Importante la sentenza della Corte europea dei diritti dell'uomo che, in materia di fecondazione assistita, ha deciso il ricorso 57813/00. Il rilievo della sentenza della Corte di Strasburgo va ben oltre la tematica della fecondazione assistita e riguarda l'affermazione della Corte come giudidice della coerenza della legislazione nazionale sui diritti fondamentali riconosciuti dalla CEDU. Al riguardo segnalo, sulla rivista telematica giuridica dell'Associazione dei costituzionalisti n. 1/2011, l'articolo di Stefano Antinori intitolato **"La Corte europea, in materia di fecondazione assistita, come garante della razionalità della legislazione, anzichè dei diritti degli individui"** . Tra l'altro, ragionamento analogo a quello dell'autore, in termini di verifica della coerenza della normative nazionali, dovrà farsi con riguardo al complessivo regime delle compatibilità e incompatibilità della professione forense in Italia, visto che la Corte di Strasburgo, nella sentenza che ha deciso il caso Bigaeva, riconobbe rientrare nell'ambito dell'art. 8 CEDU (diritto al rispetto della vita privata) anche la tutela della "vita professionale".

LEGGI DI SEGUITO LA DECISIONE DELLA CORTE DI STRASBURGO SUL RICORSO 57813/00 .....

FIRST SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 57813/00
by S. H. and OTHERS v. Austria

The European Court of Human Rights (First Section), sitting on 15 November 2007 as a Chamber composed of:

Mr C.L. Rozakis, President,
Mr L. Loucaides,
Mrs N. Vajić,
Mr A. Kovler,
Mrs E. Steiner,
Mr K. Hajiyev,
Mr G. Malinverni, judges,
and Mr S. Nielsen, Section Registrar,

Having regard to the above application lodged on 8 May 2000,

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicants,

Having deliberated, decides as follows:

THE FACTS

The first applicant, S. H., is married to the second applicant, D. H. They live in L. (Austria). The third applicant, H. E.-G., is married to the fourth applicant, M. G.. They live in R. (Austria). All the applicants are Austrian nationals. They were represented before the Court by Mr H.F. Kinz and W.L. Weh, both lawyers practising in Bregenz (Austria). The Austrian Government (“the Government”) were represented by their Agent, Ambassador F. Trauttmansdorff, Head of the International Law Department at the Federal Ministry of Foreign Affairs.

A. The circumstances of the case

The facts of the case, as submitted by the parties, may be summarised as follows.

The first applicant suffers from fallopian tube-related infertility (eileiterbedingter Sterilität). The second applicant, her husband, is also infertile.

The third applicant suffers from agonadism (Gonadendysgenesie), which means that she does not produce ova at all. Thus she is completely infertile but has a fully developed uterus. The fourth applicant, her husband, in contrast to the second applicant, can produce sperm fit for procreation.

On 4 May 1998 the first and third applicant filed a request (Individualantrag) with the Constitutional Court (Verfassungsgerichtshof) applying for a review of the constitutionality of section 3 § 1 and 2 of the Artificial Procreation Act (Fortpflanzungsmedizingesetz - see domestic law below).

Before the Constitutional Court the applicants argued that they were directly affected by the above provisions. The first applicant submitted that she could not conceive a child by natural means; thus the only way open to her and her husband would be in vitro fertilisation using sperm from a donor. That medical technique was, however, ruled out by section 3 § 1 and 2 of the Artificial Procreation Act. The third applicant submitted that she was also infertile. Suffering from agonadism she did not produce ova at all. Thus, the only way of conceiving a child open to her was to resort to a medical technique of artificial procreation referred to as heterologous embryotransfer, which would entail implanting into her uterus an embryo conceived with ova from a donor and sperm from the fourth applicant. However, that method was not allowed under the Artificial Procreation Act.

