

Written observations

S.H. AND OTHERS v. AUSTRIA
n° 57813/00

by Mr Carlo Casini MEP
and 26 other Members of the European Parliament

This group of 27 MEP has not been authorised to intervene before the European Court of Human Rights. Therefore, this text has not been submitted to the Court

On 23 February 2011 the Grand Chamber of the European Court of Human Rights will review the ruling on the subject mentioned above, pronounced by the Chamber of the First Section of the court on April 1, 2010. By this decision, Austria was condemned because its law on artificial procreation (Fortpflanzungshedizingesetz No 275/1992), Art. 1 / 1 prohibits in all cases heterologous fertilization in vitro and in vivo if the gametes coming from outside the couple are female (ova).

THE ARGUMENTS THE CHAMBER USED FOR ITS DECISION

The arguments the First Section relied upon are basically two:

A) "There is no obligation on a State to enact legislation of a kind and to allow artificial procreation. However, once the decision has been taken to allow artificial procreation and notwithstanding the wide margin of appreciation afforded to the contracting States, the legal framework devised for this purpose must be shaped in a coherent manner" (n. 74). The court, therefore, deemed inconsistent the different legal treatment between "a couple which may make use of artificial procreation techniques without resorting to ova donation" and the couples "who are prevented by the prohibition of ova donation under Section 3 of the Artificial Procreation Act from fulfilling their wish for a child"(n. 85). Analogously, the First Section found unreasonable the different treatment reserved for a couple needing sperm as opposed to ova donation. "The difference in treatment between the first and second applicants who, for fulfilling their wish for a child could only resort to sperm donation for in vitro fertilisation, had no objective and reasonable justification and was disproportionate." (n. 94).

B) Adoption creates a family relationship not founded on a blood relationship, but on a commitment that contrasts with or replaces the relationship resulting from parental descent. To this familiar state of affairs, the Court sees no insurmountable obstacle to bringing into existence new "family relations which would result from a successful use of the artificial procreation techniques at issue in the general framework of family law and other related areas of law." (No. 81).

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These arguments are erroneous and therefore it is hoped that the Grand Chamber will reverse the decision of the First Section and therefore reject the appeal against Austria.

Reply to the argument sub. A

1) Art. 3 of the International Convention on the Rights of the Child (UN 20 November 1989), establishes that “in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration”. In the preceding Declaration of the Rights of the Child (UN 20 November 1959) it is written: “mankind owes to the child the best it has to give”. These dispositions must be taken into consideration by the Grand Chamber, in accordance with Article. 53 of the European Convention for Protection of Human Rights and Fundamental Freedoms (1950) where it is established that: “Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a Party”. Analogously, art. 24 of the Charter of Fundamental Rights of the European Union, to which art. 6 of the Treaty of Lisbon gives the same legal force as the Treaty itself, repeats exactly the content of art. 3 of the Convention on the Rights of the Child.

2) In the case of artificial fertilisation two interests are juxtaposed: that of adults to have a child and that of the children have a father and mother who are such in the most complete way: genetically, lovingly, legally. The personal and family identity of the child also depends on the coming together of these three aspects of parenthood. It is not by chance that one speaks of a child's right to his/her identity and to know their origins. The "best" reasonable prospect for a child is to be able to call "father" and "mother" a man and a woman who really are such in every respect: genetically, lovingly, legally. The "best" in terms of a prognosis from the moment a new life begins, cannot be assessed only in legal terms. It is not enough that the child be declared "legitimate" by the law even when they are the fruit of heterologous fertilisation. The legal fact does not prevent hypothetical harm (psychological, emotional, educational), especially in the case of possible family crises, in which the absence of genetic parenthood can be hurled at the child with serious adverse effects especially if motherhood is denied.

3) It is true that many children are "naturally heterologous", the result of a generative and sexual freedom that the State cannot and does not want to restrict. But without artificial fertilisation this can only happen with respect to the father and not with regards to the mother. Also, there is a big difference between natural and artificial generation. The first comes from an act that is by its very nature very private, such that it cannot be made the subject of outside control. The second act involves the participation of civil society, through its medical facilities. Therefore regulatory intervention by the state is possible, particularly by the legislator. All are required to fulfill the criterion of "conscious and responsible procreation", but the duty to be guided by this ethical norm is much more strictly the case and controllable in the case of artificial fertilisation. Achieving what is "best" for the child is therefore here a duty and responsibility of the legislator.

4) In the end, between the interests of adults (to have a child) and the interests of the child (to have parents who are real and knowable in every respect), according to the provisions of Art. 3 of the Convention on the Rights of the Child, the State must, or at least may, give preference to the interest of the latter.

