IN THE EUROPEAN COURT OF HUMAN RIGHTS

Rana v. Hungary
(Application no. 40888/17)

WRITTEN COMMENTS
submitted jointly by

Transgender Europe
ILGA Europe
Transvanilla Transgender Association

7 November 2017

1. These written comments are submitted on behalf of Transgender Europe (TGEU), the European Region of the International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA-Europe) and Transvanilla, pursuant to leave granted by the President of the Fourth Section on 28 September 2017.[1] The present case concerns an Iranian trans man who was granted refugee status in Hungary. The Hungarian authorities summarily rejected his request for legal gender recognition (LGR), invoking the absence of a specific legal procedure applying to his situation. The present case is illustrative of the obstacles facing trans refugees and other recognised migrants applying for LGR in the country of settlement, particularly if their country of origin is hostile to such claims. This disagreement may potentially result in a permanent state of limbo for the person concerned, condemning them to living on the margins in their adoptive countries. More specifically in relation to Hungary, this case takes place against the background of a wider legal vacuum in relation to LGR that affects Hungarian citizens as well as foreigners.

2. The present submission is structured as follows. The first section outlines the factors pushing trans persons to emigrate and apply for asylum, the recognition of "a well-founded fear of persecution based on gender identity" as valid grounds for granting refugee status and the difficulties facing trans asylum seekers and refugees in their countries of settlement, with a particular focus on LGR. The second section looks more closely at the rights of refugees under European law, with a particular focus on the obligation to provide legal status and suitable documentation, to ensure access to social rights and not to discriminate. It then proceeds to identify the possible rationales supporting the claims made by trans refugees in this respect, with LGR being seen as an element of legal status, as a gateway to social rights and as a breach of the prohibition to discriminate. This section concludes with a review of national regulations in the area of LGR that shows a lack of consensus, although the number of states that provide recognised refugees with the possibility to access LGR appears to be higher. At the same time, this review proves that the inability to provide a birth certificate from countries that are hostile to trans rights should not constitute an insuperable obstacle to LGR in the country of settlement. Finally, the last section reviews recent developments in Hungary revealing a wider legal vacuum in relation to LGR.

I. Transgender refugees and asylum seekers

3. LGBTI persons in all regions of the world suffer from widespread physical and psychological violence, including murder, assault, kidnapping, rape, sexual violence, as well as torture and ill treatment in institutional and other settings.[2] For its part, TGEU documented 2,608 killings of trans and gender-diverse people in 69 countries worldwide between the 1st of January 2008 and the 30 September 2017.[3] The situation in Iran is a good illustration of the pattern of persecution against trans people, particularly as it was held to be sufficiently serious as to justify granting asylum to the applicant in the present case. A recent report concluded that in Iran, LGR is only available based on an official diagnosis of gender identity disorder and following completion of a lengthy gender reassignment treatment, including surgery, hormonal treatment and various forms of mandatory

[1] The interveners gratefully acknowledge the contribution of Constantin Cojocariu in the preparation of this submission.

[2] Statement issued by twelve United Nations entities in September 2015: *United Nations entities call on States to act urgently to end violence and discrimination against lesbian, gay, bisexual, transgender and intersex (LGBTI) adults, adolescents and children*, available here: http://www.ohchr.org/Documents/Issues/Discrimination/Joint_LGBTI_Statement_ENG.PDF.

[3] Data gathered in the *Transrespect versus Transphobia Worldwide* project, available here: www.transrespect.org.

psychosocial counselling.[4] Individuals who refuse or are unable to undergo these procedures are deprived of any official recognition and are rendered vulnerable to harassment and discrimination, ranging from "hostile public attitudes to acts of extreme violence, risk of arrest, detention and prosecution". Their experience is aggravated as a result of Sharia-based laws, including mandatory segregation of women and men in schools and in public transport, along with strict gender dress codes, that restrict behaviour or expression viewed as gender non-conforming, and prohibit individuals from publicly "cross-dressing" or "appearing as members of the opposite sex."

