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

FIFTH SECTION

DECISION

Application no. 40296/16
P.
against Ukraine

The European Court of Human Rights (Fifth Section), sitting on 11 June 2019 as a Chamber composed of:

Angelika Nußberger, *President,*
Ganna Yudkivska,
André Potocki,
Síofra O'Leary,
Mārtiņš Mits,
Gabriele Kucsko-Stadlmayer,
Lado Chanturia, *judges,*

and Milan Blaško, *Deputy Section Registrar,*

Having regard to the above application lodged on 6 July 2016,

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicant,

Having regard to the joint submissions by the European Region of the International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA–Europe) and Organisation Intersex International Europe (OII Europe), which were given leave to intervene as third parties in the written proceedings,

Having deliberated, decides as follows:

THE FACTS

1. The applicant, P., is a Ukrainian national who was born in 1977 and lives in Kyiv. He is an intersex person, who was registered as male at birth, but identifies as female. In the application form he indicated his gender as male. For the sake of coherence and in order to avoid any confusion, the

Court, although fully respecting the applicant's self-identification, will refer to him as male.

2. The Court acceded to the applicant's request not to have his name disclosed (Rule 47 § 4 of the Rules of Court).

3. The applicant was represented before the Court by Ms O.O. Guz, a lawyer practising in Kyiv. The Ukrainian Government ("the Government") were represented by their Agent, Mr I. Lishchyna.

4. Relying on Articles 8, 13 and 14 of the Convention, the applicant complained, in particular, of the absence of any procedure in Ukraine for changing gender and name in the civil status registration records for intersex people such as him. He further complained of the absence of an effective domestic remedy in respect of the above complaint. Lastly, the applicant complained that by refusing to identify him as female in his identity documents, the State had discriminated against him because he was intersex.

5. On 5 May 2017 the Government were given notice of the above complaints and the remainder of the application was declared inadmissible pursuant to Rule 54 § 3 of the Rules of Court.

6. On 14 November 2017 joint third-party comments were received from ILGA–Europe and OII Europe, which were given leave to intervene in the written proceedings under Article 36 § 2 of the Convention and Rule 44 § 3 of the Rules of Court.

A. The circumstances of the case

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

8. The applicant was born in 1977 and lives in Kyiv. At birth he was registered as a boy, with a clearly male name. According to the applicant, he has never identified with the assigned gender.

9. On 24 December 2012 the applicant underwent a karyotype analysis[1] at the Komisarenko Institute of Endocrinology and Metabolism of the National Academy of Medical Sciences of Ukraine. The analysis revealed that he had the following karyotype[2]: 94.5% – 47, XXY[3], 5% – 48,

1. A test to identify and evaluate the size, shape, and number of chromosomes in a sample of body cells.

2. The standard human karyotypes contain 22 pairs of autosomal chromosomes and one pair of sex chromosomes (allosomes). Standard karyotypes for females contain two X chromosomes and are denoted 46, XX; males have both an X and a Y chromosome denoted 46, XY. Sometimes, though rarely, variations occur.

3. An unusual chromosome configuration referred to as Klinefelter syndrome. It is found in about one out of every 500-1,000 newborn males. The primary feature is sterility. Often symptoms may be subtle and many people do not realise they are affected. Sometimes symptoms are more prominent and may include weaker muscles, greater height, poor coordination, less body hair, smaller genitals and breast growth. Often it is only at puberty that these symptoms are noticed.

XXXY[4] and 0.5% – 47, XXX[5]. He was diagnosed with Klinefelter syndrome (mosaic form), hypergonadotropic hypogonadism (diminished functional activity of the testes) and bilateral cryptorchidism (undescended testes).

10. On an unspecified date thereafter the applicant was examined by an endocrinologist and genetics specialist, who issued a report to that effect. It was observed that the applicant had been identifying as female from the age of fifteen. He was undergoing anti-androgen and oestrogen therapy (feminising hormone therapy). The doctor confirmed his earlier diagnoses and noted that the hypergonadotropic hypogonadism had been diagnosed outside the hormone therapy. The applicant had also been diagnosed with azoospermia[6]. The doctor found that the applicant had an intersex constitution and female-type hair. He also had underdeveloped (hypoplastic) external male genitalia. An ultrasound scan revealed that the applicant had a rudimentary uterus and an underdeveloped prostate. The echostructure of his left testis resembled the texture of an ovary. The final diagnosis, in addition to those established before, was intersexualism.

