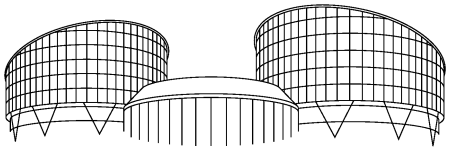

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FORMER SECOND SECTION

CASE OF Y.Y. v. TURKEY

(Application no. 14793/08)

JUDGMENT
[Extracts]

STRASBOURG

10 March 2015

FINAL

10/06/2015

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

In the case of Y.Y. v. Turkey,

The European Court of Human Rights (Second Section), sitting as a Chamber composed of:

Guido Raimondi, *President,*
Işıl Karakaş,
Nebojša Vučinić,
Helen Keller,
Paul Lemmens,
Egidijus Kūris,
Robert Spano, *judges,*
and Abel Campos, *Deputy Section Registrar,*

Having deliberated in private on 3 February 2015,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 14793/08) against the Republic of Turkey lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Turkish national, Y.Y. ("the applicant"), on 6 March 2008. Y.Y. is a transgender person who at the time the application was lodged was recognised in civil law as female. However, the Court will use the masculine form in referring to the applicant, to reflecthis preferred gender identity.

2. The applicant was represented by Mr A. Bozlu, a lawyer practising in Mersin. The Turkish Government ("the Government") were represented by their Agent.

3. The applicant alleged a violation of his right to respect for his private life (Article 8 of the Convention),in particular becausethe courts had refused his request for authorisation to undergo gender reassignment surgery. He also complained of the fact that the Court of Cassation had not considered his case on the merits andhad not given reasons for its decisions concerning him (Article 6 of the Convention).

4. On 24 March 2010the Government were given notice of the application. The acting Section President at that time also decided that the applicant's identity should not be disclosed (Rule 47 § 3 of the Rules of Court).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1981.

6. The applicant is a transgender person whosegender is recorded in the civil-status register as female. He stated that he had become aware, even as a child, of feeling that he was male, a feeling that was at variance with his anatomical sex.

A. Initial court action seeking gender reassignment

7. On 30 September 2005 the applicant applied to the Mersin District Court ("the District Court") under Article 40 of the Civil Codeseeking authorisation to undergo gender reassignment surgery. In the application instituting the proceedings the applicant's lawyer gave the following reasons for his client's request.His client had, since he was a child, regarded himself as male rather than female andfor that reason had been receiving psychological counselling since childhood; at the age of nineteen or twentyhe had contemplated suicide;his current biological identitywas at odds with the gender to which he felt he belonged;and gender reassignment was necessary in order for him to achieve harmonybetween his private perception of himself and his physical make-up.The lawyer stated that several doctors whom his client had consulted since childhood had recommended gender reassignment. The applicant, who was twenty-four years old, was living as a man, had been in a relationship with a woman for four years and was accepted as a man by his family and friends. The lawyer added that his client had been receiving treatment for the past year in the psychiatric department of İnönü University Hospital with a view to undergoing the gender reassignment surgery that he sought. Lastly, the lawyer requested that the proceedings remain confidential in view of his client's psychological state.

8. On 16 December 2005 the District Court granted the request concerning the confidentiality of the proceedings.

9. On 6 February 2006 the court heard evidence from the applicant's family. The applicant's mother stated that as a child her daughter had played mainly with boys and as an adolescent had told her mother that she felt more like a boy and wanted to be one. The applicant's mother had therefore consulted psychologists, who had expressed the view that her daughter would be happier if she could live as a man, a view which the applicant's mother shared. The applicant's older brother also said that his sister had played with boys when she was a child, had started to behave like a boy during adolescence and had had girlfriends, and that she had been determined to undergo gender reassignment by means of surgery. She had

made several suicide attempts and was still in therapy. As far as the applicant's brother was aware, the doctors had decided to go ahead with the operation.

On conclusion of the hearing the District Court sent a request for information to the medical director of the hospital where the applicant was being treated, seeking to ascertain whether the applicant wastransgender, whether gender reassignment was necessary to ensurehis mental health and whether he was permanently unable to procreate.

10. On 23 February 2006 a medical committee ofİnönü University Medical Centredrew up a psychiatric report which found that the applicant was transgender. The report further found that, froma psychological viewpoint, the applicant should henceforth live with a male identity.

11. On 28 February 2006 a medical committee of the gynaecology and obstetrics unit of the same medical centre drew up a report which found that Y.Y. had a female phenotype and was transgender.

12. On 7 April 2006 the District Court examined the two medical reports from İnönü University's medical faculty. The court observed that the authors of the report of 23 February 2006 had diagnosed the applicant as transgender and had found that, from a psychological viewpoint, he should live henceforth with a male identity,but that the authors of the report of 28 February 2006 had found Y.Y.'s phenotype to be female. However, the court considered that these reports had not answered the questions it had asked, namely whether gender reassignment was necessary in order to ensure the claimant's mental health and whether the claimant was permanently unable to procreate. The court therefore reiterated its request for information.

13. On 20 April 2006 the head of the gynaecology and obstetrics unit attached to the surgical department of İnönü University's medical faculty wrote to the head doctor of the medical centre informing him that the applicant had been examinedfollowing a request for a consultation with a plastic surgeon with a view to gender reassignment. She said that an examination had established that Y.Y. had female external and internal genitalia and was not permanently unable to procreate.

14. On 21 April 2006 a medical committee of the psychiatric department of İnönü University's medical faculty wrote to the head doctor of the medical centreinforming him that the applicant had been examined on 20 April 2006. Following that examination the medical team had concluded that,in the interests of his mental health,the applicant should be allowed to live henceforth with a male identity.

15. At the District Court hearing of 5 May 2006 the applicant's lawyer challenged the report of 20 April 2006 on the grounds that it had not been adopted by a collegiate body. The District Court accordingly requested a fresh expert report on the applicant's ability to procreate. The task of

preparing the report was entrusted to a medical committee of Çukurova University's faculty of medicine.

16. On 11 May 2006 two doctors from the gynaecology and obstetrics department of Çukurova University's faculty of medicinecarried out anexpert assessment and concluded, after examining the applicant, that hewas capable of procreating.

17. On 27 June 2006 the District Court, basing its decision on the findings of the various expert reports, refused the applicant authorisation to undergo gender reassignment, on the ground that he was not permanently unable to procreate and therefore did not satisfy one of the conditions of eligibility for gender reassignment under Article 40 of the Civil Code.

18. On 18 July 2006 the applicant appealed on points of law against that judgment. In his pleadings the applicant's lawyer stressed that his client had considered himself since childhood as male rather than female and that this belief was not a mere whim. The applicant had undergone a lengthy course of psychotherapy following which the doctors had concluded thathe was transgender andthat, from a psychological perspective,it was advisable for him to live as a man. The lawyer further submitted that his client's ability to procreate did not in any way prevent him from perceiving himself as a man; it was a biological fact over which he had no control. In Turkey as elsewhere in the world,persons who,like the applicant,were unable to reconcile their biological and psychological state were not necessarily single and unable to procreate. There were numerous examples ofpeople who had a predisposition towards transgenderismand who had married and had children before having gender reassignment surgery. It was unfair to make authorisation for a change of biological gender contingent on the ability of the transgender individuals concerned to procreate, whether they considered themselves as men or as women. Accordingly, in refusingto allow the applicant to undergo gender reassignment surgery under Article 40 of the Civil Code – which, in the lawyer's submission, did not reflect social reality – the courts had restricted his client's rights and freedoms. The lawyer further alleged that the refusal of the applicant's request on account of his ability to procreate had been unlawful. In his view, the expression "permanently unable to procreate" should be deleted from the provision in question.

19. On 17 May 2007 the Court of Cassation upheld the District Courtjudgment, taking the view that the first-instance court had not erred in its assessment of the evidence.