4. There is a strong consensus in European and other democratic societies supporting the asylum claims by LGBTI persons in general and trans persons in particular. At the Council of Europe level, the Committee of Ministers Recommendation CM/Rec(2010)5, among other documents, specifies that Member States "should recognise that a well-founded fear of persecution based on sexual orientation or gender identity may be a valid ground for the granting of refugee status and asylum under national law" and "ensure particularly that asylum seekers are not sent to a country where their life or freedom [from imprisonment] would be threatened or they face the risk of torture, inhuman or degrading treatment or punishment, on grounds of sexual orientation or gender identity."[5] At the EU level, the Qualification Directive (recast) includes gender identity among the characteristics to be considered when assessing whether an individual is a member of a particular social group in need of international protection.[6] At the national level, fifteen Council of Europe Member States (including twelve EU Member States) offer international protection on grounds of gender identity.[7] A significant and increasing body of national case law on the recognition of trans refugee claims exists.[8]

5. The UN High Commissioner for Refugees has addressed the problems transgender persons encounter when applying for asylum or being recognised as a refugee, for example on occasions where a transgender individual is asked by the authorities to produce identity documents and his or her physical appearance does not correspond to the sex indicated in the documents.[9] The EU Agency for Fundamental Rights ('EU FRA') reported that although LGBTI asylum seekers may have special reception needs and/or grounds for international protection that are related to distinct vulnerabilities, asylum authorities and procedures are

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[4] Outright Action International, *Human rights report: Being transgender in Iran*, 2016.
[5] *Recommendation CM/Rec(2010)5 of the Committee of Ministers to member states on measures to combat discrimination on grounds of sexual orientation or gender identity*, 31 March 2010, §42-43.
[6] Qualification Directive (2011/95/EU).
[7] *TGEU Trans Rights Europe Index & Map on Mental Health Diagnosis 2017*, available here: https://tgeu.org/trans-rights-map-2017/.
[8] Germany, Bezug auf VG Potsdam, Urteil vom 27.02.2014 - 6 K 435/13.A, regarding the recognition of refugee status of a Russian trans person, available here: http://www.asyl.net/index.php?id=114&tx_ttnews%5Btt_news%5D=58563&cHash=40dcc5a5618c203929735667f79807a2; Austria, Asylum Court, 24 February 2011, A4 213316-0/2008, regarding the recognition of refugee status of an Egyptian trans woman, available here: http://www.asylumlawdatabase.eu/en/case-law/austria-asylum-court-24-february-2011-a4-213316-02008 and Austria, Asylum Court, 29 January 2013, E1 432053-1/2013, regarding the recognition of refugee status of a Pakistani trans woman, available here: http://www.asylumlawdatabase.eu/en/case-law/austria-asylum-court-29-january-2013-e1-432053-12013, Austria, Unabhängiger Bundesasylsenat [Federal Independent Asylum Tribunal], 244.745/0-VIII/22/03, regarding the recognition of refugee status of a Iranian trans person, summarised in EUFRA, *Legal Study on Homophobia and Discrimination on Grounds of Sexual Orientation and Gender Identity: Austria*, 2014 Update, p. 53-54. Also see Human Rights Committee, *M.Z.B.M. v. Denmark*, communication no. 1593/2015, views of 3 April 2017, concerning the deportation of a trans woman to Malaysia.
[9] UN High Commissioner for Refugees, UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity, 21 November 2008, available at: http://www.unhcr.org/refworld/docid/48abd5660.html

often not equipped to deal with their particular situation, which in turn results in multiple forms of discrimination.[10] Trans asylum seekers and refugees suffer from multiple violations of their human rights, including traumatising journeys, physical and verbal abuse in refugee holding centres, lengthy and stressful asylum-processing procedures and lack of access to transition-related care.[11]

6. The situation exemplified by the present case is not isolated - restrictive legislation in some countries prevents trans refugees from obtaining documents that correctly identify their gender identity, which may lead to discrimination in other areas of life and, correspondingly, increased vulnerability and exclusion from the community. [12] Mismatching documents can cause re-traumatisation of trans refugees during asylum procedures and after that. Asylum authorities and security personnel continue to use the officially documented yet inappropriate name and gender marker, leading to exclusion, discrimination and violence by other compatriots and asylum seekers.[13] Many trans asylum seekers face in mass asylum accommodation a constant threat of physical and sexual assault as shown by the widely published case of Fernanda Milan, a Guatemalan trans woman who had been raped after being placed in the male wing of a Danish asylum seeker's camp due to her male identity card.[15] Access to accommodation, food, healthcare and other services are provided for asylum seekers in Hungary through mass asylum accommodation. In there, without matching identity documents trans asylum seekers are constantly at the risk of being outed and consequently discriminated, harassed and blackmailed. A reason why Sam, an Iranian trans male asylum seeker without legal recognition of his male identity, had to leave the asylum accommodation and thus loose access to related services, due to a profound fear for his safety. [16]

