

**IN THE EUROPEAN COURT OF HUMAN RIGHTS**

**Yuliya Valeryevna SAVINOVSKIKH and Others**  
**against**  
**RUSSIA**  
(Application no. 16206/19)

WRITTEN COMMENTS  
Submitted jointly by Transgender Europe and  
ILGA Europe and  
TLDP

21 July 2021

1. These written comments are submitted on behalf of Transgender Europe (TGEU), the European Region of the International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA-Europe) and the Transgender Legal Defence Project (TLDP), pursuant to leave granted on 12 May 2021.

2. The comments are structured as follows:

- i. [Section I](#) presents information about transgender parenthood and research that dispels some of the flagrantly incorrect myths and preconceptions that surround it;
- ii. [Section II](#) describes broader international trends which contextualise the justifications invoked at the national level for restricting the applicant's rights: historically, States have sought to restrict transgender parenthood and interfere with family relationships, based on hetero-normative and transphobic assumptions and depathologisation of trans identities; and
- iii. [Section III](#) examines national and international legal developments on the right to legal gender recognition, protection against discrimination based on gender identity, and protection of non-discrimination in relation to parenthood.

I. Facts and myths on transgender parenthood

a) *Information on transgender parenthood and foster care*

3. Trans people, like cisgender people, have several possible pathways to parenthood - begetting biological children with or without the use of assisted reproduction, through gestational surrogacy, adoption, step-parenthood/second- parent adoption, or, foster care. They commonly have children prior to gender transition, but also, increasingly, after gender transition as countries gradually lift the restrictions on legal gender recognition (LGR), particularly with respect to sterilisation. Even sterile individuals may still retain some options for reproduction, subject to availability of knowledge, accessible healthcare providers and/or financial resources.<sup>1</sup> Reports of trans men giving birth have become increasingly known.<sup>2</sup>

4. Trans families are equally diverse, involving one parent, two parents or multiple parents; gay, lesbian or bisexual parents; parents who are, and parents who are not, legally recognised or documented; parents living in marriage, registered or cohabiting partnerships. This is consistent with this Court's statement to the effect "that there is not just one way or one choice when it comes to leading one's family or private life."<sup>3</sup> Many trans parents live with children at any given time or place. Studies show that approximately 25–49% of the trans population have children.<sup>4</sup> An extensive LGBTI survey conducted in the EU<sup>5</sup> found that 70 % of trans respondents who share guardianship of their or their partner's child say that both partners are legal guardians.

5. The number of trans persons that act as foster parents is also increasing. Notably in the UK, reports indicate that the number of children adopted or fostered by LGBTI couples and individuals has reached record highs.<sup>6</sup>

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<sup>1</sup> Through procedures such as embryo cryopreservation, oocyte cryopreservation and ovarian tissue cryopreservation (for trans men), and sperm cryopreservation, surgical sperm extraction and testicular tissue cryopreservation (for trans women), see Chloe De Roo et al., *Fertility options in transgender people*, *International Review of Psychiatry*, 2016, VOL. 28, NO. 1, 112–119. For example, this is a possibility in Malta.

<sup>2</sup> One of the first documented cases in the USA is that of Thomas Beatie, a trans man who gave birth to three children, which ended up before the Arizona Court of Appeal (*Beatie v. Beatie*, 2014 Ariz. App. LEXIS 156, 2014 WL 3953199 Arizona Court of Appeals, August 13, 2014). Also see MacDonald et al. *Transmasculine individuals' experiences with lactation, chestfeeding, and gender identity: a qualitative study*, in *BMC Pregnancy and Childbirth*, 2016; Alexis D. Light et al., *Transgender Men Who Experienced Pregnancy After Female-to-Male Gender Transitioning*, *Obstet Gynecol* 2014; and Rubén Castro in Spain ( see, e.g., the reports of 21 May 2021 on the Spanish newspaper El País: *Rubén Castro, el hombre trans embarazado, da a luz a su "hije" Luar*, available here: <https://www.elmundo.es/espana/2021/05/03/608fd1fcfdfff74348b4593.html>).

<sup>3</sup> *Bayev and Others v. Russia*, nos. 67667/09 and 2 others, § 67, 20 June 2017.

<sup>4</sup> Myrte Dierckx et al. (2015), *Families in transition: A literature review*, *International Review of Psychiatry*, p. 2.

<sup>5</sup> EU FRA, *A long way to go for LGBTI equality*, 2020, p. 29-30.

<sup>6</sup> UK Government, *LGBT families*, - 2 March 2015, available here: <https://www.gov.uk/government/news/record-number-of->

b) *Impact of the transition on the children*

6. Studies<sup>7</sup> have conclusively dispelled fears that children in transgender families are more likely to adopt atypical gender behaviour or gender identity, or show an impact on developmental milestones.<sup>8</sup> A Belgian study,<sup>9</sup> based on in-depth interviews with minor children and their parents (trans and cisgender), found that although gender transition can be a “challenging and emotional process for the entire family”, most children “did not experience their parent’s gender transition as a painful loss.” This was often due to the various protective processes developed by the family, including family continuity and communication, the acceptance of a partner, and reflection and analysis from both the parent and child regarding the meaning of transition to set them at greater ease.

