MOOT COURT

CASE NR 1

I. THE CIRCUMSTANCES OF THE CASE

Application filed by four Austrian nationals, Ms S.H., Mr D.H., Ms. H. E.-G. and Mr M.G. ("the applicants"),

The first applicant is married to the second applicant and the third applicant to the fourth applicant.

The first applicant suffers from fallopian-tube-related infertility (eileiterbedingter Sterilität). She produces ova, but, due to her blocked fallopian tubes, these cannot pass to the uterus, so natural fertilisation is impossible. The second applicant, her husband, is infertile.

The third applicant suffers from agonadism (Gonadendysgenesie), which means that she does not produce ova at all. Thus she is completely infertile but has a fully developed uterus. The fourth applicant, her husband, in contrast to the second applicant, can produce sperm fit for procreation.

On 4 May 1998 the first and third applicants lodged an application (Individualantrag) with the Constitutional Court (Verfassungsgerichtshof) for a review of the constitutionality of section 3(1) and section 3(2) of the Artificial Procreation Act (Fortpflanzungsmedizingesetz - see paragraphs 27-34 below).

The applicants argued before the Constitutional Court that they were directly affected by the above provisions. The first applicant submitted that she could not conceive a child by natural means; thus the only way open to her and her husband would be in vitro fertilisation using sperm from a donor. That medical technique was, however, ruled out by section 3(1) and section 3(2) of the Artificial Procreation Act. The third applicant submitted that she was infertile. As she suffered from agonadism, she did not produce ova at all. Thus, the only way open to her of conceiving a child was to resort to a medical technique of artificial procreation referred to as heterologous embryo transfer, which would entail implanting into her uterus an embryo conceived with ova from a donor and sperm from the fourth applicant. However, that method was not allowed under the Artificial Procreation Act.

The first and third applicant argued before the Constitutional Court that the impossibility of using the above-mentioned medical techniques for medically assisted conception was a breach of their rights under Article 8 of the Convention. They also relied on Article 12 of the Convention and on Article 7 of the Federal Constitution, which guarantees equal treatment.

On 4 October 1999 the Constitutional Court held a public hearing in which the first applicant, assisted by counsel, participated.

On 14 October 1999 the Constitutional Court decided on the first and third applicants' request. The Constitutional Court found that their request was partly admissible in so far as the wording concerned their specific case. In this respect, it found that the provisions of section 3 of the Artificial Procreation Act, which prohibited the use of certain procreation techniques, was directly applicable to the applicants' case without it being necessary for a decision by a court or administrative authority to be taken.

As regards the merits of their complaints the Constitutional Court considered that Article 8 was applicable in the applicants' case. Although no case-law of the European Court of Human Rights existed on the matter, it was evident, in the Constitutional Court's view, that the decision of spouses or a cohabiting couple to conceive a child and make use of medically assisted procreation techniques to that end fell within the sphere of protection under Article 8.

The impugned provisions of the Artificial Procreation Act interfered with the exercise of this freedom in so far as they limited the scope of permitted medical techniques of artificial procreation. As for the justification for such an interference, the Constitutional Court observed that the legislature, when enacting the Artificial Procreation Act, had tried to find a solution by balancing the conflicting interests of human dignity, the right to procreation and the well-being of children. Thus, it had enacted as leading features of the legislation that, in principle, only homologous methods – such as using ova and sperm from the spouses or from the cohabiting couple itself – and methods which did not involve a particularly sophisticated technique and were not too far removed from natural means of conception would be allowed. The aim was to avoid the forming of unusual personal relations such as a child having more than one biological mother (a genetic mother and one carrying the child) and to avoid the risk of exploitation of women.

The use of in vitro fertilisation as opposed to natural procreation raised serious issues as to the well-being of children thus conceived, their health and their rights, and also touched upon the ethical and moral values of society and entailed the risk of commercialisation and selective reproduction (Zuchtauswahl).

Applying the principle of proportionality under Article 8 § 2, however, such concerns could not lead to a total ban on all possible medically assisted procreation techniques, as the extent to which public interests were concerned depended essentially on whether a homologous technique (having recourse to the gametes of the couple) or heterologous technique (having recourse to gametes external to the couple) was used.

In the Constitutional Court's view, the legislature had not overstepped the margin of appreciation afforded to member States when it established the permissibility of homologous methods as a rule and insemination using donor sperm as an exception. The choices the legislature had made reflected the then current state of medical science and the consensus in society. It did not mean, however, that these criteria were not subject to developments which the legislature would have to take into account in the future.

