



## WRITTEN OBSERVATIONS

*submitted to the European Court of Human Rights in the case*

*Audrey GAUVIN-FOURNIS and Clément SILLIAU v. France*

*(Applications No. 21424/16 and 45728/17)*

Grégor Puppinck, Director

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1. The ECLJ considers that the practice of anonymous ART constitutes a violation of Articles 3, 8 and 14 of the European Convention on Human Rights (ECnHR).
2. The interference and damages suffered by the applicants are the result of everything combined, and indistinctly, of their conception carried out through anonymous ART and the authorities' refusal to reveal the "natural" father's identity.
3. If the desire to have a child is deeply human, the human nature that gives rise to the desire to become a parent also placed in the child the need to be raised and loved by his or her true parents. Therefore, knowing one's biological parents, being raised by them, and having a biological filiation are part of the situation that every child born should be able to benefit from voluntarily depriving a child of his or her natural parents and of the knowledge of his or her filiation is always a serious injustice, causing suffering, as the observation of the negative consequences of ART show.

### **I. Preliminary considerations: Right and power of adults over the child**

4. No one chose to be born. The birth of a child, except in pathological cases, naturally follows the union of the parents. Even if the means of preventing it have been developed to the point where many births are now more or less planned, the birth of a child is the result of a natural process, bound to the human condition.
5. Recent developments in science have made it possible to treat some forms of infertility and to circumvent others. This is the case with assisted reproductive technology (ART) when it involves artificial insemination or heterologous in-vitro fertilisation. These methods do not cure, they circumvent sterility by means of gamete donation. The child is then considered to have been born to the couple according to a legal fiction intended to maintain the credibility, in an imitation of a natural procreation.
6. This explains and justifies that, in countries allowing heterologous ART such as France, it is reserved to couples consisting of a living man and woman, of childbearing age, suffering from medically diagnosed sterility.
7. Nevertheless, even though these methods have been authorised in order to alleviate a pathology and to meet the legitimate desire for children of infertile couples, one element was not taken into account: the interest of the child thus conceived.
8. Indeed, by separating sexuality from procreation, adults arrogated an exorbitant power over the unborn child: the power to decide on his or her conception, the power to decide whether he or she deserves to be kept (embryo selection, pre-implantation diagnosis, antenatal diagnosis) and eventually the power of life and death (destruction of the supernumerary embryos, abortion).
9. Moreover, with these methods, adults claim for themselves the power to reify the embryo into a laboratory object, created, manipulated, selected, frozen, implanted, given to science or destroyed at their own discretion.
10. Finally, in any heterologous ART, adults seize the power to deprive the child of part of his or her identity since legal filiation is based on fiction, if not a lie. In the case of artificial

insemination, generally maternal in case of IVF, the paternal biological ancestry is purely and simply erased from the life of the child.

11. At the time of the decision to use ART and its implementation, the child does not exist yet, which explains why his or her rights are largely ignored. Children and adults are not in a situation of equality which, alone, would allow, to balance their competing interests. By assuming the interest of adults precedes that of children, it is easy to forget the latter.

12. It is therefore important to accept to balance the interests of living and very concrete adults with the interests of future children. It is this balance that will make it possible to find the common good of society, rather than ignoring children and their interests so as not to have to limit the adults' freedom. A limit to adult power over unborn children is urgently needed. The wording of individual right must not be used to conceal the power over the child.

## **II. Article 3: Anonymous ART is an inhuman or degrading treatment**

13. Anonymous ART is truly an in-human treatment as it establishes a method of procreation past human nature, through the separation not only of sexuality and procreation but also of the physical and psychological dimensions of individual identity. Like any attack on human nature, this separation causes deep suffering, which is increased by the authorities' refusal to "repair" what can be repaired, by lifting the secret of the natural father's identity.

14. Heterologous ART, particularly when accompanied by the anonymity of gamete donation, ultimately consists in replacing the suffering of adults with that of children.

