

Report on Inquiry

concerning discrimination on the grounds of gender identity

The former Public Defender of Rights, JUDr. Pavel Varvařovský, received a complaint from P. H., now T. H., residing at XXX, date of birth: YYY, concerning discrimination on the grounds of gender, disability and sexual orientation in all aspects of life, but especially with respect to the acts of the Ministry of the Interior (hereinafter the “Ministry”).

T. H. does not identify with the male gender which he has been administratively assigned administratively at birth. According to medical reports¹, T. H. feels to be a gender-neutral person and requests that the current details concerning his “male sex” as indicated in the identification documents² be replaced with “neutral gender” (“neutral sex”), or be completely omitted. Assignment to the female sex/gender category is considered a less preferred, albeit acceptable solution. Sex reassignment surgery is not under consideration especially due to health concerns associated with age. Moreover, the surgery would transform male genitals into female, which T. H. sees as unnecessary. T. H. does not consider him/herself a woman. The important thing is not to be confused for a male; at the same time, the complainant sees female genitalia as superfluous and unnecessary.

Since the Czech language does not allow me to use gender-neutral expressions in all cases, I refer to T. H. in the female form or simply as “the Complainant” (*in the female gender form in the Czech language –trans.*), although I am aware that such denotation is not completely accurate.³

A - Subject of the Inquiry

The Complainant stated in her complaint that she could not achieve a change of the details concerning her sex/gender, although she had not identified with the indicated male sex/gender in the long term. She also complained against the manner in which her application had been resolved by the Ministry. In her opinion, the Ministry had not properly dealt with her application and continued referring to her in the masculine form, although she had informed the Ministry that she considered such manner of addressing degrading and discriminatory since it did not respect her gender identity. She would like to file an action with the court since, in her opinion, the Ministry had failed to deal with her application. For this purpose, she wished to obtain methodological assistance from the Defender concerning her further steps in the case.

¹ Issued by psychotherapist E. K. and General Practitioner D. Z. – see below.

² T. H. requests a change in the birth identification number, the identity card, passport and the birth certificate.

³ For this reason, and also because the Complainant communicates with our office in English, I am sending this report to her in the English language.

She would also like to achieve a change in the Population Records Act⁴ and the Registries of Births, Deaths and Marriages Act.⁵

The Public Defender of Rights, JUDr. Pavel Varvařovský, initiated an inquiry on 14 November 2012 pursuant to Section 14 of Act No. 349/1999 Coll., on the Public Defender of Rights, as amended. The aim of the inquiry was to determine whether the Ministry's procedure in addressing the Complainant's application had been in accordance with the principles of good governance⁶ and whether or not her right to equal treatment had been violated.

B - Findings

The documents collected by the Ministry indicate the following facts.

On 25 May 2012, the Complainant filed an application with the Ministry of the Interior, the Administration Activities Department, for a change of her birth identification number to neutral or at least female. She also referred to the German practice where sex/gender is not indicated on the personal identity card.⁷ She also refers to the state of affairs in Argentina, where administrative sex/gender change is possible without surgical interventions.⁸ The Complainant considers the removal of sensitive details concerning her sex/gender not to be a matter of common courtesy, but an exercise of her right to recognition of gender identity in the sense of the Anti-Discrimination Act.⁹

In the letter of 19 June 2012, sent on request of the Ministry, the Authority of Prague 21 City Ward (hereinafter the "Municipal Authority"), the Department of Civil Administration, stated that, in its opinion, no sex reassignment had taken place. Enclosed were the file records, including medical statement of 6 August 2009 issued by Viennese neurologist and psychiatrist Dr. G. L. The medical report indicates, *inter alia*, that the patient has not identified with the male sex/gender since her early childhood and wishes to be a gender-neutral person without assigned gender.

On 31 August 2012, the Ministry informed the Complainant that it would not change her birth identification number, since she had not demonstrated any of the facts that could serve as grounds for such a change.¹⁰ The header of the note contains: "Mr P. H." and the letter contains no other personal address.

