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La CEDU su stranieri e identità di genere in Ungheria
(CEDU, sez. IV, sent. 16 luglio 2020, ric. n. 40888/17)

La Corte Edu si pronuncia sul caso di un transgender iraniano, il quale aveva ottenuto l'asilo in Ungheria, ma non gli era stato consentito di accedere alla procedura legale ivi prevista per il mutamento di genere e di nome, per il fatto di non possedere un certificato di nascita ungherese. Ed invero, l'unico strumento legale in tale direzione era la modifica nel registro delle nascite, ma non essendo stata registrata in Ungheria la sua nascita, la domanda non poteva essere esaminata dall'ufficio dell'anagrafe. Il ricorrente dopo aver impugnato tale diniego innanzi ai tribunali interni, che avevano rigettato il suo ricorso, aveva adito anche la Corte costituzionale. Il giudice costituzionale, constatato che il giudice interno non aveva potuto accogliere il ricorso a causa dell'assenza nella legge di qualsiasi previsione circa la modifica dei nomi e del genere dei cittadini non ungheresi, ha giudicato incostituzionale tale omissione legislativa ed ha invitato il Parlamento a trovare una soluzione per consentire alle persone legalmente residenti in Ungheria, ma prive di certificato di nascita ungherese, di cambiare nome, ad esempio inserendo la modifica del nome su altri documenti ufficiali rilasciati dalle autorità ungheresi. Tale modifica legislativa richiesta dalla Corte costituzionale non è, tuttavia, ancora intervenuta.
I Giudici di Strasburgo hanno esaminato il caso dal punto di vista dell'obbligo positivo dello Stato di garantire il diritto del ricorrente al rispetto della sua vita privata, ribadendo la sua giurisprudenza su tale questione. Secondo la Corte Edu, infatti, nel bilanciare gli interessi in gioco in gioco, gli Stati hanno una discrezionalità limitata ("margine di apprezzamento") quando si tratta di aspetti essenziali dell'intimità delle persone, come, appunto, l'identità di genere.
La Corte Edu ha preso atto delle conclusioni del giudice costituzionale sull'esistenza di una lacuna legislativa, che ha escluso tutti i non ungheresi legalmente residenti dall'accesso alla procedura di modifica del nome e di riconoscimento del genere, indipendentemente dalle circostanze, ritenendo che si tratti di una limitazione sproporzionata del loro diritto alla dignità umana.
Inoltre, la Corte ha stigmatizzato il fatto che le autorità avessero respinto la domanda del ricorrente per motivi puramente formali, senza esaminare la sua personale situazione, senza quindi soppesare gli interessi in gioco. In particolare, non avevano tenuto conto del fatto che gli era stato concesso l'asilo proprio a causa delle persecuzioni subite nel suo paese di origine per la sua transessualità.
Senza dubbio, garantire l'accesso ad una procedura per il riconoscimento legale del genere a persone prive di certificati di nascita ungheresi, attraverso un esame di merito delle loro istanze, può rappresentare un aggravio amministrativo per le autorità statali. Tuttavia, ciò non poteva di per sé giustificare un rifiuto incondizionato della domanda del ricorrente.
Di qui la conclusione che non era stato trovato un giusto equilibrio tra l'interesse pubblico ed il diritto del ricorrente al rispetto della sua vita privata, con conseguente violazione dell'art. 8 CEDU.

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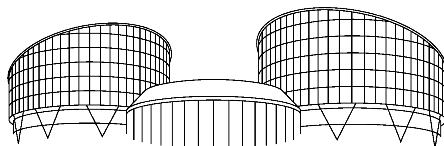

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

CASE OF RANA v. HUNGARY

(*Application no. 40888/17*)

JUDGMENT

STRASBOURG

16 July 2020

This judgment is final but it may be subject to editorial revision.

