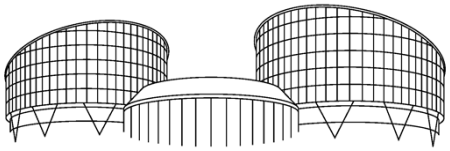

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

CASE OF A.D. AND OTHERS v. GEORGIA

(Applications nos. 57864/17, 79087/17 and 55353/19)

JUDGMENT

Art 8 • Positive obligations • Private life • Transgender men unable to obtain legal recognition of their gender without having undergone medical procedures to change their sex characteristics, due to imprecision of legal framework • Domestic authorities' failure to provide quick, transparent and accessible procedures for legal gender recognition

STRASBOURG

1 December 2022

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

In the case of A.D. and others v. Georgia,

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

Georges Ravarani*, President*,
Carlo Ranzoni,
Mārtiņš Mits,
Stéphanie Mourou-Vikström,
Lado Chanturia,
Mattias Guyomar,
Kateřina Šimáčková*, judges*,
and Victor Soloveytchik, *Section Registrar,*

Having regard to:

the applications (nos. 57864/17, 79087/17 and 55353/19) against Georgia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by three Georgian nationals, Mr A.D. ("the first applicant"), Mr A.K. ("the second applicant") and Mr Nikolo Ghviniashvili ("the third applicant") (together "the applicants"), on 1 August and 10 November 2017 and 18 October 2019 respectively;

the decision to give notice of the applications to the Georgian Government ("the Government") under Articles 3, 8 and 14 of the Convention;

the decision not to disclose the first and second applicants' names;

the observations submitted by the Government and the observations in reply submitted by the applicants;

the comments submitted by the Public Defender of Georgia, the Human Rights Centre of Ghent University, the European Region of the International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA-Europe) and Transgender Europe (TGEU), which had all been granted leave to intervene by the President of the Section (Article 36 § 2 of the Convention and Rule 44 § 3 of the Rules of Court);

Having deliberated in private on 8 November 2022,

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

INTRODUCTION

1. The present case concerns the applicants' complaints, mainly under Article 8 of the Convention, that they were unable to obtain legal recognition of gender without having undergone medical procedures to change their sex characteristics.

THE FACTS

2. The applicants' dates of birth and current places of residence and the names of the lawyers who represented them before the Court are listed in the appended table.

3. The Government were represented by their Agent, Mr B. Dzamashvili, of the Ministry of Justice.

4. The facts of the case may be summarised as follows.

I. APPLICATION NOS. 57864/17 AND 79087/17

5. The first and second applicants are transgender men (assigned female at birth).

6. On 29 May 2014 and 22 January 2015 the Civil Status Agency ("the Agency") assigned to the applicants, on the basis of applications submitted by them, traditionally male forenames to replace the previous traditionally female names which appeared in their respective civil-status records.

7. On 11 October 2014 and 15 April 2015 psychologists in Tbilisi issued medical certificates diagnosing the applicants with "gender identity disorder (transsexualism)".

8. On 9 December 2014 and 24 April 2015 the applicants requested the Agency to change the sex/gender marker in their civil-status records from female to male (the administrative procedure is also referred to in legal literature as "legal gender recognition") on the basis of the above-mentioned medical certificates. The authority rejected the requests on the ground that the applicants had not shown that they had undergone medical sex reassignment procedures.

9. The applicants lodged complaints with the courts. In the course of the proceedings, it was revealed that the second applicant, unlike the first applicant, had undergone hormonal treatment (to increase testosterone levels) and had also had his breasts surgically removed (mastectomy).

10. On 8 December 2015 and 11 May 2016 the Tbilisi City Court dismissed their complaints, reasoning that, despite the applicants' gender self-identification, a precondition for changing the sex/gender marker in the civil-status records was, pursuant to section 78(g) of the Civil Status Act of 20 December 2011 ("the 2011 Act"), a change of sex. However, as neither of the applicants had undergone any of the existing sex reassignment procedures, their request for legal gender recognition could not be allowed in the interests of the reliability and consistency of the civil-status records.

11. The domestic proceedings concluded with final effect with the Supreme Court rejecting appeals on points of law lodged by the applicants. In so far as application no. 57864/17 is concerned, a written copy of the Supreme Court's final decision of 24 November 2016 was served on the first applicant on 1 February 2017. As regards application no. 79087/17, a copy of

the Supreme Court's final decision of 9 March 2017 was served on the second applicant on 10 May 2017.

12. During the court proceedings, the Agency, while responding to questions from the judges, explicitly acknowledged that domestic law did not define which exact medical procedures were necessary or what kind of medical proof was required in order for a "change of sex" to take place within the meaning of section 78(g) of the 2011 Act (this acknowledgment was made during a hearing held on 3 December 2015 as regards the first applicant's case and during a hearing held on 13 April 2016 as regards the second applicant's case). Overall, the reasons that the domestic authorities gave for their decisions to reject the first and second applicants' applications for legal gender recognition were analogous to the reasons given by the Agency and the courts when they examined the third applicant's case (see paragraphs 14-32 below), with the sole distinction that the reasons in the latter case were slightly more detailed.

13. In April 2019 the second applicant and his unregistered partner, with whom he was expecting a child (conceived using donor sperm), left Georgia and settled in Belgium. In March 2020 the second applicant obtained a change of his sex/gender marker in the identity documents issued by Belgium, and in February 2021 he and his wife registered their marriage with the Federal Public Service in Antwerp.

II. APPLICATION NO. 55353/19

A. Administrative proceedings

14. The third applicant is also a transgender man (assigned female at birth). After he terminated his previous marriage (the union had lasted from 1992 to 1997), during which he had given birth to a daughter, he decided to change his gender identity. He started receiving hormonal treatment, which helped him to become effectively perceived by his family, friends and other social circles as a man. On 15 February 2011 the Agency, allowing his application, registered the applicant under a new traditionally male forename in place of the previous traditionally female name which had been given to him at birth.

