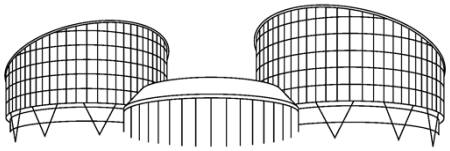

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

CASE OF PEJŘILOVÁ v. THE CZECH REPUBLIC

(Application no. 14889/19)

JUDGMENT

Art 8 • Private life • Dismissal of a widow's request to be fertilised with deceased husband's frozen sperm, domestic law allowing such fertilisation only for couples and *inter vivos* • Legislature's intention to protect the free will of the man who has consented to assisted reproduction and the right of the unborn child to know his parents • Absence of European consensus • Wide margin of appreciation not overstepped

STRASBOURG

8 December 2022

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Pejřilová v. the Czech Republic,

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

Georges Ravarani*, President*,
Mārtiņš Mits,
Lado Chanturia,
María Elósegui,
Mattias Guyomar,
Kateřina Šimáčková,
Mykola Gnatovskyy*, judges*,
and Victor Soloveytchik, *Section Registrar,*

Having regard to:

the application (no. 14889/19) against the Czech Republic lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Czech national, Ms Hana Pejřilová ("the applicant"), on 12 March 2019;

the decision to give notice of the application to the Czech Government ("the Government");

the observations submitted by the respondent Government and the observations in reply submitted by the applicant;

the comments submitted by the European Centre for Law and Justice, which was granted leave to intervene by the President of the Section;

Having deliberated in private on 15 November 2022,

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

INTRODUCTION

1. The application concerns the dismissal of the applicant's request to use her late husband's cryopreserved sperm in an assisted reproduction procedure (Article 8 of the Convention).

THE FACTS

2. The applicant was born in 1983 and lives in Bernatice. She was represented by Ms P. Langerová, a lawyer practising in Olomouc.

3. The Government were represented by their Agent, Mr V.A. Schorm, of the Ministry of Justice.

4. The facts of the case may be summarised as follows.

5. The applicant and her husband got married in 2012. They were unable to conceive a child naturally and the applicant's husband had a serious disease, so they sought the help of a centre for medically assisted reproduction ("the Centre").

6. On 26 June 2014 the applicant's husband had his sperm cryopreserved, signing a consent form agreeing to such preservation for the purpose of

having infertility treatment. The consent form included, *inter alia*, information indicating that further written consent would be required before each occasion when sperm would be thawed for the assisted reproduction procedure, and that unless clearly determined otherwise, storage of the sperm would be discontinued in the event of the donor's death.

7. On 15 December 2014 the applicant and her husband signed informed consent forms agreeing to infertility treatment using *in vitro* fertilisation (IVF), and to the thawing of the applicant's husband's sperm and its use in intracytoplasmic sperm injection. In signing the forms, they agreed to notify the Centre of any changes in their relationship which could cause the treatment to be terminated.

8. Subsequently, the applicant's husband's health deteriorated and he died on 16 June 2015, before any further steps had been taken; namely, the file does not indicate that the applicant had started the necessary hormone treatment or had her ova collected.

9. On 7 September 2015 the applicant asked to have her eggs fertilised with her late husband's cryopreserved sperm. The Centre refused, stating that such a procedure would be contrary to the law, and suggested that the applicant institute court proceedings in which they could reach a settlement.

10. The applicant therefore lodged an action with a court on 26 October 2015, seeking to oblige the Centre to perform the treatment and, in accordance with her late husband's wishes as demonstrated by the above consent forms, fertilise her eggs with his sperm.

11. At a hearing on 4 April 2016 both parties expressed their readiness to reach a settlement. On the same day the Plzeň-City District Court did not approve such a settlement, since it would have been contrary to section 6 of Law No. 373/2011 on Specific Health Services ("the SHS Act"), which required that consent to the treatment be less than six months old.

12. On 22 July 2016 that decision was upheld by the Plzeň Regional Court, which stated that the SHS Act only allowed a couple to undergo infertility treatment, not a single woman without a partner – the aim of that provision was to give children conceived by assisted reproduction at least an initial chance to grow up with both parents. In the instant case, however, the applicant and her husband had ceased to exist as a couple upon the applicant's husband's death. The court was of the view that although the applicant's late husband had applied for the treatment and given his initial consent to it, his later wishes could not be prejudged and replaced by a court decision; moreover, his previous consent could not be considered a "previously expressed wish" within the meaning of the relevant law which would be binding on the Centre, because it had not been given in the form required by law.

