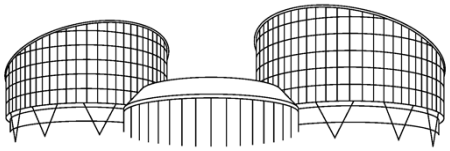

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

CASE OF A.P., GARÇON AND NICOT v. FRANCE

(Applications nos. 79885/12, 52471/13 and 52596/13)

JUDGMENT
[Extracts]

STRASBOURG

6 April 2017

This judgment became final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of A.P., Garçon and Nicot v. France,

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

Angelika Nußberger, *President,*
André Potocki,
Faris Vehabović,
Yonko Grozev,
Carlo Ranzoni,
Mārtiņš Mits,
Lətif Hüseynov, *judges,*
and Milan Blaško, *Deputy Section Registrar,*

Having deliberated in private on 21 and 28 February 2017,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in three applications (nos. 79885/12, 52471/13 and 52596/13) against the French Republic lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by three French nationals, A.P. ("the first applicant"), Émile Garçon ("the second applicant") and Stéphane Nicot ("the third applicant") on 5 December 2012 (as regards the first applicant) and 13 August 2013 (as regards the second and third applicants). The President of the Section acceded to the first applicant's request not to have his name disclosed (Rule 47 § 4 of the Rules of Court).

2. The first applicant was represented before the Court by SCP Gatineau-Fattaccini, a law firm authorised to practise in the *Conseil d'État* and the Court of Cassation. The remaining two applicants were represented by SCP Thouin-Palat and Boucard, a law firm authorised to practise in the *Conseil d'État* and the Court of Cassation, and by Mr Julien Fournier and Mr Emmanuel Pierrat, lawyers practising in Paris. The French Government ("the Government") were represented by their Agent, Mr François Alabrune, Director of Legal Affairs at the Ministry of Foreign Affairs.

3. The applicants, who are transgender persons, alleged that the refusal of their requests to have the indication of gender on their birth certificates corrected, on the grounds that persons making such a request had to substantiate it by demonstrating that they actually suffered from a gender identity disorder and that the change in their appearance was irreversible, amounted to a violation of Article 8 of the Convention (taken in conjunction with Article 3 of the Convention in the first applicant's case). Alleging a violation of Article 8 read in conjunction with Article 3, the first applicant

also criticised the fact that the domestic courts had made the correction of his birth certificate conditional on his undergoing an intrusive and degrading expert medical assessment. He further complained, under Article 6 § 1 of the Convention, "possibly taken in conjunction with Article 8", of a breach of his right to a fair hearing, stemming from the fact that the domestic courts had allegedly committed a manifest error of assessment in finding that he had not provided proof of an irreversible change in his appearance. The second and third applicants also complained of a violation of Article 14 of the Convention taken in conjunction with Article 8.

4. On 18 March 2015 the Government were given notice of the complaints concerning Articles 3, 8 and 14 of the Convention.

5. On 15 June 2015 the non-governmental organisations Alliance Defending Freedom (ADF) International and, jointly, Transgender Europe, Amnesty International and the European Region of the International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA-Europe), were given leave to intervene in the written procedure (Article 36 § 2 of the Convention and Rule 44 § 3).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. On the date of lodging of the applications, the applicants were regarded for civil-law purposes as belonging to the male sex. For that reason, the masculine form is used in referring to them; however, this cannot be construed as excluding them from the gender with which they identify.

A. Application no. 79885/12

7. The first applicant was born in 1983 and lives in Paris.

8. The first applicant stated that, although he had been entered in the register of births as being male, he had always behaved like a girl and his physical appearance had always been very feminine. As an adolescent and young adult he had struggled considerably with his gender identity, since the male identity assigned to him at birth did not match his female psychological and social identity. In 2006, after several doctors had diagnosed a gender identity disorder known as "Harry Benjamin syndrome", he had begun a transitional phase, living in society as a woman and undertaking a course of hormone treatment under the supervision of an endocrinologist, Dr H., and a neuropsychiatrist, Dr Bo.

9. The first applicant submitted three medical certificates issued by these doctors during the period in question. In the first two certificates, dated 12 April 2007, Dr Bo. stated that the first applicant had been under his supervision since 27 April 2005 "for a syndrome typical of gender identity disorder". He stated that "there [was] thus an observable difference between his current physique and the photograph on his identity card", and that "there [were] no medical or psychological contraindications for [an] operation ... on the Adam's apple". In the third certificate, dated 16 January 2008, Dr H. stated that he had been overseeing the applicant's hormone treatment for "typical primary gender identity disorder since 1 June 2006, together with Dr B.", and that "following endocrinology and metabolic tests, including karyotyping, [he was being] treated with anti-androgens and oestrogen". The doctor concluded that "the marked, plausible and genuine nature of his gender dysphoria, together with the 'real life test', [made him] eligible for reassignment surgery, of which [he had] a legitimate expectation".

10. The first applicant also produced a medical certificate issued on 3 April 2008 by another psychiatrist, Dr Ba., which certified that he had "typical Harry Benjamin syndrome" and that "there [were] currently no contraindications for the medical and/or surgical treatment entailed in the gender reassignment sought by the patient".

11. The first applicant stressed that he had not originally intended to undergo mutilating gender reassignment surgery, but had resigned himself to it because the French courts' case-law made it a precondition for a change in civil status.

12. The first applicant decided to undergo surgery in Thailand, performed by Dr S., whom he described as a "world-renowned specialist". The operation was carried out on 3 July 2008. Dr S. issued the following medical certificate:

> "... following a period of diagnosis by psychosexual specialists and an appropriate period of living full-time with a female identity, the above-mentioned person was diagnosed with a gender identity disorder (F64.0) defined as DSM IV, ICD-10. She was accepted for the appropriate surgical treatment, namely gender reassignment surgery.
>
> ... The surgery consisted of an orchidectomy, a vaginoplasty, a clitoroplasty and a labiaplasty, combined in a single operation. On completion of the operation the male sexual organs ... were replaced by organs that are female in appearance and function, with the exception of the reproductive organs. This involved removing the male reproductive organs, resulting in irremediable infertility.
>
> In accordance with all established medical and legal definitions, the operation is irreversible and means that Mr [A.P.]'s male sexual identity has been permanently changed to a female sexual identity."

13. In a certificate signed on 10 September 2008 Dr H. confirmed that the first applicant "[had] undergone irreversible male-to-female gender

reassignment surgery", and stressed that "the request for a change in civil status [was] compelling and admissible [and was] an integral part of the treatment".

14. The first applicant produced four further certificates. The first, dated 26 May 2009, was signed by Dr W., a surgeon. It stated that the first applicant had undergone "a cosmetic laryngoplasty as part of male-to-female transitioning, after irreversible reassignment surgery was performed on the external genitalia". In the second certificate, dated 27 May 2009, a speech therapist stated that she had "worked with [A.P.] for two years on feminisation of her voice", and that "her voice and appearance [were] now wholly feminine and consistent with each other". The third certificate, signed on 23 July 2009 by Dr B., a psychiatrist, read as follows:

> "... [A.P.] is under supervision for typical Harry Benjamin syndrome, for which a gender reassignment process has been under way for several years. She has had hormone treatment and the surgery required to make her appearance and behaviour female. It is therefore legitimate, in the interests of her social and professional integration, for her civil status to be brought into line with her appearance and her wishes. ..."

15. In the fourth certificate, dated 16 March 2010, Dr P., a doctor specialising in fundamental psychopathology and psychoanalysis and a psychotherapist, stated that he had started psychotherapy sessions with the first applicant and, in particular, had "noted ... the consistency between Ms [A.P.]'s statements and her preferred gender identity".

1. *Judgments of the Paris* tribunal de grande instance *of 17 February and 10 November 2009*

16. On 11 September 2008 the first applicant brought proceedings against State Counsel in the Paris *tribunal de grande instance* seeking a declaration that he was now female and that his first name was A. (a female forename). He submitted, in particular, the medical certificates of 12 April 2007 and 16 January and 10 September 2008, and the certificate issued by Dr S. On 16 October 2008 State Counsel requested a multi-disciplinary expert assessment, on the grounds that the applicant's surgery had been performed abroad.

(a) Interlocutory judgment of 17 February 2009

17. On 17 February 2009, in an interlocutory judgment, the Paris *tribunal de grande instance* stressed as follows:

> "Where a diagnosis of gender identity disorder has been made following a thorough assessment and the person concerned has undergone irreversible physical changes for therapeutic purposes, it is appropriate to consider that, although the person's new gender status is imperfect in that the chromosomal make-up is unchanged, he or she is closer, in terms of physical appearance, mindset and social integration, to the preferred gender than to the gender assigned at birth."

However, the court further found:

> "Irrespective of the status of the authors of the medical certificates produced in support of the application, the need for a firm diagnosis means that a multi-disciplinary expert assessment should be carried out in order to establish the applicant's current state from a physiological, biological and psychological perspective and to investigate the persistence of the alleged disorder in his past."

The court appointed three experts – a psychiatrist, an endocrinologist and a gynaecologist – and requested them, after interviewing and examining the first applicant and consulting the medical certificates and operation reports submitted, to:

> "(a) describe the applicant's current physical state ... and the presence or absence of any external or internal genitalia of either sex; order, with the applicant's consent, any samples and laboratory tests capable of establishing the biological and genetic characteristics of the applicant's sex; state whether a mistake could have been made in the sex recorded on the birth certificate, or an organic or biological change could have occurred later; look for traces of possible surgery aimed at bringing about or completing a transformation of the genitalia or secondary sexual characteristics; state whether the patient has been treated with either medication or hormones; state whether the surgery or hormone treatment was carried out on account of pre-existing physical anomalies or because of the patient's psychological state, leaving aside his deliberate intentions;
>
> (b) describe [the first applicant's] mental state and behaviour as regards his gender and, in so far as possible, indicate their origins and trace their development; report on any course of psychotherapy followed, specifying its duration and outcome; state whether the patient suffers from any mental disorder and, if so, specify the nature of that disorder;
>
> (c) express a view on the possible existence of gender identity disorder, giving reasons for making or ruling out such a diagnosis; state whether, in the light of all the available individual medical data (physiological, biological and physical), the person concerned should be regarded as male or female."

18. The court ruled that the costs of the expert assessment should be met by the first applicant, and ordered him to deposit a sum of 1,524 euros (EUR) for that purpose.

19. The first applicant refused to submit to an expert assessment on the grounds that this type of assessment, as well as being very costly, also failed to respect the physical and mental integrity of the person concerned. In his view the documents he had submitted, which had been written by specialist doctors and noted the genuine nature of his change of gender, were more than sufficient and it was not necessary to make him undergo a further battery of traumatic tests.

20. In an order of 13 March 2009 the Deputy President of the Paris Court of Appeal refused the first applicant leave to appeal against this interlocutory judgment.

(b) Judgment of 10 November 2009

21. On 10 November 2009 the Paris *tribunal de grande instance* rejected the first applicant's request. It stressed that the certificates produced by the first applicant, however informative, did not answer the court's questions regarding the origin, nature, persistence and consequences of the disorder in question, and that the doctors who had been consulted could not, in the space of a few lines intended to allow the operation to go ahead, carry out the work of three experts instructed on the basis of a very wide-ranging and detailed mandate. The court noted in particular that the certificates did not mention the applicant's mental state and attitude with regard to his gender, or express a view as to the origin of the disorder and its development. Likewise, they did not specify whether the first applicant suffered from mental-health problems and whether he had followed a course of psychotherapy, nor did they provide any information on his current state, having been written prior to his gender reassignment. The court added that patients who underwent surgery in France submitted a comprehensive file covering all the disciplines concerned as a precondition of reassignment surgery, something which the doctor who had operated on the first applicant in Thailand had apparently not required. In order to have their costs covered by the social-security scheme, patients in France had to undergo a whole series of rigorous examinations. The court found that, in the light of the evidence in the file, the applicant should submit willingly to the expert assessment. In accordance with Article 11 of the Code of Civil Procedure, which authorised the courts to draw all the appropriate inferences from a party's refusal to cooperate with an investigative measure, the court found that, in the absence of a multi-disciplinary expert assessment, the first applicant's request had not been sufficiently substantiated.

2. Paris Court of Appeal judgment of 23 September 2010

22. Following an appeal by the first applicant the Paris Court of Appeal, in a judgment of 23 September 2010, upheld the judgment of 10 November 2009 in so far as it had rejected the first applicant's request for the indication of gender on his birth certificate to be corrected.

23. First of all, the Court of Appeal inferred from Article 8 of the Convention that "where, following medical and surgical treatment undergone for therapeutic purposes", a person with a gender identity disorder no longer possessed all the characteristics of his or her original sex and had taken on a physical appearance closer to that of the opposite sex, which matched his or her social behaviour, the principle of respect for private life warranted amending the civil-status records to indicate the sex corresponding to the person's appearance.

24. However, the Court of Appeal found that, in the light of the documents submitted by the first applicant, it was "not established that he

no longer possesse[d] all the characteristics of the male sex". It stressed in that regard that, although the psychiatrists Bo. and Ba. had given a diagnosis of gender identity disorder in their certificates of 12 April 2007 and 3 April 2008, they had not noted the "absence of mental-health problems". The Court of Appeal further noted that the hormone treatment referred to in the certificates issued by Dr H. on 16 January and 10 September 2008 dated back a long time. It also found that the certificate drawn up by Dr S., the doctor who had operated on the first applicant in Thailand on 3 July 2008, was "extremely brief" and consisted merely in a list of items of medical information that did not make clear whether the gender reassignment surgery had been effective. Furthermore, the documentation produced by the first applicant concerning the clinic, which had been taken from the Internet, was not sufficient to establish either the scientific and surgical reputation of the surgeon who had performed the operation or whether the surgery had complied with standard medical practice. Nor was this demonstrated by Dr W.'s certificate of 26 May 2009, "owing to the lack of any detail".

