its 201<sup>st</sup> session and last revised on 26 January 2018 at its 297<sup>th</sup> session.
4. The report has been transmitted to the Committee of Minister on 31 May 2018. It is recalled that pursuant to Article 8§2 of the Protocol, this report will not be made public until after the Committee of Ministers has adopted a resolution, or no later than four months after it has been transmitted to the Committee of Ministers, namely 1 October 2018.

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<sup>2</sup> This report may be subject to editorial revision.



**DECISION ON THE MERITS**

**Adoption: 15 May 2018**

**Notification: 31 May 2018**

**Publicity: 1 October 2018**

**Transgender Europe and ILGA-Europe v. the Czech Republic**

Complaint No. 117/2015

The European Committee of Social Rights, committee of independent experts established under Article 25 of the European Social Charter (“the Committee”), during its 299th session in the following composition:

Giuseppe PALMISANO, President  
Monika SCHLACHTER, Vice-President  
Karin LUKAS, Vice-President  
Eliane CHEMLA, General Rapporteur  
Birgitta NYSTRÖM  
Petros STANGOS  
József HAJDU  
Marcin WUJCZYK  
Krassimira SREDKOVA  
Raul CANOSA USERA  
François VANDAMME  
Barbara KRESAL  
Kristine DUPATE

Assisted by Henrik KRISTENSEN, Deputy Executive Secretary

Having deliberated on 25 January, 20 March and 15 May 2018,

On the basis of the report presented by Raul CANOSA USERA ,

Delivers the following decision, adopted on that date:

## **PROCEDURE**

1. The complaint lodged by Transgender Europe and ILGA-Europe was registered on 30 March 2014.
2. Transgender Europe and ILGA-Europe allege that the legal requirement of sterilisation imposed on trans people wishing to change their personal documents so that they reflect their gender identity in the Czech Republic, is in breach of Article 11 either alone or in light of the non-discrimination clause of the Preamble to the 1961 European Social Charter (“the 1961 Charter”).
3. On 9 September 2015, referring to Article 6 of the 1995 Protocol providing for a system of collective complaints (“the Protocol”) the Committee declared the complaint admissible.
4. In its decision on admissibility, the Committee invited the Government to make written submissions on the merits of the complaint by 17 November 2015.
5. In application of Article 7§1 of the Protocol, the Committee invited the States Parties to the Protocol and the States that had made a declaration in accordance with Article D§2 of the Charter, to submit any observations they might wish to make on the merits of the complaint by 17 November 2015.
6. On 2 October 2015, the Government asked for an extension to the deadline for presenting its submissions on the merits. The President of the Committee extended this deadline until 17 December 2015. The Government’s submissions on the merits were registered on 14 December 2015.
7. The deadline set for Transgender Europe and ILGA-Europe’s response to the Government’s submissions on the merits was 30 March 2016. The response was registered on 24 March 2016.
8. Pursuant to Rule 32A of the Committee’s Rules, the President invited ADF International to submit observations, its observations were registered on 28 July 2016.
9. Additional information from Transgender Europe was registered on 17 May 2017.

## **SUBMISSIONS OF THE PARTIES**

### **A – The complainant organisation**

10. Transgender Europe and ILGA-Europe ask the Committee to find that the situation in the Czech Republic, is in breach of Article 11 either alone or in light of the non-discrimination clause of the Preamble to the 1961 Charter on the grounds that there is a legal requirement of sterilization imposed on trans people wishing to change their personal documents so that they reflect their gender identity.

### **B – The respondent Government**

11. The Government requests the Committee to find the complaint unfounded in all respects.

## **OTHER OBSERVATIONS**

### **ADF International**

ADF International, is a global partner of Alliance Defending Freedom, it advocates for the right of people to freely live out their faith and defends religious freedom, the sanctity of life, and marriage and family around the world.

12. ADF International argues that national rules on gender reassignment surgery are not within scope of Article 11, which is concerned with guaranteeing access to health services and health education. The matter before the Committee does not relate to access to healthcare, nor does it relate to health education. Access to gender reassignment surgery is clearly possible in the Czech Republic. The complaint is about the requirements imposed by law upon someone seeking a change to official documents. That falls far wide of the scope of Article 11.

13. The principle of informed consent does not explicitly appear within the Charter but it has been found to be contained within the right to health protected by international documents including the International Covenant on Economic, Social and Cultural Rights.

14. ADF International cites the UN Committee on Economic, Social and Cultural rights, General Comment No. 14 which provides that the right to health contains both freedoms and entitlements. And the freedoms include the right to be free from interference, such as the right to be free from torture, non-consensual medical treatment and experimentation. ADF International points out that non-consensual medical treatment is nestled between torture and medical experimentation. According to ADF International this gives context to the type of ill-being targeted here which includes interventions without the patient's knowledge and interventions which are continued despite the protestations of the individual. There is a clear gravity to this with the aim being ensuring people only undergo treatment which they both understand the essentials of and which, having so understood, are willing to undergo with all the risks and benefits entailed therein.

15. ADF International maintains that it is a distortion of that concept to suggest it is violated where an individual chooses to undergo gender reassignment surgery having been informed of the benefits and the risks. The surgery is neither prescribed, nor required by the State and is only carried out pursuant to an individual's informed consent.

16. The fact that a State may require gender reassignment prior to amending a birth certificate or other official document does not compel the individual to undergo the surgery. To accept the alternative would mean the State would be required to recognize as female someone still biologically and genetically male and able to reproduce as such. States should be afforded a wide margin of appreciation particularly in areas raising sensitive moral and ethical questions where there is no consensus. It is clear that there is an extreme divergence of approach across the Council of Europe region.

17. It is submitted that the fact this is an area in which the European Court of Human Rights has been particularly active should therefore be of the highest significance to the Committee in its consideration of this complaint given the interest in developing a cohesive body of human rights jurisprudence which protects fundamental rights in a consistent way.

## **RELEVANT DOMESTIC LAW AND PRACTICE**

18. Civil Code (2014), § 29 of Act No. 89/2012, Coll., Civil Code reads as follows:

### **§ 29**

#### Change of gender

(1) The gender reassignment is accomplished by a surgical operation involving the termination of reproductive function and a genital reconstruction surgery. The date stated on the certificate issued by the health service provider is considered to be the date of the administrative gender change.

(2) The gender reassignment does not affect individual's personal status, nor his personal relations and material status; however, their marriage or registered partnership will expire. In relation to the duties and rights of husband and wife, whose marriage expired, towards a common child and their material duties and rights in the period after the expiry of their marriage, a court will decide, including ex officio, about the duties and rights of the divorced spouses towards a common child and their material duties and rights in the period after the divorce; how each parent will care for the child in the future.

19. Act on Specific Health Services (2011), No.373/2011, §21-23 read as follows:

Part 4

The gender reassignment in transsexual patients

§ 21

(1) The gender reassignment of transsexual patients will for the purposes of this law be understood as the carrying out of medical procedures, whose aim is to surgically alter gender and at the same time end the reproductive function of the patient. Under the term "Transsexual patient" we understand the person with the permanent dissonance between mental and physical gender (hereinafter referred to as "Gender Identity Disorder").

