I. ÚS 1099/18 dated 8 November 2018

In Vitro Fertilisation with Sperm of a Deceased Husband

Czech Republic
JUDGMENT
Of the Constitutional Court
In the Name of the Republic

The Chamber of the Constitutional Court, consisting of the Presiding Judge Tomáš Lichovník (Judge Rapporteur) and Judges Vladimír Sládeček and David Uhlíř, held on the matter of the constitutional complaint filed by the petitioner H. P., represented by JUDr. Petra Langerová, Ph.D, Schweitzerova 116/28, 779 00 Olomouc, and directed against the Judgment of the District Court in Pilsen – City dated 28 November 2016, file reference 31 C 41/2015-74, the Judgment of the Regional Court in Pilsen dated 30 May 2017, file reference 56 Co 84/2017-114, and the Judgment of the Supreme Court dated 21 February 2018, file reference 21 Cdo 4020/2017-134, and the petition seeking the annulment of Section 6 and Section 8 (2) of Act No. 373/2011 Coll., on Specific Health Services, with the participation of the secondary party NATALART s. r. o., Parková 11a, Pilsen, as follows:

I. The constitutional complaint shall be dismissed.

II. The petition seeking the annulment of Section 6 and Section 8 (2) of Act No. 373/2011 Coll., on Specific Health Services, shall be dismissed as inadmissible.

Reasoning:

I.

On 26 March 2018, the Constitutional Court was served the application seeking the initiation of the procedure on a constitutional complaint in accordance with Section 72 of Act No. 182/1993 Coll., on the Constitutional Court, as amended (hereinafter only the "Constitutional Court Act"), by means of which the Petitioner sought the annulment of the decisions of the ordinary courts cited above.

Prior to commencing to deal with the matter, the Constitutional Court examined the formal aspects of the submission and found that the submitted constitutional complaint complied with all the requirements prescribed by the Constitutional Court Act.

II.

Within the proceedings before the District Court in Pilsen – City, the Petitioner sought for the secondary party to comply with the duty consisting in performing artificial fertilisation using the Petitioner's germ cell and cryopreserved sperm of the deceased P. P. The Petitioner stated that she was the patient of the secondary party as was her deceased spouse P. P. In the course of the treatment, the secondary party proposed to the Petitioner and her spouse an individual infertility treatment procedure, providing them with information on this procedure. On 26

April 2014, the Petitioner's deceased husband signed his informed consent to sperm cryopreservation prior to infertility treatment using the methods of assisted reproduction, by which he unambiguously agreed to have his sperm preserved frozen for the subsequent fertilisation of the Petitioner. Together with her spouse, the Petitioner signed on 15 December 2014 her informed consent to the infertility treatment via the in vitro fertilisation method, and they also expressed their consent to defrosting and using the sperm prior to the infertility treatment using assisted reproduction methods, when the sperm was intended to be defrosted and used for the infertility treatment. On the same day, the spouses P. signed their informed consent to an intracytoplasmic sperm injection, when the Petitioner was subsequently supposed to commence gradual administration of hormonal injections. The Petitioner's spouse deceased on 16 June 2015. The Petitioner stated that due to this event, her psychological condition deteriorated significantly and she was unable to undergo hormonal injections and oocyte collection immediately after her husband's death. The secondary party refused to complete the artificial fertilisation procedure due to the absence of valid consent of the Petitioner's spouse.

The competent district court concluded that the legal regulations only allowed for the fertilisation of a couple. At the time of submitting her application, the Petitioner did not live with a partner and was thus unable to apply to have the assisted reproduction performed. Even though the Petitioner's decreased spouse applied for artificial fertilisation and granted his first informed consent to its performance, according to the trial court, it is impossible to anticipate his further will in the course of the treatment and replace it with a court decision. According to the first instance court, the instant case does not even provide space for applying the institute of a previously expressed wish.

Following the Petitioner's appeal, the Regional Court in Pilsen affirmed the decision of the first instance court, concluding that the established facts did not allow the court to hold in her favour.

