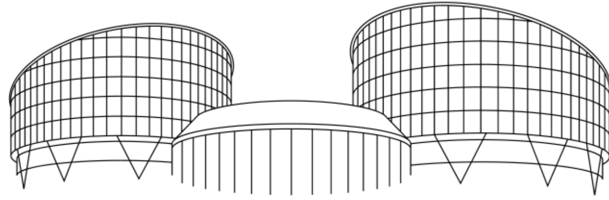

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

THIRD SECTION

CASE OF KNECHT v. ROMANIA

(Application no. 10048/10)

JUDGMENT

STRASBOURG

2 October 2012

FINAL

11/02/2013

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Knecht v. Romania,

The European Court of Human Rights (Third Section), sitting as a Chamber composed of:

Josep Casadevall, *President,*
Egbert Myjer,
Alvina Gyulumyan,
Ineta Ziemele,
Luis López Guerra,
Nona Tsotsoria,
Kristina Pardalos, *judges,*
and Santiago Quesada, *Section Registrar,*

Having deliberated in private on 11 September 2012,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 10048/10) against Romania lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a German and American national, Ms Daniela Knecht ("the applicant"), on 18 February 2010.

2. The applicant was represented by Ms Diana Elena Dragomir, a lawyer practising in Bucharest. The Romanian Government ("the Government") were represented by their Agent, Mrs I. Cambrea, from the Ministry of Foreign Affairs.

The German Government, to whom a copy of the application was transmitted under Rule 44 § 1 (a) of the Rules of Court, did not exercise their right to intervene in the proceedings.

3. The applicant alleged in particular a breach of her private and family life with regard to her inability to have a child by means of IVF using the embryos she had previously deposited in a private clinic, S., from where, having regard to criminal investigations launched with respect to S. Clinic, the embryos were seized by the state authorities and deposited at the Institute of Forensic Medicine, which was not authorised to function as a genetic bank.

4. On 22 February 2010, the President of the Chamber decided to indicate to the Government, under Rule 39 of the Rules of Court, that, without prejudice to any decision of the Court as to the merits of the case, it was desirable in the interests of the proper conduct of the proceedings that the Government take appropriate measures to ensure that the embryos were preserved until the Court had completed its examination of the case. On the

same day, the President decided that the application should be given priority treatment under Rule 41.

5. On 6 July 2010, the Chamber decided to give notice of the application to the Government. It also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1). The applicant requested the Chamber to hold a hearing. The Government objected to a hearing. The Chamber decided, pursuant to Rule 54 § 3, that no hearing was required.

6. As Mr Corneliu Bîrsan, the judge elected in respect of Romania, had withdrawn from the case (Rule 28 of the Rules of Court), the President of the Chamber appointed Mrs Kristina Pardalos to sit as *ad hoc* judge (Article 26 § 4 of the Convention and Rule 29 § 1 of the Rules of Court).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

7. The applicant was born in 1967. After numerous previous failed attempts, the applicant became the mother of a child, conceived as the result of an *in vitro* fertilisation (IVF) procedure with donated gametes. The procedure was performed in S. Medical Centre in Bucharest; and produced nineteen embryos, three of which were implanted on 8 June 2008.

The remaining sixteen embryos obtained on the same occasion were frozen until the applicant was considered fit by her physician to undergo another pregnancy. A protocol was concluded between the applicant and S., in which the applicant acknowledged that she had been informed that in 15-20% of cases, after thawing, the embryos proved not to be viable, and that if that were the case the embryo transfer would be impossible.

8. According to a document issued by the National Transplant Agency ("the NTA"), on 15 July 2009 the S. Medical Centre was authorised to function as a bank for genetic material. However, the circumstances in which that document was issued are currently under the scrutiny of the domestic criminal court, in view also of the fact that it was the Ministry of Public Health, and not the NTA, which had exclusive competence to give such authorisations.

9. On 24 July 2009, the Directorate for the Investigation of Organised Crime and Terrorism attached to the Prosecutor General's Office (DIICOT) closed the S. Medical Centre, seized all the genetic material found there and deposited it at the Mina Minovici Institute of Forensic Medicine (IFM). This decision was not contested before the courts.

10. On 25 August 2009, the applicant wrote to DIICOT in her capacity as "owner of the sixteen embryos", expressing concerns as to the state of her

frozen embryos and asking to be informed of the practical procedure to be followed in order to urgently retrieve her embryos.

11. On 7 September 2009, the applicant was informed by DIICOT that it was not aware of any technical means of identifying the embryos in question, given that an inventory was still being made of all the material seized and no document relating to the applicant's embryos had been identified.

In any event, in order to be able to retrieve her genetic material from the Institute, the applicant was advised to appoint a doctor specialising in embryology, who would then contact the IFM for that purpose.

12. In attempts to find an embryologist the applicant addressed her request to the Ministry of Health, the Embryologists' Association and the National Doctors' Association.

