SECRETARIAT / SECRÉTARIAT

SECRETARIAT OF THE COMMITTEE OF MINISTERS
SECRÉTARIAT DU COMITÉ DES MINISTRES

COMMITTEE OF MINISTERS
COMITÉ DES MINISTRES

COUNCIL OF EUROPE
75
1949 - 2024
CONSEIL DE L'EUROPE

Contact: Zoë Bryanston-Cross
Tel: 03.90.21.59.62

Date: 22/07/2024

DH-DD(2024)834

Documents distributed at the request of a Representative shall be under the sole responsibility of the said Representative, without prejudice to the legal or political position of the Committee of Ministers.

Meeting: 1507th meeting (September 2024) (DH)

Communication from NGOs (Háttér Society and Transvanilla Transgender Association) (09/07/2024) concerning the group of cases of Rana v. Hungary (Application No. 40888/17).

Information made available under Rule 9.2 of the Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements.

* * * * * * * * * * * *

Les documents distribués à la demande d'un/e Représentant/e le sont sous la seule responsabilité dudit/de ladite Représentant/e, sans préjuger de la position juridique ou politique du Comité des Ministres.

Réunion : 1507e réunion (septembre 2024) (DH)

Communication d'ONG (Háttér Society et Transvanilla Transgender Association) (09/07/2024) relative au groupe d'affaires Rana c. Hongrie (requête n° 40888/17) ***[anglais uniquement]***

Informations mises à disposition en vertu de la Règle 9.2 des Règles du Comité des Ministres pour la surveillance de l'exécution des arrêts et des termes des règlements amiables.

Committee of Ministers of the Council of Europe
Department for the Execution of Judgments of the European Court of Human Rights
DGI - Directorate General of Human Rights and Rule of Law
Council of Europe
F-67075 STRASBOURG CEDEX
DGI-execution@coe.int

Budapest, July 9, 2024

Communication from Háttér Society and Transvanilla Transgender Association

Dear Madams / Sirs,

Under Rule 9 (2) of the Rules of the Committee of Ministers for the supervision of the execution of judgments, Háttér Society and Transvanilla Transgender Association hereby submit this communication letter on the implementation of the judgments of

– RANA v. HUNGARY 40888/17, Judgment of July 16, 2020

– R.K. v. HUNGARY 54006/20, Judgment of June 22, 2023

I. Executive summary

Since the rejection of legal gender recognition (LGR) for a transgender refugee in 2016 that led to finding a violation of Article 8 by the European Court of Human Rights in the case of *Rana v. Hungary* in July 2020, the **human rights situation of transgender people has significantly deteriorated** in Hungary. First, the authorities suspended the processing of legal gender recognition requests on multiple occasions, which led to the repeated finding of Article 8's breach in *R.K v. Hungary*. When in 2019-2020 some domestic court rulings forced the relevant authorities to resume processing LGR applications, the legislature responded by adopting a complete ban on legal gender recognition on May 29, 2020 (Section 33 discussed in section IV.2). This law has been challenged before ordinary courts and the Constitutional Court (CC): some procedures resulted in CC decisions that allowed some transgender persons to acquire LGR, while keeping this possibility out of reach for other applicants and those who have not submitted an application prior to the entry into force of Section 33 (see sections IV.4 and IV.5). Section 33 only applies to persons with a birth registry entry in Hungary (Hungarian national and non-national born in Hungary), nevertheless even non-nationals have no access to LGR due to the lack of procedure. Currently, thus, **no one in Hungary – neither nationals, nor non-nationals – has access to LGR in any procedure**.

Even though just satisfaction has been paid in both the *Rana* and *R.K. cases*, no further measures for execution have been taken in either cases. The government **failed in adopting**

H-1136 Budapest, Balzac u. 8-10, Hungary. ♦ Phone: +36 1 329 2670 ♦ Fax: +36 1 799 8418
E-mail: hatter@hatter.hu ♦ Web: www.hatter.hu

both the general and individual measures that follow from the judgments. **Both applicants still have to live with official documents that do not reflect their gender identity**. Besides the failure to implement these individual measures, the government also failed to adopt the proposed general measures: there is **still no legislation that allows lawfully settled third country nationals to apply for LGR**, moreover, **LGR is no longer available for Hungarian citizens either**.

The current submission explores the legal situation of various categories of transgender people impacted by the systemic and structural violation of human rights as established by the ECtHR in the two cases at hand. The submission will highlight that many applicants who submitted a request for LGR prior to Section 33 and thus – according to the CC decision discussed in section IV.2 – should have had their request processed according to the legal framework in force at the material time are not able to do so as the **authorities are not willing to reopen the cases that were rejected based on the unconstitutional provision mandating retroactive application**. Furthermore, several people **lost access to LGR as they were not willing to undergo intrusive and degrading psychiatric examinations**. The submission closes with a set of recommendations that need to be implemented in order to secure the human rights of transgender individuals in Hungary in line with the consistent case-law of the European Court of Human Rights (ECtHR).

The **Annex** provides personal testimonies of applicants in the pending case of *E.G. and Others v. Hungary* (Application no. 12918/19) offering important insights into the everyday difficulties transgender people face in Hungary due to the lack of an accessible procedure for LGR.

