



The authorities' refusal to legally recognise a change of gender identity in the absence of surgery breached the Convention

In today's Chamber judgment¹ in the case of [X and Y v. Romania](#) (applications nos. 2145/16 and 20607/16) the European Court of Human Rights held, unanimously, that there had been:

a violation of Article 8 (right to respect for private and family life) of the European Convention on Human Rights.

The case concerned the situation of two transgender persons whose requests for recognition of their gender identity and for the relevant administrative corrections to be made were refused on the grounds that persons making such requests had to furnish proof that they had undergone gender reassignment surgery.

The Court observed that the national courts had presented the applicants, who did not wish to undergo gender reassignment surgery, with an impossible dilemma: either they had to undergo the surgery against their better judgment – and forego full exercise of their right to respect for their physical integrity – or they had to forego recognition of their gender identity, which also came within the scope of respect for private life. In the Court's view, this upset the fair balance to be struck by the States Parties between the general interest and the individual interests of the persons concerned.

The Court held that the domestic authorities' refusal to legally recognise the applicants' gender reassignment in the absence of surgery amounted to unjustified interference with their right to respect for their private life.

Principal facts

The applicants, X and Y, are Romanian nationals who were born in 1976 and 1982 respectively and live in the United Kingdom and in Bucharest (Romania). At the time their applications were lodged they were entered in the civil-status records as female.

On 21 July 2013, X (application no. 2145/16) brought an action in the District Court against the local council for the first district of Bucharest, requesting the court to authorise a gender reassignment from female to male and an administrative change of forename and personal digital identity code, and to order the district council to make the necessary changes in the civil-status register and issue a birth certificate indicating the applicant's new forename and male gender. He produced three medical certificates in support of his request, noting and confirming that he suffered from a gender identity disorder.

The court entered an objection of inadmissibility of its own motion in respect of the first request and a further objection to the effect that the other requests were premature. In his observations X argued that the purpose of the action was not to obtain authorisation for gender reassignment treatment, still less surgery – which, in his view, constituted serious interference with an individual's physical

1. Under Articles 43 and 44 of the Convention, this Chamber judgment is not final. During the three-month period following its delivery, any party may request that the case be referred to the Grand Chamber of the Court. If such a request is made, a panel of five judges considers whether the case deserves further examination. In that event, the Grand Chamber will hear the case and deliver a final judgment. If the referral request is refused, the Chamber judgment will become final on that day. Once a judgment becomes final, it is transmitted to the Committee of Ministers of the Council of Europe for supervision of its execution. Further information about the execution process can be found here: www.coe.int/t/dghl/monitoring/execution.

integrity – but rather to obtain permission to have the civil-status records amended. He added that no doctor in Romania was prepared to carry out gender reassignment surgery without a court order authorising it. As to the allegedly premature nature of the other requests, he argued that requiring proof of gender reassignment surgery before authorising changes to the civil-status records amounted to unjustified interference with the exercise of sexual autonomy and with respect for the individual's physical integrity.

On 12 June 2014 the District Court dismissed the action. X lodged an appeal. On 9 March 2015 the Bucharest County Court dismissed the appeal, endorsing the District Court's findings in full. In August 2014 X moved to the United Kingdom and in April 2015 obtained male forenames by deed poll. He maintains that he has suffered constant inconvenience owing to the mismatch between the female identifiers on the papers issued by the Romanian authorities and the male identifiers on the various documents obtained in the United Kingdom.

On 14 December 2011, Y (application no. 20607/16) brought an action in the District Court against the local council for the third district of Bucharest, seeking authorisation to undergo female-to-male gender reassignment surgery, a change of forename on the relevant administrative documents and a change of personal digital identity code. Y requested the court to instruct the local council to make the necessary amendments to the civil-status register and to issue a new birth certificate giving the applicant's new forename and indicating his gender as male.

On 23 May 2013 the court stated that once the gender reassignment surgery had been performed the applicant would be entitled to apply to the administrative authorities for a change of forename. On 3 July 2014 Y brought another action similar to the first but without requesting authorisation for gender reassignment surgery. The District Court dismissed the action on the grounds that no gender reassignment surgery had been performed. Y appealed to the County Court, which dismissed the appeal.

