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IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MRS. JUSTICE ANU SIVARAMAN

MONDAY, THE 15TH DAY OF MARCH 2021 / 24TH PHALGUNA, 1942

WP (C) .No.23404 OF 2020 (A)

PETITIONER:

HINA HANEEFA @MUHAMMED ASHIF ALI N.
AGED 22 YEARS
D/O. HANEEFA NANATH, NANTHA HOUSE,
IRUMBAZHI P.O. VALAPARAMBA,
MALAPPURAM 676 509.

BY ADVS.
SRI.C.R.SUDHEESH
SRI.RAGHUL SUDHEESH
SMT.J.LAKSHMI
SRI.K.J.GLAXON
SHRI.SANISH SASI RAJ

RESPONDENTS:

- 1 STATE OF KERALA
REPRESENTED BY IT SECRETARY,
HIGHER EDUCATION DEPARTMENT,
GOVERNMENT SECRETARIAT,
THIRUVANANTHAPURAM 695 001.
- 2 UNIVERSITY OF KERALA
REPRESENTED BY ITS REGISTRAR, SENATE HOUSE
CAMPUS, PALAYAM THIRUVANANTHAPURAM 695034.
- 3 UNIVERSITY COLLEGE,
REPRESENTED BY ITS PRINCIPAL,
MG ROAD, PALAYAM,
THIRUVANANTHAPURAM 695 034.

- 4 NATIONAL CADET CORPS.
REPRESENTED BY TIS COMMANDING OFFICER,
2 (K) BN NCC, ARMY WING,
THIRUMALA,
THIRUVANANTHAPURAM 695 006.
- 5 ASSOCIATE NCC OFFICER,
ARMY WING 2 (K) BN,
UNIVERSITY COLLEGE,
THIRUVANANTHAPURAM 695 034.
- 6 COMMANDING OFFICER,
2 (K) BN CC, ARMY WING, THIRUMALA,
THIRUVANANTHAPURAM 695 006.
- 7 UNION OF INDIA,
REPRESENTED BY ITS DEFENCE SECRETARY, ROOM NO.
101 A SOUTH BLOCK, MINISTRY OF DEFENCE, NEW
DELHI 110 011.
- 8 SREERAG S.
SOUGHT TO BE IMPLEADED

R2 BY SHRI.THOMAS ABRAHAM, SC, UNIVERSITY OF
KERALA
R4-7 BY ADV. SRI.N.S.DAYA SINDHU SHREE HARI
R8 BY ADV. K.ARJUN VENUGOPAL

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 04-02-2021, THE COURT ON 15-03-2021 DELIVERED THE FOLLOWING:-

JUDGMENT

Dated this the 15th day of March 2021

1. This writ petition is filed with the following prayers:-

“i. Issue a writ, order or direction in the nature of Mandamus or any other appropriate writ, order or direction declaring Section 6 of the National Cadet Corps Act, 1948 as illegal and ultra vires of Articles 14, 15 and 21 of the Constitution to the extent it excludes transgender community from enrolment with the National Cadet Corps;

ii. Issue a writ of mandamus or any other appropriate writ, direction or order to direct the 4th and 7th respondent to amend the enrolment criteria to include Transgender community in National Cadet Corps;

iii. Issue a writ of mandamus or any other appropriate writ, direction or order to direct the 3rd, 4th, 5th and the 6th Respondent to take necessary steps for the enrolment of the petitioner in the National Cadet Corps; “

2. Heard the learned counsel for the petitioner, learned standing counsel appearing for the 2nd respondent, the learned ASGI as well as the learned Government Pleader.

3. Petitioner, who is a student of the University College, Thiruvananthapuram, states that she is a transgender (trans-woman). It is stated that she was assigned male gender at the

time of birth and that at the age of 21, a sex re-assignment surgery was performed as is evident from Exhibit P1. It is stated that further surgery was performed on 27.5.2019 and the petitioner's name has also been changed as Hina Haneefa. Exhibit P3 transgender identity card was also issued to the petitioner showing her gender as female. When the petitioner was declined admission to the NCC unit by the 5th respondent on the ground that there is no provision for enrollment of transgender students, she had submitted Exhibit P4 representation seeking enrollment, taking note of the certificates issued to her. Further representations were submitted before the 5th respondent, but to no avail. It is submitted that the petitioner was an NCC cadet as would be evident from Exhibit P7 and that there is absolutely no justification on the part of the respondents in refusing to enroll the petitioner in the NCC battalion. The petitioner places reliance on the decision of the Apex Court in **National Legal Services Authority v. Union of India and others** [(2014) 5 SCC 438] as also the provisions of the Transgender Persons (Protection of Rights) Act, 2019 (hereinafter referred