The Supreme Court examined the matter upon the application filed by the Petitioner, dismissing the application. In its decision, it thoroughly examined the particular case, as well as the comparison of individual national regulations. However, it did not conclude that there was an interference with the Petitioner's right to a private and family life. According to the Supreme Court, the procedure under the cited statute is "permissible only "inter vivos" (between the alive), and in addition, within "the infertility treatment", as the legislature's intention to cover the relationships arising from artificial fertilisation using the sperm of a deceased man cannot be inferred from the regulation itself or the statement of reasons. Unlike the legal regulation in Belgium or the Netherlands, the Czech legislation does not allow artificial fertilisation using the sperm of a deceased man, yet unlike France or the Federal Republic of Germany, it does not prohibit such artificial fertilisation nor explicitly request a declaration from the provider of the biological material concerning how the biological material is to be treated upon their decease, as is the case in Great Britain, while the latter is obvious from the provisions of Section 8 of the Act on Specific Health Services. The provisions of Section 3 (1) (a) of Act on Specific Health Services associate assisted reproduction for the purposes of artificial fertilisation of a woman solely with medical reasons within "the treatment of her infertility or the man's infertility" and the provisions of Section 6 (1) of Act on Specific Health Services enables (allows) artificial fertilisation to be performed on a woman of fertile age if her age has not exceeded 49 years, on the basis of a written application of the woman and the man who intend to undergo this health service together, i.e. to an "infertile couple". It is obvious from the above that after the decease of the man who is

part of the infertile couple, the infertile couple can no longer be conceptually considered, and therefore it is not possible to "treat" such an infertile couple. In addition, it cannot be considered that the six-month period provided for in the provisions of Section 6 (1), sentence two before the semicolon of the Act on Specific Health Services, is analogous to the maximum conservation period of the biological material of the infertile couple. The provisions of the Act requiring the written consent of the infertile couple, not older than six months, also protect the man providing the biological material for the conception, allowing him to withdraw his consent at any time. In the instant case, the doubts concerning the actual will of the plaintiff's deceased husband to become a father even after his death cannot be completely ruled out. The informed consent to sperm cryopreservation actually contained explicit provisions on the destruction of this biological material in the event of his death. The above also means that the cryopreserved sperm of the man creating an infertile couple cannot be used to treat this couple after death, even if the six-month limitation period has not yet elapsed following the man's decease."

In her constitutional complaint, the Petitioner considers the contested decisions of the ordinary courts as erroneous, based on an incorrect assessment of the matter. At the same time, she believes that the decisions interfered with her right to private and family life, which is a natural right of a human being. The Petitioner states that the case law of the Supreme Court and the Constitutional Court has previously inferred that the existence of a family does not require both parents. The Petitioner believes that her claim cannot be rejected solely due to the fact that her husband deceased when he had granted his consent to artificial fertilisation using his frozen sperm. The ordinary courts failed to respect the will of the Petitioner's spouse, whose wish was to conceive offspring with his wife by means of artificial fertilisation. If the courts have concluded that it is possible to anticipate the subsequent will of the Petitioner's spouse in the course of artificial fertilisation, the Petitioner emphasises that the court's opinion fails to correspond to the facts of the matter, when Mr P. P. granted his informed consent for an unlimited term, unconditionally, and that he never withdrew his consent. Performing artificial fertilisation using the germ cells of her deceased husband will not result in any damage to the rights of any other entities. The Petitioner believes that the decision of the ordinary courts is contrary to Art. 10 (2) of the Charter of Fundamental Rights and Freedoms and Art. 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms.

The Petitioner believes that the provisions of Section 6 and Section 8 (2) of Act No. 373/2011 Coll., on Specific Health Services, cannot restrict the Petitioner's right to have artificial fertilisation performed using the germ cells of her spouse. The Petitioner also believes that she cannot be a hostage to the fact that the Act on Specific Health Services does not contain the provisions which would address the Petitioner's life situation. For this reason, the Petitioner believes that the above provisions are contrary to Art. 10 (2) of the Charter of the Fundamental Rights and Freedoms (hereinafter only as the "Charter") and seeks their annulment.

