REPRODUCTIVE RIGHTS

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REPRODUCTIVE RIGHTS

These summaries are made under the sole responsibility of the Department for the Execution of Judgments of the European Court and in no way bind the Committee of Ministers.

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Under the European Court's case law, the notion of "private life" within the meaning of Article 8 (right to respect for private and family life) of the European Convention on Human Rights incorporates the right to respect for both the decisions to become and not to become a parent. Thus, the European Court addresses under Article 8 issues related to the protection of reproductive rights, such as prenatal medical tests, medically assisted procreation, access to abortion, sterilisation procedures and protection of medical data. In some cases, the Court also examined issues related to the protection of reproductive rights under other Articles, such as Article 3 (the prohibition of torture or inhuman or degrading treatment or punishment), Article 6 (regarding the right of access to a court), Article 10 (freedom of expression), Article 14 (prohibition of discrimination), or Article 1 Protocol No. 1 (protection of property).

The aim of Article 8 is to protect the individual against arbitrary interference by public authorities. Any interference must pursue "a legitimate aim", be "in accordance with the law" and also "necessary in a democratic society". A restriction on a Convention right cannot be regarded as "necessary in a democratic society" unless, amongst other things, it is proportionate to the legitimate aim pursued. Moreover, the effective respect for private life may involve "the adoption of measures designed to secure respect for private life even in the sphere of relations between individuals, including both the provision of a regulatory framework of adjudicatory and enforcement machinery protecting individuals' rights and the implementation, where appropriate, of specific measures".[1]

The present factsheet provides examples of general and individual measures reported by States in the context of the execution of the European Court's judgments, concerning the: protection of mothers against discrimination, access to medically assisted procreation, regulation of home births, recognition of parent-child relationship in cases of surrogate motherhood, access to lawful abortion and to information on abortion, non-consented sterilisation, protection of personal data and access to medical records, and other issues.

[1] *Tysiąc v. Poland* (Application No. 5410/03), § 110.

1. PROTECTION OF MOTHERS AGAINST DISCRIMINATION

Ending the practice of declaring fictitious employment contracts concluded by pregnant women

CRO / *Jurčić* (54711/15)
Judgment final on 04/05/2021

Final Resolution CM/ResDH(2022)95

This case concerned the unjustified refusal in 2010 by the Croatian Health Insurance Fund (HIF) to recognise the applicant's status of insured employee, thereby denying her access to employment-related benefits (i.e. compensation of salary during sick leave for pregnancy-related complications and birth allowance during maternity leave), as she had undergone an *in vitro* fertilisation shortly before the conclusion of her employment contract. The Court criticised the domestic authorities' conclusion that the applicant had been medically unfit to assume employment due to *in vitro* fertilisation, thereby implying, in violation of both domestic and international law, that she should have refrained from taking up employment until her pregnancy was confirmed. It concluded that she had been discriminated against on the basis of her sex.

In 2012, the Croatian Gender Equality Ombudsperson issued a recommendation to HIF, calling for the termination of the discriminatory administrative practice by which employment contracts concluded by pregnant women were declared fictitious. In December 2012, HIF gave an instruction to all its branches, stating that these were no longer authorised to examine the validity of employment contracts of pregnant women but, in case of doubt, should institute civil proceedings before a competent court.

In addition, the new Compulsory Health Insurance Act 2013, in force since July 2013, in Article 122 § 4, reflects the Ombudsperson's recommendation and stipulates that the HIF may not declare employment contracts fictitious on such grounds. In case of doubt as to the validity of such contracts, the HIF shall institute proceedings before the competent civil courts. Pending the outcome of the proceedings, the person continues to benefit from its rights under the compulsory health insurance scheme. The authorities also provided examples of domestic courts' case law, both prior to and after the facts, in line with the relevant Convention standards on protection of pregnant women.

