

IN THE EUROPEAN COURT OF HUMAN RIGHTS

X. v. the former Yugoslav Republic of Macedonia

(Application no 29683/16)

WRITTEN COMMENTS

submitted jointly by

Transgender Europe

Trans Network Balkan

ILGA Europe

Subversive Front

28. July 2017

Introduction

1. These written comments are submitted jointly by Transgender Europe, Trans Network Balkan, ILGA Europe and Subversive Front.
2. The present case involves a transgender man who was asked to undergo genital surgery as a precondition for having his gender identity recognised albeit no statutory provisions regulating the procedure for recognition of gender identity exist in Macedonia.
3. This submission is structured as follows. **First**, the third party intervention will critically assess procedures that make legal gender recognition conditional on medical treatment, including hormone treatment that may lead to infertility, or any medical expertise ordered by the national court, demonstrating that they are in breach of fundamental human rights and constitute discrimination on ground of gender identity. **Secondly**, it will contextualise the practice in Macedonia by presenting recent international developments and professional expert opinions that point towards abandoning intrusive medical treatment requirements, de-psychopathologising trans identities and increasingly respecting individuals' freedom to self-determine their gender identity. **Thirdly**, it provides information regarding practical obstacles faced by trans people seeking legal gender recognition in Macedonia.

I Medicalised gender recognition procedures violate human rights law

4. The Yogyakarta Principles, an authoritative document synthesising the manner in which international law applies to lesbian, gay, bisexual, transgender and intersex (LGBTI) people, suggest that states should take “all necessary legislative, administrative and other measures” to ensure that legal gender recognition (LGR) procedures exist, which are “efficient, fair and non-discriminatory, and respect the dignity and privacy of the person concerned.”¹
5. Since 2002, the European Court of Human Rights has been at the forefront of developing the content of Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) with respect to transgender individuals' rights to have their gender identity legally recognised. The scope of right to private life entails now State Parties' obligation to respect the diverse gender identities and expressions of its residents. This is exemplified in cases such as *Goodwin v. United Kingdom*², where the Court acknowledged that the State Parties are obliged to have procedures in place to recognise the gender identity of a person, and in *Hämäläinen v. Finland* where the Court specified that the gender recognition procedure must be “effective and accessible”³.
6. Recently, the Court has gone further to lay down rules as to the nature of the

¹ Principle 3. The *Yogyakarta Principles* were mentioned as persuasive authority by Judges Sajó, Keller and Lemmens in their dissenting opinion, §16, in *Hämäläinen v. Finland* [GC], no. 37359/09, ECHR 2014.

² *Goodwin v. UK*, no. 28957/95, ECHR 2002-VI.

³ *Hämäläinen v. Finland* [GC], no 37359/09, § 64, ECHR 2014.

requirements for gender recognition. In the judgment of *A.P., Garçon and Nicot v. France*⁴ the Court held that the “irreversible transformation of appearance“ required by the French judiciary as the precondition to the LGR should be considered a mandatory sterilisation requirement, which is in breach of Article 8 of the Convention.

7. This development in the Court’s case-law follows logically from the earlier established postulate that gender identity belongs to “one of the most intimate areas of a person’s private life”,⁵ is a free-standing “right”,⁶ a “fundamental aspect of the right to respect for private life”⁷, and is “one of the most basic essentials of self-determination”.⁸ If gender identity enjoys the protection granted under Article 8, the preconditions and requirements that the State Parties establish as part of the legal procedures recognising gender identity must also be in accordance with the case law, developed over the years, on what constitutes disrespect of private life according to Art 8.

8. There is steadily growing understanding among State Parties to the Convention on gender identity being part of the intimate area of private life. As of May 2017, LGR procedures are available in 30 State Parties. While in 2013 only four countries provided LGR without sterility requirement, nowadays compulsory sterilisation is not required in 20 State Parties.⁹ In 6 states¹⁰ LGR is based on the individual’s self-determination and does not require a mental health assessment. All of these laws have been adopted in the last three years, indicating a clear trend towards greater autonomy of the individual in LGR procedures.

