



Committee of Ministers of the Council of Europe
Department for the Execution of Judgments of the European Court of Human Rights
DGI – Directorate General of Human Rights and Rule of Law
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Subject: Rule 9(2) submission concerning implementation of a *Rana v. Hungary* (Appl. No. 40888/17) judgement in Hungary

Budapest, August 9 2021

Dear Madams / Sirs,

Under Rule 9(2) of the Rules of the Committee of Ministers for the supervision of the execution of judgments, Háttér Society hereby submits this communication letter on the implementation of the judgment of

RANA v. Hungary (Appl. No. 40888/17; judgment of 16/07/2020, final on 16/07/2020).

Háttér Society, founded in 1995, is the oldest and largest lesbian, gay, bisexual, transgender, queer and intersex (LGBTQI) organization in Hungary. Its aims are calling attention to the problems faced by LGBTQI people; providing support services; exploring the situation and needs of LGBTQI people; mainstreaming these concerns in laws and public services; protecting the human rights of LGBTQI people and countering discrimination against them; promoting the health and well-being of LGBTQI people; encouraging the self-organization of LGBTQI communities; and preserving and spreading LGBTQI heritage and culture. The Legal Aid Service of Háttér Society helps dozens of transgender people every year to access legal gender recognition, and seek redress for discrimination in employment, education, healthcare, housing, and access to goods and services. Háttér Society provided the attorney who represented the applicant before the Court in the current case.

I. Summary of the case

The applicant is an Iranian national, who received asylum in Hungary in December 2015 on the ground that he had suffered persecution in Iran owing to his gender identity (transsexuality). In March 2016 the applicant applied for gender and name change to the Hungarian authorities, which was rejected on the ground that being a foreign citizen, the applicant has no birth registry entry in Hungary, so the procedure for gender and name change for Hungarian citizens could not be followed in the applicant's case. The authorities argued that the applicant should request gender and name change in his home country (where he was persecuted due to his gender identity). The Budapest Administrative and Labour Court dismissed an appeal by the applicant in November 2016. The Constitutional Court also rejected the complaint in June 2018, but – proceeding *ex officio* – found that there was a legislative omission as the Hungarian law did not allow lawfully settled people without

Hungarian birth certificates to change their name in the documents issued by the Hungarian authorities.

The European Court of Human Rights found that no fair balance between the public interest and the applicant's right to respect for his private life had been struck when he had been denied access to legal gender recognition. There had therefore been a violation of Article 8.

The current submission demonstrates that the individual measures adopted in the current case did not remedy the violation of the applicant's rights, as the applicant still has to live with official documents that do not reflect his gender identity and appearance. It will also demonstrate that the Hungarian Government's reasoning for delaying the adoption of general measures is unfounded, as the legislation adopted in May 2020 does not apply to non-citizen transgender persons, hence the cases pending at the Constitutional Court concerning the legislation will have no impact on persons in a similar situation to that of the applicant.

II. Individual measures

While the just satisfaction has been paid by the State on 15 October 2020, the applicant's documents have still not been amended: the applicant has to live with official documents that do not reflect his gender identity and appearance. The lack of proper identification documents significantly hinders his access to gainful employment, and subsequently access to housing and healthcare. The lack of legal gender recognition is not a minor inconvenience in his life: it prevents him from living in dignity and independently according to his gender identity, which was recognised as a ground of persecution in the asylum procedure by the State.

III. General measures

A. Recent changes to legislation

On 29 May 2020, the Hungarian Parliament adopted legislation amending the Registry Procedure Act, which made the legal gender recognition procedure in force in 2015, when the applicant applied for it, impossible (Section 33 of Act no. XXX. of 2020 on the amendment of specific administrative laws and free donations of property). According to the new law, the civil registry (*'anyakönyv'*) no longer contains 'sex', but 'sex at birth', and defines sex at birth as the "the biological sex based on primary sex characteristics and chromosomes". A paragraph was also added that explicitly declares that the 'sex at birth' in the registry once recorded, cannot be amended. The new legislation thus bans legal gender recognition for those persons in Hungary whose sex is recorded in the civil registry, but it does not indicate what is the procedure to follow for those persons who are legally settled in Hungary, but have no such record in the civil registry.

B. International criticism of Section 33

The ban on legal gender recognition has been criticized by the Hungarian Psychological Association,¹ the Equal Treatment Authority,² the National Authority for Data Protection and

¹ <https://www.facebook.com/230520050844602/photos/a.444597792770159/659477584615511/>

² Ministry of Justice, VII/37/7/2020.

Freedom of Information,³ the Council of Europe's Commissioner for Human Rights,⁴ the European Parliament,⁵ the UN Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity,⁶ the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, the Special Rapporteur on the right to privacy, the Special Rapporteur on violence against women, its causes and consequences,⁷ the Conference of INGOs of the Council of Europe,⁸ UNAIDS,⁹ and the UN High Commissioner for Human Rights.¹⁰

C. The Constitutional Court on Section 33

On 9 March 2021, upon a judicial motion the Constitutional Court quashed one of the new provisions of Section 33, *i.e.* the provision that prescribed the application of the new rules in pending procedures as well. The Constitutional Court reaffirmed its previous position put forward in the applicant's case [6/2018. (VI. 27.) Constitutional Court decision] that the change of name and gender for transgender persons is a fundamental right and the state has a corresponding positive obligation to facilitate the exercise of that right [Para. 35, 11/2021. (IV. 7.) Constitutional Court decision]. It is the consistent case law of the Constitutional Court that transgender persons have the right to change their name and gender in their official documents, for this reason the other cases pending at the Constitutional Court on Section 33 are not likely to bring any new standard that would change the State's obligation in the current case or similar ones.