20. On 18 June 2007 the applicant's lawyer lodged an application for rectification of that decision. In his pleadings he submitted that none of the grounds of appeal advanced by the applicant had been taken into account, and that no comment had been made on the official documents and reports included in the file. The lawyer also contested the use of the report of 11 May 2006 prepared by the gynaecology and obstetrics department of

Çukurova University's medical facultyas the basis for rejecting the applicant's claims. He argued in that regard that the report in question did not have the status of an expert report and had been drawn up following a purelysuperficial examination of his client's genitalorgans that was insufficient to establish his ability to procreate. Even assuming that the various medical reports had sufficed to establish that his client was capable of procreating, the only gender withwhich his client could identify from a physical and psychological perspective was male. Moreover, that fact had been established on 2 March 2005 in the report of the medical committee of İnönü University, where his client had also been following a long-term course of psychotherapy. The lawyer criticised the failure to take the latter fact into account. Lastly, he submitted that the courts had infringed the applicant's rights by refusinghis request for authorisation to undergo surgeryaimed at assigning to him the gender with which he naturally identified.

21. On 18 October 2007 the Court of Cassation rejected the application for rectification lodged by the applicant, observing that none of the grounds for setting aside enumerated in Article 440 of the Code of Civil Procedure applied in the case at hand.

B. Proceedings in the domestic courts following notification of the application to the Government

22. On 5 March 2013 the applicant lodged a fresh application with the Mersin District Court on the basis of Article 40 of the Civil Code, seeking authorisation to undergo gender reassignment surgery. In his application instituting the proceedings, the applicant's lawyer gave the following reasons for the request. His client had regarded himself from a young age as male rather than female and for that reason had received psychological counselling since childhood; medical reports had established that, from a psychological viewpoint, it was advisable for him to live henceforth with a male identity;the applicant's biological identity was at odds with the gender to which he felt he belonged; gender reassignment was necessary to ensure his psychological and mental well-being; on 27 March 2012 he had undergone a double mastectomy and was taking various hormones to increase his testosterone levels;he was working for his brother as a painter and decorator;he went regularly to the gym and had the physical appearance of a man;he was now thirty-two years old and had always regarded himself as a man;the friends he had met after a certain age knew him only as a man; and he did not use the first name indicated on his identity papers. The lawyer added that, in order to bring his physical appearance into line with his perception of himself, his client had resorted to all kinds of methods with damaging side-effects. In his daily life, and especially when he had to produce his identity papers for the authorities, the applicant was subjected to

denigrating and humiliating treatment and encountered numerous difficulties because of the discrepancy between his outward appearance and the identity indicated on his papers. The lawyer summed up by requesting the court to allow his client to begin the requisite formalities in order to change his identity in the civil-status register, to grant his client's request to undergo gender reassignment, to authorise him to undergo gender reassignment surgery and to declare the District Court proceedings confidential.

23. On 11 April 2013, following a full medical history and examination of the applicant, a committee made up of psychiatrists from İnönü University Medical Centre issued a medical report which found that the applicant was transgender and that gender reassignment was necessary in order to ensure his mental health. The report also stated that an expert assessment should be carried out to establish whether the applicant was permanently unable to procreate.

24. On 6 May 2013 a forensic medical report was drawn up by a committee from the forensic medicine department of İnönü University Medical Centre. According to the report, during the examination carried out on 11 April 2013 in the forensic medical department, the applicant had stated that he wished to undergo gender reassignment surgery and had already taken steps to that end in the past but had had his claims rejected by the courts. He had then applied to the European Court of Human Rights and had since brought a fresh action. The medical examination had shown that the applicant had a male phenotype (all his external characteristics).He had a beard and a moustache, his breast tissue had been surgically removed and he was receiving treatment following that operation. He had male hair growth on his arms and legs, was undergoing hormone treatment and was embarrassed by the colour of his identity card[1] and had therefore covered it before putting it in his wallet. Lastly, the applicant had stated that reassignmentwas a necessity for him.

According to the report, blood tests had revealed that the applicant had a total testosterone count of more than 16,000 ng/dl, presumably linked to the hormone treatment he was taking. However, this did not mean that he was permanently unable to procreate.

The report concluded as follows:

> "1. [The applicant] is transgender;
>
> 2. gender reassignment is necessaryfor his mental health;
>
> 3. [he] is not permanently unable to procreate (as awoman) ..."

25. On 21 May 2013 the Mersin District Court granted the applicant's request and authorised the gender reassignment surgery which he sought. In its reasoning, the District Court found it establishedthat the applicant was

[1] In Turkey, women's identity cards are pink and men's are blue.

transgender, that gender reassignment was needed to ensure his mental health,and that it was clear from the evidence of the witnesses called by the applicant that he lived as a man in every respect and suffered as a result of his situation. Accordingly, in view of the evidence and of the reports produced, the conditions set forth in Article 40 § 2 of the Civil Code were satisfied and the request should be granted. The judgment specified that it was final.

...

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

44. The applicant alleged a violation of his right to respect for his private life. He maintained that the discrepancy between his perception of himself as a man and his physiological make-up had been established by medical reports. In his application form he added that his requestto be allowed to put an end to that discrepancyhad been refused by the domestic authorities, who had based their decision on the finding that he was able to procreate. He requested authorisation to undergo gender reassignment surgery.The applicant criticised the content of Article 40 of the Civil Code and the manner in which it had been interpreted.These did not address the concerns which the provision in questionwas supposed to resolve, since the biological criterion laid down could only be satisfied by means of surgery. In the applicant's view, the impossibility of obtaining access to such surgery meant that the persons concerned were permanently deprived of any opportunity to resolve the discrepancy between their perception of their gender identity and the biological reality.

The applicant relied on Article 8 of the Convention, which provides:

> "1. Everyone has the right to respect for his private ... life...
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

45. The Government contested the applicant's allegations.

A. Admissibility

46. In additional observations dated 30 August 2013 the Government submitted that, according to their reading of the Court's well-established case-law, the applicant had to be able to demonstrate his victim status at all

stages of the proceedings. In support of their argument they cited the case of *Burdov v. Russia* (no. 59498/00, § 30, ECHR 2002-III). In the present case the District Court had ultimately ruled in favour of the applicant, authorising him to undergo gender reassignment. Accordingly, the applicant no longer had victim status for the purposes of Article 34 of the Convention.

47. The applicant contested the Government's arguments. Referring to the Court's judgments in*Chevrol v. France* (no. 49636/99, § 43, ECHR 2003-III); *Guerrera and Fusco v. Italy* (no. 40601/98, §§ 51-53, 3 April 2003); and *Timofeyev v. Russia* (no. 58263/00, § 36, 23 October 2003), he submitted that a favourable decision or measure was not in principle sufficient to deprive applicants of their victim status unless the national authorities had acknowledged, either expressly or in substance, and then afforded full redress for, the violation alleged.The dismissal of his initial request had forced him – like all persons who wished to undergo gender reassignment – to use hormones without any judicial or medical supervision. He was thus indeed a victim, and the domestic authorities had never acknowledged this state of affairs. Furthermore, he had brought a fresh action on his own initiative, whilethe domestic authorities had taken no active steps to allow him to undergo gender reassignment.

48. The Court reiterates that it falls first to the national authorities to redress any alleged violation of the Convention. The question whether or not the applicant can claim to be a victim of the violation alleged is relevant at all stages of the proceedings under the Convention (see *Burdov*, cited above, § 30). In answering this question, account should be taken not only of the formal position at the time when the application was lodged with the Court but of all the circumstances of the case in question, including any developments prior to the date of the examination of the case by the Court (see *Tănase v. Moldova* [GC], no. 7/08, § 105, ECHR 2010).

49. The Court further reiterates that, in view of these considerations, the question whether an applicant has victim status falls to be determined at the time of the Court's examination of the case where such an approach is justified in the circumstances (ibid., § 106). Furthermore,a decision or measure favourable to the applicant is not, in principle, sufficient to deprive him of his status as a "victim" for the purposes of Article 34 of the Convention unless the national authorities have acknowledged, either expressly or in substance, and then afforded redress for the breach of the Convention (see, for example, *Eckle v. Germany*, 15 July 1982, § 66, Series A no. 51; *Dalban v. Romania* [GC], no. 28114/95, § 44, ECHR 1999-VI; *Scordino v. Italy (no. 1)* [GC], no. 36813/97, §§ 179-80, ECHR 2006-V; and *Gäfgen v. Germany* [GC], no. 22978/05, § 115, ECHR 2010).

50. Only where both these conditions have been satisfied does the subsidiary nature of the protective mechanism of the Convention preclude examination of the application (see *Eckle*, cited above, §§ 69 et seq.).