### ***Numerous studies prove the seriousness of the consequences of heterologous and anonymous ART.***

15. The child is prevented, in a more or less drastic way depending on the legislations, from knowing his or her natural (or biological) parents, allowing the deliberate creation of "genetic orphans".<sup>1</sup> A part of the child's story is thus erased and made inaccessible : the child is identified with "an ideological set-up claiming (...) that he or she was born from the meeting of a person and a "material", as if -at least for the part resulting from the donation- the story of his or her life could never, irrevocably, go back beyond him or herself ."<sup>2</sup>

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<sup>1</sup> See the report « *Les orphelins génétiques* », *Enjeux*, 17 January 2007, Radio-Canada: [http://ici.radiocanada.ca/actualite/v2/enjeux/niveau2\\_13054.shtml](http://ici.radiocanada.ca/actualite/v2/enjeux/niveau2_13054.shtml); Joanna Rose, *A Critical Analysis of Sperm Donation Practices: The Personal and Social Effects of Disrupting the Unity of Biological and Social Relatedness for the Offspring*, Queensland University, 2009, p. 221. Joanna Rose mentions authors denouncing that : D. Blankenhorn, "The rights of children and the redefinition of parenthood", *Danish Institute for Human Rights*, 2 June 2005 ; A. M. M. Lebech, "Anonymity and informed consent in artificial procreation", *Bioethics*, 1997, 11 (3/4), p. 339 ; J. Fleming, *From rights to risks: A response from The Society for the Protection of Unborn Children (Northern Ireland) (Consultation Response)*. Adelaide: *Southern Cross Bioethics Institute*, 2004, p. 15.

<sup>2</sup> *Ibid.*, § 45-46.

16. This breach of transmission<sup>3</sup> leads to an unsolvable issue (where do I come from? Who do I look like, who are my parents, my family?) that can lead to identity crises,<sup>4</sup> an inability to build on solid foundations, an anxiety and other psychological problems.<sup>5</sup> Indeed, the thirst for knowledge of everything, of the world, or of oneself represents one of the features of human spirit.<sup>6</sup>

17. The anonymity of gamete donation has obvious physical and medical consequences due to the lack of access to family medical history, as pointed out by the applicants in the current cases.

18. The impossibility of knowing one's progenitor and potential half-brothers and sisters also increases the risk of unintentional incest and marriage between half-brother and half-sister. There is nothing hypothetical about this risk, as shown by various events reported by the press and the restrictions imposed by European legislation to limit this risk. Legislations authorizing or requiring the anonymity of the gamete donation is therefore inconsistent since it prevents access to one's origins to ensure that matrimonial law be respected.

19. Eventually, the consequences of anonymous gamete donation are passed on from generation to generation, as parents conceived through gamete donation can only pass on a limited knowledge of their own origins to their children. This failure to pass on a history from which one has been robbed revives within adults born from gamete donation, the suffering and vulnerability that result from the feeling that they are living on the verge of a black hole.

20. The link between parents and children is inseparably both physical and social. The exclusion of one of the aspects causes great suffering. The case of the children exchanged in Grasse (Superior Court of Grasse, 10 February 2015) shows that, even if the children were raised in loving families, and even if they know their true genetic lineage, the breach in the filiation and the deprivation of the physical dimension of filiation caused them serious damage, as shown by the amount allotted as a compensation: 400,000 € per child, not to mention the compensations granted to the parents and siblings. Moreover, the fact the law prohibits double gamete donation (i.e. demands the gamete of one of the members of the couple) in an ART brings out the importance of natural (or biological) filiation.

21. *“Treatment has [often] been considered “degrading” [by the Court] when it was such as to arouse in its victims’ feelings of fear, anguish and inferiority capable of humiliating and debasing them”.*<sup>7</sup> The European Court of Human Rights (ECHR) stressed that the absence of

<sup>3</sup> See Sébastien de Crèvecoeur, Jean-Mathias Sargologos, Jacques Duffourg-Müller, Benoît de Fleurac, Hervé Jourdan and Lionel Léon, « *Homosexualité et parentalité : de l'importance de la filiation* », *Le Figaro*, 22 February 2018.