7. The one case dealing with the request of a foreign national for LGR in a Member State decided by the Court to date, *Guerrero Castillo v. Italy*,[18] is useful in that it illustrates the conundrum that trans migrants often find themselves, caught in a legal vacuum between the country of origin and the country of settlement. The applicant in that case was a Peruvian trans man who resided in Italy. The Italian authorities authorised his request to undergo genital surgery and agreed to issue some documents recognising his male name and gender.

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[10] European Union Agency for Fundamental Rights, *Current migration situation in the EU: Lesbian, gay, bisexual, transgender and intersex asylum seekers*, March 2017, p. 1-2.

[11] Transgender Europe, *Welcome to stay: Building trans communities inclusive of trans asylum seekers and refugees in Europe*, 2016, p. 5-9; UK Lesbian& Gay Immigration Group, Stonewall, *No safe refuge: Experiences of LGBT asylum seekers in detention*, 2016; Equality Network, BEMIS, GRAMNet, *Sanctuary, safety and solidarity: Lesbian, gay, bisexual, transgender asylum seekers and refugees in Scotland*, 2011; Helsinki Citizens' Assembly –Turkey, Refugee Advocacy and Support Program & ORAM Organisation for Refuge, Asylum and Immigration, *Unsafe Heaven: The security challenges facing lesbian, gay, bisexual & transgender asylum seekers & refugees in Turkey*, 2009; Sabine Jansen and Thomas Spjker, *Fleeing homophobia: Asylum claims related to sexual orientation and gender identity in Europe*, 2011.

[12] Transgender Europe, *Welcome to stay: Building trans communities inclusive of trans asylum seekers and refugees in Europe*, 2016, p. 9-10.

[13] Frankfurter Zeitung, Die Wut des Herrn Komarov, 12 October 2017

[15] Copenhagen Post, *Campaign builds to stop deportation of trans-woman raped at Sandholm*, 29 August 2012, available here: http://cphpost.dk/news/international/campaign-builds-to-stop-deportation-of-trans-woman-raped-at-sandholm.html; Politiken, *Transkønnede Fernanda: Jeg blev voldtaget ikke bare af én mand, men af mange*, 14 August 2012, available here: http://politiken.dk/indland/art5406377/Transk%C3%B8nnede-Fernanda-Jeg-blev-voldtaget-ikke-bare-af-%C3%A9n-mand-men-af-mange.

[16] Transvanilla, *Donate to an Iranian refugee trans guy*, November 2013, http://transvanilla.hu/news/donate-to-an-iranian-refugee-trans-guy and email- correspondence between Transvanilla and TGEU

[18] *Guerrero Castillo v. Italy* (dec.), no. 39432/06, 23 June 2007.

At the same time, once the applicant's Peruvian passport expired, the Italian authorities refused to renew his residence permit. Peru lacked any LGR procedure and refused at the same time to recognise the decisions taken in Italy in that respect. The applicant was therefore in danger of losing his right to reside in Italy, while facing the possibility of having to return to a country that refused to recognise his gender identity. While the Court ultimately rejected the applicant's request, it did so on the basis that Italy did not move to expel the applicant, who was able eventually to gain legal status on the basis of legal practice that developed at the time in Italy and which is discussed below.

II. The obligation to provide recognised migrants with legal status and suitable documentation and ensure they have access to social and economic rights without discrimination

A. Legal standards

8. Legal status and appropriate documentation are key to ensuring migrants' access to public or private services, or to the labour market. EU law sets out detailed mandatory requirements relating to providing status and documentation to certain categories of migrants, such as asylum seekers,[19] recognised refugees[20] or long-term residents.[21] The Convention does not expressly require State Parties to provide a certain status or issue specific documentation. Nonetheless, specific circumstances may justify a departure from the rule in two situations. First, interferences with the right for family and private life under Article 8 may give rise to a violation, as exemplified by the following cases:

- the failure to provide the applicants with valid residence permits in the specific circumstances pertaining after the breakup of former Yugoslavia, which resulted in a loss of job opportunities, loss of health insurance, the impossibility of renewing identity documents or driving licences, and difficulties in regulating pension rights;[22]
- the failure to grant a Spanish citizen a residence permit during a period of fourteen years, forcing her to take up precarious and degrading jobs and resulting in difficulties in securing accommodation and social and financial detriment;[23]
- the residence arrangements that restricted the freedom of movement of the applicant, who benefited from subsidiary protection in Switzerland, preventing her from joining her husband, who was restricted to living in a different canton, for a period of several years.[24]

Second, an issue may arise under Article 14 if the refusal to issue specific documentation is based on discriminatory grounds. The Court has identified violations stemming from discrimination based on health status[25] or sexual orientation[26] among others.