25. The Court of Appeal went on to observe that the first applicant had refused persistently on principle to submit to an expert assessment and had not cooperated in the assessment ordered by the lower court, "on the irrelevant pretext of protection of his private life, even though the aim [had been] to establish that a person presenting with a gender identity disorder no longer possessed all the characteristics of the sex assigned at birth". The court stressed that "the possible interference with private life [had been] proportionate to the requirement to establish the person's gender identity, which [was] a component of civil status that [was] subject to the public-order principle of inalienability".

26. The Court of Appeal found, however, that the fact that the first applicant was known by a female forename – as was clear from numerous statements from those close to him – allied to his conviction that he was female, the fact that he had had various medical treatments and operations, and the "reality of his social life", meant that he had a legitimate interest in changing his male forenames to female ones. The court therefore ordered that his forenames be corrected on his birth certificate.

3. Judgment of the First Civil Division of the Court of Cassation of 7 June 2012

(a) Grounds of appeal

27. The first applicant appealed on points of law against the judgment of 23 September 2010.

28. He argued, firstly, that the right to respect for private life meant that gender reassignment should be authorised for persons whose physical appearance was closer to that of the opposite gender, to which their social

behaviour corresponded. He criticised the Court of Appeal's refusal of his request to have the indication of his gender amended because he had refused to cooperate in an expert assessment aimed at determining the origins of his gender identity disorder and its development, and at ascertaining that he no longer had all the characteristics of the male sex. In his view, in ruling in this way after noting that he was known by a female forename, that he was convinced that he belonged to the female sex, and that he had had various medical and surgical treatments and lived in society as a woman, the Court of Appeal had breached Article 8 of the Convention. The first applicant referred, in particular, to the position of the Commissioner for Human Rights of the Council of Europe as set out in his issue paper of October 2009 entitled "Human rights and gender identity", and to Resolution 1728 (2010) of the Parliamentary Assembly of the Council of Europe on discrimination on the basis of sexual orientation and gender identity (see paragraphs 73 and 75 below).

29. Secondly, he argued that it had been fully established by the medical certificates he had submitted that he was transgender, that he had undergone surgery which made him a woman, and that his physical appearance and social behaviour were female. In ruling that these documents were insufficient to establish the existence of the conditions required for gender reassignment, and criticising him for not cooperating with the expert assessment, the Court of Appeal had therefore distorted the evidence.

30. Thirdly, he alleged a violation of Article 14 of the Convention taken in conjunction with Article 8, taking the view that the Court of Appeal, in finding that he should have submitted to the expert assessment and in dismissing his appeal, had based its assessment on discriminatory grounds.

(b) The judgment

31. On 7 June 2012 the Court of Cassation (First Civil Division, Bulletin 2012, I, no. 123) dismissed the appeal in the following terms:

> "... In order to substantiate a request to have the gender markers on a birth certificate corrected, the person concerned must demonstrate, in view of the widely accepted position within the scientific community, that he or she actually suffers from the gender identity disorder in question and that the change in his or her appearance is irreversible. After examining the documents submitted, without distorting them, and having noted, firstly, that the certificate describing surgery performed in Thailand was very brief (being confined to a list of items of medical information and saying nothing about the effectiveness of the operation) and, secondly, that [the first applicant] refused in principle to undergo the expert assessment ordered by the first-instance court, the Court of Appeal was entitled to refuse the application for correction of the gender markers on the appellant's birth certificate ..."

B. Application no. 52471/12

32. The second applicant was born in 1958 and lives in Le Perreux-Sur-Marne.

33. He submitted that, although he had been entered in the register of births as male, he had been aware from a very young age of belonging to the female gender.

34. Owing to social pressure he had tried to hide his true nature and had married twice while living with the male identity entered on his birth certificate. However the marriages, from which he had children, had ended in divorce.

35. He dressed as a woman and was perceived by others as a woman. Since 2004 he had been undergoing treatment with feminising hormones and had undergone genital reconstruction surgery.

1. *Judgment of the Créteil* tribunal de grande instance *of 9 February 2010*

36. On 17 March 2009 the second applicant brought proceedings against State Counsel in the Créteil *tribunal de grande instance* seeking an order for his birth certificate to be corrected by replacing the word "male" with "female" and replacing his male forenames with the name "Émilie". He referred in particular to a certificate issued in 2004 by Dr B., a psychiatrist and specialist in transgender issues, stating that the second applicant was a transgender person.

37. The court gave judgment on 9 February 2010. It noted that the second applicant had merely filed a few invoices dated 2008 and issued in the name of "Émilie" Garçon, four statements made by witnesses in 2008 saying that they had known the second applicant for a number of years, knew that he was a "transgender" person (or "transsexual", as one of them put it) and had seen him "evolve as a woman without any apparent difficulty", and a certificate dated 23 April 2009 signed by the endocrinologist Dr T., according to which the second applicant had been receiving treatment for gender dysphoria since 2006 and taking feminising hormones since 2004, a treatment that was well tolerated and effective. Noting also that the second applicant had not submitted the certificate from Dr B., the court found that he had not "[demonstrated] that he was actually transgender as claimed". As he had not demonstrated that he actually suffered from the alleged disorder, his request had to be refused, since a change to the indication of gender in civil-status documents "was possible only in order to make a proven *de facto* situation official". The court held that it had to refuse the request for a change of forename on the same grounds, as that request was merely secondary to the request for a change in civil status.

2. Judgment of the Paris Court of Appeal of 27 January 2011

38. On 27 January 2011, following an appeal by the second applicant, the Paris Court of Appeal upheld the judgment of 9 February 2010 giving the following reasons:

> "... While the principle of the inalienability of civil status precludes the law from recognising a change wilfully sought by an individual, it does not imply that civil status cannot be changed.
>
> Where a genuine gender identity disorder that is medically recognised and untreatable has been diagnosed following a rigorous assessment, and the transgender person has undergone irreversible physical changes for therapeutic purposes, it is appropriate to consider that, although the person's new gender status is imperfect in that the chromosomal make-up is unchanged, he or she is closer, in terms of physical appearance, mindset and social integration, to the preferred gender than to the gender assigned at birth. In these circumstances, and since under Article 57 of the Civil Code the birth certificate must mention the sex of the individual concerned, the principle of change should be accepted.
>
> In the present case Émile Maurice Jean Marc Garçon ... was entered in the civil-status registers as male.
>
> It is up to the appellant to give reasons, in particular on the basis of medical evidence, why he should be regarded as female as he requests.
>
> The appellant claims to be a transgender person who has lived with a female gender identity for several years. He argues that the disparity between his preferred gender and the gender assigned to him at birth is sufficient to warrant a change in civil status without his first having to demonstrate that he has undergone gender reassignment surgery.
>
> Regarding the medical aspect he has simply submitted, as he did before the first-instance court, a certificate issued by Dr [T.] dated 23 April 2009, written on the headed paper of Dr [D. S.-B.], in which that doctor 'certifies that the endocrinologist Dr [S.-B.] has been treating Mr Émile (Émilie) Garçon for gender dysphoria ... since 2006', and specifies that the appellant has been receiving treatment with feminising hormones since 2004 and that the treatment is well tolerated and effective.
>
> This medical certificate stating that the appellant followed a course of feminising hormone treatment from 2004 to 2009 does not in itself demonstrate the existence of a permanent physical or physiological change and hence the irreversible nature of the gender reassignment process.
>
> An expert assessment appears pointless since the appellant, who rejects the idea of having to undergo genital surgery, does not mention any plastic surgery performed in connection with the current course of hormone treatment, and has not produced any opinion by a psychiatrist capable of demonstrating the existence and persistence of the alleged disorder, although Émile Garçon's birth certificate states that he has been married twice ... and divorced twice ..."

3. Judgment of the first Civil Division of the Court of Cassation of 13 February 2013

(a) Grounds of appeal

39. The second applicant appealed on points of law against the judgment of 27 January 2011. He argued in particular that, in refusing his requests on the pretext that he had not demonstrated either the existence of "permanent physical or physiological change and hence the irreversible nature of the gender reassignment process", or "the existence and persistence of the alleged disorder", the Court of Appeal had breached Article 8 of the Convention, since the right to respect for private life implied the right for individuals to define their sexual identity and to have their civil-status documents amended to reflect their preferred gender identity, without having to demonstrate the existence of a gender identity disorder or gender dysphoria, or to undergo a prior process of irreversible gender reassignment. Making the right to amendment of civil-status documents subject to proof of having undergone an irreversible process of gender reassignment amounted to requiring the holders of that right to be sterilised in order to exercise it, thereby interfering with their dignity and with due respect for their bodies and the intimacy of their private lives. The second applicant inferred from this that there had been a violation of Article 8 on account of the fact that the Court of Appeal had required him to furnish proof of having undergone that process. He added that it was discriminatory and contrary to Article 14 of the Convention to make this right subject to such proof and to proof of a gender identity disorder or gender dysphoria.

(b) Judgment of 13 February 2013

40. On 13 February 2013 the Court of Cassation (First Civil Division) dismissed the appeal on points of law in the following terms:

> "... In order to substantiate a request for correction of the gender markers on a birth certificate, the person concerned must demonstrate, in view of the widely accepted position within the scientific community, that he or she actually suffers from the gender identity disorder in question and that the change in his or her appearance is irreversible.
>
> Furthermore, after noting that [the second applicant] had merely produced a certificate issued by a doctor on 23 April 2009 on the headed paper of a different doctor, in which the former certified that the latter, an endocrinologist, was treating [the second applicant] for gender dysphoria, and which stated that the patient had been receiving treatment with feminising hormones since 2004, the Court of Appeal found that this medical certificate alone did not demonstrate the existence or persistence of a gender identity disorder, or the irreversible nature of the gender reassignment process. These are not discriminatory conditions nor do they infringe the principles set out in Articles 8 and 14 of the European Convention on Human Rights or Articles 16 and 16-1 of the Civil Code, as they are based on a fair balance between the requirements of legal certainty and the inalienability of civil status on the one hand, and the protection of private life and respect for the human body on the other ..."

C. Application no. 52471/12

41. The third applicant was born in 1952 and lives in Essey-les-Nancy.

42. He submitted that, although he had been entered in the register of births as male, he had been aware from a very young age of belonging to the female gender. He had lived with a woman from 1975 to 1991 and they had had a child together in 1978.

43. The third applicant said that he had hidden his true nature for a long time as he had been afraid of being bullied and later of losing custody of his daughter. Once his daughter was grown up he had adapted his appearance and social conduct to match his female gender identity. While most of the documents he used in everyday life reflected his gender identity, this was not the case of his civil-status documents, passport, driving licence, vehicle registration papers or entry in the national identity register. As a result, he was constantly obliged to refer to his transgender identity, to the detriment of his private life.

1. *Judgments of the Nancy* tribunal de grande instance *of 7 November 2008 and 13 March 2009*

44. On 13 June 2007 the third applicant brought proceedings against State Counsel in the Nancy *tribunal de grande instance* seeking an order for his birth certificate to be corrected by replacing the word "male" with "female" and for his forenames to be replaced by the name "Stéphanie".

(a) Judgment of 7 November 2008

45. The Nancy *tribunal de grande instance* delivered an initial judgment on 7 November 2008. It pointed out that it was "now unanimously recognised by both domestic and European case-law that transgender persons [had] the right to respect for their private life" and were therefore entitled to have their gender and forenames amended on their civil-status documents. However, the court stressed that a number of conditions had to be met, stating as follows:

> "[T]he gender identity disorder [must] be established not only medically (usually by a multi-disciplinary team of doctors, surgeons, an endocrinologist, a psychologist and a psychiatrist), but also judicially, either by means of an expert assessment (although the court is not required to order one) or on the basis of medical certificates produced by the person concerned establishing with certainty that he or she has undergone medical treatment and surgery in order to achieve gender reassignment."

The court went on to find as follows:

> "Persons wishing to have their gender changed in their civil-status documents must demonstrate that they have undergone medical and surgical treatment for therapeutic purposes and have had previous surgery to remove the external characteristics of their original sex.

Hence, only 'genuine' transgender persons can have the gender markers in their civil-status documents changed, that is to say, persons who have already undergone an irreversible gender reassignment process.

In other words, a court may order individuals' civil-status documents to be amended to reflect their preferred new gender only after they have genuinely altered their sexual anatomy to make it conform as closely as possible to their preferred gender.

These medical and surgical conditions are explained by the fact that a genuine gender identity disorder, which is characterised by 'a deeply held and unshakeable feeling of belonging to the opposite gender to one's genetically, anatomically and legally assigned gender, accompanied by an intense and consistent need to change one's gender and civil status', must be distinguished from other related but different concepts such as transvestism, which is based solely on reversible outward appearance and does not entail a change of anatomical sex.

In the present case, although S. Nicot is female in appearance and has provided documents and invoices issued to him by certain bodies in the name of Ms Stéphanie Nicot, these factors do not enable the court to assess whether he has actually changed gender. At the hearing, when questioned by the President regarding any treatment he may have undergone, S. Nicot took a militant stance – as he is perfectly entitled to do – and invoked the confidential nature of his private life ..."

46. The court therefore stayed the proceedings concerning the third applicant's requests and ordered him to "produce in the proceedings any medical documents relating to the medical and surgical treatment undergone and capable of demonstrating that he [had] actually changed gender".

(b) Judgment of 13 March 2009

47. The third applicant refused to produce any medical documents, taking the view that he had demonstrated sufficiently that he was physically and psychologically female and was integrated socially as a woman. He simply stated that his general practitioner had prescribed hormone treatment for him which meant that he had female secondary sexual characteristics such as breasts. State Counsel concluded that it was not possible to amend his civil status without proof of gender reassignment surgery.

