

ECOND SECTION
CASE OF L. v. LITHUANIA
(Application no. 27527/03)
JUDGMENT
STRASBOURG
11 September 2007
FINAL
31/03/2008

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of L. v. Lithuania,

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

Mr J.-P. COSTA, *President*, Mr A.B. BAKA, Mr R. TÜRMEŒ, Mr M. UGREKHELIDZE, Mrs E. FURA-SANDSTRÖM, Ms D. JOČIENĖ, Mr D. POPOVIĆ, *judges*, and Mrs S. DOLLÉ, *Section Registrar*,

Having deliberated in private on 17 October 2006 and 3 July 2007,

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

PROCEDURE

1. The case originated in an application (no. **27527/03**) against the Republic of Lithuania lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Lithuanian national, Mr L., on 14 August 2003. The President of the Chamber acceded to the applicant's request not to have his name disclosed (Rule 47 § 3 of the Rules of Court).

2. 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 of undergoing full gender-reassignment surgery, which in turn



had resulted in other hardships and inconveniences.

3. By a decision of 6 July 2006 the Court declared the application partly admissible.

4. A hearing on the merits took place in public in the Human Rights Building, Strasbourg, on 17 October 2006 (Rule 59 § 3).

There appeared before the Court:

(a) *for the Government* Ms E. BALTUTYTĖ, *Agent*, Ms L. URBAITĖ, *Assistant to the Agent*;

(b) *for the applicant* Mr H. MICKEVIČIUS, *Counsel*, Ms A. RADVILAITĖ, *Assistant to Counsel*.

The Court heard addresses by Mr Mickevičius and Ms Baltutytė, as well as replies by Mr Mickevičius, Ms Baltutytė and Ms Urbaitė to questions from its members.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1978 and lives in Klaipėda.

6. At birth the applicant was registered as a girl with a clearly female name under the rules of the Lithuanian language.

7. The applicant submitted that from an early age he had become aware that his mental sex was male, thus acknowledging the conflict between his mental and genital gender.

8. On 18 May 1997 the applicant consulted a microsurgeon about the possibilities of gender reassignment. The doctor proposed that the applicant first consult a psychiatrist.

9. From 4 to 12 November 1997 the applicant attended Vilnius Psychiatric Hospital for tests on his physical and psychological condition.

10. On 16 December 1997 a doctor at the Vilnius University Hospital of Santariškės confirmed the applicant's chromosomal sex as female, and diagnosed him as a transsexual. The doctor also advised that the applicant consult a psychiatrist.

11. On 23 January 1998 the Vilnius University Hospital of Raudonasis Kryžius opened a medical file on the applicant. The applicant gave his

name in a masculine form under the rules of the Lithuanian language, and his medical file referred to him as being of male gender. An entry of 28 January 1998 in the medical file included a recommendation 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. Moreover, it was recommended that the applicant consult a neurosurgeon, who subsequently performed breast removal surgery on him (see paragraph 19 below).

12. On 12 November 1998 the applicant, using his original name and surname, wrote a letter to the Ministry of Health, seeking clarification of the legal and medical possibilities for gender reassignment. He stated that he was determined to undergo this procedure.

13. On 17 December 1998 an official of the Ministry of Health replied that a working group had been set up by the Minister of Health with a view to analysing the questions pertaining to gender reassignment, and that the applicant would be duly informed about the conclusions of that group.

14. Before the Court, the applicant claimed that he had received no further communication from the Ministry of Health.

15. On 13 May 1999 a doctor at Vilnius Psychiatric Hospital confirmed that the applicant, referred to by his original name, had attended the hospital from 4 to 12 November 1997, and that he had been diagnosed as a transsexual.

16. The applicant submitted that in 1999 his general medical practitioner had refused 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 in accordance with 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 could be performed.

17. 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.

18. On an unspecified date in 1999 the applicant enrolled at Vilnius

University. Upon the applicant's request, the university administration agreed to register him as a student under the male name chosen by him (bearing the initials P.L.). 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.

19. From 3 to 9 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 enactment of subsidiary laws governing the appropriate conditions and procedure.

20. On an unspecified date in 2000, with the assistance of a Lithuanian member of parliament, the applicant's birth certificate and passport were changed to indicate his identity as P.L. The forename and surname chosen by the applicant for this new identity were of Slavic origin, and thus did not disclose his 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 – a numerical code comprising the basic information about a person in accordance with the Lithuanian civil-registration rules – remained the same, starting with the number 4, thus disclosing his gender as female (see paragraphs 28-29 below).

