CONFIRMING (THE ILLUSION OF) HETEROSEXUAL MARRIAGE: HÄMÄLÄINEN v FINLAND

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Abstract: On 16 July 2014, the European Court of Human Rights sitting as a Grand Chamber issued its most recent ruling regarding transsexuality and marriage. The question before the Court was whether a transsexual woman, who had married another woman before her gender transition, had the right to obtain full legal recognition of her gender without putting an end to their marriage. The answer given by the Court was not only a rejection of the applicant’s claim; it was also a decision that called into question the Court’s own conception of heterosexual marriage.

Keywords: transsexuality; gender transition; heterosexuality; same-sex marriage; European Court of Human Rights; Hämäläinen v Finland.

I. Introduction

The relevance the law attributes to individuals’ gender and sexuality continues to give rise to interesting cases in the area of human rights. On 16 July 2014, the Grand Chamber of the European Court of Human Rights rendered its judgment in Hämäläinen v Finland, a case with important implications for LGBT rights. The issue before the Court was whether a transsexual woman, who had married another woman before her gender transition, had the right to obtain full legal recognition of her gender without putting an end to their marriage. The applicant complained that having to choose between obtaining full recognition of her gender and the preservation of her marriage was a violation of her rights under the European Convention on Human Rights. While the Court rejected the applicant’s claim, basing its reasoning on the heterosexuality of marriage, I argue that this judgment offers strong reasons to challenge the Court’s construction of heterosexuality as a coherent idea. This ruling confirmed that the Court continues to validate domestic bans on same-sex marriage. However, the reasoning followed by both the majority ruling and the dissenting opinion showed that the Court’s belief in the heterosexuality of marriage seems to have an important element of belief and only a tenuous connection with the sexuality of the spouses.

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II. The Facts

Ms Heli Maarit Hannele Hämäläinen is a transsexual woman who lives in Finland. In 1996, before her gender transition, she married a woman with whom she had a daughter in 2002. Since 2006, she has lived as a woman and has undergone a gender transition process, inclusive of gender reassignment surgery. In 2006, she was able to legally change her name, but the domestic authorities did not allow her to amend her identity number, which continues to identify her as a man. The refusal to modify her identity number is founded in the requirements imposed by the Transsexuals (Confirmation of Gender) Act of 2002. This legislation establishes the requirements for the recognition of gender transition, which are: medical certification of transsexuality; medical certification of the impossibility to procreate; being over 18 years of age; being a Finnish citizen or resident; and not being married or in a registered partnership. The marital status requirement does not prevent the recognition of gender per se, but imposes the need for consent from the person’s spouse or partner.

The reason for the marital status requirement and for the consequential spouse/partner’s consent is that the Finnish legislation reserves the institution of marriage for different-sex couples. Same-sex couples can only obtain recognition of their union through a registered partnership, an institution that is specifically for same-sex couples. In order to preserve these separate (but almost equal) institutions based on the sexuality of the couples, the 2002 Act imposed the requirement of consent of the partner/spouse to transform marriages into partnerships and partnerships into marriages, depending on whether the new couple became a different-sex or a same-sex couple after the gender transition. In the case of the applicant, since she was married to a woman, she was unable to obtain an amendment of her identity number unless her wife gave consent to the transformation of their marriage into a registered partnership.

2 Throughout this piece, I use the term “transsexual” to refer to Ms Hämäläinen as, according to the Grand Chamber’s judgment, this is the term she seemed to have chosen to self-identify. See Hämäläinen (n.1) 45–47.