In the case of Rana v. Hungary,

The European Court of Human Rights (Fourth Section), sitting as a Committee composed of:
Branko Lubarda, *President*,
Carlo Ranzoni,
Péter Paczolay, *judges*,
and Ilse Freiwirth, *Deputy Section Registrar*,

Having regard to:

the application against Hungary lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by an Iranian national, Mr Jafarizad Barenji Rana ("the applicant"), on 29 May 2017;

the decision to give notice to the Hungarian Government ("the Government") of the complaint concerning Article 8 of the Convention and to declare inadmissible the remainder of the application;

the observations submitted by the Government and the observations in reply submitted by the applicant;

the comments submitted by Transgender Europe, the European Region of the International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA-Europe) and Transvanilla, who were granted leave to intervene jointly by the President;

the decision to reject the Government's objection to examination of the application by a Committee;

Having deliberated in private on 23 June 2020,

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

INTRODUCTION

1. The case concerns an Iranian transgender refugee whose application to have his name and sex marker officially changed was rejected because he did not have a Hungarian birth certificate. The applicant relied on Article 8 of the Convention.

THE FACTS

2. The applicant was born in 1987 and lives in Budapest. The applicant was represented by Mr Cs. Tordai, a lawyer practising in Budapest.
3. The Government were represented by their Agent, Mr Z. Tallódi, Ministry of Justice.
4. The facts of the case, as submitted by the parties, may be summarised as follows.
5. The applicant was born female in Iran but, according to the applicant, identified as male from an early age. On 29 January 2018 he submitted to the Court the English translation of a medical opinion issued on 8 September 2013 by two Iranian medical experts which confirmed that he suffered from sexual dysfunction and a personality disorder.
6. In July 2015 the applicant applied for asylum in Hungary, maintaining that while he had been born female, he had always identified as male, a fact which had manifested itself through his wearing men's clothes, working as a kickboxing trainer and being attracted to women.
7. On 14 December 2015 the asylum authority, considering that the applicant had been subjected to persecution in Iran due to his gender identity (transsexuality), recognised the applicant as a refugee.
8. On 6 March 2016 the applicant applied for a gender and name change to the Hungarian Immigration and Citizenship Office ("the Office"). He submitted that the official documents issued to him in Iran identified him as female, but that this did not match his real gender identity.
9. In its letter of 30 March 2016, the Office informed the applicant that gender reassignment was in principle registered by the Office of the Registrar of Births/Marriages/Deaths with jurisdiction over the petitioner's place of birth, and that this was dependent upon the opinion of the Ministry of Human Resources. The birth data of refugees, however, continued to be registered by the relevant foreign authorities.
10. On 6 July 2016 the Office issued a formal rejection decision without examining the application on the merits, holding that it did not have jurisdiction to take any further action. Because the applicant's birth had not been registered in Hungary, the application could not be forwarded to the relevant registrar. The applicant sought judicial review.
11. On 25 November 2016 the Budapest Administrative and Labour Court dismissed the case, upholding the conclusion of the Office as to the Hungarian administrative authorities' lack of jurisdiction. It reiterated that the authorities processed Hungarian citizens' applications for legal gender recognition according to the procedure developed in practice (see paragraph 14 below). It also emphasised that no formal decision on gender reassignment was delivered; the registration of the gender change in the birth register itself served as the decision. As a non-Hungarian citizen enjoying refugee status in Hungary, the applicant did not have a family register record in Hungary, so the practice followed in respect of Hungarian citizens could not be applied to his case. The court also referred to the fact that the applicant had failed to attach to his application the medical documentation required according to the otherwise applicable practice, in the absence of which recognition of the gender change was not possible.

