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

GRAND CHAMBER

CASE OF DICKSON v. THE UNITED KINGDOM

(Application no. 44362/04)

JUDGMENT

STRASBOURG

4 December 2007

In the case of Dickson v. the United Kingdom,

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

Christos Rozakis, *President*,
Luzius Wildhaber,
Nicolas Bratza,
Boštjan M. Zupančič,
Peer Lorenzen,
Françoise Tulkens,
Ireneu Cabral Barreto,
Corneliu Bîrsan,
Karel Jungwiert,
John Hedigan,
András Baka,
Snejana Botoucharova,
Antonella Mularoni,
Alvina Gyulumyan,
Khanlar Hajiyev,
Egbert Myjer,
Isabelle Berro-Lefèvre, *judges*,
and Vincent Berger, *Jurisconsult*,

Having deliberated in private on 10 January and 17 October 2007,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 44362/04) against the United Kingdom of Great Britain and Northern Ireland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by two British nationals, Kirk and Lorraine Dickson, husband and wife ("the applicants"), on 23 November 2004.

2. The applicants, who were granted legal aid, were represented by Mr E. Abrahamson, a solicitor practising in Liverpool. The United Kingdom Government ("the Government") were represented by their Agent, Mr J. Grainger, of the Foreign and Commonwealth Office.

3. The applicants complained about the refusal of access to artificial insemination facilities, which they argued breached their rights under Articles 8 and/or 12 of the Convention.

4. The application was allocated to the Fourth Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that

would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1. On 8 March 2005 the Court decided to communicate the application to the Government and (pursuant to Article 29 § 3 of the Convention) to examine the merits of the application at the same time as its admissibility. On 18 April 2006 a Chamber of that Section composed of Josep Casadevall, President, Nicolas Bratza, Giovanni Bonello, Rait Maruste, Stanislav Pavlovschi, Lech Garlicki and Javier Borrego Borrego, judges, unanimously declared the application admissible and, by four votes to three, held that there had been no violation of Articles 8 or 12 of the Convention. A concurring opinion of Judge Bonello, a joint dissenting opinion of Judges Casadevall and Garlicki as well as a dissenting opinion of Judge Borrego Borrego were appended to the judgment.

5. On 13 September 2006 a panel of the Grand Chamber granted the applicants' request to refer the case to the Grand Chamber in accordance with Article 43 of the Convention.

6. The composition of the Grand Chamber was determined according to the provisions of Article 27 §§ 2 and 3 of the Convention and Rule 24.

7. The applicants and the Government each filed observations on the merits.

8. A hearing took place in public in the Human Rights Building, Strasbourg, on 10 January 2007 (Rule 59 § 3).

There appeared before the Court:

(a) *for the Government*
Mr J. GRAINGER, *Agent*,
Mr D. PERRY QC, *Counsel*,
Mr A. DODSWORTH, *Adviser*;

(b) *for the applicants*
Mr E. ABRAHAMSON, *Solicitor*,
Ms F. KRAUSE, *Counsel*.

The Court heard addresses by Mr Perry and Ms Krause.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

9. The applicants were born in 1972 and 1958 respectively. The first applicant is in prison and the second applicant lives in Hull.

10. In 1994 the first applicant was convicted of murder (kicking a drunken man to death) and sentenced to life imprisonment with a tariff of fifteen years. His earliest expected release date is 2009. He has no children.

11. In 1999 he met the second applicant, while she was also imprisoned, through a prison pen-pal network. She has since been released. In 2001 the applicants married. The second applicant already had three children from other relationships.

12. Since the applicants wished to have a child, in October 2001 the first applicant applied for facilities for artificial insemination. In December 2002 the second applicant joined this application. They relied on the length of their relationship and the fact that, given the first applicant's earliest release date and the second applicant's age, it was unlikely that they would be able to have a child together without the use of artificial insemination facilities.

13. In a letter dated 28 May 2003 the Secretary of State refused their application. He first set out his general policy ("the Policy"):

> "Requests for artificial insemination by prisoners are carefully considered on individual merit and will only be granted in exceptional circumstances. In reaching decisions particular attention is given to the following general considerations:
>
> – whether the provision of artificial insemination facilities is the only means by which conception is likely to occur
>
> – whether the prisoner's expected day of release is neither so near that delay would not be excessive nor so distant that he/she would be unable to assume the responsibilities of a parent
>
> – whether both parties want the procedure and the medical authorities both inside and outside the prison are satisfied that the couple are medically fit to proceed with artificial insemination
>
> – whether the couple were in a well established and stable relationship prior to imprisonment which is likely to subsist after the prisoner's release
>
> – whether there is any evidence to suggest that the couple's domestic circumstances and the arrangements for the welfare of the child are satisfactory, including the length of time for which the child might expect to be without a father or mother
>
> – whether having regard to the prisoner's history, antecedents and other relevant factors there is evidence to suggest that it would not be in the public interest to provide artificial insemination facilities in a particular case."

He then gave his reasons for refusal in the present case:

> "... the Home Secretary has had particular regard to the likely age of your wife at the time that you will become eligible for release. Your wife will be 51 years of age at the earliest possible date of release and therefore the likelihood of her being able to conceive naturally is small. It is noted that Mrs Dickson has three children from an earlier relationship. In the light of your wife's age, the Minister has looked with very great care at both you and your wife's circumstances, ...
>
> The Minister has noted that you and your wife are in full agreement about your wish to conceive artificially. He also recognises the commitment which you and your wife have shown to one another. However, he notes that your relationship was established while you were in prison and has therefore yet to be tested in the normal environment

> of daily life. A reasoned and objective assessment cannot be made as to whether your relationship will subsist after your release.
>
> Further he is concerned that there seems to be insufficient provision in place to provide independently for the material welfare of any child which may be conceived. In addition, there seems to be little in the way of an immediate support network in place for the mother and any child which may be conceived. It also remains a matter of deep concern that any child which might be conceived would be without the presence of a father for an important part of his or her childhood years.
>
> While recognising the progress which you have made in addressing your offending behaviour, the constructive use that you have made of your time in prison in preparation for your release and your good prison behaviour, the Minister nevertheless notes the violent circumstances of the crime for which you were sentenced to life imprisonment. It is considered that there would be legitimate public concern that the punitive and deterrent elements of your sentence of imprisonment were being circumvented if you were allowed to father a child by artificial insemination while in prison."

14. The applicants sought leave to apply for judicial review of the Secretary of State's decision. On 29 July 2003 the High Court refused leave on the papers. The applicants renewed their application and on 5 September 2003 leave was again refused after an oral hearing. On 13 October 2003 the applicants introduced an application to this Court and it was declared inadmissible on 15 December 2003 on the basis that they had failed to exhaust domestic remedies (application no. 34127/03). The applicants then applied to the Court of Appeal for leave to appeal.

15. On 30 September 2004 their application was unanimously rejected by the Court of Appeal. Auld LJ relied in principle on the judgment of the Court of Appeal in *R (Mellor) v. Secretary of State for the Home Department* [2001] 3 WLR 533. He pointed to the similarity of the arguments put by the applicants in the present case and in the *Mellor* case. Auld LJ relied on the conclusion of Lord Phillips, Master of the Rolls, in the *Mellor* case (see paragraphs 23-26 below) and commented:

> "... Lord Phillips clearly had in mind, and he set it out in the course of his judgment, the provisions of Article 8.2 of the Convention setting out various matters that may justify interference with the right to respect for private and family life, including the protection of health or morals and the protection of the rights and freedom of others. It seems to me that concern, not only for the public attitude to the exercise by prisoners of certain rights in prison which they would take for granted outside, and concern for the rights of a putative child in the upbringing it would receive depending on the circumstances and the length of the imprisonment involved, are highly relevant circumstances for the purposes of Article 8.2 ...
>
> Accordingly, in my view, it is not open to [the applicants] to seek to re-open the validity of the Secretary of State's policy which this court has held in *Mellor* is rational and otherwise lawful. As Lord Phillips made clear in his judgment in that case, although the starting point of the policy is that deprivation of facilities for artificial insemination may prevent conception altogether, the finishing point is whether there are exceptional circumstances for not applying the policy ..."

He then noted that on occasions the Secretary of State had "dis-applied" the Policy when the circumstances had merited it: he referred to a letter from the Treasury Solicitor to the applicants which apparently demonstrated this fact and pointed out that counsel for the Secretary of State had informed the court that there had been other such instances.