The legislature had also not neglected the interests of men and women who had to avail themselves of artificial procreation techniques. Besides strictly homologous techniques it had accepted insemination using sperm from donors. Such a technique had been known and used for a long time and would not bring about unusual family relationships. Further, the use of these techniques was not restricted to married couples but also included cohabiting couples. However, the interests of the individuals concerned had to give way to the above-mentioned public interest when a child could not be conceived by having recourse to homologous techniques.

The Constitutional Court also found that for the legislature to prohibit heterologous techniques, while accepting as lawful only homologous techniques, was not in breach of the constitutional principle of equality which prohibits discrimination. The difference in treatment between the two techniques was justified because, as pointed out above, the same objections could not be raised against the homologous method as against the heterologous one. As a consequence, the legislature was not bound to apply strictly identical regulations to both. Also, the fact that insemination in vivo with donor sperm was allowed while ovum donation was not, did not amount to discrimination since sperm donation was not considered to give rise to a risk of creating unusual relationships which might adversely affect the well-being of a future child.

II. RELEVANT LEGAL MATERIAL

Domestic law: the Artificial Procreation Act

The Artificial Procreation Act (Fortpflanzungsmedizingesetz, Federal Law Gazette 275/1992) regulates the use of medical techniques for inducing conception of a child by means other than copulation (section 1(1)).

These methods comprise: (i) introduction of sperm into the reproductive organs of a woman, (ii) unification of ovum and sperm outside the body of a woman, (iii) introduction of viable cells into the uterus or fallopian tube of a woman and (iv) introduction of ovum cells or ovum cells with sperm into the uterus or fallopian tube of a woman (section 1(2)).

Medically assisted procreation is allowed only within a marriage or a relationship similar to marriage, and may only be carried out if every other possible and reasonable treatment aimed at inducing pregnancy through intercourse has failed or has no reasonable chance of success (section 2).

Under section 3(1), only ova and sperm from spouses or from persons living in a relationship similar to marriage (Lebensgefährten) may be used for the purpose of

medically assisted procreation. In exceptional circumstances, i.e. if the spouse or male partner is infertile, sperm from a third person may be used for artificial insemination when introducing sperm into the reproductive organs of a woman (section 3(2)). This is called in vivo fertilisation. In all other circumstances, and in particular for the purpose of in vitro fertilisation, the use of sperm by donors is prohibited.

Under section 3(3), ova or viable cells may only be used for the woman from whom they originate. Thus ovum donation is always prohibited.

The further provisions of the Artificial Procreation Act stipulate, inter alia, that medically assisted procreation may only be carried out by specialised physicians and in specially equipped hospitals or surgeries (section 4) and with the express and written consent of the spouses or cohabiting persons (section 8).

In 1999 the Artificial Procreation Act was supplemented by a Federal Act Establishing a Fund for Financing In vitro Fertilisation Treatment (Bundesgesetz mit dem ein Fonds zur Finanzierung der In vitro-Fertilisiation eingerichtet wird – Federal Law Gazette Part I No. 180/1999) in order to subsidise in vitro fertilisation treatment allowed under the Artificial Procreation Act.

The issue of maternity and paternity is regulated in the Civil Code (Allgemeines Bürgerliches Gesetzbuch). Under Article 137b, introduced at the same time as when the Artificial Procreation Act entered into force, the mother of a child is the woman who has given birth to that child. As regards paternity, Article 163 provides that the father of a child is the male person who has had sexual intercourse with the mother within a certain period of time (180 to 300 days) before the birth. If the mother has undergone medically assisted procreation treatment using sperm from a donor, the father is the person who has given his consent to that treatment, that is, the spouse or male partner. A sperm donor can in no circumstances be recognised as the father of the child.

III. CLAIM

The applicants complained that the prohibition of heterologous artificial procreation techniques for in vitro fertilisation laid down by section 3(1) and 3(2) of the Artificial Procreation Act had violated their rights under Article 8 of the Convention.

Article 8 of the Convention provides:

“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.”

CASE NR 2

I. THE CIRCUMSTANCES OF THE CASE

On 12 July 2000 Ms X and her partner J, born in November 1976, started fertility treatment at the Bath Assisted Conception Clinic. On 10 October 2000, during an appointment at the clinic, Ms X was diagnosed with a pre-cancerous condition of her ovaries and was offered one cycle of in vitro fertilization (IVF) treatment prior to the surgical removal of her ovaries. During the consultation held that day with medical staff, Ms X and J were informed that they would each need to sign a form consenting to the treatment and that, in accordance with the provisions of the Human Fertilisation and Embryology Act 1990 ("the 1990 Act"), it would be possible for either of them to withdraw his or her consent at any time before the embryos were implanted in the applicant's uterus.