11. Following a request for information by the applicant, the details of which are not available to the Court, on 6 June 2013 a specialist from the Institute of Urology of the National Academy of Medical Sciences of Ukraine wrote to him, stating:

> "1. The diagnosis 'Klinefelter syndrome' is not an indication of intersexualism or hermaphroditism.
>
> 2. Medical assistance to persons with hermaphroditism is provided, as a rule, by paediatric surgeons, as that pathology is usually revealed at birth or during childhood.
>
> 3. Patients with Klinefelter syndrome, as a rule, do not need gender reassignment. If they identify as female, they should address the gender reassignment committee of the Ministry of Public Health. Once a diagnosis of 'transsexualism' has been confirmed, they receive permission for gender reassignment.
>
> 4. The karyotype 47, XXX indicates being female. The diagnosis 'Klinefelter syndrome' is impossible with such a karyotype."

12. On 31 October 2014 the applicant's mother wrote to the director of the Public Health Department of the Kyiv City State Administration to say that her adult child, an intersex person, had been trying to get medical treatment for cryptorchidism (undescended testes) for at least four years, but without success. Although all the doctors agreed that it would be necessary

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4. A type of chromosome abnormality in males, sometimes referred to as a variant of Klinefelter syndrome, but more severe. It is estimated that this condition affects one in every 50,000 male births.

5. A rare chromosome variation affecting females. It occurs in about 1 in 1,000 newborn girls. Although females with this condition may be taller than average, this chromosomal change typically causes no unusual physical features.

6. Absence of sperm in the semen.

to remove the testes, none of them had undertaken to do so. The applicant's mother sought assistance in arranging the surgery. It is not known whether there was any follow-up to her request.

13. In July 2015 the applicant requested that the Obolonskyy District Civil Status Registration Office in Kyiv (hereinafter "the registration office") change the gender marker in his birth certificate from "male" to "female" and amend his name, patronymic and surname accordingly. The case file before the Court does not contain a copy of that request. It appears from the summary provided in the related decision of the registration office (see below) that his key argument was the discrepancy between his biological gender (female) and the gender indicated in his identity documents (male).

14. On 24 July 2015 the registration office rejected the applicant's request. In the absence of a medical certificate proving that he had undergone gender reassignment, it dismissed the applicant's argument that he was female as unsubstantiated.

15. On 19 August 2015 the applicant challenged that refusal before the Kyiv Circuit Administrative Court. He argued that the statutory rules on changing, renewing or annulling civil status registration records (see paragraph 23 below) provided for the possibility of changing one's civil records following gender reassignment (correction). Under the legislation in force, however, seeking the reassignment of one's gender was possible only in cases of transsexualism. Accordingly, that rule was not applicable to his situation. The applicant drew the court's attention to the features of his endocrine system and the genes defining his body and his appearance as female rather than male. He emphasised that legal recognition of his female identity would be his only chance of starting a normal life, free from humiliation and embarrassment.

16. On 19 November 2015 the first-instance court found against the applicant. It noted that the legislation did indeed provide that civil status records of transsexual persons could be changed following gender reassignment (correction), but did not cover the situation of intersex people. However, the court held that it remained open for the applicant to apply under point 2.15.10 of the Rules "on changing, renewing or annulling civil status registration records", which provided that records could be changed "in other specific cases, if this [did] not contradict the legislation in force" (see paragraph 23 below). In other words, the applicant could seek a judicial decision acknowledging that his gender had been erroneously defined as male at birth. His identity documents could be subsequently altered on those grounds.

17. The applicant appealed. He maintained that his situation was special, given that his biological features were a combination of both genders. He further argued that, although the legislation did not cover such a situation, it did not stop the civil records being changed accordingly. The applicant

emphasised that the desired change in his case would neither run contrary to the interests of society in general, nor infringe anybody's rights and freedoms in particular.

18. On 19 January 2016 the Kyiv Administrative Court of Appeal upheld the first-instance court's judgment and endorsed its reasoning.

