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La Corte EDU sulla mancanza di un quadro normativo statale per la modifica dell'indicatore di sesso/genere per persone transgender

(CEDU, sez. I, sent. 22 giugno 2023, ric. n. 54006/20)

La Corte Edu ha deciso il ricorso presentato da un cittadino ungherese riguardante la presunta mancanza di un quadro normativo relativo al riconoscimento giuridico del cambiamento dell'indicatore di sesso/genere nel registro delle nascite e, per conseguenza, ha verificato la supposta violazione dell'art. 8 della Convenzione.
A tal riguardo, la Corte ha primariamente ricordato che il diritto al rispetto della vita privata si estende all'identità di genere, quale componente dell'identità personale. E che ciò vale per tutti gli individui, comprese le persone transgender che non si sono sottoposte a trattamento di riassegnazione di genere o che non desiderano sottoporsi a tale trattamento. Oltre a questo, la stessa ha ribadito che l'art. 8 CEDU impone agli Stati un obbligo positivo di assicurare ai propri cittadini il diritto al rispetto effettivo della loro integrità fisica e psichica, garantendo procedure rapide, trasparenti e accessibili per modificare l'"indicatore di sesso/genere" registrato di persone transgender. Nella specie, le circostanze hanno evidenziato lacune legislative e gravi carenze che hanno lasciato il ricorrente in una situazione di incertezza *riguardo alla* sua vita privata e al riconoscimento della sua identità. Questa situazione, di cui le autorità nazionali sono state le uniche responsabili, ha avuto conseguenze negative per la salute mentale del ricorrente e ciò è apparso sufficiente per consentire alla stessa Corte di concludere che il quadro giuridico in vigore all'epoca dei fatti non prevedendo "procedure rapide, trasparenti e accessibili" per l'esame di una richiesta di modifica del sesso registrato di persone transgender sui certificati di nascita ha violato l'articolo 8 della Convenzione.

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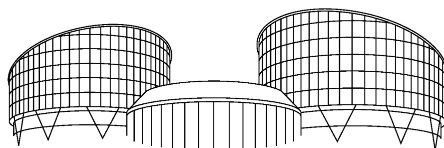

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

CASE OF XXX v. HUNGARY
(Application no. 54006/20)

FIRST SECTION
22 June 2023

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of XXX v. Hungary,

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

Marko Bošnjak, *President*,
Péter Paczolay,
Krzysztof Wojtyczek,
Alena Poláčková,
Lətif Hüseynov,
Gilberto Felici,
Erik Wennerström, *judges*,
and Renata Degener, *Section Registrar,*

Having regard to:

the application (no. 54006/20) against Hungary lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Hungarian national, Mr XXX ("the applicant"), on 16 November 2020;

the decision to give notice to the Hungarian Government ("the Government") of the application;

the decision not to have the applicant's name disclosed;

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

the comments submitted by Ordo Iuris – Institute for Legal Culture, which was granted leave to intervene by the President of the Section;

Having deliberated in private on 23 May 2023,

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

INTRODUCTION

1. The case concerns the alleged lack of a regulatory framework for the legal recognition of the change of the applicant's sex /gender marker in the register of births.

THE FACTS

2. The applicant was born in 2000 and lives in Diósd. He was represented by Ms Bodrogi, a lawyer practising in Budapest.

3. The Government were represented by their Agent, Mr Z. Tallódi, of the Ministry of Justice.

I. BACKGROUND TO THE CASE

4. Before 2016, the procedure to change the "sex/gender marker" on a person's national identity card was unregulated in Hungary. In practice, a person requesting to change his or her "sex/gender marker" in his or her certificate had to lodge an application with the authority competent for birth registration (until 1 January 2017 the Office of Immigration and Nationality and as of 1 January 2017 the Budapest Government Office). The petitioner had to attach medical reports from a gynaecologist or urologist, a specialist clinical psychologist and a psychiatrist, together with a declaration of family status and the new name chosen. The authority transmitted the request to the designated department of the Ministry of Human Resources. The Ministry delivered an expert opinion based on the above-mentioned medical reports. The expert opinion was transmitted to the authority responsible for issuing birth certificates. Neither the standards of the medical assessment nor the

procedure of the Ministry of Human Resources were formally regulated. The request had to be dismissed if the petitioner was married or living in a registered partnership.
5. Report no. AJB-883/2016 issued by the Commissioner for Fundamental Rights (see paragraph 23 below) found that in the absence of clear rules, the proceedings before the Ministry of Human Resources were protracted and no formal decisions were taken on petitioners' requests. The report also criticised the procedure of making changes in birth certificates conditional on expert medical opinions. According to the report, such expert medical opinions were relevant for eventual gender reassignment surgery, but not for legal gender recognition.
6. In November 2016 the Ministry of Human Resources suspended issuing expert opinions until procedural rules were adopted. It was of the opinion that changing the name and "sex/gender marker" on identity cards was merely an administrative act pertaining to the register of births and had no healthcare implications, and that it thus had no competence in the matter. In practice, in certain occasions the Ministry replied sent a letter to the Budapest Government Office that it had no jurisdiction to issue expert opinions.
7. On 1 January 2018 Government Decree no. 429/2017 (XII.20) on the procedural rules for the registration of birth certificates entered into force. Section 7 stipulated that the authority responsible for the issuance of birth certificates (at that time the Budapest Government Office) had to send an official notification to the competent registrar of births about the necessary changes in a petitioner's birth certificate within eight days of receipt of the expert medical opinion supporting the request (hereinafter referred to as "supporting expert medical opinion"). The registrar was required to enter the change of "sex/gender marker" into the register on the basis of a certified photocopy of the supporting expert medical opinion and the official notification from the authority.

