

Policing Procreation: Prisoners, Artificial Insemination and the Law

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Abstract

This article explores the implications of two recent case law decisions in the UK in which prisoners and their partners have sought to utilise the European Convention of Human Rights to challenge the refusal by the Prison Service to provide access to facilities for artificial insemination. After a discussion of the facts and legal principles arising from these cases, the author goes on to consider broader questions of the rights of prisoners' partners; the contested role of the welfare principle, and the challenges posed by recent research which promotes decisional privacy and autonomy in reproductive decision-making.

Introduction

In the ongoing debates prompted by advances in assisted reproduction and in understanding of human fertility, one issue has only been mentioned as an afterthought in much of the research literature in the United Kingdom, when, indeed, it has been mentioned at all: that is, the possibility of allowing male prisoners the opportunity to attempt to father children, and of allowing female prisoners to attempt to become pregnant.¹ The medical and family law literature has recognised and explored this topic to a greater extent than the penological literature, where even in the context of consideration of prisoners' rights this controversial issue has received little attention.² The relative invisibility of this issue in the UK stands in contrast to the situation in the USA where the constitutional challenges raised in the *Goodwin* case and more recently in the so-called 'procreation by Fed-Ex' case of *Gerber v. Hickman* have led to a deluge of published articles debating the issues.³ In addition, the topic came to public notice in 2002 when the New York Post reported that a prisoner and his partner, who were ineligible for conjugal visits, had allegedly bribed guards to smuggle sperm out of a prison and into a fertility clinic, as a consequence of which their daughter was conceived and born⁴. It could, however, be argued that despite the relative lack of publicity the legal position in the UK is more complex than in the US. In the UK, in contrast with many other penal jurisdictions, there is no provision for conjugal visits for prisoners and their partners. If a prisoner and his or her partner wish to conceive a child together, unless the prisoner is permitted Release on Temporary Licence (ROTL), then the prisoner has no alternative but to seek access to facilities for artificial insemination. As Sutherland writes, '*unlike the position in the United States, the right of prisoners to procreative freedom in the United Kingdom is not removed at the prison gates*'.⁵ In contrast with the situation in the USA, where there is a blanket ban, the decision as to whether to grant a prisoner access to such facilities is made by the Family Ties Unit, part of the Prisoner Administration Group of the Prison Service.⁶ Where prisoners and their families wish to challenge a decision such as this, judicial review and proceedings under the Human Rights Act 1998 provide valuable mechanisms, as does recourse to the European Court of Human Rights.⁷ It is, arguably, the discretionary nature of this decision which makes this issue potentially more thought-provoking in legal terms than if there were an outright prohibition on access to these facilities.

The Recent Case Law in the United Kingdom

The Mellor Case

In *The Queen on the Application of Mellor v. Secretary of State for the Home Department*⁸, the Court of Appeal upheld a judgement by Forbes J dismissing an application from a prisoner who was seeking access to artificial insemination. At the time of the judgement, Gavin Mellor was serving a life sentence, having been convicted of murder in 1995. The tariff element of his sentence was due to expire in 2006, although it was possible that he could be granted temporary release prior to that date. His wife, whom he married in prison in 1997, would be 31 when his tariff expired in February 2006. Mellor was challenging Home Office policy which, whilst not operating a blanket ban on artificial insemination, allows access to appropriate facilities only in exceptional circumstances. Mellor claimed that the refusal to allow him access to AI facilities breached his right to respect for private and family life under article 8 of the European Convention of Human Rights (ECHR), and his right to marry and found a family under Article 12.

The court rejected Mellor's claim, taking the view that one of the purposes of imprisonment was to punish the criminal by depriving him of certain rights and pleasures which he could only enjoy at liberty, including the enjoyment of family life, the exercise of conjugal rights and the right to found a family. In his judgment, Lord Phillips argued that a policy which generally accorded prisoners the right to conceive children by AI would '*raise difficult ethical questions and give rise to legitimate public concern*'. He also discussed the difficulties of creating a de facto single-parent family, contending that it is both legitimate and desirable that, when considering whether to have a general policy of facilitating AI for prisoners or the wives of prisoners, the state should consider the implications of children being raised in those circumstances.