In June 2017 Y underwent surgery to remove the internal female reproductive organs. This was followed on 17 October 2017 by an operation to construct male external genitalia. On 7 August 2017 he brought a further action in the courts. On 21 November 2017 the District Court allowed the action, authorised the change of gender on the applicant's identity papers, the change of forename and the amendment of the applicant's digital identity code. Lastly, it ordered the local council to make the necessary alterations to the civil-status records and to issue a new birth certificate. The court also noted that the applicant, who had been diagnosed by doctors as transgender, had undergone gender reassignment surgery. On 3 May 2018 Y was issued with a new identity card indicating a male forename and digital identity code and giving his gender as male. On 6 June 2018 he obtained a new birth certificate matching the details on his new identity card.

Complaints, procedure and composition of the Court

Relying on Article 8 (right to respect for private and family life) and, in the case of X, on Article 3 (prohibition of inhuman or degrading treatment), the applicants complained that the Romanian State had not established a clear framework for the legal recognition of gender reassignment. In their view, the requirement for them to undergo gender reassignment surgery – with the attendant risk of sterilisation – as a prerequisite for a change in their civil status had breached their right to respect for their private life. They contended that this requirement amounted to interference without any legal basis which did not pursue a legitimate aim and was not necessary in a democratic society. Under Article 6 (right to a fair hearing), X argued that the reclassification of his action by the national courts amounted to a denial of justice. Relying on Article 13 (right to an effective remedy), he maintained that he had not had an effective remedy by which to complain of the alleged violations of Articles 3 and 8 of the Convention. Under Article 14 (prohibition of discrimination), he alleged that requiring transgender persons to undergo gender reassignment surgery in order to have their civil-status records amended constituted discrimination based on gender identity compared with individuals

whose gender identity matched their assigned gender and whose gender had been legally recognised at birth without any further conditions attached. He regarded this as a breach of his right to equal recognition before the law. Lastly, he alleged a violation of his rights under Article 12 (right to marry), in view of the sterilising effect of the surgery required by the authorities.

The application was lodged with the European Court of Human Rights on 19 December 2015.

Judgment was given by a Chamber of seven judges, composed as follows:

Yonko **Grozev** (Bulgaria), *President*,
Faris **Vehabović** (Bosnia and Herzegovina),
Iulia Antoanella **Motoc** (Romania),
Gabriele **Kucsko-Stadlmayer** (Austria),
Pere **Pastor Vilanova** (Andorra),
Jolien **Schukking** (the Netherlands),
Ana Maria **Guerra Martins** (Portugal),

and also Ilse **Freiwirth**, *Deputy Section Registrar*.

Decision of the Court

Article 8

The Court noted that the applicants' complaint concerned the national authorities' refusal to legally recognise their male gender and to amend their civil status with the consequences which that entailed. The applicants argued that the lack of an appropriate legal framework had allowed the authorities to impose an additional requirement on them in order to have their requests granted, in the form of gender reassignment surgery. The Court also took note of the parties' assertion that this complaint concerned both "interference" and a positive obligation on the part of the State.

The Court referred to previous cases in which it had found that Article 8 imposed a positive obligation on States to secure citizens' right to effective respect for their physical and mental integrity. In the Court's view, the main issue to be determined was whether the regulatory arrangements in place and the decisions taken concerning the applicants allowed it to find that the State had complied with its positive obligation to respect the applicants' private life.

The Court observed at the outset that there was no specific procedure under Romanian law for dealing with requests for legal recognition of gender reassignment. The domestic courts themselves had noted that Romanian law did not lay down any specific procedure governing "individuals' change of gender".

Nevertheless, in a ruling of 2008 the Constitutional Court had acknowledged the possibility of having a change of gender recognised by the courts, and the civil courts dealing with the applicants' requests had taken the view that the Romanian legislation allowed a change of gender to be recognised.

The Court could therefore accept that a legal basis had existed in Romanian law allowing individuals to bring proceedings in order to have the substance of their requests concerning gender reassignment examined.

The Court also referred to the recommendations made by international bodies including the Committee of Ministers and the Parliamentary Assembly of the Council of Europe, as well as the United Nations High Commissioner for Human Rights and the UN Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity. All of these called on States to adopt procedures allowing persons to have their name and gender changed on official documents in a quick, transparent and accessible manner.

The Court noted in general terms that the parties disagreed as to whether Romanian law on the legal recognition of gender was clear and foreseeable. The Court observed that the examples of decisions produced by the Government and the first applicant revealed some uncertainty as to the procedure to be followed for the recognition of gender reassignment. Furthermore, with regard to the conditions to be satisfied in order to have a change of gender legally recognised and have the civil-status records amended accordingly, the Court noted that there had been divergences in the case-law, at least at the time when the applicants had brought their actions, regarding the requirement to first undergo gender reassignment surgery.

