



## Austrian ban on using sperm and ova donation for in vitro fertilisation was not in breach of the Convention

In today's Grand Chamber judgment in the case [S. H. and Others v. Austria](#) (application no. 57813/00), which is final<sup>1</sup>, the European Court of Human Rights held, by a majority, that there had been:

**No violation of Article 8 (right to respect for private and family life)** of the European Convention on Human Rights.

The case concerned the complaint by two married couples from Austria about the ban on medically-assisted procreation techniques that they wished to use.

### Principal facts

The applicants, all Austrian nationals, are two married couples who live in Austria. Suffering from infertility, they wished to use medically-assisted procreation techniques which are not allowed under Austrian law.

S.H. produces ova, but suffers from blocked fallopian tubes, which means that she cannot get pregnant naturally, and her husband D.H. is infertile. Owing to their medical conditions, only *in vitro* fertilisation with the use of sperm from a donor would allow them to have a child of whom one of them is the genetic parent. H.E.-G. suffers from agonadism, which means that she does not produce ova, while her husband M.G. can produce sperm fit for procreation. Only *in vitro* fertilisation with the use of ova from a donor would allow them to have a child of whom one of them is the genetic parent. However, both of these possibilities are ruled out by the Austrian Artificial Procreation Act, which prohibits the use of sperm from a donor for *in vitro* fertilisation and ova donation in general. At the same time, the Act allows other assisted procreation techniques, in particular *in vitro* fertilisation with ova and sperm from the spouses or cohabitating partners themselves (homologous methods) and, in exceptional circumstances, donation of sperm when it is introduced into the reproductive organs of a woman.

In May 1998, S.H. and H.E.-G. lodged an application with the Austrian Constitutional Court for a review of the relevant provisions of the Artificial Procreation Act. In October 1999, the Constitutional Court found that there was an interference with the applicants' right to respect for family life, but that it was justified, as the provisions were to avoid the forming of unusual personal relations, such as a child having more than one biological mother (a genetic one and one carrying the child). They were also to avoid the risk of exploitation of women, as pressure might be put on a woman from an economically disadvantaged background to donate ova, who otherwise would not be in a position to afford *in vitro* fertilisation in order to have a child of her own.

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<sup>1</sup> Grand Chamber judgments are final (Article 44 of the Convention).

All final judgments are transmitted to the Committee of Ministers of the Council of Europe for supervision of their execution. Further information about the execution process can be found here: [www.coe.int/t/dghl/monitoring/execution](http://www.coe.int/t/dghl/monitoring/execution)

## Complaints, procedure and composition of the Court

The applicants complained that the prohibition of sperm and ova donation for *in vitro* fertilisation violated their right to respect for family life under Article 8 (right to respect for private and family life), and that the difference in treatment compared to couples who wished to use medically-assisted procreation techniques, but did not need to use ova or sperm donation for *in vitro* fertilisation, amounted to a discriminatory treatment, in violation of Article 14 (prohibition of discrimination).

The application was lodged with the European Court of Human Rights on 8 May 2000. In its Chamber judgment of 1 April 2010, the Court held, by five votes to two, that there had been a violation of Article 14 in conjunction with Article 8 as regards the prohibition of *in vitro* fertilisation with the use of ova from a donor, which affects the couple H.E.-G and M.G. and, by six votes to one, that there had been a violation of Article 14 in conjunction with Article 8 as regards the prohibition of *in vitro* fertilisation with the use of sperm from a donor, which affects the couple S.H and D.H. On 4 October 2010, the case was referred to the Grand Chamber at the Austrian Government's request. A Grand Chamber hearing took place on 23 February 2011.

The Governments of Italy and Germany and the following organisations were granted the right to submit written comments:

*The European Centre for Law and Justice*  
*Hera Onlus and SOS Infertilità Onlus*  
*Aktion Leben*

Judgment was given by the Grand Chamber of 17, composed as follows:

Jean-Paul **Costa** (France), *President*,  
Nicolas **Bratza** (United Kingdom),  
Françoise **Tulkens** (Belgium),  
Josep **Casadevall** (Andorra),  
Elisabeth **Steiner** (Austria),  
Elisabet **Fura** (Sweden),  
Danutė **Jočienė** (Lithuania),  
Ján **Šikuta** (Slovakia),  
Dragoljub **Popović** (Serbia),  
Ineta **Ziemele** (Latvia),  
Päivi **Hirvelä** (Finland),  
Mirjana **Lazarova Trajkovska** ("The former Yugoslav Republic of Macedonia"),  
Ledi **Bianku** (Albania),  
Nona **Tsotsoria** (Georgia),  
Guido **Raimondi** (Italy),  
Işıl **Karakaş** (Turkey),  
Vincent A. **de Gaetano** (Malta), *Judges*,

and also Michael **O'Boyle**, *Deputy Registrar*.

## Decision of the Court

### Article 8

There was no dispute between the parties as to the applicability of Article 8. The Court agreed, holding that the right of a couple to conceive a child and to make use of medically-assisted procreation for that purpose was protected by Article 8, as such a choice was an expression of private and family life.

