

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

**Filed on
1 July 2015**

(a) Introduction

1. ADF International is a legal organization dedicated to protecting fundamental freedoms including the right to life, marriage and the family, and freedom of religion. In addition to holding ECOSOC consultative status with the United Nations (registered as “Alliance Defending Freedom”), ADF International has accreditation with the European Commission and Parliament, the Organization of American States, and co-operates with the Fundamental Rights Agency of the European Union and the Organization for Security and Co-operation in Europe.
2. ADF International also works with a legal alliance of more than 2,200 lawyers dedicated to the protection of fundamental human rights through which it has been involved in over 500 cases before national and international tribunals, including the Supreme Courts of the United States of America, Argentina, Honduras, India, Mexico and Peru, as well as this Court and the Inter-American Court of Human Rights.
3. At a legislative level, ADF International has also provided expert testimony before several national parliaments, as well as the European Parliament and the United States Congress.
4. The three instant cases concern the proper legal approach to individuals identifying as the opposite sex. In particular, *A.P.* and *Garçon* question whether the French pre-requisite of proof of gender reassignment before amending official documents is Convention compliant. The third case goes further in arguing that to pre-condition an amendment to official documents on any change in physical characteristics is itself violative of the Convention.
5. This brief argues firstly that while the Court has dealt with the question of *whether* countries should provide a mechanism for changes to gender after birth, the mechanics of so doing have always been considered a matter for the member State. It is further argued that this position should remain unchanged for two reasons. Firstly, because such practical questions are best decided at a national level; and secondly because there is a clear divergence of approaches within the Council of Europe region.
6. The “Yogyakarta principles” were included within the recital of relevant international materials when these three cases were recited. This brief will argue that the Court should properly afford little weight to this document either in assessing the state of international law and evaluating any European consensus in this area given the origin of this unjustifiably expansive and highly contentious document, and the intent behind its drafting.

(b) Margin of appreciation

7. The margin of appreciation is, in brief, a doctrine aimed at ensuring the subsidiarity of the Convention machinery given that “national authorities are in principle better

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 *Hämäläinen v. Finland*.¹⁰
14. The case involved a claim under Article 8 that Finland had violated the rights of a male-female transsexual. The applicant was married to a woman and wanted to maintain that marriage whilst also having his gender listed as female on official documents. Whilst same sex couples can enter a civil union in Finland, marriage is reserved to opposite sex couples. The applicant refused the suggestion that he convert his marriage to a civil union which would have then allowed the change in gender on his official documents.
15. In finding in favour of the State, this Court re-iterated that the Convention did not impose an obligation to allow same sex marriage, nor does it require special arrangements for this kind of situation. It was also indicated there was an absence of a European consensus on gender legislation meaning a wide margin of appreciation was to be afforded to Finland:

In the absence of a European consensus and taking into account that the case at stake undoubtedly raises sensitive moral or ethical issues, the Court considers that the margin of appreciation to the respondent State must still be a wide one. ...This margin must in principle extend both to the State's decision whether or not to enact legislation concerning legal recognition of the new gender of post-operative transsexuals and, having intervened, to the rules it lays down in order to achieve a balance between the competing public and private interests.¹¹

16. *Hämäläinen v. Finland* is a clear example of the Court affording an appropriately wider margin of appreciation where the question involved is not the recognition of a change in gender *per se*, but rather the mechanics of how such a change should be reconciled within the existing regulatory framework.

⁸ *X, Y, and Z v. UK*, Application no. 21830/93, 22 April 1997, see para. 44, 52.

⁹ *Goodwin*, para. 103.

¹⁰ Application no. 37359/09, 16 July 2014.

¹¹ *Id.* at para. 75.

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 and ethically sensitive areas and so the Grand Chamber justifiably found that the United Kingdom had acted within its wide margin of appreciation.

18. Thus, the means by which one determines gender, whether it is for example by anatomical analysis or by proof of gender dysphoria from a medical expert¹³ are within the margin of appreciation.

19. The Court has most recently dealt with the question of transsexualism in the recent case of *Y.Y. v. Turkey*.¹⁴ The case concerned a Turkish requirement that for access to gender-reassignment surgery, prior sterility had to be proven. Thus the context of the case was very different, as recognized by this Court:

This case provides a look at the problems faced by transsexuals which are different from those previously considered by the Court. It asks whether preconditions to gender-reassignment can be imposed upon transsexuals and whether this would comply with Article 8 of the Convention. The criteria and principles developed by this Court have been formulated in a substantially different context and cannot therefore be transposed as such to the present case.¹⁵

20. It therefore follows that the principle in that case will not readily apply to the sort of practical question at issue in the instant cases. The position remains unchanged that there exists an irreducible margin of appreciation with regards to establishing the regime through which one can be recognized as a transsexual.

