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European Court of Human Rights

ECHR 2024/3 *Case of Baret and Caballero v. France, 14 September 2023, no. 22296/20 and 37138/20* (*Fifth Section*)

This judgment is available only in French.

The Facts

The First Applicant

In 2016, after living together for eleven years, the first applicant and M.B. entered into a civil partnership. That same year M.B. was diagnosed with a brain tumour. Since it was likely that chemotherapy would affect his fertility, he deposited his sperm with a centre for research and storage of eggs and sperm (CECOS) in Marseille. In January 2019 the first applicant and M.B. were married. In March 2019 they underwent two cycles of intrauterine insemination using some of the sperm stored at the CECOS. The first cycle was unsuccessful and the second was not completed owing to M.B.'s death.

In a will drawn up at the time of their marriage, M.B. had named the first applicant as the only person with the right to decide on whether to use or destroy the stored sperm if he were to die before she became pregnant, specifying that he wanted her "to be able to conceive posthumously, perhaps in another country". In May 2019 the first applicant applied to the CECOS for authorisation to export her deceased husband's sperm to a Spanish healthcare institution for the purpose of undergoing posthumous medically assisted reproduction (MAR). The CECOS replied that her request had to be submitted to the relevant Agency of Biomedicine for approval.

In January 2020 the CECOS forwarded the export request to the Agency of Biomedicine, specifying that posthumous MAR could only be attempted in Spain during a twelve-month period following the death, that is, until 23 March 2020 in the applicant's case. On 4 February 2020 the first applicant asked the urgent applications judge at the administrative court to order the Marseille

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university hospital (APHM) to take all necessary measures to enable the export of M.B.'s sperm to go ahead so that she could undergo MAR in Spain.

In an order of 10 February 2020, her application was rejected because the two-month time-limit available to the Agency of Biomedicine for replying to her request of January 2020 had not yet expired, and the APHM had not acted in a manifestly unlawful manner in refusing to authorise the export. The first applicant lodged an appeal against that decision, which was rejected on 28 February 2020.

The Second Applicant

The second applicant and her husband had two children, who were born in October 2014 and December 2018. The second child was born through in vitro fertilisation while the husband was suffering from T-cell acute lymphoblastic leukaemia.

With a view to expanding their family, the couple had begun the procedure to undergo MAR, and five embryos had been stored at a university hospital in February 2018. In January 2019 the second applicant's husband expressed the wish that, should he die, she be able to use the stored embryos. In February 2019 the couple renewed their consent to store the embryos.

After her husband's death in April 2019, the second applicant took steps to undergo MAR with embryo transfer in Spain. In August 2019 the university hospital sent her a letter reminding her that, under French law, posthumous embryo transfer was not permitted.

In December 2019 the second applicant asked the urgent applications judge at the administrative court to order the director of the hospital to take the necessary measures to allow the export of the stored embryos to the Spanish healthcare institution. The urgent applications judge rejected her application. She appealed against that decision to the Conseil d'État, which rejected it on 24 January 2020.

The Law

Alleged Violation of Article 8 of the Convention

Relying on Article 8 (right to respect for private and family life), the applicants submitted that the refusals complained of, which had been based on the prohibition of posthumous conception laid down in the French Public Health Code

and the prohibition on exporting gametes or embryos for purposes prohibited in that Code, entailed a violation of their rights.

The Court sees no reason to call into question the applicants' free and informed wish to realise the plans for a family as foreseen with their deceased husbands. It notes that posthumous conception had been prohibited in absolute terms under French law since 1994. The Public Health Code prohibits posthumous insemination and the export of gametes or embryos to another country if they are to be used for purposes prohibited within the national territory.

The Court's task is to determine whether the domestic authorities have struck a fair balance between the competing interests at stake, namely, the applicants' personal interest in realising their plans for a family and the general-interest grounds relating to ethical considerations, put forward by the legislature and the Government.

