

Status of human gametes: human gametes are not property within the meaning of Article 1 of Additional Protocol 1 to the European Convention for the Protection of Human Rights (ruling n° 492 – 21-17.654)

15/06/2022



Ruling No. 492 FS-B

Dismissal

Public hearing of 15 June 2022

Dismissal

Mr CHAUVIN, President

Ruling No. 492 FS-B

Appeal No. Y 21-17.654

FRENCH REPUBLIC ON BEHALF OF THE FRENCH PEOPLE

RULING OF THE FIRST CIVIL CHAMBER OF THE *COUR DE CASSATION* (COURT OF CASSATION) OF 15 JUNE 2022

Ms [P] [I], widow [C], domiciled at [Address 2], brought Appeal No. Y 21-17.654 against the ruling delivered on 6 April 2021 by the *cour d'appel* (Court of Appeal) of Paris (Section 4, Chamber 13), in the dispute between her and:

1) the public establishment Assistance Publique-Hôpital de Paris (AP – HP - Public Hospitals of Paris), whose registered office is [Address 1],

2) the Prosecutor-General at the *cour d'appel* (Court of Appeal) of Paris, of address at [Address 4],

respondents at the quashings.

In the support of her appeal, the appellant invokes a single plea for quashing as appended to this ruling.

The case file has been sent to the Prosecutor-General.

On the report of Mr Serrier, judge referee, the comments of SCP Gadiou and Chevallier, lawyer of Ms [I], SCP Didier and Pinet, lawyer of Assistance Publique-Hôpital de Paris, and the advisory opinion of Mr Chaumont, advocate-general, after discussions in the public hearing of 10 May 2022 in which Mr Chauvin, President, Mr Serrier, judge referee - rapporteur, Ms Duval-Arnould, elder judge, Messrs Mornet, Chevalier, Kerner-Menay, Bacache-Gibeili, judges, Ms Gargoullaud, Dazzan, Le Gall, Feydeau-Thieffry, judges referee, Chaumont, advocate-general, and Ms Tinchon, Chamber Registrar,

Following deliberation in accordance with law, the First Civil Chamber of the *Cour de cassation* (Court of cassation), composed, pursuant to Article R. 431-5 of the Judicial Code, of the abovementioned president and judges, delivered this ruling.

Facts and procedure

1. According to the ruling under appeal (Paris, 6 April 2021), [X] [C] died on 13 January 2017 at the age of 23 from cancer, after having deposited his gametes with the Centre d'Étude et de Conservation des Oeufs et du Sperme Humain (CECOS - Centres for Sperm Conservation and Study) of the hospital [3], an establishment belonging to Assistance Publique-Hôpital de Paris (AP-HP).

2. By order of 2 November 2018, the interim judge of the Administrative Tribunal of Paris, seized by Ms [I], mother of [X] [C], rejected her petition to order the administration to take all appropriate measures to allow the gametes to be exported to a health establishment in Israel. By order of 4 December 2018, the interim judge of the Council of State dismissed Ms [I]'s appeal against that decision.

3. By decision of 12 November 2019 (No. 23038/19 §§ 16 and 20), the European Court of Human Rights, before which Ms [I] had brought an action alleging a violation of Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms, declared her petition inadmissible on the grounds that "the fate of gametes deposited by an individual and the question of respecting his will that they be used after his death concern the right of an individual to decide how and when he wishes to become a parent, which falls within the category of non-transferable rights"; and that the scope of Article 8 of the abovementioned Convention does not cover the right to found a family and cannot, according to its case law, include the right to descendants for grandparents.

4. On 22 January 2020, Ms [I] brought an action against the AP-HP before the court, claiming that there had been an unlawful act, seeking an order for her son's gametes to be returned to her. AP-HP raised a plea of lack of jurisdiction in favour of the administrative court.

Reviewing plea

Statement of plea

5. Ms [I] complains about the ruling that declares the court to be lacking jurisdiction, where:

"(1) Every natural person having the right to respect for his property, no one may be deprived of his property except in the public interest and under the conditions provided for by law and by the general principles of international law; where Article R. 2141-18 of the Public Health Code, which governs the conditions for the preservation of gametes, provides for their destruction by the administration "in the event of death of the person"; where, since this text is contrary to the First Additional Protocol of the European Convention on Human Rights, it cannot take precedence over the principles governing the protection of property laid down in that Convention; where, therefore, by relying on that regulatory text to decide that the refusal to return gametes—equivalent to their destruction—constituted "a decision that relates to the prerogatives of the AP-HP since it is based on the strict application of Article R. 2141-18 ()", the Court of Appeal infringed the Law of 16-24 August 1790, together with the Law of 24 May 1872 and the Executive Order of 16 Fructidor, year III, together with the First Additional Protocol to the European Convention on Human Rights and Fundamental Freedoms;

