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**G.I. Cátedra de Derecho y Genoma Humano
Chair in Law and the Human Genome R.G.**

2022

Universidad del País Vasco UPV/EHU
Bilbao

Ley 21383 que modifica la Carta Fundamental de la República de Chile, para establecer el desarrollo científico y tecnológico al servicio de las personas (“Ley de Neuroderechos”)*

LEY NÚM. 21.383

MODIFICA LA CARTA FUNDAMENTAL, PARA ESTABLECER EL DESARROLLO CIENTÍFICO Y TECNOLÓGICO AL SERVICIO DE LAS PERSONAS

Teniendo presente que el H. Congreso Nacional ha dado su aprobación al siguiente proyecto de reforma constitucional, iniciado en moción de los Honorables senadores señor Guido Girardi Lavín, señora Carolina Goic Borojevic, y señores Francisco Chahuán Chahuán, Juan Antonio Coloma Correa y Alfonso De Urresti Longton,

Proyecto de reforma constitucional:

“Artículo único.- Modifícase el número 1° del artículo 19 de la Constitución Política de la República, de la siguiente forma:

1) Reemplázase, en el actual párrafo final, el punto y coma por un punto y aparte.

2) Agrégase el siguiente párrafo final, nuevo:

* <https://www.bcn.cl/leychile/navegar?idNorma=1166983>

“El desarrollo científico y tecnológico estará al servicio de las personas y se llevará a cabo con respeto a la vida y a la integridad física y psíquica. La ley regulará los requisitos, condiciones y restricciones para su utilización en las personas, debiendo resguardar especialmente la actividad cerebral, así como la información proveniente de ella;” .” .

Y por cuanto he tenido a bien aprobarlo y sancionarlo; por tanto, promúlguese y llévese a efecto como Ley de la República.

Santiago, 14 de octubre de 2021.- SEBASTIÁN PIÑERA ECHENIQUE, Presidente de la República.- Andrés Couve Correa, Ministro de Ciencia, Tecnología, Conocimiento e Innovación.- Juan José Ossa Santa Cruz, Ministro Secretario General de la Presidencia.

Lo que transcribo a Ud. para su conocimiento ley N° 21.383 de fecha 14-10-2021.- Atentamente, Carolina Torrealba Ruíz-Tagle, Subsecretaria de Ciencia, Tecnología, Conocimiento e Innovación.

El consentimiento informado sanitario: Sentencia del Tribunal Europeo de Derechos Humanos de 8 de marzo de 2022. Asunto Reyes Jiménez c. España*

Information Note on the Court's case-law 260

March 2022

Reyes Jimenez v. Spain - 57020/18

Judgment 8.3.2022 [Section III]

Article 8

Positive obligations

Article 8-1

Respect for private life

Unjustified dismissal of appeal against failure to comply with statutory requirement to obtain written consent for one of three related surgical operations: *violation*

Facts – The applicant, who was a minor at the relevant time, is in a state of total dependence and disability following three surgical operations to remove a brain tumour.

His parents provided written consent for the first and third operations, together with verbal consent for the second.

The applicant complained unsuccessfully before the domestic courts that no informed consent had been given in writing for the second operation,

whereas the law provided that any surgical operation had to be accepted by the patient in writing.

Law – Article 8:

Access to domestic courts normally constituted sufficient redress for this type of complaint. The Court had to examine whether the manner in which the applicant's parents were treated could be regarded as sufficient to fulfil the State's positive obligation under Article 8.

In the view of the domestic courts, the second operation was closely related to the first and the parents were in contact with doctors between the two operations.

Admittedly, the two operations had served the same purpose of removing the tumour. However, the second one had not been rushed but had taken place a few weeks after the first, when part of the brain tumour had already been removed and the applicant's state of health was no longer the same. Under those conditions the domestic courts found that the consent which had apparently been given orally for the second operation was sufficient, without taking account of the consequences of the first one and without clarifying why it was not considered a separate operation which would have required the specific written consent provided for by law. The fact of considering that the parents were continually in contact with the doctors, based on a mere note by the regular doctor in the applicant's medical file ("family informed") and the warning "Be careful of information!" did not suffice for an unequivocal conclusion that the applicant's parents had been duly informed and had agreed to the operation, according to the domestic rules. In addition, even though the third operation had proved necessary for reasons of urgency, following complications that had arisen in the second operation, the parents' consent had then been obtained in writing.

Even though the Convention itself did not establish any particular form of consent, where domestic law laid down certain express requirements they had to be complied with in order for the interference to be considered prescribed by law.

