COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

GRAND CHAMBER

CASE OF DRAON v. FRANCE

(Application no. 1513/03)

JUDGMENT
(Just satisfaction and striking out)

STRASBOURG

21 June 2006

In the case of Draon v. France,

The European Court of Human Rights, sitting as a Grand Chamber composed of:

Luzius Wildhaber, *President*,
Christos Rozakis,
Jean-Paul Costa,
Nicolas Bratza,
Giovanni Bonello,
Lucius Caflisch,
Loukis Loucaides,
Corneliu Bîrsan,
Peer Lorenzen,
Karel Jungwiert,
Volodymyr Butkevych,
András Baka,
Mindia Ugrekhelidze,
Vladimiro Zagrebelsky,
Khanlar Hajiyev,
Renate Jaeger,
Danutė Jočienė, *judges*,
and Lawrence Early, *Section Registrar*,

Having deliberated in private on 7 June 2006,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 1513/03) against the French Republic lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by two French nationals, Mr Lionel Draon and Mrs Christine Draon ("the applicants"), on 2 January 2003.

2. The applicants were represented by Mr F. Nativi and Ms H. Rousseau-Nativi, lawyers practising in Paris. The French Government ("the Government") were represented by their Agent, Mrs E. Belliard, Director of Legal Affairs at the Ministry of Foreign Affairs.

3. Following relinquishment of jurisdiction by the Chamber to which the application had initially been assigned, the Court (Grand Chamber) gave judgment on 6 October 2005 ("the judgment on the merits"). In that judgment it held that section 1 of Law no. 2002-303 of 4 March 2002 on patients' rights and the quality of the health service had infringed the applicants' right to the peaceful enjoyment of their possessions. The Court noted that, following the birth of a child with a disability not detected

during pregnancy on account of negligence in carrying out a prenatal diagnosis, the applicants had brought an action for compensation in the French courts. Having regard to the relevant domestic rules governing liability, and bearing in mind in particular the established case-law of the administrative courts, the applicants could legitimately have expected to obtain compensation for the damage they had sustained, including the special burdens arising from their child's disability. But the above-mentioned Law of 4 March 2002, which was applicable to pending proceedings, had had the effect in the case brought by the applicants of excluding the "special burdens" from the damage for which compensation could be awarded. The Court considered that the impugned legislation had deprived the applicants, without sufficient compensation, of a substantial portion of the damages they had claimed, thus making them bear an individual and excessive burden. Consequently, the applicants had been victims of a violation of Article 1 of Protocol No. 1 (see *Draon v. France* [GC], no. 1513/03, §§ 78-86, 6 October 2005).

Regard being had to that finding of a violation, the Court did not consider it necessary to examine the applicants' complaint under Article 14 of the Convention taken in conjunction with Article 1 of Protocol No. 1.

Furthermore, regard being had to the particular circumstances of the case and to the reasoning that had led it to find a violation of Article 1 of Protocol No. 1, the Court did not consider it necessary to examine separately the applicants' complaint under Article 6 § 1 of the Convention.

The Court found no violation of Article 13 or of Article 8, even supposing that Article 8 was applicable.

As regards the complaint relating to Article 14 of the Convention taken in conjunction with Article 8, the Court noted that it fell outside the scope of the case as submitted to the Grand Chamber (see *Draon*, cited above, §§ 91, 95, 97-99 and 105-17).

Lastly, the Court awarded the applicants the sum of 15,244 euros (EUR) for the costs and expenses they had incurred up to that point in the proceedings before it.

4. Under Article 41 of the Convention, the applicants alleged that they had suffered pecuniary damage corresponding to the sums they would have received if the legal situation prior to the Law of 4 March 2002 had continued to obtain. Supplying the relevant vouchers, they claimed a total of EUR 5,615,069.63. In addition, they claimed EUR 12,000 as compensation for non-pecuniary damage resulting from the violations of the Convention they had complained of.

5. As regards the sum to be awarded to the applicants for any pecuniary or non-pecuniary damage resulting from the violation found, the Court held in the judgment on the merits that the question of the application of Article 41 was not ready for decision, and accordingly reserved it. It invited the Government and the applicants to submit their written observations on

the matter within six months and, in particular, to notify it of any agreement that they might reach (see *Draon*, cited above, §§ 119-22 and point 7 of the operative provisions).