48. In a judgment of 13 March 2009 the Nancy *tribunal de grande instance* noted that the third applicant had not produced medical and surgical evidence of gender reassignment, and therefore rejected his request. The judgment reiterated the reasoning of the judgment of 7 November 2008. The court stated as follows:

"[A change of gender in civil-status documents may be granted only to] 'genuine' transgender persons, that is, to persons who have already undergone irreversible gender reassignment, and not to persons who merely claim to be 'transgender' on the grounds that they are regarded socially as belonging to the gender corresponding to their outward appearance, but who oppose any gender reassignment surgery or refuse to provide medical and surgical evidence of such reassignment having been carried out by means of medical treatment and surgery."

The court went on to find as follows:

> "Granting S. Nicot's request would effectively amount to the creation by the courts of a 'third gender', namely persons of female appearance who nevertheless continue to have a male external sexual anatomy but can marry a man. In the opposite case, a person who is male in appearance would continue to have female genitalia and could thus give birth to a child!!! As the case-law currently stands, such a situation is wholly prohibited."

2. Judgment of the Nancy Court of Appeal of 3 January 2011

49. In a judgment of 3 January 2011 the Nancy Court of Appeal upheld the judgment of 13 March 2009. It stressed in particular that "the request for a change in civil status [did] not necessarily require proof of surgical change such as the removal or alteration of the genitalia, or plastic surgery", but implied that "the irreversible nature of the gender reassignment process be established in advance". The court went on to find that the third applicant "[had] not provided such intrinsic proof, which [could] on no account derive from the fact that he [was] regarded by others as female". It added that respect for private life could not result in the third applicant being exempted from this "obligation to provide proof, which [was] not designed to confuse transgenderism and transsexualism but which, besides the inalienability of civil status, [was] aimed at ensuring the consistency and reliability of civil-status records". That requirement, which was legitimate and in no way discriminatory, was not in breach of Article 14 of the Convention, and it was not the court's task to remedy the deficiencies in the evidence adduced by the third applicant.

3. Court of Cassation judgment of 13 February 2013

(a) Grounds of appeal

50. The third applicant lodged an appeal on points of law against the judgment of 3 January 2011. He argued that the right to respect for private life entailed the right to define one's gender identity and to have civil-status documents amended to reflect one's preferred gender, without a prior obligation to undergo an irreversible gender reassignment process and provide proof thereof. In finding that he should have furnished proof of this irreversible process, the Court of Appeal had therefore breached Article 8 of the Convention, especially since neither the principle of the inalienability of civil status nor the need for consistency and reliability of civil-status records made it necessary for individuals to undergo an irreversible process of gender reassignment, and provide proof thereof, in order to have their civil-status documents amended. The third applicant added that it was discriminatory and contrary to Article 14 of the Convention to make individuals' right to have their civil-status documents amended to reflect their preferred gender conditional upon proof that they had undergone irreversible gender reassignment.

(b) Judgment of 13 February 2013

51. The third applicant's appeal was examined at the same time as the second applicant's.

52. On 13 February 2013 the Court of Cassation (First Civil Division) dismissed the appeal on the following grounds:

> "... In order to substantiate a request for correction of the gender markers on a birth certificate, the person concerned must demonstrate, in view of the widely accepted position within the scientific community, that he or she actually suffers from the gender identity disorder in question and that the change in his or her appearance is irreversible.
>
> Given that [the third applicant] has not furnished intrinsic evidence of the irreversible nature of the gender reassignment process in his case, which cannot derive from the sole fact that he is seen by others as female, the dismissal of his claims by the Court of Appeal did not infringe the principles laid down under Articles 8 and 14 of the Convention ..., but rather struck a fair balance between the requirements of legal certainty and the inalienability of civil status on the one hand, and the protection of private life on the other ..."

II. REPORT BY THE HIGH AUTHORITY FOR HEALTH

53. In November 2009 the High Authority for Health published a report entitled "Medical treatment of gender identity disorders in France – situation and outlook".

54. Among other things, the report advocated a "care pathway" involving several stages. The first consisted in diagnosing and assessing the "gender identity disorder"; the aim was to "avoid, as far as possible, unwarranted irreversible changes". The second stage consisted in "real-life experience", the aim being to study the individual's capacity to live in the desired role. The person lived full-time in the desired gender role in his or her daily life and social and professional activities, and demonstrated his or her social integration in that role, chose a new forename and informed family members of the intended change. The third stage consisted in hormone substitution, whereby exogenous hormones were administered "in order to eliminate the secondary sexual characteristics of the sex of origin and replace them as fully as possible with those of the opposite sex". The fourth stage consisted in reassignment surgery. The report specified in that regard that, although most transgender persons wished to have reassignment surgery, it was contraindicated for some patients on medical grounds, while others felt that this step was not necessary in their case and that, for instance, hormone substitution, "peripheral" surgery and speech therapy were sufficient to give them the appearance of belonging to the other gender and allowing them to be recognised as such by society. The report further observed that a reluctance to undergo surgery might also be due to the considerable technical difficulties and the secondary effects linked to the operations.

III. RELEVANT DOMESTIC LAW AND PRACTICE

A. Code of Civil Procedure

55. The relevant provisions of the Code of Civil Procedure read as follows:

Article 11

"The parties must cooperate in the investigative measures. The judge may draw all the appropriate inferences from a failure or refusal to do so. ..."

Article 143

"The facts on which the outcome of the dispute depends may, at the parties' request or of the judge's own motion, be the subject of any legally admissible investigative measure."

Article 144

"Investigative measures may be ordered in any event where the judge does not have sufficient information to determine the case."

Article 147

"The judge must confine the choice of measures to what is sufficient in order to resolve the dispute, focusing on choosing the simplest and least costly option."

Article 232

"The judge may seek clarifications from any person of his or her choosing, in the form of observations, a consultation or an expert assessment on a factual issue which requires technical knowledge."

Article 263

"An expert assessment should be ordered only in cases where observations or a consultation would not provide the judge with sufficient clarification."

B. Case-law of the Court of Cassation

56. In two judgments of 11 December 1992 (nos. 91-11900 and 91-12373; Bulletin 1992 AP no. 13), the Court of Cassation, sitting as a full court, held as follows:

"Where a person with a gender identity disorder no longer possesses all the characteristics of his or her original sex and has taken on a physical appearance closer to that of the opposite sex, which matches his or her social behaviour, the principle of respect for private life warrants amending the civil-status records to indicate the sex corresponding to the person's appearance."

The Court of Cassation stressed that "the principle of the inalienability of civil status [did] not preclude such amendment". It therefore quashed the

contested judgments, which had dismissed requests from transgender persons to have the gender markers on their birth certificates corrected.

57. In the second of these cases the appellant had unsuccessfully requested the appellate court to order an expert medical assessment in order to demonstrate the feminisation process he had undergone and establish that he was transgender. The Court of Cassation noted that, while the fact that the appellant was female was attested to by a certificate from the surgeon who had performed the operation and the unofficial opinion of a doctor consulted by the appellant, the actual existence or otherwise of a gender identity disorder could be established only by means of an expert assessment. It therefore criticised the impugned judgment for refusing the request.

58. The Court of Cassation, sitting in plenary, thus established in 1992 five conditions for amending the indication of gender on a person's birth certificate. The person concerned had to (1) have a gender identity disorder, (2) have undergone medical and surgical treatment with a therapeutic purpose, (3) no longer have all the characteristics of the sex assigned at birth, (4) have taken on a physical appearance close to that of the other sex, and (5) display social behaviour corresponding to that sex. However, in two judgments delivered on 7 June 2012 (Bulletin 2012, I, nos. 123 and 124), one of which concerned the first applicant's case, the First Civil Division found as follows:

> "In order to substantiate a request for correction of the gender markers on a birth certificate, the person concerned must demonstrate, in view of the widely accepted position within the scientific community, that he or she actually suffers from the gender identity disorder in question and that the change in his or her appearance is irreversible."

The First Civil Division confirmed that approach on 13 February 2013 (see paragraphs 40 and 52 above).

C. Decree no. 2010-125 of 8 February 2010

59. Decree no. 2010-125 of 8 February 2010 removed the reference to "early gender identity disorder" from the annex to Article D. 322-1 of the Social Security Code concerning the medical criteria used to define "long-term psychiatric disorders" within the category of long-term disorders.

D. Circular no. CIV/07/10 of 14 May 2010 on requests for a change of gender in civil-status documents

60. The Minister of Justice and Freedoms issued Circular no. CIV/07/10, requesting Principal State Counsel attached to the Court of Cassation, and

State Counsel and Principal State Counsel at the appellate courts, as follows:

> "...[to] respond favourably to requests for a change in civil status [from transsexual or transgender persons] where hormone treatments producing permanent physical or physiological change, combined as appropriate with plastic surgery (breast prostheses or removal of mammary glands, facial plastic surgery, etc.) have resulted in an irreversible change of gender, without requiring removal of the genitalia."

The circular also requested them to "seek an expert assessment only if the information provided raise[d] serious doubts as to whether the person concerned [was] transgender".

E. Reply by the Minister of Justice and Freedoms to Written Question no. 14524 (Senate Official Gazette, 30 December 2010)

61. Written Question no. 14524 (Senate Official Gazette, 22 July 2010, p. 1904) asked the Minister of Justice and Freedoms to clarify the meaning of the word "irreversible" in Circular no. CIV/07/10 of 14 May 2010.

62. The Minister of Justice and Freedoms replied as follows (Senate Official Gazette, 30 December 2010, p. 3373):

> "The concept of irreversible gender reassignment alluded to in the circular of 14 May 2010 refers to Council of Europe Recommendation no. 1117 on the conditions of transsexuals, which is cited in the report by the High Authority for Health entitled 'Treatment of gender identity disorders in France – situation and outlook'. This is a medical rather than a legal concept. According to some specialists, irreversible reassignment may result from hormone substitution, which erases certain physiological characteristics, including fertility, sometimes irreversibly. It is for the persons concerned to furnish evidence in this regard, in particular by producing certificates from recognised specialists in this field (psychiatrists, endocrinologists and, where appropriate, surgeons) who have overseen their gender transition. State Counsel's opinion should then be based, case by case, on the medical documents produced by the person concerned."

F. Opinion of the National Advisory Commission on Human Rights (CNCDH) of 27 June 2013

63. In January 2013 the Minister of Justice and the Minister of Women's Rights addressed two questions to the National Advisory Commission on Human Rights concerning the definition of and position regarding "gender identity" in French law and the conditions for amending the indication of gender in civil-status documents. The Commission heard evidence from researchers, law lecturers, representatives of associations and members of the Senate, and took into consideration written contributions from non-governmental organisations, doctors, social science researchers and rights advocates.

64. In an opinion of 27 June 2013 the CNCDH noted that the Court of Cassation judgments of 7 June 2012 and 13 February 2013, cited above, established two conditions for changing the indication of gender in civil-status documents, namely a diagnosis of gender identity disorder and an irreversible change in physical appearance. It observed that "although surgery [was] not a requirement, the law nevertheless require[d] irreversible medical treatment, which entail[ed], among other things, sterilisation". The CNCDH also observed that the notion of irreversibility, which was "ill-defined and difficult to prove ... frequently result[ed] in a request for an expert medical assessment" and that, since the rulings on this point differed from one court to another, there were substantial inequalities in the situations of transgender persons in this regard. It added that the expert medical assessments were seen as intrusive and humiliating by the persons concerned and contributed to the protraction of the process of changing gender in civil-status documents, and that the amount of evidence required by the case-law, and the frequency of requests for expert assessments, raised the issue of the suspicions that all too often surrounded transgender people and which they perceived as a kind of denial of their identity.

65. The CNCDH went on to advocate abolishing the medical requirements. In that regard it took the view that, viewed in a judicial context, the requirement to demonstrate the existence of "gender dysphoria" was problematic in so far as "the wording itself appear[ed] to endorse the view of transgender identity as an illness, although gender identity disorders [had] been removed from the list of psychiatric disorders [by Decree no. 2010-125 of 8 February 2010]". According to the CNCDH, such a condition, which was required for the purposes of differential diagnosis strictly in the context of the medical procedures undergone by transgender persons, contributed in a judicial context to the stigmatisation of these persons and to a lack of understanding of transgender identity. With regard to the requirement to prove an irreversible change in physical appearance, the CNCDH stressed as follows:

> "23. ... This condition obliges the persons concerned to undergo medical treatments with very far-reaching consequences which entail an obligation to be sterilised. This obligation does not necessarily involve gender reassignment surgery but may be achieved by means of hormone treatment, which, according to the High Authority for Health, is liable to lead to irreversible metabolic changes if taken over a long period. Different patients appear to react differently to hormone treatment, with effects (including sterility) being produced after varying periods of time. In other words, the judicial proceedings depend on the – uncertain – progress of the medical procedure, thus contributing to considerable inequalities between the persons concerned. Furthermore, the irreversible nature of the change in physical appearance is difficult to prove and very often, in the courts' view, warrants recourse to an expert medical assessment, despite the recommendations of the circular of 14 May 2010, which called on judges to 'seek an expert assessment only if the information provided raises serious doubts as to whether the person concerned is transgender'. Besides the cost to the person concerned, expert assessments are a factor in making the proceedings

unacceptably long. Moreover, when hormone treatment is insufficient to prove the irreversible nature of the change in physical appearance, persons seeking a change of gender in their civil-status documents are often forced, as a last resort, to agree to surgery (in particular a penectomy or mastectomy). The medical requirements laid down by the law are therefore problematic in so far as some people who do not wish to have recourse to these treatments and operations nevertheless agree to this constraint in the hope of securing a successful outcome in the judicial proceedings concerning them. Consequently, the CNCDH calls for an end to any requirement to undergo gender reassignment, whether through hormone treatment entailing sterility or through recourse to surgery. ...”