9. Migrants possessing an acknowledged right to remain should be granted the right to access the full range of social rights including employment, education, housing, healthcare, social security, social assistance and other social benefits, in comparison to citizens. Differentiated treatment becomes less acceptable the more similar a foreigner's immigration status is to the situation of a state's own citizens.[27] EU law grants several such rights to

[19] Article 6 of the Reception Conditions Directive (2013/33/EU).
[20] Articles 13 and 18 of the Qualification Directive (2011/95/EU).
[21] According to various provisions in the Return Directive (2008/115/EC).
[22] *Kurić and Others v. Slovenia* [GC], no. 26828/06, §356-359, ECHR 2012 (extracts).
[23] *Aristimuño Mendizabal v. France*, no. 51431/99, §70-72, 17 January 2006.
[24] *Mengesha Kimfe v. Switzerland*, no. 24404/05, § 73-78, 29 July 2010.
[25] *Kiyutin v. Russia*, no. 2700/10, §57, ECHR 2011.
[26] *Pajić v. Croatia*, no. 68453/13, § 58-60, 23 February 2016.
[27] Agency for Fundamental Rights/European Court of Human Rights, *Handbook on European law relating to asylum, borders and immigration*, Edition 2014, p. 181 et seq.

recognised migrants - for example, the Qualification Directive recognises the right of refugees and those granted subsidiary protection to take up employment and to be self-employed, to vocational training or procedures for recognition of qualifications. For its part, the Court found violations of Article 14 on account of discrimination based on nationality/citizenship on several occasions, including in relation to the refusal to grant unemployment benefits,[28] a pension[29] or welfare benefits.[30] Furthermore, a failure to make provision for asylum seekers and/or irregular migrants resulting in destitution may in certain circumstances engage the States' responsibility under the Convention[31] or the European Social Charter.[32]

B. Legal gender recognition as an element of legal status and as gateway to other rights

10. Correct identification documents are essential for a person's wellbeing and their ability to enjoy other rights. Conversely, denying a trans person the legal recognition of their gender identity has a severe impact on their daily lives. Legal documents that contain personal details including gender markers are required on a daily basis in a variety of interactions including employment, health, access to banking and to other services, or marriage. Disagreement between one's appearance and personal documents may cause forced "outing" as a transgender person, potentially leading to humiliation and harassment. The Court has recognized the key role of LGR as a gateway to other rights. The disagreement between social reality and legal status that the absence of LGR engenders generates "feelings of vulnerability, humiliation and anxiety," "stress and alienation," amounting to "a serious interference with private life."[33] Lack of LGR has a negative impact in significant respects, such as one's "employment opportunities or travel abroad."[34] While this is true for all trans people, asylum seekers and refugees face more challenges because of the intersection of their gender, their legal status, their race, ethnicity or religion. Ethnic police profiling, a practice widely documented for Hungary,[35] puts trans migrants without legal gender recognition at an increased risk to be suspected of using falsified documents.

11. EU FRA research shows that the lack of correct identity documents is one of the drivers for disproportionately higher levels of discrimination and abuse suffered by trans people. Thus, one in three trans respondents felt discriminated against when showing their identification card or other official document that identifies their gender. In addition, almost nine in ten said that easier legal procedures for recognition of their gender identity would help them to live a more comfortable life.[36] The U.N. Independent Expert on protection against violence and discrimination based on sexual orientation and gender identify linked the absence of LGR procedures with an environment that leads to lifelong violence and