16. Auld LJ then applied the Policy to the present case:

> "To the extent that [the applicants have] suggested that [the] Secretary of State has irrationally misapplied his own policy to the circumstances, or has otherwise acted disproportionately in applying it, I would reject the suggestion. There is no basis for saying that the Secretary of State's approach can be equated, as [the applicants] suggested, with the extinction of a fundamental right. It was a weighing of the starting point of the policy against the other considerations for which the policy itself provided, an exercise of discretion and proportionality in respect of which, in my view, the Secretary of State cannot be faulted on the circumstances as presented to him."

17. The other judges also relied on the judgment in *Mellor*. Mance LJ said the following:

> "The case of *Mellor* is also clear authority that considerations and potential consequences of public interest over and above a narrow view of the requirements of good order and security in prison can play a role in a decision whether or not to permit such artificial insemination ... I note that, in addition to the European authorities specifically mentioned in paragraph 42 by Lord Phillips, the Commission, in its decision in *Draper v. the United Kingdom* [no. 8186/78, Commission's report of 10 July 1980, DR 24, pp. 81-82, §§ 61-62], also recognised the potential relevance of more general considerations of public interest."

18. On 19 December 2006 the first applicant was transferred to the open side of another prison as a Category D prisoner. In principle, he was eligible for unescorted home leave after six months should he retain his Category D status (Rule 9 of the Prison Rules 1999, as implemented by Chapter 4.3 – "Temporary Release for Life Sentence Prisoners" – of Prison Service Order 6300).

II. RELEVANT DOMESTIC AND INTERNATIONAL LAW AND PRACTICE

A. Prison Rules

19. The Secretary of State is empowered to make rules for the management of prisons by section 47 of the Prison Act 1952, the relevant parts of which provide as follows:

> "The Secretary of State may make rules for the regulation and management of prisons ... and for the classification, treatment, employment, discipline and control of persons required to be detained therein ..."

20. The relevant rules are the Prison Rules 1999 (SI 1999 No. 728). Rule 4 provides as follows:

> "Outside Contacts
>
> (1) Special attention shall be paid to the maintenance of such relationships between a prisoner and his family as are desirable in the best interests of both.
>
> (2) A prisoner shall be encouraged and assisted to establish and maintain such relations with persons and agencies outside prison as may, in the opinion of the governor, best promote the interests of his family and his own social rehabilitation."

B. *R (Mellor) v. Secretary of State for the Home Department* [2001] 3 WLR 533

21. The Policy was challenged by a Mr Mellor, a prisoner serving a life sentence for murder. He was 29 years of age at the time his case came before the Court of Appeal with a minimum of 3 years' imprisonment to serve. His wife was 25 years old. At his earliest release she would have been 28. He and his wife had been refused artificial insemination facilities: it was considered that there was nothing exceptional about their case.

22. They sought leave to apply for judicial review of the Policy itself, rather than its application to their case, arguing that it was an unjustified interference with their Article 8 rights. They distinguished the Policy from that concerning conjugal visits: the latter gave rise to pragmatic (security) concerns whereas artificial insemination did not. The government argued that the Policy was justified in that (a) it was an explicit consequence of imprisonment that prisoners should not have the opportunity to found a family; (b) there would likely be serious and justified public concern if prisoners continued to have the opportunity to conceive children while in prison; and (c) it was undesirable, as a general rule, for children to be brought up in single-parent families. The High Court refused leave and the applicants appealed.

23. The Court of Appeal (Lord Phillips delivering the main judgment) noted that the Secretary of State's decision pre-dated the incorporation of the Convention into English law and continued:

> "It is, however, his contention that English domestic law has at all times accorded with the Convention. Nor has he challenged the appellant's case that the requirements of the Convention provide a touchstone for judging the rationality of his decision and the policy pursuant to which it was reached. This is a sensible approach for what matters to the appellant is the extent of his rights today and the Secretary of State is also principally concerned with whether his policy complies with the provisions of the Convention, which now forms part of our law. In the light of this approach I propose first to consider the Strasbourg jurisprudence, then the relevant English domestic law before turning to consider whether the decision of the Secretary of State is in conflict with either."

24. Having examined relevant Commission jurisprudence (no. 6564/74, Commission decision of 21 May 1975, Decisions and Reports (DR) 2, p. 105; no. 8166/78, Commission decision of 3 October 1978, DR 13, p. 241; *Hamer v. the United Kingdom*, no. 7114/75, Commission's report of 13 December 1979, DR 24, p. 5; *Draper v. the United Kingdom*, no. 8186/78, Commission's report of 10 July 1980, DR 24, p. 72; and *E.L.H. and P.B.H. v. the United Kingdom*, nos. 32094/96 and 32568/96, Commission decision of 22 October 1997, DR 91-A, p. 61), Lord Phillips summarised five Convention principles he considered thereby established:

> "(i) The qualifications on the right to respect for family life that are recognised by Article 8(2) apply equally to the Article 12 rights.
>
> (ii) Imprisonment is incompatible with the exercise of conjugal rights and consequently involves an interference with the right to respect for family life under Article 8 and with the right to found a family under Article 12.
>
> (iii) This restriction is ordinarily justifiable under the provisions of Article 8(2).
>
> (iv) In exceptional circumstances it may be necessary to relax the imposition of detention in order to avoid a disproportionate interference with a human right.
>
> (v) There is no case which indicates that a prisoner is entitled to assert the right to found a family by the provision of semen for the purpose of artificially inseminating his wife."

25. Lord Phillips went on to approve the reasons given to justify the restriction of artificial insemination facilities to exceptional circumstances.

As to the first justification, he agreed that the deprivation of the right to conceive was part and parcel of imprisonment and, indeed, that that statement did no more than restate the Policy in that it indicated that it was a "deliberate policy that the deprivation of liberty should ordinarily deprive the prisoner of the opportunity to beget children".

On the second justification, he considered that there would likely be serious and justified public concern if prisoners continued to have the opportunity to conceive children while in prison. Lord Phillips agreed that public perception was a legitimate element of penal policy:

> "Penal sanctions are imposed, in part, to exact retribution for wrongdoing. If there were no system of penal sanctions, members of the public would be likely to take the law into their own hands. In my judgment it is legitimate to have regard to public perception when considering the characteristics of a penal system. ... A policy which accorded to prisoners in general the right to beget children by artificial insemination would, I believe, raise difficult ethical questions and give rise to legitimate public concern. ... When considering the question of whether, in the ordinary course, prisoners should be accorded the facility to beget children while imprisoned I consider it legitimate to have regard to all the consequences of that particular policy option."

As regards the third justification which concerned the alleged disadvantage of single-parent families, he commented:

> "I consider it legitimate, and indeed desirable, that the State should consider the implications of children being brought up in those circumstances when deciding

whether or not to have a general policy of facilitating the artificial insemination of the wives of prisoners or of wives who are themselves prisoners."

26. Lord Phillips then concluded:

"For those reasons [the Mellors] failed to make out [the] case that the [Policy] ... is irrational. [The Mellors] accepted that there were in this case no exceptional circumstances, and [they were] right to do so. It follows that the question of whether each of the six general considerations set out in [the Secretary of State's] letter is one to which it is rational to have regard, when looking for exceptional circumstances, does not arise. I would simply observe that it seems to me rational that the normal starting point should be a need to demonstrate that, if facilities for artificial insemination are not provided, the founding of a family may not merely be delayed, but prevented altogether.

For these reasons ... the refusal to permit the appellant the facilities to provide semen for the artificial insemination of his wife was neither in breach of the Convention, unlawful nor irrational. It follows that I would dismiss the appeal."

C. Procedure for artificial insemination in prisons

27. Responsibility for making artificial insemination arrangements is with the health-care department in the relevant prison in consultation with the local primary care trust. Since the level of health-care provision varies from prison to prison, it will therefore be a matter for local decision as to whether the collection of sperm would be overseen by staff at the prison or whether it would be necessary for an outside professional to attend for this purpose. The prisoner would be expected to meet any costs incurred.

