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Author: Elias Tissandier-Nasom
Team: Women's Rights

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Introduction

On April 4th, 2023, the European Court of Human Rights (hereinafter 'the Court') rendered its decision in the case of A.H. and others v. Germany.[1] The case brought up the question whether states should allow a transgender woman who has changed her legal gender identity to be recognised as 'mother' of a child on the child's birth certificate. The request was filed by three applicants, two mothers and their biological son. The two women conceived the child together, one provided the ovary and carried the pregnancy to term and the other, her transgender partner, provided the sperm. The child is therefore undeniably the biological son of the two applicants, equally. This is not denied by the Court. However, upon the birth of the child, the transgender mother was informed that she was only allowed to see her filiation with her son recognised if she accepted to be registered as his 'father' and under her previous 'masculine' names. The other option was to not mention the second biological parent on the child's birth certificate, erasing the biological link between parent and child.

The applicants brought the case to the Court arguing that the refusal to qualify the second mother as the child's 'mother' as well as the mention of her old 'masculine' names and the absence of other options for the filiation to be recognised constituted a violation of their right to respect for private life and family life under Article 8 of the European Convention of Human Rights (hereinafter 'the Convention') and their right to non-discrimination under Article 14 of the Convention. The Court examined the case and concluded that there was no existing violation of the Convention.

This article will provide a summary and analysis of the judgment, diving into the arguments of the German government subsequently supported by the Court, as well as exposing the weaknesses of the decision and its argumentation.

1 *A.H. and others v. Germany* (2023).

Case Summary

Arguments of the Applicants

The case concerns three applicants, a transgender mother (A.H.), a cisgender mother (G.H.), and their biological son (L.D.H.). They brought up an alleged violation of their rights under Articles 8 and 14 of the Convention due to the refusal of the German High Court to recognise the second mother, A.H., as the mother of the third applicant, L.D.H., on his birth certificate, as well as the mention of her old 'masculine' names and the absence of other options for the family to see their filiation recognised properly in the public records.[2]

The first applicant, A.H., argues that the refusal to recognise her as a mother of the child equates to a negation of her role as a parent and her registration as the 'father' of the child would negate her right to respect for her gender identity.[3]

The second applicant, G.H., argues that the decision prohibits her from sharing equal parental responsibility and rights with her child's second parent and that the registration of the first applicant as the child's 'father' would imply that she had her child with an imaginary third party, which she did not wish.[4]

The third applicant, L.D.H., argues that the refusal of the courts to recognise his mother as his legal mother on his birth certificate was depriving him of a legal filiation link with his second mother, efficiently meaning that he only had one legal parent. Furthermore, he argues that the registration of his mother as his 'father' would induce a risk of revealing his mother's transgender identity, which is counter to German national law and principles of European and international human rights law for protection of private life.[5] The three applicants further argue that only the registration of the first applicant as the mother, under her legal names, would mitigate this risk, since it is not unseen to have a birth certificate mentioning two mothers. To this extent, they refer to instances of homo-parental adoptions or filiation decisions taken abroad and then recognised *verbatim* in Germany.[6]

The applicants highlight that their interests are intimately linked, thus they deny the government's attempt to balance the interest of the first applicant with the separate interests of the third applicant, to the end of limiting the rights of the first applicant.[7] Moreover, they argue that this decision will have a negative effect on their capacity to access filiation-linked rights particularly in terms of succession and care for the child. The absence of the mention of the second mother on the birth certificate would constitute a hindrance on the child's right to know his filiation and to have it recognised by the civil

2 *A.H. and others v. Germany* (2023), para. 75.
3 *A.H. and others v. Germany* (2023), para. 91.
4 *Ibid.*
5 *Ibid.*
6 *Ibid.*
7 *A.H. and others v. Germany* (2023), para. 92.

status system. This is also the case if the first applicant would be mentioned as the 'father' of the child as it would imply that there was a third party involved in the filiation of the child and negate the first applicant as the biological parent of the child. They argue that the mention of two mothers on the birth certificate of their son would not imply that both women gave birth to the child.[8]