(2) Surgical interventions aimed at gender reassignment can be realized on the patient,

a) who has a clearly established Gender Identity Disorder and who has demonstrated the ability to permanently live as a person of the opposite sex.

b) who is not married or who has not entered into a registered partnership or similar to same-sex unions abroad, or can prove that his marriage or registered partnership or a similar bond has been dissolved.

(3) Gender reassignment surgery can be permitted to a patient who has reached the age of 18 years, on the basis of

a) a written application and

b) a positive opinion of the expert committee.

(4) Surgical interventions aimed at the gender reassignment surgery shall be attainable to the patient deprived of legal capacity, based on

a) a written request patient's legal representative; This does not affect the provisions of § 35 of the Act on Health Services,

b) a positive opinion of the expert committee and

c) a provider's territorial jurisdiction court's approval.

(5) can not perform gender reassignment surgery to a patient in custody, imprisonment, security detention or in a protective treatment.

§ 22

(1) The expert committee is constituted by the Ministry. The members of the jury are

a) a medical worker who is a state employee assigned to the Ministry,

b) a physician competent in the field of sexology,

c) a psychiatrist,

d) a clinical psychologist,

e) a physician competent in the field of diabetology and endokrinologie,

f) a physician competent in the field of urology and gynecology and obstetrics,

g) a lawyer with the expertise in the field of medical law.

(2) The commission members may not be in an employment or similar relationship to the provider, they may not be a member of control committee of the supervisory body nor a member of the control committee of the statutory body of the provider or a member of the supervisory or statutory body of the provider, neither the associate of the provider

(3) The request of the patient or the patient's legal representative shall be delivered immediately to the Ministry; the application will include an agreement of the attending physician competent in the field of sexology and gender reassignment.

(4) The patient and the patient's legal representative is always invited to the meeting of the expert commission, which will be held within 3 months from the date of the request of the patient or the patient's legal representative. The expert committee provides the patient and the patient's legal representative with the information about the nature of the medical procedure, its permanent consequences, side effects and potential risks and verifies that the patient and the patient's legal representative fully understand this information and whether the application of the patient and the patient's legal representative was entirely voluntary. In case of the request of the patient referred to in § 21 para. 4, take into account his intellectual maturity.

(5) The members of the expert committee, the patient and the patient's legal representative will sign a record of an information provided. Included in the record is also the opinion of a

patient deprived of legal capacity. If the patient with respect to their intellectual maturity is unable to view or sign the record, this shall be indicated in the record.

(6) The expert committee will draw up a written expert opinion after discussing the request, to assess, whether all the conditions for the implementation of gender reassignment have been met; they also indicate the period of validity and opinions while respecting the urgency of medical intervention. An agreement with performing the gender reassignment is needed, as is the unanimous approval of all the members of the expert committee. In the event that the consent of all members of the expert committee fails to be reached, the reasons that led to this situation will be stated. The expert committee shall send the Ministry expert opinion in 3 copies and a copy of the minutes of the meeting.

(7) The attending physician of the patient, who recommended the gender reassignment, may be invited to attend meetings of the expert committee, but may not be present during an interview with the patient and the expert committee.

(8) Included in the medical records of the patient is

- a) a written request of the patient or the patient's legal representative,
- b) a copy of the consent of the attending physician competent in the field of sexology,
- c) a record of the meeting of the expert committee
- d) the opinion of an expert committee.

(9) The Ministry shall forward

- a) a copy of the opinion of the expert committee and a copy of the minutes of the meeting of the expert commission to the patient or the patient's legal guardian,
- b) 2 copies of the opinions of the expert committee for the establishment of providers of medical documentation in accordance with paragraph 8 and handover court under paragraph 10 and a copy of the minutes of the meeting of the expert commission.

(10) The request to approve the gender reassignment is submitted to the court by the provider. The provider shall attach a written request of the patient or a written request of his legal representative to the postulation, and the opinion of the expert committee. If the patient lacks mental capacity to write an opinion, this shall be stated and explained by the provider in his request.

## § 23

(1) The gender reassignment surgery can start if the patient has given his written permission immediately prior to it.

(2) The provider shall give the patient a confirmation of the gender reassignment surgery.

20. 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 reads as follows:

### **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, ethnic or social origin, membership in a national or ethnic minority, property, gender, or other status".

21. In their submissions the parties also make reference to the following legal sources:

- 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).
- Act No. 262/2006 Coll., Labour Code, as amended: prohibition of discrimination.
- Act No. 434/2004 Coll., Employment Act, as amended: prohibition of discrimination.
- Act No. 99/1963 Coll., Civil Procedure Code, as amended: shared burden of proof.
- Act No. 115/2006 Coll., Registered Partnership 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).
- Act No. 372/2011 Coll., regulating Health Services and Terms and Conditions for Providing of Such Services (Healthcare Services Act), as amended: informed consent.
- Act. No. 133/2000 Coll., on register of Population and Birth Numbers, and on Amendments of Certain Acts. And Act No 301/2000 Coll., regulating Registries, Names and Surnames and Amendment of Some Acts, as amended.
- Regulations concerning change of national identity after a sex therapy.

## **RELEVANT INTERNATIONAL MATERIALS**

### **A – Council of Europe**

#### **1. Committee of Ministers**

22. Recommendation CM/Rec(2010)5 of the Committee of Ministers to member states on measures to combat discrimination on grounds of sexual orientation or gender identity adopted on 31 March 2010:

“20. Prior requirements, including changes of a physical nature, for legal recognition of a gender reassignment, should be regularly reviewed in order to remove abusive requirements.

21. Member states should take appropriate measures to guarantee the full legal recognition of a person's gender reassignment in all areas of life, in particular by making possible the change of name and gender in official documents in a quick, transparent and accessible way; member states should also ensure, where appropriate, the corresponding recognition and changes by non-state actors with respect to key documents, such as educational or work certificates."

## **2. Parliamentary Assembly**

23. Resolution 1728 (2010) of 29 April 2010, "Discrimination on the basis of sexual orientation and gender identity":

"...

Consequently, the Assembly calls on member states to address these issues and in particular to:

...

Ensure official documents that reflect an individual's preferred gender identity, without any prior obligation to undergo sterilisation or other medical procedures such as sex reassignment surgery and hormonal therapy."

24. Resolution 2048 (2015) of 2 April 2015, "Discrimination against Transgender people in Europe":

"...

In the light of these considerations, the Assembly calls on member States to:

...

adopt quick, transparent and accessible legal gender recognition procedures, based on self-determination, including by abolishing sterilization and other medical requirements such as a mental health diagnosis."

## **3. European Court of Human Rights**

### **Relevant judgments of the European Court of Human Rights**

25. In *A. P., Garçon and Nicot v. France*, judgment of 6 April 2017, the Court held that a requirement to undergo sterilization or treatment involving a very high probability of sterilization applying to persons who wished to change their names and gender on their birth certificate to reflect their gender identity was a violation of the right to privacy as guaranteed by Article 8 of the Convention.

26. In *Van Kück v. Germany*, judgment of 12 June 2003, the Court *inter alia*, held that there had been a violation of Article 8 (right to respect for private and family life) of the Convention. It found that since gender identity was one of the most intimate aspects of a person's private life, it appeared disproportionate to require the applicant to prove the medical necessity of the treatment. No fair balance had been struck between the interests of the insurance company on the one hand and the interests of the individual on the other.