II. Summary of the cases

II.1 *Rana v. Hungary*

An Iranian trans man arrived in Hungary in the Summer of 2015, and asked for asylum. The Hungarian authorities recognized him as a refugee on account of having a well-founded fear of persecution for being transgender, however, the documents issued still referred to him as female. He requested LGR according to the regular Hungarian procedure. The authorities rejected his request on the ground that Hungary does not have jurisdiction in his case. On judicial review the court refused – just as in R.K.'s case – to create law to close a legal lacuna. In a unanimous decision published on June 27, 2018 [Decision no. 6/2018. (VI. 27.) (in English)] his constitutional complaint was rejected on the ground that such procedure cannot address missing legislation, on the other hand – proceeding *ex officio* – the CC found that there was an unconstitutional omission because the law failed to provide for LGR and related name change for non-citizen trans people legally residing in Hungary permanently. The CC gave a deadline of December 31, 2018 for the legislator to adopt a new legislation, but up to day no legislation was passed.

The case was also submitted to ECtHR in parallel to the CC. On July 16, 2020 the ECtHR ruled that Hungary violated the applicant's right to private life (*Rana v. Hungary*, no. 40888/17).

II.2 *R.K. v. Hungary*

R.K., a Hungarian trans man, requested his LGR on January 6, 2018; on July 22, 2019, the Budapest-Capital Government Office (BCGO) informed him that under the legislation in force, no authority had jurisdiction to issue supporting expert medical opinions, which, in practice, had previously been issued by the Ministry of Human Resources. This practice had nonetheless been suspended owing to the entry into force of the GDPR. He immediately requested the BCGO to transfer his case to the competent registrar in spite of missing the supporting medical opinions. On August 10, 2019, the BCGO issued a decision on the transfer, noting that the decision did not constitute a supporting expert medical opinion within the meaning of Section 7 of Government Decree no. 429/2017. The registrar of the Budapest VI District Mayor's Office dismissed the request. R.K. sought a judicial review of the decision, which was dismissed. The court pointed out that there was no definition of the term "supporting expert medical opinion", and it was unclear which authority was competent to issue such opinions. The court acknowledged that a change of name and "sex/gender marker" was a fundamental right, however, it noted that neither the administrative authorities, nor the courts could overstep or bypass the legislative framework, and, in the absence of specific legal regulations, the court could not expand the interpretation of the legislation in force to fill the legal gap.

The case was submitted to ECtHR. On June 22, 2023, the Court ruled that Hungary violated the applicant's right to private life (Article 8) in *R.K. v. Hungary* (Application no. 54006/20).

III. Individual measures

In both cases, the just satisfaction was paid, but the applicants still have to live with documents that do not reflect their gender identity.

Regarding the *Rana v. Hungary*, the Government's action plan dated March 22, 2021 only notes the payment of just satisfaction, and does not mention that the underlying human rights violation – *i.e.* failure to provide for LGR – has been addressed or considered in any way. The prerequisite for the execution of the above individual measure is creating an enabling legal environment, which implies taking general measures that follow from the judgment, i.e. opening a prompt, accessible, and transparent procedure for LGR.

The further difficulty in implementing the *Rana v. Hungary* ECtHR decision lies in the fact that Hungarian legislation in force at the material time (Act no. III of 1952 on civil procedure) did not allow for reopening administrative or civil procedures that had been closed with a binding court decision on the ground that the ECtHR had found a violation of the ECHR in the given case. Furthermore, even if the case could be reopened, the court would have likely arrived at the same conclusion as in the original procedure: there exists no procedure for legal gender recognition for non-Hungarian nationals and the court cannot assume the role of the lawmaker. While judges in ordinary courts are entitled to petition the CC in case they deem that the applicable rules in the given procedure are in violation of the Fundamental Law, they do not have the right to submit a similar request for constitutional review if they are confronted with a legislative omission. In *Rana v. Hungary*, the applicant had already

submitted a constitutional complaint, and the CC had already found a legislative omission in violation of the Fundamental Law [Decision no. 6/2018. (VI. 27.) (in English)], but the legislator failed to adopt a new legislation up to day, even though the deadline set by the CC expired on December 31, 2018.

IV. General measures

The Government's action plan dated March 22, 2021 regarding the *Rana v. Hungary* case states that they were not willing to take general measures until the CC challenges against Section 33 were adjudicated. The Analysis by the Secretariat confirmed that "the new legislative framework introduced by the Amending Law does not affect the situation of lawfully settled third country nationals, and thus cannot be said to create an obstacle for resolving the applicant's situation in a Convention-compliant manner" (CM/Notes/1436/H46-10). Nevertheless, in February 2023 the CC did deliver its decision on Section 33 [Decision no. 3058/2023 (II. 16.), discussed in detail in section IV.2], so there is no barrier to implementing general measures even according to the reasoning of the Government.

IV.1 Legal gender recognition for Hungarian citizens prior to Section 33

The problems exposed in the *R.K. v. Hungary* case are systemic and structural in nature, and impact a significant number of transgender persons. No comprehensive, detailed piece of legislation on LGR has ever been adopted in Hungary, however, between 2004 and 2016 there was a relatively consistently applied practice for processing LGR applications. Since the beginning of 2015 the authorities involved in processing LGR applications became ever more strict about who can issue medical opinions and what exact wording the medical opinions should contain, including that there is no contraindication against gender affirmation surgeries (even if the person never wished to have such treatment). In January 2017 and in May 2018 the processing of LGR applications was suspended first with reference to a new legislation being developed, and later with reference to the EU's General Data Protection Regulation (GDPR) arguing that the authorities previously involved in the processing of applications have no right to process the sensitive medical data of applicants. These suspensions and subsequent rejections lead to a number of challenges before the ECtHR. The cases arising from the 2017 suspension (processed by the authorities in early 2018) were rejected on ground that the waiting period "cannot be considered as continuous and unreasonable" (§ 19, *Á.Cs. and Others v. Hungary*, Application no. 66078/17). Those resulting from the 2018 suspension that had not been challenged in domestic courts are pending (*E.G. and Others v. Hungary*, Application no. 12918/19). Finally, one applicant challenged the suspension by a judicial review, and after the rejection by the court turned to the ECtHR (*R.K. v. Hungary*, Application no. 54006/20, see in section II.2). Following the entry into force of Section 33 the pending cases were transferred to the local registrars. For a detailed analysis of the legal situation concerning cases commenced before Section 33 including the case transfers, the various challenges in court and the reports of the Commissioner for Fundamental Rights, see the *R.K. v. Hungary* judgment.