51. As to the redress which is “appropriate” and “sufficient” in order to remedy a breach of a Convention right at domestic level, the Court has generally considered this to be dependent on all the circumstances of the case, having regard in particular to the nature of the Convention violation at stake (see, for instance, *Gäfgen*, cited above, § 116).

52. In the present case the Court observes that the applicant lodged an initial request with the domestic courts in 2005 seeking authorisation to undergo gender reassignment surgery, and that his request was refused following court proceedings which concluded in 2007 (see paragraphs 7 to 21 above). After the present application had been notified to the Government, he followed a course of hormone therapy and underwent a double mastectomy before lodging a second request for gender reassignment with the Mersin District Court in March 2013 (see paragraph 22 above). On 21 May 2013, following a new set of judicial proceedings in which he underwent further medical examinations, his request was finally granted (see paragraph 25 above).

53. It is true, as stressed by the Government, that the domestic courts, after the Government had been given notice of the application, adopted a decision favourable to the applicant by authorising him to undergo the requested gender reassignment. However, the Court cannot overlook the fact that the situation giving rise to the present application, namely the applicant’s inability to obtain access to gender reassignment surgery owing to the courts’refusal, lasted for more than five years and seven months. In the Court’s view, there can be no doubtthat the applicant’s private life was directly affected by the courts’ refusal during this period (see paragraphs 22 and 24 above). Furthermore, it is apparent to the Court from the reasoning of the District Court’s judgment in the applicant’s favour that the judgmentdid not contain any expressacknowledgement of a violation of the applicant’s Convention rights. Likewise, the authorisation granted to the applicant cannot be interpreted as acknowledging in substance a violation of his right to respect for his private life.

54. Accordingly, the Government’s objectionthat the applicant no longer has victim status must be rejected.

55. The Court further notes that this complaint is notmanifestlyill-founded within the meaning of Article 35 § 3 (a) of the Convention and is not inadmissible on any other grounds. The Court therefore declares it admissible.

B. Merits

1. General principles

56. The Court has previously stressed on numerous occasions that the concept of "private life" is a broad term not susceptible to exhaustive definition. It includes not only a person's physical and psychological integrity (see *X and Y v. the Netherlands*, 26 March 1985, § 22, Series A no. 91),but can sometimes also embrace aspects of an individual's physical and social identity (see *Mikulić v. Croatia*, no. 53176/99, § 53, ECHR 2002-I).Elements such as gender identification, names, sexualorientation and sexual life fall within the personal sphere protected by Article 8 of the Convention (see *Dudgeon v. the United Kingdom*, 22 October 1981, § 41, Series A no. 45; *B. v. France*, 25 March 1992, § 63, Series A no. 232-C; *Burghartz v. Switzerland*, 22 February 1994, § 24, Series A no. 280-B;*Laskey, Jaggard and Brown v. the United Kingdom*, 19 February 1997, § 36, *Reports of Judgments and Decisions* 1997-I; and *Smith and Grady v. the United Kingdom*, nos. 33985/96 and 33986/96, § 71, ECHR 1999-VI).

57. Article 8 also protects the right to personaldevelopment and the right to establish and develop relationships with other human beings and the outside world (see *Schlumpf v. Switzerland*, no. 29002/06, § 77, 8 January 2009). In that connection the Court considers that the notion of personal autonomy is an important principle underlying the interpretation of the Article 8 guarantees (see *Pretty v. the United Kingdom*, no. 2346/02, § 61, ECHR 2002-III).

58. The Court has also held on many occasions that, as the very essence of the Convention is respect for human dignity and human freedom, the right of transgender persons to personal development and to physical and moral security is guaranteed (see *Christine Goodwin v. the United Kingdom* [GC], no. 28957/95, § 90, ECHR 2002-VI; *Van Kück v. Germany*,no. 35968/97, § 69, ECHR 2003-VII; and *Schlumpf*, cited above, § 101). The Court has also recognised that serious interference with private life can arise where the state of domestic law conflicts with an important aspect of personal identity (see *Christine Goodwin*, cited above, § 77).

59. The Court further observes that, while the boundaries between the State's positive and negative obligations under Article 8 do not lend themselves to precise definition, the applicable principles are nonetheless similar. In determining whether or not such an obligation exists, regard must be had to the fair balance which has to be struck between the general interest and the interests of the individual; in both contexts the State enjoys a certain margin of appreciation (see, for instance, *B. v. France*, cited above, § 44, and *Hämäläinen v. Finland* [GC], no. 37359/09, § 67, ECHR 2014).

60. When it comes to balancing the competing interests, the Court has emphasised the particular importance of matters relating to one of the most

intimate parts of an individual's life, namely the determination of an individual's gender (see *Schlumpf*, cited above, § 104). It has previously examined, in the light of present-day conditions, several cases involving the problems faced by transgender persons and has endorsed the evolving improvement of State measures to ensure their recognition and protection under Article 8 of the Convention (see *L. v. Lithuania*, no. 27527/03, § 56, ECHR 2007-IV).

2. Application of these principles in the present case

(a) Preliminary remarks

61. The Court stresses at the outset that in the above-mentioned cases the complaints were submitted by post-operative transgender persons or those who had undergone certain surgical procedures with a view to gender reassignment. In the present case, however, at the time the application was lodged the applicant had not undergone surgery, as he had been refused authorisation by the courts to undergo gender reassignment surgery on the grounds that he was not permanently unable to procreate.

62. Hence, the present case concerns an aspect of the problems potentially facing transgender persons that differs from the aspects hitherto examined by the Court, namely the issue of the prior conditions that may be imposed on transgender persons in advance of the process of gender change and the compatibility of those conditions with Article 8 of the Convention. The criteria and principles developed in the case-law cited above were thus established in a very different context and cannot therefore be transposed unaltered to the present case. However, they may serve as a guide to the Court in assessing the circumstances of the case.

(b) The approach to be taken inexamining the complaint

(i) The parties' submissions

63. The applicant claimed to have beenthe victim of interference with the exercise of his right to respect for his private life.

64. The Government contested that claim and submitted that the refusal to authorise gender reassignment surgery on the ground that the statutory conditions were not satisfied could not be said to constitute interference with the exercise of the right to respect for private life within the meaning of Article 8 of the Convention. In addressing the issue whether the right of transgender persons to effective respect for their private life gave rise to a positive obligation for the State, regard had to be had to the "fair balance which [had] to be struck between the general interest and the interests of the individual."In its judgments in *Rees v. the United Kingdom* (17 October 1986, Series A no. 106), and *Cossey v. the United Kingdom* (27 September 1990, Series A no. 184), the Court had taken into account, among other

considerations, the fact that "[t]he requirement of striking a fair balance could not give rise to any direct obligation on the respondent State to alter the very basis of its system", in order to conclude that no such obligation existed for the respondent State.

(ii) The Court's assessment

65. The Court observes that the applicant's chief complaint concerned the refusal by the domestic courts of hisrequest for access to gender reassignment surgery. Citing the judgments in*Pretty*(cited above, § 66), and *K.A. and A.D. v. Belgium*(nos. 42758/98 and 45558/99, § 83, 17 February 2005), he submitted that the principle of personal autonomy could be understood to encompass the right to make choices about one's own body. In that connection the Court observes that, while Article 8 of the Convention cannot be interpreted as guaranteeing an unconditional right to gender reassignment surgery, it has previously held that transgenderism is recognised internationally as a medical condition which warrants treatment to assist the persons concerned (see *Christine Goodwin*, cited above, § 81). The health services of most of the Contracting States recognise this condition and provide or permit treatment, including irreversible gender reassignment surgery (see paragraphs 35-43 above).

66. The Court considers that the initial refusal of the applicant's request undeniably had repercussions on his right to gender identity and to personal development, a fundamental aspect of the right to respect for private life. That refusal therefore amounted tointerference with the applicant's right to respect for his private life within the meaning of Article 8 § 1 of the Convention.

(c) Whether the interference was justified

67. In order to determine whether the interference found amounted to a violation of Article 8, the Court must ascertain whether it was justified from the standpoint of the second paragraph of that Article, in other words whether it was "in accordance with the law" and "necessary in a democratic society" in order to achieve one of the "legitimate aims" enumerated in that paragraph.

