



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

THIRD SECTION

CASE OF VAN KÜCK v. GERMANY

(Application no. 35968/97)

FINAL

12/09/2003

JUDGMENT

STRASBOURG

12 June 2003

In the case of Van Kück v. Germany,

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

Mr I. CABRAL BARRETO, *President*,

Mr G. RESS,

Mr L. CAFLISCH,

Mr R. TÜRMEŦ,

Mr B. ZUPANČIČ,

Mr J. HEDIGAN,

Mrs H.S. GREVE, *judges*,

and Mr V. BERGER, *Section Registrar*,

Having deliberated in private on 20 June 2002 and 22 May 2003,

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

PROCEDURE

1. The case originated in an application (no. 35968/97) against the Federal Republic of Germany lodged with the European Commission of Human Rights (“the Commission”) under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a German national, Ms Carola van Kück, on 6 May 1997.

2. The German Government (“the Government”) were represented by their Agent, Mr K. Stoltenberg, *Ministerialdirigent*, Federal Ministry of Justice.

3. The applicant alleged that German court decisions refusing her claims for reimbursement of gender reassignment measures and also the related proceedings were in breach of her right to a fair trial and of her right to respect for her private life and that they amounted to discrimination on the ground of her particular psychological situation. She relied on Articles 6 § 1, 8, 13 and 14 of the Convention.

4. The application was transmitted to the Court on 1 November 1998, when Protocol No. 11 to the Convention came into force (Article 5 § 2 of Protocol No. 11).

5. The application was allocated to the Fourth Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1.

6. By a decision of 18 October 2001, the Chamber declared the application admissible.

7. On 1 November 2001 the Court changed the composition of its Sections (Rule 25 § 1). This case was assigned to the newly composed Third Section.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

8. The applicant was born in 1948 and lives in Berlin. At birth, she was registered as male, with the forenames Bernhard Friedrich.

A. The proceedings for the change of the applicant's forenames

9. In 1990 the applicant instituted proceedings before the Schöneberg District Court, asking it to change her forenames to Carola Brenda.

10. On 20 December 1991 the District Court granted the applicant's request. The court found that the conditions under section 1 of the Transsexuals Act (*Gesetz über die Änderung der Vornamen und die Feststellung der Geschlechtszugehörigkeit in besonderen Fällen*) were met in the applicant's case.

11. The District Court, having heard the applicant and having regard to the written opinions of the psychiatric experts Prof. R. and Dr O. of 28 August 1991, and of the psychological expert Prof. D. of 1 September 1991, considered that the applicant was a male-to-female transsexual. It noted that, although Prof. R. and Dr O. had indicated that the applicant was not a typical transsexual, the Transsexuals Act required only that the condition of transsexuality be met, irrespective of the particular form it took. Moreover, the court found that the experts had convincingly shown that the applicant had been for at least the last three years under the constraint of living according to these tendencies and that there was a high probability that she would not change these tendencies in the future.

B. The civil proceedings against the health insurance company

12. In 1992 the applicant, represented by counsel, brought an action with the Berlin Regional Court against a German health insurance company. Having been affiliated to this company since 1975, she claimed reimbursement of pharmaceutical expenses for hormone treatment. She further requested a declaratory judgment to the effect that the defendant company was liable to reimburse 50% of the expenses for gender reassignment operations and further hormone treatment. As an employee of the Berlin *Land*, she was entitled to allowances covering half of her medical expenses; the private health insurance was to cover the other half.

13. On 20 October 1992 the Berlin Regional Court decided to take expert evidence on the questions of whether or not the applicant was a male-to-female transsexual; whether or not her kind of transsexuality was a disease; whether or not the gender reassignment operation was the necessary

medical treatment for the transsexuality; and whether or not this treatment was generally recognised by medical science.

14. The psychiatrist Dr H., having examined the applicant in January 1993, delivered his opinion in February 1993. In his conclusions, he confirmed that the applicant was a male-to-female transsexual and that her transsexuality had to be regarded as a disease. He further indicated that gender reassignment surgery was not the only possible medical treatment in cases of transsexuality. In the applicant's case, he recommended such an operation from a psychiatric-psychotherapeutic point of view, as it would improve her social situation. He noted that gender reassignment surgery was not generally recognised by medical science and that there were several comments in the specialised literature questioning whether the operation was effective; however, it could be assumed that the fact that transsexuals accepted themselves and their bodies contributed to their stabilisation. According to him, many transsexuals reached such stability only after an operation. In his view, this was the case for the applicant and an operation should therefore be approved. The expert concluded that the gender reassignment operation formed part of the curative treatment of a mental disease.

15. On 3 August 1993 the Regional Court, following an oral hearing, dismissed the applicant's claims. The court considered that under the relevant provisions of the General Insurance Conditions (*Allgemeine Versicherungsbedingungen*) governing the contractual relations between the applicant and her private health insurance company, the applicant was not entitled to reimbursement of medical treatment regarding her transsexuality.

16. In its reasoning, the court, having regard to the opinion prepared by Dr H. and to the expert opinions prepared in the proceedings before the Schöneberg District Court, considered that the applicant was a male-to-female transsexual and that her condition had to be regarded as a disease. The question whether the treatment in question was recognised by medical science was irrelevant. In the court's view, hormone treatment and gender reassignment surgery could not reasonably be considered as necessary medical treatments. Having regard to the relevant case-law of the Federal Social Court, the court found that the applicant ought first to have had recourse to less radical means, namely an extensive course of 50 to 100 psychotherapy sessions, as proposed by the psychiatric expert Prof. D. and terminated by the applicant after two sessions (according to the Government, the original manuscript decision referred to twenty-four sessions). The court was not convinced that, on account of the applicant's resistance to therapy, the intended operation was the only possible treatment.

17. Moreover, the Regional Court found that the evidence did not show conclusively that the gender reassignment measures would relieve the applicant's physical and mental difficulties, a further criterion for assuming their medical necessity. The expert Dr H. had merely recommended the operation from a psychiatric-psychotherapeutic point of view, as it would

improve the applicant's social situation. His submissions, according to which the effect of gender reassignment surgery was often overrated, did not show that the gender reassignment measures were necessary for medical reasons. The court had not, therefore, been required, of its own motion, to summon the expert to explain his opinion orally.

18. On 11 October 1993 the applicant lodged an appeal with the Berlin Court of Appeal. In the written appeal submissions, the applicant objected to the findings of the Regional Court in so far as they denied the necessity of gender reassignment measures. The applicant also submitted that she had unsuccessfully attended between twenty-four and thirty-five psychotherapy sessions. In this connection, she referred to the written expert opinions and also mentioned the possibility of taking evidence from these experts.

19. In November 1994 the applicant underwent gender reassignment surgery. According to her, having been unfit for work since February 1994, she had agreed with the physician treating her that her suffering would not permit her to await the outcome of the appeal proceedings.

20. On 27 January 1995 the Court of Appeal, following an oral hearing, dismissed the applicant's appeal. The Court of Appeal valued the claims at stake at 28,455.92 German marks.

