

Legal Memorandum: Right to know one's origins - *Gauvin-Fournis and Silliau v. France*

Context

In *Gauvin-Fournis and Silliau v. France*² the European Court of Human Rights (ECtHR) recognised, by a slim majority (4 votes to 3), that France, in refusing the applicants access to any information relating to their origins, whether concerning their donor or their biological siblings or their medical history, had not violated their right to respect for private and family life, provided for in Article 8 of the European Convention on Human Rights (ECHR). The Court found that France had not exceeded its margin of appreciation:

- by applying retroactively to applicants conceived before the Law of 29 July 1994 and to their donors, the principle of absolute anonymity that emerged with that Law.
- by making access to all the donor's information conditional on consent;
- denying donor conceived people access to the donor's medical history and to the number and identity of their biological siblings
- assuming absolute anonymity for all donors post-mortem;

In this legal memorandum, Child Identity Protection (CHIP) sets out the reasons why it aligns itself with the position of the dissenting judges, considering it to be in line with the rights and best interests of the child, as set out in international standards.

International standards

Article 8 of the ECHR, which guarantees everyone the right to respect for his or her private and family life, affirms every individual's right to identity and therefore to know his or her origins³ and the identity of his or her parents.⁴ At the same time, Article 7(1) of the Convention on the Rights of the Child (CRC) stipulates that every child has the right, as far *as possible*, to know his or her parents, a right which, according to the case law of the European Court of Human Rights, can only be hindered by the presence of material obstacles that cannot be removed by legislation.⁵ Article 8(1) of the CRC recognises that every child has the right to preserve his or her family relations, an essential component of his or her identity. Finally, the principles of equality and non-discrimination, guaranteed in Articles 2 of the CRC and 14 of the ECHR, imply equal access to information about one's origins and health, without discrimination in relation to other people not conceived by Assisted Reproductive Technology (ART) with a donation.

The limits of the 2021 bioethics law

Under pressure from international societal and legal developments in favour of defending the right to identity for all children⁶ and taking into account international commitments it has made (in particular by the CRC and the ECHR), France has found itself obliged to revise its legislation. This reform had been recommended for many years by a number of bodies, including the National Consultative Ethics Committee and the Council of State. On 6 May 2009, the State Council came out in favour of lifting donor anonymity.⁷ France is *one of the few countries to have opted for an absolute principle of donor anonymity with regard to the infertile couple and the child*, after noting that *"in all cases there is a clear trend towards lifting anonymity, whether partial or total"*.

At the time, the State Council felt that *"the primary concern for the parents' 'wishes' (which ART makes possible) should be balanced by a concern for the children, which until now has perhaps been*

The facts of the case are not in dispute. The applicants, Ms Audrey Gauvin-Fournis and Mr Clément Silliau, both French nationals, sought to obtain information about the identity of their donor, as well as non-identifying information such as their medical history. Following successive refusals by donation centres and administrative courts between 2010 and 2016, the applicants referred the matter to the ECtHR, arguing that the restrictions imposed by French legislation violated their fundamental rights under the international legal framework and constituted "interference with the exercise of their right to identity".¹

Disregarding the fact that the constant refusal since 2009 had deprived them for more than 13 years of any right of access to knowledge of their origins, this time limit led to a definitive loss of opportunity for the applicant to know her origins. Following the search for her donor in October 2022, the French State informed the applicant that he had died in March 2023, without informing her of the date or cause of death.

too neglected" and that "research by sociologists and psychologists shows that the radical application of the principle of anonymity laid down in 1994 has harmful long-term effects for the child, essentially because the child is deprived of a dimension of his or her history."

The delay in France's legislation is all the more regrettable given that the effects of absolute anonymity on people born through ART have been proven and widely recognised over the last few decades.⁸ The Bioethics Act of 2 August 2021 raises questions about the way in which France has responded to this major issue of identity, as a fundamental right. The Bioethics Act introduces a different system for access to origins depending on whether donations were made before or after 1 September 2022, the date on which the Act comes into force.

