CASES / VONNISSE

ACCESS TO ARTIFICIAL INSEMINATION FACILITIES AND A PRISONER'S RIGHT TO RESPECT FOR FAMILY LIFE

Dickson v United Kingdom Application No 44362/04 of 4 December 2007 ECtHR

1 Introduction

In this case the applicants complained about the refusal by the British Government of access to artificial insemination facilities in prison and argued that such refusal breached their right to respect for their private and family life under article 8 and/or 12 of the European Convention on Human Rights (ECHR). Article 8 reads 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" (own emphasis).

Article 12 reads:

> "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 this right."

The first applicant (Kirk Dickson), born in 1972, was in prison serving a life sentence for murder. His earliest possible release date was 2009. While they were both in prison, he met the second applicant (Lorraine Dickson) in 1999 through a prison penpal network. The second applicant was born in 1958, and is a mother of three children born from different relationships. Their request for artificial insemination facilities was refused. The Chamber of the European Court of Human Rights found no violation of Articles 8 and 12. This contribution concerns a discussion of the judgment by the Grand Chamber of the European Court of Human Rights (ECtHR), the case being referred to them in terms of article 43 of the ECHR. The relevant policy of the Government reads:

"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 AI 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 AI;
– 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 particular case."

2 The parties submissions

The reasons by the Government for refusal of access to artificial insemination facilities were the following (par 24 Chamber judgment; and par 58-63 Grand Chamber judgment):

- Even though the second applicant would be 51 years old at the earliest possible date of release and the likelihood of her being able to conceive naturally was small, the relationship was established while the parties were in prison and had not been tested in the normal environment of daily life. A reasoned and objective assessment could not be made as to whether the relationship would subsist after the first applicant's release.
- There was insufficient provision in place to provide independently for the material welfare of any child which might be conceived.
- The child would be without a father for an important part of its childhood years.
- In view of the violence of the first applicant's crime (he kicked a drunk person to death), there would be legitimate public concern that the punitive and deterrent elements of his sentence of imprisonment were being circumvented if he was allowed to father a child by artificial insemination. The Government (before the Chamber par 24) submitted that the restriction was punishment, the consequences of which were not disproportionate to the aim of maintaining a penal system designed to punish and deter. The Government further maintained that the policy was consistent with the Convention because it enabled examination of the individual merits of each case. Its justification was to be found in three principles: Losing the opportunity to beget children was one of the

> ordinary consequences of imprisonment; public confidence in the operation of the prison system would be undermined if prisoners could continue to conceive children while serving long sentences for serious offences; and the inevitable absence of one parent for a long period would have negative consequences for the child and for society as a whole. Accordingly, the normal starting point was that artificial insemination facilities would not be granted unless their refusal would prevent the founding of a family altogether. Thereafter, the authorities would take into account other relevant factors such as raising a child in the absence of a father, the stability of the relationship and public concern. As to the application of the policy in the present case, the Government noted that the fact that the applicants would not be able to conceive children naturally, *was overcome by the other reasons* relied upon by the Secretary of State.

The Dicksons (the applicants) contended that if the aim of the restriction was punishment, it did not make sense to admit of *any* exceptions to the policy. If the restriction was regarded as a necessary consequence of imprisonment, refusing artificial insemination facilities was not consequential on detention as there were simply no security or other physical or financial barriers (par 47-48). The burden on the state would be minimal (par 53). The 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 and 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 it (par 49).

The social factors (interests of the putative child and of society) said to underlie the policy were, furthermore, according to the applicants, not contemplated by article 8(2). 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 interest of the child was 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. Besides being inconsistent with the principle of rehabilitation, it was also unconvincing and injurious to assume that being raised by a single parent was necessarily not in the child's best interests. 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 of single parents and, indeed, against domestic legal developments which minimised this factor in its jurisprudence in other non-prisoner artificial insemination cases (par 54).