III.

As for the instant constitutional complaint, the District Court in Pilsen – City stated that in its view, the constitutional complaint was ill-founded, referring to the reasoning behind the decisions contested by the constitutional complaint. As for the Petitioner's application seeking the annulment of Section 6 (1) of Act No. 373/2011 Coll., the district court stated that it considered it as constitutionally conformable.

As for the instant constitutional complaint, the Regional Court stated that the Petitioner's application could not be allowed owing to the inconsistency with Act No. 373/2011 Coll. In the view of the regional court, there was no interference with the Petitioner's right to private and family life within the proceedings before the ordinary courts.

In its statement, the Supreme Court pointed out that the Petitioner's case had been examined primarily from the perspective of whether the application of the relevant substantive legal regulations would result in an interference with the right to private and family life guaranteed by Art. 8 of the Convention. On the basis of the performed assessment, it concluded that it was not the case, as the Czech legal order did not deprive the Petitioner of the right to have a child. Only in the case of artificial fertilisation does it implicitly not allow the use of the cryopreserved sperm of her deceased spouse, as there is no longer a "couple" whose infertility could be treated. The courts could not address the issue whether it would also have been possible to achieve the aim pursued by the Petitioner in another manner, for example in a jurisdiction in which any such treatment is explicitly admissible or possibly outside the system of public health insurance. The Supreme Court believes that despite the absence of an explicit rule covering the situations in which the Petitioner finds herself, there was no interference with her right to private and family life under Art. 8 of the Convention.

The Petitioner exercised her right to reply to the statements of the parties to the proceedings and pointed out that at the beginning of the relationship with the secondary party to the proceedings, there actually had been a "couple" who wished to conceive a child using cryopreserved sperm. Relying on the statement of the Supreme Court, the Petitioner claimed that, with respect to a possible violation of her right to private and family life, she perceived it as erroneous to insist on the requirement of the 6-month limitation period of the consent to the artificial fertilisation owing to the fact that this requirement was substantiated with the reference to the child's right to know their parents. The Petitioner points out that this justification contradicts the situation when the mother's egg is fertilised using the sperm of an anonymous donor who has no actual relationship with her mother, nor is he interested in establishing a family with her. In such a case, the mother's partner becomes a legal father without having a biological influence on the child's conception. The aforementioned situation would thus be completely illogically superordinate to the instant case, which was initiated by the Petitioner and her deceased spouse who wished to have a child together. The Petitioner is prevented from undergoing artificial fertilisation with her deceased husband's sperm, referring to the formal obstacles of the case and the argument that the child has the right to know their parents. In the Petitioner's view, her situation is at least on the same level with the anonymous donor situation described above. In addition, in the course of artificial fertilisation using the anonymous donor's sperm, the mother's "partner" may also be an "invited" person only to comply with the statutory obligation to have a couple attending any such artificial fertilisation. The Petitioner perceives herself as being disadvantaged by the current legal regulation.

IV.

The Constitutional Court must first note that it is not another instance in the ordinary courts system, and in principle, it is not competent to intervene in their decision-making activity, as it is not the supreme body of their system (cf. Art. 83, Art. 90, Art. 91 of the Constitution). It is the task of the Constitutional Court to protect constitutionality (Art. 83 of the Constitution), rather than mere legality. It is the task of the ordinary courts to hold judicial proceedings,

determine and assess the facts of the case, and to apply and interpret any other than constitutional regulations. Their task consists in the fact that they examine and assess whether conditions have been established for the application of a particular legal institute and that they provide the reasoning behind their reflections in this sense in a statutory procedure. An intervention of the Constitutional Court may only be taken into account in identifying the most serious faults constituting breaches of constitutionally guaranteed fundamental rights and freedoms, especially if the conclusions of the ordinary courts were grossly inappropriate and demonstrated signs of arbitrariness.

