

Anonymised version

Translation

C-247/23 – 1

Case C-247/23 [Deldits] ¹

Request for a preliminary ruling

Date lodged:

18 April 2023

Referring court:

Fővárosi Törvényszék (Hungary)

Date of the decision to refer:

29 March 2023

Applicant:

VP

Defendant:

Országos Idegenrendészeti Főigazgatóság

Fővárosi Törvényszék (Budapest High Court, Hungary)

[...]

Applicant:

VP [...] Budapest (Hungary) [...]

[...]

Defendant:

Országos Idegenrendészeti Főigazgatóság (National Directorate-General for Immigration Policing) [...] Budapest (Hungary) [...]

[...]

Subject matter of the dispute:
to record-keeping in asylum matters.

Administrative action relating

¹ The name of the present case is a fictitious name. It does not correspond to the real name of any party to the proceedings.

ORDER

The referring court is initiating a preliminary ruling procedure before the Court of Justice of the European Union regarding the interpretation of Article 16 of Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation; ‘the GDPR’).

The referring court refers the following questions to the Court of Justice of the European Union for a preliminary ruling:

1. Must Article 16 of the GDPR be interpreted as meaning that, in connection with the exercise of the rights of the data subject, the authority responsible for keeping registers under national law is required to rectify the personal data relating to the sex of that data subject recorded by that authority, where those data have changed after they were entered in the register and therefore do not comply with the principle of accuracy established in Article 5(1)(d) of the GDPR?
2. If the answer to the first question referred is in the affirmative, must Article 16 of the GDPR be interpreted as meaning that it requires the person requesting rectification of the data relating to his or her sex to provide evidence in support of the request for rectification?
3. If the answer to the second question referred is in the affirmative, must Article 16 of the GDPR be interpreted as meaning that the person making the request is required to prove that he or she has undergone sex reassignment surgery?

[...] [Matters of national procedural law]

Grounds

- 1 On the basis of Article 267 TFEU, this administrative court, which is hearing a case related to record-keeping in asylum matters, requests from the Court of Justice of the European Union (‘the Court of Justice’) the interpretation of the rules of EU law necessary to resolve the dispute in the main proceedings.

Subject matter of the dispute and relevant facts

- 2 The applicant is an individual of Iranian nationality who was recognised as a refugee in Hungary in 2014. In those proceedings, the fact that the applicant was transsexual was cited as the applicant’s reason for fleeing and the certificates from psychiatric and gynaecological specialists which the applicant provided supported the transsexual identity of the applicant, who was born a woman. After being

recognised as a refugee, the applicant was included in the register for asylum matters as a person of the female sex.

- 3 The referring court notes that the register for asylum matters serves to provide a record of the identification details of natural persons (including their sex) who have been recognised as refugees and that the competent authority in asylum matters processes those data for up to 25 years after the possible termination of that recognition.
- 4 In 2022, the applicant submitted a request to the defendant, relying on Article 16 of the GDPR, asking for the sex stated in the register for asylum matters to be rectified, changing it to male, and the name stated to be changed. As part of that process, the applicant provided the certificates from medical specialists which had already been submitted previously. The defendant rejected the request by a decision of 11 October 2022 [...]. According to the reasoning of that decision, it had not been proved that the applicant had undergone sex reassignment surgery and the documents provided only confirmed that the applicant was transsexual, but not the fact that a change of sex had occurred.
- 5 In the administrative action brought by the applicant, the applicant asks the referring court to annul the abovementioned decision. The applicant argues that, from a conceptual point of view, transsexuality means a change of sex and the medical documents provided confirm that sex reassignment has taken place. The applicant relies on the case-law of the European Court of Human Rights (ECtHR), in particular the judgments delivered in the cases *A.P., Garçon and Nicot v. France* (applications No 79885/12, No 52471/13 and No 52596/13) and *S. V. v. Italy* (application No 55216/08), and argues that surgery is not necessary for sex reassignment. The applicant stresses identifying as a man; that, according to medical reports, the applicant's appearance is male; and that, in those reports, the applicant was diagnosed under code F64.0 of the International Classification of Diseases, corresponding to transsexualism.
- 6 The defendant requests that the administrative action be dismissed, since, in its opinion, the applicant has not provided any public document or medical document certifying the change of sex.

Reasons for the request for a preliminary ruling and arguments of the parties

- 7 The referring court considers the interpretation of Article 16 of the GDPR to be necessary in order to give judgment.
- 8 According to the applicant, the possibility of 'rectification' must be granted to the applicant. As part of that procedure, it is not possible to require those submitting a request under Article 16 of the GDPR to provide excessive evidence and, in particular, to certify that a medical procedure for sex reassignment has been carried out. Such a requirement would be contrary to the case-law of the ECtHR and would infringe Article 1 (right to human dignity), Article 3 (right to the

integrity of the person) and Article 7 (right to respect for private and family life) of the Charter of Fundamental Rights of the European Union, and it would also fail to comply with the principle of equivalence, set out in Article 52(3) of the Charter, in relation to the protection of fundamental rights. The applicant emphasises that different Member States (Sweden, Denmark, Malta, Ireland, Belgium, Greece and Portugal) base legal recognition of sex on the transsexual individual's declaration.