On 25 September 2012, the Complainant filed a complaint against the manner in which her application for a change of the birth registration number had been resolved. In particular, she claimed that an appealable decision should have been

⁴ Act No. 133/2000 Coll., on registration of the population and birth identification numbers and on amendment to certain laws, as amended

⁵ Act No. 301/2000 Coll., on registries of births, deaths and marriages, name and surname and on amendment to certain related laws, as amended

⁶ Section 1 (1) of the Public Defender of Rights Act

⁷ It is, however, indicated in the passport. The German legislation concerns predominantly the issues of intersexuality and aims to prevent stigmatisation of persons or wrong gender categorisation.

⁸ *Argentina Gender Identity Law* [online] TGEU, © 2013 [retrieved on 11 May 2015]. Available at: <http://tgeu.org/argentina-gender-identity-law/>

⁹ Act No. 198/2009 Coll., on equal treatment and legal remedies for protection against discrimination and on amendment to certain laws, as amended

¹⁰ See Section 17 (2) of the Population Records Act

made on her application. She also stated that she was not male and, therefore, the personal address used was inappropriate.

In autumn 2012, the Complainant's first name was changed from P. to T. and a new identity card was subsequently issued. On 11 January 2013, the Ministry received another application in which the Complainant once again expressed her disapproval of the birth identification number and the sex/gender indicated on the identity card.

The Complainant enclosed the medical report issued by the psychotherapist E. K. The medical report states that the Complainant has been visiting the psychotherapist regularly since 2006. She was diagnosed with a chronic pelvis pain syndrome. T. H. wants to have the prostate (the source of the pain) removed, to have the penis size reduced and to have the organ changed to serve purely the purpose of urination. The Complainant rejects the transformation of her genitalia to female and, therefore, she receives mostly hormonal treatment. The psychotherapist noted that having her sex/gender indicated as "male" in the personal identification documents and in the birth identification number was a source of mental frustration for the Complainant.

On 3 September 2013, the Complainant sent another letter to the Ministry where she drew attention to the unconvincing nature of the Ministry's previous communications and the absence of advice on the possibilities of appeal. The Complainant believes that the Ministry should have issued an administrative decision; since she received no such decision, she considers her application unresolved.

The Ministry replied to this letter on 10 September 2013 and stated again that no facts had been demonstrated that could serve as grounds for a change of the birth identification number. Neither the Ministry nor the competent Registry Office had received a report on completion of sex reassignment treatment which could serve as grounds for a change of the Complainant's birth identification number and, subsequently, the details concerning her sex/gender. The Ministry also stated that, from a procedural point of view, its letter of 31 August 2012 was not a decision since no grounds for initiation of administrative proceedings had been found at the time. The Complainant was again addressed by the phrase "*Mr H.*".

During the inquiry, the Defender contacted the director of the Administrative Activities Department of the Ministry of the Interior, JUDr. Zdeněk Němec (hereinafter the "Director"), who provided his statement to the Defender on 1 October 2013. He justified the Ministry's conduct by referring to Section 17 of the Population Records Act, pursuant to which a change in the birth identification number could only be made upon assignment of a new birth identification number and this, in turn, could only be done on the basis of specifically defined facts including, *inter alia*, sex reassignment. The Ministry as an executive governmental body had to proceed in accordance with Art. 2 (3) of the Constitution of the Czech Republic and in accordance with the Czech laws. With respect to the above, the Director stated that at the given time, the law only distinguished two sexes/genders: male and female. The Czech legislation did not recognise any kind of "neutral gender". On these grounds, the Director rejected the allegation that the Ministry's procedure was incorrect. Moreover, the Administrative Activities Department had received no medical report by the stated date, indicating a completed sex reassignment on the part of the Complainant. It had not, however, invited the Complainant to provide such report. Therefore, the Ministry continued to

address the Complainant in the male gender form, irrespective of her gender-neutral identity. The Director further stated that the Ministry could take the human rights dimension of the case into account only insofar as to ensure that its procedure remained in accordance with the laws of the Czech Republic. In the period between 2006 and 1 September 2013, the Administrative Activities Department of the Ministry of the Interior had received 322 applications from the Registry offices for a change of the applicants' birth identification number on the grounds of sex reassignment. Complaints against the Ministry's procedure had not been raised in any of these cases.

The Complainant additionally informed the Defender on 24 September 2013 that she was undergoing hormonal treatment. She demonstrated this through a medical report issued by physician D. Z. on 30 July 2013. In her letter, the Complainant drew attention to the repeated use of incorrect form of address used in the Ministry's letter of 10 September 2013, as well as errors in the legal assessment of the case.

