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IN SEARCH OF CONSENSUS? HEATH, HUMAN RIGHTS AND THE REGULATION OF REPRODUCTIVE TECHNOLOGIES IN
*S.H. and Others v Austria* (Application no. 57813/00)

**Summary:** This case note analyses a recent judgment by the European Court of Human Rights involving two married couples who failed in their rights-based challenge to provisions of Austria’s Artificial Procreation Act prohibiting heterologous techniques for in vitro fertilisation (i.e. techniques using donor ova and sperm).

**Keywords:** assisted reproductive technologies, regulation of new health technologies, human rights, margin of appreciation, European Court of Human Rights.

**I. INTRODUCTION**

The case of *S.H. and Others v Austria* focuses on the extent to which Article 8 of the European Convention on Human Rights (ECHR) protects access to assisted reproductive technologies (ARTs) and raises interesting questions about access to new technologies more generally.

Article 8 of the ECHR relates to respect for private and family life stating:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

In accordance with the importance of private and family life, the European Court of Human Rights (ECtHR) has for some time acknowledged that Article 8 is engaged by decisions regarding whether or not to become a parent. The exact scope of this engagement has not been specified in the abstract, as the Court has tended to focus on the facts of the case before it. O’Connell and Gevers summarise the importance of the Margin of Appreciation (MoA) in understanding the approach of the ECtHR to this area as follows:

The ECtHR speaks of a margin of appreciation, i.e. a degree of deference that is due to the states in their implementation of the ECHR. This margin is required because the responsibility to ensure the observance of rights falls primarily on the states (Article 1); the ECtHR’s role is merely supervisory.

A wide MoA is applied in situations where there are no common standards applicable to a particular technology (having due regard to the ECHR). However, states are still required to show that the approach they adopt is justified and as common standards emerge (emerging

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1 In contrast, it is interesting to note that Art 12 is under-developed, although this may not be seen as problematic given that Art 12 is linked to the right to found a family and the right to marry.

consensus), the MoA will be restricted or indeed disappear. The Court summarised this approach in one of the first cases to consider the use of ARTs as follows:

78. Accordingly, where a particularly important facet of an individual’s existence or identity is at stake (such as the choice to become a genetic parent), the margin of appreciation accorded to a State will in general be restricted.

Where, however, there is no consensus within the Member States of the Council of Europe either as to the relative importance of the interest at stake or as to how best to protect it, the margin will be wider. This is particularly so where the case raises complex issues and choices of social strategy: the authorities’ direct knowledge of their society and its needs means that they are in principle better placed than the international judge to appreciate what is in the public interest. In such a case, the Court would generally respect the legislature’s policy choice unless it is ‘manifestly without reasonable foundation’. There will also usually be a wide margin accorded if the State is required to strike a balance between competing private and public interests or Convention rights.4

This paragraph can be seen to run in two different directions: the opening line highlights why the MoA should in general be restricted in cases where the issue being considered is particularly fundamental, however, the remainder of the paragraph indicates the role of the ‘European consensus’ in the ECtHR’s approach. This ‘bi-directionalism’ produces ambiguity in assessing how any particular case will be decided. However, it also allows the ECtHR to be flexible with respect to peculiarities in the moral and ethical standards of different states and

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3 See, for example, the decision of Goodwin v UK (2002) 35 EHRR 18.
4 Dickson v United Kingdom [GC], no. 44362/04, (2008) 46 EHRR 41, para 78.
acknowledge the difficulty states may have in regulating new technologies. The application of the MoA can therefore result in seemingly inconsistent judgments and this is because it protects the ability of states to regulate ARTs in a manner most appropriate to their domestic circumstances. It provides for sensitivity to national variations without allowing a “free for all” for States in the regulation of morally sensitive areas. In this case note, I consider the implications of this approach, in particular focusing on the differences in reasoning of the Chamber⁵ and the rejection of the Chamber’s reasoning by the Grand Chamber (GC).⁷

