CASE OF S. H. AND OTHERS v. AUSTRIA

(Application no. 57813/00)

JUDGMENT

STRASBOURG

1 April 2010

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 S. H. and Others v. Austria,

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

Christos Rozakis, *President,*
Nina Vajić,
Anatoly Kovler,
Elisabeth Steiner,
Khanlar Hajiyev,
Sverre Erik Jebens,
Giorgio Malinverni, *judges,*
and André Wampach, *Deputy Section Registrar*,

Having deliberated in private on 11 March 2010,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

11. The case originated in an application (no. 57813/00) against the Republic of Austria lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by four Austrian nationals, Ms S. H., Mr D.H., Ms. H. E.-G. and Mr M.G. ("the applicants"), on 8 May 2000. The President of the Chamber acceded to the applicants' request not to have their names disclosed (Rule 47 § 3 of the Rules of Court).

2. The applicants were represented by Mr H.F. Kinz and Mr W.L. Weh, both lawyers practising in Bregenz. The Austrian Government ("the Government") were represented by their Agent, Ambassador F. Trauttmansdorff, Head of the International Law Department at the Federal Ministry of Foreign Affairs.

3. The applicants alleged in particular that the provisions of the Austrian Artificial Procreation Act prohibiting the use of ova from donors and sperm from donors for *in vitro* fertilisation, the only medical techniques by which they could successfully conceive children, violated their rights under Article 8 of the Convention read alone and in conjunction with Article 14.

4. By a decision of 15 November 2007 the Court declared the applications partly admissible.

5. Third-party comments were received from the German Government, which had exercised its right to intervene (Article 36 § 1 of the Convention and Rule 44 § 1 (b)).

6. A hearing on the merits of the application took place in public in the Human Rights Building, Strasbourg, on 28 February 2008 (Rule 59 § 3).

There appeared before the Court:

(a) *for the Government*
Ms B. ohms, *Deputy Agent*,
Ms B. grosse,
Mr M. stormann,
Ms I. hager-ruhs, *Advisers*;

(b) *for the applicants*
Mr H. kinz,
Mr W.L. weh, *Counsels*.

The Court heard addresses by Mr Weh, Mr Kinz and Ms Ohms.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

7. The applicants were born in 1966, 1962, 1971 and 1971 respectively and live in L. and R.

8. The first applicant is married to the second applicant and the third applicant to the fourth applicant.

9. The first applicant suffers from fallopian-tube-related infertility (*eileiterbedingter Sterilität*). The second applicant, her husband, is also infertile.

10. The third applicant suffers from agonadism (*Gonadendysgenesie*), which means that she does not produce ova at all. Thus she is completely infertile but has a fully developed uterus. The fourth applicant, her husband, in contrast to the second applicant, can produce sperm fit for procreation.

11. On 4 May 1998 the first and third applicants lodged an application (*Individualantrag*) with the Constitutional Court (*Verfassungsgerichtshof*) for a review of the constitutionality of section 3(1) and section 3(2) of the Artificial Procreation Act (*Fortpflanzungsmedizingesetz* - see Relevant domestic law below).

12. The applicants argued before the Constitutional Court that they were directly affected by the above provisions. The first applicant submitted that she could not conceive a child by natural means; thus the only way open to her and her husband would be *in vitro* fertilisation using sperm from a donor. That medical technique was, however, ruled out by section 3(1) and section 3(2) of the Artificial Procreation Act. The third applicant submitted that she was also infertile. Suffering from agonadism, she did not produce ova at all. Thus, the only way open to her of conceiving a child was to resort to a medical technique of artificial procreation referred to as heterologous embryotransfer, which would entail implanting into her uterus an embryo conceived with ova from a donor and sperm from the fourth applicant. However, that method was not allowed under the Artificial Procreation Act.

13. The first and third applicants argued before the Constitutional Court that the impossibility of using the above-mentioned medical techniques for medically assisted conception was a breach of their rights under Article 8 of the Convention. They also relied on Article 12 of the Convention and on Article 7 of the Federal Constitution, which guarantees equal treatment.

14. On 4 October 1999 the Constitutional Court held a public hearing in which the first applicant, assisted by counsel, participated.

15. On 14 October 1999 the Constitutional Court decided on the first and third applicants' request. The Constitutional Court found that their request was partly admissible in so far as the wording concerned their specific case. In this respect, it found

that the provisions of section 3 of the Artificial Procreation Act, which prohibited the use of certain procreation techniques, was directly applicable to the applicants' case without it being necessary for a decision by a court or administrative authority to be taken.

16. As regards the merits of their complaints the Constitutional Court considered that Article 8 was applicable in the applicants' case. Although no case-law of the European Court of Human Rights existed on the matter, it was evident, in the Constitutional Court's view, that the decision of spouses or a cohabiting couple to conceive a child and make use of medically assisted procreation techniques to that end fell within the sphere of protection under Article 8.

17. The impugned provisions of the Artificial Procreation Act interfered with the exercise of this freedom in so far as they limited the scope of permitted medical techniques of artificial procreation. As for the justification of such an interference, the Constitutional Court observed that the legislature, when enacting the Artificial Procreation Act, had tried to find a solution by balancing the conflicting interests of human dignity, the right to procreation and the well-being of children. Thus, it had enacted as leading features of the legislation that, in principle, only homologous methods – such as using ova and sperm from the spouses or the cohabiting couple itself – would be allowed and only methods which did not involve a particularly sophisticated technique and were not too far removed from natural means of conception. The aim was to avoid the forming of unusual personal relations such as a child having more than one biological mother (a genetic mother and one carrying the child) and to avoid the risk of exploitation of women.

18. The use of *in vitro* fertilisation as opposed to natural procreation raised serious issues as to the well-being of children thus conceived, their health and their rights, and also touched upon the ethical and moral values of society and entailed the risk of commercialisation and selective reproduction (*Zuchtauswahl*).

19. Applying the principle of proportionality under Article 8 § 2, however, such concerns could not lead to a total ban on all possible medically assisted procreation techniques, as the extent to which public interests were concerned depended to a large extent on whether a heterologous or homologous technique was used.

20. In the Constitutional Court's view, the legislator had not overstepped the margin of appreciation afforded to member States when it established the permissibility of homologous methods as a rule and insemination using donor sperm as an exception. This compromise reflected the current state of medical science and the consensus in society. It did not mean, however, that these criteria were not subject to developments which the legislator would have to take into account in the future.

