CENTRUM FÖR RÄTTVISA

27 February 2024

IN THE EUROPEAN COURT OF HUMAN RIGHTS

Applications nos. 12908/23 and 24544/23

PAIC AND WERNERSSON

("Applicants")

v.

SWEDEN

("Government")

THE APPLICANTS' REPLY TO THE GOVERNMENT'S OBSERVATIONS ON THE ADMISSIBILITY AND MERITS, AND THE APPLICANTS' CLAIMS FOR JUST SATISFACTION

I. INTRODUCTION

1. The Applicants left sperm samples for fertility evaluations at Halland Hospital in 1985 and 1990 respectively. Their sperm was then used for insemination without their knowledge or consent. Thirty years later, investigative journalists revealed that the Applicants each had a biological daughter conceived through donor insemination. The Applicants submit that the use of their sperm for insemination, without their knowledge or consent, constitutes a violation of Article 8 of the Convention.

2. The Applicants have turned directly to the Strasbourg Court because there are no effective remedies for their respective claims in Sweden: their claims became time-barred before they were made aware of the violations; and the violations occurred before the Convention was incorporated into Swedish law, which, even if the claim would not be considered time-barred, leaves open the question whether there is a legal basis under Swedish law for awarding damages.

3. The President of the Section has invited the Applicants to make written observations in reply to the Government's observations of 8 January 2024. The Applicants have also been invited to submit their respective claims for just satisfaction under Article 41 of the Convention. Accordingly, they respectfully submit the following observations and claims. As instructed, they also submit a separate document, containing the Applicants' position on the Government's version of the facts. The Applicants submit their observations jointly and wish to reiterate their request that the Court order the joinder of the two applications under Rule 42 of the Rules of Court.

II. ON THE ADMISSIBILITY

A. The applicable test

4. The Government has asked the Court to declare the applications inadmissible because the Applicants have not exhausted domestic remedies. It is thus up

to the Government to satisfy the Court that there were, at the time of lodging of the applications, effective domestic remedies available to the Applicants, both in theory and in practice, which offered reasonable prospects of success (see for instance *Akdivar and Others v. Turkey*, 16 September 1996, § 68, Reports of Judgments and Decisions 1996-IV). The Government must show this with reference to "demonstrably established consistent case-law in cases similar to the applicant's" (see *Mikolajová v. Slovakia*, no. 4479/03, §§ 31 and 34, 18 January 2011). As will be set out below, the Government cannot.

B. Domestic remedies offered no prospects of success for two reasons

5. The Government has submitted that a claim for damages before the general courts would have constituted an effective remedy in the Applicants' case, which they were required to exhaust. In the Applicants' submission, such a claim would have had no prospects of success, and thus been ineffective for exhaustion purposes, for two reasons.

6. First, the Applicants' claims for damages became time-barred in December 1995 and May 2000 respectively, more than 20 years before they became aware that their rights under Article 8 of the Convention had been violated. Under Swedish law, a ten-year limitation period started to run when the Applicants' sperm was used for insemination without their knowledge or consent and their claim for damages arose (see Section 2 of the Swedish Limitation Act [*preskriptionslagen*; 1981:130]). There is no established domestic case-law permitting an exception from the ten-year limitation period with regard to a claimant's unawareness of the existence of the claim. Consequently, the time-bar renders the right to damages ineffective (see *mutatis mutandis Jann-Zwicker and Jann v. Switzerland*, no. 4976/20, §§ 81–82, 13 February 2024, where the Court found a violation of Article 6 of the Convention because the applicants claim had become time-barred before they knew that they had suffered damage; see also *Csüllög v. Hungary*, no.

30042/08, § 46, 7 June 2011, where the Court held that the requirements of Article 6 may be relevant for the evaluation for the effectiveness of a remedy).

7. Second, even if the claim would not be considered time-barred, it is uncertain whether there is a legal basis for awarding damages for violations that occurred before the Convention was incorporated into Swedish law on 1 January 1995. The Supreme Court's case-law on the right to damages is based on the assumption that the Convention constitutes Swedish law. The Supreme Court has not explicitly dealt with the issue of whether compensation could be awarded for a violation that occurred before the incorporation. Given that Sweden is a dualist state, there are compelling reasons against awarding damages based solely on an international treaty.