II. FACTS OF THE CASE

S.H. concerned complaints made by four applicants that Austrian law violated their rights under (1) Article 8, and (2) under Article 14 in conjunction with Article 8. The first applicant was married to the second applicant; the third applicant was married to the fourth applicant. Both couples were prevented from accessing particular ARTs because of Austrian prohibitions on heterologous (gametes donated by third parties) techniques of assisted reproduction. The first applicant suffered from ‘fallopian-tube-related infertility’. This meant that while she had viable eggs that could potentially be fertilised, blockages in her fallopian tubes meant that natural fertilisation was not possible. Her husband, the second applicant, was infertile. This meant that in order to achieve a pregnancy, the couple needed to be able to use in vitro fertilisation (IVF) with donor sperm. The third and the fourth applicants also needed to use IVF involving donated gametes (donated eggs), in order to achieve a pregnancy. In this case, the third applicant was completely infertile while her husband, the fourth applicant, produced viable sperm.

² S.H. and Others v Austria, no. 57813/00, (2010) 52 EHRR 6 (Chamber).
³ S.H. and Others v Austria [GC], no. 57813/00, (Grand Chamber, 3 November 2011).
In Austria, the Artificial Procreation Act of 1992 regulates assisted reproduction. The Act allows for homologous (gametes from parties to the treatment) techniques to be used within certain parameters and specifically requires that couples being treated are either married or co-habiting. Due to the sensitive issues being regulated, the Austrian government argued that the law is aimed as far as possible at imposing mirroring structures from ‘natural procreation’ on the creation of family forms through ARTs. In facilitating those techniques which did not deviate too far from natural means of conception, the legislature was attempting to balance private interests in having children against public interests in human dignity, the welfare of the child, prevention of exploitation of women, and protection of traditional family structures. The Act contained an almost blanket prohibition on the use of heterologous techniques and made it a criminal offence to place in a woman an embryo produced by ova that were not her own.

The exception to this blanket ban on heterologous techniques was the use of donated sperm for the purposes of in vivo fertilisation. The justification for this exception was threefold. First, it would be incredibly hard to police such a prohibition. Secondly, such a technique required little technical expertise, and finally it had been used for a long time. The use of donated sperm for in vivo fertilisation was not seen to involve the risk of creating unusual family forms.

The government argued that the restriction of ova donation was necessary as the aim of the prohibition was “to avoid the forming of unusual personal relations such as a child having

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8 For an interesting discussion of how the law in Great Britain can also be seen to favour traditional family forms, see J McCandless and S Sheldon, ‘The Human Fertilisation and Embryology Act (2008) and the Tenacity of the Sexual Family Form’ (2010) 73 MLR 175.
9 S.H. (Chamber) (n 6) para. 17.
10 S.H (Chamber) (n 6) para. 50.
11 SH (Chamber) (n 6) paras. 21, 50.
more than one biological mother (a genetic mother and one carrying the child) and to avoid the risk of exploitation of women." The government also feared that if it were permissible to use donated gametes, then ultimately such techniques could be used to facilitate "selective reproduction" about which there was "much societal unease". Finally, the government stated that the prohibition on ova donation was necessary to protect women from exploitation, humiliation, and to protect economically disadvantaged women from being pressured into producing more ova than they themselves needed in order to fund IVF which would otherwise be beyond their reach financially. The government rejected the applicants' claim that the prohibition was discriminatory, arguing that there was a reasonable and objective justification for the prohibition that was proportionate to the aims to be protected.

The applicants claimed that the prohibitions on the use of donated gametes for IVF constituted a breach of their rights under Article 8, as well as under Article 14 in conjunction with Article 8. They argued that the right to found a family is one of the most important facets of an individual’s private life and that "[b]ecause of the special right to found a family and the right to procreation, the Contracting States enjoyed no margin of appreciation at all in regulating these issues". They considered that the prohibitions on heterologous techniques had thwarted their only chance to have a child who was genetically related to one member of each couple. They further argued that the fact that donated sperm could be used for in vivo fertilisation rendered the general prohibition on heterologous techniques incoherent. With