21. The legislator had also not neglected the interests of men and women who had to avail themselves of artificial procreation techniques. Besides strictly homologous techniques it had accepted insemination using sperm from donors. Such a technique had been known and used for a long time and would not bring about unusual family relationships. Further, the use of these techniques was not restricted to married couples but also included cohabiting couples. In so far, however, as homologous techniques were not sufficient for the conception of a child the interests of the individuals concerned ran counter to the above-mentioned public interest.

22. The Constitutional Court also found that for the legislator to prohibit heterologous techniques, while accepting as lawful only homologous techniques, was in accordance

with the prohibition of discrimination as contained in the principle of equality. The difference in treatment between the two techniques was justified because, as pointed out above, the same objections could not be raised against the homologous method as against the heterologous one. As a consequence the legislator was not bound to apply strictly identical regulations to both. Also, the fact that insemination with donor sperm was allowed while ova donation was not did not raise a discrimination issue because again, as pointed out above, there was no risk of creating unusual relationships which might adversely affect the well-being of a future child as there was with heterologous insemination.

23. Since the impugned provisions of the Artificial Procreation Act were in line with Article 8 of the Convention and the principle of equality under the Federal Constitution, there had also been no breach of Article 12 of the Convention.

24. This decision was served on the first and third applicants' lawyer on 8 November 1999.

II. RELEVANT NON-CONVENTION MATERIAL

A. Domestic law: the Artificial Procreation Act

25. The Artificial Procreation Act (*Fortpflanzungsmedizingesetz*, Federal Law Gazette 275/1992) regulates the use of medical techniques for inducing conception of a child by means other than copulation (section 1(1)).

26. These methods comprise: (i) introduction of sperm into the reproductive organs of a woman, (ii) unification of ovum and sperm outside the body of a woman, (iii) introduction of viable cells into the uterus or fallopian tube of a woman and (iv) introduction of ovum cells or ovum cells with sperm into the uterus or fallopian tube of a woman (section 1(2)).

27. Medically assisted procreation is allowed only within a marriage or a relationship similar to marriage, and may only be carried out if every other possible and reasonable treatment aimed at inducing pregnancy through intercourse has failed or has no reasonable chance of success (section 2).

28. Under section 3(1), only ova and sperm from spouses or from persons living in a relationship similar to marriage (*Lebensgefährten*) may be used for the purpose of medically assisted procreation. In exceptional circumstances, sperm from a third person may be used for artificial insemination when introducing sperm into the reproductive organs of a woman (section 3(2)). In all other circumstances, and in particular for the purpose of *in vitro* fertilisation, the use of sperm by donors is prohibited.

29. Under section 3(3), ova or viable cells may only be used for the woman from whom they originate. Thus ova donation is always prohibited.

30. The further provisions of the Artificial Procreation Act stipulate, *inter alia*, that medically assisted procreation may only be carried out by specialised physicians and in specially equipped hospitals or surgeries (section 4) and with the express and written consent of the spouses or cohabiting persons (section 8).

31. In 1999 the Artificial Procreation Act was supplemented by a Federal Act Establishing a Fund for Financing In-vitro Fertilisation Treatment (*Bundesgesetz mit dem ein Fonds zur Finanzierung der In-vitro-Fertilisiation eingerichtet wird* – Federal Law

Gazette Part I No. 180/1999) in order to subsidise *in–vitro* fertilisation treatment allowed under the Artificial Procreation Act.

B. The position in other countries

32. On the basis of the material available to the Court, including the document "Medically-assisted Procreation and the Protection of the Human Embryo Study on the Solution in 39 States" (Council of Europe, 1998) and the replies by the member States of the Council of Europe to the Steering Committee on Bioethics' "Questionnaire on Access to Medically-assisted Procreation" (Council of Europe, 2005), it would appear that IVF treatment is regulated by primary or secondary legislation in Austria, Azerbaijan, Bulgaria, Croatia, Denmark, Estonia, France, Georgia, Germany, Greece, Hungary, Iceland, Italy, Latvia, the Netherlands, Norway, the Russian Federation, Slovenia, Spain, Sweden, Switzerland, Turkey, Ukraine and the United Kingdom. In Belgium, the Czech Republic, Finland, Ireland, Malta, Lithuania, Poland, Serbia and Slovakia such treatment is governed by clinical practice, professional guidelines, royal or administrative decree or general constitutional principles.

33. The study in particular sets out the position of domestic law as regards seven different artificial procreation techniques: artificial insemination within a couple, *in vitro* fertilisation within a couple, artificial insemination by sperm donor, ova donation, ova and sperm donation, embryo donation and intracytoplasmic sperm injection (an *in vitro* fertilization procedure in which a single sperm is injected directly into an egg).

34. As far as can be seen, sperm donation is currently prohibited only in three countries: Italy, Lithuania and Turkey, which all ban heterologous assisted fertilisation as a whole. Countries allowing sperm donation do not generally distinguish in their regulations between the use of sperm for artificial insemination and for *in vitro* fertilisation. As regards the donation of ova, it is prohibited in Croatia, Germany, Norway and Switzerland, in addition to the three countries mentioned above. Since Germany in practice allows donation of sperm only for non-*in vitro* fertilisation, the legal situation is quite similar to the situation in Austria.

35. In a number of countries, such as Cyprus, Luxembourg, Malta, Finland, Poland, Portugal and Romania, where the matter is not regulated, the donation of both sperm and ova is used in practice.

36. A comparison between the Council of Europe study of 1998 and a survey conducted by the International Federation of Fertility Societies of 2007 shows that in the field of medically assisted procreation legal provisions are developing quickly. In Denmark, France and Sweden sperm and ova donation, which was previously prohibited, is now allowed since the entry into force of new legal provisions in 2006, 2004 and 2006 respectively. In Norway sperm donation for *in vitro* fertilisation has been allowed since 2003, but not ova donation.

C. Council of Europe Instruments

37. Principle 11 of the principles adopted by the *ad hoc* committee of experts on progress in the biomedical sciences, the expert body within the Council of Europe which preceded the present Steering Committee on Bioethics (CAHBI, 1989), states:

> "1. In principle, *in vitro* fertilisation shall be effected using gametes of the members of the couple. The same rule shall apply to any other procedure that involves ova or *in vitro* or embryos in vitro.