9. Since 2014, LGR procedures were progressively reformed in 9 Member States¹¹ through legislative or judicial decisions. In the coming months, further improvements are awaited in 4 States¹². **In total, initiatives in 29 Council of Europe Member States are currently underway** or have been recently implemented, establishing a clear trend in Europe to move away from an essentialist and biological concept of gender that has in the past gone hand in hand with medicalised procedures underpinning recognition of gender identity by bodies of executive or judiciary power. Out of these Transgender Europe has advised 25 national level reform processes upon invitation by official institutions or civil society to implement practical guidelines as developed in the revised toolkit “Legal Gender Recognition in Europe” (2016)¹³.

10. These reform initiatives reflect that the European standard of “quick, transparent and

⁴ *A.P., Garçon and Nicot v. France*, nos. 79885/12 and 2 others, 6 April 2017.

⁵ *Van Kück v. Germany*, no. 35968/97, §56, ECHR 2003-VII.

⁶ *Idem*, §75.

⁷ *Idem*, §75.

⁸ *Y.Y. v. Turkey*, no. 14793/08, §102, 10 March 2015 (extracts).

⁹ Trans Rights Europe Index 2017, TGEU, available online at: <http://tgeu.org/trans-rights-map-2017/> (27.07.2017).

¹⁰ Belgium, Denmark, France, Ireland (from 18 years of age), Malta, Norway; see TGEU Trans Rights Map 2017 and <http://tgeu.org/belgium-new-gender-recognition-law-with-obstacles/> (27.07.2017).

¹¹ Belgium, Denmark, France, Greece, Ireland, Italy, Norway, Malta, Ukraine, Lithuania.

¹² Greece, Luxembourg, Portugal, Spain.

¹³ R. Köhler and J. Ehrhart, *Legal Gender Recognition in Europe*. 2nd revised edition, 2016. Available online at: http://tgeu.org/toolkit_legal_gender_recognition_in_europe/ (27.07.2017).

accessible” LGR procedures “based on self-determination”, as postulated by the Committee of Ministers¹⁴ and the Parliamentary Assembly¹⁵ are implemented also in practice. Thereby strengthening the recently emerged human rights norm that LGR procedures should rely predominantly on the self-determination of the person seeking recognition and not on the assessment by an external bystander, be it a medical or legal professional.

11. This Court’s view on the notions of gender and gender identity are very similar to those used in contemporary gender studies and leading institutions of European gender equality policy.¹⁶ The court rejected the biological essentialism in regard to gender when it ruled that it was untenable to define gender identity legally solely on the basis of chromosomes and that a more generous definition had to be adopted taking into account all circumstances of each individual case.¹⁷ In *A.P., Garçon and Nicot v. France* the Court stated that France, refusing to allow two applicants to change their gender marker with the motivation that they had not irreversibly transformed their appearance, violated Art 8¹⁸. The Court noted that the consent given to medical treatment, which would have in high probability lead to sterility, forming a mandatory prerequisite to LGR was invalid, as it forced trans people to choose between their right to bodily integrity and their right to the recognition of gender identity. Thereby the Court judged the degrading judicial practice of submitting trans people seeking legal recognition to a lengthy scrutiny to convince judges of the irreversibility of the medical transformations of their appearance, that was predominantly enthused by the biological understanding of gender, to be in violation of the Convention.

12. In this judgement, the Court referred explicitly (§ 119) to surgical and hormonal treatment. The reasoning of the Court extends to all gender reassignment procedures imposed as mandatory precondition to LGR, as long as carried out without the full and informed consent of the person concerned. The notion “gender reassignment treatment” is usually understood to comprise a variety of hormonal and surgical treatments, including hormone replacement therapy. Hormone replacement therapy, in addition to making a person on this treatment infertile, may have serious side effects, such as deep vein thrombosis, polycythaemia or overproduction of red blood cells, sleep apnoea and more, and like any other medical treatment should be administered only with prior informed consent of the patient. No person should, therefore, be required or pressured to undergo hormone therapy in order to convince the state administration or judiciary responsible of gender recognition of their gender identity. LGR being contingent on gender reassignment surgery or hormonal treatment, run counter to the respect of the physical integrity of the person. While some transgender persons may want surgery, many do not and others may want some surgery, but not the full regime that is expected by the public officials deciding over LGR. As the gender identity is part of the most intimate area of person’s private life, it means that the person seeking gender recognition should be

¹⁴ 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, § 21.

¹⁵ Resolution 2048 (2015), Discrimination against transgender people in Europe, § 6.2.1.