C. Non-application of Section 33 to non-citizens

While the adoption of Section 33 does impact the overall situation of legal gender recognition for transgender people in Hungary, it does not apply to the applicant or to other transgender persons in Hungary whose personal data are not recorded in the civil registry. The civil registry contains information about all registry events (*'anyakönyvi események'*: birth, death, marriage, registered partnership) that took place in Hungary or that relate to Hungarian citizens, as well as master data of all persons for whom registry events have been recorded (*'személyazonosító adatok nyilvántartása'*). If a foreign citizen settles in Hungary (either as a refugee or via acquiring a residence permit), their personal data are not recorded in the civil registry. This was, in fact, the very reason why the applicant's request for legal gender recognition was denied in 2015: the legal gender recognition procedure at the time was based on amending the birth registry entry, and since the applicant had no birth registry entry

³ NAIH-944-3/2021

⁴ <https://www.facebook.com/CommissionerHR/posts/1512688642240374>

⁵ https://www.europarl.europa.eu/doceo/document/TA-9-2020-0054_EN.html;
https://www.europarl.europa.eu/doceo/document/TA-9-2021-0089_EN.html

⁶ <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25844>

⁷ <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gld=25172>

⁸ https://www.coe.int/en/web/ingo/newsroom/-/asset_publisher/BR9aikJBXnwX/content/call-to-hungary-to-align-legal-gender-recognition-with-internationally-recognized-human-rights-standards

⁹ https://www.unaids.org/en/resources/presscentre/pressreleaseandstatementarchive/2020/may/20200508_hungary

¹⁰ <https://www.ohchr.org/Documents/Issues/LGBT/LGBTpeople.pdf>

in Hungary, the authorities could not follow the same procedure as they would have followed for a Hungarian citizen.

The personal data of refugees such as the applicant are, however, recorded in the Personal Data and Address Register (PDAR). For Hungarian citizens, data in the PDAR are based on the civil registry, for those whose data are not included in the civil registry, the data are recorded on the basis of official documents issued by their home country. The data elements recorded in PDAR have not been amended by Section 33, it still contains the sex of persons, and not their sex at birth. The authorities could implement the judgement of the European Court of Human Rights by introducing legislation or practice that allows for those persons whose data are not recorded in the civil registry to request the amendment of their name and sex as recorded in PDAR.

We would like to emphasize that the decision of the European Court of Human Rights was not based on the argument that a State cannot discriminate among its citizens and non-citizens, and that legal gender recognition for non-citizens should be allowed if it is allowed for citizens. The right of non-citizen transgender people to have their gender identity recognized is not contingent on whether citizens enjoy that right. The European Court of Human Rights found that there is a positive obligation to ensure an effective access to legal gender recognition as part of the right to respect of private life for anyone, regardless of the citizenship of the applicant.

In the action plan submitted to the Committee of Ministers (DH-DD(2021)320) the Hungarian Government claims that “General measures to be taken are considered to be dependent upon the outcome of a number of cases before the Constitutional Court (e.g. case no. IV/2001/2020.) concerning the latest amendments to the Registry Act introduced in 2020 relevant to the change of sex markers in the birth registry”. However, as we have shown above, the general measures needed to comply with the judgement of the European Court of Human Rights in cases similar to the applicant's are not dependent upon whether Hungarian citizens have access to legal gender recognition, thus they are not dependent upon the outcome of the cases concerning Section 33 before the Constitutional Court. Even if those cases are favourably resolved for transgender persons, the law will not apply to non-Hungarian citizens, such as the applicant. Furthermore, due to the consistent case law of the Constitutional Court as recited in the decision on the applicant's constitutional complaint, the pending cases are not likely to bring any new legal standard. Consequently, the State cannot justify the undue delay with reference to the pending domestic procedures.

IV. Recommendations

Considering the above, Háttér Society respectfully recommends the Committee to examine the case and include it in its agenda at its earliest convenience, preferably at its November 2021 CM/DH meeting. We also recommend that the Committee call on the Government of Hungary to:

1. introduce a procedure that allows transgender persons whose data are not included in the civil registry to request that their name and sex is amended in the Personal Data and Address Register in line with their gender identity, and that new identification documents containing only the amended name and sex are issued;

2. introduce a procedure that allows transgender persons whose data are recorded in the civil registry to request that their name and sex is amended in the civil registry, and that new birth certificates and identification documents containing only the amended name and sex are issued;
3. make sure that both procedures are quick, transparent, accessible and based on self-determination as required by Resolution 2048 (2015) of the Parliamentary Assembly of the Council of Europe and Recommendation CM/Rec(2010)5 of the Committee of Ministers.

Respectfully,

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executive board member
Háttér Society