EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

Press Release
issued by the Registrar of the Court

ECHR 249 (2023)
07.09.2023

Access to information about one's origins: the refusal to disclose information about the gamete donors to applicants who were born through artificial reproduction techniques did not breach Article 8 of the Convention

In today's **Chamber** judgment[1] in the case of Gauvin-Fournis and Silliau v. France (application no. 21424/16) 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 inability, alleged by the applicants, who were born in the 1980s by means of medically assisted procreation (MAP) using third-party donors, to access information concerning the respective donors. This situation had lasted until 1 September 2022, when a new legal system for obtaining access to one's origins entered into force. It introduced a system of access to information about one's origins for individuals who had been born prior to its entry into force; however, this was subject to the donors giving their consent.

The Court noted that the situation complained of by the applicants resulted from decisions taken by the legislature. Each bioethics law had been preceded by a public debate in the form of consultations, in order to take into consideration all points of view. In the Court's opinion, the legislature had duly weighed up the interests and rights at stake after an informed and gradual process of reflection on the need to lift donor anonymity. Reiterating that there was no clear consensus on the issue of access to origins, merely a recent trend in favour of lifting donor anonymity, it considered that the legislature had acted within its discretion ("margin of appreciation"). The respondent State could not therefore be criticised for the pace at which the reform had been enacted or for having been slow to agree to such reform.

The Court considered that the respondent State had not overstepped its margin of appreciation in this area, including in its decision when enacting the Bioethics Act of 2 August 2021 (Law no. 2021-2017) to make access to information about one's origins for persons in the applicants' situation subject to the condition that the third-party donor gave his or her consent.

Lastly, the Court noted that when the applications were lodged with the Court, the principle of anonymity in gamete donations had not prevented doctors from obtaining access to medical information and disclosing it to individuals born through the relevant gamete donation, where required by therapeutic necessity, including with a view to preventing the risk of consanguinity, considered by the applicants to be an infringement of their right to health. With regard to non-identifying medical information, the Court noted that the State had struck a faire balance between the competing interests at stake.

The Court concluded that the respondent State had not breached its positive obligation to ensure effective respect for the first and second applicants' private life.

A legal summary of this case will be available in the Court's database HUDOC (link).

1. Under Articles 43 and 44 of the Convention, this Chamber judgment is not final. During the three-month period following its delivery, any party may request that the case be referred to the Grand Chamber of the Court. If such a request is made, a panel of five judges considers whether the case deserves further examination. In that event, the Grand Chamber will hear the case and deliver a final judgment. If the referral request is refused, the Chamber judgment will become final on that day.
Once a judgment becomes final, it is transmitted to the Committee of Ministers of the Council of Europe for supervision of its execution. Further information about the execution process can be found here: www.coe.int/t/dghl/monitoring/execution.

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

Principal facts

The applicants, Ms Audrey Gauvin-Fournis, and Mr Clément Silliau, are French nationals who were born in 1980 and 1989 respectively and live in Levallois-Perret and Beaune-la-Rolande (France).

Application no. 21424/16

Ms Gauvin-Fournis was conceived through artificial insemination by sperm donor, an ART procedure which consists of injecting the sperm directly into the womb of the woman, who was in this case both her birth mother and biological mother. In 2009, when she was 29 her parents told her how she had been conceived.

On 22 February 2010 Ms Gauvin-Fournis asked the Bondy centre for gamete research and preservation (CECOS) to provide her with information about the gamete donor who had been involved in her conception, and specifically his identity and other non-identifying information, such as his age, occupational status, a physical description, the reasons for his donation, the number of persons conceived using his gametes, and data about his medical history. In particular, she wished to know whether her brother, born in 1977, had been conceived using the same donor.

Following the implicit refusal to grant this request, the applicant contacted the Commission for Access to Administrative Documents (CADA). It advised against the requested transmission of information, with the exception of her parents' medical files, which confirmed the steps taken by them to obtain the ART procedure. The CADA stressed the principle of anonymity underlying the donation of gametes.

On 21 September 2010 the first applicant applied to the Montreuil Administrative Court to have the CECOS's implicit decision set aside.

On 31 August 2011 Dr B., a hospital psychiatrist, issued a medical certificate at the first applicant's request, describing her severe identity crisis since the revelation about her unknown origins. On 14 June 2012 the Montreuil Administrative Court dismissed the first applicant's request.

The applicant appealed against that judgment. On 2 July 2013 the Versailles Administrative Court of Appeal (CAA) upheld the judgment using language that was identical to that used by the administrative court, while specifying that the prohibition on access to the information in question applied to all donations of a body part or product. The applicant appealed on points of law, and on 12 November 2015 the *Conseil d'État* dismissed that appeal.

Application no. 45728/17

Mr Silliau was conceived through artificial insemination by sperm donor. In 2006, when he was aged 17, his parents told him how he had been conceived.

In a letter of 18 March 2010, to which no reply was received, Mr Silliau asked the CECOS to provide him with information about the background to his conception. Following that refusal, he applied to the CADA, which, on 22 December 2010, stated that his request had become devoid of purpose, in that it was impossible to find the donor's file.

Mr Silliau applied to the Paris Administrative Court using arguments similar to those filed by the first applicant in application no. 21424/16. On 6 December 2013 the Administrative Court dismissed Mr Silliau's request on the basis of the reasoning set out by the Montreuil Administrative Court in its judgment of 14 June 2012. The Versailles Administrative Court of Appeal upheld the judgment using language identical to that of the Administrative Court. The second applicant appealed on points of law, alleging a violation of Articles 8 and 14 of the Convention. The *Conseil d'État* held that his appeal was inadmissible.