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12 H. (Chamber) (n 6) para. 17.
13 H. (Chamber) (n 6) para. 47.
15 H. (Chamber) (n 6) para. 46.
16 H. (Chamber) (n 6) para. 42.
regard to the arguments based on exploitation, they submitted that these concerns could be
overcome more effectively through other regulations.\textsuperscript{17}

Given the different techniques involved and also the specifics of some of the arguments put
forward by the Austrian government, the Court found it necessary to consider the case of the
first and second applicant separately to that of the third and fourth applicant. The Chamber
found a breach of Article 14 in conjunction with Article 8 by a margin of 6:1 in relation to the
third and fourth applicants, and 5:2 for first and second applicants. The GC subsequently
reversed this decision, finding no breach of Article 8 by a majority of 13:4 and it declined to
consider Article 14 in light of the fact that it found that Article 8 had not been breached.

\textbf{III. DECISION OF THE CHAMBER}

In reviewing the approach adopted in other contracting States, the Chamber found that there
was much variation in the regulation of ARTs. They further observed that this is an area of
medical law that is constantly and rapidly changing.\textsuperscript{18} Given the similarities between the
Austrian and German legislation in the area, the German government was permitted to make a
third party intervention at this stage. In Germany, it is also an offence to implant in a woman
an egg from another person. Again the German government justified this prohibition by
reference to the welfare of the child and the importance of the “unambiguous identity of the
mother”.\textsuperscript{19}

At the outset, it was accepted that Article 8 encompasses a broad account of what constitutes
a ‘private and family life’. In the cases of \textit{Evans}\textsuperscript{20} and \textit{Dickson}\textsuperscript{21} it had previously been

\begin{itemize}
\item \textsuperscript{17} S.H. (Chamber) (n 6) para. 42.
\item \textsuperscript{18} S.H. (Chamber) (n 6) para 36.
\item \textsuperscript{19} S.H. (Chamber) (n 6) para 52.
\item \textsuperscript{20} \textit{Evans v United Kingdom [GC]}, no. 6339/05, (2008) 46 EHRR 34.
\end{itemize}
accepted that Article 8 was engaged by decisions regarding whether or not to have a child specifically in the context of decision-making on ARTs. The extent to which Article 8 provides any protections from interference or grounds a positive obligation to assist in having a child remains vague. This is unsurprising given that Article 8 is not an absolute right in either a positive or a negative sense, with Article 8(2) indicating the grounds on which interference can be justified. As Gevers and O’Connell have pointed out: “some of these rights - notably Article 8 – are ‘qualified’ rights, i.e. they might be limited where necessary in a democratic society to protect a legitimate public interest (this is the famous proportionality doctrine).”

Given that the Chamber considers the application of Article 8 on a case-by-case basis, it is not clear what amounts to a substantive right to reproduction within the scope of Article 8 or what constitutes a legitimate interference with an individual’s Article 8 rights. As previously mentioned, the complainants argued (relying on Dickson) that given the special status of the right to found a family, the state should be afforded no MoA in how it regulates this area. However, the Chamber quickly dispensed with this argument:

69. Since the use of IVF treatment gives rise to sensitive moral and ethical issues against a background of fast-moving medical and scientific developments, and since the questions raised by the case touch on areas where there is no clear common ground amongst the Member States, the Court considers that the margin of appreciation to be afforded to the respondent State must be a wide one (see X, Y and Z v. the United Kingdom, 22 April 1997, § 44, Reports of Judgments and Decisions 1997-II). The State’s wide margin in principle extends both to its

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21 Dickson (n 4).
22 O’Connell and Gevers (n 2).
decision to intervene in the area and, once having intervened, to the detailed rules it lays down in order to achieve a balance between the competing public and private interests (see Evans, cited above § 75).23

The Chamber was therefore clear that there is a range of approaches open to each contracting State in how they regulate in this area and further specification will not be provided by the Strasbourg Court. Indeed, it did not consider that it was appropriate for the Court to provide such specification. Notwithstanding this point, it is clear from the decision that although a range of regulatory approaches may suffice, not all will be justified and therefore the Court reviewed the situations of each couple on a case-by-case basis.