G. Draft legislation

66. A bill on the protection of gender identity (no. 216) was registered with the Presidency of the Senate on 11 December 2013. It is aimed at defining a procedure enabling transgender persons to obtain, within a reasonable time and without being required to undergo any medical or surgical treatment, a change of gender in their civil-status documents and the corresponding change of forename. The reasoning included the following passage:

“Four Court of Cassation judgments [of 7 June 2012 and 13 February 2013] established the principle whereby ‘in order to substantiate a request for correction of the gender markers on a birth certificate, the person concerned must demonstrate, in view of the widely accepted position within the scientific community, that he or she actually suffers from the gender identity disorder in question and that the change in his or her appearance is irreversible’. Two conditions are therefore established: a diagnosis of gender identity disorder and an irreversible change in physical appearance. While the law does not require a surgical operation, it does require irreversible medical treatment entailing sterilisation.”

67. A further bill, on gender identity, drafted by the National Transgender Association in May 2014, is designed to enable transgender persons to obtain a change in civil status without satisfying any medical requirements and without going through the courts. Referring to the Court of Cassation judgments of 7 June 2012 and 13 February 2013, the explanatory memorandum stresses that “while the Court of Cassation does not explicitly require a surgical operation, it does nevertheless, through the nebulous criterion of an irreversible change in appearance, require medical treatment entailing sterilisation”. The explanatory memorandum adds that “the interpretation of this criterion by most of the courts amounts to requiring the transgender person to undergo a surgical operation resulting in sterility”.

H. Law on the modernisation of justice in the twenty-first century

68. Section 56 of the Law on the modernisation of justice in the twenty-first century (enacted on 12 October 2016) introduced the following

Articles into the Civil Code, concerning amendments to the indication of gender in civil-status documents:

Article 61-5

"Adults or emancipated minors who demonstrate on the basis of a sufficient combination of circumstances that the gender indicated in their civil-status documents does not correspond to the gender with which they identify, and with which others identify them, may have that indication amended.

The main circumstances taken into account, proof of which may take any form, shall be the following:

1. the fact that the persons concerned identify themselves publicly as belonging to the preferred gender;

2. the fact that they are known by family, friends or colleagues as belonging to the preferred gender;

3. the fact that they have had their forename changed so that it corresponds to their preferred gender."

Article 61-6

"The application shall be made to the *tribunal de grande instance*.

The applicant shall state his or her free and informed consent to the change of gender in the civil-status documents and shall produce any available evidence in support of the application.

The fact that an applicant has not undergone medical treatment, surgery or sterilisation shall not constitute grounds for refusing the request.

The court shall note the fact that the applicant satisfies the conditions laid down in Article 61-5 and shall order the amendment of the indication of gender and, as applicable, of the individual's forenames, in the civil-status documents."

Article 61-7

"At the request of State Counsel, an entry shall be made in the margin of the individual's birth certificate recording the change of gender and, as applicable, of forenames. This shall be done within fifteen days from the date on which the corresponding decision becomes final.

By way of derogation from Article 61-4, changes to forenames related to a change of gender shall be entered in the margin of the civil-status documents of spouses and children only with their consent or that of their legal representatives.

Articles 100 and 101 shall be applicable to changes of gender."

Article 61-8

"A change of gender in civil-status documents shall have no implications for obligations entered into *vis-à-vis* third parties or parent-child relationships established prior to the change."

69. On 17 November 2016 the Constitutional Council found section 56 of the Law to be compatible with the Constitution (Decision no. 2016-739

DC). It stressed in particular that "in enabling persons to obtain the amendment of the gender markers in their civil-status documents without requiring them to undergo medical treatment, surgery or sterilisation, the provisions [did] not infringe in any way the principle of the protection of human dignity".

IV. COMPARATIVE-LAW MATERIALS

70. It emerges from a document entitled "Trans Rights Europe Map 2016", published on 22 April 2016 by the non-governmental organisation Transgender Europe (see also "Discrimination on grounds of sexual orientation and gender identity in Europe", Council of Europe Publishing, June 2011, and the comparative-law materials referred to in the judgment in *Y.Y. v. Turkey* (no. 14793/08, §§ 35-43, ECHR 2015 (extracts)), that at that time legal recognition of the gender identity of transgender persons was not possible in seven Council of Europe member States (Albania, Andorra, Cyprus, Liechtenstein, Monaco, San Marino and the former Yugoslav Republic of Macedonia).

71. The document also makes clear that such recognition was subject to a legal requirement to undergo sterilisation in twenty-four Council of Europe member States (Armenia, Azerbaijan, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Czech Republic, Finland, France, Georgia, Greece, Latvia, Lithuania, Luxembourg, Montenegro, Norway, Romania, the Russian Federation, Serbia, Slovakia, Slovenia, Switzerland, Turkey and Ukraine). It was possible in sixteen member States without a legal requirement to undergo sterilisation (Austria, Denmark, Estonia, Germany, Hungary, Iceland, Ireland, Italy, Malta, Moldova, the Netherlands, Poland, Portugal, Spain, Sweden and the United Kingdom). France (see paragraph 68 above) and Norway (following a Law of 17 June 2016) have since joined the second category. The number of member States in which recognition is not subject to a legal requirement to undergo sterilisation has thus risen to eighteen (nineteen in Europe, counting Belarus), compared with twenty-two countries in which it is. In several of the countries concerned, the abolition of this requirement is the result of recent legal developments (an Administrative Court judgment of 27 February 2009 in Austria; a Law of 15 March 2010 in Portugal; a Federal Constitutional Court judgment of 11 January 2011 in Germany; a Law of 22 May 2013 in Sweden; a Law of 18 December 2013 in the Netherlands; a Law of 11 June 2014 in Denmark; a Law of 1 April 2015 in Malta; a Law of 15 July 2015 in Ireland; a Court of Cassation judgment of 21 July 2015 in Italy; a Law of 17 June 2016 in Norway; and a Law of 12 October 2016 in France). It appears also that a number of member States are currently reviewing or intend to review the conditions for legal recognition of the identity of transgender persons in order to remove any that appear unreasonable (Council of Europe Steering

Committee for Human Rights: Report on the implementation of Recommendation CM/Rec(2010)5 of the Committee of Ministers to member States on measures to combat discrimination on grounds of sexual orientation or gender identity – CDDH(2013)R77 Addendum VI, 21 March 2013).

72. It also emerges from this last document in particular that a psychiatric diagnosis is among the prerequisites for legal recognition of transgender identity in thirty-six European countries, with only Denmark, Iceland, Malta and Norway having enacted legislation establishing a recognition procedure that excludes such a diagnosis (two of the seventeen Autonomous Communities in Spain also have similar legislation).

V. INTERNATIONAL MATERIALS

A. Council of Europe

1. Commissioner for Human Rights of the Council of Europe

73. In October 2009 the Commissioner for Human Rights of the Council of Europe published an issue paper entitled "Human rights and gender identity" in which he adopted a stance against making legal recognition of the gender identity of transgender persons subject to irreversible sterilisation surgery. The Commissioner stated as follows:

> "...
>
> It should be stressed that the eligibility conditions for the change of sex in documents vary widely across Europe. It is possible to roughly distinguish three categories of countries. In the first category, no provision at all is made for official recognition. As pointed out above, this is in clear breach of established jurisprudence of the ECtHR. In the second and smaller category of countries, there is no requirement to undergo hormonal treatment or surgery of any kind in order to obtain official recognition of the preferred gender. Legal gender recognition is possible by bringing evidence of gender dysphoria before a competent authority, such as experts from the Ministry of Health (in Hungary), the Gender Reassignment Panel (in the UK) or a doctor or clinical psychologist. In the third category of countries, comprising most Council of Europe member states, the individual has to demonstrate:
>
> 1. that (s)he has followed a medically supervised process of gender reassignment – often restricted to certain state appointed doctors or institutions;
>
> 2. that (s)he has been rendered surgically irreversibly infertile (sterilisation), and/or
>
> 3. that (s)he has undergone other medical procedures, such as hormonal treatment.
>
> Such requirements clearly run counter to the respect for the physical integrity of the person. To require sterilisation or other surgery as a prerequisite to enjoy legal recognition of one's preferred gender ignores the fact that while such operations are often desired by transgender persons, this is not always the case. Moreover, surgery of this type is not always medically possible, available, or affordable without health insurance funding. The treatment may not be in accordance with the wishes and needs

of the patient, nor prescribed by his/her medical specialist. Yet the legal recognition of the person's preferred gender identity is rendered impossible without these treatments, putting the transgender person in a limbo without any apparent exit. It is of great concern that transgender people appear to be the only group in Europe subject to legally prescribed, state-enforced sterilisation.

It needs to be noted that many transgender people, and probably most transsexual persons among them, choose to undergo this treatment, often including the elimination of procreative organs. The treatment is often desired as a basic necessity by this group. However, medical treatment must always be administered in the best interests of the individual and adjusted to her/his specific needs and situation. It is disproportionate for the state to prescribe treatment in a 'one size fits all' manner. The basic human rights concern here is to what extent such a strong interference by the state in the private lives of individuals can be justified and whether sterilisation or other medical interventions are required to classify someone as being of the one sex or the other.

...

... States which impose intrusive physical procedures on transgender persons effectively undermine their right to found a family.

..."

2. Committee of Ministers and Parliamentary Assembly of the Council of Europe

74. 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. It stated in particular that "[p]rior requirements, including changes of a physical nature, for legal recognition of a gender reassignment, should be regularly reviewed in order to remove abusive requirements", and that "[m]ember states 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" (Appendix, points 20 and 21).

75. In Resolution 1728 (2010), adopted on 29 April 2010, on discrimination on the basis of sexual orientation and gender identity, the Parliamentary Assembly of the Council of Europe called on States to "... ensure in legislation and in practice [the] right [of transgender persons] to ... official documents that reflect an individual's preferred gender identity, without any prior obligation to undergo sterilisation or other medical procedures such as sex reassignment surgery and hormonal therapy" (point 16.11.2).

76. On 26 June 2013 the Parliamentary Assembly further adopted Resolution 1945 (2013), entitled "Putting an end to coerced sterilisations and castrations", in which it noted as follows:

> "... there is a small but significant number of both sterilisations and castrations which would fall under the various definitions of 'coerced'. These are mainly directed against transgender people, Roma women and convicted sex offenders. Neither forced nor coerced sterilisations or castrations can be legitimated in any way in the 21st century – they must stop" (point 4).

It therefore urged the member States to "revise their laws and policies as necessary to ensure that no one can be coerced into sterilisation or castration in any way for any reason" (point 7.1).

77. On 22 April 2015 the Parliamentary Assembly adopted Resolution 2048 (2015) on discrimination against transgender people in Europe. This called on the member States, among other things, to abolish sterilisation and other compulsory medical treatment, as well as a mental health diagnosis, as a necessary legal requirement to recognise a person's gender identity in laws regulating the procedure for changing a name and registered gender, and to amend classifications of diseases used at national level and advocate the modification of international classifications, making sure that transgender people, including children, were not labelled as mentally ill, while ensuring stigma-free access to necessary medical treatment.

B. United Nations

1. United Nations High Commissioner for Human Rights

78. In her report of 17 November 2011 to the Human Rights Council, entitled "Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity" (A/HRC/19/41), the United Nations High Commissioner for Human Rights observed in particular that regulations in countries that recognised changes in gender often required, implicitly or explicitly, that applicants undergo sterilisation surgery as a condition of recognition (paragraph 72). She recommended in particular (paragraph 84 (h)) that States:

> "[f]acilitate legal recognition of the preferred gender of transgender persons and establish arrangements to permit relevant identity documents to be reissued reflecting preferred gender and name, without infringements of other human rights."

2. Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment

79. In his report of 1 February 2013 to the United Nations Human Rights Council (A/HRC/22/53), the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment stressed the following (paragraph 78):

> "In many countries transgender persons are required to undergo often unwanted sterilization surgeries as a prerequisite to enjoy legal recognition of their preferred gender. In Europe, 29 States require sterilization procedures to recognize the legal gender of transgender persons. In 11 States where there is no legislation regulating

> legal recognition of gender, enforced sterilization is still practised. As at 2008, in the United States of America, 20 states required a transgender person to undergo 'gender-confirming surgery' or 'gender reassignment surgery' before being able to change their legal sex. In Canada, only the province of Ontario does not enforce 'transsexual surgery' in order to correct the recorded sex on birth certificates. Some domestic courts have found that not only does enforced surgery result in permanent sterility and irreversible changes to the body, and interfere in family and reproductive life, it also amounts to a severe and irreversible intrusion into a person's physical integrity. In 2012, the Swedish Administrative Court of Appeals ruled that a forced sterilization requirement to intrude into someone's physical integrity could not be seen as voluntary. In 2011, the Constitutional Court in Germany ruled that the requirement of gender reassignment surgery violated the right to physical integrity and self-determination. In 2009, the Austrian Administrative High Court also held that mandatory gender reassignment, as a condition for legal recognition of gender identity, was unlawful. In 2009, the former Commissioner for Human Rights of the Council of Europe observed that '[the involuntary sterilization] requirements clearly run counter to the respect for the physical integrity of the person'."