21. The justification for this irreducible minimum is particularly significant given the various ways in which the cause of transsexuality can be understood. The applicant in *Hämäläinen* claimed that “[t]ransgenderism was a *medical condition*.”¹⁶ Thus, the purpose of providing legal recognition and surgical reassignment is “assimilation ... to the gender in which the transsexual perceives that he or she properly belongs.”¹⁷

22. However, removing all *objective* requirements for transsexuals would afford an absolute right to self-determination, which is inconsistent with the Convention and the state’s interest. Such a ‘right to self-determination’ is not defined and would hold an indeterminable scope which would be by definition incompatible with the states interests and the rights of others. To move in that unprecedented direction would raise a Pandora’s box of practical problems which goes against the public interest. In *Goodwin*, it was recognised that these practical problems, such as

¹² *Id.* at para. 32.

¹³ For example, in the United Kingdom, the Gender Recognition Act 2004, s(3).

¹⁴ Application no. 14793/08, 10 March 2015.

¹⁵ *Id.* at para. 62. Unofficial translation.

¹⁶ *Hämäläinen v. Finland*, *op. cit.* at para. 17; emphasis added.

¹⁷ *Goodwin v UK*, *op. cit.*, at para. 78.

changing archived legal documents, do exist.¹⁸ Since states are most properly able to resolve these practical problems, this justifies allowing the states to determine how they will balance these competing public and private interests.

23. Nevertheless, the recent PACE Resolution 2048 recommends that member states:

develop quick, transparent and accessible procedures, based on self-determination, for changing the name and registered sex of transgender people on birth certificates ... and other similar documents; make these procedures available for all people who seek it, irrespective of age, medical status, financial situation or current or previous detentions[.]¹⁹

24. Although such resolutions *can* provide an evidential basis for an emerging European consensus, this cannot be the case for Resolution 2048 of 2015. Of the 318 members of PACE eligible to vote, 103 cast their vote, including 12 abstentions. Of those 103, 67 voted in favour of this resolution.²⁰ Statistically, these 67 votes cannot represent the entirety of the Council of Europe, particularly given some of the very controversial areas within the resolution and given the clear difference between aspects of the Resolution and the established case law of this Court.

25. The resolution contains a “self-determination” clause²¹, whereby individuals can, as they see fit, choose their gender without anything further being required, and presumably as often as they wish. However, in practice only *two* countries agree that no official psychological diagnosis is required: Denmark and Malta.²² Finally, 37 countries out of 47 anticipate a medical intervention prior to legal recognition.²³ This highlights not only the divide but the wider European consensus of putting in place a system for determining one’s gender.

26. As can be seen, when the resolution is subject to even basic scrutiny, the consensus regarding the requirements for the recognition of a new legal gender lies, in fact, against the positions advanced by the resolution.

27. It is simply not the case that a wide margin of appreciation may lead to moral relativism among member states, possibly resulting in the under protection of human rights. A response to this criticism is offered by legal philosopher Joseph Raz on how we can marry the commitment to universal human rights with a wide margin of appreciation:

The fact that something is of value to us requires that which is of value to be identified and extrapolated, and then applied to

¹⁸ *Id* at para. 85.

¹⁹ PACE Resolution 2048 (2015), §6.2.1. <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=21736&lang=en>.

²⁰ Voting information found at: <http://assembly.coe.int/nw/xml/Votes/DB-VotesResults-EN.asp?VoteID=35498&DocID=15407>; <http://www.eclj.org/Releases/Read.aspx?GUID=f3733f41-9726-43f7-86d5-c2b8ad7c1655&s=eur>.

²¹ *Op. cit.* (no. 17).

²² Transgender Rights Europe Index found at: http://tgeu.org/wp-content/uploads2015/05/trans-map-Side-B-may-2015_image.png.

²³ *Id.*

something else outside of those specific circumstances. This extrapolation objectifies the value making it, in a ‘thin’ sense, universalizable. Furthermore, the universalizability of values is what makes them intelligible as values. ... This is because we are entitled to assume that any change of value can be explained, and that value explanations depend on *universal characteristics*: factors such as time and location do not account for varied explanations.²⁴

28. In the same way, the variety of laws regarding transsexuals depends not on differing ‘thin’ moral values, but on differing perceptions of “universal characteristics.” This can justifiably give rise to different *thick* moral values [rights] without wavering on the ‘thin.’ Other commentators such as Legg support this claim:

Universal human rights thus depend on social factors to find expression and realization, and this necessarily differs from place to place and over time.²⁵

29. Therefore, as the public opinion between each member state is far from homogenous, the definition of what it means to be identified as a transsexual individual will differ between member states.