21. The Court of Appeal noted that the applicant was a male-to-female transsexual and that, according to the opinion of the expert Dr H., her transsexuality constituted a disease, a matter not in dispute between the parties to the proceedings.

22. Referring to clause 1 of the General Insurance Conditions, the Court of Appeal upheld the Regional Court's conclusions that the expert Dr H. had not confirmed the necessity of gender reassignment measures. The Court of Appeal had regard to various passages of the expert opinion. Thus, it noted that the expert had considered gender reassignment surgery as one possible medical treatment; however, the question of necessity could not be clearly affirmed given the diverging scientific opinions and results. In his view, consensus existed on the improved psycho-social situation following the change of the sexual role, although the effect of the operation as such was often overrated. In the applicant's case, the advantages of an operation would, in the expert's view, prevail, while psychotherapy could not cure the transsexuality on account of the applicant's chronic narcissistic character structure; even extended psychotherapy was not likely to result in any changes. Turning to the expert's statement that gender reassignment was not the only possible curative treatment, but recommendable from a psychiatric-psychotherapeutic point of view in order to improve the applicant's social situation, the Court of Appeal found that, with this cautious formulation, the expert had not clearly affirmed the necessity of an operation. The applicant had therefore failed to prove that the conditions for reimbursement of medical treatment were met in her case. The Court of Appeal added that, while the expert had mentioned that the gender reassignment operation "formed part of the curative treatment of a mental disease", taking his other statements into account, he had regarded success as rather uncertain. Such a

vague hope could not justify the necessity of medical treatment, bearing the aim of health insurance in mind. Thus, the health insurance had to bear only costs of treatment suitable to cure a disease. In the applicant's case, the expert had explained that gender reassignment measures could not be expected to cure the applicant's transsexuality, but at best to improve her psycho-social situation. This result was insufficient, as such an improvement did not affect the applicant's transsexuality as such. With regard to these remaining doubts, the Court of Appeal concluded that the applicant had failed to prove the necessity of her treatment.

23. The Court of Appeal further considered that, in any event, the applicant was not entitled to reimbursement under clause 5.1(b) of the General Insurance Conditions on the ground that she had herself deliberately caused the disease, as argued by the defendant in earlier submissions.

24. Referring to the details of her case history as contained in the expert opinion of Dr O. of August 1991, the Court of Appeal found in particular that the applicant was born as a male child and did not claim that she was a female on account of chromosomal factors. Initially, she had not adopted female behaviour. On account of her male orientation, she had been able to resist feelings that she would have preferred to be a girl and that this would have been more appropriate, and had controlled her emotional life at an early stage.

25. The Court of Appeal considered that the applicant had continued to live as a man. In its view, the applicant's "fear of bigger boys" at school was not gender-specific. Furthermore, applying to join the armed forces did not indicate female feelings, and she had left the armed forces not because of the feeling that she was a "woman" but because she had experienced degrading treatment. The applicant had married in November 1972, likewise a sign of her male orientation at that time. As from 1981, the spouses had wished to have a child.

26. According to the Court of Appeal, the "turning-point", as stated by the applicant, had been the moment when, after an unsuccessful operation in 1986, she had realised that she was infertile. The Court of Appeal quoted the following passage from the expert opinion of 1991:

"The recognition that he was infertile is a decisive factor confirming the subsequent transsexual development."

27. It continued in the following terms:

"Fully aware of this position, the plaintiff concluded for herself: 'If you cannot have children, you are not a man', and as a consequence she went one step further and wanted to be a woman from then on. She had never otherwise felt that she was, or that she had to become, a woman, but was merely making a statement that she could do without a penis and still have satisfying relations with his [*sic*] wife ... Doing without the one is not the same as an irresistible desire for the other. In furtherance of the self-imposed goal of wishing to be a woman, from December 1986 – without medical advice, assistance or instruction – she took female hormones ...

That was deliberate. Having recognised – no doubt painfully – that she could not have children, she decided to distance herself from her past as a man ... It was this deliberate act of self-medication that led the plaintiff ever more to her decision that she wanted to be a woman and to look like one, although it was biologically impossible. This was based on her limited preparedness or ability to reflect critically ... but was wrongfully deliberate because the plaintiff was at all events at that stage in a position to see what the consequences of her ‘self-medication’ would be, and to act accordingly.

...”

28. On 25 October 1996 the Federal Constitutional Court refused to admit the applicant’s constitutional complaint.

II. RELEVANT DOMESTIC LAW AND PRACTICE AND OTHER MATERIAL

A. The status of transsexuals

29. The German Transsexuals Act (*Gesetz über die Änderung der Vornamen und die Feststellung der Geschlechtszugehörigkeit in besonderen Fällen*) of 10 September 1980 (Federal Gazette I, p. 1654) was adopted following the decision of 11 October 1978 of the Federal Constitutional Court according to which the refusal to change the sex of a post-operative transsexual in the register of births was an unjustified interference with human dignity and everyone’s fundamental right to develop his personality freely (Reports of the Decisions of the Federal Constitutional Court, BVerfGE 49, pp. 286 et seq.).

30. Sections 1 to 7 of the Transsexuals Act govern the conditions, procedures and legal consequences of a change of a transsexual’s forenames without gender reassignment surgery. Under section 1, persons may request that their forenames be changed if, on account of their transsexual orientation, they no longer feel they belong to the sex recorded in the register of births, they have been for at least three years under the constraint of living according to these tendencies, and if there is a high probability that they will not change this orientation in the future. The competent civil courts have to obtain two medical expert opinions in order to establish whether the medical conditions are met (section 4).

31. Following gender reassignment surgery, section 8 provides for a change of the sex entered in the register of births, if, in addition to the conditions laid down in section 1, the persons concerned are not married and are not able to procreate. The forenames will be changed, if proceedings under section 1 have not yet taken place.

B. Gender reassignment surgery

1. The general health insurance system

32. Since 1989 the German health insurance system, which previously formed part of the *Reich* Insurance Code (*Reichsversicherungsordnung*) of 1911 has been governed by the Social Security Act, Book V, Health Insurance (*Sozialgesetzbuch, Fünftes Buch, Gesetzliche Krankenversicherung*), on the basis of the Health (Reform) Act (*Gesetz zur Strukturreform im Gesundheitswesen*) of 20 December 1988. Subsequently, further reform legislation was enacted. Under the relevant provisions, persons insured under the health system are entitled to medical treatment which is necessary in order to diagnose or to cure a disease, in order to prevent its aggravation or to offer relief for its symptoms.

33. The Federal Social Court, in a decision of 6 August 1987 (Reports of Decisions, BSGE 62, pp. 83 et seq.), confirmed the lower social courts' decisions that the cost of gender reassignment surgery had to be reimbursed if, in the circumstances of the individual case, the psychophysical state of the transsexual amounted to a disease and if gender reassignment was the sole means of finding relief, psychiatric and psychotherapeutic treatment having remained unsuccessful.