21. The applicant underlined that he therefore remained of female gender under domestic law. This was confirmed, *inter alia*, by the fact that, in his Vilnius University degree he had 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 faced considerable daily embarrassment and difficulties, as he was unable, for example, to apply for a job, pay social-security contributions, consult medical institutions, communicate with the authorities, obtain a bank loan or cross the State border without disclosing his female identity.

22. The applicant submitted a copy of an article by the Baltic News Agency (BNS) of 17 June 2003, quoting a statement by the Speaker of the

Seimas on the Gender-Reassignment Bill (put before Parliament on 3 June 2003 – see paragraph 30 below). It was mentioned in the article that certain MPs had accused the Minister for Health of having a personal interest in the enactment of the law, as he was a plastic surgeon. The article also mentioned that certain members of the Social Democratic Party had urged the enactment of the law as it was required by the imminent entry into force of the provisions of the new Civil Code on 1 July 2003. The article included a reference to the opinion of experts that there were presumed to be about 50 transsexuals living 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 – approximately 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 had thus been obliged to go abroad for treatment.

23. In an article by the BNS on 18 June 2003 about a 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 were 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.

24. The applicant submitted that since 1998 he had been in a stable relationship with a woman and that they had lived together since 1999.

II. RELEVANT DOMESTIC LAW AND PRACTICE

25. There were no provisions pertaining to the question of transsexuals in Lithuanian law until the adoption of the new Civil Code on 18 July 2000. The Civil Code entered into force on 1 July 2001. Article 2.27 § 1

(which 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 must be made in writing. The second paragraph of this provision states that the conditions and procedure for gender-reassignment surgery are established by law.

26. 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.

27. Rule 109.2 of the Civil Registration Rules, approved by an order of the Minister of Justice on 29 June 2001 (in force from 12 July 2001), permits a change in civil-status documents if there is a need to change a person's gender, forename and surname, following gender reassignment.

28. Under the Residents' Register Act and other relevant domestic laws, every Lithuanian resident has a numerical “personal code” (*asmens kodas*), which denotes certain basic items of information, including his or her gender. Section 8(2) of the Residents' Register Act provides that the first number of the personal code denotes the person's gender. A personal code starting with the number 3 denotes that the person is male, whereas a code starting with number 4 means that the person is female.

29. Section 5 of the Passport Act 2003 provides that a citizen's passport must be changed if the citizen changes his or her forename, surname, gender or personal code.

30. 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 to Parliament dated 4 June 2003, the Minister for Health indicated, *inter alia*, that, at present, no legal instrument 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. On the same date the Speaker of Parliament circulated an official memorandum on the Bill, stating *inter alia*:

“The Speaker of the Seimas ... strongly denounces gender-reassignment surgery and

the further consideration of a bill on the subject at a parliamentary hearing.

[At a time] when the demographic situation in Lithuania is becoming threatened, the Seimas should not exaggerate matters in considering such a controversial law, which may be taken by society as an insult to the far more important problems facing the health-care system.”

31. The order of the Minister for Health, issued on 6 September 2001, specifies the conditions under which patients in Lithuania can be referred 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 appointed by the Minister for Health, and the expenses of such treatment are covered by the Compulsory Health Insurance Fund.

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

THE LAW



I. THE GOVERNMENT'S PRELIMINARY OBJECTION

33. The Government alleged that the applicant had failed to exhaust domestic remedies as regards his complaints that he had been unable to complete the course of gender reassignment. They asserted that the applicant had had the opportunity to bring a claim – by way of civil or administrative proceedings – seeking damages for the alleged inactivity of the administrative and health-care authorities and/or doctors when dealing with his gender-reassignment needs. The Government maintained that such an action would have enabled the courts to fill the legislative lacunae. In this connection, the Government referred to the Constitutional Court ruling of 8 August 2006, in which a certain law-making role of the courts had been acknowledged (see paragraph 32 above). Alternatively, the domestic courts would have had an opportunity to seek the opinion of the Constitutional Court as to whether the existence of the legal gaps in issue was in conformity with the Constitution. While the Government conceded

that there was no particular domestic case-law regarding transsexuals, they argued that this factor alone was not sufficient to raise doubts about the effectiveness of a civil action as a remedy or to presume the lack of any prospects of success.

