

High Court of Justice of Andalusia, Ceuta and Melilla

JUDGEMENT (unofficial translation)

Honourable Members Messrs.
D. Heriberto Asencio Cantisán.
D. Guillermo Sanchis Fernández-Mensaque.
Mr. José Ángel Vázquez García.
Mr Javier Rodríguez Moral.

In Seville, on 23 January 2023.

The Fourth Section of the Contentious-Administrative Chamber of the High Court of Justice of Andalusia in Seville, formed by the Magistrates who appear at the margin, has heard on behalf of the King the appeal registered with the number 2224/19, arising from the contentious-administrative appeal no. 68/2019 brought before the Contentious-Administrative Court no. 4 of Seville between the following parties: APPELLANT: ANDREAS SPECK, represented by María del Carmen Arenas Romero and assisted by Olga Cristina Burgos García. APPELLANT: MINISTRY OF THE INTERIOR, represented and defended by the State Attorney.

FACTUAL BACKGROUND

FIRST.- On 30 July 2019, the Judge of the Contentious-Administrative Court No. 4 of Seville issued a ruling rejecting the contentious-administrative appeal No. 68/2019 filed against the resolution of the Director General of the Police dated 11 December 2018 rejecting the appeal filed against the agreement of presumptive rejection by administrative silence of the application of the now appellant for modification of data in the Register of European Union Citizens.

SECOND.- An appeal was lodged against the aforementioned decision in due time and form, the parties having presented their arguments, which are attached.

THIRD.- A day was set for the vote and judgement of the present appeal, which took place on the appointed day, having observed the legal prescriptions.

The Judge who acted as Rapporteur was Mr. José Ángel Vázquez García.

POINTS OF LAW

FIRST - The claim brought by the appellant, who is a German citizen, is that, with rectification of the data hitherto in the Central Register of Resident Foreigners, citizens of the European Union, the data relating to sex should be amended so that the sex is entered as 'indeterminate'. The judgment under appeal indicates that, although the Council of Europe, in its resolution 2048, urges Member States to "consider including a third gender option in the documents for those persons who so wish", neither from the Community legislation, nor the Spanish legislation, nor the decisions of the European Court of Justice, can it be affirmed that the right of citizens of the European Union, resident in a country of the Union other than their own nationality, to have their sex reassigned in the public registers of that Member State, at the will of the applicant, to appear as "X" or "indeterminate", is recognised. In particular, in current Spanish legislation, what Law

3/2007, of 15 March, which regulates the rectification in the registry of the mention of the sex of persons in the Civil Register, makes possible is the change from male to female or vice versa, but not to a third or indeterminate gender, although the judgment itself warns of the dubious application of this rule to the case under appeal. It is not so much on this rule as on the absence of legal regulation of the case in question that the court of first instance bases its rejection of the appeal. The appellant alleges infringement of Articles 15, 18.1 and 43.1 in relation to Article 10.1, all of the Spanish Constitution, citing Article 1 of Royal Decree 240/2007 which, in regulating the exercise of the rights of entry and exit, free movement, stay, residence, permanent residence and work in Spain by citizens of other Member States of the European Union, shall be subject to the content of that provision, without prejudice to the provisions of special laws and international treaties to which Spain is a party. Directive 2004/38/EC of the European Parliament and of the Council, of 29 April 2004, on freedom of residence and movement, as well as the European Convention on Human Rights and Fundamental Freedoms and the Universal Declaration of Human Rights of 1948, are also cited as violated, transcribing the content of various decisions of the CJEU and the European Court of Human Rights.

The State Attorney's Office, citing art. 7 no. 5 and 6 of Royal Decree 240/2007, of 16 February, regulating the entry, free movement and residence in Spain of citizens of the Member States of the European Union and of other States party to the Agreement on the European Economic Area, developed by Order PRE/1490/2012, of 9 July, as well as art. 213 of Royal Decree 557/2011, of 20 April, which approves the Regulations for the development of Organic Law 4/2000, on the rights and freedoms of foreigners in Spain, holds that the data relating to sex does not form part of the necessary content of those who must appear in the Central Register of Foreigners, which is limited to the situations of EU citizens in Spain with an impact in the field of free movement, employment, etc. and where the name, nationality, address, identity number and date of registration of the foreigner will be recorded, but without any mention of sex. In the alternative, the State Attorney's Office points out that if the intention is to modify the gender or sexual identity of a person in a Spanish register, the Spanish regulations should be followed, which do not allow the mention of sex other than male or female.

SECOND.- It is true that according to art. 7, sections 5 and 6 of Royal Decree 240/2007 and art. 2 of Order PRE/1490/2012, which lays down rules for the application of the aforementioned regulations, the certificate issued after completing the application for registration in the Central Register of Foreigners will include the name, nationality, address, identity number of the foreigner and the date of registration of the application, but it does not include the sex of the foreigner applying for registration.