The questions raised by the applicant's parents had concerned the existence of consent and the potential liability of the health professionals involved. They had not been dealt with appropriately during the domestic proceedings, which had not therefore been sufficiently effective. The

domestic judgments had not provided any response to the specific argument concerning the requirement to obtain written consent in such circumstances. Their conclusion that an oral agreement had been valid in the circumstances was insufficient in the light of the specific provisions of the law, which required that informed consent be given in writing. While the Convention did not impose consent in *written* form, provided it was unequivocal, the domestic law did require it to be in writing and the courts had not sufficiently explained why they had considered that the absence of written consent had not infringed the applicant's rights. The national system had not provided a suitable answer to the question whether the applicant's parents had actually given their informed consent to each operation, in accordance with domestic law.

Conclusion: violation (unanimously).

Article 41: EUR 24,000 for non-pecuniary damage. Claims in respect of pecuniary damage rejected.

Transexualidad: Sentencia del Tribunal Europeo de Derechos Humanos de 17 de febrero de 2022. Asunto Y v. Polonia*

FIRST SECTION

CASE OF Y v. POLAND

(Application no. 74131/14)

JUDGMENT

Art 8 • Private and family life • Positive obligations • Transgender person unable to obtain a full birth certificate without gender reassignment reference, while its short extract and new ID documents indicate only reassigned gender • Applicant's failure to demonstrate any ensuing sufficiently serious negative consequences or difficulties • Rare need for use of full copy of birth certificate • Potential risk of adverse consequences not capable of rendering current domestic system deficient • Fair balance struck between different interests at stake • Margin of appreciation not overstepped

Art 14 (+ Art 8) • Discrimination • Applicant not in analogous situation with adopted children who were issued a new birth certificate in the event of full adoption

STRASBOURG

17 February 2022

DÉFINITIF

17/05/2022

* [https://hudoc.echr.coe.int/eng#{%22itemid%22:\[%22001-215604%22\]}](https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-215604%22]})

Cet arrêt est devenu définitif en vertu de l'article 44 § 2 de la Convention. Il peut subir des retouches de forme.

In the case of *Y v. Poland*,

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

Marko Bošnjak, President,

Péter Paczolay,

Krzysztof Wojtyczek,

Erik Wennerström,

Raffaele Sabato,

Lorraine Schembri Orland,

Davor Derenčinović, judges,,

and Liv Tigerstedt, Deputy Section Registrar,

Having regard to:

the application (no. 74131/14) against the Republic of Poland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Polish national, Mr Y ("the applicant"), on 18 November 2014;

the decision to give notice of the application to the Polish Government ("the Government");

the decision not to have the applicant's name disclosed;

the observations submitted by the respondent Government and the observations in reply submitted by the applicant;

the comments submitted by the European Centre for Law and Justice and the Helsinki Foundation for Human Rights, who were granted leave to intervene by the President of the Section;

Having deliberated in private on 25 January 2025,

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

INTRODUCTION

1. The case concerns a female to male transsexual who obtained legal gender recognition. In his application the applicant complained of a breach of his right to privacy on account of the fact that his full birth certificate still indicated his sex assigned at birth.

THE FACTS

2. The applicant was born in 1969 and lives in the Paris region of France. He was represented by Ms A. Stach, a lawyer practising in Szczecin.

3. The Government were represented by their Agent, Mr J. Sobczak of the Ministry of Foreign Affairs.

4. The facts of the case, as submitted by the parties, may be summarised as follows.

I. BACKGROUND TO THE CASE

5. At birth the applicant was registered as female. He later underwent gender reassignment.

6. On 6 April 1992 the Warsaw District Court gave a decision ordering that an annotation be made to the applicant's birth certificate to indicate that his sex had changed from female to male and name had changed from X to Y. The relevant annotation was duly made.

7. On 28 December 1993 the applicant married K. in a civil ceremony.

8. On 18 August 2001 their daughter A. was born in France. Her French birth certificate indicates the applicant as her father and K. as her mother.

II. ADMINISTRATIVE PROCEEDINGS FOR REMOVAL OF THE ANNOTATION FROM THE BIRTH CERTIFICATE

9. On 22 August 2005 the applicant's lawyer asked the Prudnik Civil Registry Office (Urząd Stanu Cywilnego) to remove the reference to the Warsaw District Court's decision of 6 April 1992 from the birth certificate.

10. On 22 September 2005 the head of the Prudnik Registry Office (Kierownik Urzędu Stanu Cywilnego) refused the applicant's request on the grounds that, under section 21 of the Civil Status Records Act (prawo o aktach stanu cywilnego – "the 1986 Act"), any events occurring after a birth certificate had been drawn up had to be included in that certificate in the form of a "marginal annotation" (wzmianka marginesowa).

11. On 8 November 2005 the Opole Governor declared that decision null and void on formal grounds. The Governor's decision was subsequently overturned by the Minister of the Interior on 21 August 2006.

12. On 29 September 2006 the Opole Governor gave a decision on the merits and upheld the decision of 22 September 2005, refusing to remove the annotation about the change of gender and first name. The Governor observed that only annotations not provided for by law or in breach of personal rights could be removed.