34. The applicant contested the Government's submissions.

35. However, the Court reiterates that Article 35 § 1 of the Convention only requires the exhaustion of remedies which are available and sufficient, in theory as well as practice, on the date on which the application was lodged with it (see, among other authorities, *Stoeterij Zangersheide N.V. v. Belgium* (dec.), no. 47295/99, 27 May 2004, and, conversely, *Mifsud v. France* [GC] (dec.), no. 57220/00, §§ 15-18, ECHR 2002-VIII).

36. The Court notes that it has already dismissed this plea by the Government in its decision on the admissibility of the present application on 6 July 2006, because the applicant's complaint essentially concerns the state of the law. In this connection, it observes that the relevant provisions of the Civil Code concerning gender-reassignment surgery require implementation by subsidiary legislation, which has yet to be adopted (see paragraph 25 above). It would seem that such legislation is not a priority for the legislature (see paragraph 30 above). Moreover, the Constitutional Court judgment referred to by the Government (paragraph 32 above) was adopted well after the present application was lodged with the Court. Accordingly, it cannot be cited to oppose the applicant's claim. In these circumstances, the Court confirms its original conclusion that the applicant had no effective remedies available to him at the material time in respect of his specific complaints, and therefore dismisses the Government's preliminary objection.

II. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

37. The applicant complained that he had been unable to complete gender-reassignment surgery owing to the lack of legal regulation of the subject. He relied on Article 3 of the Convention, which provides:

“No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”

A. The parties' submissions

1. *The applicant*

38. The applicant alleged that his continuing inability to complete gender-reassignment surgery had left him with a permanent feeling of personal inadequacy and an inability to accept his body, leading to great anguish and frustration. Furthermore, owing 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 had had to face severe hostility and taunts in the light of the general public's strong opposition, rooted in traditional Catholicism, to gender disorders. Consequently, he had had to pursue an almost underground lifestyle, avoiding situations in which he might have to disclose his original identity, particularly when having to provide his personal code (see paragraph 28 above). This had left him in a permanent state of depression with suicidal tendencies.

39. In the applicant's view, the State's inactivity was the main cause of his suffering. Since the entry into force of the new Civil Code, the applicant had had reasonable hopes of completing the treatment and registering his new identity. By that stage, he had already been duly diagnosed as a transsexual, had been following hormone treatment since 1998, and had undergone breast-removal surgery. However, the Gender-Reassignment Bill – put before the legislature in June 2003 – had been withdrawn from the parliamentary agenda without any objective reason or explanation being given. The Government had therefore failed to fulfil their positive obligations under Article 3 of the Convention to protect the applicant from the impossible situation in which he found himself (described in the preceding paragraph).

40. Referring to the Court's case-law, the applicant considered that Parliament's inaction was to be seen as a concession to the negative attitude of the population, revealing the bias of a hostile majority towards the transsexual minority, which in itself should be seen as falling within the scope of Article 3. The applicant contended that the State's failure to adopt the necessary legislation on gender-reassignment surgery, which

would allow him to complete his treatment and have his new gender legally recognised, amounted to inhuman and degrading treatment.

2. The Government

41. The Government argued that neither the Convention in general nor Article 3 in particular could be interpreted as laying down a general obligation to provide full gender-reassignment surgery for transsexuals. Nor could it be maintained that such irreversible surgery was indispensable for the treatment of gender-identity disorders. In particular, general medical practice had shown that hormone therapy and partial gender-reassignment surgery, such as breast removal, might in certain cases be sufficient to help a female-to-male transsexual pursue his life experience in the role of the desired gender. The applicant had not substantiated his claim that he needed the full procedure.

42. The Government pointed out that transsexuality was a rare disorder, the scale of which was difficult to assess, particularly since freedom of movement within the European Union had encouraged many people to leave the country. There had certainly been no intention on the part of the State to humiliate or debase transsexuals. They maintained that transsexuality as a disease was by no means neglected. Indeed, the applicant had been afforded due medical assistance in the form of medical consultations and hormone treatment. The applicant was also entitled to seek confirmation of the medical necessity of full gender-reassignment surgery, which might have enabled him to be referred for medical treatment abroad, financed by the State (paragraph 31 above).