According to the Constitutional Court, when deciding on the instant case, the ordinary courts took into account all the circumstances which emerged in the proceedings, properly assessed the matter in legal terms, and applied the legal norms with respect to the constitutional principles contained in the Charter. The Petitioner's objections, which have also been submitted again in the constitutional complaint, were sufficiently addressed by the ordinary courts, providing a detailed reasoning behind their legal conclusions. In particular, the Supreme Court dealt with a possible interference with the Petitioner's right to private and family life. Relying on the case law of the European Court of Human Rights, it concluded that the right to respect for a "family life" did not protect the mere wish to establish a family but it anticipated the existence of a family. However, in the Petitioner's case, it ceased to exist upon her spouse's decease. The Supreme Court thus did not find any interference with the right to family life. The same conclusion was drawn by the Supreme Court concerning the right to respect for private life, as well. It proceeded from the fact that the Act on Specific Health Services regulated and allowed fertilisation only "inter vivos" (between the alive), and in addition solely within "infertility treatment", when the legislature's intention to cover the relationships arising from the artificial fertilisation using the sperm of a deceased man could not be inferred from the regulation itself or the statement of reasons. Following the decease of the man who is part of the infertile couple, the infertile couple can no longer be conceptually considered, and therefore it is not possible to "treat" such an infertile couple. The Supreme Court thus did not find a reason to adopt a conclusion on the actual interference with the right to respect for the Petitioner's private life, since even though it is possible to completely understand the Petitioner's objections, similarly to the case of E. v the United Kingdom, she does not claim in her Supreme Court application that she would be completely deprived of the possibility to become a mother in the future. In principle, her Supreme Court application was directed against the fact that she would no longer be able to conceive a child with her deceased spouse. The Constitutional Court has no objections to the above conclusions of the Supreme Court.

The Constitutional Court is aware that the life situation described above, in which the Petitioner has found herself, is extremely sensitive. However, the conclusions contained in the decisions of the ordinary courts are considered constitutionally conformable. In its view, as for the details, it is possible to completely rely on a very similar reasoning of the Supreme Court, the decision-making of which obviously took into account the constitutional law dimension of the whole case. The analysis of the legal regulation conducted by the Supreme Court implies that this is not a topic uniformly treated within Europe and, in its very essence, depends on the legislation of the particular State. The legal regulation concerning artificial fertilisation is based on the moral, cultural, religious and ethical values of the particular society. According to the Constitutional Court, it is primarily up to legislature to lay down the conditions and rules for the emergence of life in any other than the traditional manner.

In the context of the instant case, the Constitutional Court considers as essential mainly the circumstance also referred to by the Supreme Court, i.e. that in this case, "the doubts concerning the actual will of the plaintiff's deceased husband to become a father even after his death cannot be completely ruled out. The informed consent to sperm cryopreservation actually contained explicit provisions on the destruction of this biological material in the event of his death. The above also means that the cryopreserved sperm of the man creating an infertile couple cannot be used to treat this couple after death, even if the six-month limitation period has not yet elapsed following the man's decease." The Constitutional Court agrees with this conclusion.

As the Constitutional Court did not find a violation of the Petitioner's right to respect for her family and private life, the constitutional complaint was dismissed as ill-founded (Section 82 (1) of the Constitutional Court Act).

The provisions of Section 74 of the Constitutional Court Act imply that a petition seeking the annulment of a law or any other legal regulation is of an ancillary nature, as it may only be filed with a constitutional complaint directed against a decision of the public authority issued on the basis of the application of a contested legal regulation or part thereof, and this petition "shares the fate" of the constitutional complaint.

If the constitutional complaint was dismissed, the basic condition for possible discussion of the petition seeking the annulment of the law was not complied with, and the Constitutional Court has therefore dismissed the petition seeking the annulment of part of the Act as inadmissible.

Instruction: The judgment of the Constitutional Court cannot be appealed.

