



EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIRST SECTION

**CASE OF X v. THE FORMER YUGOSLAV REPUBLIC OF
MACEDONIA**

(Application no. 29683/16)

JUDGMENT

STRASBOURG

17 January 2019

FINAL

17/04/2019

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of X v. the former Yugoslav Republic of Macedonia,

The European Court of Human Rights (First Section), sitting as a Chamber composed of:

Linos-Alexandre Sicilianos, *President*,

Aleš Pejchal,

Krzysztof Wojtyczek,

Pauliine Koskelo,

Tim Eicke,

Jovan Ilievski,

Gilberto Felici, *judges*,

and Abel Campos, *Section Registrar*,

Having deliberated in private on 27 November 2018,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 29683/16) against the former Yugoslav Republic of Macedonia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Macedonian national, X (“the applicant”), on 23 May 2016. The Vice-President of the Section acceded to the applicant’s request not to have his name disclosed (Rule 47 § 4 of the Rules of Court). Respecting his self-identification, the Court will refer to his gender as male.

2. The applicant was represented by Ms N. Boshkova and Mr Cojocariu, lawyers practising in Skopje and Orpington, United Kingdom, respectively. The Macedonian Government (“the Government”) were represented by their Agent, Mr K. Bogdanov, who was succeeded by their current Agent, Ms D. Djonova.

3. The applicant, who is transgender, alleged the absence of a legislative framework and an effective remedy for legal gender recognition and the arbitrary and unjustified imposition of a requirement for genital surgery to be undertaken in order to have his sex/gender marker in the official records changed.

4. On 10 March 2017 the above complaints were communicated to the Government and the remainder of the application was declared inadmissible, pursuant to Rule 54 § 3 of the Rules of Court. It was also decided that priority should be granted to the application under Rule 41 of the Rules of Court.

5. On 6 and 9 June 2015 the non-governmental organisations Alliance Defending Freedom International (ADF) and, jointly, Transgender Europe, the European Region of the International Lesbian, Gay, Bisexual, Trans and

Intersex Association (ILGA-Europe), Trans Network Balkan (TNB) and Subversive Front were given leave to intervene in the written procedure (Article 36 § 2 of the Convention and Rule 44 § 3).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicant was born in 1987 and lives in Skopje.

7. At birth the applicant was registered as a girl, with a clearly female name. The applicant submitted that from an early age he became aware that he was male rather than female. Not being able to obtain appropriate medical treatment in the respondent State, in 2010 the applicant went to a specialist clinic in Belgrade, where a psychologist and sexologist diagnosed him with “transsexuality”. A medical certificate dated 20 September 2010 included a recommendation that the applicant pursue hormone treatment with a view to eventual genital reassignment surgery. The applicant started taking hormones to increase his testosterone levels.

8. On 1 June 2011 the applicant applied for a change of his first and family name. In a decision of 7 June 2011 the Ministry of the Interior allowed that application, registering the applicant under a clearly male forename (the applicant also changed his surname). Soon after, it issued the applicant with a new identity card bearing his new name. However, the sex/gender marker and numerical personal code (composed of ten digits, some of which indicate the person’s sex) remained the same, identifying the applicant as a female.

9. On 5 July 2011 the applicant lodged an application to have the sex/gender marker and the numerical personal code on his birth certificate corrected (*корекција*) to indicate that he was male. In support of his application he submitted copies of a medical report by a surgeon at the specialist clinic in Belgrade (see paragraph 7 above) and referred to the paper entitled “Human rights and gender identity” of October 2009 issued by the Commissioner for Human Rights of the Council of Europe (see paragraph 34 below) and the Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity.

10. In a decision of the same date, the Civil Status Registry (“the Registry”) – a body within the Ministry of Justice (“the Ministry”) - dismissed the applicant’s application, stating that “no certificate [has been] issued by a competent authority [attesting to the fact] that [the applicant’s] sex [had] been changed, the application having been corroborated only with

a certificate that gender reassignment surgery [was] in preparation, which cannot be regarded as proof that it [would] take place.”

11. The applicant appealed to the Ministry, alleging that there was no statutory provision that regulated the matter in hand. Sex reassignment surgery was unavailable in the respondent State and unjustified in his case. Furthermore, such a requirement would subject him to unwanted medical treatment and sterilisation, in breach of his rights. He argued that he had already been diagnosed as transsexual, which was sufficient to obtain legal gender recognition. In a decision of 17 October 2011 the Ministry dismissed the appeal, finding that the impugned decision had been based on section 23 of the Civil Status Registration Act (*Закон за матичната евиденција*) (“the Act”; under the 2016 amendment this provision became section 22(2) – see paragraph 25 below) and that the evidence produced had not been “sufficient and relevant” in respect of the alteration (*промена*) sought.

12. In November 2011 the applicant challenged the refusal of the lower administrative authorities to modify his sex/gender marker on the birth certificate before the Administrative Court. He argued that there was no statutory provision proscribing or specifying any conditions for the alteration of a person’s sex/gender marker and personal code.

13. On 28 February 2013 the Administrative Court quashed the Ministry’s decision. Since the applicant’s request had not been in the case file, the court could not ascertain whether the applicant had sought the rectification or alteration of the sex/gender marker only or also of the personal code, the latter having not been addressed in the impugned decision. It also held that the Ministry should have specified the appropriate evidence required and set a time-limit for the applicant to provide it. Lastly, the court found that the Ministry had neither established the relevant facts nor provided adequate reasons for its decision. In this connection it held that section 23 of the Civil Status Registration Act did not specify any requirement to have the sex/gender marker changed; it only contained an instruction to administrative authorities regarding the evidence to be adduced and assessed in such proceedings.

14. On 11 June 2013 the applicant underwent a double mastectomy (breast removal) in Belgrade and continued his hormonal therapy.