A. Third and Fourth Applicants

The Chamber considered and dispensed with the arguments of the Austrian government. With regard to arguments about morality and social acceptability, the Chamber found that this was not enough to ban specific procedures and endorsed the arguments that once an area is to be regulated, then such regulation must be coherent.24 On the issue of safety, the Chamber further found that other more proportionate steps could have been taken, such as those already in place which confined the use of ARTs to medical professionals with recognised skills.25 Arguments regarding the exploitation of, and risks to, women were rejected as it was felt they would justify general prohibitions on assisted reproduction rather than prohibitions on specific procedures. Any specific dangers that gamete donation may give rise to could again be dealt with through more proportionate measures, rather than a blanket prohibition.26 The Chamber considered arguments regarding unusual family relationships and the welfare of the

23 S.H. (Chamber) (n 6) para. 69.
24 S.H. (Chamber) (n 6) para. 74.
25 S.H. (Chamber) (n 6) para. 76.
26 S.H. (Chamber) (n 6) paras. 77–78.
child to provide the strongest justification for a prohibition, although they ultimately rejected a blanket prohibition as disproportionate to the aims sought to be realised:

81. The aim of maintaining legal certainty in the field of family law by keeping a long-standing principle of this field of law \([\textit{mater semper certa est, pater est quem nuptiae demonstrant}]\) as one of its basic features certainly has its merits. Nevertheless, unusual family relations in a broad sense are well known to the legal orders of the Contracting States. Family relations which do not follow the typical parent-child relationship based on a direct biological link, are nothing new and have already existed in the past, since the institution of adoption, which creates a family relationship between persons which is not based on descent but on contract, for the purpose of supplementing or replacing biological family relations. From this matter of common knowledge the Court would conclude that there are no insurmountable obstacles to bringing family relations which would result from a successful use of the artificial procreation techniques at issue into the general framework of family law and other related fields of law.\(^{27}\)

The Chamber therefore found that there had been an unjustified interference with the Article 14 in conjunction with Article 8 rights of the third and fourth applicants who wished to use donated eggs for IVF.

B. First and Second Applicants

In relation to the first and second applicants, who wished to use donated sperm for IVF, the Chamber was only prepared to consider the supplementary argument put forward by the

\(^{27}\) \textit{S.H.} (Chamber) (n 6) para. 81.
Austrian government to justify the regulatory distinction on using donated sperm for the purposes of *in vivo* fertilisation rather than IVF. This is the threefold argument previously referred to: namely, the technique has been around for some time; it does not require medical expertise; and any prohibition would be difficult to enforce. The Chamber was not persuaded by these concerns, which they regarded as matters of ‘efficiency’. The Chamber therefore found that there had been an unjustified interference with Article 14.

The Chamber acknowledged that decisions about whether or not to have children are covered by Article 8; however, it refused to detail what this might mean and confined itself to the specifics of the case before it. In my view, the reasoning of the Chamber at this stage is very crude in not acknowledging a distinction between the permissibility of ARTs *generally* and the permissibility of a *specific* ART. ARTs are not homogenous in terms of the ethical issues that they raise and the approach of the Chamber fails to acknowledge this distinction. For example, consider the issue of risks of exploitation where women who act as ova donors. It is true that assisted reproduction in general raises the potential for women to suffer harm through the disproportionate burden on women during treatment. However, these risks are in general tempered by the possible benefits of having a child. This will not always be the case for ova donors. In addition, if ova donors are parties to the treatment process and donation forms part of an indirect payment process (direct payment for ova is banned in Austria), then the possibility of harm through exploitation is in fact greater.