The Court points out firstly that the aim of the absolute nature of the prohibition on posthumous insemination is to safeguard general interests relating to moral or ethical considerations. This prohibition represents a political choice going back to the first Bioethics Act of 1994, which has been consistently repeated each time that the Act has been revised and, recently, in 2021, in the context of comprehensive legislative debates on the subject. It notes that the legislative process had resulted in a decision to maintain the status quo, regard being had to the specific ethical issues involved in posthumous conception.

The Court reiterates that in matters of general policy, the role of the domestic policy-maker should be given special weight. The Court then observes that it is clear from the applicable legislative provisions and the case-law of the Conseil d'État that the prohibition on exporting gametes or embryos is the corollary of the prohibition on posthumous insemination within the national territory. The prohibition on export is thus intended to avert the risk that the provisions of the Public Health Code banning such insemination would be circumvented.

In the Court's view, the contested export prohibition is compatible as a matter of principle with the right to respect for private life, otherwise the absolute prohibition on posthumous insemination will be rendered meaningless. On the one hand, and until the enactment of the revised version of the Act in 2021, the legislature has attempted to reconcile the wish to broaden access to MAR with the need to respect society's concerns as to the sensitive ethical considerations raised by the prospect of posthumous conception. At the same time, and as held by the Conseil d'État, the prohibition on exporting gametes

or embryos arises from the wish to strike a balance between the competing interests, in the light of the legislature's aim of preventing ethical standards from being circumvented.

Secondly, the Court observes that the successive revisions of the Bioethics Act have never led to a distinction being made on the basis of whether the MAR requests related to posthumous insemination or posthumous transfer of embryos. The refusal to make a distinction between the two situations demonstrates the sensitive and complex nature of the issues raised by the question of whether to allow posthumous MAR. The Conseil d'État has also specified that a review of the compatibility of the contested provisions and their application with Article 8 would be no different in the event of a dispute concerning embryos. For its part, the Court reiterates its finding that an embryo does not have independent rights or interests. In those circumstances, it considers that, in prohibiting the posthumous transfer of embryos, the legislature had not overstepped its discretion ("margin of appreciation").

Thirdly, the Court points out that the Conseil d'État has carried out its review in accordance with the methodology laid down by it in its decision in *Gonzalez Gomez*. It has held that in making the contested requests, the applicants' sole aim has been to circumvent French law, and that they have not put forward any particular arguments that would have justified the law not being applied in their cases. It has noted that they have no links with Spain and that the mere fact that the husband has consented to the procedure or that an embryo exists is not sufficient to find that there has been an excessive interference with their right to respect for their wishes. The Court considers that, in the circumstances of the present cases, there is no reason to depart from the findings of the domestic court.

The Court concludes that the domestic authorities have struck a fair balance between the competing interests at stake and that the respondent State has acted within its discretion. There has therefore been no violation of Article 8 of the Convention. Nevertheless, the Court acknowledges 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. The Court reiterates that, while the States enjoy a wide discretion in the bioethical sphere, the legislative framework put in place by them has to be coherent.

For these reasons, the Court holds, unanimously, that there has been no violation of Article 8 of the Convention.

Concurring opinions of Judge Ravarani and of Judge Elósegui.

ECHR 2024/4 *Case of Miranda Magro v. Portugal, 9 January 2024, no. 30138/21* (*Fourth Section*)

The Facts

The applicant, born in 1975, was diagnosed with paranoid schizophrenia in 2002. In September 2019 he was found guilty of, but not criminally responsible for, criminal damage, making threats and sexual harassment. The Criminal Court ordered his preventative detention for a maximum of three years in a psychiatric facility. However it suspended that order on the condition that he undergo the necessary psychiatric treatment at a hospital in Évora. As the applicant had missed some appointments or had not seen a specialist when at the appointments, and further serious criminal allegations had been made against him, the authorities concluded that he was in a vulnerable situation. As a result, in February 2021 the Criminal Court concluded that he had broken the terms of the suspension of his preventative detention, and ordered his confinement. In April of that year owing to a shortage of space at a hospital in Lisbon, he was placed in the psychiatric unit of a prison hospital to await admission outside the prison system.