5) In any case, the issue highlighted here is delicate, it is of great importance, including many different possible evaluations that may all be reasonable and therefore each single State should be allowed to make its own decisions.

6) Therefore the Chamber of the First Section unjustly only referred to art. 8 and art. 14 of the European Convention. It should also have considered art. 3 of the Convention on the Rights of the Child. In addition, Art. 8 of the European Convention allows interference by public authority in family life not only to protect “health or morals”, but also “to protect the rights and freedoms of others”. However: the minor - as some national laws refer to the child - for example the Italian law

on adoption (Law n. 149 of March 28, 2001), has the right to live and grow in " his/her family", understood as that family in which he/she was biologically generated. Furthermore, the donation of ova carries serious risk for the health and even the life of the donor due to the drugs needed to cause hyper-ovulation and the surgery involved in collecting the ova. There are no similar risks for the donation of sperm. Therefore, it is reasonable for a State to consider the risks of egg donation as superior to the benefits derived from it.

Reply to the argument sub. B

7) The modern practice of child adoption is not an instrument to give children to those who have none, but, on the contrary, is a means of giving a family to a child that did not have one. Adoption implies a state of material or moral abandonment of the child. A person who wants a child cannot try to obtain one at any cost. He cannot kidnap a child, taking him/her from another family which, perhaps, is quite numerous. Nor is it permissible to buy a child. You can adopt a child whose parents have died or who have physically abandoned him/her, or if the parents are not able to properly raise and educate their child. But the death of their parents, or their material or moral abandonment of the child, are not what is "best" for the child. Adoption is a remedy for something evil.

8) In heterologous artificial procreation a child is generated by the biological father or mother or both, with the sole purpose of abandoning him/her. The "donor" mother of the oocyte and the "donor" father of the sperm want a child that is genetically their child to be born, but reject any responsibility towards him/her: they abandon their child from the beginning.

9) Many constitutions establish the obligation to support one's children. As examples we can mention art. 30 of the Italian Constitution and art. 6 subsections 2 and 3 of the German Constitution. The generation of a child creates a responsibility. In heterologous artificial procreation this responsibility is completely denied. It cannot, therefore, use the legal institution of adoption of minor children to justify heterologous procreation. The wide margin of appreciation afforded to the contracting States in situations inherent to family life.

10) The European Court of Human Rights has repeatedly stated that in family matters States have a wide margin of appreciation which cannot be suppressed by interpretations of the Court itself. This principle, stated recently in the ruling *A. B. C. vs Ireland* (16 December 2010), is repeated several times in the ruling we are examining here of April 1, 2010 made by the Chamber of the First Section. The arguments that we have summarized in order to criticize that decision may not be shared by all, but their reasonableness is not contestable. There are serious reasons for considering that the prohibition of heterologous procreation does not violate the principle of equality, because there are different elements that justify different treatment of homologous and heterologous procreation.

11) The wide margin of appreciation allowed to States should be recognized even more strongly as the debate involves the values that define the cultural identity, history and constitutional system of a nation. Family law belongs that area that identifies a people. This was stated with great force in a recent ruling by the German Constitutional Court on June 30, 2009 about the Treaty of Lisbon (nn. 249, 251, 252). Where the family is recognized as the fundamental group unit of the State (art. 15 of the Universal Declaration on Human Rights, art. 10 of the International Covenant on Economic, Social and Cultural Rights and art. 23 of the International Covenant on Civil and Political Rights) it is logical that States are very jealous in defining its structure, in accordance with their traditions.

12) The above considerations that require or at least allow a different judgment concerning heterologous artificial procreation and homologous artificial procreation, are valid both when the gamete coming from outside the couple is female (ova) and when it is male (sperm) and in the case of in vitro fertilisation and in vivo fertilisation. Some international documents affirm a human right to genetic identity. What is certainly meant by this expression is the right to have a genetic heritage that is not artificially modified, but also the right to maintain and know family relationships characterized by one's genetic inheritance. The Council of Europe in Recommendation 934 of 1982 states "the rights to life and to human dignity protected by Articles 2 and 3 of the European Convention on Human Rights imply the right to inherit a genetic pattern which has not been artificially changed" (Article 4, Section I) and requests that this right of inviolability of genetic heritage be explicitly included in the European Convention on Human Rights (Article 4, Section II and Art. 7, B). The European Parliament has turned to the right to genetic identity and connects it to the right to life and family as the basic rights of the newly conceived (Resolution of 16 March 1989 on the ethical and legal problems of genetic engineering and human artificial fertilization and to psychological and existential identity) and in 1998 concerning cloning "reaffirms that every individual has the right to their genetic identity" (Resolution on cloning of 15 January 1998 and Resolution on cloning of September 9, 2000). Fatherhood and motherhood are elements that identify the person not only in the sense of their civil status, but also in a psychological sense that goes beyond what is genetic. The mechanism of fertilisation was only discovered relatively recently. The 46 chromosomes that identify the human species and that are present in each of the billions of cells that make up the human body, are transmitted to the child in equal measure (23 +23) from the father and mother. Each delivers to the new life the physical and mental characteristics of the whole ascending paternal and maternal lines, including grandparents great-grandparents, and so on. Heterologous fertilization interrupts the link determined by the genetic line.