D. The objectives of a prison sentence

28. Criminologists have referred to the various functions traditionally assigned to punishment, including retribution, prevention, protection of the public and rehabilitation. However, in recent years there has been a trend towards placing more emphasis on rehabilitation, as demonstrated notably by the Council of Europe's legal instruments. While rehabilitation was recognised as a means of preventing recidivism, more recently and more positively it constitutes rather the idea of re-socialisation through the fostering of personal responsibility. This objective is reinforced by the development of the "progression principle": in the course of serving a sentence, a prisoner should move progressively through the prison system thereby moving from the early days of a sentence, when the emphasis may be on punishment and retribution, to the latter stages, when the emphasis should be on preparation for release.

1. Relevant international human rights' instruments

29. Article 10(3) of the International Covenant on Civil and Political Rights ("the ICCPR") provides that the "penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation". The General Comment of the Human Rights Committee on Article 10 further states that "no penitentiary system should be only retributory; it should essentially seek the reformation and social rehabilitation of the prisoner".

30. The United Nations Standard Minimum Rules for the Treatment of Prisoners (1957) contains specific provisions on sentenced prisoners, including the following guiding principles:

> "57. Imprisonment and other measures which result in cutting off an offender from the outside world are afflictive by the very fact of taking from the person the right of self-determination by depriving him of his liberty. Therefore the prison system shall not, except as incidental to justifiable segregation or the maintenance of discipline, aggravate the suffering inherent in such a situation.
>
> 58. The purpose and justification of a sentence of imprisonment or a similar measure deprivative of liberty is ultimately to protect society against crime. This end can only be achieved if the period of imprisonment is used to ensure, so far as possible, that upon his return to society the offender is not only willing but able to lead a law-abiding and self-supporting life.
>
> 59. To this end, the institution should utilise all the remedial, educational, moral, spiritual and other forces and forms of assistance which are appropriate and available, and should seek to apply them according to the individual treatment needs of the prisoners."

2. European Prison Rules 1987 and 2006

31. The European Prison Rules are recommendations of the Committee of Ministers to member States of the Council of Europe as to the minimum standards to be applied in prisons. States are encouraged to be guided in legislation and policies by those rules and to ensure wide dissemination of the Rules to their judicial authorities as well as to prison staff and inmates.

The 1987 version of the European Prison Rules ("the 1987 Rules") notes, as its third basic principle, that:

> "The purposes of the treatment of persons in custody shall be such as to sustain their health and self-respect and, so far as the length of sentence permits, to develop their sense of responsibility and encourage those attitudes and skills that will assist them to return to society with the best chance of leading law-abiding and self-supporting lives after their release."

The latest version of those Rules adopted in 2006 ("the 2006 Rules") replaces this above-cited principle with three principles:

> "Rule 2: Persons deprived of their liberty retain all rights that are not lawfully taken away by the decision sentencing them or remanding them in custody.
>
> ...

> Rule 5: Life in prison shall approximate as closely as possible the positive aspects of life in the community.
>
> Rule 6: All detention shall be managed so as to facilitate the reintegration into free society of persons who have been deprived of their liberty."

The commentary on the 2006 Rules (prepared by the European Committee on Crime Problems – "the CDPC") noted that Rule 2 emphasises that the loss of the right to liberty should not lead to an assumption that prisoners automatically lose other political, civil, social, economic and cultural rights: in fact restrictions should be as few as possible. Rule 5, the commentary observes, underlines the positive aspects of normalisation recognising that, while life in prison can never be the same as life in a free society, active steps should be taken to make conditions in prison as close to normal life as possible. The commentary further states that Rule 6 "recognises that prisoners, both untried and sentenced, will eventually return to the community and that prison life has to be organised with this in mind".

32. The first section of Part VIII of the 2006 Rules is entitled "Objective of the regime for sentenced prisoners" and provides, *inter alia*:

> "102.1 In addition to the rules that apply to all prisoners, the regime for sentenced prisoners shall be designed to enable them to lead a responsible and crime-free life.
>
> 102.2 Imprisonment is by the deprivation of liberty a punishment in itself and therefore the regime for sentenced prisoners shall not aggravate the suffering inherent in imprisonment."

In these respects, the CDPC commentary explains that Rule 102:

> "... states the objectives of the regime for prisoners in simple, positive terms. The emphasis is on measures and programmes for sentenced prisoners that will encourage and develop individual responsibility rather than focussing narrowly on the prevention of recidivism. ...
>
> The new Rule is in line with the requirements of key international instruments including Article 10(3) of the [ICCPR], ... However, unlike the ICCPR, the formulation here deliberately avoids the use of the term, "rehabilitation", which carries with it the connotation of forced treatment. Instead, it highlights the importance of providing sentenced prisoners, who often come from socially deprived backgrounds, the opportunity to develop in a way that will enable them to choose to lead law-abiding lives. In this regard Rule 102 follows the same approach as Rule 58 of the United Nations Standard Minimum Rules for the Treatment of Prisoners."

33. Rule 105.1 of the 2006 Rules provides that a systematic programme of work shall seek to contribute to meeting the objective of the prison regime. Rule 106.1 provides that a systematic programme of education, with the objective of improving prisoners' overall level of education, as well as the prospects of leading a responsible and crime-free life, shall be a key part of regimes for sentenced prisoners. Finally, Rule 107.1 requires that the release of sentenced prisoners should be accompanied by special

programmes enabling them to make the transition to a law-abiding life in the community.

34. The reason for the evolution towards the 2006 Rules can be understood through two Committee of Ministers recommendations, both of which address the rehabilitative dimension of prison sentences.

35. The preamble to Recommendation (2003)23 on the management by prison administrations of life-sentence and other long-term prisoners provides that:

> " ... the enforcement of custodial sentences requires striking a balance between the objectives of ensuring security, good order and discipline in penal institutions, on the one hand, and providing prisoners with decent living conditions, active regimes and constructive preparations for release, on the other;"

The aims of the management of long-term prisoners in paragraph 2 of the Recommendation included the following:

> "– to ensure that prisons are safe and secure places for these prisoners ...;
>
> – to counteract the damaging effects of life and long-term imprisonment;
>
> – to increase and improve the possibilities of these prisoners to be successfully resettled and to lead a law-abiding life following their release."

The recommendation also outlined five linked principles (paragraphs 3-8) for the management of long-term prisoners:

– account to be taken of the personal characteristics of prisoners (individualisation principle);

– prison life to be arranged so as to approximate as closely as possible to the realities of life in the community (normalisation principle);

– the opportunity to be accorded to exercise personal responsibility in daily prison life (responsibility principle);

– a clear distinction should be made between the risks posed by life and long-term prisoners to themselves, to the external community, to other prisoners and to those working or visiting the prison (security and safety principle);

– prisoners should not be segregated on the basis of their sentence (non-segregation principle); and

– the planning of an individual prisoner's long-term sentence should aim at securing progressive movement through the prison system (progression principle).

The Recommendation also specifies (at paragraph 10) use of the progression principle to ensure progressive movement through the prison system "from more to less restrictive conditions with, ideally, a final phase spent under open conditions, preferably in the community". There should also be participation in prison activities that "increase the chances of a successful resettlement after release" and conditions and supervision measures that are "conducive to a law-abiding life and adjustment in the community after conditional release".

36. The second relevant Committee of Ministers' recommendation is Recommendation (2003)22 on conditional release (parole). The fifth paragraph of the preamble considers that "research has shown that detention often has adverse effects and fails to rehabilitate offenders". The Recommendation outlines (paragraph 8) the following measures to reduce recidivism, by the imposition of individualised conditions such as:

> "– the payment of compensation or the making of reparation to victims;
>
> – entering into treatment for drug or alcohol misuse or any other treatable condition manifestly associated with the commission of crime;
>
> – working or following some other approved occupational activity, for instance, education or vocational training;
>
> – participation in personal development programmes; and
>
> – a prohibition on residing in, or visiting, certain places."

THE LAW

I. ALLEGED VIOLATION OF ARTICLES 8 AND 12 OF THE CONVENTION

37. The applicants complained about the refusal of artificial insemination facilities, arguing that that refusal breached their right to respect for their private and family life guaranteed by Article 8. The relevant parts of that Article read as follows:

> "1. Everyone has the right to respect for his private and family life ...
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

38. They also complained that that refusal breached their right to found a family under Article 12 of the Convention, which reads as follows:

> "Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of that right."

A. The Chamber judgment

39. While the Chamber confirmed that persons continued to enjoy all Convention rights following conviction except the right to liberty, it also noted that any prison sentence has some effect on the normal incidents of liberty and inevitably entailed limitations and controls on the exercise of

Convention rights. The fact of such control was not, in principle, incompatible with the Convention but the key issue was whether the nature and extent of that control was compatible.