However, in exceptional cases defined by the member states, the use of gametes of donors may be permitted. ”

38. The Convention on Human Rights and Biomedicine of 1997 does not deal with the question of donation of gametes, but forbids to use a medically assisted reproduction technique to choose the sex of a child. Its Article 14 reads as follows:

“The use of techniques of medically assisted procreation shall not be allowed for the purpose of choosing a future child's sex, except where serious hereditary sex-related disease is to be avoided.”

39. The Additional Protocol to the above Convention, on Transplantation of Organs and Tissues of Human Origin, of 2002, which promotes donation of organs, expressly excludes from its scope reproductive organs and tissues.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION READ IN CONJUNCTION WITH ARTICLE 8

40. The applicants complained that the prohibition of heterologous artificial procreation techniques for *in vitro* fertilisation laid down by section 3(1) and section 3(2) of the Artificial Procreation Act had violated their rights under Article 14 read in conjunction with Article 8.

41. These provisions, in so far as relevant, read as follows:

Article 14: Prohibition of discrimination

“The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”

Article 8: Right to respect for private and family life

“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 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. Submissions by the parties

1. The applicants

42. The applicants submitted that Article 8 of the Convention was applicable and therefore also Article 14. Because of the special importance of the right to found a family and the right to procreation, the Contracting States enjoyed no margin of appreciation at all in regulating these issues. The decisions to be taken by couples wishing to make use of artificial procreation concerned their most intimate sphere and therefore the legislature should show particular restraint in regulating these matters.

43. All the arguments raised by the Government in defence of the impugned legislation were directed against artificial procreation in general and were therefore not persuasive when it came to accepting some procreation techniques while rejecting others. The risk of exploitation of female donors, to which the Government referred, was not relevant in circumstances such as those in the present case. To combat any potential abuse in the Austrian situation, it was enough to forbid remunerated ova or sperm donation; such a prohibition existed in Austria.

44. The system applied under the Artificial Procreation Act was incoherent and illogical, since heterologous forms of medically assisted procreation were not prohibited in general but exceptions were made for sperm donation in relation to specific techniques. The reasons for this difference in treatment were not persuasive. Furthermore, it was not clear why the legislation in force allowed for artificial insemination with donor sperm, while it categorically prohibited ova donation. In particular the distinction made between insemination with sperm from donors and *in vitro* fertilisation with donor sperm was incomprehensible. Thus, the impugned legislation constituted discrimination prohibited by Article 14.

2. The Government

45. The Government submitted that Article 14 complemented the other substantive provisions of the Convention and its Protocols. Since the applicability of Article 8 of the Convention was not disputed, and they referred in this respect to the findings of the Austrian Constitutional Court, Article 14, read in conjunction with those provisions, applied as well.

46. The Government submitted further that, according to the Court's case-law, a difference in treatment was discriminatory for the purpose of Article 14 if it had no objective and reasonable justification, that is, if it did not pursue a "legitimate aim" or if there was not a reasonable relationship of proportionality between the means employed and the aim sought to be realised. However, Contracting States enjoyed a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justified different treatments in law. The prohibition of *in vitro* fertilisation with sperm or ova from a donor was objectively and reasonably justified. The prohibition which pursued the legitimate aim of protecting the health and well-being of the women and children concerned as well as safeguarding general ethics and the moral values of society, was also proportionate.

47. Even though the right to respect for private life also comprised the right to fulfil the wish for a child, it did not follow that the State was under an obligation to permit indiscriminately all technically feasible means of reproduction or even to provide such means. In making use of the margin of appreciation afforded to them, the States had to decide for themselves what balance should be struck between the competing interests in the light of the specific social and cultural needs and traditions of their countries. The Austrian legislature had struck a fair balance, taking into account all the interests concerned. Such a balance allowed for medically assisted procreation while at the same time providing for certain limits where the current stage of medical and social development did not yet permit a legal authorisation of *in vitro* fertilisation with the sperm or ova of third persons, as desired by the applicants. Therefore the Artificial Procreation Act was characterised by the intention to prevent negative repercussions and

potential misuses and to employ medical advances only for therapeutic purposes and not for other objectives such as "selection" of children, as the legislature could not and should not neglect the existing unease among large sections of society about the role and possibilities of modern reproductive medicine.

48. After thorough preparation the legislature had found an adequate solution in a controversial area, taking into account human dignity, the well-being of the child and the right to procreation. *In vitro* fertilisation opened up far-reaching possibilities for a selective choice of ova and sperm, which might finally lead to selective reproduction (*Zuchtauswahl*). This raised essential questions regarding the health of children thus conceived and born, touching especially upon the general ethics and moral values of society.

49. In the discussion in Parliament it had been pointed out that ova donation might lead to problematic developments such as exploitation and humiliation of women, in particular of those from an economically disadvantaged background. Pressure might be put on a female donor who otherwise would not be in a position to afford an *in vitro* fertilisation to fulfil her own wish for a child.

50. *In vitro* fertilisation also raised the question of unusual relationships in which the social circumstances deviated from the biological ones, namely, the division of motherhood into a biological aspect and an aspect of "carrying the child" and perhaps also a social aspect. Finally, one had also to take into account that children had a legitimate interest in being informed about their actual descent, which, with donated sperm and ova, would in most cases be impossible. With the use of donated sperm and ova within the framework of medically assisted procreation, the actual parentage of a child was not revealed in the register of births, marriages and deaths and the legal protective provisions governing adoptions were ineffective in the case of medically assisted procreation. The reasons for allowing artificial insemination, as set out in the explanatory report to the Government's bill on the Artificial Procreation Act, were that because it was such an easily applicable procreation method, compared with others, it could not be monitored effectively. Also, this technique had already been in use for a long time. Thus, a prohibition of this simple technique would not have been effective and consequently would not constitute a suitable means of pursuing the objectives of the legislation effectively.

51. The Government therefore concluded that the prohibition of *in vitro* fertilisation with sperm or ova from a donor was objectively and reasonably justified. The prohibition, which pursued the legitimate aim of protecting the health and well-being of the women and children concerned as well as safeguarding general ethics and the moral values of society, was also proportionate. Accordingly, the applicants had not been discriminated against.

B. Third party submissions by the German Government

52. The German Government submitted that under section 1(1) of the German Embryo Protection Act (*Embryonenschutzgesetz*) it was a punishable offence to place inside a woman an egg not produced by her.