Arguments of the German government

The government argues to support the decision of the German High Court in saying that the first applicant could only see her filiation to the third applicant recognised under the term 'father' and her previous 'masculine' names on the birth certificate. Their argumentation is based on three points: the protection of the best interest of the child,[9] the obligation to register filiation biologically and according to sexual functions in the legal registry,[10] and the large margin of appreciation left by the European Court of Human Rights in determining matters that are not consensual among European states.[11]

In the first place, the government highlights that this decision was not meant to diminish the rights of transgender individuals, which are protected under German law, particularly given the suppression of the sterilisation requirement for legal gender change. However, in the present case, the government argues that the rights of the transgender applicant may be limited by the interests and rights of the third applicant, her son. The government therefore argues that it is in the best interest of the child that filiation rights in German law are defined by the sexual function of each parent, *ergo* only the person giving birth can be registered as the mother and only the person providing the sperm can be registered as the father. They argue that this is to avoid practices of surrogacy which are prohibited in Germany. Moreover, the decision to only allow the transgender mother to register under her previous 'masculine' names is argued to be in the interest of the child in respecting his right to decide when and to whom he wants to disclose his mother's transidentity and avoid the risk of it being disclosed when he provides his birth certificate.[12]

Then, the government argues that, regardless, they enjoy a large margin of appreciation on this matter as there is no established European consensus on transgender parenthood among members of the Council of Europe. They consider that this falls under their right to dispose of a large margin of appreciation in balancing individual and public interests due to the sensitive, moral and ethical character of the question at hand.[13] The public interest is defined by the government as lying in the necessary "clear and immediate legal link between a child and their parents and in the existence of accurate and complete civil status registries."[14]

8 *Ibid.*

9 *A.H. and others v. Germany* (2023), para. 97.

10 *A.H. and others v. Germany* (2023), para. 98.

11 *A.H. and others v. Germany* (2023, para. 100.

12 *A.H. and others v. Germany* (2023), para. 97-99.

13 *A.H. and others v. Germany* (2023), para. 100.

14 *A.H. and others v. Germany* (2023), para. 101 [*the translation was made by the author as the case documents were only available in French at the time of publication; the official translation might differ slightly*]

Decision of the Court

The Court decided in favour of the German government in finding that there was no violation of Article 8 of the Convention under private life. The Court reached this decision based on the margin of appreciation principle under Article 8 of the Convention, as brought up by the German government. The Court judged that although the margin of appreciation was limited by the serious character of the matter – the respect of the individual's identity, the margin was also largely limited by the absence of consensus among European states as to the recognition of transgender legal parenthood.[15] The Court considers that the impact of the decision on the first two applicants' right to privacy is limited by the fact that the contested mentions are in a third party's personal documentation and the right of the third applicant to self-determination is not impacted as the decision does not put his identity in question but the one of his parent. Then, the Court decided that the German government was within its rights to analyse the interests of the child in opposition to the rights of his mothers, as the best interest of the child must always be first in all considerations including a child, in accordance with Article 3 of the United Nations Convention on the Rights of the Child.[16] The Court recognises that part of the child's interests lie in his right to know where he came from, including his exact filiation. The Court further mentions the government's argument going further in saying that the registration of the child's parents according to 'biological sexual functions' is necessary to ensure stability in his filiation in the case where the transgender parent decides to change their gender again.[17] Finally, the Court highlights that the applicants are able to obtain an extract of the third applicant's birth certificate that does not mention any information related to the parents if needed, thus rendering void the concerns of the applicants.[18]

The Court also found that the request was not receivable under the concept of 'family life' in the sense of Article 8 of the Convention. It followed the government on that point as well, pointing out that the consequences of the decision have no impact on the applicants' relations within their family sphere but rather may impact their relations with the public sphere. To this end, they argue that even if the first applicant was to be registered as the child's father on his birth certificate, she would still be allowed to be called 'mother' by her child and her partner. Thus, the Court and the German government consider that the existence of family life between the applicants is neither threatened nor contested by the decision.[19]

Finally, the court decided that the claim under Article 14, non-discrimination, was ill-founded and dismissed it. The Court considers that the definition of the legal status of 'mother' is left to a large

