

EUROPEAN COURT OF HUMAN RIGHTS

FIFTH SECTION

APPLICATION NOS:

79885/12

52471/13

52596/13

**A.P.
Garçon
Nicot**

Applicants

v.

France

Respondent

**WRITTEN OBSERVATIONS
OF THIRD PARTY INTERVENER:**

ADF International

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placed than an international court to evaluate local needs and conditions.”¹ It is a powerful way of ensuring that human rights are properly protected whilst at the same time mitigating the risk of human rights imperialism. This sensitivity to the history, culture and law of member is a source of the legitimacy of the Court’s judgments given that the Convention is “built on diverse economic, cultural, and legal traditions...”²

8. The doctrine has recently been formally recognised, and is soon to be entrenched into the preamble of the Convention by Protocol 15 when it comes into force.³ The doctrine is therefore a powerful method of ensuring a balance of uniformity in the protection of Convention rights whilst also supporting the diversity of social realities in different member states.
9. It is submitted that there is a significant difference between the fact of legal recognition of a transsexual⁴ individual, such as, in *Goodwin v. United Kingdom*,⁵ and that of the measure used to identify him or her as such upon which that identification is contingent. The latter asks questions of inherent definition. Among member States, there are a variety of different medical, social, and legal approaches to define what it means to be a transsexual - a disparity which only increased in light of the recent resolution of the Parliamentary Assembly of the Council of Europe.⁶ Therefore, a state ought to be afforded a wide margin of appreciation to determine the foundational measure by which one ascertains transsexuality given the lack of a common understanding.
10. In 1996, the Court in *Goodwin v. United Kingdom* held that Article 8 of the Convention was violated when a state withheld legal recognition from a diagnosed transsexual who has undergone sex reassignment surgery. *Goodwin* concerned the inability to change integral documents pertaining to identity including birth certificates. The Court applied a narrower margin of appreciation recognising the

clear and uncontested evidence of a continuing international trend in favour not only of increased social acceptance of transsexuals but of legal recognition of the new sexual identity of post-operative transsexuals.⁷

11. However, in cases which raise complex scientific, legal, moral and social issues, particularly in the absence of a social consensus among the member states, the

¹ Explanatory Report on ‘Protocol No. 15 amending the Convention on the Protection of Human Rights and Fundamental Freedoms, art.1. http://www.echr.coe.int/Documents/Protocol_15_explanatory_report_ENG.pdf.

² Bakircioglu, O , 'The Application of the Margin of Appreciation Doctrine in Freedom of Expression and Public Morality Cases', *German Law Journal*, vol. 8, 2007, p.717.

³ Protocol No. 15 amending the Convention on the Protection of Human Rights and Fundamental Freedoms, art.1. http://www.echr.coe.int/Documents/Protocol_15_ENG.pdf.

⁴ The use of this term throughout this brief is guided by the inclusion of this language within the World Health Organization’s International Statistical Classification of Diseases and Related Health Problems. However, the term itself is contested and has, in some circles, been entirely replaced by the term ‘trans-gender’.

⁵ *Goodwin v. UK*, Application no. 28957/95, 11 July 2002.

⁶ PACE Resolution 2048 (2015).

⁷ *Id.* at para. 85.

Court affords discretion to the states, yielding a wider margin of appreciation.⁸ For the reasons set out above, this is an indispensable manifestation of the exercise of this Court's supervisory, rather than appellate, function.

12. This much was recognized by this Court in *Goodwin v. United Kingdom*. The judgment contains an extended paragraph dealing with the scope of the margin of appreciation specifically in the context of recognition of changes in gender which concludes that:

...it is for the Contracting State to determine *inter alia* the conditions under which a person claiming legal recognition as a transsexual establishes that gender re-assignment has been properly effected or under which past marriages cease to be valid and the formalities applicable to future marriages.⁹

13. It is submitted that this affords a proper margin of appreciation to the states and there has been no significant shift within the Council of Europe region such as would justify a departure from this clear exposition of the content of the margin in this context. Indeed, the Grand Chamber has confirmed this as recently as 2014 in the case of

17. An earlier case is further indicative of the proper approach to questions of mechanics. In *X, Y and Z v. United Kingdom*, the applicant, a post-operative female-to-male transsexual, claimed under Article 8 that his right to respect to family life had been violated when the State refused to formally recognise him as the *father* of a child.¹² Such questions of inherent definition are both relatively novel

(d) Legal Status of the Yogyakarta principles

40. Even though, as former United Nations High Commissioner for Human Rights Louise Arbour explained, “Human rights principles, by definition, apply to all of us, simply by virtue of having been born human,”⁴¹ the drafters specifically tailored these fundamental rights to people who identify themselves under the LGBT umbrella. This can be very dangerous because focusing a right on a specific, and small, segment of individuals necessarily implies that all those who do not identify themselves as homosexuals do not enjoy that same right equally.⁴² The Principles further corrupt the fundamental human rights that they restate by melding many of them to expensive, impractical, and unnecessary governmental spending mandates.
41. Beyond those norms already enumerated in international law, many of which lose their legitimacy within the Principles because they are drafted with a caveat taking away their universality and promoting a disproportionate benefit to those who engage in homosexual behavior, the more radical Principles themselves have absolutely no grounding in legal or scientific fact. The Principles, for example, define sexual orientation as “each person’s capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with,

human rights protection for a minority segment of the population by proffering preferential treatment, and by feigning to be document prescribed by law rather than merely a policy document.

(e) Conclusion

44. The instant cases raise relatively novel questions in terms of how far Article 8 reaches into national procedures which allow for recognition of changes in gender. The case law of the Court in this area has hitherto focused on the legality of restrictions which prevent recognition at all and the judgments that followed have been consistent in holding that the mechanics for recognition are a matter for the State.

45. Furthermore, these are fundamental definitional questions,

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