C - The Defender's Assessment of the Case

The case can be viewed not only from the perspective of administrative law, i.e. in the sense of the Population Records Act, but also from the human rights perspective, in particular in terms of the right to equal treatment. This is why the first part of my report¹¹ focuses on the Complainant's case itself and the procedure of the Ministry from the viewpoint of applicable legal regulations. The second part of my report¹² includes my thoughts concerning the conformity of the existing legal regulation of sex/gender change with the rights guaranteed by the Constitution. It is not the aim of the second part to predict a potential ruling of the Constitutional Court, but rather to initiate a public debate on the conditions of sex/gender change, especially the sterilisation requirement.

C.1 Administrative-law Aspects of the Case

C.1.1 Change of the Birth Identification Number

The Complainant objected to the structure of the birth identification number, which clearly denotes the holder's administrative sex/gender.¹³ If this sex/gender does not correspond to their physical appearance, which is often the case with transgender persons¹⁴ or gender-neutral persons, then some sort of "coming out" is forced upon these persons.¹⁵ The harm caused to these persons is two-fold. Gender identity is purely a private matter and each individual is free to present him/herself in public in a manner of their choice and feeling. Primary harm is thus caused by interference with

¹¹ C. 1 Administrative-law Aspects of the Case

¹² C. 2 Human Rights Aspects of the Case

¹³ Section 13 (3) of the Population Records Act:

(3) *Birth identification number is a 10-digit number exactly divisible by the number 11. The first two digits are the last two digits of the person's year of birth, the next two digits show the month of birth (increased by 50 if the person is female), and the third couple of digits shows the day of birth. The four-digit suffix serves to distinguish persons born on the same calendar day.*

¹⁴ The term "transgender persons" in this report means persons who psychologically do not identify with their physical sex.

¹⁵ The term "coming out" here means internal and external public recognition and revelation of a person's sexual orientation or gender identity.

the individual's private sphere. In some cases, secondary harm may be caused by disclosure of sensitive information on his/her gender identity. This harm lies in subsequent discrimination against the transgender person, especially in the services sector. These were among the reasons why the Complainant applied with the Ministry for a change of her birth identification number.

Birth identification numbers are set by the Ministry pursuant to the Population Records Act¹⁶ and assigned to persons at the individual assignment points.¹⁷ The birth identification number can be changed at the assignment point where the original birth identification number was assigned. If the birth identification number had been assigned before the effect of the Population Records Act, it can be changed by the Ministry.¹⁸

A change of the birth identification number occurs through the assignment of a new birth identification number,¹⁹ where such change can only be made in cases stipulated by the law, including sex reassignment.²⁰ In terms of the law, sex/gender change of an individual takes place by means of a sex reassignment surgery with simultaneous sterilisation and transformation of the genitalia.²¹ The New Civil Code thus associates gender with the physical sex, irrespective of the psychological dimensions of gender and the internally experienced identity of a person.

If a sex reassignment surgery has been done, the assignment point will assign a new number *ex officio*.²² For this reason, a new birth identification number after sex reassignment cannot be assigned on the basis of an application. The Complainant's applications, in which she requests a change of her indicated sex/gender, can thus only be considered instigations to initiate administrative proceedings on a change of the birth identification number in the sense of Section 42 of Act No. 500/2004 Coll., the Code of Administrative Procedure, as amended. The administrative authority does not issue a decision in these cases in the sense of Section 67 (1) of the Code of Administrative Procedure, but rather merely informs the applicant of the manner of resolution of the instigation. If the administrative authority does not inform the applicant within 30 days despite the applicant's request for the authority to do so, the applicant may request that the superior administrative authority take steps against inactivity.²³ In other cases, the applicant may file a complaint with the respective administrative authority.²⁴ Since the Complainant has not undergone sex reassignment surgery and no other grounds have arisen for a change of the birth identification number either, I

¹⁶ Section 13 (2) of Act No. 133/2000 Coll., on population records, as amended

¹⁷ Assignment points are set by Section 14 of the Population Records Act.