2. Private health insurance

34. The basic rules for private health insurance, as for any other private insurance, are laid down in the Insurance Contract Act (*Gesetz über den Versicherungsvertrag*) of 1908, as amended. According to section 178.b, private health insurance covers expenses for curative treatment which is medically necessary on account of a disease or injuries suffered as a result of an accident or for other medical services for illness, as far as stipulated in the contract. The insurer is exempted from liability if the insured person has deliberately caused his or her own disease or accident (section 178.l). The contractual relations are standardised in general insurance conditions.

35. The Federal Court of Justice, in a decision of 11 April 1994 (*Versicherungsrecht* 1995, pp. 447 et seq.), endorsed the lower court's finding that gender reassignment surgery had to be considered as necessary medical treatment of a disease if the insured person's change of gender had been recognised under sections 8 et seq. of the Transsexuals Act.

C. Other relevant material

36. In its judgment of 30 April 1996 in *P. v. S. and Cornwall County Council* (C-13/94, Rec. 1996, p. I-2143), the European Court of Justice (ECJ) found that discrimination arising from gender reassignment constituted discrimination on grounds of sex and, accordingly, Article 5 § 1 of Council Directive 76/207/EEC of 9 February 1976, on the

implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion and working conditions, precluded dismissal of a transsexual for a reason related to a gender reassignment. It held, rejecting the argument of the United Kingdom Government that the employer would also have dismissed P. if P. had previously been a woman and had undergone an operation to become a man, that

“... [w]here a person is dismissed on the ground that he or she intends to undergo or has undergone gender reassignment, he or she is treated unfavourably by comparison with persons of the sex to which he or she was deemed to belong before undergoing gender reassignment.

To tolerate such discrimination would be tantamount, as regards such a person, to a failure to respect the dignity and freedom to which he or she is entitled and which the Court has a duty to safeguard.” (paragraphs 21-22)

37. In its judgment of 17 February 1998, in *Lisa Jacqueline Grant v. South-West Trains Ltd* (C-249/96, Rec. 1998, p. I-621), the ECJ clarified the resulting position as follows

“... That reasoning, which leads to the conclusion that such discrimination is to be prohibited just as is discrimination based on the fact that a person belongs to a particular sex, is limited to the case of a worker’s gender reassignment and does not therefore apply to differences of treatment based on a person’s sexual orientation.

...

... Community law as it stands at present does not cover discrimination based on sexual orientation, such as that in issue in the main proceedings.

It should be observed, however, that the Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, signed on 2 October 1997, provides for the insertion in the EC Treaty of an Article 6a which, once the Treaty of Amsterdam has entered into force, will allow the Council under certain conditions (a unanimous vote on a proposal from the Commission after consulting the European Parliament) to take appropriate action to eliminate various forms of discrimination, including discrimination based on sexual orientation.”

The ECJ concluded that the refusal by an employer to allow travel concessions to the person of the same sex with whom a worker has a stable relationship, where such concessions are allowed to a worker’s spouse or to the person of the opposite sex with whom a worker has a stable relationship outside marriage, does not constitute discrimination prohibited by Article 119 of the Treaty or Directive 75/117.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

38. The applicant complained about the alleged unfairness of German court proceedings concerning her claims for reimbursement of medical expenses against a private health insurance company. She relied on Article 6 § 1 of the Convention, the relevant part of which reads as follows:

“In the determination of his civil rights and obligations ..., everyone is entitled to a fair ... hearing ... by [a] ... tribunal ...”

A. Arguments of the parties

1. *The applicant*

39. The applicant maintained that the German courts had arbitrarily interpreted the notion of “necessary medical treatment” in a narrow sense. In her view, the expert had recommended her operation without hesitation. However, the Court of Appeal in particular had transposed general views on transsexuality in the medical opinion of Dr H. and had required the operation to be the only possible treatment.

40. She also considered that the Court of Appeal should not have drawn conclusions from a written expert opinion prepared in the context of a previous set of court proceedings without hearing the expert Dr O. She had only agreed to the consultation of these files in order to avoid repeated taking of evidence on her sexual orientation. The experts had never situated the biographical information concerned in the context of the question whether she had herself deliberately caused her transsexuality. Moreover, in her expert opinion, Dr O. had only stated that the applicant’s infertility had contributed to its development. The Court of Appeal’s conclusion, without an expert medical report, that her hormone treatment had brought about her transsexuality was arbitrary.

2. *The Government*

41. According to the Government, the proceedings as a whole had been fair. In their view, the applicant had had the opportunity to put forward all relevant arguments and to adduce evidence. Moreover, the Berlin Regional Court had taken evidence on the question whether the operation was a necessary medical treatment and had duly taken the conclusions of the expert Dr H. into account. Likewise, the Court of Appeal had fully considered the expert medical opinion and, at an oral hearing, it had given the applicant a further opportunity to comment on the matter.

42. The German courts' interpretation of the insurance contract between the applicant and the health insurance company, and in particular of the necessity of the gender reassignment surgery as medical treatment, could not be objected to under the Convention. The burden of proof had been on the applicant as the insured person. The expert had not unequivocally affirmed the medical necessity of an operation, but had recommended the operation from a psychiatric-psychotherapeutic point of view. The Court of Appeal had concluded therefrom that the operation was not necessary as a medical treatment, even though the applicant's social situation could be improved. The courts also had regard to the proceedings concerning the change of the applicant's forenames.

43. Furthermore, as the written expert opinion had been conclusive, the Regional Court and the Court of Appeal had not been obliged to summon the expert.

44. Moreover, the Court of Appeal, taking into account the defendant's submissions, had to take evidence on the question whether the applicant had herself deliberately caused the disease. The court had assessed this matter on the basis of an expert opinion, prepared by Dr O. in the context of the proceedings before the Schöneberg District Court concerning the change of forenames. In the first-instance proceedings, the applicant had agreed that these files be consulted.

45. According to the Government, this expert opinion contained sufficient elements concerning, *inter alia*, her early youth, her military service and her marriage to support the conclusion that the applicant had herself deliberately caused her transsexuality. In this respect, the Court of Appeal had correctly noted that the applicant had started hormone medication without first consulting a medical practitioner.

B. The Court's assessment

1. The Court's general approach

46. The Court reiterates that it is in the first place for the national authorities, and notably the courts, to interpret domestic law and that it will not substitute its own interpretation for theirs in the absence of arbitrariness (see, *mutatis mutandis*, *Ravnsborg v. Sweden*, judgment of 23 March 1994, Series A no. 283-B, pp. 29-30, § 33; *Bulut v. Austria*, judgment of 22 February 1996, *Reports of Judgments and Decisions* 1996-II, pp. 355-56, § 29; and *Tejedor García v. Spain*, judgment of 16 December 1997, *Reports* 1997-VIII, p. 2796, § 31).

47. Moreover, it is for the national courts to assess the evidence they have obtained and the relevance of any evidence that a party wishes to have produced. The Court has nevertheless to ascertain whether the proceedings considered as a whole were fair as required by Article 6 § 1 (see *Mantovanelli v. France*, judgment of 18 March 1997, *Reports* 1997-II,

pp. 436-37, § 34, and *Elsholz v. Germany* [GC], no. 25735/94, § 66, ECHR 2000-VIII).