13. On 28 November 2016 the district court dismissed the applicant's action. Subscribing to the reasoning adopted by the regional court in its decision of 22 July 2016, it considered that the applicant had failed to satisfy

the conditions for applying for medically assisted reproduction set by the SHS Act, since she was no longer part of a couple and there was no valid informed consent from her late husband.

14. On 30 May 2017, following an appeal by the applicant, the regional court upheld the above dismissal. It shared the view that the applicant's request was contrary to sections 6 and 8 of the SHS Act, which enabled assisted reproduction to be performed only on the basis of an application and written consent from the infertile couple, consent which must be less than six months old. The court observed that even though the applicant's late husband had given the initial necessary consent to the treatment being started, it could not be presumed that he would not have changed his mind during the treatment; his further consent could thus not be replaced by a court's decision.

15. By judgment no. 21 Cdo 4020/2017 of 21 February 2018, the Supreme Court dismissed an appeal on points of law by the applicant, relying extensively on the Court's relevant case-law. Considering that examining the matter under the right to respect for family life would require the actual existence of a "family", while a mere wish to found one was not protected by Article 8, it admitted that the failure to complete the assisted reproduction procedure using the cryopreserved sperm of the applicant's late husband could amount to an interference with the applicant's right to respect for her private life.

The Supreme Court then referred to a comparative study of the relevant legislation of certain Council of Europe member States, some of which allowed, under certain conditions, artificial fertilisation post-mortem (Belgium and the Netherlands), and some of which prohibited it (France and Germany). The court also referred to the explanatory report to the SHS Act demonstrating the Czech legislature's intent.

As to the legitimate aim pursued by section 6 of the SHS Act, the Supreme Court firstly emphasised that it was in a child's best interests to be born to a complete family and have both parents, at least at the stage of conception. It further observed that assisted reproduction techniques were available only to couples being treated for infertility; however, after the death of the man in such a couple, the infertile couple within the meaning of section 6 of the SHS Act would no longer exist. Moreover, the requirement that the infertile couple's written consent be less than six months old protected the man providing the sperm and made it possible for him to revoke his consent. In the instant case, the Supreme Court considered that it was unclear whether the applicant's husband would have wished to become a father after his death, given that he had signed an informed consent form containing an explicit provision on the destruction of the cryopreserved sperm in the event of his death. Thus, the Centre was not obliged to perform the requested procedure on the applicant using her late husband's cryopreserved sperm.

Lastly, the Supreme Court noted that the applicant had not suffered a real interference with her right to respect for her private life, since she had not

been deprived of all opportunities to become a mother, as she was still able to conceive naturally or apply to have treatment with another partner.

16. By judgment no. I. ÚS 1099/18 of 8 November 2018, the Constitutional Court dismissed a constitutional appeal by the applicant. It considered that the lower courts had adequately examined the applicant's arguments and provided detailed reasoning for their findings, and that the Supreme Court had duly taken into account the constitutional dimension to the case as well as the Court's case-law. In its view, the conclusions reached by those courts were compliant with the Constitution, and the analysis carried out by the Supreme Court showed that there was no European consensus on the issue.

The Constitutional Court further observed that legislation concerning medically assisted reproduction was based on the moral, cultural, religious and ethical values of society, therefore it was primarily up to the legislature to set the rules for such treatment.

In a dissenting opinion joined to the judgment, one of the judges considered that the law should only prevent situations where a child would be born against a man's will. In his opinion, the applicable legislation had been misused in the present case to prevent the treatment being completed after the death of the applicant's husband, and the courts should have tried to find out what his wishes had been.

RELEVANT LEGAL FRAMEWORK AND PRACTICE

I. THE SPECIFIC HEALTH SERVICES ACT (LAW NO. 373/2011 AS IN FORCE ON 15 DECEMBER 2014)

17. Under section 3(1), assisted reproduction (*asistovaná reprodukce*) means techniques and procedures enabling to collect and manipulate germs cells and to create a human embryo through fertilisation of an egg by sperm outside of the woman's body, with a view to artificially fertilising the woman.

According to section 3(3), artificial fertilisation (*umělé oplodnění*) encompasses both the introduction of sperm into a woman's reproductive organs (artificial insemination) and the transfer into a woman's reproductive organs of a human embryo created by fertilisation of an egg by sperm outside of the woman's body (IVF).

18. Under section 6(1), artificial fertilisation could be performed on a woman of fertile age – no older than 49 – on the basis of a written application by the woman and the man who intended to undergo the infertility treatment together. The application of the infertile couple had to be less than six months old.

