

IN THE EUROPEAN COURT OF HUMAN RIGHTS

Y.T. v. Bulgaria (Application no. 41701/16)

WRITTEN COMMENTS

submitted jointly by

Transgender Europe (TGEU)

ILGA Europe

Bilitis Resource Center Foundation

4 May 2017

I. Introduction

1. These written comments are submitted jointly by Transgender Europe (TGEU), ILGA Europe and the Bilitis Resource Center Foundation (Bilitis), pursuant to leave granted by the President of the Fifth Section on 31 March 2017. The present case involves a trans man who had been denied the legal recognition of his gender identity at the national level, on the basis that gender reassignment treatment was not capable of resulting in a change of sex. This case raises the issue of the scope and contents of the positive obligation under Article 8 of the Convention to have in place an adequate procedure affording trans people the possibility of changing their legal gender.

2. This submission is structured as follows. First, this submission examines the contents of the positive obligation to adopt legislation allowing trans people to have their gender legally recognised, both in terms of its underlying rationale as well as of its desirable features. Second, it briefly discusses the implications of the judgment in the case *A.P., Garçon and Nicot v. France*¹ for the present case, as well as providing a brief update on relevant developments that took place over the past several months across Europe and beyond. In the *A.P., Garçon and Nicot* judgment, handed down on 6 April 2017, after the request for leave to intervene in the present case had been lodged, the Court held that the sterilisation requirement as precondition to legal gender recognition ('LGR') was in breach of Article 8 of the Convention. Third, this submission provides information regarding the regulations and procedure on LGR in Bulgaria.

I. A “quick, transparent and accessible” legal gender recognition procedure

3. The Court acknowledged for the first time that Article 8 required State Parties to adopt a LGR procedure in the seminal judgment *Christine Goodwin v. United Kingdom*,² handed down in 2002, a ruling reiterated on several occasions since then.

¹ *A.P., Garçon and Nicot v. France*, nos. 79885/12 and 2 others, 6 April 2017.

² *Christine Goodwin v. the United Kingdom* [GC], no. 28957/95, § 78, ECHR 2002-VI.

For instance, in *Hämäläinen v. Finland*, the Court mentioned the obligation to adopt LGR procedures that were “effective and accessible”.³ Despite the existence of well-settled principle, many Council of Europe State Parties have yet to comply with this minimal requirement, either by failing to have in place any LGR procedure, or by adopting procedures that are manifestly unfit for purpose. We will analyse each of these scenarios in turn.

4. In 2014, or twelve years after *Goodwin* had been adopted, the Court referred to “the majority of the Council of Europe Member States” as still lacking a LGR procedure.⁴ TGEU research concludes that currently seventeen State Parties are in this position, including Bulgaria.⁵

5. Persistent failure to comply may be motivated by ignorance or even by a quiet disavowal of the *Goodwin* ruling. It is therefore important to recall that denying a trans person the legal recognition of their gender identity has a severe impact on their daily lives. Identification documents 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. Documents correctly identifying the holder’s gender identity are essential for participation in social life, developing stable and cognizable family relationships. According to a 2014 EU Agency for Fundamental Rights (FRA) survey, 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.⁶

³ *Hämäläinen v. Finland* [GC], no. 37359/09, §64, ECHR 2014

⁴ *Idem*, §80.

⁵ Albania, Andorra, Armenia, Austria, Bulgaria, Cyprus, Georgia, Hungary, Liechtenstein, Lithuania, Luxembourg, FYR Macedonia, Moldova, Monaco, Russian Federation, San Marino and Serbia.

⁶ 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.

Conversely, the World Professional Association for Transgender Health (WPATH)⁷ 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.⁸ 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. "No particular medical, surgical, or mental health treatment or diagnosis is an adequate marker for anyone's gender identity, so these should not be requirements for legal gender change."⁹ Consequently, Governments were urged "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."

6. For its part, this Court has described gender identity as "one of the most intimate areas of a person's private life",¹⁰ as a free-standing "right",¹¹ as "a fundamental aspect of the right to respect for private life"¹² and as "one of the most basic essentials of self-determination,"¹³ linking it to a "right to sexual self-determination," itself an aspect of the right to respect for private life.¹⁴

7. A critical aspect of the Court's reasoning in *Goodwin* is that it explicitly overruled a line of jurisprudence in English law espousing the view that sex had to be defined by reference to biological criteria, without regard to any modification occurring as a result of surgery. As no amount of surgery could modify the underlying chromosomal makeup of each person, gender marker/sex was regarded as an immutable legal category.¹⁵ The Court refuted this approach, known as biological essentialism,

⁷ The WPATH publishes the *Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People* (SoC), which outline the treatment protocols for gender reassignment treatment, "based on the best available science and expert professional consensus". The latest version from 2011 is available here: <http://www.wpath.org/>.