[28] *Gaygusuz v. Austria*, 16 September 1996, Reports of Judgments and Decisions1996-IV.
[29] *Andrejeva v. Latvia* [GC], no. 55707/00, ECHR 2009.
[30] *Koua Poirrez v. France*, no. 40892/98, ECHR 2003-X.
[31] *M.S.S. v. Belgium and Greece* [GC], no. 30696/09, ECHR 2011.
[32] *Defence for Children International v. the Netherlands*, Complaint No. 47/2008, merits, 20 October 2009; *International Federation of Human Rights Leagues v. France*, Complaint no. 14/2003, merits, 8 September 2004.
[33] *Christine Goodwin v. the United Kingdom* [GC], no. 28957/95, § 77, ECHR 2002-VI.
[34] *L. v. Lithuania*, no. 27527/03, § 57, ECHR 2007-IV.
[35] See *ENAR Shadow Report 2015-16 on racism and migration in Europe*; Andreas Kadar, *Police Ethnic Profiling in Hungary – An Empirical Research*, Acta Juridica Hungarica, 50, No 3, pp. 253–267 (2009); *'I Can Stop and Search Whoever I Want'. Police Stops of Ethnic Minorities in Bulgaria, Hungary, and Spain,* NewYork: Open Society Institute, 2007
[36] European Union Agency for Fundamental Rights, *Being Trans in the European Union: Comparative Analysis of EU LGBT Survey Data* ("the FRA Survey") 2014, pp. 81-82, 95.

discrimination.[37] The World Professional Association for Transgender Health (WPATH) recommended LGR as a measure capable of alleviating discomfort and distress related to the discrepancy of a person's gender identity and the gender assigned at birth.[38] The WPATH emphasized that "legally recognized documents matching self-identity are essential to the ability of all people to find employment, to navigate everyday transactions, to obtain health care, and to travel safely," and that barriers to LGR may harm the physical and mental health of the person in question.

C. Refusal to provide legal gender recognition as discrimination

12. Gender identity is a fundamental aspect of personal identity and a fundamental right. The Court has described gender identity as "one of the most intimate areas of a person's private life",[39] a free-standing "right",[40] "a fundamental aspect of the right to respect for private life"[41] and as "one of the most basic essentials of self-determination,"[42] linked to the "right to sexual self-determination," itself an aspect of the right to respect for private life.[43] These pronouncements benefit all individuals, regardless of whether they had undergone gender reassignment treatment or not.[44]

13. Gender identity is covered by the prohibition of discrimination in the Convention (Article 14)[45] and the International Covenant on Civil and Political Rights (Article 26) among other instruments of international law. The Human Rights Committee (HRC) reached this conclusion in a recent case concerning the validity of certain requirements attached to LGR.[46] Notably, the HRC considered that trans people were similarly situated as cisgender individuals insofar as their need for LGR was concerned.[47] It then follows that trans refugees may arguably also be considered to find themselves in the same position as (trans or cisgender) nationals of the State in question in regard to their need for LGR. Moreover, trans asylum seekers and refugees are potentially further affected by intersectional discrimination due to their gender identity and nationality.

14. EU gender equality law covers trans people who underwent, are undergoing or are planning to undergo "gender reassignment." Notably, the European Commission stated it would treat discrimination related to "gender identity" similar to "gender reassignment".[48] The Court of Justice of the European Union (CJUE) clarified in *K.B. v. National Health*

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[37] *Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity*, A/HRC/35/36, 19 April 2017, §57.
[38] WPATH, *Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People* (SoC), p.10. The SoC outline the treatment protocols for gender reassignment treatment, "based on the best available science and expert professional consensus". The latest version dates from 2011 and is available here: http://www.wpath.org/.
[39] *Van Kück v. Germany*, no. 35968/97, §56, ECHR 2003-VII.
[40] *Idem,* §75.
[41] *Idem,* §75.
[42] *Y.Y. v. Turkey*, no. 14793/08, §102, 10 March 2015 (extracts).
[43] *Idem,* §78.
[44] *A.P., Garçon and Nicot v. France*, nos. 79885/12 and 2 others, §94-95, ECHR 2017.
[45] ECtHR, *Identoba and Others v. Georgia*, no. 73235/12, § 96, 12 May 2015 ("the prohibition of discrimination under Article 14 of the Convention duly covers questions related to sexual orientation and gender identity").
[46] HRC, *G. v. Australia*, Communication no. 2172/2012, 17 March 2017
[47] *Idem*, § 7.14.
[48] European Commission, *Report on the application of Council Directive 2004/113/EC implementing the principle of equal treatment between men and women in the access to and supply of goods and services* (COM(2015) 190 final), 05 May 2015, p. 4

Service Pensions Agency that discrimination also exists when the person in question is unable to fulfil a necessary precondition for the accessing of rights covered by equality legislation. In this case, K.B. was not able to marry her trans male partner, due to inexistent legal gender recognition, which was a precondition for him being able to access a widower's pension.[49] Refugees without citizenship (yet) in the country of settlement or who are not able to produce a birth certificate, for reasons which might be linked to why they sought international protection, cannot be expected to fulfil the preconditions to access legal gender recognition. Refugees would also suffer from discrimination to the extent that they were denied access to social rights, due to LGR, a necessary precondition, being unavailable in the State in question.