19. Section 8(1) provided that before starting the assisted reproduction techniques and procedures, the assisted reproduction centre had to inform the infertile couple about the nature of the proposed techniques and procedures,

their permanent consequences and potential risks, and how surplus embryos would be disposed of, including the expected costs and the period of storage.

Under section 8(2), after receiving the information specified in subsection 1, the infertile couple would give their written consent to assisted reproduction; such consent had to be given repeatedly, before each attempt at artificial fertilisation.

20. According to the explanatory report, the law was adopted so that the Czech Republic could meet its obligations in health protection and the provision of health services arising from the relevant international instruments, including the Convention and the Convention on Human Rights and Biomedicine. Since a man who consented to the artificial fertilisation of a woman would be regarded as the father of the child conceived via assisted reproduction, such artificial fertilisation could not be performed without repeated instances of consent from the "infertile couple" – before starting the procedure and before every attempt at artificial fertilisation.

II. THE GOVERNMENT'S COMPARATIVE STUDY ON THE CURRENT SITUATION IN EUROPE

21. The Government submitted in their observations of August 2020 that they had been able to compare the relevant legislation of seventeen member States of the Council of Europe – namely Belgium, Bulgaria, Denmark, Estonia, France, Croatia, Ireland, Italy, Germany, the Netherlands, Norway, Poland, Greece, Slovakia, Slovenia, the United Kingdom and Switzerland.

Out of those countries, only Ireland did not allow assisted reproduction in public health facilities but a new legislation was under preparation.

Among the countries which allowed assisted reproduction, half of them allowed it for couples only (France, Italy, Norway, Poland, Greece, Slovakia, Slovenia and Switzerland) and the other half also allowed it for individuals (Belgium, Bulgaria, Denmark, Estonia, Croatia, Germany, the Netherlands and the United Kingdom). The main reason for restricting individuals' access to assisted reproduction lay in the protection of the child's best interests, even though the issue was continuously evolving. A precondition for assisted reproduction was informed consent given by the mother and, where it was allowed for couples only, also by her husband or partner. In most of the countries, consent was valid until it was withdrawn.

Seven countries (Belgium, Denmark, Estonia, Italy, the Netherlands, Greece and the United Kingdom) allowed assisted reproduction to continue after the death of the husband or partner. In Estonia, the partner had to specify in his consent form whether he agreed to the use of his sperm in assisted reproduction after his death; in Italy, both patients had to be living at the moment the ovum was fertilised (when the embryo was created), but from that moment on assisted reproduction could be pursued even after the death of the husband or partner. Another five countries (Belgium, Denmark,

the Netherlands, Greece and the United Kingdom) allowed contractual arrangements for the post-mortem use of sperm or a fertilised ovum.

On the other hand, eight countries (Bulgaria, France, Croatia, Germany, Norway, Slovakia, Slovenia and Switzerland) did not permit the continuation of assisted reproduction after the death of the husband or partner; except for Slovakia, such prohibition was explicit.

THE LAW

ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

22. The applicant submitted that the State should respect her choice of the father of her child, as well as her late husband's wish to have a child with her, and should allow her to continue with the assisted reproduction procedure using her late husband's frozen sperm. She relied on Article 8 of the Convention, the relevant parts of which provide as follows:

> "1. Everyone has the right to respect for his private and family life ...
>
> 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 ... for the protection of health or morals, or for the protection of the rights and freedoms of others."

A. Admissibility

23. The Government considered that in so far as the applicant wished to rely on her right to respect for her family life, the application was incompatible *ratione materiae* in this regard.

24. The applicant maintained that Article 8 of the Convention was applicable in the instant case.

25. The Court observes 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, encompasses, *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; *A, B and C v. Ireland* [GC], no. 25579/05, § 212, 16 December 2010; and *Paradiso and Campanelli v. Italy* [GC], no. 25358/12, § 163, 24 January 2017). The Court has also held that the right of a couple to conceive a child and to make use of medically assisted procreation for that purpose is protected by Article 8 (see *S.H. and Others v. Austria* [GC], no. 57813/00, § 82, ECHR 2011; *Knecht v. Romania*, no. 10048/10, § 54, 2 October 2012; and *Lia v. Malta*, no. 8709/20, § 39, 5 May 2022).

The Court will therefore examine the present case under Article 8, which guarantees the applicant's right to respect for her private life.

