

“THIS IS THE RULING BY THE IZMIR COURT OF FIRST INSTANCE NO. 6 THAT HAS THE AUTHORITY OF JUDGMENT IN THE NAME OF THE TURKISH NATION, ACCORDING TO ARTICLE 9 OF THE CONSTITUTION OF THE REPUBLIC OF TURKEY NO. 2709”

REPUBLIC OF TURKEY

IZMIR

COURT OF FIRST INSTANCE No. 6

FILE NO / 2009/474

RULING NO / 2010/186

JUDGE / Mürsel ERMİŞ / 24174

PROSECUTOR

OF THE REPUBLIC / Sami DÜNDAR / 21754

CLERK / Saliha AL / 69212

Plaintiff / The People

Defendant / Black Pink Triangle Association for Research on Sexual Orientation and Gender Identity and Solidarity Against Discrimination

Representation / Att. Elif Ceylan ÖZSOY, Att. Oktay CERİT, Akdeniz Cad. No: 1/802
Reyent İşhanı Pasaport IZMIR

Case / Annulment of the association

Case Date / 16th October 2009

Ruling Date / 30th April 2010

After the open trial conducted in our court with hearings of both parties;

ALLEGATION / In the case file, the people as the plaintiff have requested that the defendant be annulled based on Article 60/2 of the Turkish Civil Code no. 4721, on the grounds that the Izmir Department of Associations had found omissions in the defendant association's statute and has notified Oktay Cerit, one of the founders of the association, on the date of 26th May 2009 that these omissions shall be corrected within 30 days with regards to Article 17 of the Law on Associations no. 5253 and Article 60/2 of the Turkish Civil Code no. 4721, and three copies of the new statute, every page signed by the founders, shall be submitted alongside a written application, however, board members of the defendant Black Pink Triangle Association for Research on Sexual Orientation and Gender Identity and Solidarity Against Discrimination have failed to comply with the request within the given time.

DEFENCE / The representation of the defendant have stated that the Black Pink Triangle Association for Research on Sexual Orientation and Gender Identity and Solidarity Against Discrimination was founded on 20th February 2009 when the association's statute, the declaration of formation and other necessary documents were filed with the Izmir Department of Associations in the name of the Governor's Office of Izmir; that the 60-day period granted to the administrative authority by Article 60 of the Turkish Civil Code to examine the documents and give notification about the omissions was over on 21st April 2009, before which the defendant association was not contacted; Izmir Department of Associations stated, with a writ dated 25th May 2009, that Article 2 of the defendant association's statute (Addendum 4), which regulates the aims of the association, was in breach of Article 56 of the Turkish Civil Code and Articles 33/3 and 41 of the Constitution, therefore it falls under the conditions for the restrictions on the freedom of assembly and association listed under Article

11/2 of the European Convention on Human Rights, and requested that these omissions be corrected; that the defendant association's board of founders corrected the technical omissions but opted not to change Article 2 of the association's statute, which regulates the aims of the association, and submitted the new statute and the requested documents to Izmir Department of Associations within the legal 30-day period, on 18th June 2009, and with the registration number 10,328; that Izmir Department of Associations applied to the Prosecutor's Office of Izmir to have the association annulled; that the administrative authorities' power to inspect was removed by the amendment of the Constitution in 2001 and therefore the request to annul the association by the Governor's Office of Izmir is in breach of the Constitution; that they request from the court that the Constitutional Court examine and nullify Article 60 of the Turkish Civil Code; that the Governor's Office of Izmir exceeded the clearly stated 60-day period to examine the statute; that the application of the Governor's Office of Izmir to the Prosecutor's Office of Izmir is unlawful; that the Prosecutor's Office of Izmir breached the right to a fair trial when it filed a lawsuit against the association without serving the allegations against the association; that the contrariness to law alleged by the Governor's Office of Izmir, which is also the grounds of the case file, is abstract, unclear and unintelligible; that the claim, as put forth in the request for correction which was submitted by the Izmir Department of Associations in the name of the Governor's Office of Izmir to the association 90 days after the declaration of formation, that Article 2 of the statute, which explains the aims of the association, is in breach of the Constitution, the Turkish Civil Code and the European Convention on Human Rights, is very abstract because it is not stated which part of Article 2, which comprises 23 provisions, is in breach thereof, and why and how; that it is not stated which of the 23 provisions that make up Article 2 should be changed and in which way; that it is not stated which of the 7 conditions that is listed as justifiable reasons to restrict the freedom of assembly and association in Article 2 of the European Convention on Human Rights it falls under; therefore it is not clear whether lesbian, gay, bisexual, *travesti* and transsexual persons coming together under the roof of the defendant association to work in solidarity against discrimination should be restricted because it is against the interests of national security, territorial integrity or public safety, the prevention of disorder or crime, the protection of health or morals, or the protection of the reputation or rights of others; that the authority was content with a generalised and ambiguous reason where the grounds for action was not clearly stated; that the only grounds in the case file is Article 60/2 of the Turkish Civil Code, and that the reason for the case is that the defendant association decided not to change Article 2 of the statute despite the fact that the administrative authority found that Article 2 of the statute is in breach of the abovementioned provisions; that the administrative authority, in spite of its unconstitutional use of power to inspect, did not specify which of the 23 provisions of Article 2 needs to be changed; that the administrative authority did not leave any other option to the association other than legal recourse, and that this immediately implies an understanding that is in fundamental breach of the freedom of assembly and association; and that some concepts were defined by the Black Pink Triangle Association, which also works on eliminating prejudices against homosexuality by clarifying concepts that are widely misunderstood, to facilitate the hearings and to make it easier to understand the statute:

Homosexual; man or woman who is emotionally, erotically and sexually inclined towards those who are of his or her own sex. Homosexuality; male or female persons having emotional, erotic, sexual inclinations towards those who are of his or her own sex.

Gay; used for both female and male homosexuals at first, this word currently denotes male homosexuals. The word gay was put forth to define the lifestyle created by the emotional, erotic and sexual inclinations of same-sex persons.

Lesbian; is used to define women who are emotionally, erotically and sexually inclined towards those who are of their own sex.

Bisexual; is a man or a woman who is emotionally, erotically and sexually inclined towards those who are of his or her own sex, and also those who are of the opposite sex.

Homophobia; denotes prejudices against and hatred towards homosexuals.

Heterosexuality; denotes individuals who are emotionally, sexually and erotically inclined towards individuals of the opposite sex.

Heterosexism; is the viewpoint that sees heterosexuality as an imperative, and force it upon others as the one and only way to exist.

Transsexualism; the desire to belong to or look like the opposite sex; to feel like a member of the opposite sex.

Transsexual; is viable for both sexes; a person can be male and want to be female, or be female and want to be male.

Travesti; generally denotes the desire to be a member of the opposite sex in physical appearance and behaviour. It is usually understood that a *travesti* is a man in women's clothes, but this word may be used for persons of both sexes. *Travestis* are those who enjoy using things of the opposite sex, wearing clothes of the opposite sex, and exhibiting behaviour of the sex that they want to belong to.

Transphobia; denotes prejudices against and hatred towards *travesti* and transsexual individuals. It signifies fear of those who change their gender, defying the sexual and social roles that are expected of them because of their biological sex.

It was requested that the case be refused on the grounds that there are registered associations in Turkey with the same statute as the defendant association, and that the motion of the Prosecutor's Office be deemed unlawful because the Governor's Office of Izmir exceeded the 60-day period to examine the statute that is clearly stated by law.

EVIDENCE AND REASON /

With the case file no. 2009/42 dated 16th October 2009, Prosecutor's Office of Izmir requested that the Black Pink Triangle Association for Research on Sexual Orientation and Gender Identity and Solidarity Against Discrimination be annulled based on Article 60/2 of the Turkish Civil Code, on the grounds that "the association's board members have failed to comply with the request."

The defendant association was founded on 20th February 2009 when the association's statute, the declaration of formation and other necessary documents were filed with the Izmir Department of Associations in the name of the Governor's Office of Izmir. According to Article 60/1 of the Turkish Civil Code, the declaration of formation, the documents and the association's statute in the file shall be examined within 60 days by the highest ranking civil authority of the district. Even though the said 60-day period ended on 21st April 2009, the defendant association received no notification. However after this period was exceeded, Izmir

Department of Associations stated, with a writ dated 25th May 2009, that Article 2 of the defendant association's statute, which regulates the aims of the association, was in breach of Article 56 of the Turkish Civil Code and Articles 33/3 and 41 of the Constitution, therefore it falls under the conditions for the restrictions on the freedom of assembly and association listed under Article 11/2 of the European Convention on Human Rights, and requested that these omissions be corrected. This writ was served to the association's authority on 26th May 2009.

The defendant association's board of founders corrected the technical omissions but opted not to change Article 2 of the association's statute, which regulates the aims of the association, and submitted the new statute and the requested documents to Izmir Department of Associations within the legal 30-day period, on 18th June 2009.

Article 2 of the defendant association's statute that was requested to be changed comprises 23 provisions and the refusal to change this article is the grounds for the case.