27. In *Y.Y. v. Turkey*, judgment of 10 March 2015, the Court held that there had been a violation of Article 8 (right to respect for private and family life) of the Convention finding that, in denying the applicant, for many years, the possibility of undergoing such an operation [gender re-assignment surgery], the Turkish State had breached his right to respect for his private life. The Court reiterated in particular that the possibility for transsexuals to have full enjoyment of the right to personal development and physical and moral integrity could not be regarded as a controversial question. It considered that, even supposing that the denial of the applicant's initial request for access to such surgery had been based on a relevant ground, it was not based on a sufficient ground. The resulting interference with the applicant's right to respect for his private life could not be considered "necessary" in a democratic society.

28. In *Christine Goodwin v. United Kingdom*, judgment of 11 July 2002, the applicant complained of the lack of legal recognition of her changed gender and in particular of her treatment in terms of employment and her social security and pension rights and of her inability to marry.

29. The Court held that there had been a violation of Article 8 (right to respect for private and family life) of the Convention, owing to a clear and continuing international trend towards increased social acceptance of transsexuals and towards legal recognition of the new sexual identity of post-operative transsexuals.

"Since there are no significant factors of public interest to weigh against the interest of this individual applicant in obtaining legal recognition of her gender re-assignment, the Court reaches the conclusion that the notion of fair balance inherent in the Convention now tilts decisively in favour of the applicant" (§ 93 of the judgment)."

#### **4. Commissioner for Human Rights**

30. Issue paper (2009)2, "Human Rights and Gender Identity", Strasbourg, July 2009:

##### "3.2.1 Conditions for the change of sex and name

Access to procedures to change one's sex and one's first name in identity documents is vital for a transgender person to live in accordance with one's preferred gender identity. Indeed, the ability to live in the preferred gender and be legally recognised as such is preconditioned by identity papers that are used to conduct everyday life, for example when using a health insurance card, a driving licence or an educational certificate during a job application process. The often lengthy and bureaucratic processes for the recognition of sex and name change result in the inability to travel with valid documents, even to visit relatives in a neighbouring country for a weekend. It could also lead to restrictions on participation in education or employment wherever birth certificates are necessary or sex is indicated on national identity cards. It can mean that transgender people without the correct documentation are effectively hindered from meaningful participation in the labour market, leading to unemployment.

There is a need to distinguish between procedures for the change of first name and those for the change of sex. However, both processes frequently require that the individual concerned must first be considered eligible for the procedure by the medical profession.

It should be stressed that the eligibility conditions for the change of sex in documents vary widely across Europe. It is possible to roughly distinguish three categories of countries. In the first category, no provision at all is made for official recognition. As pointed out above, this is in clear breach of established jurisprudence of the ECtHR. In the second and smaller category of countries, there is no requirement to undergo hormonal treatment or surgery of any kind in order to obtain official recognition of the preferred gender. Legal gender recognition is possible by bringing evidence of gender dysphoria before a competent authority, such as experts from the Ministry of Health (in Hungary), the Gender Reassignment Panel (in the UK) or a doctor or clinical psychologist. In the third category of countries, comprising most Council of Europe member states, the individual has to demonstrate:

1. that (s)he has followed a medically supervised process of gender reassignment – often restricted to certain state appointed doctors or institutions;
2. that (s)he has been rendered surgically irreversibly infertile (sterilisation), and/or
3. that (s)he has undergone other medical procedures, such as hormonal treatment.

Such requirements clearly run counter to the respect for the physical integrity of the person. To require sterilisation or other surgery as a prerequisite to enjoy legal recognition of one's preferred gender ignores the fact that while such operations are often desired by transgender persons, this is not always the case. Moreover, surgery of this type is not always medically possible, available, or affordable without health insurance funding. The treatment may not be in accordance with the wishes and needs of the patient, nor prescribed by his/her medical specialist. Yet the legal recognition of the person's preferred gender identity is rendered impossible without these treatments, putting the transgender person in a limbo without any apparent exit. It is of great concern that transgender people appear to be the only group in Europe subject to legally prescribed, state-enforced sterilisation.

It needs to be noted that many transgender people, and probably most transsexual persons among them, choose to undergo this treatment, often including the elimination of procreative organs. The treatment is often desired as a basic necessity by this group. However, medical treatment must always be administered in the best interests of the individual and adjusted to her/his specific needs and situation. It is disproportionate for the state to prescribe treatment in a "one size fits all" manner. The basic human rights concern here is to what extent such a strong interference by the state in the private lives of individuals can be justified and whether sterilisation or other medical interventions are required to classify someone as being of the one sex or the other.

Two important national court rulings support this view. On 27 February 2009, the Austrian Administrative High Court ruled that mandatory surgery was not a prerequisite for gender (and name) change. A transgender woman, who underwent all changes apart from the genital surgery and lived as a woman in all social relations, could establish to the court that her particular employment situation would not be conducive to the several months' sick leave needed for the operation and that she could not leave her family financially uncared for. This led the court to point out that the legislator had to abolish the original requirement since the court was not able to establish any need for this specific requirement pertaining to transsexual women.

In Germany, the Federal Supreme Court has indicated in a judgment that "an operative intervention as a precondition for the change of gender is increasingly regarded as problematic or no longer tenable among experts".

The key point here is that there is no inherent need to enforce one set of specific surgical measures for the classification of an individual to be eligible for changing sex. Similar reasoning lies behind the Spanish *Ley de Identidad de Género* and the British Gender Recognition Act. Both laws have recognised that the protection of the majority's assumed unease with the procreation of transgender people – which is, due to hormonal treatment and the wishes of most concerned individuals, extremely rare – does not justify a state's disregard of their obligation to safeguard every individual's physical integrity. States which impose intrusive physical procedures on transgender persons effectively undermine their right to found a family.

Recommendations to Council of Europe member states

"Member states of the Council of Europe should:

Abolish sterilisation and other compulsory medical treatment as a necessary legal requirement to recognise a person's gender identity in laws regulating the process for name and sex change;

..."

31. Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine 1999:

"Chapter II – Consent

Article 5 – General rule

An intervention in the health field may only be carried out after the person concerned has given free and informed consent to it.

This person shall beforehand be given appropriate information as to the purpose and nature of the intervention as well as on its consequences and risks.

The person concerned may freely withdraw consent at any time. "

## 5. European Commission against Racism and Intolerance

32. The Czech Republic country report (CRI (2015)35) confirmed that surgery is a mandatory condition for legal gender recognition and "gender reassignment should not be a prerequisite for gender changes in personal documents", §127.

## B – United Nations

33. The International Covenant on Economic, Social and Cultural Rights, 16 December 1966, includes the following provisions:

### "Article 12

1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for:

(a) The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child;

(b) The improvement of all aspects of environmental and industrial hygiene;

- (c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases;
- (d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness.”

34. UN Committee on Economic, Social and Cultural Rights has issued the following general comments:

**General Comment No.14 (2000) on the right to the highest attainable standard of health:**

“§8. The right to health is not to be understood as a right to be *healthy*. The right to health contains both freedoms and entitlements. The freedoms include the right to control one’s health and body, including sexual and reproductive freedom, and the right to be free from interference, such as the right to be free from torture, non-consensual medical treatment and experimentation. By contrast, the entitlements include the right to a system of health protection which provides equality of opportunity for people to enjoy the highest attainable level of health.”