43. Whilst recognising that transsexuals might encounter some difficulties in their daily lives, the Government asserted that those difficulties were not intentionally created or inflicted by the State. On the contrary, steps had been taken to alleviate the problems, such as allowing the applicant to change his name. A change in the entries for all official documents, including the personal code, could be effected on completion of a transsexual's gender-reassignment surgery.

44. Furthermore, the State could not be held responsible for the alleged deterioration in the applicant's health, as he had chosen – on his own initiative and disregarding the warnings of doctors – to continue his

hormone treatment unofficially, beyond that prescribed for two months in 1998.

45. In sum, the Government maintained that the alleged ill-treatment did not attain the minimum level of severity in order to fall within the scope of Article 3. They considered that the issue of the regulation of gender-reassignment surgery and the recognition of transsexuals' identity fell to be dealt with under Article 8 of the Convention alone. Anyway, the Government asserted, the State had fulfilled its positive obligations under both Articles 3 and 8 by providing adequate health care for the treatment of disease and avoidable death, including appropriate treatment for transsexuals – psychiatric, surgical, hormonal, and so on.

B. The Court's assessment

46. The Court observes that the prohibition under Article 3 of the Convention is of an absolute nature, but that the kind of treatment qualified as inhuman and degrading will depend upon an examination of the facts of the specific case in order to establish whether the suffering caused was so severe as to fall within the ambit of this provision. Moreover, according to its established case-law, Article 3 entails a positive obligation on the part of the State to protect the individual from acute ill-treatment, whether physical or mental, whatever its source. Thus if the source is a naturally occurring illness, the treatment for which could involve the responsibility of the State but is not forthcoming or is patently inadequate, an issue may arise under this provision (see, for example, *D. v. the United Kingdom*, judgment of 2 May 1997, *Reports of Judgments and Decisions* 1997-III, pp. 793-94, §§ 51-54, and, *mutatis mutandis*, *Pretty v. the United Kingdom*, no. 2346/02, §§ 49-52, ECHR 2002-III).

47. However, an examination of the facts of the present case, whilst revealing the applicant's understandable distress and frustration, does not indicate circumstances of such an intense degree, involving the exceptional, life-threatening conditions found in the cases of Mr D. and Mrs Pretty cited above, and thereby falling within the scope of Article 3 of the Convention. The Court considers it more appropriate to analyse this aspect of the applicant's complaint under Article 8 (respect for private life)

below.

48. Consequently, the Court finds no violation of Article 3 of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

49. The applicant alleged that the State had failed to fulfil its positive obligations under Article 8, which provides, in so far as relevant:

“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

50. Referring to his arguments under Article 3 (see paragraphs 38-40 above), the applicant repeated that the State had failed to provide him with a lawful opportunity to complete his gender reassignment and obtain full recognition of his post-operative gender. He reiterated that the right to gender-reassignment surgery had been envisaged by the new Civil Code since 2003, but no subsidiary legislation had been passed to implement that right. The applicant further emphasised 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 (see paragraph 28 above). As a result he had forgone 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 had thus been condemned to legal and social ostracism because he looked masculine but his personal documents identified him as a woman.

51. The applicant argued that there was no public interest whatsoever militating against the interests of medically recognised transsexuals in completing their gender change and having 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*

52. Further to their pleadings under Article 3 (see paragraphs 41-45 above), 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 was incomplete. In that connection they cited, *inter alia*, the cultural specificities and religious sensitivities of Lithuanian society regarding the gender-reassignment debate.

53. In so far 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.

54. 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 pointed out that the applicant had indeed been able to make a gender-neutral change in his name.

55. 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 suggested to the applicant that he undergo a comprehensive psychiatric and physical examination of his current state of health with a view to assessing his present possibilities and needs, but the applicant had declined that offer. The Government expressed a certain concern about the level of expertise available in Lithuania for such rare and specialised surgery at present, whereas surgery performed by practising experts abroad might be an appropriate temporary solution to the problems faced by transsexuals, for which the State could provide financial assistance (paragraph 31 above).

B. The Court's assessment

56. The Court would emphasise the positive obligation upon States to ensure respect for private life, including respect for human dignity and the quality of life in certain respects (see, *mutatis mutandis*, *Pretty*, cited above, § 65). 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 (see, for example, *Christine Goodwin v. the United Kingdom* [GC], no. 28957/95, ECHR 2002-VI; *Van Kück v. Germany*, no. 35968/97, ECHR 2003-VII; and *Grant v. the United Kingdom*, no. 32570/03, ECHR 2006-VII). 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 (see, for example, *Christine Goodwin*, §§ 71- 93, and *Grant*, §§ 39-44, both cited above).