¹⁶ According to the European Institute for Gender Equality “gender” refers to the social attributes and opportunities associated with being male and female [...] These attributes, opportunities and relationships are socially constructed and are learned through socialization processes. They are context and time-specific and changeable. See at: <http://eige.europa.eu/gender-mainstreaming/concepts-and-definitions> Or see the chapter on gender in the Stanford Encyclopaedia of Philosophy: <https://plato.stanford.edu/entries/feminism-gender/#GenSocCon> (26.07.2017).

¹⁷ *Christine Goodwin v. the United Kingdom* [GC], no. 28957/95, § 82, ECHR 2002-VI.

¹⁸ § 135.

considered the first to know about their identity and how they wish to express it, not the medical personnel. Or as the World Professional Association for Transgender Health (WPATH) has put it: “No particular medical, surgical, or mental health treatment or diagnosis is an adequate marker for anyone’s gender identity, so these should not be requirements for legal gender change.”¹⁹

13. *A.P., Garçon and Nicot v. France* judgment will, therefore, among other international human rights developments pave the way to demedicalised LGR procedures that will fully respect the identities and rights of trans people.

Discrimination on ground of gender identity

14. Parties to the Convention must ensure everyone the enjoyment of the rights contained in the Convention without discrimination on ground of gender identity.²⁰

15. Gender markers, such as gendered social security numbers or the F/M/X gender marker in person’s documents or civil records, carry information on person’s civic status as well as identity, as do their name or marital status. All people, whether transgender or not, have a gender identity and are at some point in their life in contact with an administration that either documents or acknowledges their gender. In the absence of quick, transparent and accessible procedures based on self-determination to rectify the gender markers, transgender people find themselves in a disadvantaged position because of their gender identity, compared to other populations.

16. Moreover, submitting a person to a medical procedure or an examination without medical necessity solely for the purpose of documenting or recognising their gender or to provide identification documents that correspond to the holder’s gender identity and/or expression, because their gender identity differs from dominant gender roles and expectations, discriminates this person on ground of their gender identity. When LGR procedures consist of requirements that are used only in case of transgender people (e.g. forensic examination or requirement to undergo medical treatments), transgender people’s right to private life cannot be enjoyed to the same extent as persons whose gender corresponds to their gender assigned at birth, putting trans people in a disadvantaged position because of their gender identity.

17. Several Council of Europe bodies have called for measures to address the ongoing discrimination and stigma facing transgender people, and to put in place quick, transparent and accessible legal gender recognition procedures based on self-determination.²¹ The European Parliament has called upon the European Commission and the World Health Organisation to act towards ending listing of trans identities as mental illnesses. It also encouraged states to introduce quick, transparent and accessible legal gender recognition procedures that are based on person’s self-determination as well as introducing laws combating transphobic hate crime

¹⁹ The full statement by WPATH from 2015 online at: <http://tgeu.org/wp-content/uploads/2015/01/WPATH-2015-Statement-on-Gender-Identity-Recognition.pdf> (27.07.2017).

²⁰ *Identoba and others v. Georgia*, no. 73235/12, ECHR 2015.

²¹ See for example Parliamentary Assembly, Resolution 2048 (2015) - Discrimination against transgender people or Commissioner for Human Rights, Discrimination on grounds of sexual orientation and gender identity in Europe (2011 – 2nd edition).

and discrimination.²² In its 2017 report the European Parliament recognises that the medicalisation and pathologizing, combined with prejudice, stigmatisation and discrimination, may damage the mental health of trans people.²³

18. Considering all the above mentioned, any requirement in national law or practice to provide evidence that a person's physical appearance has been irreversibly changed, or submitting a person to medical or forensic examination violates the person's right to private life as would do the absence of statutory LGR procedure. Transgender person's declaration on their gender identity is the primary source of information when documenting gender in legal documents.

II Ending psychopathologisation of trans people

19. The World Health Organisation (WHO) proposes in the next version of the International Classification of Diseases (ICD-11) to remove all trans-related diagnoses from the Mental Health Chapter.²⁴ Instead, a new chapter "Conditions related to Sexual Health" is proposed with the placement of two new diagnoses Gender Incongruence in Adolescence/adulthood (GIAA) and Gender Incongruence in Childhood (GIC). The new chapter/ diagnoses shall facilitate access to medical treatment and cost coverage for those trans people who wish to undergo such therapies, while recognising that being transgender is not pathologic.