6. In letters dated 6 April 2006 the Government and the applicants informed the Court that the parties had reached agreement on the question of just satisfaction.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

7. The applicants were born in 1961 and 1962 respectively and live in Rosny-sous-Bois.

8. In the spring of 1996 Mrs Draon became pregnant for the first time. The second ultrasound scan, carried out in the fifth month of pregnancy, revealed an anomaly in the development of the foetus.

9. On 20 August 1996 an amniocentesis was carried out at Saint-Antoine hospital, run by Assistance publique-Hôpitaux de Paris (AP-HP). The amniotic fluid sample was sent for analysis to the establishment's cytogenetics laboratory (headed by Professor T.) with a request for karyotype and digestive enzyme analysis. In September 1996 T. informed the applicants that the amniocentesis showed the foetus had "a male chromosomal pattern with no anomaly detected".

10. R. was born on 10 December 1996. Very soon, multiple anomalies were observed, particularly defective psychomotor development. The examinations carried out led to the conclusion that there was a congenital cardiopathy due to a "chromosomal anomaly".

11. When informed of this, T. admitted that his service had made the wrong diagnosis, the anomaly having already been entirely detectable at the time of the amniocentesis. He stated: "Concerning the child Draon R., ... we regret to have to say that there was indeed an asymmetry between the foetus's two copies of chromosome 11; that anomaly or peculiarity escaped our attention."

12. According to the medical reports, R. presents cerebral malformations causing grave disorders, severe impairment and permanent total invalidity, together with arrested weight gain. This means that it is necessary to make material arrangements for his everyday care, supervision and education, including ongoing specialist and non-specialist treatment.

13. On 10 December 1998 the applicants sent a claim to AP-HP seeking compensation for the damage suffered as a result of R.'s disability.

14. In a letter dated 8 February 1999, AP-HP replied that it "[did] not intend to deny liability in this case" but invited the applicants to "submit an application to the Paris Administrative Court which, in its wisdom, will assess the damage for which compensation should be paid".

15. On 29 March 1999 the applicants submitted to the Paris Administrative Court a statement of their claim against AP-HP, requesting an assessment of the damage suffered.

16. At the same time the applicants submitted to the urgent applications judge at the same court a request for the appointment of an expert and an interim award.

17. In a decision of 10 May 1999, the urgent applications judge of the Paris Administrative Court made a first interim award of 250,000 French francs (FRF) (EUR 38,112.25) and appointed an expert. He made the following points, among other observations:

> "[AP-HP] does not deny liability for the failure to diagnose the chromosomal anomaly which the boy R. is suffering from; ... having regard to the non-pecuniary damage, the disruption in the conditions of their lives and the special burdens arising for Mr and Mrs Draon from their child's infirmity, AP-HP's liability towards them in the sum of 250,000 francs may be considered, at the current stage of the investigation, not seriously open to challenge."

18. The expert filed his report on 16 July 1999 and confirmed the seriousness of R.'s state of health.

19. On 14 December 1999, in a supplementary memorial on the merits, the applicants requested the Administrative Court to assess the amount of the compensation which AP-HP should be required to pay.

20. AP-HP's memorial in reply was registered on 19 July 2000. The applicants then filed a rejoinder and further documents concerning the modifications to their home and the equipment necessitated by R.'s state of health.

21. In addition, the applicants again asked the urgent applications judge to make an interim award. In a decision of 11 August 2001, the urgent applications judge of the Paris Administrative Court made an additional interim award of FRF 750,000 (EUR 114,336.76) to the applicants "in view of the severity of the disorders from which the boy R. continues to suffer and the high costs of bringing him up and caring for him since 1996".

22. After being prompted several times, verbally and in writing, by the applicants, the Paris Administrative Court informed them that the case had been set down for hearing on 19 March 2002.

23. On 5 March 2002 Law no. 2002-303 of 4 March 2002 on patients' rights and the quality of the health service ("the Law of 4 March 2002") was published in the Official Gazette of the French Republic. Section 1 of that Law, being applicable to pending proceedings, affected those brought by the applicants.

24. In a letter of 15 March 2002, the Paris Administrative Court informed the applicants that the hearing had been put back to a later date and that the case was likely to be decided on the basis of a rule over which the court did not have discretion, since it applied to their claim by virtue of section 1 of the Law of 4 March 2002.

25. In a judgment of 3 September 2002, the Paris Administrative Court, acting on a proposal made by the Government Commissioner, deferred its decision and submitted to the *Conseil d'Etat* a request for an opinion on interpretation of the provisions of the Law of 4 March 2002 and their compatibility with international conventions.