In its reply, the Ministry of Health gave the applicant a list of the medical institutions accredited as banks for genetic material, by virtue of ministerial Order no. 1225 of 1 July 2008; the S. Medical Centre and the IFM were not mentioned in the list. The Ministry also informed the applicant that it could not intervene in any way in the contractual relationship between her and S., assuming that such a contract existed and included specific provisions as to who could retrieve the embryos and under what circumstances. Referring to the letter of 7 September 2009 from DIICOT, the Ministry suggested that the applicant should contact S. and, on the basis of the contract she had concluded with the clinic, ask for support in identifying and retrieving her embryos.

The Embryologists' Association replied to the applicant on 12 October 2009, informing her that an embryo transfer could be performed only by a specialist in assisted reproduction, and that such transfers could not be carried out until the relevant embryos had been properly identified.

13. The applicant finally contacted two doctors from the P. Clinic in Sibiu (300 km from Bucharest). On 2 November 2009, in accordance with the legal requirements, the P. Clinic requested the authority of the NTA to perform the retrieval, but received no answer. The request was reiterated on 29 January 2010; on 1 February the NTA informed the P. Clinic that it could not grant the requested authority, since such authority could only be given in respect of a tissue and cell bank accredited by the NTA, which the IFM was not.

14. On 10 February 2010, DIICOT informed the applicant that the NTA's refusal was not binding on DIICOT; the IFM had been appointed as the legal custodian of the genetic material pending a criminal investigation. Once the investigation was terminated and the S. Clinic was indicted, the file was to be sent before the criminal courts on 24 February 2010. Consequently, an order was issued authorising the applicant to retrieve her embryos by 25 February 2010, since after that date the Institute for Forensic Medicine would cease to act as a deposit bank appointed by the

investigating authorities. The applicant was required to be accompanied by an embryologist and to provide a special container with liquid nitrogen for the transfer.

15. The applicant managed to obtain from a clinic in Austria a special container with liquid nitrogen of the kind required for such transfers and asked the clinic to carry out the transfer.

On 12 February 2010, the P. Clinic informed the applicant that the NTA had refused to consent to the transfer for the following reasons: the IFM had never been authorised by the NTA to store such materials and therefore there could be no guarantee as to the quality of the material stored there (against contamination, deterioration, and so on); moreover, the storage of such material in the Institute did not comply with the legal requirements (Order of the Minister of Public Health no. 1763/2007) concerning the traceability of the genetic material.

In view of the NTA's refusal, of the fact that the P. Clinic carried out its activities under the authority of the NTA, and in so far as it could not guarantee the quality and security of the genetic material, the clinic informed the applicant that it could not proceed with the retrieval.

16. On 19 February 2010 the applicant wrote again to DIICOT, asking it to issue an order allowing the IFM to continue to store her embryos until the NTA had consented to their retrieval. As justification of the need for such an urgent measure, the applicant pointed out that an inability to transfer the embryos would have serious repercussions on the right to life of her embryos and on her right to have a family.

On the same day, the applicant sent a similar letter to the NTA, asking it to re-evaluate the circumstances of her case and consequently to authorise the transfer of her embryos to the P. Clinic.

17. The NTA replied on 23 February 2010, informing the applicant as follows: the IFM had been appointed as custodian in complete disregard of the legal provisions of Directive 2004/23/EC and of Article 148 (4) of the Health Reform Act (Law no. 95/2006); the IFM had never been accredited, nor had it been given approval by the NTA to operate as a bank for genetic material; the S. Medical Centre had been accredited to operate as a bank of genetic material only on 15 July 2009, and not in June 2008, when the embryos had been frozen and stored; the Code of Criminal Procedure, invoked by DIICOT, did not provide any safeguards as to the security and safety of the embryos while they were stored at S. (for one year) and subsequently at the IFM (for six months).

The NTA also contended that it did not have any information regarding the way in which the embryos had been transported from S. to the IFM, and was thus unable to guarantee that the minimum sanitary conditions had been complied with.

The NTA could therefore not authorise the transfer of the embryos from the IFM to another clinic, either within Romania or internationally;

furthermore, according to the provisions of Article 19 (3) of Directive 2004/23/EC, “all tissue and cells that do not comply with [the legal] provisions shall be discarded.”

A. Proceedings before the Court under Rule 39

18. On 18 February 2010, the applicant requested the Court under Rule 39 of the Rules of Court to direct the Romanian authorities to allow her to retrieve her sixteen embryos stored at the Institute of Forensic Medicine.

19. On 22 February 2010, the President of the Chamber to which the case had been allocated decided, in the interests of the parties and the proper conduct of the proceedings before the Court, to indicate to the Government of Romania, under Rule 39 of the Rules of Court, that the embryos should not be destroyed after 25 February 2010, for the duration of the proceedings before the Court.

The President also decided to request the Government, under Rule 54 § 2 (a) of the Rules of Court, to submit information as to the legal status of the embryos after 25 February 2010 and on the domestic law and procedure which would allow the applicant to obtain a court transfer order quickly.

20. In reply, the Government informed the Court as follows.

21. In its letter of 26 February 2010, the IFM informed the Government that it was merely the authorised depository of a receptacle seized by DIICOT from S., and that its only obligation was to make sure that the receptacle was preserved at a temperature of -80 degrees Celsius. The IFM therefore could not dispose of the biological material stored in the receptacle in any way.

