Italy—Medically-Assisted Procreation—Italian Constitutional Court, Decree 150 of June 7, 2012 and European Court of Human Rights, Judgments *SH v Austria* (57813/00), November 3, 2011, (Grand Chamber) and *Costa and Pavan v Italy* (54270/10), August 28, 2012, (Tenth Chamber)

☞ Assisted reproduction; Constitutionality; Discrimination; Italy; Right to respect for private and family life

The controversial Italian Law 40/2004 on medically-assisted procreation has recently been the object of some national and international case-law developments.

Between September 2010 and February 2011, the courts of Florence, Catania and Milan considered constitutionality in connection with claims lodged by couples unable to conceive both naturally and via homologous assisted reproduction; they had been denied by physicians to use donor male or female gametes due to the ban on medically-assisted heterologous (i.e. with donors) reproduction imposed by art.4 of Law 40/2004.

The constitutional claims were grounded in several provisions of the Italian Constitution, the main one being art.117 para.1 (respect of international duties) as related to the judgment rendered on April 1, 2010 by the European Court of Human Rights (First Chamber) in the case *SH v Austria*.[1] The latter judgment found fault with the 1992 Austrian Act banning heterologous assisted reproduction—not absolute, being the use of donor male gametes not prohibited—for breach of arts 8 and 14 ECHR; in the court's view, the ban in question was not sufficiently justified by the need to protect specific public interests. It should be noted that the Strasbourg Court's judgment also afforded additional arguments to the other constitutional standards claimed by the local courts—e.g. those set forth in art.2 (human rights protection) and in art.3 (equality principle).

However, in November 2011, the Grand Chamber, acting under art.43 ECHR, ruled on the case *SH v Austria* whilst the Italian case was still pending before the Constitutional Court, reversing the conclusions of the First Chamber: it dismissed the claimed breach of art.8 ECHR and ruled that the Austrian Act had not exceeded the margin of discretion afforded to Member States.[2]

In June 2012, the Italian Constitutional Court sent the case back to the lower courts as it found that the Grand Chamber judgment was a "novum" impacting on the interpretation of art.8 EHRC as well as on the constitutionality issue raised in the case in point; those courts have now to reconsider whether the Italian legislation is still in breach of the EHRC. Howsoever, it cannot be ruled out that Law 40/2004 may be found to be flawed by having regard to the other Constitutional provisions relied upon apart from the Strasbourg case law. For instance, an argument relating to art.3 of the Constitution might consist in the unequal treatment brought about by Law 40/2004 vis-à-vis the couples that are unable to use both natural and homologous assisted reproduction. This also applies to the financial issues involved, as the ever-increasing recourse to heterologous assisted reproduction in the United States, where it is permitted, translates into a factual parenting opportunity that is only affordable to the couples with adequate financial resources.

That being said, a few highlights from the Grand Chamber's judgment in the Austrian case suggest that the assessment of Law 40/2004 could lead to different conclusions. Indeed, the 1992 Austrian Act is more permissive than the 2004 Italian Law, because the former provides for a partial ban on heterologous fertilisation, whilst the latter bans such fertilisation in all cases. From this standpoint, Law 40/2004 does not strike a full-fledged balance in reconciling the public and private interests at stake, which is the rationale underlying the regulation of highly sensitive issues; in case, this could steer the Strasbourg Court's view on the use made by Italy of the margin of discretion. Furthermore, the Grand Chamber has stated that this subject matter is liable to fast-pace developments in both scientific and social consensus terms, and that:

> "Even if it finds no breach of Article 8 in the present case, the Court considers that this area, in which the law appears to be continuously evolving and which is subject to a particularly dynamic development in science and law, needs to be kept under review by the Contracting States."[3]

Meanwhile, in the judgement of August 28, 2012 on case *Costa and Pavan v Italy* the Strasbourg Court (Tenth Chamber) has censored the Law 40/2004 with regard to homologous assisted reproduction.[4] The court had been approached by a couple of spouses—both healthy carriers of a severe hereditary disease—who had applied for being allowed to rely on in-vitro homologous fertilisation to perform a pre-implantation diagnosis and prevent their second child from being born with that disease; however, this request had been rejected because Law 40/2004 only allows homologous fertilisation and pre-implantation diagnosis in barren couples as well as if there is a risk of sexually transmissible diseases and/or B/C hepatitis.

The Tenth Chamber clarified that the right to bear a child not affected by genetic diseases falls under the scope of art.8 EHRC, found that the right to the protection of private and family life had been infringed and awarded a monetary just satisfaction to the petitioners. It is worth observing that it also underlined the inconsistency of the Italian legislation, as it prevents pre-implantation diagnosis in several cases whilst it allows abortion on medical grounds. The judgment will become final after three months if not challenged; however, the Italian Government has already expressed its intention to present a review claim before the Grand Chamber in order to obtain a "jurisprudential clarification". The Bishops conference of Italy, whose first reaction to the latter judgement was anger, can now resume its strenuous defence of the Law 40/2004.

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New Zealand—Megaupload's Kim Dotcom, US Copyright Enforcement Efforts and the New Zealand Legal System

: Copyright offences; Extradition; File sharing; Judicial review; New Zealand; Search warrants; Surveillance; United States; Websites

The founder of the website Megaupload, Kim Dotcom, was arrested in a raid executed by the New Zealand police in conjunction with the FBI on January 20, 2012. Dotcom and his associates were wanted by the United States Government in relation to the activities of Megaupload. The substance of the allegations were that: Dotcom and his associates were part of a conspiracy to operate websites that facilitated the uploading and distribution of copyrighted content; they had profited

[1] *H v Austria* (57813/00) (2011) 52 E.H.R.R. 6.
[2] *H v Austria* (57813/00) [2012] 2 F.C.R. 291.
[3] *H v Austria* (57813/00) [2012] 2 F.C.R. 291 at [118].
[4] *Costa and Pavan v Italy* (54270/10), August 28, 2012