26. The Court further notes that the application is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

(a) The applicant

27. The applicant asserted in her application that the decision to conceive a child was a private decision of a couple who wished to become parents and should not be reviewed by any court. She emphasised that she and her husband had decided to have recourse to a medically assisted reproduction procedure because of her husband's disease which could have led to his sterility. In her view, the domestic courts' decisions had been formalistic; in particular, the conclusion about whether or not her husband would have wished to proceed with the treatment should not have been based on the wording of the consent form, but on other evidence, such as the statements of his parents, who had repeatedly consented to the continuation of the treatment. She further asserted that Czech law did not provide for any explicit prohibition on using the sperm of a deceased person.

28. In her observations, the applicant argued that the applicable legislation was not sufficiently foreseeable and that there was no relevant reason to limit the validity of consent to artificial fertilisation to six months, since Czech law provided for the possibility to withdraw consent which had already been given. In this regard, she emphasised that her late husband had repeatedly signed written consent forms without having the opportunity to amend the terms of such forms, and that their decision to have his sperm cryopreserved demonstrated their common wish to have a biological child.

29. As regards the legitimate aims put forward by the Government, the applicant was of the view that the impugned legislation protected those aims only to the minimum extent and was thus not appropriate, as it created an unjustified inequality between cases of natural conception and conception through assisted reproduction. In her view, consent given by a couple at the beginning of an assisted reproduction procedure, at the moment when sperm was collected to be preserved, should suffice. This would also harmonise the approach in relation to anonymous sperm donors – who gave their consent only once and whose status (alive or dead) was not verified at the moment of fertilisation – and identifiable donors.

30. The applicant submitted that the requirements set by the SHS Act were capable of eliminating only an insignificant number of situations in which a child would not have contact with one of his parents. For example, Czech law did not prohibit artificial fertilisation where a formal consent would be given by a man who simply accompanied a woman to an appointment and who was

then formally registered as a child's father, without being his or her biological father and without being required to take care of the child. In cases of anonymous sperm donors, a child had no opportunity to find out the identity of his or her biological father, and formally his or her father was the man who had consented to the assisted reproduction.

31. Submitting that the Government's argument concerning the protection of a man's autonomy was too restrictive, the applicant criticised the impugned legislation for not distinguishing situations such as the present one, where a deceased man's wishes were clearly indicated by his decision to have his sperm cryopreserved because of a disease which was likely to lead to his sterility or death and by the repeated instances of his consent to the treatment. While alive, her husband had never changed his mind about having a child with her, nor had he withdrawn his consent, unlike the partner of the applicant in the case of *Evans* (cited above). The applicant further argued that there could be situations where a man's free will was not respected, for example when a child was conceived naturally because a woman stopped using contraception without informing the man, or where she decided to terminate a pregnancy regardless of the man's position.

32. The applicant was also not convinced that the legislation pursued the aim of protecting morals, since it could not prevent situations where assisted reproduction *de facto* involved only a woman, provided that that woman was able to secure the consent of any man pretending to be her partner. She also pointed out that in a poll reacting to an online article describing her case, more than 88% of 3,590 readers had considered that she should have been allowed to proceed with the assisted reproduction.

33. Lastly, the applicant submitted that the State's margin of appreciation was not unlimited and could not justify any interference, and certainly not the present one which prevented her from having a family with her husband. She argued that she would not be able to have post-mortem artificial fertilisation abroad, saying that the sperm could not be transferred without her late husband's explicit consent.

(b) The Government

34. The Government did not dispute that the applicant's situation fell within the scope of the right to respect for one's private life; they also considered that the case raised important and sensitive issues deserving careful examination. Referring to the Court's approach adopted in recent applications concerning assisted reproduction (they referred to *S.H. and Others v. Austria* (cited above); *Knecht* (cited above); and *Parrillo v. Italy* [GC], no. 46470/11, § 167, ECHR 2015) as well as to the questions asked by the Court, they considered that the present case should be examined from the perspective of the State's negative obligations. Like the highest domestic courts, the Government were of the view that the applicant's right to respect for her private life had been interfered with as a result of the courts'

decisions not to endorse the settlement between the applicant and the Centre, and to reject her action seeking to continue with the assisted reproduction procedure after her husband's death.