80. In his conclusions and recommendations, he called on all States (paragraph 88):

> "... to repeal any law allowing intrusive and irreversible treatments, including forced genital-normalizing surgery, involuntary sterilization, unethical experimentation, medical display, 'reparative therapies' or 'conversion therapies', when enforced or administered without the free and informed consent of the person concerned. He also calls upon them to outlaw forced or coerced sterilization in all circumstances and provide special protection to individuals belonging to marginalized groups.**"**

3. World Health Organisation (WHO), United Nations Children's Fund (UNICEF), Office of the High Commissioner for Human Rights (OHCHR), UN Women, UNAIDS, United Nations Development Programme (UNDP) and United Nations Population Fund

81. In May 2014 WHO, UNICEF, OHCHR, UNAIDS, UNDP and the United Nations Population Fund published an interagency statement on eliminating forced, coercive and otherwise involuntary sterilisation. They observed in particular that in many countries transgender persons were required to undergo sterilisation surgeries that were often unwanted, as a prerequisite to obtaining gender-marker changes on their papers. The authors also noted that, according to international and regional human rights bodies and some constitutional courts, and as reflected in recent legal changes in several countries, these sterilisation requirements ran counter to respect for bodily integrity, self-determination and human dignity, and could cause and perpetuate discrimination against transgender and intersex persons. They called for action to ensure that sterilisation, or procedures resulting in infertility, were not a prerequisite for legal recognition of preferred sex/gender.

THE LAW

...

II. ALLEGED VIOLATIONS OF ARTICLE 8 OF THE CONVENTION

83. The applicants complained about the refusal of their requests to have the indication of gender on their birth certificates corrected on the grounds that persons making such a request had to substantiate it by demonstrating that they actually suffered from a gender identity disorder and that the change in their appearance was irreversible. They criticised the fact that the latter requirement meant that transgender persons who, like them, wished to have the indication of their gender amended in their civil-status documents were compelled to undergo prior surgery or treatment entailing irreversible sterility. The applicants relied on Article 8 of the Convention, which provides:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 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."

The first applicant (application no. 79885/12) further relied on Article 8 read in conjunction with Article 3 of the Convention, which provides:

> "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

84. The second applicant (application no. 52471/13) also complained specifically of the fact that the first requirement (for individuals to prove that they suffered from a gender identity disorder) infringed the dignity of the persons concerned as it assumed that they suffered from a mental disorder. He relied on Article 8, cited above.

85. The first applicant (application no. 79885/12) also criticised the fact that the domestic courts had made the correction of the gender markers on his birth certificate conditional on his undergoing a traumatic expert medical assessment. In his view, the expert assessments required in this context by the French Court of Cassation amounted, at least potentially, to degrading treatment. He relied on Article 8 read in conjunction with Article 3, both cited above.

...

B. Merits

1. Preliminary issues

(a) Applicability of Article 8 of the Convention

92. The Court has stressed on numerous occasions that the concept of "private life" is a broad term not susceptible to exhaustive definition. It includes not only a person's physical and psychological integrity, but can sometimes also embrace aspects of an individual's physical and social identity. Elements such as gender identity or identification, names, sexual orientation and sexual life fall within the personal sphere protected by Article 8 of the Convention (see, in particular, *Van Kück v. Germany*, no. 35968/97, § 69, ECHR 2003-VII; *Schlumpf v. Switzerland*, no. 29002/06, § 77, 8 January 2009; and *Y.Y. v. Turkey*, cited above, § 56, and the references cited therein).

93. The Court has also emphasised that the notion of personal autonomy is an important principle underlying the interpretation of the guarantees of Article 8 of the Convention (see *Pretty v. the United Kingdom*, no. 2346/02, § 61, ECHR 2002-III). This has led it to recognise, in the context of the application of that provision to transgender persons, that it includes a right to self-determination (see *Van Kück*, § 69, and *Schlumpf*, § 100, both cited above), of which the freedom to define one's sexual identity is one of the most basic essentials (see *Van Kück*, cited above, § 73). It has also found that the right of transgender persons to personal development and to physical and moral security is guaranteed by Article 8 (see, among other authorities, *Van Kück*, § 69; *Schlumpf*, § 100; and *Y.Y. v. Turkey*, § 58, all cited above).

94. The Court's judgments in this sphere have hitherto concerned legal recognition of the gender identity of transgender persons who had undergone reassignment surgery (see *Rees v. the United Kingdom*, 17 October 1986, Series A no. 106; *Cossey v. the United Kingdom*, 27 September 1990, Series A no. 184; *B. v. France*, 25 March 1992, Series A no. 232-C; *Christine Goodwin v. the United Kingdom* [GC], no. 28957/95, ECHR 2002-VI; *I. v. the United Kingdom* [GC], no. 25680/94, 11 July 2002; *Grant v. the United Kingdom*, no. 32570/03, ECHR 2006-VII; and *Hämäläinen v. Finland* [GC], no. 37359/09, ECHR 2014), and the conditions of access to such surgery (see *Van Kück*, cited above; *Schlumpf*, cited above; *L. v. Lithuania*, no. 27527/03, ECHR 2007-IV; and *Y.Y. v. Turkey*, cited above). However, it cannot be inferred from this that the issue of legal recognition of the gender identity of transgender persons who have not undergone gender reassignment treatment approved by the authorities, or who do not wish to undergo such treatment, does not come within the scope of application of Article 8 of the Convention.

95. The right to respect for private life under Article 8 of the Convention applies fully to gender identity, as a component of personal identity. This holds true for all individuals.

96. The "private life" aspect of Article 8 is therefore applicable to the present case. Moreover, this was not disputed by the Government.

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

97. Referring to the judgments in *I. v. the United Kingdom*, *Christine Goodwin*, and *Van Kück* (all cited above), the Government observed that Article 8 imposed an obligation on the member States to legally recognise the gender reassignment of transgender persons; States had discretion only in determining the conditions to be met by persons seeking legal recognition of their acquired gender identity, for the purposes of establishing that they had actually undergone reassignment. The Government inferred from this that the complaint should be examined from the standpoint of the State's positive obligations.

98. The second and third applicants did not comment expressly on this point.

99. The Court agrees with the Government. As, for instance, in the case of *Sheffield and Horsham v. the United Kingdom* (30 July 1998, § 51, *Reports of Judgments and Decisions* 1998-V), the applicants' complaints fall to be examined from the perspective of whether or not the respondent State failed to comply with its positive obligation to secure to the persons concerned the right to respect for their private lives. The Court also refers to the case of *Hämäläinen*, cited above, which, like the present case, concerned the compatibility with Article 8 of the Convention of the conditions for legal recognition of the gender identity of a transgender person. In that case the Court found it more appropriate to examine the applicant's complaint from the perspective of the State's positive obligations. In other words, the issue to be determined is whether respect for the applicants' private lives entails a positive obligation for the State to provide a procedure allowing them to have their gender identity legally recognised without having to fulfil the conditions of which they complain (see, *mutatis mutandis*, *Hämäläinen*, cited above, § 64).

100. The Court notes that, at first sight, France complies with this positive obligation since French law permits transgender persons to have their identity legally recognised by having their civil-status documents corrected. However, at the time of the events in the applicants' case, French law made it a condition of legal recognition for the persons concerned to demonstrate that they suffered from a gender identity disorder and that the change in their appearance was irreversible. The requests to that effect made by the second and third applicants were therefore rejected on the grounds that they had not fulfilled the condition in question. Hence, the issue to be addressed with regard to the second and third applicants is whether, in

imposing that condition on them, France failed to comply with its positive obligation to secure their right to respect for their private lives. In the case of the first applicant, the issue is whether France failed to comply with that obligation by making legal recognition of the applicant's identity subject to an expert medical assessment.

101. Accordingly, the Court will examine whether, in view of the margin of appreciation which they enjoyed, the French authorities, by making legal recognition of the applicants' gender identity subject to such conditions, struck a fair balance between the competing interests of the individuals concerned and of the community as a whole, the aims in the second paragraph of Article 8 being of a certain relevance (see, for example, *Hämäläinen*, cited above, § 65).

2. The requirement to demonstrate an irreversible change in appearance

(a) The parties' submissions

(i) The second and third applicants

102. Both the applicants argued that requiring persons to demonstrate the "irreversible nature of the change in appearance" amounted to requiring sterility.

103. The applicants did not submit observations, but set out their arguments in their application. In their view, it was clear from the Court's case-law that the fundamental freedom to define one's gender identity was enshrined in Article 8, without its exercise being made subject to a diagnosis of a psychiatric disorder or to medical or surgical treatment; this was also the approach advocated in Resolution 1728 (2010) of the Parliamentary Assembly (cited above). The criteria employed by the Court of Cassation were in contradiction with this approach, as they were based not on the idea that gender reassignment was a fundamental freedom, but on the notion that persons seeking a change in civil status suffered from a psychiatric disorder affecting their gender identity and which the reassignment surgery was supposed to cure. Furthermore, this approach could not be justified by the irrational fear that individuals would be able to have the gender markers in their civil-status documents altered indefinitely and on a whim, thereby jeopardising the principle of the inalienability of civil status. This was the case, firstly, because of the hierarchy of norms and, secondly, because that principle did not mean that a change of status was irreversible; moreover, such a move was possible, for instance, in relation to marital status and individuals' forenames. There was no moral value that justified depriving persons of the fundamental right to choose their gender identity and to ensure that their civil-status documents reflected that identity, on the grounds that they had not undergone an irreversible

gender reassignment process. That would amount to imposing sterilisation on people who wished to exercise this right, in disregard of their dignity and the respect due to their bodies and the intimacy of their private lives.

(ii) The Government

104. In their observations the Government acknowledged that it emerged from the judgment in *Y.Y. v. Turkey*, cited above, that permanent sterility as a prior condition for gender reassignment amounted to a breach of Article 8. However, the irreversible nature of the change, required by the Court of Cassation judgments of 7 June 2012 "[did] not necessarily entail" sterility and did not amount to compelling the persons concerned to undergo sterilisation. The "medical and surgical treatment" required under the earlier case-law "was traditionally understood as requiring the removal of the original genitalia and their replacement by artificial genitalia of the preferred gender (an operation known as gender reassignment)". The Court of Cassation had replaced that requirement by the requirement to demonstrate an irreversible change in appearance, in order to take account of the development of medical techniques. The reason it had not defined this concept was because it was medical rather than legal. The Government acknowledged that gender reassignment surgery resulted in sterility, but argued that scientists were not unanimous as to the effects of hormone treatment on fertility. However, such treatment did have an irreversible impact on physical appearance, with the High Authority for Health having stated that the breast development and testicular atrophy caused by oestrogen therapy "[might] be irreversible", and that changes to the voice, the growth of facial hair, baldness and enlargement of the clitoris resulting from testosterone treatment "[were] irreversible". The judge's assessment as to whether there had been an irreversible change in appearance such that the gender markers in the person's civil-status documents should be altered was made in the light of all this medical information. Several recent decisions demonstrated that the courts had allowed such alterations on the basis of medical certificates stating that the person concerned had undergone surgery or hormone treatment, without requiring proof of sterility.

105. The Government inferred from the fact that the complaint fell to be examined from the standpoint of positive obligations that "it [was] unnecessary to examine whether the interference [had been] in accordance with the law". The refusal of the applicants' requests had pursued a legitimate aim as it had been guided by the French principle of the inalienability of civil status, according to which the decision to amend a birth certificate could not be a matter for the individual's choice alone, even though that choice fell within the sphere of respect for private life. It was because the reliability and consistency of French civil-status records were at stake, and in the interests of the necessary structural role of sexual identity within the country's social and legal arrangements, that a change of gender

in civil-status documents could be permitted only when the irreversible nature of the gender reassignment process had been objectively established.

106. Furthermore, the Court had reiterated in its judgment in *Y.Y. v. Turkey*, cited above, that whereas States' margin of appreciation was restricted when a particularly important facet of an individual's existence or identity was at stake, it was wider where there was no consensus within the member States. Only a minority of European countries did not require any surgery or hormone treatment. Noting that the Court had observed in the same judgment that the current trend was in favour of relaxing the statutory criteria with regard to the prior sterilisation requirement and the need for gender reassignment surgery, the Government stressed that – as established at the time of the facts in the present case – French positive law reflected this trend, since it no longer made the amendment of gender markers subject to gender reassignment surgery, but rather to proof that hormone treatment or surgery had had an irreversible impact on the person's appearance. The Government inferred from this that it was not disproportionate to refuse a request for the indication of gender to be amended where the irreversible nature of the change in appearance had not been demonstrated. Such a refusal struck a fair balance between the principle of the inalienability of civil status and the requirements of legal certainty on the one hand, and the right of all individuals to respect for their private life on the other.

107. In the specific case of the third applicant the Government contended that his request had been refused on the ground that, having merely argued that he was regarded by others as female, he had not provided proof of the irreversible nature of the gender reassignment process. As to the second applicant, his request had been turned down on the grounds that, in view of the deficient nature of the medical records produced, neither of the conditions established by the Court of Cassation's case-law had been met in his case.

108. Lastly, in a letter dated 17 January 2017 the Government informed the Court that the legal framework governing requests for a change of gender had been amended by the Law on the modernisation of justice in the twenty-first century, enacted on 18 November 2016 (see paragraph 68 above). They stated that the new provisions "provide[d] persons wishing to have the gender markers in their civil-status documents changed with a specific, simplified and paperless procedural framework". They added as follows:

> "By this means, adults or emancipated minors who demonstrate on the basis of a sufficient combination of circumstances that the gender indicated in their civil-status documents does not correspond to the gender with which they identify, and with which others identify them, may have that indication amended."

The Government further specified that "it [was] expressly stated that the fact of not having undergone medical treatment, surgery or sterilisation [could] not be cited as grounds for refusing a request".

(b) Observations of the third-party interveners

(i) ADF International

109. In the view of ADF International, these three applications raised relatively novel issues going to the manner in which Article 8 came into play in the context of domestic proceedings concerning the recognition of gender reassignment.

110. The third-party intervener observed that the Court's case-law in this sphere focused on the lawfulness of the restrictions imposed on recognition, with the Court consistently finding that it was for States to define the mechanisms for recognition. This raised fundamental questions regarding definitions, which had ramifications in the spheres of ethics, psychology and medical science, and in relation to which the States should enjoy wide discretion. The way in which States addressed transgender issues varied from one country to another depending on the specific features of the domestic environment, with each State defining rules aimed at striking a balance between the competing public and private interests at stake. This approach was supported by the widely diverging legal options chosen by the member States regarding this issue.