- **Persons conceived on or after 31 March 2025 from donations made after 1 September 2022** will have the right, when they come of age, i.e. in 2044 at the earliest, to access the identity and non-identifying information relating to their donor. Since 1 September 2022, donation has been subject to the donor's consent to the lifting of their anonymity. However, by giving priority until 31 March 2025 to the use of gametes that were anonymous before 1 September 2022⁹ the law delays the real impact of the new system and increases the number of people for whom obtaining information is uncertain.
- **Persons born or to be born (i.e. all persons conceived by donation until 30 March 2025) from donations made before 1 September 2022** will have access to their origins subject to two conditions: the donor's consent to the lifting of anonymity and the absence of the donor's death. In addition, the Bioethics Act makes no provision for automatically seeking the consent of donors who made their donation before the adoption of the Act, thereby reducing the risk of not being able to obtain consent due to the death of the donor. Furthermore, unlike Belgium, where since 2019 children have been informed directly on reaching the age of majority of the possibility of accessing information relating to their origins¹⁰ the French law leaves this initiative solely to the donor conceived person. Furthermore, where the donor is deceased at the time of the request for consent to lift anonymity, the children are definitively deprived of any opportunity to access information about their origins, as is the case with the applicant.
- **In any event, irrespective of the date of donation**, the French legislator has maintained its refusal to communicate any information relating to biological siblings, at the child's request, which is a major breach of the child's identity rights and also increases the risk of non-conscious encounters between members of the same sibling. It also maintained its refusal to pass on to persons conceived by donation any information about the medical history of the donor or his close relatives. In addition, French legislation has not reviewed its position on the minimum age of 18, despite the recommendation made in June 2023 by the UN Committee on the Rights of the Child to allow minors born through ART access to information about their origin as soon as they express a request for it.¹¹

The French bioethics law offered an opportunity to respond to the ethical, medical and identity-related challenges raised by a long-standing and now well-established trend in favour of greater protection of the right to identity. By failing to guarantee fairness and transparency in access to origins for all people born by ART, including those born before the legislation came into force (i.e. all those already born and all those conceived by donation up to 30 March 2025), France has failed to fully defend this fundamental right.

Gauvin-Fournis and Silliau - the missed opportunity to balance children's rights and donors' interests

According to CHIP, the ECtHR's decision in *Gauvin-Fournis and Silliau v. France* demonstrates what is considered to be a conflict of interest between "the right to privacy of donors before the entry into force of the new law and the right of persons born of these techniques to know their identity".¹²

The majority has opted for absolute anonymity for donations made before 1 September 2022, including those made before 29 July 1994, i.e. even before the principle of anonymity was first enshrined in law, a decision that seems neither proportionate nor legitimate. Knowing one's origins does not lead to the establishment of a parent-child relationship¹³ and there is no proven distress for the donor¹⁴ revealing non-identifying information.

Furthermore, it has been established that the lack of transmission of medical records, as is the case for the applicant, can have a negative impact on the mental and physical health of individuals born through ART.¹⁵ In the light of this major health issue, the choice to conceal this information is inappropriate. Furthermore, the decision to preserve the anonymity of the donor after his death does not appear to be consistent, insofar as, for example, children born under X have the right to access their origins (and more specifically the identity of their genitor) in these same circumstances.¹⁶

The argument put forward by the majority that there was no clear consensus on the question of access to origins¹⁷ can be refuted by the fact that "a clear and constant trend in this direction did exist before the 2021 Act came into force".¹⁸ The study of comparative legislation in several European countries carried out by the Council of Europe in 2022 clearly highlighted this "trend towards lifting anonymity".¹⁹ But above all, this trend is not a recent one: some countries, such as Sweden (1985), Germany (1989), Austria and Switzerland (1992), Norway (2003), the Netherlands (2004) and the United Kingdom (2005), have long accepted it. Several countries have gone further in terms of legislation, such as Sweden, Norway and Finland, or the State of Victoria in Australia, with the adoption of the "VIC" law in 2016, which guarantees all children born from a donation the right to access information, regardless of the date of the donation or the donor's possible non-consent.²⁰

In view of the above, CHIP aligns itself with the concluding remarks of the dissenting opinion which states:

The applicants, despite their obvious differences, shared a common destiny, that of living with the questioning and cruelty of the mystery of their origins, and of having been subjected for years to a law which, although revised, remained unchanged in principle, at a time when the suffering of children born from donated gametes was becoming increasingly well-known and a European trend was emerging towards opening the door to knowledge of one's origins.

