

**Case C-43/24 [Shipov]<sup>i</sup>**

**Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice**

**Date lodged:**

23 January 2024

**Referring court:**

Varhoven kasatsionen sad (Bulgaria)

**Date of the decision to refer:**

18 January 2024

**Appellant in cassation:**

K.M.H.

**Respondent in cassation:**

Obshtina Stara Zagora

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**Subject matter of the main proceedings**

Compatibility with EU law of a binding interpretation of national legislation of a Member State which rules out any possibility of amending entries concerning the gender, understood only as the biological sex, and the name of a particular person contained in his or her civil status documents, in the case where that person states that he or she is transsexual

**Subject matter and legal basis of the request**

Interpretation of EU law in accordance with Article 267 TFEU

<sup>i</sup> The name of this case is fictitious and not the real name of any of the parties to the proceedings.

## Questions referred for a preliminary ruling

1. Do the principles of the equality of Union citizens and freedom of movement enshrined in Article 9 of the Treaty on the European Union (TEU) and in Articles 8 and 21 of the consolidated version of the Treaty on the Functioning of the European Union (TFEU), and reinforced in Article 7 of the Charter of Fundamental Rights of the European Union and Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms, preclude national legislation of a Member State which rules out any possibility of amending the entry concerning gender, name and identification number (EGN) contained in the civil status documents of an applicant who states that he or she is transsexual?

2. Do the principles of the equality of Union citizens and freedom of movement enshrined in Article 9 of the Treaty on European Union (TEU) and in Article 8 and Article 21 of the consolidated version of the Treaty on the Functioning of the European Union (TFEU), and the prohibition of discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation laid down in Article 10 TFEU, which are reinforced in Article 7 of the Charter of Fundamental Rights of the European Union and Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms, and the principle of an effective remedy, preclude national case-law (*in casu*, Interpretative Decision No 2/2023 of the Obshto sabranie na grazhdanskata kolegia [(General Assembly of Civil Chambers)] of the Varhoven kasatsionen sad [(Supreme Court of Cassation)]) to the effect that the material law applicable in the territory of a Member State of the European Union does not provide for any possibility of changing the gender, name and identification number recorded in the civil status documents of an applicant who states that he or she is transsexual, thereby placing him or her in a position different from that in which he or she would be in another Member State under whose case-law the opposite is the case?

Is it permissible for national case-law, on the basis of religious values and moral principles, not to permit a change of gender identity unless it is required by certain – intersex – persons for medical reasons?

Is it permissible for national case-law, on the basis of religious values and moral principles, to permit a change of gender for medical reasons only in certain cases and for certain (intersex) persons, but not in other cases of a change of gender identity for other, different medical reasons?

3. Does the obligation of the Member States of the European Union to recognise a person's civil status as established in another Member State under the law of that State, which is recognised in the case-law of the European Court of Justice (in the judgments in Cases C-673/16 and C-490/20) in relation to the application of Directive 2004/38/EC and Article 21(1) TFEU, also apply in relation to gender as an essential element of the civil status entry, and does a change of gender, established in another Member State, on the part of a person

who also has Bulgarian nationality, require that fact to be recorded in the corresponding registers of the Republic of Bulgaria?

4. Is a binding interpretation of the [Bulgarian] constitution by a judgment of the *Konstitutsionen sad* (Bulgarian Constitutional Court) to the effect that the term ‘gender’ is to be understood exclusively in the biological sense, permissible in the light of the right to a fair trial arising from the Charter and the ECHR; is that interpretation compatible with the requirements of EU law; and is it capable of constituting a legal impediment to the registration of a change of gender?