13) A State which views heterologous artificial procreation as being a negative act may still find a reason to introduce an exception to this principle. Within the wide margin of appreciation afforded to States, it is possible that heterologous fertilisation with male gametes is seen as less harmful than using female gametes. First of all one can observe that the judgment concerning the internal coherence in a law, where it is found permissible by the Court in Strasburg, should not lead to the State being condemned for having allowed heterologous fertilisation without limitations, but rather the exception allowed to the ban on heterologous fertilisation should be judged incoherent. The Chamber of the First Section affirmed the freedom of States to prohibit all forms of artificial fertilisation, and even allowed that this discretionary power may be exercised in respect of a particular type of artificial fertilisation. In any case, if there is a general power to ban, one has to admit the possibility of only partially prohibiting it. If we place ourselves within the internal logic of a single law, the coherence must be evaluated according to the principles and assessments in that law. Consequently, since the law gives a generally negative judgment of heterologous fertilisation but makes an exception by allowing in vivo insemination with semen, it would have been more logical to point out the incoherence of the exception and not the incoherence of the rule. If within a law a certain behaviour is considered especially socially undesirable or admits the freedom to express such an assessment, the censure should concern the exception and not the rule. If the exception is bad, according to the logic of the Austrian law, it is not coherent to extend permission for what that law considered illicit.

14) Just as the distinction between homologous and heterologous procreation may have a reasonable foundation, the distinction between heterologous fertilisation on the part of the mother and the use of sperm from outside the couple may be equally reasonable. The bond of motherhood is a bond, especially in the early years of the child's life, that is stronger than the ties to the father. This is a common experience and is confirmed scientifically by psychology and biology. That the

young have a special need for their mother is certain. The new human being, already in the womb, receives not only sustenance, warmth and oxygen, but gives to the mother. Recent discoveries show that (K) fetal stem cells are transferred to the mother that remain with her, not just during the pregnancy, but throughout her life, even if the pregnancy is not carried to term. The special relationship of the child to the mother is also clear from breastfeeding after birth. Other recent discoveries about the intrauterine development of the senses of the child (especially hearing and smell) are the existence of an intimate relationship between mother and child before birth. The unity of genetic, gestational, emotional and legal motherhood seems to be very strong. If we examine the case from the standpoint of the best interests of the child and not only from the standpoint of the interests of the adults, one judges that heterologous procreation with an ovum that does not come from the mother who will raise the child is worse than heterologous fertilization done using sperm.

15) The Austrian law goes even further. It does not allow heterologous in vitro fertilisation, but allows the heterologous in vivo fertilisation only if it is done with semen. The same reasoning applies here as in the reasoning given above with regards to the rule and exceptions. The ease with which insemination can be performed and the frequency with which a child can be generated following a woman's sexual intercourse with a man who is not her husband or partner, makes this exception less objectionable.

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16) The undersigned, propose the arguments briefly summarized above because they believe they contribute to justice in relation to their responsibilities as European Parliamentarians and the institutional roles they have in constitutional, legal and scientific matters. The European Parliament has several times considered genetic engineering and medically assisted procreation. One need only recall two resolutions adopted March 13, 1989 and confirmed later (European Parliament, Resolution on Protection of human rights and the dignity of human beings in relation to biological and medical applications of 20 September 1996), which both expressed the same judgment on heterologous procreation expressed here. The undersigned also point out that the Charter of Fundamental Rights of the European Union is part of the European human rights system which was inaugurated with the European Convention of Human Rights of 1950 and that therefore there is an interest in having a harmonious relationship between the two documents and the Court of Justice is active both in the Council of Europe and at the level of the European Union. For these reasons we recommend that this brief be given proper consideration by the Grand Chamber.

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