In Brno, on 8 November 2018

Tomáš Lichovník
Presiding Judge

Dissenting opinion of Judge David Uhlíř

I disagree with the judgment of the First Chamber in this case (hereinafter only as the "Judgment"), and in accordance with the provisions of Section 22 of the Constitutional Court Act, I hereby submit my dissenting opinion. I do believe that all the contested judgments were supposed to be set aside and the contested provisions of Act No. 373/2011 Coll., on Specific Health Services, were supposed to be interpreted in a constitutionally conforming manner.

The decision of a man and a woman to conceive a child together is their sovereign private right which is not to be interfered with by the State. In essence, there is no greater private matter in family life than conceiving a child and parenthood. Similarly, the free will of the woman is also respected, not only whether she wishes to conceive a child, but also whether she wishes to carry the conceived child to term; even in this case, the law respects this decision as part of the right to private life. The protection of these rights is conferred on each individual by the Charter of Fundamental Rights and Freedoms in its Article 10 (2).

On the other hand, there are exceptional and eugenically justifiable cases, such as restrictions imposed by the Criminal Code in the provisions concerning the criminality of intercourse between relatives; a similar meaning is also provided by the provisions of Section 6 (2) of the Act on Specific Health Services, which do not allow artificial fertilisation to be performed in the case of a couple with a family relationship excluding the conclusion of marriage. However, these exceptional cases do not at all apply to the instant case.

Medical techniques of assisted reproduction enable a child to be conceived even for couples who are unable to conceive naturally. Owing to the fact that conception using assisted reproduction techniques requires the co-operation of the healthcare facility, and that assisted reproduction is to a large extent covered by public health insurance, the State was provided with a possibility and need to enter this field of private and family life and to regulate human reproduction if operated with the assistance of a physician. However, this regulation restricts the fundamental rights to private and family life in certain manners, for example by setting an upper age limit for artificial fertilisation. Nevertheless, all such restrictions must be interpreted in accordance with Article 4 (4) of the Charter, i.e. their application must protect the substance and meaning of fundamental rights and freedoms and restrictions must not be misused for purposes other than those for which they were established.

In this case, the restrictive provisions include the provisions of Section 6 (1) and Section 8 (2) of the Act on Specific Health Services, according to which the application of an infertile couple for artificial fertilisation must not be older than 6 months and prior to any artificial fertilisation, the infertile couple is required to grant their written consent. It is necessary to clarify the purpose of these limitations. I believe that these limitations only serve to prevent conception without the consent of the man who is to become the father of the child. The courts, however, interpreted these limitations in violation of Article 4 (4) of the Charter and abused them to prevent the completion of the infertile couple's previously initiated treatment after the decease of the man in this couple.

There is no provision in the Czech legal order which would imply that the use of the sperm after the death of the man who donated the sperm has been excluded from use for assisted reproduction; in broader terms, it may be stated that the same applies to the embryo if one of the biological parents or both have died. Donating germ cells or embryos is routinely performed without the healthcare facility verifying whether anonymous donors or donors are still alive. I have not found any justifiable reason why a non-anonymous donor should be subject to stricter scrutiny than an anonymous donor.

In a situation where no explicit provision of the Act prohibits the use of frozen sperm after the death of its donor, it is appropriate to follow the wishes of the deceased. Respecting the wish of an individual even after their death is an important cultural institute on which the entire inheritance law is based and which is common to almost all cultures. Even in this case, which does not concern a material estate as in the inheritance proceedings, but the most intimate element of human privacy, it should not be decided in the proceedings before the courts without first establishing the actual wish of the deceased and considering its significance.

I am convinced that it is insufficient to infer the wish of the deceased only from the wording of the pre-printed "Instruction and informed consent to cryopreservation (freezing) of sperm prior to infertility treatment by assisted reproduction methods". The wording on which the Supreme Court's contested decision is based literally reads only as follows: "The storage of

sperm will also be terminated in the event of the man's death, unless clearly indicated otherwise."