**General Comment No. 22 (2016) on the right to sexual and reproductive health:**

“§58. Laws and policies that indirectly perpetuate coercive medical practices, including incentive- or quota-based contraceptive policies and hormonal therapy, as well as surgery or sterilization requirements for legal recognition of one’s gender identity, constitute additional violations of the obligation to respect. Further violations include state practices and policies that censor or withhold information, or present inaccurate, misrepresentative or discriminatory information, related to sexual and reproductive health.”

35. The Committee for the Elimination of Discrimination Against Women has issued the following general recommendation:

**General Recommendation No. 24:**

“§31. States parties should also, in particular:

...

(e) Require all health services to be consistent with the human rights of women, including the rights to autonomy, privacy, confidentiality, informed consent and choice;”

36. UN Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, report 2009, 1 August 2009, A/64/272:

“§9. Informed consent is not mere acceptance of a medical intervention, but a voluntary and sufficiently informed decision, protecting the right of the patient to be involved in medical decision-making, and assigning associated duties and obligations to health-care providers. Its ethical and legal normative justifications stem from its promotion of patient autonomy, self-determination, bodily integrity and well-being.

...

§19. Informed consent invokes several elements of human rights that are indivisible, interdependent and interrelated. In addition to the right to health, these include the right to self-determination, freedom from discrimination, freedom from non-consensual experimentation,

security and dignity of the human person, recognition before the law, freedom of thought and expression and reproductive self-determination. All States parties to the International Covenant on Economic, Social and Cultural Rights have a legal obligation not to interfere with the rights conferred under the Covenant, including the right to health. Safeguarding an individual's ability to exercise informed consent in health, and protecting individuals against abuses (including those associated with traditional practices) is fundamental to protecting these rights.”

37. UN Special Rapporteur on Torture, and other cruel, inhuman or degrading treatment or punishment, report 2013, 1 February 2013, A/HRC/22/53:

“88. The Special Rapporteur calls upon all States to repeal any law allowing intrusive and irreversible treatments, including forced genital-normalizing surgery, involuntary sterilization, unethical experimentation, medical display, “reparative therapies” or “conversion therapies”, when enforced or administered without the free and informed consent of the person concerned. He also calls upon them to outlaw forced or coerced sterilization in all circumstances and provide special protection to individuals belonging to marginalized groups.

...

38. In the context of prioritizing informed consent as a critical element of a voluntary counselling, testing and treatment continuum, the Special Rapporteur on the right to health has also observed that special attention should be paid to vulnerable groups. Principles 17 and 18 of the Yogyakarta Principles, for instance, highlight the importance of safeguarding informed consent of sexual minorities. Health-care providers must be cognizant of, and adapt to, the specific needs of lesbian, gay, bisexual, transgender and intersex persons (A/64/272, para. 46). The Committee on Economic, Social and Cultural Rights has indicated that the International Covenant on Economic, Social and Cultural Rights proscribes any discrimination in access to health-care and the underlying determinants of health, as well as to means and entitlements for their procurement, on the grounds of sexual orientation and gender identity.”

38. UN Special Rapporteur on Torture, and other cruel, inhuman or degrading treatment or punishment, report 2016, 5 January 2016, A/HRC/31/57:

“49. Transgender persons often face difficulties in accessing appropriate health care, including discrimination on the part of health-care workers and a lack of knowledge about or sensitivity to their needs. In most States they are refused legal recognition of their preferred gender, which leads to grave consequences for the enjoyment of their human rights, including obstacles to accessing education, employment, health care and other essential services. In States that permit the modification of gender markers on identity documents abusive requirements can be imposed, such as forced or otherwise involuntary gender reassignment surgery, sterilization or other coercive medical procedures (A/HRC/29/23). Even in places with no legislative requirement, enforced sterilization of individuals seeking gender reassignment is common. These practices are rooted in discrimination on the basis of sexual orientation and gender identity, violate the rights to physical integrity and self-determination of individuals and amount to ill-treatment or torture.”

...

72. With regard to abuses in health-care settings, the Special Rapporteur calls upon States to:

...

(e) Outlaw forced or coerced sterilization in all circumstances and provide special protection to individuals belonging to marginalized groups; and ensure that health-care providers obtain free, full and informed consent for such procedures and fully explain the risks, benefits and alternatives in a comprehensible format, without resorting to threats or inducements, in every case;”

(...)

“(h) Adopt transparent and accessible legal gender recognition procedures and abolish requirements for sterilization and other harmful procedures as preconditions;”

39. UN Independent Expert, report to the UN Human Rights Council, June 2017, A/HRC/35/36:

“57. In many countries, transgender persons are not able to have their self-identified gender recognized by the State, even with gender reassignment surgery, and have to endure lifelong abuses and discrimination. Non-recognition is interlinked with the environment that leads to violence and discrimination. In some situations, they are forced to undergo gender reassignment surgery, other medical procedures, such as psychological assessment, conversion therapy, sterilization and also divorce, with or without legal recognition of their self-identified gender. Other impediments include bureaucratic hurdles and difficulties in accessing medical care, such as hormone treatment, as well as in accessing the wherewithal of life, such as education, housing, a decent standard of living and employment opportunities. Yet, a number of countries, such as Argentina, Australia, Malta, and Scandinavian countries, are now leading the way by enabling people to have their self-identified gender recognized under national law without the need for surgery and related medical procedures, unless they opt for the latter on a non-coerced basis, and by reducing the bureaucratic hurdles along the way.”

40. The United Nations High Commissioner for Human Rights, in its report of 17 November 2011 to the Human Rights Council, “Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity”, A/HRC/19/41, observed in particular that regulations in countries that recognised changes in gender often required, implicitly or explicitly, that applicants undergo sterilisation surgery as a condition of recognition (§72). She recommended in particular that States:

“[f]acilitate legal recognition of the preferred gender of transgender persons and establish arrangements to permit relevant identity documents to be reissued reflecting preferred gender and name, without infringements of other human rights” §84.

41. Elimination forced of coercive and otherwise involuntary sterilization; An inter-agency statement of OHCHR, UN Women, UNAIDS, UNDP, UNFPA, UNICEF and WHO:

“In many countries, transgender and often also intersex persons are required to undergo sterilization surgeries that are often unwanted, as a prerequisite to receiving gender affirmative treatment and gender-marker changes (16, 64).

According to international and regional human rights bodies and some constitutional courts, and as reflected in recent legal changes in several countries, these sterilization requirements run counter to respect for bodily integrity, self-determination and human dignity, and can cause and perpetuate discrimination against transgender and intersex persons (15, 64, 140, 141–146).

Discrimination on the basis of gender identity has been recognized by international human rights bodies as a human rights violation. Human rights bodies have condemned the serious human rights violations to which transgender and intersex persons are subjected and have recommended that transgender and intersex persons should be able to access health services, including contraceptive services such as sterilization, on the same basis as others: free from coercion, discrimination and violence. They have also recommended the revision of laws to remove any requirements for compulsory sterilization of transgender persons (39, para 21; 163, para 32; 164; 165; 166).”