The law evolved too late for the applicant, whose biological father's death now prevents her from knowing the truth once and for all. Even if the possibility of asking her biological father, through a commission, to disclose his identity or any other identifying information remains open to the applicant, the years of secrecy guaranteed by law have deprived her of a fundamental part of her identity that no subsequent legislative intervention will be able to compensate for.

In view of the importance of the identity issue raised by this case for all children born or to be born by ART with donation²¹ we consider that it would be essential for the Grand Chamber to re-examine this "serious issue of general importance".²² so as to guide the legislature and all other actors setting national standards in this area, in accordance with internationally recognised standards of respect for the rights of the child.

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1. *Gauvin-Fournis v France* (reported case) - 21424/16, June 2018, European Court of Human Rights.
 2. *Gauvin-Fournis and Silliau v. France*, no. 21424/16 and 45728/17, 07 September 2023, European Court of Human Rights.
 3. *Odièvre v. France*, no. 42326/98, 13 February 2003, European Court of Human Rights.
 4. *Jäggi v. Switzerland*, no. 58757/00, § 37, 13 July 2006; *Boljevic v. Serbia*, no. 47443/14, § 28, 16 June 2020, European Court of Human Rights.
 5. *Gauvin-Fournis v France* (reported case) - 21424/16, June 2018, European Court of Human Rights.
 6. *Gauvin-Fournis and Silliau v. France*, no. 21424/16 and 45728/17, European Court of Human Rights (ECHR), Joint dissenting opinion of Judges Ravarani, Mourou-Vikström and Gnatovskyy, 07 September 2023.
 7. <https://www.conseil-etat.fr/publications-colloques/etudes/revision-des-lois-de-bioethique>
 8. *Gauvin-Fournis and Silliau v. France*, no. 21424/16 and 45728/17, European Court of Human Rights (ECHR), Joint dissenting opinion of Judges Ravarani, Mourou-Vikström and Gnatovskyy, 07 September 2023.
 9. Decree 2023-785 of 16 August 2023: JO 17 :
<https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000047974226>
 10. *Child Identity Protection (CHIP)*. (2023). Summary of the intervention by Child Identity Protection (CHIP) in the context of the proposed law (tabled by Mrs Valérie Van Peel) creating an Institute for the conservation and management of donor data, DOC 55 0186/001 and 55 0186/002 (16 May 2023).
 11. *Committee on the Rights of the Child* (2023, June 2). Concluding observations on the combined sixth and seventh reports of France.
 12. *Gauvin-Fournis and Silliau v. France*, no. 21424/16 and 45728/17, 07 September 2023, European Court of Human Rights.
 13. *Silliau v France* (reported case) - 45728/17, June 2018, European Court of Human Rights.
 14. *Gauvin-Fournis v France* (reported case) - 21424/16, June 2018, European Court of Human Rights.
 15. *Gauvin-Fournis v France* (reported case) - 21424/16, June 2018, European Court of Human Rights.
 16. <https://www.cnaop.gouv.fr/l-acces-aux-origines-en-questions.html#question3>
 17. *Gauvin-Fournis v France* (reported case) - 21424/16, June 2018, European Court of Human Rights.
 18. *Gauvin-Fournis and Silliau v. France*, nos. 21424/16 and 45728/17, 07 September 2023, European Court of Human Rights. Joint dissenting opinion of Judges Ravarani, Mourou-Vikström and Gnatovskyy, 07 September 2023.
 19. CDCJ, 22 September 2022, *Comparative Legislation Study*, No. 186.
 20. *The Parliament of Victoria* (2016). *Assisted Reproductive Treatment Amendment Act 2016* [Assented to 1 March 2016].
 21. "It is estimated that more than 8 million children worldwide have been born using medically assisted reproductive technologies, many of them conceived through sperm or egg donation". Committee on Social Affairs, Health and Sustainable Development. (2019). Anonymous sperm and egg donation: striking a balance between the rights of parents, donors and children.
<https://pace.coe.int/fr/files/25439/html>
 22. "The Panel shall accept the request if the case raises serious questions affecting the interpretation or application of the Convention or the Protocols thereto, or a serious issue of general importance". European Courts of Human Rights (2021, 2 June). Practice followed by the Panel of the Grand Chamber when deciding on requests for referral under article 43 of the Convention. p. 25.
https://www.echr.coe.int/documents/d/echr/note_gc_eng