22. The Ministry of Public Health informed the Government on 8 March 2010 that they had asked the IFM to take all necessary measures to adequately preserve the applicant’s embryos. The Ministry also asked the NTA to share with the IFM all relevant information concerning the appropriate procedure for preserving the above-mentioned embryos.

23. With regard to the information required under Rule 54 § 2 (a), the Government appended the letter of 8 March 2010 from DIICOT, which stated that the applicant’s request to have her genetic material returned had already been granted by the prosecutor on 12 November 2009. The decision had been taken after the applicant’s embryos had been identified on 5 November 2009; the applicant had been given until 25 February 2010 to retrieve her embryos, the same deadline having been set for four other individuals who were in a situation similar to the applicant’s, in view of the necessity of avoiding repeated interferences with the contents of the receptacles and the fact that since an indictment had already been issued, the investigation authorities could no longer pay the IFM the cost of storage.

DIICOT also informed the Government that the seizure, transport and handover of the genetic material to IFM had been carried out with the agreement of the Ministry of Public Health, whose representative – the manager of the NTA at that time – had cooperated directly with the investigation authorities.

24. In conclusion, the Government contended that the applicant already had a decision allowing the transfer of the embryos, which could be carried out at any time provided the applicant was accompanied by an embryologist and had the appropriate receptacle.

25. In response to the Government's reply, the applicant asked the Court to note that it was not specified whether the applicant would be able to retrieve her embryos in the absence of authorisation from the NTA. In practice, as she had already shown, the embryo transfer was not possible unless the NTA authorised it.

B. Proceedings seeking to obtain authorisation for the embryo transfer

1. Request lodged with the criminal courts

26. On 20 April 2010, the applicant formulated before the Bucharest County Court civil claims in the criminal proceedings pending before the domestic courts following the indictment issued by DIICOT (see paragraph 14 above); she thus asked the court to allow an embryo transfer from the IFM to a Romanian or foreign authorised clinic.

The applicant's request was dismissed on 6 July 2010; the court considered that given that the prosecutor's decision of 12 November 2009 had already granted her claim, the actual implementation and enforcement of the decision exceeded the framework of the criminal trial. The court also held that the applicant had the opportunity, if she so wished, to contest the NTA's refusal to authorise the embryo transfer before the civil courts.

The applicant contested this ruling; on 23 July 2010 her appeal was dismissed as inadmissible by the Bucharest Court of Appeal. In the court's reasoning it was stated that there was no legal basis to respond to her request within the criminal proceedings, the civil courts having jurisdiction to examine her complaints.

In his dissenting opinion, Judge D.D. estimated that the applicant's request was well founded, in so far as, in spite of the prosecutor's decision ordering the restitution of her embryos, the authorities were refusing to implement the decision. Having regard to the fact that the confiscation of the embryos was carried out within criminal proceedings, it was only natural that the restitution should also be carried out within the same proceedings. At the same time, considering that the applicant could not be held responsible for the confiscation, which had been ordered by the

investigating authorities in the absence of any authorisation from the NTA, it was excessive to ask the applicant to pursue yet another set of proceedings in order to be able to obtain authorisation for transfer from the NTA.

2. Request lodged before the administrative courts

27. On 28 July 2010 the applicant lodged with the Bucharest Court of Appeal a request seeking to obtain, in accordance with the provisions of Law no. 554/2004 regulating administrative proceedings, the NTA's authorisation for the transfer of her embryos to a specialised and authorised clinic, whether in Romania or abroad.

In their defence, the NTA reiterated their arguments, according to which the fact that the embryos had been deposited firstly at S., and then at the IFM, where they had been transported under unknown conditions, neither of the two institutions being at the time accredited as banks for genetic material, created uncertainty with regard to the safety and quality of the embryos (see also paragraph 17 above). In such circumstances, it was not possible to authorise transfer under the relevant legislation. Furthermore, if any clinic from Romania agreed to deposit the sixteen embryos, the NTA would have to revoke that clinic's accreditation for non-compliance with the law.

The applicant's request was dismissed as ill-founded on 10 December 2010. The court considered that in view of the relevant legislation, requiring specific standards of quality and safety with regard to the genetic material and in so far as neither the S. Clinic at the time of the original deposit of embryos nor the IFM, was accredited or authorised to function as banks of genetic material, the NTA's refusal was justified and in accordance with the law.

28. The applicant contested this judgment before the High Court of Cassation and Justice, reiterating that according to the Government's submissions before the Court, the transfer of the embryos from the S. Clinic into the IFM was carried out with the approval of the Ministry of Health and of the NTA's manager; in that respect, the NTA's refusal to authorise a further transfer appeared unjustified. Furthermore, the applicant's few visits to the IFM for the purposes of checking the state of her embryos revealed that the embryos were being kept in precarious conditions, in the absence of any trained staff able to properly supervise their preservation.