111. Lastly, ADF International submitted that no account should be taken of the Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity in examining these three applications, as those principles did not reflect established international law and went beyond what the Court had accepted hitherto.

(ii) Amnesty International, ILGA Europe and Transgender Europe (TGEU)

112. The interveners pointed first of all to the principle established by Article 5 of the Oviedo Convention on Human Rights and Biomedicine, according to which any intervention in the health field could only be carried out after the person concerned had given free and informed consent to it. In France, transgender persons seeking legal recognition of their gender were required to undergo a variety of medical treatments. Their consent was compromised because they were unable to obtain recognition if they had not undergone the treatments in question. Effectively, they had to choose between two fundamental rights, namely the right to recognition of their gender identity and the right to respect for their physical integrity. The trans community was a diverse one. While some transgender persons had undergone or wished to undergo genital surgery or hormone therapy, others did not wish to do so, or were unable to because, for instance, of the cost, the fact that they were elderly or in poor physical condition, the fear of post-operative complications, their religious or personal beliefs, opposition from their loved ones, the wish to retain their reproductive capacity,

opposition from the authorities, or because they did not need surgery in order to be comfortable with their gender identity.

113. Furthermore, on the basis of the "irreversibility" requirement many French courts made a change in civil status conditional on surgery resulting in sterilisation. The third-party interveners stressed that, on account of the serious implications, genital surgery should be performed only on persons who had requested it and who had given their free and informed consent. They also criticised the fact that, in France, the process of gender recognition tended to view the situation of transgender persons as a disorder, regarding trans identity as a mental illness. This contributed to the stigmatisation of transgender persons and their social exclusion.

114. The vast majority of medical professionals rejected the idea that the transition process should necessarily and inevitably culminate in genital surgery. The interveners pointed in particular to the position of the World Professional Association for Transgender Health. The requirement of an irreversible change in appearance imposed by the case-law of the French Court of Cassation was based on an irrational fear that persons would change gender more than once; in fact, studies showed that this was unlikely to happen.

115. The interveners submitted that forced sterilisation and forced medical treatments interfered drastically with physical integrity and reproductive rights, and as such were incompatible with the prohibition of inhuman and degrading treatment under Article 3 of the Convention. They were also in breach of Article 8 of the Convention, as States had only very limited discretion where individuals' intimate identity was at stake.

(c) The Court's assessment

(i) Preliminary issue

116. The first issue that arises in the present case is whether, by requiring transgender persons seeking recognition of their gender identity to demonstrate the "irreversible nature of the change in appearance", French positive law as it existed at the time of the events in the present case made such recognition conditional on surgery or treatment resulting in sterilisation.

117. The Court observes at the outset the ambiguity of the terms used. The reference to "appearance" suggests superficial change, whereas the notion of irreversibility reflects a radical transformation which, in the context of a change in the legal identity of transgender persons, in turn raises the notion of sterility. The Court considers this ambiguity to be problematic where individuals' physical integrity is at stake.

118. The Court notes that the Government referred to (without producing) domestic decisions apparently demonstrating that some first-instance courts had approved a change in civil status for transgender

persons without requiring them to provide proof of sterility. However, it observes that one of the applicants referred to contemporaneous decisions (producing two of them) which showed, by contrast, that several courts had required such proof.

119. The Court also observes that in its opinion of 27 June 2013 the CNCDH stressed that "although surgery [was] not a requirement, the law nevertheless require[d] irreversible medical treatment, which entail[ed], among other things, sterilisation" and that "this condition oblige[d] the persons concerned to undergo medical treatments with very far-reaching consequences which entail[ed] an obligation to be sterilised". The CNCDH specified that "this obligation [did] not necessarily involve gender reassignment surgery but [might] be achieved by means of hormone treatment, which, according to the High Authority for Health, [was] liable to lead to irreversible metabolic changes if taken over a long period" (see paragraph 63 above). This view was shared by the authors of the bill on the protection of gender identity (no. 216), registered with the Senate on 11 December 2013, the reasoning of which states that, while positive law at the time "[did] not require a surgical operation, it [did] require irreversible medical treatment entailing sterilisation" (see paragraph 66 above). Associations involved in protecting the interests of transgender persons, such as Transgender Europe (see paragraph 71 above) and the National Transgender Association (see paragraph 67 above), likewise observe that sterility was one of the conditions established by French positive law as it existed at the material time in the present case.

120. The Court will therefore proceed on the basis that, at the time of the circumstances in the applicants' case, French positive law made recognition of the gender identity of transgender persons conditional on sterilisation surgery or on treatment which, on account of its nature and intensity, entailed a very high probability of sterility.

(ii) The margin of appreciation

121. In implementing their positive obligations under Article 8 the States enjoy a certain margin of appreciation. A number of factors must be taken into account when determining the breadth of that margin. Hence, where there is no consensus within the member States of the Council of Europe, either as to the relative importance of the interest at stake or as to the best means of protecting it, particularly where the case raises sensitive moral or ethical issues, the margin will be wider. There will also usually be a wide margin if the State is required to strike a balance between competing private and public interests or Convention rights. Nevertheless, 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, in particular, *Hämäläinen*, cited above, § 67, and the references cited therein).

122. In the present case the Court notes that the Contracting Parties are divided as regards the sterility requirement (see paragraph 71 above). There is therefore no consensus on the subject. It further notes that public interests are at stake, with the Government pleading in that regard the necessity of safeguarding the principle of the inalienability of civil status and ensuring the reliability and consistency of civil-status records, and that the present case raises sensitive moral and ethical issues.

123. Nevertheless, the Court also notes that an essential aspect of individuals' intimate identity, not to say of their existence, is central to the present applications. This is so, firstly, because the issue of sterilisation goes directly to individuals' physical integrity, and secondly because the applications concern individuals' gender identity. In this regard, the Court has previously stressed that "the notion of personal autonomy is an important principle underlying the interpretation of the guarantees of Article 8" (see *Pretty*, § 61; *Van Kück*, § 69; and *Schlumpf*, § 100, all cited above) and that the right to gender identity and personal development is a fundamental aspect of the right to respect for private life (see *Van Kück*, cited above, § 75). This finding leads it to conclude that the respondent State had only a narrow margin of appreciation in the present case.

124. Moreover, the Court notes that the condition in question ceased to be part of the positive law of eleven Contracting Parties, including France, between 2009 and 2016, and that similar reforms are under discussion in other Contracting Parties (see paragraph 71 above). This shows that a trend has been emerging in Europe in recent years towards abolishing this condition, driven by developments in the understanding of transgenderism.

125. The Court also notes that numerous European and international institutional actors involved in the promotion and defence of human rights have adopted a very clear position in favour of abolishing the sterility criterion, which they regard as an infringement of fundamental rights. These include the Commissioner for Human Rights of the Council of Europe, the Parliamentary Assembly of the Council of Europe, the United Nations Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, the World Health Organisation, the United Nations Children's Fund, the United Nations High Commissioner for Human Rights and the OHCHR, UN Women, UNAIDS, the United Nations Development Programme and the United Nations Population Fund (see paragraphs 73-81 above). It observes that many of these declarations were made prior to or around the same time as the Court of Cassation's judgments in the cases of the second and third applicants.

(iii) Whether a fair balance was struck between the general interest and the applicants' interests

126. The Court notes that, in order to obtain recognition of their identity, persons in the applicants' situation had no choice but to first undergo

difficult medical treatment, or surgery, which, under French positive law as it existed at the time of the events in the present case, had to result in an irreversible change of appearance. As the Court pointed out above, this meant in all probability that they had to be sterilised. However, not all transgender persons wish to – or can – undergo treatment or surgery leading to such consequences, as illustrated by the example of the second and third applicants in the present case. The Court notes in that regard that in its opinion of 27 June 2013, cited above, the CNCDH stressed that some people who did not wish to have recourse to such treatment or operations nevertheless agreed to this constraint in the hope of securing a successful outcome in the proceedings concerning the amendment of their civil status (see paragraph 65 above).

127. Medical treatments and operations of this kind go to an individual's physical integrity, which is protected by Article 3 of the Convention (although this provision was not relied on by the second and third applicants) and by Article 8.

128. Hence, in different contexts, the Court has found a violation of these provisions in cases concerning the sterilisation of mentally competent adults who had not given their informed consent. In particular, it found that, since sterilisation concerns an essential human bodily function, it has implications for multiple aspects of individuals' integrity, including their physical and mental well-being and their emotional, spiritual and family life. It specified that, while it may be performed legitimately at the request of the person concerned, for instance as a means of contraception, or for therapeutic purposes where a case of medical necessity has been convincingly established, the situation is different where it is imposed on a mentally competent adult patient without his or her consent. In the Court's view, such a course of action is incompatible with respect for human freedom and dignity, which constitute one of the core principles of the Convention (see *Soares de Melo v. Portugal*, no. 72850/14, §§ 109-11, 16 February 2016, and *G.B. and R.B. v. the Republic of Moldova*, no. 16761/09, §§ 29-30 and 32, 18 December 2012).

129. More broadly, the Court has held that, in the sphere of medical assistance, even where the refusal to accept a particular treatment might lead to a fatal outcome, the imposition of medical treatment without the consent of a mentally competent adult patient would interfere with his or her right to physical integrity (see *V.C. v. Slovakia*, no. 18968/07, § 105, ECHR 2011, and the cases cited therein: *Pretty*, cited above, §§ 63 and 65; *Glass v. the United Kingdom*, no. 61827/00, §§ 82-83, ECHR 2004-II; and *Jehovah's Witnesses of Moscow v. Russia,* no. 302/02, § 135, 10 June 2010; see also *Soares de Melo*, cited above, § 109).

130. Medical treatment cannot be considered to be the subject of genuine consent when the fact of not submitting to it deprives the person concerned of the full exercise of his or her right to gender identity and

personal development, which, as previously stated, is a fundamental aspect of the right to respect for private life (see *Van Kück*, cited above, § 75).

131. Making the recognition of transgender persons' gender identity conditional on sterilisation surgery or treatment – or surgery or treatment very likely to result in sterilisation – which they do not wish to undergo therefore amounts to making the full exercise of their right to respect for their private life under Article 8 of the Convention conditional on their relinquishing full exercise of their right to respect for their physical integrity as protected by that provision and also by Article 3 of the Convention.

132. The Court fully accepts that safeguarding the principle of the inalienability of civil status, ensuring the reliability and consistency of civil-status records and, more generally, ensuring legal certainty, are in the general interest. However, it notes that, on the basis of this interpretation of the general interest, French positive law as it stood at the material time presented transgender persons not wishing to undergo full gender reassignment with an impossible dilemma. Either they underwent sterilisation surgery or treatment – or surgery or treatment very likely to result in sterilisation – against their wishes, thereby relinquishing full exercise of their right to respect for their physical integrity, which forms part of the right to respect for private life under Article 8 of the Convention; or they waived recognition of their gender identity and hence full exercise of that same right. In the Court's view, this amounted to disrupting the fair balance which the Contracting Parties are required to maintain between the general interest and the interests of the persons concerned.

133. The Court reiterates in that regard its finding in *Y.Y. v. Turkey* (cited above, § 119), to the effect that due respect for the physical integrity of the applicant (a transgender person whose request to undergo gender reassignment surgery was refused on the grounds that he had not demonstrated that he was permanently unable to procreate) precluded any obligation for him to undergo treatment resulting in permanent infertility. It further observes that in the case of *Soares de Melo* (cited above, § 111) it found a violation of Article 8 on account of the requirement for the applicant to undergo sterilisation surgery in order to exercise her parental rights as protected by that same provision.

134. Furthermore, the Court observes that on 12 October 2016 the French legislature expressly excluded sterilisation from the conditions to be fulfilled by transgender persons seeking recognition of their identity. The new Article 61-6 of the Civil Code states that "[t]he fact that an applicant has not undergone medical treatment, surgery or sterilisation shall not constitute grounds for refusing the request [for amendment of the gender markers in civil-status documents]" (see paragraph 68 above).

135. Accordingly, the refusal of the second and third applicants' requests for a change in civil status, on the grounds that they had not provided proof of the irreversible nature of the change in their appearance –

that is to say, demonstrated that they had undergone sterilisation surgery or medical treatment entailing a very high probability of sterility – amounts to a failure by the respondent State to fulfil its positive obligation to secure their right to respect for their private lives. There has therefore been a violation of Article 8 of the Convention on this account in respect of these applicants.

3. Requirement for individuals to prove the existence of a gender identity disorder (application no. 52471/13)

(a) The parties' submissions

136. The second applicant submitted that making legal recognition of transgender persons' gender identity conditional on proof that they "actually suffered from a gender disorder" amounted to labelling them as being mentally ill, and hence to an infringement of their dignity.

137. The Government observed that a prior diagnosis of gender identity disorder was a requirement in most countries. In its 2009 report the High Authority for Health had stressed that, in the medical procedure leading to the change in a transgender patient's morphology, a diagnosis of gender dysphoria was required for the purposes of differential diagnosis, in order for the doctors to be sure, before administering hormone treatment or performing surgery, that the patient's suffering did not stem from other causes such as mental illness.

(b) The Court's assessment

138. The Court is mindful of the fact that the second applicant echoed the stance taken by the non-governmental organisations working to protect transgender rights, to the effect that transgenderism is not an illness and that addressing gender identities from the perspective of a psychological disorder adds to the stigmatisation of transgender persons. This is also the position of the CNCDH, which in its opinion of 27 June 2013 (see paragraphs 63-65 above) stressed as follows:

> "Viewed in a judicial context, the requirement to attest to the existence of 'gender dysphoria' is problematic in so far as the wording itself appears to endorse the view that transgender identity is an illness, although gender identity disorders were removed from the list of psychiatric disorders [by Decree no. 2010-125 of 8 February 2010]."