20. The de-psychopathologisation of trans identities has been driven by the United Nations and regional human rights mechanisms' motivation to reduce stigma and to improve human rights compliance.²⁵ It results from a global process involving trans communities, scientists and academia,²⁶ including field-testing of the new categories in Brazil, India, Lebanon, México

²² European Parliament Annual report on human rights and democracy in the world 2013 and the EU policy on the matter. Online at: <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P8-TA-2015-0076&language=EN&ring=A8-2015-0023> (27.07.2017).

²³ European Parliament 14.02.2017 report on Promoting gender equality in mental health and clinical research. Online at: <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P8-TA-2017-0028&language=EN&ring=A8-2016-0380> (27.07.2017).

²⁴ World Health Organisation. ICD-11 Beta Draft (Joint Linearization for Mortality and Morbidity Statistics). 2017; <http://apps.who.int/classifications/icd11/browse/l-m/en> (20.04.2017).

²⁵ The statement published by UN and regional human rights mechanisms on the occasion of International Day against Homophobia, Transphobia and Biphobia on 17 May 2017, calls for states to depathologize trans and gender diverse identities and expressions, including for young transgender people, refrain from pathologizing medical classifications, including in the context of the upcoming review of the International Classification of Diseases. Online at: <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=21622&LangID=E> (24.05.2017).

²⁶ See Drescher J, Cohen-Kettenis P, Winter S. Minding the body: situating gender identity diagnoses in the ICD-11. *Int Rev Psychiatry*. 2012;24(6):568-577; A rationale for this recommendation was developed in the article "Minding the Body: Situating gender identity diagnoses in the ICD-11" *International Review of Psychiatry*, 24, 568-577), by J. Drescher, P. Cohen-Kettenis and S. Winter; Reed GM, Drescher J, Krueger RB, et al. Disorders related to sexuality and gender identity in the ICD-11: revising the ICD-10 classification based on current scientific evidence, best clinical practices, and human rights considerations. *World Psychiatry*. 2016;15(3):205-221. doi:10.1002/wps.20354.

and South Africa^{27,28,29}. The approval of ICD-11 is planned to take place in the World Health Assembly in May 2018, and to be implemented by governments from January 2019.³⁰ This is likely to have an effect on how states provide for legal gender recognition, if based on a mental health diagnosis, and medical treatments.

21. Out of the 41 Council of Europe Member States with legal gender recognition procedures 31 require a mental health diagnosis or comparable assessment either explicit (14 states) or implicit (18) in these procedures.³¹ These assessments and diagnoses flow from national versions of the International Classification of Diseases. As demonstrated by Degner and Nomanni, mandatory psychiatric assessments or diagnostics in legal gender recognition are not compatible with Art 8 and Art 14 ECHR, as they constitute forced psychiatric treatment, state-enforced stigmatisation, for the lack of reliable external tests they rely on gender stereotypes, and are incompatible with the right to choose medical treatment freely.³²

22. The proposed removal of trans-related diagnoses in ICD-11 would end the declaration of trans people as mentally ill in relation to their gender identity. Deleting the diagnoses from the chapter of Mental Health Disorders eliminates thus the psychopathological framework on which LGR procedures in Europe have been based on.

III Practical obstacles trans people face seeking legal gender recognition in Macedonia

23. Legal gender recognition is not explicitly regulated under Macedonian law, leaving transgender people in uncertainty regarding their legal status and without protection from discrimination. However, trans people can resort to certain laws in their efforts for partial uniformity of the public registry data with their gender identity. According to the 1995 Law on the Personal Name, trans people can change their name and surname provided the preconditions prescribed for all citizens are met. The law does not mention gender identity nor regulate the name change when it is related to gender identity. The law provides no gendered limitations to the choice of person's first name. According to the 1992 Law on Personal Identification Number, every citizen has a unique personal identification number, including data on gender. There is no clearly set procedure regarding a change of the personal identification number, even in cases where a person has undergone a gender reassignment

²⁷ Beek TF, Cohen-Kettenis PT, Bouman WP, de Vries ALC, Steensma TD, Witcomb GL, et al. (2016) Gender Incongruence of Adolescence and Adulthood: Acceptability and Clinical Utility of the World Health Organization's Proposed ICD-11 Criteria. Online at: journals.plos.org/plosone/article?id=10.1371/journal.pone.0160066 (27.07.2017) .