13. On 26 February 2007 the Opole Regional Administrative Court dismissed an appeal by the applicant, referring to the reasons given by the Governor. It held that a marginal annotation about the applicant's gender of origin and change of name could not be considered to be in breach of his personal rights.

14. On 16 July 2008 the Supreme Administrative Court dismissed the applicant's cassation appeal.

III. PROCEEDINGS FOR A NEW BIRTH CERTIFICATE

15. On 5 September 2011 the applicant lodged a request with the Warsaw District Court to be issued a new birth certificate. He relied on sections 48 and 49 of the 1986 Act relating to the drawing up of new birth certificates following adoption (see paragraph 28 below).

16. On 20 October 2011 the court dismissed the applicant's request. The court held that, pursuant to sections 48 and 49 of the 1986 Act, a new birth certificate could only be drawn up in the event of adoption of a child. In addition, it noted that the civil courts had jurisdiction to invalidate, correct and recognise the contents of a civil status document. Since the present case did not concern any of those situations, the request had to be dismissed.

17. The applicant appealed. He referred to the sensitive situation of trans-gender people, submitting that the authorities should have applied sections 48 and 49 of the 1986 Act by analogy.

18. On 12 February 2013 the Warsaw Regional Court dismissed his appeal. The court upheld the reasoning of the District Court. With reference to the applicant's submissions that the first-instance court should have applied sections 48 and 49 of the 1986 Act by analogy and drawn up a new birth certificate, the Regional Court held that the provisions concerning civil status could not be applied by analogy. Sections 48 and 49 of the 1986 Act listed very specific situations in which a new birth certificate could be issued. A full birth certificate reflected the situation at the time of a person's birth. A subsequent change of gender could not be a reason to invalidate that birth certificate and draw up a new one. The court further noted that the applicant's birth certificate had been amended to reflect his gender reassignment.

19. The applicant lodged a cassation appeal, relying, in particular, on the provisions of the Polish Constitution (Articles 32 and 47), Articles 8 and 14 of the Convention and the Court's case-law.

20. On 28 May 2014 the Supreme Court dismissed his cassation appeal. The court considered, referring to the 1986 Act, that following gender reassignment it was not possible to draw up a new birth certificate. Any changes had to be indicated as an annotation on the existing birth certificate. The Supreme Court also noted that Parliament had been working on a bill on gender recognition.

IV. PROCEEDINGS CONCERNING FOSTER CARE

21. On 23 March 2010 a district court in the Paris region granted custody of K.'s three year old niece - A.L. to the applicant's wife. The applicant submitted that A.L. lived with him and his family.

RELEVANT LEGAL FRAMEWORK AND PRACTICE

I. DOMESTIC LAW AND PRACTICE

A. Constitutional provisions

22. The Constitution of the Republic of Poland of 1997 contains the following provisions relating to non-discrimination, equality of men and women and the right to privacy.

Article 32

“1. All persons shall be equal before the law. All persons shall have the right to equal treatment by public authorities.

2. No one shall be discriminated against in political, social or economic life for any reason whatsoever.”

Article 33

“1. Men and women shall have equal rights in family, political, social and economic life in the Republic of Poland.

...”

Article 47

“Everyone shall have the right to legal protection of his [her] private and family life, of his [her] honour and good reputation and to make decisions about his [her] private life.”

B. The Code of Civil Procedure

23. Article 189 of the Code of Civil Procedure (“CCP”) provides as follows:

“A plaintiff may request the court to establish the existence or non-existence of a legal relationship or right, if he or she has a legal interest therein.”

C. The Law on Civil Status Records

1. General provisions

24. The procedure for making entries in the Polish civil status register, as in force at the material time, was laid down in the Act on Civil Status Records (Prawo o aktach stanu cywilnego) of 29 September 1986 (“the 1986 Act”).

Section 21

“(1) If, after the drawing up of a civil status record, events occur affecting its content or validity, the changes resulting therefrom shall be entered in the record in the form of an additional annotation.

(2) The basis for entering the information referred to in subsection 1 are final judicial decisions, final [administrative] decisions, extracts of civil status records and other documents having an impact on the content or validity of the record.

3) Below the text of the civil status record shall be footnotes containing information on other civil status records relating to the same person.”

2. *Birth certificates*

25. The relevant provisions relating to the drawing up, issuing of copies and amendment of birth certificates read as follows:

Section 40

“(1) A birth certificate is drawn up on the basis of a written notification of the child’s birth issued by a doctor, midwife or healthcare facility;

(2) The birth certificate shall include:

1) the surname, forename(s) and sex of the child;

...”

Section 79

“Civil status records may be used to issue:

1) full and short extracts of civil status records;

...”

Section 80

“A full copy reproduces verbatim the content of the civil status record, including all additional annotations (wzmianki dodatkowe); the content of footnotes (przypiski) shall be given only at the request of the person concerned.”