40. As to whether the impugned restriction constituted an interference with the applicants' right to respect for their private and family lives (the State's negative obligations) or a failure by the State to fulfil a positive obligation in those respects, the Chamber considered that the impugned restriction concerned the State's refusal to take steps to allow something not already an existing general entitlement. Accordingly, the case concerned a complaint about the State's failure to fulfil a positive obligation to secure the applicants' rights.

41. The requirements of the notion of "respect" for private and family life in Article 8 were not clear cut, especially as far as the positive obligations inherent in that concept were concerned, and varied considerably from case to case having regard notably to the diversity of situations obtaining in Contracting States and the choices which had to be made in terms of a State's priorities and resources. These considerations were of particular relevance in the present case, where the issues raised touched on an area where there was little consensus amongst the member States of the Council of Europe. Accordingly, this was an area in which the Contracting States enjoyed a wide margin of appreciation.

42. As to the fair balance that had to be struck between the interests of the community and those of the individual in determining the existence and scope of any positive obligation, the Chamber first examined the Policy in general. It considered its two principal aims to be legitimate: the maintenance of public confidence in the penal system and the welfare of any child conceived and, therefore, the general interests of society as a whole. The Chamber attached particular importance to the fact that it did not operate as a blanket ban but rather allowed consideration of the circumstances of each application for artificial insemination facilities on the basis of domestic criteria considered to be neither arbitrary nor unreasonable and which related to the underlying legitimate aims of the Policy. The Chamber rejected the suggestion that domestic consideration was merely theoretical or illusory, as the unchallenged evidence was that artificial insemination facilities had been granted in certain cases in the past.

43. Finally, and as to the application of the Policy in the applicants' case, the Chamber had regard to the difficult situation in which the applicants found themselves. However it noted that careful consideration had been given by the Secretary of State to their circumstances, that the decision had then been examined in detail by the High Court and the Court of Appeal, and that those courts had found that not only was the Policy rational and lawful but that its application in their circumstances was neither unreasonable nor disproportionate.

44. Having regard to the wide margin of appreciation afforded to the national authorities, the Chamber went on to find that it had not been shown that the decision to refuse the applicants facilities for artificial insemination was arbitrary or unreasonable or that it had failed to strike a fair balance between the competing interests so that there was no appearance of a failure to respect the applicants' rights to their private and family life and, consequently, no violation of Article 8 of the Convention.

45. For the same reasons, the Chamber found that there had been equally no violation of Article 12 of the Convention.

B. The applicants' submissions

1. Article 8 of the Convention

46. The applicants disputed the reasoning and conclusions of the Chamber, relying rather on the dissenting opinions of Judges Casadevall, Garlicki and Borrego Borrego. The jurisprudence cited by the Government was mainly that of the former Commission, and was neither indicative of current trends nor referred directly to the point. Since the matter was free of precedent, the Grand Chamber was free to rule.

47. They noted that the Government had, before the Chamber and initially before the Grand Chamber, maintained that the aim of the restriction was punishment. If that was indeed the aim, it did not make sense to admit of any exceptions to the Policy: logically the Policy should not have any application to, for example, post-tariff prisoners detained on the basis of future risk – but it did. The Policy thereby discriminated between a life-sentence prisoner admitted to open conditions and those who were not so admitted; and there was no link between the offence and the punishment: while the refusal of facilities for artificial insemination to a person convicted of offences against children could be coherent, the broad refusal apart from in exceptional cases was arbitrary.

48. However, before the Grand Chamber, the Government mainly emphasised that the Policy was a necessary consequence of imprisonment: apart from being a highly subjective view, refusing artificial insemination facilities was not consequential to detention as there were simply no security or other physical or financial barriers. The Chamber's failure to deal with both of those issues undermined its judgment.

49. This punitive aim, implying as it did that prisoners' fundamental rights were the exception rather than the norm, was not compatible with the Convention. Only the right to liberty was automatically removed by a sentence of imprisonment. A State had to justify the limitation of any other rights. The starting-point of the Policy was therefore wrong and should be reversed: the Policy should be that prisoners had a right to procreate unless there were compelling reasons against. This inversed structure prevented

any real assessment of each individual case: it was necessary to show that, but for artificial insemination, conception would be impossible and, thereafter, exceptional circumstances had to be demonstrated. The odds were thereby so stacked against the grant of facilities that there was no real individual assessment and the result was a foregone conclusion so that the Policy amounted to a blanket ban.

50. The applicants maintained that the burden placed on the State by the requested facilities was so minimal (allowing something to take place with minimal regulation) that the distinction between positive and negative obligations had no useful application. If one had to choose, they argued that a refusal of artificial insemination facilities constituted an interference with a right to beget children (negative obligation). The suggestion that it had to be analysed as a positive obligation presupposed that the aim of imprisonment and of the Policy was punishment so that, as noted above, one lost one's fundamental rights (including the right to beget children) on imprisonment as part of that punishment. Once it was accepted that a prisoner retained his Convention rights on imprisonment and was simply requesting a procedure to facilitate one of those rights, that request had to be analysed in the negative obligation context. Even if an onerous burden on the State could be analysed in the positive obligation context, there was evidently none and the Government did not argue that there was: the applicants would have paid any costs and there was no burden on security or facilities except for access to the prison by an approved visitor to take away the sample.

51. As to the margin of appreciation to be applied and the trend towards conjugal visits, the applicants pointed out that they were asking for something less onerous and, if there was no consensus about artificial insemination facilities, this was because such facilities were not necessary in those countries where conjugal visits were granted. The Court could not hide behind the margin it felt should be accorded in the present case. On the contrary, the refusal was based on a Policy which had never been subjected to parliamentary consideration and which allowed for no real proportionality examination domestically: the margin of appreciation had no role to play in such circumstances. Rather, this Court had to step into the shoes of the domestic decision-makers and make its own determination of where the balance of interests lay.

52. As to the considerable justification necessary for the refusal of artificial insemination facilities, the applicants maintained that neither the Policy, nor its application in their case, was adequate.

53. The punitive aim was, for reasons noted above, not coherent or logical. As regards the argument that the inability to beget children was a direct consequence of imprisonment, the applicants argued above that the burden on the State would be minimal.

54. The social factors (interests of the putative child and of society) said to underlie the Policy were not contemplated by the second paragraph of Article 8. The concept of the wider public interest was vague, ill-defined and there was, in any event, no evidence that providing the requested facilities would undermine public confidence in the penal system. The suggestion that the best interests of the child were relevant to the grant of facilities was offensive, inappropriate, paternalistic and unconvincing: it was the thin edge of the wedge as regards judging who should become parents and who should be born (Codd, "Regulating Reproduction: Prisoners' Families, Artificial Insemination and Human Rights" [2006] EHRLR 1); it was inconsistent with the principle of rehabilitation; it was unconvincing and injurious to assume that being raised by a single parent was necessarily not in the child's best interests; and the interests of the child as a justification was specious as it suggested that the only way to protect that child's interest was to ensure it was never born. These arguments were also insulting to single parents and, indeed, against domestic legal developments which minimised this factor in its jurisprudence in other non-prisoner artificial insemination cases (*R v. Blood* [1997] 2 WLR 806 and the Human Fertilisation and Embryology (Deceased Fathers) Act 2003). This effectively put the burden on the parent to prove that he or she could be a good parent (including financially). In any event, the domestic body competent to make decisions regarding human fertilisation was the Human Fertilisation and Embryology Authority which should have been competent to determine if the applicants were suitable candidates for artificial insemination.

55. As to the application of the Policy to them, the applicants underlined that a refusal of artificial insemination facilities would extinguish their right to found a family (given the first applicant's sentence and the second applicant's age). They disputed the Secretary of State's conclusion that there was insufficient financial provision for any child conceived: the second applicant would not be dependent on State benefits (she owned a property worth 200,000 pounds sterling (GBP), was following a course in counselling and, on qualification, would be able to command an hourly rate of GBP 30). It was unfair to state that their relationship had not been tested: the strength of any relationship (prisoner or other) was uncertain, there was no link between imprisonment and dissolution of relationships and, indeed, the first applicant's imprisonment had not weakened their relationship. In any event, this latter argument was circuitous as it could automatically negate any request for artificial insemination facilities from such long-term prisoners. It was equally unjust and circular to argue that the first applicant would be initially absent: long-term absence was a necessary starting-point to apply for the requested facilities (artificial insemination being the only means of conception) but at the same time it meant artificial insemination could not be granted (given the consequent separation from any child

conceived). It did not make sense that their marriage was accepted as rehabilitative and to be supported by the system but that the right to procreate was not.

