



## Van Kück v. Germany

Application No. 35968/97; (2003) 37 EHRR 51

**Country:** Germany

**Region:** Europe

**Year:** 2003

**Court:** European Court of Human Rights European Court of Human Rights

**Health Topics:** Health care and health services, Health systems and financing, Mental health, Sexual and reproductive health

**Human Rights:** Right to due process/fair trial, Right to privacy

### Facts

The applicant was registered as a male at birth. In 1991, The District Court granted the applicant's request to change her forenames to Carola Brenda after hearing from several psychiatric and psychological experts who determined that the applicant was a male-to-female transsexual and had been for the last three years living as a female.

In 1992, the applicant brought an action against a German health insurance company claiming reimbursement of expenses for pharmaceutical hormone treatment as well as a declaratory judgment stating that the company was liable to reimburse 50% of the expenses for gender reassignment surgery. The Regional Court heard from a psychiatrist who recommended surgery as part of a curative treatment in the applicant's case, testifying that applicant was a male-to-female transsexual and that her transsexuality was a disease. In 1993 the applicant's claims were dismissed by the Regional Court, which found that she was not entitled to reimbursement of medical treatment regarding her transsexuality under the General Insurance Conditions governing her contract with the insurance company. The Regional Court reasoned that hormone treatment and gender reassignment surgery could not be considered necessary medical treatments.

The applicant appealed to the Berlin Court of Appeal, objecting to the Regional Court's finding that gender reassignment surgery was unnecessary. In 1994, applicant underwent gender reassignment surgery prior to the outcome of the appeal proceedings. In 1995 the Court of Appeal dismissed applicant's claims, concluding that the applicant had failed to prove the necessity of her treatment, and that based on the applicant's prior history of living as a man and decision to take hormone therapy only after learning of her infertility, the applicant had deliberately caused her transsexuality.

The applicant alleged that the German courts violated the requirement in Article 6 § 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms (the Convention) for a fair hearing, as well as the right to respect for applicant's private life under Article 8 of the Convention. Applicant also complained that the German courts' treatment amounted to discrimination under Article 14 of the Convention.

### Decision and Reasoning

With respect to the alleged violation of Article 6 of the Convention, the Court noted that the German courts had concluded that the expert had not clearly affirmed the medical necessity of gender reassignment surgery because such expert's recommendation was limited to confirming the improvement in the applicant's social situation. The Court found that the German courts' evaluation of such expert opinion and their assessment that improving the applicant's social situation as part of psychological treatment did not meet the requisite conditions of medical necessity did not comport with the Court's prior jurisprudence on the matter. The Court determined that the German courts should have heard additional testimony from expert witnesses in order to determine the necessity of the surgery for applicant and that, considering that gender identity was one of the more intimate areas of a person's private life, the burden placed on the applicant to prove medical necessity of a treatment appeared disproportionate. Thus the Court found that "the interpretation of the term 'medical necessity' and the evaluation of the evidence in this respect were not reasonable." [Para 56.] Furthermore, in response to the German courts' finding that the applicant had deliberately caused her own transsexuality, the Court held that the German courts had not taken the appropriate evidence on this issue.

Thus, the Court concluded that the proceedings in the German courts did not satisfy the requirements of a fair hearing, and State was in breach of Article 6 § 1.

With respect to the alleged violation of Article 8 of the Convention (guaranteeing respect for private life), the Court noted that gender identification falls within the sphere protected by Article 8 and that the State may be required to take positive steps to guarantee this respect for private life. The Court determined that the central issue was the impact of the German courts' decision not to require reimbursement for the cost of gender reassignment surgery on the applicant's right to respect for her sexual self-determination as one of the aspects of her right to respect her private life. [Para 78] The Court concluded that the German courts, on the basis of general assumptions as to male and female behaviour, substituted its views on the most intimate feelings and experiences for those of the applicant [para 81] and had also disproportionately placed the burden of proving the medical necessity of treatment in an intimate area of private life on the applicant.

The Court thus concluded that the German courts had violated Article 8 § 1.

The Court also held that the applicant's complaints did not give rise to any separate cause of action under Article 14 of the Convention that was not addressed under Articles 6 and 8.

Ultimately, the Court held that the applicant was entitled to damages from the State.

One judge concurred with the judgment, but highlighted three additional factors, (1) the parallelism between private health insurance and the social-security system in Germany; (2) Article 8's impact on private-law relations between private actors; and (3) respect for the free will and choices of transsexuals.

Three judges dissented, arguing that the case was not about transsexuals' rights to private life, dignity, and gender self identification; rather, considering the uncertainty over whether the surgery was "medically necessary," the dissenting judges found that the judgment overly restricted the ability of the insurance company to litigate the terms of a contract negotiated with the applicant.

### Decision Excerpts

The Court considers that determining the medical necessity of gender reassignment measures by their curative effects on a transsexual is not a matter of legal definition. In *Christine Goodwin* (see paragraph 52 above), the Court referred to the expert evidence in the British case of *Bellinger v. Bellinger*, which indicated a growing acceptance of findings of sexual differences in the brain that are determined pre-natally, although scientific proof for the theory was far from complete. The Court considered it more significant that transsexualism has wide international recognition as a medical condition for which treatment is provided in order to afford relief. Para 54.

The Court reaffirms its statement in *I. v. the United Kingdom and Christine Goodwin* (see paragraph 52 above) that, given the numerous and painful interventions involved in gender reassignment surgery and the level of commitment and conviction required to achieve a change in social gender role, it cannot be suggested that there is anything arbitrary or capricious in the decision taken by a person to undergo gender reassignment. Para 59.

Elements such as gender identification, name and sexual orientation and sexual life fall within the personal sphere protected by Article 8. . . . The very essence of the Convention being respect for human dignity and human freedom, protection is given to the right of transsexuals to personal development and to physical and moral security. Para 69.

81. The Court of Appeal also reproached the applicant with having deliberately caused her transsexuality. In evaluating her sexual identity and development, the Court of Appeal analysed her past prior to the taking of female hormones and found that she had only shown male behaviour and was thus genuinely male orientated. In doing so, the Court of Appeal, on the basis of general assumptions as to male and female behaviour, substituted its views on the most intimate feelings and experiences for those of the applicant, and this without any medical competence. It thereby required the applicant not only to prove that this orientation existed and amounted to a disease necessitating hormone treatment and gender reassignment surgery, but also to show the genuine nature of her transsexuality although, as stated above (see paragraph 75 above), the essential nature and cause of transsexualism are uncertain.

82. In the light of recent developments (see *I. v. the United Kingdom and Christine Goodwin*, cited above, § 62 and § 82, respectively), the burden placed on a person to prove the medical necessity of treatment, including irreversible surgery, in one of the most intimate areas of private life, appears disproportionate. Paras 81, 82.