12. On 17 February 2017 the applicant lodged a constitutional complaint against the Budapest Administrative and Labour Court's decision, arguing, inter alia, that the register of personal data and residence addresses included data on name and gender and that the requested change could be registered therein. On 13 June 2017 the Constitutional Court declared his complaint admissible.
13. On 19 June 2018 the Constitutional Court rejected the applicant's constitutional complaint, holding that the adjudicating judge could not have decided differently within the existing legal framework since no statutory basis for changing the names of non-Hungarian citizens existed. The Constitutional Court held that the right to change one's name was a fundamental one. This was even more the case when it came to changing name after gender reassignment, because of the inviolability of human identity and human dignity. Changing name following a change of gender fell within the ambit of the right to a name. In fact, changing name went hand in hand with changing gender, in so far as everyone was entitled to have a name that was aligned with his or her gender. The State was therefore obliged to adopt regulations that acknowledged gender reassignment and provided a discrimination-free opportunity to enter the resulting name change into the register. The complete lack of regulations excluded lawfully settled non-Hungarian citizens from the name-changing procedure, including those whose country of origin did not allow for such a procedure. The Constitutional Court considered that the legislative omission identified was disproportionately restrictive and unconstitutional. In its view, the legislator was under the obligation to find a different solution for petitioners without Hungarian birth certificates, for example by entering the change of name in other documents received from the Hungarian authorities. The Constitutional Court called upon Parliament to meet its legislative duty by 31 December 2018 and invited the applicant to resubmit his request.
The legislative change requested by the Constitutional Court has not yet been carried out.

RELEVANT LEGAL FRAMEWORK AND PRACTICE

14. At the material time, although Hungary did not have specific legislation on legal gender recognition, it was possible to change one's documents on the basis of an informal practice. Applicants for legal gender recognition had to submit a medical expert opinion diagnosing transsexuality, recommending gender reassignment surgery – which was not in itself a prerequisite for the recognition – and excluding contraindications, together with an expert opinion of a clinical psychologist. The legal gender change was recognised in the registrar's procedure (see paragraph 15 below) on the basis of an expert opinion issued by the Department for Healthcare and Public Health of the Ministry of Human Resources and notified to the civil registry.
15. Section 69/B(1) of Act no. I of 2010 on the registrar's procedure provides that the register of personal identification data in the electronic family register contains, inter alia, the data subject's surname and forename at birth and the subject's gender, as well as any modification of these data.
16. Section 27 of the Decree of the Public Administration and Justice Minister no. 32/2014 (V. 19.) on detailed rules for performing the registrar's duties, which was adopted on 19 May 2014, provides:

"The Central Office of the Registrar shall promptly notify the registrar keeping the register of births of the change of name in connection with gender reassignment in order to make the change in the

birth register. The registering registrar shall enter the gender reassignment on the basis of the notification made by the Central Office of the Registrar."

As of 1 January 2017 this provision was amended as follows:

"Within eight days upon receipt of the healthcare expert opinion supporting gender reassignment, the gender reassignment and the change of the forename made necessary by the foregoing shall be notified by the registry responsible for the change of name to the registrar keeping the register of births, for the purpose of entering them in the register. The registrar keeping the register of births shall enter the gender reassignment in the family register on the basis of the notification made by the registry responsible for the change of name, as the basic document, and the certified photocopy of the healthcare expert opinion."

Government Decree no. 429/2017 (XII. 20.) on the detailed rules for performing the registrar's duties, which was adopted on 20 December 2017, includes the same provision in its section 7.
17. An overview of relevant international materials is outlined in X v. the former Yugoslav Republic of Macedonia, no. 29683/16, §§ 31-34, 17 January 2019.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

18. The applicant complained that the refusal to change his name and his sex marker from "female" to "male" in his identity documents had amounted to a violation of Article 8 of the Convention, which reads as follows:

"1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

A. Admissibility

1. Submissions by the parties

(a) The Government

19. In their observations of 17 October 2017, the Government submitted that the application was premature as the domestic proceedings were still pending before the Constitutional Court. Alternatively, if the constitutional complaint could not be considered an effective remedy, then neither could judicial review proceedings, in which case the application had been lodged out of time.