15. On 9 February 2015 the third applicant lodged an application with the Agency under section 78(g) of the 2011 Act to have his sex/gender marker changed in the civil-status records from female to male. In support of his application, he submitted a medical opinion issued by a psychologist on 31 October 2014 ("the medical opinion of 31 October 2014"), diagnosing him with "gender identity disorder (transsexualism)".

16. On 10 June 2015 the Agency rejected the third applicant's application. The authority stated that, after having studied the civil-status records in respect of the applicant's birth, marriage, parenthood, divorce and change of

forename, nowhere could it find an indication of the applicant's having changed his sex within the meaning of section 78(g) of the 2011 Act. The Agency further noted that the medical opinion of 31 October 2014 had diagnosed the applicant with a medical condition but had not confirmed any change of his sex characteristics.

17. On 8 July 2015 the third applicant appealed against the Agency's decision of 10 June 2015 on the grounds that section 78(g) of the 2011 Act should not be interpreted as requiring a change of sex characteristics and that the fact that the applicant considered himself to be a man, which was further confirmed by the medical opinion of 31 October 2014, coupled with the hormonal treatment which he had received and the changes in his "social behaviour, appearance and style of dress", should be sufficient for the purposes of the above-mentioned legal provision. The applicant also referred to the fact that he had already changed his forename from a traditionally female name to a traditionally male one.

18. On 5 August 2015 the Agency dismissed the third applicant's appeal, reiterating the reasons given in its decision of 10 June 2015.

19. Subsequently, the third applicant lodged another application for legal gender recognition but the Agency again rejected it, with the final decision being given on 1 December 2015. In that decision, the Agency acknowledged that domestic law did not define exactly what constituted "a change of sex" as this term was employed in section 78(g) of the 2011 Act. However, the authority maintained that, given the current state of domestic law, before the applicant could request a change of the sex/gender marker, it would be necessary for him to submit a medical certificate showing that his biological and/or physiological sex characteristics had been changed as well.

B. Court proceedings

1. Proceedings before the court of first instance

20. On 7 September 2015 the third applicant challenged the Agency's refusal to change his sex/gender marker in the civil-status records before the Tbilisi City Court. He argued, among other things, that no legal provision required a change of anatomical/physiological sex characteristics as a precondition for legal gender recognition. The authority's refusal had amounted, in his opinion, to a breach of Article 8 of the Convention. He also complained that he had been discriminated against, referring to various instances of transphobic attitudes, ridicule, hate speech and abuse to which he had been subjected in his daily life on account of the fact that his sex assigned at birth (female) and his current gender identity (male) did not match in the official identity documents.

21. The respondent authority submitted its comments in reply, defending its position that a "change of sex" within the meaning of section 78(g) of the 2011 Act could not have meant anything but a change of biological and/or

physiological sex characteristics. The authority argued that had the legislature wished to refer to a "change of gender" as a ground for a change of the sex/gender marker in identity documents, which was what the applicant had asserted in his legal action, it would have clearly stated this in the 2011 Act, as the distinction between the two terms – "gender" and "sex" – was already a matter of common legal knowledge.

22. Within the framework of the court proceedings, a court-commissioned panel of psychologists and sexologists issued a medical opinion noting that the applicant had expressed traits of both genders in his sexual life and had experienced problems with sexual adaptation.

23. The City Court also heard an expert – a psychologist who had extensive experience in working with transgender people – who stated, among other things, that, although this was rare, it was still possible that a transgender person might decide at a certain point of his or her life to return to his or her original gender.

24. By a judgment of 27 December 2016, the Tbilisi City Court dismissed the applicant's action, stating that, under section 78(g) of the 2011 Act, the change of the sex/gender marker in various civil-status records could be effected only if there had been a corresponding change in sex. Whilst the court noted that the applicant's sex could be changed by way of medical procedures, it did not specify exactly what those procedures were. As regards the applicant's reference to Article 8 of the Convention, the City Court reasoned that there had been no interference with his rights under that provision because the refusal of a change of the sex/gender marker in the civil-status records had had nothing to do with the applicant's right to gender self-identification. Indeed, the State had never called into question the applicant's gender identity, as it was undisputed that the applicant had been able to lead the social life of a man without any interference. The court concluded that only post-operative transgender people were entitled, after having changed their sex, to obtain legal gender recognition.

2. Proceedings before the appellate court

25. On 6 February 2017 the applicant appealed against the judgment of 27 December 2016.

26. During the main hearing before the Tbilisi Court of Appeal, which took place on 4 July 2017, the applicant maintained that he did not consider himself to be required by law to present any document attesting to a change of his sex characteristics. He stated that his gender self-identification should have been sufficient for the respondent authority to allow his application for legal gender recognition. He also requested that the appellate court take into account the Court's recent ruling in *A.P., Garçon and Nicot v. France* (nos. 79885/12 and 2 others, §§ 92-154, 6 April 2017).

27. The respondent authority replied that the State did not question the applicant's current gender, that is, the fact that he considered himself to be a man. What was at stake, however, was the change of the marker of the applicant's sex, and the applicant had not proven that he had changed his sex. A medical opinion diagnosing the applicant with "gender identity disorder" or stating that he exhibited the psychological traits of both genders (see paragraphs 15 and 22 above) was not sufficient. The Agency noted that prior to the present dispute, there had been only two other cases in which a similar medical opinion diagnosing "gender identity disorder" had not been accepted as sufficient proof for the purposes of section 78(g) of the 2011 Act (see paragraphs 5-12 above).

28. During the hearing, one of the judges of the appellate chamber asked the respondent authority which exact medical procedures the applicant would have to undergo in order to be able to prove a change of sex, whether those could only be done by means of surgical intervention or whether some other, less intrusive, procedures might suffice and whether, in that connection, there was a need for further precisions to be introduced into the domestic law. The respondent authority's brief reply was that the relevant domestic law was already clear about what constituted a change of sex, and that it could be achieved by means of "surgical procedures".