15. In the resumed proceedings, the Registry instructed the Forensic Institute (*Институт за судска медицина*) to examine the applicant. As reported in the Registry’s decision (see paragraph 17 below), on 20 June 2014 the Forensic Institute drew up a report, which stated: “[O]wing to his mastectomy and on-going hormonal therapy, [the applicant] displays male sexual characteristics which affect his everyday life. Although there is no statutory regulation ... and the second genital surgery has not been carried out, [the experts] consider that [the applicant] should be provided with a document attesting to his new sex ...”

16. The Registry also requested that the Ministry of Health specify the nature of the certificate and the authority competent to attest to the change of the applicant's sex. In reply, the Ministry of Health stated that the sex alteration procedure was not specified in health-related regulations and suggested that evidence regarding prior medical intervention in respect of the applicant should be taken into consideration.

17. On 29 December 2014 the Registry, referring to section 23 of the Act, dismissed the applicant's request for the alteration of the sex/gender marker on the birth register, holding that despite its requests to competent authorities it had not obtained "evidence of an actual change of sex (*не прибави доказ со кој ќе утврди фактичка состојба која укажува на промена на полот*)".

18. The applicant appealed against that decision. On 16 October 2015 the Ministry dismissed the appeal and upheld the decision of the Registry.

19. On 11 November 2015 the applicant challenged the latter decision before the Administrative Court, arguing that section 23 of the Act did not specify any requirement for an alteration of the sex/gender marker in civil - status documents. He furthermore submitted that the Registry had authority to administer civil-status records and accordingly to decide on the matter. The applicant also referred to the Court's case-law on the matter.

20. On 28 April 2017 the Administrative Court set aside the Ministry's decision since it had failed to forward the case file.

21. On 28 February 2018 the Registry rejected (*отфрла*) the applicant's application for lack of jurisdiction (*ненадлежност*), holding that it did not concern the rectification of an error in an entry, but the alteration of the sex/gender marker in the civil status register. On 13 July 2018 the State Commission, which had become competent to decide such issues in second instance, upheld that decision. The proceedings before the Administrative Court are underway.

22. The applicant submitted several reports from 2012 and 2016 in which psychologists had found that the protracted procedure in respect of seeking legal recognition of the applicant's gender identity was having negative consequences on his psychosocial and mental health and everyday life.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. The Constitution

23. Under Article 8(2) of the Constitution, everything that is not prohibited by the Constitution and laws is permitted.

B. Civil Status Registration Act

24. Under section 2 of the Act, the Registry has jurisdiction to administer the civil status register.

25. Section 22(2) of the Act provides that the registrar (*матичар*) rectifies errors in an entry in the civil status register until registration is completed and after it is completed – errors are to be rectified by means of a decision.

C. Personal Name Act (*Закон за личното име*)

26. Under section 5 of the Personal Name Act, a person can apply to have his or her forename and family name changed.

27. Section 6 of the Act provides that a change of a personal name will not be allowed in respect of a person who is prosecuted or convicted for an offence subject to State prosecution and who has not yet served his or her sentence. Such a request will also not be granted in respect of a person who has not fulfilled property-related or other marital- and parental-related obligations prescribed by law. The Ministry of the Interior is responsible for obtaining relevant evidence and information in this respect.

28. Section 7 provides that a request to have one's personal name changed is to be submitted to the Ministry of the Interior, which shall decide on it within thirty days.

D. Courts Act

29. Section 8(2) of the Courts Act provides that a court cannot reject a civil claim owing to a lacuna in the law; rather, it shall decide on it on the basis of general principles of law unless it is explicitly prohibited from doing so by law.

E. Relevant jurisprudence

30. In two judgments of 25 September and 2 October 2017 (U-6.no.909/2015 and Ui.no.16/2017), the Administrative Court recognised the new gender identity of two post-operative transgender people who had undergone “male-to-female transgenderism” medical surgery and ordered the relevant administrative authorities to register the claimants' new gender in the civil status register and to amend their numerical personal codes appropriately. According to the Government, the Registry was obliged to change the sex/gender markers in their birth certificates on the basis of those judgments.

III. INTERNATIONAL MATERIALS

A. Committee of Ministers of the Council of Europe

Recommendation CM/Rec(2010)5 of the Committee of Ministers to member States on measures to combat discrimination on grounds of sexual orientation or gender identity, 31 March 2010

31. The relevant parts of the Recommendation read as follows:

“IV Right to respect for private and family life

...

21. Member States should take appropriate measures to guarantee the full legal recognition of a person’s gender reassignment in all areas of life, in particular by making possible the change of name and gender in official documents in a quick, transparent and accessible way; member states should also ensure, where appropriate, the corresponding recognition and changes by non-state actors with respect to key documents, such as educational or work certificates.”

B. Parliamentary Assembly of the Council of Europe

1. Resolution 2048 (2015) on “Discrimination against transgender people in Europe”, 22 April 2015

32. The relevant parts of the Resolution read as follows:

“6. ... the Assembly calls on member States to:

...

6.2. as concerns legal gender recognition:

6.2.1. develop quick, transparent and accessible procedures, based on self-determination, for changing the name and registered sex of transgender people on birth certificates, identity cards, passports, educational certificates and other similar documents [and] make these procedures available for all people who seek to use them, irrespective of age, medical status, financial situation or police record;

...”

2. Resolution 1728 (2010) entitled “Discrimination on the basis of sexual orientation and gender identity”, 29 April 2010

33. The relevant parts of the Resolution read as follows:

“16. Consequently, the Assembly calls on member States to address these issues and in particular to:

...

16.11. address the specific discrimination and human rights violations faced by transgender persons and, in particular, ensure in legislation and in practice their right to:

...

16.11.2. official documents that reflect an individual's preferred gender identity, without any prior obligation to undergo sterilisation or other medical procedures such as sex reassignment surgery and hormonal therapy;

..."

C. United Nations High Commissioner for Human Rights

Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity (A/HRC/19/41), 17 November 2011

34. The relevant parts of the above report read as follows:

"G. Gender recognition and related issues

71. In many countries, transgender persons are unable to obtain legal recognition of their preferred gender, including a change in recorded sex and first name on State-issued identity documents. As a result, they encounter many practical difficulties, including when applying for employment, housing, bank credit or State benefits, or when travelling abroad.

