

Monsieur le Président Jean-Paul COSTA  
Cour européenne des Droits de l'Homme  
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Vienna, January 28th, 2011

Third Intervention of *aktion leben österreich* in the  
**CASE OF S. H. AND OTHERS v. AUSTRIA**  
**Application no. 57813/00, Strasbourg, 1 April 2010**

Your Worship, Monsieur le Président,

we are very grateful for the opportunity to intervene – as third party – in the  
CASE of S.H. AND OTHERS v. Austria.

*aktion leben österreich's* objections divide into

- I. objections in principle and
- II. detailed objections to the grounds for the judgement concerning
  - a. ova donation
  - b. ova- and sperm donation compared to adoption and
  - c. sperm donation in case of in vitro fertilisation (hereinafter referred to as "IVF")

## **I – Objections in principle:**

*aktion leben österreich* meets two fundamental problems concerning the grounds for the judgement of the European Court of Human Rights' (hereinafter referred to as "ECHR") Chamber against Austrian Procreation Acts:

1. Due to the prohibition of ova- and sperm donation in the case of IVF, the ECHR can see an infringement of the European Convention on Human Rights' (hereinafter referred to as "the Convention") Article 8 (Right to Respect for Private and Family Life), Article 12 (Right to Marry and Found a Family) and Article 14 (Prohibition of Discrimination).

From our point of view this notion is based on the improper premise, that the Convention's Article 12 implies a human's right to a child as a matter of principle. This would also imply the Member States' undertaking to make all medically assisted procreation techniques available to couples who are unable to conceive. Such a broad interpretation of the Convention would be basically new and unilaterally postulated by the ECHR. It would mean a change of paradigm, that wouldn't proceed without a discussion phase at great length and the Member States' consensus.

Coincidentally this interpretation of Article 12 is in contradiction to § 74, *"...the Court would emphasise that there is no obligation on a State to enact legislation of the kind and to allow artificial procreation."*...

Furthermore the ECHR states, *"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 which allows the different legitimate interests involved to be taken into account adequately and in accordance with the obligations deriving from the Convention."*

We feel that the admission of medically assisted procreation techniques on principle must not imply the permission for every possible technique. The coherency to the Austrian settlement is a matter of opinion, but obviously there's no sign of discrimination in the sense of the Convention. A discrimination detected by the ECHR can only relate to rights, which are ensured by the Convention, alias Convention Rights. Since there is no right to a child and—as a result of this—no right to any medically assisted procreation techniques, we don't see a discrimination in maintaining the prohibition of ova- and sperm donation in the case of in vitro fertilisation.

2. Within the grounds for the judgement we generally miss the consideration of the rights and the welfare of those children, who have been and will be begotten through reproductive medicine.

Though we can understand the pain of unwanted childlessness, we don't want the desires of couples, who are unable to conceive to be the only desires that are considered, when it comes about the legal regulation of assisted procreation. We demand a basic rethinking for the good of the children, as they are the weakest of all parties.

3. We are also very upset how poor women's rights are considered in the grounds for the judgement, especially since ova donation means a health risk and finally harm with intent (*dolus eventualis*) to women.

## **II. Detailed objections**

### **a. ova donation**

The ECHR is of the opinion, that there are other ways than the prohibition of ova donation to protect women from exploitation. Forasmuch the Austrian Constitutional Court's reasoning could not justify unequal treatment. Consequently upon this fact the ECHR concludes an infringement of Convention's Article 14 in connection with Article 8 (five to two).

In contrast to the ECHR's opinion, *aktion leben österreich* cannot find a justification of ova donation in Article 8 and Article 12, but finds indeed the reasoning for the prohibition of it:

- The prohibition of ova donation protects the health of ova donating women.
- The prohibition prevents negative health effects on children, who would be begotten via ova donation.
- The prohibition protects morality, as there is no „right to a child“ due to ethnical reasons.
- A right to family does not include the right to a child whose genesis would put the health of another person at risk. The Protection of Human Rights and Fundamental Freedom prevails.

*aktion leben österreich* is of the opinion, that the prohibition of ova donation has to be kept upright to protect women's and children's health, rights and fundamental freedom (Article 8 (2)).

For many reasons, which are significant for the human co-existence, ova-donation is not justifiable:

From an ethico-medical point of view, the main problem with ova donation is the surgical intervention on third parties.

The ethical legitimacy to a surgical intervention requires

- a free and informed declaration of consent
- a preponderance of the contribution to welfare over anticipated risks and charges
- and main focus on the patient's well-being, not on the interests of third parties or society in general (after Sigrid Graumann: „Eizellspende und Eizellhandel – Risiken und Belastungen für die betroffenen Frauen.“ In: Umwege zum eigenen Kind, Göttinger Schriften zum Medizinrecht. Bd.3, Göttingen 2008).