It was true that in some other cases the courts had allowed requests even in the absence of gender reassignment surgery.

Consequently, the Court considered that the Romanian legal framework for the recognition of gender had been unclear and therefore unforeseeable.

As to the requirement for individuals to undergo gender reassignment surgery in order to have their civil-status records amended, it was clear from the case file that the domestic courts had ruled that the applicants were transgender on the basis of detailed information. The courts had noted, in particular, that the applicants had undergone hormonal therapy and had had mastectomies. However, the courts had refused to recognise the applicants' gender reassignment on the grounds that they had not had genital surgery for that purpose. The courts took the view that the principle of self-determination did not suffice to grant the applicants' requests for gender reassignment. The Court observed that the applicants had not wished to undergo the surgery in question before obtaining legal recognition of their gender reassignment and for that sole purpose, and that they relied in substance on their right to self-determination.

The Court also remarked that the applicants in the present case had not focused particularly on the sterilisation aspect of the surgery, while acknowledging that the surgery in question could result in such an outcome. The fact remained, however, that gender reassignment surgery clearly affected the physical integrity of the persons concerned.

The Court noted that the courts had in no way substantiated their reasoning as to the precise nature of the general interest weighing against allowing legal recognition of a change of gender, and had not conducted a balancing exercise between that interest and the applicants' right to recognition of their gender identity. The Court was unable to identify the general-interest grounds that had led to the refusal to amend the information in the civil-status records to match the applicants' gender identity.

The Court saw this as evidence of a rigid approach to the recognition of the applicants' gender identity which had placed them for an unreasonable and continuous length of time in a distressing position apt to give rise to feelings of vulnerability, humiliation and anxiety. The domestic courts had presented the applicants, who did not wish to undergo gender reassignment surgery, with an impossible dilemma: either they had to undergo the surgery against their better judgment – and thus forego full exercise of their right to respect for their physical integrity – or they had to forego recognition of their gender identity, which also came within the scope of the right to respect for private life. In the Court's view, this upset the fair balance to be struck by the States Parties between the general interest and the individual interests of the persons concerned.

In addition, the Court observed that the present case concerned matters that were constantly evolving in the Council of Europe member States, with an ever smaller number of countries requiring gender assignment surgery as a prior condition for legal recognition of gender identity.

The Court therefore held that the refusal of the domestic authorities to legally recognise the applicants' gender reassignment in the absence of gender reassignment surgery amounted to unjustified interference with their right to respect for their private life.

There had therefore been a violation of Article 8 of the Convention on account of the lack of a clear and foreseeable procedure for the legal recognition of gender identity making it possible to amend the indication of gender, and hence the person's name and digital personal code, on official documents in a quick, transparent and accessible manner.

Furthermore, the national authorities' refusal in the present case to recognise the applicants' male identity in the absence of gender reassignment surgery had upset the fair balance to be struck by the State between the general interest and the interests of the applicants. It was therefore unnecessary to examine the applicants' arguments concerning the impossibility of obtaining gender reassignment surgery in Romania.

Articles 6, 13 and 14

In view of its finding of a violation of Article 8 of the Convention the Court saw no need, in the circumstances of the present case, to rule separately on the complaints under Articles 6, 13 and 14 of the Convention.

Article 12

The Government stressed that the first applicant had not raised this complaint expressly before the national courts and that in any event the complaint was premature since, if the applicant obtained a change to his indicated gender and his personal digital code, his right to marry a woman would be implicitly recognised.

The Court noted that, while the applicant had relied on Articles 3, 8 and 14 of the Convention before the national courts, he had omitted to invoke Article 12 of the Convention. He did not appear to have raised in substance a complaint alleging a violation of his right to found a family. This complaint therefore had to be rejected for failure to exhaust domestic remedies.

Just satisfaction (Article 41)

The Court held that Romania was to pay 1,153 euros (EUR) to the second applicant in respect of pecuniary damage, EUR 7,500 in respect of non-pecuniary damage to each of the two applicants, and EUR 8,910 in respect of costs and expenses to the first applicant's lawyer and EUR 845 in respect of costs and expenses to the second applicant.

The judgment is available only in French.

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The European Court of Human Rights was set up in Strasbourg by the Council of Europe Member States in 1959 to deal with alleged violations of the 1950 European Convention on Human Rights.