The first and third applicant argued before the Constitutional Court that the impossibility of using the above-mentioned medical techniques for medically-assisted conception was a breach of their rights under Article 8 of the Convention. They also relied on Article 12 of the Convention and on Article 7 of the Federal Constitution, which guarantees equal treatment.

On 4 October 1999 the Constitutional Court held a public hearing in which the first applicant, assisted by counsel, participated.

On 14 October 1999 the Constitutional Court decided on the first and third applicants' request. The Constitutional Court found that their request was partly admissible in so far as the wording

concerned their specific case. In this respect, it found that the provisions of section 3 of the Artificial Procreation Act, which prohibited the use of certain procreation techniques, was directly applicable to the applicants' case without it being necessary for a decision by a court or administrative authority to be taken.

As regards the merits of their complaints the Constitutional Court considered that Article 8 was applicable in the applicants' case. Although no case-law of the European Court of Human Rights existed on the matter, it was evident in the Constitutional Court's view that the decision of spouses or a cohabiting couple to conceive a child and to make use for that end of medically-assisted procreation techniques fell within the sphere of protection of Article 8.

The impugned provisions of the Artificial Procreation Act interfere with the exercise of this freedom in so far as they limited the scope of permitted medical techniques of artificial procreation. As for the justification of such interference the Constitutional Court observed that the legislature, when enacting the Artificial Procreation Act, had tried to find a solution by balancing the conflicting interests of human dignity, the right to procreation and the well-being of children. Thus, it adopted as leading features of the legislation that as a principle only homologous methods such as using ova and sperm from the spouses or the cohabiting couple itself would be allowed and only methods which did not involve a particularly sophisticated technique and were not too far removed from natural means of conception. The aim was to avoid the forming of unusual personal relations such as a child having more than one biological mother (a genetic mother and one carrying the child) and to avoid the risk of exploitation of women.

The use of in vitro fertilisation as opposed to natural procreation raised serious issues as to the well-being of children thus conceived, their health and their rights, and also touched upon the ethic and moral values of society and entailed the risk of commercialisation and selective reproduction. (Zuchtauswahl).

Applying the principle of proportionality under Article 8 § 2, however, such concerns could not lead to a total ban on all possible medically-assisted procreation techniques, as the extent to which public interests were concerned depended to a large extent on whether a heterologous or homologous technique was used.

In the Constitutional Court's view the legislator had not overstepped the margin of appreciation afforded to member States when it drew the line at allowing the use of homologous methods as

a rule and insemination using donor sperm as an exception. This compromise reflected the current state of medical science and the consensus in society. It did not mean however that these criteria were not subject to developments which the legislator would have to take into account in the future.

The legislator had also not neglected the interests of men and women who had to avail themselves of artificial procreation techniques. Besides strictly homologous techniques it had accepted insemination using sperm from donors. Such a technique had been known and used for a long time and would not bring about unusual family relationships. Further, the use of these techniques was not restricted to married couples but also included cohabiting couples. In so far, however, as homologous techniques were not sufficient for the conception of a child the interests of the individuals concerned ran counter to the above-mentioned public interests.

The Constitutional Court also found that for the legislator to prohibit heterologous techniques, while accepting as lawful only homologous techniques, was in accordance with the prohibition of discrimination as contained in the principle of equality. The difference in treatment between the two techniques was justified because, as pointed out above, the same objections could not be raised against the homologous method as against the heterologous one. As a consequence the legislator was not bound to apply strictly identical regulations to both. Also the fact that insemination with donor sperm was allowed while ovum donation was not did not raise a discrimination issue because again, as pointed out above, there was no risk of creating unusual relationships which might adversely affect the well-being of a future child as there was with heterologous insemination.

Since the impugned provisions of the Artificial Procreation Act were in accordance with Article 8 of the Convention and the principle of equality under the Federal Constitution, there had also been no breach of Article 12 of the Convention.

This decision was served on the first and third applicants' lawyer on 8 November 1999.