20. Furthermore, the Government raised an objection in relation to the applicant's victim status. They contended that the applicant did not live at the address indicated in the application form and potentially not even in Hungary, so he could not be considered a victim of a violation resulting from Hungarian law. They also argued that the applicant had failed to prove his transsexuality by medical examination.
21. Lastly, the Government argued that the application constituted an abuse of the right of individual application as it was in fact an actio popularis aimed at publicising the situation of transsexuals in Hungary.

(b) The applicant

22. The applicant submitted that the constitutional complaint could not be considered an effective remedy, since it did not provide for speedy redress. Alternatively, if ordinary judicial review proceedings were ineffective, as claimed by the Government, legal gender recognition was not possible for refugees in Hungary which meant that the violation was continuous.
23. As regards his victim status, the applicant submitted that he lived in Hungary and had requested the legal recognition of his gender there. He had registered his new address in Budapest on 28 August 2017. The Hungarian authorities had recognised him as a refugee without questioning his transsexuality. They had then declined to examine on the merits his application for a legal change of gender, including the medical examination of his transsexuality.

2. The Court's assessment

(a) Applicability of Article 8 of the Convention

24. The right to respect for private life under Article 8 of the Convention extends to gender identity and individuals' names, as components of personal identity (see A.P., Garçon and Nicot v. France, nos. 79885/12 and 2 others, §§ 92-94, 6 April 2017 (extracts), and S.V. v. Italy, no. 55216/08, §§ 57-59, 11 October 2018). The present case concerns the inability of the applicant as a transgender refugee to obtain the legal recognition of his gender identity and his resulting change of name. The "private life" aspect of Article 8 of the Convention is therefore applicable to the present case, a fact which was, moreover, not disputed by the Government.

(b) Non-exhaustion of domestic remedies and non-compliance with the six-month rule

25. The Court notes that the applicant lodged his application with the Court while the proceedings before the Constitutional Court were still pending. In the meantime, on 19 June 2018 the Constitutional Court rejected the applicant's constitutional complaint (see paragraph 13 above). The Court must therefore dismiss the Government's objection that the application was premature (see paragraph 19 above).
26. As regards the Government's argument that the application was submitted out of time since the six-month time-limit should be regarded as having started to run before the applicant had instituted the judicial proceedings, the Court observes the following. The Budapest Administrative and Labour

Court dismissed the applicant's case, reiterating that the Hungarian administrative authorities had no jurisdiction in the matter (see paragraph 11 above). In its decision of 19 June 2018, the Constitutional Court established that there existed an unconstitutional legislative omission with respect to the name-changing procedure for lawfully settled non-Hungarian citizens such as the applicant (see paragraph 13 above). It required Parliament to introduce a remedy for this omission by 31 December 2018, which has yet to be done. Accordingly, the Court considers that it was not unreasonable for the applicant to initiate judicial proceedings to have his position settled at domestic level before submitting his complaint to the Court. It therefore considers that the applicant's court action cannot be regarded as futile. The Court is satisfied that it interrupted the running of the six-month time-limit and, consequently, dismisses the Government's objection on non-compliance with the six-month rule.

(c) Victim status and abuse of the right of individual application

27. At the outset, the Court notes that on 28 August 2017 the applicant registered his new address in Hungary and informed the Court accordingly. The Government did not dispute that the applicant actually lived there. They argued, however, that the applicant had failed to prove his transsexuality by medical examination and objected to his victim status on that ground.

28. The Court observes that the domestic authorities rejected the applicant's application for the change of his sex marker without considering it on the merits or examining whether the applicant in fact fulfilled the medical conditions required in practice for such a change to be registered. The applicant complained about the effects of those decisions and the deficient legal framework on his Article 8 rights.

29. The Court, without prejudging the merits of the case, cannot discern any elements which could call into question either the applicant's victim status or the responsibility of the respondent State. In these circumstances, the Court also rejects the Government's contention that the applicant abused the right of individual application by lodging an actio popularis.

