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Kirk Dickson, Lorraine Dickson v Premier Prison Service Ltd, Secretary of State for the Home Department

C3/2004/1103

Court of Appeal (Civil Division)

30 September 2004

Neutral Citation Number [2004] EWCA Civ 1477

2004 WL 2495808

Before: Lord Justice Auld, Lord Justice Mance, Lord Justice Jonathan Parker

Thursday 30th September, 2004

On Appeal from the High Court Queen's Bench Division (Mr Justice Pitchford)

Representation

Miss F Krause (instructed by A S Law of Liverpool) appeared on behalf of the Appellants.

The First Respondent was not represented and did not attend.

Miss Jane Collier (instructed by Treasury Solicitor) appeared on behalf of the Second Respondent.

JUDGMENT

LORD JUSTICE AULD:

1. This is an application for permission to appeal the decision of Mr Justice Pitchford on 5 September 2003 refusing Kirk Dickson and Lorraine Dickson permission to apply for judicial review and for an extension of time in which to do so.

2. The applicants are husband and wife who married in 2001 while both were serving prisoners. Mr Dickson is aged 31 and has no children by any previous relationship. Mrs Dickson is 45 and has three children by other relationships, two of them adults and the third still at school. They met by correspondence through the prison service pen-pal system while both serving sentences. Mr Dickson is serving a life sentence for murder. His sentence tariff is 15 years which will keep him in custody until at least 2009. Mrs Dickson has been released from prison, but by the time Mr Dickson has served his tariff she will be at least 51.

3. Mr and Mrs Dickson seek to challenge the refusal by the Secretary of State for the Home Department to accord them facilities for artificial insemination, pursuant to his policy of only granting such applications in exceptional circumstances. The main rationale for that policy, it seems to me, are (1) considerations of the interests of the yet unborn child, and (2) a legitimate public concern that punitive and deterrent elements of sentences of imprisonment would be circumvented if male prisoners were allowed to father a child through artificial insemination while in prison.

4. Following her release from prison Mrs Dickson has visited Mr Dickson regularly, but they have never of course co-habited. She owns and occupies a four-bedroom house in Hull and lives on income support. She is however undertaking a university course with a view to seeking employment.

5. In October 2001 Mr Dickson applied for facilities for him artificially to inseminate Mrs Dickson, an application in which she joined in December 2002 when solicitors, instructed on behalf of both of them, made representations to the Secretary of State via the Prison Administrative Group. In those representations the solicitors stated that the couple had known one another for over three years, had been married for over two-and-a-half years and saw each other regularly. They stated that, given Mr Dickson's earliest expected date of release, it was improbable that they could produce a child unless they were given facilities for artificial insemination. They maintained that this was an exceptional circumstance for the grant of such facilities.

6. The Secretary of State, in his decision letter of 28 May 2003 refusing their application, first set out his policy for such requests, a policy which corresponds closely to that which was before this court in *R (Mellor) v Secretary of State for the Home Department [2001] EWCA Civ 472*, namely:

> "Requests for facilities for artificial insemination by prisoners are carefully considered on individual merit and will only be granted in exceptional circumstances. In reaching decisions particular attention was 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 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 a particular case."

7. The Secretary of State then gave his reasons for refusal, having regard to those general considerations in his policy. He referred, in particular, to (1) the fact that Mrs Dickson would be 51 at the earliest possible date for Mr Dickson's release, leaving her with a very small likelihood of being able to conceive naturally; (2) the fact that, despite their full agreement in seeking facilities for artificial insemination and the commitment they had so far shown to each other, their relationship had yet to be tested in the normal environment of daily life, making it difficult to assess whether it would continue after Mr Dickson's release; (3) the seeming insufficiency of resources to provide independently for the material welfare of any child who might be conceived; (4) the seeming paucity of any supportive network for mother and child and the fact that the child would not have the presence of a father for an important part of his or her own childhood; and (5) notwithstanding Mr Dickson's good and

constructive prison record, the nature and circumstances of the murder for which he was serving the life sentence meant, in the Secretary of State's words, that “there would be legitimate public concern that the punitive and deterrent elements of [his] sentence of imprisonment were being circumvented if [he] were allowed to father a child through artificial insemination while in prison”.

8. As Mr Justice Pitchford pointed out in his concise and carefully reasoned judgment, the policy identified in that letter had been considered and applied by this court in Mellor. That was a case in which the only challenge was as to the rationality of the policy. It was common ground that there were, on the facts, no exceptional circumstances for not following it. Lord Phillips MR, with whom Peter Gibson and Latham LJJ agreed, held, in response to three challenges to it, that the policy did not conflict with prisoners' rights under Articles 8 and 12 of the European Convention of Human Rights, that considerations of the interests of the yet unborn child are relevant to the formulation of penal policy, and so are considerations of public concern.

