



INTERNATIONAL HUMAN RIGHTS
LouvainX online course - prof. Olivier De Schutter

READING MATERIAL
related to: section 4, sub-section 2: The duty to protect and conflicting rights

European Court of Human Rights (GC), *Odièvre v. France* (Appl. no. 42326/98), judgment of 13 February 2003:

[The applicant was born in 1965 from a mother who requested that the birth be kept secret in a form she completed at the Health and Social Security Department when abandoning her. She was subsequently placed with the Child Welfare Service at the Health and Social Services Department (*Direction de l'action sanitaire et sociale* – “the DASS”). In 1969, a full adoption order was made on 10 January 1969 in favour of Mr and Mrs Odièvre. On 27 January 1998 the applicant applied to the Paris *tribunal de grande instance* for an order for the “release of information about her birth and permission to obtain copies of any documents, birth, death and marriage certificates, civil-status documents and full copies of long-form birth certificates”. It was answered to her that she should address herself to the administrative courts and that, in any case, the application would be denied, since the French law of 8 January 1993, which confirmed the system of anonymous births which had been traditional in the French legal system also introduced new provisions concerning the secret abandonment of children, and stipulated for the first time that choosing to give birth in secret had an effect on the determination of filiation, as Articles 341 and 341-1 of the Civil Code created an estoppel defence to proceedings to establish maternity: where a child had been secretly abandoned, there was no mother in the legal sense of the word. Following a number of reports about problems emerging from the 1993 legislation, however, the Law of 22 January 2002 was adopted. Without calling into question the right to give birth anonymously, this law allows arrangements to be made for disclosure of identity subject to the mother's and the child's express consent being obtained. And it abolishes the parents' right to request confidentiality under Article L. 224-5 of the Social Action and Families Code. The 2002 law provides for the establishment of a National Council for Access to Information about Personal Origins entrusted with facilitating access to information about personal origins. The Council shall accede to the request of the child or his representatives to be informed about the identity of his or her natural mother (a) if it already has in its possession an express declaration waiving confidentiality in respect of the mother's identity; (b) if the mother's wishes have been verified and she has not expressly stated that she wishes to keep her identity secret; (c) if one of its members or a person appointed by it has been able to obtain the mother's express consent without interfering with her private life; (d) if the mother has died, provided that she has not expressed a contrary intent following a request for access to information about the child's origins. In such cases, one of the members of the Council or a person appointed by it shall advise the mother's family and offer it assistance.]

41. The applicant complained that France had failed to ensure respect for her private life by its legal system, which totally precluded an action to establish maternity being brought if the

natural mother had requested confidentiality and, above all, prohibited the Child Welfare Service or any other body that could give access to such information from communicating identifying data on the mother.

42. In the Court's opinion, people "have a vital interest, protected by the Convention, in receiving the information necessary to know and to understand their childhood and early development". With regard to an application by Mr Gaskin for access to the case records held on him by the social services – he was suffering from psychological trauma as a result of ill-treatment to which he said he had been subjected when in State care – the Court stated: "... confidentiality of public records is of importance for receiving objective and reliable information, and ... such confidentiality can also be necessary for the protection of third persons. Under the latter aspect, a system like the British one, which makes access to records dependent on the consent of the contributor, can in principle be considered to be compatible with the obligations under Article 8, taking into account the State's margin of appreciation. The Court considers, however, that under such a system the interests of the individual seeking access to records relating to his private and family life must be secured when a contributor to the records either is not available or improperly refuses consent. Such a system is only in conformity with the principle of proportionality if it provides that an independent authority finally decides whether access has to be granted in cases where a contributor fails to answer or withholds consent." (*Gaskin*, judgment of 7 July 1989, Series A no. 160, p. 20, § 49; see also *M.G. v. the United Kingdom*, no. 39393/98, § 27, 24 September 2002)

In [*Mikulić v. Croatia*, judgment of 7 February 2002, Appl. No. 53176/99], the applicant, a 5-year-old girl, complained of the length of a paternity suit which she had brought with her mother and the lack of procedural means available under Croatian law to enable the courts to compel the alleged father to comply with a court order for DNA tests to be carried out. The Court weighed the vital interest of a person in receiving the information necessary to uncover the truth about an important aspect of his or her personal identity against the interest of third parties in refusing to be compelled to make themselves available for medical testing. It found that the State had a duty to establish alternative means to enable an independent authority to determine the paternity claim speedily. It held that there had been a breach of the proportionality principle as regards the interests of the applicant, who had been left in a state of prolonged uncertainty as to her personal identity (§§ 64-66).

43. The Court observes that Mr Gaskin and Miss Mikulić were in a different situation to the applicant. The issue of access to information about one's origins and the identity of one's natural parents is not of the same nature as that of access to a case record concerning a child in care or to evidence of alleged paternity. The applicant in the present case is an adopted child who is trying to trace another person, her natural mother, by whom she was abandoned at birth and who has expressly requested that information about the birth remain confidential.