### **Provisions of European Union law and case-law relied on**

Treaty on the European Union (TEU), in particular Article 9

Treaty on the Functioning of the European Union (TFEU), in particular Articles 8, 10, 21 and 267

Charter of Fundamental Rights of the European Union (‘the Charter’), in particular Article 7

Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment of men and women as regards access to employment, vocational training and promotion, and working conditions (‘Directive 76/207/EEC’)

Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (‘Directive 2004/38/EC’)

Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (‘Directive 2006/54/EC’)

Judgments of the Court of Justice relied on:

- *Razzouk and Beydoun v Commission*, 75/82 and 117/82, ECLI:EU:C:1984:116
- *Defrenne*, 149/77, ECLI:EU:C:1978:130
- *P v S*, C-13/94, ECLI:EU:C:1996:170
- *Grzelczyk*, C-184/99, ECLI:EU:C:2001:458
- *Coman and Others*, C-673/16, ECLI:EU:C:2018:385

– *Stolichna obshtina, rayon ‘Pancharevo’*, C-490/20, ECLI:EU:C:2021:1008

### **Provisions of international law relied on**

Convention for the Protection of Human Rights and Fundamental Freedoms (‘ECHR’), in particular Articles 8, 9 and 14

Recommendation CM/Rec(2010)5 of the Committee of Ministers to member states on measures to combat discrimination on grounds of sexual orientation or gender identity of 31 March 2010 (adopted by the Committee of Ministers of the Council of Europe)

Resolutions of the Parliamentary Assembly of the Council of Europe:

- 2048 (2015) on ‘Discrimination against transgender people in Europe’ of 22 April 2015
- 1728 (2010), entitled ‘Discrimination on the grounds of sexual orientation and gender identity’ of 29 April 2010

Report on discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity (A/H[RC]/19/41) of 17 November 2011

Case-law of the European Court of Human Rights (ECtHR) in Strasbourg relied on:

- Judgment of 25 March 1992, *B v. France* (application no. 13343/87)
- Judgment of 9 July 2020, *Y. T. v. Bulgaria* (application no. 41701/16)
- Judgment of 27 September 2022, *P. H. v. Bulgaria* (application no. 46509/20)

### **Provisions of national law relied on**

Konstitutsia na Republika Bulgaria (Constitution of the Republic of Bulgaria, ‘the Constitution’), in particular Articles 4, 6, 32 and 57

Judgment of the Konstitutionsen sad (Constitutional Court) No 15 of 26 October 2021 in Constitutional Law Case No 6/21;

Grazhdanskoprotsesualen kodeks (Code of Civil Procedure), Articles 127, 146, 280, 288, 292, 293, 546, 547 and 628 to 633

Nakazatelen kodeks (Criminal Code), Article 128

Zakon za grazhdanskata registratsia (Law on the Civil Status Register, ‘the ZGR’), in particular Articles 1 to 5, 8, 9, 12 to 14, 19, 42, 45, 73 to 75, 83, 100 and 101

Zakon za zashtita ot diskriminatsia (Law on protection against discrimination), in particular Articles 1, 2, 4 and 6 und Paragraphs 1, point 1, and 17 of the Additional Provisions

Zakon za balgarskite lichni dokumenti (Law on Bulgarian identity documents), Article 9

Zakon za sadebnata vlast (Law on the constitution of the courts), in particular Article 130