Based on FoI response from the BCGO, between January 1, 2017 and May 28, 2020 (*i.e.* the entry into force of Section 33) 197 LGR applications were received and 62 of these applications were accepted before May 28, 2020. The BCGO transferred 116 cases to local registrars after Section 33 was adopted. The answers of the BCGO failed to provide information on exactly how many cases had been pending at the time Section 33 entered into force; and what happened with the cases that were not transferred to the local registrars. Thus, the number of cases similar to R.K. was between 116 and 135.

IV.2 Section 33 and its challenges before the CC

On May 19, 2020 the Hungarian Parliament adopted Act no. XXX of 2020 on the amendment of specific administrative laws and free donations of property. Its Section 33 amended Act no. I of 2010 on the registry procedure (Registry Procedure Act, RPA), so that the civil registry no longer contains 'sex',[1] but 'sex at birth', and defines sex at birth as the "the biological sex based on primary sex characteristics and chromosomes". A paragraph was also added that explicitly declares that the 'sex at birth' once recorded in the registry, cannot be amended. An English language translation of the RPA showing relevant sections of the law after amendment is available here. The amended Section 101/A (2) of the RPA ordered the newly introduced changes – including the prohibition of changing the sex at birth – to apply also in cases pending on May 29, 2020.

Various challenges were launched against Section 33. Applicants who had submitted an LGR application prior to Section 33, and whose applications were rejected by the local registrar and/or the BCGO challenged these decisions in court, which ultimately resulted in the CC declaring the retroactive application of Section 33 to pending procedures in violation with the Fundamental Law [Decision no. 11/2021. (IV. 7.)]. CC Decision no. 3386/2021. (X. 1.) confirmed that this decision shall be understood to exclude the application of the impugned provision in every pending procedure. For an overview of the fate of cases impacted by these CC decisions see sections IV.3–IV.5.

An applicant who had not requested an LGR prior to Section 33 submitted such a request in January 2021, which was rejected by the BCGO based on Section 33. The applicant challenged this decision in court. In the pending case the judge petitioned the CC for a constitutional review. In their petition to the CC, the judge requested an examination of the RPA's conformity with the Fundamental Law and the annulment of the wording 'at birth' in the RPA. The CC, in its Decision no. 3058/2023 (II. 16.) did not hold the contested provisions of the RPA contrary to the Fundamental Law. The CC endorsed the legislative reasoning of the amendment without any criticism on the merits. According to the CC "(t)he sex entered in the register is indeed based on a fact established by the doctor, which is merely declared by the register". Unless proven otherwise, the birth registry is a confirmation of the facts and rights registered, and therefore has no legal effect of its own. However, the sex declared by the

[1] In Hungarian language, there are no separate words for sex and gender, only one word *nem*. If one wants to emphasize the difference, they can say *biológiai nem* and *társadalmi nem* (biological sex and social sex), but those words are not used in any legislation. The new legislation uses the notion *születési nem* (sex at birth). In the current document we will use sex to translate the term *nem* to English, as this is the translation used in official translations of Hungarian legislation.

register may give rise to rights or obligations, and it is therefore necessary to define the concept of sex at birth (par. 24). According to the CC, the concept of sex at birth reflects the biological sex of the child established at birth (par. 31), which is not necessarily the same as a person's gender identity – that can be different from their sex at birth (par. 32). The registration of sex at birth may constitute a limitation on the individual's right to self-determination, but since sex at birth has become a "constitutional concept" with the Ninth Amendment to the Fundamental Law (in a provision unrelated to legal gender recognition), its registration is therefore constitutionally justified (par. 40). Consequently, the CC ruled that the registration of one's sex at birth instead of or in addition to one's "self-identified sex corresponding to [their] gender identity" is constitutionally acceptable, and that the lack of legal gender recognition is not an unnecessary and disproportionate restriction on the right to privacy (par. 50). The CC's decision did not address the practice of the ECtHR referred to in the petition, nor did it consider the submission of the Hungarian Psychological Society or the National Authority for Data Protection and Freedom of Information. The CC failed to address the ECHR references contained in the petition, and clearly contradicted the established case-law of the ECtHR, *e.g.* the standards laid down in *Christine Goodwin v. the United Kingdom* (Application no. 28957/95) judgment: biological criteria cannot be the sole determining factors in deciding on a person's legal gender marker. According to the judgment, "(u)nder Article 8 of the Convention, in the twenty-first century the state cannot determine the gender of a post-operative transsexual solely by the biological criteria of birth" (§ 100).