19. On 17 February 2016 the Higher Administrative Court rejected a request by the applicant for leave to appeal on points of law.

B. Relevant domestic law

1. *Constitution of Ukraine (1996)*

20. The relevant provision reads as follows:

Article 23

"Every person has the right to free development of his personality, provided that the rights and freedoms of other persons are not violated thereby, and has duties to society, in which free and comprehensive development of his personality shall be guaranteed."

2. *Civil Code (2003), as worded at the material time*

21. The relevant extracts read as follows:

Article 28 – Name of an individual

"1. An individual acquires rights and obligations and exercises them under his or her name.

The name of a Ukrainian national comprises a surname, given name and patronymic.

...

3. An individual shall be given a name in accordance with the law."

Article 49 – Civil status registration

"...

3. An individual's birth, origin, citizenship, marriage, divorce in the cases provided for by law, change of name and death shall be registered with the State.

4. Registration of civil status shall be carried out in accordance with the law ..."

3. *State Registration of Civil Status Act (Закон України «Про державну реєстрацію актів цивільного стану») (2010)*

22. The relevant provisions read as follows:

Section 9 – State registration of civil status

"1. State registration of civil status is carried out with a view to ensuring the exercise of an individual's rights, and official recognition and confirmation by the

State of the facts of an individual's birth, origin, marriage, divorce, change of name and death. ...

5. The Ministry of Justice of Ukraine shall approve rules on State registration of civil status, as well as rules on changing, renewing or annulling civil status registration records."

4. Rules "on changing, renewing or annulling civil status registration records" («Правила внесення змін до актових записів цивільного стану, їх поновлення та анулювання», approved by Order of the Ministry of Justice no. 96/5 of 12 January 2011 (as further amended)

23. The relevant rules read as follows:

"2.13. Civil status records may be changed on the basis of:

... 2.13.2. a ruling of the administrative court;

2.13.3. a report *(висновок)* of a [registration office] ...

2.13.12. Civil status records may also be changed in other specific cases, if this does not contradict the legislation in force ...

2.15. A [registration office] shall issue a report *(висновок)*:

... 2.15.5. where a change of surname, given name and patronymic is necessitated by a change of gender; ...

2.15.10. in other specific cases, if this does not contradict the legislation in force."

5. Order no. 60 of the Ministry of Public Health "on improving medical assistance for persons requiring gender reassignment (correction)" («Про удосконалення надання медичної допомоги особам, які потребують зміни (корекції) статевої належності») of 3 February 2011 (repealed with effect from 30 December 2016)

24. The Order provided for the following procedure for gender reassignment: an established clinical diagnosis of "transsexualism" by the gender reassignment committee of the Ministry of Public Health, a mandatory stay for at least one month in a psychiatric hospital, and irreversible sterilisation. The numerous contraindications included "anatomical features making it difficult (or impossible) to adapt to the desired gender (such as hermaphroditism and disorders in the development of genitalia)".

6. Order no. 1041 of the Ministry of Public Health "on establishing biomedical and psychosocial indications for gender reassignment (correction), approval of the form of primary records and instructions for their completion" («Про встановлення медико-біологічних та соціально-психологічних показань для зміни (корекції) статевої належності та затвердження форми первинної облікової документації й інструкції щодо її заповнення») of 5 October 2016, enacted on 30 December 2016 (repealing Order no. 60 mentioned above)

25. The new Order lists the following as "biomedical and psychosocial indications for gender reassignment (correction)":

> "1. The psychiatric and behavioural disorder [described as] 'transsexualism' under the Tenth Edition of the International Classification of Diseases is a biomedical indication for gender reassignment (correction).
>
> 2. Discomfort and distress caused by the discrepancy between an individual's gender identity and the gender assigned to him or her at birth (and its associated gender role and/or primary and secondary sex characteristics) are psychosocial indications for gender reassignment (correction)."

26. It also establishes the form of a medical certificate on gender reassignment (correction), which is issued by a medical consultative board of a primary care centre (instead of the gender reassignment committee, as was previously the case). The medical certificate must specify the patient's personal information, the biomedical and psychosocial indications for gender reassignment (correction), and the nature and extent of the medical intervention. As further explained, the medical intervention can consist of hormone therapy and surgery.