Change of domestic law to provide for the equal treatment of biological and adoptive mothers regarding maternity leave

CRO / *Topcic-Rosenberg* (19391/11)
Judgment final on 24/03/2014

Final Resolution CM/ResDH(2016)187

The violation in this case was due to the rigid interpretation by the domestic authorities of the Maternity Leave Act, the *lex specialis* in force at the time, which led to a discriminatory refusal to grant paid maternity leave to a self-employed adoptive mother of a three-year-old child, on the ground that self-employed biological mothers were entitled to paid maternity leave only until the child's first birthday, thus ignoring the general principles under the Labour Act, which recognised that the position of a biological mother at the time of birth corresponds to that of an adoptive mother immediately after the adoption.

The impugned legislation was repealed, and the new Maternity and Parental Benefits Act came into force in January 2009, providing for an equal treatment of biological and adoptive mothers as regards access to paid maternity leave.

As to the applicant, the impugned proceedings were reopened, the applicant's claim was accepted by the High Administrative Court which, in February 2015, annulled the decisions of the Croatian Health Insurance Fund and ordered it to render a new decision in compliance with the principles of the Court's judgment. Due to the passage of time, the applicant did not request the paid leave itself but only the related allowances which were duly disbursed.

2. ACCESS TO MEDICALLY ASSISTED PROCREATION

2.1. Access to artificial insemination facilities

UK / *Dickson* (44362/04)
Grand Chamber judgment of 04/12/2007

Final Resolution CM/ResDH(2011)176

Access to artificial insemination facilities for prisoners serving life sentences

The violation of the right to respect for the applicants' family life in this case resulted from the authorities' refusal to grant a prisoner serving a life sentence and his wife their request for artificial insemination facilities. The European Court considered that a fair balance had not been struck between the competing public and private interests involved. Moreover, as the general policy regarding requests for artificial insemination by prisoners was not enshrined in primary legislation, these issues had never been weighed, nor issues of proportionality assessed by Parliament.

Following the Court's judgment, the policy on assessing applications for permission to access assisted conception facilities by prisoners has been amended and the provision that applications will only be granted in very exceptional circumstances has been removed. The Secretary of State has an obligation under the Human Rights Act to respect rights protected by the Convention and now applies a proportionality test when taking a decision and balances the individual circumstances of the applicant against the criteria in the policy and the public interest in accordance with the Court's judgment. Decisions made under the policy may be challenged in judicial review proceedings.

The applicants were awarded just satisfaction for the non-pecuniary damage and the costs and expenses incurred, which was duly paid by the authorities. Furthermore, the applicant was transferred to an open prison in December 2006, which made him in principle eligible for unescorted home leave. The applicants' lawyer confirmed that in these circumstances, the applicants no longer required access to assisted conception.

2.2. Access to preimplantation genetic diagnosis

ITA / *Costa and Pavan* (54270/10)
Judgment final on 11/02/2013

Final Resolution CM/ResDH(2016)276

Access of healthy carriers of cystic fibrosis to screening embryos for in vitro fertilisation

The violation in this case resulted from the inconsistency in national legislation in the field of procreation, preventing healthy carriers of cystic fibrosis from acceding to medically assisted procreation and, in this context, to embryo screening (or pre-implantation genetic diagnosis – PGD) to allow procreation of a child unaffected by that disease, while authorising the termination of pregnancy on medical grounds when a foetus was affected by the same pathology.

On 14 May 2015, by judgments No. 26/2015 and 29/2015, the Constitutional Court declared the relevant legal provisions unconstitutional, insofar as they did not allow access to medically assisted procreation (and thus to PGD) to fertile couples who are healthy carriers of a serious genetic disease, thereby ending the inconsistency in national legislation. On a practical level, several private structures were created to offer the possibility of using medically assisted procreation and PGD to non-sterile couples, wishing to avoid pregnancy on the basis of an embryo that would develop into a foetus affected by a serious genetic disease. As regards public structures, some of them already offer the medical treatment in question to couples in a situation similar to that of the applicants, while others were awaiting legislative intervention to specify the pathologies justifying access to medically assisted procreation with prior PGD.

As regards the applicants, in 2013, at their request, an injunction was issued ordering the public health agency to perform the requested medical procedures (medically assisted procreation including prior embryo screening) either directly or through other specialised structures. The injunction was complied with.