57. The present case involves another aspect of the problems faced by transsexuals: Lithuanian law recognises their right to change not only their gender but also their civil status (paragraphs 25, 27, and 29 above). However, there is a gap in the relevant legislation; there is no law regulating full gender-reassignment surgery. Until such a law is enacted, no suitable medical facilities appear to be reasonably accessible or available in Lithuania itself (paragraphs 13, 16, 19, 22, 25, 30 and 55 above). 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 certain significant situations in his private life, such as his employment opportunities or travel abroad, he remains a woman (paragraphs 19-21 above).

58. The Court notes that the applicant has undergone partial gender-reassignment surgery. It is not entirely clear to what extent he could

complete the procedure privately in Lithuania (see the newspaper reference in paragraph 22 above). However, that consideration has not been put forward by either party to the present case so, presumably, it is to be ruled out. As a short-term solution, it may be possible for the applicant to have the remaining operation abroad, financed in whole or in part by the State (paragraphs 31, 42 and 55 above).

59. 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 relevant provisions came into force and the necessary legislation, although drafted, has yet to be adopted (paragraph 30 above). Given the few individuals involved (some 50 people, according to unofficial estimates – see paragraph 22 above), 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.

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

IV. ALLEGED VIOLATION OF ARTICLE 12 OF THE CONVENTION

61. The applicant complained that his inability to complete his gender reassignment had prevented him from marrying and founding a family, in violation of Article 12 of the Convention, which reads as follows:

“Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.”

A. The parties' submissions

62. The applicant submitted that he been living as a man for some 10 years now and had been diagnosed with a gender identity disorder 9 years ago. He had been in a stable relationship with a woman since 1998 and they had been living together since 1999 (paragraph 24 above). They

wished to legalise their long-lasting relationship, marry and establish a family through adoption.

63. The Government argued that the applicant could not be considered a victim or even a potential victim of the alleged violation, in that the relevant rules of civil law did not prevent a transsexual from marrying in his new identity following gender-reassignment surgery. The key issue was still that of gender recognition and, as such, it was more appropriately dealt with under Article 8 of the Convention.

B. The Court's assessment

64. The Court observes that the applicant's complaint under Article 12 is premature in that, should he complete full gender-reassignment surgery, his status as a man would be recognised together with the right to marry a woman. In these circumstances, the Court agrees with the Government that the key issue is still that of the gap in legislation, which has been analysed under Article 8 above. Consequently, it finds it unnecessary to examine this aspect of the case separately under Article 12 of the Convention.

V. ALLEGED VIOLATION OF ARTICLE 14 IN CONJUNCTION WITH ARTICLES 3 AND 8 OF THE CONVENTION

65. The applicant argued that the lack of legal regulation in Lithuania regarding the treatment and status of transsexuals disclosed a discriminatory attitude on the part of the Lithuanian authorities, in breach of Article 14 of the Convention, which provides 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.”

A. The parties' submissions

66. The applicant alleged that the failure of the State to pass the necessary legislation on gender reassignment was essentially due to the prejudices and hostile attitudes of the majority of the Lithuanian population towards transsexuals as a minority group, and served no

legitimate aim. No objective and reasonable justification had been put forward by the Government for the indefinite postponement of the enactment of the subsidiary legislation required by the Civil Code. As a result, the applicant had been denied vital opportunities as a transsexual, particularly as regards the treatment of his gender identity disorder and the effective legal recognition of his status.

67. The Government contested those allegations. They claimed that no separate issue arose under this provision that had not already been dealt with under Articles 3 and 8.

B. The Court's assessment

68. The Court again finds that, in the circumstances of the present case, the applicant's complaint of discrimination is essentially the same, albeit seen from a different angle, as that which it has considered above under Articles 3 and 8 of the Convention (see *Van Kück*, cited above, § 91). Consequently, it finds it unnecessary to examine this aspect of the case separately under Article 14 of the Convention.