7. The majority of transgender parents surveyed in numerous studies detailed that relationships with their children were generally good or positive, including after “coming out” or transitioning.<sup>10</sup> Several variables may play a role during difficult gender transitions, including the age of children (younger children seem more accepting), the relationship between parents, even when they are separated, and the existence of social stigmatisation.<sup>11</sup> Both children and parents often experienced a lack of trans or trans-friendly and knowledgeable therapists, a lack of support groups and having social service needs related to childcare and networking with other parents.<sup>12</sup> These, however, are not challenges derived from the parent’s transition *per se*, but are the product of the societal circumstances and can be addressed through adequate legislation, policies, and education.

8. Besides challenges, some research suggests that transgender families provide a beneficial environment for accepting differences and embracing diversity.<sup>13</sup> In particular, finding permanent families for children in the foster care system has positive benefits for them. Evidence demonstrates that children adopted out of foster care are 50 % less likely to be arrested, 20 % less likely to become teen parents, and 24 % less likely to experience unemployment as adults.<sup>14</sup>

II. Relevant trends on transgender rights

9. While still prevalent in many countries, transphobic legislation and policies that have historically harmed trans persons and have barred them from benefiting from, among others, their right to family life, are becoming more progressive, particularly in the latest decades.

a) *Historical restrictions on transgender people’s reproductive and family rights*

10. Historically, States sought to control transgender people’s reproductive rights and disrupt parent/child relationships through legal restrictions and court practice, underpinned by hetero-normative and transphobic assumptions, that trans people should not found families or raise children. The sterilisation requirement, motivated by a concern for preserving traditional gender roles, used to be the norm across Europe and still is the law in 11 States.<sup>15</sup> In light of this historical background, any limitations imposed by the state on trans people to

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[children-adopted-by-lgbt-families.](#)

<sup>7</sup> This account is based on several meta-analyses: Myrte Dierckx et al. (2015), *supra* note 4, International Review of Psychiatry; Rebecca L. Stotzer et al., *Transgender Parenting: A Review of Existing Research*, Williams Institute, 2014, Trish Hafford-Letchfield et al., *What do we know about transgender parenting?: Findings from a systematic review*, Health Soc Care Community. 2019;27:1111–1125; Myrte Dierckx et al., *Resilience in Families in Transition: What Happens When a Parent Is Transgender?*, 66 FAM. REL. 399, 399, 403, 408 (2017); Carla A. Pfeffer et al., *Transgender-Parent Families*, in Abbie E. Goldberg and Katherine R. Allen (eds.), *LGBTQ- Parent Families: Innovations in Research and Implications for Practice*, Springer, 2nd 2020.

<sup>8</sup> Myrte Dierckx et al. (2015), p. 2-3; *supra* note 4.

<sup>9</sup> Myrte Dierckx et al. (2017), p. 11, *supra* note 4.

<sup>10</sup> See Rebecca L. Stotzer et al., p. 9-10 or Trish Hafford-Letchfield et al., p. 1119-1120.

<sup>11</sup> Myrte Dierckx et al. (2015), p. 2-3. Similar outcomes reported in or Trish Hafford-Letchfield et al., p. 1119-1120.

<sup>12</sup> Rebecca L. Stotzer et al., p. 12, Myrte Dierckx et al. (2017), p. 3.

<sup>13</sup> Rebecca L. Stotzer et al., p. 12.

<sup>14</sup> Amanda Fixsen, (2011), *Children in Foster Care: Societal and Financial Costs*, Eugene, OR: *A Family for Every Child*, here: [https://www.afamilyforeverychild.org/wp-content/uploads/2018/04/children\\_in\\_foster\\_care.pdf](https://www.afamilyforeverychild.org/wp-content/uploads/2018/04/children_in_foster_care.pdf).

<sup>15</sup> Bosnia & Herzegovina, Cyprus, Czech Republic, Finland, Kosovo, Latvia, Montenegro, Romania, Serbia, Slovakia, and Turkey. See <https://rainbow-europe.org/> or <https://transrightsmap.tgeu.org/index>

have children, including in foster care settings, may be interpreted as a continuation of the approach to limit reproductive and family rights of trans people.

11. There were also other restrictions. Sweden used to have a ban on saving own reproductive material, in addition to the sterilization requirement,<sup>16</sup> while other countries prevented trans individuals with children from accessing gender recognition procedures.<sup>17</sup> Married trans people are often required to end their marriage before being able to rectify their identification documents. The UK makes LGR in the case of married trans people contingent on spousal consent.<sup>18</sup> These requirements provide fuel for family disagreements during an already challenging transition period and provide the cisgender spouse with the upper hand in case of a dispute, with access to children frequently at stake.

12. Similarly, courts in some States used to routinely void marriages involving trans partners based on the doctrine that sex is an immutable biological category that is fixed at birth. This doctrine was introduced in the infamous 1970's UK judgment *Corbett v. Corbett* that permeated the law for several decades. The jurisprudence built on *Corbett* formed a pretext for severing contact between trans parents and their children in many cases, as void marriages extinguished any rights of custody or visitation. Furthermore, there is widespread discrimination in child custody disputes, based on outdated and unscientific stereotypes around transgender parenthood.<sup>19</sup>

13. This discriminatory jurisprudence met its end in the *Christine Goodwin*<sup>20</sup> judgment, which, in turn, led to the adoption of the UK's Gender Recognition Act 2004. The judgment and subsequent legislation was a clear rejection of the transphobic position previously taken by the courts, and illustrates the evolution that the UK (and other countries) have experienced with regard to the perception and regulation of trans parenthood.