## **C – Inter American Court of Human Rights**

42. Inter-American Court of Human Rights: Gender identity, and equality and non-discrimination with regard to same-sex couples. State obligations in relation to change of name, gender identity, and rights deriving from a relationship between same-sex couples (interpretation and scope of Articles 1(1), 3, 7, 11(2), 13, 17, 18 and 24, in relation to Article 1, of the American Convention on Human Rights). Advisory Opinion OC-24/17 of 24 November 2017, Series A No. 24. (Only in Spanish):

43. In its advisory opinion the Inter-American Court reaffirmed the right to identity in general, and particularly distinguishing between sexual identity and gender identity, on which it bases most of its argument. It stated that States have to facilitate the exercise of right to sexual and gender identity (§101). Any procedure that a State might establish should only depend on the free and informed consent of the individual, without asking for requirements such as medical or psychological certifications (§§127 et seq). Specifically referring to

“the requirement of surgical operations and / or hormonal treatment, the Court concluded (§147) that such a requirement would be contrary to the right to integrity (Article 5 of the American Convention on Human Rights), the right to privacy (Article 11.2) and the right to liberty (Article 7) as well. Furthermore, the Court recalls its own case-law on the inclusion of the right to health into the right to integrity.”

## THE LAW

44. Article 11§1 of the 1961 Charter reads as follows:

### **Article 11 - The right to protection of health**

Part I: "Everyone has the right to benefit from any measures enabling him to enjoy the highest possible standard of health attainable."

Part II: "With a view to ensuring the effective exercise of the right to protection of health, the Parties undertake, either directly or in cooperation with public or private organisations, to take appropriate measures designed inter alia:

1. to remove as far as possible the causes of ill-health;

..."

### **Preamble (Extract)**

"...

Considering that the enjoyment of social rights should be secured without discrimination on grounds of race, colour, sex, religion, political opinion, national extraction or social origin;"

## **A – Arguments of the parties**

### **1. The complainant organisation**

45. Legal gender recognition is regulated by two pieces of legislation; the Civil Code (2014) and the Act on Specific Health Services (2011), both of which explicitly mention sterilisation. The Civil Code, states that "the change of sex is accomplished by a surgical operation involving the termination of reproductive function and a change of genitalia" and that the date of the change of legally registered sex is considered to be the one stated by the health service which provided the treatment in question.

46. The Act on Specific Health Services, regulates in more detail the medical aspects of gender reassignment treatment, including the eligibility for gender reassignment surgery. The Act makes it clear that the "sex change of transsexual patients is understood as the carrying out of medical operations, whose aim is to surgically change sex and at the same time disable the reproductive function."

47. In order to obtain authorization to undergo gender reassignment surgery, an individual must fulfill the following cumulative requirements:

- (i) be diagnosed unequivocally with gender identity disorder;
- (ii) prove their ability to permanently live as a person of the opposite sex;

- (iii) prove that they were not married, in a registered partnership, or that the marriage or registered partnership has been terminated;
- (iv) be at least 18-year old;
- (v) not be subject to a custodial or protective medical treatment measure.

48. A multidisciplinary “expert commission” is tasked with examining any applications for gender reassignment surgery for the whole country. In the event of a positive decision by the commission, gender reassignment surgery leading to infertility may take place. The changes in the Population Registry are operated based on a certificate issued by the medical service providing the treatment in question. The medical file of the person in question is then transmitted to a court that authorizes the changes to the birth certificate. With the new birth certificate, they may then change all other identity documents to correspond to their new identity, including the passport or the driving license. The legal gender recognition procedure usually takes approximately seven years, including two years on average spent obtaining all relevant medical certificates, undergoing hormonal treatment and taking the so-called “real life test” which involves living publicly in accordance with the gender identity sought by the person in question. The procedure before the above-mentioned commission, until the actual identity document changes are implemented, including the gender reassignment measures required under the law, may take approximately five years.

49. For individuals designated female at birth, sterilisation involves the removal of the ovaries (oophorectomy), customarily along with the uterus (hysterectomy). It is emphasized that at least the ovaries must be actually removed, therefore other methods of sterilisation are not accepted for the purposes of legal gender recognition.

50. For individuals designated male at birth, sterilisation (castration in some texts) includes visibly altering the genitals through vaginoplasty. Reversible or non-surgical sterilisation, such as that commonly induced through hormone replacement therapy (when e.g. the ovaries cease production), or a vasectomy, is not mentioned in the legislation as a sufficient measure for being granted legal gender recognition.

51. According to Transgender Europe and ILGA-Europe sterilisation is a major medical procedure, with irreversible consequences for a person’s health, especially reproductive health, self-conception and mental wellbeing. As with any other medical procedure, the informed consent of the person concerned is in principle required.

52. Transgender Europe and ILGA-Europe maintain that informed consent is compromised where access to a benefit or right is predicated on agreement to undergo a medical procedure. Czech law makes access to legal recognition of one’s gender identity conditional upon “agreeing” to undergo sterilisation, regardless of the preferences of the person in question. In other words, trans people are faced with a

closed choice between two fundamental rights – the right to health, and the right to legal gender recognition.

53. Transgender Europe and ILGA-Europe state that sterilisation without informed consent has been conceptualized in international law as a violation of the right to health, the right to physical integrity, the right to respect for private life or the right to decide on the number and spacing of children. If a trans person chooses to stay free from any medical intervention, they have to face the daily indignity and suffering resulting from the incongruence between their gendered appearance and the gender marker inscribed in their documents. Depending on their specific circumstances, the person in question may be prevented from getting married and founding a family, may find it difficult to secure stable employment, may face difficulties in daily interactions where an identity document is required, including for example opening a bank account.

54. Under international law, medical treatment may be imposed only in an emergency situation for the benefit of the health of the individual concerned, where that individual is not able to provide consent. Sterilisation for the purposes of legal gender recognition clearly does not meet these conditions. Legal gender recognition is not a health emergency. Those who would not otherwise want to undergo any gender reassignment measures end up de facto in a situation where they are forced to accept such treatment. Moreover, those who wish to undergo gender reassignment surgery are compelled to do so as part of a legal process – legal gender recognition – not necessarily related to their actual health needs. It follows that although trans people formally apply for legal gender recognition of their own initiative, in many cases their consent to undergoing sterilisation is fundamentally vitiated. The situation in the Czech Republic whereby trans people are forced to undergo sterilisation, under pain of withholding legal gender recognition, is therefore in breach of the right to protection of health under Article 11 of the 1961 Charter.

55. The sterilisation requirement is also discriminatory on the grounds of gender identity, and therefore in violation of the discrimination provision in the Preamble to the 1961 Charter. Trans people are discriminated when compared to cisgender people, whose gender identity is readily recognized at birth without the need to undergo sterilisation.

56. This difference in treatment lacks an objective and reasonable justification. It is also important to note that policies aimed at restricting reproductive rights often target stigmatized minorities (including racial minorities, women with disabilities, etc.), and in that sense they are inherently discriminatory.

57. Transgender Europe and ILGA-Europe state that Article 11 of the 1961 Charter applies to specific trans related issues, and in this respect cites the Committee's question to all states in 2013 to provide information as part of their reporting obligations under the ESC/RESC as to "whether legal gender recognition

for transgender persons requires (in law or in practice) that they undergo sterilisation or any other invasive medical treatment which could impair their health or physical integrity”.