...

73. The Human Rights Committee has expressed concern regarding lack of arrangements for granting legal recognition of transgender people's identities. It has urged States to recognize the right of transgender persons to change their gender by permitting the issuance of new birth certificates and has noted with approval legislation facilitating legal recognition of a change of gender.

...

VII. Conclusions and recommendations

...

84. The High Commissioner recommends that Member States:

...

(h) Facilitate legal recognition of the preferred gender of transgender persons and establish arrangements to permit relevant identity documents to be reissued reflecting preferred gender and name, without infringements of other human rights.

..."

IV. OTHER MATERIALS

Transgender Europe, "Trans Rights Europe Map 2018", published on 14 May 2018

35. It can be seen from a document entitled "Trans Rights Europe Map 2018", published by the non-governmental organisation Transgender Europe, that legal recognition of the gender identity of transgender people is

not possible in seven Council of Europe member States (Albania, Andorra, Cyprus, Liechtenstein, Monaco, San Marino and the former Yugoslav Republic of Macedonia). The document also makes clear that such recognition, even where it is possible, is subject to different legal requirements, such as sterilisation, compulsory medical intervention or mental health assessment, divorce or age restrictions.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

36. The applicant complained under Article 8 of the Convention of the lack of a regulatory framework for the legal recognition of his gender identity and about the requirement, which had no basis in domestic law, that he undergo genital surgery as a precondition for having his (male) gender identity recognised. Under Article 13, the applicant alleged a lack of an effective remedy. The Court considers that this later complaint is absorbed by the applicant's complaint about the lack of legal framework for legal gender recognition and will be analysed accordingly. Article 8 of the Convention reads as follows:

“1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, 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.”

A. Admissibility

1. *Applicability of Article 8 of the Convention*

37. In the instant case the applicant formulated his complaints under Article 8 of the Convention, and the Government did not dispute the applicability of that provision.

38. The Court sees no reasons to hold otherwise. The right to respect for private life under Article 8 of the Convention extends to gender identity, as a component of personal identity. This holds true for all individuals, including transgender people, like the applicant, who have not undergone gender reassignment treatment, or who do not wish to undergo such treatment (see *A.P., Garçon and Nicot v. France*, nos. 79885/12 and 2 others, §§ 92-94 ECHR 2017 (extracts)).

39. The “private life” aspect of Article 8 of the Convention is therefore applicable to the present case, which concerns the applicant’s application for the sex/gender marker to be altered in the civil status register.

2. *Non-exhaustion of domestic remedies*

(a) **The parties’ submissions**

40. The Government submitted that the impugned proceedings were still ongoing and that no conclusion could be drawn as to their outcome. They stated that: “[It] is legally possible that the proceedings could end with a decision on the merits ... it would be wrong to consider ahead of time that the final outcome of the case could be unsuccessful”. For this reason, they maintained that the application was premature.

41. The applicant contested the Government’s objection. The impugned proceedings, which concerned his request to have his sex/gender marker changed in the civil status register from a female to a male one, had lasted for more than seven years and there was no indication that they would be completed in the near future. It was therefore for the Court to decide on the case.

(b) **The Court’s assessment**

42. The general principles regarding the exhaustion rule under Article 35 § 1 of the Convention are set out in *Vučković and Others v. Serbia* (see *Vučković and Others v. Serbia* (preliminary objection) [GC] (nos. 17153/11 and 29 others, §§ 70-77, 25 March 2014, with further references, in particular to *Akdivar and Others v. Turkey*, 16 September 1996, *Reports of Judgments and Decisions* 1996-IV).

43. In that context, the Court finds it appropriate to reiterate that according to the “generally recognised rules of international law” there may be special circumstances which absolve the applicant from the obligation to exhaust the domestic remedies at his or her disposal (see *Vučković and Others*, cited above, § 73 and *Akdivar and Others*, cited above, § 67). The excessive length of the domestic proceedings may constitute a special circumstance which would absolve the applicants from exhausting the domestic remedies at their disposal (see *M. and M. v. Croatia*, no. 10161/13, § 174, ECHR 2015 (extracts), and *Šorgić v. Serbia*, no. 34973/06, § 55, 3 November 2011).

44. Turning to the present case, the Court notes that the impugned proceedings which the applicant instituted in order to obtain redress in regard to the situation of which he complains before it have so far been pending for more than seven years and it is not yet possible to predict when they will come to an end. It should be observed that the protracted examination of the applicant’s claim and the failure to obtain legal recognition of the preferred gender have, as stated by psychologists (see

paragraphs 22 above), is having long-term negative consequences for the applicant's mental health.

45. The Court therefore considers that, given the nature and the particular situation of the applicant, who faces a continuing situation highly prejudicial to his private life, he cannot be expected to await any longer the outcome of the impugned proceedings (see *X v. Germany*, no. 6699/74, Commission decision of 15 December 1977, Decisions and Reports (DR) 11, pp. 16 and 24).

46. Accordingly, the Court rejects the Government's preliminary objection on the grounds of non-exhaustion of domestic remedies.

3. Non-compliance with the six-month rule

(a) The parties' submissions

47. As regards the applicant's complaint about the alleged lack of clear legal procedures for gender recognition, the Government maintained that the applicant had not complied with the six-month time-limit, which according to them had started to run when he had become aware or ought to have become aware of the circumstances complained of. According to the Government, that had been long before the application had been submitted before the Court – namely, before the applicant had instituted the impugned domestic proceedings.

48. The applicant contested the Government's objection, arguing that, notwithstanding the lack of clear regulation of the gender recognition procedure, the applicable legislation (paragraphs 23, 25 and 29 above) laid a sufficient legal basis for his request to be decided on the merits. Furthermore, the Convention was directly applicable and the domestic courts could have relied on the relevant case-law of the Court. Lastly, he maintained that he had been required to try the available domestic remedies before applying to the Court.