Finally, several direct constitutional complaints against Section 33 were submitted under Section 26 (2) of Act no. CLI of 2011 on the CC. The petitioners argued that the mere existence of the legislation constituted a violation of their constitutional rights, thus there was no need to exhaust the remedies before submitting a constitutional complaint. A few months after Decision no. 3058/2023 (II. 16.), the CC rejected these petitions without examining their merits in its Order no. 3235/2023 (VI. 2.). It held that the petitions did not meet the requirements for a direct constitutional complaint. The Court considered that the applicants had access to the courts: the main proof of this was that the petition which led to Decision no. 3058/2023 (II. 16.) was also brought by a judge, thus there was room for a court procedure prior to reaching out to the CC, which may offer remedy. Ironically, the judge used as an example had no other option but to reject the petition for review after the CC's ruling in February 2023 (49.K.700.621/2023/11.).

IV.3 Applications prior to Section 33 – successfully completed LGRs

After the CC ruled that the retroactive application of Section 33 to proceedings started before Section 33 entered into force is unconstitutional, in all cases Háttér Society and Transvanilla are aware of and where a judicial review was pending, the (ordinary) court ordered the BCGO to repeat the procedure citing CC Decision no. 11/2021. (IV. 7.). In the repeat procedures the BCGO rejected the applications citing that: a) the relevant provision – in force at the time of submitting the request for LGR – did not define what supporting medical opinion meant, b) the BCGO did not have the necessary expertise to decide if the supporting medical opinions submitted by the applicants were adequate or not, c) there was no explicit

provision in law to decide what kind of forensic expert shall be appointed. Applicants challenged before court the BCGO's decisions once again citing that if the BCGO finds that they do not have the necessary expertise they could still appoint a forensic expert based on the general provisions on forensic experts. Court decisions[2] confirmed this position and ordered the BCGO to repeat the procedure. In most cases the court instructed the BCGO to either accept the supporting medical opinions submitted by the applicants, or appoint a forensic expert. A few court decisions instructed the BCGO to accept the supporting medical opinions without the possibility of appointing a forensic expert. In more than ten cases, mainly in cases where the court did not allow the appointment of a forensic expert, the BCGO turned to the Curia (supreme court) and requested an extraordinary judicial review. In other cases the BCGO did not deliver a decision, but suspended the procedures referring to the ongoing Curia reviews they initiated. The Curia decided in favor of the applicants in all known cases,[3] so the BCGO had to resume the procedures.

In all cases where a legal challenge was launched against the BCGO for rejecting the application based on Section 33, the BCGO resumed the procedures and they notified the applicants to visit a registrar and remedy procedural deficiencies: a) provide the original copies of the supporting medical opinions, b) confirm their LGR application, c) pay a higher administrative service fee. Applicants then received another notification from the BCGO from the beginning of June 2022 asking them to confirm whether they are willing to subject themselves to an examination by a committee of forensic experts. Those that responded positively were referred to the Medical Forensic Expert Committee (*Egészségügyi Területen Működő Igazságügyi Szakértői Testület*) to act as forensic expert to answer four questions: (1) Does the person examined suffer from any mental problems that may affect their decision-making capacity? (2) Can the gender identity of the person examined be influenced or altered by psychotherapeutic or psychiatric intervention? (3) Diagnosis with the relevant ICD code. (4) In view of the diagnosis, is the change of the sex marker in the birth registry (from woman to man or man to woman) of the person examined supported or not supported? The psychiatric assessment included intrusive and degrading questions such as when the applicant masturbated first, how often they currently do, what is the gender of their sexual partners, if they felt sexual arousal by wearing clothes or perfume meant for the opposite sex, or when they see themselves in the mirror. In all cases examined so far, the Committee delivered a positive opinion, and subsequently the BCGO informed the local registrar of the change of gender, and the registrar amended the birth registry and issued a new birth certificate. So far 59 such cases have ended with LGR, and although the BCGO claims that there are no further pending cases, Háttér Society is in contact with one person whose case has not been closed yet.

IV.4 Applications prior to Section 33 – rejected expert examination

In their responses to Háttér Society's freedom of information requests, the BCGO reported that 3 out of those who challenged the rejection of their request for LGR submitted prior to

[2] *E.g.*: 16.K.705.947/2020., 1.K.700.695/2021., 11.K.704.950/2021.

[3] *E.g.*: Kfv.III.37.787/2021/6., Kfv.VI.38.056/2021/10., Kfv.VII.38.067/2021/9.

Section 33, after the successful litigation eventually did not consent to the expert examination as described in IV.3. In these cases, the BCGO rejected the application for LGR, and no further remedy was available for those concerned. Háttér Society and Transvanilla are not aware of any procedure initiated in these cases challenging the need for an expert examination before either domestic, or international judicial fora.

IV.5 Applications prior to Section 33 – no judicial challenge

Despite the CC quashing the RPA provision mandating the retroactive application of Section 33 in Decision no. 11/2021. (IV. 7.) (discussed in section IV.2), the procedures pending on May 29, 2020 (the entry into force of Section 33) were not automatically resumed. On the petition of several individuals who had submitted a request for LGR prior to Section 33, the Commissioner for Fundamental Rights published a new report in 2021 (AJB-1846/2021). The report reaffirmed the findings of the CC on the unconstitutionality of the retroactivity of RPA's amendment by Section 33, and called on the BCGO to process applications that had been launched before the entry into force of Section 33 according to the old procedure. The report also found that the fact that LGR applications had not been decided for months prior the entry into force of Section 33 was – on its own – sufficient ground for quashing these decisions. The deficiencies of the procedure were also confirmed by the ECtHR in *R.K. v. Hungary*. The report called on the BCGO and the Prime Minister's Office (PMO) as the supervisory body of the BCGO to reopen *ex officio* all cases that had been launched and later rejected based on Section 33. The report also highlighted the opinion of the Ministry for Human Capacities that a medical diagnosis of transsexualism from a psychiatrist or a clinical psychologist is sufficient evidence for LGR. The report did not address the questions regarding the constitutionality of Section 33, and the CFR did not challenge the law before the CC.

