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Council of State

N° 248357

Published in the Lebon collection

Section of litigation

Ms. Hagelsteen, President

Miss Anne Courrèges, Rapporteur

Mr. Devys, Government commissioner

Reading of September 26, 2005

FRENCH REPUBLIC

IN THE NAME OF THE FRENCH PEOPLE

Considering the complaint, registered 3 July 2002 to the secretariat of the Council of State, presented by the *ASSOCIATION AGAINST HANDIPHOBIA* on 36 Brule Maison street in Lille (59000), represented by its chairman; the *ASSOCIATION AGAINST HANDIPHOBIA* request to the Council of State the cancellation of decree 2002-779 of May 3, 2002 for the application of Article L. 2123-2 from the Code of Public Health.

Considering the other documents in the file;

Considering the Constitution of October 4, 1958 including its preamble;

Considering the European Convention for the Protection of Human Rights and Fundamental Freedoms;

Considering the Universal Declaration of Human Rights;

Considering the International Covenant on Civil and Political Rights;

Considering the International Covenant on Economic, Social and Cultural Rights;

Considering the code of the public health, including its article L. 2123-2;

Considering the law 2001-588 of July 4, 2001;

Considering the Code of Administrative Justice;

After hearing in open session:

- The report of Miss Anne Courrèges, Masters of Requests [Maître des Requêtes]

- The conclusions of Mr. Christophe Devys, Government commissioner;

Considering, on the one hand, that under Article L. 2123-2, introduced in the Code of Public Health by Article 26 of the law of July 4, 2001 regarding the voluntary termination of pregnancy and contraception: Tubal ligation or *vas deferens* for contraceptive purpose cannot be performed on a minor. It can only be performed on an adult whose mental faculty is impaired and constitutes a disability that justified their placement under guardianship or curatorship when there is an absolute medical contraindication against methods of

contraception or a proven inability to effectively implement them. The operation is subject to a decision by the guardianship judge overseeing the person, the parents or the legal guardian of that person. The judge decides after hearing the person involved. If she/he is able to express her/his consent, it must be systematically sought and taken into account after she/he was given the information appropriately to her/his level of understanding. Her/his refusal or revocation of consent cannot be ignored and has to be respected. The judge hears the father and mother of the person or her/his legal representative and any person whose views are deemed useful. The judge seeks the advice of a committee composed of medically qualified experts and representatives of associations for disabled people. The committee evaluates the medical justification for the procedure, its risks and its reasonably foreseeable consequences both physically and psychologically. A decree from the Council of State defines the conditions for the application of this article;

Whereas, on the other hand, if pursuant to Article 21 of the Constitution, the Prime Minister shall administer laws and exercise statutory authority subject to the jurisdiction conferred to the President of the Republic by Article 13 of the Constitution, and if the exercise of statutory authority gives not only the right but also the obligation to take the necessary measures for the application of the law, the situation is different when compliance with the country's international obligations would hamper the Prime Minister's abilities;

Considering that in support of its cancellation request based on an *ultra vires* of the decree of May 3, 2002, made for the purposes of the above provisions of Article L. 2123-2 of the Code of Public Health, the applicant association argued that the law from which it is derived was adopted in breach of the principles established by the Declaration of the Rights of Man and of the Citizen of 1789 and France's international commitments;

First, considering that it is not for the Council of State acting in litigation to rule on the conformity of the law with the Constitution;

Second, considering that the only publication of the text of the Universal Declaration of Human Rights, in the Official Journal of February 9, 1949, is not stored among diplomatic documents that have been ratified and published and have under section 55 of the Constitution of October 4, 1958 an authority superior to that of domestic law; thus, the applicant can not rely on this Declaration to challenge the legality of the contested decree;

Third, considering that the provisions of Article 12 of the International Covenant on Economic, Social and Cultural Rights of December 19, 1966, under which States Parties (...) recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health do not have direct effect in the domestic legal order;

Fourth, considering that it is clear from the wording of Article L. 2123-2 that sterilization cannot be performed on a minor; that the existence of an absolute medical contraindication against methods of contraception or a proven inability to effectively implement them must be recognized; that, if the person is able to express her/his will, sterilization can not be imposed; that the conditions under which the guardianship judge is called upon to decide are precisely defined; that the judge is required to hear the person, her/his parents or legal

representative and to obtain the opinion of a committee composed of medically qualified experts and representatives of associations for disabled persons, which evaluates the medical justifications for the procedure, its risks and its reasonably foreseeable consequences on the physical and psychological levels;

With regard to all the rules and guarantees as defined, the request from the applicant association is not justified by arguing that the contested provisions of Article L. 2123-2 of the Code of Public Health, including the decree providing for its imposition, would have as a purpose or as an effect the promotion of the involuntary sterilization of people with disabilities and would therefore be inconsistent, on the one hand, with the right to marry and to start a family recognized by Article 12 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and Article 23 of the International Covenant on Civil and Political Rights of December 19, 1966, and on the other hand, with the prohibition of inhuman and degrading treatment under Articles 3 and 7 of the same Convention and the same Covenant, and finally, with the right to private and family life guaranteed by Article 8 of that same Convention; that, for the same reasons, the plea alleging that the law, including the contested decree, imply a discrimination contrary to the provisions of Articles 14 and 26 of the said Convention of the said Covenant should be discarded;

Considering that it follows from the foregoing that the *ASSOCIATION AGAINST HANDIPHOBIA* is not entitled to seek the contested decree's cancellation;

DECIDES

First article: The request from the *ASSOCIATION AGAINST HANDIPHOBIA* is rejected.

Second article: This decision shall be notified to the *ASSOCIATION AGAINST HANDIPHOBIA*, the Prime Minister and the Minister of Health and Solidarity.