Article 20 of the United Nations Universal Declaration of Human Rights and Article 22 of the International Covenant on Civil and Political Rights state that everyone has the freedom of assembly and association. Article 11 of the European Convention on Human Rights reiterates this, and states that no restrictions shall be placed on the exercise of the right to association other than such as are prescribed by law and are necessary in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. Also, Article 14 of the same convention prohibits discrimination and states that the enjoyment of rights and freedoms shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

Article 10 of the Constitution states that all individuals are equal without any discrimination before the law, irrespective of language, race, colour, sex, political opinion, philosophical belief, religion and sect, or any such considerations and that state organs and administrative authorities shall act in compliance with the principle of equality before the law in all their proceedings and in utilization of all forms of public services. Article 33 of the Constitution, which falls under the section that regulates rights and duties of the individual, states, in accordance with international conventions, that everyone has the right to form associations, or become a member of an association, or withdraw from membership without prior permission; no one shall be compelled to become or remain a member of an association; and the freedom of association may only be restricted by law on the grounds of protecting national security and public order, or prevention of crime commitment, or protecting public morals, public health. The last provision of Article 90 of the Constitution states that international agreements duly put into effect bear the force of law; and that in the case of a conflict between international agreements in the area of fundamental rights and freedoms duly put into effect and the domestic laws due to differences in provisions on the same matter, the provisions of international agreements shall prevail.

Article 56 of the Turkish Civil Code states that no association may be formed for an object contrary to the laws and ethics; Article 57 states that every person has the right to form an association without obtaining prior consent; Article 58 states that statutes of an association may not contain provisions contrary to the laws; Article 59 states that associations are regarded as legal entity from the very moment they present declaration of formation, statutes

and other documents required for incorporation to the highest administrative authority at the locality of their domicile; Article 60 states that if the declaration of formation, the statute of the association and other required documents are found to be contrary to law or incorrect information is provided about the status of the founders, the founders shall be immediately requested to amend these; if they fail to correct the omissions within thirty days as of notification date, the highest administrative authority informs the Prosecutor's Office to file an action in the competent court of first instance for the annulment of the association.

Despite the fact that the association's aims are alleged to be immoral and contrary to law, sexual identity or orientation is not a phenomenon that is voluntarily chosen by individuals, and is an involuntary phenomenon that is either innate or that stems from upbringing. It is a well-known fact that there are persons who have different sexual orientations that are defined by the words lesbian, gay, bisexual, *travesti* and transsexual in our country, as in every other country in the world. Words that are used to define such persons are widely used in scientific publications, in the media and in daily life. It is not possible to characterise having such involuntary sexual orientations or usage of the words to define such individuals as immoral; nor are they prohibited by our country's laws. Thus, it is not possible to assume that the usage of the words lesbian, gay, bisexual, *travesti* and transsexual in the association's statute is immoral and contrary to law.

With regards to whether the aims of the defendant association are immoral and contrary to law, public morality is a subjective concept that may change with time and place and especially the individuals who constitute the society. To be able to characterise the association's aims as immoral, it must be determined that the association was formed with aims that are against strictly determined morals that are accepted by the whole of the society, and that the activities of the association are intended to accomplish such a goal. When Article 2 of the defendant association's statute, which explains the aims of the association, and Article 3, which explains the activities to accomplish these aims, are examined and evaluated together, it is seen that the general aim of the association is to strengthen the unity and solidarity amongst lesbian, gay, bisexual, *travesti* and transsexual persons; to prove that these individuals exist as a part of the society; to cultivate a freer environment in the society; to ensure that lesbian, gay, bisexual, *travesti* and transsexual individuals can express themselves within this environment; to correct misinformation and wrong opinions about these individuals in the society; to prevent ostracism of such individuals from the society; and to end discrimination against such individuals to ensure their integration into the society. What is perceived as immoral by the society is not being lesbian, gay, bisexual, *travesti* or transsexual, nor the usage of these words, but the incitement and provocation, by way of their own lifestyle, of other people into being lesbian, gay, bisexual, *travesti* or transsexual. None of the abovementioned articles and provisions stipulate that lesbian, gay, bisexual, *travesti* and transsexual individuals are not allowed to come together to form an association with the aim of creating solidarity and unity amongst such persons.

Therefore, it is obvious in the association's writ, declaration and the file that lesbian, gay, bisexual, *travesti* and transsexual individuals have a legal right to form an association.

RULING / For the reasons mentioned above, the court rules:

1. The request to annul the association is REFUSED, because lesbian, gay, bisexual, *travesti* and transsexual individuals have a right to form an association like everyone else,

2. It is not necessary to charge a fee, because the case falls under Public Law.
3. Trial expenses shall be paid by the plaintiff; since the defendant created no expenses, it is not necessary to rule on this matter.
4. Since the defendant was represented by a lawyer, 1000 Turkish Liras, which was set according to the lawyers' minimum fee chart, will be retrieved from the plaintiff and given to the defendant.

This ruling was read out loud in front of the legal representation of the defendant association Att. Elif Ceylan Özsoy, Att. Oktay Cerit, in the presence of Sami Dündar, the Prosecutor of the Republic, with the road to appeal open within 15 days. 30th April 2010.

Clerk 69212

Judge 24174