8. These two reasons for dismissing the Government's non-exhaustion plea will be iterated in further detail below.

C. A claim for damages was ineffective because the claim became time-barred before the Applicants were made aware that their rights had been violated

9. The Applicants submit that a claim for damages would not have had any prospects of success due primarily to their claim being time-barred more than 20 years before they were made aware of the violation. The Government submits that the domestic courts could have allowed an exception to Section 2 of the Limitation Act. This position is, however, theoretical and lacks a basis in domestic law as it currently stands.

10. Under Swedish law, the statutory time-limit starts to run when the claim arises, which in tort law is when the tortious act occurs. No consideration is given to the claimant's knowledge of the claim (see the preparatory works to the Limitation Act, prop. 1979/80:119, p. 39). The same applies to claims arising from violations of the Convention (see the preparatory works to the amendment to the Swedish Tort Liability Act [*skadeståndslagen*; 1972:207], which codified the right to damages for Convention violations,

prop. 2017/18:7, pp. 64 and 77). No exception to this rule has ever been made with reference to the claimant's knowledge of a violation.

11. To support its claim that the national courts in this particular situation could carve out an exception to the general rule on limitations in the Applicants' case, the Government has referred to a single judgment from the Swedish Supreme Court (NJA 2018 p. 103). Coincidently, that case was also litigated by undersigned counsel for the Applicants in this case. The Applicants distinguish the Supreme Court case from the present case on two grounds.

12. First, NJA 2018 p. 103 did not involve a violation of the Convention, but rather a violation of the Swedish Constitution. Under Chapter 2, Section 7 of the Instrument of Government (*regeringsformen*), no Swedish citizen who resides or has resided in Sweden may be deprived of their citizenship. In NJA 2018 p. 103, the claimant had been unlawfully deprived of his Swedish citizenship when he was 8 years old. He then spent 23 years as a stateless person. In view of the exceptional circumstances of the case, and the prominent position that the right to citizenship holds in the Swedish constitution, the Supreme Court held that an exception to the general rule on limitations was justified. In subsequent case-law, the Supreme Court has maintained that the exception in NJA 2018 p. 103 was made specifically by virtue of the considerations that arise under Chapter 2, Section 7 of the Instrument of Government (see NJA 2018 p. 793, para 21). The legislator made the same finding in the preparatory works for the codified right to compensation for violations of the Constitution (see prop. 2021/22:229, p. 49). Sweden's most highly qualified publicist on the law of limitations, former Supreme Court president Stefan Lindskog, has equally found that NJA 2018 p. 103 constitutes a unique exception, which is not applicable in any other circumstances (see Lindskog, *Statute of limitations: On the cessation of legal obligations after a defined period of time*, 5 ed., 2021, p. 457, [Lindskog, Preskription: Om civilrättsliga förpliktelsers upphörande efter viss tid, 5 uppl., 2021]).

13. Second, NJA 2018 p. 103 concerned a continuous violation of the Constitution for 23 years during which the Government refused to restore the claimant's citizenship. The violation in the present case was not continuous. It consisted in an instantaneous violation, which occurred when the Applicants' sperm was used for insemination. The claim became time-barred 10 years after the tortious act occurred – in other words 10 years after the unlawful use of their sperm. Under the law on limitations, claims arising from continuous violations are treated differently than instantaneous violations, because a continuous violation continuously causes more harm. Such a claim, therefore, becomes time-barred progressively.

14. In NJA 2018 s. 103, the unlawful deprivation of the claimant's citizenship occurred in November 1989. So, under the general rule on limitations in continuous situations, the claim became time-barred one day at a time starting in November 1999. The claimant submitted his claim for damages in August 2014. The claim relating to the period before August 2004 was thus considered time-barred under the general rule. Given the particular considerations under Chapter 2, Section 7 of the Instrument of Government, however, the Supreme Court held that the *dies a quo* should be determined with reference to when the on-going violation was put to an end, and the claimant's citizenship was restored. Otherwise, the claimant would have been required to raise his claim while the Government maintained that he was not and had never been a Swedish citizen, which would render the right to compensation illusory. The Supreme Court, therefore, found that the limitations period should be considered suspended during the time of the violation, to afford the claimant a real possibility to raise his claim.

15. In short, NJA 2018 p. 103 is distinguishable from the present case and does not support a departure from the general rule on limitation in relation to violations of the Convention, as the Government suggests. It is not reasonable to require that the Applicants should seize the general courts in a speculative suit to carve out an exception to the rules on limitations, based on a judgment

that both the Supreme Court, the legislator and respected academics have found to be a unique exception with limited precedential value.