The recommendations in the CFR report have not been implemented, neither the BCGO, nor the PMO (or its legal successor, the Minister for Regional Development and Public Administration) has reopened cases *ex officio.* In at least two cases, the local registrar reopened the case (either on request by the applicant or on their own initiative), but in the rest of the cases, the procedures did not resume if the applicants did not seek judicial review at the time the decision was issued. At least 5 such persons requested the local registrars to reopen their case, but their request was rejected. Subsequently some of these applicants also turned to the prosecution service to use their mandate to uphold the public order and request the reopening of such cases. In at least one case the prosecution agreed that the decision should be revoked (T.K.1214/2021/2-II.), and called on the local registrar to do so, but the local registrar rejected the call, and the prosecution service decided not to pursue the case in court. The applicant later turned to the Minister for Regional Development and Public Administration to intervene as the supervisory body, and order the local registrar to reopen the case. The case is pending.

In their response to the freedom of information requests submitted by Háttér Society, the BCGO did not provide an exact number on how many individuals have been affected by the failure to reopen their cases by the authorities. Of the 116 cases transferred by the BCGO to local registrars, 54 cases have not been transferred back to the BCGO, but their fate is

uncertain: it is possible, yet very unlikely, that the registrars reopened and decided favorably cases; it is much more likely that the registrars rejected cases on the basis of the unconstitutional and repealed retroactive application of Section 33, and if the applicants did not seek judicial review, those cases were terminated. Finally, it is also possible that the applicant sought judicial review, and they lost in court, although Háttér and Transvanilla are not aware of any such court decisions.

IV.6 Applicants who did not submit a request for LGR before Section 33

Applications for LGR submitted *after* Section 33 entered into force were rejected by the BCGO. The BCGO reported a contradicting number of such cases: they first indicated that 34 such applications were submitted between May 29, 2020 and May 31, 2021, while later they reported that only 8 such applications had been submitted after May 29, 2020. To Háttér's knowledge in only 1 case did the applicant seek judicial review against the rejection; Háttér provided legal representation in that procedure. The judge in the pending procedure petitioned the CC to review RPA's conformity – as amended by Section 33 – with the Fundamental Law, and the case led to Decision no. 3058/2023 (II. 16.) discussed above in section IV.2. Following the decision of the CC, the Budapest Regional Court, in the pending case, dismissed the applicant's petition.[4] On November 2, 2023, the Curia (supreme court) found the petition for extraordinary review inadmissible.[5] Considering that the CC had a chance to address the underlying constitutional issue, no constitutional complaint was submitted prior to the application to the European Court of Human Rights (ECtHR). The case is currently pending before the ECtHR (Application no. 11436/24).

At least two individuals who did not submit a request for LGR turned to the CFR urging him to submit a petition for constitution review of Section 33, but the CFR has not issued a decision in those cases for more than three years, and has not even responded to written requests for an update on the status of their case. Furthermore, a trans woman turned to the National Authority for Data Protection and Freedom of Information (NADPFI) claiming that the fact that she can no longer apply for LGR and has to sign her male name at her workplace or in a bank, or has to show her male identity documents to the police, violates data protection principles as she is forced to reveal sensitive data about her health status (having a transsexualism diagnosis), sex life and sexual orientation. NADFPI [NAIH-944-1/2021 (in English)] found that the current Hungarian legislation does not allow for changing ones name and sex on official documents, which violates Article 5 (1) d) of GDPR, which requires that personal data shall be "accurate and, where necessary, kept up to date; every reasonable step must be taken to ensure that personal data that are inaccurate, having regard to the purposes for which they are processed, are erased or rectified without delay". NADFPI recommended that (at least) for persons who have undergone gender confirmation surgery there should be a procedure to rectify personal data, to prevent the disclosure of private information related to their gender identity and potentially to their health status. NADFPI found that in their case the "change of sex" is not based on subjective factors, but is based

[4] 49.K.700.621/2023.11.

[5] Kfv.V.37.635/2023/2.

on objective, factual data. The PMO rejected the recommendation arguing that 'sex at birth' is not altered for persons that undergo gender confirmation surgeries, so the civil registry data does not need to be rectified.

After Decision no. 3058/2023. (II. 16.) was rendered by the CC, no effective remedy remained available for those who wish to get LGR in Hungary: the BCGO would need to reject applications for LGR, ordinary courts have no mandate to override the statutory ban, and the CC made its position unequivocally clear. For this reason, dozens of applications have been submitted by Háttér Society and Transvanilla Transgender Association directly to the ECtHR (by July 9, 2024 Háttér filed 87 applications[6] and Transvanilla submitted 3 complaints). There may be further applications pending where neither organization provides representation, and thus has no direct knowledge of the status of the cases.

According to a survey conducted by Háttér Society and the Institute of Sociology in 2023, of the 1,133 transgender and non-binary persons completing the survey only 34 (3%) have undergone legal gender recognition. Of those 334 respondents who identify as either male or female (binary transgender persons), 16 (5%) reported their legal gender recognition having been rejected and 203 (61%) that they have not submitted such a request because it was not legally possible or they did not know how to do it. Extrapolating based on the number of respondents having undergone LGR among respondents and the overall number of LGRs approved prior to Section 33, there are potentially thousands of transgender persons directly affected by the ban on LGR. The LGBTIQ III Survey of the EU Fundamental Rights Agency similarly found that only 3% of Hungarian trans respondents had their legal gender changed.