(c) Open to States to pursue policy in light of social evidence

30. This Court, in *Handyside v. United Kingdom*, recognized that a legitimate interest must be a “pressing social need” and that the State’s action must be proportionate and reasonably related to the legitimate aim pursued.²⁶ When the Court determines that a particular issue does not command a broad consensus within the member states, the Court recognizes a wider margin of appreciation indicating greater deference to the Member State’s interference.²⁷ As this Court has recognized, there remains divergent medical and psychiatric opinion as relates to the nature of transsexualism and whether it is wholly a psychological issue or rather is associated with differentiation in the brain.²⁸
31. Legal recognition was never sought in order to promote “self-actualization” but was a recognition that some considered gender-reassignment surgery as a “treatment”. Even this categorization is dubious and far from universal. The World Health Organization (“WHO”), for example, continues to classify transsexualism,

²⁴ Raz, J, *Value, Respect and Attachment*. 1st ed.; 2001 Cambridge University Press. p. 47 - 54, cited in Legg, A., *The Margin of Appreciation in International Human Rights Law: Deference and Proportionality*. 1st ed.; 2012 Oxford University Press. p. 42.

²⁵ Legg, A., *The Margin of Appreciation in International Human Rights Law: Deference and Proportionality*. 1st ed.; 2012 Oxford University Press. p. 44.

²⁶ *Handyside v. United Kingdom*, no. 5493/72, December 7, 1976.

²⁷ See for example, *VGT v. Switzerland* no. 24699/94 June 28, 2001 and *Murphy v. Ireland* no. 44179/98 July 10, 2003. But contrast *Animal Defenders v. UK*, no. 48876/08, April 22, 2013.

²⁸ ECHR, *Case of Christine Goodwin v. the United Kingdom* [GC], application no. 28957/95, judgment of 11 July 2002, § 81.

transvestitism and gender identity disorder as behavioral or mental disorders.²⁹ Of note are two of the definitions offered by WHO.

32. WHO defines transexualism as:

A desire to live and be accepted as a member of the opposite sex, usually accompanied by a sense of discomfort with, or inappropriateness of, one's anatomic sex, and a wish to have surgery and hormonal treatment to make one's body as congruent as possible with one's preferred sex.³⁰

33. Gender identity disorder is classified as:

A disorder, usually first manifest during early childhood (and always well before puberty), characterized by a persistent and intense distress about assigned sex, together with a desire to be (or insistence that one is) of the other sex. There is a persistent preoccupation with the dress and activities of the opposite sex and repudiation of the individual's own sex. The diagnosis requires a profound disturbance of the normal gender identity; mere tomboyishness in girls or girlish behaviour in boys is not sufficient.³¹

34. It should also be noted that gender reassignment surgery is not viewed universally as an appropriate treatment for transgenderism. For example, Johns Hopkins University in Baltimore, which is ranked by U.S. News and World Report as the third leading American hospital in the field of psychiatry,³² was one of the first U.S. hospitals to introduce sex-reassignment surgery. However, in 1979, John Hopkins' closed its gender identity clinic and thereafter ceased performing the surgery based on a published report it produced in 1977 identifying transgenderism as a mental disorder.³³ The former Head of Psychiatry and current Distinguished Professor of Psychiatry at John Hopkins, Prof. Dr. Paul McHugh, strongly reiterated his position regarding transgenderism as a mental disorder in a Wall Street Journal Op-Ed published only two weeks ago.³⁴

35. With such divisive medical and psychological debates taking place over the nature of the treatment and diagnosis of transgenderism, it would be wholly inappropriate for this Court to make a decisive pronouncement which would strip member states of their role in determining the most proportionate and appropriate means of promoting public order, public health and morals under Article 8 of the Convention.

²⁹ World Health Organization, *International Statistical Classification of Diseases and Related Health Problems 10th Revision (ICD-10)-2015-WHO Version for ;2015*, Chapter 5: Mental and Behavioral Disorders. F64.

³⁰ *Id.*, F64.0.

³¹ *Id.*, F64.2.

³² <http://health.usnews.com/best-hospitals/rankings/psychiatry>.

³³ Wise TN, Dupkin C, Meyer JK (1981). Partners of distressed transvestites. *American Journal of Psychiatry* . 1981 Sep;138(9):1221-4. http://www.ncbi.nlm.nih.gov/entrez/query.fcgi?cmd=Retrieve&db=pubmed&dopt=Abstract&list_uids=7270729.

³⁴ <http://www.wsj.com/articles/paul-mchugh-transgender-surgery-isnt-the-solution-1402615120>.