29. The High Court gave its ruling on 17 May 2011, allowing the applicant's request and obliging the NTA to authorise the transfer of the sixteen embryos from the IFM to an authorised clinic in Romania or abroad.

In its reasoning, the court mainly held that in so far as the NTA's attribution was to coordinate the activities of procurement, processing, preservation, storage, validation and distribution of human tissue and cells in Romania, there was no legal ground for it to interfere in the implementation of the prosecutor's decision to restore the embryos.

The fluctuating attitude of the NTA concerning its participation and/or cooperation with the criminal investigation authorities, namely, confirming that the retrieval of the embryos from S. had been done with the approval of the NTA's manager, while also holding that the transfer had been made without its consent, proved once more that the NTA was confused and uncertain about the scope of its own authority. The NTA's cooperation with the criminal investigation authorities was certain, as it came out especially from the observations submitted by the Government's Agent before the Court (see paragraph 23 above). Such cooperation was, in any event, natural, having regard to the specific nature of the confiscated goods. In this context, the NTA should have advised the investigation authorities to deposit the embryos in an authorised clinic, which they did not do. On the contrary, the NTA proved to be excessively formalistic only when it came to the restitution of the embryos to the applicant, considering, unfoundedly, that it was within its competence to intervene in the enforcement of the prosecutor's decision:

> "This behaviour on the part of the NTA breached the applicant's right to retrieve her embryos and to make use of them as urgently as possible, in view of the special characteristics of the genetic material and also of the applicant's age, in the context of her desire to become a mother."

30. The NTA's allegations, that in 2008, when the applicant underwent the IVF, she did not comply with the relevant legal requirements, were not in themselves relevant, in so far as the criminal proceedings regarding the activity of the S. Clinic were still pending; moreover, in 2008, when the applicant deposited her embryos at S., the clinic was in the process of being accredited, as shown by the inspections organised to that end on 24 June 2008, and 15 April and 13 July 2009 by the NTA and the Department for the Control of Public Health, culminating with the accreditation apparently having been granted to the clinic by the NTA on 15 July 2009.

In spite of all these factors, and of the fact that the prosecutor decided that the embryos should be given back to the applicant, the NTA unjustifiably intervened and blocked the restitution procedure; the NTA unlawfully arrogated to itself an authority it did not have, while also threatening any medical institution which could have received the embryos even without the NTA's authorisation that in such a case their licence would be suspended or even revoked.

Furthermore, the NTA could not cite any doubt as to the security and quality of the genetic material because it had been deposited at the IFM, an unauthorised clinic, having regard to the fact that at the moment of the deposit their agreement had been given, and afterwards, following the Court's request that the embryos should be preserved and protected pending the proceedings before this Court, the NTA was expressly solicited by the Ministry of Health to provide expertise so as to satisfy the Court's request.

Referring to the case of *Ternovszky v. Hungary* (no. 67545/09, 14 December 2010), the High Court held that when there was no domestic law able to adequately define the specific circumstances in the relationship between an individual and the state, the latter was bound to protect fundamental human rights, such as, in the present case, the right to respect for private life and the right to life.

For this reason, the court considered that:

> "By its obstructive attitude, the NTA infringed the applicant's rights and interests linked to the right to a private life and the right to life, by not properly balancing the public interest that the NTA is bound to protect and the legitimate interests of the applicant."

It therefore allowed the applicant's claims as formulated, holding that

> "the NTA was obliged to authorise the transfer of the sixteen embryos from the IFM to an authorised and specialised clinic in Romania or abroad, a clinic which would be able to receive the embryos in its bank and which would be able to assist the applicant with the desired embryo transfer."

3. *Enforcement of the judgment of 17 May 2011*

31. In accordance with the High Court's ruling, on 15 June 2011 the NTA issued a decision in which it "authorised the transfer of the sixteen embryos from the IFM Mina Minovici to an authorised clinic in Romania, in accordance with the relevant legal framework".

The NTA further held that the second alternative mentioned in the High Court's judgment, namely that the transfer could also be authorised abroad, could not be implemented, in so far as the appropriate authorisation for a transfer abroad was not an ordinary authorisation for transfer, but "an authorisation for export", which was never requested as such by the applicant; moreover, authorisation for export had a very particular character, and in its absence the export of human tissues and cells was prohibited.

32. Subsequently, the applicant unsuccessfully attempted to transfer her embryos to the B. clinic (a private clinic in Bucharest). In their response to the Government on why the transfer was not possible, on 6 October 2011 the B. Clinic informed that they could not proceed with the transfer without relevant medical information concerning the embryos and their medical history, including data on how they had been preserved from the very beginning. Consequently and having regard to the fact that the clinic did not have the special quarantine conditions needed for deposit of the embryos, the transfer could not be carried out in compliance with the applicable legal provisions.

33. On 12 October 2011, a DIICOT prosecutor issued a decision, in which it was held that having regard to the High Court's ruling and to the fact that the only State medical institutions accredited to function as "human cells and/or tissue banks" were respectively the Prof. Dr. Panait Sârbu Obstetrics and Gynaecology Hospital in Bucharest and the Emergency

County Hospital in Cluj, for reasons of efficiency the first institution was to become the new custodian of the applicant's embryos. The embryo transfer was to be carried out by a specialist transport company, the costs being borne by the DIICOT. All documents regarding the maintenance of the embryos were to be transferred to the new custodian.