On an unspecified date the applicant's brother lodged a habeas corpus application with the Supreme Court of Justice, claiming that his brother was being unlawfully detained at the prison hospital. That was dismissed, but the Supreme Court did note the temporary nature of his detention in the prison hospital and that he should be urgently transferred to a healthcare facility outside of the prison system.

On 18 October 2021, the applicant was transferred to a mental-health facility in Coimbra.

The Law

Alleged Violation of Article 3 of the Convention

The applicant complained of a lack of adequate medical treatment during his detention from 14 April until 18 October 2021 in the psychiatric unit of the prison hospital. This, combined with the inappropriate conditions of detention, had in his opinion amounted to a breach of Article 3 of the Convention, which forbids inhuman or degrading treatment.

When examining Article 3 complaints, the Court must take account of the cumulative effects of the conditions of detention and any inadequacy of the medical treatment. In its analysis, the Court draws on the findings of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) in its reports of 13 November 2020, as well as the findings of the reports of the Portuguese Ombudsman in her role as National Preventive Mechanism (NPM) of 2019 and 2020 and other relevant UN human rights monitoring bodies. Those reports have identified mental health-related issues as one of the main challenges facing the prison system in Portugal.

The reports shed light on several general problems associated with detention conditions and healthcare provision in prisons for detainees with mental illnesses, who in principle should be placed in suitable facilities for psychiatric treatment but are not because of a lack of spaces, as was the case with the applicant. For instance, with particular reference to the situation in the psychiatric unit of the prison hospital in question, the NPM pointed out that accommodation was inadequate and that there was a lack of staff and of clinical adequacy, especially in view of the principle of individualised treatment required in such situations In the CPT's view, patients in that situation did not have an adequate therapeutic environment, which should include an increased variety and number of organised activities being offered daily and the provision of adequate facilities for occupational and recreational activities.

The Court notes the concerns expressed in the annual report for 2021 of the Portuguese General Directorate for Reintegration and Prison Services (DGRSP), according to which the psychiatric unit of the prison hospital in question was intended for the temporary detention of regular inmates with mental health problems. Nonetheless, owing to the shortage of spaces in the regular mental health institutions, in practice it has been housing on a permanent basis mentally ill persons subject to preventive detention who were in need of psychiatric treatment. This issue is also addressed in the NMP report of 2019, which notes that this situation creates great difficulties for the prison system, making it difficult to respond appropriately to the psychiatric and therapeutic needs of people with psychiatric disorders who are imposed a preventive detention.

In this connection, the Court observes that the Government did not provide any evidence, such as medical reports or a copy of the applicant's individual therapeutic plan, attesting that he had received individualised, continuous and specialised care and follow-up treatment, and that appropriate therapy and medication had been prescribed and provided to him. The Court notes that it has not been shown that the administration of drugs with long-lasting

effects was complemented by the implementation of a comprehensive treatment strategy.

Alleged Violation of Article 5 § 1 (e) of the Convention

The applicant submitted that his detention in the psychiatric ward of a regular prison had not been lawful since he had not received the level of treatment and therapeutic care required by his mental health. He argued that he should have been detained in an appropriate psychiatric institution in the healthcare system. The Court considers that the applicant's complaint should be examined from the standpoint of Article 5 § 1 (e) of the Convention, which requires a procedure described by law for the lawful detention of persons of unsound mind.

