

CASE OF L. v. LITHUANIA

(Application no. 27527/03)

11 September 2007

In the case of L. v. Lithuania, [t]he European Court of Human Rights (Former Second Section), [d]elivers the following judgment:

PROCEDURE

The case originated in an application (no. 27527/03) against the Republic of Lithuania lodged with the Court by Mr L. The President of the Chamber acceded to the applicant's request not to have his name disclosed.

The applicant alleged violations of Articles 3, 8, 12, and 14 of the Convention, in respect of the lack of legal regulation regarding transsexuals in Lithuania, and particularly the absence of any lawful possibility to undergo full gender-reassignment surgery, which in turn resulted in other hardships and inconveniences. . . .

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

[The applicant was born in 1978 and registered at birth as a female with a clearly female name under the rules of the Lithuanian language. The applicant submitted that from an early age he became aware of his male mental sex, thus acknowledging the conflict between his mental and genital gender. Beginning in 1997, the applicant consulted doctors about the possibility of gender-reassignment surgery. A doctor confirmed the applicant's chromosomal sex as female, and diagnosed him as a transsexual. This doctor also advised that the applicant consult a psychiatrist.]

[The Vilnius University Hospital recommended that the applicant pursue hormone treatment with a view to eventual gender-reassignment surgery. Thereafter a two-month course of hormone treatment was officially prescribed for the applicant. In 1999, the applicant's general medical practitioner refused to continue to prescribe hormone therapy in view of the legal uncertainty as to whether full gender-reassignment could be carried out, with the new identity of a transsexual being registered pursuant to the domestic law. Thereafter the applicant continued the hormone treatment "unofficially", as it was considered at that time that such treatment should be followed for two years before the full surgical procedure.]

On an unspecified date in 1999, the applicant requested that his name on all official documents be changed to reflect his male identity; that request was refused. On an unspecified date in 1999, the applicant entered Vilnius University. Upon the applicant's request, the university administration agreed to register the applicant as a student under the male name chosen by him. The applicant asserted before the Court that the decision of the University was exceptional and purely humanitarian, the laws applicable at the material time having clearly required his registration under his original female name, as indicated in his birth certificate and passport.

In May 2000 the applicant underwent “partial gender-reassignment surgery” (breast removal). The applicant agreed with the doctors that a further surgical step would be carried out upon the adoption of the subsidiary laws governing the conditions and procedure thereof.

On an unspecified date in 2000, with the assistance of a Lithuanian Member of Parliament (the “MP”), the applicant’s birth certificate and passport were changed to indicate the applicant’s identity as [P.L.] The name and surname chosen by the applicant for this new identity were of Slavic origin, and thus did not disclose the applicant’s gender. The applicant could not choose a Lithuanian name or surname as they are all gender-sensitive. However, the applicant’s “personal code” in his new birth certificate and passport, i.e. a numerical code comprising the basic information about a person in accordance with the Lithuanian civil registration rules, remained the same, starting with number “4”, thus disclosing his gender as female.

The applicant underlined that he therefore remains of female gender under domestic law. This was confirmed by the fact that, in his Vilnius University diploma received after successfully graduating in 2003, his “personal code” remained the same and denoted him as a female. As a result, he claimed that he faces great daily embarrassment and difficulties, as he is unable to apply for a job, pay social security contributions, consult medical institutions, communicate with the authorities, obtain a bank loan, cross the State border, etc., without disclosing his female identity.

The applicant submitted a copy of an article by the Baltic News Agency (BNS) of 17 June 2003, quoting the statement of the Chairman of Seimas on the Gender-Reassignment Bill (put before Parliament on 3 June 2003). . . . The article included a reference to the opinion of experts, according to which about 50 transsexuals were presumed to live in Lithuania. It was mentioned that certain Vilnius and Kaunas surgeons were properly equipped and qualified to carry out gender-reassignment surgery, the cost of which could be between 3,000 and 4,000 Lithuanian litai (“LTL”); about 870 to 1,150 euros [“EUR”]), excluding the cost of hormone therapy. The article stated that a number of persons had already applied for gender-reassignment, but that the surgery could not be fully completed in the absence of adequate legal regulation. It was presumed that some of the Lithuanian transsexuals were thus obliged to go abroad for treatment.