9. There was, we are told, a petition to the House of Lords seeking leave to appeal the decision of the Court of Appeal in that case, largely on the grounds on which Miss Flo Krause, on behalf of Mr and Mrs Dickson, seeks leave on this application today. But the House of Lords refused leave.

10. In the course of his judgment Lord Phillips identified, at paragraph 17, an important element in the Secretary of State's policy as put to him in that case:

> “‘(5) The cautious approach which is taken to requests for artificial insemination made by prisoners has been adopted for the following reasons: (a) it is an explicit consequence of imprisonment that a prisoner should not have the opportunity to beget children while serving their sentences until they come to a stage where they are allowed to take leave on temporary licence; (b) serious and justified public concern would be likely if prisoners continued to have the opportunity to conceive children while serving sentences; (c) that whilst many children are brought up successfully by single parents, the evidence suggests that children do better when they can stay in close contact with both parents. The creation of what would inevitably be one-parent families because one partner was serving a sentence of imprisonment seems likely to be disadvantageous to society as a whole as well as not being in the interests of the welfare of the child.
>
> (6) It is thus the aim of the policy to limit the grant of artificial insemination facilities to those who can reasonably be expected to be released into a stable family setting and play a parental role in bringing up any child conceived by AI. Account must also be taken of public interest considerations. It is also the intention of the policy that AI should only be granted where it is necessary to facilitate conception (for example, in circumstances where, for medical reasons, the couple could not conceive naturally or where the woman's medical condition indicated that there was only a small window of opportunity left to the couple in which to conceive so that conception would be unlikely following release) in order to avoid AI being used simply to circumvent the normal consequences of imprisonment.”

I read those passages from the policy as put before the court in Mellor to show how close they are to those as stated in this case, and how close they are to the issue raised by Miss Krause on behalf of Mr and Mrs Dickson.

11. In the course of his judgment Lord Phillips made two observations indicating the qualifications of the policy according to circumstances. First, in paragraph 45 he said:

> “It does not follow … that it will always be justifiable to prevent a prisoner from inseminating his wife artificially, or indeed naturally. The interference with fundamental human rights which is permitted by article 8 (2) involves an exercise in proportionality.

> Exceptional circumstances may require the normal consequences of imprisonment to yield, because the effect of its interference with a particular human right is disproportionate."

And at paragraph 68 he said:

> "… 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."

12. Mr Justice Pitchford in his judgment referred to the Secretary of State's acceptance of that normal starting point and its application to the facts of this case. However he also noted that the Secretary of State had found that it had been outweighed — perhaps "overtaken" would be a better word — by the other considerations set out in his decision letter, in particular lack of a stable relationship outside the prison environment and the interests of the putative child. He rejected the notion that he considered implicit in the case put on behalf of Mr and Mrs Dickson, that their inability to start their own family trumped all other considerations. It was, as Lord Phillips put it, only the starting point, and to that extent simply one of the considerations on the issue whether the circumstances were, in all, exceptional so as to merit the grant of facilities for artificial insemination. He concluded his judgment at paragraphs 17 and 18 by stating that there was nothing arguably unfair or irrational in the Secretary of State's application of the policy in the terms and for the reasons he gave.

13. Miss Krause, in her skeleton argument in support of this application, described as her most compelling argument that, unless it succeeds, Mr and Mrs Dickson's Articles 18 and 12 rights and their incidents — respectively to respect for their private and family life and to marry — would be, as she put it, "totally extinguished", and thus that the Secretary of State's decision is disproportionate. Her attack was not so much as to the manner of the Secretary of State's application of his policy to the circumstances of the case, but as to the policy itself. She characterised the latter, notwithstanding its approval by this court in Mellor, as akin to an absolute bar, one, she says, that sits uneasily with the exercise of discretion in the matter. She suggested that the exceptionality threshold was so high that, in reality, no one could benefit from the policy. Alternatively, she argued that Mr Justice Pitchford misinterpreted the policy so as to read it as an absolute policy, in her words "to deprive prisoners of the facility to beget children".

14. In her oral elaboration of her submissions today Miss Krause pointed out that apart from the case of Mellor, there is no direct authority on the point as it goes to the circumstances of this case, certainly not in Strasbourg. She argued that Mellor does not close the door to her argument. She described the decision as being on the cusp of the policy which had been developed before the advent of the European Convention on Human Rights to our law. The policy was, she maintained, a pre-Convention policy based on old-fashioned Wednesbury irrationality principles starting, in this post-ECHR climate, from the wrong end.