48. In particular, Article 6 § 1 places the “tribunal” under a duty to conduct a proper examination of the submissions, arguments and evidence adduced by the parties, without prejudice to its assessment of whether they are relevant to its decision (see *Van de Hurk v. the Netherlands*, judgment of 19 April 1994, Series A no. 288, p. 19, § 59).

49. As to the issue of transsexualism, the Court observes that, in the context of its case-law on the legal status of transsexuals, it has had regard, *inter alia*, to developments in medical and scientific thought.

50. In *Rees v. the United Kingdom* (judgment of 17 October 1986, Series A no. 106, pp. 15-16, § 38), the Court noted:

“Transsexualism is not a new condition, but its particular features have been identified and examined only fairly recently. The developments that have taken place in consequence of these studies have been largely promoted by experts in the medical and scientific fields who have drawn attention to the considerable problems experienced by the individuals concerned and found it possible to alleviate them by means of medical and surgical treatment. The term ‘transsexual’ is usually applied to those who, whilst belonging physically to one sex, feel convinced that they belong to the other; they often seek to achieve a more integrated, unambiguous identity by undergoing medical treatment and surgical operations to adapt their physical characteristics to their psychological nature. Transsexuals who have been operated upon thus form a fairly well-defined and identifiable group.”

51. In *Cossey v. the United Kingdom* (judgment of 27 September 1990, Series A no. 184, p. 16, § 40), it considered that there had been no noteworthy scientific developments in the area of transsexualism in the period since the date of adoption of its judgment in *Rees*, cited above, which would compel it to depart from the decision reached in the latter case. This view was confirmed subsequently in *B. v. France* in which it observed that there still remained uncertainty as to the essential nature of transsexualism and that the legitimacy of surgical intervention in such cases was sometimes questioned (judgment of 25 March 1992, Series A no. 232-C, p. 49, § 48; see also *Sheffield and Horsham v. the United Kingdom*, judgment of 30 July 1998, *Reports* 1998-V, pp. 2027-28, § 56).

52. However, in recent judgments (see *I. v. the United Kingdom* [GC], no. 25680/94, §§ 61-62, 11 July 2002, and *Christine Goodwin v. the United Kingdom* [GC], no. 28957/95, §§ 81-82, ECHR 2002-VI), the Court came to different conclusions. In *Christine Goodwin*, the Court noted:

“81. It remains the case that there are no conclusive findings as to the cause of transsexualism and, in particular, whether it is wholly psychological or associated with physical differentiation in the brain. The expert evidence in the domestic case of *Bellinger v. Bellinger* was found to indicate 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 considers it more significant however that transsexualism has wide international recognition as a medical condition for which treatment is provided in order to afford relief (for example, the *Diagnostic and Statistical Manual*, 4th edition (DSM-IV) replaced the diagnosis of transsexualism with ‘gender identity disorder’; see also *The International*

Classification of Diseases, 10th edition (ICD-10)). The United Kingdom National Health Service, in common with the vast majority of Contracting States, acknowledges the existence of the condition and provides or permits treatment, including irreversible surgery. The medical and surgical acts which in this case rendered the gender reassignment possible were indeed carried out under the supervision of the national health authorities. Nor, given the numerous and painful interventions involved in such surgery and the level of commitment and conviction required to achieve a change in social gender role, can it be suggested that there is anything arbitrary or capricious in the decision taken by a person to undergo gender reassignment. In those circumstances, the ongoing scientific and medical debate as to the exact causes of the condition is of diminished relevance.

82. While it also remains the case that a transsexual cannot acquire all the biological characteristics of the assigned sex (see *Sheffield and Horsham*, cited above, p. 2028, § 56), the Court notes that with increasingly sophisticated surgery and types of hormonal treatments, the principal unchanging biological aspect of gender identity is the chromosomal element. It is known however that chromosomal anomalies may arise naturally (for example, in cases of intersex conditions where the biological criteria at birth are not congruent) and in those cases, some persons have to be assigned to one sex or the other as seems most appropriate in the circumstances of the individual case. It is not apparent to the Court that the chromosomal element, amongst all the others, must inevitably take on decisive significance for the purposes of legal attribution of gender identity for transsexuals ...”

2. Assessment of the “medical necessity” of gender reassignment measures

53. The Court notes that, in the civil proceedings against her private health insurance company, the applicant, who changed her forenames after recognition of her transsexuality in court proceedings under the Transsexuals Act in 1991, claimed reimbursement of medical expenses in respect of gender reassignment measures, namely hormone treatment and gender reassignment surgery. In 1992 the Regional Court ordered an expert opinion on the questions of the applicant’s transsexuality and the necessity of gender reassignment measures. The Regional Court and the Court of Appeal concluded that the expert had not clearly affirmed the medical necessity of gender reassignment surgery. In this respect, the Regional Court considered two points, namely, prior recourse to extensive psychotherapy as a less radical measure and the lack of a clear affirmation of the necessity of gender reassignment measures for medical purposes, the expert’s recommendation being limited to an improvement in the applicant’s social situation. The Court of Appeal endorsed the second aspect of the Regional Court’s reasoning and concluded that, as there remained doubts, the applicant had failed to prove the medical necessity of the gender reassignment surgery.

54. The Court, bearing in mind the complexity of assessing the applicant’s transsexuality and the need for medical treatment, finds that the Regional Court rightly decided to obtain an expert medical opinion on these questions. However, notwithstanding the expert’s unequivocal recommendation of gender reassignment measures in the applicant’s

situation, the German courts concluded that she had failed to prove the medical necessity of these measures. In their understanding, the expert's finding that gender reassignment measures would improve the applicant's social situation did not clearly assert the necessity of such measures from a medical point of view. 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".

55. In the present case, the German courts' evaluation of the expert opinion and their assessment that improving the applicant's social situation as part of psychological treatment did not meet the requisite condition of medical necessity does not seem to coincide with the above findings of the Court (see *Christine Goodwin*, cited above). In any case, it would have required special medical knowledge and expertise in the field of transsexualism. In this situation, the German courts should have sought further, written or oral, clarification from the expert Dr H. or from any other medical specialist.

56. Furthermore, considering recent developments (see *I. v. the United Kingdom* and *Christine Goodwin*, both cited above, § 62 and § 82, respectively), gender identity is one of the most intimate areas of a person's private life. The burden placed on a person in such a situation to prove the medical necessity of treatment, including irreversible surgery, appears therefore disproportionate.

57. In these circumstances, the Court finds that the interpretation of the term "medical necessity" and the evaluation of the evidence in this respect were not reasonable.

3. *Assessment of the cause of the applicant's transsexuality*

58. The Court of Appeal further based its decision on the consideration that, under the insurance conditions, the defendant was exempted from payment on the ground that the applicant had deliberately caused her transsexuality. In this respect, the Court of Appeal found that it was only after having had to recognise that, as a man, she was infertile that the applicant had decided to become a woman, and had forced this development by self-medication with female hormones.

59. 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.