35. The Government maintained that the above interference had been based on section 6(1) and section 8(2) of the SHS Act, which set out two imperative and cumulative conditions for assisted reproduction, neither of which had been satisfied by the applicant. In their view, the law had been accessible to the applicant, who had been repeatedly informed by the Centre about the requirements set by the SHS Act. As to the foreseeability of the law, the Government admitted that the applicant's case was the first of its kind which had given the domestic courts an opportunity to clarify both of the key requirements. As regards the six-month validity of a couple's consent, the courts had considered that the legislature had sought to protect not only the free will of a man who had consented to artificial insemination, but also the right of an unborn child to know his or her parents. According to the Government, the special and extraordinary nature of artificial fertilisation and its significant long-lasting impact on the lives of the persons concerned justified the relevant time-limit being stricter than those set for other medical interventions.

The courts had also confirmed that in requiring an application for assisted reproduction to be filed by an infertile couple, the legislature had intended to allow assisted reproduction solely *inter vivos*, and to ensure that a child was conceived by a couple; indeed, artificial fertilisation with a deceased man's sperm was not permitted under Czech law, because an infertile couple no longer existed as a couple after the man's death. In response to the applicant's argument that Czech law did not regulate situations where a child was conceived against a man's will through sexual intercourse, and that the decision to terminate a pregnancy was only up to a woman (see paragraph 31 above), the Government argued that a situation where artificial means were used to create an embryo was fundamentally different, and required the consent of both persons who were providing their germ cells.

36. The Government further asserted that such an interference pursued two legitimate aims. Firstly, as regards the protection of the rights and freedoms of others, the law sought to protect the rights and freedoms of an unborn child by giving him or her a chance, at least at the moment of conception, to be born into a complete family, or by keeping situations where this was not the case to an absolute minimum. Furthermore, the law also protected the autonomy of a man who consented to assisted reproduction, since the fact that he gave his consent when he was alive did not automatically mean that he would consent to it after his death. Secondly, the interference pursued the aim of the protection of morals, given that assisted reproduction was an extremely complex and delicate issue; the legislature's policy choice reflected above all the moral, cultural, religious and ethical values of society. In this context, the Government were convinced that a poll run in an online

discussion forum, which the applicant had referred to (see paragraph 32 above), could not in any case be viewed as a reliable source of information regarding the views of society as a whole.

Moreover, the SHS Act had been adopted in order to protect patients and their rights and to comply with international human rights obligations of the Czech Republic (see paragraph 20 above).

37. In relation to the necessity of the interference, the Government believed that, in view of the complex issues at stake and the absence of a European consensus, the State should enjoy a considerably wide margin of appreciation as regards conditions set for assisted reproduction. In this regard, they emphasised that no agreement had yet been reached among the Council of Europe member States as to whether to allow assisted reproduction after a partner's death (see paragraph 21 above). It was also noteworthy that, unlike the applicant in the case of *Evans* (cited above), the applicant in the present case had not been prevented from becoming a mother to her own biological child, since she could conceive a child with another partner or even have her eggs fertilised with her late husband's sperm in one of the countries which allowed artificial fertilisation post-mortem. In this regard, the Government submitted that while the applicant had contacted the Centre and been provided with general information about transferring the sperm abroad (which generally required the donor's consent), she had never officially requested such a transfer. According to information provided by the Centre, it still continued to store the frozen sperm of the applicant's late husband.

38. The Government also emphasised that in the instant case, the courts had had to balance the applicant's individual interests against those of her deceased husband and her unborn child, and also the public interest in securing and supporting births within complete families; in the Government's view, the courts had done so thoroughly, without exceeding their wide margin of appreciation. Their decisions had been based on relevant and sufficient grounds and had managed to strike a fair balance between the competing interests.

39. Lastly, the Government observed that the consent given by the applicant and her husband on 15 December 2014 had expired on 15 June 2015, after the statutory six-month period had elapsed, and that the applicant's husband had died on 16 June 2015, which had brought the infertile couple's existence as a couple within the meaning of the SHS Act to an end. They noted that although the Centre had repeatedly advised the applicant about the statutory conditions, she had not taken any steps in relation to the artificial fertilisation during that six-month period, and had not explained why the assisted reproduction procedure had not been pursued immediately after the initial consent had been given. It was also not clear why the applicant and her husband had not given their consent again before the end of that period, which justified the domestic courts' finding that it was not possible to determine with certainty the actual wishes of the applicant's late husband,

especially as he had been informed when signing the written consent form that his biological material would be destroyed in the event of his death (see paragraph 6 above). The Government pointed out that doubts about the applicant's husband's wishes could have been clarified by way of appropriate tools offered by the legislation, such as a previously expressed wish, a notarial record, a reference in his will, and so on. However, the applicant had not adduced any evidence proving that her husband had wished to have a child born through assisted reproduction even in the event of his death.