28 S.H. (Chamber) (n 6) para. 93.
30 See Wilkinson (n 14).
IV. DECISION OF THE GRAND CHAMBER

Following a request from the Austrian government, the decision was referred to the GC in accordance with Article 43 of the ECHR. The GC roundly rejected the reasoning and conclusion of the Chamber; instead, it acknowledged the varied justifications for prohibiting specific techniques.31 It was prepared to allow for a wide application of the MoA because of the lack of European consensus over the permissibility of heterologous techniques. That is not to say the reasoning of the GC is without weakness or that the outcome of the GC decision is to be preferred to that of the Chamber. O’Connell and Gevers summarise the approach of the GC with regard to the application of the MoA as follows:

The Grand Chamber found that the Austrian legislation was within the margin of appreciation. However, the judgment does indicate that the ECtHR might decide differently in a few years. The Grand Chamber noted there was an ‘emerging consensus’ permitting gamete donation for IVF, albeit that this was not yet based on settled principles.32

The judgment concluded with a word of caution for the Austrian Government, highlighting that this was an area where there were ‘particularly dynamic developments in science and law’ and that the states needed to keep their legislation under review; the Grand Chamber mentioned the Goodwin case in this context, presumably as an example that the ECtHR may decide to narrow the margin of appreciation if states do not act themselves.

32 S.H. [GC] (n 7) para 96.
Notwithstanding these words of warning, I would argue that the reasoning of the GC is flawed on this issue as was pointed out in the dissenting judgment. The GC grounded its Opinion within a particularly constrained temporal framework. Although it highlighted that this was an area of rapid change, like the situation in Goodwin, it then chose to decide a case in 2011 by reference to standards that existed in 2000 when the alleged breach occurred. The law in Austria in this area remains the same today. Given that it often takes many years for cases to be heard by the ECHR, it is unclear why it is desirable in situations where there has been no change in the law for the Court to adopt temporal constraints regarding the European consensus when in fact such a consensus has now emerged. More broadly, this impacted upon how the Court assessed the MoA, particularly in relation to the regulation of social and family relationships.  

The GC cited, with approval, the 1997 decision of X, Y and Z v the United Kingdom.  

[T]he Court observed that there existed no generally shared approach amongst the High Contracting Parties with regard to the manner in which the social relationship between a child conceived by artificial insemination by donor and the person who performed the role of father should be reflected in law … It concluded that the issues of the case touched upon areas where there was little common ground amongst the member States of the Council of Europe and, generally speaking, the law appeared to be in a transitional stage.

This case concerned the question of whether UK law breached the Article 8 rights of a post-operative transsexual man by preventing him from being legally acknowledged as the father of his children on their birth certificates. The man and his partner had used donor sperm in

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35 S.H. [GC] (n 7) para. 83.
order to achieve a pregnancy. This decision was handed down in 1997 and the complainants in *S.H v Austria* initially lodged their complaint with the Austrian Constitutional Court in 1998. The GC went on to say:

> From the material at the Court’s disposal, it appears that since the Constitutional Court’s decision in the present case many developments in medical science have taken place to which a number of Contracting States have responded in their legislation. Such changes might therefore have repercussions on the Court’s assessment of the facts. However, it is not for the Court to consider whether the prohibition of sperm and ova donation at issue *would or would not be justified today under the Convention*. The issue for the Court to decide is whether these prohibitions were justified at the time they were considered by the Austrian Constitutional Court … However, the Court is not prevented from having regard to subsequent developments in making its assessment.36

In confining their considerations to the period of time when the initial complaint was lodged, the GC avoided having to consider the current European consensus on the permissibility of heterologous IVF. The final sentence, which highlights the GC’s entitlement to consider current developments in assessing the legal position in contracting States (i.e. whether there is a European consensus which the GC might then use to narrow the Margin of Appreciation) is redundant. This is because the GC does not in fact take these developments into consideration in the decision. This is despite acknowledging that the Austrian Constitutional Court had issued a similar direction and the Austrian Government had provided no evidence of having kept the law under review. Indeed, the joint dissenting Opinion of Judges Tulkens, Hirvelä,

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36 *S.H. [GC] (n 7)* para. 84 [emphasis added].
Lazarova Trajkovska and Tsotsoria is critical of this empty assertion of authority to keep laws under review without actually doing so:

In these particular circumstances, we find it artificial for the Court to confine its examination to the situation as it existed when the Constitutional Court gave judgment in 1999 and in the context at the time, thus deliberately depriving a Grand Chamber judgment, delivered at the end of 2011, of any real substance. Admittedly, the judgment takes care to specify that ‘the Court is not prevented from having regard to subsequent developments in making its assessment’, but that specification remains a dead letter in actual fact.\(^\text{37}\)

In effect, the temporal constraints adopted by the GC forced them to issue a judgment that was outdated before it was made.