⁸ *Idem*, p. 10.

⁹ *WPATH Statement on Legal Recognition of Gender Identity*, 19 January 2015, http://www.wpath.org/uploaded_files/140/files/WPATH%20Statement%20on%20Legal%20Recognition%20of%20Gender%20Identity%201-19-15.pdf.

¹⁰ *Van Küçk v. Germany*, no. 35968/97, §56, ECHR 2003-VII.

¹¹ *Idem*, §75.

¹² *Idem*, §75.

¹³ *Y.Y. v. Turkey*, no. 14793/08, §102, 10 March 2015 (extracts).

¹⁴ *Idem*, §78.

¹⁵ *Christine Goodwin v. the United Kingdom* [GC], no. 28957/95, § 52-53, ECHR 2002-VI.

taking into account among others the increased social acceptance of transgender people in evidence at the time. The Court ruled that it was untenable to define gender identity legally solely on the basis of chromosomes and that a more generous definition had to be adopted taking into account all circumstances of each individual case.¹⁶ Notably, our understanding of what constitutes gender has shifted greatly since *Goodwin* was adopted, among others by deemphasizing the importance of genital surgery and focusing on how the person in question defines themselves. The need to base LGR on the self-determination of the person concerned is underlined by WPATH's assessment that "no mental health treatment or diagnosis" should be a requirement. That notwithstanding, the approach adopted by Bulgarian courts in the present case, suggesting that no amount of surgery could change the underlying determinants of sex and therefore denying the very possibility of changing one's legal gender on principle, appears to be deeply at odds with the basic tenets of the Court's ruling in *Goodwin*.

8. While in some Council of Europe State Parties LGR procedures are nominally available, they are profoundly dysfunctional. This may be because of draconic requirements (such as forced psychiatric hospitalisation in Ukraine until recently), confusing rules or inconsistent court practice giving rise to arbitrariness, exceedingly lengthy procedures and other factors. To address this problem, the Committee of Ministers¹⁷ and the Parliamentary Assembly¹⁸ urged States to adopt "quick, transparent and accessible" LGR procedures "based on self-determination"¹⁹, whereas the Council of Europe Commissioner for Human Rights asked for "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."²⁰

The Yogyakarta Principles, an authoritative document synthesising the manner in which international law applies to LGBTI people, suggested that States should take "all necessary legislative, administrative and other measures" to ensure that LGR

¹⁶ *Idem*, §82.

¹⁷ *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.

¹⁸ Resolution 2048 (2015), *Discrimination against transgender people in Europe*, §6.2.1.

¹⁹ *Idem*.

²⁰ *Human Rights and Gender Identity*, Issue Paper by Thomas Hammarberg, Council of Europe Commissioner for Human Rights, 2009, Recommendation §5.

procedures exist, which are “efficient, fair and non-discriminatory, and respect the dignity and privacy of the person concerned.”²¹

The World Health Organisation (WHO) is suggesting in the next version of the International Classification of Diseases (ICD-11) to remove all trans-related diagnoses from the Mental Health Chapter.²² Instead, a new chapter (Conditions related to Sexual Health) is proposed with the placement of two new diagnoses Gender Incongruence in Adolescence/adult (GIAA) and Gender Incongruence in Childhood (GIC), to facilitate access to medical treatment and cost coverage thereof. The de-psychopathologisation of trans identities has been driven by the motivation to reduce stigma and to improve human rights compliance. It results from a global process involving trans communities, scientists and academia,²³ including field-testing of the new categories in Brazil, India, Lebanon, México and South Africa^{24,25,26}. The approval of ICD-11 is planned to take place in the World Health Assembly in May 2018, and to be implemented by governments from January 2019.²⁷ This is likely to have an affect on how Member States provide for legal gender recognition, if based on a mental health diagnosis, and trans-specific healthcare.

9. In *A.P, Garçon and Nicot v. France*, the Court noted that the requirement imposed on trans people seeking LGR to demonstrate “the irreversible [...] transformation of their appearance” was inherently ambiguous, and therefore

²¹ 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.