(c) European Centre for Law and Justice

40. The European Centre for Law and Justice submitted that, unlike embryos, to which both persons who had provided their genetic material had a certain right, gametes were only linked to the person who had provided them; the applicant had no rights over her late husband's gametes, and the absence of such rights was intended to protect his rights.

41. The European Centre for Law and Justice further asserted that in most countries, assisted reproduction was only available to heterosexual couples where both persons were alive and of fertile age. Fertilisation post-mortem distorted the therapeutic aim of that procedure and became a tool in the right to have an orphaned child, interfering with the rights and interests of children conceived in that way. Therefore, it was compatible with the Convention to prohibit certain forms of assisted reproduction, like IVF with donated gametes (the intervener referred to *S.H. and Others v. Austria* (cited above)).

2. The Court's assessment

(a) Preliminary considerations

42. The Court reiterates that the right to conceive a child and to make use of medically assisted procreation for that purpose is protected by Article 8 (see the case-law cited in paragraph 25 above). The fact that it is now technically possible to keep human embryos in frozen storage gives rise to an essential difference between IVF and fertilisation through sexual intercourse, namely the possibility of allowing a lapse of time, which may be substantial, to intervene between creation of the embryo and its implantation in the uterus. The Court considers that it is legitimate – and indeed desirable – for a State to set up a legal scheme which takes this possibility of delay into account (see *Evans*, cited above, § 84).

43. 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 of procedures to be followed or authorities to be involved and to what extent, especially since the use of IVF treatment continues to give rise 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 has considered that the margin of appreciation to be

afforded to the respondent State is a wide one (see *Evans*, cited above, § 81, and *S.H. and Others v. Austria*, cited above, § 97). Moreover, 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).

44. In the above-mentioned cases, namely *Evans* (cited above, §§ 39-42) and *S.H. and Others v. Austria* (cited above, §§ 35–40), the Court relied on a 1998 comparative study across thirty-nine States, including thirty-five member States of the Council of Europe, on medically assisted procreation and the protection of the human embryo. The survey, in particular the responses to questions 19 and 20 concerning the availability of assisted reproduction techniques to a widow, showed that at that time the transfer of an embryo fertilised while the husband had still been alive was allowed by four member States (Germany, the United Kingdom, Spain and Switzerland). In sixteen member States, including the Czech Republic, the use of the embryo after the husband's death was prohibited; twelve member States did not regulate this issue, and sufficient information could not be obtained from three. As regards artificial insemination and IVF with the sperm of the deceased, eighteen member States, including the Czech Republic, did not allow these techniques, while two countries (Spain and the United Kingdom) did, subject to the deceased husband's prior informed consent; twelve member States did not regulate these issues, and sufficient information for a clear conclusion could not be obtained from three member States.

45. The Court admits that in the field of medically assisted procreation in general, legal provisions are developing quickly, as demonstrated by a comparison between the above Council of Europe study of 1998 and the survey conducted by the International Federation of Fertility Societies in 2007 (see *S.H. and Others v. Austria*, cited above, § 40). However, the present case raises specific ethical questions linked to the issues of public interest (see paragraph 50 below), allowing for the States' wide margin of appreciation. In any event, the overview provided by the Czech Government (see paragraph 21 above), based on information received from member States attributing great significance to the issues at stake and closely monitoring the developments in this area, confirms that there is no clear common ground amongst the member States in this area.

46. The Court also accepts the Government's submission (see paragraphs 34 and 38 above) that the issues raised by the present case are of a morally and ethically delicate nature and involve, beyond individual interests, a number of wider, public interests as well. Since they touch on the regulation of IVF treatment, the consent to be given to the use of genetic material provided for that purpose and the use of a deceased man's sperm, where there is no clear European consensus, the Court considers, in line with

its above-mentioned case-law, that in the instant case, the respondent State must be afforded a wide margin of appreciation.

47. The Court also has to analyse whether the provisions of the Czech legislation as applied in the present case gave rise to an interference with the applicant's right to respect for her private life (the State's negative obligations) or to a failure by the State to fulfil a positive obligation in that regard. In the Court's view, the legislation in question can be seen as raising an issue as to whether there is a positive obligation on the State to allow a woman, whose partner had his sperm collected according to the couple's wish to conceive a child through artificial fertilisation, to use the cryopreserved sperm after the man's death. However, the matter can also be seen as an interference by the State with the applicant's right to respect for her private life as a result of the refusal to allow her to undergo infertility treatment that had been developed by medical science. In the present case, the Court will approach the case as one involving an interference with the applicant's right to avail herself of techniques of assisted reproduction resulting from the operation of section 6(1) and section 8(2) of the SHS Act, since she was in fact prevented from doing so by the application of that law which she unsuccessfully sought to challenge before the Czech courts. In any case, the applicable principles regarding justification under Article 8 § 2 of the Convention are broadly similar for both analytical approaches adopted (see *Evans*, cited above, § 75, and *S.H. and Others v. Austria*, cited above, § 88).