The Court finds that the applicant's detention was a measure decided in accordance with a procedure prescribed by law and was therefore covered by Article 5 § 1 (e) of the Convention. In that connection, the Court notes that the conditions in which a person suffering from a mental health disorder receives treatment are also relevant in assessing the lawfulness of his or her detention within the meaning of Article 5 of the Convention. In order to determine whether the detention of the applicant as a person of unsound mind has been lawful in the present case, the Court, taking into account its findings under Article 3, will assess the appropriateness of the institution in which he was detained, including whether an individualised treatment plan was put in place. Such a plan should have taken account of the specific needs of his mental health and have been aimed specifically, in so far as possible, at curing or alleviating his condition, including, where appropriate, bringing about a reduction in or control over the level of danger posed, with a view to preparing him for possible future reintegration into society.

The Court notes that between 14 April and 18 October 2021, the applicant, who was found to be not criminally responsible, was detained in the psychiatric unit of the prison hospital; the prison hospital is primarily aimed at serving the ordinary prison community suffering from mental illness and is not part of the health system. The Court accepts that the mere fact that the applicant was not placed in an appropriate facility does not, per se, render his detention unlawful. However, the Court reiterates that keeping detainees with mental illnesses in the psychiatric ward of ordinary prisons pending their placement in a proper mental health establishment, without the provision of sufficient and appropriate care, as appears to have been the case with the applicant, is not compatible with the protection ensured by the Convention for such individuals.

The Court is not convinced that the applicant was offered appropriate treatment or that the therapeutic environment he was placed in was suitable for his condition. In this connection, the Court reiterates that the level of care provided must go beyond basic care. Mere access to health professionals, consultations and the provision of medication cannot suffice for treatment to be considered appropriate and thus satisfactory under Article 5 of the Convention.

The Court considers that the applicant's deprivation of liberty in the psychiatric unit of the Caxias Prison Hospital was not lawful and violated the requirements of Article 5 § 1 (e) of the Convention.

For these reasons, the Court holds, unanimously, that there has been a violation of Article 3 and Article 5 § 1 of the Convention.

ECHR 2024/5 *O.G. and others against Greece, 23 January 2024, no. 71555/12 and 48256/13* (*Third Section*)

This judgment is available only in French.

The Facts

The applicants are Greek nationals who were born between 1976 and 1986. Most applicants were prostitutes who had been diagnosed as HIV-positive; one applicant was the sister of a prostitute. In the context of a police operation in the centre of Athens, the prostitutes were arrested by the police on different dates in 2012. They had to undergo an identity check, medical screening for sexually transmitted diseases and blood tests which confirmed that they were HIV-positive. Charges were brought against them for intentionally attempting to inflict serious bodily harm, together with the offence of inflicting simple harm.

The prosecutor subsequently ordered, on the basis of Law no. 2472/1997, that their names and photographs be made public, together with the reasons why criminal proceedings had been brought against them, and a reference to their HIV-positive status. The prosecutor's order was downloaded to the police website and the dissemination of their personal data received extensive media coverage for several days, especially on television.

Following these events, the applicant whose sister was a prostitute and had been diagnosed with HIV was alerted – by an acquaintance – that her name and photograph had been broadcast on the main evening television news programme instead of those of her sister.

The Law

Alleged Violation of Article 8 of the Convention Concerning the Taking of a Blood Sample Without the Prior Consent of the Persons Concerned

The applicants complained that their consent had not been obtained prior to the blood test to which they had been required to submit. The Court considers that the questions raised by the present case must be examined from the point of view of Article 8 of the Convention, which protects the right to private and family life.

The Court considers that the blood test in question amounted to an interference with the private life of the applicants. The Government indicates that the intervention in question had been based on a combination of provisions. The Court notes that all of the legal provisions referred to by the Government concern the obligation for individuals engaged in prostitution, with or without authorisation, to submit to screening tests for certain diseases, including HIV/Aids.

However, none of these provisions indicate the procedure to be followed, nor any reference to screening that was to be carried out by police or judicial authorities, with or without the consent of the individuals concerned. In addition, the provisions of the Code of Criminal Procedure required a prosecutor's order before the investigating judge or police officers could carry out investigative measures, the only exception being where there existed an imminent danger, an argument that the Government has never relied on and which, in any event, has not been the case here. Even supposing that the measure has been taken with a view to obtaining evidence of the applicants' involvement in an offence in the context of a preliminary investigation, no order authorising the imposition of blood tests had been issued to the police or to doctors from the KEELPNO (a team of doctors assigned to the disease control and prevention centre).