to as the 2019 Act) to contend that the petitioner is entitled and eligible for enrollment on the basis of the certificates produced by her. It is submitted that after the authoritative pronouncement by the Apex Court with regard to the rights of transgender persons to a life with human dignity, the continued actions on the part of the respondents in perpetuating discrimination against persons like the petitioner only for the reason that she was born with the characteristic of a gender which did not match her self-perceived gender identity amounts to violation of the petitioner's valuable rights guaranteed under Article 14, 15, 19 and 21 of the Constitution of India. It is stated that the provisions of the Transgender Persons (Protection of Rights) Act, 2019 are also manifestly violated by the actions of the respondents. It is submitted that any provisions of the National Cadet Corps Act, 1948, or the absence of such provisions in so far as enrollment of transgenders are concerned, would have to be considered in the light of the authoritative pronouncement by the Apex Court and the provisions of the 2019 Act, since the enactment is clearly intended to do away with the social injustice meted

out to persons like the petitioner and to ensure a life with human dignity to them. It is, therefore, contended that the respondents are duty bound to grant enrollment to the petitioner, taking note of Ext.P3 identity card issued to her in accordance with her eligibility.

4. A counsel statement has been placed on record by the Central Government Counsel on behalf of respondents 4 to 7. It is stated that the NCC was raised with an aim to provide a suitable environment to train the youth to take up a career in Armed Forces and that it follows a curriculum and training module following the Armed Forces which is sometimes gender specific due to difference in physical, biological and psychological aspects. It is stated that the 2019 Act defines a transgender person as 'a person whose gender does not match with the gender assigned to that person at birth and includes a trans-man and trans-woman (whether or not such person has undergone Sex-Reassignment surgery or hormone therapy or laser therapy or such other therapy), persons with intersex variations, genderqueer and persons having such socio-cultural

identities as Kinner, Hijra, Arvani and Jogta”. Accordingly to this definition of the Act transgender is an umbrella term for persons, which can include transsexual, transvestite, Genderqueers and inter-sexual. It is stated at paragraphs 3, 4 and 5 of the counsel statement as follows:-

3. The sexual orientation of a transgender may be hetero-sexual, homosexual, bisexual or asexual. In a normal circumstances these biological features and sexual orientation will not have any impact on the society and organizations in which they function. However, in organizations like Armed Forces or NCC where close physical contact, confined stay under field conditions, sharing of basic facilities like accommodation, toilets, bathing, sleeping facilities etc. as a routine rather than exception, there is a need for gender specific regulations. While examining the types of transgender we have seen that even a biologically fully developed male or female having potency for sexual activity can choose the identity of transgender/trans-man trans-woman based on the persons gender affinity even without going under medical procedure or sex re-assignment surgery. Simultaneously the sexual orientation of the person can be heterosexual, homosexual or bisexual. Under these circumstances induction of a transvestite (Cross-Dresser) or Genderqueer or intersexual or transsexual not under gone sex-reassignment medical procedure especially if their sexual orientation is heterosexual or bisexual in to boys or girls NCC divisions will have serious undesirable consequences. Further training parameters of Boys and Girls cadets are different , thus trans-women in a girls unit will have an unfair advantage over other girls cadets and trans-men in a boys unit will have an inherent disadvantage.

4. In the case of the petitioner as per records produced by her she has undergone Sexual-reassignment surgery. However, as per the transgender Act the persons who have not undergone Sex-reassignment procedure or Genderqueer or intersexual is also considered as transgender. Thus hypothetically a biological male, who is either Transvestite (Cross-Dresser), Bigender, Demigender or Transsexual not undergone any medical procedure but assumes the gender identity of a female in spite of his sexual orientation as bisexual or heterosexual, is eligible to get enrolled in to a girls NCC unit. Presence of such a person in common bathroom, sleeping area and in close contact physical training activities etc. will be a violation of privacy and dignity of a girl cadet.

