From Max to Nadine: Judgment on Transsexuals

Changing one’s gender is undoubtedly one of the most far-reaching decisions a human being can make. Last week, the Court issued its judgment in an important case on the issue: Schlumpf v. Switzerland. Nadine Schlumpf, born in 1937 as Max Schlumpf, decided to change sex in 2002. She claimed that she had suffered psychologically from her childhood onwards because of her gender identity, which several times led her almost to commit suicide. Only after her children had grown up and her husband had died of cancer, did she decide to take concrete steps. In 2003 she started hormonal therapy and psychiatric and endocrinological treatment. A year later, she successfully underwent a sex-change operation. Her health insurance, where she had applied for reimbursement in the same month, refused to pay. The core reason, apart from health risks at her high age - Schlumpf was in her late sixties - was that the established case-law of the Federal Insurance Court made clear that a two-year ‘observation period’ was necessary before any operation in view of the far-going consequences.

Schlumpf complained in Strasbourg about that refusal to reimburse based on the reasoning mentioned above. The Court agreed with her and - among others - found that her right to respect for private life under Article 8 ECHR had been violated. It specifically called into question the no-exception status of the case-law at the national level (the two-year rule), which in the applicant’s case very particular situation (relatively high age) failed to strike a fair balance. The Court noted that the Convention does not guarantee a right to be reimbursed for gender-change operations. What is indeed the legal essence of the case is not the reimbursement, but the overly rigid application of the two-year rule in Swiss case law. Nevertheless, this is a clear case were the Court went beyond questions of legal recognition of transsexuals (not at stake here, but in several earlier British cases) and addressed a very practical aspect of gender change. Essentially, the Court’s verdict is thus a plea for precise balancing. To assess whether exceptions to the Swiss rule were justified, the Court indicated that the expertise of medical staff should have been sought to take into account all medical, biological and psychological aspects. Instead of a "mechanical" application of rules in such cases, as the Court labelled it, the judgment favours a human approach - and is to be recommended for it!

Two of the seven judges dissented, pointing to the margin of appreciation for the state, the clarity of the existing Swiss case law, and the fact that the health insurance notified the applicant of their refusal to reimburse one day before the operation - making it the applicant’s own choice to go through with it in the knowledge of not being reimbursed.

Again, the judgment itself is available only in French, but the Court’s press release in English can be found here. For a short overview of some of the Court’s preceding case law on transsexualism, see Beate Rudolf’s article European Court of Human Rights: Legal Status of Postoperative Transsexuals in the International Journal of Constitutional Law (Vol.1.4, 2003, pp. 716-721).
1 comment:

έleurblack said...

I am in exactly the same situation as despite being 62 in May 2009 and having first approached my doctor way back in 1961 I have still not had any of the therapies appropriate to my situation and I am getting exceedingly depressed. My local health do have an exceptional cases committee that can approve funding for exceptional cases but no matter how I try to convince them of the seriousness of my condition they refuse to sanction any treatment in less that two years making my transition at least 6 years whicah ll the experts say is far too long.

I now have a leading UL law firm looking at it.

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