Accordingly, not even a reference to the relevant legal provisions has preceded the contested acts. Furthermore, no specific procedure has been followed with regard to the medical acts in question, which had been carried out in police premises. Thus, none of the provisions referred to by the Government can justify a medical intervention by the police officers or by the KEELPNO doctors such as that which has been carried out on the applicants.

For this reason, the Court considers that this interference had not been "in accordance with the law" within the meaning of Article 8 of the Convention, given that the provisions of domestic law in question ought to have been

foreseeable as to their effects for the applicants. It follows that there has been a violation of Article 8 of the Convention.

Alleged Violation of Article 8 of the Convention Concerning the Publications of the Applicants' Personal Data

The Court notes that the publication of the applicants' data has amounted to an interference with their right to respect for their private life. The legal basis for this interference has been Law no. 2472/1997, and the aim has been "protection of the rights and freedoms of others". However, the publication has not been "necessary in a democratic society".

The Court notes that the prosecutor has not examined in his order whether other measures, capable of ensuring a lesser degree of exposure for the applicants, could have been taken in the present case. He has merely ordered the publication of the data in question, without examining the particular situation of each of the applicants or assessing the potential consequences for them of such dissemination. Nor has he examined whether a general announcement, restricted to the region in which the events have occurred and referring merely to the arrest of prostitutes who are HIV positive, could have sufficed to achieve the aim pursued. Although the domestic authorities were seeking to protect public health, and more specifically the health of individuals who had had sexual relations with the applicants at any point, there is nothing to indicate that the above measure would not have achieved the aim sought, while having less significant repercussions for the applicants' private lives.

Moreover, the applicants have not had a legal possibility to be heard by the prosecutor before he ruled on the disclosure of their date, nor could they, once the order had been issued, lodge an appeal in order to have it re-examined by the prosecutor attached to the appellate court. This form of appeal has not been introduced in the domestic legislation until after the events which have given rise to the present applications.

Those considerations are particularly relevant here, in that the information disseminated concerned the applicants' HIV-positive status, disclosure of which is likely to dramatically affect their private and family life, as well as social and employment situation, since its nature is such as to expose them to opprobrium and the risk of ostracism.

Accordingly, the interference with the right of (some of) the applicants to respect for their private life has not been sufficiently justified and has been disproportionate to the legitimate aims pursued. It follows that there has been a violation of Article 8 of the Convention.

For these reasons, the Court holds, *inter alia*, that (in respect of some of the applicants) there has been a violation of Article 8 of the Convention.

Joint partly dissenting opinion of Judges Vilanova, Grozev and Ktistakis.

ECHR 2024/6 *Diaconeasa against Romania, 20 February 2024, no. 53162/21* (*Fourth Section*)

The Facts

The applicant had a stroke in 2013 which left her unable to move, talk or take proper care of her basic needs. In 2015 and again on 9 November 2016 the Commission for the Protection of Adults with Disabilities (the Commission) issued a certificate, valid for one year, stating that the applicant suffered from a severe disability necessitating a personal assistant.

On 3 October 2017 the Commission undertook a "complex evaluation" of the applicant's capacities, as required by law, and filled in a one-page form with the conclusions of its social, medical and psychological assessment. It noted that the applicant received help from her two daughters and recommended that they continue their support.

On 22 November 2017 the Commission issued a new certificate, valid for two years, whereby the applicant was assessed as having a severe disability *not* necessitating a personal assistant.

The Court of Appeal upheld this decision and observed that the applicant could move around with the help of a cane or walking frame and that she only needed partial assistance for her daily home activities. It therefore concluded that the applicant had not completely lost the capacity to take care of herself and perform her daily tasks and did not need permanent help.