3. REGULATION OF HOME BIRTHS

Clarification of domestic legal framework to allow effective medical assistance for home births

HUN / *Ternowszky* (67545/09)
Judgment final on 14/03/2011

Final resolution CM/ResDH(2012)88

The violations in this case stemmed from the ambiguous regulation and judicial practice regarding home birth and the lack of specific and comprehensive legislation on the subject. Due to sanctions imposed on health professionals for assisting in home births, in contradiction with the right of mothers to choose the circumstances in which they wish to give birth, women were *de facto* deprived of the right to effective medical assistance for home births.

To avoid recurrence of similar situations in the future, new rules governing the professional and material conditions of home birth were introduced by Government Decree No. 35/2011 of 21 March 2011. The decree was subsequently amended and according to the wording in force since 1 January 2017 it stipulates that, women aged between 18 and 40, in the 37th to 41st weeks of their pregnancies, free of medical complications, can choose to give birth at home or in a home birth-centre. The Decree lays down duties, competencies and responsibilities of professionals assisting in home births, notably the presence of a 'responsible person' who can be either a professional obstetrician or a midwife with the required qualification who is registered in the operational register of health workers. The regulation further provides for strict hygienic rules and requires the existence of a hospital not farther than a 20-minute drive away.

As to the applicant, she was able to give birth at home by the time the judgment was delivered, and the just satisfaction awarded by the Court for the costs and expenses incurred was duly paid by the Hungarian authorities.

4. RECOGNITION OF PARENT-CHILD RELATIONSHIP IN CASES OF SURROGATE MOTHERHOOD

Legal recognition of parent-child relationship between biological fathers and their children born abroad through surrogate motherhood

FRA / *Mennesson* (65192/11)
Judgment final on 26/09/2014

FRA / *Labassee* (65941/11)
Judgment final on 26/09/2014

FRA / *Laborie* (44024/13)
Judgment final on 19/01/2017

FRA / *Foulon and Bouvet* (9063/14)
Judgment final on 21/10/2016

Final Resolution CM/ResDH(2017)286

These cases concerned a violation of the right to private life of the applicant children born abroad through surrogate motherhood, due to the authorities' refusal to recognise and thus establish under domestic law a legal parent-child relationship with their biological fathers. The Court held that the effects of non-recognition in French law of that legal parent-child relationship are not limited to the parents alone, but also affect the children themselves, whose right to respect for their private life – which implies that everyone must be able to establish the substance of his or her identity, including the legal parent-child relationship – is substantially affected.

As regards issuing certificates of French nationality, the authorities addressed to the public prosecutors and chief clerks of the district courts (*greffiers en chef des tribunaux d'instance*) the circular of 25 January 2013, defining the conditions of issuing such certificates to children born abroad when there is a sufficient likelihood that an arrangement for surrogate motherhood was used. Since then, applications for such certificates are granted, provided that the other conditions recalled by the *circular of 5 May 1995 on the issue of certificates of French nationality* are fulfilled and the parent-child relationship with a French national results from a foreign civil status record that is valid under Article 47 of the Civil Code.[2] The 2013 circular specifies that the mere suspicion of a recourse to surrogacy abroad is not sufficient to reject applications for French nationality certificates.[3]

[2] DH-DD(2017)817, p. 7.

[3] *Idem*

As regards the registration of birth certificates issued abroad in the French civil status registers, two judgments of the plenary of the Court of Cassation, of 3 July 2015, clarify the legal situation of children with a valid civil status abroad within the meaning of Article 47 of the Civil Code, and now authorise, subject to their compliance with the other provisions of this Article, the registration of foreign birth certificates of children born by surrogacy, without prejudice to the prohibition of surrogacy agreements under French law.
As to the applicants, Law No. 2016-1547 of 18 November 2016 established a procedure for reviewing final civil decisions related to the status of persons following a judgment of the Court finding a violation of the Convention. The applicants could apply for such a review until 15 May 2018 and certificates of French nationality were delivered to the applicant's children.