It might therefore be thought that an application for the modification of personal data, such as sex, would serve no purpose when there is no previous reference to it. However, if we examine the application form for registration in the Central Register of Foreigners, available on the website of the Ministry of the Interior, we can see that there is a box relating to Sex, H or M, and in the Instructions for filling in the application, with the number (1), it is indicated that the appropriate option Male/Female should be ticked. Therefore, although the sex is not an item of information which appears on the certificate issued after completing the application for registration, it does appear on the application (standard form) and is therefore among the information known to and on file with the administrative authority. The modification of a piece of information that was initially required is in principle legitimate for the applicant and even advisable for the administration itself in order to have real information.

THIRD.- It then remains to be determined whether we accept the argument of the judgment of first instance and of the State Attorney's Office that, given that current Spanish legislation does not admit the official mention of any sex other than male or female, the claim that "X", "indeterminate" or a similar indicative should appear as such cannot be upheld. In an initial response to this question, it is significant that, according to the documents provided by the appellant, the Ministry of Health and

Families of the Andalusian Regional Government has agreed to the appellant's request that in the Andalusian Public Health System user database, instead of male sex, "indeterminate" should appear, especially when the sex data does not appear on the user's health card, and even cites in support of such a decision Law 2/2014, of 8 July, comprehensive for non-discrimination on grounds of gender identity and recognition of the rights of transsexual persons in Andalusia.

We are not unaware that the legislation cited by the Junta de Andalucía is not applicable to the present case and even that it does not directly regulate a case such as the one at hand, but it is fully acceptable that the Administration, whatever its territorial scope (local, regional or state) has personal data of citizens, including those from European Union countries, which correspond, in the present case, to the actual sexual identity (or if you prefer the expression "gender identity", emancipated from the merely biological reality of people).

Furthermore, in view of the purpose of the regulations governing the obligation to enter in a register, drawn up and made available to the Spanish authorities, foreigners who are nationals of a European Union country and resident in Spain, it is highly advisable to ensure uniformity in the information extracted from the personal and other data requested from the foreigner, so that there is no discrepancy between the information held by the authority of the country of origin and that supplied and made available to the Spanish authorities. In compliance with this circumstance, Article 7(6) of Royal Decree 240/2007 requires that, together with the application for registration in the Central Register of Foreigners, the applicant's valid passport must be presented. What would then be distorting is, as in this case, that the appellant's passport, a document which also proves his sex insofar as it coincides with the German Civil Register, shows his sex as "undetermined" and yet in a Spanish register, such as the Central Register of Foreigners, it shows his sex as male. It is not a question of whether, for the purposes of the Spanish Civil Register, a reference not permitted by the legislation regulating it, such as 'indeterminate', is recorded as sex, but only of whether the data available to the Administration for the purposes of a register such as the Central Register of Foreigners are identical to those of the foreign national applying for registration, a citizen of a State of the European Union, and who appears in the registers of the country of origin. Avoiding the disparity of personal data, taking into account those that appear as the data subject's own according to his national legislation and that these are those that appear in the Spanish registers, we believe that this is a response in accordance with the purpose of the registration, which is otherwise obligatory, and which, if we want to transfer it to the field of private international law, we could say that it is equivalent to taking into consideration the data subject's national law as the point of connection.

From the foregoing, we conclude that, with the appeal substantially upheld, we must reverse the judgment under appeal and uphold the appellant's claim that the information provided by the appellant when completing the application for registration in the Central Register of Foreigners should be amended so that, instead of the sex of the appellant being male, it should be "indeterminate", "X" or equivalent expression, as this is the one that appears on the official documentation issued by the authorities of Germany, the country of which he is a national.

FOURTH.

Since the legal issue addressed in the appeal is undoubtedly controversial, it is not appropriate to impose costs on any of the parties.

Having regard to the aforementioned precepts and others of general and pertinent application.-

WE DECIDE: Substantially upholding appeal no. 2224/2019 lodged by ANDREAS SPECK, we reverse the judgement handed down by the Administrative Court no. 4 of Seville in contentious-administrative appeal no. 68/2019 and, substantially upholding the same, we annul the contested agreement referred to in the first factual background of this judgement and uphold the plaintiff's claim in the terms set out in the last paragraph of the third legal ground, without imposition of costs on either of the parties.

An appeal in cassation may be lodged against this judgment, in the terms and with the requirements contained in art. 88 et seq. The appeal must be prepared in writing before this Chamber within 30 days from the date following notification of this decision.

Return the proceedings to the Court with a copy of this judgment for its execution and enforcement.

The original of this judgment shall be kept in the corresponding file and a full copy shall be attached to the case file.

Thus, by our judgement, definitively judging, we pronounce, order and sign it.