16. The Government further notes that the Swedish Supreme Court recently granted leave to appeal in a case concerning the statute of limitations with regards to violations of the Convention (see Government's observations, para 34). The Supreme Court's judgment is expected to be delivered in the second quarter of 2024. The case concerns abuse of children placed in state care between 1975 and 1985. Unlike the Applicants here, the claimants in that case were aware of the violations and were not prevented from lodging a complaint for damages before their claims became time-barred. The two cases thus turn on different facts. The forthcoming judgment of the Supreme Court will not, therefore, directly apply to the Applicants' case.

17. In any event, the outcome of the Supreme Court case does not affect the availability of remedies at the time when the Applicants lodged their applications. When the Applicants seized the Strasbourg Court, the lower courts in that case had recently held that NJA 2018 p. 103 was not applicable to violations of the Convention and that general rules on limitations apply. As the law stood when the Applicants submitted their applications, it was thus clear that their claims were time-barred under Swedish law.

18. Finally, the Government submitted that whether a claim is time-barred must be raised by the defendant and cannot be examined by a court *ex officio* (see Government's observations, para 43). While that is true, nothing indicates that the Region would waive the statute of limitation, only to litigate with taxpayers' money that there somehow existed a legal basis for using the Applicants' sperm without their knowledge or consent.

19. In short, the Government's contention that the domestic courts could have allowed an exception to Section 2 of the Limitation Act cannot be entertained in practice.

D. A claim for damages was also ineffective because it is uncertain if damages can be awarded for violations that occurred before the incorporation of the Convention

20. The Applicants further submit that a claim for damages would have been ineffective because there is no established legal basis for awarding damages for violations that occurred before the Convention was incorporated into Swedish law on 1 January 1995.

21. The Government argues that it follows from the case-law of the Swedish Supreme Court that damages for a violation of the Convention can be awarded "without a specific legislative basis" (see Government's observations, para 39). But the Government misinterprets the Supreme Court's reference to "legislative basis". It does not follow from the cited statement that the Supreme Court has awarded damages based on a *direct application* of the Convention as an instrument of international law, as the Government argues (see Government's observations, para 39).

22. In the case referenced by the Government, the Supreme Court considered the case-law from the Strasbourg Court and found that Article 13 of the Convention could constitute sufficient basis for awarding damages. The Supreme Court hereby derogated from the general requirement under Swedish tort law that there be an explicit statutory basis for awarding non-pecuniary damages (see NJA 2005 p. 462). The Supreme Court, however, noted in passing that Article 13, as the Convention as a whole, constitutes Swedish law by virtue of the Incorporation Act (*lagen om den europeiska konventionen angående skydd för de mänskliga rättigheterna och de grundläggande friheterna*; 1994:1219). This case, therefore, does not provide basis for the conclusion that damages can be awarded for violations that occurred before the Convention was incorporated in 1995. In fact, the Supreme court has never explicitly dealt with that issue.

23. In the absence of explicit support for the Government's reading of NJA 2005 p. 462, one cannot expect that the domestic courts would deviate from established principles regarding the relationship between national and international law. Dualism is a long-standing feature of the Swedish legal order (see for instance NJA 1981 s. 1205). Sweden, as a dualist state, upholds a clear distinction between domestic law and international law. International law is thus only recognised as part of the domestic legal order if it has been transformed or incorporated into the national legal system (see Harris, O'Boyle and Warbrick, *Law on the European Convention on Human Rights*, 4th ed., 2018, p. 27 and Nowak, *Introduction to the International Human Rights Regime*, 2003, p. 36).

24. The Supreme Court has even expressly stated that in a case before Swedish courts, the domestic courts apply the Convention as *Swedish law*, not as an international treaty (see NJA 2012 p. 1038, paras 15–16). Against this background, there is nothing to suggest that the domestic courts would or could have awarded damages in the Applicants' case.

25. Consequently, a claim for damages would have been ineffective and without prospects of success also because of the limited legal basis for awarding damages before 1995.

E. The Government's preliminary objection on non-exhaustion should be dismissed

26. In conclusion, there were no effective remedies available to the Applicants that they were required to exhaust. It cannot be required, as the Government suggests, that the Applicants should empty their pockets to pursue a speculative suit, which would require that the domestic courts not only carve out a new exception to the statute of limitations, but also abandon Sweden's dualist relationship to international law. The Government's preliminary objection on the ground of non-exhaustion must, therefore, be dismissed.