(b) The Court's assessment

49. The six-month time-limit under Article 35 § 1 of the Convention marks out the temporal limits of supervision carried out by the organs of the Convention and signals to both individuals and State authorities the period beyond which such supervision is no longer possible. As a rule, the six-month period runs from the date of the final decision in the process of the exhaustion of domestic remedies. Where it is clear from the outset, however, that no effective remedy is available to the applicant, the period runs from the date of the acts or measures complained of, or from the date of the applicant gaining knowledge of such acts or their effect on or prejudice to him or her. Where an applicant avails himself of an apparently existing remedy and only subsequently becomes aware of circumstances which render the remedy ineffective, it may be appropriate for the purposes

of Article 35 § 1 to take the start of the six-month period from the date when the applicant first became aware or ought to have become aware of those circumstances (see *El-Masri v. the former Yugoslav Republic of Macedonia* [GC], no. 39630/09, §§ 135 and 136, ECHR 2012).

50. The Court observes that the Government's argument that the applicant's complaint had been submitted out of time consisted of maintaining that the six-month time-limit should be regarded as having started to run when the applicant first became aware or ought to have become aware of the circumstances complained of, which according to them had been before he had instituted the impugned proceedings. In so far as this argument may be understood as contesting the effectiveness of the remedy used by the applicant, it is seemingly in contradiction with their submissions that the impugned proceedings could not be considered futile ahead of time (see paragraph 40 above). Be that as it may, the Court does not accept the Government's objection under this head for the following reasons.

51. It is to be noted that the applicant was not prevented in any practical manner from bringing his claim to have his sex/gender marker changed in the official civil-status records before the national authorities. Indeed, the case was litigated up to the Administrative Court, which ruled twice in the proceedings by upholding the applicant's claim and remitting the case for fresh examination by the administrative authorities. Initially, the authorities' findings were based on section 22(2) (the former section 23) of the Act and concerned the absence of documentary evidence attesting to the factual change of sex. After the applicant's circumstances had changed, the Registry commissioned a medical examination of the applicant exclusively for the purposes of the impugned proceedings (see paragraphs 15 and 16 above). It was only in the last decision of 28 February 2018 – namely more than six and a half years after the introduction of the applicant's application – that the Registry declared that it did not have authority to decide on the claim. That decision is not final, since appeal proceedings are still pending.

52. The above demonstrates, in the Court's opinion, the efforts of the national authorities, including the courts, to decide on the applicant's claim and set the relevant legal principles regarding issues which, in the absence of any prior domestic jurisprudence, appear to have been novel when submitted for adjudication. The Court notes that the Administrative Court has accepted claims identical to those of the applicant in the instant case, admittedly under different factual circumstances, but decided under the same law (see paragraph 30 above).

53. Accordingly, the Court considers that it was not unreasonable that the applicant decided to pursue the impugned remedy in order to have his position settled at domestic level before submitting his complaint to the Court. This is in line with the principle of subsidiarity, according to which it is best for issues to be resolved, in so far as possible, at the domestic level. It is in the interests of the applicant, and the effectiveness of the Convention

system, that the domestic authorities, who are best placed to do so, act to put right any alleged breaches of the Convention (see *El Masri*, cited above, § 141).

54. In such circumstances, and having regard to the diligence and interest displayed by the applicant in the proceedings, the Court rejects the Government's objection that the applicant's complaint was introduced out of time.

4. Conclusion

55. No other grounds for declaring the application inadmissible having been established, it must therefore be declared admissible.

B. Merits

1. The parties' submissions

56. The applicant maintained that the procedure to have the sex/gender marker in the civil status register changed was not regulated by law nor was there any established judicial practice in respect of the matter. The law did not differentiate between the rectification and alteration of entries in the public records. The case at issue confirmed that there was no "quick, transparent and accessible" legal gender recognition procedure in the respondent State. Furthermore, the authorities had arbitrarily created and imposed on him a surgery requirement. Relying on the case of *A.P., Garçon and Nicot* (cited above), the applicant submitted that the imposition of that requirement had been in violation of the right to respect for private life under Article 8. That case had set a precedent that transgender people should not be forced to choose between their right to bodily integrity and the right to have their gender identity legally recognised. Contrary to that principle, he had been required to undergo genital surgery even though (i) there had not been a statutory basis and (ii) it had not been justified.

57. The Government submitted that rectifications and changes of entries in the civil status register were regulated by the Act. Under section 22(2) of the Act, the Registry had authority to rectify errors in the civil status register by its own decision and to change an entry by implementing a decision of other relevant bodies. They contested the applicant's arguments that he had been required to undergo full reassignment surgery in order to have his sex/gender marker changed. However, there was no possibility to have his sex/gender marker, unlike his personal name, changed on the basis of self-determination or contrary to decisive biological characteristics. Even assuming that such a change was legally possible, it would cause many practical problems for both the people concerned and others. The Government stated that the terms and conditions for legal gender recognition varied among the States. In the absence of a European

consensus on the conditions under which the sex/gender marker could be changed in official records, the States should enjoy a wider margin of appreciation to regulate the matter and to strike a fair balance between the interests of an individual and the general interest.

2. Observations of the third-party interveners

(a) ADF International

58. The third-party intervener submitted that member States diverged significantly in their approach to issues of legal gender status and changes thereto. The Court recognised, accordingly, that they enjoyed a wide margin of appreciation in regulating those issues. There were further diverse medical and psychiatric opinions on the nature of transsexualism and surgical treatment. Accordingly, Article 8 could not be construed as dictating that a single practice be followed by the member States on questions of administrative procedure pertaining to changes to legal gender status. The requirement of “complete sex reassignment surgery” also had various practical implications and could not accordingly be seen as simply an arbitrary and baseless requirement under law.

59. For those reasons a cautious approach should be applied to requests for legal recognition of changes to perceived identity without any medical or surgical treatment. Acceptance of such claims would introduce significant uncertainty and would imply that States would be required to officially recognise changes solely on the basis of self-determination.

60. ADF concluded that when a case, such as the instant one, raised fundamental questions regarding definitions which had ramifications in the spheres of ethics, psychology and medical science, the States should enjoy wide discretion in defining rules aimed at striking a balance between the competing public and private interests at stake. The way in which States addressed transgender issues depended on the specific features of the domestic environment.