29. By a judgment of 24 October 2017, the Tbilisi Court of Appeal dismissed the applicant's appeal and upheld the judgment of 27 December 2016 mainly on the basis of the same grounds as those given in the latter decision. It added that neither of the two medical opinions available in the case file (see paragraphs 15 and 22 above) could prove that the third applicant had changed his sex. As regards his reference to the Court's judgment in *A.P., Garçon and Nicot* (cited above), the court suggested that, although several European countries, including France, had opted for allowing a change of the sex/gender marker in civil-status records on the basis of a person's gender self-identification, Georgian law was clear in making the matter contingent upon sex reassignment "by means of surgery." It went on to specify that it was important "for any medical procedures undertaken with the aim of changing sex to have an irreversible impact, and this irreversibility cannot be achieved by means of hormonal treatment only. ... The change of a secondary sex characteristic cannot in and of itself show a change of sex."

3. Proceedings before the cassation court

30. On 2 May 2018 the applicant lodged an appeal on points of law with the Supreme Court of Georgia, mainly maintaining his previous argument that the relevant domestic law, namely section 78(g) of the 2011 Act, could not be interpreted to require a transgender person to necessarily undergo irreversible sex reassignment surgery in order to obtain legal recognition of gender. He again referred to the Court's ruling in *A.P., Garçon and Nicot* (cited above).

31. By a decision of 18 April 2019, the Supreme Court dismissed the applicant's appeal on points of law as inadmissible, upholding the appellate judgment of 24 October 2017. The main reasons for the decision, which largely reiterated those of the lower courts, read, in their relevant parts, as follows:

> "[The applicant] has stated that, after having undergone hormonal treatment and a change in his appearance, he feels comfortable and does not wish to undergo a surgical intervention. By all means, his position ought to be respected and protected by the State. However, ... a person's sex is not merely his or her physical appearance, but is, first and foremost, determined by that person's biological attributes. ...
>
> Every person has a possibility of having his or her sex/gender marker changed in the civil-status records but only when the requested change corresponds to the person's sex characteristics. ...
>
> Records in the Civil Status Registry must reflect objective data ... The accuracy, consistency and reliability of such records are in the public interest. This ensures legal stability. It is thus important for procedures undertaken with the aim of obtaining the change of sex to be of an irreversible nature. ...
>
> The applicant's reference to the Court's judgment in [*A.P., Garçon and Nicot*] is irrelevant in the circumstances of the present case because the applicant has not presented any medical certificate attesting that the hormonal treatment he received was of an irreversible nature. Furthermore, unlike the situation in the French case, one of the medical opinions diagnosed the applicant as exhibiting psychological traits of both a man and a woman. ...
>
> In the light of the foregoing, the Agency's rejection of the applicant's request for a change of the sex marker in the civil-status records cannot be equated with a violation of the applicant's right to gender self-identification. ..."

32. As an additional argument in support of its opinion that the Agency's refusal to allow a change of the sex/gender marker in the civil-status records could not be deemed to have been contrary to Article 8 of the Convention, the Supreme Court referred to Article 30 § 1 of the Constitution of Georgia, which declared that marriage was "a union between a woman and a man". In other words, the Constitution did not recognise same-sex marriages. That being so, the Supreme Court continued, if transgender people were allowed to have their sex/gender markers changed on their identity documents solely on the basis of their gender self-identification, without having changed their sex, this could potentially result in leeway for same-sex couples to marry, which would constitute a breach of the Constitution. However, referring to the Court's judgment in *Hämäläinen v. Finland* ([GC], no. 37359/09, § 71, ECHR 2014), the Supreme Court went on to emphasise that Article 8 of the Convention could not be interpreted as imposing an obligation on Contracting States to grant same-sex couples access to marriage.

RELEVANT LEGAL FRAMEWORK AND PRACTICE

I. DOMESTIC LAW

33. The relevant part of Article 12 of the Constitution of Georgia reads as follows:

Article 12 – Right to the free development of personality

"Everyone has the right to the free development of his or her personality".

34. In its judgment of 14 April 2016 in *The Public Defender of Georgia, Giorgi Burjanadze and Others v. Parliament of Georgia*, the Constitutional Court ruled that "the right to the free development of personality [under Article 12 of the Constitution of Georgia] consists of ... the right to have one's sex (*სქესი*) and sexual orientation self-determined, which also includes the right to change his or her sex."

35. The domestic law recognised the possibility of changing the sex/gender marker in the Civil Status Registry as early as 1998. Specifically, section 106 of the Act of 15 October 1998 on Registration of Civil Acts made it clear that "a change of sex" was a ground for either the Agency or the Ministry of Justice to make the necessary amendments in the civil-status records. Furthermore, until 15 December 2010 (the date when that provision was repealed), section 107(1) of the Act of 15 October 1998 clarified that a request for a change of the sex/gender marker had to be accompanied "by a medical report confirming the change of sex".

36. On 20 December 2011 the above-mentioned Act of 15 October 1998 was repealed and replaced by a new Civil Status Act, which is still in force. Section 78 of this new Act, as worded at the time of the events in question (see also paragraph 10 above), read as follows:

Section 78 - Grounds for requesting amendments to public records on civil status

"Amendments to public records on civil status can be requested on the basis of: ...

(g) a change of sex, providing that the person making the request wishes to change his or her first name or family name in connection with the change of sex."

37. Neither the Civil Status Act of 20 December 2011 nor any other piece of legislation contains any further details about how to proceed with a request for a change of the sex/gender marker in civil-status records, such as what exactly constitutes a change of sex, which exact medical procedures are necessary for such a change to be legally recognised.