B. Relevant domestic law

The Artificial Procreation Act (Fortpflanzungsmedizingesetz, Federal Law Gazette 275/1992) regulates the use of medical techniques for inducing conception of a child by other means than

copulation (section 1 § 1).

These methods comprise: (i) introduction of sperm into the reproductive organs of a woman, (ii) unification of ovum and sperm outside the body of a woman, (iii) introduction of viable cells into the uterus or fallopian tube of a woman and (iv) introduction of ovum cells or ovum cells with sperm into the uterus or fallopian tube of a woman (section 1 § 2).

Medically-assisted procreation is allowed only within a marriage or a relationship similar to marriage, and may only be carried out if every other possible and reasonable treatment for inducing pregnancy through intercourse has failed or has no reasonable chance of success (section 2).

Under section 3 § 1 only ova and sperm from spouses or from persons living in a relationship similar to marriage (Lebensgefährten) may be used for the purpose of medically-assisted procreation. As an exception, sperm from a third person may be used for artificial insemination when introducing sperm into the reproductive organs of a woman (section 3 § 2). In all other circumstances, and in particular for the purpose of in vitro fertilisation, the use of sperm by donors is prohibited.

Under section 3 § 3 ova or viable cells may only be used for the woman from whom they originate. Thus ovum donation is always prohibited.

The further provisions of the Artificial Procreation Act stipulate, inter alia, that medically-assisted procreation may only be carried out by specialised physicians and in specially equipped hospitals or surgeries (section 4) and after express and written consent of the spouses or cohabiting persons (Section 8).

C. The position in other countries

On the basis of the material available to the Court, including the document “Medically-assisted Procreation and the Protection of the Human Embryo Study on the Solution in 39 States” (Council of Europe, 1998) and the replies by the member States of the Council of Europe to the

Steering Committee on Bioethics' “Questionnaire on Access to Medically-assisted Procreation” (Council of Europe, 2005), it would appear that IVF treatment is regulated by primary or secondary legislation in Austria, Azerbaijan, Bulgaria, Croatia, Denmark, Estonia, France, Georgia, Germany, Greece, Hungary, Iceland, Italy, Latvia, the Netherlands, Norway, the Russian Federation, Slovenia, Spain, Sweden, Switzerland, Turkey, Ukraine and the United Kingdom. In Belgium, the Czech Republic, Finland, Ireland, Malta, Lithuania, Poland, Serbia and Slovakia such treatment is governed by clinical practice, professional guidelines, royal or administrative decree or general constitutional principles.

The study in particular sets out the position of domestic law as regards seven different artificial procreation techniques: artificial insemination within a couple, in vitro fertilisation within a couple, artificial insemination by donor, ovum donation, ovum and sperm donation, embryo donation and intracytoplasmic sperm injection.

As far as can be seen the same situation as in Austria exists under Swedish and Norwegian law and, although not easy to compare, under German law. Donation of sperm is prohibited in Ireland, Italy, Lithuania, “the former Yugoslav Republic of Macedonia” and Turkey, and ovum donation in a larger number of member states, namely Croatia, Germany, Ireland, Italy, Lithuania, Norway, “the former Yugoslav Republic of Macedonia”, Slovakia, Sweden, Switzerland and Turkey.

COMPLAINTS

The applicants complained that the prohibition of heterologous artificial procreation techniques for in vitro fertilisation laid down by section 3 §§ 1 and 2 of the Artificial Procreation Act had violated their rights under Article 8 and 12 of the Convention, read alone and in conjunction with Article 14.

THE LAW

1. The Government's preliminary objection

As regards the second and fourth applicants, the Government submitted that only the first and third applicants had lodged an application with the Constitutional Court for review of the constitutionality of section 3 of the Artificial Procreation Act, while the second and fourth applicants, their spouses, had not participated in those proceedings. Hence the application must be rejected pursuant to Article 35 of the Convention in so far as it concerned the second and fourth applicants.