15 *A.H. and others v. Germany* (2023), para. 112.
16 *A.H. and others v. Germany* (2023), para. 123.
17 *A.H. and others v. Germany* (2023), para. 127.
18 *A.H. and others v. Germany* (2023), para. 130-132.
19 *A.H. and others v. Germany* (2023), para. 84-87.

margin of appreciation of the state and the situation of the first applicant cannot be considered analogous to that of the second applicant who gave birth to the child. Similarly, it considers that it is within Germany's margin of appreciation to treat the first applicant as any other person who has contributed to the conception of the child by providing male gametes. In this sense, the Court decided that there is no difference in treatment between equal individuals and the decision does not fall under the non-discrimination principle.[20] If there may be arguments as to why transgender women may not be in a similar situation as cisgender women, it is also very clear that they are not in a similar situation as cisgender men either. To argue so is the essence of a transphobic discourse.

20 *A.H. and others v. Germany* (2023), para. 142-144.

Commentary

The conflict between the rights of the child and the right to privacy of the transgender parent

While the applicants reminded the Court that their claims were one and that they had no opposite interests with each other, the German government and the Court highlighted the importance of examining the interest of the child separately, in accordance with the principle of the best interest of the child contained in Article 3 of the Convention on the Rights of the Child. It came from this analysis that the child was deemed to have an interest, and a right under German law and the Convention, to have access to the details of his filiation. In deciding this, the Court followed the German government in defining that the meaning of this right implied the right of the child to see his parents registered according to the sex they were assigned at birth and the reproductive function they exercised in his conception. This alone raises the question of the legitimate interest this effectively represents for the child. The argument then goes further in saying that the parent should also be registered under the names they were given at birth, even if they have been legally changed prior to the birth of the child, in order to protect the child's interest in keeping their parent's transgender identity secret or having to disclose their parent's transgender identity in presenting a birth certificate. Thus, the Court and the German government argue that it is in the interest of a transgender parent to be misgendered and misnamed on their child's birth certificate in order to preserve their right to secrecy regarding their identity. While the right to not have one's transgender identity disclosed is one to be considered, it is one for the applicant to bring up, not for the state to use as a counter-balancing act to justify the limitation of their right to see said identity respected in the first place.

A concerning trend in this argument is the attempt to diminish the issues in question by the German government in arguing that transgender persons represent a very small number of cases, thus no exception nor changes should be made to the existing system of filiation to accommodate them.[21] Similarly, the German High Court, mentioned by the Court, in putting the interests of the child against the rights of the first two applicants, shows that the refusal to register the transgender mother as his 'mother' was aimed at protecting him and ensuring stability in his filiation in case she decided to transition back to male. It goes on to specify that this was not just a theoretical possibility but one that was real in practice.[22] This is highly problematic in the way it suggests that de-transitions of transgender persons are common.[23] This is not the case, the rate of de-transitions among transgender people is low. Moreover, the spread of misinformation regarding de-transitions and transgender identities in general

21 *A.H. and others v. Germany* (2023), para. 52.

22 *A.H. and others v. Germany* (2023), para 54.

23 De-transioning refers to the process of reversing one's decision to change their gender identity from the one they were assigned at birth.

has a severe negative impact on the lives of transgender individuals. For instance, it may create a sense that gender transitions result in much uncertainty and limit the willingness of doctors and peers to support transgender persons they encounter. This may even lead to the withholding of treatment from transgender persons because of the doubt that they might regret it.[24] It was also shown that most de-transitions are at least partly motivated by external factors such as family and peer pressure and increased exposure to violence.[25] In scope of this, most de-transitions are thus caused by the discrimination and violence that minorities are faced with in the absence of protection for their rights, rather than by an internal regret over the decision to transition. In this sense, the argument of the Court in saying that the interest of the child is in seeing his mother suffer administrative violence in order to protect him in case she eventually decides to de-transition seems weak.