53. The prohibition was supposed to protect the child's welfare by ensuring the unambiguous identity of the mother. Biologically, only women were capable of carrying a child to term. Splitting motherhood into a genetic and a biological mother would result

in two women having a part in the creation of a child. This would be an absolute novelty in nature and in the history of mankind. In legal, historical and cultural terms, the unambiguousness of motherhood represented a fundamental and basic social consensus and, for this reason alone, was considered indispensable by German legislators. In addition, the relationship with the mother was assumed to be important for the child's discovery of identity. As a result, the child would have extreme difficulties in coping with the fact that in biological terms two women had a part in his or her existence. Split motherhood and the resulting ambiguousness of the mother's identity might jeopardise the development of the child's personality and lead to considerable problems in his or her discovery of identity. It was therefore contrary to the child's welfare.

54. Another danger was that the biological mother, being aware of the genetic background, might hold the egg donor responsible for any illness or handicap of the child and reject him or her. A conflict of interests between the genetic and biological mother could unfold to the detriment of the child. For the donor, making ova available was a complicated and invasive procedure which might result in a physical and psychological burden and a medical risk for the donor. Another conflict which might arise and strain the genetic and biological mothers' relationships with the child was that a donated egg might result in the recipient getting pregnant while the donor herself failed to get pregnant by means of *in vitro* fertilisation.

55. For the aforementioned reasons, split motherhood was considered to be a serious threat to the welfare of the child which justified the existing prohibitions under the Embryo Protection Act.

C. The Court's assessment

1. Applicability of Article 14 in conjunction with Article 8

56. The Government accepted that Article 8 was applicable to the case and consequently they did not dispute the applicability of Article 14 of the Convention. In this respect they referred to the findings of the Constitutional Court which, in its judgment of 14 October 1999, held that the decision of spouses or a cohabiting couple to conceive a child and to make use for that end of medically assisted procreation techniques fell within the sphere of protection of Article 8.

57. The applicants agreed with the Government as to the applicability of Article 14 read in conjunction with Article 8 of the Convention.

58. The Court reiterates that the notion of "private life" within the meaning of Article 8 of the Convention is a broad concept which encompasses, *inter alia*, the right to establish and develop relationships with other human beings (see *Niemietz v. Germany*, judgment of 16 December 1992, Series A no. 251-B, p. 33, § 29), the right to "personal development" (see *Bensaid v. the United Kingdom*, no. 44599/98, § 47, ECHR 2001-I) or the right to self-determination as such (see *Pretty v. the United Kingdom*, no. 2346/02, § 61, ECHR 2002-III). It encompasses elements such as names (see *Burghartz v. Switzerland*, judgment of 22 February 1994, Series A no. 280-B, p. 28, § 24), gender identification, sexual orientation and sexual life, which fall within the personal sphere protected by Article 8 (see, for example, *Dudgeon v. the United Kingdom*, judgment of 22 October 1981, Series A no. 45, pp. 18-19, § 41, and *Laskey, Jaggard and Brown v. the United Kingdom,* judgment of 19 February 1997, *Reports of Judgments and Decisions*

1997-I, p. 131, § 36), and 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).

59. In the case of *Dickson v. the United Kingdom*, which concerned the refusal of facilities for artificial insemination to the applicants, a prisoner and his wife, the Court found that Article 8 was applicable in that the artificial insemination facilities at issue concerned their private and family lives which notions incorporate the right to respect for their decision to become genetic parents (*Dickson v. the United Kingdom* [GC], no. 44362/04, § 66, ECHR 2007-XIII with further references).

60. The Court therefore considers that the right of a couple to conceive a child and to make use of medically assisted procreation for that end comes within the ambit of Article 8, as such a choice is clearly an expression of private and family life. Article 8 of the Convention therefore applies to the present case.

61. With regard to Article 14, which was relied on in the present case, the Court reiterates that it only complements the other substantive provisions of the Convention and the Protocols thereto. It has no independent existence since it has effect solely in relation to "the enjoyment of the rights and freedoms" safeguarded by those provisions (see, among many other authorities, *Sahin v. Germany* [GC], no. 30943/96, § 85, ECHR 2003-VIII). The application of Article 14 does not necessarily presuppose the violation of one of the substantive rights protected by the Convention. It is necessary but it is also sufficient for the facts of the case to fall "within the ambit" of one or more of the Articles of the Convention (see *Petrovic v. Austria*, judgment of 27 March 1998, *Reports* 1998-II, § 22 and *Burden v. United Kingdom* [GC], no. 13378/05 §58, ECHR 2008-...).

62. Since the applicants complain that they are victims of a difference in treatment which lacks objective and reasonable justification as required by Article 14 of the Convention, that provision, taken in conjunction with Article 8, is applicable.

2. Compliance with Article 14 in conjunction with Article 8

63. The applicants claim to be in a similar or analogous position to other couples who wish to avail themselves of medically assisted procreation techniques but who, owing to their medical condition, do not need ova donation or sperm donation for *in vitro* fertilisation. The applicants therefore were subject to a difference in treatment. Regard must be had to the aim behind that difference in treatment and, if the aim was legitimate, to whether the different treatment was justified.

64. The Court reiterates that, for the purposes of Article 14, a difference in treatment is discriminatory if it has no objective and reasonable justification, which means that it does not pursue a "legitimate aim" or that there is no "reasonable proportionality between the means employed and the aim sought to be realised" (see, *inter alia*, *Petrovic*, cited above, § 30; and *Salgueiro da Silva Mouta v. Portugal*, no. 33290/96, § 29..., ECHR 1999-IX). In that connection the Court observes that the Convention is a living instrument, to be interpreted in the light of present-day conditions (see, *inter alia*, *Johnston and Others v. Ireland*, 18 December 1986, § 53, Series A no. 112).

65. The Court reiterates further that Contracting States enjoy a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment (see *Van Raalte v. the Netherlands*, 21 February 1997, § 39, *Reports of Judgments and Decisions* 1997-I). The scope of this margin will vary according to the circumstances, the subject matter and the background (see *Petrovic*, cited above, § 38).

66. The applicants submitted that because of the special importance of the right to found a family and the right to procreation, the Contracting States enjoyed no margin of appreciation at all in regulating these issues.

67. In the Government's view the Austrian legislator, in devising the framework for artificial procreation and for deciding in that context which procreation techniques were allowed, had a particularly wide margin of appreciation which was a decisive element in assessing whether a difference of treatment in otherwise similar situations pursued a legitimate aim

68. The Court notes that in the field of medically assisted procreation there is no uniform approach to this question among the State Parties to the Convention (see Council of Europe, Medically Assisted Procreation and the Protection of the Human Embryo – Comparative Study on the Situation in 39 States, June 1998, CDBI/INF (98) 8). Medically assisted procreation is regulated in detail in some countries, to a certain extent in others and in further countries not at all. If legislation exists in a country, there is a broad variety of techniques which are allowed and forbidden. As far as can be seen, the same situation as in Austria exists under German law. Donation of sperm is prohibited in Italy, Lithuania and Turkey, while donation of ova is prohibited in Croatia, Germany, Italy, Lithuania, Norway, Switzerland and Turkey.