The applicants submitted that it was apparent that both applicant couples, composed of the first and second applicants and the third and fourth applicants, should be considered as joined parties because they were affected by the legal situation about which they complained in the same manner. For this reason the Court should accept the second and fourth applicants as parties to the present proceedings.

The Court reiterates that the application of the rule of exhaustion must make due allowance for the fact that it is being applied in the context of machinery for the protection of human rights that the Contracting Parties have agreed to set up. Accordingly, the Court has recognised that Article 35 § 1 must be applied with some degree of flexibility and without excessive formalism. The rule is neither absolute nor capable of being applied automatically. In reviewing whether it has been observed it is essential to have regard to the particular circumstances of each individual case. This means amongst other things that the Court must take realistic account of the general legal and political context in which the remedies operate, as well as the personal circumstances of the applicant (see Menteş and Others v. Turkey, judgment of 28 November 1997, Reports of Judgments and Decisions 1997-VIII, p. 2707, § 58).

The Court observes that the first and third applicants applied to the Constitutional Court for a review of the constitutionality of section 3 of the Artificial Procreation Act. In these proceedings they showed that they had, together with their spouses, taken a firm decision to undergo a process of medically-assisted procreation as given their medical condition natural conception of a child was not possible, and that they were therefore directly affected by the prohibition at issue. Although the second and fourth applicants, their spouses, did not participate in the proceedings before the Constitutional Court, their personal situation was intrinsically linked to that of their spouses. Thus, the Court finds it sufficient that the latter have instituted the proceedings and put their case and consequently also their spouses' case before the competent domestic court.

The Court therefore concludes that all the applicants have exhausted domestic remedies within the meaning of Article 35§ 1 of the Convention. The Government's preliminary objection must therefore be rejected.

2. Article 8 of the Convention

The applicants complained that the prohibition of heterologous artificial procreation techniques for in vitro fertilisation laid down by section 3 §§ 1 and 2 of the Artificial Procreation Act violated their rights under Article 8 of the Convention.

Article 8 of the Convention, in so far as relevant, states as follows:

“1. Everyone has the right to respect for his private and family life ...

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

As regards the applicability of Article 8 of the Convention the Government referred to the findings of the Constitutional Court that the private life aspect within the meaning of Article 8 § 1 of the Convention also covered the desire of couples or life companions to have children as one of the essential forms of expression of their personality as human beings. They therefore accepted that Article 8 was applicable to the proceedings at issue.

In the Government's view it could be left open whether the measure at issue should be deemed to be an interference by a public authority or an alleged breach of a positive duty, because both obligations were subject to the same principles. In both instances a fair balance had to be struck between the competing private and public interests and in both contexts the State enjoyed a certain margin of appreciation, which, in the absence of a common standard established by the Contracting States, was a particularly wide one.

Even though the right to respect for private life also comprised the right to fulfil the wish for a

child, it did not follow that the State was under an obligation to permit indiscriminately all technically feasible means of reproduction or even to provide such means. In making use of the margin of appreciation afforded to them, the States had to decide for themselves what balance should be struck between the competing interests in the light of the specific social and cultural needs and traditions of their countries. The Austrian legislature, taking into account all the interests concerned, had struck a fair balance in line with Article 8 of the Convention. Such a balance allowed for medically-assisted procreation while at the same time providing for certain limits where the stage of medical and social development did not yet permit a legal authorisation of in vitro fertilisation with the sperm or ova of third persons as desired by the female applicants. Therefore the Artificial Procreation Act was characterised by the intention to prevent negative repercussions and potential misuses and to employ medical advances only for therapeutic purposes and not for other objectives such as “selection” of children, as the legislature could not and should not neglect the existing unease among large sections of society about the role and possibilities of modern reproductive medicine.

After thorough preparation the legislature had found an adequate solution in the area of conflict, taking into account human dignity, the well-being of the child and the right to procreation. In vitro fertilisation opened up far-reaching possibilities for a selective choice of ova and sperm, which might finally lead to selective reproduction (Zuchtauswahl). This raised essential questions regarding the health of children thus conceived and born, especially touching upon the general ethics and moral values of society.

