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Date: 15/11/2021

DH-DD(2021)1188

Meeting: 1419th meeting (December 2021) (DH)

Communication from NGOs (Transgender Europe, ILGA Europe, Coalition Margins and Transforma) (04/11/2021) in the case of X. v. North Macedonia (Application No. 29683/16).

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.

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Réunion : 1419e réunion (décembre 2021) (DH)

Communication d'ONG (Transgender Europe, ILGA Europe, Coalition Margins et Transforma) (04/11/2021) relative à l'affaire X. c. Macédoine du Nord (Requête n° 29683/16) ***[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.

Rule 9.2 submission in X v NORTH MACEDONIA

JOINT SUBMISSION BY TRANSGENDER EUROPE, ILGA-EUROPE, COALITION MARGINS AND TRANSFORMA TO THE COMMITTEE OF MINISTERS OF THE COUNCIL OF EUROPE IN THE CASE OF X V. THE FORMER YOUGOSLAV REBUBLIC OF MACEDONIA (APPLICATION NO. 29683/16)

04 November 2021

Summary

The North Macedonian government has not yet executed the general measures from the judgement in *X v North Macedonia*. The submitting organisations are concerned over a continued delay in the legislative process towards adopting legal gender recognition procedures. Actions as indicated in the government's action plan have stalled without a timeline for progress. Amendments to an existing legal draft risk that the procedures would not meet Council of Europe standards in this field.

The submitting organisations suggest **keeping the X v North Macedonia case under enhanced supervision** and for the **Committee of Ministers to issue an interim resolution** to remind the government that procedures need to be free from any abusive requirements, such as medical or mental health requirements, divorce, or age, to limit accessibility only to those identifying within the gender binary, as well as any administrative barriers.

Introduction

This joint submission is made in accordance with Rule 9.2 of the Rules of the Committee of Ministers for the supervision of the execution of judgments. It aims to assist the Committee of Ministers in its evaluation of the general measures outlined under the North Macedonian Government's Revised Action Plan submitted to the Committee of Ministers in a communication dated 29 September 2021 ("the Government's Communication")[1] regarding the implementation of the judgment in the *X v. NORTH MACEDONIA* case.[2]

[1] See Communication from North Macedonia: Revised Action Plan, 29 September 2021.

[2] The submitting organisations are grateful for the support of Margarita S. Ilieva in drafting this submission and the input received by Natasha Boskova, legal representative of X v. NORTH MACEDONIA and member of the task

While we welcome the Government's Revised Action Plan as set out in the Government's Communication, we are concerned over the delay in its implementation. Presently, the Court's judgment in *X v. NORTH MACEDONIA* lacks execution in terms of the necessary general measures, that is to say, the adoption of a legislative framework to govern legal gender recognition in accordance with the applicable standards of the Council of Europe, including the case law of the European Court of Human Rights (the Court). North Macedonia has not amended its legislation in line with the judgment in the case, as well as other trans-relevant jurisprudence. The requisite legal framework is not in place.

In March 2020, the Committee of Ministers had recalled that the Court had found that the legal framework in the respondent State did not provide quick, transparent and accessible procedures to change the transgender applicant's gender as recorded on his birth certificate. The Committee of Ministers had strongly encouraged the authorities to ensure that the draft legislation is adopted by the end of 2020.[3] Nearly a year later than this deadline, the amendments are still pending, with no parliamentary consideration of them being scheduled.

Description of the case

The case of *X v. NORTH MACEDONIA* concerns a violation of the transgender applicant's right to respect for his private life on account of the absence of quick, transparent and accessible procedures in national legislation that would allow the change of the gender marker on his birth certificate – a violation of Article 8 of the Convention.

The Court found that the national regulatory framework on the legal gender recognition (LGR) was marred by a number of important gaps, such as the existence and nature of any requirement that a claimant needs to fulfil in order to have the gender marker in the official records changed (§69 of the judgment). As a result, the applicant had been left in a situation of distressing uncertainty vis-à-vis his private life and the recognition of his identity since 2011, when he had applied with the Civil Status Registry for a change of the gender marker on his birth certificate.

Individual measures

The individual measures implied by the Court's judgment have been executed: the Civil Status Registry has changed the applicant's gender marker in the official records and the Ministry of Internal Affairs has issued a new male personal identity number for the applicant corresponding to his gender identity. On 26 October 2020, a new birth certificate with the new gender marker and personal identity number was issued to the applicant.[4] The applicant received compensation as per the Court's judgment.