15. However, it is important to note that Mellor, though dealing with facts that preceded the coming into force of the Human Rights Act 1998, was considered by Lord Phillips essentially in the context of Convention rights, anticipating, as the courts had done for some years before the formal incorporation of the Convention into our law, their principles and requirements. At paragraph 21 of his judgment Lord Phillips, after setting out Article 12, said this:

> "The Secretary of State made his decision before the Convention was incorporated into English domestic law. 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."

16. Miss Krause referred the court to the more recent decision of Hirst v the United Kingdom, a decision of the European Court given on 30 March 2004, inviting the court to regard it as a platform for unseating the reasoning of at least part of the judgment of the court in Mellor. But that case involved a blanket ban on the voting rights of prisoners while they remained prisoners. It was not a case where, as in Mellor and here, the policy was in question was one that allowed of exceptions and where there was an element of discretion built into the decision under challenge. Miss Krause said that the court must look nevertheless at the rationale of the policy and its denial of married people's rights to beget children.

17. Miss Krause referred to a number of European authorities which, she indicated, focused, not so much on the elements that had exercised Lord Phillips and Mr Justice Pitchford as to the public interest and the rights of the putative child, but on the practicalities of the security of the prison regime if couples were granted the right to conceive naturally while serving prison sentences. She referred in particular to *Hamner v The United Kingdom [1979] 4 EHRR 139*, X v The United Kingdom [1975] 2 DR 105 (a Commission decision), X and Y v Switzerland [1978] 13 DR 241 and also ELH v The United Kingdom (Application 32094 of 1986).

18. Miss Krause maintained that there is a distinction to be drawn — and one was concerned, as we are here, with artificial insemination — between the legitimate consideration of maintaining the physical security and safety of the prison regime and that where the court is considering a wider interest. That wider interest may be that of a putative child; it may be the interests of society's attitude one way or another to the conception of children in custody; or it may be the element of punishment that figures the Secretary of State's articulation of his policy. Miss Krause submitted that such social considerations are outside penal policy or, at any event, they should not be allowed to influence penal policy so as to create a policy of the sort in question here, denying conception in prison save in exceptional circumstances. She maintained that such a policy does not pursue a legitimate aim and that such European authorities, to which I have just referred, that bear on it do not support it.

19. The difficulty with that argument is that it is the same or very close to the argument advanced by Mr Pannick, on behalf of the applicants, in Mellor. Lord Phillips set it out at paragraph 40 of his judgment in the following terms:

> "Mr Pannick makes the following submissions on behalf of the appellant. The reason why imprisonment is a justifiable restriction on the exercise of conjugal rights is pragmatic. Permitting the exercise of conjugal rights in prison, together with the privacy that this would involve, would endanger the security of prisons: see X and Y v Switzerland … Thus imprisonment and the exercise of conjugal rights are incompatible *in practice* . The same is not true of the provision by a prisoner of a sample of semen. This could be taken from the prisoner within the prison without undue dislocation of the prison regime. Alternatively it could be provided by escorting the prisoner to a clinic, which would involve no greater administrative burden than that involved when a prisoner is taken to a funeral of a close relative, or to a hospital for treatment. It follows that artificial insemination provides a method by which a prisoner can exercise his right to found a family which is compatible with his imprisonment. That is a fundamental right which the prisoner ought to be permitted to exercise in the absence of a cogent reason for interfering with it" —

Thus argued Mr Pannick on behalf of the applicant. However Lord Phillips went on to deal with the argument of Miss Rose, on behalf of the Secretary of State, and to give his own views on it. This is how he put it, describing the Secretary of State's stance in paragraph 41:

> "[Miss Rose] submits that the purpose, or at least a purpose, of imprisonment is to punish the criminal by depriving him of certain rights and pleasures which he can only enjoy when at liberty. Those rights and pleasures include the enjoyment of family life, the exercise of conjugal rights and the right to found a family. Imprisonment is inconsistent with those rights not merely as a matter of practical incompatibility but because part of the object of the exercise is that it should preclude the exercise of those rights. A prisoner cannot procreate by the medium of artificial insemination without the positive assistance of the prison authorities. In the absence of exceptional circumstances they commit no infringement of article 12 if they decline to provide that

assistance."