¹⁸ Section 17 (7) of the Population Records Act

¹⁹ Section 17 (1) of the Population Records Act

²⁰ An exhaustive list of the events serving as grounds for a change of the birth identification number is given by Section 17 (2) of the Population Records Act:

(2) A change of the birth identification number shall be made if

a) the same birth identification number has been assigned to two or more birth identification number holders;

b) a wrong birth identification number has been assigned;

c) an adoption has taken place; or

d) sex reassignment has been performed.

²¹ Section 29 (1) of Act No. 89/2012 Coll., the Civil Code

²² Section 17a (1) of the Population Records Act

²³ See Section 80 (2) of the Code of Administrative Procedure

²⁴ See Section 175 of the Code of Administrative Procedure

believe that the Ministry could not have initiated proceedings on changing the birth identification number. I am thus of the opinion that the Ministry acted in accordance with the law when it informed the Complainant that it would not initiate proceedings *ex officio*.

For this reason, I do not agree with the Complainant's conclusion that the Ministry should have issued a decision *in rem* against which she could have appealed. In my opinion, in this particular case the Complainant could only have filed a complaint with the Minister against the manner of resolution of her instigation, which she had indeed already done. However, her complaint was found groundless on the basis of the above-mentioned circumstances and the Complainant was repeatedly given advice on the requirements for a change of the birth identification number.

C.1.2 The Principle of Courtesy and Openness

The administrative-law aspects of the Ministry's and the Municipal Authority's procedure involve more than just the manner of resolution of the Complainant's application. Pursuant to Section 4 of the Code of Administrative Procedure, public administration constitutes a public service and any administrative authority should, as far as possible, deal with persons approaching it with due courtesy and openness. Due courtesy includes a suitable form of personal address. It is understandable that a wrong form of address may be used inadvertently or due a lack of knowledge. However, both the Ministry and the Municipal Authority knew of the Complainant's lack of self-identification with the administratively-assigned male sex/gender. The Complainant also made it clear that she considered being addressed in the male gender form inappropriate. Association with the male gender causes her psychological difficulties, which is also clear from the provided medical reports.

Therefore, I believe that in similar situations, transgender or gender-neutral persons should be addressed by the gender they personally prefer, or in a neutral manner.²⁵ Although this matter may seem petty to some, a proper form of address is closely associated with the dignity of the addressee, especially in cases where the addressee wishes to achieve a change in his/her sex/gender. I consider such infringements of the persons' dignity completely unnecessary, since it is not necessary to use the "Mr" (*in Czech "Vážený pan" - Dear Sir – in identification details – trans.*) form of address in the header of a letter. Such form of address may be omitted where appropriate due to the circumstances since it does not serve as an expression of respect to the other person, but causes psychological harm instead. All dealings between administrative authorities and the recipients of their services should, in view of the principle of openness, take into account the individuality of each person; the authorities should deal with the person in such a way as to prevent unnecessary harm to his/her dignity.

²⁵ As an example of a neutral form of address, I offer "Good day" (*literal translation of the Czech "Dobrý den" - trans.*), which is admittedly not a grammatically correct form of address, but it is more aligned with the principle of due courtesy, i.e. to act courteously and with respect to other persons. Neutral form of address will cause far lesser harm to transgender or gender-neutral persons than being addressed in the gender they reject.

C.2 Human Rights Aspects of the Case

C.2.1 Sex Change/Reassignment

One of the basic values of the present-day democratic states adhering to the rule of law is the principle of equality of persons before the law and in their dignity. The principle of equality thus permeates the entire legislation. The extraordinary importance of equality also is reflected in the systematic categorisation of the right to equal treatment in Article 1 of the Charter of Fundamental Rights and Freedoms (hereinafter the “Charter”),²⁶ and in the preamble of both the Charter and the Constitution. The Charter further details the right to equal treatment for instance in Art. 3 (1), which stipulates a non-exhaustive list of reasons which must not serve as grounds for differentiation among persons in the application of the Charter rights. A person’s gender is one of these reasons. The right not to be discriminated against on the grounds of gender thus belongs to fundamental human rights, which means it cannot be construed narrowly as a mere ban on discrimination on the grounds of belonging to a gender, but has to be conceived more broadly as a ban on any kind of discrimination related to gender and sex, including their change.²⁷ The Court of Justice of the European Union reached the same conclusion concerning the interpretation of the principle of gender equality in employment.²⁸ In conclusion, the government has the duty to ensure that transgender persons have the same rights as cisgender persons²⁹ and treat them with equal care and respect.

