

Press release issued by the Registrar

GRAND CHAMBER JUDGMENTS
DRAON v. FRANCE and MAURICE v. FRANCE

The European Court of Human Rights has today delivered at a public hearing its Grand Chamber judgments¹ in the cases of *Draon v. France* (application no. 1513/03) and *Maurice v. France* (no. 11810/03).

In these two cases the Court held unanimously that there had been:

- a **violation of Article 1 of Protocol No. 1** (protection of property) to the European Convention on Human Rights;
- **no violation of Article 13** (right to an effective remedy);
- **no violation of Article 8** (right to respect for private and family life), supposing that this provision was applicable.

The Court considered that the question of Article 41 (just satisfaction) was not yet ready for decision in respect of pecuniary and non-pecuniary damage, and accordingly reserved it in its entirety. It awarded Mr and Mrs *Draon* 15,244 euros (EUR) and Mr and Mrs *Maurice* EUR 21,400 for costs and expenses. (The judgments are available in French and English.)

1. Principal facts

The applicants are French nationals: Christine and Lionel Draon, born in 1962 and 1961 respectively and living in Rosny-sous-bois (France), and Sylvia and Didier Maurice, born in 1965 and 1962 respectively and living in Boulogny (France). Mr and Mrs Maurice also acted on behalf of their two daughters, aged 15 and eight.

Mr and Mrs Draon and Mr and Mrs Maurice are the parents of children with severe congenital disabilities which, due to medical errors, were not discovered during prenatal examinations. They brought proceedings against the hospital authorities concerned. However, the Law of 4 March 2002, better known as the “Kouchner Law” or “anti-Perruche Law”² – which applied to pending proceedings – came into force while their actions were pending. They were therefore awarded compensation only for non-pecuniary damage and disruption to their lives, and not for the special burdens arising from their child’s disability.

New provisions have since been introduced, by the Law of 11 February 2005, to reform the system for compensating disability in France. To date, that law has not yet entered into force.

¹ Grand Chamber judgments are final (Article 44 of the Convention).

² The Law of 4 March 2002 on patients’ rights and the quality of the health service, establishes new rules for compensation for losses sustained by the parents of children born with a disability which, due to an error, was not discovered during pregnancy. The rules preclude, among other things, claims against the doctor or hospital concerned for compensation for special burdens arising throughout the child’s life as a result of its disability, whereas such claims could be made under the previous rules.

Draon v. France

When five months pregnant with their first child, Mrs Draon had an ultrasound scan which disclosed an anomaly in the development of the foetus. An amniocentesis was performed in August 1996 at the Saint-Antoine Hospital, for which the Paris Health Authority (*Assistance Publique-Hôpitaux de Paris – AP-HP*) is responsible. No foetal abnormality was detected. However, Mr and Mrs Draon's child, who was born in December 1996, very soon presented serious cerebral malformations, a major disability and total, permanent invalidity requiring full-time specialist care. AP-HP admitted that there had been an error of diagnosis and that the chromosomal abnormality could have been traced when the amniocentesis was carried out.

The applicants issued proceedings in the administrative courts against AP-HP. The urgent-applications judge made them an interim award of approximately EUR 155,500 in total. While their case was being examined on the merits, the Law 4 March 2002, which had recently come into force, was applied to their case.

Relying on that Law and on an opinion given by the *Conseil d'Etat* on 6 December 2002, the Paris Administrative Court ruled on 2 September 2003 that AP-HP had been grossly negligent and had deprived the applicants of the possibility of seeking a voluntary termination of pregnancy on therapeutic grounds. It ruled that they were therefore entitled to compensation. It dismissed the part of the applicants' claims relating to the special burdens arising from the child's disability throughout his life, and awarded them EUR 180,000 for non-pecuniary damage and disruption to their lives. An appeal by Mr and Mrs Draon against that judgment is currently pending before Paris Administrative Court of Appeal.

Maurice v. France

In 1990 Mr and Mrs Maurice's first child was born with infantile spinal amyotrophy, a genetic disease caused by muscular atrophy. Two years later, Mrs Maurice decided to terminate a second pregnancy on learning that there was a risk that the child she was carrying might be suffering from the same illness.

In 1997 Mrs Maurice became pregnant for a third time and sought a prenatal diagnosis, which was performed by an AP-HP laboratory. The tests did not reveal any abnormalities. The child was born in September 1997 and it became apparent over the following months that she was suffering from the same genetic illness. A report by a medical expert found that there had been a diagnostic error, Mr and Mrs Maurice's results having been mixed up with those of another family.

The applicants issued proceedings in the administrative courts against AP-HP. The urgent-applications judge made them an interim award of EUR 152,499, which was reduced on appeal to EUR 15,245 under the Law of 4 March 2002, that had come into force in the meantime. In December 2002 the *Conseil d'Etat* set the interim award at EUR 50,000.