<sup>4</sup> See Samantha Besson, Enforcing the Child's Right to Know Her Origins: Contrasting Approaches Under the Convention on the Rights of the Child and the European Convention on Human Rights, *International Journal of Law, Policy and the Family* (2007), p. 138 and 141.

<sup>5</sup> Hearing of Mr. Claude Huriet at the National Assembly on 20 January 2009 on the case of bulimia and anorexia of a young girl having learned about her conception with sperm donation: <http://pmanonyme.asso.fr/?p=1939>: *“The child will be in permanent doubt, thinking that he recognizes his father on every street corner”*, Stéphane Clerget (child psychiatrist), *Valeurs actuelles*, 18 September 2008. (free translation)

<sup>6</sup> *“Man, this being thirsty for meaning, never ceases to try to understand the origin of everything: the origin of the world, the origin of life, the origin of human beings. This thirst seems inscribed in his intelligence and his psychology since the dawn of time. It represents one of the characteristics of the human mind.”* Benoît Bayle, *À la poursuite de l'enfant parfait, l'avenir de la procréation humaine*, Robert Laffont, 2009, p. 37. (free translation)

<sup>7</sup> *R. R. v. Poland*, No 27617/04, 26 May 2011, §150; *Iwańczuk v. Poland*, No 25196/94, 15 November 2001, § 51; *Wiktorko v. Poland*, No 14612/02, 31 March 2009, § 45.

any intent to humiliate or debase the victim “*does not inevitably lead to a finding that there has been no violation of Article 3.*” (*R.R. v. Poland*, § 151).

22. The deep suffering of the applicants and of many people born from gamete donation is undeniable.

23. Although the purpose of heterologous ART was undoubtedly not to debase children, being subjected to the exorbitant power of adults – who made the decision to conceive them, performed the manipulation involving other parties necessary for such conception and the continuation of the pregnancy, and maintain this power by prohibiting access to information they hold – is undeniably humiliating.

24. The prohibition of inhuman or debasing treatment does in no way provide for any exception. The fact that those treatments were carried out with no idea of their consequences is irrelevant. The humiliation and suffering caused reaches a sufficient degree to establish a violation of Article 3.

### **III. Article 8: Anonymous ART violates the right to respect for private and family life**

#### ***Interference in the right to respect for private life***

25. The anonymity of gamete donation infringes the child’s right to identity by depriving him or her of the knowledge of his or her origins. Article 8 of the European Convention on Human Rights establishes respect for privacy, which includes a right to an identity that is recognised as a fundamental condition for the right<sup>8</sup> to autonomy and personal development.<sup>9</sup> The Court also considered that “*Respect for private life requires that everyone should be able to establish details of their identity as individual human beings and that an individual’s entitlement to such information is of importance because of its formative implications for his or her personality [...] This includes obtaining information necessary to discover the truth concerning important aspects of one’s personal identity, such as the identity of one’s parents.*”<sup>10</sup> In the case *Odièvre v. France*, the Court stated that “*Matters of relevance to personal development include details of a person’s identity as a human being and the vital interest protected by the Convention in obtaining information necessary to discover the truth concerning important aspects of one’s personal identity, such as the identity of one’s parents (see Mikulić v. Croatia, no. 53176/99, §§ 54 and 64, ECHR 2002-I). Birth, and in particular the circumstances in which a child is born, forms part of a child’s, and subsequently the adult’s, private life guaranteed by Article 8 of the Convention.*”<sup>11</sup> The Court also ruled in the case *Jäggi v. Switzerland* that “*the right to an identity, which includes the right to know one’s parentage, is an integral part of the notion of private life.*”<sup>12</sup>

26. The importance of natural (or biological) filiation is also emphasised by the Court in cases relating to surrogacy, both to condemn a State which has not taken into account this existing

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<sup>8</sup> *Pretty v. The United-Kingdom*, No 2346/02, 29 April 2002, § 61.