58. Transgender Europe and ILGA-Europe refer to a range of international materials which they maintain support their arguments, i.e. that mandatory sterilisation is regarded as a violation of the right to health, notably the report of 2009 UN special Rapporteur on the Right to Health, General Recommendations and Concluding Observations of International Committee on Economic Social and Cultural Rights and Committee on the Elimination of Discrimination against Women, 2013 report of the UN Special Rapporteur on Torture, a joint statement of seven UN Agencies (OHCHR, UN Women, UNAIDS, UNDP UNFPA, UNICEF and WHO, the Yogyakarta Principles as well as case law of the ECtHR (see above §§25-29).

59. In particular Transgender Europe and ILGA- Europe refer to the judgment of the ECtHR in *A.P, Garçon and Nicot v. France* (see above §25) where the Court held that 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 applicants’ right to respect for private life under Article 8 of the Convention. The Court noted that consent given to a medical treatment forming a mandatory prerequisite to legal gender recognition was invalid, as it forced trans people to choose between their right to bodily integrity and their right to the recognition of their gender identity.

60. Transgender Europe and ILGA-Europe states that there is a clear trend in Europe towards simplifying legal gender recognition procedures and abolishing the sterilisation requirement and provides examples of states that have recently abolished the requirement of sterilisation, they also indicate where change has come through superior court judgments striking down legislation which contains such a requirement, for example in Germany, Austria and Sweden.

## **2. The respondent Government**

61. The Government states that Czech legislation has allowed filing applications for gender reassignment since the 1970s. An individual’s right to gender reassignment surgery is guaranteed by the Act on Specific Health Services (2011). Provisions of the Act on Registries allow for the adoption of a neutral name or surname on commencing gender reassignment treatment and on completion of gender reassignment surgery the right (not an obligation) to change a transgender person’s name and surname as well as personal identity documents, including the birth certificate, to reflect the persons new gender.

62. Equal treatment and non-discrimination are guaranteed by Czech law; inter alia, by the Charter of Fundamental Rights and Freedoms, and provisions of the Anti-Discrimination Act which stipulate 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.

63. The Government states that the national legislation is consistent with the previous case law of the ECtHR, which only stated that gender reassignment surgery cannot be contingent on the condition of infertility/sterilisation; not that legal recognition change of gender cannot be subject to prior gender reassignment surgery including sterilisation.

64. According to the Bulletin of the Ministry of Health of the Czech Republic No. 8/2012, any surgery resulting in a change in gender can only be carried out on patients with a documented ability of living in the opposite gender role during at least 12 months and having taken relevant hormonal preparations for at least 12 months. The application for gender reassignment surgery is examined by an 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 as to whether all conditions for gender reassignment 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 gender reassignment must be commenced.

65. After completion of gender reassignment, a change of gender will be made in the birth register, based on confirmation issued by the health service provider. The date of the gender identity change will be the day indicated in the confirmation. The Population Registry then requests the Ministry of Interior to change the national identity number in compliance with the Register of Population Act. After recording the change of the national identity number in the relevant register, the Registry will send an abstract to the Ministry of Interior and it will issue a new birth certificate to the individual.

66. Gender reassignment surgery can only be undertaken after consent is given by the relevant transgender person in writing. They must by law be informed about the purpose and nature of the healthcare intervention as well as on its consequences and risks, including 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 for further hormonal therapy, and also regular medical surveillance. A person can withdraw his/her consent any time.

67. Therefore the Government maintains that it is not correct to state that in certain cases that gender reassignment surgery is conducted against the will of the relevant person. Transgender persons are not forced to undergo official gender change in the Czech Republic.

68. The Government further states that the issue does not fall within the ambit of Article 11 of the 1961 Charter, the right to health, since the subject of the complaint belongs *de facto* to the area of personal status. It argues that the Committee has not previously examined issues relating to gender reassignment under Article 11 of the 1961 Charter.

69. Furthermore, the Government argues that there are no clear human rights standards in this area. Different trends in other countries as well as in the recommendations provided by international organisations can be identified, consequently, each country should have a margin of appreciation in this area. Compared with other countries, the Czech Republic provides high levels of support and assistance to transgender persons.

70. According to the Government the Czech Republic is continually addressing the questions associated with the rights of transgender persons and also cooperates with the Committee for Sexual Minorities and nongovernmental non-profit organisations.

## **B – Assessment of the Committee**

71. The Committee observes that Transgender Europe and ILGA-Europe invoke Article 11 generally. The Committee considers that the allegations raised relate to Article 11§1 of the 1961 Charter which encompasses, inter alia, the right to the highest possible standard of health and the right of access to health care. Under Article 11, health is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity, in accordance with the definition of health in the Constitution of the World Health Organisation (WHO), which has been accepted by all Parties to the Charter.

72. The Committee recalls that it has emphasized the importance of dignity in connection with the right to the protection of health under Article 11, "human dignity is the fundamental value and indeed the core of positive European human rights law – whether under the European Social Charter or under the European Convention of Human Rights and [that] health care is a prerequisite for the preservation of human dignity"; (*International Federation of Human Rights Leagues (FIDH) v. France*, Complaint No.14/2003, decision on the merits of 8 September 2004, §31).

73. It further recalls that it has held that the right to protection of health guaranteed in Article 11 of the Charter complements Articles 2 and 3 of the European Convention on Human Rights-as interpreted by the European Court of Human Rights (Conclusions 2005, Statement of Interpretation on Article 11).

74. Respect for physical and psychological integrity is also inextricably part of the right to the protection of health guaranteed by Article 11 of the 1961 Charter.

75. In light of the issues raised in the complaint the Committee reiterates that it interprets the rights and freedoms set out in the Charter in the light of current conditions (*Marangopoulos Foundation for Human Rights v. Greece*, Complaint No. 30/2005, decision on the merits of 6 December 2006, §194) and in the light of relevant international instruments (*European Federation of National Organisations working with the Homeless (FEANTSA)*, Complaint No. 39/2006, decision on the merits of 5 December 2007, §64), as well as in light of new emerging issues and situations, in other words, the 1961 Charter is a living instrument. The current complaint raises a new issue relating to the health of transgender persons in the Czech Republic, under Article 11 of the 1961 Charter.

76. The Committee notes that the Civil Code (2014) and the Act on Specific Health Services (2011) in essence require that in order for a transgender person to have their gender identity recognized they are required to undergo medical sterilization; without this medical intervention they cannot have their identity documents altered. It notes that many transgender persons will wish to undergo such a procedure however it also notes that there may be others who do not wish to undergo such treatment or for whom it is not recommended. Transgender persons in the Czech Republic who do not wish or are not advised for health reasons, etc., to undergo gender reassignment surgery will be unable to have their identity documents changed to reflect their gender.

77. In certain cases transgender persons in the Czech Republic may be forced to accept to undergo a medical sterilization, a serious life altering medical intervention, with risks of side effects and complications, and which is not medically necessary, in order to have their gender identity recognized. Further, the Czech situation has a serious impact on a person's health and ability to give free consent.

78. The Committee notes that state recognition of a person's gender identity is itself a right recognized by international human rights law, including the ECtHR, and is important for guaranteeing the full enjoyment of all human rights.