(i) The legal basis for the interference

68. According to the Court's settled case-law, the expression "in accordance with the law" not only requires that the impugned measure should have a legal basis in domestic law, but also refers to thequalityofthelaw in question, which should be accessible to the person concerned and foreseeable as to its effects (see, among many other authorities, *Amann v. Switzerland* [GC], no. 27798/95, § 50, ECHR 2000-II;*Slivenko v. Latvia* [GC],no. 48321/99, § 100, ECHR 2003-X; and

Fernández Martínezv. Spain [GC], no. 56030/07, § 117, ECHR 2014 (extracts)).

69. In the present case the Court notes first of all that the issue of the existence of a legal basis is not disputed between the parties. The applicant himself stated that the interference in question had been based on Article 40 of the Civil Code. The Government, for their part, asserted that the requirements of that provision were clear and that in the present case the Mersin District Court had not examined previous court rulings regarding the statutory conditions. Basing its findings on the various expert assessments, it had simply refused the applicant's request on the ground that the statutory criteria for gender reassignment had not been fully met since the applicant was not incapable of procreating.

70. The Court notes that the District Court rulingof 27 June 2006 refusing the applicant authorisation to undergo gender reassignment as he had requested was based on Article 40 of the Civil Code. It is apparent from that provision that, under Turkish law, transgender persons who satisfy certain statutory criteria have the right not only to undergo gender reassignment but also to obtain legal recognition of their new gender by amending their civil status ... However, under Article 40 of the Civil Code, this possibility is subject to a number of conditions, including the inability of the person to procreate.It was on the basis of this condition that the applicant's request was initially refused.

71. Accordingly, the Court considers that the interference complained of had a legal basis in domestic law. However, in view of its finding regarding the necessity of that interference (see paragraphs 121-22 below), the Court does not deem it necessary to determine whether or not the effects of the provision in question were foreseeable.

(ii) Whether the interference pursued a legitimate aim

(α) The parties' submissions

72. The applicant submitted that there had been no public-interest grounds for refusing his request to undergo surgical or medical procedures with a view to gender reassignment. The general arguments advanced by the Government to demonstrate that the interference in question fulfilled a public-order interest(such as the need to prevent procedures of this kind from becoming commonplace, the irreversible nature of these procedures and possible misuse by the sex industry, see paragraphs 74 to 75 below) could not be regarded as logical from a scientific, social or legal viewpoint.

73. In the Government's view, it was clear from the Court's case-law that States had the right to control activities that were damaging to the life and safety of others (they referred to *Pretty*, cited above, and to *Laskey, Jaggard and Brown*, cited above). Theyconcluded from the *Pretty* judgment that the more serious the damage incurred the greater the weight that should

be attached to publichealth and safety considerations when assessed in relation to the competing principle of personal autonomy.

74. In that regard the Government argued that the regulation of gender reassignment surgery came not only within the sphere of protection of the public interest in so far as it sought to prevent surgery of this kind from becoming commonplace and to prevent needless operations, but also within the sphere of protection of the interests of individuals who wished to undergo suchsurgery, giventhat it was irreversible and posed a risk to the physical and mental well-being of the persons concerned. While transgender personswho underwent surgery lost some of the characteristics of their gender of origin, they did not acquire all the characteristics of their new gender. Furthermore, it rendered them permanently unable to procreate. Account also had to be taken of the risk that individuals who had undergone gender reassignment surgery, the effects of which were irreversible, might have regrets later.

75. Lastly, the Government wished to prevent gender reassignment surgery from becoming commonplace.They argued that this would be dangerous in view of the irreversible nature of the surgery and the risk that certain sections of society (the sex industry for example) might make improper use of the medical possibilities it offered.

(β) The Court's assessment

76. The Court reiterates that the enumeration of the reasons capable of justifying interference with the right to respect for private life, as listed in Article 8 § 2, is exhaustive and that their definition is restrictive (see *S.A.S.v. France*[GC], no. 43835/11, § 113, ECHR 2014 (extracts)). For it to be compatible with the Convention, an instance of interference with an applicant's right to respect for his or her private life must therefore pursue an aim that can be linked to one of those listed in this provision. The Court's practice is to be quite succinct when it verifies the existence of a legitimate aim within the meaning of the second paragraphs of Articles 8 to 11 of the Convention (ibid.).

77. Nevertheless, in the present case, given that the applicant contested the relevance of the aims relied on by the Government (see paragraph 72 above), the Court considers that it should set out its position in greater detail. Ittakes note of the Government's argument that the regulation of gender reassignment surgery falls within the sphere of protection of the general interest and is aimed in particular at preventing such surgery from becoming commonplace and preventingits improper use by certain sections of society,especially the sex industry. The Government further referred to the aim of protecting the interests of the individuals concerned, in view of the risks of these procedures for their physical and mental well-being.

78. In view of the manner in which they were framed, the Court is not persuaded by the Government's arguments concerning the risk of gender

reassignment surgery becoming commonplace or being misused by certain sections of society. In particular, it is not convinced that the aims relied on in that regard fall within the category of the legitimate aims set forth in Article 8 § 2.

79. However, the Court notes that the Government also stressed the irreversible nature of gender reassignment surgery and the health risks posed by this type of operation. In that connection it has no reason to doubt that, in enacting the legislation in question, the respondent Government sought to achieve a legitimate aim within the meaning of the second paragraph of Article 8, and it accepts that this type of surgery may be made subject to State regulation and supervision on health-protection grounds.

80. That being said, the Court notes that the Government's observations did not specifically address the infertility/sterility requirement referred to in the legislation and on the basis of which the applicant's request was initially rejected. However, in view of its findings regarding the necessity of the interference at issue (see paragraphs 121-22 below), it considers it unnecessary to deal with this issue in greater depth.

(iii) Whether the interference was necessary

(α) The applicant's submissions

81. The applicant pointed out that very few people applied to the courts under Article 40 of the Civil Code seeking permission to live in a physically and psychologically congruent manner. However, numerous individuals underwent illegal operations or had treatment abroad because they did not satisfy the statutory criteria.

82. Treatments aimed at ending a person's reproductive capacity (sterilisation or hormone treatment) were regarded as commonplace for men and women whowere not transgender and simply did not wish to have children. The applicant complained of the fact that, as a transgender person, he was deprived of this possibility.

83. The applicant further submitted that Article 40 of the Civil Code should not be interpreted as precluding hormone treatment or medical sterilisation procedures for persons seeking gender reassignment. Although these types of treatment existed in Turkey they had not been available to him. Since non-transgender men and women who did not wish to have children had access to this type of routine, irreversible treatment, he too, as a transgender person, should have had access to it. In his view, he should not have to live in a situation where his physical appearancewas at variance with the gender to which he felt he belonged. In the light of the scientific and social data (contained in the medical reports included in the file), the law should offer him a solution.

84. Referring to the position adopted by the Court in the case of*Tavlı v. Turkey*(no. 11449/02, §§ 35-37, 9 November 2006), the applicant

submitted that the current legislation should be interpreted in the light of scientific, biological and social reality.

85. Arguing that many transgender people were not permanently unable to procreate, the applicant submitted that Article 40 of the Civil Code did not meet "any need" as it did not contain any provision based on actual necessity. For instance, it made no reference to a "trial period" or to "hormone treatment" or any other type of treatment, butsimply referred to gender reassignment "operations" without mentioning any other medical procedure. There was therefore a real legal vacuum in that regard.The information on medical procedures published by the social security scheme did not address this issue either.

86. The applicant also cited an article written by two academics specialising in civil law concerning a ruling by the civil courts[2] refusing a request for authorisation to undergo gender reassignment on the ground that the person concerned had reproductive organs. The authors had observed that the issue of the constitutionality of such a refusal had not been examined and that the courts had likewise not considered how the situation should be examined from the perspective of the European Convention on Human Rights.

87. In sum, the applicant submitted that the gender reassignment procedure did not apply in practice to transgender persons who were able to procreate – in other words, the majority of transgender persons – owing to the fact that Article 40 of the Civil Code did not indicate the treatment methods to be used and to the lack of any other legislative provisions on the subject. This situation forced transgender people to act outside the law and to resort to medical treatment or surgery that was not systematically supervised by the courts or the medical profession.