²² World Health Organisation. ICD-11 Beta Draft (Joint Linearization for Mortality and Morbidity Statistics). 2017; <http://apps.who.int/classifications/icd11/browse/l-m/en>. Accessed 20 April 2017

²³ See Drescher J, Cohen-Kettenis P, Winter S. Minding the body: situating gender identity diagnoses in the ICD-11. *Int Rev Psychiatry*. 2012;24(6):568-577; A rationale for this recommendation was developed in the article “Minding the Body: Situating gender identity diagnoses in the ICD-11” *International Review of Psychiatry*, 24, 568-577, by J. Drescher, P. Cohen-Kettenis and S. Winter; Reed GM, Drescher J, Krueger RB, et al. Disorders related to sexuality and gender identity in the ICD-11: revising the ICD-10 classification based on current scientific evidence, best clinical practices, and human rights considerations. *World Psychiatry*. 2016;15(3):205-221. doi:10.1002/wps.20354

²⁴ Beek TF, Cohen-Kettenis PT, Bouman WP, de Vries ALC, Steensma TD, Witcomb GL, et al. (2016) Gender Incongruence of Adolescence and Adulthood: Acceptability and Clinical Utility of the World Health Organization’s Proposed ICD-11 Criteria. *PLoS ONE* 11(10): e0160066. doi:10.1371/journal.pone.0160066.

²⁵ Robles R, Fresán A, Vega-Ramírez H, et al. Removing transgender identity from the classification of mental disorders: a Mexican field study for ICD-11. *The Lancet Psychiatry*.3(9):850-859.

²⁶ Report on the Shanghai Conference of the ICD-11 Field Studies Coordinating Group. *Shanghai Archives of Psychiatry*. 2014;26(1):57. doi:10.3969/j.issn.1002-0829.2014.01.010.

²⁷ See WHO, ICD-11 Revision Conference Report Tokyo, Japan, 12-14 October, 2016.

problematic, as it juxtaposed two terms (“appearance” and “irreversibility” which suggested a “radical transformation”) that were inconsistent (§117). In turn, the vague wording of the provisions on LGR under French law gave rise to contradictory case law, including with respect to the requirement to undergo sterilisation.

10. National courts across Europe also struck down LGR procedures that did not work well in practice. In 2014, the Croatian Constitutional Court ruled in favour of a young trans man, holding that LGR proceedings that lasted almost four years were too lengthy and therefore in breach of fair trial guarantees under the Croatian Constitution, and that the failure to adopt enabling secondary legislation rendered existing rules on LGR inoperable, amounting to a breach of the right to private life.²⁸ In Ukraine, the Kiev Administrative Court ruled in favour of two trans persons, whose LGR request had initially been rejected by a commission working under the supervision of the Ministry of Health, based on a letter issued by the Institute of Urology, setting out the list of medical procedures that had to be undertaken to achieve the desired outcome.²⁹ The Administrative Court decided that the Institute lacked legal authority to issue such letters, with the requirements set out therein not being provided for under the law.

11. Considering the case-law reviewed above, some of the features of the LGR scheme available in Bulgaria appear to be problematic from the view point of Article 8 of the Convention. These include the lack of clear rules generating contradictory and arbitrary outcomes and the practical impossibility of complying with the genital surgery requirement derived from the ban imposed on doctors to perform treatment leading to the disablement of reproductive functions.

II. The requirement to undergo gender reassignment treatment

12. The recently decided *A.P., Garçon and Nicot v. France* case went some way towards addressing some of the issues that we proposed to cover in these written comments. Notably, TGEU and ILGA Europe also submitted written comments in that case, that are at least partially reflected in the Court’s judgment. The applicants in the

²⁸ Croatia, Constitutional Court, No. U-III B-3173/2012, 18 March 2014

²⁹ Ukraine, Kiev Administrative Court, 19 June 2015; Ukraine, Kiev Administrative Court, 10 July 2015.

A.P., Garçon and Nicot case complained about the deficient manner in which LGR procedures operated in France, involving a *de facto* requirement to undergo medical treatment resulting in sterilisation, being lengthy, costly and unpredictable. Notably, the situation in France was not unlike that in Bulgaria, in that the procedure for changing one's legal gender was not fully codified and developed jurisprudentially, in a civil law system lacking sufficient means to ensure the consistency of the case law. The Court held that the requirement to undergo sterilisation or treatment involving a very high probability of sterility in order to change the entries on birth certificates was in breach of the applicants' right to respect for private life under Article 8 of the Convention. In reaching this decision, the Court noted that consent given to medical treatment forming a mandatory pre-requisite to LGR was invalid, as it forced trans people to choose between their right to bodily integrity and their right to the recognition of gender identity.