<sup>9</sup> *Bensaid v. The United-Kingdom*, No 44599/98, 6 February 2001, § 47.

<sup>10</sup> *Phinikaridou v. Cyprus*, No 23890/02, 20 December 2007, § 45.

<sup>11</sup> *Odièvre v. France [GC]*, No 42326/98, 13 February 2003, § 29.

<sup>12</sup> *Jäggi v. Switzerland*, No 58757/00, 13 July 2006, § 37.

link<sup>13</sup> as to conclude that there was no violation of the applicant's rights in the absence of any biological link with the child.<sup>14</sup>

27. The Court ensures that the biological link between parents and children be respected, and that the natural right of parents to maintain a link with their children be respected.<sup>15</sup> The case law concerns mainly requests from parents, but it would be unlikely for the Court not to protect this link as much when the request comes from children.

28. In this case, it is not even a question of having this link legally recognised, since the law provides that filiation cannot be contested, it is only a question of giving children information held by the administration. The Court acknowledges that the right to identity includes the right to know and have one's ascendant recognised.<sup>16</sup> The lifting of anonymity would ease some suffering but would not eliminate all violations of the children's rights, particularly because it prevents children from having their natural filiation recognised, which goes beyond the mere knowledge of one's origins. The Court also stated that "*respect for private life requires that everyone should be able to establish details of their identity as individual human beings, which includes the legal parent-child relationship*"<sup>17</sup> and established the right to challenge a filiation which is not in accordance with biological truth.<sup>18</sup>

29. The ECHR thus clearly links the knowledge of biological origins to the establishment of the filiation that usually stems from it. In cases dealing with surrogacy, the Court considers the possible existence of a biological link between the child and his or her backers. Therefore, in the event of an illegal surrogacy agreement, the ECHR states that "*Having regard to the importance of biological parentage as a component of identity, it cannot be said to be in the interests of the child to deprive him or her of a legal relationship of this nature where the biological reality of that relationship has been established and the child and parent concerned demand full recognition thereof.*"<sup>19</sup>

30. As a comparison, the Court acknowledged the absence of violation of the Convention in a case in which the State had promptly removed the child from his buyers to place him for adoption, as there was no biological link between the child and the buyers.<sup>20</sup> The case law on surrogacy thus confirms the importance of the biological dimension of filiation. By premeditating a non-biological filiation as a condition of the child's very existence, heterologous ART violates the child's right to identity.

31. The ECHR also acknowledges the relevance of measures taken by the States to restrict ART in order to protect the child. The Court therefore recognises that "*the community as a whole has an interest in maintaining a coherent system of family law which places the best interests of the child at the forefront.*"<sup>21</sup> These elements show that it is consistent with the Convention to prohibit the use of certain forms of ART, as Italy did in 2004, for instance, by prohibiting heterologous ART. Moreover, in 2011, the ECHR approved the Austrian legislation prohibiting

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<sup>13</sup> *Mennesson v. France*, No 65192/11, 26 June 2014.

<sup>14</sup> *Paradiso and Campanelli v. Italy [GC]*, No 25358/12, 24 January 2017.

<sup>15</sup> *Görgülü v. Germany*, No 74969/01, 26 February 2004.

<sup>16</sup> *Pascaud v. France*, No 19535/08, 16 June 2011, § 59.

<sup>17</sup> *Mennesson, op.cit.*, § 96.

<sup>18</sup> *Jäggi v. Switzerland, op. cit.*

<sup>19</sup> *Mennesson, op. cit.*, § 100.

<sup>20</sup> *Paradiso and Campanelli, op. cit.*

<sup>21</sup> *X, Y and Z v. The United-Kingdom [GC]*, No 21830/93, 22 April 1997, § 47.

fertilisation with ovum “donation”.<sup>22</sup> The possibility for States to set limits on ART confirms the absence of right to a child within the case law of the ECHR.