8. In June 2018 the Ministry of Human Resources reaffirmed its understanding that there was no need for it to provide a separate medical opinion, since the medical and psychological reports constituted "supporting expert medical opinions" sufficient to register changes in birth certificates. However, the Budapest Government Office was of the opinion that applications for the registration of gender identity required "supporting expert medical opinions" issued by the Ministry of Human Resources. In practice, in certain cases, the Budapest Government Office transferred the requests without the official notification required under section 7 of Government Decree no. 429/2017 to the competent registrars for lack of jurisdiction in the matter, leaving it up to the registrars to decide whether to register the requested changes. On some occasions, the registrars dismissed the requests on the grounds that they did not contain either the necessary official notification or the supporting medical expert opinion. Other petitioners were informed already by the Budapest Government Office that, according to the rules in force, no authority had jurisdiction to decide on the admissibility of a request for gender recognition, and that the rules did not specify what constituted a supporting medical expert opinion. These petitioners were requested "to wait" until the adoption of the necessary rules.
9. On 25 May 2018 Regulation (EU) 2016/679 of the European Parliament and of the European Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data (the General Data Protection Regulation – hereinafter "the GDPR") entered into force. The Ministry of Human Resources considered that it had no legal basis to process the sensitive data transmitted by the Budapest Government Office together with requests for legal gender recognition. The Ministry of Human Resources thus returned requests to the Budapest Government Office without examination.
10. According to the information provided by Budapest Government Office at the request of the Commissioner for Fundamental Rights, between 25 May 2018 and August 2019 seventy-four people applied for the legal recognition of their gender identity from the Government Office. Five of the petitioners requested that their requests be transferred to the competent registrars even though the

Ministry of Human Resources had not issued a supporting medical expert opinion. Two petitioners had their "sex/gender marker" changed in the registry and in two cases the registry dismissed the request.

11. On 29 May 2020 amendments to Act no. I of 2010 on the civil registration procedure entered into force. Section 69/B(1)b)be) provided that the register of births had to contain the "sex at birth" of the person concerned. Section 69/B(3) specified that the sex assigned at birth could not be changed. Section 101/A(2) provided that the amended provisions were to apply to proceedings instituted before the entry into force of the new provisions and still pending.

12. Accordingly, section 7 of Government Decree no. 429/2017 on the duties of the authorities concerning the change of "sex/gender markers" in birth certificates was repealed as of 2 July 2020.

13. In proceedings initiated by a third party before the Miskolc High Court challenging the lawfulness of an administrative decision dismissing a request concerning a change of name and "sex/gender marker" (see paragraph 49 below), the High Court turned to the Constitutional Court, seeking a review of section 101/A(2) of Act no. I of 2010. In decision no. 11/2021 (IV.7) (case no. III/2030/2020) of 9 March 2021, the Constitutional Court declared the provision providing for the application of the new rules to pending requests unconstitutional as it constituted retroactive legislation. Thus section 101/A(2) was repealed, with effect of 8 April 2021.

II. THE INDIVIDUAL CIRCUMSTANCES OF THE APPLICANT

14. The applicant requested to change his "sex/gender marker" and name on 6 January 2018, attaching to his request medical reports from an expert clinical psychologist, a psychiatrist and a gynaecologist. On 22 July 2019 the Budapest Government Office informed the applicant 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.

15. On 23 July 2019 the applicant requested the Government Office to transfer his case to the competent registrar. On 10 August 2019 the Government Office 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.

16. The registrar of the Budapest VI District Mayor's Office dismissed the request on the grounds that it did not contain either the Government Office's official notification or the supporting expert medical opinion. On 24 November 2019 the applicant sought a judicial review of the decision.

17. On 10 June 2020 the Budapest High Court rejected the applicant's request, finding for the administrative authority and citing the absence of a supporting expert medical opinion and an official notification in the applicant's file. The court pointed out that there was no definition of the term "supporting expert medical opinion". In fact, it was not clear either which authority had the competence to issue such opinions. It held that the medical reports submitted by the applicant could not be accepted as a "supporting expert medical opinion", and that the general rules regulating the appointment of experts in administrative proceedings could not be applied either. The court acknowledged that a change of name and "sex/gender marker" was a fundamental right and that the applicant had suffered from emotional and health-related problems. It also had sight of concurring opinions in the Constitutional Court's decision no. 6/2018 (VI.27) (see paragraph 27 below) finding that the legislature had not adopted rules regulating legal gender recognition. It nonetheless held that there was a legal lacuna concerning the official notifications and supporting expert medical opinions. However, neither the administrative authorities nor the courts could overstep 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.

RELEVANT LEGAL FRAMEWORK AND PRACTICE

18. Section 7 of Government Decree no. 429/2017 (XII.20) on the procedural rules for the registration of birth certificates, as in force between 1 January 2018 and 2 July 2020, provided as follows:

> "The register body responsible for name changes shall notify the registrar of births of the change of gender and ensuing change of first name within eight days of receipt of the supporting expert medical opinion with a view to entering the changes in the register. The registrar shall enter the change of sex into the register on the basis of a certified photocopy of the supporting expert medical opinion and the official notification of the register body responsible for the name change."