3 Initial judgment by the Chamber of the ECtHR (18 April 2006)

The ECtHT (Chamber), by four votes to three, held that there was no violation of article 8 of the ECHR. The court had regard to the difficult position of the applicants. Artificial insemination remained their only realistic hope of having a child together. The requested facilities would not be as onerous for the authorities as those required for conjugal visits. The second applicant also maintained that she had sufficient resources to care for the child (par 37 Chamber judgment). On the other hand, the court agrees with the Government, that these factors were *outweighed* by other factors such as, the nature and gravity of the first applicant's crime; the welfare of the child who might be conceived in view of the prolonged absence of the father for an important part of his childhood, and the apparent lack of sufficient material provision and an immediate support network in place for the mother and child (par 38 Chamber judgment). In a concurring opinion to the Chamber judgment the opinion was held that permitting a child to be born to the applicants would not be fostering the best interests of the child. It would, on the contrary, be injurious to the "rights of others" in article 8(2) (par 5). In the architecture of the Convention, at least as fundamental as the right of a woman to be a mother, is the dogma of the supreme interest of children. In conflicts where the interests of a child are an issue, the ethic guiding domestic courts and the ECtHR has been that the "protection of the rights of the child" should be paramount (par 6). The judge was far from persuaded that kick-starting into life a child in the meanest circumstances, could be viewed as an exercise in promoting its finest interest. The debut of life into a one-parent family, deprived of the presence of a father and of a father-figure by offspring of a life prisoner convicted for the most serious crime of violence, would not appear to be the best way of giving a child-to-be a headstart in life (par 7). There was also the opinion that in the potential mother's case, the test still requires balancing her natural craving to found a family, with the rights of the child she desires to have.

4 Judgment by the Grand Chamber of the ECtHR (4 December 2007)

The ECtHR (Grand Chamber) held that article 8 was indeed applicable to the complaint 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"* (par 66). With reference to the judgment in *Hirst v United Kingdom* (no 2) ([GC] no 74025/01 par 69 ECHR 2005), prisoners in general continue to enjoy all the fundamental rights and freedoms guaranteed under the Convention but for the right to liberty (par 67). Any restrictions on those rights (*eg*, the right to vote; right to respect for family life; right to freedom of expression; right to practice their religion; *etc*) must be justified in each individual case. This justification can flow, *inter alia*, from the necessary and inevitable consequences of imprisonment or 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* (*Hirst* judgment; par 70). The core issue was whether a fair balance was struck between the competing public and private interests involved (par 71).

With regard to the applicants, artificial insemination remained the only realistic hope of them, a couple since 1999 and married since 2001, of having a child given the second applicant's age and the first applicant's release date. The court considered it evident that the matter was of vital importance to the applicants (par 74). Whilst the inability to beget a child might be a consequence of imprisonment, it is not an inevitable one. The grant of artificial insemination facilities would involve no security issues or impose any significant administrative or financial demands on the state. There is no place under the Convention system, where tolerance and broadmindedness are the acknowledged hallmarks of democratic society, for the automatic forfeiture of rights by prisoners based purely on what might offend public opinion (*Hirst*). However, the court acknowledged that the maintaining of public confidence in the penal system has a role to play in the development of penal policy. While accepting that punishment remains one of the aims of imprisonment, the court, however, underlined 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 (par 75).

The court was prepared to accept as legitimate, for the purposes of article 8(2), 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 (*L.C.B. v UK*, judgment of 9 June 1998, DR 1998-III, § 36; *Osman v UK*, judgment of 28 Oct 1998, *Reports* 1998-VIII, § 115-116; and *Z v UK* [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 (par 76). The policy placed an inordinately high "exceptionality" burden on the applicants when requesting artificial insemination facilities. It sets the threshold so high against them from the outset that it did not allow a balancing of the competing individual and public interests (par 82). There has, accordingly, been a violation of article 8 (twelve votes to five).

5 Discussion

The *Dickson* judgment has brought about yet another important development with regard to the *content* of a person's right to respect for his/her family life. The interpretation of the concept "family" and of the

content and consequences of "family life" in European human rights case law, can be seen as an example of how the ECtHR keeps track of social developments (Harris *Law of the European Convention on Human Rights* (1995) 312). Clements (*European Human Rights Taking a Case Under the Convention* (1999) 176) refers to changing perceptions on the nature and content of the right to respect for family life and the scope of the state's positive obligation(s) in this regard. He remarks (176): "It is a characteristic of Article 8 that the general public attitude is evolving; an evolution in thinking *which the Court is prepared to mirror*" (own emphasis).