This case was brought by a prisoner in relation to his own rights, not that of his partner, although as Mellor pointed out in his initial letter of application, his wife also had a right to found a family. Article 8 appears to protect de facto family life: under Article 12, it could be argued that, following the decision of the ECHR in *X & Y v. Switzerland*⁹, if the applicants are married they have therefore founded a family.¹⁰ Depending on how 'founding a family' is defined, if a male prisoner is denied access to facilities for AI, then in order to exercise her own rights his partner would either have to have sex with someone other than her husband, or conceive through formal or informal Artificial Insemination by Donor (AID), and thus bear a child of whom her husband would not be the biological father. Thus the partners of prisoners denied access to AI are themselves eligible to challenge the policy on the grounds that their own rights are being infringed, although to date only one prisoners' wife has sought to challenge the denial of AI facilities on these grounds, with no success either initially or on appeal.¹¹

The Dickson Case

In October 2003 Kirk Dickson applied for facilities to artificially inseminate his wife, which was refused. In his letter refusing access to AI facilities, the Secretary of State set out his policy for responding to such requests, which is very close to that considered by the court in *Mellor*.¹² Lorraine Dickson, his wife, failed in her subsequent application for judicial review. Lorraine Dickson, herself an ex-prisoner, befriended Karl Dickson, who is

-serving a mandatory life sentence, via the prison pen friend scheme and married him in 2001. She has since been released from prison. Her husband will not be eligible to apply for release on licence until 2009, by which time she will be 51.¹³ Mr Dickson has no children; Mrs. Dickson has two adult children and one school-age child another relationship. In seeking permission to apply for judicial review, her barrister argued that there were ‘exceptional circumstances’ why AI facilities should be provided: however Pitchford J said that the Prison Service were justified in refusing such facilities, and in taking into account that their relationship had not been tested outside the prison; the ‘violent circumstances’ of Kirk Dickson’s offence¹⁴; and the fact that he would not be with the child during a large part of the child’s formative years. Lorraine Dickson already has three children by other relationships, and the judge refused to accept that the couple’s desire to have a child ‘trumped all other considerations.’ The Dicksons then sought permission to appeal this earlier decision, and asked for an extension of time in which to do so. In September 2004 the Court of Appeal ruled on this application and refused the Dicksons leave to apply for judicial review, stressing the validity of the Prison Service policy, and describing the Home Secretary’s decision to refuse AI facilities as ‘*an exercise of discretion and proportionality.*’

Analysis

These cases raise important questions about the nature, impact and purposes of imprisonment. Both highlight the ongoing process of interpreting the rights of prisoners and their families under the European Convention of Human Rights and, more philosophically, prompt consideration as to whether the state has a legitimate interest in regulating the creation of the children of offenders.

Punishment and the rights of prisoners

Professor John Williams challenges the loss of the right or opportunity to procreate as a ‘natural consequence of imprisonment’ as expounded by Lord Phillips in *Mellor*, and explores the court’s reasoning concerning the welfare of the child and the problems of guaranteeing equal treatment for male and female inmates.¹⁵ He contends that the explicit denial of prisoners’ rights to have children appears to have no authority and contradicts Prison Rule 4. However, the European Court of Human Rights has not yet found a violation of the ECHR where the right of prisoners to procreate was an issue.¹⁶ Of course, if prisoners were allowed conjugal visits then there would be no need to seek access to alternative means of conception, but it has been argued that the necessary privacy required could endanger the security of the prison.¹⁷ The same, however, is not true of AI, which offers a method by which a prisoner can exercise his right to found a family which is compatible with the demands of prison security.

At the core of the debate is the question of whether the right to procreate is lost as a collateral consequence of imprisonment, not only for offenders but also for their partners. It is indisputable that imprisonment removes or limits some rights of prisoners, but it is also indisputable that imprisonment does not automatically result in the forfeiture of all rights at the prison gate. The enactment of the Human Rights Act 1998 has generated litigation and also a greater awareness of the relevance of human rights issues in the prison context.¹⁸ The cases have explored *which* rights survive incarceration, and to what extent. For example, in the recent case of *Hirst v United Kingdom* the European Court of Human Rights considered

the legality of the disenfranchisement of convicted prisoners whilst in detention.¹⁹ In his recent inaugural professorial lecture Andrew Coyle reiterated that the classic formulation of prisoners' rights laid down in 1982 in *Raymond v. Honey*²⁰ and subsequently approved by the House of Lords in *Simms*²¹ still applies and that its consequences are still every bit as important as they were in 1982²²; that is, in the words of Lord Wilberforce: '*a convicted prisoner...retains all civil rights which are not taken away expressly or by necessary implication*'. Although apparently following *Simms*, Lord Phillips in *Mellor* seems to suggest that the state's interest in restricting rights is a necessary consequence of imprisonment, which can only be successfully challenged if disproportionate.