C. Relevant domestic case-law cited by the Government

27. On 2 October 2013 the Circuit Administrative Court of the Autonomous Republic of Crimea ("the Crimea Administrative Court") allowed an administrative claim by an individual against the Saky Registration Office. The claimant was a mother wishing to change the sex marker of her child born in August 2012 from "male" to "female" in the birth certificate and to amend the surname, given name and patronymic accordingly. She had applied to the registration office for the above-mentioned changes to her child's documents, relying on a "medical birth certificate" dated 11 October 2012, which gave the child's gender as "female" and not "male" as indicated in the birth certificate of 3 August 2012. The mother had also provided a number of other medical documents (doctors' opinions and conclusions, extracts from the child's medical file, a report by a medical genetics laboratory and so on). The registration office had however refused to change the child's sex marker, referring to the

absence of a medical certificate on gender reassignment. The Crimea Administrative Court found such an approach unlawful and ordered the registration office to carry out the requested changes. On 15 January 2014 the Sevastopol Administrative Court of Appeal upheld that judgment.

28. On 12 June 2015 Kyiv Circuit Administrative Court ("the Kyiv Administrative Court") allowed an administrative claim by an individual against the gender reassignment committee of the Ministry of Public Health. The claimant, a transgender person, had undergone certain surgical procedures with a view to changing her gender from female to male. She was also following hormone therapy to that effect. The committee had refused to confirm her gender reassignment by a medical certificate on the grounds that the required minimum of surgical correction had not been attained. The Kyiv Administrative Court criticised that approach as not based on law. It referred, in particular, to Order no. 60 of the Ministry of Public Health of 3 February 2011 (see paragraph 24 above), from which it followed that gender reassignment (correction) should be carried out, if possible, to the extent desired by the patient.

29. On 26 November 2015 the Ternopil Circuit Administrative Court, relying on the Rules "on changing, renewing or annulling civil status registration records" (see paragraph 23 above), allowed an administrative claim by an individual (born in 1983) against the Zbarazh registration office, ordering the latter to change the claimant's sex marker from "male" to "female" in his birth certificate and amend his surname, given name and patronymic accordingly. According to the summary of the claimant's arguments in the judicial decision in question, he argued that "the [local] registration office had committed a number of errors when completing [his] birth certificate of [...] 1983". The claimant relied, in particular, on a "medical birth certificate" issued in March 2014, which acknowledged that his real gender was "female", whereas his 1983 birth certificate wrongly indicated it as "male". The defendant agreed with the claim and admitted that "a number of errors" had been committed in the claimant's birth certificate. The Ternopil Circuit Administrative Court held as follows:

> "... the court considers that indeed there are a number of errors in [the claimant's] birth certificate, which should be corrected. The Zbarazh registration office is therefore obliged to change the birth certificate [...], namely: to change the gender marker from "male" to "female" [and to adjust the surname, given name and patronymic accordingly]."

D. Relevant international material

30. On 24 June 2013 the Foreign Affairs Council of the European Union adopted "Guidelines to promote and protect the enjoyment of all human rights by lesbian, gay, bisexual, transgender and intersex (LGBTI) persons". The relevant part of the guidelines read as follows:

"8. The EU is keenly aware that the promotion of human rights on grounds of sexual orientation and gender identity in many areas around the world, including within the EU, can lead to sensitive discussions. However, building on international standards and its own legislative framework, the EU is committed to advancing the human rights of LGBTI persons in a meaningful and respectful way. It will do so by taking into account the local realities in which human rights defenders need to advance their struggle.

... The term **intersex** covers bodily variations in regard to culturally established standards of maleness and femaleness, including variations at the level of chromosomes, gonads and genitals. ...

20. Appropriate identity documents are a pre-requisite to effective enjoyment of many human rights. Transgender persons who do not have identity documentation in their preferred gender may as a result be exposed to arbitrary treatment and discrimination at the hands of individuals and institutions. No provision is made in some countries for legal recognition of preferred gender. In other countries, the requirements for legal gender recognition may be excessive, such as requiring proof of sterility or infertility, gender reassignment surgery, hormonal treatment, a mental health diagnosis and/or having lived in the preferred gender for a specified time period (the so-called 'real-life experience')."