III. ON THE MERITS

27. The Government has left it to the Court to decide whether there has been a violation of the Applicants' rights under Article 8 of the Convention (see Government's observations, para 61). In the Applicants' submission, it would befit the Government to acknowledge that there has been a violation. Clearly, there can be no legal basis, legitimate aim, or proportionality in using a man's sperm for insemination without his knowledge or consent. Instead, the Government makes a number of observations, seemingly to cast doubt on the relevant circumstances of the case, and in particular on the matter of consent.

28. First, the Government notes that the use of the Applicants' sperm "occurred a considerable number of years ago" and that there are "significant uncertainties as to the exact circumstances surrounding those acts" (see Government's observations, para 56). In the Applicants' understanding, however, the relevant facts are not in dispute (see also Applicants' observations on the facts of 27 February 2024, submitted separately). It follows from the Government's statement of facts that the hospital used the Applicants' sperm without their *knowledge* (see Government's observations, paras 7–8). The Applicants therefore presume that the Government does not dispute that the Applicants' sperm was used for inseminations without their *consent*. It is hardly possible to consent to a procedure without being aware of it. If the Government does in fact dispute the lack of consent, it ought to clarify its position accordingly.

29. Second, in an apparent attempt to obscure the lack of legal basis for using the Applicants' sperm without their consent, the Government notes: (i) that there was no requirement at the relevant time to obtain the donor's written consent prior to insemination; (ii) that the responsible doctor was tasked with choosing an appropriate sperm donor; (iii) that there were, merely, "statements in the legislative history of the Insemination Act and in the supplementary regulations regarding the information to be given to the donor and the tests to be performed" (see Government's observations, paras 57 and

58). All the while, though, the Government makes no references to the fact that the requirement of consent can be traced back to long before 1985 and 1991, when the Applicants' sperm was used in breach of that requirement (see for instance the early preparatory works for the Insemination Act, SOU 1953:9, p. 49, enclosure 7, where a public inquiry concluded that insemination can only be allowed if the sperm donor consent to the use of his sperm). Contrary to the Government's suggestion, the Applicants' sperm could only have been used for insemination with their informed consent. Consequently, the interference with their rights under Article 8 of the Convention was not in accordance with the law.

30. Third, the Government notes that both an internal and an external investigation were initiated by Region Halland following the disclosure of the events underlying the Applicants' complaints. The Government notes: (i) that Region Halland has adopted a number of measures as a result, (ii) that there are indications that the Region intends to take additional measures, and (iii) that the Region has announced that it will report the incidents under the Patient Safety Act (*patientsäkerhetslagen*; 2010:659). Here, the Applicants wishes to draw the Court's attention to the fact that the Region has neither acknowledged the violation of the Applicants' rights nor awarded them compensation. This being so, the Government's observations in this context are not relevant to the present case.

31. In conclusion, the use of the Applicants' sperm without their knowledge or consent violated their rights under Article 8 of the Convention. There is no room or margin to find otherwise.

IV. JUST SATISFACTION CLAIMS

A. The Applicants each claim EUR 10,000 in non-pecuniary damages

32. The unlawful use of the Applicants' sperm without their knowledge or consent strikes at the core of the rights protected by Article 8 of the Convention. It disregards their autonomy, disrespects their physical integrity,

and disrupts their established identity. The finding of a violation does not constitute sufficient redress. Having regard to the nature of the violation and the feelings of distress, powerlessness and frustration resulting from it, the Applicants invite the Court to award them EUR 10,000 each in respect of non-pecuniary damages.

33. There is no analogous case on which to model the award. The following case-law could, however, provide guidance for the assessment.

34. First, the Court has previously held that the right to respect for private life under Article 8 of the Convention specifically incorporates the right to respect for autonomy in deciding whether to become or not to become a parent (see *Evans v. the United Kingdom* [GC], no. 6339/05, § 71, ECHR 2007-I, concerning the balancing of the opposing interests of two individuals who disagreed on whether their frozen embryos should be used or destroyed). The unlawful use of the Applicants' sperm without their knowledge or consent deprived them of the right to decide whether or not to become a parent. Their autonomy was thus not only restricted, but disregarded.