- 9 According to the defendant, the applicant has not fully complied with the requirement to rectify the omission, since no public documents or medical documents certifying the change of sex have been provided.

Relevant legal provisions

- 10 Article 16 of the GDPR:

‘The data subject shall have the right to obtain from the controller without undue delay the rectification of inaccurate personal data concerning him or her. Taking into account the purposes of the processing, the data subject shall have the right to have incomplete personal data completed, including by means of providing a supplementary statement.’

- 11 Paragraph 81 of the A menedékjogról szóló 2007. évi LXXX. törvény (Law LXXX of 2007 on the right to asylum; ‘the Law on the right to asylum).

‘The competent authority in asylum matters shall, in the register relating to such matters, process the personal data of refugees, beneficiaries of subsidiary protection, beneficiaries of resettlement schemes (“befogadott”), beneficiaries of temporary protection (“menedékes”), and also persons seeking international protection and persons subject to the Dublin procedure (together, “persons subject to this Law”), information relating to their stay and to the assistance and aid to which they are entitled, as well as subsequent changes to such information, for the purpose of:

- (a) checking that they have the status of refugees, of beneficiaries of subsidiary protection, of beneficiaries of temporary protection or of beneficiaries of resettlement schemes, and ensuring that they are entitled to enjoy the rights arising from that status;
- (b) checking their entitlement to the assistance and aid defined in this Law and in other legislation;
- (c) their personal identification;
- (c) avoiding the duplication of procedures; and
- (e) detecting whether an application has been submitted more than once.’

12 Paragraph 82(f) of the Law on the right to asylum

‘For the purposes of this Chapter, the following data of the persons subject to this Law shall be regarded as identification data of natural persons:

[...]

(f) sex;’

13 Paragraph 83(1)(a) of the Law on the right to asylum

‘The register for asylum matters shall contain the following data of the persons subject to this Law:

(a) identification data of natural persons;’

14 Paragraph 83A(5) of the Law on the right to asylum

‘The competent authority in asylum matters shall be obliged, of its own motion, to delete entries which are contrary to the regulations, to correct those which are incorrect and to supply any entries omitted from the official register kept by it.’

Statement of the reasons forming the basis of the questions referred

15 In view of the above, it is necessary to initiate a preliminary ruling procedure in order to clarify in precisely what conditions the right of the data subject to rectification, established in Article 16 of the GDPR, is recognised in relation to data recorded with reference to his or her sex.

16 The questions referred to the Court of Justice for a preliminary ruling are relevant because, even though the applicable Hungarian legislation, the Law on the right to asylum, in general contains provisions regarding the processing of changes to recorded data and regarding the correction of erroneous entries, that legislation does not regulate either the procedure or the requirements with regard to the change of sex and the consequent change of name considered in this case. In its judgment 6/2018, of 27 June, the Alkotmánybíróság (Constitutional Court, Hungary) declared the existence of an unconstitutional situation on account of omission, which infringes Article II (inviolability of human dignity) and Article XV(2) (prohibition of discrimination) of the Magyarország Alaptörvény (Basic Law of Hungary) and which is due to the fact that the legislature has not regulated the procedure for changing the sex and name of individuals who do not have Hungarian nationality and are legally settled [in Hungary], while that possibility is granted to Hungarian nationals. The Constitutional Court called on the Hungarian Parliament to fulfil its legislative duty by 31 December 2018, at the latest. Moreover, in its judgment given on 16 July 2020 in the case *Rana v. Hungary* (application No 40888/17), the ECtHR declared that Article 8 of the European Convention on Human Rights had been infringed as a consequence of the fact that

Hungary did not grant a person whose refugee status had been recognised the possibility of accessing the procedure for legal recognition of gender identity. In spite of the abovementioned judicial decisions, Hungarian legislation, to this day, still does not contain the provisions necessary for carrying out the procedures.

- 17 The referring court also notes that, after the judgment of the Constitutional Court referred to above was given, Hungarian nationals are no longer granted the possibility of their change of sex being legally recognised either and, consequently, the referring court is unable to fill the gap in the law by means of the analogous application of the provisions relating to Hungarian nationals. The applicant also noted the lack of Hungarian legislation and, for that reason, based the administrative action on Article 16 of the GDPR directly.
- 18 In view of the foregoing considerations, it is necessary, in order to resolve the dispute in the main proceedings, to clarify whether it is possible, on the basis of Article 16 of the GDPR as directly applicable EU law, to impose on the defendant the obligation to rectify the data relating to sex which appears in its register and, if so, what evidence a person requesting such rectification may be required to provide.

[...] [Matters of national procedural law]

Budapest, 29 March 2023.

[...] [Signatures]