General measures

I. Existing law.

force set up to prepare the legislative amendments to the Civil Status Registration Act (see the Government's Communication, §18, for acknowledgment of Ms. Boshkova's membership in the task force).

[3] See Decision of the Committee of Ministers, 1369th meeting, 3-5 March 2020.

[4] See the Status of execution as documented by the Committee of Ministers.

In its communications to the Committee of Ministers, including the latest Government's Communication, North Macedonia has consistently acknowledged the need to reform the domestic legislation in order to address the issues found by the Court's.[5] Whilst the Government adopted draft amendments to the Civil Status Registration Act, which it submitted to Parliament for consideration in May 2021, the latter has not progressed them in any way whatsoever.

I.1. Stagnant legislation.

Under the existing, unreformed legislation, the legal issues and gaps that the Court had identified (§67-9 of the judgment) remain:

- no provision in the law to explicitly allow the alteration of a person's gender marker in the civil status register;
- no provision in the law specifying the terms and conditions to be fulfilled for such an alteration, or procedures to be followed; no legal clarity regarding the existence and nature of any requirement that a claimant needs to fulfil in order to have their sex/ gender marker in official records changed;
- no provision/ case law specifying the nature of the evidence required;
- no provision specifying the body competent to decide an application for legal gender recognition (LGR).

Whilst North Macedonia's Government, as noted above, has adopted draft legislation to correct these issues, the amendments are still pending in Parliament with no clear timeline regarding their adoption as a law. Moreover, certain of the most important draft provisions, in terms of execution of the Court's judgment, face concerted political opposition. There is uncertainty whether they would remain in the final version of the draft law for Parliament to vote on – see specifics below. Furthermore, other provisions of the bill are problematic in themselves as discussed below.

I.2. Evolving, unstable, arbitrary case law.

In terms of evolution of the domestic case law since the Court's judgment, notwithstanding the lack of legislative reform, only five LGR cases have been decided in a manner corresponding to the Court's judgment, including the case of the applicant, X., who obtained LGR in September 2020. Between October 2020 and March 2021, four further cases pending before the State Commission were positively decided based on the Court's judgment. These cases had been variously pending for two to ten years.

However, in other cases, LGR applicants have been unsuccessful on illegitimate grounds, including requirements arbitrarily imposed by Civil Status Registry clerks that are not prescribed by the law. Notably, LGR applications based on self-determination are rejected. Furthermore, the Civil Status Registry denies consideration of new cases (ones that had not been pending at the time the Court delivered its judgment), as well as cases remanded by the Administrative Court or the State Commission, on alleged lack of jurisdiction grounds. Whilst

[5] See the Government's Communication, §17-28.

the authorities no longer require medical proof of gender reassignment, as had been their position in the case of X, for the past four years, the Civil Status Registry has been rejecting LGR applications on grounds of its purported lack of competence. This body has been declaring that it is not competent to decide LGR cases as there is no law that clearly regulates this subject matter. Accordingly, one of the central issues identified by the Court in its judgment – the legal uncertainty regarding the LGR-competent body – has remained unaddressed in practice, as well as under the legislation. Overall, the case law is contradictory and unpredictable.

Furthermore, the length of proceedings remains questionable. Reportedly, certain cases have been pending since 2018. In some instances, the administration of cases has been marked by unreasonable delays. For example, in a case favourably decided by the Administrative Court in 2019, the Civil Status Registry has still not taken the necessary steps in terms of LGR, claiming that they had not received the Court's decision.

II. Issues pertaining to the draft Amendments to the Civil Status Registration Act.

II.1 Restrictive provisions and gaps.

II.1.a. Restrictive provisions.

The pending draft amendments limit LGR access to nationals over the age of 18 who have legal capacity and are not married (Article 19-a, draft Amendments to the Civil Status Registration Act). Accordingly, individuals who are *a priori* vulnerable by definition, including children and youth, people with mental health concerns resulting in limited capacity, and non-nationals, are arbitrarily excluded, as are married people. The latter restriction means that married LGR applicants would be forced to choose between their marriages and LGR, and accordingly divorce their spouses, or forego LGR. These restrictions raise important issues with regard to personal autonomy and private life, as well as direct and indirect discrimination in relation to due protection of personal identity under Article 8 of the Convention. The right to respect for one's gender identity belongs to all individuals, as acknowledged by the Court (§38, *X v. NORTH MACEDONIA*).