13. The *A.P., Garçon and Nicot* judgment refers explicitly or implicitly to surgical or hormonal treatment leading to sterilisation, in the particular circumstances present in France at the time. However, the Court's reasoning extends *mutatis mutandis* to all gender reassignment procedures imposed as a mandatory precondition to LGR, as long as carried out without the full and informed consent of the person concerned. In that sense, we would reiterate that the notion of "gender reassignment treatment" is usually understood to comprise a variety of hormonal and surgical treatments, such as bilateral mastectomy and reconstruction ("top surgery"), hysterectomy (removal of uterus and other internal pelvic organs) and phalloplasty (creation of a penis) for trans men and breast augmentation, penectomy (removal of penis), orchiectomy (removal of the testicles) or vaginoplasty (creation of a vagina) for trans women. All these procedures are extremely invasive, involving substantial health risks, potentially with lifelong implications.

14. The Court based its *A.P., Garçon and Nicot* ruling on a careful consideration of recent international and national developments across Europe, concluding that there has been a trend towards abandoning the sterilisation requirement. In agreement with our written comments in that case, the Court also noted that some countries have even adopted legislation based on self-determination of gender identity, allowing trans people to obtain recognition of their gender identity based on a simple statement given

before a suitably qualified State official. While reiterating the fact that by continuing to deny trans people a workable LGR procedure, Bulgaria is deeply at odds with these trends, we would provide the Court with an update of relevant developments that took place over the past few months, and which strengthen the Court's findings in *A.P., Garçon and Nicot v. France*.

15. On 24 March 2017, the Swedish Government announced the details of a pay out scheme for the transgender people who had been forced to undergo sterilisation under legislation on LGR that was in force until 2013, understood to constitute a serious human rights violation. Under the scheme, each trans person will receive the equivalent of approximately 23,600 Euro, an amount that is in line with compensation previously paid out by the Swedish Government to other people who had been affected by similar eugenic policies in the past.³⁰ The Administrative Court of Appeal in Sweden had previously declared the sterilisation requirement to be in breach of the ban on forced medical procedures in the Swedish Constitution, the right to respect for private life (Art. 8 ECHR) and of the prohibition of discrimination (Art. 14 ECHR).

16. On 20 June 2016, a court in Athens ruled that the sterilization requirement breached the provisions on the right to private life and the prohibition of discrimination that Greece was a party to.³¹ In January 2017, the Ukrainian Minister of Health cancelled a notorious decree regulating LGR and trans-related health care, widely considered to have been the most draconic in Europe. The order issued on this occasion removed the requirement of a mandatory 30-45-day stay in a closed psychiatric ward for those seeking LGR, as well as other pre-requisites including not having minor children, being married, not being a homosexual or having an intersex condition, and being “insufficiently socially adapted.” On 30 March 2017, the Spanish region of Valencia adopted legislation that guarantees the self-determination of gender identity, depathologises trans identities, bans conversion therapies, and prohibits discrimination on the grounds of gender identity and gender expression.³²

³⁰ More details available here: <http://tgeu.org/sweden-announces-to-pay-compensation-to-trans-people/>.

³¹ Civil Court of Athens No 418/20 June 2016; details available here: <https://transgendersupportassociation.wordpress.com/2016/07/01/press-release-subject-historical-decision-of-the-civil-court-whereby-it-was-decided-that-birth-certificate-of-a-trans-person-can-change-without-the-prerequisite-surgical-procedure/>.