### **Succinct presentation of the facts and procedure in the main proceedings**

- 1 Under the Bulgarian Law on the Civil Status Register, a birth certificate must be issued within a certain period after the birth of every child in Bulgaria. This must contain the particulars listed in detail in that law, in particular the name, identification number, sex and nationality of the child (Article 45). The first name of each person is chosen by that person’s parents and communicated in writing to the registrar at the time when the birth certificate is issued (Article 12). In accordance with Article 19 of that law, a change of the first name, patronymic or family name is to be authorised by the court on written application by the person concerned, in particular where essential circumstances make this necessary. Under that law, a change to the entries concerning civil status contained in civil status documents which have already been issued must take place by way of judicial or administrative procedure (Article 73).
- 2 On the basis of the latter two provisions, K.M.H applied to the Rayonen sad (District Court), Stara Zagora (Bulgaria), to have it established by court judgment that he is of the female sex and to authorise a change to the entries concerning his gender and his name in his birth certificate.
- 3 K.M.H. was born in Obshtina Stara Zagora (municipality of Stara Zagora), Bulgaria, on 7 August 1990. On 10 August 1990, the administrative authority of that municipality issued a birth certificate for K.M.H. recording him as being a person of the male sex. Although born with male sexual characteristics, K.M.H. always felt himself to be a woman in terms appearance, behaviour, perception, emotions and conduct. Even in earliest childhood, he was not interested in toys considered to be boys’ toys, and, during puberty, began to adopt women’s hairstyles, use make-up, wear women’s clothes and engage in activities typical of women. He has felt sexually attracted to men since his youth. K.M.H. behaved like a woman, dressed like a woman and felt like a woman, but met with a lack of understanding from his parents and the other members of his family. K.M.H. is recorded as being a person of the male sex in the identity card issued by the Ministerstvo na vatreshnite raboti (Ministry of Internal Affairs, MVR), Stara

Zagora. Since his appearance and his behaviour do not tally with the entry in the official identity documents relating to him, he struggles to find work. He is currently living in Italy and has a long-term partner who pays for his keep. He has started hormone therapy and wishes to undergo gender reassignment surgery, a process which also entails a change of civil status. A change of gender and name would help him to overcome the problems he encounters on a daily basis and the difficulties he faces when looking for work. K.M.H. considers it to be his human right to live a fulfilled life in harmony with himself. His wish to change his gender is serious and irrefutable.

- 4 In the proceedings at first instance, opinions were obtained from a Bulgarian expert in endocrinology, metabolic diseases and andrology, and an Italian psychologist. The wish of the person concerned to complete the clinical and therapeutic procedure for full male-to-female transition was confirmed. He was diagnosed as having gender identity dystrophy (disorder) and difficulties with social interaction and relationships. In those proceedings, the court also commissioned a comprehensive report from two experts, a psychiatrist and a psychologist, who confirmed the applicant's transsexualism, in that he has a wish to be perceived as belonging to the opposite sex which is accompanied by feelings of distress on account of his anatomical sex. The report established that the person under assessment is not suffering from any physical or mental illnesses, only a gender identity disorder. It makes clear that transsexualism is not a mental illness. Transsexualism arises during the embryo's sexual development in the womb. People with transsexualism are forced to live in constant distress and in conflict both with their own anatomy and with society.
- 5 By judgment of 28 February 2018, the Rayonen sad (District Court), Stara Zagora, dismissed K.M.H.'s application as unfounded. It stated that, although the applicant has transsexualism, there is no legal basis in Bulgarian law for granting his application. In Bulgarian law, there are no provisions, criteria and conditions in accordance with or under which transsexual persons can successfully apply to change the gender entry in their birth certificate. The law provides for a procedure for changing civil status details in civil status documents which have already been issued, but not a procedure for changing the facts on the basis of which those details are entered. Objectively, Bulgarian law does not provide for any possibility of determining gender in any way other than by reference to primary sexual characteristics, in particular, by reference to psychological gender as a sense of belonging to a particular gender. There is no definition of the term 'transsexualism' for legal purposes. The gaps in Bulgarian material and procedural law cannot be closed by the direct application of Article 8 ECHR, even though the latter forms part of domestic law.
- 6 K.M.H. appealed to the Okrazhen sad (Regional Court), Stara Zagora, which, on 15 June 2018, confirmed the judgment at first instance. The appeal court stated that civil status registration includes all of the particulars which distinguish a person from other persons in society and in his or her family in his or her capacity as the holder of subjective rights. Those particulars, including the name and the

sex of the person concerned, are reproduced in the registers of civil status documents and in the population registers. The gender of a natural person is determined at birth by reference to his or her primary sexual characteristics. Under Bulgarian law, 'gender' is to be understood as referring to 'biological' sex rather than 'psychological' gender, and the conditions for a change of gender are not laid down in law. For that reason, it is not possible to authorise a change of gender unless this is necessary on account of a physical change. The legal provisions contained in the Law on the Civil Status Register are perfectly clear and leave no room for any other interpretation. In those circumstances, there are no grounds for authorising a change to the civil status particulars contained in the applicant's birth certificate.