Aside from the Complainant’s right to equal treatment, her right to personal integrity protected by Article 7 of the Charter is also under threat. The inviolability of a person is one of the manifestations of respect and protection of human dignity. For the above reasons, it is not permissible to interfere with the physical and mental integrity of a person without his/her free and informed consent.³⁰ From the medical point of view, dissonance between physical and psychological gender is considered a disorder of sex development.³¹ The disorder is associated with a feeling of disagreement with one’s own body and the social role associated with the given sex/gender. This disorder is treated by means of harmonisation of the gender as experienced by the person and his/her physical sex. Examples from the lives of transgender persons demonstrate that transformation of the genitals is not a necessary part of the harmonisation process. I thus believe that the treatment should aim to achieve identification with the person’s gender and his/her mental balance. Such a state can be achieved, in particular, by means of modification of the person’s external appearance and his/her public image, since there is a close relationship between one’s own perception of gender dissonance

²⁶ Resolution of the Presidium of the Czech National Council No. 2/1993 Coll., on promulgation of the Charter of Fundamental Rights and Freedoms, as amended by Act No. 162/1998 Coll.

²⁷ For more on the interpretation maxim *in dubio pro libertate* see WAGNEROVÁ, Eliška; ŠIMÍČEK, Vojtěch; LANGÁŠEK, Tomáš; POSPÍŠIL, Ivo; et al.: *Listina základních práv a svobod. Komentář. (Charter of Fundamental Rights and Freedoms – Commentary)*. Prague: Wolters Kluwer ČR, 2012, p. 18. ISBN 978-80-7357-750-6.

²⁸ Paragraph 17 *et seq.* of the judgment of the Court of Justice of the European Union of 30 April 1996 in case C-13/94, *P v S*.

Its conclusions were reinforced by subsequent rulings, the latest being the judgment of 27 April 2006 in case C-423/04, *Richards*.

²⁹ The term “cisgender persons” means persons who do psychologically identify with their physical sex.

³⁰ For more details, see WAGNEROVÁ, ŠIMÍČEK, LANGÁŠEK, POSPÍŠIL *et al.*, op. cit., p. 188.

³¹ *International Statistical Classification of Diseases and Related Health Problems: Chapter V: MENTAL AND BEHAVIOURAL DISORDERS (F00-F99)* [online], Institute of Health Care Information and Statistics, © 2015 [retrieved on: 11 May 2015]. Available at: <http://www.uzis.cz/cz/mkn/index.html>

(also called *gender dysphoria – trans.*) and its perception by society. However, the issue of necessity of transformation of the genitals within treatment of gender dissonance is a medical rather than legal matter and I will thus leave it to the experts.

Although treatment of gender dissonance and transformation of genitals and sterilisation is voluntary, I believe that the consent given by the patient in this case is, to an extent, specific. Firstly, sterilisation in itself represents a more serious interference with a person's integrity than most other medical interventions in the integrity of the body since it results in permanent infertility, i.e. inability to conceive a child. Sterilisation thus affects not only personal integrity, but also parenthood and the right to family life in the broader sense of the term. Secondly, the patient's consent to sterilisation given as part of the treatment of gender dissonance is specific because of the level of freedom involved in giving such consent. Freedom (liberty) is usually understood as absence of direct coercion. However, I believe that even indirect coercion interferes with the freedom to control one's own body (the physical dimension of personal integrity) and affects decision-making on the part of the person who is giving consent. Indeed, it is possible to distinguish positive freedom (liberty), i.e. the possibility of acting in certain way, from negative freedom, i.e. an unrestricted choice from possible solutions.³² The patient usually evaluates the possible risks associated with a medical procedure, on the one hand, and the possible benefits, i.e. improvement of the patient's medical condition, on the other hand. The risk assumed (i.e. surgery) is directly related to an improvement of his/her medical condition. However, in case of sex/gender change, or change of the birth identification number, the current legislation connects gender identity with parenthood, although the issues are quite different. Persons suffering from dissonance of their gender identity with their sex at birth (transgender persons) are, unlike cisgender persons, forced to choose between changing their administrative sex/gender and the possibility of conceiving children. The risk of the surgery, moreover resulting in infertility, is in no way related to the pursued interest, which in this case does not involve an improvement of the medical condition, but an administrative change in the population records.