31. On 26 July 2013 the Office of the United Nations High Commissioner for Human Rights (OHCHR) launched "UN Free & Equal", a global UN campaign for equal rights and the fair treatment of lesbian, gay, bi, trans (LGBT) and intersex people. The relevant parts of the factsheet "Intersex" prepared in the framework of the campaign read as follows:

"What does 'intersex' mean?

Intersex people are born with sex characteristics (including genitals, gonads and chromosome patterns) that do not fit typical binary notions of male or female bodies.

Intersex is an umbrella term used to describe a wide range of natural bodily variations. In some cases, intersex traits are visible at birth while in others, they are not apparent until puberty. Some chromosomal intersex variations may not be physically apparent at all.

According to experts, between 0.05% and 1.7% of the population is born with intersex traits – the upper estimate is similar to the number of red haired people.

Being intersex relates to biological sex characteristics, and is distinct from a person's sexual orientation or gender identity. An intersex person may be straight, gay, lesbian, bisexual or asexual, and may identify as female, male, both or neither.

Because their bodies are seen as different, intersex children and adults are often stigmatized and subjected to multiple human rights violations, including violations of their rights to health and physical integrity, to be free from torture and ill-treatment, and to equality and non-discrimination. ...

Discrimination

...

Some intersex people also face barriers and discrimination if they wish to or need to amend sex markers on birth certificates and official documents. ...

Action points

States:

... Enact laws to provide for facilitated procedures to amend sex markers on the birth certificates and official documents of intersex people. ...”

32. On 4 May 2015 the Office of the UN High Commissioner for Human Rights issued a report entitled “Discrimination and violence against individuals based on their sexual orientation and gender identity” (A/HRC/29/23). The relevant extract reads as follows:

“79. States should address discrimination by:

(i) Issuing legal identity documents, upon request, that reflect preferred gender, eliminating abusive preconditions, such as sterilization, forced treatment and divorce; ...”

33. The relevant parts of a research paper by the Council of Europe Commissioner for Human Rights “Human rights and intersex people”, which was published in April 2015 and re-edited in September 2015, read as follows (with the footnotes omitted):

“The Commissioner’s recommendations

4. Member states should facilitate the recognition of intersex individuals before the law through the expeditious provision of birth certificates, civil registration documents, identity papers, passports and other official personal documentation while respecting intersex persons’ right to self-determination. Flexible procedures should be observed in assigning and reassigning sex/gender in official documents while also providing for the possibility of not choosing a specified male or female gender marker. Member states should consider the proportionality of requiring gender markers in official documents. ...

1.1. Understanding intersex people

It is important to note the distinction between intersex and trans people:

Intersex individuals are persons who cannot be classified according to the medical norms of so-called male and female bodies with regard to their chromosomal, gonadal or anatomical sex. The latter becomes evident, for example, in secondary sex characteristics such as muscle mass, hair distribution and stature, or primary sex characteristics such as the inner and outer genitalia and/or the chromosomal and hormonal structure. ...

In essence, as a result of surgeries or other sex-altering medical interventions, intersex people are denied their right to physical integrity as well as their ability to develop their own gender identity, as an a priori choice is made for them. ...

The invisibility of intersex people in society is another serious problem. Their life experience is often shrouded in secrecy and shame, also as a result of their frequently being unaware of the surgeries or treatments that were performed on them early on in their life. Access to medical records is often rendered very difficult, as is access to personal history, including childhood pictures and other memories. Intersex individuals who are discovered later on in life may experience the same invasive treatment – without their free and informed consent – as intersex individuals who are identified during childhood.

A strong fear of stigmatisation and social exclusion forces most intersex people to stay 'in the closet', even when they become aware of their sex. Moreover, society remains largely ignorant about the existence of intersex people since hardly any information is made available to the public about the matter. Consequently, for many years, the human rights problems affecting intersex people's well-being were either unknown or ignored. Awareness about their suffering has only recently risen to the fore in a number of human rights fora, and is yet to be recognised by the wider human rights community as a pressing concern. ...