The CNCDH added:

> "Asking transgender persons to demonstrate that they suffer from gender dysphoria, which is a requirement for the purposes of differential diagnosis strictly in the context of the medical procedures undergone by them, contributes in a judicial context to the stigmatisation of these persons and to a lack of understanding of transgender identity."

It therefore recommended that this requirement no longer form part of the procedure for obtaining a change of gender in civil-status documents.

139. However, the Court observes that a psychiatric diagnosis features among the prerequisites for legal recognition of transgender persons' gender identity in the vast majority of the forty Contracting Parties which allow such recognition, with only four of them having enacted legislation laying down a recognition procedure which excludes such a diagnosis (see paragraph 72 above). Hence, there is currently near-unanimity in this regard. The Court also notes that "transsexualism" features in Chapter V of the World Health Organisation's International Classification of Diseases (ICD-10, no. F64.0) entitled "Mental and behavioural disorders", under the category "Disorders of adult personality and behaviour", sub-category "Gender identity disorders". Furthermore, unlike the sterility condition, the requirement to obtain a prior psychiatric diagnosis does not directly affect individuals' physical integrity. Lastly, while the Commissioner for Human Rights of the Council of Europe (see paragraph 73 above) has stressed that the requirement to obtain a psychiatric diagnosis may hinder the exercise of individuals' fundamental rights, especially where it is designed to limit their legal capacity or impose medical treatment on them, the position of European and international fundamental rights organisations on this point seems less clear-cut than with regard to the sterility requirement.

140. The Court concludes from this that, even though an important aspect of the identity of transgender persons is at stake in the context of their gender identity (see paragraph 123 above), the Contracting Parties retain wide discretion in deciding whether to lay down such a requirement.

141. The Court also notes that the Government referred to the remarks made by the High Authority for Health to the effect that a diagnosis of gender dysphoria is required for the purposes of differential diagnosis, so that doctors can be sure, before administering hormone treatment or performing surgery, that the patient's suffering does not stem from other causes. In so far as the Government thereby seek to argue that the requirement of a prior psychiatric diagnosis is a means of ensuring that individuals who are not really transgender do not embark on irreversible medical reassignment treatment, their argument is not wholly persuasive as regards the situation of individuals who – like the second and third applicants – refuse to undergo treatment resulting in irreversible sterilisation. Nevertheless, the Court accepts that this requirement is aimed at safeguarding the interests of the persons concerned in that it is designed in any event to ensure that they do not embark unadvisedly on the process of legally changing their identity.

142. In that regard, moreover, the interests of the second and third applicants overlap to some extent with the general interest in safeguarding the principle of the inalienability of civil status, the reliability and consistency of civil-status records, and legal certainty, given that this requirement also promotes stability in changes of gender in civil-status documents.

143. Consequently, and especially in view of the wide margin of appreciation which they enjoyed, the Court considers that the French authorities, in refusing the second applicant's request to have the indication of gender on his birth certificate amended, on the grounds that he had not shown that he actually suffered from a gender identity disorder, struck a fair balance between the competing interests at stake.

144. In other words, the refusal of the second applicant's request on these grounds does not disclose a failure by France to comply with its positive obligation to secure his right to respect for his private life. There has therefore been no violation of Article 8 of the Convention on this account in respect of the second applicant.

4. Obligation to undergo a medical examination (application no. 79885/12)

(a) The parties' submissions

(i) The applicant

145. The first applicant, who argued that this complaint fell to be examined from the standpoint of negative obligations since the obligation to undergo a traumatic expert medical assessment constituted interference with his intimate sphere, submitted that the interference in question had not been in accordance with the law. He observed in that connection that no provision specifically required recourse to an expert medical assessment in order to establish the change in a transgender person's appearance, and the irreversible nature thereof, as part of the procedure for amending his or her civil-status records. This meant that, as noted by the Minister of Justice's circular referred to above, the case-law differed from one court to another regarding the use of this type of evidence, especially in the case of surgery performed abroad. As a result the persons concerned faced arbitrary treatment. Furthermore, the interference in question had not pursued any of the legitimate aims enumerated in the second paragraph of Article 8. With regard to the principle of the inalienability of civil status, the first applicant observed that this was not covered by any of those aims. He also inferred from the judgment in *B. v. France* (cited above, §§ 52 et seq.) that this principle by itself could not constitute a legitimate aim. As to the second aim relied on by the Government, it was not possible to argue that an expert assessment carried out after medical treatment resulting in an irreversible change in appearance and accompanied by sterilisation, not to say mutilation, was aimed at safeguarding the health of the person concerned.

146. As to the issue of proportionality, the first applicant reiterated that States enjoyed limited – or indeed minimal – room for manoeuvre where transgender persons' right to respect for their private life was in issue, especially where their physical integrity was at stake. He stressed the

particularly traumatic nature of expert medical assessments such as those that had been ordered in his case. The CNCDH had stated in its report referred to above that they were perceived as "intrusive and humiliating", and produced statements to that effect made by transgender persons who had been subjected to them. In his view, there were ways of ensuring that the persons concerned had undergone an irreversible change in appearance that interfered less with their freedoms, such as requiring them to furnish certificates issued by several doctors of their own choosing. The applicant also produced some comments from legal observers concerning the Court of Cassation judgment in his case, in which the authors expressed surprise at the courts' finding that the evidence submitted to them had been insufficient.

(ii) The Government

147. The Government submitted that the interference complained of had been in accordance with the law, as the judge could order an expert assessment under Articles 143 to 174, 232 to 248 and 263 to 284-1 of the Code of Civil Procedure. The case-law had softened since the 1992 Court of Cassation judgments cited above. An expert assessment was now ordered only where the medical documents produced by the applicant were deemed insufficient to establish that he or she actually had a gender identity disorder and that the change in physical appearance was irreversible. Furthermore, the interference had pursued a legitimate aim in terms of the need to preserve the reliability of civil-status records, the inalienability of civil status, and the protection of the health of the persons concerned (the Government referred in this regard to *Y.Y. v. Turkey*, cited above, § 79). On this last point they stated, without providing further details, that "the Court [had] accepted that the State [might] intervene in order to ascertain, in the interests of health protection, the irreversible nature of the surgery or treatment undergone by the applicant".

148. On the issue of proportionality the Government stressed that expert medical assessments were not ordered as a matter of course, but only to offset any shortcomings in the medical evidence furnished with a view to demonstrating the irreversible nature of the change in appearance. This was borne out by several recent decisions of the first-instance courts. In 2010, for example, an expert assessment had been ordered in only 17% of cases. The Government added that the circular issued by the Minister of Justice on 14 May 2010 specified that expert assessments should be requested only where the evidence provided raised serious doubts as to whether the person making the request was really transgender. Hence, in the instant case, the first-instance court had ordered the expert assessment in question on account of the unsatisfactory nature of the documents supplied by the applicant. Expert opinions that were non-mandatory in principle but to which the courts were required to have recourse, in the interests of

applicants themselves, where they deemed the evidence produced to be insufficient, were a reasonable solution in view of the importance of the interests at stake.

(b) The Court's assessment

149. The Court notes the first applicant's assertion that he was relying on Article 8 of the Convention taken in conjunction with Article 3. As master of the characterisation to be given in law to the facts of the case, it considers it appropriate to examine the first applicant's allegations from the standpoint of Article 8 alone.

150. That being said, the Court must take into consideration the fact that the first applicant, who opted to undergo gender reassignment surgery abroad, argued in the domestic courts that he had thereby fulfilled the conditions laid down by positive law in order to obtain a change in civil status. The expert assessment in question, which had been aimed at establishing whether that claim was accurate, had therefore been ordered by a judge as part of the taking of evidence, an area in which the Court allows the Contracting Parties very considerable room for manoeuvre, provided that they do not act in an arbitrary manner.

151. It is for the domestic courts to assess the probative value of the evidence submitted to them. In the present case the Paris *tribunal de grand instance*, in its judgment of 17 February 2009 (see paragraph 17 above), gave precise reasons as to why it deemed the evidence produced by the first applicant to be insufficient. It accordingly appointed experts specialising in three different but complementary fields and issued them with a detailed remit. There is nothing to suggest that this decision was taken in an arbitrary manner. As pointed out by the Government, the court was thus ruling on the basis of the power of exclusive jurisdiction conferred on it by French law, as the Code of Civil Procedure authorises the first-instance judge to order any investigative measure "in any event where the judge does not have sufficient information to determine the case" (Article 144); these measures include expert assessments (Articles 232 and 263 et seq.).

152. These considerations lead the Court to conclude that, although the expert medical assessment that was ordered entailed an intimate genital examination of the first applicant, the extent of the resulting interference with the exercise of his right to respect for his private life should be qualified to a significant degree.

153. The Court therefore considers that, in rejecting the first applicant's request to have the indication of gender on his birth certificate altered, on the grounds that he had refused in principle to cooperate with the medical expert assessment that it had ordered, the domestic court – which under Article 11 of the Code of Civil Procedure was entitled to draw any inferences from such a refusal – struck a fair balance between the competing interests at stake.

154. In other words, this fact does not disclose a failure by France to comply with its positive obligation to secure the first applicant's right to respect for his private life. There has therefore been no violation of Article 8 of the Convention on this account in respect of the first applicant.

...

FOR THESE REASONS, THE COURT

...

4. *Holds*, by six votes to one, that there has been a violation of Article 8 of the Convention in respect of the second and third applicants on account of the requirement to demonstrate an irreversible change in appearance (applications nos. 52471/13 and 52596/13);

5. *Holds*, unanimously, that there has been no violation of Article 8 of the Convention in respect of the second applicant on account of the requirement to demonstrate the existence of a gender identity disorder (application no. 52471/13);

6. *Holds*, unanimously, that there has been no violation of Article 8 of the Convention in respect of the first applicant on account of the requirement to undergo a medical examination (application no. 79885/12);

...

Done in French, and notified in writing on 6 April 2017, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Milan Blaško	Angelika Nußberger
Deputy Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the dissenting opinion of Judge Ranzoni is annexed to this judgment.

A.N.
M.B.

DISSENTING OPINION OF JUDGE RANZONI

(Translation)

1. My disagreement with the majority of the Chamber concerns the finding of a violation of Article 8 of the Convention in respect of the second and third applicants (applications nos. 52471/13 and 52596/13) on account of the obligation to establish the irreversible nature of the change in appearance. Accordingly, I also voted against the finding that, as regards these two applications, there was no need to examine separately the complaint under Article 14 of the Convention read in conjunction with Article 8.

2. On 17 March 2009 the second applicant requested that his birth certificate be corrected in order to have the indication of his gender changed from "male" to "female" and to have his male forename replaced by a female forename. His request was refused, in particular because he had not demonstrated the irreversible nature of the gender reassignment process, which was a requirement under domestic law as in force at that time. In a judgment of 13 February 2013 the Court of Cassation dismissed his appeal on points of law, finding that this requirement was not discriminatory and did not infringe the principles laid down under Articles 8 and 14 of the Convention (see paragraphs 32 to 40 of the judgment).

3. On 13 June 2009 the third applicant lodged a request for correction of his birth certificate, similar to that of the second applicant. This request too was refused, on the grounds that the applicant had not demonstrated with certainty that he had undergone the medical and surgical treatment necessary in order to complete the process of gender reassignment. The Court of Cassation examined the third applicant's appeal at the same time as that of the second applicant and arrived at the same conclusion (see paragraphs 41-52 of the judgment).

4. In two judgments delivered on 7 June 2012 the Court of Cassation held that, in order to substantiate a request to have the indication of gender on a birth certificate corrected, the person concerned had to demonstrate, in view of the widely accepted position within the scientific community, that he or she actually suffered from the gender identity disorder in question and that the change in his or her appearance was irreversible (see paragraph 58 of the judgment). It is this second requirement which, in the view of the majority of the Chamber, constituted a failure on the part of the respondent State to comply with its positive obligation to secure the applicants' right to respect for their private lives (see paragraph 135 of the judgment).

5. I do not dispute the fact that at the material time French positive law made recognition of the gender identity of transgender persons conditional on sterilisation surgery or on treatment which, on account of its nature and intensity, entailed a very high probability of sterility (see paragraph 120 of

the judgment). I can also subscribe without any hesitation to the majority's assessment that this case concerns an essential aspect of individuals' intimate identity, since the right to gender identity and personal development is a fundamental aspect of the right to respect for private life under Article 8 of the Convention (see, in particular, paragraph 123 of the judgment). Moreover, such medical treatments and operations go to the physical integrity of the individuals concerned. However, neither the second nor the third applicant relied on Article 3 of the Convention (see paragraph 128 of the judgment).

6. I can also accept that, in the search for a fair balance between the general interest and the interests of the applicants (see paragraphs 126 to 135 of the judgment), there are strong arguments in favour of finding that the obligation to undergo sterilisation surgery or treatment in order to have one's gender identity recognised disrupts this fair balance and amounts to a violation of Article 8 of the Convention. Nevertheless, there are also weighty arguments which tilt the balance in favour of the margin of appreciation of the respondent State, and thus in favour of finding that there has been no violation of Article 8.

7. In October 2016 the situation regarding the legal recognition of the gender identity of transgender persons in the Council of Europe member States was as follows (see paragraphs 70-71 of the judgment). In seven member States recognition was not possible; in twenty-two member States it was possible, but was subject to legal requirements including the disputed condition of sterilisation of the person concerned; and in "only" eighteen member States, sterilisation was no longer required by law for recognition of the gender identity of transgender persons.