The relevant provisions of the Austrian Artificial Procreation Act raised an issue as to whether there was a positive obligation on the State concerned to permit certain forms of artificial procreation. However, the Court found it reasonable to approach the case as one involving an interference by the State with the applicants' right to respect for their family life. They had been prevented from using certain techniques of artificial procreation by the application of the law that they unsuccessfully sought to challenge before the Austrian courts.

It was thus undisputed that the prohibition at issue was provided for by law. As regards the State's margin of appreciation in regulating matters of artificial procreation, the Court observed that there was today a clear trend in the legislation of Council of Europe member States towards allowing gamete donation for the purpose of *in vitro* fertilisation. However, that emerging European consensus was not based on settled principles, but it reflected a stage of development within a particularly dynamic field of law and thus did not decisively narrow the margin of appreciation of the State. The Court therefore considered that the margin of appreciation to be given to Austria had to be a wide one, given that the use of *in vitro* fertilisation treatment gave rise – at the time of the Austrian court's decision, and continued to give rise today – to sensitive ethical issues against a background of fast-moving scientific developments.

The Court observed that the Austrian legislature had not completely ruled out artificial procreation, as it allowed the use of homologous techniques. According to the Austrian Constitutional Court's findings, the legislature had tried to reconcile the wish to make medically-assisted procreation available on the one hand and the existing unease among large sections of society as to the role and possibilities of modern reproductive medicine on the other.

The Austrian legislature could have enacted safeguards to reduce the risks attached to ovum donation; that it might lead to exploitation of women from an economically disadvantaged background and that women might be pressured into producing more ova than necessary. Furthermore, unusual family relations, which did not follow the typical parent-child relationship based on a direct biological link, were not unknown in the legal orders of the Council of Europe member States, and adoption was a satisfactory legal framework for such relations known in all those States.

However, the Court could not overlook the fact that the splitting of motherhood between a genetic mother and the one carrying the child differed significantly from adoptive parent-child relations. The legislature had thus been guided, in particular, by the aim of maintaining a basic principle of civil law, that the identity of the mother is always certain, and of avoiding the possibility that two women could claim to be the biological mother of the same child.

The Court further observed that all relevant legal instruments at European level were either silent on the question of ova donation or – in the case of the European Union Directive on safety standards for the donation of human cells – expressly left the decision on whether or not to use germ cells to the State concerned.

As regards the prohibition of sperm donation for *in vitro* fertilisation, it was true that that type of artificial procreation combined two techniques which, taken alone, were allowed under Austrian legislation. Furthermore, some of the Government's arguments in defence of the prohibition of gamete donation for *in vitro* fertilisation could only be applied to the prohibition of ovum donation. However, there remained the basic concerns that the donation of gametes involving the intervention of third persons in a highly technical medical process was a controversial issue in Austrian society, raising complex ethical questions on which there was not yet a consensus.

The fact that the Austrian legislature, when prohibiting the use of donated sperm or ova for *in vitro* fertilisation, did not at the same time rule out sperm donation for *in vivo* artificial insemination showed that it approached the matter carefully, seeking to reconcile social realities with its approach of principle. There was furthermore no prohibition under Austrian law on going abroad to seek treatment for infertility that used artificial procreation techniques not allowed in Austria.

The Court concluded that Austria had not, at the relevant time, exceeded the margin of appreciation afforded to it, neither as regards the prohibition of ovum donation for the purposes of artificial procreation nor as regards the prohibition of sperm donation for *in vitro* fertilisation. There had accordingly been no violation of Article 8 in the applicants' case.

At the same time, the Court pointed out that the Austrian Constitutional Court, in its 1999 decision upholding the prohibition in question, had held that the legal regime reflected the state of medical research and a consensus in society at the time. Those criteria might be subject to developments which the legislature, according to the domestic court's decision, would have to take into account in the future. The Austrian Government had given no indication that the authorities had followed up that aspect of the ruling. While not finding a violation in the applicants' case, the Court underlined that the field of artificial procreation, being subject to a particularly dynamic development in science and law, had to be kept under review by the member States.

#### Article 14 in conjunction with Article 8

In view of its findings under Article 8, the Court did not consider it necessary to examine the complaint separately under Article 14 in conjunction with Article 8.

#### Separate opinions

Judge de Gaetano expressed a separate opinion. Judges Tulkens, Hirvelä, Lazarova Trajkovska and Tsotsoria expressed a joint dissenting opinion. These opinions are annexed to the judgment.

*The judgment is available in English and French.*

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#### Press contacts

[echrpress@echr.coe.int](mailto:echrpress@echr.coe.int) | tel: +33 3 90 21 42 08

**Nina Salomon (tel: + 33 3 90 21 49 79)**

Emma Hellyer (tel: + 33 3 90 21 42 15)

Tracey Turner-Tretz (tel: + 33 3 88 41 35 30)

Kristina Pencheva-Malinowski (tel: + 33 3 88 41 35 70)

Denis Lambert (tel: + 33 3 90 21 41 09)

**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.