19. The relevant part of Article 4 of Act no. I of 2017 on the Code of Administrative Court Procedure, as in force since 1 January 2018, provides as follows:

> "(1) The subject of the administrative dispute shall be the lawfulness of an act regulated under administrative law and taken by an administrative organ with the aim of altering the legal situation of an entity affected by administrative law or an act resulting in such an alteration, or the lawfulness of the administrative organ's failure to carry out such an act (hereinafter "administrative activity")."

20. Act no. I of 2010 on the civil registration procedure, as in force since 29 May 2020, provides as follows:

Section 69/B

> "(1) The register of personal identification data shall contain the following:
>
> ...
>
> b) relating to the person concerned:
>
> ba) given name and surname at birth,
>
> bb) place of birth,
>
> bc) date of birth or, if that is not available, age,
>
> bd) personal identification number,
>
> be) sex at birth,
>
> bf) mother's given name and surname at birth,
>
> bg) father's given name and surname at birth,
>
> bh) certified non-Hungarian citizenship, stateless status or unknown citizenship, acquisition or termination of Hungarian citizenship; foreign citizenship acquired after termination of Hungarian citizenship, if, after termination, a vital event occurs relating to the person concerned; in the case of domestic civil registration, the date of acquisition of Hungarian citizenship by the child and his former citizenship,
>
> bi) married name,
>
> bj) family status,
>
> ...
>
> (3) The data specified in subsection (1) b) be) cannot be changed."

21. The Explanatory Report provides as follows:

> "The concept of sex is currently not included in the legislation, given that the definition of sex is based on biological grounds. It can be determined by primary sexual characteristics or chromosome. The sex registered in the civil register is based on facts established by a doctor and declared by the register. Until proven otherwise, the register is declaratory in respect of the facts and rights registered therein and therefore does not create rights. However, on the basis of the sex declared by the register, rights and obligations may arise. Accordingly, it is necessary to define the concept of sex at birth. Given that it is not possible to completely change one's biological sex, it is necessary to declare by law that the sex at birth cannot be changed in the civil register either."

22. Section 101/A of Act no. I of 2010, in force between 29 May 2020 and 8 April 2021, provided as follows:

> "The provision of this Act amended by Act no. CIX of 2016 amending Act no. I of 2010 on the civil registration procedure (hereinafter 'the Amending Act') shall also apply to proceedings ongoing at the time of entry into force of the Amending Act and to repeated proceedings."

I. RELEVANT DOMESTIC PRACTICE

A. Reports of the Commissioner for Fundamental Rights

23. In his report in case no. AJB-883/2016 issued in September 2016, the Commissioner for Fundamental Rights reviewed the practice of legal gender recognition in consultation with the relevant ministries. The Ministry of Human Resources acknowledged that there were no rules in place for legal gender recognition and that it could not therefore provide information on the practice and standards it applied. The Ministry of the Interior informed the Commissioner that no formal decision had been taken on legal gender recognition. The Commissioner concluded as follows:

> III.2."... In Hungary at present there is a possibility for the legal recognition of gender, however there is no legal framework for the procedure ... Based on the above, I conclude that in a procedure of such importance for human dignity and self-determination, the total absence of a legal framework establishing clear rules, guarantees, competences and responsibilities violates the rule of law principle of legal certainty. Furthermore, the absence of a clear and foreseeable practice and the lack of accessible information constitutes a serious infringement of the good administration of justice and the right to an effective remedy ..."

24. In his report in case no. AJB-294/2018, the Commissioner for Fundamental Rights reiterated the findings of the report in case no. AJB-883/2016. The report found that, informally, as of 1 January 2017, the Ministry of Human Resources was to issue medical expert opinions at the request of the Government Office, but that the procedure and preconditions for issuing such opinions were unclear. The report agreed with decision no. 6/2018 (VI.27) of the Constitutional Court, issued in connection with a non-Hungarian national, that the absence of regulation was unconstitutional. The report called on the relevant ministry to enact legislation governing legal gender recognition.

25. In his report issued in case no. AJB-1846/2021, the Commissioner for Fundamental Rights examined the practice that had occurred since the adoption of the Commissioner's previous report (see paragraphs 8-10 above). He found that the accurate interpretation of the term "supporting expert medical opinions" could not be clarified by the relevant authorities for two years. Persons applying for legal gender recognition were not informed of the conditions for changing the data in their birth certificate. In practice, since June 2018, the examination of the requests has been delayed

or suspended. The report observed that in the absence of the requisite supporting medical expert opinion, the Budapest Government Office transferred requests to the registrars, sometimes with considerable delay. In reply, the competent registrars adopted divergent practices, occasionally registering the new "sex/gender marker" and occasionally dismissing the requests. The Commissioner found that the practice of the relevant authorities infringed the very essence of legal gender recognition. In sum, the Commissioner found the practice in breach of the principle of rule of law, the petitioners' right to fair proceedings and the right to human dignity. The Commissioner called on the relevant ministry and the Budapest Government Office to regulate the proceedings for the legal recognition of gender identity for requests lodged before and pending on 29 May 2020.

B. Constitutional Court decisions

26. In decision no. 58/2001 (XII.7), the Constitutional Court pointed out that in the case of transsexual persons, the right to change one's name was a fundamental right. The decision made reference to the Court's case-law to the extent that the right of "transsexual" persons to change their name might lead to allowing them to request a change of their name as registered. The applicability of the Constitutional Court's decision following the entry into force of the Fundamental Law was confirmed in decision no. 27/2015 (VII.21).