Regarding a divorce requirement in *Hämäläinen v. Finland*, the Court only accepted an exclusion of married people from LGR access on narrow grounds. In Finland, at the time, an alternative to marriage existed under the law that was equivalent in terms of spouses' as opposed to partners' rights. This is not the case in North Macedonia where no such partnership is provided for under the law. Hence, measures are needed to ensure that the rights of spouses, children, and depended family members are safeguarded in cases where LGR applicants would have to end their marriages in order to access the LGR procedure.

The amendments would demand an LGR applicant's declaration to the effect that they require LGR as their official gender marker does not correspond to their gender identity to be certified by a notary public (Article 19-c, draft Amendments to the Civil Status Registration Act). In practice, this would render applicants' effective access to the procedure dependent on their local notary public's understanding of the right to LGR, which would not necessarily be adequate in all cases. Notaries have not been trained to perform this role without

encroaching on personal autonomy and privacy. There is a probability that, in practice, some LGR applicants would risk being confronted with unwanted conduct, such as intrusive questions, a lack of sensitivity, and possible disrespect at the hands of unprepared practitioners. Whilst notaries public, as well as Civil Status Registry staff, could yet be trained and/or receive clear instructions from the executive branch, a community concern remains that LGR applicants could still risk receiving prejudicial treatment, including harassment, on the part of notaries public due to prevailing transphobic prejudices at the national level. Reportedly, on occasion, trans litigants have been ridiculed by members of the judiciary in the course of legal proceedings.[6] The trans community's argument is that, the greater number of officials/ practitioners standing between an applicant and their LGR, the greater the risk of such unwanted conduct. Such a greater risk would not be justified where the need to take it is not clearly established, that is, where the involvement of additional practitioners is not strictly necessary. The latter necessity would have to be evidence-based. It is considered, at the community level, that the involvement of notaries public is not necessary. There is certainly no evidence to the contrary. No needs-based justification for this requirement of notary certification has been demonstrated. Accordingly, the restriction and the corresponding risks it poses are not demonstrably proportionate. The affected community and human rights experts consider this requirement unjustified as its necessity in a democratic society has not be shown.[7] Furthermore, this requirement is capable of resulting in divergent practices and unequal access to justice in different localities based on non-harmonised approaches taken by individual notaries.[8] The drafters of the amendments might have been inspired by the Maltese LGR law. While in the Maltese legal framework it had been necessary to introduce a public deed into the LGR procedure, this is not the case in North Macedonia.

The draft procedure involves fees that are capable of proving exclusionary for certain groups of LGR applicants based on socio-economic status. Specifically, the current fee for certification of an applicant's declaration by a notary public is approx. EUR 9, whilst the fee for the procedure before the Civil Status Registry is EUR 5. The fee to appeal against the Registry's decision is EUR 5. Additionally, a separate procedure to change one's name would cost another EUR 6. In the national context, these amounts, cumulatively, would constitute an obstacle for a proportion of LGR applicants. In North Macedonia, the minimum wage amounts to EUR 235; more than 40 % of the population live in poverty.[9] A total amount of EUR 25 in LGR-related fees constitutes more than 10 % of the national minimum wage. LGR procedures

[6] These arguments and anecdotal evidence have been supplied by Ms. Natasha Boskova, legal representative of the applicant and member of the task force set up to draft the legislative amendments (see the Government's Communication, §18).

[7] This position has been attested to by Ms. Natasha Boskova, legal representative of the applicant and member of the task force set up to draft the amendments (see the Government's Communication, §18).

[8] Participants in the "Legal Gender Recognition in the EU" study (European Commission, 2020) from all regions of Europe have documented substantial regional and local differences within a country that can undermine individuals' (equal) access to their entitlements under LGR procedures. For one individual, the interaction with the LGR process 'depends a lot if one is lucky to be born in the right region or in the right city' ("Legal Gender Recognition in the EU", 8.5 *Failure to follow the law and regional 'pot luck'*, p. 169).

[9] Almost a quarter of the inhabitants of North Macedonia live in poverty. Poverty is highest (45%) in a household of two adults and three or more dependent children. This is followed by a single parent with dependent children (42,8%). Inactive and unemployed people are among the most vulnerable categories, their poverty rates being 33,9% and 33,2%, respectively). See official statistics as reported by Deutsche Welle.

should be fee-free, or any fees should be minimised. Alternatively, there should be a simple exemption mechanism for individuals for whom the amounts are burdensome.