14. However, sex as an immutable biological category has been re-surfacing in Council of Europe member states such as Bulgaria<sup>21</sup>, Hungary<sup>22</sup> and Russia<sup>23</sup>.

#### b) Depathologisation

15. The historical discrimination of trans persons, including with respect to parenthood, is in part based on the pathologisation of trans persons. In recent decades, many countries have abandoned this belief and condemn the pathologisation of trans persons.<sup>24</sup>

16. Pathologisation, which is based on the pre-conceived idea that trans identities are inherently disordered, subverts an essential aspect of human personality and leads to serious human rights violations.<sup>25</sup> In 2016, several regional and global international human rights

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<sup>16</sup> Jenny Gunnarsson Payne & Theo Erbenius (2018) *Conceptions of transgender parenthood in fertility care and family planning in Sweden: from reproductive rights to concrete practices*, *Anthropology & Medicine*, 25:3, 329-343.

<sup>17</sup> In Ukraine, Order No. 60/3 February 2011 of the Health Ministry, withdrawn on 31 December 2016, automatically disqualified trans people with minor children from LGR. In Japan, original statutory provisions, upheld by the Supreme Court in 2007, required trans people applying for LGR to be childless, justified with the need to prevent 'disturbance of the family order' and potential 'harm for children' as well as Japan's unique customs, traditions and family structures. There was partial reform in 2008 and now only the absence of minor children is required, Jens M. Scherpe (ed.), *The legal status of transsexual and transgender persons*, Intersentia, 2015, p. 638.

<sup>18</sup> For example England and Wales, under the Legal Gender Recognition Act 2004.

<sup>19</sup> Myrte Dierckx et al. (2017), *infra* note 4, p. 2.

<sup>20</sup> *Christine Goodwin v. the United Kingdom* [GC], no. 28957/95, ECHR 2002-VI.

<sup>21</sup> Oxford Human Rights Hub, Constitutional Court of Bulgaria Declares Istanbul Convention Unconstitutional, here: <https://ohrh.law.ox.ac.uk/promoting-gender-ideology-constitutional-court-of-bulgaria-declares-istanbul-convention-unconstitutional/>

<sup>22</sup> TGEU, *Hungary's Constitutional amendments will hurt children*, here: <https://tgeu.org/hungarys-constitutional-amendments-will-hurt-children/>.

<sup>23</sup> TGEU, *Russia plans to outlaw legal gender recognition*, here: <https://tgeu.org/russia-outlaws-lgr/>.

<sup>24</sup> For example, Denmark was the first country in the world to declassify trans identities, moving their reference to a section of their national medical guidelines that do not deal with mental illness or sexuality.

<sup>25</sup> OHCHR, *Living Free and Equal: What States are doing to tackle violence and discrimination against lesbian, gay, bisexual, transgender and intersex people*, 2016, pp. 74-75; Joint statement of United Nations and regional human rights experts, "Pathologization – Being lesbian, gay, bisexual and/or trans is not an illness", 17 May 2016; Reports of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity: A/73/152, 2018, § 10-16 and A/HRC/35/36, 2017, § 58.

mechanisms issued a joint statement calling for an urgent end to the pathologisation of trans adults and children, by reforming medical classifications and adopting measures to prevent all forms of forced treatment and procedures affecting the people in question.<sup>26</sup> The group noted that pathologisation was one of the root causes behind widespread human rights violations and an obstacle to overcoming negative attitudes, stereotypes, and the barriers preventing the realisation of their rights. In particular, still today, pathologisation remains in some countries as a justification for imposing unwanted medical treatments, hindered access to gender-affirming treatments and to LGR, contributing to the marginalisation and exclusion of trans persons in education, health, employment and housing among other areas and was conducive to violence.

17. More specifically, the Inter-American Court of Human Rights (IACtHR) has considered that medical or psychological certification of gender identity runs counter to the principle of self-determination and that of the free development of one's personality.<sup>27</sup> According to the IACtHR, certification pre-requisites are invasive and call into question the person's identity, while resting on the assumption that having an identity contrary to the sex assigned at birth is inherently pathological, and perpetuate the prejudices associated with the gender binary.

18. The World Professional Association for Transgender Health (WPATH) has also emphasised that "the expression of gender characteristics, including identities, that are not stereotypically associated with one's assigned sex at birth is a common and culturally-diverse human phenomenon which should not be judged as inherently pathological or negative."<sup>28</sup> "Gender identity disorder" or equivalent diagnoses contribute to the stigmatisation and social exclusion of trans people, without contributing to their physical or mental wellbeing.<sup>29</sup>

19. In 2019, in a move signalling international consensus on the rejection of the pathologisation of trans persons, the World Health Organisation (WHO) amended the International Classification of Diseases (ICD), removing all trans-related diagnoses from the mental health chapter and opening a new chapter on "Conditions related to Sexual Health," that includes gender incongruence<sup>30</sup>. The new chapter is intended to facilitate access to medical treatment and cost coverage for those trans people who wish to undergo such therapies, while recognising that being transgender is not a mental health condition. The WHO explained that "trans-related and gender diverse identities are not conditions of mental ill health, and classifying them as such can cause enormous stigma."<sup>31</sup> The new version of the authoritative manual, ICD-11, is expected to be implemented at the national level from January 2022.