Section 81

“A short extract of a civil status record states its content, taking into account the additional annotations and omitting any deleted words, paragraphs and sentences.”

Section 82

“A short extract [of a civil status record] shall include the following information:

1) a copy of the birth certificate - the surname and forename(s), place and date of birth and the forenames and surnames of the child's parents;

..."

Section 83

"1. Copies of civil status records and the certificates referred to in section 79 shall be issued at the request of a court or another State authority, the person whose civil status has been established in the record, his or her ascendant, descendant, sibling, spouse or legal representative.

2. Copies of civil status records and certificates confirming entries in civil status records or the lack thereof may also be issued at the request of persons other than those specified in subsection 1 who demonstrate a legal interest therein, and at the request of a social organisation, if justified by the statutory aims of that organisation and if in the public interest. A certificate of loss or destruction of a civil status record may also be issued at the request of other interested persons."

26. In the majority of official situations, only a short extract of the birth certificate is required (for example when concluding a civil marriage, obtaining a death certificate or applying for an identity document or passport). A full copy of the birth certificate is required, for example, in the adoption process, when applying for another nationality or to change a name or surname, in complex inheritance cases or in criminal proceedings if the court has doubts as to previous convictions.

27. After the annotation is made to the birth certificate, the person concerned may apply for a new personal registration number (PESEL) and new identity documents.

3. Adoption and civil status records

28. The relevant provisions relating to the issuing of new birth certificates in the event of adoption read as follows:

Section 48

"1 In the event of a decision on adoption to which the parents of the child have consented before a guardianship court without naming the adopter [adoptio plenissima], a new birth certificate shall be drawn up for the adoptee; in this certificate the adopters shall be entered as parents.

...

3. Upon the drawing up of a new birth certificate, an additional annotation shall be recorded in the existing birth certificate of the adoptee; the existing birth certificate of the adoptee shall not be disclosed and no copies of it shall be issued, unless requested by the court in connection with a case in which it deems it necessary.

4. Once the adoptee has reached the age of majority, he or she may request access to the part of the civil status record relating to the existing birth record.”

Section 49

“1. In the event of a decision on adoption in the manner specified in Article 121 of the Family and Custody Code [adoptio plena], a new birth certificate may be drawn up for the adoptee, in which the adopters shall be entered as parents, if the guardianship court has so decided. The provisions of [section] 47(2) to (5) shall apply accordingly.

1a. The guardianship court shall rule on the drawing up of a new birth certificate at the request of the adopter, with the consent of the adoptee [if he or she] has reached the age of thirteen, or at the request of the adoptee with the consent of the adopter. The provisions of Article 118 § 2 and 3 of the Family and Custody Code shall apply accordingly.

2. Upon the drawing up of a new birth certificate, an additional annotation shall be recorded in the existing birth certificate of the adoptee; the existing birth certificate of the adoptee shall not be disclosed and no copies of it shall be issued, unless requested by the court in connection with establishing the origin of the adoptee, recognition or termination of the adoption relationship, or in connection with other matters in which the court deems it necessary.

2a. Once the adoptee has reached the age of majority, he or she may request access to the part of the civil status record relating to the existing birth record.

3. In the event of termination of the adoption relationship, the adoptee’s new birth certificate shall be invalidated by the court in non-contentious proceedings; the additional reference to the drawing up of the new birth certificate entered in the adoptee’s existing birth certificate shall also be invalidated.”

4. *The 2014 Act*

29. On 1 March 2015 the new Act on Civil Status Records of 28 November 2014 (“the 2014 Act”) entered into force. It contains similar provisions as regards the issuing of copies and amendment of birth certificates (sections

44(1) to (3), 45(1) and 48(1)) and the drawing up of new birth certificates in the event of adoption (sections 71 and 73).

D. Supreme Court's case-law

1. Decision of 22 March 1991

30. The Supreme Court's decision (postanowienie) of 22 March 1991, given in case no. III CRN 28/91, includes guidelines on the procedures for the legal recognition of persons who have undergone gender reassignment surgery. The Supreme Court found that recognition of gender reassignment (made by means of a declaratory judgment) did not have retroactive effect and, as such, could not lead to rectification (sprostowanie) of a person's civil status record. However, a final judgment recognising sex reassignment could serve as a basis for making an additional entry (wpis dodatkowy) in the civil status register.

2. Resolution of 22 September 1995

31. On 22 September 1995 the Supreme Court issued a resolution (III CZP 118/95) confirming that it was possible to lodge a claim under Article 189 of the CCP to recognise the sexual identity of a transgender person. In such cases, the parents of the person requesting gender reassignment should be defendants. If the parents were dead or their whereabouts unknown, the court should appoint a guardian.

