



EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

Legal summary

January 2023

Y v. France - 76888/17

Judgment 31.1.2023 [Section V]

Article 8

Article 8-1

Respect for private life

Refusal by the national authorities to insert the term "neutral" or "intersex", instead of "male", on the birth certificate of an intersex person: *no violation*

Facts – The applicant, whose birth certificate indicates that he is "male", has been a biologically intersex person since birth, as attested by medical certificates. He has neither testicles nor ovaries, his body has never produced sex hormones and he did not develop either male or female characteristics. Given that he had been "administratively assigned" the male gender, when he began suffering from osteoporosis he was prescribed, for forty years, a hormone-based treatment intended for men, which artificially changed his appearance (he grew a beard and his voice broke).

In January 2015 he asked the public prosecutor at the *tribunal de grande instance* to request the president of that court to order that the term "male" on his birth certificate be replaced by the term "neutral" or, if that were not possible, by the word "intersex". In August 2015 the president of the *tribunal de grande instance* found for the applicant. The court of appeal set aside that judgment in March 2016. Then in May 2017 the Court of Cassation dismissed an appeal on points of law lodged by the applicant.

Law – Article 8:

It was established that the applicant was an intersex person since, biologically, he fell into neither the "male" nor "female" category, as ascertained on the basis of the National Ethics Advisory Committee's definitions in its Opinion no. 132, the court of appeal's finding, and the medical certificates submitted. There was thus a discrepancy between his biological identity, for which he claimed recognition, and his legal identity.

With regard to the applicability of Article 8, personal identity – of which gender identity was one component – came within the scope of the right to respect for private life enshrined by that provision (see *X and Y v. Romania*; *Y.T. v. Bulgaria*; *A.P., Garçon and Nicot v. France*).

The only issue which arose in the present application, which did not concern the question of gender self-determination, was that of the consequences for the right to respect for private life, enshrined by Article 8 of the Convention, of assigning the male or female gender to an individual who, given that they were biologically intersex, fell into neither of these categories.

(a) *Whether the case concerned a negative obligation or a positive obligation* – It was appropriate to approach the present case from the perspective of a positive obligation: the applicant’s complaint referred to an alleged shortcoming in French law which had given rise to a situation breaching his right to private life. The Court had followed this approach in several cases concerning the gender identity of transgender persons (see *X and Y v. Romania*; *Y.T. v. Bulgaria*; *S.V. v. Italy*; *A.P., Garçon and Nicot v. France*, *Hämäläinen v. Finland* [GC]; *Christine Goodwin v. the United Kingdom* [GC]; and *Sheffield and Horsham v. the United Kingdom* [GC]).

(b) *The national margin of appreciation* – An essential aspect of individuals’ intimate identity was central to the present case, in that it concerned gender identity. The notion of personal autonomy was an important principle underlying the interpretation of the guarantees provided for by Article 8, and the right to gender identity and personal development was a fundamental aspect of the right to respect for private life. Those factors militated in favour of a narrow margin of appreciation (see *A.P., Garçon and Nicot v. France*).

Nonetheless, the questions in issue concerned a topical matter which was open to discussion or even controversy, and on which opinion in a democratic society could reasonably differ widely. Furthermore, the vast majority of thirty-seven member States (not including France) provided for gender specification on birth certificates or identity documents, with no possibility of indicating a gender reference other than “male” or “female”. Although it appeared that the issue of recognition for non-binary gender status had recently been or was being studied in certain countries, there appeared to be no current European consensus on the matter.

In addition, public interests which fell within the scope of general interest were at stake: safeguarding the principle of the inalienability of civil status, ensuring the reliability and consistency of civil-status records and, more generally, ensuring legal certainty.

Thus, the respondent State enjoyed a wide margin of appreciation in implementing its positive obligation to secure to the applicant effective respect for his private life.

(c) *Balancing the respective interests* – The discrepancy between the applicant’s biological identity and his legal identity was such as to cause him suffering and anxiety.

The court of appeal had pointed out that assigning male or female gender to a new-born child who showed biological sexual ambiguity, in contradiction with medical findings that gender could not be determined unequivocally, ran the risk of creating a conflict between that decision and the individual’s sexual identity as experienced when an adult. The fair balance required by Article 8 meant that such persons ought to be given the opportunity either to ensure that their civil status did not mention any gender category, or that the gender that had been assigned to them could be changed – but only where the assigned sex “did not correspond to their physical appearance and their social behaviour”. For that reason, the court of appeal dismissed the applicant’s request, on the grounds that this last condition had not been met, in that his physical appearance was that of a male, that he had married and that he and his wife had adopted a child. The Court of Cassation had confirmed that, for that reason, the breach of his right to respect for private life had not been disproportionate to the legitimate aim pursued.