5. On the other hand if the petitioner is admitted in to a girls NCC unit based on her assigned identity of trans-woman any other transgender in spite of their biological features and sexual orientation as discussed above cannot be denied similar opportunity under the right of equality. Thus any decision by the Honourable Court in favour of the petitioner will open a flood gate of unmanageable situation where sexually potent Cross-dresser, Genderqueers etc with bisexual or heterosexual orientation can join NCC units of the opposite gender.”

5. A prayer is, therefore made that there is requirement for more detailed categorization of transgender based on their biological features and sexual orientation to assign them male or female gender identity and a need to formulate detailed guidelines on medical and psychological aspects on assigning

gender identity to transgender for induction into gender specific organizations like the Armed Forces and the NCC. It is contended that the said exercise comes within the prerogative of the Central Government and till such detailed guidelines are formed, the enrollment of the petitioner to the NCC girls unit should not be considered, since it would have wider adverse consequence all over the nation.

6. A counter affidavit is also placed on record on behalf of respondents 4 to 7. It is contended that the petitioner had made an application to join the senior girls' wing of the NCC and this application had been forwarded to the Commanding Officer to Kerala Battalion NCC seeking clarification. It is stated that enrollment is to be carried out, taking note of the eligibility criteria as stipulated in Section 6 of the NCC Act, 1948 (male and female gender only). It is stated at paragraphs 11, 12 and 15 as follows:

"11.It is humbly submitted that since the petitioner joined the college identifying and claiming to be a transgender and declaring that the petitioner belongs to transgender category (Female). Being so, the Petitioner cannot tum around and claim that

the Petitioner is to be enrolled as a cadet in the Girls Division enrolment for which is open only to female gender. It is humbly submitted that the Petitioner exhausted right to self-perceived gender identity by choosing the same as "Female" and has taken admission under the Transgender category (Female). Hence, she now falls under the third gender category "transgender (Female)" and not the 'female' sex category, now being claimed by her.

12. It is humbly submitted that a student can be enrolled in "Girls Division" only if the student is admitted under the Female category in the College. It may be noted that as per Section 6 (2) any student of the female sex of any University or school may offer herself for enrolment as a cadet in the Girls Division. For getting the benefit of the Section 6(2) of the NCC Act 1948, the candidate has to be enrolled under 'female' category by the College.

15.It is humbly submitted that one of the primary aim of NCC is to groom the cadets for a future with the Army Forces whereas, as such, there is no provision existing for entry of transgender (Female/Male) in the Indian Armed Forces. Moreover, in case she is permitted to join the NCC, she would entail herself to appear for Service Selection Board through NCC 'C' certificate scheme whereas at present, she remains ineligible to join the Armed Forces."

7. An impleading petition has been placed on record by an NCC cadet through his father and guardian contending that the interim direction issued by this Court is against the scheme of the 2019 Act. It is stated that the right of a transgender person

as defined in Section 2(k) is only to a self perceived gender identity and the person can be recognized only as a transgender. It is stated that the person has no right to be declared as belonging to his or her self perceived gender and therefore, the Identity Card issued to the petitioner itself is bad. It is further stated that the NCC Act recognizes only persons belonging to the male or female gender and since the petitioner is admittedly a transgender, she cannot be enrolled in the NCC. It is submitted that the petitioner has not approached the official respondents seeking induction of transgender students and that the request for enrollment to a unit that only admits girls and boys in terms of the NCC Act is, therefore, misconceived. The contention that the admission as well as the training in NCC units are gender specific is also supported by the additionally impleaded respondent and it is contended that it is only after making provisions in the NCC Act for inducting transgenders and after appropriate steps are taken for the induction and training of such transgender persons that the petitioner can be inducted into the NCC.

8. A reply affidavit has also been placed on record by the

petitioner. It is submitted that the petitioner has a right to be recognized as a transgender person under the Act and a further right to self perceived gender identity. It is stated that since the petitioner has undergone sex-reassignment surgery, there is no further impediment to her being treated as a transgender (trans-woman) and being enrolled as an NCC cadet recognizing her self perceived gender identity as a female. It is submitted that the contention that a direction to enroll the petitioner in the NCC unit will have “far reaching consequences” is completely untenable, since the Apex Court has already laid down the law and the said law is applicable to all authorities within the State of Kerala by virtue of Article 144 of the Constitution of India. The Apex Court has clearly upheld the rights of transgender persons who had been denied the basic human rights which are guaranteed to every citizen by the Constitution of our country.