The prosecutor's decision was not contested by the applicant.

34. In accordance with this decision, on 19 October 2011 the embryo transfer was carried out and the embryos placed in the Assisted Reproduction Laboratory within the Prof. Dr. Panait Sârbu Hospital, the newly appointed custodian. According to a letter sent by the Ministry of Health to the Government on 15 December 2011, the new custodian was accredited as a genetic bank and human cell and tissue bank, and was also authorised to assist the applicant with any procedure related to artificial insemination.

35. In a letter of 11 November 2011, the applicant submitted that the transfer of the embryos had once more been carried out without her consent and even without her being consulted or informed in advance. She further stated that in the Prof. Dr. Panait Sârbu Hospital she had had bad experiences, in so far as in 2007 she underwent two unsuccessful IVF procedures there and therefore she could no longer trust the professional capacity of those doctors. She considered that she was entitled to be assisted for future IVF by doctors of her choice, in whom she trusted; therefore the transfer of her embryos into the above-mentioned clinic had denied her that right.

The applicant requested the opportunity to transfer her embryos to a clinic of her choice, at the expense of the Romanian authorities, who were responsible for the situation created and also for the well-being of her embryos.

36. By a letter of 23 December 2011, the Prof. Dr. Panait Sârbu Hospital informed the applicant's representative that from 16 January 2012 they could be contacted to set a date on which the applicant, in the presence of an embryologist, could come to take possession of her genetic material in order to transfer it elsewhere, in accordance with the applicable rules and regulations set by the NTA.

By a letter sent to the Court on 3 March 2012, the applicant stated that she had found a clinic outside Bucharest "willing to help" her and that a date of transfer was "hopefully" imminent. In the meantime, she had also tried to set up a new procedure in the hope of a new pregnancy. She further stressed the trauma she had gone through on account of the State's successive interferences with her right to have another child by IVF.

37. On 14 May 2012, the applicant alleged that she had contacted many clinics in Romania regarding the transfer of her embryos, but in spite of the fact that they were open to the idea at the beginning, "after further evaluation, the risk for them seemed to high" and no transfer was agreed.

38. The Government replied that on one hand, the applicant's assertions were too vague and unsubstantiated, and on the other hand, that she had not acted with specific diligence to transfer her embryos from Prof. Dr. Panait Sârbu clinic, either to start an IVF procedure or at least to get more information about how her embryos were being taken care of in that clinic.

On 19 June 2012, the Government sent a document issued by the Prof. Dr. Panait Sârbu clinic in which it was confirmed that the applicant could initiate an IVF procedure in that clinic, with the assistance of a doctor and an embryologist of her choice, whether from Romania or from abroad, in so far as these two had a license to practice in Romania. Furthermore, a letter from the private clinic M.N.L. in Bucharest was appended, stating that the clinic was willing to take the applicant's embryos while its doctors would monitor both the patient and the embryo-transfer.

On 22 June 2012, the applicant met the manager of the M.N.L. clinic; following their discussion, she wrote a letter to the clinic in which she asked for more information concerning the concrete stages envisaged for the embryo transfer, as well as a precise date on which such a transfer could be accomplished.

II. RELEVANT DOMESTIC AND COMPARATIVE LAW

A. Health-Care Reform Act (Law no. 95/2006)

39. The Act is divided into seventeen titles, covering a wide array of subjects specific to the public health area. Title VI contains provisions covering the procurement and transplant of organs, tissues and cells of human origin used for therapeutic purposes, the donors of organs, tissues and human-origin cells, the donation and transplant thereof and the financing of transplant activity. It transposes into national legislation Directive 2004/23/EC of the European Parliament and of the Council of 31 March 2004 on setting standards of quality and safety for the donation, procurement, testing, processing, preservation, storage and distribution of human tissue and cells. It also defines the role and responsibilities of the National Transplant Agency, as the main competent authority in the field of the procurement and transplant of organs, tissues and cells of human origin, including the accreditation, designation, authorization or licensing of tissue establishments and tissue and cell preparation processes.

Section 143

The National Transplant Agency shall be responsible for the coordination, supervision, approval and implementation of any provisions regarding transplant activities.

Section 148

(4) Any transplant of tissue and cells of human origin may be processed only from the banks accredited or approved by the National Transplant Agency...

(9) Imports or exports of tissue and cells shall be possible only if specifically authorised by the National Transplant Agency.

B. Order of the Minister of Public Health no. 1763 of 12 October 2007

40. This sets out provisions governing the mechanisms to be put into place to ensure the quality and safety of tissues and cells and their traceability, in compliance with the relevant European law requirements.

C. Order of the Minister of Public Health no. 1225 of 1 July 2008

41. This lists the tissue establishments accredited, designated, authorized or licensed to function as tissue and human cell banks and/or users. Neither the clinic S., nor the IFM appear in this Act.