(b) Compliance with Article 8 § 2 of the Convention

(i) In accordance with the law

48. Firstly, the Court considers that the measure at issue was provided for by law, namely sections 6 and 8 of the SHS Act (see paragraphs 17-19 above).

(ii) Legitimate aim

49. The Court further notes that the parties are in dispute as to whether the measure pursued one or more legitimate aims. The Government argued that the legislation aimed to protect the rights and freedom of others, namely unborn children and deceased men, as well as morals (see paragraph 36 above). The applicant disagreed, considering that the impugned legislation protected the interests mentioned by the Government only to the minimum extent. In her view, it also created an unjustified inequality between cases of natural conception and conception through assisted reproduction, as well as, in the latter situation, inequality between cases involving anonymous and identifiable donors (see paragraphs 29-32 above).

50. The Court reiterates that it acknowledged in the case of *Evans* (cited above, § 84) that it was legitimate for a State to set up a legal scheme taking into account the possibility of a delay between creation of an embryo and its implantation in the uterus, in the framework of IVF. In the Court's view, such

considerations apply *a fortiori* to a situation where only sperm has been frozen and no embryo has yet been created. It is noteworthy, indeed, that unlike in the cases of *Parrillo* or *Knecht* (both cited above), the issue complained of in the present case does not relate to the use of frozen embryos, to which the Court has recognised a certain "potential for life" (see *Parrillo*, cited above, § 167), but to the possibility to use cryopreserved sperm of a deceased person. This raises rather an ethical question which involves considerations of public interest that may reflect, among others, the situation of to-be-born children.

51. The relevant provisions of the Czech SHS Act (see paragraphs 17 and 19 above) provide that artificial fertilisation can be performed only on the basis of a written application by the woman and the man who intend to undergo the infertility treatment together, an application which must be less than six months old; also, the infertile couple has to give written consent to assisted reproduction, and this has to be given again before each attempt at artificial fertilisation. In the instant case, the domestic courts considered that after the death of her husband the applicant no longer formed part of an "infertile couple" within the meaning of section 6 of the SHS Act.

52. In the Court's view, the Czech legislature's decision to enact such provisions, and their interpretation by the domestic courts, reveal the intention to respect human dignity and free will, as well as a desire to ensure a fair balance between the parties involved in assisted reproduction, so that every person donating gametes for the purpose of such treatment would know in advance that no use could be made of his or her genetic material without his or her continuing consent. The Court has already held that such general interests are legitimate and consistent with Article 8 (see, *mutatis mutandis*, *Evans*, cited above, § 89).

53. In response to the applicant's argument that anonymous sperm donors only gave consent once, when they donated sperm (see paragraph 29 above), the Court notes that the wording of the SHS Act indicates that an infertile couple's consent to assisted reproduction is needed irrespective of whether artificial fertilisation is performed with sperm provided by an anonymous donor or with sperm provided by the woman's partner. There is thus no difference between the conditions to be satisfied in cases involving anonymous and identifiable donors. This is consistent with the applicant's submission, based on the Civil Code, that the man who has consented to assisted reproduction (and not the anonymous donor) is considered to be the father of a child born via assisted reproduction (see paragraph 30 above).

54. Having regard to the foregoing, the Court is satisfied that the measure complained of pursued a legitimate aim, namely the protection of morals and the rights and freedoms of others.

(iii) Necessity in a democratic society

55. In order to determine whether the impugned measure was "necessary in a democratic society", the Court has to consider whether, in the light of the case as a whole, the reasons adduced to justify it were relevant and sufficient for the purposes of Article 8 § 2. Account being taken of the State's margin of appreciation (see paragraphs 43 and 46 above), it falls to the Court to examine carefully the arguments taken into consideration during the legislative process and leading to the choices that have been made by the legislature, and to determine whether a fair balance has been struck between the competing interests of the State and those directly affected by those legislative choices (see, in particular, *S.H. and Others v. Austria*, cited above, §§ 91 and 97). However, the central question in terms of Article 8 of the Convention is not whether a different solution might have been adopted by the legislature that would arguably have struck a fairer balance, but whether, in striking the balance at the point at which it did, the Czech legislature exceeded the margin of appreciation afforded to it under that Article. In determining this question, the Court attaches some importance to the fact that, as noted above, there is no sufficiently established European consensus as to whether a widow can have her eggs fertilised with the frozen sperm of her deceased husband (see, *mutatis mutandis*, *S.H. and Others v. Austria*, cited above, § 106).