27. Decision no. 6/2018 (VI.27) contained the following relevant passages:

> "... Since a change of name legally recognising the change of gender has a fundamental rights basis, the State – in accordance with its duty to protect – must develop a regulatory framework leading to the recognition of gender identity and allowing for the possibility of registering the resulting name change in the register, without discrimination ... The Constitutional Court also noted that – in line with international standards – the practice developed in Hungary did not require a gender-affirming intervention as a precondition for the legal recognition of gender and name change ..."

In his concurring opinion, Judge Sulyok noted as follows:

> "... In the case under review, the Constitutional Court, within the framework of a 'real' constitutional complaint under section 27 of the [Act on the Constitutional Court], acted in the matter of a non-Hungarian petitioner. Due to being bound by the petition, the Constitutional Court could not take a position on the constitutionality of the regulations that apply to transsexual persons who are Hungarian citizens, however, in my opinion, the reasoning of the majority decision has a substantial impact on it. As highlighted in the reasoning of the majority decision: 'in the opinion of the Constitutional Court, the special name change connected to gender identity as a fundamental determinant of a person's identity, as a right to have one's own name, shall fall into the unlimited domain of the right to have a name.' Taking into account the Constitutional Court's practice connected to the rule laid down in Article I § 3 of the Fundamental Law, I consider it necessary to draw the attention of the legislator to the fact that the present government decree-level regulation of name changes connected to the gender identity of Hungarian citizens needs to be reviewed.
>
> [69] In addition to examining the appropriateness of the level of the regulation in the sources of law, it should also be emphasised that the requirement of legal certainty compels the State to ensure that the rules of law are clear and unambiguous, and that they are ascertainable and predictable in terms of their operation for the addressees of the norm. The subordination of public authority and public administration to the law is one of the most important fundamental requirements resulting from the principle of the rule of law laid down in Article B § 1 of the

Fundamental Law: the bodies vested with public authority shall function within the organisational framework laid down by law, in the operational order specified by law, within the procedural limits regulated by law in a manner that is ascertainable and predictable for citizens. However, according to report no. AJB-883/2016 of the Commissioner for Fundamental Rights, based on the regulations in force on legal gender recognition, the role played in the procedure by the department of the Ministry of Human Resources is not clear, the legal nature of the 'information note' placed on the website of the [Budapest Government Office] is questionable, and it is problematic that the fundamental right to a legal remedy cannot be enforced in the case of a 'rejection decision' as in fact there is no formal decision.

[70] Based on the above, I consider that the legislator should consider re-regulating the whole issue on the appropriate level of the sources of law, also taking Hungarian citizens into account, and similarly to the Act of Parliament enacted in Germany decades ago (*Gesetz über die Änderung der Vornamen und die Feststellung der 22 Geschlechtszugehörigkeit in besonderen Fällen*), should consider enacting a separate Act on legal gender recognition ..."

28. Decision no. 11/2021 (IV.7) of 9 March 2021 concerned proceedings for the judicial review of an administrative decision dismissing a request for registration of the petitioner's gender identity and name change. The Miskolc High Court had suspended the proceedings and submitted a petition to the Constitutional Court to declare section 101/A(2) of Act no. I of 2010 contrary to the Fundamental Law. The Constitutional Court found that the application of the amended substantive rules on legal gender recognition to requests lodged prior to the entry into force of the amendments violated the prohibition of retroactive legislation. The Constitutional Court thus repealed the contested provision (see also paragraph 13 above).

29. In February 2020, the Debrecen Administrative and Labour Court suspended proceedings concerning the judicial review of a decision of the registrar of the Debrecen Mayor's Office dismissing a transgender person's request to register his gender identity and name change. The court sought a review (*normakontroll*) of section 7 of Government Decree no. 429/2017 before the Constitutional Court, arguing that the provision on legal gender recognition was incomplete and the level of regulation of the matter insufficient. In decision no. 3358/2021 of 12 July 2021, the Constitutional Court dismissed the request, finding that the court was in essence asking it to establish an omission on the part of the legislature. The court, however, had no power to initiate that type of proceedings.

C. Decisions of the *Kúria*

30. Judgment no. KFv. 38.206/2021/6 of 22 March 2022 concerned the judicial review of an administrative decision of the Budapest Government Office dismissing the petitioner's request to change his name and "sex/gender marker". On 31 March 2021 the Government Office dismissed the petitioner's request based on section 69/B(3) of Act no. I of 2010 on the prohibition on changing the sex at birth in the register, and on section 101/A(2) prescribing the application of this rule to ongoing procedures. Since in the meantime the Constitutional Court found section 101/A(2) contrary to the Fundamental Law the Government Office revoked its previous decision on 2 June 2021. However, it dismissed the request anew, this time on the grounds that no authority had jurisdiction to issue supporting expert medical opinions and that the medical reports submitted by the petitioner did not constitute such an opinion. Following a petition for review, the Budapest Surroundings High Court overturned the administrative decision and remitted the case to the Government Office. It held that section 7 of Government Decree no. 429/2017 did not specify the preconditions of the supporting medical expert opinion, and that it was up to the Government Office to take evidence, if necessary,

by appointing a medical expert, to establish whether the change of the petitioner's sex was justified from a medical point of view. The *Kúria* upheld the first-instance judgment. It held that for ongoing requests lodged before 29 May 2020, the rules in force at the time of lodging the request, including section 7 of Government Decree no. 429/2017, were applicable. In the *Kúria*'s understanding, the absence of specific procedural rules concerning the issuance of supporting expert medical opinions meant that it was left to the administrative authority to decide what type of expert medical opinion was accepted in proceedings aimed at the change of sex. The role of the Government Office was to verify whether there was an expert medical opinion or, if necessary, appoint a forensic medical expert.