5. ACCESS TO LAWFUL ABORTION AND TO INFORMATION ON ABORTION

Access to lawful abortion

IRL / *A. B. and C.* (25579/05)
Grand Chamber judgment of 16/12/2010

Final Resolution CM/ResDH(2014)273

The Court found that the authorities failed to comply with their positive obligation to secure to the third applicant effective respect for her private life due to the absence of any implementing legislative or regulatory regime providing an accessible and effective procedure by which she could have established whether she qualified for a lawful abortion in Ireland in accordance with Article 40.3.3 of the Constitution, which had been interpreted by the Supreme Court as meaning that abortion in Ireland was lawful if there was a real and substantial risk to the life of the mother which could only be avoided by termination of her pregnancy.
Following the Court's judgment, the Protection of Life during Pregnancy Bill 2013 entered into force on 1 January 2014. This law in conjunction with several regulations and a guidance document to assist health professionals in their implementation now constitute the framework according to which individuals can establish whether they qualify for a lawful abortion in Ireland in accordance with the Constitution. They set out the relevant criteria and actions to be taken for the assessment of whether there is a real and substantial risk to the mother's life on grounds of illness (concurring favourable opinions from an obstetrician and another medical practitioner), or a risk of suicide (in this case the opinion shall be supported by three medical practitioners out of which two should be psychiatrists). An urgent procedure is also provided for (favourable opinion of one medical practitioner). The law also provides for a review procedure by which the woman can challenge the failure to provide an opinion, or an opinion deemed insufficient. The procedure takes place before a review committee of medical practitioners (convened by the Health Service Executive from a list of ten practitioners).

Access to information on abortion

IRL / *Open Door and Dublin Well women* (14234/88)
Plenary Court's judgment of 29/10/1992

Final Resolution DH(96)368

The violation of the applicants' right to freedom of expression in this case resulted from an injunction issued by the Supreme Court in March 1988 restraining the applicants (agencies counselling pregnant women), *inter alia* from providing pregnant women with information concerning abortion facilities abroad, an interference which was found by the Court to be disproportionate to the aims pursued.
Following the Court's judgment, in 1992, subsection 3 of Article 40 of the Constitution was amended to clarify that the guaranteed right to life of the unborn shall not limit the freedom to obtain or make available information relating to services for termination of pregnancies, lawfully available in another state. Subsequently, the Irish Parliament enacted the "Regulation of information (Services outside the State for Termination of Pregnancies) Act, 1995". According to this act, it is lawful, subject to certain conditions, to give information which "is likely to be required by a woman for the purpose of availing herself of services provided outside the State for the termination of pregnancies

and relates to such services or to persons who provide them". Such information may be given in public meetings, in publications or on radio and television. Doctors and other counsellors likewise can communicate such information under certain conditions.
As to the applicants, the impugned injunction was lifted, and the just satisfaction awarded by the Court for the damages and costs and expenses was paid.

Allowing activities promoting the decriminalisation of abortion

PRT / *Women on Waves and Others* (31276/05)
Judgment final on 03/05/2009

Final Resolution CM/ResDH(2011)145

The violation of the applicants' right to freedom of expression in this case resulted from the authorities' decision, in 2004, to prohibit their ship ("*Borndiep*") from entering Portuguese territorial waters. The ship had been chartered by the applicant associations with a view to staging activities promoting decriminalisation of abortion. The Court found that although lawful and pursuing a legitimate goal this decision was disproportionate and not necessary in a democratic society.
Following and in parallel to the Women on Waves and Others' application to the Court, multiple abortion trials were held in various Portuguese cities, receiving extensive media coverage and keeping the abortion debate alive. This movement, also known as the legalisation movement, led to the referendum of 11 February 2007 by which abortion was legalised in Portugal. In this context, the authorities considered that publication and dissemination constituted sufficient measures to prevent future similar violations. The Court's judgment has been translated, published on the website of the Principal State Prosecutor, and largely disseminated to administrative courts and competent authorities.
As for the applicants, the just satisfaction in respect of non-pecuniary damage incurred by the applicants awarded by the Court was duly paid.