The GC acknowledged that there is an emerging consensus across Europe on the permissibility of gamete donation. However, it rejected the view that this narrowed the MoA to be afforded to the Austrian government and instead reconsidered the criteria for an assessment of consensus. Like the Chamber, the GC acknowledged that this was a fast moving area. It then moved from this position to concluding that given ART was a fast moving area of medical practice it was also the case that consensus in terms of the techniques which are permitted across contracting States is simply consensus in practice not based on settled principle. Therefore the MoA to be afforded to contracting States was a wide one as trends in practice are subordinate to a consensus on principles underpinning such practice:

\(^{37}\) S.H.[GC] (n 7), joint dissenting Opinion of Judges Tulkens, Hirvelä, Lazarova Trajkovska and Tsotsoria, para. 4.
96. The Court would conclude that there is now a clear trend in the legislation of the Contracting States towards allowing gamete donation for the purpose of IVF, which reflects an emerging European consensus. That emerging consensus is not, however, based on settled and long-standing principles established in the law of the member States but rather reflects a stage of development within a particularly dynamic field of law and does not decisively narrow the margin of appreciation of the State.

97. Since the use of IVF treatment gave rise then and continues to give rise today to sensitive moral and ethical issues against a background of fast-moving medical and scientific developments, and since the questions raised by the case touch on areas where there is not yet clear common ground amongst the member States, the Court considers that the margin of appreciation to be afforded to the respondent State must be a wide one (see X, Y and Z v. the United Kingdom, cited above, § 44).³⁸

This echoes the concurring opinion of Judge Finlay Geoghegan in the recent case of A, B, and C v Ireland:

The facts available to the Court only relate to the legislation in force. The Court had no facts before it relating to the existence or otherwise of a legal protection for or right to life of the unborn or any identified public interest arising out of profound moral values in relation to the right to life of the unborn in any of the majority contracting States. Further, and importantly, there were no facts before the Court which, in my view, permit it to deduce that the abortion legislation in force in the majority Contracting States demonstrates either a balance struck in those

³⁸ S.H. [GC] (n 7) paras 96–97 [emphasis added].
Contracting States between relevant competing interests, or the existence of a consensus amongst those Contracting States on a question analogous to that in respect of which the margin of appreciation under consideration relates i.e. the fair balance to be struck between the protection accorded under Irish law to the right to life of the unborn, and the conflicting rights of the first and second applicants to respect for their private lives protected by Article 8 of the Convention.39

Here, Finlay J. argues that one cannot assess the moral views (settled principles) of a society by reference to the practices within that society alone. Specifically in the case of abortion, it is not possible to draw conclusions regarding the status of the unborn simply by reference to whether a country allows abortion or not. According to the GC in the present case, one cannot assess the moral principles regarding parenthood by reference to whether the State in fact allows heterologous donation. This is because it is an area of rapid development and so there has not yet been time for settled principles to emerge in line with technological developments. It appears as if the approach taken by the GC significantly raises the threshold for what a consensus should consist of in the context of fast moving technological advances, particularly in the sphere of reproduction. Given that settled principles by definition emerge after practice (i.e. technological advances) how could a consensus in principle narrow the MoA with regard to the regulation of new technologies? By the time settled principles emerge, it may well be the case that technologies are no longer new.

A final issue touched on by the GC was that of cross border reproductive care (CBRC). There is an emerging literature on this issue and it is likely to be something that the ECtHR returns

to in the future, given that some countries have now introduced legislation that specifically prohibits CBRC. The Grand Chamber noted:

In this connection the Court also observes that there is no prohibition under Austrian law on going abroad to seek treatment of infertility that uses artificial procreation techniques not allowed in Austria and that in the event of a successful treatment the Civil Code contains clear rules on paternity and maternity that respect the wishes of the parents.  