31. In judgment no. Kfv.37.787/2021/6 of 10 November 2021 the *Kúria* found that in the absence of any objection from the Government Office, an expert medical opinion containing a "diagnosis of transsexualism" constituted a supporting expert medical opinion. In addition, in the light of decision no. 11/2021 (IV.7) of the Constitutional Court, the Government Office was to apply the legislation as in force at the time the petitioner's request for legal gender recognition was lodged.

32. In decision no. Kfv.37.005/2022/2 the *Kúria* dismissed without examination on the merits the Budapest Government Office's petition for the review of a first-instance judgment obliging the latter to process a request for legal gender recognition. The Government Office pointed to the divergent case-law of the lower courts, showing that there was no legal framework for the recognition of gender identity. The *Kúria* was of the view that the regulations in force allowed a decision to be taken concerning the recognition of gender identity.

II. INTERNATIONAL MATERIAL

33. The relevant international law material is set out in, among other cases, *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

II. 34. The applicant complained under Article 8 of the Convention of the lack of a regulatory framework for the legal recognition of his gender identity.

Article 8 of the Convention reads as follows:

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

A. Admissibility

35. The Government submitted that the applicant had failed to exhaust domestic remedies. Under Article 4 of Act no. I of 2017, he could have initiated judicial proceedings to compel the administrative authority to comply with its obligation to deliver a decision on the merits of his request for registration of his gender change.

36. Furthermore, errors in the application and interpretation of the law by lower courts were subject to review before the *Kúria.* Following the decision of the *Kúria,* the applicant could have filed a constitutional complaint under sections 26 or 27 of the Act on the Constitutional Court.
37. The applicant argued that at the material time the law on gender recognition had been incomplete. The lacunae in the law could not be remedied by judicial proceedings. Neither the administrative courts nor the Constitutional Court had the judicial power to enact legal regulations. Consequently, proceedings to compel an administrative authority to deliver a decision could not be considered an effective remedy.
38. The Court considers that the Government's argument that the applicant failed to exhaust domestic remedies is closely related to the question whether there existed legal proceedings for gender recognition and should therefore be joined to the merits of the case.
39. It further notes that the application 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.The parties' submissions

(a) The applicant

40. The applicant submitted that legal gender recognition was an important element of private life as protected by Article 8 of the Convention. As a result of the non-recognition of his gender identity, his official documents did not reflect his gender identity and he had to disclose that he was transgender each time he had to present his official documents. At school, he had felt excluded by teachers and other students, who had refused to accept his decision or use his preferred name. He also felt regularly humiliated during medical consultations.
41. He argued that his request for the legal recognition of his gender identity had been refused owing to the deficiencies of the legal regulation at the material time. Referring to the judgment in the case of *Rana v. Hungary* ([Committee], no.40888/17, 16 July 2020), the applicant argued that Parliament was under the obligation to perform its legislative duties Instead, it had banned legal gender recognition.
42. He further pointed out that a number of petitioners had complained to the Constitutional Court in respect of both section 7 of Government Decree no. 429/2017 and Act no. 1 of 2010 on the civil registration procedure, but that it had not reached a decision in any of the cases.
43. The applicant pointed out that although decision no. 11/2011 of 9 March 2021 of the Constitutional Court annulled section 101/A of Act no. I of 2010 concerning the retroactive application of the legislation excluding the change of "sex/gender markers" in the register, this was only relevant for pending cases. However, at that point his case was no longer pending before the domestic authorities, since the final judgment was rendered in his case on 10 June 2020. Thus, his case could not be reopened.

(b) The Government

44. The Government submitted that the domestic law, as in force at the material time, had provided for the recognition of gender change, as evidenced by the fact that a number of petitioners had obtained the legal recognition of their gender identity.
45. The Budapest Government Office was the designated authority for processing gender and name changes and had to notify the local registrars to enter the requisite changes in the register within eight days of receipt of a request. If the Government Office failed to perform its duties, the omission could be the subject of an administrative dispute before the courts pursuant to section 128(2) of the

Act on Administrative Procedure. If the court found that the administrative authority had not performed its statutory obligations, it would instruct the authority to perform the omitted act within the relevant statutory time-limit, or otherwise within thirty days.
46. Furthermore, the judicial review of administrative acts pursuant to section 109(1) and (2) of Act no. CXL of 2004 on the general rules of administrative procedure was not limited to formal decisions but were applicable to any act of an administrative authority, including for example notifications, for situations where the administrative authority should have adopted a formal decision in the matter.