20. These changes deprive pathologisation of trans identities of its 'scientific' justification, and make clear that legislation, case law, and policies substantiated on this basis (such as the rejection of trans foster parents for reasons related to their "mental health") are unjustified, disproportionate, and should be outright rejected.

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<sup>26</sup> "Pathologization – Being lesbian, gay, bisexual and/or trans is not an illness" For International Day against Homophobia, Transphobia and Biphobia - Tuesday 17 May 2016, available here <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=19956&LangID=E>.

<sup>27</sup> I/A Court H.R., *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 November 24, 2017. Series A No. 24, available here (in English): [http://www.corteidh.or.cr/docs/opiniones/seriea\\_24\\_eng.pdf](http://www.corteidh.or.cr/docs/opiniones/seriea_24_eng.pdf), §127 et seq.

<sup>28</sup> WPATH *De-psychopathologisation Statement*, 26 May 2010. The WPATH publishes the *Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People* (SoC), which outline the treatment protocols for gender reassignment treatment, "based on the best available science and expert professional consensus". The latest version from 2011 is available here: <http://www.wpath.org/>.

<sup>29</sup> Ibid.

<sup>30</sup> World Health Organisation, ICD-11 for Mortality and Morbidity Statistics (ICD-11 MMS) 2018 version, available here: <https://icd.who.int/browse11/1-m/en>. Also see "WHO releases new International Classification of Diseases (ICD 11)", 18 June 2018, available here: [https://www.who.int/news-room/detail/18-06-2018-who-releases-new-international-classification-of-diseases-\(icd-11\)](https://www.who.int/news-room/detail/18-06-2018-who-releases-new-international-classification-of-diseases-(icd-11)).

<sup>31</sup> WHO/Europe brief – transgender health in the context of ICD-11: <http://www.euro.who.int/en/health-topics/health-determinants/gender/gender-definitions/who-europe-brief-transgender-health-in-the-context-of-icd-11#402873>.

### III. Discrimination based on gender identity in relation to parental rights

21. A review of European and national legislation and case law makes clear that there is an international consensus recognising the rights of trans persons to legal gender recognition, non-discrimination on the basis of gender identity, and the right to family life in the form of foster parenting.

#### a) *The right to legal gender recognition (LGR) in Europe*

22. Council of Europe standards support the principle that a trans person's officially recognised gender identity should be determinative of all their rights and obligations. The Committee of Ministers called on States to "take appropriate measures to guarantee the full legal recognition of a person's gender reassignment in all areas of life."<sup>32</sup>

23. The Parliamentary Assembly<sup>33</sup> and the Commissioner for Human Rights<sup>34</sup> have also affirmed the right to gender self-determination.

24. Most European countries have LGR procedures in place.<sup>35</sup> An increasing number of Council of Europe members have in place LGR legislation based on self-determination,<sup>36</sup> while other countries have laws that recognize LGR subject to a judicial procedure or a medical certification.<sup>37</sup>

25. There are Council of Europe members who are also Member States to the European Union (EU) that have not yet adopted explicit legislation on the recognition of gender identity. However, they are nonetheless required to do so in certain areas of law by virtue of the case law of the Court of Justice of the European Union (CJEU).

26. For decades now, the CJEU has established that discrimination against people may amount to sex discrimination. In *P v. S*, the CJEU found that trans people should not be forced to choose between presenting in accordance to their gender identity and keeping their job.<sup>38</sup> In 2018, the CJEU held that requiring a trans woman to divorce before being recognised in her inner gender identity, a necessary pre-condition for becoming eligible for a retirement pension from the statutory age available to women, constituted discrimination based on sex.<sup>39</sup>

27. Thus, in line with the case law of the CJEU, EU Member States must act in accordance with these judgments and ensure the right to LGR of trans people.

28. This Court has established that gender identity is "one of the most basic essentials of self-determination."<sup>40</sup>

29. According to the Court, gender identity is a fundamental personal characteristic and a basic attribute of self-determination that comes within the scope of the rights of the Convention, such as the right to respect for private life.<sup>41</sup> In essence, this means that Members of the Council of Europe have to respect the right to legal recognition of the gender identity of trans persons.

30. The members of the Council of Europe must respect this right regardless of the possible administrative "burdens" that this may carry. In *Christine Goodwin*, the Court reasoned that,

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<sup>32</sup> *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*, 31 March 2010, §21.

<sup>33</sup> Resolution 2048 (2015), *Discrimination against transgender people in Europe*, §6.2.1.

<sup>34</sup> See for example the Commissioner's statement of 22 October 2015, in which he "encouraged member states to follow the current European trend towards recognising the self-determination of trans people regarding their gender," Annual Activity Report 2015, 14 March 2016, p. 30.

<sup>35</sup> See TGEU's Trans Rights Map (<https://transrightsmat.tgeu.org/>) and ILGA-Europe's Rainbow Map (<https://rainbow-europe.org/>), both projects updated in May 2021/.