In an article by the BNS about the meeting between the Prime Minister and the heads of the Lithuanian Catholic Church, the Prime Minister was quoted as saying that it was too early for Lithuania to adopt a law on gender-reassignment, and that there was “no need to rush” or “copy the principles that exist in one country or another.” The article stated that the Catholic Church had been among the most ardent opponents of such legislation. At the same time, the Prime Minister conceded that the Government was obliged to prepare a Gender-Reassignment Bill in view of the entry into force of Article 2.27 § 1 of the new Civil Code on 1 July 2003.

The applicant claimed that since 1998 he has had a stable relationship with a woman and that they have lived together since 1999.

II. RELEVANT DOMESTIC LAW AND PRACTICE

There were no provisions pertaining to the question of transsexuals in Lithuanian law until the adoption of the new Civil Code. The Civil Code entered into force on 1 July 2001. Article 2.27 § 1 (which Article only entered into force on 1 July 2003) provides that an unmarried adult has the right to gender-reassignment surgery (*pakeisti lytį*), if this is medically possible. A request by the person concerned shall be made in writing. The second paragraph of this provision stipulates that the conditions and procedure for gender-reassignment surgery shall be established by law.

On 27 December 2000 the Government adopted a decree specifying the measures needed for the implementation of the new Civil Code. The preparation of a Gender-Reassignment Bill was mentioned in it. Rule 109.2 of the Civil Registration Rules, approved by an order of the Minister of Justice of 29 June 2001 (in force as of 12 July 2001), permits the change in the acts of civil status if there is a need to change a person's gender, name and surname, following gender-reassignment. . . . Article 5 of the Passport Act 2003 provides that a passport shall be changed if a citizen changes his or her name, surname, gender or personal code.

The Gender-Reassignment Bill was prepared by a working group of the Ministry of Health in early 2003. On 3 June 2003 the Government approved the Bill, sending it for consideration to the Seimas (Parliament). In an explanatory note dated 4 June 2003 to Parliament, the Minister of Health indicated *inter alia* that, at present, no legal act regulated the conditions and procedure for gender-reassignment. The Bill was initially scheduled for a plenary session of Parliament on 12 June 2003, but it was not examined that day. It was rescheduled for 17 June 2003, but was then omitted from Parliament's agenda. . . .

The order of the Minister of Health, issued on 6 September 2001, specifies the conditions under which patients in Lithuania can be directed for treatment abroad, in cases where the necessary treatment for a certain illness is not available in Lithuania. The decision is taken by a special commission of experts called by the Minister of Health, and the expenses of such treatment are covered by the Compulsory Health Insurance Fund.

On 8 August 2006 the Constitutional Court ruled that the courts were empowered to fill the legal gaps left by the legislator where this was necessary, *inter alia*, for the protection of the rights and freedoms of a particular individual.

THE LAW

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III. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

The applicant alleged that the State has failed to respect its positive obligations under Article 8, which provides in so far as relevant as follows:

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 ... for the protection of health or morals, or for the protection of the rights and freedoms of others.

A. The parties' submissions

1. The applicant

The applicant alleged that his continuing inability to complete gender-reassignment surgery left him with a permanent feeling of personal inadequacy and an inability to accept his body, leading to great anguish and frustration. Furthermore, due to the lack of recognition of his perceived, albeit pre-operative, identity, the applicant constantly faced anxiety, fear, embarrassment and humiliation in his daily life. He has had to submit to severe hostility and taunts in the light of the general public's strong opposition, rooted in traditional Catholicism, to gender disorders. Consequently, he has had to follow an almost underground life-style, avoiding situations in which he might have to disclose his original identity, particularly when having to provide his personal code. This has left him in a permanent state of depression with suicidal tendencies.

The applicant emphasized that the State had failed to provide him with a lawful opportunity to complete his gender-reassignment and obtain full recognition of the post-operative gender. He reiterated that the right to gender-reassignment surgery had been foreseen by the new Civil Code since 2003, but no subsidiary legislation had been adopted to implement that right. The applicant further recalled that, although he had been able to change his name to a gender-neutral form, the law did not provide for a change in the personal code of pre-operative transsexuals. As a result he has foregone numerous opportunities in the areas of, for example, employment, health care, social security, freedom of movement, business transactions, socialising and personal development, in order to avoid hostility and taunts. He has thus been condemned to legal and social ostracism because he looks masculine but his documents identify him as a woman.