(c) The third-party intervener

47. Ordo Iuris was under the impression that "transsexualism" was the psychological imbalance that might arise when there was antagonism between a person's desired and perceived body image. It submitted that individuals with a gender incongruence diagnosis were six times as likely to have mental healthcare visits, and that the sex transition process did not necessarily help them to find fulfilment and happiness.
48. In its opinion, despite developments in the case-law on the status of transsexual persons, States still had a wide margin of appreciation in procedural matters related to the legal recognition of sex identity. Procedural requirements were intended to protect the public interest in the form of the truthfulness of civil status registers and the mental health of a person applying for legal gender recognition. They were also intended to verify that the decision to change sex had been made with full awareness of the consequences, in a free and mature manner. It could not be inferred from the Court's case-law that States were obliged to legally recognise the gender of a person who had not completed the hormonal and surgical reassignment process.
49. It pointed to opinions which considered sex as an objective biological fact, independent from human feelings, and to the legal and moral controversies of sex reassignment due to a personal sense of belonging. Decisions regarding so-called gender identity, which were based on capricious or arbitrary motivations, remained outside the protection of the Convention.
50. Ordo Iuris suggested that the margin of appreciation of States in the legal recognition of sex reassignment should be wide, given that it raised serious moral and social controversies. It stated that sex reassignment of a parent could seriously affect his or her child's psychological development. Moreover, information in birth certificates should be truthful and contain biological facts, not wishes, for the sake of legal certainty and in the interests of children in knowing their biological origins.

2. The Court's assessment

(a) Preliminary remarks

51. The Court observes that the applicant's grievances concern the alleged lack of a regulatory framework for legal gender recognition.
52. As the Court has previously held, the right to respect for private life under Article 8 of the Convention extends to gender identity, as a component of personal identity. This holds true for all individuals, including transgender people who have not undergone gender reassignment treatment or who do not wish to undergo such treatment (see *A.P., Garçon and Nicot v. France*, nos. 79885/12 and 2 others, §§ 92-94 ECHR 2017 (extracts)).
53. While the essential object of Article 8 is to protect individuals against arbitrary interference by public authorities, it may also impose on a State certain positive obligations to ensure effective respect for the rights protected by Article 8. This Article imposes on States a positive obligation to secure to their citizens the right to effective respect for their physical and psychological integrity.

This obligation may involve the adoption of specific measures, including the provision of an effective and accessible means of protecting the right to respect for private life. Such measures may include both the provision of a regulatory framework of adjudicatory and enforcement machinery protecting individuals' rights and the implementation, where appropriate, of these measures in different contexts (see *Hämäläinen v. Finland* [GC], no. 37359/09, §§ 62 and 63, ECHR 2014).

54. Turning to the present case, the Court notes that since the entry into force of the amendments to Act no. I of 2010 – in particular sections 69/B(1)b)be) and 69/B(3) – on 29 May 2020, the data on a person's sex at birth cannot be changed in the register. Section 101/A(2), which prescribed the retroactive application of these provisions to ongoing cases, was repealed by the Constitutional Court as of 8 April 2021.

55. As regards the specific circumstances of the applicant, the Court observes that as he had lodged his request prior to 29 May 2020, the above-mentioned legal provisions prohibiting the change of "sex/gender marker" were not applicable to his case. The applicant's request has been examined and dismissed in application of the legal provisions in force prior to the amendments to Act no. I of 2010. Nonetheless, the Court finds it relevant to point out that under the rules currently in force, the applicant is not anymore in the position to lodge a new request for the legal recognition of his gender identity.

56. Therefore, having regard to the facts of the case and the parties' submissions, the Court considers that the primary question to be determined is whether or not at the material time the respondent State failed to comply with its positive obligation to put in place an effective and accessible procedure, with clearly defined conditions securing the applicant's right to respect for his private life.

(b) Compliance with the State's positive obligation

57. The relevant Convention principles concerning the State's positive obligations have been summarised in the Court's judgment in the case of *Hämäläinen* (cited above, §§ 65-68). Furthermore, the Court has stated in its case-law on legal gender recognition, that what member States are expected to do under Article 8 of the Convention is to provide quick, transparent and accessible procedures for changing the registered "sex/gender marker" of transgender people (see *X v. the former Yugoslav Republic of Macedonia*, no. 29683/16, § 70, 17 January 2019). It is indeed from the point of view of the latter, very specific positive obligation that the Court will proceed with its task in the present case is to assess whether, in view of the margin of appreciation available to it, the respondent State struck a fair balance between the general interest and the individual interest of the applicants in having their "sex/gender marker" changed in the civil-status records, and by extension in all their official identity documents, to match their gender identity (see *A.D. and Others v. Georgia*, nos. 57864/17 and 2 others, § 73, 1 December 2022).

58. The Court first notes that while there was no provision in the domestic law that explicitly provided for the alteration of a person's gender identity, legal gender recognition took place as the change of a person's name and "sex/gender marker" in the register of births in the course of administrative proceedings.

59. In practice, until 2016 the Office of Immigration and Nationality processed requests containing medical reports from a gynaecologist or urologist, a specialist clinical psychologist and a psychiatrist, transmitting them to the Ministry of Human Resources for an expert medical opinion. The local registrar then recorded the necessary changes in the register of births. This practice was criticised by the Commissioner for Fundamental Rights for the lack of a clear regulatory framework and the ensuing protractedness of the proceedings, due to which in November 2016 the Ministry of Human Resources suspended issuing expert opinions until procedural rules were adopted.