3 Within this piece, I use the terms sex and gender interchangeably, as the Court has done in its early case-law on transsexuality. However, my reasons for this understanding of sex/gender are probably different to the Court’s motives. While it is unclear why the Court does not distinguish between the two notions, my reasons are based on the belief that both sex and gender are cultural constructions. This position has been developed further in Gonzalez-Salzberg, “The Accepted Transsexual and the Absent Transgender: A Queer Reading of the Regulation of Sex/Gender by the European Court of Human Rights”, (2014) 29 American University International Law Review 797. As to the Court, the interchangeable use of sex/gender can be seen in Rees v United Kingdom (1986) 9 EHRR 56, Cossey v United Kingdom (1990) 13 EHRR 622, and Sheffield and Horsham v United Kingdom (1998) 27 EHRR 163.

4 A number of human rights bodies have expressed their opposition to the requirement of sterilisation for the recognition of gender transition, see UN High Commissioner for Human Rights, Discriminatory Laws and Practices and Acts of Violence Against Individuals Based on Their Sexual Orientation and Gender Identity, at 72 and 84.h, A/HRC/19/41 (Nov. 17, 2011); Council of Europe, Discrimination on Grounds of Sexual Orientation and Gender Identity in Europe (2nd ed., September 2011) 13; World Health Organization, Eliminating Forced, Coercive and Otherwise Involuntary Sterilization: An Interagency Statement, OHCHR, UN Women, UNAIDS, UNDP, UNFPA, UNICEF and WHO (May 2014).

5 At the time of the adoption of the judgment the possibility of extending marriage rights to same-sex couples was under examination by the Finnish Parliament, a fact that was highlighted by the Grand Chamber. Hämäläinen, (n.1) 69.
In 2007, Ms Hämäläinen requested her local registry office change her identity number to a female one. Her claim was denied because her wife had not given consent to transform their marriage into a partnership. The applicant then instituted proceedings before the Administrative Court, complaining that having to choose between the preservation of her marriage and the full recognition of her gender was a violation of her rights. The Administrative Court rejected her complaint, and after a series of unsuccessful appeals to the Supreme Administrative Court, the applicant complained to the European Court of Human Rights.

**III. The Chamber’s Decision**

Ms Hämäläinen complained to the European Court of Human Rights that her right to respect for both private and family life (Article 8) had been violated, when the full recognition of her (acquired) gender was made conditional on the transformation of her marriage into a registered partnership. The applicant also complained under Article 14 (prohibition of discrimination), in conjunction with the right to respect for private life, that the State’s refusal to give her a female identity number amounted to discriminatory treatment, since she had to explain the lack of congruence between her identity and the official number in many different circumstances. On 13 November 2012, the Chamber rendered its judgment on the case. It found Ms Hämäläinen’s application to be admissible, which came as a pleasant surprise, since two very similar cases had been declared inadmissible by the Court in 2006. The Chamber declared the applicant’s complaints admissible under the right to respect for her private life (Article 8), both by itself and in conjunction with the prohibition of discrimination (Article 14). In addition, it decided ex officio to communicate the application under the right to marry (Article 12).

The central issue examined by the Chamber was the applicant’s complaint of a violation of Article 8 in isolation, due to the full recognition of her gender being made conditional on the transformation of her marriage into a partnership. The Chamber performed the usual four-tier analysis under Article 8, examining whether there was an interference with the right to respect for private life; whether the interference was prescribed by law; whether it pursued a legitimate aim as established in Article 8; and whether it was “necessary in a democratic society”.

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6 *H v Finland* Application no 37359/09, 13 November 2012.

7 The cases were *Parry* and *R and F*, both against the United Kingdom, in which transsexual applicants complained that the legislation that required putting an end to their marriages, as a condition for obtaining full legal recognition of their gender, was a violation of their human rights. However, in those occasions, the Court found the applications to be manifestly ill-founded. *Parry v United Kingdom* (dec) Application no 42971/05, 28 November 2006; *R and F v United Kingdom* (dec) Application no 35748/05, 28 November 2006.

8 The Chamber also declared inadmissible, as manifestly ill-founded, parts of the application concerning violations to the prohibition of inhuman or degrading treatment (art.3), freedom of movement (art.2 of Protocol 4), and further claims under article 14. *H v Finland* (n.6) 68–69.