56. Finally, even if the Policy had some application, in the present case unjustifiably, to the first applicant, the same could not be said of the second applicant who was not in prison, a point with which the Court of Appeal, the Government and the Chamber had failed to grapple. She initially maintained that, since she was not a prisoner, the Policy could have no application to her so there were no competing rights which could override hers. However, before the Grand Chamber she accepted that her position could not be considered entirely independently of the first applicant's and that her rights could not trump all others: however she maintained that she should have the right to beget a child with her husband unless there were exceptional reasons against that (for example, if the father was a convicted child murderer). However she was prevented from doing so by a blanket and unconvincing Policy, which had even less relevance to her as a non-prisoner. The extinguishment of her Article 8 rights required a particularly robust justification.

2. Article 12 of the Convention

57. Whereas the applicants had accepted before the Chamber that a conclusion of no violation under Article 8 would lead to the same conclusion under Article 12 of the Convention, they maintained before the Grand Chamber that the complaints under Articles 8 and 12 were separate and should be examined as such.

C. The Government's submissions

1. Article 8 of the Convention

58. The Government relied on the Chamber's judgment and argued, for the reasons given in that judgment and by the Court of Appeal, that there had been no violation of Article 8 of the Convention.

While the Chamber recognised the "well established" principle that, liberty apart, prisoners continued to enjoy all Convention rights including the right to respect for private and family life (see *Hirst v. the United Kingdom (no. 2)* [GC], no. 74025/01, ECHR 2005-IX), it had also accepted that imprisonment inevitably and necessarily involved some limitation on an individual's rights. The Chamber had also accepted that the case concerned the fulfilment of a positive obligation to which a wide margin of appreciation applied and that, in the overall balancing of individual and public interests required, the public legitimate aims were the maintenance of public confidence in the penal system and the interests of any child

conceived and, thus, those of society as a whole. The Policy, and its application in the applicants' case, was not disproportionate to those aims.

59. The Chamber judgment was consistent with the Court's case-law (see, notably, *Golder v. the United Kingdom*, 21 February 1975, § 45, Series A no. 18) and with that of the Commission (referred to by the Court of Appeal – see paragraph 24 above – in the above-mentioned *Mellor* case). The Chamber judgment and that of the Court of Appeal in the above-mentioned *Mellor* case were also consistent. Finally, the Chamber judgment mirrored the justification given by the Court of Appeal for the Policy and its application in the present case.

60. The Government further maintained that the Policy was consistent with the Convention.

It was not a blanket policy but one that enabled the examination of the merits of each case taking into account Convention principles. The statistics demonstrated that the individual assessment was genuine: 28 applications for artificial insemination facilities had been made since 1996, 12 were not pursued, 1 was withdrawn as the relationship had broken down, 1 applicant was released on parole and 2 were pending. Of the remaining 12 applications, 3 were granted and 9 were refused.

The Policy's justification was to be found in three principles: losing the opportunity to beget children was part and parcel of the deprivation of liberty and an ordinary consequence of imprisonment; public confidence in the prison system were to be undermined if the punitive and deterrent elements of a sentence would be circumvented by allowing prisoners to conceive children (in that latter context, the nature and gravity of the crime was relevant); and the inevitable absence of one parent, including that parent's financial and other support, for a long period would have negative consequences for the child and for society as a whole. This latter point was indeed a complex and controversial one, underlining why the State authorities were best placed to make this assessment. It was legitimate that the State considered implications for any children conceived so that one of the aims of the Policy was to limit the grant of artificial insemination facilities to those who could reasonably be expected to be released into a stable family setting and play a parental role. Indeed, the State had an obligation to ensure effective protection and the moral and material welfare of children.

61. Accordingly, the starting-point was that artificial insemination facilities would be granted in exceptional circumstances, namely when its refusal would prevent the founding of a family altogether and, thereafter, the authorities would take into account other factors determinative of exceptionality. That starting-point was, in the Government's view, a reasonable one. It would be frequently the case that the refusal of artificial insemination facilities would not affect rights guaranteed by Article 8. This would be the case, for example, where a child was conceived in whose life

the father would, as a consequence of his imprisonment, have no real involvement, the mere right to procreate not being a Convention right. It would only be in unusual circumstances that the duration of imprisonment would, without artificial insemination, prevent a prisoner from having children after his release. While the Government recognised that rehabilitation was a fundamental and important aspect of imprisonment, the Policy took account of all relevant elements.

62. Moreover, the Policy was correctly applied in the present case, the authorities having identified the relevant factors and struck a fair balance. That the applicants would not otherwise be able to conceive was outweighed by the reasons relied upon by the Secretary of State: the lack of an established relationship; the first applicant's long absence from the life of any child; insufficient material provision foreseen for the child and little by way of a support network for the second applicant; and legitimate public concern that the punitive and deterrent elements of a sentence would be circumvented if the first applicant (convicted of a violent murder) was allowed to father a child. The interests taken into account included those of the second applicant, including her wish to have a child with the first applicant: however, the fact was that her position was linked to that of the first applicant and, if her interests were to be the decisive factor, the State would be left with no discretion whatsoever.

63. Finally, the Government maintained that they should be afforded a wide margin of appreciation – the case involving as it did a claim that the State should take positive steps to circumvent the otherwise inevitable consequences of imprisonment to assist the parties to conceive – in an area of social policy where difficult choices had to be made between the rights of an individual and the needs of society. As explained above, this was not a blanket policy and there did not appear to be any European consensus in favour of the provision of facilities for artificial insemination of prisoners.

2. Article 12 of the Convention

64. The Government relied on the Chamber judgment and maintained that there was no violation of Article 8 so that there could equally be no violation of Article 12 of the Convention.

D. The Court's assessment of the complaint under Article 8 of the Convention

1. Applicability of Article 8

65. The restriction in issue in the present case concerned the refusal to the applicants of facilities for artificial insemination. The parties did not dispute the applicability of Article 8, although before the Grand Chamber the Government appeared to suggest that Article 8 might not apply in

certain circumstances: where, for example, a prisoner's sentence was so long that there was no expectation of ever "taking part" in the life of any child conceived and Article 8 did not guarantee a right to procreate.

66. The Court considers that Article 8 is applicable to the applicants' complaints in that the refusal of artificial insemination facilities concerned their private and family lives, which notions incorporate the right to respect for their decision to become genetic parents (see *E.L.H. and P.B.H. v. the United Kingdom*, nos. 32094/96 and 32568/96, Commission decision of 22 October 1997, DR 91-A, p. 61; *Kalashnikov v. Russia* (dec.), no. 47095/99, ECHR 2001-XI; *Aliev v. Ukraine*, no. 41220/98, § 187-89, 29 April 2003; and *Evans v. the United Kingdom* [GC], no. 6339/05, § 71-72, ECHR 2007-I).