In the case of ova donation risks and charges are the donor's burden, while the contribution to welfare is only saved for women (and their partners) with the desire to have children – if the treatment ends up with a child. Sigrid Graumann makes it clear: „These medical actions have to be seen as bodily harm that cannot be balanced by any contribution to the well-being of a woman, who has been injured.“

### **Prohibition of ova donation for medical reasons:**

If women knew the exact facts of health risks caused by ova donation, they possibly would not donate any ova. The health risks a donor is exposed to, are very significant.

We quote Giselin Berg: „Ova donation is – with the words of the English regulatory body HFEA – a medical and operative invasive process that can be physically exhausting, painful, stressful which is – as being a part of an IVF treatment – void of real and potential health risks. Most of all it applies to hyperstimulation, which varies from 1 – 10% and appears in its heavy form in case of 2% of all IVF treatments.“

Some authors even name a percentage of 5%.

Fluid accumulation in abdomen and lungs may cause serious malfunctions, from the shortness of breath up to kidney failure. These complications then require intensive-care medicine; England reports 5 cases of death that occurred with ova donation.

An operation—if needed in case of heavy hyperstimulation—might harm the donor’s future fertility. During surgical ova removal bleedings, infections and infringements of organs may occur. Pregnant women after donation are—as compared with other IVF-patients—at a higher risk of suffering from pregnancy-induced hypertension or pre-eclampsia, not only as a result of the increased phenomena of multiple pregnancies. (Giselind Berg, Eizellspende—eine Chance für wen? In: Umwege zum eigenen Kind, Göttingen 2008)

### **Ova donation: rarely altruistic, voluntarily and “unpaid” indeed**

The ethical legitimacy of ova-winning is solely depending on the donor’s free and informed declaration of consent; the pain of unwanted childlessness is not relevant, Sigrid Graumann marks. The donor’s voluntariness should be called into question: As these women are dependent on their doctors, even the voluntariness of women who are donating ova left from their own IVF-treatment during an ova-sharing-program must be doubted.

Women in poor countries or women with bad economic circumstances are not given voluntariness at all. These so-called allowances mean a lot of money to many of the potential donors, so they easily forget all the risks—even if they are informed about it at all. Sigrid Graumann resumes: Women would not donate without direct or financial stimuli.

Therefore the permission to ova donation would utilise the state of emergency of women in poorer countries or poorer social ranks – just to enforce the individual desire to have children. States that legalize such practices make themselves guilty of exploiting women.

### **Ova donation supports market mechanisms – women are being „recruited“**

Ova donation produces misuse and supports market mechanisms in reproductive medicine. Examples are:

The female body is subjected to commercialisation and becoming a trading good.

- In England the „Egg-Sharing-Program“ gives an IVF for half the price to women who donate ova.
  - Some companies combine reproductive medicine with tourism. Couples with the wish to reproduction, book some kind of holiday that can be used for an IVF.
  - The term „representation allowance“ is mainly used for the money that is given to women from emergent countries, who donate ova. This might help them for a short time to bridge financial problems for a while. But these women are not secured in case of any medical problems that might occur.
  - This market is even rising in states where „payment“ for ova donation is prohibited. The term “representation allowance” can be interpreted in too many ways. US-American examples prove that female students of specific subjects are „donors in demand“, who are being motivated by higher „allowances“. An Austrian reproduction doctor makes sure to his clients only to „recruit“ the best donors: *„It is important, that the donor comes from a good social environment, that she is studying or that she’s pursuing a profession regularly. We are basically trying to find non-smoking donors“.* ([www.ivf.at/Eizellentnahme](http://www.ivf.at/Eizellentnahme)).
- This is promotion– this is recruitment! This is a commercialisation of the female body! It is the vilification of women that are „recruited“ to still other people’s desires.

The protections of the donor’s health and dignity, the well-informed voluntariness of the donation as well as the protection against exploitation, have to be operative and legally enforceable. This is quite impossible for the State of Austria in the case of importation, but it is also quite difficult within the country. Solely the existing prohibition is effective and enforceable in Austria.

#### **b. Abnormal family circumstances – ova and sperm donation compared to adoption**

In terms of in vitro fertilisation through donated ova the court records that unconventional family constellations are the result from adoption as well. We don’t share the ECHR’s opinion:

If a couple adopts a child, they are both genetically not related to the child; they have the same position as social parents have towards their child. In case of sperm or ova donation

one parent is genetically related to the child, while the other parent isn't. This can affect family relationship in a bad way.

So there is no valuable comparison to adoption. To give up for adoption is also a woman's or a family's way out of an extreme situation. The natural parents often want to provide a

better life for their unborn or born children. This is an altruistic act, only for the good of the child. But above all, governmental efforts should have highest priority in providing children a good life together with their parents. The decisive difference between adoption and IVF is, that adopted children are not conceived and born in acceptance of abnormal family circumstances, IVF-children surely are. The adoption of a child does not only require a legal judgement, it also improves an adverse social situation for the child. On the contrary IVF does not serve the child but only the social status of the involved couple.

We doubt that it is on behalf of the ECHR to use the exceptional situation of children as justification to allow problematic methods.