- 7 K.M.H. lodged an appeal in cassation against the judgment on appeal. The Varhoven kasatsionen sad (Supreme Court of Cassation, 'the VKS') allowed the appeal in cassation in relation to the following questions: (i) Is there an infringement of Bulgarian law in the case where the court seised refuses to authorise a legal change to the civil status particulars concerning 'gender' contained in a person's birth certificate which is applied for on account of transsexualism, on the ground that there is no law providing for such a change? (ii) Is a prior surgical intervention in relation to the external sexual characteristics of the person concerned necessary in order for an application for a legal change to the gender originally recorded for that person to be capable of being successful? By judgment of 28 June 2019, the VKS decided that transsexual persons cannot be subjected against their will to an obligation to undergo a surgical intervention to change their body as a condition for changing their gender. In accordance with the case-law of the ECtHR, the right to respect for private and family life includes the possibility for transsexual persons to change their gender. The State is therefore required to ensure respect for those rights and to prevent unjustified interference with the exercise thereof, since the determination of a person's gender, name, sexual orientation and sex life form part of the private life protected by Article 8 ECHR. Notwithstanding the absence of any relevant national legislation, the principle of respect for private and family life requires the court to examine on a case-by-case basis whether the material conditions for a change of gender as the prerequisite for a legal change to the civil status particulars concerning 'gender' in a person's birth certificate are met, so that the necessary appropriate balance between the public interest and the private interest can be struck. The VKS referred the case back to the appeal court for reconsideration, directing it to gather new evidence.
- 8 On reconsidering the case, the Okrazhen sad (Regional Court), Stara Zagora, followed the binding directions from the VKS. On 21 November 2019, however, the appeal court confirmed the original judgment at first instance to the effect that the gender of a new-born person is determined at birth by reference to that person's primary sexual characteristics – his or her biological sex. In the present case, the person concerned is seeking to have the individualising characteristic of his 'gender' changed on account of his own inner perception of belonging to the female sex. However, gender is a biological rather than a social category and is

therefore dependent not on a personal decision but on anatomy and physiology. The court reiterates the finding that the Bulgarian Law on the Civil Status Register does not provide for a procedure for registering another, new, different type of gender, including so-called psychological gender, in the birth certificate. In these proceedings, a change of gender is possible only after a physical change. From a physiological point of view, the person concerned is clearly and unambiguously of the male sex, notwithstanding his inner identification with the opposite sex. For those reasons, the court confirms that the application by the person concerned to change the particulars concerning his gender and name in his birth certificate is unfounded.

- 9 The applicant brought an appeal in cassation against the judgment on appeal. The VKS found that the relevant case-law is contradictory, stayed the proceedings and proposed to the General Assembly of Civil Chambers ('the OSGK') of the VKS that it adopt an interpretative decision. Interpretative Decision No 2/2020 was therefore adopted on 20 February 2023. Thereafter, the VKS reopened the proceedings in the present case and allowed the appeal in cassation to proceed, on account of a contradiction with the case-law of the Court of Justice of the European Union (in particular with the judgment in *P v S*, C-13/94, ECLI:EU:C:1996:170), in relation to the following legal questions: (a) Do natural persons have the right to determine their own identity, including the particular gender to which they belong? (b) Does the court's refusal to order a change to the gender, name and identification number recorded in the civil status documents of an applicant who states that he or she is transsexual constitute unequal treatment?