1.2. Diversity of intersex people

It is important not to lump all intersex people into one new collective category, such as a 'third sex', perhaps running in parallel to female and male. Such a classification would be incorrect due to the great diversity among intersex people and the fact that many intersex individuals do identify as women or men, while others identify as both or neither. In effect, intersex is an umbrella term including people with 'variations in sex characteristics', rather than a type per se. This diversity is not unique to intersex people, as – unsurprisingly – a range of variations in sexual anatomy is also found in women and men that meet the medical norms of their respective categories.

The term 'hermaphrodite' was widely used by medical practitioners during the 18th and 19th centuries before 'intersex' was coined as a scientific and medical term in the early 20th century. Before the current medical classification of the disorder of sex development (DSD) was developed, variations in intersex sex characteristics were classified under different categories, the most common being: congenital adrenal hyperplasia (CAH), androgen insensitivity syndrome (AIS), gonadal dysgenesis, hypospadias, and unusual chromosome compositions such as XXY (Klinefelter Syndrome) or XO (Turner Syndrome). The so-called "true hermaphrodites" referred to those who had a combination of ovaries and testes. ...

1.3. Current knowledge base

Several gaps remain with regard to the human rights knowledge base on intersex issues. To date there is little information about the legal and social situation of intersex people in many European countries and around the world. It is thus not surprising that the first resolution inclusive of intersex issues, adopted within the Council of Europe setting, called on member states to: 'undertake further research to increase knowledge about the specific situation of intersex people'.

... one's gender does not necessarily develop in conformity with one's assigned sex. In the case of intersex people, estimates of assigning the wrong sex to them vary between 8.5% and 40%. These children end up rejecting the sex they were assigned at birth demonstrating the major infringements of their psychological integrity. ..."

34. On 14 February 2019 the European Parliament adopted Resolution on the rights of intersex people (2018/2878(RSP)). Its relevant extracts read as follows:

"... The European Parliament, ...

J. whereas some intersex people will not identify with the gender they are medically assigned at birth; whereas legal gender recognition based on self-determination is only possible in six Member States; whereas many Member States still require sterilisation for legal gender recognition;

...

Identity documents

9. Stresses the importance of flexible birth registration procedures; welcomes the laws adopted in some Member States that allow legal gender recognition on the basis of self-determination; encourages other Member States to adopt similar legislation, including flexible procedures to change gender markers, as long as they continue to be registered, as well as names on birth certificates and identity documents (including the possibility of gender-neutral names); ..."

COMPLAINTS

35. The applicant complained that there was no procedure in Ukraine allowing intersex people like him to change their gender and name records according to their self-identification. He also complained of the absence of an effective domestic remedy in that regard. Lastly, the applicant complained that he had suffered discrimination in the enjoyment of his Convention rights for being an intersex person. He relied on Articles 8, 13, and 14 of the Convention.

THE LAW

36. The applicant alleged a breach of his rights under Articles 8, 13 and 14 of the Convention, the relevant parts of which read as follows:

Article 8

"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."

Article 13

"Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

Article 14

"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. The parties' submissions

1. The Government

37. The Government argued that the applicant had failed to exhaust the domestic remedies available to him in Ukraine before lodging his application with the Court. They pointed out that two options had been possible in his case and that he had failed to use either of them.

38. Firstly, as the Kyiv Circuit Administrative Court had indicated to the applicant in its decision of 19 November 2015, he could have sought a judicial finding that he had been assigned the male gender at birth erroneously. He could have subsequently had his legal identity documents changed on those grounds. To demonstrate that the above-mentioned legal avenue would have offered the applicant a reasonable prospect of success, the Government cited a domestic court decision allowing a similar claim (see paragraph 29 above).

39. The second option for the applicant, in the Government's opinion, had been to apply to the then-existing gender reassignment committee with a view to clarifying his diagnoses and obtaining a medical certificate on gender reassignment (correction). They submitted a copy of a domestic court decision, which illustrated, firstly, that such a certificate could have been issued regardless of the extent of the gender reassignment or correction measures and, secondly, that the committee's approach could have further been challenged before the courts (see paragraph 28 above).

2. The applicant

40. The applicant contested the Government's arguments. He pointed out that the crux of his application was the absence of any legal mechanism that would allow intersex people to obtain the necessary amendments to their identity documents. The applicant noted that the Kyiv Circuit Administrative Court had acknowledged the lack of such a legal mechanism (see paragraph 16 above).