26. On 6 December 2002 the *Conseil d'Etat* gave an opinion in the context of the litigation in progress (*avis contentieux*) which is reproduced in the judgment on the merits (§ 51).

27. On the basis of that opinion, the Paris Administrative Court ruled on the merits of the case on 2 September 2003. It began with the following observations:

"Liability:

The provisions of section 1 of the Law of 4 March 2002, in the absence of any provisions in the Law providing for deferred entry into force, are applicable under the conditions of ordinary law following publication of the Law in the Official Gazette of the French Republic. The rules which it lays down, as decided by the legislature on general-interest grounds relating to ethical considerations, the proper organisation of the health service and the equitable treatment of all disabled persons, are not incompatible with the requirements of Article 6 of the Convention, with those of Articles 5, 8, 13 and 14 of the Convention or with those of Article 1 of Protocol No. 1 to [the] Convention. ... The general-interest grounds which the legislature took into account when laying down the rules contained in the first three sub-paragraphs of paragraph I justify their application to situations which arose prior to the commencement of pending proceedings. It follows that those provisions are applicable to the present action, brought on 29 March 1999.

The administrative courts do not have jurisdiction to determine the constitutionality of statute law; [the applicants'] request that this Court review the constitutionality of the Law of 4 March 2002 must therefore be refused.

It appears from the investigation that in the fifth month of Mrs Draon's pregnancy, after an ultrasound scan had shown a manifest problem affecting the growth of the foetus, she and Mr Draon were advised to consider the option of an abortion if karyotype analysis after an amniocentesis revealed a chromosomal abnormality. Mr and Mrs Draon then decided to have that test performed at Saint-Antoine Hospital. They were informed by the hospital on 13 September 1996 that no anomaly of the foetus's male chromosomal pattern had been detected. However, very soon after the baby's birth on 10 December 1996 magnetic resonance imaging revealed a serious malformation of the brain due to a karyotypic anomaly.

The report of the expert appointed by the Court states that this anomaly was entirely detectable; failure to detect it therefore constituted gross negligence on the part of [AP-HP] which deprived Mr and Mrs Draon of the possibility of seeking an abortion

on therapeutic grounds and entitles them to compensation under section 1 of the Law of 4 March 2002."

28. The court then assessed the damage sustained by the applicants as follows:

"... firstly, ... the amounts requested in respect of non-specialist care, the specific costs not borne by social security, the costs of building a house suited to the child's needs with a number of modifications to the home and the purchase of a specially adapted vehicle relate to special burdens arising throughout the life of the child from his disability and cannot therefore be sums for which [AP-HP] is liable.

... secondly, ... Mr and Mrs Draon are suffering non-pecuniary damage and major disruption to their lives, particularly their work, regard being had to the profound and lasting change to their lives brought about by the birth of a seriously disabled child; ... these two heads of damage must be assessed, in the circumstances of the case, at 180,000 euros.

... lastly ..., although Mr and Mrs Draon submitted that they could no longer holiday in a property they had purchased in Spain, they are not deprived of the right to use that property; consequently their claim for compensation for loss of enjoyment of real property must be rejected. ..."

29. The court concluded by ordering AP-HP to pay the applicants the sum of EUR 180,000, less the amount of the interim awards, interest being payable on the resulting sum at the statutory rate from the date of receipt of the claim on 14 December 1998, the interest due being capitalised on 14 December 1999 and subsequently on each anniversary from that date onwards. AP-HP was also ordered to pay the applicants the sum of EUR 3,000 in respect of costs not included in the expenses and to bear the cost of the expert opinion ordered by the president of the court.

30. On 3 September 2003 the applicants appealed against the judgment. Their appeal is currently pending before the Paris Administrative Court of Appeal.

II. RELEVANT DOMESTIC LAW AND PRACTICE

31. Here the Court refers to the judgment on the merits (§§ 36-58).

THE LAW

32. On 10 May 2006 the applicants sent the Registry the text of an agreement, signed by the parties' representatives, which reads as follows:

"AGREEMENT

Between, on the one hand,

The State, represented by Mr Xavier BERTRAND, Minister for Health and Solidarity ...

Assistance publique-Hôpitaux de Paris, a public health establishment ...

And, on the other hand,

Mr and Mrs DRAON ...