35. Second, the Court has long held that the right to respect for private life under Article 8 of the Convention encompasses a right to respect for one's physical integrity (see *inter alia X and Y v. The Netherlands*, 26 March 1985, Series A no. 91). The Applicants confided in the domestic health care system with a view to establish their fertility. But in a breach of trust, their genetic material was misappropriated and used for insemination without their knowledge and consent. This disrespect for their physical integrity offends their dignity.

36. Third, the Court has found that being a father is intrinsically linked to a persons' identity. Even if family ties have not been established, respect for private life also comprises the right to establish relationships with other human beings (see *Mikulić v. Croatia*, no. 53176/99, §§ 52–54, ECHR 2002 concerning a father seeking to establish a relationship with his daughter born out of wedlock). Finding out that they unknowingly had fathered children 30

years ago, disrupted the Applicants' established physical and social identities. Even more so for Mr Zdravko Paic, who has no other children.

37. In this context, the Applicants cannot be treated as consenting sperm donors, who would not be entitled to establish relationships with children born as a result of the use of their sperm. Contrary to the situation of consenting sperm donors, the Applicants' respective daughters could have sought to establish legal family ties, had they not already had legal and *de facto* fathers. While disturbed by the violation of their rights, the Applicants are at the same time grateful for the possibility to form relationships with their, now adult, children. Both Applicants have developed relationships with their children after being informed of their existence. By failing to uncover the unlawful use of their sperm, and to properly document its use, the Region denied the Applicants a potential relationship with their children for many years. This aspect should also be weighed in the assessment of the award in respect of non-pecuniary damages.

38. Fourth, some benchmarks for the award can be identified. For violations of the right to decide whether or not to become a parent under Article 8 of the Convention, where either identity, physical integrity or both were at stake, the Court has awarded applicants non-pecuniary damages in the range of EUR 5,000 to 7,500 (see *Dickson v. the United Kingdom* [GC], no. 44362/04, ECHR 2007-V, where the Court awarded EUR 5,000 because the applicants' request for artificial insemination was denied without an assessment of proportionality; *Costa and Pavan v. Italy,* no. 54270/10, 28 August 2012, where the Court awarded EUR 7,500 because the applicants were denied access to a treatment for conceiving a healthy child; and *Mikulić v. Croatia,* no. 53176/99, ECHR 2002-I, where the Court awarded EUR 7,000 because lengthy and inefficient proceedings in a paternity process had brought the applicant uncertainty as to her personal identity in violation of Articles 6 and 8 of the Convention).

39. The cases referred to above were all decided more than 10 years ago. Awards for just satisfaction should be based on "updated macroeconomic data" (see Practice Directions to the Rules of Court concerning just satisfaction claims, para 14). Accounting for inflation, there are thus several benchmarks from cases raising similar issues, where damages awarded by the Court would amount to around EUR 10,000 today.

40. In light of the available benchmark cases and considering the seriousness of the violation of the Applicants' right to respect for autonomy, physical integrity and identity, which resulted in feelings of distress, powerlessness and frustration, the Court is respectfully asked to award each of the Applicants EUR 10,000 in respect of non-pecuniary damages under Article 41 of the Convention.

B. The Applicants jointly claim EUR 18,300 in respect of legal costs

41. Upon finding a violation, the Court is also asked to order the Government to reimburse the Applicants for costs and expenses incurred in the case, with an interest rate applied as the Court considers appropriate.

42. At this stage, the Applicants claim compensation for their legal costs amounting to EUR 18,300, for a total of 122 hours, specified below, at an hourly rate of EUR 150:

    a) Zdravko Paic: preparing and drafting the application: 60 hours, written submission on friendly settlement: 1 hour.
    b) Bengt Wernersson: preparing and drafting the application: 20 hours, written submission on friendly settlement: 1 hour.
    c) Both Applicants: joint written observations on the admissibility and merits, claims for just satisfaction and observations on the Government's statement of facts: 40 hours.

43. To date, the Applicants have not paid any legal costs, but they are under a contractual obligation to do so if the Court finds a violation and awards

compensation for legal costs (see Centrum för rättvisa's terms of engagement, enclosures 8–9).

44. The Applicants wish that any award for non-pecuniary damage and costs and expenses be made jointly into the bank account of their representatives:

Name of representative: Fredrik Bergman Evans
Bank: [redacted]
Account number: [redacted]
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