2. Relevant general principles

67. The Court notes the above-mentioned *Hirst* judgment, which concerned a legislative restriction on prisoners' right to vote:

> "69. In this case, the Court would begin by underlining that prisoners in general continue to enjoy all the fundamental rights and freedoms guaranteed under the Convention save for the right to liberty, where lawfully imposed detention expressly falls within the scope of Article 5 of the Convention. For example, prisoners may not be ill-treated, subjected to inhuman or degrading punishment or conditions contrary to Article 3 of the Convention (see, among many authorities, *Kalashnikov v. Russia*, no. 47095/99, ECHR 2002-VI; *Van der Ven v. the Netherlands*, no. 50901/99, ECHR 2003-II); they continue to enjoy the right to respect for family life (*Ploski v. Poland*, no. 26761/95, judgment of 12 November 2002; *X. v. the United Kingdom*, no. 9054/80, Commission decision of 8 October 1982, DR 30, p. 113), the right to freedom of expression (*Yankov v. Bulgaria*, no. 39084/97, §§ 126-145, ECHR 2003-XII, *T. v. the United Kingdom*, no. 8231/78, Commission report of 12 October 1983, DR 49, p. 5, §§ 44-84), the right to practise their religion (*Poltoratskiy v. Ukraine*, no. 38812/97, §§ 167-171, ECHR 2003-V), the right of effective access to a lawyer or to court for the purposes of Article 6 (*Campbell and Fell v. the United Kingdom*, judgment of 28 June 1984, Series A, no. 80; *Golder v. the United Kingdom*, judgment of 21 February 1975, Series A, no. 18), the right to respect for correspondence (*Silver and Others v. the United Kingdom*, judgment of 25 March 1983, Series A no. 61) and the right to marry (*Hamer v. the United Kingdom*, no. 7114/75, Commission report of 13 December 1979, DR 24, p. 5; *Draper v. the United Kingdom*, no. 8186/78, Commission report of 10 July 1980, DR 24, p. 72). Any restrictions on these other rights require to be justified, although such justification may well be found in the considerations of security, in particular the prevention of crime and disorder, which inevitably flow from the circumstances of imprisonment (see, for example, *Silver*, cited above, §§ 99-105, where broad restrictions on the right of prisoners to correspond fell foul of Article 8 but stopping of specific letters, containing threats or other objectionable references were justifiable in the interests of the prevention of disorder or crime).
>
> 70. There is, therefore, no question that a prisoner forfeits his Convention rights merely because of his status as a person detained following conviction. Nor is there any place under the Convention system, where tolerance and broadmindedness are the

acknowledged hallmarks of democratic society, for automatic disenfranchisement based purely on what might offend public opinion.

71. This standard of tolerance does not prevent a democratic society from taking steps to protect itself against activities intended to destroy the rights or freedoms set forth in the Convention. Article 3 of Protocol No. 1, which enshrines the individual's capacity to influence the composition of the law-making power, does not therefore exclude that restrictions on electoral rights are imposed on an individual who has, for example, seriously abused a public position or whose conduct threatened to undermine the rule of law or democratic foundations (see, for example, no. 6573/74, cited above; and, *mutatis mutandis*, *Glimmerveen and Hagenbeek v. the Netherlands*, applications nos. 8348/78 and 8406/78, Commission decision of 11 October 1979, DR 18, p. 187, where the Commission declared inadmissible two applications concerning the refusal to allow the applicants, who were the leaders of a proscribed organisation with racist and xenophobic traits, to stand for election). The severe measure of disenfranchisement must, however, not be undertaken lightly and the principle of proportionality requires a discernible and sufficient link between the sanction and the conduct and circumstances of the individual concerned. ..."

68. Accordingly, a person retains his or her Convention rights on imprisonment, so that any restriction on those rights must be justified in each individual case. This justification can flow, *inter alia*, from the necessary and inevitable consequences of imprisonment (§ 27 of the Chamber judgment) 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. However, it cannot be based solely on what would offend public opinion.

3. Negative or positive obligations

69. The parties disagreed as to whether the refusal of the requested facilities constituted an interference with the applicants' existing right to beget a child (to be analysed in the context of the State's negative obligations) or a failure by the State to grant a right which did not previously exist (an alleged positive obligation). The Chamber considered that the applicants' complaints fell to be analysed as a positive obligation.

70. The Court observes that although the object of Article 8 is essentially that of protecting the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference. In addition to this primarily negative undertaking, there may be positive obligations inherent in an effective respect for private and family life. These obligations may involve the adoption of measures designed to secure respect for private and family life even in the sphere of the relations of individuals between themselves. The boundaries between the State's positive and negative obligations under Article 8 do not lend themselves to precise definition. The applicable principles are nonetheless similar. In particular, in both instances regard must be had to the fair balance to be struck between the competing interests (see *Odièvre v. France* [GC], no. 42326/98, § 40, ECHR 2003-III, and *Evans*, cited above, § 75).

71. The Court does not consider it necessary to decide whether it would be more appropriate to analyse the case as one concerning a positive or a negative obligation since it is of the view that the core issue in the present case (see paragraphs 77-85 below) is precisely whether a fair balance was struck between the competing public and private interests involved.

4. The conflicting individual and public interests

72. As to the applicants' interests, it was accepted domestically that artificial insemination remained the only realistic hope of the applicants, a couple since 1999 and married since 2001, of having a child together given the second applicant's age and the first applicant's release date. The Court considers it evident that the matter was of vital importance to the applicants.

73. The Government have cited three justifications for the Policy.

74. Before the Grand Chamber they first relied on the suggestion that losing the opportunity to beget children was an inevitable and necessary consequence of imprisonment.

Whilst the inability to beget a child might be a consequence of imprisonment, it is not an inevitable one, it not being suggested that the grant of artificial insemination facilities would involve any security issues or impose any significant administrative or financial demands on the State.

75. Secondly, before the Grand Chamber the Government appeared to maintain, although did not emphasise, another justification for the Policy, namely 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.

The Court, as the Chamber, reiterates that there is no place under the Convention system, where tolerance and broadmindedness are the acknowledged hallmarks of democratic society, for automatic forfeiture of rights by prisoners based purely on what might offend public opinion (see *Hirst*, cited above, § 70). However, the Court could accept, as did the Chamber, that the maintaining of public confidence in the penal system has a role to play in the development of penal policy. The Government also appeared to maintain that the restriction, in itself, contributed to the overall punitive objective of imprisonment. However, and while accepting that punishment remains one of the aims of imprisonment, the Court would also underline the evolution in European penal policy towards the increasing relative importance of the rehabilitative aim of imprisonment, particularly towards the end of a long prison sentence (see paragraphs 28-36 above).

76. Thirdly, the Government argued that 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 Court is prepared to accept as legitimate for the purposes of the second paragraph of Article 8 that the authorities, when developing and applying the Policy, should concern themselves as a matter of principle with

the welfare of any child: conception of a child was the very object of the exercise. Moreover, the State has a positive obligation to ensure the effective protection of children (see *L.C.B. v. the United Kingdom*, 9 June 1998, § 36, *Reports of Judgments and Decisions* 1998-III; *Osman v. the United Kingdom*, 28 October 1998, § 115-16, *Reports* 1998-VIII; and *Z and Others v. the United Kingdom* [GC], no. 29392/95, § 73, ECHR 2001-V). However, that cannot go so far as to prevent parents who so wish from attempting to conceive a child in circumstances like those of the present case, especially as the second applicant was at liberty and could have taken care of any child conceived until such time as her husband was released.

5. Balancing the conflicting interests and the margin of appreciation

77. Since the national authorities make the initial assessment as to where the fair balance lies in a case before a final evaluation by this Court, a certain margin of appreciation is, in principle, accorded by this Court to those authorities as regards that assessment. The breadth of this margin varies and depends on a number of factors, including the nature of the activities restricted and the aims pursued by the restrictions (see *Smith and Grady v. the United Kingdom*, nos. 33985/96 and 33986/96, § 88, ECHR 1999-VI).

78. Accordingly, where a particularly important facet of an individual's existence or identity is at stake (such as the choice to become a genetic parent), the margin of appreciation accorded to a State will in general be restricted.

Where, however, there is no consensus within the member States of the Council of Europe either as to the relative importance of the interest at stake or as to how best to protect it, the margin will be wider. This is particularly so where the case raises complex issues and choices of social strategy: the authorities' direct knowledge of their society and its needs means that they are in principle better placed than the international judge to appreciate what is in the public interest. In such a case, the Court would generally respect the legislature's policy choice unless it is "manifestly without reasonable foundation". There will also usually be a wide margin accorded if the State is required to strike a balance between competing private and public interests or Convention rights (see *Evans*, cited above, § 77).

79. Importantly, in its *Hirst* judgment, the Court commented that while there was no European consensus on the point so that a wide margin of appreciation applied, it was not all-embracing. It found that neither the legislature nor the judiciary had sought to weigh the competing interests or assess the proportionality of the relevant restriction on prisoners. That restriction was considered to be "a blunt instrument" which indiscriminately stripped a significant category of prisoners of their Convention rights and it imposed a blanket and automatic restriction on all convicted prisoners irrespective of the length of their sentence, the nature or gravity of their

offence or of their individual circumstances. The Court continued in *Hirst* (§ 82):

> "Such a general, automatic and indiscriminate restriction on a vitally important Convention right must be seen as falling outside any acceptable margin of appreciation, however wide that margin might be, and as being incompatible with Article 3 of Protocol No. 1."