Without determining what led a man at the age of 32 years to apply for sperm cryopreservation, what his state of health was, what ideas of the result of the assisted reproduction he had, the motives for his decision, or how he expressed himself before his or her closest relatives, it is impossible to draw a reliable conclusion on what his wishes were. And if his wishes have not been established, it cannot be said whether the contested judgments are in accordance or inconsistent with his pre-mortal wishes, while I perceive the acceptance of any such wish as a fundamental expression of the State's respect for the autonomous sphere of man. Even in the area of sub-constitutional law, this requirement is expressed explicitly in Section 81 (1) of the Civil Code, according to which the "personality of an individual including all his natural rights are protected. Every person is obliged to respect the free choice of an individual to live as he pleases."

In addition, I cannot accept an interpretation of the law according to which the opinion of the deceased, in the case of using their organs for the purposes of transplantation, is not only respected, but consent is even presumed, while in the case of using frozen sperm, the opinion of the deceased is deemed irrelevant.

The law is a human creation and therefore is intended to serve human society as a whole and as a person as an individual. I do not share the concept according to which society and the individual should serve the literal interpretation of the law; this is based on the conviction of the superterrestrial origin and the meaning of the wording of the law. I would like to recall the idea of the Constitutional Court reiterated on a number of occasions, namely that the ordinary court is not bound by the literal wording of the law in absolute terms, but that it may and must deviate from it if required by the purpose of the law. What is essential here is that the interpretation of a law that would allow the Petitioner to conceive a child would not in any manner damage the rights of other entities. The healthcare facility itself, which has been a party to the proceedings before the ordinary courts, has expressed its willingness to settle the case and perform the assisted reproduction. The only persons who would be directly affected by the birth of the child, i.e. the parents of the Petitioner's deceased spouse, the potential grandparents of the child, expressed their consent to the Petitioner's wishes.

In this context, I consider it important that both the healthcare facility, which was the party to the proceedings before the ordinary courts, and the courts themselves repeatedly expressed in their statements and decisions their understanding of the Petitioner's wish to conceive a child but failed to and may not have been prepared to interpret the relevant provisions of Act No. 373/2011 Coll., on Specific Health Services, in a constitutionally conforming manner, and at the same time to comply with the Petitioner's wish essential in her life. In a broader perspective, it is also necessary to recall Article 6 (1) of the Charter, according to which everyone has the right to life and human life is worthy of protection even before birth. Certainly, it cannot be said that the still unconcealed and unborn child has a potential right to life, yet it is impossible to rightfully justify why this hope for life in the instant case is deprived of the child solely due to the fact that their biological father died and why the Petitioner, wishing to be their mother, is deprived of this hope as well.

In order to fulfil the maxim that parenthood is under the protection of the law, and if the population decline of the nation and our country is to be averted, the State should welcome the desire and willingness of every couple and every woman to conceive, give birth and raise

every child who may come into the world, rather than find reasons and manners to make conception and birth of a child difficult or impossible.

I believe that my colleagues' opinion, expressed in this Judgment, is binding and valid only for this time and for this case. The relationship of the state's power to parenthood has undergone fundamental changes over the last few generations, ranging from the equalisation of children born in and outside wedlock to a change in law which allowed the use of assisted reproduction to conceive a child even by unmarried couples. Currently, there are many countries where there are fewer obstacles for the Petitioner to conceive a child using assisted reproduction and frozen sperm from her deceased husband. European countries' view of the issues of assisted reproduction is considerably variable depending on the place and time, as the Supreme Court has explained in detail in the reasoning behind the Judgment 21 Cdo 4020/2017-134. Even though I disagree with the decision contained in the judgment, the care which the Supreme Court's chamber has devoted to the matter deserves recognition and, in my opinion, also suggests that, in the meta-legal context, the ordinary courts accepted the Petitioner's wishes.

I do hope that there will be a change and liberalisation of the law or that the plenum of the Constitutional Court will have an opportunity to decide in accordance with Section 11 (2) (i) of the Constitutional Court Act on a statement on the legal opinion of a different chamber which will deviate, in a similar yet different case, from the legal opinion contained in the present Judgment I. ÚS 1099/18. However, I am afraid that it will not be of any practical significance to the Petitioner.

David Uhlíř