<sup>36</sup> Eight countries, Belgium, Denmark, Iceland, Ireland, Luxembourg, Malta, Norway, Portugal have procedures solely based on self-determination, while France and Greece do not require any sort of medical certification for the purposes of LGR, but have other, non-medical requirements or formalities, such as judicial filters or single status. *Ibid.*

<sup>37</sup> For example, Germany and Italy.

<sup>38</sup> CJEU, Case C-13/94, *P v S and Cornwall County Council* [1996]

<sup>39</sup> CJEU, Case C-451/16, *MB v. Secretary of State for Work and Pensions* [2018].

<sup>40</sup> *Y.Y. v. Turkey*, no. 14793/08, §102, 10 March 2015 (extracts).

<sup>41</sup> *Van Kück v. Germany*, no. 35968/97, §56 and 75, ECHR 2003-VII.

although the legal changes envisaged with respect to LGR had significant “repercussions” in terms of birth registration, access to records, family law, affiliation, inheritance, criminal justice, employment, social security and insurance, these were “far from insuperable.” The Court was unable to identify any specific “hardship or detriment” flowing from LGR being made available and stated that “society may reasonably be expected to tolerate a certain inconvenience to enable individuals to live in dignity and worth in accordance with the sexual identity chosen by them at great personal cost.”<sup>42</sup>

b) *Gender identity as a protected ground for non-discrimination*

31. The Council of Europe’s Committee of Ministers<sup>43</sup> and the Parliamentary Assembly<sup>44</sup> established gender identity as a ground of non-discrimination and call upon Member States to combat discrimination based on gender identity in all areas of life. Similarly, the Convention on Preventing and Combating Violence against Women (the Istanbul Convention) prohibits discrimination based on gender identity, among other grounds.<sup>45</sup>

32. Most European countries have non-discrimination laws protecting transgender people and many criminalise violence on the basis of gender identity.<sup>46</sup> While others do not have explicit legislation at national level, this right has been recognised by the courts. This is the case, for instance, in Spain. While Spain has not (yet) implemented a federal legislation that explicitly recognises gender identity as a ground for non-discrimination,<sup>47</sup> the Constitutional Court has long recognized that Article 14 of the Spanish Constitution on the right of equality and non-discrimination also covers gender identity. In particular, it has stated that:

*“the condition of transsexual, although it is not expressly mentioned in Article 14 of the Spanish Constitution as one of the specific cases in which discriminatory treatment is prohibited, is undoubtedly a circumstance included in the clause “any other personal condition or circumstance.”<sup>48</sup>*

33. As mentioned above, transgender people in the European Union are also protected under EU gender equality legislation.

34. While not explicit, the term “sex” includes gender identity. It is consistent case law of the CJEU that discrimination against people who intend to undergo, are undergoing and have undergone gender reassignment amounts to sex discrimination.<sup>49</sup>

35. In case *P. v. S. and Cornwall County Council* (cited in Section III (a) above), the CJEU had to adjudicate on whether the dismissal of a trans person for having proposed to undergo gender reassignment treatment constituted a case of unlawful discrimination under Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions. The CJEU reasoned that, considering “its purpose and

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<sup>42</sup> *Christine Goodwin v. the United Kingdom* [GC], no. 28957/95, §91, ECHR 2002-VI. The Court has recently restated the same principle as follows: “states are required, in accordance with their positive obligation under Article 8, to recognize the change of gender undergone by post-operative transsexuals through, *inter alia*, the possibility to amend the data relating to their civil status, and the ensuing consequences,” *Hämäläinen v. Finland* [GC], no. 37359/09, §68, ECHR 2014.

<sup>43</sup> *Rec. 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*, 31 March 2010, Section I.A. *P.V. v. Spain*, no. 35159/09, § 30, 30 November 2010.

<sup>44</sup> Parliamentary Assembly, *Discrimination against Transgender people in Europe*, Resolution 2048(2015), §6.1.

<sup>45</sup> *Council of Europe Convention on preventing and combating violence against women and domestic violence*, Articles 3 and 4§3.

<sup>46</sup> See the TGEU Trans Rights Map thematic maps on Non-Discrimination (<https://transrightsmap.tgeu.org/home/non-discrimination>) and Hate Speech / Crime (<https://transrightsmap.tgeu.org/home/hate-speech-and-crime>), launched May 2021. For example, the Portuguese Penal Code criminalizes discrimination and incitement to hatred and violence based on gender identity.

<sup>47</sup> Spain is on track to adopt a national law that will recognize and protect the rights of trans persons, and will explicitly declare gender identity as a ground for non-discrimination.

<sup>48</sup> Spanish Constitutional Court, Judgment 176/2008, *Alex PV* [2009].