(2) any natural person having the right to respect for his property, no one may be deprived of his property except in the public interest and under the conditions provided for by law and by the general principles of international law; where Article R. 2141-18, which regulates the conditions for the preservation of gametes, provides for their destruction "in the event of death of the person"; where, since this text is contrary to the First Additional Protocol to the European Convention on Human Rights, it cannot take precedence over the principles governing the protection of property laid down in that Convention; in this case, [X] [C], having been the owner of his gametes, transferred ownership to his mother; where, by deciding otherwise, on the ground that "the donation is expressly reserved for the decision of the applicant and of him alone", a circumstance provided for exclusively in Article R. 2141-18 of the Public Health Code, the Court of Appeal again violated the Law of 16-24 August 1790 and the Executive Order of 16 Fructidor year III, together with the Law of 24 May 1872 and the First Additional Protocol to the European Convention on Human Rights and Fundamental Freedoms;

(3) the court judge has also jurisdiction to rule on unlawful acts when they result from a decision taken by the administration that has infringed personal liberty; where, in this case, Ms [C] had, in the terms of particularly detailed conclusions, with numerous supporting documents, argued that, during his lifetime, her son [X] had never ceased wanting to conceive a child, including post-mortem, since he knew he was suffering from an incurable disease, fatal in the short term; where Ms [C]'s action is a continuation of that desire expressed before several witnesses and relating to the freedom of individuals to ensure their descendants; where, having pointed out that the court judge regained jurisdiction in the event of infringement of an individual freedom, the court of appeal focused exclusively on the question of the extinguishment of the right to ownership of gametes; that by determining in this way, without examination, as it had been invited to do, whether or not the destruction of the gametes by the CECOS infringed the individual freedom to

procreate expressed during his lifetime by [X] [C] and pursued, according to his wish, by his mother, the Court of Appeal had, in any case, deprived its decision of a legal basis in the light of Article 66 of the Constitution, together with the Law of 16-24 August 1790 and the Decree of 16 Fructidor, year III, together with the Law of 24 May 1872 and the First Additional Protocol to the European Convention on Human Rights and Fundamental Freedoms."

Court's response

6. According to Articles L. 2141-11, in the wording resulting from Law No. 2011-814 of 7 July 2011, and R. 2141-18, in the wording resulting from Executive Order No. 2016-173 of 4 March 2016, of the Public Health Code, any person whose medical care is liable to impair fertility or whose fertility is liable to be prematurely impaired may benefit from the collection and preservation of his gametes or germinal tissue with a view to the subsequent provision of medical assistance for reproduction, preservation and restoration of fertility for the benefit of the person concerned and, in the event of death of the person, the preservation of gametes or germinal tissue shall be discontinued.

7. The administrative court has jurisdiction to hear and determine claims against a public health establishment relating, inter alia, to the transfer and exportation of gametes or germinal tissues.

8. There is an unlawful act on the part of the administration, justifying, by exception to the principle of separation of the administrative and judicial authorities, the jurisdiction of the judicial courts to order the cessation or the reparation thereof, only insofar as the administration either proceeded to the forced execution, under irregular conditions, of a decision, even a lawful one, infringing personal freedom or leading to the extinction of a property right, or took a decision that has the same effect of infringing personal freedom or extinguishing a property right and which is manifestly insusceptible of being linked to a power belonging to the administrative authority.

9. Since human gametes do not constitute property within the meaning of Article 1 of the First Additional Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, having regard to the economic and proprietary scope attached to that text (ECHR, 27 August 2015, No. 46470/11, [GC], § 215), that only the person can dispose thereof and that the freedom to procreate does not fall within the scope of personal freedom as defined in Article 66 of the Constitution, the Court of Appeal, applying Article R. 2141-18 of the Public Health Code, upheld that the AP-HP's refusal to return the gametes was related to its prerogatives, ruled out the existence of an unlawful act and deduced that the judicial court has no jurisdiction to hear the dispute.

10. The plea is therefore unfounded.

ON THESE GROUNDS, the Court:

DISMISSES the appeal;

Orders Ms [I] to pay the costs;

Pursuant to Article 700 of the Civil Procedure Code, dismisses the claim made by Ms [I] and orders her to pay the sum of 3,000 euros to Assistance Public-Hôpitaux of [Location 5];

Thus decided by the First Civil Chamber of the *Cour de cassation* (Court of cassation) and pronounced by the president at the public hearing on the fifteenth of June, two thousand and twenty-two.

President : Mr Chauvin

Judge referee : Mr Serrier

Lawyer(s) : SCP Gadiou and Chevallier – SCP Didier and Pinet

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