69. Since the use of IVF treatment gives rise to sensitive moral and ethical issues against a background of fast-moving medical and scientific developments, and since the questions raised by the case touch on areas where there is no clear common ground amongst the Member States, the Court considers that the margin of appreciation to be afforded to the respondent State must be a wide one (see *X, Y and Z v. the United Kingdom*, 22 April 1997, § 44, *Reports of Judgments and Decisions* 1997-II). The State's wide margin in principle extends both to its decision to intervene in the area and, once having 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 § 75). However, the differences in the approaches adopted by the Contracting States do not, as such, make any solution reached by a legislature acceptable. It does not absolve the Court from carefully examining the arguments discussed in the legislative process and from examining whether the arguments advanced by the Government for justifying the difference of treatment in issue are relevant and sufficient. In doing so the Court finds that the situation of the first and second applicants and that of the third and fourth applicants have to be examined separately.

a. The Third and Fourth Applicants (ova donation)

70. The third applicant is completely infertile and does not produce ova at all while her husband, the fourth applicant, can produce sperm fit for procreation. It is not in dispute that owing to their medical conditions only *in vitro* fertilisation with the use of ova from a donor would allow the applicant couple to fulfil their wish for a child of which at least one of the applicants is the genetic parent. However the prohibition of heterologous artificial procreation techniques for *in vitro* fertilisation laid down by section 3(1) of the Artificial Procreation Act, which prohibits sperm donation rules out this possibility. There is no exception to this rule.

71. The Court has established in its case-law that, in order for an issue to arise under Article 14, there must be a difference in the treatment of persons in relevantly similar

situations (*D.H. and Others v. the* Czech Republic [GC], no. 57325/00, § 175, ECHR 2007). Such a difference in treatment is discriminatory if it has no objective and reasonable justification; in other words, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised. The Contracting State enjoys a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment (*Stec and Others v. the United Kingdom* [GC], nos. 65731/01 and 65900/01, §§ 51-52, ECHR 2006-VI; *Burden*, cited above, § 60).

72. Thus, the Court has to examine whether the difference in treatment between the third and fourth applicants and a couple which, for fulfilling its wish for a child may make use of artificial procreation techniques without resorting to ova donation, has an objective and reasonable justification, that is, if it does pursue a legitimate aim or if there is a reasonable relationship of proportionality between the means employed and the aim sought to be realised.

73. The Government argued that the prohibition of ova donation for *in vitro* fertilisation adopted by the Austrian legislature pursued a legitimate aim and was proportionate. In their view the Austrian legislature struck a fair balance between the public and private interests involved. They argue that the legislature had to set certain limits on the possibilities offered by the medical techniques of artificial procreation because it had to take account of the morally and ethically sensitive nature and unease existing among large sections of society as to the role and possibilities of modern reproductive medicine.

74. The Court considers that concerns based on moral considerations or on social acceptability are not in themselves sufficient reasons for a complete ban on a specific artificial procreation technique such as ova donation. Such reasons may be particularly weighty at the stage of deciding whether or not to allow artificial procreation in general, and the Court would emphasise that there is no obligation on a State to enact legislation of the kind and to allow artificial procreation. However, once the decision has been taken to allow artificial procreation and notwithstanding the wide margin of appreciation afforded to the Contracting States, the legal framework devised for this purpose must be shaped in a coherent manner which allows the different legitimate interests involved to be taken into account adequately and in accordance with the obligations deriving from the Convention.

75. The Government argued further that medically advanced techniques of artificial procreation such as *in vitro* fertilisation carried the inherent risk of not being employed only for therapeutic purposes but for other objectives such as the "selection" of children; *in vitro* fertilisation posed such a risk. In addition, they submitted that there was a risk that ova donation might lead to the exploitation and humiliation of women, in particular from an economically disadvantaged background, as pressure might be put on a woman to donate who otherwise would not be in a position to afford an *in vitro* fertilisation in order to fulfil her own wish for a child.

76. The Court considers that the risks associated with new techniques in a sensitive field like medically assisted procreation must be taken seriously and that it is in the first place for the domestic legislator to assess these risks after carefully weighing the different public and private interests involved and the dangers which might be faced. However, a complete ban on the medical technique at issue would not be proportionate

unless, after careful reflection, it was deemed to be the only means of effectively preventing serious repercussions. In the present case the Court is not persuaded that a complete ban was the only means at the disposal of the Austrian legislature. Given that the Artificial Procreation Act reserves this kind of intervention to specialised medical doctors, who have particular knowledge and experience in this field and are themselves bound by the ethical rules of their profession, and that the Act provides for further safeguards in order to minimise the risk, the Court finds that the prohibition of ova and sperm donation for *in vitro* fertilisation cannot be considered the only or the least intrusive means of achieving the aim pursued.

77. As regards the argument of risk of exploitation of women and abuse of these techniques, the Court considers that this is an argument which does not specifically concern the procreation techniques at issue but seems to be directed against artificial procreation in general. Furthermore, potential abuse, which undoubtedly has to be combated, is not a sufficient reason for prohibiting a specific procreation technique as a whole, if there exists the possibility to regulate its use and devise safeguards against abuse. In this respect the Court observes that under Austrian law remuneration of ova and sperm donation is prohibited by law.

78. At the hearing the Government also pointed out that obtaining ova for the purpose of donation was a risky and serious medical intervention which had serious repercussions for the donor. The Court appreciates that the Austrian legislature makes an effort to avoid unnecessary health risks but it notes in the first place that in case of homologous *in vitro* fertilisation the risk incurred by the woman from whom the ova are taken must be the same and this medical intervention is one allowed by the Artificial Procreation Act. In so far as the argument is linked to those concerning the risk of an abuse of ova donation or its commercialisation, the Court considers that the arguments given above are also valid in this context.

79. The Government also submitted that *in vitro* fertilisation raised the question of unusual relationships in which the social circumstances deviated from the biological ones, namely the division of motherhood into a biological aspect and the aspect of "carrying the child" and perhaps also a social aspect.