44. The expression "everyone" in Article 8 of the Convention applies to both the child and the mother. On the one hand, people have a right to know their origins, that right being derived from a wide interpretation of the scope of the notion of private life. The child's vital interest in its personal development is also widely recognised in the general scheme of the Convention (see, among many other authorities, *Johansen v. Norway*, judgment of 7 August 1996, *Reports* 1996-III, p. 1008, § 78; *Mikulić*, no. 53176/99, § 64; and *Kutzner v. Germany*, no. 46544/99, § 66, ECHR 2002-I). On the other hand, a woman's interest in remaining anonymous in order to protect her health by giving birth in appropriate medical conditions cannot be denied. In the present case, the applicant's mother never went to see the baby at the clinic and appears to have greeted their separation with total indifference [...]. Nor is it alleged that she subsequently expressed the least desire to meet her daughter. The Court's task is not to judge that conduct, but merely to take note of it. The two private interests with which the Court is confronted in the present case are not easily reconciled; moreover, they do not concern an adult and a child, but two adults, each endowed with her own free will.

In addition to that conflict of interest, the problem of anonymous births cannot be dealt with in

isolation from the issue of the protection of third parties, essentially the adoptive parents, the father and the other members of the natural family. The Court notes in that connection that the applicant is now 38 years old, having been adopted at the age of four, and that non-consensual disclosure could entail substantial risks, not only for the mother herself, but also for the adoptive family which brought up the applicant, and her natural father and siblings, each of whom also has a right to respect for his or her private and family life.

45. There is also a general interest at stake, as the French legislature has consistently sought to protect the mother's and child's health during pregnancy and birth and to avoid abortions, in particular illegal abortions, and children being abandoned other than under the proper procedure. The right to respect for life, a higher-ranking value guaranteed by the Convention, is thus one of the aims pursued by the French system.

In these circumstances, the full scope of the question which the Court must answer – does the right to know imply an obligation to divulge? – is to be found in an examination of the law of 22 January 2002, in particular as regards the State's margin of appreciation.

46. The Court reiterates that the choice of the means calculated to secure compliance with Article 8 in the sphere of the relations of individuals between themselves is in principle a matter that falls within the Contracting States' margin of appreciation. In this connection, there are different ways of ensuring “respect for private life”, and the nature of the State's obligation will depend on the particular aspect of private life that is at issue (see *X and Y v. the Netherlands*, cited above, p. 12, § 24).

46. The Court observes that most of the Contracting States do not have legislation that is comparable to that applicable in France, at least as regards the child's permanent inability to establish parental ties with the natural mother if she continues to keep her identity secret from the child she has brought into the world. However, it notes that some countries do not impose a duty on natural parents to declare their identities on the birth of their children and that there have been cases of child abandonment in various other countries that have given rise to renewed debate about the right to give birth anonymously. In the light not only of the diversity of practice to be found among the legal systems and traditions but also of the fact that various means are being resorted to for abandoning children, the Court concludes that States must be afforded a margin of appreciation to decide which measures are apt to ensure that the rights guaranteed by the Convention are secured to everyone within their jurisdiction.

48. The Court observes that in the present case the applicant was given access to non-identifying information about her mother and natural family that enabled her to trace some of her roots, while ensuring the protection of third-party interests.

49. In addition, while preserving the principle that mothers may give birth anonymously, the system recently set up in France improves the prospect of their agreeing to waive confidentiality, something which, it will be noted in passing, they have always been able to do even before the enactment of the law of 22 January 2002. The new legislation will facilitate searches for information about a person's biological origins, as a National Council for Access to Information about Personal Origins has been set up. That council is an independent body composed of members of the national legal service, representatives of associations having an interest in the subject matter of the law and professional people with good practical knowledge of the issues. The legislation is already in force and the applicant may use it to request disclosure of her mother's identity, subject to the latter's consent being obtained to ensure that her need for protection and the applicant's legitimate request are fairly reconciled. Indeed, though unlikely, the possibility that the applicant will be able to obtain the information she is seeking through the new Council that has been set up by the legislature cannot be excluded.

The French legislation thus seeks to strike a balance and to ensure sufficient proportion between the competing interests. The Court observes in that connection that the States must be allowed to determine the means which they consider to be best suited to achieve the aim of reconciling those interests. Overall, the Court considers that France has not overstepped the margin of appreciation which it must be afforded in view of the complex and sensitive nature

of the issue of access to information about one's origins, an issue that concerns the right to know one's personal history, the choices of the natural parents, the existing family ties and the adoptive parents.

Consequently, there has been no violation of Article 8 of the Convention

Joint dissenting opinion of Mr Wildhaber, Sir Nicolas Bratza, Mr Bonello, Mr Loucaides, Mr Cabral Barreto, Mrs Tulkens and Mr Pellonpää :

4. As regards *compliance* with Article 8, this is a situation in which there are competing rights or interests: on the one hand, the child's right to have access to information about its origins and, on the other, the mother's right, for a series of reasons specific to her and concerning her personal autonomy, to keep her identity as the child's mother secret. Other interests may also come into play, such as the need to protect the health of mother and child during pregnancy and at the birth, and the need to prevent abortion or infanticide.