The margin of appreciation and European consensus defence

The consensus logic used by the Court to deal with matters of 'ethical', 'moral' or 'controversial' social issues, and in this LGBTQIA+ rights, presents strong weaknesses. Its underlying consequence is the dependence of the access of minorities to rights under the Convention on the majority's opinion. In this sense, as long as a significant amount of states have oppressive policies concerning minority groups, the Court will not interfere nor push for the protection of the rights of those targeted.[26]

A move from this rhetoric finally occurred in January of 2023 when the Court rendered its Grand Chamber judgement in the case of *Fedotova and others v. the Russian Federation.* In this decision, the Court found the existence of a positive obligation for states to organise real opportunities for same-sex partnerships. The Court moved from the consensus logic to redefine the threshold as the existence of an 'ongoing trend', leaving for more leeway in defining when the Court may feel confident enough to impose obligations on all state parties. Using this new broader approach, the Court narrowed drastically the margin of appreciation of states. It recognised the data brought by the Russian Federation regarding the lack of social support for same-sex partnerships on its territory, however it pointed out that the refusal to recognise same-sex relationships would constitute a violation of the "underlying values of the Convention".[27] In doing so, the Court recognised that even in the absence of a clear consensus among European states regarding the legal recognition of same-sex relationships, the rights of the minority could not be a "condition on its being accepted by the majority".[28] In doing so, it underlined that this approach had the aim of ensuring that the rights of minorities under the Convention, in this case

24 *Detransition Facts and Statistics 2022: Exploding the Myths Around Detransitioning.* (2023, March 3). GenderGP Transgender Services. https://www.gendergp.com/detransition-facts/

25 Turban, J. L., Keuroghlian, A. S., Almazan, A. N., & Loo, S. S. (2021).

26 O'Hara, C. (2021, June 8).

27 *Fedotova and others v. the Russian Federation* (2023), para 52.

28 *Ibid.*

same-sex couples, could not be limited by states even when negative public opinion still existed. This decision signals a potential change in the approach of the Court to LGBTQIA+ questions. However, it appears clear from the decision in the case of *A.H. and others v. Germany* that, if the Court has reached enough confidence to support the rights of same-sex couples, it still has a long way to go in being a real support and effective remedy to the harm and violations suffered by transgender persons in the Council of Europe.

On another note, it is unclear that the slight change in approach created in *Fedotova and others v. the Russian Federation* would effectively remedy the weakness of the consensus logic in practice. It only lowers the threshold to reach a significant agreement among state parties but still applies the same rhetoric. In this sense, a better approach to the question of minority rights might lie in the work of the Inter-American Court of Human Rights, which looks at such questions through the lens of anti-discrimination and the principle of equality. Thus, the Court should be examining the case at hand from the standpoint of Article 14 of the Convention and the principle of non-discrimination combined with the idea of "underlying values of the Convention" mentioned in the case of *Fedotova*. In doing so, it might have been able to expose the underlying discrimination in the position of the German government in rendering it obligatory for a transgender woman to choose between legally recognising her child or seeing her right to respect for her gender identity violated.

The dismissal of the discrimination angle

The Court's finding that the request under Article 14 of the Convention (principle of non-discrimination) was ill-founded is fundamentally problematic. Although it is largely due to the Court's reliance on the consensus argument to avoid making controversial decisions on the rights of LGBTQIA+ persons, it is necessary to highlight that this approach and the argumentation behind it are harmful to LGBTQIA+ individuals as much as to the consistency of the Court's case law. It is not the first time that the Court has avoided examining a case related to LGBTQIA+ persons under Article 14. We note for instance the case of *Fedotova and others v. the Russian Federation* (2023)[29] in which the Court put aside the consensus argument under Article 8 when it came to the positive obligation of states to recognise same-sex partnerships but yet did not examine the case under Article 14. In cases directly relating to LGBTQIA+ rights, it is extremely unlikely that the question of non-discrimination will be irrelevant.[30]

In the case of *A.H. and others v. Germany*, it is not enough to say that there was no difference in treatment because the transgender mother was treated the same as any father who provided the male gametes in the conception of the child. It is of a fundamentally discriminatory nature to argue that

29 *Fedotova and others v. the Russian Federation* (2023).

