



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

SECOND SECTION

DECISION

Application no. 41146/14
X and Y
against Italy

The European Court of Human Rights (Second Section), sitting on 16 September 2014 as a Committee composed of:

Paul Lemmens, *President*,

Robert Spano,

Jon Fridrik Kjølbro, *judges*,

and Abel Campos, Deputy Section Registrar,

Having regard to the above application lodged on 23 May 2014,

Having regard to the decision to grant priority to the above application under Rule 41 of the Rules of Court,

Having regard to the decision to grant the applicants anonymity,

Having deliberated, decides as follows:

THE FACTS

The applicants, Mr X. and Ms Y., are Italian nationals, who were born in 1974 and 1976 respectively and live in Rome. They were represented before the Court by Mr N. Paoletti and Ms Claudia Sartori, lawyers practising in Rome.

The circumstances of the case

The facts of the case, as submitted by the applicants, may be summarised as follows.

In December 2013 the applicants underwent an *in vitro* fertilization in a public hospital in Rome. Three embryos resulted from the fertilization. The second applicant underwent an implantation, however she failed to become pregnant.

On 13 April 2014 the applicants acquired from the media the information that a woman, having undergone with her partner an *in vitro* fertilization in the same hospital and during the same period, had become pregnant with twins whose DNA was genetically incompatible with her DNA and her partner's.

The applicants have then been asked by the hospital to have their DNA verified. It has been consequently ascertained that the applicants' DNA was compatible with the one of the above-mentioned fetus.

Referring to Article 30 of the Medical Deontological Code (protecting the right of information of patients), on 29 April 2014 and 5 May 2014 the applicants have requested the local health authority (ASL *azienda sanitaria locale*) to provide them with information concerning the identity of the woman and men who were waiting for the twins. Although they had not been provided with a written answer, the applicants had been informed by the hospital that their request could not be granted as the disclosure of those information would have amounted in a violation of the other couples' privacy rights,

On 24 July 2014 the applicants instituted an urgent application under Article 700 of the code of civil procedure before the Rome Tribunal, the content of which was subject to some modifications in the course of the proceedings due to the fact that the twins were born in the meantime on 3 August 2014. The applicants asked ultimately the babies to be allocated in a protected institution or, alternatively, to have recognized, as biological parents, their visiting rights.

On 8 August 2014 the Rome Tribunal rejected the applicants' claims on the ground that according to the civil code the mother is considered to be the woman who gives birth and the father is the mother's husband at the moment of the delivery. Hence the applicants were not entitled to initiate any action that would suppose the declaration of their status of biological parents. The judge eventually added that the applicants were fully entitled to bring an action against the hospital in order to obtain a compensation for the damages deriving from the tragic event occurred to them.

COMPLAINT

Invoking Article 8 of the Convention, the applicants complain that their right to respect for their private and family life has been violated since their embryos have been wrongly implanted in another woman's uterus as a consequence of a mistake made by a public hospital. For the applicants, the Italian legal system does not guarantee any protection of their status of biological parents of the to-be-born twins, despite the fact that the DNA test has established the applicants' DNA compatibility with the one of the twins.

THE LAW

Relying on Article 8 of the Convention, the applicants complain of a violation of their right to respect for their private and family life since their embryos have allegedly been implanted in another woman's uterus.

The Court notes at the outset that the applicants are required under Article 35 § 1 of the Convention to exhaust domestic remedies.

The Court considers that the applicants have failed to introduce at domestic level any action – civil or criminal – in order to seek damages for the alleged medical negligence, as correctly observed by the Rome Tribunal, or to establish the possible criminal responsibility of the persons concerned. The procedure they have initiated under Article 700 of the code of civil procedure was in fact solely aimed to obtain a declaration concerning their alleged status of biological parents. Moreover this procedure, decided by a first instance court whose decision is subject to an appeal action, constitutes a mere preliminary and urgent remedy which can be followed by an ordinary action on the merits.

In addition, the applicants have failed to submit a request to access administrative acts, as foreseen by Section 22 of Law no. 241/90, in order to obtain the information requested. According to Section 25 of the abovementioned Law, in case of lack of response by the Public Administration (*silenzio-rigetto*), they would have been entitled to introduce proceedings before the Administrative Tribunal.

The applicants failed therefore to give to the respondent State the opportunity of preventing or putting right the violations alleged before those allegations are submitted to the Convention institutions (see *Selmouni v. France* [GC], no. 25803/94, § 74, ECHR 1999 V).

It follows that the application must be rejected under Article 35 §§ 1 and 4 of the Convention for non-exhaustion of domestic remedies.

For these reasons, the Court unanimously

Declares the application inadmissible.

Abel Campos
Deputy Registrar

Paul Lemmens
President