(β) The Government's submissions

88. Referring to the cases of *Christine Goodwin* and *Van Kück* (both cited above) and to*Grant v. the United Kingdom*(no. 32570/03, ECHR 2006-VII), the Government stressed that the Court had already examined, in the light of present-day living conditions, several cases relating to the problems encountered by transgender persons. The Court had welcomed the constantly improved measures taken by States under Article 8 of the Convention to protect these persons and recognise their situation.While allowing States a measure of discretion in the matter, the Court had held that they were required, in accordance with their positive obligations under Article 8, to recognise the new gender identity of post-operative transgender persons, in particular by amending their civil status,

[2] Judgment of the İzmir District Court of 17 December 2003 (E. 2002/979 and K. 2003/102) and Court of Cassation judgment of 18 June 2003 (E. 2003/7323 and K. 2003/906).

with the consequences that this entailed (the Government referred in this connection to the judgments in *Christine Goodwin*(cited above, §§ 71-93), and *Grant*(cited above, §§ 39-44).

89. In the Government's submission, the Turkish legal system complied with this requirement, as post-operative transgender persons had their civil status amended in the register and subsequently led their lives in conformity with their new official identity.

90. In the above-mentioned cases, however, the Court had examined complaints submitted by transgenderpersons who had already undergone gender reassignment surgery, whereas the present case concerned the refusal of the domestic courts to authorise the applicant to undergo such surgery. Since 1988, Turkish law had made provision for gender reassignment and granted full legal recognition to the new gender identity of post-operative transgender persons.

91. As to the conditions to be satisfied in order to undergo gender reassignment, the Government referred to Article 40 of the Civil Code. The domestic legislation and the detailed arrangements for its implementation did not mean that the persons concerned had to undergo prior medical sterilisation or hormone therapy in order to be eligible for gender reassignment surgery. In the present case the applicant's request had been examined by the Mersin District Court in the light of the statutory requirements.

92. While they acknowledged that the notion of personal autonomy reflected an important principle underlying the interpretation of the Article 8 guarantees, the Government maintained that the Court had never held that Article 8 encompassed a right to self-determination as such (they referred to the judgments in *Schlumpf*, *Van Kück* and *Pretty*, all cited above). It was not possible to infer from Article 8 of the Convention or from the Court's case-law on the subject the existence of an unconditional right to gender reassignment by means of surgery. In the Government's view,such a right would negate the protection that the Convention was designed to afford.

93. In view of the seriousness and the irreversible nature of gender reassignment surgery, the uncertainty that remained as to the necessity of such operations in treating gender identity disorders, and the risk of such operations becoming commonplace,with the associated dangers, the State should be allowed a wide margin of appreciation in regulating gender reassignment and determining the criteriawhich individuals must meet before undergoing gender reassignment surgery.

94. In order to determine whether the statutory requirements for gender reassignment were fully satisfied, the Mersin District Court had sought to verify that all the prior conditions for the authorisation of gender reassignment had been met, and in particularthe condition of being permanently unable to procreate. It had based its conclusions on specialist knowledge and findings.

95. Furthermore, in view of the uncertainty that remained concerning the essential nature of transgenderism and the extremely complex situations arising out of it, the Government submitted that the legislation in question provided for appropriatelegal measures in this sphere. Relying on *B. v. France*(cited above), they argued that the Court itself had noted that some uncertainty still remained as to the essential nature of transgenderism and that the legitimacy of surgical intervention in such cases was sometimes questioned.

96. In the Government's view, it was not possible to argue that such surgery was vital for the treatment of gender identity disorders. Obtaining a clear diagnosis of transgenderism was of the utmost importance and such a diagnosis had to be made very carefully in order to avoid any confusion with other similar psychological disorders. A finding that gender reassignment surgery was necessary should be made for reasons of medical as well aspsychological necessity.

97. Furthermore, the legal situations arising out of transgenderism were very complicated. They concerned, in particular, issues of an anatomical, biological, psychological and mental nature linked to transgenderism and its definition; issues of consent and the other conditions to be satisfiedprior to any operation; the circumstances in which a change of gender identity could be authorised; the international aspects; the legal effects, whether retroactive or not, of such change; the possibility of choosing another first name; the confidentiality of the documents and information relating to the change; and the impact on the family. There was not yet a sufficiently broad consensus among the Council of Europe member States on these different points for the Court to make decisive findings restricting the Contracting States' margin of appreciation.Hence, this was a sphere in which the Contracting States, owing to the lack of common ground on the subject, continued to enjoy a wide margin of appreciation.

98. Arguing that gender reassignment surgery entailed very considerable risks, the Government submitted that the conditions laid down bydomestic law were not open to criticism from either a legal or a medical point of view. They feared that the opposite approach might lead to operations being performed without any prior checks as to their medical necessity and without any guarantees of a successful medical outcome.

99. In view of all these considerations, the domestic courts' refusal to authorise the applicant to undergo gender reassignment surgery could not be said to constitute an infringementof his right to respect for his private life within the meaning of Article 8 of the Convention. The domestic authorities had not overstepped the margin of appreciation that had to be left to them in cases such as the present one.Accordingly, there had been no violation of Article 8.

(γ) The Court's assessment

100. According to the Court's settled case-law, an instance of interference will be considered "necessary in a democratic society" for a legitimate aim if it answers a "pressing social need", if it is proportionate to the legitimate aim pursued and if the reasons adduced by the national authorities to justify it are "relevant and sufficient" (see, among other authorities, *Nada v. Switzerland* [GC], no. 10593/08, § 181, ECHR 2012, and *Animal Defenders International v. the United Kingdom* [GC], no. 48876/08, § 105, ECHR 2013 (extracts)).

101. While it is for the national authorities to make the initial assessment in all these respects, the final evaluation of whether the interference is necessary remains subject to review by the Court for conformity with the requirements of the Convention. A margin of appreciation must be left to the competent national authorities in this assessment. The breadth of this margin varies and depends on a number of factors including the nature of the Convention right in issue, its importance for the individual, the nature of the interference and the object pursued by the interference. The margin will tend to be narrower where the right at stake is crucial to the individual's effective enjoyment of "intimate" or key rights. Accordingly, where a particularly important facet of an individual's existence or identity is at stake, the margin allowed to the State will be restricted. Where, however, there is no consensus within the member States of the Council of Europe, either as to the relative importance of the interest at stake or as to how best to protect it, the margin will be wider (see *S. and Marper v. the United Kingdom* [GC], nos. 30562/04 and 30566/04, §§ 101-02, ECHR 2008, and *Fernández Martínez*, cited above, § 125).

102. In the present case the Court observes that the proceedings before the domestic courts directly concerned the applicant's freedom to define his gender identity, one of the most basic essentials ofself-determination (see*Van Kück*, cited above, § 73). In that regard it points out that it has repeatedly signalledits consciousness of the serious problems facing transgender persons and has stressed the importance of keeping the need for appropriate legal measures under review (see *Christine Goodwin*, cited above, § 74).

103. The Court reiterates that is of crucial importance that the Convention is interpreted and applied in a manner which renders its rights practical and effective, not theoretical and illusory. A failure by the Convention institutions to maintain a dynamic and evolutive approach would risk rendering it a bar to reform or improvement (see, among other authorities, *Stafford v. the United Kingdom* [GC],no. 46295/99, § 68, ECHR 2002-IV).

104. In the context of the present case, the Court therefore considers it appropriate to take account of the development of international and European law, and of law and practice in the various Council of Europe

member States, in order to assess the circumstances of the present case "in the light of present-day conditions" (for a similar approach, see, among other authorities, *Tyrer v. the United Kingdom*, 25 April 1978, § 31, Series A no. 26).

105. In that regard the Court observes that the possibility for transgender persons to undergo gender reassignment treatment exists in many European countries, as does legal recognition of their new gender identity. It further notes that the regulations or practice applicable in a number of countries that recognise gender reassignment make legal recognition of the new preferred gender contingent, either implicitly or explicitly, on gender reassignment surgery and/or on the inability to procreate...

106. In its judgment in *Christine Goodwin* (cited above, § 85) the Court held that,in accordance with the principle of subsidiarity, it was primarily for the Contracting States to decide on the measures necessary to secure Convention rights to everyone within their jurisdiction and that, in resolving within their domestic legal systems the practical problems created by the legal recognition of post-operative gender status, the Contracting States had to be granted a wide margin of appreciation.

107. In the Court's view, the same is undoubtedly true in relation to the legal requirements governing access to medical or surgical procedures for transgender persons wishing to undergo the physical changes associated with gender reassignment.