II. INTERNATIONAL MATERIAL

38. In the report on his visit to Georgia from 25 September to 5 October 2018, the United Nations' Independent Expert on protection against violence

and discrimination based on sexual orientation and gender identity made the following findings:

> "66. According to established practice, full sex reassignment surgery preceded by an assessment by psychologists and sexologists and hormonal therapy are a prerequisite for amending gender markers in identity documents. The Independent Expert was shocked to learn that, based on the assessment by psychologists and sexologists, the surgeon decides whether the patient is a 'true transsexual', depending on the patient's will to undergo full or only partial gender affirmation procedures. The Independent Expert is extremely concerned that such abusive requirements are applied at the discretion of medical professionals who are evidently uneducated on sexual orientation and gender identity. Moreover, he notes that the surgery recommended to 'true transsexuals' lead to completely unnecessary mutilation, sterilization, great pain and suffering.
>
> 67. Such treatments and procedures can lead to severe and lifelong physical and mental pain and suffering and, if forced, coercive or otherwise involuntary, can violate the right of persons to be free from torture and other cruel, inhuman or degrading treatment or punishment. Sterilization requirements run counter to respect for bodily integrity, self-determination and human dignity, and can cause and perpetuate discrimination against transgender persons.
>
> 68. Furthermore, the right to equal recognition before the law is a basic element in a well-functioning framework for protection from arbitrary arrest and detention, torture and ill-treatment, as it is well established that in all situations of deprivation of liberty the proper identification of the individual is the first guarantee of State accountability. Without it, trans persons are victims of discrimination in all aspects of their lives, including in employment and with regard to housing and access to social security, and they are socially excluded and subjected to high levels of violence. They may also face restrictions to their right to freedom of movement. For these reasons, the gender recognition system that allows trans persons to change their name and gender markers on identity documents should be a simple administrative process based on the self-determination of the applicant, and it should be accessible and, to the extent possible, free of charge."

39. The European Commission against Racism and Intolerance (ECRI), in its Report on Georgia published on 1 March 2016 (fifth monitoring cycle), recommended the following:

> "100. The criteria for gender reassignment surgery are unclear and not standardised. The requirements for official recognition of a new gender identity and associated changes of documents are also vague. ...
>
> 111. ECRI recommends that the authorities develop clear guidelines for gender reassignment procedures and their official recognition."

40. In his report of 5 January 2016 to the United Nations Human Rights Council (A/HRC/31/57), the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment stressed the following (paragraph 49):

> "49. Transgender persons often face difficulties in accessing appropriate health care, including discrimination on the part of health-care workers and a lack of knowledge about or sensitivity to their needs. In most States they are refused legal recognition of their preferred gender, which leads to grave consequences for the enjoyment of their

> human rights, including obstacles to accessing education, employment, health care and other essential services. In States that permit the modification of gender markers on identity documents abusive requirements can be imposed, such as forced or otherwise involuntary gender reassignment surgery, sterilization or other coercive medical procedures (A/HRC/29/23). Even in places with no legislative requirement, enforced sterilization of individuals seeking gender reassignment is common. These practices are rooted in discrimination on the basis of sexual orientation and gender identity, violate the rights to physical integrity and self-determination of individuals and amount to ill-treatment or torture."

41. In his report of 4 May 2015 to the Human Rights Council, entitled "Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity" (A/HRC/29/23), the United Nations High Commissioner for Human Rights observed the following (paragraphs 70 and 79):

> 70. Regulations in States that recognise changes in gender often impose abusive requirements as a precondition of recognition – for example, by requiring that applicants be unmarried and undergo forced sterilisation, forced gender reassignment and other medical procedures, in violation of international human rights standards. ...
>
> 79. States should address discrimination by: ... (i) [i]ssuing legal identity documents, upon request, that reflect preferred gender, eliminating abusive preconditions, such as sterilisation, forced treatment and divorce; ..."

42. In its General Comment no. 22, published on 2 May 2016, the United Nations Committee on Economic, Social and Cultural Rights (International Covenant on Economic, Social and Cultural Rights) noted the following (paragraph 58):

> "58. Laws and policies that indirectly perpetuate coercive medical practices, including incentive- or quota-based contraceptive policies and hormonal therapy, as well as surgery or sterilisation requirements for legal recognition of one's gender identity, constitute additional violations of the obligation to respect. Further violations include state practices and policies that censor or withhold information, or present inaccurate, misrepresentative or discriminatory information, related to sexual and reproductive health."

43. Other relevant international legal materials of a general nature concerning legal gender recognition in Europe, including those issued by various Council of Europe bodies, were summarised in the Court's judgment in *X v. the former Yugoslav Republic of Macedonia* (no. 29683/16, §§ 31-34, 17 January 2019).

THE LAW

I. JOINDER OF THE APPLICATIONS

44. Having regard to the similar subject matter of the applications, the Court finds it appropriate to examine them jointly in a single judgment.

II. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

45. The applicants complained, relying on Articles 3, 8 and 14 of the Convention, about their inability to have their sex/gender markers changed in civil-status records. Being the master of the characterisation to be given in law to the facts of a case, the Court considers that the complaints fall to be examined solely under Article 8 of the Convention (compare *S.V. v. Italy*, no. 55216/08, § 77, 11 October 2018, and *A.P., Garçon and Nicot v. France,* cited above, §§ 158 and 160). This provision reads as follows:

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

A. Admissibility

46. The Government submitted that the applications were inadmissible on two grounds. Firstly, they asserted that, whilst Article 8 of the Convention undoubtedly covered gender-related issues, the gist of the applications consisted of a debate over what constituted a change of sex under the relevant domestic law (section 78(g) of the 2011 Act). However, in their view, issues relating to biological and/or physiological sex did not, contrary to gender-related questions, fall within the scope of the cited provision, for which reason the applications were inadmissible as being incompatible *ratione materiae* with the provisions of the Convention. Secondly, the Government argued that the applicants had not exhausted domestic remedies, as required by Article 35 § 1 of the Convention, because they had not applied to the Constitutional Court to request that section 78(g) of the Civil Status Act be struck down as being unconstitutional.

47. The applicants disagreed.

48. Noting the Government's challenge to the applicability of Article 8 to the dispute over the change of sex/gender markers in civil-status records, the Court reiterates that issues relating to the legal recognition of the gender identity of transgender people – which are essentially construed around the question of whether and under which exact legal conditions sex/gender markers can be changed – fall squarely, by virtue of being an important component of transgender people's right to personal identity, development and physical and moral security, within the scope of the right to respect for private life under Article 8 of the Convention (see *X and Y v. Romania*, nos. 2145/16 and 20607/16, § 171, 19 January 2021; *S.V. v. Italy*, cited above, § 77; and *A.P., Garçon and Nicot*, cited above, §§ 158 and 160).