(b) Joint observations of Transgender Europe (TGEU), the European Region of the International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA-Europe), Trans Network Balkan (TNB) and Subversive Front

61. The interveners pointed to the relevant case-law of the Court with respect to transgender individuals’ rights to have their gender identity legally recognised. They referred to the comparative information about the situation in different Council of Europe member States (see paragraph 35 above), which given the recent developments, indicated a clear trend towards greater autonomy of individuals in legal gender recognition procedures. The reforms that were underway reflected the fact that the European standard of “quick, transparent and accessible” legal gender

recognition procedures “based on self-determination”, as postulated in the Council of Europe documents (paragraphs 31-33 above), were implemented in practice. Referring to the case of *A.P., Garçon and Nicot* (cited above) they submitted that legal gender recognition should not be dependent on gender reassignment surgery or hormonal treatment.

62. They submitted that the lack of statutory regulation of legal gender recognition procedures in the respondent State created a state of uncertainty for transgender people, which mitigated in favour of inconsistent practice being created and applied by the domestic authorities. Furthermore, there was limited access to trans-specific health care, which impeded any medical treatment (not available in the respondent State) in order to have gender identity recognised.

3. *The Court’s consideration*

(a) **Preliminary remarks: Whether the case concerns interference or a positive obligation**

63. The Court has previously held that while the essential object of Article 8 is to protect individuals against arbitrary interference by public authorities, it may also impose on a State certain positive obligations to ensure effective respect for the rights protected by Article 8. This Article imposes on States a positive obligation to secure to their citizens the right to effective respect for their physical and psychological integrity. This obligation may involve the adoption of specific measures, including the provision of an effective and accessible means of protecting the right to respect for private life. Such measures may include both the provision of a regulatory framework of adjudicatory and enforcement machinery protecting individuals’ rights and the implementation, where appropriate, of these measures in different contexts (see *Hämäläinen v. Finland* [GC], no. 37359/09, §§ 62 and 63, ECHR 2014).

64. The Court observes that the applicant’s grievances concern the alleged lack of a regulatory framework for legal gender recognition and the alleged requirement that such recognition be conditional on complete sex reassignment surgery.

65. Having regard to the facts of the case and the parties’ submissions, the Court considers that the primary question to be determined is whether or not the respondent State failed to comply with its positive obligation to put in place an effective and accessible procedure, with clearly defined conditions securing the applicant’s right to respect for his private life, as defined above (see paragraphs 38 and 39 above). The answer to that question would be determinative for the other aspect of the applicant’s complaint – namely that he was allegedly compelled to undergo complete gender reassignment surgery in order to have his sex/gender marker changed in the birth register. This is so given the fact that that aspect

concerns a specific requirement which allegedly was imposed by the authorities to be fulfilled by the applicant, as a pre-operative transsexual who has undergone partial surgery.

(b) Compliance with the State's positive obligation

66. The relevant Convention principles have been summarised in the Court's judgment in the case of *Hämäläinen* (cited above, §§ 65-67).

67. Turning to the present case, the Court notes that there is no provision in the domestic law that explicitly allows the alteration of a person's sex/gender marker in the civil status register, unlike the right to have a person's personal name changed (see paragraphs 26-28 above). Furthermore, the legislation does not impose any terms and conditions to be fulfilled and procedures to be followed. That was confirmed by the Administrative Court (see paragraph 13 above). Similarly, no provision clearly specifies the body that has jurisdiction to decide such a request (unlike a request for a change of a personal name – see paragraph 28 above). That the respondent State has no regulatory framework regarding legal recognition of gender reassignment was confirmed by relevant international fora (see paragraphs 35 and 61 above) and acknowledged by the Court in its analysis of comparative law (*Hämäläinen*, cited above, § 32). The same appears to have been acknowledged in the impugned proceedings (see paragraphs 13, 15 and 16 above).

68. Notwithstanding the above, the Court will examine the Government's argument that the Act was to be considered as having laid a sufficient and effective legal basis for the issue at stake. In this connection the Government maintained that the Act – in particular section 22(2) – permitted the rectification and modification of entries in the civil status register and vested the Registry with authority to decide on both matters in two different ways: errors could be rectified directly by the Registry and entries could be altered on the basis of a separate decision by a body with the relevant authority, as a prerequisite for the change sought. Since the applicant sought to change the gender that had been assigned at birth and recorded as such in the birth register, it would appear that it fell to be examined under the latter procedure described above. That was the approach applied by the Registry, which refused on two occasions to change the applicant's sex/gender marker in the birth register from a female to a male one owing to the absence of documentary evidence attesting to his altered sex (see paragraphs 10 and 17 above). However, the Registry did not specify the nature of that evidence, despite it having lodged requests with the relevant authorities for information in this respect (see paragraph 16 above). The Administrative Court referred to that omission in remitting the case for reconsideration (see paragraph 13 above). The Court attaches weight to the fact that the Government did not present any evidence that those issues, including the procedure for obtaining the relevant evidence,

were regulated by law or that there was established judicial practice regarding the matter. In so far as it may be inferred from the Government's submissions that a judicial declaration by the Administrative Court acknowledging the applicant's new gender identity could be relied upon by the Registry in making the change sought (see paragraph 30 above), it is to be noted that that court did not decide on the applicant's case on the merits, even though it had examined it on two occasions (see paragraphs 13 and 20 above). Lastly, it is not without relevance that the Registry, in its last decision of 28 February 2018 – namely six and a half years after the applicant had initiated the impugned proceedings – declared that it did not have authority to decide on the applicant's claim (see paragraph 22 above).