The signatories of the present agreement being referred to hereafter as “the parties”,

THE TERMS OF AGREEMENT ARE PRECEDED BY THE FOLLOWING STATEMENT OF THE FACTS OF THE CASE:

Mrs DRAON became pregnant in 1996.

The first ultrasound scan was normal but the second, at five months, revealed that the foetus was not developing properly. It was then suggested to Mr and Mrs DRAON that a sample of amniotic fluid should be taken for karyotype analysis.

The karyotype analysis was carried out at the Saint-Antoine Hospital, an establishment run by Assistance publique-Hôpitaux de Paris.

The karyotype was declared normal, the pregnancy ran its course and the child was born on 10 December 1996.

Anomalies quickly became apparent. Magnetic resonance imaging and karyotype analysis were carried out. The MRI scan revealed a serious malformation of the brain and the karyotype analysis showed an anomaly in the form of a centromeric duplication of chromosome 11.

Mr and Mrs DRAON then submitted a claim to AP-HP on 10 December 1998 seeking compensation in full for the damage they had sustained on account of the erroneous karyotype analysis carried out at the Pathological and Cytogenetic Embryology Laboratory of the Saint-Antoine Hospital.

By a decision of 8 February 1999, AP-HP admitted liability and suggested that Mr and Mrs DRAON should apply to the Paris Administrative Court under the urgent procedure for an assessment of the damage for which compensation could be paid. They did so on 29 March 1999.

Concurrently, Mr and Mrs DRAON instituted proceedings on the merits of their claim in the Paris Administrative Court.

In a judgment of 2 September 2003, the Paris Administrative Court made reference to the terms of section 1 of the Law of 4 March 2002 on patients’ rights and the quality of the health service, which provides: ‘No one may claim to have suffered damage by the mere fact of his or her birth ... where the liability of a health-care professional or establishment is established *vis-à-vis* the parents of a child born with a disability not detected during the pregnancy by reason of gross negligence, the parents may claim compensation in respect of their damage only. That damage cannot include the special burdens arising from the disability throughout the life of the child.

Compensation for the latter is a matter for national solidarity. The provisions of the present paragraph I shall be applicable to proceedings in progress, except for those in which an irrevocable decision has been taken on the principle of compensation.'

The court held that the karyotypic anomaly had been entirely detectable and that failure to detect it constituted gross negligence conferring entitlement to compensation under the conditions laid down in section 1 of the Law of 4 March 2002.

It ordered AP-HP to compensate Mr and Mrs DRAON for non-pecuniary damage and the disruption to their lives, particularly their working lives, but ruled out the compensation claims they had submitted in respect of the special burdens arising from their child's disability.

In execution of that judgment, AP-HP paid Mr and Mrs DRAON the sum of 196,793.75 euros (180,000 plus 16,793.75 interest).

On 23 October 2003 Mr and Mrs DRAON appealed against the judgment of the Paris Administrative Court to the Paris Administrative Court of Appeal.

They argued that the provisions of the Law of 4 March 2002 were not applicable to their case and requested compensation for all the damage they had sustained on account of the incorrect karyotype analysis.

On 10 January 2003 Mr and Mrs DRAON lodged an application with the European Court of Human Rights.

That application directly contested the compatibility with the Convention of section 1 of Law no. 2002-303 of 4 March 2002, concerning medical liability for the birth of a disabled child.

On 6 October 2005 the European Court of Human Rights gave judgment against France in so far as the retrospective effect of the Law of 4 March 2002 had deprived the applicants, without reasonably proportionate compensation, of a substantial portion of the damages they had claimed.

In its judgment the Grand Chamber of the Court observed: '... the grounds relating to ethical considerations, equitable treatment and the proper organisation of the health service mentioned by the *Conseil d'Etat* in its opinion of 6 December 2002 and relied on by the Government could not, in the instant case, legitimise retrospective action whose result was to deprive the applicants, without sufficient compensation, of a substantial portion of the damages they had claimed, thus making them bear an individual and excessive burden' [paragraph 85].

In its judgment of 6 October 2005, the European Court of Human Rights invited the parties to reach a negotiated settlement.

The proper course of action is accordingly to make good the damage sustained by Mr and Mrs DRAON on account of negligence on the part of AP-HP and the retrospective nature of the impugned legislation.

The parties have come together and decided to end the dispute between them.

