



Request for medically assisted reproduction submitted by a same-sex couple: application inadmissible

In its decision in the case of **Charron and Merle-Montet v. France** (application no. 22612/15) the European Court of Human Rights has unanimously declared the application inadmissible. The decision is final.

The application concerned a female married couple who had applied for medically assisted reproduction by means of artificial insemination. The application was rejected by Toulouse Hospital on the grounds that “the Bioethics Law currently in force in France did not authorise such medical provision for same-sex couples”.

Ms Charron and Ms Merle-Montet complained about the rejection of their application, relying on Article 8 (right to respect for private and family life) and Article 14 (prohibition of discrimination).

Noting the importance of the subsidiarity principle, the Court considered that because Ms Charron and Ms Merle-Montet had not appealed to the administrative courts to set aside Toulouse Hospital’s decision for abuse of authority, they had failed to exhaust domestic remedies.

Principal facts

The applicants are French nationals who were born in 1982 and 1986 respectively and live in Montauban (France). They have been married since 3 May 2014.

Wishing to have a child together, Ms Charron and Ms Merle-Montet decided to seek medically assisted reproduction. In December 2014 they submitted to Toulouse Hospital’s Centre for Medical Reproductive Assistance a request for information on the procedure for access to medically assisted reproduction in the form of artificial insemination or *in vitro* fertilisation.

On 15 December 2014 Dr F.L. replied that he could not accede to their request on the grounds that “the Bioethics Law currently in force in France did not authorise such medical provision for same-sex couples” (Article L. 2141-2 of the Public Health Code).

Complaints, procedure and composition of the Court

The application was lodged with the European Court of Human Rights on 7 May 2015.

Relying on Article 8 (right to respect for private and family life) and Article 14 (prohibition of discrimination), Ms Charron and Ms Merle-Montet complained that their request for medically assisted reproduction had been rejected on the grounds that French law did not authorise such medical provision for same-sex couples. They complained of a violation of their right to respect for their private and family life and of discrimination on the grounds of sexual orientation.

The decision was given by a Chamber of seven, composed as follows:

Angelika **Nußberger** (Germany), *President*,
Erik **Møse** (Norway),
André **Potocki** (France),
Síofra **O’Leary** (Ireland),
Mārtiņš **Mits** (Latvia),
Gabriele **Kucsko-Stadlmayer** (Austria),

Lado Chanturia (Georgia), *Judges*,

and also Claudia Westerdiek, *Section Registrar*.

Decision of the Court

The Court noted that Toulouse Hospital's decision of 15 December 2014 rejecting the applicants' request for access to medically assisted reproduction had been an individual administrative decision that could have been set aside on appeal for abuse of authority before the administrative courts. However, Ms Charron and Ms Merle-Montet had not used that remedy, considering that it would have been ineffective in view of the reasoning of Constitutional Council Decision No. 2013-669 DC of 17 May 2013. The main question was therefore whether the applicants could validly contend that the remedy in question was ineffective.

In that connection, the Court noted that Decision No. 2013-669 had involved the Constitutional Council considering a request on the constitutionality of the Law "allowing same-sex couples to marry" rather than of Article L. 2141-2 of the Public Health Code. Although the Constitutional Council's decision had touched on the question of the conformity with the constitutional principle of equality of the differentiation between homosexual couples and heterosexual couples resulting from Article L. 2141-2, and thus had addressed the issue of whether or not it was discriminatory, it had nonetheless only dealt with that issue indirectly because the application submitted to it had not related to that provision of the Public Health Code but to the Law allowing same-sex couples to marry. Nor had the Constitutional Court dealt, even indirectly, with the issue of the conformity of Article L. 2141-2 with the constitutional rights to a normal family life and to respect for private life. However, the application lodged with the Court had been based on the prohibition of discrimination laid down in Article 14 of the Convention and on the right to respect for private and family life as enshrined in Article 8.

Moreover, scrutiny of an individual measure's conformity with the Convention as conducted by the "ordinary courts" was different from scrutiny of a law's conformity with the Constitution as conducted by the Constitutional Council: a measure adopted pursuant to a law whose conformity with constitutional provisions protecting the fundamental rights had been established could be ruled incompatible with the same rights as safeguarded by the Convention on the grounds, for instance, of its disproportionate nature in the particular circumstances of a case.

In other words, even though the chances of the success of an application to set aside Toulouse Hospital's decision for abuse of authority based on Articles 8 and 14 of the Convention had possibly been reduced by the Constitutional Council's decision, it would not have been "obviously doomed to failure".

Furthermore, the Court reiterated that the obligation on exhaustion of domestic remedies was intended, *inter alia*, to enable member States to remedy the situation which was the subject of the application before having to answer for their acts before an international body. That principle was especially important in the case of complaints under Article 8 either alone or in conjunction with Article 14. Indeed, it was vital, where the Court was addressing the complex and delicate issue of the requisite balance to be struck between the competing rights and interests in implementing that provision, that that balancing exercise had previously been conducted by the domestic courts, since the latter were in principle best placed to do so. The domestic courts had not yet had to adjudicate applications against decisions to deny same-sex couples access to a medically assisted reproduction procedure on the basis of the provisions of Article L. 2141-2 of the Public Health Code.

In view of the importance of the subsidiarity principle, therefore, the Court held that since the applicants had failed to appeal to the administrative courts to set aside Toulouse Hospital's decision for abuse of authority, they had not exhausted all domestic remedies within the meaning of Article

35 § 1 of the Convention. The application was therefore rejected pursuant to Article 35 §§ 1 and 4 of the Convention.

The decision is available only in French.

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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.