69. All the above is sufficient for the Court to conclude that the current regulatory framework in the respondent State on legal gender recognition leaves a number of important questions unanswered. Among them is the existence and nature of any requirement that a claimant needs to fulfil in order to have the sex/gender marker in the official records changed. As noted in paragraph 67 above, the domestic law does not address that issue. Furthermore, it was not argued – and the Court was not presented with any evidence – that there was any (let alone settled) jurisprudence specifying any such requirement. The applicant argued that he had been compelled to undergo complete gender reassignment surgery in order to have the sex/gender marker changed in the birth register. Assuming that the early findings of the administrative authorities may have pointed to such a conclusion, the Court observes that no definitive position was taken on the matter. It is to be noted that the applicant's claim to be granted a new male sex/gender marker was not finally dismissed, and the impugned proceedings are still pending (see, conversely, *Hämäläinen*, cited above, § 64). Accordingly, and having regard to the arguments stated above, any conclusion as to whether the applicant, as a pre-operative transsexual who has undergone partial surgery, will be allowed to have his preferred gender legally recognised would veer precariously close to speculation.

70. The Court finds that the circumstances of the case reveal legislative gaps and serious deficiencies that leave the applicant in a situation of distressing uncertainty *vis-à-vis* his private life and the recognition of his identity. As stated above (see paragraphs 22 and 44), the protracted examination of the applicant's claim, for which the national authorities bore sole responsibility, is having long-term negative consequences for his mental health. The foregoing considerations are sufficient to enable the Court to conclude that the current legal framework in the respondent State does not provide “quick, transparent and accessible procedures” for changing on birth certificates the registered sex of transgender people (see paragraphs 31 and 32 above).

71. In the light of the above considerations, the Court concludes that there has been a violation of Article 8 of the Convention on account of the

lack of a regulatory framework ensuring the right to respect for the applicant's private life (see paragraphs 38 and 39 above).

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

72. Article 41 of the Convention provides:

“If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”

A. Damage

73. The applicant claimed 23,650 euros (EUR) in respect of pecuniary damage. That figure covered loss of income (given his limited employment opportunities) and the cost of medical examinations and past (see paragraph 14 above) and possible future interventions (complete gender reassignment surgery). Copies of invoices were submitted in support. He also claimed EUR 10,500 in respect of non-pecuniary damage for the stress, anxiety, fear and humiliation suffered. In this connection he submitted a psychiatric report of 4 November 2017 which reiterated earlier findings regarding the negative consequences of the ongoing proceedings on his psychosocial and mental health (see paragraph 22 above).

74. The Government contested these claims as unsubstantiated and excessive and submitted that there was no causal link between the pecuniary damage claimed and the alleged violations.

75. The Court does not discern any causal link between the violation found and the pecuniary damage claimed; it therefore rejects this claim. On the other hand, it awards the applicant EUR 9,000 in respect of non-pecuniary damage, plus any tax that may be chargeable.

B. Costs and expenses

76. The applicant did not claim the reimbursement of any costs and expenses. Accordingly, the Court does not award any sum in this respect.

C. Default interest

77. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT,

1. *Declares*, by a majority, the application admissible;
2. *Holds*, by five votes to two, that there has been a violation of Article 8 of the Convention on account of the lack of a regulatory framework ensuring the right to respect for the applicant's private life;
3. *Holds*, by five votes to two,
 - (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final, in accordance with Article 44 § 2 of the Convention, EUR 9,000 (nine thousand euros), plus any tax that may be chargeable, to be converted into the national currency of the respondent State, at the rate applicable at the date of settlement;
 - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period, plus three percentage points;
4. *Dismisses*, unanimously, the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 17 January 2019, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Abel Campos
Registrar

Linos-Alexandre Sicilianos
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the joint separate opinion of Judges Pejchal and Wojtyczek is annexed to this judgment.

L.A.S.
A.C.

DISSENTING OPINION OF JUDGES PEJCHAL AND WOJTYCZEK

1. We respectfully disagree with the views of the majority that (i) the application is admissible and that (ii) there has been a violation of Article 8 of the Convention on account of the lack of a regulatory framework ensuring the right to respect for the applicant's private life.

I. The question of applicability of Article 8 in the instant case

2. We have explained our views concerning the interpretation of the European Convention on Human Rights in general and of Article 8 of the Convention in particular in our dissenting opinion appended to the judgment of 14 December 2017 in the case of *Orlandi and Others v. Italy* (nos. 26431/12 and 3 others, 14 December 2017). We would like to reiterate here that the Court's mandate is limited to ensuring the observance of the engagements undertaken in an international treaty, namely, the Convention and the Protocols thereto (Article 19), which was only a first step for the collective enforcement of certain rights stated in the Universal Declaration of Human Rights (see the Preamble to the European Convention on Human Rights). Moreover, in a Europe that adheres to the ideals of the rule of law and democracy the letter of the Convention is the impassable frontier for the powers of the European Court of Human Rights. It is incompatible with the mandate of a judicial body to trigger or amplify societal changes by way of an "evolutive interpretation" of the Convention.

3. The majority set forth their methodology in the instant case in the following terms in paragraph 65, *in principio*.

"Having regard to the facts of the case and the parties' submissions, the Court considers that the primary question to be determined is whether or not the respondent State failed to comply with its positive obligation to put in place an effective and accessible procedure, with clearly defined conditions securing the applicant's right to respect for his private life, as defined above (see paragraphs 38 and 39 above) ...".

This statement triggers two objections. Firstly, we note that the approach adopted is based upon a confusion between issues of procedural law (the reference to "an effective and accessible procedure") and issues of substantive law (the requirement of "clearly defined conditions securing the applicant's right to respect for his private life"). The latter have to be clearly distinguished from the former.

Secondly, the majority refer to "respect for his private life, **as defined above**" (emphasis added). Indeed, an assessment as to whether or not a respondent State failed to comply with a positive obligation presupposes a sufficiently clear and precise definition of the content of the Convention right and in particular of the positive obligations encompassed therein.

Unfortunately the majority do not propose such a definition in the reasoning.

4. Concerning the meaning of Article 8, the majority state the following in paragraphs 38 and 39 of the judgment:

“38. ...The right to respect for private life under Article 8 of the Convention extends to gender identity, as a component of personal identity. This holds true for all individuals, including transgender people, like the applicant, who have not undergone gender reassignment treatment, or who do not wish to undergo such treatment (see *A.P., Garçon and Nicot v. France*, nos. 79885/12 and 2 others, §§ 92-94 ECHR 2017 (extracts)).