41. The applicant submitted that the remedies referred to by the Government had not been applicable to his situation. He emphasised that his case did not concern the rectification of an erroneous gender assignment, like in one of the domestic judgments cited by the Government, but rather the lack of a simple and transparent administrative procedure for changing identity documents.

42. The applicant also contended that it would have been pointless for him to apply to the gender reassignment committee, given that it had only dealt with transgender people, but not intersex people like him.

3. Third-party intervention

43. ILGA–Europe and OII Europe observed that, although the legislative amendments enacted in Ukraine in 2016 (see paragraphs 25-26 above) had been a considerable step forward, they did not address the issue of legal gender recognition for intersex persons.

44. The third parties also made an overview of international and comparative law and pointed out that there was growing acknowledgement of the need for quick, transparent and accessible gender recognition and name procedures based on self-determination.

B. The Court's assessment

1. General case-law principles regarding the requirement to exhaust effective domestic remedies

45. It is a fundamental feature of the machinery of protection established by the Convention that it is subsidiary to the national systems safeguarding human rights. The Court is concerned with the supervision of the implementation by Contracting States of their obligations under the Convention. It should not take on the role of Contracting States, whose responsibility it is to ensure that the fundamental rights and freedoms enshrined therein are respected and protected on a domestic level. The rule of exhaustion of domestic remedies is based on the assumption – reflected in Article 13 of the Convention, with which it has close affinity – that there is an effective remedy available in respect of the alleged violation. The rule is therefore an indispensable part of the functioning of this system of protection (see *Vučković and Others v. Serbia* (preliminary objection) [GC], nos. 17153/11 and 29 others, § 69, 25 March 2014).

46. The object of the rule is to allow the national authorities to address the allegation of a violation of a Convention right and, where appropriate, to afford redress before that allegation is submitted to the Court. If the complaint presented before the Court has not been put, either explicitly or in substance, to the national courts when it could have been raised, the national legal order has been denied the opportunity which the rule on exhaustion of domestic remedies is intended to give it to address the Convention issue (see *S.M.M. v. the United Kingdom*, no. 77450/12, § 52, 22 June 2017). Furthermore, the Court is not a court of first instance; it does not have the capacity, nor is it appropriate to its function as an international court, to adjudicate on cases which require the finding of basic facts, which should, as a matter of principle and effective practice, be the domain of domestic jurisdiction (see *Demopoulos and Others v. Turkey* (dec.) [GC], nos. 46113/99, 3843/02, 13751/02, 13466/03, 10200/04, 14163/04, 19993/04 and 21819/04, § 69, ECHR 2010). In cases requiring the balancing of conflicting interests under, for example, Article 8 of the

Convention it is particularly important that the domestic courts are first given the opportunity to strike the "complex and delicate" balance between the competing interests at stake. Those courts are in principle better placed than this Court to make such an assessment and, as a consequence, their conclusions will be central to its own consideration of the issue (see *Palomo Sánchez and Others v. Spain* [GC], nos. 28955/06, 28957/06, 28959/06 and 28964/06, § 57, 12 September 2011 as regards Article 10; *Courtney v. Ireland* (dec), no. 69558/10, 18 December 2012; and *Charron and Merle-Montet v. France* (dec), no. 22612/15, § 30, 16 January 2018 as regards Article 8).

47. The obligation under Article 35 requires only that an applicant should have normal recourse to the remedies likely to be effective, adequate and accessible (see *Sejdovic v. Italy* [GC], no. 56581/00, § 45, ECHR 2006-II). To be effective, a remedy must be capable of remedying directly the impugned state of affairs and must offer reasonable prospects of success. However, the existence of mere doubts as to the prospects of success of a particular remedy which is not obviously futile is not a valid reason for failing to exhaust that avenue of redress (see *Vučković and Others*, cited above, § 74).

48. It is incumbent on the Government claiming non-exhaustion to satisfy the Court that the remedy was an effective one available in theory and in practice at the relevant time, that is to say that it was accessible, was one which was capable of providing redress in respect of the applicant's complaints, and offered reasonable prospects of success (see *Sejdovic*, cited above, § 46). However, once this burden of proof has been satisfied, it falls to the applicant to establish that the remedy advanced by the Government was in fact used or was for some reason inadequate and ineffective in the particular circumstances of the case, or that there existed special circumstances absolving him or her from the requirement (see *Vučković and Others*, cited above, § 77).