On 25 November 2003 Paris Administrative Court ordered AP-HP to pay Mr and Mrs Maurice EUR 224,500 to cover non-pecuniary damage and the disruption to their lives, under the Law of 4 March 2002. It dismissed the applicants' claims relating to the special burdens arising from the child's disability throughout her life. An appeal by the applicants is currently pending before Paris Administrative Court of Appeal. The applicants also brought an action against the State arguing that it had engaged its responsibility by passing the Law of

4 March 2002. The action was dismissed at first instance and an appeal is currently pending before Paris Administrative Court of Appeal.

2. Procedure and composition of the Court

The applications were lodged with the European Court of Human Rights on 2 January and 28 February 2003 respectively. They were declared admissible on 6 July 2004.

On 19 October 2004 the Chamber to which the two cases had been allocated relinquished jurisdiction in favour of the Grand Chamber, in accordance with Article 30¹ of the Convention. A Grand Chamber hearing was held at the Human Rights Building in Strasbourg on 23 March 2005.

Judgment was given by the Grand Chamber of 17 judges, composed as follows:

Luzius **Wildhaber** (Swiss), *President*,
Christos **Rozakis** (Greek),
Jean-Paul **Costa** (French),
Nicolas **Bratza** (British),
Giovanni **Bonello** (Maltese),
Lucius **Caflich** (Swiss) ²,
Loukis **Loucaides** (Cypriot)
Corneliu **Bîrsan** (Romanian),
Peer **Lorenzen** (Danish),
Karel **Jungwiert** (Czech),
Volodymyr **Butkevych** (Ukrainian),
András **Baka** (Hungarian),
Mindia **Ugrekhelidze** (Georgian),
Vladimiro **Zagrebelsky** (Italian),
Khanlar **Hajiyev** (Azerbaijani),
Renate **Jaeger** (German),
Danute **Jočienė** (Lithuanian), *judges*,

and also Lawrence Early, *Deputy Grand Chamber Registrar*.

3. Summary of the judgments³

Complaints

The applicants alleged that the Law of 4 March 2002 had infringed their right to the peaceful enjoyment of their possessions and amounted to a breach of Article 1 of Protocol No. 1.

¹ Where a case pending before a Chamber raises a serious question affecting the interpretation of the Convention or the protocols thereto, or where the resolution of a question before the Chamber might have a result inconsistent with a judgment previously delivered by the Court, the Chamber may, at any time before it has rendered its judgment, relinquish jurisdiction in favour of the Grand Chamber, unless one of the parties to the case objects.

² Judge elected in respect of Liechtenstein.

³ This summary by the Registry does not bind the Court.

They also complained that that law had created an unjustified inequality of treatment between the parents of children whose disabilities were not detected before birth on account of medical negligence or the direct act or omission of a third party, and the parents of children whose disability was not detected before birth on account of some other form of negligence. They relied on Article 14 (prohibition of discrimination) of the Convention.

Relying also on Article 6 (right to a fair hearing), the applicants alleged that the immediate applicability of the Law of 4 March 2002 to pending proceedings, including their case, had infringed their right to a fair trial. Relying on Article 13 (right to an effective remedy), they further alleged that the immediate applicability of that Law to pending proceedings had deprived them of an effective remedy, since they could no longer obtain compensation, from the person responsible, for the special burdens arising from their child's disability.

Lastly, the applicants maintained that the legal rules introduced by the Law of 4 March 2002 constituted, among other things, arbitrary interference by the State in their private and family life, as guaranteed by Article 8 in that, by depriving them of part of the compensation to which they would have been entitled before the Law entered into force, it prevented them from providing for their children's needs.

Decision of the Court

Article 1 of Protocol No. 1

The Court noted that in the case of *Draon* the French Government acknowledged that the applicants could legitimately have expected to obtain compensation for their loss, including "special burdens" since AP-HP had admitted liability towards the applicants prior to the enactment of the Law of 4 March 2002. The Government accordingly accepted that there had been interference with the right to the peaceful enjoyment of a "possession" within the meaning of Article 1 of Protocol No. 1.

In the case of *Maurice*, however, the Government submitted that AP-HP's liability had not been established because, even if the results had not been switched, the prenatal diagnosis communicated to the applicants would have been uncertain on account of the presence of maternal blood in the sample taken. Accordingly, the applicants, in the Government's submission, were not entitled to automatic compensation and could not therefore plead a "legitimate expectation" of having their claim satisfied.

The Court considered, however, that – as the French courts had unambiguously found – the existence of a direct causal link between the negligence by AP-HP and the prejudice sustained by the applicants was established. Before entry into force of the Law of March 2002 the applicants had had a claim which they could legitimately have expected to be realised, and therefore a "possession" within the meaning of Article 1 of Protocol No. 1.

Whether there was interference with the right to peaceful enjoyment of a "possession"

The Court noted that the Law of 4 March 2002 had deprived the applicants of the possibility of obtaining compensation for "special burdens" arising from their child's disability whereas, as early as March 1999 in the case of Mr and Mrs *Draon* and December 2001 in that of Mr and Mrs *Maurice*, the applicants had brought proceedings in the administrative courts and

been granted substantial interim awards given that AP-HP's liability towards them was not seriously open to challenge.

The Law complained of had therefore entailed interference with the exercise of the rights to compensation which could have been asserted under the domestic law applicable until then, and consequently of the applicants' right to peaceful enjoyment of their possessions.