The GC seems to take a favourable view of the absence of a prohibition on travel in the context of assessing the proportionality of prohibitions at national level, drawing support from the case of *A, B, and C v Ireland* in this regard. In that case, the lack of prohibition on women travelling to access abortion services was considered as part of the proportionality of the Irish prohibition on abortion. In both cases, the reliance on travel disregards the fact that travel is either not an option for many or is an option that involves considerable emotional and financial burden. At the same time, it often increases the health risks for those involved. In the present case of *S.H. v Austria*, the GC’s apparent endorsement of travel in order to access CBRC is problematic for several additional reasons, two of which are highlighted here. First, it implies that concerns about exploitation and the welfare of the child are nullified by crossing borders. Second, it undermines the arguments of the Austrian government that prohibitions on ova donation are necessary in order “that the basic principle of civil law – *mater semper certa est* – should be maintained”.

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40 *S.H. [GC] (n 7)* para. 114. This can be contrasted to the situation in Turkey which has recently introduced legislation to ban travel to seek treatment with donated gametes: see I Turkmenog, ‘Home and Away: The Turkish Ban on Donor Conception’ (2012) 4 Law Innovation and Technology 144.


42 *S.H. [GC] (n 7)* para. 104.
Ultimately the GC found no unjustified interference with the Article 8 rights of either the first and second applicants, or the third and the fourth applicants. In the circumstances, the GC did not adjudicate on Article 14.

V. CONCLUSION

This case once again raises questions about the extent to which Article 8 both protects individuals from interference in accessing ARTs and creates positive obligations to provide access to such technologies. Of particular interest are the questions raised by the judgment of the GC regarding CBRC, as well as the scope of Article 8 in grounding a right to access new technologies. With regard to the first of these issues, we once again see the GC endorsing the ability to travel as being part of a calculation of proportionality. It is likely that the ECtHR will again consider prohibitions on the use of donated gametes. As mentioned previously, Turkey has recently introduced legislation which bans CBRC for the purposes of using donated gametes. What would the GC do in such a case where it is forced to question the proportionality of the impact within a particular country, rather than allowing a particular government to rely on ‘reproductive exile’ as a means of ignoring the rights of particular groups? Or should this be seen as an example of an area where the GC is correct to avoid imposing views on states when this may reduce governments’ ability to handle moral conflict within their borders? 43

With regard to new technologies, the joint dissenting Opinion in the GC was critical of the way in which the MoA was applied by the majority. For the dissenting judges, the reasoning of the majority was problematic because of the lack of protection of individual rights to benefit from advances in health technologies:

Today, ‘society has to cope with new challenges brought to the forefront by [a] technological revolution [in the field of assisted reproduction] and its social implications’. In this respect, it seems to us important to recall Article 12 § 1 and Article 15 § 1b of the International Covenant on Economic, Social and Cultural Rights (1966) which recognizes the right of everyone to enjoy the benefits of scientific progress and its applications, and the right of everyone to enjoy the highest standard of physical and mental health. Ultimately, what is at stake here is not a question of choice between different techniques but, more fundamentally, a restriction on access to heterologous IVF constituting denial of access to available treatment.\(^{44}\)

This reasoning stands in stark contrast to the approach of the majority who thought that in areas of “fast moving” developments in medicine and/or technology, consensus should be measured not just by what is permissible in practice but also whether there is an underlying settled principle. So what is the appropriate threshold in this area? A lack of consensus in answering this question is likely to pose problems for the Court in the future, particularly in circumstances when it may be required to consider complaints regarding the infringement of rights to access new health technologies.\(^{45}\) A threshold of settled principle may not be achievable in the context of ‘fast moving’ technological advances involving new health technologies.

\(^{44}\) S.H. [GC] joint dissenting Opinion (n 7) para. 9.