49. Article 8 is therefore applicable in the present case, and the Government's objection in that regard must be dismissed.

50. As regards the Government's objection of non-exhaustion of domestic remedies, the Court reiterates that it has already found the lodging of an individual constitutional complaint in Georgia to be an ineffective remedy for the purposes of Article 35 of the Convention, mainly on account of the Constitutional Court's inability, the legal situation which is currently still in force, to set aside individual decisions by the public authorities or courts which directly affect complainants' rights (see *Apostol v. Georgia*, no. 40765/02, §§ 35-46, ECHR 2006-XIV; *Mumladze v. Georgia*, no. 30097/03, § 37, 8 January 2008; and *Khoniakina v. Georgia*, no. 17767/08, § 59, 19 June 2012). This objection must therefore be dismissed.

51. The Court further notes that the applicants' complaints under Article 8 are neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. They must therefore be declared admissible.

B. Merits

1. The applicants' arguments

52. The applicants argued that the State had failed to put in place a legal framework through which they could have their gender legally recognised. Requiring them to undergo unspecified sex reassignment surgery as a precondition for legal gender recognition constituted a disproportionate interference with their rights under Article 8 of the Convention. The applicants stated that they should not be obliged to undergo dangerous, costly and unregulated surgical interventions to a degree that was not clearly defined in domestic law. They submitted that the situation in Georgia was very similar to that described in *X v. the former Yugoslav Republic of Macedonia* (no. 29683/16, § 36, 17 January 2019), or even worse. In that sense, even though North Macedonia had lacked a functional procedure in respect of legal gender recognition, two transgender people had still been able to have their documents changed (ibid., § 30). In contrast, there was not a single example of any successful legal gender recognition in Georgia. Indeed, the Government had failed to adduce any evidence to prove that the procedure in place had worked at least in some cases. The applicants argued that sex reassignment procedures were effectively not available in the public health system in Georgia. The country's healthcare sector lacked clinical guidelines for trans-specific medical procedures or official standards for managing transgender care.

53. The applicants further noted that the Government had failed to address the Court's question, addressed to the parties upon the notification of the case to the Government, regarding the exact medical procedures required for the purposes of legal gender recognition in Georgia. The obvious reason for this omission had to be that no such list was even available and that this climate

of confusion was maintained by design in order to hinder transgender people's access to legal gender recognition. They maintained that the requirement to undergo unspecified surgical interventions, which had been imposed on them by the Agency and the domestic courts, did not have a clear legal basis. If the domestic legal requirement was that a transgender person had to undergo genital surgery, which entailed the risk that that person might become sterile, this would clearly be at odds with the Court's ruling in *A.P., Garçon and Nicot* (cited above). The applicants also complained that the Government had failed to convincingly explain exactly what the public interest was in not allowing them to obtain legal recognition of their gender in the absence of sex reassignment surgery.

2. The Government's arguments

54. Although the Government submitted their observations on the merits of the three applications separately and on different dates, they requested the Court to treat the arguments which appeared in their latest set of observations, submitted in application no. 55353/19, as equally applicable for the purposes of the examination of the two preceding applications, nos. 57864/17 and 79087/17.

55. In particular, the Government stated that there was no possibility of having the applicants' sex/gender markers, unlike their forenames, changed solely on the basis of their gender self-identification, contrary to their known biological/anatomical characteristics. They noted that the terms and conditions for legal gender recognition varied among the member States of the Council of Europe. In the absence of a European consensus on the conditions under which a sex/gender marker could be changed in civil-status records, the States should enjoy a wider margin of appreciation to regulate the matter and to strike a fair balance between the interests of an individual and the general interest. The Government asserted that there was a lack of uniform practice concerning the removal of surgical intervention as a precondition for the legal recognition of gender. The Government further argued that the Court's case-law on legal gender recognition was controversial and required clarification. In that connection, they suggested that the present cases were fundamentally different from the Court's previous cases on the matter on account of the distinction between the applicants' "sex" and their "gender". Accordingly, the Government argued that the applicants' assertions concerning gender identity were purely subjective, and therefore remained outside the State's remit. The applicants had been able to freely live lives compatible with their new gender identity without interference from the State. In contrast, the indication of "sex" in personal documents had to be based on "objective biological, physiological and/or anatomical factors", and should remain the State's prerogative.

56. The Government also called into question the applicability of the Court's findings in *A.P., Garçon and Nicot* (cited above) to the circumstances

of the present case because (i) the judgment in that case had been predicated on the legal reforms that had already taken place in France, (ii) there were certain differences between the Georgian and French legal systems, and (iii) there was no right under international law to legal gender recognition in the absence of medical procedures, for which reason the French case had, in the Government's view, been decided by the Court *ultra vires*. The Government further submitted that the accuracy, consistency and reliability of civil-status records were in the public interest. They argued, as an example, that the possibility of changing the sex/gender marker in the absence of a corresponding change of biological sex could allow criminals to change their identity and evade justice. That being so, the Government argued that it was in the public interest for the applicants to undergo irreversible sex reassignment procedures prior to requesting legal recognition of their new gender. All these circumstances proved, in the Government's view, that there had been no interference with the applicants' right to respect for their private life. The Government also reiterated the argument given in the relevant decision of the Supreme Court, namely that, should transgender people be allowed to have their new gender legally recognised without undergoing sex reassignment procedures, this would give leeway for same-sex couples to marry, in breach of the relevant constitutional restriction (see paragraph 32 above).