60. The Court observes at the outset that the applicant had obtained recognition of her transsexuality in court proceedings under the Transsexuals Act in 1991. Furthermore, she had undergone gender reassignment surgery at the time of the Court of Appeal's decision.

61. The Court notes that the issue of the cause of the applicant's transsexuality did not appear in the Regional Court's order for the taking of expert evidence and was not, therefore, covered by the opinion prepared by Dr H. The Court of Appeal did not itself take evidence from Dr H. on this question, nor did it examine the experts involved in the earlier proceedings in 1990 and 1991, respectively, as the applicant had requested. Rather, the Court of Appeal analysed personal data recorded in a case history which was contained in the opinion prepared by Dr O. in 1991 in the context of the proceedings under the Transsexuals Act. This opinion had been limited to the questions whether the applicant was a male-to-female transsexual and had been for at least the last three years under the constraint of living according to these tendencies, which were answered in the affirmative.

62. In the Court's opinion, the Court of Appeal was not entitled to take the view that it had sufficient information and medical expertise for it to be able to assess the complex question of whether the applicant had deliberately caused her transsexuality (see, *mutatis mutandis*, *H. v. France*, judgment of 24 October 1989, Series A no. 162-A, pp. 25-26, § 70).

63. Moreover, in the absence of any conclusive scientific findings as to the cause of transsexualism and, in particular, whether it is wholly psychological or associated with physical differentiation in the brain (see again *I. v. the United Kingdom* and *Christine Goodwin*, loc. cit.), the approach taken by the Court of Appeal in examining the question whether the applicant had deliberately caused her condition appears inappropriate.

4. Conclusion

64. Having regard to the determination of the medical necessity of gender reassignment measures in the applicant's case and also of the cause of the applicant's transsexuality, the Court concludes that the proceedings in question, taken as a whole, did not satisfy the requirements of a fair hearing.

65. Accordingly, there has been a breach of Article 6 § 1 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

66. The applicant further considered that the impugned court decisions had infringed her right to respect for her private life within the meaning of Article 8 of the Convention, the relevant parts of which read:

“1. Everyone has the right to respect for his private ... life ...

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

A. Arguments of the parties

67. The applicant considered that the Court of Appeal had failed to respect her sexual identity in projecting an image of her personality which was based on misconstrued facts. When looking at her male past, the Court of Appeal had regarded various episodes as disclosing a male orientation without taking into account the efforts to repress the feeling of having a different identity. It had thereby disregarded the development of her personality and sexual identity.

68. The Government maintained that the Court of Appeal had duly considered an expert opinion prepared in the context of previous court proceedings. They repeated that the applicant had agreed to the consultation of these files. The Court of Appeal had highlighted some elements in the said expert opinion in order to show that the applicant had herself deliberately caused her transsexuality. It had not criticised the applicant’s sexual orientation, nor had it regarded this orientation as reprehensible or unacceptable. Rather, the fact that the Court of Appeal had referred to the circumstance that the applicant was meanwhile living as a woman showed that it had accepted and respected her sexual identity. However, the Court of Appeal had been obliged to consider the applicant’s personal development in deciding whether her claim against the insurance company was valid.

B. The Court’s assessment

1. General principles

69. As the Court has had previous occasion to remark, the concept of “private life” is a broad term not susceptible to exhaustive definition. It covers the physical and psychological integrity of a person (see *X and Y v. the Netherlands*, judgment of 26 March 1985, Series A no. 91, p. 11, § 22). It can sometimes embrace aspects of an individual’s physical and social identity (see *Mikulić v. Croatia*, no. 53176/99, § 53, ECHR 2002-I). Elements such as, for example, gender identification, name and sexual orientation and sexual life fall within the personal sphere protected by Article 8 (see, for example, *B. v. France*, cited above, pp. 53-54, § 63; *Burghartz v. Switzerland*, judgment of 22 February 1994, Series A no. 280-B, p. 28, § 24; *Dudgeon v. the United Kingdom*, judgment of 22 October 1981, Series A no. 45, pp. 18-19, § 41; *Laskey, Jaggard and Brown v. the United Kingdom*, judgment of 19 February 1997, *Reports* 1997-I, p. 131,

§ 36; and *Smith and Grady v. the United Kingdom*, nos. 33985/96 and 33986/96, § 71, ECHR 1999-VI). Article 8 also protects a right to personal development, and the right to establish and develop relationships with other human beings and the outside world (see, for example, *Burghartz*, cited above, opinion of the Commission, p. 37, § 47, and *Friedl v. Austria*, judgment of 31 January 1995, Series A no. 305-B, opinion of the Commission, p. 20, § 45). Likewise, the Court has held that although no previous case has established as such any right to self-determination as being contained in Article 8, the notion of personal autonomy is an important principle underlying the interpretation of its guarantees (see *Pretty v. the United Kingdom*, no. 2346/02, § 61, ECHR 2002-III). Moreover, 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 (see *I. v. the United Kingdom*, § 70, and *Christine Goodwin*, § 90, both cited above).

70. The Court further reiterates that, while the essential object of Article 8 is to protect the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference: in addition to this negative undertaking, there may be positive obligations inherent in an effective respect for private or family life. These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves (see *X and Y v. the Netherlands*, cited above, p. 11, § 23; *Botta v. Italy*, judgment of 24 February 1998, *Reports* 1998-I, p. 422, § 33; and *Mikulić*, cited above, § 57).

71. However, the boundaries between the State's positive and negative obligations under Article 8 do not lend themselves to precise definition. The applicable principles are nonetheless similar. In determining whether or not such an obligation exists, regard must be had to the fair balance which has to be struck between the general interest and the interests of the individual; and in both contexts the State enjoys a certain margin of appreciation (see, for instance, *Keegan v. Ireland*, judgment of 26 May 1994, Series A no. 290, p. 19, § 49; *B. v. France*, cited above, p. 47, § 44; and, as recent authorities, *Sheffield and Horsham*, cited above, p. 2026, § 52, and *Mikulić*, cited above, § 57).

72. For the balancing of the competing interests, the Court has emphasised the particular importance of matters relating to a most intimate part of an individual's life (see *Dudgeon*, cited above, p. 21, § 52, and *Smith and Grady*, cited above, § 89).

2. Application of these principles to the present case

73. In the present case, the civil court proceedings touched upon the applicant's freedom to define herself as a female person, one of the most basic essentials of self-determination. The applicant complained in substance that, in the context of the dispute with her private health insurance

company, the German courts, in particular the Berlin Court of Appeal, had failed to give appropriate consideration to her transsexuality.

74. The Court observes that the applicant's submissions under Article 8 § 1 are focused on the German courts' taking and evaluation of evidence as regards her transsexuality, a matter which has already been examined under Article 6 § 1. However, the Court points to the difference in the nature of the interests protected by Article 6, namely procedural safeguards, and by Article 8 § 1, ensuring proper respect for, *inter alia*, private life, a difference which justifies the examination of the same set of facts under both Articles (see *McMichael v. the United Kingdom*, judgment of 24 February 1995, Series A no. 307-B, p. 57, § 91; *Buchberger v. Austria*, no. 32899/96, § 49, 20 December 2001; and *P., C. and S. v. the United Kingdom*, no. 56547/00, § 120, ECHR 2002-VI).