9. Sections 5 and 6 of the National Cadet Corps Act, 1948 provides as follows :-

5. Division of Corps into Divisions.- There shall be three Divisions of the Corps, namely :-

- (i) the Senior Division, recruitment to which shall be from amongst the students of the male sex of any university;

(ii) the Junior Division, recruitment to which shall be from amongst the students of the male sex of any school; and

(iii) the Girls' Division, recruitment to which shall be from amongst the students of the female sex of any university or school.

6. Enrolment.-(1) Any student of the male sex of any university may offer himself for enrolment as a cadet in the Senior Division, and any student of the male sex of any school may offer himself for enrolment as a cadet in the Junior Division if he is of the prescribed age or over.

(2) Any student of the female sex of any university or school may offer herself for enrolment as a cadet in the Girls Division :

Provided that in the latter case she is of the prescribed age or over.”

10. The Transgender Persons (Protection of Rights) Act, 2019 has been enacted pursuant to the judgment of the Apex Court in **National Legal Services Authority v. Union of India and others** [(2014) 5 SCC 438]. Section 2(b)(i) of the Act defines 'establishment' as any body or authority established by or under a Central Act or a State Act or an authority or a body owned or controlled or aided by the Government or a local authority, or a Government company as defined in Section 2 of the Companies Act, 2013 and includes a Department of the Government. A 'transgender person' is defined under Section 2(k) as a person whose gender does not match with the gender assigned to that person at birth and includes trans-man or trans-woman (whether

or not such a person has undergone Sex Reassignment Surgery or hormone therapy or laser therapy or such other therapy), person with intersex variations, genderqueer and person having such socio-cultural identities as kinner, hijra, aravani and jogta. Section 3 of the Act provides that no person or establishment shall discriminate against a transgender person. Under Section 3(a) the denial or discontinuation of, or unfair treatment in, educational establishments and services thereof is specifically prohibited under the Act. Section 4 specifically provides that a transgender person shall have a right to be recognised as such, in accordance with the provisions of this Act. Section 4(2) provides that a person recognised as a transgender under sub-section (1) shall have a right to self-perceived gender identity. Section 7 of the Act specifically provides as follows :-

7. Change in gender

(1) After the issue of a certificate under sub-section (1) of Section 6, if a transgender person undergoes surgery to change gender either as a male or female, such person may make an application, along with a certificate issued to that effect by the Medical Superintendent or Chief Medical Officer of the medical institution in which that person has undergone surgery, to the District Magistrate for revised certificate, in such form and manner as may be prescribed.

(2) The District Magistrate shall, on receipt of an application along with the certificate issued by the Medical Superintendent or Chief Medical Officer, on being satisfied with the correctness of such certificate, issue a certificate indicating change in gender in such form and manner and within such time, as may be prescribed.

(3) The person who has been issued a certificate of identity under Section 6 or a revised certificate under sub-section (2) shall be entitled to change the first name in the birth certificate and all other official documents relating to the identity of such person: Provided that such change in gender and the issue of revised certificate under sub-section (2) shall not affect the rights and entitlements of such person under this Act."

Under the Act the appropriate Governments and establishments are obliged to provide full and effective participation of transgender persons and their inclusion in society in a non-stigmatizing and non-discriminatory manner.

11. The Apex Court in **National Legal Services Authority v. Union of India and others** [(2014) 5 SCC 438] had considered the issue of recognition of self-perceived gender identity and had specifically held that the transgender persons are also entitled to basic human rights including right to life with human dignity and right to privacy and freedom of expression. Apart from declaring that transgender persons have a right to be treated as third

gender for the purpose of safeguarding their rights, the Apex Court had also declared that transgender persons have a right to decide their self identified gender and the Central Government was specifically directed to grant legal recognition to their gender identity, be it male, female or transgender. After considering the provisions of the International Conventions and the extant case law on the point, the Apex Court held that the right of a person to a self-perceived gender identity is a part of his fundamental rights guaranteed under Articles 14 and 21 of the Constitution of India and that a person cannot be discriminated against on the basis of sexual orientations or gender identity different from that assigned at the time of the birth.