The applicant argued that there was no public interest whatsoever weighing against the interests of medically recognised transsexuals to complete their gender change and have it legally entrenched. Furthermore, the absence of necessary legislation was disproportionate to the protection of any purported countervailing interest of the community as a whole. Accordingly, the State had failed in its positive obligations under Article 8 to complete the measures it had already envisaged to protect the applicant's human dignity and prevent intrusion into his private life.

2. The Government

The Government maintained that a wide margin of appreciation should be afforded to States in regulating gender-reassignment and deciding whether to recognise a person's new identity where the required surgery is incomplete. In this respect they cited, *inter alia*, the cultural specificities and religious sensitivities of Lithuanian society regarding the gender-reassignment debate.

Insofar as the regulation of gender-reassignment surgery was concerned, the Government reiterated their claim that the medical treatment afforded to transsexuals in Lithuania was capable of guaranteeing respect for private life. Moreover, Lithuanian law entitled transsexuals to have the entries in official documents changed, including their personal code, after full gender-reassignment.

As regards the pre-operative recognition of a diagnosed gender, the Government argued that there was an overriding public interest in ensuring legal certainty as to a person's gender and the various relationships between people. In this connection, they recalled that the applicant had indeed been able to make a gender-neutral change in his name.

The Government again stressed that the applicant had failed to provide evidence as to the necessity and feasibility of full gender-reassignment surgery in his case. They had recently proposed to the applicant that he undergo a comprehensive psychiatric and physical examination of his current state of health with a view to assessing present possibilities and needs, but the applicant has declined that offer. The Government expressed a certain concern about the level of expertise available in Lithuania for such specialised, rare surgery at the moment, whereas surgery performed by practising experts abroad might be an appropriate temporary solution to the problems faced by transsexuals, for which the State might provide financial assistance.

B. The Court's assessment

The Court recalls the positive obligation upon States to ensure respect for private life, including respect for human dignity and the quality of life in certain respects. It has examined several cases involving the problems faced by transsexuals in the light of present-day conditions, and has noted and endorsed the evolving improvement of State measures to ensure their recognition and protection under Article 8 of the Convention (e.g. *Christine Goodwin v. the United Kingdom*, no. 28957/95; *Van Kück v. Germany*, no. 35968/97; *Grant v. the United Kingdom*, no. 32570/03). Whilst affording a certain margin of appreciation to States in this field, the Court has nevertheless held that States are required, by their positive obligation under Article 8, to implement the recognition of the gender change in post-operative transsexuals through, *inter alia*, amendments to their civil status data, with its ensuing consequences.

The present case presents another aspect of the problems faced by transsexuals: Lithuanian law recognises their right to change not only their gender but also their civil status. However, there is a gap in the pertinent legislation; there is no law regulating full gender-reassignment surgery. Until that law is adopted there do not appear to be suitable medical facilities reasonably accessible or available in Lithuania itself. Consequently, the applicant finds himself in the intermediate position of a pre-operative transsexual, having undergone partial surgery, with certain important civil status documents having been changed. However, until he undergoes the full surgery, his personal code will not be amended and, therefore, in some significant situations for his private life, such as his employment opportunities or travel abroad, he remains a woman.

The Court notes that the applicant has obtained partial gender-reassignment surgery. It is not entirely clear to what extent he could complete the procedure privately in Lithuania (cf. the newspaper reference above). However, that consideration has not been put forward by either party to the present case so, presumably, it is to be excluded. As a short term solution, it may be possible for the applicant to have the remaining operation abroad, financed in whole/part by the State.

The Court finds that the circumstances of the case reveal a limited legislative gap in gender-reassignment surgery which leaves the applicant in a situation of distressing uncertainty vis-à-vis his private life and the recognition of his true identity. Whilst budgetary restraints in the public health service might have justified some initial delays in implementing the rights of transsexuals under the Civil Code, over four years have elapsed since the pertinent provisions came into force and the necessary legislation, although drafted, has yet to be adopted. Given the few individuals involved (some 50 people, according to unofficial estimates), the budgetary burden on the State would not be expected to be unduly heavy. Consequently, the Court considers that a fair balance has not been struck between the public interest and the rights of the applicant.