The current legislation, i.e. the requirement for sex reassignment surgery and sterilisation, thus raises doubts with respect to compatibility with the right to inviolability of a person. An administrative act, i.e. a change of the birth identification number, is made conditional on a significant interference with the physical integrity of the given person. On the one hand stands the individual's interest not to have his bodily integrity interfered with and his/her right to dignity³³ and equal treatment – i.e. to be treated as if the individual belonged to the majority.³⁴ On the other hand, there is the interest of society to protect the traditional way of keeping a public register, in this case the population records, and the exclusive association of gender with a particular sex, regardless of the gender identity experienced by individuals.

³² More on the concept of positive and negative liberty: BERLIN, Isaiah. *Four Essays on Liberty*. Prague: Prostor, 1999. p. 219 ff. ISBN 80-7260-004-4.

³³ Article 1 and Art. 10 (1) of the Charter

³⁴ Article 1 and Art. 3 (1) of the Charter

Nevertheless, the final decision in this conflict of interests, i.e. a decision concerning the constitutionality of sterilisation, is up to the Constitutional Court of the Czech Republic.

I will thus only briefly mention the reasoning provided by the German Constitutional Court, which exercised its powers and abolished a similar legal regulation on the grounds of disproportional interference with the right to gender identity and physical integrity of an individual.³⁵ The Austrian Supreme Administrative Court and Constitutional Court proceeded on a similar note when they set aside the rejecting decisions issued by courts of lower instances concerning applications for administrative sex/gender change without the need to undergo sex reassignment surgery.³⁶

C.2.2 Overview of Sex/Gender Change Legislation in Other European Countries

The issue of sex change is not topical exclusively in the Czech Republic; indeed, it is a matter of global interest. Having regard to their shared values and common legal framework, I believe that comparison with European countries, including Russia and Turkey, is appropriate. Data below are based on the information collected by Transgender Europe, an advocacy group interested in the issues of sex/gender change.³⁷

Out of 49 surveyed countries, including all 28 EU Member States, 31 countries (of which 22 are EU Member States) permit administrative sex/gender change. Out of these 31 countries, 16 (including 13 EU Member States) do not require sterilisation. The current trend, especially in the European Union, is to move away from the requirement for sterilisation in relation to administrative sex/gender change.

Currently, the international order is not shaped solely by nation states, but also various international organisations within the framework of which states enter into binding international treaties and conventions. One of the most important organisations of this kind is the 47-member Council of Europe. The purpose of the Council of Europe is to strengthen the rule of law in the member states and to promote the protection of the human rights of its member states' inhabitants. One of the documents adopted by the Council of Europe is the European Social Charter (hereinafter the "Social Charter"), which the Czech Republic ratified in 1999.³⁸ Compliance with the Social Charter is two-fold. The parties submit reports on implementation of the Social Charter.³⁹ Furthermore, selected organisations are allowed to submit complaints against non-satisfactory implementation of the Social Charter.⁴⁰ These complaints are addressed

³⁵ judgement of the Federal Constitutional Court of Germany of 11 January, File No. 1 BVR 3295/07

³⁶ judgement of the Supreme Administrative Court of the Republic of Austria of 27 January 2009, File No. VfGH 2008/17/0054, and judgement of the Constitutional Court of the Republic of Austria of 3 December 2009, File No. VfGH B 1973/08-13

³⁷ Data are based on: *Trans Right Europe Index 2015* [online], TGEU, published on 24 April 2015 [retrieved on: 27 May 2015], available at: <http://tgeu.org/wp-content/uploads/2015/05/trans-map-Side-B-may-2015.pdf>.