The Law

The applicant complained that the authorities' refusal to provide her with a personal assistant had disproportionately affected her right to respect for her private life, as it had forced her into isolation and had deprived her of her autonomy.

The Court is prepared to approach the case as one involving an interference with the applicant's right to respect for her private life. It should be ascertained

whether the decision to withdraw the benefit of a personal assistant was "necessary in a democratic society" within the meaning of Article 8 § 2 of the Convention and in particular whether the State, within its margin of appreciation, struck a fair balance between the applicant's interest in maintaining the benefit of a personal assistant and the relevant interests of the community.

In this connection, the Court notes that the Disability Act calls for the protection of people with disabilities in the light of the guiding principles enshrined in that Act, including freedom of choice, social inclusion and respect for the specific needs of the individuals concerned. The level of protection afforded is based on a complex and personalised evaluation establishing an individual's level of disability. That assessment must take into account not only medical data but also other indicators of the individual's degree of autonomy (or lack thereof), assessed in the light of his or her living conditions.

Moreover, the Convention on the Rights of Persons with Disabilities (CRPD), to which the respondent State is a party, recognises people with disabilities as full subjects of rights and as rights holders. The CRPD encourages respect for dignity, individual autonomy and independence.

The principles reflected in Articles 19, 20 and 28 of the CRPD are of particular relevance to the present case. The respondent State has recognised the equal rights of all persons with disabilities and their right to an adequate standard of living and social protection, and has committed itself to take effective and appropriate measures to help persons with disabilities to live independently and be included in the community and to ensure their personal mobility.

On the basis of the domestic requirements, medical professionals and social services assessed that the applicant's situation had not improved since 2016 and that she needed help with the most basic tasks, such as personal hygiene, dressing herself, using the toilet, cleaning, cooking, walking, shopping, using means of transport and managing money.

The Court of Appeal noted that the applicant's medical condition only warranted the classification "severe" for her disability and that she was able to move around with help and only needed partial assistance in her daily activities. However, that court does not appear to have engaged with the applicant's predicament, and gave no consideration in reaching its decisions to the medical, social and neurological assessments that consistently indicated the applicant's need for assistance. The applicant's argument, supported by evidence, to the effect that her medical condition had not improved since 2016 was not addressed by the Court of Appeal either.

Moreover, when finding that the applicant needed partial assistance, neither the Commission nor the Court of Appeal explored alternative practical arrangements to ensure respect for her dignity and the effective enjoyment of

her right to autonomy. Admittedly, the Commission recommended that the applicant should continue to receive support from her family, and the social enquiry reports noted that she received such support. However, neither the Commission nor the Court of Appeal assessed the quality and dependability of that support. In the absence of a thorough domestic assessment, the Court cannot accept that support spontaneously given by family members could replace adequate disability benefits, as the Government seem to suggest.

Bearing in mind what was at stake for the applicant, as well as her overall vulnerability – which required enhanced protection from the authorities –, the Court is not convinced that in their decisions, the Commission and the Court of Appeal struck a fair balance between the competing public and private interests at stake as required by Article 8.

For these reasons, the Court holds, unanimously, that there has been a violation of Article 8 of the Convention.

Notes

These summaries are based on the press release and the provisional text of the judgements of the European Court of Human Rights. These judgments are still subject to editorial revision before their reproduction in *Reports of Judgments and Decisions*. For the full provisional text, see http://www.echr.coe.int.

Joseph Dute | ORCID: 0000-0003-1536-1725
Professor Emeritus of Health Law, Faculty of Law, Radboud University, Nijmegen, The Netherlands
Corresponding author, e-mail: jos.dute@ru.nl

Tom Goffin | ORCID: 0000-0002-3525-1446
Professor of Health Law, Faculty of Medicine and Health Sciences, University of Ghent, Ghent, Belgium
tom.goffin@ugent.be