32. This reasoning was subsequently confirmed in a number of the Supreme Court's judgments.

E. Legislative initiatives

33. On 23 July 2015 Parliament passed the Gender Recognition Bill (Ustawa o uzgodnieniu płci). However, in October 2015 it was vetoed by the President. It had been designed to facilitate the process of gender recognition.

II. INTERNATIONAL MATERIAL

A. Commissioner for Human Rights of the Council of Europe

34. On 31 August 2010 the Commissioner for Human Rights of the Council of Europe published a Human Rights Comment entitled “Forced divorce and sterilisation – a reality for many transgender persons”, in which he stated, in particular, as follows:

“All countries need to develop expeditious and transparent procedures for changing the name and gender of a transgender person on official documents, in accordance with the case-law of the European Court of Human Rights.

In 2002, in *Goodwin v UK*, the Strasbourg Court’s Grand Chamber stressed that in the twenty first century the rights of transgender persons should be effectively protected by states. They should have the same right to personal development and to physical and moral security enjoyed by others in society. ...”

B. Committee of Ministers of the Council of Europe

35. On 31 March 2010 the Committee of Ministers of the Council of Europe adopted Recommendation CM/Rec(2010)5 on measures to combat discrimination on grounds of sexual orientation or gender identity. Paragraph 21 states that:

“[m]ember [S]tates should take appropriate measures to guarantee the full legal recognition of a person’s gender reassignment in all areas of life, in particular by making possible the change of name and gender in official documents in a quick, transparent and accessible way; member [S]tates should also ensure, where appropriate, the corresponding recognition and changes by non-state actors with respect to key documents, such as educational or work certificates.”

C. Parliamentary Assembly of the Council of Europe

36. On 22 April 2015 the Parliamentary Assembly of the Council of Europe (PACE) adopted Resolution 2048 (2015) entitled “Discrimination against transgender people in Europe”. The member States were called upon, in particular, to:

“6.2.1 develop quick, transparent and accessible procedures, based on self determination, for changing the name and registered sex of transgender people on birth certificates, identity cards, passports, educational certificates and other similar documents; make these procedures available for all people who seek to use them, irrespective of age, medical status, financial situation or police record;”

THE LAW

I. PRELIMINARY OBJECTIONS

37. The Government made several preliminary objections. They argued that the application was incompatible *ratione personae*, *ratione loci* and *temporis* with the provisions of the Convention. They further submitted that the applicant had not complied with the six-month rule laid down in Article 35 § 1 or with the rule of exhaustion of domestic remedies. Lastly, they stressed that the applicant had not suffered a significant disadvantage.

A. Victim status

1. The parties

38. The Government argued that the applicant could not be considered a “victim” for the purposes of Article 34 of the Convention. They referred to the fact that the short extract of his birth certificate and his identity documents indicated his new name and reassigned sex. Moreover, the applicant had not demonstrated that he had actually applied for French citizenship or for adoption, or that the disclosure of his full birth certificate had led to a breach of his right to respect for his private life.

39. The applicant did not submit any comments on this objection.

2. The Court’s assessment

40. The Court observes that the issue of whether or not the applicant’s private life was affected by the fact that his full birth certificate includes reference to the sex assigned at birth is inseparably linked to its assessment of whether

the requirements of Article 8 of the Convention have been satisfied in the particular circumstances of the case.

41. It accordingly joins the Government's objection of incompatibility *ratione personae* to the merits of the case.

B. Lack of jurisdiction

1. The parties

42. The Government submitted that the application was incompatible *ratione personae* and *ratione loci* with the provisions of the Convention. In the circumstances of the present case, Poland could not be held responsible for the acts of the French authorities if the applicant were to apply for adoption in France or for French citizenship. The case related to prospective future events to be carried out in France and was therefore outside Polish jurisdiction.

43. The applicant did not comment on this objection.

2. The Court's assessment

44. The Court observes that the applicant is a Polish national who complained that the Polish authorities had failed to comply with their duty to guarantee to him full legal recognition of his sexual identity. He referred to administrative and judicial proceedings conducted in Poland and complained about the content of his Polish civil status documents. In the light of the above, the Court considers that the Government's objection of incompatibility *ratione loci* and *ratione personae* must be dismissed.

C. Ratione temporis

1. The parties

45. The Government submitted that the application was incompatible *ratione temporis* with the provisions of the Convention. They referred to the fact that on 6 April 1992 the Warsaw District Court had issued a decision ordering that the applicant's birth records be amended to indicate that the sex assigned at birth had changed from female to male and his name had changed from X to

Y. That ruling had become final before the entry into force of the Convention in respect of Poland.

46. The applicant did not submit any comments.

2. The Court's assessment

47. The Court considers that the factual grounds for the applicant's application to the Court are the domestic courts' decisions issued between 2011 and 2014 dismissing his application for a new birth certificate. Consequently, and in so far as the applicant's complaints are directed against those decisions, the Court has temporal jurisdiction to entertain the application.