D. Comparative information

15. Although this review is not exhaustive, it suggests that comparatively more countries chose to provide recognised refugees with LGR, as well as that the lack of a principled justification for treating refugees and citizens differently in this respect.

16. In Austria, recognized refugees may apply for LGR on the same terms as Austrian nationals.[50] A birth certificate is usually required, but not indispensible.

17. In Belgium, legal changes introduced in 2017 allow access to LGR procedures to those included in the foreigners' register, comprising recognized refugees and those benefiting from subsidiary protection.[51] Basic requirements are defined by the nationality of the refugee/person benefiting from subsidiary protection, should a LGR procedure exist in the country of nationality as long as these do not pose harsh requirements, such as mandatory medical treatment or sterility. Refugees without a birth certificate can get a replacement certificate at the Commissioner General for Refugees and Stateless Persons.

18. In Germany, foreigners possessing an indefinite right of residence, including recognized refugees and stateless persons are eligible to apply for LGR on the same terms as German nationals.[52] Other foreigners with an indefinite right of residence may apply for LGR if they can prove that their home state does not have an equivalent legal gender procedure. Courts vested with such requests ordinarily request for proof of identity and residency, usually a birth certificate and a copy of the ID/passport or certificate of residence, as well as, in some cases, a personal written biography. The current legal regime stemmed from a 2006 Constitutional Court judgment[53] regarding one Thai and one Ethiopian national who could neither change their legal gender in their countries of origin, that lacked any rules in that respect, nor in Germany, under the terms of the Transsexuals Act, although they resided in Germany. The Constitutional Court reasoned that the provisions in question placed at a disadvantage the citizens of those states that did not permit LGR. A departure from the principle that the national law governed the rules on personal status was

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[49] '[t]he decision to restrict certain benefits to married couples while excluding all persons who live together without being married is either a matter for the legislature to decide or a matter for the national courts as to the interpretation of domestic legal rules [...] there is inequality of treatment which [...] affects one of the conditions for the [...] necessary precondition for the grant of such a pension: namely, the capacity to marry'

[50] According to information received from local transgender activists.

[51] Art. 3 of *Loi réformant des régimes relatifs aux personnes transgenres en ce qui concerne la mention d'un changement de l'enregistrement du sexe dans les actes de l'état civil et ses effets*, 2017. Additonal information available here: http://www.cgrs.be/en/content/documents.

[52] *Transsexuellengesetz* (Law on Transsexuals), 10 September 1980.

[53] Germany, Constitutional Court, 1 BvL 1/04, 1 BvL 12/04, 18 July 2006.

permissible if the law in question was contrary to fundamental rights. Consequently, the Constitutional Court decided that the impugned provisions were contrary to Article 2§1 (right to protection of personhood) in conjunction with Articles 1§1 (human dignity), and 3 (equality before the law) in the Basic Act.

19. In Ireland, the Gender Recognition Act 2015 allows those "ordinarily resident" in Ireland to apply for LGR, making specific provision for the documents that have to be supplied in different eventualities.[54] Thus, if the birth is registered in accordance with a civil system of registration of births in the place where the birth occurred, proof of which is a document issued in accordance with that system of registration, or a statutory declaration declaring why it is not feasible to produce the proof and exhibiting other evidence of birth. If, on the other hand, the birth is not registered because there is no system of civil registration of births in the place where the birth occurred, proof of which is a statutory declaration declaring that there is no such system and exhibiting other evidence of birth.

20. Italian legislation does not include any citizenship requirements for those applying for LGR. A leading judgment handed down in 2000 noted that in these circumstances the general conflict of laws rules were applicable so that the law of the nationality of the applicant would principally determine the applicable rules.[55] However, the court went on to find that if the law of nationality did not allow a change of gender, then this constituted a breach of the Italian 'public order', and hence the Italian law was applicable. With this judgment, foreigners residing in Italy became eligible to apply for LGR.