In *Marckx v Belgium* ((1979) 2 EHRR 330 342 par 31) the ECtHR reiterated that article 8 does not merely compel the state to abstain from interference in a person's family life. In addition to this primary negative undertaking, there may be positive obligations inherent in an effective respect for family life. 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 (par 70). On the one hand, there are the need to maintain the public confidence in the penal system and the welfare of any child conceived as a result of artificial insemination, therefore, the general interests of society as a whole. On the other hand, there is the rights of both applicants – not only that of the prisoner – to respect for their family life. This notion of "family life" incorporates the right to respect for "their decision to become genetic parents" (par 66 Grand Chamber judgment).

The importance of this judgment lies in (a) the proposition that imprisonment should not, as a rule, be a bar to procreation, or rather, the decision to become a genetic parent; (b) public opinion (outcry) alone cannot serve as justification for the restriction of such rights; (c) the importance of the rehabilitative aim of imprisonment; and (d) the fact that the partner of the prisoner also has a right to respect for her family life. With regard to this last-mentioned aspect, it must be emphasised that because prisoners do not (usually) exist in isolation, legal decisions and policy considerations as to the rights of a prisoner have an impact not only on the prisoner, but also on their family members. (Codd "Regulating Reproduction: Prisoner's Families, Artificial Insemination and Human Rights" 2006 *EHRLR* 1). *Dickson*, albeit not expressly, suggests that the wife does not lose her right to family life and to found a family merely as a consequence of being married to a prisoner (Codd 2006 *EHRLR* 4). An earlier issue (see Chamber judgment) as to whether there should be a distinction between parties who met and married in prison, the relationship therefore not being tested outside prison, and partners where one party was sent to prison after they have enjoyed marriage outside prison, has now been resolved. In principle there should be no distinction. It is my view that family life indeed existed between the parties in that they were lawfully married with sufficient emotional ties binding them to such an extent that they wanted to have a child together. This conclusion is supported by an earlier judgment of the ECtHR in *Abdulaziz, Cabales and*

Balkandali v United Kingdom ((1985) 7 EHRR 471 496 par 62) to the following effect:

> "[Family life] includes the relationship that arises from a *lawful and genuine marriage* even where the family is not yet fully established. It *normally* also comprises cohabitation in the case of a married couple" (own emphasis).

Cohabitation is thus not a *sine que non* for the existence of family life. (See also *Berrehab v Netherlands* ((1989) 11 EHRR 322 329 par 21).

Other potential issues in this regard that may become relevant in the future, are whether artificial insemination facilities should also be available to couples who are not married but have committed to a lifelong relationship outside of marriage? What about the situation where the woman is a prisoner and the man outside? Should it also be available to single women and homosexual couples?

Another contentious issue is that of the welfare of the to-be-conceived child (see the different judgments of the Chamber and Grand Chamber in this regard). Codd (2006 *EHRLR* 5) suggests that although on a day-to-day basis the one parent will be living away from the family in restrictive circumstances, it does not necessarily follow that he is not in contact with his children, or exercising a meaningful parental role, albeit remotely. Sutherland ("Procreative Freedom and Convicted Criminals in the United States and the United Kingdom: Is Child Welfare Becoming the New Eugenics?" 2003 *Oregon Law Review* 1003) argues that prisoners can continue to participate in decision-making through discussions with the child's mother and personal contact can be maintained through telephone calls, letters, e-mail and visits. This degree of contact is arguably no less than that engaged in by many separated or divorced parents (Sutherland 2003 *Oregon Law review* 1003). Jackson ("Prisoners, Their Partners and the Right to Family Life" 2007 *Child and Family Law Quarterly* 239) points out that the dubious reasoning that the baby's interests demanded that he or she never be conceived and born, ignores two more cogent factors which pull in the opposite direction, namely, the important role family relationships play in a prisoner's rehabilitation and the question of proportionality. The *Dickson* judgment has now confirmed that protecting children cannot go so far as to prevent parents who so wish from attempting to conceive a child. The situation is arguably similar to where one parent is suffering from a fatal illness and has very little chance of surviving even the birth of the child (see the dissenting opinion to the Chamber judgment). Attempts to protect the rights of the unborn child lead to the situation that the person protected never benefits from the interpretation of what is in his/her best interests because he/she is never born (Codd 2006 *EHRCR* 5). Before discussing the situation in South Africa it is interesting to investigate briefly other rights with regard to their family life prisoners in European context enjoy.