Complaints, procedure and composition of the Court

Relying on Article 8 (right to respect for private and family life), the applicants submitted that their inability to obtain information concerning their respective biological fathers constituted an infringement of their right to respect for their private and family life. Relying on Article 14 (prohibition of discrimination) in conjunction with Article 8, they submitted that, owing to the method through which they had been conceived, they faced discrimination in the exercise of their right to respect for their private life, by contrast with other children, since it was impossible for them to obtain non-identifying information concerning the third-party donor, including medical information.

The applications were lodged with the European Court of Human Rights on 15 April 2016 and 23 June 2017.

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

Georges **Ravarani** (Luxembourg), *President*,
Carlo **Ranzoni** (Liechtenstein),
Mārtiņš **Mits** (Latvia),
Stéphanie **Mourou-Vikström** (Monaco),
María **Elósegui** (Spain),
Mykola **Gnatovskyy** (Ukraine) and,
Catherine **Brouard-Gallet** (France)*, ad hoc judge*,

and also Martina **Keller**, *Deputy Section Registrar.*

Decision of the Court

Article 8

The Court noted that when the applicants lodged their applications, persons in their situation had no means, once the method of their conception had been revealed to them, of discovering the identity of the third-party donor or obtaining access non-identifying information about him or her. From the first bioethics laws in 1994, the legislature had opted for an absolute principle of anonymity in gamete donations. There were two exceptions to the principle of anonymity, restricted to doctors, in the event of therapeutic necessity or where the donor was diagnosed with a serious genetic anomaly. This situation lasted until 1 September 2022, when a new legal system for obtaining access to one's origins entered into force. It introduced a system of access to information about one's origins for individuals who had been born prior to its entry into force; however, this was subject to the donors' consent and, as shown by the preparatory work on reform of the bioethics legislation and feared by the applicants, provided that the donors and their files could be located, and that the human and financial resources to do so were available.

Firstly, the Court noted that the situation complained of by the first and second applicants arose from decisions taken by the legislature, after what the Court could only consider as very detailed debates of an undoubtedly high standard. Each bioethics law had been preceded by a public debate in the form of consultations in which all points of view had been considered and the interests and rights at stake had been weighed up as evenly as possible.

In the Court's opinion, the legislature had duly weighed up the interests and rights at stake after an informed and gradual process of reflection on the need to lift donor anonymity. Reiterating that there was no clear consensus on the issue of access to origins, merely a recent trend in favour so lifting donor anonymity, it considered that the legislature had acted within its discretion ("margin of appreciation"), admittedly reduced by the fact that an essential aspect of the applicants' private life

had been at issue. Accordingly, the respondent State could not be criticised for the pace at which the reform had been enacted or for having been slow to agree to such reform.

Secondly, with regard to non-identifying medical information – access to which was, in the applicants' complaint, excessively restrictive – the Court noted that it was also covered by absolute anonymity as to the donor and by medical confidentiality, subject to the derogations provided for in respect of doctors. The Court noted that when the applications had been lodged with the Court, the principle of anonymity in gamete donations had not prevented doctors from obtaining access to medical information and disclosing it to individuals born through the relevant gamete donation where this had been required by therapeutic necessity. This included preventing the risk of consanguinity, considered by the applicants to be the main infringement of their right to health. Equally, in its decision of 12 November 2015 the *Conseil d'État* had held that non-identifying medical information could be obtained as a preventive measure, specifically in the case of a couple where both partners had been born through gamete donations. In addition, the previous legislation had also provided that the donor could, if he or she were diagnosed with a genetic disease, authorise the doctor to contact the gamete donation centre, so that it could inform the child born from the donation. Moreover, the Court noted that there was no European consensus on the disclosure of medical information and the right to be informed about one's health.

The Court considered that France had struck a fair balance between the competing interests at stake with regard to non-identifying medical information.

Thirdly, the Court examined the shortcomings complained of by the applicants with regard to the details of the system introduced since 1 September 2022.

With regard to children born from donations made after that date, the Court noted that they could now apply to the CAPADD in order to request the donor's consent to the disclosure of his or her identity and other non-identifying data. The Court did not underestimate the fear that donors might not be found, or that they might not consent to the disclosure of information about them, since they had been guaranteed absolute and definitive anonymity. The second scenario was in fact what had happened in the first applicant's case. The Court noted, however, that the legislature's decision had grown out of a concern to respect the situations created by previous legislation, and did not see how the respondent State could have settled the matter differently. Accordingly, it considered that the respondent State had not overstepped the margin of appreciation enjoyed by it in choosing to make access to information about one's origins subject to the condition that the third-party donor gave his or her consent.

The Court concluded that the respondent State had not breached its positive obligation to ensure effective respect for the applicants' private life. It followed that there had been no violation of Article 8 of the Convention.

Article 14 taken together with Article 8

In the light of its findings under Article 8 of the Convention, the Court considered that this complaint did not give rise to any essential separate issue and concluded that no separate examination of this point was necessary.

Separate opinions

Judge Elósegui expressed a concurring opinion. Judges Ravarani, Mourou-Vikström and Gnatovskyy expressed a joint dissenting opinion. These opinions are annexed to the judgment.

The judgment is available only in French.

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