32. The Court’s case law is consistent with the report of the CAHBI (predecessor of the DH-BIO) which, as early as 1989, required that a child born through ART should have access “*at an appropriate age*” to information relating to his or her conception and to the identity of his or her donor or donors (principle 13).<sup>23</sup>

### ***The ECnHR must be interpreted in light of the Convention on the Rights of the Child***

33. The ECnHR must be read in light of the Convention on the Rights of the Child (CRC), which is the international text with the highest number of signatures and ratifications.

34. In accordance with Article 3-1 of the Convention on the Rights of the Child, whereby the interests of the child must be a primary consideration, the Court has consistently held that the protection of the best interests of the child must be taken into account and constitutes a legitimate aim.<sup>24</sup> The Court noted “*that an individual’s interest in discovering his parentage does not disappear with age, quite the reverse.*”<sup>25</sup>

35. The best interests of the child must not be interpreted in a restrictive way. Taking it into account and respecting it benefits not only to children already born but also to children in general. Therefore, its enforcement justifies limiting the power of adults over children, including the terms and circumstances of their artificial conception and birth.

36. This broad interpretation of the best interests of children makes it possible to go beyond a merely individualistic reading of human rights and to take into account the general interest.

37. It should be noted in this regard that the Grand Chamber adopted such an interpretation in the *Paradiso and Campanelli* judgment by stating that the “*legitimate aim of preventing disorder, and also that of protecting children*” regarding surrogacy is “*not merely [the protection of] the child in the present case but also children more generally – having regard to the prerogative of the State to establish descent through adoption and through the prohibition of certain techniques of medically assisted reproduction.*”<sup>26</sup> Therefore, the protection of the best interests of the child extends to that of children in general, that is, of future generations.

### ***Anonymous-ART infringes several rights guaranteed by this Convention.***

38. The most damaging harm to the children is that to their right proclaimed in Article 7-1 of the CRC, which states: “*The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents.*” This article deals with birth and therefore refers to the child’s natural (or biological) father and mother, in the Latin etymological sense

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<sup>22</sup> *S.H. and others v. Austria [GC]*, No 57813/00, 3 November 2011.

<sup>23</sup> Principles set out in the report of the Ad Hoc Committee of Experts on Bioethics, CAHBI, published in 1989. Published in *Texts of the Council of Europe on Bioethical matters*, Volume II, Directorate General I, Human Rights Directorate, Human Rights Policy and Development Department Bioethics Unit, Strasbourg, April 2014.

<sup>24</sup> See for instance, *Neulinger and Shuruk v. Switzerland [GC]*, No 41615/07, 6 July 2010, § 134-135; *X and others v. Austria [GC]*, No 19010/07, 19 February 2013, § 138; *X. v. Latvia [GC]*, No 27853/09, 26 November 2013, § 95-96.

<sup>25</sup> *Jäggi v. Switzerland, op. cit.*, § 37 and § 40.

<sup>26</sup> *Paradiso and Campanelli v. Italy, op. cit.*, § 197.

of the word “*parens, accusative Parentem: who gave birth*”<sup>27</sup> and not the social parents. Any other interpretation of the term parents would deprive this provision of its substance and would in fact enshrine a right-power of adults over the child. This understanding of Article 7 is consistent with the ordinary meaning of the word, the context, and the intent of the drafters of the CRC. It is further confirmed by the Committee on the Rights of the Child (CRC), which stated in its 2002 Concluding Observations that “*While noting the recent Adoption and Children Bill (2002), the Committee is concerned that children born out of wedlock, adopted children, or children born in the context of a medically assisted fertilization do not have the right to know the identity of their biological parents. In light of articles 3 and 7 of the Convention, the Committee recommends that the State party take all necessary measures to allow all children, irrespective of the circumstances of their birth, and adopted children to obtain information on the identity of their parents, to the extent possible.*”<sup>28</sup>

39. The right to know and be cared for by his or her parents is guaranteed “to the extent possible”, that is, in the absence of material obstacles that could not be removed by legislation. This provision also implies that the State shall refrain from taking measures that make impossible the child’s access to this right. The *travaux préparatoires* of the CRC indicate that this mention was added in order to take into account cases of “secret adoption”<sup>29</sup> and also mention the case of deceased parents.