56. Turning to the present case, the Court observes that the applicant wished to have recourse to assisted reproduction because her husband had a serious disease and it was impossible for them to conceive a child naturally (see paragraphs 5 and 27 above). Thus, before he started his oncological treatment, the applicant's husband had his sperm cryopreserved (see paragraph 6 above). It is not in dispute that, owing to his death, only fertilisation with the use of that frozen sperm would allow the applicant to have a child genetically related to her late husband.

57. However, the Czech legislature has set limits on the use of assisted reproduction techniques, allowing this only for couples whose consent is less than six months old. The applicant's husband died on 16 June 2015, more than six months after giving his consent to the thawing of his sperm and its use in IVF (see paragraph 7 above), therefore on that day the applicant ceased to satisfy both of the above-mentioned conditions.

58. The Court reiterates that it is not contrary to the requirements of Article 8 of the Convention for a State to enact legislation governing important aspects of private life which does not provide for the weighing of competing interests in the circumstances of each individual case, thereby promoting legal certainty and preventing arbitrariness and inconsistency inherent in weighing, on a case-by-case basis. Where such important aspects are at stake, it is not inconsistent with Article 8 that the legislature adopts rules of an absolute nature which serve to promote legal certainty (see *Evans*, cited above, § 89, and *S.H. and Others v. Austria*, cited above, § 110). Indeed,

in a sensitive domain like artificial procreation, concerns based on moral considerations or on social acceptability must be taken seriously. Also, when examining the compatibility of a prohibition of a specific artificial procreation technique with the requirements of the Convention, the legislative framework of which it forms a part must be taken into consideration, and the prohibition must be seen in this wider context (see *S.H. and Others v. Austria*, cited above, § 112).

59. The Court reiterates that the present case concerns only the refusal to allow a woman, whose partner had his sperm collected according to the couple's wish to conceive a child through artificial fertilisation, to use the cryopreserved sperm after the man's death. It observes in this connection that artificial fertilisation using cryopreserved sperm, provided by either a woman's partner or an anonymous donor, is allowed under Czech law solely for couples and *inter vivos*. Indeed, in order to protect not only the free will of the man who has consented to assisted reproduction, but also the right of the unborn child to know his parents, the SHS Act requires the existence of a couple who wishes to undergo such treatment and who must give written consent before each attempt at fertilisation. Although neither an unborn child nor a deceased person are the holders of Convention rights as such (see, for example, *Evans*, cited above, § 56; *Jäggi v. Switzerland*, no. 58757/00, § 42, ECHR 2006-X), the Court finds such considerations relevant and sees no reason to call this legislative choice into question. Rights under Article 8 are not absolute and therefore do not require Contracting States to allow artificial fertilisation post-mortem.

60. The Court notes also that there is no prohibition under Czech law on a person going abroad to seek post-mortem fertilisation in a country which allows it, even though transferring sperm abroad could also be subject to conditions (see paragraph 37 above). It finds it equally noteworthy that in most of the few countries which allow assisted reproduction to continue after the death of a husband or partner, such a procedure is surrounded by guarantees related to the deceased man's prior informed consent (see paragraphs 21 and 44 above).

61. In the present case, the Court cannot but conclude that the domestic rules were clear and were brought to the attention of the applicant. The domestic courts carefully examined her arguments, but considered that the provisions of the SHS Act could not be disapplied. They emphasised, *inter alia*, that in a situation where the applicant's husband had signed an informed consent form containing an explicit provision on the destruction of the cryopreserved sperm in the event of his death, the further consent from him which was required by law could not be prejudged and replaced by a court's decision after he passed away (see paragraphs 14 and 15 above).

62. The Court does not find that the applicant's legitimate right to respect for the decision to have a child genetically related to her late husband should be accorded greater weight than the legitimate general interests protected by

the impugned legislation. This is all the more so that the Czech Republic has to be afforded a wide margin of appreciation in this respect, which it did not overstep.

63. In view of the foregoing considerations, the Court is of the view that there has been no violation of Article 8 of the Convention.

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.

Done in English, and notified in writing on 8 December 2022, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Victor Soloveytchik Registrar	Georges Ravarani President