The Court could not accept this reasoning, in so far as it amounted to giving priority to physical and social appearance over the applicant’s biological intersex reality. It proceeded from confusion between the concept of identity and the concept of appearance, although as an element of private life, an individual’s identity could not be reduced to the appearance that this person was perceived as having by other persons. It also ignored the reality of the applicant’s life experience; assigned at birth as belonging to the male sex and having, in consequence, been socially identified as such, he had had

no other option but to “pretend to be a man”, and his partial and late virilisation (development of male characteristics) was not the result of his own choice, but arose from the hormonal treatment that he had received for his osteoporosis.

Nonetheless, the national courts had fully acknowledged that the fact of assigning male or female gender to persons, such as the applicant, who were biologically intersex, affected their right to respect for their private life. However, they had also taken into account the importance of the public-interest issues that were at stake. In this connection, the arguments put forward by the national authorities, based on respect for the principle of the inalienability of civil status and the need to preserve the consistency and reliability of civil status records and of the social and legal arrangements in place in France, were relevant. Moreover, according to the Court of Cassation, judicial recognition of a “neutral” gender would have far-reaching consequences for the rules of French law, constructed on the basis of a binary system of genders, and would imply multiple coordinating legislative amendments. An information report by the French Senate pointed out that such recognition would have far-reaching legal consequences for the legislation governing family law, the legal parent-child relationship, procreation and male-female equality, and concluded that, while it was essential to ensure that intersex persons could enjoy the right to respect for private life, any reform of their legal status would have to be preceded by careful reflection. The court of appeal had also held that granting the applicant’s request would be tantamount to recognising the existence of another gender category and therefore to exercising a normative function, which was in principle a matter for the legislature and not for the judiciary. Thus, respect for the principle of the separation of powers, without which there was no democracy, had been at the heart of the domestic courts’ considerations.

The Court too was required to exercise restraint in the present case. The applicant stated that he was not asking for the enshrinement of a general right to recognition of a third gender, but only for rectification of his civil status so that it would reflect the reality of his identity. Nonetheless, if the Court were to uphold his claim and state that the refusal to insert the term “neutral” or “intersex” on his birth certificate instead of “male” had amounted to a violation of Article 8, this would necessarily mean that the respondent State would be required, in order to discharge its obligations under Article 46 of the Convention, to amend its national law accordingly. However, a special weight had to be accorded to the role of the domestic policy-maker in matters of general policy on which opinions within a democratic society could reasonably differ widely. This was particularly true where, as in the present case, the question was one on which society would have to make a choice (see *S.A.S. v. France* [GC]).

Particularly in the absence of a European consensus in this area, it was therefore appropriate to leave it to the respondent State to determine at what speed and to what extent it could meet the demands of intersex persons, such as the applicant, with regard to civil status, giving due consideration to the difficult situation in which they found themselves in terms of the right to respect for private life, especially the discrepancy between the legal position and their biological reality.

In the light of the above considerations, and having regard to the margin of appreciation enjoyed by it, the respondent State had not failed in its positive obligation to secure effective respect for the applicant’s private life.

Conclusion: no violation (six votes to one).

(See also *Sheffield and Horsham v. the United Kingdom* [GC], 22985/93 and 23390/94, 30 July 1998, [Legal Summary](#); *Christine Goodwin v. the United Kingdom* [GC], 28957/95, 11 July 2002, [Legal Summary](#); *S.A.S. v. France* [GC], 43835/11, 1 July 2014, [Legal Summary](#); *Hämäläinen v. Finland* [GC], 37359/09, 16 July 2014, [Legal Summary](#); *A.P., Garçon and Nicot v. France*, 79885/12 et al., 6 April 2017, [Legal Summary](#); *S.V.*

v. Italia, 55216/08, 11 October 2018, [Legal Summary](#); *Y.T. v. Bulgaria*, 41701/16, 9 July 2020, [Legal Summary](#); *X and Y v. Romania*, 2145/16, 19 January 2021, [Legal Summary](#))

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