80. The Court observes that, according to the Constitutional Court's decision of 14 October 1999, the Austrian legislator was guided by the idea that medically assisted procreation should take place similarly to natural procreation, in particular that the basic principle of civil law – *mater semper certa est, pater est quem nuptiae demonstrant* – should be maintained by avoiding the possibility that two persons could claim to be the biological mother of one and the same child and to avoid disputes between a biological and a genetic mother in the wider sense.

81. The aim of maintaining legal certainty in the field of family law by keeping a long-standing principle of this field of law as one of its basic features certainly has its merits. Nevertheless, unusual family relations in a broad sense are well known to the legal orders of the Contracting States. Family relations which do not follow the typical parent-child relationship based on a direct biological link, are nothing new and have already existed in the past, since the institution of adoption, which creates a family relationship between persons which is not based on descent but on contract, for the purpose of supplementing or replacing biological family relations. From this matter of common knowledge the Court would conclude that there are no insurmountable obstacles

to bringing family relations which would result from a successful use of the artificial procreation techniques at issue into the general framework of family law and other related fields of law.

82. The Government relied on a further argument militating against the permission of ova and sperm donation for *in vitro* fertilisation, namely that children had a legitimate interest in being informed about their actual descent, which, with donated sperm and ova, would in most cases be impossible as the actual parentage of a child was not revealed in the births, marriages and deaths register.

83. The Court is not persuaded by this argument either. In this respect it reiterates that respect for private life requires that everyone should be able to establish details of their identity as individual human beings and that an individual's entitlement to such information is of importance because of its formative implications for his or her personality (see, for example, *Mikulić v. Croatia*, no. 53176/99, §§ 53-54, ECHR 2002-I, and *Gaskin v. the United Kingdom*, judgment of 7 July 1989, Series A no. 160, p. 16, §§ 36-37, 39). This includes obtaining information necessary to discover the truth concerning important aspects of one's personal identity, such as the identity of one's parents (see *Jäggi v. Switzerland*, no. 58757/00, § 25, ECHR 2006-..., and *Odièvre v. France* [GC], no. 42326/98, § 29, ECHR 2003-III).

84. However, such a right is not an absolute one. In the case of *Odièvre,* cited above, which concerned anonymous birth and the impossibility for the applicant to obtain information about her biological parents, the Court found no breach of Article 8 of the Convention because the French legislator had achieved a proper balance between the public and private interests involved (see *Odièvre*, cited above, § 49). The Court therefore considers that the Austrian legislator could also find an appropriate and properly balanced solution between competing interests of donors requesting anonymity and any legitimate interest in obtaining information of a child conceived through artificial procreation with donated ova or sperm.

85. In conclusion the Court finds that the Government have not submitted a reasonable and objective justification for the difference in treatment between the third and fourth applicants, who are prevented by the prohibition of ova donation for artificial procreation under Section 3 of the Artificial Procreation Act from fulfilling their wish for a child, and a couple which may make use of artificial procreation techniques without resorting to ova donation. Accordingly, there has been a violation of Article 14 of the Convention taken in conjunction with Article 8 as regards the third and fourth applicants.

b. The First and Second Applicants (sperm donation)

86. The first applicant suffers from fallopian-tube-related infertility and the second applicant, her husband, is also infertile. It is not in dispute that owing to their medical conditions only *in vitro* fertilisation with the use of sperm from a donor would allow the applicant couple to fulfil their wish for a child of which at least one of the applicants is the genetic parent.

87. However the prohibition of heterologous artificial procreation techniques for *in vitro* fertilisation laid down by section 3(1) of the Artificial Procreation Act, which, in the circumstances of the first and second applicant, rules out sperm donation excludes this possibility. At the same time section 3 (2) of that Act allows sperm donation for in vivo fertilisation.

88. Therefore, the Court has to examine whether the difference in treatment between the first and second applicants who, for fulfilling their wish for a child could only resort to sperm donation for *in vitro* fertilisation and a couple which lawfully may make use of sperm donation for *in vivo* fertilisation, has an objective and reasonable justification, that is, if it does pursue a legitimate aim or if there is a reasonable relationship of proportionality between the means employed and the aim sought to be realised.

89. The Court observes at the outset that this artificial procreation technique combines two techniques which taken alone are allowed under the Artificial Procreation Act, namely *in vitro* fertilisation with the gametes of the couple on the one and sperm donation on the other hand. Thus, a prohibition of the combination of these lawful techniques requires, in the Court's view, particularly persuasive arguments by the Government.

90. The Court considers that the various arguments advanced by the Government in order to justify the prohibition of ova donation are of little relevance for the examination of the prohibition at issue. Some relate to concerns against artificial procreation in general, while there is no complete ban under Austrian law. Some, like preventing the exploitation of women in vulnerable situations, limiting potential health risks for ova donors and preventing the creation of unusual family relations because of split motherhood simply do not apply. Some, like the risk of eugenic selection and problems stemming from the legitimate interest of children conceived through gamete donation to be informed of their actual descent, are directed against sperm donation, which, however, is allowed for the purpose of *in vivo* fertilisation.

91. In justifying the prohibition of sperm donation the Government has submitted a further argument. The reasons given for justifying this difference in treatment between *in vitro* fertilisation and artificial insemination were that the latter technique had already been in use for a considerable time when the Artificial Procreation Act entered into force and, because it was easy to handle and did not necessarily require the assistance of a trained medical surgeon, compliance with a prohibition would have been impossible to monitor.

92. It must be remembered that the Convention is designed to “guarantee not rights that are theoretical or illusory but rights that are practical and effective” (see, *inter alia*, *Folgerø and Others v. Norway* [GC], no. 15472/02, § 100, ECHR 2007-..., and *Salduz v. Turkey* [GC], no. 36391/02, § 51, 27 November 2008). The Court must therefore take into account the effectiveness of a given instance of interference when assessing whether there exists a reasonable relationship of proportionality between the means employed and the aim sought to be realised. Thus, the Court finds that it is legitimate to take also into account whether the interference envisaged by the State would be an effective means of pursuing a legitimate goal.