VI. APPLICATION OF ARTICLE 41 OF THE CONVENTION

69. 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

70. The applicant claimed LTL 33,589.46 (approximately EUR 9,728) for pecuniary damage, which represented:

(a) his loss of earnings, given his limited employment prospects in order to avoid drawing attention to his status (LTL 26,391);

(b) compensation for private and 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 of completing the gender-reassignment procedure

(LTL 2,880).

71. The applicant further claimed EUR 47,680 to cover the fees for the eventual completion of gender-reassignment surgery. In this connection, 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.

72. Finally, the applicant claimed EUR 200,000 for the non-pecuniary damage resulting from the stress, anxiety, fear and humiliation which he had suffered, as well as his inability to enjoy his rights.

73. The Government considered these claims to be unsubstantiated and speculative. They noted that, before the Civil Code had come 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 submitted any evidence of his current needs and state of health, in relation to further surgery.

74. The Court notes the limited nature of the violation which it has found (see paragraphs 59-60 above). It considers that the applicant's claim for pecuniary damage would be satisfied by the enactment 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 satisfied by his having the final stages of the necessary surgery performed abroad and financed, at least in part, by the respondent State. Consequently, as an alternative in the absence of any such subsidiary legislation, the Court would award the applicant EUR 40,000 in pecuniary damage.

75. 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

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

77. 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.

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

C. Default interest

79. 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. *Dismisses* by six votes to one the Government's preliminary objection;
2. *Holds* by six votes to one that there has been no violation of Article 3 of the Convention;
3. *Holds* by six votes to one that there has been a violation of Article 8 of the Convention;
4. *Holds* by six votes to one that there is no need to examine separately the applicant's complaints under Articles 12 and 14 of the Convention;
5. *Holds* by five votes to two that the respondent State, in order to satisfy the applicant's claim for pecuniary damage, is to pass the required subsidiary legislation to Article 2.27 of its Civil Code on 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 six votes to one that alternatively, 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 six votes to one 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 six votes to one

(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;

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

Done in English, and notified in writing on 11 September 2007, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

S. DOLLÉ J.-P. COSTA Registrar President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of the Court, the separate opinions of Judges Fura-Sandström and Popović are annexed to this judgment.

J.-P.C. S.D.

PARTLY DISSENTING OPINION OF JUDGE FURA-SANDSTRÖM

I voted against holding that the respondent State, in order to satisfy the applicant's claim for pecuniary damage, should pass the required subsidiary legislation, pursuant to Article 2.27 of its Civil Code on the gender reassignment of transsexuals, within three months of the judgment becoming final (see paragraph 74 and point 5 of the operative part). In all other aspects I agree with the majority.

My principal concern is that, by adopting such a solution, the Court

risks acting *ultra vires*. The Convention clearly sets out a division of competences. Under Article 41 of the Convention, it falls to the Court, when a violation of the Convention or its Protocols has been found, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, to afford just satisfaction to the injured party, if necessary. Article 46 § 2 of the Convention states that “the final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution”.

Looking at the case at hand, I would make the following observations. The applicant claimed the amount of EUR 57,408 for pecuniary damage in respect of medical fees, loss of earnings, hormone treatment and the expense of eventual completion of gender-reassignment surgery abroad (see paragraphs 70-71 of the judgment). The applicant further alleged 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 (see paragraph 71 of the judgment). So I wonder whether the imposition of an obligation upon the respondent Government to pass the required legislation would be “affording just satisfaction to the injured party”, strictly speaking. The applicant does not seem to believe this to be the case.

I am aware of the possibility for the Court to prescribe general measures in order to prevent the recurrence of similar violations in the future (see, for example, *Broniowski v. Poland* [GC], no. 31443/96, ECHR 2004-V, and *Hutten-Czapska v. Poland* [GC], no. 35014/97, ECHR 2006-VIII, where the violations originated in a systemic problem connected with the malfunctioning of domestic legislation, and there were many other similar cases pending before the Court as well as a great number of potential applicants). However, the present application can be distinguished from such cases, as here the Court prescribes a general measure to redress an individual complaint. Only as an alternative, should those legislative measures prove impossible to adopt within the said time-limit, is the respondent State ordered to pay EUR 40,000 in respect of pecuniary damage (see paragraph 74 and point 6 of the operative part). For me, this does not afford just satisfaction to the applicant, as required by Article 41.

For these reasons I would have preferred the Court simply to order a payment in respect of pecuniary damage, and only as a secondary measure to indicate the need to pass new legislation.