Ms X considered whether she should explore other means of having her remaining eggs fertilised, to guard against the possibility of her relationship with J ending. J reassured her that that would not happen.

On 12 November 2001 the couple attended the clinic for treatment, resulting in the creation of six embryos which were placed in storage and, on 26 November 2001, Ms X underwent an operation to remove her ovaries. She was told she would need to wait for two years before the implantation of the embryos in her uterus.

In May 2002 the relationship between the applicant and J ended and subsequently, in accordance with the 1990 Act, he informed the clinic that he did not consent to Ms X using the embryos alone or their continued storage.

The applicant brought proceedings before the High Court seeking, among other things, an injunction to require J to give his consent. Her claim was refused on 1 October 2003, J having been found to have acted in good faith, as he had embarked on the treatment on the basis that his relationship with Ms X would continue. On 1 October 2004, the Court of Appeal upheld the High Court's judgment. Leave to appeal was refused.

On 26 January 2005 the clinic informed the applicant that it was under a legal obligation to destroy the embryos, and intended to do so on 23 February 2005.

On 27 February 2005 the European Court of Human Rights, to whom the applicant had applied, requested, under Rule 39 (interim measures) of the Rules of Court, that the United Kingdom Government take appropriate measures to prevent the embryos being destroyed by the clinic before the Court had been able to examine the case. The embryos were not destroyed.

The applicant, for whom the embryos represent her only chance of bearing a child to which she is genetically related, has undergone successful treatment for her pre-cancerous condition and is medically fit to continue with implantation of the embryos. It was understood that the clinic was willing to treat her, subject to J's consent.

IV. RELEVANT LEGAL MATERIAL

Human Fertilisation and Embryology Act 1990.

Important policy objective of the 1990 Act was to ensure that both gamete providers (i.e. the providers of the sperm and eggs) continued to consent from the commencement of the treatment until the implantation of the embryos. The primacy of continuing bilateral consent had been central to the Warnock Committee's recommendations about the regulation of IVF treatment and although neither the Warnock Report nor the Green Paper had discussed what was to happen if the parties became estranged during treatment, the White Paper emphasised that donors of genetic material would have the right under the proposed legislation to vary or withdraw their consent at any time before the embryos were used.

Schedule 3 provides:

"Consents to use of gametes or embryos

Consent

1. A consent under this Schedule must be given in writing and, in this Schedule, 'effective consent' means a consent under this Schedule which has not been withdrawn.

2. — (1) A consent to the use of any embryo must specify one or more of the following purposes—

(a) use in providing treatment services to the person giving consent, or that person and another specified person together,

(b) use in providing treatment services to persons not including the person giving consent, or

(c) use for the purposes of any project of research,

and may specify conditions subject to which the embryo may be so used.

(2) A consent to the storage of any gametes or any embryo must—

(a) specify the maximum period of storage (if less than the statutory storage period), and

(b) state what is to be done with the gametes or embryo if the person who gave the consent dies or is unable because of incapacity to vary the terms of the consent or to revoke it,

and may specify conditions subject to which the gametes or embryo may remain in storage.

(3) A consent under this Schedule must provide for such other matters as the Authority may specify in directions.

(4) A consent under this Schedule may apply—

(a) to the use or storage of a particular embryo, or

(b) in the case of a person providing gametes, to the use or storage of any embryo whose creation may be brought about using those gametes,

and in the paragraph (b) case the terms of the consent may be varied, or the consent may be withdrawn, in accordance with this Schedule either generally or in relation to a particular embryo or particular embryos.

Variation and withdrawal of consent

4.—(1) The terms of any consent under this Schedule may from time to time be varied, and the consent may be withdrawn, by notice given by the person who gave the consent to the person keeping the gametes or embryo to which the consent is relevant.

(2) The terms of any consent to the use of any embryo cannot be varied, and such consent cannot be withdrawn, once the embryo has been used—

(a) in providing treatment services, or

(b) for the purposes of any project of research.

III. COMPLAINT

The applicant complained that domestic law permitted her former partner effectively to withdraw his consent to the storage and use by her of embryos created jointly by them, preventing her from ever having a child to whom she would be genetically related. She relies on Articles 2, 8 and 14 of the Convention.

Article 2 of the Convention privides:

“1. Everyone’s right to life shall be protected by law. ...”

Article 8 of the Convention provides:

“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."

Article 14 of the Convention provides:

"The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."