D. Romanian Criminal Procedure Code

42. In its relevant parts concerning the procedure on the sequestration of goods pending criminal investigation, the code reads as follows:

Article 165

(1) The authority that enforces the sequestration (*sechestru*) must identify and evaluate the goods in question; it may, if need be, make recourse to experts. [...]

(9) If there is the danger of estrangement, other movables sequestered will be sealed or taken away, and a custodian can be appointed.

Article 166

(1) The body that enforces the sequestration draws up an official report on all acts performed under Section 165, including a detailed description of the goods sequestered and specifying their value...

Article 168

(1) Against this measure taken and of its enforcement means, the defendant, the party bearing the civil responsibility, as well as any other interested person may complain to the criminal investigation body who ordered the measure or to the prosecutor who supervises the criminal investigation, before summoning the court, after which the complaint is addressed to the relevant court.

(2) The court decision may be appealed against separately. The appeal does not suspend the execution.

(3) After the final settlement of the criminal trial, if no complaint has been lodged against the enforcement of the assurance measure, it may be contested under the civil law.

Article 169

(1) If the criminal investigation body or the court finds that items taken away from the defendant, or from any other person who received them in custody, are the property of the victim or have been wrongly taken away from him/her, it orders the return of those items to the victim. Any other person who claims a right over the things taken away may ask under Article 168 for enforcement of this right and return of the items taken.

(2) The items taken away are returned only if this does not impede the revealing of the truth and the just settlement of the cause, and imposes upon the person to whom they are returned the obligation to keep them until the decision is declared final.

E. Comparative Law

43. An overview of the law and practice concerning artificial procreation in general and on the standards of quality and safety for the donation, procurement, testing, processing, preservation, storage and distribution of human tissue and cells in Europe is included in *S. H. and Others v. Austria* ([GC], no. 57813/00, §§ 35-44, 3 November 2011).

THE LAW

I. ADMISSIBILITY OF THE APPLICATION

44. In their observations submitted on 2 September and 6 October 2010, the Government raised three preliminary objections, as follows.

45. Firstly, the Government cited the lack of victim status for the applicant, in so far as her claim to retrieve her embryos from the IFM had already been allowed by the Prosecutor in the decision of 12 November 2009.

46. Secondly, the Government contended that the applicant became the client of S. Clinic, a private clinic, in June 2008, when the clinic did not have a proper licence, either as a bank for genetic material or as a clinic specialising in IVF. It is submitted that the clinic was apparently accredited by the NTA to carry out tissue banking activities (processing, deposit and distribution) only on 15 July 2009; however, the accreditation itself is currently under criminal investigation (see also paragraph 8 above). In any event, the clinic has never received authorization – which would imply authority to carry out removals and transplants - as a few days after its accreditation the DIICOT launched their investigation and the activity of the clinic was suspended.

It followed that the State could not be held responsible *ratione personae* for the applicant’s choice, which determined certain subsequent effects on her right to a private life, in so far as it was the applicant who had freely

chosen the services of S., in spite of the fact that the clinic did not comply with the legal and medical requirements for its proper functioning in the IVF field. From that respect, in making her choice the applicant proved to have shown a certain lack of diligence (*culpa in eligendo*) in so far as any diligent person would normally make minimal preliminary inquiries about a clinic which she/he intends to entrust with the safeguarding of their embryos.

47. Finally, the Government contended that the applicant had at her disposal the legal provisions of Law no. 554/2004 regarding administrative proceedings, which allowed her to contest the NTA's refusal to authorise a transfer of embryos from the IFM into a private clinic, a legal remedy which she had not used.

48. The applicant argued that in spite of the prosecutor's decision of 12 November 2009, she was still not able to transfer her embryos to a specialised clinic where she would be able to undergo another IVF procedure.

She further contended that when she approached the S. Clinic she was in fact following her doctor, who used the facilities of that clinic. Furthermore, the applicant disagreed that a patient had the obligation to check *a priori* all the authorisations and licences of a clinic he/she intended to approach; it was the responsibility of the State to make sure that a clinic which is allowed to function operates in compliance with the applicable legal and medical requirements, and yet, in June 2008 when she underwent the IVF at S., the latter had been allowed to function for almost a decade, in a building 500 m away from the NTA's headquarters, but apparently without the required licence. From that respect and in view also of the state authorities' hesitations when handling her case, the State's failure to provide and properly implement a sufficiently clear legal framework in this area of expertise could not be denied.

49. The Court firstly notes that pending proceedings before it, namely on 28 July 2010, the applicant lodged a request with the domestic administrative courts, asking them in accordance with Law no. 554/2004 to oblige the NTA to authorise the transfer of her embryos from the IFM into a specialised clinic, whether in Romania or abroad. The proceedings ended on 17 May 2011, when the Romanian highest court allowed the applicant's claims.

From that respect, the Court considers that the Government's preliminary objection concerning the exhaustion of domestic remedies has been left without object.