Being adopted is never an easy situation for a child. Adopted children usually search for their biological parents, including the ambition to "undo" this very cut in their life. (s. „Adoption and Search for Identity“, [www.irmelawiedmann.de](http://www.irmelawiedmann.de)).

It is a special challenge for adoptees and adoptive parents to cope with this situation. It is not ethical to induce a purposely planned adoption. It is an emergency solution to provide a good—and maybe better—life for an unexpected and unwanted child and to find parents for a child and not the other way around.

### **c. Sperm donation in case of in vitro fertilisation**

Concerning IVF through sperm donation the court points out, that this method is a combination of two procedures that are – every one for itself – legal. A prohibition of the combination of these two techniques would require extraordinary convictive arguments. In Austria sperm donation for insemination is bound to a special right of children conceived via insemination: As at the age of 14 these children get access to notations and have the right to know with whose sperm they were conceived (§ 20 FmedG).

This regulation protects the children's rights to know their ancestry and is written down in several international regulatory documents.

The access to the donor's data is also medically justified, e.g. in case of a severe illness or if family history is required. It can also help to avoid undetected blood-related partnerships. The existing Austrian jurisdiction concerning sperm donation helps to keep the involved problems under control.

The admission of sperm donation for IVF would break the mould:

- It would mean a considerable increase of sperm donors. Blood-related relationship of those children conceived via sperm donation (especially in combination with ova donation) would be hard to oversee.
- If sperm would be used from men who are not living in Austria, these children would barely be able to find or contact their biological father. This might not only become a problem in case of a severe illness, when the child needs help from a genetically related person.
- It is a fact, that only the fewest children – conceived via ova- or sperm donation – know the identity of their “biological” parents, unless the data is deleted in many countries except Austria and Germany.
- Mostly in case of sperm donation the art of procreation is kept secret to children, because sterility is a trauma for many men. It affects relationships and leads to an imbalance within the family: The child is genetically related to its mother, but not to its father. So it is very hard for many parents to tell the truth to their children, who might never know parts of their roots.

Latest research findings like the ones of French psychoanalyst Serge Tisseron or of the American family therapist Evan Imber-Black show, that these children are growing up with a „dark secret“ which might lead to steady crisis of identity. The increase of sperm donation leads to even more of these problems.

- Those children who could find their biological fathers of course want to get in contact with them. On the website [www.spenderkinder.de](http://www.spenderkinder.de) for instance children conceived via sperm donation can find their fathers and siblings. But very often these longings lead to bitter disappointments: The donors are living happily together with wife and children and can barely imagine welcoming a child in their family for whom they have given their sperm years ago for an “allowance”.

Mostly they don't want any contact, while their children are yearning for a meeting. In this case an increase of IVF is questionable.

- It is proved that children conceived via IVF are more often preterm neonates, underweight, premature and disabled than naturally conceived children. The risk of suffering from a miscarriage is also higher. Prove is - among others – a recent study executed by the university hospital in Aarhus in Denmark (Human Reproduction, doi:10.1093/humrep/deq 023 sowie Bd. 25, S. 605; „Proteomics“, Bd. 8, S. 4344;) Up to this day there does not exist any prospective long-term-study.

A couple's desire to have children via IVF brings a lot of problems along. So the restriction of IVF cannot be seen as an infringement of the Convention. It has to stay in a state's administrative discretion to minimize psychic and physical risks of its citizens. The permission to sperm donation for IVF does not only increase confused family relations by additional donors, but also expands the IVF-induced health risks for children. This administrative discretion of every single state in case of assisted procreation is particularly noted in the ECHR's § 65 to 69.

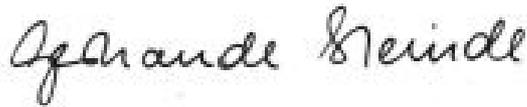
The prohibition of sperm donation for IVF is also maintainable due to the legitimacy of unequal treatment (the Convention's Article 8 (2)) to protect the children's health, their rights and their freedom.

We generally want to state, that the restriction to insemination on sperm donation, solely serves the purpose of procreation. Sperm donation for IVF also leads to a creation of embryos that will never be implanted. There are permanent demands to make these supernumerary embryos available for research. This is a total perversion of the sperm donation's primary aim. So the limitation to insemination is absolutely necessary to prevent the misuse of IVF-created embryos as well as to prevent an ongoing increase of supernumerary embryos.

**Summary:**

A state cannot be committed to allow all forms of assisted procreation techniques. This would presuppose the existence of a legally liable right to a child, no matter which heavy price couples with the desire to have children or other people would have to pay. Neither in the Austrian jurisdiction nor in the European Convention on Human Rights such a right is enshrined. The aim to fulfil an unwanted and non-dischargeable desire for a child does not justify the means. Children are NOT their parents' property. There can't be any future right to a child at all cost, as it would endanger the health of others –especially of women-. Furthermore such a right would justify surgical interventions, which are of no use–but possibly of danger–for the patient and would purposely endanger the physical and mental well-being of IVF-children.

Kind regards,



Dr. Gertraude Steindl

President