#### **Succinct presentation of the reasoning in the request for a preliminary ruling**

- 10 In the view of the referring court, the most significant reason for the need for this request for a preliminary ruling is the possible contradiction between the national case-law binding on the court and EU law.
- 11 First, it is to be noted that the Bulgarian Konstitutsionen sad (Constitutional Court) has provided a binding interpretation of the term 'gender' used in the Bulgarian Constitution (judgment No 15 of 26 October 2021). The Constitutional Court assumes that, as it is used in the Bulgarian Constitution, that term is to be understood in its biological sense. The question has to do not with whether a person's right to determine his or her gender is recognised in one way or another, but 'only with the State's obligation to respect that person's self-determination in relation to a gender other than his or her biological sex'. In this regard, the referring court considers it necessary to examine whether the unrestricted observance of the aforementioned binding interpretation of the [Bulgarian] Constitution is compatible with the requirements of EU law, and whether that interpretation constitutes a legal impediment to the registration of a change of gender.



12 In accordance with Article 130(2) of the ZSV, interpretative decisions are binding on the judicial and administrative authorities, on local self-government authorities and on all authorities which adopt administrative measures. In this regard, account is also to be taken of the special attention which the referring court pays hereafter to Interpretative Decision No 2/2020 of the OSGK of the VKS of 20 February 2023, cited in paragraph 7. According to that decision, the relevant Bulgarian material law does not provide for any possibility for the court, in proceedings under the Law on the Civil Status Register, to authorise a change to the particulars concerning gender, name and identification number recorded in the civil status documents of an applicant who states that he or she is transsexual. Bulgarian law understands the term ‘gender’ only in its biological sense and does not permit the court to allow civil status documents issued in respect of a transsexual person to be changed in relation to his or her gender. That decision proceeds on the assumption that any failure to comply with a judgment of the Constitutional Court constitutes an infringement of the Basic Law, since such a failure affects the fundamental principles of the rule of law, which is governed by the Constitution and national law. EU law does not require any other conclusion to be drawn in this regard, since rules on civil status fall within the competence of the Member States, which is to say that the national identity of [the citizens of] those States is taken to be that which is inherent in the political and constitutional structures of those States. In its judgments, the Court of Justice of the European Union leaves the regulation of civil status and marriage to the autonomy of the Member States of the European Union. In the present case, the public interest outweighs the interest of transsexual applicants in being allowed to change their gender in civil status registers. Changing the particulars recorded in the civil status documents issued in respect of an applicant who states that he or she is transsexual impacts on the civil status of other persons, including minors and those without legal capacity (the applicant’s children), as well as his or her spouse. As a result, a person’s parentage by birth is determined not by two persons of different genders (mother and father) but by persons of the same gender; this is not permitted by the applicable law of the Republic of Bulgaria. The overriding public interest arises from an examination of the material law applicable in the country. Neither the Law on the Civil Status Register nor the any other law prescribes how a change to the particulars concerning the gender, name and identification number of an applicant who states that he or she is transsexual impacts on the civil status documents of the applicant’s child, in particular on the parentage recorded in the child’s birth certificate, in which the applicant is recorded as being the father or mother. That change affects the rights of another person, but its consequences for the child are not expressly regulated. The ECtHR has not held that Article 8 ECHR establishes in connection with the rights of a transsexual person conditions under which the national court of a State which is a contracting party to the Convention is required to authorise a change to the gender recorded the civil status documents issued in respect of that person, and has found no infringement in such non-fulfilment of positive obligations incumbent on the State.

13 The referring court also draws a parallel with the case-law of the ECtHR and recalls that, by its judgments of 9 July 2020 in *Y.T. v. Bulgaria* (application no.