6 Other rights of prisoners with regard to family life in terms of the ECHR

6 1 General

A convicted prisoner's deprivation of liberty does not mean that he loses protection of the other fundamental rights in the Convention (*Hirst* judgment; and Reid *A Practitioner's Guide to the European Convention on Human Rights* (2004) 434). It nevertheless remains the case that any measure depriving a prisoner of liberty by definition has some effect on the normal incidents of liberty and inevitably entails limitation and control on the exercise of rights, including a measure of control on prisoners' contacts with the outside word. The fact of such control is not, in principle, incompatible with the Convention (par 27 Chamber judgment with reference to *Silver v UK* of 25 March 1983). The key issue is whether the nature and extent of that control can be justified under the Convention (par 27 Chamber judgment).

6 2 Visitation rights and access to family

The European Commission on Human Rights (the Commission has since been abolished) considered that continued contact by a prisoner with his family took on added importance in the context of article 8 since normal means of continuing relationships had been removed. The Commission found that article 8 requires the state to assist prisoners, as far as possible, to create and sustain ties with their families in order (also) to facilitate their social rehabilitation (Appl no 9054/80 Oct 8 1982 30 DR). The ECtHR has since endorsed this approach. The judgment in *Messina v Italy* (No 2) (Appl no 25498/94 judgment of 28 Sept 2000) held that any detention which is lawful entails by its very nature a limitation on private and family life. However, it is an essential part of a prisoner's right to respect for family life that the prison authorities assist him in maintaining contact with his close family (see *Quinas v France* Appl no 13756/88, Commission dec of 12 March 1990 DR 65 265); (par 61)). In *Messina* the applicant was subject to a special prison policy which involved restrictions on the number of family visits (not more than two per month) and imposed measures for the supervision of such visits (prisoners were separated from visitors by a glass partition) (par 62). The court decided that these restrictions constituted interference with the exercise of the applicant's right to respect for his family life (see *X v UK*, appl no 8065/77, Commission decision of 3 May 1978 DR 14 246) (par 62). They, however, pursued legitimate aims under article 8(2), namely the protection of public safety and the prevention of disorder or crime (par 64). In that context, the court took into account the specific nature of the phenomenon of organised crime, particularly of the Mafia type, in which family relations often play a crucial role (par 66). In view of the above considerations, the restrictions of the applicant's right to respect for his family life did not go beyond what is necessary in a democratic society for

the protection of public safety and the prevention of disorder or crime (par 24).

There is, however, no right to unlimited visiting (Reid 435). In theory there should be good reasons for obstacles placed in the way of contacts and an absolute ban could only be justified in exceptional circumstances (Reid 435; and *Lavents v Latvia* 28 Nov 2002 par 141). Prisoners held in special security categories are also unable to derive from article 8 the right to unsupervised visits or to visits unencumbered by partitions or screens. The Commission found that although such restrictions were *prima facie* an interference, they were justified in the interests of public safety and the prevention of crime and disorder. Visits by families are often rendered difficult and practically discouraged where a prisoner is held in a prison far from the district where his close relatives live. The Commission always started from the premise that a prisoner could not derive from article 8 a right to choose the place of confinement and that separation from family and the hardship that it caused inevitably flowed from imprisonment. It would only be in exceptional circumstances that the location of a prison a long way from a prisoner's home or family might infringe the requirements of article 8 (Reid 435).

As regards external visits, article 8 does not guarantee a detained person an unconditional right for leave to attend the funeral of a relative. Earlier applications to attend a daughter's wedding (*X v UK* appl no 4623/70 (1972) Yearbook XV 370) or to attend a mother's funeral (*X v UK* appl no 5229/71 (1973) Coll 42 140) were turned down and not regarded as an interference with article 8. However, in *Ploski v Poland* (Appl no 26761/95 of 12 Nov 2002), where the applicant had lost both parents in the space of a month, the court considered that the charges brought against the applicant did not concern violent crime. Although the court was aware of the problems of a financial and logistical nature caused by escorted leaves and the shortage of police and prison officers, the seriousness of what was at stake, namely refusing an individual the right to attend the funerals of his parents, meant the state could have refused attendance only if there had been compelling reasons and if no alternative solution – like escorted leave – could have been found (par 37). The court reiterated that article 8 does not guarantee a detained person an unconditional right to leave to attend a funeral of a relative. It is up to domestic authorities to assess each request on its merits. In the particular circumstances of the present case, and notwithstanding the margin of appreciation left to the state, the refusal of leave to attend the funerals of the applicant's parents, was not "necessary in a democratic society" and was not proportionate to the legitimate aims pursued (par 39).