39. The “private life” aspect of Article 8 of the Convention is therefore applicable to the present case, which concerns the applicant’s application for the sex/gender marker to be altered in the civil status register.”

This part of the reasoning is a typical example of a *non sequitur*. We agree with the very general premise that the right to respect for private life under Article 8 of the Convention extends to gender identity as a component of personal identity. The problem is that this general requirement does not tell us anything about the precise scope of State obligations in this field. The conclusion that Article 8 of the Convention is applicable to the present case does not logically follow from the proposition that the right to respect for private life under Article 8 of the Convention extends to gender identity, as a component of personal identity.

5. This logically erroneous *non sequitur* appears even clearer when placed against the backdrop of the existing Grand Chamber case-law. The majority rightly state in paragraph 66 that the relevant Convention principles have been summarised in the Court’s judgment in the case of *Hämäläinen v. Finland* ([GC], no. 37359/09, ECHR 2014). We note that these principles were summarised in that judgment as follows:

“67. In implementing their positive obligations under Article 8, the States enjoy a certain margin of appreciation. A number of factors must be taken into account when determining the breadth of that margin. Where a particularly important facet of an individual’s existence or identity is at stake, the margin allowed to the State will be restricted (see, for example, *X and Y v. the Netherlands*, cited above, §§ 24 and 27, and *Christine Goodwin*, cited above, § 90; see also *Pretty v. the United Kingdom*, no. 2346/02, § 71, ECHR 2002-III). Where, however, there is no consensus within the member States of the Council of Europe, either as to the relative importance of the interest at stake or as to the best means of protecting it, particularly where the case raises sensitive moral or ethical issues, the margin will be wider (see *X, Y and Z v. the United Kingdom*, 22 April 1997, § 44, *Reports* 1997-II; *Fretté v. France*, no. 36515/97, § 41, ECHR 2002-I; and *Christine Goodwin*, cited above, § 85). There will also usually be a wide margin of appreciation if the State is required to strike a balance between competing private and public interests or Convention rights (see *Fretté*, cited above, § 42; *Odièvre*, cited above, §§ 44-49; *Evans v. the United Kingdom* [GC], no. 6339/05, § 77, ECHR 2007-I; *Dickson v. the United Kingdom* [GC], no. 44362/04, § 78, ECHR 2007-V; and *S.H. and Others v. Austria* [GC], no. 57813/00, § 94, ECHR 2011).

68. The Court has already examined several cases relating to the lack of legal recognition of gender reassignment surgery (see, for example, *Christine Goodwin*, cited above; *Van Kück v. Germany*, no. 35968/97, ECHR 2003-VII; *Grant*, cited above; and *L. v. Lithuania*, cited above, § 56). While affording a certain margin of appreciation to States in this field, it has held that States are required, in accordance with their positive obligations under Article 8, to recognise the change of gender undergone by post-operative transsexuals through, *inter alia*, the possibility to amend the data relating to their civil status, and the ensuing consequences (see, for example, *Christine Goodwin*, cited above, §§ 71-93, and *Grant*, cited above, §§ 39-44)."

We note in this context that, according to the Grand Chamber, where there is no consensus within the member States of the Council of Europe, either as to the relative importance of the interest at stake or as to the best means of protecting it, particularly where the case raises sensitive moral or ethical issues, the margin will be wider. We further note that States are required only to recognise the *change of gender undergone by post-operative transsexuals* (emphasis added). *A contrario*, the Grand Chamber did not impose any obligation to recognise the change of sex by transsexuals who had not undergone an operation, leaving the regulation of that issue to the High Contracting Parties.

6. In our view, Article 8 under its positive limb can be applicable to positive claims raised by applicants only if there is at least a sufficiently precise *prima facie* obligation to accept such claims (see, on *prima facie* rights, R. Alexy, *A Theory of Constitutional Rights*, Oxford: Oxford University Press 2002, p. 197-200). For the reasons explained above, this condition has not been fulfilled in the instant case. Therefore Article 8, as interpreted by the Grand Chamber, is not applicable to the specific claims raised by the applicant. In any event, even assuming that these claims could encompass at least a *prima facie* obligation of the State to act, the grievances raised under Article 8 should have been declared manifestly ill-founded.

II. The question of “European consensus”

7. We note that it appears clearly from the factual findings made by the Court in the above-mentioned case of *Hämäläinen v. Finland* that there is no consensus among the European States on the question whether there is a right to have a new sex legally recognised and which conditions have to be fulfilled for such recognition.

This has been further confirmed in the judgment *A.P., Garçon and Nicot v. France* (applications nos. 79885/12, 52471/13 and 52596/13) in the following terms:

“... the Court notes that the Contracting Parties are divided as regards the sterility requirement (see paragraph 71 above). There is therefore no consensus on the subject. It further notes that public interests are at stake, with the Government pleading in that regard the necessity of safeguarding the principle of the inalienability of civil status

and ensuring the reliability and consistency of civil-status records, and that the present case raises sensitive moral and ethical issues.”

The current state of legislation in the High Contracting parties has been presented in a document entitled “Trans Rights Europe Map 2018”, published by the non-governmental organisation Transgender Europe. The majority summarised their conclusions in the following terms in paragraph 35:

“It can be seen from a document entitled “Trans Rights Europe Map 2018”, published by the non-governmental organisation Transgender Europe, that legal recognition of the gender identity of transgender people is not possible in seven Council of Europe member States (Albania, Andorra, Cyprus, Liechtenstein, Monaco, San Marino and the former Yugoslav Republic of Macedonia). The document also makes clear that such recognition, even where it is possible, is subject to different legal requirements, such as sterilisation, compulsory medical intervention or mental health assessment, divorce or age restrictions.”

8. In their reasoning the majority refer to the judgment in the above-mentioned case of *A.P., Garçon and Nicot v. France*. We note in this context that in that judgment one of the Chambers of the Court departed from the above-mentioned principles set forth in the case of *Hämäläinen v. Finland*. In our view, such a departure has not been persuasively justified in the reasoning. Moreover, the scope of that Chamber judgment is limited as it pertains to a State in which the legislation has been changed, subsequent to the facts of the case, in a way which accommodates the claims of the applicants.

