

Malaysian Transsexuals Lose Discrimination Claim

Malaysian High Court Upholds a Ban on Cross-dressing

Sunday 28 October 2012, by [ERT](#) (Date first published: 26 October 2012).

The Equal Rights Trust (ERT) is disappointed to learn that the Malaysian High Court has rejected a request that a Syariah (Shari'a) Law in one of the Malaysian states which bans Muslim men from cross-dressing be declared unconstitutional. The High Court rejected arguments submitted by four transsexuals that the law breaches a number of their fundamental rights including the rights to non-discrimination, freedom of expression and human dignity.

The case was brought before the High Court by four male-to-female transsexuals (known in Malaysia as "Mak Nyah") who sought to challenge section 66 of the Syariah Criminal (Negeri Sembilan) Enactment 1992, which states that "wearing women's attire" or "posing as a woman" is a criminal offense if done by a man. Prior to bringing their challenge, all four Mak Nyah had at various times been arrested, detained and charged for offences under section 66. Both in their challenge and in testimonies they provided to ERT in 2011, the applicants accused the religious authorities of targeting them and described, amongst other things, being groped and, in some cases, beaten during the course of their arrest and/or detention.

The applicants challenged section 66 on the basis that it violated a number of their fundamental rights as enshrined in the Federal Constitution of Malaysia. They argued that section 66 violated:

- Their right to non-discrimination under Article 8(2) of the Constitution. In particular, section 66 discriminated against them on the grounds of their gender identity and this falls within the scope of the word "Gender" in Article 8(2).
- Their right to freedom of expression under Article 10(1)(a), which includes the freedom to express identity through dress.
- Their right to freedom of movement under Article 9(2) on the basis that they are unable to move freely without risking arrest due to their dress.
- Their rights to live with dignity, to privacy and to livelihood/work under Article 5(1) on the basis that they are deprived of their autonomy and are unable to work due to being restricted from moving in public places without risking arrest.

ERT provided a legal brief to the applicants' lawyers in the case, arguing that section 66 was unconstitutional on the basis that it discriminated against the applicants, and others in a similar situation, on the ground of their gender identity. ERT's brief argued that section 66 discriminated against the applicants' rights under Articles 8(1) and 8(2) of the Federal Constitution of Malaysia to "equal protection of the law" (Art. 8(1)) and not to be subject to discrimination in any law (Art. 8(2)). In particular, ERT relied on the Declaration of Principles on Equality and argued that section 66 of the Criminal Enactment amounted to direct discrimination which is unlawful under Article 8 of the Constitution, stating that:

- The transsexuals' "gender identity" is a "prohibited ground" of discrimination under the Constitution and, in any case, discrimination against transsexuals would fall within the scope of the prohibited ground of "sex" or "gender";
- Section 66 itself subjects cross-dressing trans persons to less favourable treatment than persons of other gender identities. Furthermore, the arrest, detention and charging of the applicants and other trans persons represents less favourable treatment compared to persons of other gender identities who are not so arrested and charged;
- The conduct which section 66 prohibits - cross-dressing - is so closely correlated with the applicants' gender identity that cross-dressing helps to define their identity. Accordingly, the law criminalising cross-dressing is targeting trans persons and is less favourable treatment on grounds of their gender identity; and
- Article 8 of the Constitution provides no exception to its protection and there is no legitimate aim which would justify section 66 being in existence, as cross-dressing poses no threat to any legitimate public interest.

ERT is deeply concerned that transsexuals continue to suffer discrimination in Malaysia and that the High Court has not taken this opportunity to declare one of the discriminatory laws to which they are subject to be unconstitutional. ERT is concerned not only at the Court's decision not to find the law to amount to unconstitutional discrimination but also its decision not to consider the law to be a breach of a number of the applicants' other fundamental rights including their rights to freedom of expression and privacy.

The Equal Rights Trust (ERT)

P.S.

* The Equal Rights Trust , Friday 26th October 2012:
<http://www.equalrightstrust.org/newsstory26october2012/index.htm>

To read ERT's legal brief in the case, go to the original site.

To read the testimonies of the four applicants, as published in Volume 7 of the Equal Rights Review, go to the original site.