80. In the present case, the parties disputed the breadth of the margin of appreciation to be accorded to the authorities. The applicants suggested that the margin had no role to play since the Policy had never been subjected to parliamentary scrutiny and allowed for no real proportionality examination. The Government maintained that a wide margin of appreciation applied given the positive obligation context, since the Policy was not a blanket one and since there was no European consensus on the subject.

81. The Court notes, as to the European consensus argument, that the Chamber established that more than half of the Contracting States allow for conjugal visits for prisoners (subject to a variety of different restrictions), a measure which could be seen as obviating the need for the authorities to provide additional facilities for artificial insemination. However, while the Court has expressed its approval for the evolution in several European countries towards conjugal visits, it has not yet interpreted the Convention as requiring Contracting States to make provision for such visits (see *Aliev*, cited above, § 188). Accordingly, this is an area in which the Contracting States could enjoy a wide margin of appreciation in determining the steps to be taken to ensure compliance with the Convention with due regard to the needs and resources of the community and of individuals.

82. However, and even assuming that the judgment of the Court of Appeal in the *Mellor* case amounted to judicial consideration of the Policy under Article 8 (despite its pre-incorporation and judicial review context, see paragraphs 23-26 above), the Court considers that the Policy as structured effectively excluded any real weighing of the competing individual and public interests, and prevented the required assessment of the proportionality of a restriction, in any individual case.

In particular, and having regard to the judgment of Lord Phillips in the *Mellor* case and of Auld LJ in the present case, the Policy placed an inordinately high "exceptionality" burden on the applicants when requesting artificial insemination facilities (see paragraphs 13, 15-17 and 23-26 above). They had to demonstrate, in the first place, as a condition precedent to the application of the Policy, that the deprivation of artificial insemination facilities might prevent conception altogether (the "starting-point"). Secondly, and of even greater significance, they had to go on to demonstrate that the circumstances of their case were "exceptional" within the meaning of the remaining criteria of the Policy (the "finishing-point"). The Court considers that even if the applicants' Article 8 complaint was before the Secretary of State and the Court of Appeal, the Policy set the threshold so

high against them from the outset that it did not allow a balancing of the competing individual and public interests and a proportionality test by the Secretary of State or by the domestic courts in their case, as required by the Convention (see, *mutatis mutandis*, *Smith and Grady*, cited above, § 138).

83. In addition, there is no evidence that when fixing the Policy the Secretary of State sought to weigh the relevant competing individual and public interests or assess the proportionality of the restriction. Further, since the Policy was not embodied in primary legislation, the various competing interests were never weighed, nor issues of proportionality ever assessed, by Parliament (see *Hirst*, § 79, and *Evans*, §§ 86-89, both cited above). Indeed, the Policy was adopted, as noted in the judgment of the Court of Appeal in the *Mellor* case (see paragraph 23 above), prior to the incorporation of the Convention into domestic law.

84. The Policy may not amount to a blanket ban such as was in issue in the *Hirst* case since in principle any prisoner could apply and, as demonstrated by the statistics submitted by the Government, three couples did so successfully. Whatever the precise reason for the dearth of applications for such facilities and the refusal of the majority of the few requests maintained, the Court does not consider that the statistics provided by the Government undermine the above finding that the Policy did not permit the required proportionality assessment in an individual case. Neither was it persuasive to argue, as the Government did, that the starting-point of exceptionality was reasonable since only a few persons would be affected, implying as it did the possibility of justifying the restriction of the applicants' Convention rights by the minimal number of persons adversely affected.

85. The Court therefore finds that the absence of such an assessment as regards a matter of significant importance for the applicants (see paragraph 72 above) must be seen as falling outside any acceptable margin of appreciation so that a fair balance was not struck between the competing public and private interests involved. There has, accordingly, been a violation of Article 8 of the Convention.

E. The Court's assessment of the complaint under Article 12 of the Convention

86. The Court considers, as did the Chamber, that no separate issue arises under Article 12 of the Convention and that it is not therefore necessary also to examine the applicants' complaint under this provision (see *E.L.H. and P.B.H. v. the United Kingdom*, cited above, and *Boso v. Italy* (dec.), no. 50490/99, ECHR 2002-VII).

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

87. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

88. The applicants requested a declaration that the Policy concerning facilities in prisons for artificial insemination was contrary to the Convention and, further, that the Court direct or request the respondent State to give urgent consideration to a renewed request for artificial insemination facilities.

89. The Court's function is, in principle, to rule on the compatibility with the Convention of the existing measures and it does not consider it appropriate in the present case to issue the requested direction (see *Hirst*, cited above, § 83).

A. Non-pecuniary damage

90. The applicants sought compensation as regards the distress suffered by them having regard to the delay since their initial domestic application for the relevant facilities and the reduced chances of the second applicant conceiving a child. They did not specify a particular sum. Alternatively, they suggested that the question of any compensation be adjourned to see if the second applicant were to conceive and/or to obtain an expert report on the effect of delay on the chances of conception.

The Government submitted that there was no specific evidence of distress over and above the normal concern of any party to litigation and, further, that the submission about the second applicant's reduced chances of conceiving was speculative. In the Government's view, a finding of a violation would constitute sufficient just satisfaction.

91. The Court does not consider it useful to adjourn its examination of this aspect of the applicants' claims under Article 41 of the Convention. It is further of the view that there is no causal link between the violation established (refusal of the requested facilities without an assessment complying with Article 8) and the damage alleged (the applicants' failure to conceive a child) having regard, *inter alia*, to the nature of conception and the second applicant's age even when she initially applied for the facilities in December 2002.

92. However, the Court has found that, in applying the Policy, the domestic authorities did not take adequate account of the interests of the applicants on a matter of vital importance to them (paragraph 72 above). In such circumstances, the Court considers it evident that this failure was, and continues to be, frustrating and distressing for the applicants. The Court

therefore awards, on an equitable basis, 5,000 euros (EUR) in total to the applicants in compensation for the non-pecuniary damage suffered, to be converted into pounds sterling at the rate applicable on the date of settlement.

B. Costs and expenses

93. The applicants claimed reimbursement of their legal costs and expenses as regards their solicitor and their counsel at a rate of 250 pounds sterling (GBP) per hour. As to their solicitor, they claimed for almost 21 hours' work (of which 13 concerned the Grand Chamber) as well as for his attendance (2 days) at the hearing before the Grand Chamber. They also claimed for the costs of 110 letters and telephone calls at GBP 25 per letter/call. They further claimed for 31 hours of work by counsel (of which 22 concerned the Grand Chamber) as well as for counsel's attendance at the hearing (also 2 days). With value-added tax (VAT) at 17.5%, the overall legal costs and expenses claim amounted to GBP 24,733.75.

The Government maintained that the hourly rate of GBP 250 (for both the barrister and solicitor) was excessive, particularly as neither was based in London. Any nationally approved fee levels were not relevant in this regard and the Court should allow an hourly rate of no more than half the above-noted amount. In the Government's view, the number of hours for which fees were claimed was also excessive, particularly since the solicitor appeared in some respects to duplicate work done by counsel. The Court should, the Government concluded, award no more than GBP 8,000 in total in respect of legal costs and expenses.

94. The Court notes that only legal costs and expenses found to have been actually and necessarily incurred and which are reasonable as to quantum are recoverable under Article 41 of the Convention (see, among other authorities, *Smith and Grady v. the United Kingdom* (just satisfaction), nos. 33985/96 and 33986/96, § 28, ECHR 2000-IX).

95. The Court finds that the claims may be regarded as somewhat high, in particular having regard to the claim for 2 days' professional costs of a solicitor and of counsel for the Grand Chamber hearing which lasted one morning and noting that the bill of costs vouching counsel's costs omitted 22 hours of Grand Chamber work otherwise listed in the overall itemised bill of costs for which the applicants claimed reimbursement. Although significant work was necessarily involved in the preparation for and attendance at the Grand Chamber hearing, it finds the amounts claimed for the period after the Chamber judgment excessive. It also finds the hourly charge-out rate to be high. In the applicants' favour, it is noted that the applicants' essential concern, and the bulk of the argument, centred on their successful complaint about the Policy's compliance with Article 8 of the Convention.

96. In light of the circumstances of the case, the Court awards legal costs and expenses in the amount of EUR 21,000, inclusive of VAT and less EUR 2,148.09 in legal aid paid by the Council of Europe, to be converted into pounds sterling on the date of settlement.