40. Heterologous MAP also conflicts with: - article 8 (1) of the CRC which acknowledges the child’s right to “*preserve his or her identity ... and family relations*”; - article 9 (3) of the CRC which guarantees the “*right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis.*”

### ***The absence of a proportionate legitimate aim***

41. As was already clearly proven, anonymity only serves the interests of adults. The various reasons put forward by the French authorities to justify the failure to reveal all or part of the identity of the applicant’s natural father are not convincing.

- The biological father’s right to remain unknown. Assuming that a man may have a right to ignore the children he has conceived; the government does not provide evidence that the applicant’s natural father does not wish to have contact with them. He may have changed his mind and wish to know the children he has conceived, especially when he made this gift in his youth and with a certain unawareness.
- Regarding the desire to avoid “*reducing the supply and demand of gametes*” (free translation), it should be stressed that the use of heterologous IVF is not an end in itself, but a means to procreate. To raise this argument is equivalent to refraining from criticizing the consequences of a means so as not to question it. In other words, this argument appears to be unverified in practice.
- As far as the rights of social parents are concerned, it should be noted that the law does not recognize the right of parents to oppose any action initiated by their children to contest and seek paternity. Thus, in principle, parents have no right to maintain a false

<sup>27</sup> Clotilde Brunetti-Pons, « Existe-t-il un droit de connaître ses origines ? », *Le don de gamètes*, Colloque Evry 2013 (directed by Aude Mirkovic), Bruylant, 2014, p. 96.

<sup>28</sup> *UN Committee on the Rights of the Child: Concluding Observations: United-Kingdom of Great Britain and Northern Ireland*, 9 October 2002, CRC/C/15/Add.188, § 31-32.

<sup>29</sup> *Collection « Travaux préparatoires »*, E/CN.4/1989/WG.1/ WP.4: 378 1. § 96, p. 378. (free translation)



filiation. Why should the fact of having conceived a child by gamete donation give them such a right? Moreover, in the current case, the applicant's social parents gave their consent for them to take paternity action.

42. In any case, these arguments concern only the real or supposed interest of adults and the use of ART, never that of the children.

43. Moreover, it should be noted that Article L 1211-5 paragraph 2 of the French Code of Public Health provides that "*the principle of anonymity can only be waived in cases of therapeutic necessity*" (free translation). The rule on anonymity is therefore not absolute. All of the government's arguments based on the alleged absolute nature of anonymity must therefore be removed.

44. More importantly, the exception to the rule of anonymity should have applied in this case in view of the psychological illnesses caused to the applicants by the very fact of their way of procreation. The French authorities have not, to date, justified their choice to interpret this exception restrictively, as benefiting only persons likely to suffer from genetic illnesses, excluding psychological illnesses. This is an inconsistency and an unjustified difference of treatment in the establishment of French law, to the detriment of the applicants, in violation of article 14 of the Convention.

45. The argument that anonymity would be necessary to allow use of heterologous ART should also be considered. The purpose of heterologous ART is to have a child. Certainly, this goal is human and natural, but it does not correspond to a right of the social parents, except if one is to recognize the existence of a right to the child. Only the existence of a right to a child by heterologous ART would justify, to a certain extent, the rule of anonymity as a condition for the exercise of this right.