41701/16) and of 27 September 2022 in *P.H. v Bulgaria* (application no. 46509/20), the ECtHR found Bulgaria to have violated Article 8 ECHR on the ground that that State had failed to strike an appropriate balance between the public interest and the applicant's personal interest in securing a change of civil status. The ECtHR based those decisions on the fact that the national courts, despite finding that the gender claimed did not correspond to the applicants' biological sex, and refusing to allow the identity documents to be changed, because such a change was not in the public interest, did not provide any reasons with respect to the particular nature of the public interest in relation to the right of the applicants to have their gender identity recognised.

- 14 In the light of the case-law cited, the referring court recognises that the right to private and family life does indeed include the possibility for transsexual persons to change their gender, and that this fact requires the State to ensure respect for those rights and to prevent any unjustified interference with the exercise of those rights. Since, in accordance with the [Bulgarian] Constitution, the provisions of the ECHR are directly applicable and take precedence over Bulgarian national law, citizens are able to rely on those provisions before the national courts, even in the absence of detailed national legislation.
- 15 In this regard, the referring court takes the view that the material law applicable in Bulgaria, which includes both EU law and the case-law of the ECtHR, does not contain any prohibition on changing the particulars concerning gender, name and identification number recorded in the civil status documents of an applicant who states that he or she is transsexual. The question arises as to whether the aforementioned interpretative decision introduces national case-law which treats transsexual persons less favourably than intersex persons or other persons for whom a legal change of gender is necessary for medical reasons.
- 16 The referring court notes that transsexual persons of Bulgarian nationality changed their gender by way of judicial proceedings, even without having undergone surgical intervention or hormone treatment, before Interpretative Decision No. 2/2023 was adopted. The right of persons to change their gender as recorded in civil status documents has already been recognised in a number of final judgments given by Bulgarian courts on the basis of statutory provisions. It must therefore be clarified whether taking account of that interpretative decision leads to discrimination and an infringement of the right to a fair trial (inasmuch as that interpretative decision effectively imposes a prospective prohibition on legally changing the gender of transsexual persons).
- 17 In the view of the referring court, that difference in the case-law relating to persons in the same or a similar situation constitutes unequal treatment that creates uncertainty and ambiguity with regard to the legal position of the persons concerned and adversely affects their right to live according to the gender to which they assign themselves. The referring court also recalls that, in accordance with the principle of equal treatment, 'persons who are in the same situation must be treated in the same way in law'.

- 18 The referring court is of the view that gender change is a process that should move from what is simpler and reversible (harmless to health and life) to what is more complex and irreversible (entailing a risk to health and life). According to that logic, a person's name and identification number, changes to which are reversible, must be changed first; the transsexual person can, if he or she expresses a wish to do so and acts on his or her own free will, take steps towards irreversible surgical or other interventions to adapt his or her physical gender, later. It is in a transsexual person's interests not to be compelled, first of all, to undergo risky biological treatments and irreversible surgical interventions as a condition of the possibility of a later change to his or her gender for civil status purposes.
- 19 In the view of the referring court, the subject matter of the interpretation sought should also include the question whether the prohibition on a legal change to the particulars contained in a person's birth certificate infringes the principles of the equality of citizens of the Union and freedom of movement, enshrined in Article 8 and Article 21 TFEU, which are reinforced by Article 7 of the Charter and Article 8 ECHR, since the persons concerned are unable to provide proof of their identity by means of their identity documents, in which they are recorded as being of the opposite sex.
- 20 In this regard, the referring court is of the view that, since gender is an aspect of civil status, the Court of Justice must examine whether EU law imposes an obligation on the Bulgarian court to recognise a change to the gender of a Bulgarian national which has been made in another Member State by ordering that change to be recorded in the relevant [Bulgarian] registers. The consequence of a finding to the contrary would be that the same person could be registered as being of a different gender in different Member States.
- 21 In the view of the referring court, the uncertainty in relation to these questions, which are crucial to the resolution of this dispute, can be dispelled only by a binding interpretation of the provisions of EU law cited in the questions referred for a preliminary ruling, which the Court of Justice of the European Union alone has jurisdiction to give.