<sup>49</sup> CJEU, Case C-13/94, *P. v. S. and Cornwall County Council* [1996]. The notion of ‘gender identity’ is expressly mentioned in EU law: Directive 2012/29/EU of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime. Preamble, §9; Directive 2011/95/EU of 13 December 2011 on standards for the qualification of third country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast), [2011], Article 10(1)(d).

the nature of the rights which it seeks to safeguard,” the scope of the directive in question “cannot be confined to discrimination based on the fact that a person is of one or other sex.” Therefore, “such discrimination is based, essentially, if not exclusively, on the sex of the person concerned.” Those findings were reiterated, with some variation, in three other cases: *K.B.*,<sup>50</sup> concerning the access of the trans partner to a survivor’s occupational pension, *Richards*,<sup>51</sup> concerning the access to a statutory retirement pension, and *MB*, concerning the access of a married trans woman to a statutory retirement pension.<sup>52</sup>

36. The protection against discrimination on the basis of gender identity (or sex) also extends to discrimination suffered in the context of the family life.

37. It is settled case law of this Court that gender identity is a fundamental personal characteristic and a basic attribute of self-determination that comes within the scope of the rights of the Convention, such as the right to non-discrimination of Article 14 of the Convention.<sup>53</sup>

38. While the language used by the Court has varied in the past, it has long established that gender identity is protected under Article 14. For example, in *P.V. v. Spain*, the Court stated that Article 14 “undoubtedly” covered “transsexuality”<sup>54</sup>; and in *Identoba and others v. Georgia*, the Court mentioned that Article 14 “duly covers questions related to sexual orientation and gender identity.”<sup>55</sup> In *Hämäläinen*, the Court appeared to suggest that gender identity should be encompassed within the grounds of “gender or sexual orientation” and that strict scrutiny would have been called for.<sup>56</sup>

39. The above points are based on the recognition that trans people should not have to face discriminatory consequences after choosing to live in accordance with their gender identity or because they underwent gender-affirming medical treatment. After all, the Court has affirmed that “given the numerous and painful interventions involved in gender reassignment surgery and the level of commitment and conviction required to achieve a change in social gender role, it cannot be suggested that there is anything arbitrary or capricious in the decision taken by a person to undergo gender reassignment.”<sup>57</sup> For example, the *A.P., Garçon and Nicot v. France* judgment was predicated on the finding that trans people faced an “impossible dilemma” in being forced to choose between their right to bodily integrity and their right to gender identity recognition.<sup>58</sup> Notwithstanding the outcome in *Hämäläinen*, based on a particular set of facts, the dissenting judgments made a similar point, in particular “it is highly problematic to put two human rights – in this case, the right to recognition of one’s gender identity and the right to maintain one’s civil status against each other.” This is consistent with this Court’s statement to the effect “that there is not just one way or one choice when it comes to leading one’s family or private life.”<sup>59</sup>

40. The fact that gender identity is covered by Article 14 was most recently confirmed by the Court in the *A.M. v. Russia*, which concerned the restriction of a trans woman’s parental rights in view of her gender identity.<sup>60</sup> The Court firmly reiterated that “the prohibition of discrimination under Article 14 of the Convention duly covers questions related to gender identity”.

c) *Non-discrimination in relation to parenthood across Europe*

41. Several European countries recognise trans parents’ right to parenthood, including in

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<sup>50</sup> CJEU, Case C-117/01 *K.B. v National Health Service Pensions Agency and Secretary of State for Health* [2004].

<sup>51</sup> CJEU, Case C-423/04 *Richards v Secretary of State for Work and Pensions* [2006].

<sup>52</sup> CJEU, Case C-451/16, *MB v. Secretary of State for Work and Pensions* [2018].

<sup>53</sup> *Van Kück v. Germany*, no. 35968/97, §56 and 75, ECHR 2003-VII.

<sup>54</sup> *P.V. v. Spain*, no. 35159/09, § 30, 30 November 2010

<sup>55</sup> *Identoba and Others v. Georgia*, no. 73235/12, § 96, 12 May 2015. Also *Beizaras and Levickas v. Lithuania*, no. 41288/15, § 113, 14 January 2020.

<sup>56</sup> *Hämäläinen v. Finland* [GC], no. 37359/09, § 109, ECHR 2014.

<sup>57</sup> *Christine Goodwin v. the United Kingdom* [GC], no. 28957/95, §52, ECHR 2002-VI.

<sup>58</sup> *A.P., Garçon and Nicot v. France*, nos. 79885/12 and 2 others, §132, 6 April 2017.

<sup>59</sup> *Bayev and Others v. Russia*, nos. 67667/09 and 2 others, § 67, 20 June 2017.

<sup>60</sup> *A.M. v Russia* no. 47220/19

foster care, either in their national law or through their case law.

42. Spain is a prime example, where several regions have adopted legislation explicitly recognising the right to equal participation in foster care of trans parents.<sup>61</sup> At national level, in *Alex P.V.* regarding the loss of custody of a trans parent after their transition, the Spanish Constitutional Court recognised the rights of trans parents to not be discriminated against because of their gender identity.<sup>62</sup>

43. Similarly in Portugal, the 2016 adopted law prohibits gender-based discrimination for access to adoption, foster care and other family relationship.<sup>63</sup>

44. UK courts have recently examined a widely publicised case that considered the question of whether social discrimination could justify denying visitation rights to a trans woman that involved a family belonging to an Ultra-Orthodox Jewish community. The claimant, a trans woman who had been married with five children, was excluded from the community after transitioning to her inner gender identity and denied access to her children. She made an application for direct contact, which was initially rejected based on fears that the children would be ostracised from their community.<sup>64</sup> However, this decision was reversed on appeal, based on several considerations. First, the Court of Appeal expressed doubts that social animus, without greater justification, could suffice to terminate all direct contact between parent and child. Second, the court was concerned that not enough attempts were made to enforce direct contact before terminating contact. Third, the human rights implications of the decision had not been sufficiently considered.<sup>65</sup>