³⁸ Communication of the Ministry of Foreign Affairs No. 14/2000 Coll. of International Treaties

³⁹ Article 21 of the European Social Charter

⁴⁰ Article 1 of the Additional Protocol to the European Social Charter Providing for a System of Collective Complaints (hereinafter the "Protocol").

by the Committee of Independent Experts.⁴¹ If this Committee comes to the conclusion that the Social Charter was not applied in a satisfactory manner, the Committee of Ministers shall adopt a recommendation addressed to the party concerned on how it should better implement the Social Charter.⁴²

Recently, Transgender Europe and ILGA-Europe filed such a complaint against the Czech Republic in relation to the requirement for sterilisation in pursuing administrative sex/gender change. The complaint states that the current legislation is at variance with Article 11 of the Social Charter, which provides for the right to protection of health, in conjunction with the principle of non-discrimination espoused in the Preamble to the Social Charter. According to the complainant organisations, the variance lies in the involuntariness of the consent to sterilisation, since transgender persons cannot otherwise achieve the desired correspondence of the administrative sex/gender and their gender identity.

This disadvantage is made even more severe in cases of gender-neutral persons, who are not interested in a change of their physical sex, or persons who cannot undergo sex reassignment surgery for various reasons. These persons are completely denied the possibility of changing their administrative sex/gender.

The last relevant case from abroad I wish to mention is the recent judgment of the European Court of Human Rights (hereinafter the “ECHR”) in case *Y.Y. v. Turkey*.⁴³ In this case, the ECHR dealt with the conditions for administrative sex/gender change. Turkish law requires that administrative sex/gender change be approved by the court. However, the court will only grant approval if the applicant produces a certificate of sterilisation. The ECHR considered such a condition impermissible since it violated the right of an individual to personal development and the right to control his/her own body. The ECHR admitted that sterilisation pursued a legitimate aim; however, court approval was not crucial for preserving this aim in this individual case.

However, it is unclear as of today whether the issue of sterilisation will be raised in other signatory countries of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter the “Convention”)⁴⁴ and whether the ECHR conclusions concerning violation of Art. 8 (1) of the Convention, i.e. the right to a private and family life, are applicable also in other countries.

C.2.3 Gender Neutrality

The previous subchapters dealt with the issue of sex/gender change in the current bipolar gender system used in population records, which distinguishes only two genders: the male and the female. A solution consisting in a change of the administrative sex/gender to female is, however, less preferable to the Complainant than being recognised as a being of “neutral gender”. Such a variant is not permissible under the current legislation; introducing a third gender category, i.e. neutral, is

The Protocol was ratified by the Czech Republic in 2012; see Communication of the Ministry of Foreign Affairs No. 43/2012 Coll. of International Treaties

⁴¹ Article 5 of the Protocol

⁴² Article 9 (1) of the Protocol

⁴³ Judgment of the Chamber of the ECHR of 10 March 2015, complaint No. 14793/08, *Y.Y. v. Turkey*

⁴⁴ Published under No. 209/1992 Coll.

exclusively a matter of the legislator's choice.⁴⁵ The assessment of whether the current legal regulation of gender in population records complies with the Constitution belongs solely with the Constitutional Court, whose decision I cannot predict in any way. Nevertheless, I will briefly address this matter as part of the methodological help I am providing to the Complainant.

In my opinion, if a ban on discrimination on the grounds of gender applies not only to adherence to a certain gender but also to its change, it affects all the more so gender neutrality, i.e. non-adherence to any gender or adherence to the neutral gender. For these reasons, I believe that the ban on discrimination pursuant to Art. 3 (1) of the Charter also applies to persons who do not identify with any of the traditionally established genders. The current legal regulation of gender in the population records raises the question of whether or not it is in conflict with the principle of equal treatment declared in Article 1 and Art. 3 (1) of the Charter, or other constitutional rights such as right to dignity and personal integrity.⁴⁶

In similar cases, the Constitutional Court uses the proportionality test through which it determines whether or not the solution adopted by the legislature is arbitrary. Such a test comprises three steps. Firstly, it is determined whether the chosen measure can be used to attain the intended goal. Secondly, it is determined whether another measure exists that could be used to attain the intended goal without interfering (or interfering less severely) with the protected right. Lastly, the actual proportionality of the adopted measure is considered in respect of the intended goal and the resulting interference with the fundamental right.⁴⁷ Therefore, the Constitutional Court's decision should be based on determination of whether the current legal regulation is proportional in relation to the threatened or affected rights of the Complainant and other gender-neutral persons.