IV.7. Non-national applicants

As described in detail by Háttér Society's previous Rule 9 submission of August 9, 2021, Section 33 does not apply to non-Hungarian nationals who do not have a birth registry entry in Hungary. Nevertheless, LGR is not available to non-nationals either as there is no procedure to process such requests.

Since no measures to implement the ECtHR judgment had been taken in the *Rana v. Hungary* case, on August 26, 2021 (*i.e.* after Section 33 was passed), another Iranian trans refugee requested legal gender recognition, this time he attempted to get his data corrected in the Personal Data and Address Register (PDAR) under GDPR Article 16. The Ministry of Interior – maintaining the PDAR – informed the applicant that PDAR is a derivative registry, the data is based on the Asylum Registry (AR) maintained by the National Directorate-General for Aliens Policing (OIF). The applicant then requested that the Ministry transfer the case to OIF, which the Ministry did in an official decision. On December 13, 2021, the Ministry revoked its transfer decision and rejected the application arguing that there are no provisions requiring a change in the AR to be recorded in PDAR and that there are no procedures to allow for the change of name and gender of the applicant. The applicant requested a judicial review, arguing that revoking the transfer decision and not deciding the

[6] Application nos. 30821/23; 37564/23; 37566/23; 37571/23; 42871/23; 42861/23; 42863/23; 42855/23; 8722/24; 6061/24; 6062/24; 8726/24; 6067/24; 6071/24; 6070/24; 6073/24; 6801/24; 6807/24; 6804/24; 8727/24; 8725/24; 6798/24; 6797/24; 6803/24; 6802/24; 6074/24; 6076/24; 37576/23; 6800/24.

case under GDPR was unlawful. During the lawsuit the Ministry repeated that the original request was for the correction of PDAR not of AR. The Court delivered a very narrow decision declaring the revoking of the transfer decision unlawful, and holding that the request had to be adjudicated by OIF. OIF rejected the request on grounds that the original request concerned correcting PDAR, which is not within the jurisdiction of OIF. The applicant launched a judicial review of the decision and parallelly resubmitted a request to OIF to correct AR. The two procedures were merged, OIF rejected the application on the ground that the "change of sex" has not been sufficiently proven. The Hungarian court turned to the Court of Justice of the European Union requesting a preliminary ruling (C-247/23). The CJEU procedure is pending, a public hearing was held on June 3, 2024; the Advocate General's opinion will be published on September 12, 2024.

IV.8 Complete lack of LGR: non-compliance with ECtHR standards

All applications addressed to the ECtHR argue that the Hungarian state violates the right to respect for private life guaranteed by Article 8 of the European Convention for Human Rights (ECHR) for the following reasons. First, determining "gender by purely biological criteria" constitutes a violation of Article 8 since 2002 (*Christine Goodwin v. the United Kingdom*, Application no. 28957/95, § 100), and the Hungarian legislation does exactly the same without allowing for any exceptions. Second, even though the right to respect for private life cannot be described within an exhaustive definition, the ECtHR has consistently held that it encompasses the physical and social identity of the individual, including their gender identification (*Pretty v. the United Kingdom*, Application no. 2346/02, § 61). The protection of human dignity and human freedom is at the core of the ECHR, and as part of the private sphere it protects the right of everyone to determine the details of their identity (*Christine Goodwin v. the United Kingdom*, Application no. 28957/95, § 90), *A.P., Garçon and Nicot v. France*, Application nos. 79885/12; 52471/13; 52596/13, § 93, *A.D. and Others v. Georgia*, Application nos. 57864/17; 79087/17; 55353/19, § 71). The protection extends to all transgender persons who are not / have not been involved in gender affirming treatment or do not wish to be involved in such treatment.

Second, Article 8 of the ECHR not only protects against arbitrary interference with the exercise of the right, but in a number of situations imposes a positive obligation on the state to ensure the effective exercise of the right (*Hämäläinen v. Finland*, Application no. 37359/09, §§ 64-67). When implementing their positive obligation, Member States have a margin of appreciation, but in drawing the boundaries of their discretion, account must be taken, *inter alia*, of (1) "the importance of the interest at stake and whether "fundamental values" or "essential aspects" of private life are in issue"; (2) "the impact on an applicant of a discordance between the social reality and the law"; and (3) the burden that compliance with the positive obligation would impose on the State (*Hämäläinen v. Finland*, Application no. 37359/09, § 66). The State must strike a fair balance between competing interests, and the ECtHR emphasized "the particular importance of matters relating to one of the most intimate parts of an individual's life, namely the determination of an individual's gender" (*Y.Y. v. Turkey*, Application no. 14793/08, § 60) It is undisputed that the well-being and mental health of the transgender applicant is seriously affected by the need to continue to use documents

recording their sex assigned at birth, while it cannot be justified that the State would be unduly burdened by the reinstating of the gender recognition procedure: applicants in these cases have been deprived of a right that existed before May 2020 and no overriding public interest can be invoked against its restoration.

