

Austria

Favourable Decision in Constitutional Court's TransX Same-Sex Marriage Case

RKL: „Government should promote families, not destroy them“

Rechtskomitee LAMBDA (RKL) highly welcomes the Constitutional Court's decision to initiate procedures for the repeal of Interior Ministry's Decree on Transsexuals which pressures same-sex spouses to dissolve their marriage (VfGH 02.12.2006, B 947/05).

The applicant is a male-to-female transsexual living a happy family life with her wife and their two children. Last year she underwent sex-change-operation. Since then she has been living as a woman in same-sex marriage with her wife, whom she had already married when being a man.

According to the case-law of the European Court of Human Rights post-operative transsexuals have a fundamental right under the European Convention of Human Rights that their sex-entry in the birth register be changed to their new sex; and by that also to get documents representing this new sex.

The Decree on Transsexuals issued by the Minister of Interior in the year 1996 however makes the fulfilment of this human right for married transsexuals, whose marriage turns same-sex after the operation, dependent upon dissolution of their marriage.

That way ordered by the Ministry of Interior the registry office refused to correct the sex entry in the birth register. So she, as a woman, still has to operate with male documents and thereby must lay open her transsexuality to anyone who sees these documents. Her case is especially precarious as – under Austrian legislation – her conjugal community not being disrupted she is unable to dissolve her marriage, to fulfil the condition set by the authorities.

Same-sex marriage no ground for refusal

The Constitutional Court now in principle agreed with the applicant and initiated procedures for the repeal of (the main parts of the) Interior Ministry's Decree on Transsexuals. On the one hand the decree (considered by the Ministry to be a merely internal order to the registry offices) seemed to be unlawful on the basis that it has not been properly published in the federal law gazette ("Bundesgesetzblatt"). On the other hand the Court shares the concerns the applicant raised about substantive unlawfulness of the decree. Sex would change by the operation, also when a person is married. The birth registry therefore had to be corrected to reflect this change, and the Court could not find a law establishing a ban on such a correction if a person is married. It seems that the refusal to correct the birth register could not prevent that the spouses turn same-sex after the operation, the judges said.

The Court will now invite the Ministry of Interior to comment on its concerns. On that basis and the (counter)arguments of the applicant the Court then will decide on the repeal of the decree.

"The Constitutional Court merits high respect for this decision", says *Dr. Helmut Graupner*, president of the Austrian lesbian and gay rights organization *Rechtskomitee LAMBDA (RKL)* and counsel of the applicant, "The Federal Government on its side should promote marriage and families and not intend to destroy them just on the basis of them being same-sex."

Rechtskomitee LAMBDA (RKL), founded in 1991, on a supra-partisan and denominational level is working for the implementation of human rights for homo- and bisexual men and women. In its honorary board it convenes so prominent members as the Chairman of the Social-Democratic Party of Austria (SPÖ) Dr. Alfred Gusenbauer, President MP Peter Schieder, MP Mag. Terezija Stoisits (Green Party), the well-known child and adolescent psychiatrist Univ.-Prof. Dr. Max Friedrich and the Ombudspersons for Children and Adolescents of Vienna DSA Monika Pinterits und Dr. Anton Schmid, the Secretary General of Amnesty International Austria Mag. Heinz Patzelt and the well-known human rights experts Dr. Lilian Hofmeister und Univ.-Prof. Dr. Manfred Nowak, the sexologists ao.Univ.-Prof. Dr. Josef Christian Aigner, Prof. Dr. Rotraud Perner and Mag. Johannes Wahala, the theologian Univ.-Prof. Dr. Kurt Lüthi, entertainer Günter Tolar and many more.

The full text of the judgment:

http://www.vfgh.gv.at/cms/vfgh-site/attachments/8/6/1/CH0003/CMS1136971180681/transsexuellenerlass_b947-05.pdf

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