79. Like all Charter rights, Article 11 imposes a range of positive and negative obligations. The title of the article – 'the right to protection of health' – makes clear that States' obligations under that provision are not solely limited to ensuring enjoyment of the right to benefit from any positive, proactive state measures enabling enjoyment of the highest possible standard of health attainable (such as ensuring equal access to quality health care). Nor are states' duties limited to the taking of those measures highlighted in Article 11 of the 1961 Charter. Rather, the notion of the protection of health incorporates an obligation that the state refrain from interfering directly or indirectly with the enjoyment of the right to health. In this context it refers to the definition of health cited above. This interpretation of Article 11 is consistent with the legal protection afforded by other important international human rights provisions related to health.

80. The Committee considers that surgical gender reassignment surgery as required in the Czech Republic for a change of gender identity is not necessary for the protection of health. Obliging an individual to undergo such serious surgery which could in fact be harmful to health cannot be considered as being consistent with the obligation that the state refrain from interfering with the enjoyment of the right to health and in such cases States must eliminate the interference. Any kind of medical treatment which is not necessary can be considered as contrary to Article 11, if obtaining access to another right is contingent upon undergoing it.

81. In addition the Committee considers that any medical treatment without informed consent necessarily raises issues under Article 11 of the 1961 Charter. Informed consent has been defined by the UN Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental health (see above §36) as follows: “informed consent is not mere acceptance of a medical intervention, but a voluntary and sufficiently informed decision, protecting the right of the patient to be involved in medical decision-making, and assigning associated duties and obligations to health-care providers. Its ethical and legal normative justifications stem from its promotion of patient autonomy, self-determination, bodily integrity and well-being.”

82. The Committee considers, (noting in particular the Council of Europe’s Convention on Human Rights and Biomedicine (Oviedo Convention) 1997, and the well-established position of other human rights bodies) that any medical treatment without free informed consent (subject to strict exceptions) cannot be compatible with physical integrity and necessarily with the right to protection of health. Medical treatment without free informed consent breaches physical and psychological integrity, and may in certain cases be injurious to health both physical and psychological. Guaranteeing free consent is fundamental to the enjoyment of the right to health, and is integral to autonomy and human dignity and the obligation to protect the right to health.

83. The Committee refers to the case law of the ECtHR in particular due to the close links between the right to health guaranteed by Article 11 of the 1961 Charter not only with Article 2 and 3 but also Article 8 of the Convention. It recalls that it attaches great importance to the indivisibility of all human rights which form the European system of human rights. The Committee considers in this respect the recent decision of the ECtHR in A.P., *Garçon and Nicot v. France* (see above §25), concerning the rights of transgender people, where the Court held that there had been a violation of Article 8 (right to respect for private life) of the Convention, the Court held, in particular, that making recognition of the sexual identity of transgender persons conditional on undergoing an operation or sterilizing 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-which is directly involved when it comes to sterilization.

84. The ECtHR underlined that "Medical treatments and operations of this kind go to an individual's physical integrity, which is protected by Article 3 of the Convention and by Article 8. Medical treatment cannot be considered to be the subject of genuine consent when the fact of not submitting to it deprives the person concerned of the full exercise of his or her right to gender identity and personal development, which, as previously stated, is a fundamental aspect of the right to respect for private life (see Van Kück, § 75, cited above)."

85. The Committee also notes the position of other regional and international Human Rights bodies, in particular, the Council of Europe Human Rights Commissioner, the General Comments of the UN Committee on Social Economic and Cultural Rights (in particular General Comment No. 22, see §34) and the UN Special Rapporteur on Torture, as well as the recent Advisory Opinion of the Inter-American Court of Human Rights (cited above).

86. The Committee considers that the condition attached for the recognition of transgender person's gender identity vitiates free consent, and therefore such a requirement violates physical integrity, operates contrary to the notion of human dignity and consequently cannot be considered as compatible with the right to protection of health as guaranteed by Article 11§1 of the Charter.

87. The Committee notes that Transgender Europe and ILGA-Europe allege that the situation is also discriminatory on grounds of gender identity. It alleges that trans people are discriminated when compared to cisgender people, whose gender identity is readily recognized at birth without the need to undergo sterilization. This difference in treatment lacks an objective and reasonable justification.

88. The Committee however considers that while there may be discrimination issues in the complaint, as the complaint has been lodged under the 1961 Charter the Committee will not consider the complaint in light of the Preamble to the 1961 Charter.

89. In the light of all these considerations, the Committee holds that the situation in the Czech Republic constitutes a violation of Article 11§1 of the 1961 Charter.

## CONCLUSION

For these reasons, the Committee concludes by 11 votes to 2 that there is a violation of Article 11§1 of the 1961 Charter.



Raúl CANOSA USERA  
Rapporteur



Giuseppe PALMISANO  
President



Henrik KRISTENSEN  
Deputy Executive Secretary

In accordance with Rule 35§1 of the Rules of the Committee, a separate concurring opinion of Karin LUKAS is appended to this decision.

## SEPARATE CONCURRING OPINION OF KARIN LUKAS

1. I fully share the majority view of the Committee concerning the violation of Article 11§1 of the 1961 Charter in this case. However, I do only partly concur with the reasoning of the Committee, in particular the heavily procedural approach used to discard issues of discrimination that to me are the central matter at stake here.
2. Although the Committee acknowledges that “there may be discrimination issues in the complaint, as the complaint has been lodged under the 1961 Charter the Committee will not consider the complaint in light of the Preamble to the 1961 Charter.” This is difficult to understand given the facts of the case.
3. Besides similar resolutions of the Parliamentary Assembly which the Committee cites and that all refer to *discrimination* based on sexual identity and the discrimination of transgender persons, various UN human rights bodies condemn this interference with the right to health as discriminatory state conduct.
4. I specifically cite Resolution 2048 (2015) of 2 April 2015 of the Council of Europe Parliamentary Assembly, “Discrimination against Transgender people in Europe” which reads as follows: “...In the light of these considerations, the Assembly calls on member States to: (...) adopt quick, transparent and accessible legal gender recognition procedures, based on self-determination, including by abolishing sterilization and other medical requirements such as a mental health diagnosis.”
5. This is exactly what is at the heart of this complaint, and the Committee has failed to examine this key aspect under Article 11§1 in conjunction with the Preamble of the 1961 Charter which prohibits discrimination.
6. As the complainant organisations rightly point out, the sterilisation requirement is discriminatory on the ground of gender identity. Transgender persons are discriminated when compared to cisgender persons, whose gender identity is recognized at birth without any seriously infringing medical interventions being imposed, such as sterilisation.
7. This difference in treatment lacks an objective and reasonable justification. Under international human rights law, medical treatment may only be imposed in emergency situations for the benefit of the health of the individual concerned, where that individual is not able to give his or her consent. Sterilisation for the purposes of legal gender recognition clearly does not meet these conditions and is therefore in grave violation of Article 11§1 and the Preamble to the 1961 Charter.
8. Furthermore, it should be noted that sterilisation is one of the most severe medical interventions, leaving permanent and irreversible effects on the persons concerned.
9. Therefore, I regret that the Committee has avoided this central analysis by recourse to rather formalistic considerations. This has the effect of undervaluing the extent of the violation imposed by the State Party in question.