Third, in the context of gender recognition, the Court has defined the State's positive obligation as to provide “quick, transparent and accessible procedures” for transgender people to change their sex on their birth certificate (*X. v. FYROM*, Application no. 29683/16, § 70, reiterated in *R.K. v. Hungary*, Application no. 54006/20, § 57). In this context, the Court has already held incompatible with Article 8 of the Convention (1) the 'transitional period' as a condition for legal gender recognition or for access to gender-affirmation treatment (*Schlumpf v. Switzerland*, Application no. 29002/06); (2) infertility as a condition for access to gender-affirmation treatment or surgery (*Y.Y. v. Turkey*, Application no. 14793/08; *A.P., Garçon and Nicot v. France*, Application nos. 79885/12; 52471/13; 52596/13); 3. refusal to change the name prior to gender affirming surgery (*S.V. v. Italy*, Application no. 55216/08); 4. refusal to recognise applications for LGR without examining their merits (*Y.T. v. Bulgaria*, Application no. 41701/16; and *X. and Y. v. Romania*, Application nos. 2145/16; 20607/16); 5. refusal to grant legal gender recognition for non-citizens lawfully settled in a Member State (*Rana v. Hungary*, Application no. 40888/17).

Finally, the current legislation in force since Section 33 not only imposes a ban contrary to the ECHR, it creates an irresolvable contradiction between the identity of the applicants and their social reality and legal status. The practice described – and condemned – in *R.K. v. Hungary* (Application no. 54006/20) was abolished by Section 33 which entered into force on May 29, 2020: it cannot be demonstrated that either before the adoption of the amendment, in the legislative procedure, or subsequently, in the judicial procedure, the State authorities had in any way weighed the competing interests and struck a fair balance. There is no public interest which could justify the total deprivation of the right to legal gender recognition protected by Article 8 of the ECHR, and the Hungarian State is thus failing to fulfill its positive obligation under Article 8.

V. Summary

The current Hungarian legislative framework and legal practice thus does not allow transgender persons to access LGR in a quick, transparent and accessible manner via:

(1) a legislative ban (for Hungarian citizens who did not submit an LGR request prior to Section 33),

(2) the non-implementation of binding CC decisions (for Hungarian citizens who did submit an LGR request before Section 33, but decided to challenge the rejection based on the retroactive application of Section 33 only after the CC delivered its supportive decision),

(3) the imposition of intrusive and degrading psychiatric assessments on applicants (for Hungarian citizens who did successfully challenge the rejection of their LGR request

submitted prior to Section 33, but were not willing to subject themselves to such assessment), and

(4) a lack of an appropriate procedure and/or the requirement of irreversible surgical interventions (for lawfully settled non-Hungarian citizens).

The Committee of Ministers on its meeting held on June 8-10, 2022 has already noted with concern the adoption of Section 33. Section IV.8 offers detailed analysis on how the complete lack of LGR for both Hungarian and non-Hungarian nationals violates well-established ECtHR standards.

Transgender persons whose official documents do not reflect their gender identity, name or gender expression have to disclose that they are transgender every time they need to present these documents. In Hungary this is likely to be an almost daily occurrence. In situations where official documents are required to obtain goods or services – for example, in finding employment, enrolling in education, obtaining housing, or claiming welfare benefits – transgender individuals are forced to disclose one of the most intimate aspects of their private life to access these benefits. For victim testimonies, see the Annex.

VI. Recommendations

Háttér Society and Transvanilla Transgender Association recommend that the Committee of Ministers

VI.1 schedule the cases for the next examination at the Committee's earliest convenience;

VI.2 express serious concern about not only the failure to execute the judgments promptly, fully and effectively, but indeed actions contrary to the letters and spirit of the case-law of the ECtHR; and

VI.3 call on the Hungarian government to implement the following:

as individual measures:

VI.3.1 provide legal gender recognition to the applicants in the *Rana v. Hungary* and *R.K. v.* Hungary cases, and ensure that all individual measures are taken to fully implement the ECtHR judgments.

as general measures:

VI.3.2 immediately adopt – with the meaningful involvement of civil society actors – legislation that allows both Hungarian national and lawfully settled non-Hungarian national transgender and intersex persons to access legal gender recognition in a quick, transparent and accessible procedure based on self-identification;

VI.3.3 reopen LGR procedures that were launched prior to Section 33 and were rejected because the legal framework at the material time did not contain – in violation of the ECHR – foreseeable rules and conditions for processing applications;

VI.3.4 reopen LGR procedures that were initiated prior to Section 33 and were rejected on the basis of the (unconstitutional and repealed) provision requiring the retroactive application of Section 33;

VI.3.5 abolish the practice of subjecting LGR applicants whose pre-Section 33 requests are still being processed to intrusive and degrading psychiatric assessments.

Respectfully,

Elektronikusan aláírta:
Dr. Polgári Eszter
2024-07-09 18:50:30 +0200
Szignó

Dr. Eszter Polgári
Director, Legal Programme
Háttér Society

H-1136 Budapest, Balzac u. 8-10, Hungary. ♦ Phone: +36 1 329 2670 ♦ Fax: +36 1 799 8418
E-mail: hatter@hatter.hu ♦ Web: www.hatter.hu

ANNEX

Transgender persons whose official documents do not reflect their gender identity, name or gender expression have to disclose that they are transgender every time they need to present these documents. In Hungary this is likely to be an almost daily occurrence. In situations where official documents are required to obtain goods or services – for example, in finding employment, enrolling in education, obtaining housing, or claiming welfare benefits – transgender individuals are forced to disclose one of the most intimate aspect of their private life to access these benefits.

In the following section, we present the personal experiences of some of the applicants, in their own words.