Whether the interference was justified

The Court accepted that the Law of 4 March 2002 was "in the public interest", the French Parliament thereby putting an end to a line of case-law of which it disapproved and changing the legal rules governing medical liability.

With regard to the proportionality of that interference, the Court observed that the Law of 4 March 2002 had applied a new liability rule to legal proceedings which were still pending at that time, putting an end to the case-law applicable when the applicants' child's disability was detected. The retrospective applicability of legislation to pending proceedings did not in itself upset the requisite fair balance, but that Law had abolished purely and simply, with retrospective effect, one of the essential heads of damage, relating to very large sums of money, in respect of which the parents of children whose disabilities had not been detected before birth, like the applicants, could have claimed compensation from the hospital held to be liable. The French legislature had thus deprived the applicants of an existing "asset" which they had previously possessed, namely an established claim to recovery of damages which they could legitimately have expected to be determined in accordance with the decided case-law of the *Conseil d'Etat*.

The Court noted that the amount of compensation payable to the applicants under the Law of 4 March 2002 was considerably less than the sum payable under the previous liability rules and was clearly inadequate, as the Government and the legislature themselves admitted, since those benefits had been extended recently by new provisions introduced by a Law of 11 February 2005.

The very limited nature of the existing compensation and the uncertainty surrounding the application of the 2005 Law – regarding the date of its entry into force and the amounts payable to the applicants – ruled out the conclusion that this important head of damage could be regarded as having been reasonably compensated in the period since the enactment of the Law of 4 March 2002.

As regards the compensation awarded to the applicants to date, the Court noted that it covered non-pecuniary damage and disruption to the applicants' lives, but not special burdens arising from the children's disability throughout their lives. The amounts awarded were very much lower than the applicants could legitimately have expected and were not definitive since an appeal was pending. The compensation thus awarded to the applicants could not therefore compensate for the claims lost.

Lastly, the Court considered that the grounds relating to ethical considerations, equitable treatment and the proper organisation of the health service relied on by the Government and by the *Conseil d'Etat* in its opinion did not legitimise, in the applicant's case, retrospective action whose result was to deprive the applicants, without sufficient compensation, of a substantial portion of the damages they had claimed.

Such a radical interference with the applicants' rights had upset the fair balance to be maintained between the demands of the general interest on the one hand and protection of the right to peaceful enjoyment of possessions on the other. In so far as it concerned proceedings pending on 7 March 2002, the date of its entry into force, section 1 of the Law of 4 March 2002 therefore breached Article 1 of Protocol No. 1.

Article 14

Regard being had to its finding of a violation concerning the applicants' right to the peaceful enjoyment of their possessions, the Court held unanimously that it was not necessary to examine the complaint under Article 14 of the Convention taken together with Article 1 of Protocol No. 1.

Article 6 § 1

The Court held, by twelve votes to five, that it was not necessary to examine separately the complaint under Article 6 § 1.

Article 13

After reiterating that the Convention did not go so far as to guarantee a remedy allowing a Contracting State's laws as such to be challenged before a national authority, the Court held that there had not been a violation of Article 13.

Article 8 and Article 14

The Court did not consider it necessary to determine the issue whether Article 8 was applicable in the present case since, even supposing that it was, it considered that there had not been a breach of that provision.

The Court noted that, following the stormy debate caused by the *Perruche* judgment delivered by the Court of Cassation in November 2000, the French Parliament had decided to modify the existing system of medical liability. The Law of 4 March 2002 had been the result of comprehensive debate in Parliament, in the course of which account had been taken of legal, ethical and social considerations, and concerns relating to the proper organisation of the health service and the need for fair treatment for all disabled people.

In deciding that the costs of caring for disabled children should be borne by reliance on national solidarity, the French legislature had taken the view that it was better to deal with the matter through the legislation laying down the conditions for obtaining compensation for disability than to leave to the courts the task of ruling on actions under the ordinary law of liability. It was not for the Court to take the place of the national authorities in assessing the advisability of such a system or in determining what might be the best policy in this difficult social sphere. Accordingly, the Court held that there had been no violation of Article 8.

As regards the complaint under Article 14, taken together with Article 8, it fell outside the scope of the case as submitted to the Grand Chamber because it had been raised for the first time before it at the hearing, that is, after adoption of the admissibility decisions.

Judges Rozakis, Bratza, Bonello, Loucaides and Jočienė expressed a joint partly dissenting opinion, and Judge Bonello a separate opinion. Both these opinions are annexed to the judgments.

The Court's judgments are accessible on its Internet site (<http://www.echr.coe.int>).

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The European Court of Human Rights was set up in Strasbourg by the Council of Europe Member States in 1959 to deal with alleged violations of the 1950 European Convention on Human Rights. Since 1 November 1998 it has sat as a full-time Court composed of an equal number of judges to that of the States party to the Convention. The Court examines the admissibility and merits of applications submitted to it. It sits in Chambers of 7 judges or, in exceptional cases, as a Grand Chamber of 17 judges. The Committee of Ministers of the Council of Europe supervises the execution of the Court's judgments. More detailed information about the Court and its activities can be found on its Internet site.