In the light of the above considerations, the Court concludes that there has been a violation of Article 8 of the Convention.

VI. APPLICATION OF ARTICLE 41 OF THE CONVENTION

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

The applicant claimed pecuniary damage of 33,589.46 Lithuanian litai (“LTL”]; about 9,728 euros [“EUR”]), which represented:

- a) his loss of earnings, given his limited employment possibilities in order to avoid drawing attention to his status (LTL 26,391);
- b) compensation for his private as well as unofficial medical treatment, which was more costly than State health care, but did not require him to reveal his identity (LTL 4,318.46); and
- c) compensation for his prolonged hormone treatment, while awaiting the legal possibility to complete the gender-reassignment procedure (LTL 2,880).

The applicant further claimed EUR 47,680 to cover the fees for the eventual completion of the gender-reassignment surgery. In this respect, the applicant argued that, even if the legal gaps in Lithuanian law were eventually filled, there would still be no prospect of completing the gender-reassignment surgery in Lithuania within a reasonable time. He therefore contended that this sum was needed to carry out the surgery abroad.

Finally, the applicant asked for non-pecuniary damage in the amount of EUR 200,000 in respect of the stress, anxiety, fear and humiliation which he has suffered, as well as the inability to enjoy his rights.

The Government considered these claims to be unsubstantiated and speculative. They noted that, prior to the Civil Code which came into force on 1 July 2003, the applicant had had no right to treatment for his disorder under domestic law. Moreover, the applicant had not presented any evidence of his current needs and state of health, in relation to further surgery.

The Court recalls the limited nature of the violation which it has found. It considers that the applicant's claim for pecuniary damage would be met by the adoption of the subsidiary legislation which has been at issue in the present case, within three months of the present judgment becoming final, pursuant to Article 44 § 2 of the Convention. However, should that prove impossible, and in view of the uncertainty about the medical expertise currently available in Lithuania, the Court is of the view that this aspect of the applicant's claim could be met by him having the final stages of the necessary surgery performed abroad, to be financed, at least in part, by the respondent State. Consequently, as an alternative in the absence of the said subsidiary legislation, the Court would award the applicant EUR 40,000 in pecuniary damage.

As regards the applicant's claim for non-pecuniary damage, the Court, deciding on an equitable basis, as required by Article 41 of the Convention, awards the applicant EUR 5,000.

B. Costs and expenses

The applicant claimed EUR 9,403 for legal costs and expenses incurred in the proceedings before the Court. The cost of travel to the Court hearing, together with accommodation and other related expenses, were claimed in the sum of EUR 603.

The Government submitted that the claim for legal costs and expenses appeared excessive and unjustified, particularly as the applicant had received legal aid from the Council of Europe.

The Court notes that the applicant had the benefit of legal aid from the Council of Europe for his representation in the present case in the total amount of EUR 2,071.81. It concludes that this amount is sufficient in the circumstances.

FOR THESE REASONS, THE COURT

...

3. *Holds*, by 6 votes to 1, that there has been a violation of Article 8 of the Convention;
...
5. *Holds*, by 5 votes to 2, that the respondent State, in order to meet the applicant's claim for pecuniary damage, is to adopt the required subsidiary legislation to Article 2.27 of its Civil Code on the gender-reassignment of transsexuals, within three months of the present judgment becoming final, in accordance with Article 44 § 2 of the Convention;
6. *Holds*, by 6 votes to 1, alternatively, that should those legislative measures prove impossible to adopt within three months of the present judgment becoming final, in accordance with Article 44 § 2 of the Convention, the respondent State is to pay the applicant EUR 40,000 (forty thousand euros) in respect of pecuniary damage;
7. *Holds*, by 6 votes to 1, that the respondent State is to pay the applicant, within the aforementioned three month period, EUR 5,000 (five thousand euros) in respect of non-pecuniary damage;
8. *Holds*, by 6 votes to 1,
 - (a) that the respondent State is to pay the applicant, within the aforementioned three month period, any tax which may be chargeable on the above amounts, and that all the sums due are to be converted into the currency of the respondent State at the rate applicable at the date of settlement;
 - (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;