75. In the present case, the facts complained of not only deprived the applicant of a fair hearing as guaranteed under Article 6 § 1, but also had repercussions on a fundamental aspect of her right to respect for private life, namely her right to gender identity and personal development. In these circumstances, the Court considers it appropriate to examine under Article 8 also the applicant's submission that the German courts, in dealing with her claims for reimbursement of medical expenses, had failed to discharge the State's positive obligations.

76. The Court notes at the outset that the proceedings in question took place between 1992 and 1995 at a time when the condition of transsexualism was generally known (see the references to the German legislation and case-law, paragraphs 29 to 31, 33 and 35 above, and the Court's considerations in its case-law, cited in paragraphs 50 to 52 above). In this connection, the Court likewise notes the remaining uncertainty as to the essential nature and cause of transsexualism and the fact that the legitimacy of surgical intervention in such cases is sometimes questioned (see the Court's observations of 1992, 1998 and 2002 in *B. v. France*, in *Sheffield and Horsham*, in *I v. the United Kingdom*, and in *Christine Goodwin*, all cited above – paragraphs 50-52).

77. The Court has also previously held that the fact that the public health services did not delay the giving of medical and surgical treatment until all legal aspects of transsexuals had been fully investigated and resolved, benefited the persons concerned and contributed to their freedom of choice (see *Rees*, cited above, p. 18 § 45). Moreover, manifest determination has been regarded as a factor which is sufficiently significant to be taken into account, together with other factors, with reference to Article 8 (see *B. v. France*, cited above, p. 51, § 55).

78. In the present case, the central issue is the German courts' application of the existing criteria on reimbursement of medical treatment to the applicant's claim for reimbursement of the cost of gender reassignment surgery, not the legitimacy of such measures in general. Furthermore, what matters is 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 as one of the aspects of her right to respect for her private life.

79. The Court notes that the Regional Court referred the applicant to the possibility of psychotherapy as a less radical means of treating her condition, contrary to the statements contained in the expert opinion.

80. Furthermore, both the Regional Court and the Court of Appeal, notwithstanding the expert's unequivocal recommendation, questioned the necessity of gender reassignment for medical reasons without obtaining supplementary information on this point.

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.

83. In this context, the Court notes that, at the relevant time, the applicant, in agreement with the doctor treating her, had undergone the gender reassignment surgery in question.

84. In the light of these various factors, the Court reaches the conclusion that no fair balance was struck between the interests of the private health insurance company on the one side and the interests of the individual on the other.

85. In these circumstances, the Court considers that the German authorities overstepped the margin of appreciation afforded to them under paragraph 2 of Article 8.

86. Consequently, there has been a violation of Article 8 § 1 of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION TAKEN IN CONJUNCTION WITH ARTICLES 6 § 1 AND 8

87. The applicant also complained that the Court of Appeal's decision amounted to discrimination against her on the ground of her transsexuality. She relied on Article 14 of the Convention, which reads as follows:

“The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”

88. In the applicant's submission, the findings of the Court of Appeal were arbitrary and infringed her personal integrity. In that connection, she noted that her transsexuality had been established in the context of the proceedings before the District Court.

89. The Government submitted that the German courts had not discriminated against the applicant on account of her transsexuality. Any person arguing that the costs of surgical operations should be borne by a health insurance company had to show a valid claim and, in the case of a dispute, adduce relevant evidence. In respect of the medical treatment of transsexuals, evidence had to be furnished for this sexual orientation and the reasons therefor. The need to determine whether or not a disease had been deliberately caused applied to all insured persons. For a transsexual, hormone treatment was relevant circumstantial evidence. The Court of Appeal's evaluation and assessment of evidence did not disclose any discrimination.

90. The Court reiterates that where domestic courts base their decisions on general assumptions which introduce a difference of treatment on the ground of sex, a problem may arise under Article 14 of the Convention (see *Schuler-Zraggen v. Switzerland*, judgment of 24 June 1993, Series A no. 263, pp. 21-22, § 67). Similar considerations apply with regard to discrimination on any other ground or status, that is, also on the ground of an individual's sexual orientation.

91. The Court considers, however, that, in the circumstances of the present case, the applicant's complaint that she was discriminated against on account of her transsexuality amounts in effect to the same complaint, albeit seen from a different angle, that the Court has already considered in relation to Article 6 § 1 and, more particularly, Article 8 of the Convention (see *Smith and Grady*, cited above, § 115).

92. Accordingly, the Court considers that the applicant's complaints do not give rise to any separate issue under Article 14 of the Convention taken in conjunction with Articles 6 § 1 and 8.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

93. Article 41 of the Convention provides:

“If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”

A. Damage

94. The applicant, referring to practical difficulties in quantifying the damage sustained as a result of the Berlin court decisions refusing her claims for reimbursement of the cost of gender reassignment measures, in particular as far as the consequential negative impact on her life was concerned, claimed payment of 14,549 euros (EUR), that being the equivalent of the value fixed by the Court of Appeal (see paragraph 20 above).

95. The Government did not comment on the applicant’s claim.

96. The Court cannot speculate as to what the outcome of the impugned proceedings would have been if the Convention had not been violated. However, it considers that the applicant undeniably sustained non-pecuniary damage as a result of the unfairness of the court proceedings and the lack of respect for her private life. Having regard to the circumstances of the case and ruling on an equitable basis as required by Article 41, the Court awards her compensation in the sum of EUR 15,000.

B. Costs and expenses

97. The applicant’s claim for costs and expenses was broken down as follows:

(i) EUR 1,916 representing the costs awarded against her by the Berlin Regional Court (1,730 German marks (DEM)) and by the Berlin Court of Appeal (an advance payment of DEM 567 and an overall award of DEM 1,449); and

(ii) EUR 807 (DEM 1,578.37) for legal expenses in the proceedings before the Federal Constitutional Court.

98. The Government did not raise any objections to the claims.

99. If the Court finds that there has been a violation of the Convention, it may award the applicant not only the costs and expenses incurred before the Strasbourg institutions, but also those incurred before the national courts for the prevention or redress of the violation (see, in particular, *Zimmermann and Steiner v. Switzerland*, judgment of 13 July 1983, Series A no. 66, p. 14, § 36).

100. In the Court’s view, reimbursement of the court costs relating to the proceedings before the Regional Court on the merits of her claims for

reimbursement of medical expenses cannot be ordered, there being no sufficient connection between those costs and the violation found. On the other hand, the applicant is entitled to be paid the costs of the proceedings before the Court of Appeal since the ground of appeal was the Regional Court's determination of the medical necessity of gender reassignment measures in her case, which was one element in the Court's finding of a violation of Articles 6 and 8. As to the quantum of these costs, the Court, having regard to the court bills filed by the applicant, notes that the advance payment was deducted from the overall award of costs. Furthermore, the applicant's legal expenses in the proceedings before the Federal Constitutional Court must be reimbursed.