(d) Legal Status of the Yogyakarta principles

36. In November 2006, a self-described “distinguished group of human rights experts” from only 25 countries met and drafted the Yogyakarta Principles (“Principles”); named after Yogyakarta, Indonesia where the document was drafted. The document represents a non-binding and non-democratically created list of alleged human rights related to “lesbian, gay, bisexual, and transsexual” (“LGBT”) individuals.³⁵ The drafters claim both that the Principles “reflect the existing state of international human rights law in relation to issues of sexual orientation and gender identity” and that the Principles “affirm binding international legal standards with which all States must comply.”³⁶
37. It is submitted that this Court, if it relies on the Principles, would be doing something never before done by an international tribunal; that being the legitimizing of a non-binding, non-legislatively drafted document without any governmental or inter-governmental input as a binding human rights document.
38. The slippery slope upon which the document asserts its binding nature falters already in the preamble, “[a]cknowledging that this articulation must rely on the current state of international human rights law and will require revision on a regular basis in order to take account of development in that law.”³⁷ The drafters, then, implicitly admit that they are not only articulating unchangeable human rights, but also a bevy of malleable policy assertions.³⁸ The reality is that the Principles assert a number of novel and dangerous privileges proffered as “human rights,” policy assertions, and governmental mandates that neither reflect the existing state of international human rights law nor correspond with the traditional beliefs and values held by the majority of the global populace. Giving authority to a non-binding policy wish-list which goes against the consensus law in the majority of Council of Europe States would considerably undermine the legitimacy of this Court.
39. The Principles themselves, in an attempt to feign legitimacy, strategically conceal their more radical assertions within a bundle of obvious and redundant human rights that are already universally legally binding and therefore not in need of being restated.³⁹ The strategy can be effective; a radical and controversial redefinition of family, like the one contained in Principle 24, would almost certainly shock and delegitimize the Principles in the eyes of most.⁴⁰ However, this effect is numbed and the radical nature of Principle 24 may even be overlooked when read alongside a group of legitimate and foundational human rights. It is for this reason that the Principles unnecessarily contain redundant human rights, most already being identified in the European Convention of Human Rights and other foundational human rights treaties, and belonging the human family as a whole.

³⁵ *The Yogyakarta Principles* (2007), p. 7, http://www.yogyakartaprinciples.org/principles_en.pdf

³⁶ *Id.*

³⁷ *Id.* at 9..

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.* at 27-28.

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, individuals of a different gender or the same gender or more than one gender,”⁴³ and gender identity as:

Each person’s deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical, or other means) and other expressions of gender, including dress, speech and mannerisms.”⁴⁴

42. This definition of “sexual orientation” is dubious because it equalizes all sexual relationships, divorcing sexuality from its biological purpose (procreation) and social responsibility,⁴⁵ while this definition of “gender identity” is legally flawed because it is completely subjective, ignoring the basic objective biological reality that people are born of a certain sex.
43. All human beings have equal amounts of dignity simply because they are human.⁴⁶ Dignity should in no way be linked to sexual orientation or gender identity. Plus, that everyone has equal dignity does not mean that every sexual orientation warrants equal respect.⁴⁷ The Principles as a whole set a very dangerous precedent by lacking in legal certainty, providing a discriminatory balance of

⁴¹ Douglas Sanders, *The Role of the Yogyakarta Principles* (2008), p. 7, <http://sxpoltics.org/wp-content/uploads/2009/03/yogyakarta-principles-2-douglas-sanders.pdf>

⁴² See *The Yogyakarta Principles* (2007), http://www.yogyakartaprinciples.org/principles_en.pdf (generally).

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ See Jakob Cornides, *A Brief Commentary on the Yogyakarta Principles*, p. 2, http://works.bepress.com/cgi/viewcontent.cgi?article=1019&context=jakob_cornides.

⁴⁶ See *Universal Declaration of Human Rights*, (Dec. 12, 1948).


⁴⁷ See Jakob Cornides, *A Brief Commentary on the Yogyakarta Principles*, p. 10, http://works.bepress.com/cgi/viewcontent.cgi?article=1019&context=jakob_cornides.

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, with ramifications in ethics, psychology, and medical science which must be afforded a wide margin of appreciation. States approach the question of transsexuality in various ways in accordance with their particular national environment. In this sense, they are laying down rules to achieve a balance between their competing public and private interests. This position is further supported by the extreme divergence in the legal position as between member states on this question.
46. Finally, it is respectfully submitted that in analyzing the instant cases, no regard should be had to the Yogyakarta Principles which do not represent established international law and go radically beyond what has previously been accepted by this Court.

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