60. Following the entry into force of Government Decree no. 429/2017, the Budapest Government Office was the designated authority to officially notify the local registrars to record the changing of names and "sex/gender markers" in the register based on a supporting expert medical opinion.
61. However, the Court cannot but note that while the provision relied on by the Government was in force from 1 January 2018, the practice remained inconsistent and, with very few exceptions, had not yielded any results (see paragraph 10 above). Nevertheless, the Court will examine the Government's argument that the domestic legal framework was to be considered as having established a sufficient and effective legal basis for the issue at stake.
62. As the Commissioner for Fundamental Rights pointed out in his reports, following the entry into force of Government Decree no. 429/2017, the approach applied by the Government Office was either to suspend the processing of requests for legal gender recognition or to transfer the requests (of its own motion or at the petitioner's request) to the competent local registrars for decision, without the requisite official notification and without the supporting expert medical opinion. That seems to be due to the numerous inconsistencies in the division and understanding of their respective competencies between the authorities involved. While the Ministry of Human Resources considered that there was no need for it to issue an additional supporting medical expert opinion, the Government Office was of the opinion that it was in the Ministry's competency to do so. Furthermore, in the understanding of the Ministry of Human Resources the entry into force of the GDPR required the adoption of new procedural rules allowing the processing of sensitive personal data.
63. The lack of a clear legal framework also left the local registrars with excessive discretionary powers, leading to the inconsistent practice of either dismissing requests for gender recognition, citing failure to comply with the statutory preconditions, or occasionally allowing them (see paragraph 10 above).
64. As the facts of the present case demonstrate, the absence of any clarification of the nature of the certificate and the authority competent to attest to the change of "sex/gender marker" and to issue a supporting expert medical opinion was an effective obstacle to the petitioners' exercise of their right to legal gender recognition. In the applicant's case, after the Budapest Government Office had transferred his request to the registrar, the latter dismissed it for lack of the requisite documents.
65. The Court finds unconvincing the Government's argument that the applicant could have initiated judicial proceedings to compel the administrative authority to comply with its obligation to deliver a decision on the merits of his request for registration of his gender change.
66. In this connection, it notes that the local registrar issued an administrative decision, which the applicant challenged in judicial proceedings. The Budapest High Court nonetheless found that the administrative decision issued in the applicant's case could not be remedied in judicial proceedings as it was the result of legal lacunae, and that it was not for the administrative authorities or for the courts to fill the legal gap through interpretation (see paragraph 17 above).
67. The Court also considers that Government's conclusion that the applicant would have been allowed to have his "preferred gender" recognised if he had pursued his case before the *Kúria* and the Constitutional Court, is close to speculation, without any basis in domestic practice.
68. In this regard, it observes that a number of domestic authorities, including the Commissioner for Fundamental Rights and the Constitutional Court, reached the same conclusion as the Budapest High Court in the applicant's case concerning the legislative gap and the need for the legislator to enact appropriate rules governing the legal recognition of gender identity.
69. The Court attaches weight to the fact that the report of the Commissioner for Fundamental Rights in case no. AJB-1846/2021 concluded that the legislation did not impose any terms and conditions to be fulfilled by petitioners who wished to have their "sex/gender marker" changed or any procedures to be followed by the authorities (see paragraph 25 above). Moreover, it is not

without relevance in this regard that the concurring opinion to decision no. 6/2018 of the Constitutional Court noted that the requirement of legal certainty compelled the State to ensure that the rules of law were clear and unambiguous (see paragraph 27 above).

70. The Court cannot but agree with the finding of the Commissioner for Fundamental Rights that the above-mentioned inconsistencies in the interpretation of the domestic law by the domestic authorities were the result of the law itself not being sufficiently detailed and precise.

71. In this connection, the Court is mindful of the recent changes in Act no. I of 2010 excluding the change of the "sex/gender marker" in the register. It is true that the Constitutional Court declared unconstitutional and repealed as of 8 April 2021 the provision prescribing the retroactive application of these rules for pending cases. However, the Constitutional Court's ruling could not change the applicant's situation, whose case had terminated on 10 June 2020.

72. The Court also has regard of the decisions of the *Kúria* stating that for requests lodged before 29 May 2020 and still pending, the applicable provisions permitted the modification of entries in the register of births. As to the procedure to be followed, the *Kúria* emphasised that for those requests the Government Decree vested the Budapest Government Office with authority to decide on the matter on the basis of a supporting expert medical opinion, and the local registrars to alter the entries on the basis of the official notification (see paragraphs 30 to 32 above).

73. The Court however considers that the applicant's situation did not change with the adoption of the *Kúria*'s decisions either, as they were delivered over a year after the lodging of his application with the Court and after the refusal of his request for the recognition of his gender identity. It observes that the *Kúria* took no position on the question of whether there was a procedure at all to be followed in cases, such as the present one, where no proceedings were any longer pending, as the authorities had already dismissed the request for the legal recognition of gender identity due to the legal lacuna.

74. The Court observes in this respect that in practice the applicant would have no other means, but to submit a new request for the change of his "sex/gender marker" in the register, which is in turn excluded under the legislation currently in force.

75. In any event, the reading of these decisions does not lead the Court to the conclusion that there is an established practice of legal gender recognition in Hungary.

76. The Court finds that the circumstances of the present case reveal legislative gaps and serious deficiencies that left the applicant in a situation of distressing uncertainty *vis-à-vis* his private life and the recognition of his identity. As stated above, this situation, for which the national authorities bore sole responsibility, is having long-term negative consequences for the applicant's mental health. The foregoing considerations are sufficient to enable the Court to conclude that the legal framework in force at the material time in the respondent State did not provide "quick, transparent and accessible procedures" for the examination of a request to change the registered sex of transgender people on birth certificates (see paragraph 57 above, with reference to *X v. the former Yugoslav Republic of Macedonia*, cited above, § 70).