21. While LGR in Malta is only accessible to citizens, a person who was granted international protection under the Refugees Act can declare on oath the person's self-determined gender and first name. The Commissioner for Refugees shall record such amendment in their asylum application form and protection certificate within fifteen days.[56]

22. Asylum seekers in the Netherlands cannot obtain any form of gender recognition for the duration of their asylum request. Refugees do have access, as long as they can provide their original birth certificate and have legal residence for at least one year. These conditions are the same for all non-Dutch nationals legally residing in The Netherlands. The procedure after registering the original birth certificate at the Civil Registry of The Hague is similar for all people requesting change of legal gender. While the new name and gender for refugees will be registered on their residence card their passport will not be changed as long as there is no mutual recognition of LGR with the country of nationality.

23. In the United Kingdom, the Gender Recognition Act 2004 does not stipulate any residency or citizenship requirements. In that respect, a person may apply for LGR if their birth certificate is a UK birth certificate, or there is no gender recognition system in their home country or state, or they have not made use of their home country's gender recognition process. However, a non-citizen will not receive a replacement birth certificate since they do not possess one in the UK registry.[57]

24. In Finland,[58] Sweden,[59] Switzerland,[60] Norway,[61] residents, including recognized

[54] Gender Recognition Act 2014,
[55] Tribunale di Milano sez. IX, sent. 17 luglio 2000.
[56] ACT for the recognition and registration of the gender of a person and to regulate the effects of such a change, as well as the recognition and protection of the sex characteristics of a person, Art. 4(8).
[57] Additional information is available here: http://www.pfc.org.uk/GRC_Applications.html.
[58] The Act on the Recognition of the Sex of Transsexual Individuals (laki transseksuaalin sukupuolen vahvistamisesta) (563/2002).
[59] The Gender Recognition Act (reformed in 2012), section 3.

refugees, are eligible for LGR. In Slovenia,[62] Poland,[63] Portugal,[64] Spain,[65] Greece,[66] LGR is only available to nationals. In other countries, such as Romania, the situation is unclear.

III. The absence of a functional legal gender recognition procedure in Hungary, for nationals or foreigners alike

25. State Parties have a positive obligation under Article 8 to adopt LGR procedures[67] that are "effective and accessible."[68] The Court found violations of the Convention in several other cases on account of LGR schemes that were misconceived or incomplete, giving rise to arbitrary or unfair outcomes. Thus, the violation of Article 8 in *L. v. Lithuania* was predicated on the failure to adopt enabling legislation facilitating access to LGR, although the right to gender reassignment surgery (a precondition to LGR) as well as the right to change civil status were already embedded in national law. In finding against Lithuania, the Court referred specifically to "the limited legislative gap" which the Government failed to address.[69] In *Y.Y. v Turkey*, the Court found the feature of Turkish law making access to genital surgery conditional on the infertility of the person in question highly unusual, impractical and in any event unjustified.[70] This legal requirement, applied strictly by national courts, rendered impossible in practice the access to LGR, conditioned in turn on the obligation to undergo genital surgery.

26. The same principle is firmly entrenched in other international law and professional guidelines. The Committee of Ministers[71] and the Parliamentary Assembly[72] demanded "quick, transparent and accessible" LGR procedures "based on self-determination"[73], whereas the Commissioner for Human Rights recommended "expeditious and transparent procedures for changing the name and sex of a transgender person on birth certificates, identity cards, passports, educational certificates and other similar documents."[74] The Yogyakarta Principles suggested that States were duty bound to take "all necessary legislative, administrative and other measures" to ensure that LGR was available and that the procedure was "efficient, fair and non-discriminatory, and respected the dignity and privacy of the person concerned."[75] The WPATH asked States "to eliminate unnecessary barriers, and to institute simple and accessible administrative procedures for transgender people to obtain legal recognition of gender, consonant with each individual's identity."[76]