12. With regard to the question whether a person who is born as a male with predominantly female orientation or vice-versa has a right to get himself to be recognised as a member of the gender of his choice, when the person has undergone surgical procedures for change of physical gender attributes, the Apex Court held that the right of a human being to choose his sex or gender identity is integral to his or her personality and is one of

the most basic aspects of self determination, dignity and freedom. It is in the above background that the contentions raised in this writ petition requires to be considered.

13. I notice that the provisions of the National Cadet Corps Act recognises NCC units and cadets only from among males and females. The National Cadet Corps Act is an enactment of the year 1948. It originally provided for enrollment of only members of the male gender as members. Amendments have been effected to include a senior division for women cadets as well The further march of the times and the change in perceptions and the declarations by the Apex Court as well as the statutory enactments recognising the rights of the transgender persons as also the right to a self-perceived identity have to be taken into account by the respondents. We cannot take recourse to the outdated provisions of a 1948 enactment to deal with the realities of life in the year 2021. The situation has to be viewed in the light of the 2019 Act which recognises the right of transgender persons to a life with dignity and prohibits discrimination against them. That the enactment was one intended to give effect to the rights guaranteed to such persons under Article 14, 15, 19 and 21

of the Constitution of India is to be borne into mind while considering cases of this nature.

14. In view of the specific provisions in the 2019 Act by which a transgender person has a right to be recognized not only as a transgender but also a right to self perceived gender identity, I am of the opinion that the petitioner who has opted for the female gender and has undergone sex reassignment surgeries for aiding her self perception as a member of the said gender would definitely be entitled to enrollment in the NCC unit reckoning her as a transgender and further as a member of her self perceived gender, that is, the female gender. The fact that the provisions of the NCC Act do not recognize the third gender or that detailed guidelines are required to be drawn up for the integration of persons of the third gender into the Armed Forces or the National Cadet Corps cannot, according to me, be a justification for denying admission to the petitioner to the NCC unit on the basis of the Identity Card obtained by her.

15. In the instant case, taking note of the pleadings and the materials on record, I am of the opinion that the petitioner is entitled to enrollment in the NCC senior girls' division and the

rejection of the request of the petitioner for such enrollment is completely unsustainable.

16. In the above view of the matter, this writ petition is allowed. The petitioner will be permitted to participate in the selection process on the basis of her application, taking note of Ext.P3 issued to her and if she is successful in the selection, she will be enrolled in the NCC unit of the University college. Needful shall be done with regard to the application of the petitioner for enrollment in the NCC unit within a period of one month from the date of receipt of a copy of this judgment.

17. There will be a further direction to the respondents to amend the enrollment criteria prescribed under Section 6 of the NCC Act, 1948 to include transgender community and to provide guidelines for enrolling transgender persons also in the NCC. Appropriate steps shall be taken by the competent among the respondents without delay, at any rate, within six months from the date of receipt of a copy of this judgment.

This writ petition is ordered accordingly.

Sd/-
Anu Sivaraman, Judge

APPENDIX

PETITIONER'S EXHIBITS:

- EXHIBIT P1 TRUE COPY OF THE CERTIFICATE FROM VELA
HOSPITAL DATED 24.10.2018.
- EXHIBIT P2 TRUE COPY OF THE AFFIDAVIT DATED
11.11.2019 SWORN BY THE PETITIONER.
- EXHIBIT P3 TRUE COPY OF THE IDENTITY CARD DATED
08.02.2019 ISSUED BY THE SOCIAL JUSTICE
DEPARTMENT.
- EXHIBIT P4 TRUE COPY OF THE REPRESENTATION DATED
15.10.2020 SUBMITTED BY THE PETITIONER
TO THE SIXTH RESPONDENT.
- EXHIBIT P5 TRUE COPY OF THE REPRESENTATION DATED
16.10.2020 SUBMITTED BY THE PETITIONER
TO THE FIFTH RESPONDENT.
- EXHIBIT P6 TRUE COPY OF THE LETTER DATED
16.10.2020 TO THE SIXTH RESPONDENT.
- EXHIBIT P7 TRUE COPY OF THE CERTIFICATE ISSUED BY
THE DIRECTOR GENERAL OF THE NCC DATED
29.03.2013.
- EXHIBIT P8 TRUE COPY OF THE NATIONAL CADET CORPS
AT 1948.

True copy

PS to Judge