

Prisoners and the Right to Privacy and Family Life

Dickson v United Kingdom [2007] ECHR 44362/04 (Grand Chamber, 4 December 2007)

On 4 December 2007, the Grand Chamber of the European Court of Human Rights handed down its decision in *Dickson v The United Kingdom*, a case concerning prisoners' access to artificial insemination facilities. The applicants complained that the refusal by the Secretary of State to allow the first applicant access to artificial insemination facilities whilst in prison constituted a breach of the applicants' rights under art 8 (right to private and family life) and art 12 (right to marry and found a family) of the *European Convention on Human Rights*. The Grand Chamber held (by a 12:5 majority) that there had been a violation of art 8, but that it was not necessary to examine the complaint under art 12.

Facts

The applicants are a married couple. The first applicant was convicted of murder in 1994 and was sentenced to life imprisonment, with an expected release date in 2009. The second applicant, his wife, lives in the community. The first applicant has no children and the second applicant has three children from earlier relationships. The second applicant was to be 51 years of age on the first applicant's earliest possible release date.

The applicants applied to the Secretary of State for access to facilities for artificial insemination, on the basis that it was unlikely, having regard to the first applicant's release date and the second applicant's age, that they would be able to have a child together without the use of artificial insemination facilities.

The policy applied by the Secretary of State was that requests for artificial insemination by prisoners be carefully considered on individual merit but would only be granted in exceptional circumstances and according to certain criteria set out in the Policy.

On 28 May 2003, the Secretary of State refused the application ('Decision').

The applicants exhausted their domestic remedies in the United Kingdom and the matter was subsequently heard by a Chamber of the European Court of Human Rights, and then the Grand Chamber of that Court.

Decision

The Grand Chamber held that art 8 applies to the Decision in so far as it constitutes a breach of the applicants' right to private and family life, which includes the right to respect for the applicants' decision to become genetic parents (at para 62).

The Grand Chamber confirmed that prisoners continue to enjoy all their rights, save for those that are removed as a necessary consequence of imprisonment, and that any restriction on those rights must be justified in each individual case. It stated (at 22):

This justification can flow, *inter alia*, from the necessary and inevitable consequences of imprisonment ... or (as accepted by the applicants before the Grand Chamber) from an adequate link between the restriction and the circumstances of the prisoner in question.

The UK government relied upon the following three justifications for the Policy:

1. That losing the opportunity to beget children was an inevitable and necessary consequence of imprisonment.
2. That public confidence in the prison system would be undermined if the punitive and deterrent elements of a sentence would be circumvented by allowing prisoners guilty of certain serious offences to conceive children.
3. The absence of a parent for a long period would have a negative impact on any child conceived and consequently on society as a whole.

The Grand Chamber rejected the first justification, stating that an inability to beget children is not an *inevitable* consequence of imprisonment. Providing access to artificial insemination facilities would not create a security issue or any significant administrative or financial demands on the State (para 74). In relation to the second justification, the Grand Chamber accepted that it is necessary that there is public confidence in the penal system, but stated that rights could not be forfeited on the basis of what might offend public opinion. Further, penal policy had evolved towards increasing the relative importance of the rehabilitative aims of imprisonment (para 75). The third justification for the Policy was accepted on the basis that it is legitimate that the policy should be concerned with the welfare of a child (para 76).

The Grand Chamber considered that the Policy placed too onerous a burden on particular applicants. Just in order for the policy to apply, the applicants had to show that the deprivation of access would prevent conception altogether. Further, once they satisfied that initial threshold, they needed to prove 'exceptional' circumstances within the meaning of the criteria set out in the Policy. The court held that the Policy set the threshold so high against the applicants from the outset that there was no real balancing of the competing individual and public interests and that therefore a proportionality analysis had not been properly undertaken (para 82). As the proportionality assessment had not been made, the Decision fell outside 'any acceptable margin of appreciation so that a fair balance was not struck between the competing public and private interest involved' (para 85).

The court therefore ordered the respondent State to pay damages and the costs of the applicants.

Emily Howie is a Senior Associate in the Allens Arthur Robinson Corporate Responsibility Group and a Board member of the Human Rights Law Resource Centre