IN CONSEQUENCE, THEY HAVE REACHED THE FOLLOWING AGREEMENT:

Article 1:

As requested by the Court, the purpose of the present agreement is to afford just satisfaction to Mr and Mrs DRAON and to put an end to the disputes between them and the State and AP-HP relating to the damage they sustained on account of negligence by AP-HP and the retrospective scope of section 1 of the Law of 4 March 2002.

Article 2: Compensation

The compensation proposed to Mr and Mrs DRAON to make good the damage they have sustained amounts to EUR 2,131,018 (two million one hundred and thirty-one thousand and eighteen euros), made up as follows:

– EUR 1,428,540, as a capital sum for provision of the child's needs, by his parents, throughout his life;

– EUR 702,478 for all other heads of damage taken together.

Interest is payable on the sum of EUR 2,131,018 from 14 December 1998. The accrued interest on 14 December 1999 and on that date in each succeeding year will be capitalised and will itself earn interest, the total compound interest to be calculated as on 31 March 2006.

The default interest and capitalised interest accrued by 31 March 2006 amount to EUR 541,768.02 (five hundred and forty-one thousand seven hundred and sixty-eight euros and two cents).

The total compensation payable, including interest, therefore amounts to EUR 2,672,786.02 (two million six hundred and seventy-two thousand seven hundred and eighty-six euros and two cents).

The money paid to Mr and Mrs DRAON following the Paris Administrative Court's judgment of 2 September 2003, that is, EUR 196,793,75 (one hundred and ninety-six thousand seven hundred and ninety-three euros and seventy-five cents), is to be deducted from that sum.

Consequently, after addition of the sum of EUR 12,121 (twelve thousand one hundred and twenty-one euros) requested from the European Court of Human Rights by Mr and Mrs DRAON as compensation for the non-pecuniary damage they sustained on account of the Law of 4 March 2002 (EUR 12,000 plus EUR 121 in interest payable from 6 October 2005, the date of the judgment of the European Court of Human Rights, to 31 March 2006), the final total of the compensation to be paid to Mr and Mrs DRAON comes to EUR 2,488,113.27 (two million four hundred and eighty-eight thousand one hundred and thirteen euros and twenty-seven cents).

That payment excludes any other form of reparation to Mr and Mrs DRAON in respect of the same prejudice.

Article 3: Waivers

In consideration of payment of the sum intended as final settlement mentioned in Article 2, Mr and Mrs DRAON undertake to withdraw their claim against AP-HP (application no. 03PA04057) before the Paris Administrative Court of Appeal. In addition, they will inform the ECHR that they have obtained just satisfaction and that they wish to withdraw all further compensation claims against the French State before that Court.

Article 4: Settlement effect

The present agreement is governed by French law and constitutes settlement for the purposes of Articles 2044 et seq. of the Civil Code.

The present agreement has the binding effect of a final judgment by virtue of Article 2052 of the Civil Code.

Article 5: Payment

Payment of the sum due under the terms of the present settlement shall be effected by bank or postal account transfer from Assistance publique-Hôpitaux de Paris to Mr and Mrs DRAON within forty-five days from the date of receipt of the present agreement, duly signed by the parties, by AP-HP. For that purpose, Mr and Mrs DRAON will send their bank or postal account details to Assistance publique-Hôpitaux de Paris.

The official empowered to authorise the payment shall be the treasurer of Assistance publique-Hôpitaux de Paris ...”

33. The Court takes formal note of the above agreement. It observes that its purpose is to put an end to the dispute. It further observes that under the terms of the settlement thus reached the applicants will be paid compensation for the pecuniary and non-pecuniary damage they have sustained and that in consideration they will withdraw all other compensation claims against the French State before the Court and their action against AP-HP in the Paris Administrative Court of Appeal.

34. Having examined the terms of the agreement reached, the Court considers that it is equitable within the meaning of Rule 75 § 4 of the Rules of Court and that it is based on respect for human rights as defined in the Convention and its Protocols (Article 37 § 1 *in fine* of the Convention and Rule 62 § 3 of the Rules of Court).

35. Accordingly, the remainder of the case should be struck out of the Court’s list (Article 37 § 1 (b) of the Convention and Rule 43 § 3).

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Takes formal note* of the agreement between the parties and the arrangements made to ensure compliance with the undertakings given therein (Rule 43 § 3 of the Rules of Court);

2. *Decides* to strike the remainder of the case out of the list.

Done in English and in French, and notified in writing on 21 June 2006, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Lawrence Early	Luzius Wildhaber
Registrar	President