5. In the instant case, while reiterating that Article 8 does not merely compel States to abstain from arbitrary interference but that “in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective respect for private life” (see paragraph 40 of the judgment), the Court found that the applicant's complaint was not so much that the State had interfered with her rights under the Convention, but that it had not complied with its duty to act. In other words, “the substance of the [applicant's] complaint is not that the State has acted but that it has failed to act” (see *Airey v. Ireland*, judgment of 9 October 1979, Series A no. 32, p. 17, § 32). In these circumstances, the Court had to examine whether the State was in breach of its positive obligation under Article 8 of the Convention when it turned down the applicant's request for information about her natural mother's identity. Its task was not therefore to verify whether the interference with the applicant's right to respect for her private life was proportionate to the aim pursued but to examine whether the obligation imposed on the State was unreasonable having regard to the individual right to be protected, even if there are similarities between the principles applicable in both cases as regards the balance to be struck between the rights of the individual and of the community (see *Keegan v. Ireland*, judgment of 26 May 1994, Series A no. 290, p. 19, § 49, and *Kroon and Others v. the Netherlands*, judgment of 27 October 1994, Series A no. 297-C, p. 56, § 31).

6. In order to decide that issue, the Court must examine whether a fair balance has been struck between the competing interests. It is not, therefore, a question of determining which interest must, in a given case, take absolute precedence over others. In more concrete terms, the Court is not required to examine whether the applicant should, by virtue of her rights under Article 8, have been given access to the information regarding her origins, whatever the consequences and regardless of the importance of the competing interests or, conversely, whether a refusal of the applicant's request for the information in question was justified for the protection of the rights of the mother (or, for instance, for the protection of the rights of others or in the interests of public health). It must perform a “balancing of interests” test and examine whether in the present case the French system struck a reasonable balance between the competing rights and interests.

7. That is the nub of the problem. As a result of the domestic law and practice, no balancing of interests was possible in the instant case, either in practice or in law. In practice, French law accepted that the mother's decision constituted an absolute defence to any requests for information by the applicant, irrespective of the reasons for or legitimacy of that decision. In all circumstances, the mother's refusal is definitively binding on the child, who has no legal means at its disposal to challenge the mother's unilateral decision. The mother thus has a discretionary right to bring a suffering child into the world and to condemn it to lifelong ignorance. This, therefore, is not a multilateral system that ensures any balance between the competing rights. The effect of the mother's absolute “right of veto” is that the rights of the

child, which are recognised in the general scheme of the Convention (see *Johansen v. Norway*, judgment of 7 August 1996, *Reports of Judgments and Decisions* 1996-III, and *Kutzner v. Germany*, no. 46544/99, ECHR 2002-I), are entirely neglected and forgotten. In addition, the mother may also by the same means paralyse the rights of third parties, in particular those of the natural father or the brothers and sisters, who may also find themselves deprived of the rights guaranteed by Article 8 of the Convention. In view of these considerations, we cannot be satisfied by the majority's concession that "the applicant was given access to non-identifying information about her mother and natural family that enabled her to trace some of her roots while ensuring the protection of third-party interests" (see paragraph 48 of the judgment). [...]

17. With regard to striking a fair balance between the competing interests, we consider the approach adopted by the Court in *Gaskin v. the United Kingdom* (judgment of 7 July 1989, Series A no. 160, p. 20, § 49), which it followed in *M.G. v. the United Kingdom* (no. 39393/98, 24 September 2002) to be relevant. "In the Court's opinion, persons in the situation of the applicant have a vital interest, protected by the Convention, in receiving the information necessary to know and to understand their childhood and early development. On the other hand, it must be borne in mind that confidentiality of public records is of importance for receiving objective and reliable information, and that such confidentiality can also be necessary for the protection of third persons. Under the latter aspect, a system like the British one, which makes access to records dependent on the consent of the contributor, can in principle be considered to be compatible with the obligations under Article 8, taking into account the State's margin of appreciation. The Court considers, however, that under such a system the interests of the individual seeking access to records relating to his private and family life must be secured when a contributor to the records either is not available or improperly refuses consent. Such a system is only in conformity with the principle of proportionality if it provides that an independent authority finally decides whether access has to be granted in cases where a contributor fails to answer or withholds consent."

18. If the system of anonymous births is to be retained, an *independent authority* of that type should have the power to decide, on the basis of all the factual and legal aspects of the case and following adversarial argument, whether or not to grant access to the information; such access may in appropriate cases be made conditional, or subject to compliance with a set procedure. In the present situation, in the absence of any machinery enabling the applicant's right to find out her origins to be balanced against competing rights and interests, blind preference was inevitably given to the sole interests of the mother. The applicant's request for information was totally and definitively refused, without any balancing of the competing interests or prospect of a remedy.