(d) Conclusion

30. The Court concludes that the complaint is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

B. Merits

1. Submissions by the parties

(a) The applicant

31. Referring to this Court's case-law, the applicant submitted that the member States had positive obligations in respect of the legal recognition of a transgender person's gender identity. There was no legal framework for the procedure for legal gender recognition in Hungary, regardless of the place of birth of the applicant. The procedure in place was not foreseeable, accessible and precise.

32. The applicant further submitted that while it was left to the State to set up the procedure by which gender change could be legally recognised, Hungary could not exclude him – as a refugee whose personal status was governed by its laws – from accessing such a procedure just because he did not have a Hungarian birth certificate. In the absence of such a certificate, the decision on the legal recognition of his gender could take other forms. He could not be expected to request recognition of his gender in his country of origin, where he had been persecuted on the basis of his transsexuality, which was precisely why Hungary had granted him refugee status in the first place.

(b) The Government

33. The Government submitted that they would take the same position on the issues raised in the application as the Constitutional Court, where the case was still pending at the time of the Government's observations (the decision was adopted on 19 June 2018). They emphasised that no permission was needed to change "legal gender" in Hungary, as the change was merely registered by a rectification to the birth register. Consequently, foreigners (including refugees) could not have changes of gender registered.
34. The Government further submitted that the applicant could contact the Iranian authorities to have his gender change registered in Iran. Moreover, the fact that he was recognised as a refugee did not mean that his transsexuality was established by the Hungarian authorities. In this connection, they argued that the applicant's transsexuality had never been medically established and that he had failed to enclose any medical documentation with his application to the domestic authority. In their submissions of 2 February 2018, the Government argued that the medical certificate submitted by the applicant (see paragraph 5 above) did not prove his transsexuality by European medical standards.

2. Observations of the third-party interveners

35. Transgender Europe, the European Region of the International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA-Europe) and Transvanilla jointly pointed to the difficulties faced by transgender asylum-seekers and refugees in their countries of settlement. They provided a comparative overview of national regulations in the area of legal gender recognition and outlined relevant developments in Hungary.

3. The Court's assessment

36. The Court observes that the applicant alleged the existence of an unjustifiably restrictive practice on the part of the Hungarian authorities, which made access to the legal gender recognition procedure conditional on the petitioner having a Hungarian birth certificate, and a deficient legislative framework.
37. The Court notes in this connection that the Hungarian legal system at the relevant time permitted transgender persons to have their gender identity legally recognised by having their civil status corrected on the basis of rectifications made to the family register (see paragraph 14 above). While the applicants for legal gender recognition had to provide a medical expert opinion

diagnosing transsexuality and recommending gender reassignment surgery, the latter was not in itself a prerequisite for the recognition (see ibid.). However, as observed by the Constitutional Court, there was a gap in the relevant legislation in that there was no statutory basis allowing for recognition of gender reassignment and access to the name-changing procedure for lawfully settled non-Hungarian citizens (see paragraph 13 above). Therefore, the Court considers that the applicant's complaint falls to be examined from the standpoint of whether or not the respondent State has failed to comply with the positive obligation to secure the applicant's right to respect for his private life, in particular by not providing him with a procedure allowing him to have his gender identity legally recognised in the absence of a Hungarian birth certificate (see, mutatis mutandis, X v. the former Yugoslav Republic of Macedonia, no. 29683/16, §§ 63-65, 17 January 2019, and L. v. Lithuania, no. 27527/03, §§ 56-57, ECHR 2007-IV).

38. The Court refers to the relevant Convention principles regarding positive obligations under Article 8, which have been summarised in Hämäläinen v. Finland ([GC], no. 37359/09, §§ 65-67, ECHR 2014, with further references). It considers that the main question to be addressed in the present case is whether, in view of the margin of appreciation available to them, the Hungarian authorities struck a fair balance between the competing interests of the applicant in having his gender identity legally recognised and the community as a whole (ibid., § 65).

