

June 2003

Van Kück v. Germany - 35968/97

Judgment 12.6.2003 [Section III]

Article 8

Article 8-1

Respect for private life

Refusal to order private insurance company to reimburse costs of gender re-assignment surgery: *violation*

Article 6

Civil proceedings

Article 6-1

Fair hearing

Fairness of proceedings concerning reimbursement of the costs of gender re-assignment surgery: *violation*

Facts: The applicant, who was born male, obtained authorisation from the District Court in 1991 to adopt a female name, by virtue of the Transsexuals Act. The applicant then brought an action against a private health insurance company for reimbursement of the costs of hormone treatment and a declarator of its liability to reimburse 50% of the costs of gender re-assignment surgery (the other 50% being met by the applicant's employment health insurance). In 1993 the Regional Court dismissed the action, finding on the basis of an expert report that while treatment would improve the applicant's social condition, it could not reasonably be regarded as necessary for medical reasons. The court considered that the applicant ought first to have tried extensive psychotherapy and added that it had not been shown conclusively that the treatment would relieve the applicant's situation. In 1995 the Court of Appeal dismissed the applicant's appeal, agreeing that the necessity of the treatment had not been proved. It further considered that the applicant was not entitled to reimbursement because she had caused the disease herself. In that respect it referred to the fact that the applicant had started to take female hormones, without medical advice, only after discovering that as a man she was infertile. The applicant had in the meantime proceeded with gender re-assignment surgery.

Law: Article 6 § 1 – The courts' evaluation of the expert opinion and their conclusion that improving the applicant's social situation did not satisfy the condition of medical necessity did not seem to coincide with the Court's findings in its recent judgments concerning transsexuals (e.g. the *Christine Goodwin* judgment of 11 July 2002), in particular that "transsexualism has wide international recognition as a medical condition for which treatment is provided in order to afford relief ... including irreversible surgery." In any case, as specialist knowledge in the field was required, the courts should have sought further

clarification from a medical expert. Moreover, since gender identity is one of the most intimate aspects of private life, it appeared disproportionate to require the applicant to prove the medical necessity of the treatment. Consequently, the courts' interpretation of "medical necessity" and their evaluation of the evidence was not reasonable. With regard to the Court of Appeal's reference to causes of the applicant's condition, it could not be said that there was anything arbitrary or capricious in a decision to undergo gender re-assignment surgery and the applicant had in fact already undergone such surgery by the time the Court of Appeal gave its judgment. In addition, the cause of the applicant's transsexuality was not addressed in the expert report and no further expert evidence was obtained by the Court of Appeal, which was not entitled to take the view that it had sufficient information to be able to assess that complex question. In the light of these factors, the proceedings, taken as a whole, did not satisfy the requirements of a fair hearing.

Conclusion: violation (four votes to three).

Article 8 – While the applicant's submissions under Article 8 had focused on the taking and evaluation of evidence as regards her transsexuality, a matter which already examined under Article 6, the facts also had repercussions on a fundamental aspect of her right to respect for private life, and it was appropriate to examine whether the courts, in dealing with the reimbursement claim, violated the State's positive obligations. The central issue was the courts' application of the criteria on reimbursement of the medical costs of gender re-assignment surgery and not the legitimacy of such measures in general. Furthermore, what mattered was not the entitlement to reimbursement as such, but the impact of the court decisions on the applicant's right to respect for her sexual self-determination. Both the Regional Court and the Court of Appeal had questioned the medical necessity of gender re-assignment, without obtaining further medical information, and the Court of Appeal had in addition reached the conclusion that the applicant had deliberately caused her condition of transsexuality, without any medical competence and on the basis of general assumptions as to male and female behaviour. In the light of the recent developments, the burden placed on a person to prove the medical necessity of treatment in the field of one of the most intimate areas of private life, appeared disproportionate. In the light of these factors, no fair balance had been struck between the interests of the insurance company on the one hand and the interests of the individual on the other.

Conclusion: violation (four votes to three).

Article 14 in conjunction with Articles 6 and 8 – No separate issue arose under Article 14.

Conclusion: no separate issue (unanimously).

Article 41 – The Court made awards in respect of non-pecuniary damage and in respect of costs and expenses.