

AUT-2025-3-003

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Assisted reproduction

Headnotes

An unconditional ban on medically non-indicated egg retrieval and storage, which denies women – regardless of their age at the time of egg retrieval or use of these eggs for artificial reproduction – access to these medical procedures, is disproportionate and thus violates [Article 8 ECHR](#).

Summary

1. According to the Federal Act on Reproductive Medicine (hereinafter, "FMedG"), medically assisted reproduction is only permitted if achieving pregnancy through sexual intercourse appears medically futile, pregnancy through sexual intercourse is unreasonable due to the serious risk of transmission of an infectious disease, the pregnancy is to be achieved within the framework of a same-sex partnership between two women, or it must be carried out for the purpose of pre-implantation diagnosis. If, according to the state of medical science and experience, several promising and reasonable methods are possible, only the one that is associated with fewer health impairments and risks for the persons involved and that produces fewer viable cells may be used initially. The welfare of the child must be taken into account in this assessment. § 2b.1 FMedG stipulates under the heading "Cell collection and storage" that sperm, egg cells and testicular and ovarian tissue "may also", i.e. without the general conditions being met, be collected and stored for future medically assisted reproduction "if a physical condition or its treatment in accordance with the state of medical science and experience poses a serious risk that pregnancy can no longer be achieved through sexual intercourse". The retrieval and storage of oocytes or ovarian tissue for future medically assisted reproduction without such a medical reason ('social egg freezing') is therefore not permitted.

2. The applicant intends to have her egg cells collected and stored, but does not meet the legal requirements. She therefore filed a constitutional complaint with the Constitutional Court, claiming that the absolute ban on having eggs collected for future medically assisted reproduction for non-medical reasons is incompatible with the right to respect for private life under [Article 8 ECHR](#).

3.1. The Constitutional Court observed that the desire to have a child and to use natural or medically assisted methods of reproduction for this purpose falls within the scope of

protection of [Article 8 ECHR](#) as part of private life. Insofar as the collection and storage of oocytes, which is not medically indicated at the time of retrieval, is necessary for future medically assisted reproduction, the right to have this carried out by third parties also falls within the scope of protection of [Article 8.1 ECHR](#) from the point of view of respect for private life.

3.2. In its previous rulings, the Constitutional Court has assumed that legal restrictions on reproductive medicine can serve legitimate aims in accordance with [Article 8.2 ECHR](#). However, the Constitutional Court noted at the outset that the particular ethical and moral problems that may be associated with (especially heterologous) forms of artificial reproduction (e.g. exploitation of a woman's fertility, creation of unusual personal relationships, creation of surplus embryos, selection of embryos) do not arise where oocytes are retrieved and stored for later in vitro fertilisation, because these measures are aimed at achieving a homologous pregnancy with the germ cells of spouses, registered partners or life partners. The problems mentioned above do not result from the egg retrieval and storage itself, but from the in vitro fertilisation procedure (which follows these measures). Against this background, the legislator does not have the same (broad) scope for legal policy decisions when regulating the measures in question as it does, according to the case law of the Constitutional Court, when regulating (reproductive) medical procedures, particularly when these raise complex scientific, legal, moral and social issues.

3.3. The method of egg retrieval and storage is associated with certain health risks, for example in connection with hormonal stimulation prior to retrieval and during retrieval itself, as well as due to an increasing rate of chromosomally abnormal eggs, depending on the woman's age. Furthermore, as the prospective mother ages, there are increased health risks associated with the pregnancy itself, which correlate with decreasing chances of success of medically assisted reproduction. During the oral hearing, certain age limits for retrieval (40 to 42 years) and for the use of oocytes (45 to 50 years) were therefore mentioned from a medical point of view. As a result, the Constitutional Court could not see that the retrieval and storage of oocytes for medically assisted reproduction, which is not medically indicated at the time of retrieval, is associated with such health risks for the intended mother or the child that can only be prevented by an unconditional ban and not by less drastic means, such as information and counselling requirements and age requirements for the subsequent use of oocytes. The Constitutional Court also pointed out that the freedom of choice regarding reproduction (and the manner thereof) protected by [Article 8 ECHR](#) means in the present context that the decision on the retrieval and storage of oocytes must be taken by the woman herself on her own responsibility. It is therefore up to her to obtain the information necessary for her decision and to weigh up the relevant reasons for and against carrying out the measures. The fact that the decision-making process may be subject to various external influences, such as social or professional pressures, which cannot be completely ruled out even by legal regulations – provided that the method is permissible in principle – does not in itself justify an absolute ban on the measures in question. Nor can the risk of a woman's inaccurate assumptions about the chances of success of these measures justify the ban.

3.4. With regard to the problems mentioned above (3.2.), the legislator has broad discretion in ordering accompanying measures for the method of "social egg freezing", within which it can, for example, regulate advertising for this method or the avoidance of economic incentives for its implementation. Under certain circumstances – which the

Constitutional Court did not have to examine in detail here – legal precautions (e.g. information and counselling requirements and certain age requirements) may be not only constitutionally permissible but also necessary in the light of [Article 8 ECHR](#) in order to enable women to make a free and informed decision and to exclude constellations that are particularly risky from a health perspective from the outset. Finally, the Constitutional Court noted that complete legal equality between medically indicated egg retrieval and storage on the one hand and the use of this method without medical reasons on the other is not required. For example, a differentiated regulation of the woman's age at the time of egg retrieval may be justified in order to enable retrieval for medical reasons, such as premature menopause.

3.5. The Constitutional Court therefore ruled that an unconditional ban on medically non-indicated egg retrieval and storage, which denies women – regardless of their age at the time of egg retrieval or use of these eggs for artificial reproduction – access to these medical procedures, is not necessary to achieve legitimate objectives and is therefore disproportionate. The relevant provision of the FMedG thus violated [Article 8 ECHR](#).

Cross-references

Constitutional Court:

– G 16/2013, G 44/2013, 10.12.2013 [[AUT-2013-3-002](#)].

European Court of Human Rights:

– *X, Y and Z v. The United Kingdom* (GC), no. 21830/93, 22.04.1997;

– *S.H. and Others v. Austria* (GC), no. 57813/00, 03.11.2011.