48. The Government's objection of incompatibility *ratione temporis* must accordingly be rejected.

D. Non-exhaustion of domestic remedies

1. The parties

49. The Government argued that the applicant had failed to exhaust the available domestic remedies. In particular, they pointed out that he should have lodged a constitutional complaint with the Constitutional Court challenging the compatibility of sections 48 and 49 read in conjunction with section 40(2)(1) of the 1986 Act as to their compatibility with Articles 32 §§ 1 and 2 (prohibition of discrimination), Article 33 § 1 (equality of men and women) and Article 47 (protection of private life) of the Polish Constitution (see paragraphs 22, 25 and 28 above).

50. The applicant did not comment on this objection.

2. The Court's assessment

51. The Court reiterates that it has already held that a constitutional complaint in Poland is an effective remedy for the purposes of Article 35 § 1 of the Convention only in a situation in which the alleged violation of constitutional rights and freedoms has resulted from the application of a legal provision which can reasonably be questioned as unconstitutional. Furthermore, such a provision has to constitute the direct legal basis for the individual decision in respect of which the violation is alleged. Thus, the constitutional complaint

procedure cannot serve as an effective remedy if the alleged violation has resulted only from the erroneous application or interpretation of a statutory provision which, in its content, is not unconstitutional (see, most recently, *Xero Flor w Polsce sp. z o.o. v. Poland*, no. 4907/18, § 198, 7 May 2021).

52. In the present case, the alleged violation originated in the decisions of the domestic courts refusing to apply *mutatis mutandis* sections 48 and 49 of the 1986 Act to the applicant's situation. The Court points to the established case-law of the Constitutional Court, which provides that constitutional complaints based solely on an allegedly erroneous interpretation of a legal provision are excluded from its jurisdiction unless an applicant contests a provision as understood in well-established and long-standing case law of the courts; as a result, such a complaint cannot be deemed an effective remedy within the meaning of Article 35 § 1 of the Convention. The domestic courts refused to interpret the domestic provisions as requested by the applicant. Therefore, a constitutional complaint cannot be regarded as an effective remedy in the applicant's case (see, for example, *Palusiński v. Poland (dec.)*, no. 62414/00, 3 October 2006, and *Długołęcki v. Poland*, no. 23806/03, § 25, 24 February 2009).

53. For these reasons, the Government's objection of non exhaustion of domestic remedies must be dismissed.

E. Six-month time-limit

1. The parties

54. The Government also submitted that the applicant had failed to comply with the six-month time-limit. They argued that his application to the Court had been lodged on 18 November 2014, even though the question relating to the annotation on the birth certificate had already been resolved by the Supreme Administrative Court on 16 July 2008.

55. The applicant did not submit any comments.

2. The Court's assessment

56. The Court cannot accept the Government's arguments. It is clear from the applicant's submissions that his complaint concerns an ongoing breach of his right to private and family life. Following unsuccessful proceedings

before the administrative courts relating to the removal of the annotation from the birth certificate, the applicant instituted another set of proceedings, this time before the civil courts, to be issued with a new one (see paragraph 15 above). The proceedings were terminated on 28 May 2014, that is, less than six months before his application was lodged with the Court. In the circumstances of the present case, there is no indication that those proceedings had no prospects of success or could not have afforded him redress.

57. Accordingly, the Court rejects the Government's objection as to failure to comply with the six-month rule.

F. Non-significant disadvantage

1. The parties

58. Lastly, the Government argued that the applicant had not suffered a significant disadvantage within the meaning of Article 35 § 3 (b) of the Convention. They stressed that the applicant's sex assigned at birth was visible only in the full birth certificate, which was not public and was only accessible in exceptional situations to a limited number of people. The applicant had failed to demonstrate that he had actually been adversely affected by that situation. Moreover, his complaints had been thoroughly examined at national level in administrative and judicial proceedings.

59. The applicant did not comment on the Government's objection.

2. The Court's assessment

60. The Court observes that the question of whether the applicant has suffered a "significant disadvantage" in the instant case is closely linked to the complaint about the alleged breach of his privacy and the authorities' duty to guarantee full legal recognition of his sexual identity. It therefore considers that this particular objection raised by the Government should be joined to the merits of the case.

II. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

61. The applicant alleged a breach of his private and family life on account of the fact that his full birth certificate included reference to the sex assigned

at birth. He relied on Article 8 of the Convention, the relevant parts of which read 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 national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

A. Admissibility

62. The Court notes that this complaint is neither manifestly ill founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

B. Merits

1. The applicant

63. The applicant submitted that his inability to fully amend his civil status records had affected his private life. He maintained that he was afraid that disclosure of the information relating to his sex assigned at birth would have an impact on his family and private life. In his view, this situation amounted to mental suffering.