77. In the light of the above considerations, the Court dismisses the Government's preliminary objections as to the non-exhaustion of domestic remedies (see paragraphs 66 and 69 above) and concludes that there has been a violation of Article 8 of the Convention on account of the lack of a regulatory framework ensuring the right to respect for the applicant's private life.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

III. 78. 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

79. The applicant claimed EUR 20,000 in respect of non-pecuniary damage.
80. The Government deemed these sums excessive.
81. The Court considers that the applicant must have sustained some non-pecuniary damage on account of the violation of Article 8 of the Convention, which cannot be compensated for by the mere finding of a violation. Making its assessment on an equitable basis as required by Article 41 of the Convention, it awards the applicant EUR 10,000 under this head.

B. Costs and expenses

82. The applicant also claimed EUR 2,700 for the costs and expenses incurred before the domestic courts and those incurred before the Court. This sum corresponds to sixty hours of legal work billable by his lawyer at an hourly rate of EUR 45.
83. The Government objected to the amount claimed.
84. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these were actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the applicant the full amount claimed covering all costs and expenses.

FOR THESE REASONS, THE COURT

1. *Decides,* by a majority, to join to the merits the Government's preliminary objection concerning the non-exhaustion of domestic remedies and *dismisses* it;

2. *Declares*, by a majority, the application admissible;

3. *Holds*, by six votes to one, that there has been a violation of Article 8 of the Convention;

4. *Holds*, by six votes to one,

(a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into the currency of the respondent State at the rate applicable at the date of settlement:
(i) EUR 10,000 (ten thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
(ii) EUR 2,700 (two thousand seven hundred euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;
(i) 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;

5. *Dismisses*, unanimously, the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 22 June 2023, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Renata Degener
Registrar
Marko Bošnjak
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

(a) Concurring opinion of Judge Hüseynov;
(b) Dissenting opinion of Judge Wojtyczek.

M.B.
R.D.

CONCURRING OPINION OF JUDGE HÜSEYNOV

1. I fully share the majority's view that there has been a violation of Article 8 of the Convention in the present case. I am writing separately to flag my strong disagreement with a statement contained in paragraph 76 of the judgment. The statement in question reads as follows: "[The Court concludes] that the legal framework in force at the material time in the respondent State did not provide *'quick, transparent and accessible procedures' for the examination of a request to change* the registered sex of transgender people on birth certificates" (emphasis added).

2. When making this statement, the Chamber refers to paragraph 70 of the Court's judgment in the case of *X. v. the former Yugoslav Republic of Macedonia* (no. 29683/16, 17 January 2019). However, the formulation used in that judgment is conspicuously different: "The foregoing considerations are sufficient to enable the Court to conclude that the current legal framework in the respondent State does not provide *'quick, transparent and accessible procedures' for changing* on birth certificates the registered sex of transgender people" (emphasis added).

3. It is evident that the Chamber has limited the scope of the Contracting Parties' obligation on legal gender recognition as clearly formulated in the *X.* case and reiterated recently in *A.D. and Others v. Georgia* (nos. 57864/17 and 2 others, § 73, 1 December 2022). The thrust of this obligation is to obtain an actual change of a person's identity, not just an examination of the relevant request which can impose an onerous burden on the person; or such a request can ultimately be arbitrarily denied due to certain pathologising or unreasonable requirements, as, for example, in cases where the domestic law makes the recognition of the gender identity of transgender persons conditional on sterilisation surgery or on medical treatment entailing a very high probability of sterility (see *A.P., Garçon and Nicot v. France*, nos. 79885/12, 52471/13 and 52596/13, § 135, 6 April 2017).

4. It is also worth adding that the Council of Europe institutions have been explicit and consistent in their appeals to member States to "develop quick, transparent and accessible procedures, based on self-determination, for changing the name and registered sex of transgender people" on legal

documents (see, in particular, PACE Resolution 2048 (2015) of 22 April 2015 entitled "Discrimination against transgender people in Europe").

5. What is surprising is that the Chamber does use the formulation introduced by the Court in *X.* when setting out the general principles relating to the matter (see paragraph 57 of the judgment), however, in reaching the conclusion in the case, it deviates from that wording, without providing any grounds for that. It appears that by having done so, the Chamber has distorted the gist of the present case: the applicant's complaint concerned the alleged lack of a regulatory framework effectively enabling him to exercise his right to legal gender recognition (see paragraph 64 of the judgment), and the majority's finding is that there has been a violation of Article 8 of the Convention on account of the lack of such a regulatory framework ensuring that right (see paragraph 77 of the judgment). In the light of the above, the Chamber's statement in question is certainly unfortunate and, I believe, will not be followed by the Court in its relevant case-law.

DISSENTING OPINION OF JUDGE WOJTYCZEK

I respectfully disagree with the views that the application is admissible and that Article 8 has been violated in the instant case. I refer in this respect to the arguments put forward in the joint dissenting opinion written by Judge Pejchal and myself and appended to the judgment in the case of *X v. the Former Yugoslav Republic of Macedonia* (no. 29683/16, 17 January 2019). I note that further important arguments supporting our view have been provided in the powerful dissenting opinion of Judge Ranzoni appended to the judgment in the case of *A.P., Garçon and Nicot v. France* (nos. 79885/12 and 2 others, 6 April 2017). In my view, the Convention does not guarantee the right to obtain a change of the registered sex on birth certificates and the High Contracting Parties can choose how to regulate this domain.