57. Asserting that the essential purpose of the applicants' complaints under Article 8 was to obtain legal recognition of gender without presenting any real medical evidence besides the medical opinions diagnosing them with "gender identity disorder" (a document that could be issued in a matter of a few days without detailed scrutiny of the person's psychological portrait), the Government cautioned the Court against upholding the applicants' advocated theory of complete gender self-determination, also known in the legal literature as the theory of self-declaration. Gender self-declaration meant that any form of external verification was removed and transgender people would be allowed to rely entirely on their own assertions. Although this approach might work in certain societies, it would have deleterious effects in other, less-prepared societies. In that connection, the Government argued, with reference to a number of scientific, legal and political publications on the matter, that there necessarily had to be a serious medico-legal process before any male-bodied person who self-identified as female could legally be allowed to become a woman and access women-only spaces without consent and without necessarily having had or intending to have any hormonal or surgical treatment. However, the theory of gender self-declaration offered no safeguards and was open to abuse and inappropriate use, not, obviously, by the majority of transgender people as such, but by disturbed, confused or malicious men. At the heart of the debate was the safety of cis-born women and access to women-only spaces, and the concern that gender self-declaration might allow dangerous cis-born men into safe spaces for

women and lead to physical and sexual attacks. Empirical evidence showed that the overwhelming majority of sex offenders were male and that persistent sex offenders were often skilled manipulators who would not hesitate to go to great lengths to gain access to those they wished to abuse, and one way they could do so was by claiming to identify as women. In addition to those safety concerns, a clear distinction between gender identity and sex would ensure that women-only spaces, which had been set up to compensate for women's longstanding political, social and economic disadvantages, remained functional.

58. The Government thus maintained that sex and gender were different, and that the law should continue to treat them as categories distinct from one another. Sex was a strictly protected characteristic in law, whereas gender identity was not. Although advocates of transgender-related rights often conflated sex and gender or used them interchangeably, the Government insisted that only by maintaining the two as separate categories would it be possible to reconcile the concerns of both those who identified as transgender and those who were born women.

3. Observations of the third-party interveners

(a) Public Defender of Georgia

59. The Office of the Public Defender (Ombudsperson) of Georgia submitted, on the basis of an analysis of the relevant domestic practice, that the main problem that transgender people encountered when taking legal steps aimed at changing the sex/gender marker in civil-status records was the lack of clarity as to what exactly constituted a "change of sex" within the meaning of section 78(g) of the Civil Status Act (see paragraph 36 above). There was not the slightest indication in the domestic law as to exactly which medical or other documents transgender people had to show in order for legal gender recognition to take place. Furthermore, the Office of the Public Defender stated that, to date, not a single case of a successful change of a sex/gender marker by a transgender person had taken place in the country.

60. The third-party intervener also submitted that it had twice, in 2015 and 2019, officially approached the Georgian Government regarding initiatives to set up a multidisciplinary working group on the creation of a specific and clear procedure for change of sex/gender marker by transgender people but there had been no reaction to its initiatives.

(b) ILGA-Europe and TGEU

61. The two third-party interveners jointly submitted information about the current state of affairs as regards the right to gender self-determination. They noted that sex/gender markers were used as elements of identification in a variety of interactions with other individuals and the State. In that sense,

the change of the sex/gender markers (legal gender recognition – "LGR") was an aspect of the right to equal protection before the law.

62. TGEU invited the Court to consult its interactive Trans Rights Europe Map, the latest version of which (2022)[1] revealed that, currently, eleven States out of the forty-six member States of the Council of Europe – Belgium, Denmark, France, Greece, Iceland, Ireland, Luxembourg, Malta, Norway, Portugal and Switzerland – had put in place LGR based on varying types of self-determination (ranging from total self-determination to the putting in place of judicial filters).

63. As regards four of the remaining member States – Austria, Germany, the Republic of Moldova and the Netherlands – whilst, strictly speaking, no LGR based on self-determination had been put in place, a medical diagnosis (labelled "gender identity disorder" or "transsexualism") was deemed to be sufficient for a change of the sex/gender marker.

64. It was further reported that, in addition to a medical diagnosis, "abusive medical interventions" were required in twenty member States – Bosnia and Herzegovina, Croatia, Cyprus, the Czech Republic, Estonia, Finland, Italy, Latvia, Liechtenstein, Lithuania, Montenegro, Poland, Romania, Serbia, Slovakia, Slovenia, Spain, Sweden, Türkiye and Ukraine.

65. Lastly, the remaining eleven member States of the Council of Europe – Albania, Andorra, Armenia, Azerbaijan, Bulgaria, Georgia, Hungary, Monaco, North Macedonia, San Marino, and the United Kingdom – were identified as countries where, despite certain procedures being available in theory, LGR was not, judging by domestic practice, "consistently available" in reality.

66. The third-party interveners' remaining submissions mainly consisted of an analysis of various comparative legal materials, as well as the Court's case-law in the sphere of protection of the rights of transgender people.

(c) The Human Rights Centre of Ghent University

67. The third-party intervener stated, on the basis of an analysis of the relevant domestic law and practice, that transgender people in Georgia were unable to change their sex/gender marker in civil-status records. The main problem was that whilst sex reassignment procedures were required to change a sex/gender marker, the exact criteria for those medical procedures were unclear and not standardised by law.

68. The third-party intervener's remaining submissions mainly consisted of an analysis of various comparative legal materials, as well as the Court's current case-law in the sphere of protection of the rights of transgender people and recommendations on how the case-law could be further developed in

[1] https://transrightsmap.tgeu.org/home/

order to ensure a more effective protection of their rights under Articles 3, 8 and 14 of the Convention.

4. The Court's assessment

(a) Whether the case concerns interference or a positive obligation

69. The Court observes that the applicants' grievances, whilst being directed against the domestic authorities' refusal to have their sex/gender markers changed in civil-status records, essentially concern the alleged lack of a sufficient regulatory framework for legal gender recognition. In this connection, the Court reiterates that the compatibility with Article 8 of the Convention of the conditions, or the total lack thereof, for legal recognition of the gender identity of a transgender person is to be examined from the perspective of the State's positive obligations (compare *X v. the former Yugoslav Republic of Macedonia*, cited above, §§ 63-65, and *Hämäläinen*, ([GC], no. 37359/09, § 62-64, ECHR 2014).