²⁸ Robles R, Fresán A, Vega-Ramírez H, et al. Removing transgender identity from the classification of mental disorders: a Mexican field study for ICD-11. *The Lancet Psychiatry*.3(9):850-859.

²⁹ Report on the Shanghai Conference of the ICD-11 Field Studies Coordinating Group. *Shanghai Archives of Psychiatry*. 2014;26(1):57. doi:10.3969/j.issn.1002-0829.2014.01.010.

³⁰ See WHO, ICD-11 Revision Conference Report Tokyo, Japan, 12-14 October, 2016.

³¹ Explicit is used in the sense of explicitly stated by law or interpreted as stated by law, while implicit is to be understood as arising from the circumstances of the legal gender recognition procedures. Data taken from Degner A., Nomanni M., *Psychiatry in legal gender recognition procedures in Europe - A comparative human rights analysis*, Humboldt-University Law Clinic, 2017, pp 9 and updated by Transgender Europe.

³² *Ibid.* For an analysis on compatibility with Art 8 see p. 20 ff and with Art 14 on pages 43-44.

surgery.

24. As of 27 July 2017 the third party interveners know of only one person who has succeeded to fully change the data regarding their gender in the public registers in Macedonia. In practice, transgender people may face some obstacles in the process of name change, and strong opposition when requesting the change of the gender marker in the registers. As a result of legal obscurities in current laws, in five different cases, initiated in the same time period, the Office for Management of Registers of Births, Marriages and Deaths made different decisions and differently applied the Law on Registers of Birth, Deaths and Marriages. Consequently, in one case, the Office allowed the change of the gender marker, while in another case, a trans person in an identical position was denied the change with the explanation that they had failed to submit medical documentation confirming gender reassignment surgery. In two other cases where the persons had undergone gender reassignment surgeries, trans individuals were denied a change of the gender marker with an explanation that such cases do not fall under the competency of the Office. It is also common in Macedonia that people are pushed to use personal connections to gain access to their legal rights, or to use such connections where no defined procedures exist. Additionally, access to rights as well as administrative procedures, whether regulated or not by law, often depends on the will of the administrative staff.

25. The Coalition of Sexual and Health Rights of the Marginalized Communities has conducted a research on transgender Experiences in Macedonia. The research shows that the change of gender marker as well as personal gendered code is difficult to access even to people who have undergone gender reassignment surgery. There are also testimonies that tell of transgender people's distress to express their true gender identity when coming in contact with authorities fearing stigmatization and pathologizing.³³

26. In addition to the Macedonian law in force not providing clear and consistent guidelines for legal gender recognition, there is limited access to trans-specific health care, including counselling, diagnosing and hormonal treatment, and the care provided is often unprofessional. Meaning that even if a transgender person wanted or would be willing to undergo medical treatment in order to obtain LGR, this would be difficult. This came out in the study conducted in 2016 by the Coalition of Sexual and Health Rights of Marginalized Communities. For example, the hormonal medication usually prescribed to trans patients is not registered as medication to be prescribed for that specific diagnostic code. Approval for hormone therapy is mostly obtained with psychiatric approval and is only accessible outside of Macedonia, with the closest provider being in Belgrade. According to the testimonies of number of trans people who have accessed these services, there are serious ethical and medical concerns about actions of the Belgrade medical teams who provide trans-specific healthcare. There are testimonies telling that the teams have forced people to undergo unwanted medical treatments or that they deny wanted treatments. Some examples are conditioning one surgical procedure on also having other, unwanted ones and using surgical methods that a patient explicitly said no to when the person is under anaesthesia.

Lack of access to legal gender recognition causes confusion and further impedes access also to health care, when the gender marker in a person's identification documents does not match the social expectations tied to the physical appearance of people with that legal gender.

³³ One of the interviewee (code name Meti) telling: „*But what scares me, it's when I apply for new papers, and the question pops: "What's your sex?". Like, I want to say it, but I don't know how they might react. And however one does this, there might be consequences. [...] And I only feel a need to hide my identity before the law. When applying for papers, I'm scared to say what I am, because they will immediately say "She's sick!"*.”