DISSENTING OPINION OF JUDGE POPOVIĆ

I respectfully disagree with the opinion of the majority of the judges, for the following reasons.

Although I voted along with my colleagues in favour of the admissibility of the application in this case, I have subsequently reconsidered my opinion in the light of the parties' submissions at the oral hearing.

On the one hand, the applicant submitted that he had never availed himself of any domestic remedies because of their alleged ineffectiveness. On the other hand, the Government submitted that there had been a recent, convincing ruling of the Constitutional Court of Lithuania on national judicial remedies.

Faced with such facts, my approach is twofold: either one returns to the question of admissibility, or one raises of one's own motion the issue under Article 13 of the Convention, read in conjunction with either Article 8 or Article 3 of the Convention, thus thoroughly reconsidering the matter and determining whether there is an effective remedy under domestic law.

My preference would be to return to the admissibility issue with reference to paragraph 1 of the law part of the admissibility decision in this case, taken on 6 July 2006, which refers to the decision in *Valašinas v. Lithuania* (no. 44558/98, 14 March 2000) as the only authority. However, this precedent is clearly distinguishable from the present case. The decision on admissibility in *Valašinas* in favour of an applicant who had not exhausted domestic remedies was taken after the Court had made an on-the-spot investigation into the applicant's conditions of detention. In the present case the Court has merely agreed with the applicant's allegation that no effective domestic remedy existed. The present applicant's only argument was founded on a legal gap in the national legal system,

stemming either from a failure of the Government to pass subsidiary legislation or to introduce a bill to that end. However, there was, and still is, under Lithuanian law primary legislation (Article 2.27 § 1 of the Civil Code 2001) which unequivocally meets the applicant's aspirations.

The applicant appears to have sought redress from the Ministry of Health, which failed to respond. In such circumstances, the applicant should have tried to bring an action against the administration for failure to act, but despite being represented by a lawyer, he failed to do so.

Alleging the ineffectiveness of domestic remedies, without any attempt to turn to the domestic judiciary, the applicant apparently relies on the idea that the courts would somehow be unwilling to find in his favour despite the existence of a clear legal provision in the Civil Code.

One can only speculate that this submission is borne of the view that the judiciary is still a relic of the former authoritarian communist regime. Such courts would refuse to take a constructive approach to a legal provision, because of the mentality of the judges, who used to work in fear of the political authorities for decades. They would therefore tend to stick to a strictly literal interpretation of the text of the written law. The applicant therefore apparently feared that, in the absence of specific subsidiary legislation, the national courts of law might refuse to apply primary legislation.

However, although social developments and adjustment take time, there is nothing to support the view that, nowadays, an applicant should be allowed by this Court to neglect the judiciary of a High Contracting Party to the Convention by claiming its *prima facie* ineffectiveness. Such an approach is wholly unjustified. On the contrary, national judges should be encouraged to take a bolder stand in interpreting domestic legal provisions, and applicants should not be allowed to circumvent their national courts. Applicants must apply to the domestic courts before lodging an application with this Court.

Moreover, the Government submitted that there had been some evolution in the domestic case-law. It was to be found in the ruling of the Constitutional Court of Lithuania as regards the general issue of remedies before domestic courts of law. The Constitutional Court stated, *inter alia*:

“... the courts ... which administer justice ... have to construe law so that they are able to apply it.” Further on, the Constitutional Court found that if the courts of law were not to interpret the law “it would mean that law is treated only in its textual form and is identified with the latter” (Constitutional Court of Lithuania, case 34/03, Decision of 8 August 2006, § 6.2.3.3).

The majority of judges seem to be convinced, in the absence of any evidence whatsoever, that the courts in Lithuania would be willing to apply future legislation, if enacted after the introduction of the Government's bill, although they might fail to apply the existing law. Such a belief appears groundless, especially if one takes account of the fact that the applicant has never tried to apply to the domestic courts.

The position of the parties is as follows: the applicant failed to exhaust domestic remedies, preferring merely to allege their ineffectiveness, although he was unable to substantiate that allegation, whereas the Government relied on the evolution of the domestic case-law concerning remedies.

I agree with the Government's preliminary objection of non-exhaustion of domestic remedies, and consider the application premature and, therefore, inadmissible pursuant to Article 35 §§ 1 and 4 of the Convention.