108. However, the Court has previously held that it attaches less importance to the lack of evidence of a common European approach to the resolution of the legal and practical problems posed than to the existence of clear and uncontested evidence of a continuing international trend in favour not only of increased social acceptance of transgender persons but of legal recognition of the new gender identity of post-operative transgender persons (see *Christine Goodwin*, cited above, § 85).

109. It further reiterates thatthe right of transgender persons to personal development and to physical and moral security in the full sense enjoyed by others in society cannot be regarded as a matter of controversy requiring the lapse of time to cast clearer light on the issues involved (see *Christine Goodwin*, cited above, § 90).

110. In that connection it emphasises that, in the Appendix to Recommendation CM/Rec(2010)5 on measures to combat discrimination on grounds of sexual orientation or gender identity, the Committee of Ministers of the Council of Europe stated that prior requirements, including changes of a physical nature, for legal recognition of a gender reassignment, should be regularly reviewed in order to remove abusive requirements ...Furthermore, in Resolution 1728 (2010) on discrimination on the basis of sexual orientation and gender identity, the Parliamentary Assembly of the Council of Europe called on the member States to address the specific discrimination and human rights violations faced by transgender persons

and, in particular, to ensure in legislation and in practice their right toofficial documents that reflectedthe individual's preferred gender identity, without any prior obligation to undergo sterilisation or other medical procedures such as gender reassignment surgery or hormone therapy ...

111. The Court also observes that some member States have recently amended their legislation or practice regarding access to gender reassignment treatment and the legal recognition of gender reassignment by abolishing the infertility/sterility requirement ...

112. In that connection the Court considers it worthwhile to highlight the specific features of Turkish law in this sphere. In the majority of countries which require hormone treatment or gender reassignment surgery as a prior condition for legal recognition of a person's preferred gender, the individual's sterility or infertility is assessed after the medical or surgical procedure for gender reassignment (see paragraphs 42-43 above). However, while Turkish law makes the amendment of the individual's civil status contingent upon physical change following gender reassignment surgery "carried out in conformity with the aim specified in the court authorisation and using those medical techniques", it is apparent from the impugned ruling of the Mersin District Court that in the present case the inability to procreate was a requirement which had be satisfied in advance of the gender reassignment process,with the result that itdetermined the applicant's accessto gender reassignment surgery.

113. On the basis of the evidence in the file, and in particular the witness statements of the applicant's family before the domestic courts (see paragraph 9 above), the Court observes that the applicant has for many years lived in society as a man. It is also apparent that he hasreceived psychological counselling since adolescenceand was diagnosed as transgender by a committee of experts in psychology, who also concluded that it was necessary for him to livehenceforth with a male identity (see paragraphs 7, 10 and 14 above). In September 2005, when he applied to the courts for the first time for authorisation to undergo gender reassignment surgery, the applicant had thus already been engaged for many years in a process of gender transition; he was receiving psychological counselling and had for a long time been acting as a man in society.

114. Despite this situation, the domestic courts initially refused him the authorisation he needed in order to undergo the physical change to which he aspired. The Court reiterates in that regard thatserious interference with private life can arise where the state of domestic law conflicts with an important aspect of personal identity (see *Christine Goodwin*, cited above, § 77).

115. Furthermore, the Court has previously held that it cannot be suggested that there is anything capricious in the decision taken by a person to undergo gender reassignment, given the numerous and painful interventions involved and the level of commitment and conviction required

to achieve a change in social gender role (see *Christine Goodwin*, cited above, § 81, and *Schlumpf*, cited above, § 110).

116. In the present case the Court notes that the domestic courts justified their initial refusal to grant the applicant's request solely by reference to the fact that he retained his ability to procreate. It fails to see why persons wishing to undergo gender reassignment surgeryshould have to demonstrate that they are unable to procreate even before the physical process of gender change can be undertaken.

117. In that regard the Court notes, in view of the information provided by the parties, that domestic law makes provision for medical procedures witha view to voluntary sterilisation (see paragraphs 23-24 above). In his observations of 25 October 2010 the applicant maintained that he did not have access to these procedures within the existing legal framework (see paragraphs 83 and 87 above). He added that there were no legislative provisions laying down the procedure to be followed or the type of treatment he could undergo, and that there was therefore a legal vacuum in that regard (see paragraphs 85-87 above). In his additional observations of 23 October 2013 the applicant's lawyer stated that his client, after lodging the present application with the Court, had resorted to hormone treatment without any judicial or medical supervision (see paragraph 47 above).

118. While maintaining that the domestic courts' refusal of the applicant's request on account of his ability to procreate had been in accordance with the law, the Government contended that neither the legislation complained of nor the detailed arrangements for its implementation required the applicant to undergo prior medical sterilisation or hormone therapy (see paragraph 91 above). However, the Court fails to see how, other than by undergoing a sterilisation operation, the applicant could have complied with the requirement of permanent infertility given that, in biological terms, he had the ability to procreate.

119. In any event, the Court does not deem it necessary to rule on the question of possible access by the applicant to medical treatment that would have enabled him to satisfy this requirement, since it considers that due respect for his physical integrity precluded any obligation for him to undergo this type of treatment.

120. Moreover, in the circumstances of the present case and in view of the manner in which the applicant's complaint was framed, it suffices for the Court to note that the applicant challenged, both in the domestic courts and in the Convention proceedings, the reference in the legislation to a permanent inability to procreate as a prior requirement for authorisation to undergo gender reassignment.

121. In the Court's view, this requirement appears wholly unnecessary in the context of the arguments advanced by the Government to justify the regulation of gender reassignment surgery (see paragraphs 74 and 75 above). Accordingly, even assuming that the reason for the rejection of the

applicant's initial request to undergo gender reassignment surgery was relevant, the Court considers that it cannot be regarded as sufficient. The interference with the applicant's right to respect for his private life arising from that rejection cannot therefore be considered "necessary" in a democratic society.

The fact thatthe Mersin District Court changed its approach,authorising the applicant in May 2013 to undergo gender reassignment surgery notwithstanding the medical findings to the effect that he was not permanently unable to procreate(see paragraphs 24 and 25 above), undoubtedly supports this conclusion.

122. Accordingly, the Court considers that in denying the applicant for many years the possibility of undergoing gender assignment surgery, the State breached his right to respect for his private life. There has therefore been a violation of Article 8 of the Convention.

...

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

...

2. *Holds*that there has been a violation of Article 8 of the Convention;

...

Done in French, and notified in writing on 10 March 2015, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

AbelCampos	Guido Raimondi
Deputy Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

(a) concurring opinion of Judges Keller and Spano;

(b) concurring opinion of Judges Lemmens and Kūris.

G.R.A.
A.C.

JOINT CONCURRING OPINION OF JUDGES KELLER AND SPANO

(Translation)

1. We voted in favour of finding a violation of Article 8 of the Convention. Nevertheless, we are not entirely convinced by the majority's reasoning. Our reservations relate to the fact that the Court did not answer the question whether the interference sought to achieve one of the legitimate aims set forth in Article 8 § 2 of the Convention. From a methodological viewpoint, we consider it difficult to address the issue of proportionality without having first defined the legitimate aim (A). In our view, the Court should have examined in depth whether the Government had demonstrated (implicitly) the existence of a legitimate interest capable of justifying the requirement of permanent infertility as a prior condition for access to gender reassignment treatment, as found in the impugned decision of the domestic courts (B). Lastly, we would like to make a few general observations regarding recent developments in the sphere of transgenderism and the requirement of a permanent inability to procreate in that context. We believe that these considerations are of importance for similar cases in the future (C).

2. In the present case the applicant, a transgender person, has for years regarded himself as a man. His family and friends have accepted his new identity. In May 2013 the Mersin District Court granted his request and authorised the gender reassignment surgery he sought (see paragraph 25 of the judgment).

A. (In)sufficient determination of the legitimate aim

3. Under Turkish law, anyone wishing to undergo gender reassignment may apply to the domestic courts for authorisation. The person concerned must, among other requirements, demonstrate that he or she is permanently unable to procreate ... – a requirement also laid down in other Council of Europe member States ...