6 3 Conjugal visits

In *X and Y v Switzerland* (13 DR 241 (1978)), the applicants were a married couple who had been held separately on remand in the same prison. The authorities refused to allow the applicants to have sexual relations while in

prison. The applicants alleged a violation of articles 8 and 12. The Commission dismissed their application in the following terms:

> "it is generally considered to be justified for the prevention of disorder in prison not to allow sexual relations of married couples in prison. The Commission accepts that in fact the security and good order in prison would be seriously endangered if all married prisoners were allowed to keep up their conjugal life in prison. In this case the respect for privacy would require that the prison authorities renounce their right of constant supervision. Uncontrolled visits or contacts could, *inter alia*, facilitate the exchange of secret messages, the smuggling in of goods such as drugs or even arms".

A similar approach was adopted by a unanimous Chamber in *Aliev v Ukraine*, (Appl no 41220/98 of 29 April 2003). The court considered that while detention is by its very nature a limitation on private and family life, it is an essential part of a prisoner's right to respect for family life that prison authorities assist in maintaining effective contact with his or her close family members (see, *eg*, *Messina v Italy* (No 2)). Whilst noting with approval the reform movements in several European countries to improve prison conditions by facilitating conjugal visits, the refusal of such visits may *for the present time* be regarded as justified for the prevention of disorder and crime within the meaning of article 8(2) (see, *eg*, *E.L.H. and P.B.H. v UK,* nos 32094/96 and 32568/96, Commission dec of 22 Oct 1997, DR 91 61; and *Kalashnikov v Russia* (dec) no 47095/99 ECHR 2001-XI); par 188). The reference to "for the present time" suggests that this is an issue which the court may be willing to revisit in the future (Mombray *Cases and Materials on the European Convention on Human Rights* (2008) 785).

7 South Africa

The South African Constitution does not contain an explicit right to family life. In *Ex parte Chairperson of the Constitutional Assembly:* In re *Certification of the Constitution of the Republic of South Africa* (1996 4 SA 744 (CC)) the Constitutional Court remarked (par 99 807D-F) that families are constituted, and are dissolved in such a variety of ways, resulting in the possible outcomes of constitutionalising family rights being so uncertain, that constitution-makers frequently prefer not to regard the right to marry or to pursue family life as a fundamental right that is appropriate for definition in constitutional terms. The Constitution, furthermore, clearly prohibits an arbitrary state interference with the right to marry or to establish and raise a family while section 7(1) enshrines the values of human dignity, equality and freedom. On the other hand, various sections either directly or indirectly support the institution of marriage and family life. Section 28(1)(b), for example, stipulates that every child has the right to family or parental care or the appropriation of alternative care when removed from the family environment. Another example, is a prisoner's right in terms of section 35(2)(f)(i) to be visited by his spouse or partner and next of kin. Since 1996 attempts have been made by the courts to deal with aspects of family life under different sections of the Constitution which presumably afford indirect

protection to the family. In *Dawood, Shalabi and Thomas v Minister of Home Affairs* (2000 1 SA 997 (C)) Van Heerden J held that the right to dignity in section 10 must be interpreted to afford protection to the institutions of marriage and family life. The Constitutional Court (2000 3 SA 936 (CC)) confirmed this approach.

With regard to prisoners' rights, Chaskalson in *S v Makwanyane* (1995 3 SA 391 (CC) par 142-143) recognised that although imprisonment inevitably impairs a person's dignity, the state undoubtedly has the power to impose this form of punishment as part of the criminal justice system. However, prisoners do not lose their rights on entering prison. On the contrary, prisoners "retain all the rights to which every person is entitled under [the Bill of Rights] subject only to limitations imposed by the prison regime that are justifiable under [the limitations clause]" (*S v Makwanyane supra* par 142-143 as interpreted by Currie and De Waal *The Bill of Rights Handbook* (2005) 10.1-10.2 276). The circumstances in which prisoners are placed necessarily mean that they will have to tolerate greater limitations of their right, including their right to dignity, than other persons. But any infringement of prisoners' rights must be justifiable with reference to the objective of placing them in prison: that is the prevention of crime and the rehabilitation of the offender (Currie and De Waal 10.1-10.2 276). This necessarily implies that prisoners retain their right to family life (as part of the right to dignity) and that any infringement must be justifiable in view of the above-mentioned principles. In this regard section 35(2)(f)(i) is aimed at protecting a prisoner's family life by providing for visitation rights by family members. This is also reflected in section 13(2) of the Correctional Services Act (111 of 1998), the Regulations in terms of section 134(1) with regard to visits by family members, the White Paper on Corrections in South Africa (2005) and the Department of Correctional Services Strategic Plan (2008/9-2012/13).