In the discussion in Parliament it had been pointed out that ovum donation might lead to problematic developments such as exploitation and humiliation of women, in particular of those from an economically-disadvantaged background. Pressure might be put on a female donor who otherwise would not be in a position to afford an in vitro fertilisation to fulfil her own wish for a child.

In vitro fertilisation also raised the question of unusual relationships in which the social circumstances deviated from the biological ones, namely, the division of motherhood into a biological aspect and an aspect of “carrying the child” and perhaps also a social aspect. Finally, one had also to take into account that children had a legitimate interest in being informed about their actual descent, which, with donated sperm and ova, would in most cases be impossible. With the use of donated sperm and ova within the framework of medically-assisted procreation, the actual parentage of a child was not revealed in the register of births, marriages and deaths and the legal protective provisions governing adoptions were ineffective in the case of medically-assisted procreation. The reasons for allowing artificial insemination, as set out in the explanatory report to the Government's bill on the Artificial Procreation Act, were that because it was such an easily applicable procreation method, compared with others, it could not be monitored effectively. Also, this technique had already been in use for a long time. Thus, a

prohibition of this simple technique would not have been effective and consequently would not constitute a suitable means of pursuing the objectives of the legislation effectively.

The applicants agreed with the Government that Article 8 was applicable. They submitted further that the impugned legislation constituted direct interference with their rights under Article 8 because, in the absence of such legislation, the medical treatment they were seeking, in vitro fertilisation with donated ova or sperm, would have been a common and readily available medical technique. Thus there was no question of a positive obligation, but of a classic case of interference, which was not necessary in a democratic society and was disproportionate. Because of the special importance of the right to found a family and the right to procreation, the Contracting States enjoyed no margin of appreciation at all in regulating these issues. The decisions to be taken by couples wishing to make use of artificial procreation concerned their most intimate sphere and therefore the legislature should show particular restraint in regulating these matters.

All the arguments raised by the Government were against artificial procreation in general and were therefore not persuasive when it came to accepting some procreation techniques while rejecting others. The risk of exploitation of female donors, to which the Government referred, was not relevant in circumstances such as those in the present case. To combat any potential abuse in the Austrian situation, it was enough to forbid remunerated ovum or sperm donation; such a prohibition existed in Austria.

Lastly, the applicants submitted that the system applied under the Artificial Procreation Act was incoherent and illogical, since heterologous forms of medically-assisted procreation were not prohibited in general but exceptions were made for sperm donation in relation to specific techniques. The reasons for this difference in treatment were not persuasive. In this context it had to be noted that there existed a public fund for financing in vitro fertilisation, apparently because use of this technique was in the public interest, while at the same time severe restrictions were imposed on its use.

The Court considers, in the light of the parties' submissions, that the complaint raises serious issues of fact and law under the Convention, the determination of which requires an examination of the merits. The Court concludes therefore that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. No other ground for declaring it inadmissible has been established.

3. Article 14 of the Convention read in conjunction with Article 8

The applicants also complained that the prohibition of heterologous artificial procreation techniques for in vitro fertilisation as laid down by section 3 §§ 1 and 2 of the Artificial Procreation Act violated their rights under Article 8 of the Convention, read in conjunction with Article 14.

Article 14 of the Convention reads as follows:

“The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”

The Government submitted that Article 14 complemented the other substantive provisions of the Convention and its Protocols. Since the applicability of neither Article 8 of the Convention nor of Article 12 was disputed, Article 14, read in conjunction with those provisions, applied in the present case.