6. NON-CONSENTED STERILISATION

Adequate compensation for medical malpractice

MDA / G.B. and R.B. (16761/09)
Judgment final on 18/03/2013

Final Resolution CM/ResDH(2017)369

This case concerned the violation of the applicant couple's private and family lives on account of the disproportionately low amount of compensation awarded by the domestic courts in 2007-2008 on account of the first applicant having been permanently sterilised without her knowledge or consent during a Caesarean section performed on her with medical negligence in a state-owned hospital.
Following the Court's judgment, the Plenary of the Supreme Court of Justice adopted Decision No 8 of 24 December 2012, where it strongly encouraged domestic courts to ensure the direct application of the Convention and its jurisprudence in cases requiring the payment of compensation for non-pecuniary damage so that their amount is proportional to the amounts awarded by the Court in cases with similar violations and against states with a comparable economic development. The authorities provided several examples of domestic court decisions issued between 2012 and 2017 awarding proportional compensation for non-pecuniary damage resulting from medical malpractice. To improve the judicial practice on this matter, in 2016 the National Institute of Justice organised a series of trainings for the prosecutors and judges on "Rules of awarding just satisfaction according to Article 41 of the Convention".
As to the applicants, the Court awarded just satisfaction in respect of non-pecuniary damage and costs and expenses, which was paid without delay.

Effective legal safeguards to protect reproductive health in the context of sterilisation

SVK / *V.C.* (18968/07)
Judgment final on 08/02/2012

SVK / *N.B.* (29518/10)

These cases concerned forced sterilisations of Roma women carried out in public hospitals between 1999 and 2002. The Court found that the sterilisation procedure had grossly interfered with the

applicants' physical integrity as they were thereby deprived of their reproductive capacity, many of them at an early stage of their reproductive lives, with gross disregard to the applicants' right to autonomy and the respect for their private and family life, on account of their sterilisation without their full and informed consent.

Judgment final on 12/09/2012

SVK / *I.G. and Others* (15966/04)
Judgment final on 29/04/2013

Final Resolution CM/ResDH(2014)43

In response to the findings of the Court based on the legislation in force at the material time,[4] the authorities adopted the Health Care Act 2004, which became operative on 1 January 2005. It governs in detail the provision of information to patients and their informed consent and its section 40 spells out the prerequisites for sterilisation. These include a written request and written consent following prior information *inter alia* on alternative methods of contraception and planned parenthood, as well as the possible medical consequences of sterilisation. No sterilisation may be carried out until at least thirty days after informed consent has been given. A new Regulation was adopted and entered into force as of 1 August 2013, to ensure that the requirement of consent be uniformly understood by all health establishments and to standardise the conduct of health professionals.

As for the applicants, having regard to the circumstances of each case, and noting the partial redress already obtained through compensation awarded at domestic level by the applicants in *N.B* and *I.G. and Others*, the Court awarded just satisfaction for the non-pecuniary damage incurred which was duly paid by the authorities.

7. PROTECTION OF PERSONAL DATA AND ACCESS TO MEDICAL RECORDS

Ensuring effective protection of medical records

MDA / *Radu* (50073/07)
Judgment final on 15/07/2014

Final Resolution CM/ResDH(2017)347

This case concerned the disclosure of medical information by a medical institution belonging to the Ministry of Health, which had ordered the applicant's hospitalisation, to her employer, the Police Academy. The information included details about her pregnancy, the results of the artificial insemination she had undergone, her infection with hepatitis B, and other sensitive medical details, despite an explicit prohibition in the domestic legislation to disclose such information. The applicant was hospitalised in August 2003, on account of an increased risk of miscarriage. Her employer hereafter requested information from the medical institution on who had ordered the applicant's hospitalisation, when she had been hospitalised, what had been the initial and final diagnoses, and what treatment she had received. On an unspecified date the applicant suffered a miscarriage. According to the medical report, one of the factors which had led to the miscarriage was the stress to which she had been subjected.