49. The Court further reiterates at the outset that the Convention does not provide for the institution of an *actio popularis*. Under the Court's well-established case-law, in proceedings originating in an individual application under Article 34 of the Convention, its task is not to review domestic law *in abstracto*. Instead, it must determine whether the manner in which it was applied to, or affected, the applicant gave rise to a violation of the Convention (see *Correia de Matos v. Portugal* [GC], no. 56402/12, § 115, 4 April 2018, with further references).

2. Application of the above principles to the present case

50. The issue in the present case before the Court is not, as the applicant alleges, the abstract question whether the absence of regulations on the legal identification of intersex people in Ukraine is compatible with the

Convention, but whether his rights under the Convention have been respected.

51. The Court notes that the applicant, who was registered as male at birth, was eventually found to be an intersex person and identifies as female. He sought to change his sex marker from "male" to "female" in his identity documents and amend his surname, given name and patronymic accordingly.

52. It appears that, when applying for those changes to the registration office and subsequently to the administrative courts, the applicant made no attempt to exhaust the remedy indicated by these courts. In the absence of legal provisions explicitly covering the situation of intersex people, he did not consider to base his claim on the Rules "on changing, renewing or annulling civil status registration records". The Kyiv Circuit Administrative Court, despite rejecting the applicant's claim as not based on law, explained to him that there was no explicit provision in the law against his case, and, on the contrary, guided him as to the further concrete steps to be taken in order to obtain what he wanted (see paragraph 16 above). This decision was confirmed by the courts of two levels of jurisdiction.

53. The Court observes that the Government provided an example of domestic case-law where a person aged thirty-two had obtained a judicial finding that the wrong gender had been assigned to him at birth based on the Rules "on changing, renewing or annulling civil status registration records" (see paragraph 29 above). This is the only known judicial decision where the issue of an alleged error in the assignment of gender in a birth certificate was dealt with in respect of an adult person. It appears that in the cited case, in which the decision was handed down while the applicant's case was pending, the courts interpreted and applied the legal rules in a manner favourable to the claimant. Although it remains unknown whether that person was intersex, what kind of medical documents were presented to the court in that case, and how different the medical situation was, it cannot be ruled out that a similar approach could be applied to the applicant in the present case.

54. Overall, the Court considers that there was no reason for the applicant to insist on the absence of a legal mechanism instead of trying the one suggested by the administrative court, which could not be regarded as obviously futile.

55. It follows that, in the circumstances of the case, the applicant has not shown that the first remedy referred to by the Government was inadequate or ineffective. His failure to pursue that avenue was not justified (see paragraph 47 above). There is no reason to assume that he could not still make use of it.

56. As regards the second domestic remedy suggested by the Government, that is to say, compliance with the gender reassignment (correction) preconditions before seeking to change one's legal identity, the

Court accepts the applicant's reservations. That said, it cannot be overlooked that the applicant did pursue "feminising" hormone treatment and considered surgery with a view to removing the testes (see paragraphs 10 and 12 above). However, only if the nature and extent of the medical intervention were in strict compliance with the applicant's wishes, this option, based on Order no. 1041 of the Ministry of Public Health (see paragraphs 25 and 26 above), might offer an effective remedy for his situation (see *A.P., Garçon and Nicot v. France*, nos. 79885/12 and 2 others, §§ 126-35, 6 April 2017 (extracts)). The Court sees however no need to pursue the question of the effectiveness of such a request, as the first of the remedies mentioned by the Government and indicated by the domestic courts is considered to be effective for his case.

57. In the light of the foregoing, the Court concludes that the applicant´s complaint under Article 8 taken alone and in conjunction with Article 14 must be rejected under Article 35 §§ 1 and 4 of the Convention for non-exhaustion of domestic remedies, and his complaint under Article 13 is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

For these reasons, the Court, unanimously,

Declares the application inadmissible.

Done in English and notified in writing on 4 July 2019.

Milan Blaško
Deputy Registrar

Angelika Nußberger
President