Lord Phillips accepted that argument on behalf of the Secretary of State and rejected the approach of Mr Pannick. He did so in paragraphs 41, 42 and 67 of his judgment. Paragraph 42 reads:

> "I consider that the jurisprudence considered above, and in particular ELH and PBH v United Kingdom … supports Miss Rose's submission. The Commission noted with sympathy the facilitating of conjugal visits in several European countries, but concluded that *for the present time* the refusal of such visits should continue to be regarded as *justified for the prevention of disorder or crime* . Mr Pannick submitted that those words were referring simply to the disorder or crime that would be liable to occur within prisons if conjugal rights were allowed. it seems to me that the reference by the Commission with sympathy to the countries where such visits were allowed demonstrates that they appreciated that such visits were not physically incompatible with the effective operation of a prison service. In none the less continuing to accept that there was no obligation to facilitate such visits, the Commission recognised that the majority of signatories to the Convention maintained a policy that those who had been sentenced to imprisonment should not be permitted to exercise those rights. In so doing they were adhering to what they correctly understood to be the existing jurisprudence."

At paragraph 67 Lord Phillips, after referring to Mr Pannick's main submission, said:

> "Here again Mr Pannick submitted that this was not a material consideration"

(namely the disadvantage of single parent families)

> "when formulating penal policy. He argued that there were many circumstances in which children came to be brought up in single parent families and there could be no justification for the state to attempt to prevent this in the case of prisoners. Again, I do not agree. By imprisoning the husband the state creates the situation where, if the wife is to have a child, that child will, until the husband's release, be brought up in a single parent family. 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."

20. In so ruling 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 imprisonment involved, are highly relevant circumstances, for the purpose of Article 8.2. So, Lord Phillips clearly had in mind the European jurisprudence on which Miss Krause largely sought to rely in this application.

21. Accordingly, in my view, it is not open to Miss Krause 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 insemmination may prevent conception altogether, the finishing point is whether there are exceptional circumstances for not applying the policy.

22. As Miss Collier has noted on behalf of the Secretary of State in her skeleton argument, Miss Krause's contention characterises the policy in a way that is inconsistent with its terms and as it was understood and applied by the court in Mellor, namely as if it precluded the Secretary of State from considering any of the other factors to which he referred in his decision. It is plain that the policy does not do that. On the contrary, it expressly allows for circumstances that would or could call for its application having regard to one or more of the considerations mentioned in the decision letter. It is

plain, too, that on occasions the Secretary of State has disapplied the policy when circumstances have merited it, as demonstrated by a letter from the Treasury Solicitor to Mr and Mrs Dickson's solicitors of 18 May. Miss Collier has informed the court this morning that there have been other instances too, or at least one other instance, post the advent of the Convention to our law, where the Secretary of State has disapplied the policy on the special circumstances of the case.

23. To the extent that Miss Krause has 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 Miss Krause 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.

24. Accordingly I would refuse this application and an extension of time in which to make it, and do so on the merits. In the circumstances it is not necessary for me to rehearse the arguments, one way or another, on the issue of delay, a delay of over six months after judgment before seeking permission to appeal. However, given that delay and the urgency of the matter on which Mr and Mrs Dickson place so much reliance, I would have been inclined to refuse an extension despite the explanation proffered. They and their solicitor should have moved faster than they did. For those reasons I would refuse both applications.

LORD JUSTICE MANCE:

25. I agree with my Lord's reasoning and conclusions. Miss Krause relies on Lord Phillips' statement in paragraph 68 in Mellor v The Home Secretary 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."

However Lord Phillips was identifying a starting point, not a matter necessarily sufficient of itself to mean that artificial insemination should be permitted to take place between a serving prisoner and his wife.

26. 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: see, for example, paragraphs 42 and 66 to 68. 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 United Kingdom App No. 8186/78 at paragraphs 61 to 62, also recognised the potential relevance of more general considerations of public interest.

27. I would, for my part, respectfully concur with the thinking in that regard of Lord Phillips and the Commission.

28. In that light, I cannot see any real prospect of the present applicant succeeding in this court on a challenge to the Secretary of State's decision in the present case. The Secretary of State's reasoning appears to be coherent and has not really been challenged as such if the general considerations which he took into account were legitimate to consider.

29. Accordingly it seems to me that we should refuse this application, leaving Miss Krause's clients in a position where they can probably now say that any requirement that domestic remedies be exhausted has been satisfied, although that is not a point on which we have to express any view.

LORD JUSTICE JONATHAN PARKER:

30. I also agree that these applications should be refused for the reasons my Lord, Lord Justice Auld, has given. It seems to me that the decision of this court in Mellor places, effectively, an insuperable obstacle in the applicant's way.

31. I accordingly agree with the order proposed.

Order: Application refused

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