101. Ruling on an equitable basis, the Court decides to award the applicant the sum of EUR 2,500.

C. Default interest

102. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT

1. *Holds* by four votes to three that there has been a violation of Article 6 § 1 of the Convention;
2. *Holds* by four votes to three that there has been a violation of Article 8 of the Convention;
3. *Holds* unanimously that no separate issue arises under Article 14 of the Convention taken in conjunction with Articles 6 § 1 and 8;
4. *Holds* by four votes to three
 - (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, the following amounts:
 - (i) EUR 15,000 (fifteen thousand euros) in respect of non-pecuniary damage;
 - (ii) EUR 2,500 (two thousand five hundred euros) in respect of costs and expenses;
 - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

5. *Dismisses* unanimously the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 12 June 2003, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Vincent BERGER
Registrar

Ireneu CABRAL BARRETO
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following opinions are annexed to this judgment:

- (a) concurring opinion of Mr Ress;
- (b) dissenting opinion of Mr Cabral Barreto, Mr Hedigan and Mrs Greve.

I.C.B.
V.B.

CONCURRING OPINION OF JUDGE RESS

I fully agree with the judgment of the Chamber and would like to add the following.

1. Even though the case concerns the interpretation of the terms of a contract negotiated between the applicant and her private insurance company and related litigation, three factors must be taken into account: firstly, the parallelism between private health insurance and the social-security system in Germany; secondly, the impact of Article 8 on private-law relations between individuals or between individuals and companies; and, thirdly, respect ultimately for the free will of transsexuals and the choices made by them.

2. There exists a close legal relationship between the social-security system in Germany and, as an alternative or addition for certain groups of people, private insurance. The conditions of private insurance must, *mutatis mutandis*, be the same as those of the public system. As is clear from the judgment of the Chamber, gender-related operations are covered by the social-security system and by private health insurance although, it would appear, the conditions laid down by administrative courts and civil courts are, at least in their tendency, different (see paragraph 33 of the judgment).

3. According to German constitutional law, fundamental rights have a direct impact on relations between private persons. The same is true with the rights of the Convention. Under the Convention, Contracting States have to ensure (Article 1) that individuals can enjoy their private life and one of the requirements, as the Court stressed in *Christine Goodwin v. the United Kingdom* ([GC], no. 28957/95, ECHR 2002-VI), is respect for gender identity. The terms of the contract between the applicant and her private insurers must be interpreted in the light of these requirements of Article 8. The term “necessary” in relation to gender reassignment surgery must therefore be interpreted with a view not only to respecting the difficult situation of potential transsexuals but also to taking into account the findings of science which were set out in the recent judgment in *Christine Goodwin*. According to those findings, the situation is one which is dominated by the brain and is characterised by both objective and subjective elements. In the light of these requirements, did the German courts approach the question with due regard to Article 8? Despite the fact that the doctor who had seen the applicant concluded, after weighing the advantages and disadvantages in the applicant’s case, that the advantages outweighed the disadvantages and that an operation was therefore to be *recommended*, the German courts held that that was not a clear affirmation of the *necessity* of the operation. The Court of Appeal’s reasoning would be quite acceptable and, as is said in the dissenting opinion, reasonable if it did not fall to be judged from the standpoint of whether the requirements of Article 8 – respect for the specific private-life circumstances of the applicant – had been observed.

4. This leads me to my third and last consideration. In cases where the question arises whether a gender reassignment operation is necessary and the doctor who examined the person concerned came to the conclusion, as in the instant case, that the applicant was a transsexual and that transsexuality constituted a disease and accordingly, after weighing up the drawbacks and advantages, recommended the operation, the decision of the applicant should always be the final and decisive factor to indicate that the operation was necessary. I think that this type of case, following the reasoning in *Christine Goodwin*, can be clearly distinguished from other medical cases. Where a transsexual, after lengthy treatment, has been told by his or her doctor that in that doctor's view, the advantages of an operation outweigh the disadvantages, it cannot be said that the transsexual caused the "disease" deliberately. This does not mean that in the case of every transsexual surgery should be assumed to be necessary, but if a transsexual has, over quite a long period, undergone treatments of a different kind, such as psychotherapy (see paragraph 16 of the judgment), the individual has done everything necessary to come finally to the conclusion, which has to be respected, that only a gender reassignment operation would be helpful and thus necessary in his or her case. The applicant had already had recourse to less drastic means, such as hormonal treatments. To prolong her situation, which had already lasted quite a time (see paragraphs 11 and 26 of the judgment), would, in my view, have amounted to treatment not in keeping with "respect" for private life under Article 8. It is a most intimate and private aspect of a person's life whether to undergo a gender reassignment operation, and therefore the courts, in considering the necessity of an operation should take into account, as one of the decisive factors, the wishes of the transsexual. I cannot see any arbitrary element in the applicant's decision finally, after quite lengthy treatment, to undergo the reassignment operation, when even her doctor had recommended it.

DISSENTING OPINION OF JUDGES CABRAL BARRETO,
HEDIGAN AND GREVE

1. We regret that we must disagree with the majority in this case.

For us, this case is not about the rights of transsexuals to respect for their private life, dignity and gender self-identification. These rights we consider now clearly established in the jurisprudence of the European Court of Human Rights, most recently in *Christine Goodwin v. United Kingdom* ([GC], no. 28957/95, ECHR 2002-VI) with which we are in full agreement. In our view, this case deals with the adjudication at the applicant's request, by the German courts, on two of the terms of her private contract of medical insurance. We fear that the judgment overly restricts the ability of one of the parties, in this case the defendant insurance company, to litigate the terms of a contract negotiated with the other party, in this case, the applicant.

2. The facts of the case are outlined in the judgment and need no repetition. Suffice it to note that the history of the case is somewhat unusual. The German courts were obliged to determine whether, pursuant to the General Insurance Conditions, the applicant's private insurers were obliged to reimburse her 50% of the cost of certain pharmaceutical expenses connected with hormone treatment and her gender reassignment operation.

3. The issue before the German courts was whether the operation and attendant treatment were necessary and whether the disease had been self-inflicted. The terms of the insurance contract were such that, were the operation not necessary or the disease self-inflicted, the insurer would not be obliged to pay out on the policy.

4. The case was heard initially by the Berlin Regional Court. It decided to take expert evidence on the following matters:

- (a) Was the applicant a male-to-female transsexual?
- (b) Was her kind of transsexuality a disease?
- (c) Was the gender reassignment operation the necessary medical treatment for the transsexuality?
- (d) Was this treatment generally recognised by medical science?

In the Regional Court, the applicant failed. That court considered that the hormonal and surgical course intended by the applicant could not reasonably be considered as necessary at that time and on its own and therefore in this case. It was of the view that the applicant ought *first* to have had recourse to less radical means, namely an extensive course of 50 to 100 psychotherapy sessions as recommended by the psychiatrist Dr H., the author of the expert opinion in question. The applicant had in fact refused to continue after 24 sessions (confusion as to whether there were 2 or 24 sessions is resolved, with the agreement of the Government, in favour of the applicant's case, as 24 sessions). It seems to us from reading Dr H.'s report that it was his firm view that a full course of psychotherapy was to be, at the very least, one of the components of a comprehensive treatment possibly

including surgery, and an essential part of a successful gender reassignment. In the light of this report and of the somewhat unusual background to the applicant's condition together with the irreversible nature of the surgery, the Regional Court's above view seems to us to be not unreasonable.