70. Accordingly, the Court will examine the present case through the lens of the respondent State's positive obligations. Since the principles applicable to assessing a State's positive and negative obligations under the Convention are similar, regard must be had to the fair balance that has to be struck between the competing interests of the applicants and of the community as a whole, the aims in the second paragraph of Article 8 being of a certain relevance (see *Hämäläinen*, cited above, § 65).

(b) Compliance with the State's positive obligations

71. The Court reiterates that in implementing their positive obligations under Article 8, the States enjoy a certain margin of appreciation. A number of factors must be taken into account when determining the breadth of that margin. Where a particularly important facet of an individual's existence or identity is at stake, the margin allowed to the State will be restricted. Where, however, there is no consensus within the member States of the Council of Europe, either as to the relative importance of the interest at stake or as to the best means of protecting it, particularly where the case raises sensitive moral or ethical issues, the margin will be wider (see *Hämäläinen*, cited above, § 67). As regards the particular importance of matters relating to a most intimate part of an individual's life, namely the right to gender identity, the Court has often emphasised the Contracting States have a narrow margin of appreciation in this particular sphere (see *S.V. v. Italy*, cited above, § 62; *Y.T. v. Bulgaria*, no. 41701/16, § 63, 9 July 2020).

72. Observing that some of the Government's arguments could be understood to be calling into question the very existence of an enforceable right under Georgian law to have one's sex marker changed in civil-status records (see paragraphs 55 and 58 above), the Court notes that, as it can be seen from the relevant domestic law and the Constitutional Court's ruling of

14 April 2016, not only has the Georgian legislator clearly enshrined such a right in law but it was also interpreted to form part of the relevant constitutional right to free development of personality under Article 12 of the Constitution (see paragraphs 33-36 above)

73. Furthermore, the Court has stated in its case-law on legal gender recognition, that what member States are expected to do under Article 8 of the Convention is to provide quick, transparent and accessible procedures for changing the registered sex marker of transgender people (see *X v. the former Yugoslav Republic of Macedonia*, cited above, § 70). It is indeed from the point of view of the latter, very specific positive obligation that the Court will proceed with its task in the present case is to assess whether, in view of the margin of appreciation available to it, the respondent State struck a fair balance between the general interest and the individual interest of the applicants in having their sex/gender marker changed in the civil-status records, and by extension in all their official identity documents, to match their gender identity.

74. The Court accepts the Government's argument that safeguarding the principle of the inalienability of civil status, the consistency and reliability of civil-status records and, more broadly, the need for legal certainty are in the general interest and justify, as a matter of principle, the regulation of legal gender recognition (see, *mutatis mutandis, A.P., Garçon and Nicot*, cited above, § 142). However, the key problem in the present case is that it is not clear at all what the legal regime for the change of the sex/gender marker actually is in Georgia. Namely, whilst there is a provision in the domestic law that allows the alteration of a person's sex/gender marker in civil-status records (section 78(g) of the Civil Status Act), the law is silent about the terms and conditions to be fulfilled and, if so required, the medical procedures to be followed for legal gender recognition to take place. Noting the Government's omission to address the Court's specific question regarding the exact medical procedures required for the purposes of legal gender recognition in the country, as well as the fact that similar questions raised in the proceedings before the domestic courts were also left unanswered (see paragraphs 12, 28 and 53 above), the Court finds it established that domestic law and practice did not provide any indication of the exact nature of the medical procedures to be followed. It is noteworthy that despite the fact that such a right has existed in the country since 1998, not a single case of successful legal gender recognition has been reported to date (see paragraphs 35 and 52 above).

75. The Court observes that the Government forcefully argued that the expression "change of sex" in section 78(g) of the Civil Status Act had to be assessed on "biological, physiological and/or anatomical criteria". However, considering the lack of any legislative clarification, it is not clear what their reading of the law is based on. Indeed, the utmost care and precision is required when using such different terms interchangeably, because each of those terms has its own particular meaning and entails distinct legal

implications. For example, to the extent that "change of sex" is to be defined on the basis of biological criteria, then it would never be possible to obtain legal gender recognition, as chromosomes cannot be changed by any amount of medical intervention (see *Christine Goodwin v. the United Kingdom* [GC], no. 28957/95, § 82, ECHR 2002-VI). The Court further observes that, apart from the unclear definition of "change of sex" based on "biological, physiological and/or anatomical criteria", there was a clear contradiction in how the domestic courts handled the third applicant's case. Thus, whilst the Court of Appeal stated that the completion of hormonal treatment, with the resultant change in secondary sex characteristics, was not sufficient for legal gender recognition, the Supreme Court suggested the contrary, notably that a medical certificate attesting to the "irreversibility" of the hormonal treatment was sufficient (see paragraphs 29 and 31 above).

76. The Court is of the opinion that the above-mentioned inconsistencies in the reading of the domestic law by the domestic courts were conditioned, at least in part, by the fact that the law itself is not sufficiently detailed and precise. Incidentally, the same findings about the poor quality of the domestic law have been expressed by relevant international bodies (see paragraphs 38-39, 65 and 67 above). In this connection, the Court also notes with interest that, even if prior to 15 December 2010 the domestic law had contained at least some indication that an application for legal gender recognition ought to be accompanied "by a medical certificate", even that already minimal degree of precision disappeared from the law after that date. The imprecision of the current legislation undermines, in its turn, the availability of legal gender recognition in practice and, as was illustrated by the three applicants' individual situations, the lack of a clear legal framework leaves the gatekeepers – the competent domestic authorities – with excessive discretionary powers, which can lead to arbitrary decisions in the examination of applications for legal gender recognition. Such a situation is fundamentally at odds with the respondent State's positive obligation to provide quick, transparent and accessible procedures for legal gender recognition (see *X v. the former Yugoslav Republic of Macedonia*, cited above, § 70, and also *Y.T. v. Bulgaria*, cited above, § 73), and the foregoing considerations are sufficient for the Court to conclude that there has been a violation of Article 8 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

77. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

78. The first and second applicants claimed 20,000 euros (EUR) each and the third applicant claimed EUR 15,000 in respect of non-pecuniary damage.