39. The Court accepts that safeguarding the principle of the inalienability of civil status, the consistency and reliability of civil-status records and, more broadly, the need for legal certainty are in the general interest and justify putting in place stringent procedures (see, mutatis mutandis, A.P., Garçon and Nicot, cited above, § 142). It stresses that its task is not to take the place of the competent national authorities in determining the most appropriate policy governing procedures for changing gender and name. Therefore, the Court does not call into question as such the choice of the Hungarian authorities to regulate the legal recognition of gender change as a special kind of name-changing procedure performed by a registrar keeping the register of births (see paragraphs 14-16 above). Nevertheless, as regards the balancing of the competing interests, the Court also notes that an essential aspect of individuals' intimate identity is central to the present application because it concerns an individual's gender identity, a sphere in which the Contracting States have a narrow margin of appreciation (see Hämäläinen, cited above, § 67, and A.P., Garçon and Nicot, cited above, § 123).

40. In this connection, the Court refers to the findings of the Constitutional Court, according to which the legislative gap identified excluded all lawfully settled non-Hungarian citizens from accessing the procedures for changing gender and name regardless of their circumstances, which disproportionately restricted their right to human dignity (see paragraph 13 above). It further observes that the domestic authorities rejected the applicant's application purely on formal considerations, without examining his situation and therefore without conducting any balancing exercise of the competing interests. In particular, the relevant authorities did not take into account the fact that the applicant had been recognised as a refugee precisely because he had been persecuted on the grounds of his transgenderism in his country of origin. The Court considers that in the circumstances of his case the applicant could not reasonably have been expected to pursue the recognition of gender reassignment and the name-change procedure in his country of birth. In that

connection, it reaffirms the principle that the Convention protects rights that are not theoretical or illusory, but practical and effective.
41. It is true that any measure aimed at providing those without Hungarian birth certificates with the opportunity to access the procedure for legal gender recognition, together with an examination of their claims on the merits, may constitute an additional administrative burden on Hungarian authorities. However, this cannot in itself justify an unconditional refusal of the applicant's application to obtain legal recognition of his true gender identity (compare and contrast Guerrero Castillo v. Italy (dec.), no. 39432/06, 12 June 2007), especially since the positive obligation as framed by the Constitutional Court (see paragraph 13 above) can be considered relatively narrow and the possible impact on the State does not appear to be severe (see Hämäläinen, cited above, § 66 in fine).
42. In view of the foregoing, the Court considers that by not giving the applicant access to the legal gender recognition procedure a fair balance has not been struck between the public interest and the applicant's right to respect for his private life.
There has therefore been a violation of Article 8 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

43. Article 41 of the Convention provides:

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

A. Damage

44. The applicant claimed 10,000 euros (EUR) in respect of non-pecuniary damage.
45. The Government submitted that the amount claimed by the applicant was excessive and that the finding of a violation would constitute sufficient just satisfaction.
46. The Court considers that the applicant has suffered non-pecuniary damage which cannot be compensated for solely by the finding of a violation. It awards the applicant EUR 6,500 in respect of non-pecuniary damage, plus any tax that may be chargeable.

B. Costs and expenses

47. The applicant claimed EUR 3,000 for the costs and expenses incurred before the Court, corresponding to twenty hours of legal work.
48. The Government submitted that that amount was excessive.
49. Having regard to all the materials in the case file, the Court considers it reasonable to award the applicant EUR 1,500 for the costs and expenses incurred before the Court, plus any tax that may be chargeable to the applicant.

C. Default interest

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

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. Declares the application admissible;
2. Holds that there has been a violation of Article 8 of the Convention;
3. Holds

(a) that the respondent State is to pay the applicant, within three months, the following amounts, to be converted into the currency of the respondent State at the rate applicable at the date of settlement:

(i) EUR 6,500 (six thousand five hundred euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
(ii) EUR 1,500 (one thousand five hundred euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

4. Dismisses the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 16 July 2020, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Ilse Freiwirth — Branko Lubarda
Deputy Registrar — President