

EUROPEAN COURT OF HUMAN RIGHTS

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Press release issued by the Registrar

CHAMBER JUDGMENT SCHLUMPF v. SWITZERLAND

The European Court of Human Rights yesterday notified in writing its Chamber judgment¹ in the case of *Schlumpf v. Switzerland* (application no. 29002/06). ([THE JUDGMENT IS AVAILABLE ONLY IN FRENCH.](#))

The Court held:

- unanimously, that there had been a **violation of Article 6 § 1** of the European Convention on Human Rights as regards the right to a fair trial;
- unanimously, that there had been a **violation of Article 6 § 1** as regards the right to a public hearing;
- by five votes to two, that there had been a **violation of Article 8** (right to respect for private and family life).

In accordance with Article 41 of the Convention (just satisfaction), the Court awarded the applicant 15,000 euros (EUR) for non-pecuniary damage and EUR 8,000 for costs and expenses).

1. Principal facts

The applicant, Nadine Schlumpf, is a Swiss national who was born in 1937 and lives in Aarau (Switzerland). She was registered at birth under the name Max Schlumpf, of male sex.

The case concerned the applicant's health insurers' refusal to pay the costs of her sex-change operation on the ground that she had not complied with a two-year waiting period to allow for reconsideration, as required by the case-law of the Federal Insurance Court as a condition for payment of the costs of such operations.

The applicant submitted that the psychological suffering caused by her gender identity disorder went back as far as her childhood and had repeatedly led her to the brink of suicide. In spite of everything, and although by the age of about 40 she was already certain of being transsexual, she had accepted the responsibilities of a husband and father until her children had grown up and her wife had died of cancer in 2002.

¹ Under Article 43 of the Convention, within three months from the date of a Chamber judgment, any party to the case may, in exceptional cases, request that the case be referred to the 17-member Grand Chamber of the Court. In that event, a panel of five judges considers whether the case raises a serious question affecting the interpretation or application of the Convention or its protocols, or a serious issue of general importance, in which case the Grand Chamber will deliver a final judgment. If no such question or issue arises, the panel will reject the request, at which point the judgment becomes final. Otherwise Chamber judgments become final on the expiry of the three-month period or earlier if the parties declare that they do not intend to make a request to refer.

The applicant decided in 2002 to change sex and from then on lived her daily life as a woman. She began hormonal therapy and psychiatric and endocrinological treatment in 2003.

An expert medical report in October 2004 confirmed the diagnosis of male-female transsexualism and stated that the applicant satisfied the conditions for a sex-change operation.

In November 2004 the applicant asked SWICA, her health insurers, to pay the costs of the sex-change operation, and supplied a copy of the expert report. On 29 November 2004 SWICA refused to reimburse the costs, noting that according to the case-law of the Federal Insurance Court the mandatory clause providing for reimbursement of the costs of a sex-change operation which health-insurance policies were required to include applied only in cases of "true transsexualism", which could not be established until there had been an observation period of two years.

On 30 November 2004 the applicant nevertheless successfully underwent the operation. In mid-December 2004 she again applied to SWICA, who again refused.

In late January 2005 the applicant appealed unsuccessfully against that decision. She attempted to show that at the stage medical science had then reached it was possible to identify true cases of transsexualism without waiting for two years to elapse. She also proposed that the Senior Consultant of the Zurich Psychiatric Clinic be asked to give evidence in the context of a further investigation.

On 14 February 2005 the applicant's civil status was modified to reflect her sex-change and she was registered under the forename of Nadine.

In early April 2005 the applicant appealed to the cantonal insurance court and asked for a public hearing. When the cantonal insurance court informed her of the possibility of sending the case back to the health-insurers for a further investigation the applicant withdrew that request in the event of the case being remitted. However, she said that waiver would not apply if the case were to go to the Federal Insurance Court or the European Court of Human Rights.

In June 2005, without holding a hearing, the cantonal insurance court set aside the health-insurers' refusal to pay the costs of the sex-change operation and remitted the case for a further investigation and reconsideration.

In July 2005 SWICA appealed to the Federal Insurance Court, arguing that the cantonal insurance court had disregarded the Federal Court's case-law to the effect that costs could only be reimbursed after a period of two years and submitting in addition that the existence of an illness had not been established.