Secondly, having regard to the final judgment given in the above-mentioned proceedings, which confirmed that it was impossible for the applicant to retrieve and transfer her embryos on account of the NTA's obstructive interventions which have thus infringed the applicant's rights and interests protected by Article 8 of the Convention (see paragraph 30

above), the Court estimates that the Government's remaining objections have lapsed.

50. The Court then considers that the applicant's complaints are not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that they are not inadmissible on any other grounds. They must therefore be declared admissible.

II. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

51. The applicant's complaint essentially concerns a breach of her right to a private and family life in so far as she was prevented from becoming a parent by means of an IVF procedure using her frozen embryos, on account of the State's failure to offer her the assistance she required in the matter, namely by allowing her to transfer her embryos into a specialised clinic of her choice.

Article 8 of the Convention reads as follows:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

A. The parties' submissions

52. The applicant denied any responsibility for the events that took place from July 2009, in so far as it was the Prosecutor who had decided at the time to transfer her embryos into an unauthorised clinic, which triggered the NTA's subsequent refusal to allow her to retrieve and transfer her embryos into a specialised and authorised clinic. It was the responsibility of the state institutions to be aware of the fact that, once transferred into an unauthorised location, the embryos would have to remain there, in conformity with the European and national regulations in this sensitive field of processing and depositing human cells and tissue.

The applicant further contended that it was the lack of communication or even conflict between the state institutions involved in this area of expertise that obstructed her from placing her embryos in a specialised clinic where she would be able to start a new IVF procedure. These conflicts were all the more prejudicial to her, in view also of the fact that she was turning 45, and had therefore less and less chance of a successful IVF procedure.

53. The Government submitted that even assuming that there has been an interference with the applicant's right to private life in the present case, such interference was prescribed by the law and it was necessary in a

democratic society, as it was aimed at the protection of public order, namely the prevention of crime, at protecting health and the rights and liberties of others.

Furthermore, the interference complained of was proportional, for the following reasons.

At the outset, it was the applicant who freely placed herself in a risky situation by using, in June 2008, the facilities of a clinic that was neither authorised to operate in the IVF field, nor to function as a bank of genetic material. According to the information provided by the NTA, at the time of the IVF procedure neither the clinic S., nor the applicant complied with the existing legal and medical requirements. There was no information in the applicant's medical file prepared at the S. Clinic regarding the collection of the respective sex cells, their origin, the procedures followed in their subsequent handling, nor any data on the storage of the embryos, steps which were obligatory for IVF procedures. The S. Clinic was the only body responsible for keeping and providing data concerning the traceability of the genetic material, and without that information no medical procedure should have taken place. In this context, the applicant's choice of S. rendered applicable the principle according to which *nemo auditor propriam turpitudinem allegans*.

The measures subsequently taken by the authorities in connection with the closing of the S. Clinic were aimed at putting an end to an activity which raised suspicions as to its lawfulness and medical safety. Even in such a context, the interests of the applicant were accommodated, in so far as her request to retrieve her embryos was promptly allowed by the prosecutor, a decision that was never contested by the applicant.

B. The Court's assessment

54. The Court firstly notes that it is not disputed between the parties that Article 8 is applicable and that the case concerns the applicant's right to respect for her private life. The Court agrees, since "private life", which is a broad term, encompassing, *inter alia*, elements such as the right to respect for the decisions both to have and not to have a child (see *Evans v. the United Kingdom* [GC], no. 6339/05, § 71, ECHR 2007-IV, and *A, B and C v. Ireland* [GC], no. 25579/05, § 212, 16 December 2010) or the right of a couple to conceive a child and to make use of medically assisted procreation to that end, such a choice being clearly an expression of private and family life (see *S. H. and Others v. Austria*, cited above, § 82).

55. The Court pinpoints that the issues complained of in the present case particularly relate to the NTA's refusal to authorise the applicant to transfer her embryos from the IFM into a specialised clinic of her choice, where she could make use of these embryos via an IVF procedure. The reason given by the Romanian authorities for that refusal was that such an authorisation

would be in breach of European and national legislation concerning the standards of quality and safety for the processing and depositing of human tissue and cells.

In this context, the Court reiterates that although the object of Article 8 is essentially that of protecting the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference. In addition to this primarily negative undertaking, there may be positive obligations inherent in an effective respect for private and family life. These obligations may involve the adoption of measures designed to secure respect for private and family life, even in the sphere of the relations of individuals between themselves. The boundaries between the State's positive and negative obligations under Article 8 do not lend themselves to precise definition. The applicable principles are nonetheless similar. In particular, in both instances regard must be had to the fair balance to be struck between the competing interests (see *Evans*, cited above, § 75).

In the present case, the Court will approach the case as one involving an interference with the applicant's right to a private life, since she was in fact prevented from using her embryos by the state authorities, who, in their turn, relied on the legal provisions applicable in the matter and established specific and strict requirements, that were not met in the applicant's case. In any event, as noted above, the applicable principles regarding justification under Article 8 § 2 are broadly similar for both the analytical approaches adopted (*see S. H. and Others v. Austria*, cited above, § 88).