45. Some courts in France have also recognised the rights of trans persons to parenthood. In a case related to a woman who had conceived a child while retaining her male reproductive system, the courts recognised her right to be filiated as a parent. The Court of Appeal decided that it was “clear that it is in the child's best interests to have the reality of his filiation with regard to Mrs. X established”.<sup>66</sup> Although the French Court of Cassation later overturned the decision of the Court of Appeal, it acknowledged that the establishing of a parental link was in the best interest of the child.<sup>67</sup>

46. For its part, in 2018 the Parliamentary Assembly adopted a resolution that asked States to “protect the rights of parents and children in rainbow families without discrimination based on [...] gender identity,” including with respect to parental authority.<sup>68</sup>

47. The Court has recognised the right of trans persons to non-discrimination in relation to parenthood, in particular with regard to the right of biological parents. Under such framework, the Court will decide on the possible violation of the rights of trans parents from the perspective of justification (*i.e.*, whether the best interests of the child could warrant the measure taken by the authorities in the specific case) and proportionality (*i.e.*, whether the means used to achieve the aim were justified). The very same principle should be applied in cases of foster parenting.

48. On the few occasions that it has encountered trans families with children, this Court considered their wellbeing. For example, in *Hämäläinen v. Finland*, concerning a trans woman who was married and who begot a daughter prior to undergoing gender-affirming medical treatment and applying for LGR, she complained that she was required to divorce before being issued with documents that reflected her gender identity. The Court rejected her claims, but in doing so it emphasised that a registered partnership scheme was available that would

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<sup>61</sup> Including the Autonomous Community of Aragon, Extremadura, and Murcia.

<sup>62</sup> Spanish Constitutional Court, Judgment 176/2008, *Alex PV* [2009].

<sup>63</sup> Council of Europe, *Report of the European Commission Against Racism and Intolerance about Portugal*, p. 36, here: <https://rm.coe.int/fifth-report-on-portugal-portuguese-translation-/16808de7db>.

<sup>64</sup> *J v B and the Children (Ultra-Orthodox Judaism: Transgender)* [2017] EWFC 4.

<sup>65</sup> *In the Matter of M (Children) (hereinafter ‘Re M’)* [2017] EWCA Civ 2164.

<sup>66</sup> Court of Appeal of Montpellier, Decision n° 16/06059, 14 November 2018.

<sup>67</sup> Court of Cassation, First Civil Chamber, Decision n° 519 of 16 September 2020, ECLI:FR:CCAS:2020:C100519. See also Opinion of the Advocate General, Case n° H 18-50.080 and X 19-11.251 [2020].

<sup>68</sup> Parliamentary Assembly, Resolution on “Private and family life: achieving equality regardless of sexual orientation,” 10 October 2018, 4.5.

replace marriage and that sufficiently protected the applicant's relationship with her infant daughter.<sup>69</sup>

49. In *X, Y and Z v. United Kingdom*, the main applicant, a trans man, complained about the authorities' refusal to register him as father to his long-standing partner's daughter, born by artificial insemination by donor. From the outset, the Court decided that the applicants' ties qualified as protected "family life."<sup>70</sup> While declining to find a violation of the Convention, the Court emphasised that the applicant was not prevented in any way from acting as a father in the social sense: he lived together with his daughter, he provided her with emotional and financial support, she used his surname and he exercised full joint parental responsibility.<sup>71</sup>

50. The applicant in *P.V. v Spain*, a trans woman, had been married and had a child before transitioning.<sup>72</sup> After separation, the applicant's former wife lodged proceedings with a view to removing her parental authority and visitation rights, because she took hormones and wore women's clothes. National courts mostly rejected the request as unfounded, taking the view that the applicant had not neglected her parental duties, and only permitted a partial and temporary restriction on the visitation rights due to her "emotional instability." The Court dismissed the applicant's Article 14 claim noting that she had not been deprived of all contact and that the system of visits had eventually been expanded.

51. These cases show that the Court has developed clear principles with respect to custody decisions and access to children. The right of parents and children to enjoy each other's company subsists even if the relationship between the parents is broken.<sup>73</sup> The Court will engage on a case-by-case, fact-specific assessment to determine whether the trans parent has in fact been discriminated against. The best interests of the child are a primary consideration in this area, potentially overriding parental rights in the case of conflict. Nonetheless, there is an assumption that maintaining the child's ties with their family serves their best interests, unless the family has proved particularly unfit.