Official procedures, dealings with the authorities

> Every single time I have to deal with government authorities, there are always problems when they see the photo on my ID. When asked to show my ID, I've often had to explain that I am the person appearing on the documents. – Applicant A.
>
> When I was selling my house, the transaction almost fell through because my lawyer didn't want to accept my identification papers, saying she wasn't convinced that I was the property seller. She repeatedly mentioned the "housing mafia", regarding her duty to dispel all possible doubts about the identity of the property's true owner. She called in two of her colleagues, other lawyers, for the purpose of "facial analysis", asking them to give their opinions as "independent experts" as to whether I was me. They printed my ID photo onto A4-sized paper and held it beside my face to compare the two. Although I had already informed the lawyer that I was transsexual, ascertaining my identity took over two hours, all of which took place in front of the buyers of my property. – Applicant B.
>
> Recently, I was out walking with my partner, and police officers stopped us and asked to see our ID. When they saw the name on my ID card, they made rude, sarcastic comments that we must be homosexual and that we should go home and do it in private. Since then, I've been terrified of showing the police my ID. – Applicant C.
>
> As someone who hasn't experienced it personally, you might not realize how important official ID is. COVID-19 travel restrictions made border crossings rare and dangerous, I was extremely anxious when traveling anywhere. It happened to me multiple times that border police didn't believe that my passport was legitimate or that it belonged to me. Once, I was questioned in the open door of a packed bus, with border control agents loudly discussing what my "true gender" is and what genitals I have. It went on for almost an hour. – Applicant D.
>
> While renewing my Hungarian passport in Vienna, I was repeatedly told to sign my name like it is written on my passport. The clerk at the consulate told me that "your name is whatever is in your documents, not what you imagine". – Applicant E.

> I'm afraid to interact with any of the authorities in any capacity, as all these events come with a high risk of abuse, discrimination, and general rudeness. I live in a constant state of stress, not knowing when the next time will be; someone will question, attack, or dismiss my identity because it doesn't match what's on my official papers. – Applicant F.

Bank

> Last time, the clerk requested my personal ID card, asked me to wait, and went away, returning with the branch manager. They pointed the camera at me, asked me for a specimen signature, and then checked my personal data with the Ministry of the Interior's central data registry. I try to always go to the same bank, hoping they'll get used to me, but it doesn't always work. Once, a new clerk didn't know what to do, but the clerk next to them said loudly, "Relax, it's OK, it's just that weirdo we were talking about on Monday". – Applicant G.

Post Office

> Several times, they've refused to give me a registered letter or a package, saying that I have to get a power of attorney from the addressee because the photo on my ID card doesn't match how I look. When I said that I was the person in the photo and that I was transsexual, they yelled at me that they didn't understand and that I had to bring a power of attorney and then I could pick up the letter. – Applicant A.

At the workplace

> I have had many negative experiences when applying for a job with a name and ID documents that do not match who I am and how I look. Personally, my biggest problem is that I want to work as a freight train engineer, which is impossible with female ID papers because they only hire men. – Applicant B.
>
> Luckily, at my job, they arranged for it so that my official name only appears on my pay slip, and only HR knows about it. But there's one interface where my official name once temporarily appeared and everyone could see it. My co-workers don't know my original name, and I'm constantly terrified that sooner or later, they'll find out that I haven't been a girl since birth. – Applicant C.
>
> Finding a job is very difficult since my name doesn't match what's on my official paperwork, and companies prefer to hire someone else who's "less of a hassle". I've been jobless for years, and the only way I can get by right now is by doing contract work at a small company run by friends. I've lost considerable income, not because of my transness (which is not something people figure out unless they see my ID), but only because I can't change my official name. – Applicant D.

Medical care

When I see a doctor, my appearance regularly causes problems. When they call out my name in the waiting room and I stand up, they yell at me to stop kidding around, they didn't call me. Last time, when I went for a urine test, they wouldn't let me use the restroom for the gender that matched my name (female), and I had to explain in front of everyone. Two weeks ago, they wouldn't let me in for a lung screening test because they said I wasn't the same person as the one who'd made the appointment. – Applicant E.

Studies

It's very unpleasant that, even though I've gone through all the operations so that I'm completely a man in the physical sense, I still have a woman's name in my official documents. I've just started studying at a new school and I've had to explain to each of my teachers that I'm registered under a different name than the name I use, and could they please use my chosen name. It's annoying for me and the teachers because they always have to handle it discreetly so the whole class doesn't find out. But I know that this can only last for a short time, and eventually, it's inevitable that all the other students will find out, which will be very humiliating for me. – Applicant F.

Between 2010 and 2015, I was a full-time day student at the Faculty of Law of Miskolc University. Before defending my dissertation, I took a leave of absence to perform missionary service for my church. After I returned, I decided to change my name and gender. I submitted my application and asked for a deferral of my dissertation defense because I wanted to do it under my new name. The reason for this was that I didn't want my old name on my diploma, because you can't change that after, and then I'd have to explain each time I apply for a job. Because of the suspension of the review of my application, I've had to defer the defense of my dissertation repeatedly, and each time, I've had to take out a student loan to cover the missing 30 credits. Altogether, I've taken out 780,000 HUF in loans. Meanwhile, because it's taken too long, I've lost my status as a full-time student, which means I can't be a lawyer. – Applicant JG.

Psychological effects

The current situation is causing me tremendous psychological distress, to a degree that cannot be quantified in money. – Applicant C.

Since they passed the new law that bans gender change, I've had intense panic attacks; I end up curled up in the bathtub, crying to the point of barely being able to breathe. – Applicant G.