30 See for instance: Arnardóttir, O. M. (2017). Vulnerability under Article 14 of the European Convention on Human Rights. *Oslo Law Review*, *4*(3), 150–171. https://doi.org/10.18261/issn.2387-3299-2017-03-03

treating a transgender woman similarly to a cisgender man does not constitute a violation of the woman's rights directly linked to her gender identity, hence discriminatory on grounds of gender identity. Moreover, the argument that there is a public interest in defining the categories of 'mother' and 'father' according to sexual functions in the conception of the child is a direct reproduction of binary cisgender and heteronormative patterns that are not representative of the reality of gender identity and human bodies. There are women capable of producing sperm and men capable of carrying out pregnancies, like this case proves. Additionally, there are persons who do not fall within those categories altogether, be it in terms of sexual characteristics (intersex persons) or gender identity (non-binary persons). This is something that has been recognised by the German state. Particularly, we note that the German government has enacted in the last years legal reforms to organise the legal recognition and protection of intersex and non-binary persons, particularly through the creation of a third legal gender category.[31] In light of this, it is hard to argue that Germany is not able to organise the recognition of forms of reproduction and filiation outside of cisgender heterosexual relationships.

The government clearly states that the obligation to register the transgender parent under their assigned birth gender and the names they were given at birth, even if the birth of the child occurs after they have legally changed those in the registries, is to prevent situations like this of the applicants. Since Germany has deleted the requirement for sterilisation to access legal gender recognition and name change, the government argues that there is a possibility that transgender persons who have socially and legally transitioned may still be capable of procreation, which is true. The requirements for sterilisation were initially created because transgender identity was considered as a mental illness and thus transgender persons were deemed unfit to care for children. It is also largely inscribed in a long history of oppression and degrading treatment of transgender persons.[32] In this sense, maintaining limits to the effective ability of transgender persons to see their children recognised through administrative obstacles as a response to the suppression of the sterilisation requirement pushes people to think about the motivation behind this decision. While the suppression of the sterilisation requirement should be the start of the consideration of transgender persons as equal human beings, capable of healthy parenting, this new administrative obstacle shows a still existent resistance to the protection of their right to do so equally to others, without having to go through degrading procedures exposing their transgender identity and forcing harmful references to their past selves. In this sense, there is a fundamental question of discrimination in this case and it is regrettable that the Court avoided addressing it properly.

31 *Male – Female – Diverse: The "third option" and the General Act on Equal Treatment*. (n.d.). Antidiskriminierungsstelle. https://www.antidiskriminierungsstelle.de/EN/about-discrimination/grounds-for-discrimination/gender-and-gender-identity/third-option/third-option-node.html

32 M.H. (2017, September 1). *Why transgender people are being sterilised in some European countries*, The Economist, https://www.economist.com/the-economist-explains/2017/09/01/why-transgender-people-are-being-sterilised-in-some-european-countries

Conclusion

Altogether, this decision is a serious step backwards in the development of a protective human rights framework for transgender individuals. More than only affecting the applicants in limited circumstances where the birth certificate of the child needs to be provided as defended by the government and the Court, it has a much larger impact on the relation between transgender persons and the state. The refusal to recognise transgender persons in their correct gender identity is fundamental to the respect of their identity and has been recognised as a positive obligation for states under Article 8 of the Convention.[33] The refusal to extend this obligation in situations of parenthood shows a lack of commitment to the protection of transgender persons and respect for their identity in practice. Similarly, while the enactment of legal recognition and protection for intersex and non-binary persons, even in Germany, can be seen as a first step in letting go of cisgender and heteronormative patterns in society and governance, this decision seems to point to the complete opposite. Whenever children are involved, their best interest must always be central in the decision. Just like same-sex adoption is still not legal in many places while same-sex partnerships have been recognised as a positive obligation by the Court, the question of transgender parenthood seems to be lagging behind the question of legal gender recognition for transgender persons. This is not to say that the Court has not recognised the importance of the protection of transgender persons' rights and equality in law. Particularly, it pointed to the recommendations of the Council of Europe to see transgender parents registered with their correct gender identity,[34] yet there is no binding follow-up when the Court is faced with a case. It is time for the Court to recognise the absence of harm caused to children by LGBTQIA+ identities, particularly in a time where LGBTQIA+ persons, and particularly transgender women, are being exponentially targeted by violence and hatred.

33 *Christine Goodwin v. the United Kingdom* (2002).

34 *A.H. and others v. Germany* (2023), para. 65
Council of Europe General Assembly, Resolution No 2239 on "private and family life: achieving equality regardless of sexual orientation", 10 October 2018, para 4.6.

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