## **APPENDIX**

### **Decision on admissibility**



**DECISION ON ADMISSIBILITY**

**9 September 2015**

**Transgender Europe and ILGA-Europe v. Czech Republic**

Complaint No. 117/2015

The European Committee of Social Rights, committee of independent experts established under Article 25 of the European Social Charter (“the Committee”), during its 280th session attended by:

Giuseppe PALMISANO, President  
Petros STANGOS, Vice-President  
Lauri LEPPIK, General Rapporteur  
Birgitta NYSTRÖM  
Elena MACHULSKAYA  
Karin LUKAS  
Eliane CHEMLA  
József HAJDU  
Marcin WUJCZYK  
Krassimira SREDKOVA  
Raul CANOSA USERA  
Marit FROGNER  
François VANDAMME

Assisted by Régis BRILLAT, Executive Secretary,

Having regard to the complaint dated 30 March 2015, and registered as No. 117/2015, on the same date, lodged by Transgender Europe and ILGA-Europe, and signed respectively by Julia Ehrh, Executive Director of Transgender Europe and Evelyne Paradis, Executive Director of ILGA-Europe requesting that the Committee find that the situation in the Czech Republic is in violation of Article 11 in light of the non-discrimination clause of the Preamble to the European Social Charter (“the 1961 Charter”).

Having regard to the documents appended to the complaint;

Having regard to the observations of the Government of the Czech Republic (“the Government”) on admissibility, registered on 30 June 2015;

Having regard to the 1961 Charter and in particular to Article 11 as well as the non-discrimination clause in the Preamble which read as follows:

**Article 11 - The right to protection of health**

Part I: "Everyone has the right to benefit from any measures enabling him to enjoy the highest possible standard of health attainable."

Part II: "With a view to ensuring the effective exercise of the right to protection of health, the Parties undertake, either directly or in cooperation with public or private organisations, to take appropriate measures designed inter alia:

1. to remove as far as possible the causes of ill-health;
2. to provide advisory and educational facilities for the promotion of health and the encouragement of individual responsibility in matters of health;
3. to prevent as far as possible epidemic, endemic and other diseases, as well as accidents."

**Preamble** (Extract)

“[...]”

Considering that the enjoyment of social rights should be secured without discrimination on grounds of race, colour, sex, religion, political opinion, national extraction or social origin;”

Having regard to the 1995 Additional Protocol to the 1961 Charter providing for a system of collective complaints (“the Protocol”);

Having regard to the Rules of the Committee adopted on 29 March 2004 at its 201st session and last revised on 9 September 2014 at its 273<sup>rd</sup> session (“the Rules”);

Having deliberated on 9 September 2015;

Delivers the following decision adopted on this date:

1. Transgender Europe and ILGA-Europe allege that the legal requirement of sterilisation imposed on trans people wishing to change their personal documents so that they reflect their gender identity in the Czech Republic, is in breach of Article 11 either alone or in light of the non-discrimination clause of the Preamble to the 1961 Charter.
2. In its observations, the Government does not contest that the complaint meets the conditions for admissibility laid down in Articles 1(b), Article 3 and 4 of the Protocol.
3. However it requests that the Committee declare the complaint inadmissible on the grounds that the subject matter of the complaint falls outside the scope of Article 11 of the 1961 Charter. Namely, it argues that Article 11 of the 1961 Charter cannot be interpreted as establishing a right to be legally recognised as an individual of the opposite gender and a refusal to do so cannot be considered as a denial of the right to health care. Further it argues that the legislation on gender re-assignment treatment in the Czech Republic is in conformity with the 1961 Charter as well as the case law of the European Court of Human Rights.

## **THE LAW**

### *As to the admissibility conditions set out in the Protocol and the Committee's Rules*

4. The Committee notes that in accordance with Article 4 of the Protocol, which was ratified by the Czech Republic on 4 April 2012 and entered into force for this state on 1 June 2012, the complaint has been submitted in writing and concerns Article 11 of the 1961 Charter, a provision accepted by the Czech Republic when it ratified this treaty on 3 November 1999 and the Preamble to the 1961 Charter and by which it has been bound since its entry into force on 3 December 1999.
5. Moreover, the grounds for the complaint are indicated.
6. The Committee notes that, in accordance with Articles 1 b) and 3 of the Protocol, Transgender Europe and ILGA- Europe are international non-governmental organisations with participative status with the Council of Europe. They are included in the list, established by the Governmental Committee, of international non-governmental organisations that are entitled to lodge complaints before the Committee.
7. As regards the particular competence of Transgender Europe and ILGA-Europe in the matter of the complaint, the Committee firstly notes that, Transgender Europe is a regional umbrella organisation working for equality and the advancement of the human rights of transgender persons in Europe. Transgender Europe represents 68 member organizations and 44 individual members in 41 countries. It advocates, inter alia, for the rights of transgender persons with European institutions such as the Council of Europe, and the European Union. The Committee further notes that ILGA-Europe seeks to defend at European level the human rights of those who face discrimination on the grounds of sexual orientation, gender identity, or gender expression. Its membership consists of over 400 non-governmental organizations from across Council of Europe countries, whose members are mainly

lesbian, gay, bisexual, transgender or intersex individuals. The Committee consequently considers that the organisations have particular competence within the meaning of Article 3 of the Protocol, as regards the present complaint.

8. As regards the signature of the complaint, the Committee notes that the complaint has been signed by Julia Ehrt Executive Director of Transgender Europe and Evelyne Paradis, Executive Director ILGA-Europe, entitled to represent their respective organisations in conformity with Article 14 and F of their respective statutes. Transgender Europe has furthermore produced an extract from the minutes of the meeting of its Board, held in Zurich on 27 March 2015, during which it granted a power of attorney to Julia Ehrt to represent the organisation for the purposes of the instant complaint. Therefore the Committee holds that the complaint satisfies the requirements of Rule 23.

*As to the Government's objections concerning the admissibility*

9. The Committee considers that the objection raised by the Government, namely that the subject matter of the complaint, the legal requirement of sterilisation imposed on trans people wishing to change their personal documents so that they reflect their gender identity, falls outside the scope of Article 11 of the 1961 Charter, is an issue which is linked to the substance of the complaint and therefore should be dealt with at the merits stage.

10. The Government's further objection that the situation in the Czech Republic would be in conformity with the European Convention of Human Rights as interpreted by the European Court of Human Rights is irrelevant to the admissibility of the complaint.

11. It follows that the Government's objections cannot be sustained.

12. For these reasons, the Committee, on the basis of the report presented by Raul CANOSA USERA and without prejudice to its decision on the merits of the complaint,

**DECLARES THE COMPLAINT ADMISSIBLE**

Pursuant to Article 7§1 of the Protocol, requests the Executive Secretary to notify the complainant organisation and the Respondent State of the present decision, to transmit it to the parties to the Protocol and the States having submitted a declaration pursuant to Article D§2 of the Revised European Social Charter, and to publish it on the Council of Europe's Internet site;

Invites the Government to make written submissions on the merits of the complaint by 17 November 2015;

Invites Transgender Europe and ILGA-Europe to submit a response to the Government's submissions by a deadline which it shall determine;

Invites Parties to the Protocol and the States having submitted a declaration pursuant to Article D§2 of the Revised European Social Charter to make comments by 17 November 2015, should they so wish;

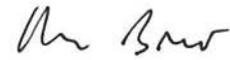
Pursuant to Article 7§2 of the Protocol, invites the international organisations of employers or workers mentioned in Article 27§2 of the 1961 Charter to make observations by 17 November 2015.



Raul CANOSA USERA  
Rapporteur



Giuseppe PALMISANO  
President



Régis BRILLAT  
Executive Secretary