46. Yet, the Convention does not provide for any right to a child, or even, as seen before, for a right to the use of techniques that enable a child to be artificially conceived. The "right to marry and to found a family" guaranteed by Article 12 of the European Convention on Human Rights imposes only a negative obligation on the State not to interfere with the decision of a married couple consisting of a man and a woman to try to procreate. The Court stressed that "Article 12 of the Convention does not guarantee a right to procreation".<sup>30</sup> The Court only asserted the existence of a "*right to respect for both the decisions to become and not to become a parent*"<sup>31</sup> and of a "*right to respect for their decision to become genetic parents*."<sup>32</sup> Thus, the Court logically admitted that "*there is no obligation on a State to enact legislation of the kind and to allow artificial procreation*".<sup>33</sup> Therefore, there is no obligation on a State to legalize the use

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<sup>30</sup> *Šijakova and others v. "the former Yugoslav Republic of Macedonia"* (Dec.), No 67914/01, 6 March 2003, § 3. See also, *S.H. and others v. Austria op. cit.*, decision on admissibility of 15 November 2007, § 4: "*Article 12 of the Convention does not guarantee a right to procreation*"; Separate opinion of judge De Gaetano in the case *S.H. and others v. Austria op. cit.*, "*neither Article 8 nor Article 12 can be construed as granting a right to conceive a child at any cost. The "desire" for a child cannot, to my mind, become an absolute goal which overrides the dignity of every human life*" (§ 2).

<sup>31</sup> *Evans v. The United-Kingdom* [GC], No 6339/05, 10 April 2007, § 71; *S.H. v. Austria*, No 57813/00, 1<sup>st</sup> April 2010, § 58.

<sup>32</sup> *Dickson v. The United-Kingdom* [GC], No 44362/04, 4 December 2007, § 66.

<sup>33</sup> *S.H. and others v. Austria op. cit.*, § 74. See also *Costa and Pavan v. Italy*, No 54270/10, 28 August 2012.

of ART, nor is there a right to use this technique. Thus, the anonymity of gamete donation cannot be justified under the Convention on the basis of the needs of the use of ART.

47. Assuming that the refusal to reveal the identity of the natural father is legitimate, the refusal to communicate only non-identifying information seems clearly unnecessary for the purpose pursued and therefore disproportionate.

48. As for the argument that the rule of anonymity already applies in the case of anonymous childbirth, it is enough to observe that anonymity serves the interests of the child in the case of anonymous childbirth, and the interests of adults in the case of anonymous use of ART. Thus, anonymity does not serve the same purpose in either case. In the case of an anonymous childbirth as Judge Sajó stressed, “*the protection of anonymity is a measure that serves the right to life of the offspring*”.<sup>34</sup>

49. The Court approved the French law of 22 January 2002 concerning notably anonymous childbirth, as it states that “*the applicant may use it to request disclosure of her mother’s identity, subject to the latter’s consent being obtained to ensure that her need for protection and the applicant’s legitimate request are fairly reconciled*”.<sup>35</sup> By contrast, in 2012, the Court condemned the Italian anonymous childbirth system, due to the impossibility of lifting the secrecy, even partially. The ECHR found that Italy, unlike France, “*failed to strike a balance and achieve proportionality between the interests at stake and thus overstepped the margin of appreciation which it must be afforded*”.<sup>36</sup> This condemnation attests that the Court refuses that the mother’s right to secrecy, by being irreversible and absolute, prevents the child from requesting information about his or her natural parents. In light of these decisions, the principle of the anonymity of donors results from an unbalanced and unfair consideration of the rights and interests involved.

50. Moreover, assuming that the aim pursued was legitimate, and proportionate, when the disputed measure was adopted, this is no longer the case since the development of genetic tests enabling any person having doubts about his or her filiation to carry out a test without even informing his or her relatives. The development of these techniques, combined with the development of genetic databases, considerably reduces the protection of the anonymity of the natural parents of children born through anonymous use of ART.

51. Eventually, it should be pointed out that there has been a significant evolution in public opinion in favour of respect for the right to know one’s origins, including within the French National Consultative Committee on Ethics (CCNE) and among LGBT people and activists, who see respect for this right as a condition of sustainability and of their access to this use, particularly in that it makes it possible to maintain a paternal or maternal figure- reduced to the minimum- in the case of ART or surrogacy for single or same-sex partners.

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<sup>34</sup> *Godelli v. Italy*, No 33783/09, 25 September 2012, Dissenting Opinion.