C. Default interest

97. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT

1. *Holds* by twelve votes to five that there has been a violation of Article 8 of the Convention;

2. *Holds* unanimously that it is not necessary to examine the complaint under Article 12 of the Convention;

3. *Holds* by twelve votes to five
   (a) that the respondent State is to pay the applicants, within three months, EUR 5,000 (five thousand euros) in respect of non-pecuniary damage and EUR 21,000 (twenty-one thousand euros) in costs and expenses, less EUR 2,148.09 (two thousand one hundred and forty-eight euros nine cents) in legal aid paid by the Council of Europe and inclusive of any tax that may be chargeable, which payments are to be converted into pounds sterling at the rate applicable on the date of settlement;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

4. *Dismisses* unanimously the remainder of the applicants' claim for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 4 December 2007.

Vincent Berger Jurisconsult	Christos Rozakis President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following concurring and dissenting opinions are annexed to this judgment:

(a) concurring opinion of Judge Bratza;

(b) joint dissenting opinion of Judges Wildhaber, Zupančič, Jungwiert, Gyulumyan and Myjer.

C.R.
V.B.

CONCURRING OPINION OF JUDGE BRATZA

An unsatisfactory feature of Protocol No. 11 to the Convention, which ushered in the permanent Court in Strasbourg, is that a national judge who has already been party to a judgment of a Chamber in a case brought against his or her State is not only entitled but, in practice, required to sit and vote again if the case is referred to the Grand Chamber. In his partly dissenting opinion in *Kyprianou v. Cyprus* ([GC], no. 73797/01, ECHR 2005-XIII), Judge Costa described the position of the national judge in such circumstances as "disconcerting", the judge having to decide whether to adhere to his or her initial opinion on the case or "with the benefit of hindsight [to] depart from or even overturn [that] opinion".

Where the case has already been fully argued and discussed at Chamber level and no new information or arguments have been advanced before the Grand Chamber, national judges have, unsurprisingly, normally adhered to their previous opinion, although not necessarily to the precise reasoning which led to that opinion in the Chamber.

In the present case, the material and arguments before the Grand Chamber did not differ in any significant respect from those before the Chamber. I have nevertheless concluded, on further reflection, that my previous view on the main issue was wrong and I have voted with the majority in finding that the applicants' rights under Article 8 were violated.

Unlike the Chamber, the Grand Chamber has not found it necessary to determine whether the case should more appropriately be analysed as one concerning the State's positive or negative obligations under the Article. However, it is common ground that, whatever the nature of the obligation, the key question is whether a fair balance was struck between the competing public and private interests involved.

In the majority judgment to which I was a party, the Chamber found that the Policy of the Secretary of State, as set out in the letter of 28 May 2003, as well as its application in the present case in refusing the grant of artificial insemination facilities not only served a legitimate aim but struck a fair balance between the rival interests. The focus of the Grand Chamber has been primarily on the compatibility with Article 8 of the Policy itself. The Chamber's conclusion that the Policy was compatible was founded principally on the fact that it did not operate as a blanket ban on the grant of artificial insemination facilities but allowed consideration of the circumstances of each application for such facilities according to criteria which were found to be neither arbitrary nor unreasonable. In this respect the case differed from that of *Hirst v. the United Kingdom (no. 2)* ([GC], no. 74025/01, ECHR 2005-IX), which concerned a general exclusion of serving prisoners from the right to vote. That such individual assessment was not merely theoretical or illusory was found by the Chamber to be

confirmed by the fact that access to facilities had in fact been granted in certain cases.

After further deliberation on the case, I have been persuaded, for reasons more fully developed in the majority opinion in the Grand Chamber, that a fair balance was not preserved by the Policy.

As was noted by the Court of Appeal in the case of *R (Mellor) v. Secretary of State for the Home Department* [2001] 3 WLR 533, the Policy statement reflected a "deliberate policy that the deprivation of liberty should ordinarily deprive the prisoner of the opportunity to beget children". While it is the case that the Policy did not wholly exclude serving prisoners, even life prisoners, from the opportunity of obtaining access to artificial insemination facilities, I consider that the Policy was unduly weighted against the individual prisoner requesting such facilities, by placing on him the burden of showing not merely that, without such facilities, conception might be prevented altogether, but that there were "exceptional circumstances" in his case which justified a departure from the general rule against the grant of such facilities.

Even if the philosophy underlying the Policy can be considered to be compatible with the well-established principle that, liberty apart, prisoners continue to enjoy all Convention rights including the right to respect for private and family life, in common with the majority of the Court, I consider that, in imposing such a burden on a prisoner, the Policy did not allow for a fair balance to be struck between the competing public and private interests involved.

JOINT DISSENTING OPINION OF JUDGES WILDHABER, ZUPANČIČ, JUNGWIERT, GYULUMYAN AND MYJER

In the instant case, the first applicant (Kirk Dickson), born in 1972, was serving a life sentence in prison for murder. His earliest full release date was 2009. While they were both in prison, he met (in 1999) and married (in 2001) the second applicant (Lorraine Dickson), born in 1958, a mother of three children from other relationships. Their request for artificial insemination facilities was refused definitively in 2004. The Chamber found no violation of Articles 8 and 12, whereas the majority of the Grand Chamber now finds a violation of Article 8. To our regret, we have to dissent.

The majority of the Grand Chamber finds Article 8 applicable. It discusses the adequacy of the legal basis for a restriction only indirectly, but since the judgment focuses on the proportionality of restrictions in a democratic society, one must assume that the legal basis was found to be adequate. We agree, although we find the *obiter dictum* in paragraph 83 of the judgment suggesting that the Policy should have been "embodied in primary legislation" to be unhelpful. We do not think that the problem of artificial insemination facilities in prisons was so evident or burning that direct action by Parliament was needed.

We accept that imprisonment is a deprivation of liberty within the scope of Article 5, so that prisoners retain their fundamental rights, except for restrictions which are inherent in, or necessarily concomitant to, the deprivation of liberty itself (see paragraphs 31 and 65). And that is the crux of this case.

It is correctly noted (in paragraph 28) that the objectives of imprisonment "include retribution, prevention, protection of the public and rehabilitation".

As the judgment points out, a growing number of Contracting Parties have made possible conjugal visits in prisons, subject to a variety of different restrictions (paragraph 81). Nevertheless, the Court's case-law has not interpreted Articles 8 and 12 as requiring Contracting States to make provision for conjugal visits in prisons. We fail to see how it can be argued that there is no right to conjugal visits in prisons, but that there is instead a right for the provision of artificial insemination facilities in prisons (this interpretation results implicitly from paragraphs 67-68, 74, 81 and 91). Not only is this contradictory: it also plays down the wide margin of appreciation which States enjoy (and should enjoy) in this field.

The margin of appreciation of member States is wider where there is no consensus within the States and where no core guarantees are restricted. States have direct knowledge of their society and its needs, which the Court does not have. Where they provide for an adequate legal basis, where the legal restrictions serve a legitimate aim and where there is room to balance

different interests, the margin of appreciation of States should be recognised.

This is so in the instant case. The government's Policy allowed for the balancing of interests and was not a blanket one. The British courts did balance the various interests. We fail to see how the majority of the Grand Chamber can claim that there was no weighing of the "relevant competing individual and public interests" (paragraph 83).

To the contrary, in our view the majority did not weigh several interests that ought to have deserved consideration. Thus the Court might have wished to discuss the very low chances of a positive outcome of *in vitro* fertilisation of women aged 45 (see Bradley J. Van Voorhis, "In Vitro Fertilization", *The New England Journal of Medicine* 2007, 356: 4, pp. 379-86). The Court also fails to address the question whether all sorts of couples (for example, a man in prison and a woman outside, a woman in prison and a man outside, a homosexual couple with one of the partners in prison and the other outside) may request artificial insemination facilities for prisoners. We are of the opinion that in this respect too States should enjoy an important margin of appreciation.

In conclusion, in the specific circumstances of the case (the couple established a pen-pal relationship while both were serving prison sentences; the couple had never lived together; there was a 14-year age difference between them; the man had a violent background; the woman was at an age where natural or artificial procreation was hardly possible and in any case risky; and any child which might be conceived would be without the presence of a father for an important part of his or her childhood years), it could not be said that the British authorities had acted arbitrarily or had neglected the welfare of the child which would be born.