C.2.4 Gender-neutral Population Records

Although the Complainant expressly refers to the conditions of recording gender,⁴⁸ I believe that the core of the problem, i.e. the forced revelation of her gender identity each time personal identification documents are shown, is closely related to the issue of contents and form of the recorded personal data.

Specifically, the question stands whether the compulsory indication of the sex/gender of the holder of the document is indeed necessary. The structure of the birth identification number, i.e. whether it should clearly indicate the sex/gender and age of its holder or, alternatively, whether it should simply serve as an identifier without meaningful content, is a separate issue.⁴⁹ These issues, however, belong with the legislature and I mention them only as examples of the possible direction the public

⁴⁵ Neutral gender is currently only recognised in Australia in connection with the decision of the High Court of Australia of 2 April 2014, S273/2013, in case *NSW Registrar of Births, Deaths and Marriages v Norrie*.

⁴⁶ Article 10 (1) and Art. 1 (7) of the Charter

⁴⁷ The proportionality test was applied by the Constitutional Court e.g. in its judgment of 9 October 1996, File No. Pl. ÚS 15/96.

The Constitutional Court dealt with the ban on arbitrariness e.g. in its resolution of 16 January 2012, File No. IV. ÚS 1881/11.

⁴⁸ i.e. the lack of a third, neutral sex/gender category.

⁴⁹ Such a change may soon be adopted in Slovakia.

debate on equal rights for genderqueer⁵⁰ and transgender persons can take in the future.

D - Conclusions

The case at hand turns on the issue of maintaining the dignity of all persons regardless of their gender. Gender and the social roles associated with it cannot, in my opinion, be connected exclusively with the person's physical sex. In some cases involving especially transgender persons, there is a gender dissonance, where the person's experienced gender does not correspond to his/her physical sex. In other words, the person's gender identity is not aligned with his/her sex at birth. Although the Charter of Fundamental Rights and Freedoms declares equal dignity and rights for all persons, in reality these persons often find themselves pushed to the fringes of society.⁵¹

One of the reasons for their exclusion is the legal regulation providing for gender records in the population records, which makes an administrative change of gender conditional on sterilisation, and which also recognises only two genders, male and female, placing persons who identify with neither one outside of the population records system. The condition of sterilisation in order to achieve sex/gender change serves only to highlight the negative impact of the bipolar conception of gender identity. The case in question thus gives rise to the question of whether the relevant legislation is in conformity with the Czech Constitution. This, however, may only be decided by the Constitutional Court, not by the Public Defender of Rights.

The Complainant further complained against the procedure of the Ministry of the Interior. I concluded on the basis of my inquiry that the Ministry had proceeded in accordance with the law and had made no errors. The Complainant's adverse situation results from the legal regulation, not from the steps taken by the Ministry; the executive branch is not competent to evaluate constitutionality of legal regulations. If the Complainant wishes to achieve a change in the way the system of population records works, i.e. to introduce a gender-neutral birth identification number and/or administrative change of her sex/gender, she would first have to precipitate a change in the legislation.

The Complainant also objected to the inappropriate form of address used by the Ministry. However, I believe this was caused simply by the lack of insight into the genderqueer issues on the part of the Ministry. If the Ministry indicates its interest, I will be glad to assist it in introducing suitable measures, for example training for the Ministry's and other administrative authorities' staff or guidelines for communication with genderqueer and transgender persons.

⁵⁰ The term "genderqueer persons" means all persons who perceive their gender identity differently from the majority, i.e. not solely in terms of male and female dichotomy.

⁵¹ I am also basing this conclusion on the findings of the European Union Agency for Fundamental Rights, e.g. the *European Union lesbian, gay, bisexual and transgender survey*. Luxembourg, 2014, 140 p. ISBN 978-92-9239-175-1.

Available at: http://fra.europa.eu/sites/default/files/fra-eu-lgbt-survey-main-results_tk3113640enc_1.pdf; and *Being trans in the European Union*. Luxembourg, 2014, 127 p. ISBN 978-92-9239-644-2. Available at: http://fra.europa.eu/sites/default/files/fra-2014-being-trans-eu-comparative_en.pdf.

I am sending this report to the Minister of the Interior with the request that he provide his statement within 30 days of its delivery.

I shall also inform the Complainant of my findings and conclusions.

Mgr. Anna Š a b a t o v á, Ph.D.
Public Defender of Rights