<sup>35</sup> *Odièvre v. France*, *op. cit.*, § 49.

<sup>36</sup> *Godelli v. Italy*, *op. cit.*, § 58.

### ***A limited margin of appreciation***

52. The ECLJ considers that the defendant government's margin of appreciation does not allow it, in this case, to exonerate itself from its responsibility towards the applicants.

53. The Court generally acknowledges a wide margin of appreciation in the recognition of new controversial rights, such as access to ART or surrogacy, which, it acknowledges, raise "*sensitive moral and ethical issues*".<sup>37</sup> This is not the case here. These do not relate to the legalisation of ART, but to the right to know one's parents. One cannot seriously claim that this natural right be controversial.

54. Thus, the current case concerns the guarantee of a fundamental right, firmly established, protecting "*a particularly important facet of an individual's existence or identity*".<sup>38</sup> Furthermore, the choice by the French legislator seems isolated among the countries that have authorized heterologous use of ART. Indeed, many European countries lifted the anonymity of gamete donation, such as Sweden in 1984, Austria in 1992, Norway in 2003, the Netherlands in 2004, the United-Kingdom in 2005 and Finland in 2006. In Germany, it was the Constitutional Court which, as early as 1989, recognized the right of every person to know his or her genetic origins.<sup>39</sup> Most of these countries established a central authority in charge of collecting information on gamete donors and to act as an intermediary between the child and his or her parents and the donors. Some States, such as Iceland since 1996 and Belgium since 2007, give donors and intended parents the choice between anonymous and nominative donation. In addition, several countries, such as Spain or Denmark, allow children born through ART to access non-identifying data on their donors.

55. Consequently, the margin of appreciation granted to the State should therefore be limited,<sup>40</sup> especially since the best interests of the children and their natural rights are at stake.

### **IV: Article 14: A discrimination on the ground of birth**

56. In the current case, there are several differences of treatment to the detriment of the applicants in the enjoyment of their right to privacy, owing to the circumstances of their birth, which are not sufficiently justified. The differences in treatment are obvious:

- first of all, in the fact of having been kept in the ignorance of their mode of conception; then, of having been kept in ignorance of the identity of their natural fathers, of the existence of possible natural brothers and sisters and of their medical history;

- in the exclusion of psychic illnesses among the causes of illness for which the anonymity of the gamete donor is allowed to be lifted;

- then, eventually, in the legal prohibition on bringing any action to contest and establish filiation and in taking paternity action.

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<sup>37</sup> *Evans v. The United-Kingdom [GC]*, *op. cit.*, § 81. See also *S.H. v. Austria [GC]*, *op. cit.*, § 20 and 97; *X, Y and Z v. The United-Kingdom [GC]*, No 21830/93, 22 April 1997, § 44; *Paradiso and Campanelli v. Italy [GC]*, *op. cit.*, § 194.

<sup>38</sup> *Dickson v. United-Kingdom*, *op. cit.*, § 78. See also *Evans v. United-Kingdom [GC]*, *op. cit.*, § 77.

<sup>39</sup> *Ibid.*, p. 44.

<sup>40</sup> *X and others v. Austria [GC]*, *op. cit.*, § 148.

- In the alternative, even assuming that the prohibition on establishing a filiation link between the donor and the child conceived from the donation, which is laid down in article 311-19, 1<sup>st</sup> paragraph, of the French Civil Code, is even legitimate, it is not clear on what grounds a person conceived in this way should be prohibited from contesting his or her filiation, in particular when he or she does not have a good relationship with his or her legal parent. In this case, the situation of a person born through anonymous ART is no different from that of a person whose legal father is not their natural father, but their rights are unequal.

57. **In conclusion**, it is clear that the applicant's rights under Article 3, 8 and 14 of the Convention were violated by the authorities' refusal to reveal all or part of the identity of the natural father.

However, the origin of these violations lies in the very technique of heterologous ART, the use of which is contrary to the interests of the children.