The Department of Correctional Services' Policy on Marriage of Offenders (2006) (according to clause 4 the policy) derives its mandate from, amongst others, the Constitution of the Republic of South Africa 108 of 1996; the Correctional Services Act 111 of 1998; the White Paper on Corrections in South Africa 2005; the Department of Correctional Services Strategic Plan as well as the United Nations Standard Minimum Rules for the Treatment of Offenders) and echoes the sentiment that marriage can play a positive role in promoting family ties in order to enhance rehabilitation of offenders with a view to promote their re-integration into society (clause 6 on Policy Objectives). In terms of the policy, no offender shall be excluded from the benefit of the marriage policy. *However, conjugal rights and the right to reproduction shall not be exercised whilst in correctional centres* (clause 72). This is based (according to the policy) on the limitation of rights in terms of section 36 of the Constitution. Although section 36 does not contain the exact wording as that of article 8(2) they arguable have the same effect. In terms of section 36 rights entrenched in the Bill of Rights may be limited only by a law of general application to the extent that the limitation is reasonable in an open and democratic society, based on human dignity, equality and freedom, taking into account certain factors (s 36(1)). The marriage policy

does not specify the specific purpose or reason for the limitation with regard to reproduction. The purpose can arguably be one or a combination of the following:

- Considerations of security, in particular the prevention of crime and disorder which inevitably flow from the circumstances of imprisonment;
- a policy which accorded to prisoners, in general, the right to conceive children by artificial insemination, but raises serious ethical and moral issues giving rise to public concern and a lack of confidence in the penal system;
- punishment and retribution for crimes committed (see *S v Makwanyane* par 185);
- the concerns for the rights of others, in this instance, the rights of the to be conceived child.

Unlike conjugal visits it is suggested that provision for artificial insemination facilities does not entail any risk to security or the prevention of crime and disorder. It has been said (*Dickson*) that public concern (outcry) alone cannot serve as justification for an infringement of a rights. Currie and De Waal (*The Bill of Rights Handbook* 162 fn 2) confirm though that while individual rights will usually trump collective goals or general welfare (public interest), there can be occasions when rights must give way to overriding important social concerns. With South Africa in the grip of crime one can imagine a degree of public outcry if prisoners were to be allowed to conceive children whilst in prison. In the words of the Grand Chamber in *Dickson* "there is [however] no place under the Convention system, where tolerance and broadmindedness are the acknowledged hallmarks of democratic society, for the automatic forfeiture of rights by prisoners based purely on what might offend public opinion". This is echoed in the words of Didcott J in *S v Makwanyane* (par 185), where he states that the Constitution envisaged a society based on values of "reconciliation and ubuntu and not vengeance and retaliation". Retribution and vengeance on their own or in combination with other aims should not be accepted as worthy purposes of punishment in an enlightened society to which South Africans have now committed themselves (par 185; and Currie and De Waal 7.2 178). Such an approach also conforms to provisions in the United Nations Standard Minimum Rules for the Treatment of Prisoners (1957) and the European Prison Rules 2006 to the effect that 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 (see clauses 57, 58, 59 and 102.1-102.2 of the respective instruments).

The Correctional Services Act (ss 2, 13, 36), the Marriage Policy and other documents such as the Position Paper on Social Reintegration and the White Paper on Corrections in South Africa (2005), emphasise the rehabilitative aim of imprisonment and the important role the family has to play in the prisoners' eventual reintegration into society. While accepting that punishment remains one of the aims of imprisonment, *Dickson* underlines

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. Can the infringement of a prisoner's right with regard to reproduction in South Africa be justified with reference to the objective of placing them in prison: that is the prevention of crime and the rehabilitation of the offender? Only time will tell. In this regard, however, the ECtHR has, at least, provided some important guidelines.

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