³² *Ley integral del reconocimiento del derecho a la identidad y expresión de género en la Comunitat Valenciana*, available here:

III. Bulgarian legislation and practice on LGR

17. Legal gender recognition is not comprehensively regulated under Bulgarian law. Instead, several pieces of legislation suggest the possibility of recognising legally one's gender identity as follows:

- Article 9 of the Bulgarian Personal Documents Law;³³
- Article 20, section 6 and article 22, paragraph 6, section 5 of the Rules and Regulations for Issuing Bulgarian Personal Documents;³⁴
- Paragraph 1, point 17 of the Additional Provisions in the Protection against Discrimination Law.³⁵

18. In the absence of clear legislation, a practice has developed whereby trans people wishing to change their gender marker must lodge a request with the ordinary court at the place of their permanent address. The decision is then taken based on an expert opinion rendered by a commission formed of a sexologist, a psychologist and a psychiatrist. A survey of the case law from 2000 until 2012³⁶ and a follow-up monitoring of recent cases conducted by the Bilitis Resource Center show great variation in the length of proceedings in different cases, as well as inconsistent interpretation of the legal pre-requisites for a positive LGR decision. Consequently, outcomes in individual cases vary based on the judges' personal opinions on the correct interpretation of the law, as well as their knowledge of trans issues or applicable human rights standards. We also became aware of the fact that access to court is made difficult by the fact that very few lawyers possessing the necessary knowledge are willing to get involved in LGR cases. This is further complicated by absence of publicly accessible information about the procedure.

<http://www.inclusio.gva.es/documents/610460/163610072/Avantprojecte+de+Llei+integral+del+reconeixement+del+dret+a+la+identitat+i+expressi%20de+gènere+en+la+Comunitat+Valenciana/26f691de-2a12-45b8-b772-d19d5c5d9b0e>.

³³ Available here: www.lex.bg/laws/ldoc/2134424576 (in Bulgarian).

³⁴ Available here: <http://lex.bg/bg/laws/ldoc/2135663268> (in Bulgarian).

³⁵ Available here: www.lex.bg/laws/ldoc/2135472223 (in Bulgarian). Notably, here the language used is “change of sex” (the law does not make use of the term “gender”).

³⁶ *National litigation strategy on gender reassignment for trans/intersex people*, 2012, available here: http://www.bilitis.org/db/images/Strategy_Gender_Reassign_final.pdf.

19. A common feature of successful cases is the emphasis placed on the modification of secondary sex characteristics of the person concerned. In that sense, judges usually expect claimants to start hormonal treatment resulting in visible physical changes before lodging a request for LGR. It therefore follows that gender marker and name changes are possible even in the absence of surgical bodily modifications. In a recently decided LGR case³⁷, the Supreme Court of Cassation confirmed this line of jurisprudence, by stating that “individuals cannot be obliged to undergo a surgical intervention to modify their body without their consent as a prerequisite for changing their legal sex/gender marker.” At the same time, the claimant had to prove “their serious and unwavering intent to biologically affirm the role they perform psychically and socially”, by “at the very least” undergoing hormonal treatment in line with existing court practice.

20. Bilitis identified in their research a more progressive strand of jurisprudence, particularly from courts in larger cities, including cases in which LGR requests were granted even in the absence of hormonal treatment. However, the above-mentioned Supreme Court of Cassation judgment will likely make such decisions more difficult in the future. With that judgment, the Supreme Court of Cassation reinforced the biological determination of sex, leaving trans people who do not identify with either gender or those whose physical condition does not allow them to undergo hormonal replacement therapy in limbo.

21. In yet another line of jurisprudence, the courts rejected LGR requests on principle, based on the reasoning that no amount of medical interventions can change the individual’s gender assigned at birth. The case before the Court appears to belong to this category. Another example is a decision handed down by the Pazardzhik Regional Court in 2003 denying the request submitted by a trans man who had undergone hormonal treatment and in which the applicant had undergone genital

³⁷ Judgment № 205/5 January 2017, available here: http://legalworld.bg/getatt.php?filename=oo_58248.docx (in Bulgarian).

surgery and hormonal treatment, on the basis that “there is not enough scientific evidence that a person can transition entirely from one biological sex to another”.³⁸

22. The most recent report on Bulgaria by the European Commission against Racism and Intolerance (ECRI),³⁹ which also covers the situation of transgender people, confirms the absence of specific legislation or meaningful procedures on LGR. At the same time, ECRI identified a positive trend towards granting such requests based on relevant diagnoses, without any requirement of undergoing specific gender reassignment treatment. ECRI also noted that the costs of hormonal treatment were not covered from the national health insurance, which may in practice restrict access to LGR in case the hormonal treatment was required as discussed above. Accordingly, ECRI asked the Bulgarian authorities to develop legislation on LGR and gender reassignment that was in line with international standards and expertise.

³⁸ Decision of Pazardzhik Regional Court of 13 November 2003 in civil case № 1055/2001.

³⁹ ECRI Report on Bulgaria, 19 June 2014, §119-123.