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Decision no. 2012–249 QPC of 16 May 2012

Cryo–Save France [Collection of umbilical cord or placenta blood cells or umbilical cord or placenta cells]

On 20 March 2012, the Constitutional Council, in the conditions provided for by Article 61–1 of the Constitution, received an application for a priority preliminary ruling on the issue of constitutionality raised by the Conseil d'État (decision no. 346207 of 19 March 2012) on behalf of the company Cryo–Save France, raising the conformity of subparagraph IV of the fourth paragraph of Article L. 1241–1 of the Public Health Code with the rights and freedoms guaranteed by the Constitution.

THE CONSTITUTIONAL COUNCIL,

Having regard to the Constitution;

Having regard to Ordinance no. 58–1067 of 7 November 1958 as amended, concerning the basic law on the Constitutional Council;

Having regard to the Public Health Code;

Having regard to law no. 2011–814 of 7 July 2011 on bioethics;

Having regard to the Regulation of 4 February 2010 on the procedure applicable before the Constitutional Council with respect to applications for priority preliminary rulings on the issue of constitutionality;

Having regard to the observations filed by the applicant company by the SCP Roche and associates on 11 April 2012 and 25 April 2012;

Having regard to the observations of the Prime Minister, registered on 11 April 2012;

Having regard to the documents produced and appended to the case files;

Having heard Thomas Roche Esq. for the applicant company and Mr Xavier Pottier, appointed by the Prime Minister, at the public hearing on 10 May 2012;

Having heard the Rapporteur;

1. Considering that the fourth paragraph of Article L. 1241–1 of the Public Health Code provides: "The collection of haematopoietic cells of umbilical cord blood and placenta blood as well as cells from the umbilical cord and placenta may only be carried out to scientific or therapeutic ends with a view to anonymous donation free of charge, and provided that during her pregnancy the woman provided her written consent to the collection and use of these cells, following receipt of information on the purposes of such use. This consent may be revoked in any way and at any time until the collection has been completed. By way of derogation, the donation may be made to the newborn infant or to the brothers or sisters of this child in the event of certified therapeutic necessity which is duly substantiated upon collection";

2. Considering that, according to the applicant company, by depriving women giving birth of the right to collect umbilical cord or placenta blood cells or umbilical cord or placenta cells for further family usage, the legislature has encroached upon individual freedom; that these provisions, which prevent collection which may be useful for the health of family members, also violates the objective of constitutional standing of the protection of health; that finally, in depriving healthily born infants and unborn siblings of any possibility of benefiting from a transplant of umbilical cord or placenta blood cells, whereas this right is open to unhealthy siblings, these provisions breach the principle of equality;
3. Considering that the legislature is at liberty at any time, when ruling on the matters within its jurisdiction, to amend earlier legislation or to repeal and replace it, as the case may be, with other provisions provided that, when doing so, it does not encroach upon the legal guarantees of constitutional requirements;
4. Considering that individual freedom is proclaimed by Articles 1, 2 and 4 of the 1789 Declaration of the Rights of Man and the Citizen;
5. Considering that pursuant to Article 6, the law must be "the same for all, whether it protects or punishes"; that the principle of equality does neither prevent the legislator from settling different situations in different ways, nor does it depart from equality in the general interest, provided that in both cases the resulting difference in treatment is directly related to the subject matter of the law providing for the different treatment;
6. Considering that pursuant to the eleventh recital to the Constitution of 27 October 1946, the Nation "shall guarantee to all, notably to children, mothers (...) protection of their health";
7. Considering in the first place that the legislation enacted prior to the aforementioned Law of 7 July 2011 subjected the collection of umbilical cord or placenta blood cells or of umbilical cord or placenta cells to the regime applicable to the collection of surgical residues regulated under Article L. 1245-2 of the Public Health Code; that in enacting the contested provisions, the legislature considered the principle of the anonymous donation of these cells for no charge; that it intended to prevent the collection of umbilical cord or placenta blood cells or of umbilical cord or placenta cells with a view to their conservation by the individual for possible further usage, in particular within the family; that the choice of the legislature to render the collection of these cells conditional upon the prior issue of the written consent of the woman did not have either the object or the effect of granting rights over these cells; that it is not for the Constitutional Council, which does not dispose of a general power of appreciation and decision making of the same nature as that of Parliament, to impose its assessment in place of that of the legislature with regard to the conditions under which these cells may be collected and the manner in which they may be used; that accordingly, the objection alleging the violation of personal freedom must be rejected;
8. Considering secondly that in enacting the contested provisions, the legislature did not authorise the collection of umbilical cord or placenta blood cells or of umbilical cord or placenta cells intended for transplants within the family in the absence of any certified therapeutic necessity which is duly substantiated upon collection; that it considered that in the absence of such a requirement, transplants of these cells within the family do not have any certified therapeutic advantage compared to other transplants; that it is not for the Constitutional Council, which does not have a general power of appreciation and decision making of the same nature as that of Parliament, to call into question the provisions thus adopted by the legislature, having regard to the state of knowledge and the state of the art; that accordingly, the fact that it is impossible to collect umbilical cord or placenta blood cells or umbilical cord or placenta cells for the sole purposes of their conservation by the individual for possible further usage in particular within the family where it is not justified by any therapeutic necessity upon collection cannot be regarded as a violation of the principle of the protection of health as guaranteed under the 1946 Preamble;
9. Considering thirdly that the legislature has reserved the possibility to collect umbilical cord or placenta blood cells or umbilical cord or placenta cells for usage within the family solely to cases in which it is justified by certified therapeutic necessity which is known upon collection; that accordingly, the contested provisions do not subject to different



regulation persons who find themselves in an identical situation; that the principle of equality before the law has therefore not been violated;

10. Considering that the contested provisions are not contrary to any other right or freedom guaranteed by the Constitution;

HELD :

Article 1 .– The fourth paragraph of Article L. 1241–1 of the Public Health Code is constitutional.

Article 2 .– This decision shall be published in the *Journal Officiel* of the French Republic and notified in the conditions provided for under Article 23–11 of the Ordinance of 7 November 1958 referred to hereinabove.

Deliberated by the Constitutional Council in its session on 16 May 2012, sat on by: Mr Jean–Louis DEBRÉ, President, Mr Jacques BARROT, Mrs Claire BAZY MALAURIE, Mr Guy CANIVET, Mr Renaud DENOIX de SAINT MARC, Mrs Jacqueline de GUILLENCHMIDT, Mr Hubert HAENEL and Mr Pierre STEINMETZ.

Announced on 16 May 2012.