



Prohibition on exporting gametes and embryos to a country which authorises posthumous insemination did not breach the right to respect for private life protected by Article 8 of the Convention

In today's Chamber judgment¹ 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

1. Under Articles 43 and 44 of the Convention, this Chamber judgment is not final. During the three-month period following its delivery, any party may request that the case be referred to the Grand Chamber of the Court. If such a request is made, a panel of five judges considers whether the case deserves further examination. In that event, the Grand Chamber will hear the case and deliver a final judgment. If the referral request is refused, the Chamber judgment will become final on that day. Once a judgment becomes final, it is transmitted to the Committee of Ministers of the Council of Europe for supervision of its execution. Further information about the execution process can be found here: www.coe.int/t/dghl/monitoring/execution.

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.

A legal summary of this case will be available in the Court's database HUDOC ([link](#)).

Principal facts

The first applicant, Ms Léa Baret (application no. 22296/20), is a French national who was born in 1992 and lives in Saint-Raphaël. The second applicant, Ms Laurene Caballero (application no. 37138/20), is a French national who was born in 1992 and lives in Langolen.

Application no. 22296/20

In 2016, after living together for eleven years, Ms Baret 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 the centre for reproductive biology at the *Centre d'étude et de conservation des œufs et sperme* (Centre for research and storage of eggs and sperm, the CECOS) at the Conception Hospital in Marseille.

In January 2019 Ms Baret 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 Ms Baret 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 Ms Baret applied to the CECOS for authorisation to export her deceased husband's sperm to a Spanish healthcare institution for the purpose of undergoing posthumous MAR. The CECOS replied that her request had to be submitted to the relevant Agency of Biomedicine for approval, and that, in the interim, it was suspending application of the provisions of the Public Health Code governing the disposal of stored gametes in the event of the donor's death. In January 2020 it 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 Ms Baret asked the urgent applications judge at the Marseille Administrative Court to order the Marseille University Hospital Trust (*Assistance publique Hôpitaux de Marseille – 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.

Ms Baret lodged an appeal against that decision, which was rejected on 28 February 2020 in an order upholding the findings of the lower court.

Application no. 37138/20

Ms Caballero 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 the Brest University Hospital in February 2018.

In January 2019 Ms Caballero's husband expressed the wish that, should he die, Ms Caballero 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, Ms Caballero took steps to undergo MAR with embryo transfer in Spain.

In August 2019 the Rennes University Hospital sent her a letter reminding her that, under French law, posthumous embryo transfer was not permitted.

In December 2019 Ms Caballero asked the urgent applications judge at the Rennes 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 in an order. Ms Caballero appealed against that decision to the *Conseil d'État*, which rejected it in an order of 24 January 2020.

Complaints, procedure and composition of the Court

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 by Article L. 2141-2 of the Public Health Code and the prohibition on exporting gametes or embryos for purposes prohibited by French law under Article L. 2141-11-1 of that Code, entailed a violation of their rights.

The applications were lodged with the European Court of Human Rights on 27 May 2020 and 14 August 2020.

Judgment was given by a Chamber of seven judges, composed as follows:

Georges Ravarani (Luxembourg), *President*,
Lado Chanturia (Georgia),
Carlo Ranzoni (Liechtenstein),
María Elósegui (Spain),
Mattias Guyomar (France),
Kateřina Šimáčková (the Czech Republic),
Mykola Gnatovskyy (Ukraine),

and also Victor Soloveytchik, *Section Registrar*.

Decision of the Court

Article 8

The Court saw 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 noted that posthumous conception had been prohibited in absolute terms under French law since 1994. Articles L. 2141-2, L. 2141-9 and L. 2141-11-1 of the Public Health Code prohibited posthumous insemination and the export of gametes or embryos to another country if they were to be used for purposes prohibited within the national territory.

The Court's task was to determine whether the domestic authorities had 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 pointed out firstly that the aim of the absolute nature of the prohibition on posthumous insemination was to safeguard general interests relating to moral or ethical considerations. This prohibition represented a political choice going back to the first Bioethics Act of 1994, which had been consistently repeated each time that the Act had been revised and, recently, in 2021, in the context of comprehensive legislative debates on the subject. It noted 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 reiterated that in matters of general policy, the role of the domestic policy-maker should be given special weight.

The Court then observed that it was clear from the applicable legislative provisions and the case-law of the *Conseil d'État* that the prohibition on exporting gametes or embryos was the corollary of the prohibition on posthumous insemination within the national territory. The prohibition on export was 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 was compatible as a matter of principle with the right to respect for private life, otherwise the absolute prohibition on posthumous insemination would be rendered meaningless.

On the one hand, and until the enactment of the revised version of the Act in 2021, the legislature had 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 arose 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 observed that the successive revisions of the Bioethics Act had 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 demonstrated the sensitive and complex nature of the issues raised by the question of whether to allow posthumous MAR. The *Conseil d'État* had 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 reiterated its finding that an embryo did not have independent rights or interests. In those circumstances, it considered that, in prohibiting the posthumous transfer of embryos, the legislature had not overstepped its discretion ("margin of appreciation").

Thirdly, the Court pointed out that the *Conseil d'État* had carried out its review in accordance with the methodology laid down by it in its decision in *Gonzalez Gomez* (CE Ass., 31 May 2016, no. 396848). It had held that in making the contested requests, the applicants' sole aim had been to circumvent French law, and that they had not put forward any particular arguments that would have justified the law not being applied in their cases. It had noted that they had no links with Spain and that the mere fact that the husband had consented to the procedure or that an embryo existed was not sufficient to find that there had been an excessive interference with their right to respect for their wishes. The Court considered that, in the circumstances of the present cases, there was no reason to depart from the findings of the domestic court.

The Court concluded that the domestic authorities had struck a fair balance between the competing interests at stake and that the respondent State had acted within its discretion. 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. The Court reiterated

that, while the States enjoyed a wide discretion in the bioethical sphere, the legislative framework put in place by them had to be coherent.

Separate opinions

Judges Ravarani and Elósegui each expressed a separate opinion. These opinions are annexed to the judgment.

The judgment 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.