We note that the reasoning of this judgment refers to a “trend” that “has been emerging” in Europe. References to “emerging trends” are typical signs of judicial activism and are used in the absence of arguments under the applicable rules of treaty interpretation, codified in Articles 31 and 32 of the Vienna Convention on the Law of Treaties.

9. We would also like to add in this context two or three more general remarks. Firstly, the Convention reflects the consensus of the High Contracting Parties. But we know what Cato (as quoted by Titus Livius) said: *nulla lex satis commoda omnibus est*. That is why the Convention contains Article 57 and also Article 15. An absolute consensus is not possible in the human community.

Secondly, social life is regulated not only by the law but also by different types of social rules. In many fields social self-regulation may yield better results than legal rules.

Thirdly, if there is no consensus among the High Contracting Parties as regards the question of a wide interpretation of some of the Articles of the Convention, the statement that a legislative framework on this issue does not exist in a particular member State loses its relevance. In such situations, we cannot adjudicate on the absence of a legislative framework without

avoiding the threat of a fundamental conflict with the spontaneous social order among the free citizens of that particular State.

III. The question of the “regulatory framework” in the respondent State

10. The argumentative strategy of the majority is based on the assumption that the undeniable delay in obtaining a final decision in the applicant’s case must have been caused by deficiencies in the domestic legislation. Showing that the cause of such delays in processing a case lies in deficient legislation is, however, a very perilous exercise.

Firstly, the fact that certain legal issues are not explicitly regulated does not mean that there is no regulatory framework pertaining to those issues. The question may be regulated either by more general (written or unwritten) legal principles or by unwritten *rules of closure* which ensure the completeness of a legal system. In paragraph 29 the majority rightly refer to section 8(2) of the Courts Act, which provides that a court cannot reject a civil claim owing to a lacuna in the law; rather, it shall decide on it on the basis of general principles of law unless it is explicitly prohibited from doing so by law. This clearly implies that a claim raised without a legal basis must be rejected by the competent domestic authorities and ultimately by the courts.

Secondly, we note that throughout the proceedings the domestic non-judicial bodies constantly applied one criterion for sex-marker alteration: the persons concerned had to provide evidence of an actual change of sex, meaning proof of sex reassignment surgery. The applicant’s claim was either dismissed by the non-judicial bodies on the merits or rejected for lack of jurisdiction because it could not be classified as a request for rectification of an entry. We also note that the Administrative Court did not have the opportunity to examine the substance of the applicant’s claim. Its judgments had a very limited scope: they quashed the decisions made by the domestic authorities on technical grounds – first because the applicant’s request had not been in the case file and the decision of the Minister was not properly reasoned and second because the applicant’s file was not forwarded to the Court (see paragraphs 13 and 20). It is true that the Administrative Court’s judgment of 28 February 2013 addressed the issue of the requirements for a sex change, but in any event an erroneous interpretation of the relevant substantive provisions was not the reason for quashing the administrative decision.

Thirdly, if we understand the domestic law of the respondent State correctly, the legislation in force – even if it permits a change of first name relatively freely – does not grant transsexual persons the right to have their new sex officially registered without previous sex reassignment surgery. The majority note the lack of domestic case-law on this issue. This only implicitly confirms that the claim of the applicant in respect of the sex

marker does not have any legal basis in domestic law. There is no case-law because of the general awareness that potential claims will be rejected as groundless. The two judgments of the Administrative Court cited in paragraph 30 further uphold that the principle that the right to have the new sex registered and the personal code modified is limited to persons who have undergone sex reassignment surgery. In any event, it is not acceptable to find a lack of a “regulatory framework” ensuring a Convention right before a first claim raised by a person concerned has ever been decided on the merits by a final judicial decision.

Fourthly, a deficiency in the domestic legislation usually entails inconsistencies in the case-law and diverging lines of interpretation. There is no such divergence in respect of the applicant’s request to have the sex marker changed. On the contrary, the approach of all the bodies which addressed the substance of the applicant’s claim in respect of the sex marker confirmed that it lacked a legal basis in domestic law. Even in situations when delays in processing arise in connection with the content of domestic law, a single case of delayed proceedings is not *per se* a sufficient ground to declare a legal framework as lacking or deficient as such.

In the present case the applicant’s request to have the sex marker modified has not been examined within a reasonable time because of procedural mistakes made by the domestic authorities in application of the existing rules, not because of problems with the interpretation or the content of any legal provisions, let alone any substantive provisions. In such conditions, there are no sufficient reasons to conclude that the domestic legislation is deficient or unclear.

11. The majority find a violation of Article 8 of the Convention on account of the “lack of a regulatory framework ensuring the right to respect for the applicant’s private life”. They place the accent on the protracted examination of the claim and the distressing uncertainty. There therefore seems to be a violation not because the applicant’s claim has not been upheld within a reasonable time but because it has not been examined on the merits within a reasonable time. If we understand the reasoning correctly, a possible way of executing the judgment, in line with the above-mentioned Grand Chamber judgment in the case of *Hämäläinen v. Finland*, would be to confirm – either in a clear judicial decision or in an explicit legislative provision – that the applicant’s claim for a change of the sex marker is groundless.

Conclusion

12. In our view, the delay in processing the applicant's request at the domestic level is not justified. The applicant is entitled to have his claim examined within a reasonable time. In the instant case however, this is an issue under Article 6, not Article 8 of the Convention.

The Convention mechanism is based upon the idea of subsidiarity. In particular, the interpretation of national law is a matter for the domestic courts and other national authorities. In the instant case, the Court has departed from its established case-law on subsidiarity by finding a lack of an appropriate "regulatory framework" in respect of a certain class of claims before any such claim has ever been finally decided on the merits by a domestic court. We regret to say that this is not an appropriate way of engaging in judicial dialogue with domestic courts and legislators for the sake of protection of human rights.