

Embryonic Screening as A European Human Right

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Abstract

The European Court lifted the Italian ban on pre-implantation diagnostics (PGD). As such the Court accepted PGD as a generally accepted means for medically assisted procreation, which may have consequences for other member states prohibiting PGD.

Keywords: Embryonic Screening, European Court, Human Right

On August 28, 2012, the Council of Europe's Human Rights Court concluded that the Italian ban on embryonic screening violated article 8 of the European Convention on Human Rights, which provides a right to respect for one's private and family life (1). Since Italy is one of the few countries prohibiting pre-implantation diagnostics (PGD) for medically-assisted procreation, this ruling may force Italy to lift this ban in the near future.

The applicants, Rosetta Costa and Walter Pavan, are an Italian couple. In 2006, after they had a daughter born with cystic fibrosis they found out they were both carriers of the disease. During a second pregnancy Mrs Costa opted for an abortion because upon prenatal screening the fetus was diagnosed with cystic fibrosis.

This time the couple wanted to have a child by in vitro fertilization (IVF), and to genetically screen the embryo *prior* to implantation (PGD). However, Italian law prohibits PGD. On the other hand, it allows IVF for infertile couples and those situations in which the man has a sexually transmitted disease such as HIV or

hepatitis B or C, to avoid transmitting the infection (2). The couple claimed that the only way to have a healthy baby would be by starting a pregnancy in a natural way, have the fetus' genetic profile monitored throughout pregnancy, and then decide to terminate the pregnancy every time the fetus was tested positively for cystic fibrosis. Such a stressful procedure is the direct result of the ban on PGD, which interfered with their right to start a family.

In this case, the Court considered the Convention's right to private and family life applicable (Article 8). Traditionally, the focus was on privacy of health information. Nowadays, however, the concept of private life is interpreted more broadly including "a person's physical and psychological integrity, and may even include a right to establish and develop relationships" (3). Apart from abstaining from arbitrary intervention in the private sphere, article 8 incorporates so-called 'positive obligations' of member states to realize the fulfilment of a private life. These positive obligations may cover: facilitating access to fertility treatment, access to donor insemination, and the implantation of de-frozen embryo (4). Since assisted procreation is a controversial issue in the member states, the Court allows member states a wide margin of appreciation in terms of deciding on the nature and extent of these

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obligations. Furthermore, the Court allows member states to formulate restrictions on family life for specific reasons (e.g., protection of health and morals) and in accordance with the law.

The Italian government defended the ban as an interference “to protect the health of the mother and child, and to avoid the risk of eugenic abuses”. In its review, the Court criticized this justification since Italian law accepts a therapeutic abortion in case of genetic defects such as cystic fibrosis, but simultaneously prohibiting a less invasive and less stressful selection method like PGD. This inconsistency in legislation, causing harm to the couple, was reason for the Court to conclude that the ban on PGD was a disproportionate (ineffective and unnecessary) interference of the couple's private life and therefore violated their right to private and family life.

This outcome can be considered as a victory for fertile couples genetically afflicted with cystic fibrosis. Apart from this conclusion the Court made another interesting observation, namely that more than 32 Council of Europe member states already allowed PGD as a means for medically assisted procreation. The Court therefore concluded that there is consensus on this ethical delicate issue. In addition, the Biomedicine Convention, although not ratified by Italy, also legitimizes predictive and genetic screening test for health purposes (5). What the Court

is saying is that, in case there was no consensus, the Court may have accepted Italy's wide margin of appreciation in banning PGD.

Although the Court accepted a right to access to embryonic screening, article 8 must not be interpreted as providing claimants with a right to a genetic healthy child. Such a claim would be illusory since one cannot claim health as a legal right. Instead, one can claim access to health care services as a means to achieve good health. Secondly, PGD and other genetic screening technologies cannot fully exclude all genetic risks.

Acknowledgments

I confirm there is no conflict of interest.

References

1. COSTA and PAVAN v. ITALY (application no. 54270/10) Aug 28, 2012 at www.hudoc.echr.coe.int.
2. Act no. 40, February 19, 2004, art. 4 and Ministerial Decree on Health no. 31639, April 11, 2008.
3. NIEMIETZ v. GERMANY, (Appl. no. 13710/88) Dec. 16, 1992 (§ 29).
4. DICKSON v. THE UNITED KINGDOM (appl. no. 44362/04) Dec 4, 2007; SH v. AUSTRIA (Appl. no. 57813/00) Nov 3, 2011; EVANS v. THE UNITED KINGDOM (Appl. no. 6339/05) April 10, 2007.
5. Article 12 Convention on Human Rights and Biomedicine (Biomedicine Convention), 1997.