4. In the instant case it was not disputed that the interference had a sufficient legal basis (see paragraphs 68-71 of the judgment). The Court therefore turned to the question of the legitimate aim of the interference. In doing so it correctly observed that the Government had not commented on the permanent infertility/sterility requirement imposed by the legislation in question (see paragraph 80 of the judgment). However, it was precisely because the applicant did not satisfy that requirement that the national authorities denied him gender reassignment surgery for years. In our view, the Court could have stopped there and delivered a shorter judgment, simply finding that the Government had failed to invoke a valid legitimate aim. To

our regret, the majority chose not to deal with this issue in greater depth, proceeding instead to examine whether or not the interference had been proportionate (see paragraph 80 of the judgment).

5. We are well aware that the Court has taken the same approach in other cases. In those cases it either did not address the issue whether the law satisfied all the requirements of clarity and foreseeability (see, for example,*S. and Marper v. the United Kingdom* [GC], nos. 30562/04 and 30566/04, § 99, ECHR 2008; *Kurić and Others v. Slovenia* [GC], no. 26828/06, §§ 348-50, ECHR 2012 (extracts); and *I.S.v. Germany*, no. 31021/08, §§ 72-75, 5 June 2014), or it expressed doubts, as in the present case, regarding the legitimacy of the aim relied on by the Government (see *A, B and C v. Ireland* [GC], no. 25579/05, §§ 227-28, ECHR 2010).

6. This approach appears to us to be justified in cases where the issues raised relate essentially to proportionality. In the present case, however, it gives rise to a number of problems. In particular, a general question arises as to how it is possible to weigh up the interests represented on the one hand by the legitimate aim pursued by the State, and on the other hand by the rights of the individual, if the former is disregarded.

B. Proportionality in the present case

7. Any examination of proportionality necessarily entails weighing up the interests involved. As regards the applicant, these are clearly his right to define his gender identity and his right to physical and mental well-being – considerations which are undoubtedly at the heart of the private life of each individual and thus of Article 8 of the Convention. As regards the State, the majority accepts – as justification for the regulation and supervision of gender reassignment surgery – the arguments relating to the irreversible nature of gender reassignment surgery and the health risks posed by this type of operation (see paragraph 79 of the judgment).

8. Nevertheless, it seems to us difficult to justify requiring permanent infertility as a prior condition for gender reassignment by referring to the serious consequences of reassignment surgery, given that permanent sterilisation generally involves treatments which themselves are liable to have serious health implications. The Court rightly opted against this approach.

9. However, the majority's reasoning raises other obvious problems. Firstly, the arguments advanced by the majority in paragraphs 102-11 and 116-19 of the judgment clearly relate to the question whether requiring permanent infertility as a prior condition for gender reassignment treatment is *in itself* compatible with Article 8 of the Convention. Secondly, the Court appears to use language normally used in assessing whether or not the interference pursued a legitimate aim rather than the issue of

proportionality. This can be seen clearly in paragraph 121 of the judgment, which states:

> "In the Court's view, this requirement appears wholly unnecessary in the context of the arguments advanced by the Government to justify the regulation of gender reassignment surgery ... Accordingly, even assuming that the reason for the rejection of the applicant's initial request to undergo gender reassignment surgery was relevant, the Court considers that it cannot be regarded as sufficient."

10. Lastly, the majority finds a violation on the ground that the interference was disproportionate since the applicant was for years denied the possibility of gender reassignment surgery. It also notes that in 2013 the District Court granted the applicant's request notwithstanding the medical findings concerning his ability to procreate.

11. Hence, there are two possible interpretations of the majority's reasoning. According to a narrower interpretation, the Court, in the specific circumstances of the present case, deems the interference in question (the refusal of authorisation for gender reassignment surgery) to be disproportionate. On the basis of a broader interpretation, however, the Court is also ruling *implicitly on the requirement of permanent infertility* as a prior condition for access to gender reassignment treatment. This second aspect appears to us to be problematic, as the Government did not comment on the need for such a condition. In our view, the Court should have expressed its position on this point with greater clarity.

C. Permanent sterility as a prior condition

12. We would like to stress some important points in addition to those dealt with in more or less explicit fashion in the judgment.

13. First of all, it should be observed that *forced sterilisation*, which has been practised in almost all countries and all societies[1], remains a difficult subject to this day. The notion undoubtedly has negative connotations and the Court has not been spared some sad cases on the subject, particularly concerning women of Roma origin (see, among other examples, *K.H. and Others v. Slovakia*, no. 32881/04, ECHR 2009 (extracts); *V.C. v. Slovakia*,

[1] With particular reference to women of Roma origin or women with disabilities, see World Health Organization, "Eliminating forced, coercive and otherwise involuntary sterilization: An interagency statement", OHCHR, UN Women, UNAIDS, UNDP, UNFPA, UNICEF and WHO, 2014, pp. 4-7; Commissioner for Human Rights of the Council of Europe, "Human rights of Roma and Travellers in Europe", 2012; Commissioner for Human Rights of the Council of Europe, "Recommendation concerning certain aspects of law and practice relating to sterilisation of women in the Slovak Republic", 2003; and the 2008 report of the Special Rapporteur on tortureand other cruel, inhuman or degrading treatment or punishment, Manfred Nowak (A/63/175), § 60, and the references cited therein.

no. 18968/07, ECHR 2011 (extracts); *N.B. v. Slovakia*, no. 29518/10, 12 June 2012;*I.G. and Others v. Slovakia*, no. 15966/04, 13 November 2012; and *R.K. v. the Czech Republic*, no. 7883/08, 27 November 2012 (friendly settlement)).

14. In the context of these cases, the Court consistently stressed the importance of prior consent to sterilisation, a requirement which, moreover, flows from the international conventions and the general principles of human dignity and freedom. For their consent to be valid, the persons concerned must be informed of their state of health, the reason for sterilisation and the possible alternatives. They must also be given a reasonable length of time in which to take the final decision (see, for example, *V.C. v. Slovakia*, cited above, §§ 107-15). Permanent sterilisation is thus a particularly sensitive issue.

15. In the "European and international materials" part of the judgment (see paragraphs 29-34 of the judgment), the Court refers to a number of bodies which have criticised permanent sterilisation as a prior condition for gender reassignment. For instance, in Recommendation CM/Rec(2010)5, the Committee of Ministers of the Council of Europe stressed, in points 20-21 ... that making gender reassignment subject to prior requirements (including irreversible sterilisation) should be reviewed by the member States "in order to remove abusive requirements". Similarly, in Resolution 1728 (2010), point 16.11.2 ..., the Parliamentary Assembly of the Council of Europe took issue with any obligation for individuals to undergo sterilisation or other medical procedures as a prerequisite for having official documents changed. Lastly, in his issue paper of 29 July 2009 ... the Commissioner for Human Rights of the Council of Europe called on member States to make gender reassignment procedures available. More explicitly, he even recommended "[a]bolish[ing] sterilisation and other compulsory medical treatment which may seriously impair the autonomy, health or well-being of the individual, as necessary requirements for the legal recognition of a transgender person's preferred gender" (2011 report, points 2 and 4 ...).

16. We would add that in 2013, in its concluding observations concerning Ukraine, the United Nations Human Rights Committee adopted for the first time a recommendation relating specifically to legal recognition of gender[2]. The Committee recommended to the Ukrainian Government that

[2] Human Rights Committee, "Concluding observations on the seventh periodic report of Ukraine", adopted on 23 July 2013, CCPR/C/UKR/CO/7, § 10:"The Committee is … concerned at reports that according to Ministry of Health order No. 60 of 3 February 2011 'On the improvement of medical care to persons requiring a change (correction) of sex', transgender persons are required to undergo compulsory confinement in a psychiatric institution for a period up to 45 days and mandatory corrective surgery in the manner prescribed by the responsible Commission as a prerequisite for legal recognition of their gender".

it repeal any disproportionate requirements such as mandatory corrective surgery[3].

17. In a similar vein, the Special Rapporteur on torture found in 2013 that coercive or forced sterilisation was contrary to respect for the person's physical integrity, and highlighted the importance of safeguarding informed consent of sexual minorities[4].

18. The 2014 report by the World Health Organization on forced and coercive sterilisation also confirms that a number of international human rights protection bodies have already recommended the abolition of sterilisation as a prior condition for medical treatment for transgender people[5].

19. The materials cited above are evidence of an international trend against requiring sterilisation as a prior condition for entering a change of gender in the official registers and for gender reassignment surgery.