In September 2005 the applicant explicitly asked the Federal Insurance Court for a public hearing and requested that it call expert witnesses to answer questions on the treatment of transsexualism. Her request was refused, among other reasons because the Federal Court considered that the relevant issues were legal questions, so that a public hearing was not necessary. It also reaffirmed the pertinence of the two-year observation period. It noted that despite what various experts had submitted during the proceedings and the stage modern medical science had reached, caution was vital, given in particular the irreversibility of the

operation and the need to avoid unjustified operations.

The Federal Insurance Court noted that at the time of the operation the applicant had been under psychiatric observation for less than two years and held that the health-insurers had been justified in refusing to reimburse the costs.

2. Procedure and composition of the Court

The application was lodged with the European Court of Human Rights on 7 July 2006.

Judgment was given by a Chamber of seven judges, composed as follows:

Christos **Rozakis** (Greece), *President*,
Nina **Vajić** (Croatia),
Khanlar **Hajiyev** (Azerbaijan),
Dean **Spielmann** (Luxembourg),
Sverre Erik **Jebens** (Norway),
Giorgio **Malinverni** (Switzerland),
George **Nicolaou** (Cyprus), *judges*,

and also Søren **Nielsen**, *Section Registrar*.

3. Summary of the judgment²

Complaints

Relying on Article 6 § 1 (right to a fair trial), the applicant complained of an infringement of her right to a fair trial and to a public hearing. She further alleged that a fair balance had not been preserved between her interests and those of her health-insurers, contrary to Article 8 (right to respect for private life).

Decision of the Court

Article 6 § 1

The Court considered that it was disproportionate not to accept expert opinions especially as it was not in dispute that the applicant was ill. By refusing to allow the applicant to adduce such evidence, on the basis of an abstract rule which had its origin in two of its own decisions in 1988, the Federal Insurance Court had substituted its view for that of the medical profession, whereas the Court had previously ruled that determination of the need for sex-change measures was not a matter for judicial assessment.

The Court held that the applicant's right to a fair hearing before the Federal Insurance Court had been infringed, contrary to Article 6 § 1.

The Court reiterated that the public nature of judicial proceedings was a fundamental principle of any democratic society and emphasised a litigant's right to a public hearing at at least one level of jurisdiction. It observed that the applicant could not be considered to have

² This summary by the Registry does not bind the Court.

waived the right to a public hearing before the Federal Court.

The Court observed that as the question of the applicant's sex-change was not an exclusively legal or technical matter, and given the difference of opinion between the parties as to the necessity of the observation period, a public hearing was necessary.

Consequently, the Court held that the applicant's right to a public hearing had not been respected, contrary to Article 6 § 1.

Article 8

The Swiss Government submitted that in order to restrict health-insurance costs in the general interest it was necessary to place limits on the services to be reimbursed. The applicant submitted that her age justified an exception and asserted that she had not learned of the two-year waiting period until after the operation.

The Court considered that the period of two years, particularly at the applicant's age of 67, was likely to influence her decision as to whether to have the operation, thus impairing her freedom to determine her gender identity.

It pointed out that the Convention guaranteed the right to personal self-fulfilment and reiterated that the concept of "private life" could include aspects of gender identity. It noted the particular importance of questions concerning one of the most intimate aspects of private life, namely a person's gender identity, for the balancing of the general interest with the interests of the individual.

The Court considered that respect for the applicant's private life required account to be taken of the medical, biological and psychological facts, expressed unequivocally by the medical experts, to avoid the mechanical application of the two-year delay. It concluded that, regard being had to the applicant's very particular situation, and bearing in mind the respondent State's latitude in relation to a question concerning one of the most intimate aspects of private life, a fair balance had not been struck between the interests of the insurance company and those of the applicant.

There had therefore been a violation of Article 8.

Judges Vajić and Jebens expressed a joint partly dissenting opinion, which is annexed to the judgment.

The Court's judgments are accessible on its Internet site (<http://www.echr.coe.int>).

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***The European Court of Human Rights** was set up in Strasbourg by the Council of Europe Member States in 1959 to deal with alleged violations of the 1950 European Convention on Human Rights.*