56. Such interference will be in breach of Article 8 of the Convention unless it can be justified under paragraph 2 of Article 8 as being "in accordance with the law", pursuing one or more of the legitimate aims listed therein, and being "necessary in a democratic society" in order to achieve the aim or aims concerned.

1. *In accordance with the law and legitimate aim*

57. The Court considers that the measure at issue, namely the prosecutor's decision made in the context of criminal proceedings started against S. Clinic, to seize the embryos and place them "in custody" in a State institution, was in accordance with the provisions of Article 165 of the Romanian Criminal Procedure Code. The measure was taken with the approval and in cooperation of the Ministry of Public Health (see paragraph 23 above).

At the same time, the measure pursued a legitimate aim, namely the prevention of crime, the protection of health or morals and the protection of the rights and freedom of others in the context of a clinic operating without the required licence necessary in such a sensitive field as assisted reproduction procedures. The aim of the measure as such has not been in

dispute between the parties, who concentrated their arguments on the necessity for the interference.

2. *Necessity in a democratic society and the relevant margin of appreciation*

58. In that connection the Court reiterates that in order to determine whether the measures taken were "necessary in a democratic society" it has to consider whether, in the light of the case as a whole, the reasons adduced to justify them were relevant and sufficient for the purposes of Article 8 § 2 (see, among many other authorities, *P., C. and S. v. the United Kingdom*, no. 56547/00, § 114, ECHR 2002-VI).

59. In cases arising from individual applications, the Court's task is not to review the relevant legislation or practice in the abstract; it must as far as possible confine itself, without overlooking the general context, to examining the issues raised by the case before it (see *Olsson v. Sweden (no. 1)*, 24 March 1988, § 54, Series A no. 130). Consequently, the Court's task is not to substitute itself for the competent national authorities in determining the most appropriate policy for regulating matters of artificial procreation, in respect mainly of procedures to be followed or authorities to be involved and to what extent, especially since the use of IVF treatment gave rise then and continues to give rise today to sensitive moral and ethical issues against a background of fast-moving medical and scientific developments. It is why in such a context the Court considered that the margin of appreciation to be afforded to the respondent State is a wide one (see *S.H. and Others v. Austria*, cited above, § 97). The State's margin in principle extends both to its decision to intervene in the area and, once it has intervened, to the detailed rules it lays down in order to achieve a balance between the competing public and private interests (see *Evans*, cited above, § 82).

60. Having this in mind and turning to the circumstances of the present case, the Court finds that it has not been shown that the decision of the prosecutor to confiscate the genetic material found at S. Clinic and to deposit it with a custodian (namely, the IFM) was arbitrary or unreasonable.

However, the subsequent effects on the applicant's right to private life of this measure taken in the context of criminal proceedings launched against S. were, as underlined by the national courts, aggravated by the NTA's obstructive and oscillatory attitude, which triggered the impossibility for the applicant to transfer her embryos into a clinic specialising in assisted reproduction procedures (see paragraphs 29-30 above).

61. The Court nevertheless notes that in the judgment of 17 May 2011, the highest Romanian court expressly acknowledged that the applicant had suffered a breach of her rights under Article 8 on account of the NTA's refusal to allow an embryo transfer from the IFM to a specialist clinic, and offered her the required redress for the breach, namely that the embryos be

transferred into a specialised and authorised clinic. This transfer was enforced in a relatively short period of time following the pronouncement of the High Court's judgment and consequently, the applicant's embryos have now been transferred and deposited in a specialist clinic, namely in the Department for Assisted Reproduction within the Prof. Dr. Panait Sârbu public hospital.

It follows that the applicant's initial complaint, that it was impossible for her to retrieve and transfer her embryos from the IFM, has remained without object in so far as the domestic authorities have adopted and implemented measures albeit with some delay designed to secure respect for the applicant's right to a private life and consequently the transfer as required by the applicant was made and the embryos have now been deposited in a specialised and authorised clinic.

62. The applicant's further complaint refers to the fact that in the new clinic she would not be able to proceed with another IVF on account of her past bad experiences in that same place. However, while refraining from any speculation on the matter, which falls outside its competence, but having regard to the latest information received from the parties (see paragraphs 34-38 above), the Court considers that it has not been provided with sufficient evidence that the applicant would not be able to have her interest accommodated in relation to the desired IVF procedure in so far as to sustain her claims under Article 8.

63. Therefore, having regard to the developments of the applicant's situation, the Court finds that it has not been shown that the State failed to strike a fair balance between the competing interests. Accordingly, there is no appearance of a failure to respect the applicant's right to private life.

64. There has therefore been no violation of Article 8 of the Convention.

III. RULE 39 OF THE RULES OF COURT

65. In view of its findings set out above, the Court considers it is appropriate to lift the interim measure indicated to the Government of Romania under Rule 39 of the Rules of Court (see paragraph 4 above).

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the application admissible;

2. *Holds* that there has been no violation of Article 8 of the Convention;

3. *Decides* to discontinue the interim measure indicated to the Government under Rule 39 of the Rules of Court.

Done in English, and notified in writing on 2 October 2012, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Santiago Quesada	Josep Casadevall
Registrar	President