20. In our view, the practice of several national courts also highlights the issue of permanent sterilisation as a prior condition for gender reassignment. Although this national case-law relates primarily to the conditions for having a change of gender recorded in the official civil-status registers (rather than authorisation for gender reassignment surgery), we can observe a general trend towards regarding a requirement to undergo permanent sterilisation as anti-constitutional.

21. The Austrian Constitutional Court, for instance, held in a ruling of 3 December 2009[6] that gender reassignment surgery could not be seen as a precondition for a change of gender in the civil-status register.

22. In similar fashion, in a ruling of 11 January 2011[7], the German Constitutional Court held that requiring permanent sterilisation and surgery in order to modify a person's external characteristics was contrary to the constitutional guarantees relating to physical integrity and the right to sexual self-determination. It considered that requiring individuals to

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[3] "The State party should also amend order No. 60 and other laws and regulations with a view to ensuring that: (1) the compulsory confinement of persons requiring a change (correction) of sex in a psychiatric institution for up to 45 days is replaced by a less invasive measure; (2) any medical treatment should be provided in the best interests of the individual with his/her consent, should be limited to those medical procedures that are strictly necessary, and should be adapted to his/her own wishes, specific medical needs and situation; (3) any abusive or disproportionate requirements for legal recognition of a gender reassignment are repealed" (ibid.).

[4] Juan E. Méndez, report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, 2013, A/HRC/22/53, §§ 38, 78 and 79; see also Commissioner for Human Rights of the Council of Europe, "Human rights and gender identity", issue paper (2009), pp. 19 et seq.

[5] World Health Organization, "Eliminating forced, coercive and otherwise involuntary sterilization: An interagency statement", HCHR, UN Women, UNAIDS, UNDP, UNFPA, UNICEF and WHO, 2014.

[6] Austrian Constitutional Court, B 1973/08-13, 3 December 2009, § 3, pp. 8-9.

[7] German Constitutional Court, 1 BvR 3295/07, 11 January 2011.

undergo surgery in order to end their reproductive capacity was contrary to Article 2 § 2 of the German Constitution[8]. The requirement placed the persons concerned under duress, as they had to choose between interference with their physical integrity and non-recognition of their change of gender[9].

23. Furthermore, the Stockholm Administrative Court of Appeal found in a judgment of 19 December 2012[10] that the requirement to undergo sterilisation imposed by Law no. 1972/119 on gender determination was incompatible with the Swedish Constitution and with Articles 8 and 14 of the European Convention on Human Rights[11]. In its reasoning it stressed that sterilisation could not be regarded as voluntary if no other option existed in order to have a change of gender recorded in the civil-status register. The Swedish Parliament amended the Law accordingly in 2013.

24. The Swiss Federal Civil-Status Office also published an opinion on 1 February 2012 concerning European developments in the sphere of transgender rights. It found that "legal recognition of a change of gender [was] possible even if the irreversible change of gender and the inability to procreate – necessary for such recognition – [had been] brought about without surgical intervention (sterilisation; construction of genital organs) but instead by means of hormone therapy, for example[12]."

25. Lastly, it is worth noting that in the United States, federal and state governments no longer explicitly require sterilisation in order to have a change of gender recorded on a birth certificate or driving licence[13].

26. In view of the foregoing, one thing is clear: situations in which sterilisation is the only option in order to obtain authorisation for gender reassignment surgery amount to *de facto* forced sterilisation[14]. In examining whether the interference was proportionate, it is vital to take account of the fact that the sterility requirement is a form of interference which has serious and irreversible consequences. Although much less stringent measures could be envisaged, the majority did not highlight this fact.

27. We would further point out, as regards the margin of appreciation, that the right to gender identity and personal development are fundamental

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[8] German Constitutional Court, 1 BvR 3295/07, 11 January 2011, § 68.

[9] German Constitutional Court, 1 BvR 3295/07, 11 January 2011, § 69.

[10] Kammarrätten i Stockholm, Avdelning 03 (Stockholm Administrative Court of Appeal, Division 03), no. 1968-12, 12 December 2012.

[11] The Administrative Court of Appeal also ruled that the law was discriminatory as it related only to transgender persons.

[12] Legal opinion of the Federal Civil-Status Office of 1 February 2012 on transgender issues, p. 8.

[13] See the references cited by L. Nixon, "The Right to (Trans) Parent", 20 Wm. & Mary Journal of Women and Law 73 (2013), p. 89.

[14] See also Commissioner for Human Rights of the Council of Europe, "Forced divorce and sterilisation – a reality for many transgender persons", *Human Rights Comments*, 31 August 2010: "These requirements clearly run against the principles of human rights and human dignity, as also underlined by Court decisions in Austria and Germany."

aspects of the right to respect for private life (see paragraph 7 above). The majority itself acknowledges that "freedom to define [one's] gender identity [is] one of the most basic essentials of self-determination" (see paragraph 102 of the judgment). Hence, it seems clear to us that the margin of appreciation in a case such as this should be reduced to a minimum.

D. Conclusion

28. Although we agree with the finding of a violation of Article 8, we believe that the Court should have addressed the question whether, in the present case, the interference pursued a legitimate aim capable of justifying permanent sterilisation. It should also, as applicable, have examined in greater depth whether the requirement of permanent sterilisation as such is compatible with Article 8 of the Convention.

CONCURRING OPINION OF JUDGE LEMMENS, JOINED BY JUDGE KŪRIS

(Translation)

1. I am in full agreement with my colleagues that there has been a violation of Article 8 of the Convention. The judgment highlights once again the importance of the right to gender identity as a component of the right to respect for private life for transgender persons.

However, I would like to make clear how I interpret the scope of the judgment.

2. The applicant complained of the application in his case of Article 40 of the Turkish Civil Code.

Article 40 contains two paragraphs ... The first concerns gender reassignment, making it subject to a number of conditions, including a permanent inability to procreate. The second paragraph relates to the rectification of the civil-status register following a change of gender, that is to say, the legal recognition of the individual's new gender. The process leading to recognition of the person's new gender comprises two stages, and at each stage the involvement of the courts is required: first in order to authorise the gender reassignment (first paragraph) and then to recognise the legal effects of reassignment once it has actually taken place (second paragraph).

3. The judgment relates only to the first stage. It examines the Convention compatibility of making a permanent inability to procreate *a prior condition for gender reassignment surgery*. The judgment finds that this condition cannot be considered "necessary" in order to achieve the aims relied on by the Government in this context.

I would like to draw attention to the Court's assertion that it "fails to see how, other than by undergoing a sterilisation operation, the applicant could have complied with the requirement of permanent infertility given that, in biological terms, he had the ability to procreate" (see paragraph 118 of the judgment). While it was impossible for the applicant to comply with that condition, I would point out that other persons could do so. Women who wish to undergo gender reassignment may obtain authorisation to have such surgery performed if they are no longer fertile or have never been fertile. Apparently, it is with this category of women in mind that the legislature makes provision for gender reassignment. A woman who is fertile, on the other hand, may not relinquish the physical characteristics of a woman, including the ability to procreate, in order to undergo gender reassignment.

3. The judgment does not address the issue of the Convention compatibility of requiring a permanent inability to procreate *as a prior condition for the legal recognition of a change of gender*, in particular for persons who have undergone gender reassignment surgery.

Needless to say, there are arguments in favour of finding that the condition referred to above also raises an issue from this point of view. I would refer to the concurring opinion of my colleagues Judge Keller and Judge Spano.

However, I believe that the Court was right not to rule on the condition in question in this broader context. Not just because that issue was not submitted to it, but also because there is insufficient evidence in the file to enable it to rule in full knowledge of the facts. The reasons relied on by the Government to justify making gender reassignment contingent on a permanent inability to procreate (see in particular the legitimate aims referred to in paragraphs 74-75 and 77 of the judgment) are not necessarily the same reasons that a State might rely on to justify imposing the same requirement as a condition for legal recognition of a change of gender.

While there is a clear trend among States towards granting legal recognition of the new gender of transgender persons without requiring a permanent inability to procreate as a prior condition, I am struck by the fact that many States still have such a requirement in their legislation ... I would be curious to know what reasons they might rely on to justify such a system. Those reasons may or may not be sufficient: I simply do not know.

For this reason in particular I am of the view that this judgment cannot be interpreted as precluding definitively a requirement for individuals to be permanently unable to procreate in the context of gender reassignment. The Court will have to await another opportunity to examine this issue in greater depth.