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**STEERING COMMITTEE  
FOR HUMAN RIGHTS IN THE FIELDS OF BIOMEDECINE AND  
HEALTH (CDBIO)**

**Developments in the field of bioethics  
in the case law of the European Court of Human Rights (ECHR)**

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based on the terms of the official documents published by the ECHR

## **Contents**

<b>Recent case-law</b> .....	3
Reproductive rights .....	3
Surrogacy and private life .....	3
Baret et Caballero c. France .....	3
Gauvin-Fournis v. France and Silliau v. France.....	4
C v. Italy.....	5

## Recent case-law

### Reproductive rights

#### Surrogacy and private life

#### Judgement

##### **Baret et Caballero v. France**

14 September 2023

In the case of [Baret and Caballero v. France](#) (applications nos. 22296/20 and 37138/20) the European Court of Human Rights held, unanimously, 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 cases concerned the prohibition on exporting the sperm of the first applicant's deceased husband and the embryos created by the second applicant with her deceased husband to Spain, a country where posthumous conception was permitted.

The Court found in particular that the contested prohibition had affected the applicants' private life in that the possibility for people to exercise their choice as to what happened to their embryos or gametes came within the ambit of their right to self-determination, and that it constituted an interference with their right to attempt to have children by having recourse to medically assisted reproduction (MAR) techniques.

It considered that the impugned interference, which derived from the notion of family as it prevailed at the time and which aimed to guarantee respect for human dignity and self-determination and to ensure a fair balance between the interests of the different parties involved in MAR, pursued the legitimate aims of "the protection of the rights and freedoms of others" and the "protection of morals".

As to the necessity of the impugned interference, the Court considered that the absolute nature of the prohibition on posthumous insemination in France was a political choice and that, when it came to a social issue relating to moral or ethical considerations, the role of the domestic policy-maker had to be given special weight. It noted that the prohibition on exporting gametes or embryos, which equated to "exporting" the prohibition on posthumous conception within the national territory, had as its aim to avert the risk that the provisions of the Public Health Code prohibiting this practice would be circumvented. It also noted that, up until the enactment of the Bioethics Act of 2 August 2021, the legislature had attempted to reconcile the desire to extend access to MAR with the need to respect society's concerns as to the sensitive ethical considerations raised by the possibility of posthumous conception.

The Court found that the above considerations were also relevant as concerned the prohibition on posthumous embryo transfer, reiterating that an embryo did not have independent rights or interests.

It pointed out that the *Conseil d'État* had carried out its review of the contested refusals in accordance with the methodology laid down by it in its decision in *Gonzalez Gomez* and that, in the circumstances of the present cases, there was no reason to depart from the findings of the domestic court. It followed that the domestic authorities had struck a fair balance between the competing interests at stake, that the respondent State had acted within its discretion, and that there had therefore been no violation of Article 8 of the Convention.

Nevertheless, the Court acknowledged that the legislature's decision to extend the right to MAR to female couples and single women since 2021 reopened the debate as to the relevance of the justification for maintaining the prohibition complained of by the applicants.

### **Gauvin-Fournis v. France and Silliau v. France**

7 September 2023

#### **Judgement**

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 nonidentifying 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.

## **C v. Italy**

31 August 2023

### **Judgement**

In the case of [C v. Italy](#) (application no. 47196/21) the European Court of Human Rights held, by a majority, that there had been:

- A violation of Article 8 (right to respect for private and family life) of the European Convention on Human Rights with regard to the establishment of a legal parent-child relationship between the applicant and her biological father, and
- No violation of Article 8 with regard to the establishment of a legal parent-child relationship between the applicant and her intended mother.

The case concerned the Italian authorities' refusal to recognise the legal parent-child relationship established by a Ukrainian birth certificate between C, a child born through a gestational surrogacy arrangement abroad, and her biological father and intended mother.

The Court observed that, as it had found in previous cases (mainly [Mennesson v. France](#) and [Labassee v. France](#)), under Article 8 of the Convention, domestic law had to provide a possibility of recognition of the legal relationship between a child born through a surrogacy arrangement abroad and the intended father where he was the biological father.

#### *Legal parent-child relationship between the applicant and her biological father*

The Court noted that in the present case the domestic courts had been unable to take a swift decision to protect the applicant's interest in having her legal relationship with her biological father established. The applicant, now aged four, had been kept since birth in a state of protracted uncertainty as to her personal identity and, as she had no legally established parentage, was considered a stateless person in Italy. The Court

therefore held that, despite the margin of appreciation afforded to the State, the Italian authorities had failed to fulfil their positive obligation to ensure the applicant's right to respect for her private life under the Convention.

*Legal parent-child relationship between the applicant and her intended mother*

The Court found that while Italian law did not allow for the details of the birth certificate to be registered concerning the intended mother, it nevertheless afforded her the possibility of legally recognising the child by means of adoption. By refusing to enter the details of the applicant's Ukrainian birth certificate in the relevant Italian civil register in so far as it designated E.A.M. as her mother, the respondent State had not exceeded its margin of appreciation and there had thus been no violation of Article 8 of the Convention in that regard.