The Government submitted further that, according to the Court's case-law, a difference in treatment was discriminatory for the purpose of Article 14 if it had no objective and reasonable justification, that is, if it did not pursue a “legitimate aim” or if there was not a reasonable relationship of proportionality between the means employed and the aim sought to be realised. However, Contracting States enjoyed a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justified different treatments in law. The Government contended that, as already pointed out with regard to Article 8, the prohibition of in vitro fertilisation with sperm or ova from a donor was objectively and reasonably justified. The prohibition which pursued the legitimate aim of protecting the health and well-being of the women and children concerned as well as safeguarding general ethics and the moral values of society, was also proportionate. Accordingly, the applicants had not been discriminated against.

This was disputed by the applicants. They submitted that even if the impugned legislation was justified under paragraph2 of Article 8, it nevertheless constituted discrimination prohibited by Article 14, because it allowed for artificial insemination with donor sperm, while it categorically

prohibited ovum donation. In particular the distinction made between insemination with sperm from donors and in vitro fertilisation with donor sperm was incomprehensible.

The Court considers, in the light of the parties' submissions, that the complaint raises serious issues of fact and law under the Convention, the determination of which requires an examination of the merits. The Court concludes therefore that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. No other ground for declaring it inadmissible has been established.

4. Article 12 of the Convention

The applicants complained further that the prohibition of heterologous artificial procreation techniques for in vitro fertilisation, laid down by section 3 paragraphs 1 and 2 of the Artificial Procreation Act, violated their rights to found a family as guaranteed by Article 12 of the Convention, which reads as follows:

“Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.”

The Government submitted that even if it was accepted that the right to found a family also covered the right of a couple to have children, such a right was subject to “the national laws governing the exercise of this right”. Legal regulation such as in the present case, which did not prohibit all technical possibilities but permitted some of them, did not impair the very essence of the right to found a family. Thus there was no appearance of a violation of Article 12.

The applicants submitted that the substantive rights guaranteed by the Convention and the Protocols thereto were not rigidly separated from one another, the arguments in favour of finding a breach of Article 8 were also in favour of finding a breach of Article 12.

The Court reiterates that Article 12 of the Convention does not guarantee a right to procreation (see Margarita Šijakova and Others v. “the former Yugoslav Republic of Macedonia” (Dec), no. 67914/01, 6 March.2003). Accordingly, this provision is not applicable in the present case.

It follows that this complaint is incompatible ratione materiae with the provisions of the Convention within the meaning of Article 35 § 3 and must be rejected in accordance with Article 35 § 4.

5. Article 14 of the Convention read in conjunction with Article 12

The applicants further complained that the prohibition of heterologous artificial procreation techniques for in vitro fertilisation as laid down by section 3 paragraphs 1 and 2 of the Artificial Procreation Act violated their rights under Article 12 of the Convention, read in conjunction with Article 14.

The Court reiterates that Article 14 complements the other substantive provisions of the Convention and its Protocols. It has no independent existence since it has effect solely in relation to “the enjoyment of the rights and freedoms” safeguarded by those provisions. Although the application of Article 14 does not presuppose a breach of those provisions – and to this extent it is autonomous – there can be no room for its application unless the facts at issue fall within the ambit of one or more of the latter (see Karlheinz Schmidt v. Germany, judgment of 18 July 1994, Series A no. 291-B, p. 32, § 22).

Having regard to its findings above that Article 12 of the Convention does not guarantee a right to procreation, the Court finds that this provision is inapplicable in the present case. Accordingly, Article 14 cannot apply in the instant case.

It follows that the complaint under Article 12 of the Convention taken together with Article 14 is incompatible ratione materiae with the provisions of the Convention within the meaning of Article 35 § 3 and must be rejected in accordance with Article 35 § 4.

For these reasons, the Court unanimously

Declares admissible, without prejudging the merits, the applicants' complaints that the

prohibition of heterologous artificial procreation techniques for in vitro fertilisation as provided for by section 3 §§ 1 and 2 of the Artificial Procreation Act violated their rights under Article 8 of the Convention, read alone and in conjunction with Article 14;

Declares inadmissible the remainder of the application.

Søren Nielsen Christos Rozakis
Registrar President

S.H. AND OTHERS v. AUSTRIA DECISION