In response, although the Court did not contest the quality of the domestic laws in the field, after the events that gave rise to the present case, Parliament enacted a new Law on protection of personal data ("Law No 133"), which came into force in April 2012. It was adopted in the framework of the Council of Europe "Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data" of 1981and its Additional Protocol of 2001 (CETS No. 108), as well as EU "Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data". Article 7 of the new law specifies that medical data is protected and shall not be disclosed, unless in exceptional circumstances provided by the law, with or without personal consent. Its processing, management, transmission and disclosure is supervised by the Centre for Protection of Personal Data. All medical institutions, including those under the authority of the

[4] "[…] The 1972 Sterilisation Regulation and the Health Care Act 1994 required patient's consent prior to medical intervention. However, those provisions […] did not provide appropriate safeguards. In particular, they allowed a situation to occur in which an intervention of a particularly serious nature was carried out without the applicant's informed consent as defined in the Convention on Human Rights and Biomedicine, by which Slovakia was bound at the relevant time." (§ 152, *V.C. v. Slovakia*, 18968/07).

Ministry of Interior, were required to register at the Centre and to set up their internal rules, medical documentation, forms and files, etc. in compliance with the new law, in order to exclude the risk of disclosure of sensible medical information. Any disclosure can be reported by the victim to the Centre for Protection of Personal Data that will initiate its own investigation into the case or will recommend other remedies such as criminal investigations, contravention proceedings, civil compensation etc. Following the adoption of Law No 133, Parliament also amended other relevant laws to ensure protection of personal data. Specific trainings for the judiciary and prosecution authorities on issues pertaining to the protection of personal data, were organised by the National Institute of Justice. Doctors and medical staff benefit from periodic training organised by the Ministry of Health, notably on issues concerning protection of medical information and personal data.

As to the applicant, the medical documents at issue were destroyed by her former employer. The just satisfaction awarded by the Court for the non-pecuniary damage incurred was paid.

Ensuring access to medical records

SVK / *K.H. and Others*
(32881/04)
Judgment final on 06/11/2009

Final Resolution CM/ResDH(2012)56

This case concerned violations of the applicants' right to respect for private and family life and of their right to access to a court. In 2002, the domestic authorities refused to allow the applicants, eight Slovak women of Roma ethnic origin, to photocopy their own medical records when they suspected that their infertility might have resulted from a sterilisation procedure performed in hospitals during caesarean deliveries. The authorities relied on section 16(6) of the Health Care Act 1994, according to which they were only allowed "to consult medical records and to make excerpts thereof", thus also imposing a disproportionate limitation on their ability to present their cases to a court in an effective manner.

To prevent the recurrence of such violations, section 16 of the Health Care Act 1994, which granted patients or their legal representative the right to receive only excerpts from medical records, was repealed on 01/01/2005 by the Health Care Act 2004. Section 25 of the Health Care Act 2004, in force as of 1 January 2005, expressly allows patients or those authorised by them to make copies of their medical records.

As for the applicants, on the basis of the new legislation, seven of the applicants were able to make photocopies of their files and the one whose medical records were lost could seek redress before the domestic courts for negligent handling of her medical records.

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8. OTHER ISSUES

Access to gender reassignment without having regard to the person's ability to procreate

TUR / *Y.Y.* (14793/08)
Judgment final on 10/06/2015

Final Resolution CM/ResDH(2018)395

The violation in this case resulted from the domestic courts' rejection of the applicant's request of 2005 for gender reassignment on the sole ground that the precondition of a permanent inability to procreate was not fulfilled. The refusal referred to Article 40 of the Civil Code, according to which the permanent inability to procreate was a requirement for authorisation to undergo gender reassignment. In May 2013, the Mersin District Court ultimately granted the applicant authorisation to undergo the operation, without considering whether Y.Y. was permanently unable to procreate. The European Court found that the denial for many years of the possibility to undergo such an operation had breached the applicant's right to respect for private life.

Similar violations will be prevented in the future, given that the Constitutional Court, in its decision of 29/11/2017, found that the impugned provision of Article 40 of the Civil Code was unconstitutional; thus, the requirement of permanent inability to procreate in view of obtaining an authorisation to undergo gender reassignment was deleted from Article 40 of the Civil Code.

As for the applicant, following surgery, his gender and name were changed in his new identity card, which he received on 1 April 2016.

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