64. In the application form the applicant argued that he wished to institute proceedings for acquisition of French nationality and for adoption of his wife's niece (see paragraph 21 above). However, for the purpose of these proceedings he would have to provide a full copy of his birth certificate which indicated the sex assigned at birth. Thus, he could not institute such proceedings out of fear that he would be exposed to the hostile reaction of society and might suffer humiliating experiences.

2. The Government

65. The Government submitted that Polish law and the courts had implemented appropriate measures to have gender reassignment legally recognised and

the relevant data changed in birth records (by an appropriate annotation). Consequently, the respondent State had fulfilled its positive obligation to ensure a real, effective and available procedure for altering civil status records.

66. The Government further stressed that the change of data in birth certificates had full effect under private and public law. The short extract of the birth certificate indicated the applicant's new name and reassigned gender. In most official situations, only an extract of the birth certificate was required (for example when concluding a civil marriage, obtaining a death certificate or applying for an identity document, passport or PESEL).

67. In the Government's view, the obligation to entirely remove all records relating to the gender assigned at birth could not be considered a positive obligation under Article 8 of the Convention. Moreover, there was no such obligation under any international documents binding Poland or the Recommendation of the Committee of Ministers CM/Rec(2010)5 on measures to combat discrimination on grounds of sexual orientation or gender identity (see paragraph 35 above).

68. The Government also submitted that most European countries applied the procedure of adding marginal annotations to birth certificates indicating the change of gender and possibly the change of first name. Such a practice existed, for example, in Belgium, Luxembourg and France. However, in this sensitive area there was no European consensus and therefore the margin of appreciation granted to the domestic authorities should have been wide.

69. Lastly, they argued that keeping a reference to the gender assigned at birth in the full birth certificate was important for the person concerned. Having this annotation meant that it was possible, when necessary, to prove certain facts predating the gender reassignment, particularly in relation to education, kinship, inheritance, acquisition of property and so forth.

3. The third-party interveners

(a) Helsinki Foundation for Human Rights

70. The Helsinki Foundation for Human Rights ("HFHR") submitted that there were no statutory regulations explicitly setting out the gender recognition procedure for a transgender person in Poland. The possibility of correcting the designation of a person's gender was acknowledged through judicial interpretation. The domestic courts accepted that the modification of a per-

son's gender could be recognised in civil proceedings through a declaratory action under Article 189 of the Code of Civil Procedure. HFHR referred to the procedure established by the Supreme Court in its decision of 22 March 1991 (case no. III CRN 28/91) (see paragraph 30 above).

71. HFHR further noted that the proposed bill vetoed in 2015 (see paragraph 33 above) had included a provision stating that a court ruling granting a gender recognition request was a basis for drawing up a new birth certificate for the person concerned. It had also provided that a full copy of the birth certificate would be issued only at the request of a court, the person concerned or his or her biological or adopted children if that had been necessary to confirm family ties.

(b) European Centre for Law and Justice

72. The European Centre for Law and Justice ("ECLJ") submitted that a birth certificate, which attested a person's birth, contained objective characteristics about that person, including his or her filiation, and served as a reference for his or her entire life. This dual function was reflected in the two types of Polish civil status documents. A short extract of the birth certificate contained relevant and up to date information and thus constituted proof and a means of identifying the person. A full copy of the birth certificate was a copy of the original document drawn up at the time of birth, which included annotations made during the person's life. The practice of making annotations to an original birth certificate was in force in other European countries. Even member States which had modified the conditions and procedures relating to gender reassignment had kept the practice of making annotations to the original birth certificate (for example, France, Belgium and Luxembourg).

4. The Court's assessment

(a) Preliminary remarks

73. The Court has previously held that while the essential object of Article 8 is to protect individuals against arbitrary interference by public authorities, it may also impose on a State certain positive obligations to ensure effective respect for the rights protected by Article 8. This Article imposes on States a positive obligation to secure to their citizens the right to effective respect for their physical and psychological integrity. This obligation may involve

the adoption of specific measures, including the provision of an effective and accessible means of protecting the right to respect for private life. Such measures may include both the provision of a regulatory framework of adjudicatory and enforcement machinery protecting individuals' rights and the implementation, where appropriate, of these measures in different contexts (see *Hämäläinen v. Finland* [GC], no. 37359/09, §§ 62 and 63, ECHR 2014).

74. In the present case, the Court notes that the applicant did not specifically complain about the lack of a regulatory framework for legal gender recognition in Poland (compare, for example, *X v. the former Yugoslav Republic of Macedonia*, no. 29683/16, 17 January 2019, and *Y.T. v. Bulgaria*, no. 41701/16, 9 July 2020). Rather, the crux of the case is the alleged breach of the applicant's privacy rights given that the information about his gender reassignment is included in his full birth certificate. Consequently, the question to be determined is whether respect for the applicant's private life and/or family life entails a positive obligation on the respondent State to provide an effective and accessible procedure allowing the applicant to obtain a birth certificate without any reference to the gender assigned at birth.