93. Even if one were to accept this argument submitted by the Government as a question of mere efficiency it must be balanced against the interests of private individuals involved. In this respect the Court reiterates that where a particularly important facet of an individual's existence or identity is at stake, the margin allowed to the State will be restricted (see *Evans*, cited above, § 77; *X. and Y. v. the Netherlands*, judgment of 26 March 1985, Series A no. 91, §§ 24 and 27; *Dudgeon*, cited above, § 52 and *Christine Goodwin v. the United Kingdom* [GC], no. 28957/95, § 90, ECHR 2002-VI). In the Court's view the wish for a child is one such particularly important facet and, in the

circumstances of the case, outweighs arguments of efficiency. Thus, the prohibition at issue lacked a reasonable relationship of proportionality between the means employed and the aim sought to be realised.

94. The Court therefore finds that the difference in treatment between the first and second applicants who, for fulfilling their wish for a child could only resort to sperm donation for *in vitro* fertilisation and a couple which lawfully may make use of sperm donation for *in vivo* fertilisation, had no objective and reasonable justification and was disproportionate. Accordingly, there has been a violation of Article 14 of the Convention taken in conjunction with Article 8 as regards the first and second applicants.

II. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

95. The applicants also complained that the prohibition of heterologous artificial procreation techniques for *in vitro* fertilisation laid down by section 3(1) and 3(2) of the Artificial Procreation Act had violated their rights under Article 8 of the Convention.

96. In the circumstances of the present case the Court considers that in view of the considerations under Article 14 read in conjunction with Article 8 of the Convention no separate issue arises under Article 8 of the Convention alone.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

97. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

98. Without distinguishing between pecuniary and non-pecuniary damages the applicants claimed a sum of EUR 20,000 for each applicant couple. They submitted that as a consequence of the prohibition under the Artificial Procreation Act they had suffered great emotional distress. In addition, they had been forced to obtain the necessary treatment in other countries where it was readily available, as a result of which they had incurred considerable additional costs. Eventually they had had to abandon their wish to have children of their own and resort to adoption, which had also been a difficult and painful decision.

99. In so far as the applicants claimed non-pecuniary damages, the Government refrained from any comment as the suffering of the applicants did not lend itself to any evaluation in terms of money. In so far as the applicants appeared to be claiming an award in respect of pecuniary damage, the Government submitted that there was no causal link between the violation found and the damages claimed as regards the costs for treatment undergone and expenses incurred for adoption.

100. The Court does not discern any causal link between the violation found and the claim in respect of pecuniary damage. Accordingly, no award can be made under this head. However, the applicants have undoubtedly sustained non-pecuniary damage. Making an assessment on an equitable basis, the Court awards each applicant couple EUR 10,000 as compensation for non-pecuniary damage.

B. Costs and expenses

101. The applicants claimed EUR 15,000 per applicant for costs and expenses incurred both in the domestic proceedings and the proceedings before the Court.

102. The Government considered this claim excessive and, on the basis of their own calculation, were only ready to pay compensation for procedural costs in an amount of EUR 22,000 (inclusive of VAT) for representation of all applicants in the domestic proceedings and in the proceedings before the Court.

103. The Court observes that the applicants have not submitted any bills which would justify awarding a higher amount than the one accepted by the Government. Accordingly, the Court awards under this head EUR 18,333 for costs and expenses incurred by all applicants in the proceedings before the domestic instances and the Court for both lawyers appearing before the Court.

C. Default interest

104. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT

1. *Holds* by five votes to two that there has been a violation of Article 14 of the Convention read in conjunction with Article 8 as regards the third and fourth applicants;
2. *Holds* by six votes to one that there has been a violation of Article 14 of the Convention read in conjunction with Article 8 as regards the first and second applicants;
3. *Holds* unanimously that it is not necessary to examine the application also under Article 8 of the Convention;
4. *Holds* unanimously
   (a) that the respondent State is to pay each applicant couple, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 10,000 (ten thousand euros) in respect of non-pecuniary damage and to pay all the applicants EUR 18,333 (eighteen thousand three-hundred and thirty-three euros), plus any tax that may be chargeable to the applicants, in respect of costs and expenses;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
5. *Dismisses* unanimously the remainder of the applicants' claim for just satisfaction.

Done in English, and notified in writing on 1 April 2010, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

André Wampach Christos Rozakis
Deputy Registrar President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following dissenting opinions of Judge Steiner and Judge Jebens are annexed to this judgment.

C.L.R.

A.M.W.

PARTIALLY DISSENTING OPINION OF JUDGE STEINER

I entirely agree with the majority that there has been a breach of Article 14 of the Convention read in conjunction with Article 8 as regards the first and second applicant. However, I do not agree that there has been a breach of these provisions as regards the third and fourth applicant. In my opinion the prohibition of heterologous artificial procreation techniques for *in vitro* fertilisation laid down by section 3(1) of the Artificial Procreation Act is in conformity with Article 14 read in conjunction with Article 8.

The field of artificial procreation is subject to a particularly dynamic development both in science and in the development of a legal framework for its medical application. It is for this reason particularly difficult to obtain a sound basis for assessing the adequacy and appropriateness of legislative measures which might show their consequences only after a considerable length of time. It is therefore understandable that the States find it necessary to act with particular caution in the field of artificial procreation.

The Austrian legislature has not completely ruled out artificial procreation allowing the use of homologous techniques of procreation. According to the findings of the Constitutional Court in its decision of 14 October 1999, the Austrian legislator was guided by the idea that medically assisted procreation should take place similarly to natural procreation, in particular that the basic principle of civil law "mater semper certa est, pater est quem nuptiae demonstrant" should be maintained by avoiding the possibility that two persons could claim to be the biological mother of one and the same child and to avoid disputes between a biological and a genetic mother in the wider sense. By doing so the legislature tried to reconcile the wish to make medically assisted procreation available and the existing unease among large sections of society as to the role and possibilities of modern reproductive medicine, raising issues of a morally and ethically sensitive nature.

The Austrian legislator has also taken specific safeguards and precautions under the Artificial Procreation Act, namely to reserve the use of artificial procreation techniques to specialised medical doctors, who have particular knowledge and experience in this field and are themselves bound by the ethical rules of their profession and to prohibit remuneration of ova and sperm donation by law. These measures are intended to prevent potential risks of eugenic selection and their abuse and to prevent the risk of exploitation of women in vulnerable situations as ova donors and one could also consider that the Austrian legislator might devise and adopt further measures or safeguards for reducing the risk attached to ova donation as described by the Government. The Government also argued that there was the risk of creating unusual relationships in which the social circumstances

deviated from the biological ones, but unusual family relations in a broad sense, which do not follow the typical parent-child relationship based on a direct biological link are not unfamiliar to the legal orders of the Contracting States. The institution of adoption had been created over the time to give a satisfactory legal framework to such relations, which is known in all the member states. Thus, a legal framework regulating satisfactorily the problems arising from ova donation could also have been adopted. However, one cannot overlook that the splitting of motherhood between a genetic mother and one carrying out the child significantly differs from relations based on adoption and has added a new quality to this problem.