52. Strict scrutiny applies to restrictions on parental rights of contact, which may lead to the parent-child relationship being effectively curtailed. Such restrictions require an in-depth examination of the entire family situation and a whole series of factors, in particular factors of a factual, emotional, psychological, material and medical nature.<sup>74</sup> This Court has been willing to interrogate restrictions couched in the high language of the best interests principle, which were in fact based on stereotypes and lacked evidence of actual harm. In a case involving a Jehovah's Witness parent, the Court criticised domestic courts for "ruling *in abstracto* and on the basis of general considerations, without establishing a link between the children's living conditions with their mother and their real interests."<sup>75</sup> In *Y.I. v. Russia*, the Court stated that "the applicant's drug addiction appears to have been the main, if not the only, ground for depriving her of parental authority" and that the authorities "did not assess the impact which the children's separation from their mother [...] might have on their well-being."<sup>76</sup> In *Vojnity v. Hungary*, the Court pointed out that "there is no evidence that the applicant's religious convictions involved dangerous practices or exposed his son to physical or psychological harm."<sup>77</sup> In *Cința v. Romania*, the Court concluded that "the applicant was perceived as a threat because of his mental illness without further consideration to the concrete circumstances of the case and the family situation."<sup>78</sup>

53. This also applies to the severance of family ties in the context of foster care. In *A.M.V. v. Finland*, the Court found that "where a restriction on fundamental rights applies to a

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<sup>69</sup> *Hämäläinen v. Finland* [GC], no. 37359/09, §§85-86, ECHR 2014. Compare and contrast with pre-*Goodwin* Commission decision in the case *L.F. v. Ireland*, no. 28154/95, 2 July 1997.

<sup>70</sup> *X, Y and Z v. United Kingdom*, 22 April 1997, Reports of Judgments and Decisions 1997-II, §36-37.

<sup>71</sup> *Idem*, §50.

<sup>72</sup> *P.V. v. Spain*, no. 35159/09, 30 November 2010.

<sup>73</sup> *Kacper Nowakowski v. Poland*, no. 32407/13, § 70-75, 10 January 2017.

<sup>74</sup> *Idem*, §78.

<sup>75</sup> *Palau-Martinez v. France*, no. 64927/01, § 42, ECHR 2003-XII.

<sup>76</sup> *Y.I. v. Russia*, no. 68868/14, § 90, 93, 25 February 2020.

<sup>77</sup> *Vojnity v. Hungary*, no. 29617/07, § 38, 12 February 2013.

<sup>78</sup> *Cința v. Romania*, no. 3891/19, § 74, 18 February 2020.

particularly vulnerable group in society that has suffered considerable discrimination in the past, then the State's margin of appreciation is substantially narrower and it must have very weighty reasons for the restrictions in question<sup>79</sup>. The reason for this approach, which questions certain classifications per se, is that such groups were historically subject to prejudice with lasting consequences, resulting in their social exclusion. Such prejudice could entail legislative stereotyping which prohibits the individualised evaluation of their capacities and needs."<sup>80</sup>

54. As a result, it is clear that family ties (including ties developed through foster care)<sup>81</sup> may only be severed in exceptional circumstances. Everything must be done to preserve personal relations and, if and when appropriate, to "rebuild" the family. In that sense, States have a positive obligation to adopt specific measures designed to facilitate contact and "reconcile the conflicting interests of the parties," including by providing mediation services, addressing communication barriers<sup>82</sup> or helping persons in difficulty.<sup>83</sup>

55. The Court has already dismissed as unscientific the Russian authorities' concerns about exposing children to "gay propaganda", as well as their reliance on majoritarian preferences in order to justify differential treatment.<sup>84</sup>

56. In the recent judgment of *A.M. v. Russia*, which concerned the restriction of a trans woman's parental rights in view of her gender identity<sup>85</sup> the Court found that (emphasis added):<sup>86</sup>

*"[...] in restricting the applicant's parental rights and contact with her children without doing a proper evaluation of the possible harm to the applicant's children, the domestic courts relied on her gender transition, singled her out on the ground of her status as transgender person and made a distinction which was not warranted in the light of the existing Convention standards.*

*80. The Court does not discern any reason to doubt that the domestic authorities pursued a legitimate aim of the protection of the rights of children in these proceedings. However, in absence of any demonstrably convincing and sufficient reasons for the difference in treatment, the Court finds it impossible to conclude that a reasonable relationship of proportionality existed between the means employed and the aim pursued. Thus the impugned decision amounted to discrimination."*

#### IV. Conclusion

57. For the reasons set out above, the third party interveners submit that:

- i. trans persons have a right to LGR which is recognized as part of the right to private life and must be respected by Members of the Council of Europe, including Russia;
- ii. gender identity is a protected ground for non-discrimination, as explicitly recognized by this Court; and
- iii. decisions on child custody rights under foster care systems for transgender parents based on negative preconceptions and myths about transgender parents rather than on an individualised analysis of factors that are genuinely important to the child's well-being, constitute a violation of their rights to family life and non-discrimination.

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<sup>79</sup> *Kiyutin v. Russia*, no. 2700/10, § 63, 10 March 2011.

<sup>80</sup> *A.M.V. v. Finland*, no. 53251/13, ECHR 20, § 73.

<sup>81</sup> *Harroudj v. France*, no. 43631/09, ECHR 2012.

<sup>82</sup> *Idem*, §87-88, 95.

<sup>83</sup> *Y.I. v. Russia*, no. 68868/14, § 87, 25 February 2020.

<sup>84</sup> *Bayev and Others v. Russia*, nos. 67667/09 and 2 others, § 70, 20 June 2017.

<sup>85</sup> *A.M. v. Russia no. 47220/19*, 6 July 2021.

<sup>86</sup> *A.M. v. Russia*, §79 and 80.