(b) Compliance with the State's positive obligations

75. The relevant Convention principles are summarised in the Court's judgment in the case of *Hämäläinen* (cited above, §§ 65-68).

76. The Court reiterates in particular that in implementing their positive obligation 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. In the context of "private life" the Court has considered that where a particularly important facet of an individual's existence or identity is at stake the margin allowed to the State will be restricted (see, for example, *Christine Goodwin v. the United Kingdom* [GC], no. 28957/95, § 90 ECHR 2002 VI, and *Hämäläinen*, cited above, § 67).

77. Turning to the facts of the present case the Court notes that the applicant was registered at birth as female. He underwent gender reassignment, lodged a claim with the domestic courts and had his name and gender changed in the official documents. The relevant annotation was made to the civil status register and he was subsequently issued with new identity documents (see paragraphs 5 and 6 above).

78. The Court further observes that the applicant later lawfully married K. and continues to live in society as a male person (see paragraphs 7 and

8 above). While the applicant's full birth certificate includes a marginal annotation about the gender reassignment, the short extract of the birth certificate indicates only his new name and reassigned gender. In nearly all everyday situations the applicant is able to establish his identity by means of identification documents or the short extract of the birth certificate (see paragraphs 26, 27 and 66 above). The Court acknowledges the applicant's feelings that the marginal annotation to his birth certificate is demeaning and causes him mental suffering (see paragraph 63 above and compare Christine Goodwin, cited above, § 77). However, it does not appear that in his daily life the applicant is required to reveal these intimate details of his private life and that the inconveniences complained of are sufficiently serious.

79. Furthermore, as is apparent from domestic law and as submitted by the parties, full birth records are not publicly accessible. Only a limited number of persons and entities may access the register of births and obtain full copies of birth certificates (see paragraph 25 above). In addition, the applicant himself would seldom be required to provide a full copy of the birth certificate (in relation to proceedings for adoption, application for citizenship elsewhere, possibly in the context of criminal proceedings; see paragraph 26 above). In this connection, the Court is mindful of the historical nature of the birth record system and that, in view of the public interest, reference to the gender assigned at birth, might, in certain situations, be necessary to prove certain facts predating the sex reassignment, even though this could cause the person concerned to experience some distress.

80. Notwithstanding all the above considerations, the Court finds that the applicant did not demonstrate that he had suffered any sufficiently serious negative consequences or difficulties resulting from the fact that the sex assigned at birth is still visible in the form of an annotation on his full birth certificate. He failed to provide any details that he had been affected by that situation and to what extent.

81. The Court cannot rule out the possibility that the applicant might potentially face some inconvenience on account of the fact that his full birth records contain a reference to the gender assigned to him at birth. Even so, such a potential risk of adverse consequences is not capable of rendering the current Polish system deficient from the point of view of the State's positive obligation.

82. In conclusion, given the particular circumstances of the present case, the Court accepts that the Polish authorities struck a fair balance between the different interests at stake, while remaining within the wide margin of appreciation available to them.

83. There has accordingly been no violation of Article 8 of the Convention.

84. In view of this conclusion, the Court considers it unnecessary to rule on the Government's preliminary objections relating to the question of victim status and significant disadvantage (see, *mutatis mutandis*, *Kurt v. Austria* [GC], no. 62903/15, § 213, 15 June 2021 and paragraphs 41 and 60 above).

III. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION

85. The applicant complained that he had been discriminated against, contrary to Article 14 of the Convention. He compared his situation to that of adopted children where a new birth certificate was issued. Article 14 of the Convention reads as follows:

“The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”

A. Admissibility

86. The Court notes that this complaint is neither manifestly ill founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

B. Merits

87. It is undisputed in the present case that the applicant's situation falls within the notion of “private life” and “family life” within the meaning of Article 8 of the Convention. Consequently, Article 14 of the Convention, taken in conjunction with Article 8, is applicable.

88. The Court further observes that the applicant's complaint under Article 14 of the Convention concerns his inability to obtain a new birth certificate without any information about the gender reassignment. The applicant compared his situation to that of adopted children, who are issued a new

birth certificate in the event of full adoption (see paragraph 28 above). For the Court, these situations are not sufficiently similar to be compared to each other. The applicant cannot therefore claim to be in the same situation as the other category of persons relied on (compare *Hämäläinen*, cited above, §§ 107-13).

89. There has accordingly been no violation of Article 14 of the Convention.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. Joins to the merits the Government's preliminary objections concerning lack of victim status and lack of significant disadvantage and decides that it is unnecessary to rule on them;

2. Declares the application admissible;

3. Holds that there has been no violation of Article 8 of the Convention;

4. Holds that there has been no violation of Article 14 of the Convention.

Done in English, and notified in writing on 17 February 2022, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Liv Tigerstedt
Deputy Registrar

Marko Bošnjak
President