The Austrian legislator could have devised a different legal framework for regulating artificial procreation allowing ova donation, which would be in accordance with its stated intentions. It notes in this regard that this latter solution has been adopted in a number of Member States of the Council of Europe (see § 33 above). However, in my view the central question is not whether a different solution might have been found by the legislature which would arguably have struck a fairer balance, but whether, in striking the balance at the point at which it did, the Austrian legislator exceeded the margin of appreciation afforded to it under Article 14 of the Convention. In determining this question, it is of quite some importance that, while, as noted above, there is no international consensus as to the point at which consent to the use of genetic material may be withdrawn, Austria is by no means alone among the Member States in prohibiting ova donation for the purpose of artificial procreation.

In this respect I would emphasize that the only instruments at European level dealing with the subject matter of ova donation for artificial procreation are the principles adopted by the ad hoc committee of experts on progress in the biomedical sciences of 1989. Principle 11 states that, in principle *in vitro* fertilisation shall be effected using gametes of the members of the couple (see § 36 above). The Convention on Human Rights and Biomedicine of 1997 and the Additional Protocol of 2002 to this Convention are silent on this matter (see §§ 37-38 above). The prohibition of ova donation under the Artificial Procreation Act is in accordance with the above-mentioned principle.

Thus, in adopting the clear and principled rule of Section 3 of the Artificial Procreation Act whereby ova donation for purposes of artificial procreation was prohibited without exception, the Austrian legislator did not exceed the wide margin of appreciation afforded to it under Article 14 of the Convention.

DISSENTING OPINION OF JUDGE JEBENS

I respectfully disagree with the majority that there has been a violation of Article 14 of the Convention read in conjunction with Article 8 as regards any of the four applicants. Neither do I find that there has been a violation of Article 8 read alone. I discuss firstly the question concerning Article 8, taken alone.

1. There is in my opinion no doubt that the decision of spouses or a cohabiting couple to conceive a child falls within the ambit of Article 8, regardless of whether that can only be fulfilled by the use of medically assisted procreation techniques. However, artificial procreation raises difficult questions, notably not because of the use of medical assistance in itself, but because it may sometimes collide with deep-rooted ethical standards and because it may create the risk of unwanted consequences. That is the situation in this case, and it is for such reasons that the Austrian legislators have decided to prohibit the use of certain procreation methods.

The Austrian Artificial Procreation Act regulates the use of artificial methods for conceiving a child by permitting the use of known medical techniques, but prohibiting the use of ova or sperm from others than the couple itself for *in vitro* fertilisation. This reflects the purpose of the Act, which is to assist married and cohabiting couples who are unable to conceive a child by natural means, while at the same time preventing unwanted results, such as the creation of unusual family relations, commercialisation and selective reproduction and exploitation of poor women. In addition to such concrete reasons the legislator took into account the actual state of consensus in the Austrian society. Thus, the prohibition of the use of donor material was based not only on the possibilities of modern reproductive medicine, but also on the unease within the population on a morally and ethically sensitive issue.

I find it clear that the above reasons fall within the limits of Article 8 § 2 of the Convention, in that they are covered partly by "the protection of health and morals" and partly by "the protection of the rights and freedoms of others". As to the question of whether the prohibition was proportionate to the aims it pursued, it is of importance that it prevents the applicants from their only possibility to biologically have children of their own. However, other, less restrictive, but still effective means do not seem to have been practically feasable. Furthermore, it must be taken into account that though Austria is in a minority among the European States, there is no European consensus with respect to artificial procreation with the use of donor material. Because of this, and the fact that the case concerns a very sensitive issue, the State should in my opinion be afforded a wide margin of appreciation (see *Evans v. the United Kingdom* [GC], no. 6339/05, § 77, ECHR 2007-IV). Bearing in mind that the Austrian legislators have weighed the competing interests carefully and concluded with a reasonable solution, which to a very large extent opens up for artificial procreation, I do not think it is for the Court to interfere.

2. The applicants also rely on Article 14, read in conjunction with Article 8. Since I have concluded above that Article 8 is applicable alone, I also find Article 14 to be applicable, in conjunction with Article 8.

It follows from the Court's case-law that a treatment is discriminatory, within the meaning of Article 14, if it has no objective and reasonable justification. However, an issue can only arise under Article 14 if the different treatment refers to situations which are relevantly similar (see *D.H. and Others v. the Czech Republic* [GC], no. 57325/00, § 175, ECHR 2007-...). Even if that is the case, the Contracting States have a certain margin of appreciation when assessing whether and to what extent a different treatment is justified, (*Stec and Others v. the United Kingdom* [GC], no. 65731/01, §§ 51-52, ECHR 2006-VI, *Burden v. the United Kingdom* [GC], no. 13378/05, § 60, ECHR 2008-...).

Turning to the facts of the case, I note firstly that all the four applicants are treated differently from couples who are able to make use of the medical techniques allowed under the Artificial Procreation Act, namely those who produce ova and sperm, and who therefore do not need a donor. This is a difference in treatment between persons whose position is similar because they all need medical assistance in order to conceive a child, but different with respect to the method to be applied. More important is the fact that this difference refers to the very essence of the prohibition in the Austrian legislation. Bearing in mind that the States have a certain margin of appreciation, and that the prohibition is based on reasons which are in my mind acceptable, I am not able to conclude that there has been a violation in respect of the difference in treatment discussed above.

The first and second applicant, who need sperm donation in order to fulfil their wish for a child, further complain that they are discriminated against, because the Artificial Procreation Act prohibits the use of donor sperm for *in vitro* fertilisation, but allows the use of donor sperm for artificial insemination. I find these applicants to be in a similar position as couples who can utilise the insemination method, in that both groups need sperm donation. The reason for the difference in treatment is partly historical, in that the insemination technique has been in use for many years, and partly practical, because insemination is so easily performed that a prohibition could not be effectively controlled. Referring again to the States' margin in such matters, I am convinced by the fact that the Austrian legislators have not by the above exception permitted sperm donation as such, but accepted the realities and avoided legislation which would be impractical. In such circumstances it would also in my opinion be very unfortunate to restrict the possibilities of one group of couples from obtaining assistance, in order not to discriminate against another.