8. Furthermore, this development is a recent one in those eighteen member States, a fact that emerges very clearly from the majority judgment. Of the countries concerned, eleven abolished sterilisation as a condition for legal recognition between February 2009 and October 2016 (see paragraph 71 of the judgment). This means that, for example, at the time of the first-instance judgments in the cases of the second and third applicants, on 9 February and 13 March 2009 respectively (see paragraphs 37 and 48 of the judgment), only eight member States did not require sterilisation. By the time of the Court of Cassation judgments of 13 February 2013 (see paragraphs 40 and 52 of the judgment), legal recognition of the identity of transgender persons was possible, without sterilisation being a legal requirement, in only eleven member States.

9. As the Chamber reiterates (see paragraph 121 of the judgment), in implementing their positive obligations under Article 8 of the Convention the member States enjoy a certain margin of appreciation. A number of factors must be taken into account when determining the breadth of that margin. Where a particularly important facet of an individual's existence or identity is at stake, the margin allowed to the State will be restricted. Where,

however, there is no consensus within the member States of the Council of Europe, either as to the relative importance of the interest at stake or as to the best means of protecting it, particularly where the case raises sensitive moral or ethical issues, the margin will be wider. There will also usually be a wide margin if the State is required to strike a balance between competing private and public interests (see *Hämäläinen v. Finland* [GC], no. 37359/09, § 67, ECHR 2014, with further references).

10. In the present case, at the time of the impugned judgments, which were delivered by the Court of Cassation on 13 February 2013, no consensus existed among the member States on the issue of requiring sterilisation as a prior condition for the legal recognition of transgender identity. Only eleven of the forty-seven member States did not require such a condition. At present – more specifically in October 2016 – such recognition is possible, without sterilisation being required by law, in only eighteen of the forty-seven member States. This is by no means a majority of the member States, still less does it represent a European consensus, which is still a long way off.

11. In the absence of consensus and in view of the fact that the present case undoubtedly raises sensitive moral and ethical issues, the margin of appreciation to be left to the respondent State remains wide (see *Hämälainen*, cited above, § 75, and *X, Y and Z v. the United Kingdom*, 22 April 1997, § 44, *Reports of Judgments and Decisions* 1997-II). However, this margin vanishes in the analysis conducted by the majority in paragraphs 121 to 135 of the judgment. How can this be? Of course, the finding that an essential aspect of individuals' intimate identity is at stake may reduce the margin of appreciation (see paragraph 123 of the judgment), but not completely. What other factors prompted the majority to disregard entirely the margin of appreciation and also the fact that, to date, only a minority of the member States have abolished the sterility requirement?

12. In this regard the judgment highlights the existence of a "trend" towards the abolition of this requirement (see paragraph 124). I acknowledge that there exists a certain trend in Europe, but it is, as demonstrated above, only recent. Is this sufficient justification for narrowing considerably the margin of appreciation, which is in principle a wide one? I doubt it. Societies are moving only gradually towards abolishing sterilisation as a prerequisite for legal recognition of the gender identity of transgender persons.

13. I am conscious of the fact that the Court observed in *Y.Y. v. Turkey* (no. 14793/08, § 108, ECHR 2015), referring to the judgment in *Christine Goodwin v. the United Kingdom* ([GC], no. 28957/95, § 85, ECHR 2002-VI), "that it attache[d] less importance to the lack of evidence of a common European approach to the resolution of the legal and practical problems posed than to the existence of clear and uncontested evidence of a continuing international trend in favour not only of increased social

acceptance of transgender persons but of legal recognition of the new gender identity of post-operative transgender persons". However, these two cases concerned other issues, namely legal recognition of a process of gender reassignment that had already been completed (*Christine Goodwin*), and the possibility for a transgender person to undergo gender reassignment without being subject to a requirement to be unable to procreate (*Y.Y. v. Turkey*). It must be pointed out that the Court noted in *Christine Goodwin* that it was for the Contracting State to determine, *inter alia*, the conditions under which a person claiming legal recognition as a transsexual established that gender reassignment had been properly effected (see *Christine Goodwin*, cited above, § 103). Furthermore, in *Y.Y. v. Turkey*, the comparative survey of the legislation of thirty-two member States carried out by the Court had shown that the option for transgender persons to undergo gender reassignment treatment already existed in twenty-four of the thirty-two member States, in other words in the majority of the countries surveyed. It appears that none of these States made treatment conditional on an inability to procreate (see *Y.Y. v. Turkey*, cited above, §§ 35-39). In other words, this was more than a mere trend: a clear majority of the States did not impose conditions similar to those laid down by the respondent State in that case.

14. There is also a need to examine and determine the question whether there are substantial and valid grounds capable of justifying the requirement to be unable to procreate and the retention of the corresponding systems in the majority of the member States (a question asked, for instance, by Judge Lemmens in his separate opinion annexed to the judgment in *Y.Y. v. Turkey*, cited above). In the present case, unfortunately, the Court did not answer this question, but simply stated that the trend referred to above was "driven by developments in the understanding of transgenderism" (see paragraph 124 of the judgment). This strikes me as a somewhat bold assumption, which is not backed up by any references in the judgment. In view of the facts as established in this case, the Court is unaware of the precise reasons for these developments, just as it is unaware of the reasons that have prompted most of the member States to retain to date this prior condition for legal recognition of the gender identity of transgender persons.

15. As regards the margin of appreciation, the majority note that "numerous European and international institutional actors in the human rights field have adopted a very clear position in favour of abolishing the sterility requirement" (see paragraph 125 of the judgment). To my mind, this argument is insufficient to justify the application of a very narrow margin of appreciation or the finding that there is a clear European trend. It is true that the Commissioner for Human Rights of the Council of Europe adopted a stance in 2009 against making legal recognition of transgender identity subject to irreversible sterilisation surgery (see paragraph 73 of the judgment), and that the Parliamentary Assembly noted in a 2013 Resolution

that "[n]either forced nor coerced sterilisations or castrations can be legitimated in any way in the 21st century" (see paragraph 76 of the judgment). However, I note, while acknowledging the great importance of the institutions and organisations listed in paragraph 125 of the judgment, that they are for the most part involved in the "promotion" of human rights. The majority's assessment is not based on European or international human rights "protection" institutions, or on binding international conventions or settled case-law within the member States.

16. While it is true that an essential aspect of individuals' intimate identity is in issue, it is arguable, in the absence of consensus at European level, that the member States' margin of appreciation remains wide, especially since a highly sensitive issue is at stake. For that reason it could also be argued that a Contracting State – in this instance, France – should not be criticised in 2017 for having given priority between 2009 and 2013 to the requirement to demonstrate the irreversible nature of the change in appearance. In a context where standards were evolving, but where the trend was even less clear than it is today, the respondent State took the view that this arrangement was the most fitting at the time, a position still taken by the majority of member States. Had it adopted this point of view, the Court could have found that the respondent State, during the period when the decisions were given, had not overstepped its margin of appreciation or, accordingly, breached Article 8 of the Convention. It could nevertheless have called on the (other) member States to continue to monitor the issue giving rise to the present case and to pursue their efforts in the direction of the trend that had been demonstrated.

17. By contrast, the finding of a violation of Article 8 of the Convention in the present case actually has the effect of requiring twenty-two member States, in order to avoid future violations of this provision, to amend their legislation and abolish the sterilisation requirement as a condition for legal recognition of transgender identity, to say nothing of the seven member States in which legal recognition of such identity is currently not possible.

18. In cases of this type the Court has been cautious where there is no European consensus, and has advanced by means of little steps. The case-law on transgender issues is proof of that.

For instance, in the case of *Rees v. the United Kingdom* (17 October 1986, Series A no. 106), the law in the United Kingdom did not grant transsexuals a legal status corresponding to their actual situation. The Court held that there had been no violation of Article 8, finding that "there is at present little common ground between the Contracting States in this area and that, generally speaking, the law appears to be in a transitional stage". Consequently, it considered that "this is an area in which the Contracting Parties enjoy a wide margin of appreciation" (§ 37). It specified that "[t]he need for appropriate legal measures should ... be kept under review having regard particularly to scientific and societal developments" (§ 47).

In *Cossey v. the United Kingdom* (27 September 1990, Series A no. 184), the Court reached a similar conclusion, and also noted that an annotation to the entry in the register of births would not be an appropriate solution.

In the case of *B. v. France* (25 March 1992, Series A no. 232-C), the Court found a violation of Article 8 for the first time in a case concerning the recognition of transsexual persons, taking into consideration the factors that distinguished that case from the cases of *Rees* and *Cossey*.

In *X, Y and Z v. the United Kingdom* (cited above) and *Sheffield and Horsham v. the United Kingdom* (30 July 1998, *Reports* 1998-V), the Court did not depart from its judgments in *Rees* and *Cossey*. It did not consider it necessary to "conclude that on the basis of scientific and legal developments alone the respondent State can no longer rely on a margin of appreciation to defend its continuing refusal to recognise in law a transsexual's post-operative gender", finding that "it continues to be the case that transsexualism raises complex scientific, legal, moral and social issues, in respect of which there is no generally shared approach among the Contracting States" (*Sheffield and Horsham*, § 58).

In its judgment in *Christine Goodwin* (cited above) the Grand Chamber of the Court found, sixteen years after the *Rees* judgment, that there had been a violation of Article 8 in view of an international trend in favour of increased social acceptance of transsexuals and of legal recognition of the new sexual identity of post-operative transsexuals, "[s]ince there are no significant factors of public interest to weigh against the interest of this individual applicant in obtaining legal recognition of her gender re-assignment" (§ 93). Nevertheless, the Court reaffirmed that it was for the Contracting State to determine, *inter alia*, the conditions of that recognition (see paragraph 13 above).

After *Christine Goodwin*, the Court delivered several judgments in Article 8 cases which also dealt with the legal recognition of the gender identity of transgender persons who had undergone reassignment surgery, and with other consequences arising for these persons from their situation (see, for example, *Van Kück v. Germany*, no. 35968/97, ECHR 2003-VII (violation); *Grant v. the United Kingdom*, no. 32570/03, ECHR 2006-VII (violation); *L. v. Lithuania*, no. 27527/03, ECHR 2007-IV (no violation); *Schlumpf v. Switzerland*, no. 29002/06, 8 January 2009 (violation); *P.V. v. Spain*, no. 35159/09, 30 November 2010 (no violation); *P. v. Portugal* (dec.), no. 56027/09, ECHR 2011 (struck out of the list); *Cassar v. Malta*, no. 36982/11, 9 July 2013 (struck out of the list); and *Hämäläinen*, cited above (no violation).

The case of *Y.Y. v. Turkey* (cited above) concerned the authorities' refusal to allow a transgender person to undergo gender reassignment on the grounds that the person concerned was not permanently unable to procreate. This was the first time, to my knowledge, that the Court had ruled on this requirement, albeit in a different context to the present case. It found a

violation of Article 8, but taking into consideration the fact that a clear majority of the member States did not impose similar conditions to those laid down by the respondent State (see paragraph 13 above).

19. Between the *Rees* judgment in 1986 and the case of *Y.Y.* in 2015, the Court constantly elaborated upon its case-law in this field, but did so cautiously, "little by little", or, to put it another way, "step by step". However, with the present judgment the Court has not taken a mere step but a whole leap, and, what is more, on a highly sensitive subject, a new aspect of transsexualism – or, more accurately, transgenderism – in the absence of consensus among the member States on this specific aspect, and in awareness of the breadth of the margin of appreciation resulting from all these factors.

20. I confess that I found it difficult to make a decision in this very difficult and sensitive case. As I already stated in paragraph 6 above, there are weighty arguments to support the conclusion that the obligation to undergo sterilisation surgery or treatment in order to have one's gender identity recognised disrupts the fair balance to be struck between the general interest and the interests of the applicants, and therefore amounts to a violation of Article 8 of the Convention. However, the majority also accepted, quite rightly, "that safeguarding the principle of the inalienability of civil status, ensuring the reliability and consistency of civil-status records and, more generally, ensuring legal certainty, are in the general interest". They nevertheless considered that the balance was tipped in favour of the interests of the persons concerned (see paragraph 132 of the judgment). Admittedly, such an assessment is not without some foundation.

21. On the other hand, there is far from being a European consensus on this requirement, and the minority of member States which had abolished it was even smaller at the time. These considerations made me hesitate. My hesitation grew in view of the arguments advanced by the majority concerning the member States' margin of appreciation and the European and international "trends", arguments which, to my mind, are not wholly persuasive. Nor do I consider it appropriate to refer to Article 3 of the Convention in order to strengthen the argument (see paragraphs 127 and 131 of the judgment), since the second and third applicants had not relied on that provision.

22. Furthermore, the observation made in paragraph 134 of the judgment concerning the fact that the French legislature, on 12 October 2016, expressly excluded sterilisation from the conditions to be met by transgender persons in order to obtain recognition of their identity, strikes me as a problematic argument, as the principles established in our judgment will apply not only to the respondent State but also to the other member States.

23. I wonder what the Chamber would have concluded if, instead of amending the legislation a few months before our judgment, the French

legislature had maintained the condition of an irreversible change in appearance. Would it still have found that the respondent State had overstepped its margin of appreciation in choosing that legislative option?

24. In view of all these considerations, and bearing in mind the importance and consequences of a Court judgment on this subject, I would have preferred to see the Chamber relinquish jurisdiction in favour of the Grand Chamber under Article 30 of the Convention. The conditions for relinquishment would have been met, as the case raised serious questions affecting the interpretation and application of Article 8 of the Convention and the concepts of "margin of appreciation" and "consensus". The implications of this judgment for all the member States therefore warranted invoking the authority of the Grand Chamber. I regret the fact that the majority did not adopt this approach.

25. After reflecting as outlined above, I decided in favour of the margin of appreciation allowed to the respondent State in fulfilling its positive obligation to secure the right of the second and third applicants to respect for their private lives in relation to a highly sensitive subject which raises very tricky issues and where no European consensus exists. Accordingly, I voted against finding a violation of Article 8 of the Convention on this account.

...