The Regional Court further found that the evidence did not show conclusively that the gender reassignment measures would relieve the applicant's physical and mental difficulties and that this was a further criterion for determining their medical necessity. The expert had recommended the operation from a psychiatric-psychotherapeutic point of view, as it would improve the applicant's social situation.

According to the court's assessment of the evidence, this expert report did not establish that the operation was the necessary medical treatment in this case but had expressed the view that the applicant ought first to complete the extensive course of psychotherapy recommended by the psychiatrist. This assessment does not appear to us to be either arbitrary or unreasonable and we do not find any reason therefore to criticise it.

It is to be noted that at the time of the Regional Court's hearing, the applicant had not yet had the surgery in question.

5. The applicant appealed to the Berlin Court of Appeal. She objected to the finding of non-necessity. She submitted that she had attended between twenty-four and thirty-five psychotherapy sessions. She refused to attend any more. She referred to the written expert opinions and referred to the possibility of hearing these experts.

6. In November 1994 the applicant went ahead with the surgery without completing the course of psychotherapy which had been advised as an essential part of a gender reassignment including possible surgery.

7. On 27 January 1995 the Court of Appeal, following an oral hearing, dismissed the appeal. The reasons are set out in paragraphs 21 to 28 of the present judgment.

8. For the purposes of this dissenting opinion, we consider the following findings of the Court of Appeal of note:

(a) the applicant was a transsexual;
(b) according to Dr H., her transsexuality constituted a disease;
(c) the Court of Appeal confirmed the Regional Court's conclusions as follows:

(i) Dr H. had not confirmed the necessity of the operation;
(ii) in Dr H.'s view, such surgery was a possible medical treatment but the question of necessity could *not be clearly affirmed*;

(iii) weighing up the limitations and advantages in the applicant's case, Dr H. was of the view that the advantages prevailed and therefore he recommended the operation;

(iv) the Court of Appeal found Dr H.'s formulation to be cautious and not therefore a clear affirmation of the necessity of the operation;

(v) in the Court of Appeal's view, Dr H.'s report showed that he regarded the success of surgery in the applicant's case as rather

uncertain. The Court of Appeal described this as “a vague hope” and concluded that such could not justify the necessity of surgery bearing in mind the aim of health insurance.

We find all the above conclusions to be reasonable in the circumstances.

9. The Court of Appeal then went on to consider clause 5.1(b) of the contract and whether the applicant had in fact caused her own disease as had been argued by the defendant insurance company.

The Court of Appeal referred to the case history contained in the expert opinion of Dr O. in 1991. It quoted from this as set out in paragraphs 26 and 27 of the present judgment and, as a result, the Court of Appeal found that the applicant had caused the disease deliberately. Again we are of the view that it was open to the Court of Appeal on any reading of this report reasonably to come to such a conclusion and we note that all it needed to rely on were the strictly factual details of the applicant’s case history as contained therein.

10. We agree that it is for the national courts to assess the evidence they have obtained but that it is for the European Court to ascertain whether the proceedings considered as a whole were fair. We further agree that the national courts are under a duty to conduct a proper examination of the submissions, arguments and evidence adduced by the parties. As noted above, we are also in agreement with the decision of this Court in *Christine Goodwin*.

11. We cannot agree with the characterisation of Dr H.’s recommendation for surgery as “unequivocal” (see paragraph 54 of the judgment). As noted above, we take the view that the conclusions of both the Regional Court and the Court of Appeal in this respect were reasonable. Their characterisation of his report was “cautious”, “not a clear affirmation of the necessity of the operation”. They also noted that “success of the operation was uncertain” and that the recommendation was based on a “vague hope” of success.

12. We are in agreement that gender identity is one of the most intimate and private aspects of any person’s life. We cannot, however, agree as outlined in the second sentence of paragraph 56 of the judgment that this means that there is anything disproportionate about requiring a person such as the applicant to prove the medical necessity of treatment, including irreversible surgery. This case involves an action by the applicant to force her private insurers on foot of her contract with them to reimburse her 50% of the cost of such treatment. One of the terms of that contract as outlined above was that such treatment must be medically necessary. The insurance company took the view that it was not. Not unnaturally, the applicant took the view that it was. The issue therefore was the very question of necessity. Nothing in our view in *Christine Goodwin* prohibits or should prohibit a party to such a contract of insurance from litigating any term of that contract including the term requiring the medical necessity of the relevant treatment. To find otherwise, we fear, means that the medical necessity of surgery

would have to be assumed in every case involving a transsexual. This in our view cannot be correct. Indeed, the likely consequence would be the exclusion of such cover from medical insurance policies to the great disadvantage of transsexuals in general.

13. In relation to the question of causation, our opinion differs also from that of the majority for the same reasons as outlined above. In this regard, we note the most unusual historical background to this case. We note that the applicant herself had agreed to the use of the reports in the earlier proceedings. The factual history contained therein is quite striking on the issue of causation and, in the context of the action on the contract in question we do not consider the decision of the Court of Appeal in this regard to be arbitrary or unreasonable and, as noted above, save as provided, it is for the national courts to assess the evidence. In our view, for the reasons outlined, the proceedings taken as a whole were fair.

14. For the above reasons we regretfully disagree with the majority in this judgment and find no breach of Article 6 § 1 of the Convention.

Alleged violation of Article 8 of the Convention

15. We agree with the general principles as outlined in paragraphs 69 to 72 of the judgment. We cannot agree with the statement in paragraph 79 that the Regional Court referred the applicant to the possibility of psychotherapy as a less radical means of treating her condition “*contrary to the statements contained in the expert opinion*”. As outlined in paragraph 16 of the judgment, the Regional Court found that the applicant ought to have *first* had recourse to less radical means. Such a view was very significant in the context of necessity. We have above expressed our disagreement with the characterisation of Dr H.’s view on the necessity for surgery as an “*unequivocal recommendation*”. We further disagree with the description of the Court of Appeal’s judgment in relation to causation as a reproach.

16. The task of the German courts at the request of the applicant in this case was to adjudicate upon her contract of insurance in respect of two issues:

- (a) the necessity of surgical gender reassignment;
- (b) the causation of the applicant’s condition.

In order to do so it was inevitable that a painful and intrusive analysis of the applicant’s case history was required. A proper respect for the undoubted right of transsexuals to respect for their dignity, private life and gender self-determination demands that such an adjudication be carried out with all appropriate respect and decorum, but does not prevent such an analysis being carried out at all. It seems to us that this judgment provides otherwise and that, in order to follow it, domestic courts would never be able to carry out such an adjudication in any meaningful manner.

It is for these reasons that, in respect of the Article 8 and Article 6 complaints, we respectfully beg to differ.