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[60] Article 42 of the Civil Code.
[61] Legal Gender Amendment Act, Art. 2.
[62] Article 4 of the Register of Civil Status Act. Article 9.
[63] Polish Civil Code.
[64] The Gender Identity Law (Law No 7/2011 of 15 March 2010).
[65] Ley 3/2007 Rectificacion registral de la sexo de las persona.
[66] According to information received from local transgender activists.
[67] *Christine Goodwin v. the United Kingdom* [GC], no. 28957/95, § 78, ECHR 2002-VI.
[68] *Hämäläinen v. Finland* [GC], no. 37359/09, §64, ECHR 2014.
[69] *L. v. Lithuania*, no. 27527/03 (Sect. 2), ECHR 2007-IV – (11.9.07), §59.
[70] *Y.Y. v. Turkey*, no. 14793/08, § 112-122, ECHR 2015 (extracts).
[71] *Recommendation CM/Rec(2010)5 of the Committee of Ministers to member states on measures to combat discrimination on grounds of sexual orientation or gender identity*, §21.
[72] Resolution 2048 (2015), *Discrimination against transgender people in Europe*, §6.2.1.
[73] Idem.
[74] *Human Rights and Gender Identity*, Issue Paper by Thomas Hammarberg, Council of Europe Commissioner for Human Rights, 2009, Recommendation §5.
[75] Principle 3. The *Yogyakarta Principles* were mentioned as persuasive authority by Judges Sajó, Keller and Lemmens in their dissenting opinion, §16, in *Hämäläinen v. Finland* [GC], no. 37359/09, ECHR 2014.
[76] *WPATH Statement on Legal Recognition of Gender Identity*, 19 January 2015, http://tinyurl.com/hsja25m.

27. Hungary has never had any legislation on LGR. Nonetheless, from 2004 until November 2016 it was possible to change one's documents based on an informal practice that developed in time.[77] Applicants for LGR had to obtain the following medical documents:

- an expert opinion of a psychiatrist diagnosing transsexualism (F64.0) and recommending the „change of sex/gender"[78];
- an expert opinion of a clinical psychologist;
- an expert opinion from an urologist or a gynecologist (depending on the assigned sex) certifying that sex reconstruction surgery is not contraindicated.

The applicant could not be married or in a registered civil partnership, had to be over 18 and had to be Hungarian citizen. The legal gender was recognized based on an expert opinion issued by the Department for Health Care and Public Health of the Ministry of Human Capacities (*Emberi Erőforrások Minisztériuma Egészségügyi Ellátási és Közegészségügyi Főosztály*a - EMMI) and communicated to the civil registry.

28. In 2015, Transvanilla Transgender Association and two individual complainants turned to the Office of the Commissioner for Fundamental Rights pointing out the anomalies around the practice on name and gender marker and asking for legal reform. The petitioners argued that LGR was based on an unpredictable and ever changing practice, which did not guarantee the right to a fair trial and right to self-determination. In September 2016, the Commissioner published a comprehensive report in response to the above-mentioned petition and other individual complaints received, in which he found lack of legal certainty stemming from discovered regulatory problems and violation of the right to private life.[79] The Commissioner asked the Minister of Human Capacities „to initiate and prepare a legislative regulation, in the form of a law, related governmental decree or ministerial order level, guaranteeing the right to a fair trial, the right to an effective remedy, separate from the issue of gender-affirming medical treatments, with transparent age requirements, providing trans persons with the opportunity to choose and alter their name and gender/sex corresponding to their gender identity".

29. After the publication of the Commissioner's report, the Ministry suspended *sine die* the practice of issuing expert opinions, which means that currently there is no possibility for LGR in Hungary, whether for citizens or for foreigners. In official letters sent in response to rejected applications for LGR throughout 2017, the Ministry explained its decision as follows: „taking into account that your request arrived after the issuance of opinions was suspended, it is not possible to issue an opinion before the new regulation is introduced. However I inform you that according to the previous practice I have reviewed the documentation and it is corresponding to requirements required at that time. I will inform you later about the new procedure and the documentation required to issue an expert opinion." Until today, neither the applicants, nor Transvanilla or the Commissioner have been informed about a new procedure or any legislative or policy measures taken to this end.[80]

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[77] Official information about LGR procedure in Hungary previously in force, published on the website of the Government Office, is available here: http://bit.ly/2rU7eeY.

[78] There are no separate words for sex and gender in Hungarian.

[79] Report of the Commissioner for Human Rights, AJB-883/2016, available here: http://bit.ly/2vVe5pL.

[80] Oral report by the Commissioner's office at the *Thematic roundtable discussions Fundamental rights of trans persons*, 25 October 2017, Budapest