Arguably, the amendments would create a dependence on legal representation on the part of LGR applicants. As the procedure to change one's name, which is governed by different legislation, is separate from LGR proceedings, and other bodies are competent, in practice, LGR applicants would face difficulties navigating this legal landscape without professional legal help. Furthermore, the practice in terms of name-change procedures varies by locality. Procedures should be uniformly accessible for all, quick and transparent. Procedures should empower their users, and not take away from their confidence to take autonomous legal action, regardless of the availability or affordability of legal help. Even where legal help is available free of charge thanks to civil society organisations, procedure users should not be made to see themselves as dependent on lawyers for access to LGR services. Those services should be considered basic.

II.1.b. Gaps.

The amendments make no provision for legal recognition of non-binary gender identity. Limiting LGR only to those persons identifying within the gender binary leaves out the majority of trans people. 64% of trans respondents to the EU Fundamental Rights Agency LGBTI Survey (2019) did not identify within the gender binary.[10] The proposed procedure therefore risks excluding (most of) those whom it should serve. The procedure should accordingly provide for the possibility to choose a third gender marker, "X", as an alternative to male or female denominators.

II.2 Political challenges.

We warmly welcome the draft provision banning requirements of medical proof for the purposes of LGR (Article 19-b of the amendments). This corresponds to state-of-the-art medical and human rights standards. However, we note with concern that this provision has come under targeted political attack and is, therefore, at a risk of being eliminated/ weakened in the forthcoming parliamentary process, resulting in a deficient law. Opposing political parties have reportedly announced alternative draft amendments requiring medical proof or third-party confirmation of one's gender identity. It is crucial that Parliament retains focus on the applicable supranational standards, which reject any certification, medical or otherwise, of one's gender identity as being inacceptable from a human-rights perspective. The relevant international standards dismiss a medical approach in accordance with a trans depathologisation paradigm.[11]

For the less-then-ideal option of involving medical practitioners or another third party vetting mechanism in LGR procedures, Parliament should duly take into account the relative lack of professionals trained in trans-specific respect and support in the country, and, accordingly, the substantial risk of abuse, intentional, as well as unconscious, of trans individuals approaching practitioners to claim their due LGR access.

[10] See "A long way to go for LGBTI equality" (FRA, 2020), p. 60.
[11] In 2018, the World Health Organization upgraded the International Classification of Diseases –ICD 11 by, inter alia, removing trans identities from the category of mental health disorders.

Parliament should guard against any political tendencies to (re-)introduce any further LGR access requirements that are not provided for in the draft amendments (or in the existing legislation, for that matter) that would further restrict individual standing and/or entitlements, without contributing any added value in a democratic society.

It is important to ensure an adequately inclusive, consultative, participatory, and representative procedure in Parliament that would allow all relevant actors, including community representatives and organisations, as well as human rights experts, to be heard during the discussions and their considerations to be effectively taken into account.

As noted, the amendments have been delayed indefinitely. Currently, they have not taken a place in the agenda for Parliament's work. It is important to ensure the speediest possible parliamentary process for them, given the issues defining the current legal situation as discussed above.

Conclusion

Following from the above, we respectfully urge the Committee of Ministers to maintain *X v. NORTH MACEDONIA* under enhanced supervision. We further call on the Committee of Ministers to adopt an interim resolution under Rule 16 of its Rules. We ask the Committee of Ministers to require a roadmap detailing the manner, in which a swift adoption of an LGR legal framework will be implemented, as well as the Government's plans to overcome the obstacles to human-rights conforming enforcement we have discussed above. The interim resolution we suggest should recall that an LGR framework needs to be free from any abusive requirements, such as medical or mental health requirements, divorce, or age limits, restricting access to those identifying within the gender binary, as well as administrative barriers, such as a notary deed or unfeasible or indirectly discriminatory administrative fees. Finally, we would like to remind the Committee of Ministers that only a legal framework that adheres to the Council of Europe standards of being quick, transparent, and accessible and based on self-determination could effectively prevent violations similar to those established by the Court in the case of X.

Sincerely,

Masen Davis,
TGEU Executive Director

(also for the co-signatories)