79. The Government submitted that the amounts claimed were not justified in the circumstances of the case.

80. The Court accepts that the applicants must have suffered non-pecuniary damage which cannot be compensated for solely by the finding of a violation. It finds it appropriate to award them EUR 2,000 each under this head, plus any tax that may be chargeable.

B. Costs and expenses

1. Applications nos. 57864/17 and 79087/17

81. On 7 March 2019, within the time-limit allocated by the Court for the submission of just satisfaction claims under Rule 60 of the Rules of Court, the first and second applicants claimed a total of EUR 30,323.71 for the costs and expenses incurred before the Court by two of their lawyers from the European Human Rights Advocacy Centre (EHRAC) in London (see the appended table). No copies of legal service contracts, invoices, vouchers or any other supporting financial documents were submitted. The amount claimed was based on the number of hours spent by the two lawyers in question on the case (132 hours) and the lawyers' hourly rate (150 pounds sterling (GBP)) and included, in addition, a claim for postal, translation and other administrative expenses incurred by the lawyers.

82. On 10 April 2019 the Government replied that the claims were unsubstantiated and excessive. They stated, in particular, that no copy of the legal service contract between the applicants and the two lawyers in question had been submitted.

83. On 1 August 2019 the applicants, without being invited by the Court to do so and without being given any additional time for this submission, supplemented their previous claims with a legal service contract signed by them and a representative of EHRAC on 30 July 2019.

84. The Court observes at the outset that the applicants' submissions of 1 August 2019 were submitted in breach of the relevant procedural requirement contained in Rule 60. That is to say, the submissions reached the Court outside the relevant time-limit, and no extension was requested before the expiry of that period. Furthermore, the submissions consisted of a legal service contract signed and dated after the applicants had formally lodged their just satisfaction claims with the Court, and no explanation for this discrepancy was given. In these circumstances, the submissions of 1 August 2019 cannot be taken into consideration by the Court (compare, among other authorities, *A and B v. Georgia*, no. 73975/16, § 58, 10 February 2022, with further references).

85. As regards the applicants' claims submitted under Rule 60 on 7 March 2019, the Court observes that they did not contain documents showing that the applicants had paid or were under a legal obligation to pay the fees charged by their two representatives from EHRAC. In the absence of such documents, the Court finds no basis on which to accept that the costs and expenses claimed by the applicants have actually been incurred (see *Merabishvili v. Georgia* [GC], no. 72508/13, § 371, 28 November 2017, and, as a recent authority, *A and B v. Georgia*, cited above, § 59).

86. It follows that the claims must be rejected.

2. Application no. 55353/19

87. On 3 December 2020, within the time-limit allocated by the Court for the submission of just satisfaction claims under Rule 60, the third applicant claimed EUR 9,812.86 for the costs and expenses incurred before the Court by three of his lawyers from EHRAC in London (see the appended table). The claim was based on a legal service agreement signed by the third applicant and the director of EHRAC on 28 August 2019 confirming that the applicant was under a legal obligation to pay fees to the lawyers from EHRAC based on an hourly rate of GBP 150, as well as any administrative expenses that those lawyers would incur in the future proceedings before the Court. The agreement was further supplemented by timesheets, dated 2 December 2020, summarising the number of hours spent by three London-based lawyers on the third applicant's case (forty-eight hours and thirty minutes in total), and included, in addition, invoices confirming the existence of postal, translation and other administrative expenses incurred by the three lawyers in question.

88. The Government replied that the claim was unsubstantiated and excessive.

89. Having regard to the available legal financial documents, in particular the enforceable legal service agreement, the Court observes that the third applicant was indeed under a legal obligation to pay the fees charged by the three lawyers from EHRAC (see *Merabishvili*, cited above, § 371). That being so, the Court considers it reasonable to award the sum of EUR 9,812.86 claimed for the costs and expenses in the proceedings before the Court, plus any tax that may be chargeable to the third applicant.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Decides* to join the applications;

2. *Declares* the applications admissible;

3. *Holds* that there has been a violation of Article 8 of the Convention;

4. *Holds* that there is no need to examine the complaints under Articles 3 and 14 of the Convention;

5. *Holds*

(a) that the respondent State is to pay the applicants, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into the currency of the respondent State at the rate applicable at the date of settlement:

(i) EUR 2,000 (two thousand euros) to each of the three applicants, plus any tax that may be chargeable, in respect of non-pecuniary damage;

(ii) EUR 9,812.86 (nine thousand eight hundred and twelve euros and eighty-six cents) to the third applicant, plus any tax that may be chargeable to him, in respect of costs and expenses;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

6. *Dismisses* the remainder of the applicants' claim for just satisfaction.

Done in English, and notified in writing on 1 December 2022, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Victor Soloveytchik Registrar	Georges Ravarani President

APPENDIX

List of cases:

No.	Application no.	Applicant Date of birth Place of residence	Represented by
1.	57864/17	**Mr A.D.** **1979** **Tbilisi**	A lawyer practising in Tbilisi – Ms K. Bakhtadze – and five lawyers from the European Human Rights Advocacy Centre (EHRAC) in London – Mr P. Leach, Ms R. Remezaite, Ms J. Gavron, Ms J. Sawyer and Mr J. Clifford.
2.	79087/17	**Mr A.K.** **1988** **Antwerp**	The same lawyers as in application no. 57864/17.
3.	55353/19	**Mr Nikolo GHVINIASHVILI** **1973** **Tbilisi**	Three lawyers practising in Tbilisi – Ms N. Jomarjidze, Ms T. Oniani and Mr G. Tabatadze – and seven lawyers from EHRAC in London – Mr P. Leach, Ms R. Remezaite, Ms J. Gavron, Mr C. Cojocariu, Mr K. Levine, Ms J. Evans and Ms J. Sawyer.