The decision in *Mellor* has been subsequently criticised by several authors. John Williams refers to the policy as '*the constructive sterilisation of prisoners*' and argues that the policy as accepted does not provide the appropriate level of respect for prisoners' rights. He is dismissive of the court's reliance on concerns that it would be inherently problematic to grant access to male inmates because then such access would have to be granted to women, arguing that '*to deny a right to somebody simply on the basis that another person may be denied it does not rationally further the cause of equal opportunities*.' This view of the *Mellor* decision is shared by Livingstone and others, who refer to it as '*a particularly regressive approach to prisoners' legal rights*', arguing that '*the level of deprivation which is legitimated by a sentence of imprisonment is considerably harsher [in the UK] than in other countries in Europe*'.²³ Indeed, these policies controlling access to AI have been referred to as '*the new eugenics*'.²⁴ A contrasting view is that presented by Pollybeth Proctor from an American perspective. She argues that close scrutiny of English jurisprudence and societal values, as well as Convention case law and article provisions, provides ample justification for the understanding of the right to procreate as interpreted in *Mellor*.²⁵ It must be remembered that the decision is of a discretionary nature and thus only some prisoners are prohibited from access to AI. Both men in these cases were serving mandatory life sentences: it is possible therefore that the courts are drawing a distinction between those convicted of murder and those convicted of other offences.²⁶

Research into the collateral consequences of imprisonment for prisoners and their families has documented the stigma and social exclusion of prisoners' family members, especially prisoners' partners.²⁷ As the research literature documents, it is tempting but too simplistic to argue that since they are not convicted prisoners themselves, prisoners' partners and family members retain all the same rights as other citizens. It is not easy to explain why the partner of a prisoner can lose her own right to found a family as a consequence of being married to a prisoner, since prisoners' partners have not been convicted and imprisoned. It is, however, well-established in the criminological research literature that prisoners' family members are frequently treated as 'guilty by association,' stigmatised and taking on a share of the 'spoiled identity' of the imprisoned family member.²⁸ In the *Mellor* judgment, Lord Phillips cited the 1975 case of *X v. UK*²⁹, a case concerning the denial of conjugal rights, and concluded that '*a lawfully convicted prisoner is responsible for his own situation and cannot complain on that account that his right to found a family has been infringed*.' The courts could, therefore, be applying the same principle to prisoners' partners. In both of these cases the women married serving prisoners, and for both of these married couples the judges referred to the fact that their relationships had not existed outside the prison. The prison service policy suggests that the situation would be different if the marriage had existed prior to the period of incarceration.

The persistence of the welfare principle and the reproductive autonomy debate

The future welfare of children to be conceived by artificial insemination was a key consideration in *Mellor* and was reiterated in *Dickson*. The Court of Appeal in *Mellor* argued that it was better for the well-being of children to be in contact with both parents and in the *Dickson* cases, the courts questioned the interests of the putative child, the judges stressing the desirability of children staying in contact with both parents in a stable family setting. The adoption of these welfare considerations in this context reflects the principle embodied in Section 13(5) of the Human Fertilisation and Embryology Act 1990 which provides that, in relation to fertility services, a woman should not be provided with treatment services unless account has been taken of the welfare of any child who may be born as a result of the treatment. The welfare of children has been of fundamental importance in legal decision making in family law for many years; however, as Emily Jackson (2002) points out, the welfare principle enshrined in the HFEA 1990 differs from previous formulations such as that under the Children Act 1989 in that it purports to make a child's best interests relevant to a judgment made prior to that child's conception.³⁰ It is clear from reading the judgments in *Mellor* and *Dickson* that a version of this welfare principle operates in the decision-making process of the Prison Service even though the HFEA itself does not apply in this context.

This application of a welfare principle in relation to pre-conception decision-making in relation to assisted reproduction has been vociferously challenged and less convincingly defended.³¹ In an insightful article challenging the primacy of the welfare principle Jackson argues that the inclusion of welfare considerations in the decision in *Mellor* is misguided and that to consider the future welfare of any child a prisoner may conceive is '*too speculative a consideration*' in this context.³² In referring to the 'best interests of the unborn child' the Court of Appeal in *Dickson* hit a complex philosophical issue head-on: that is, the 'non-identity problem' - the person protected never benefits from this interpretation of their best interests because they are never born.³³ As Sutherland perceptively points out, whilst it is undisputed that the state has obligations to children already born, in terms of promoting their welfare and protecting them from harm, '*in denying the opportunity to procreate it is going a great deal further by policing access to parenthood itself*'³⁴. Intuitively one may argue that it is undesirable for someone who has offended against children to be allowed to conceive a child; however, it is difficult to convincingly argue that it is in a child's best interests not to exist. To disallow certain 'unfit' individuals from conceiving is, after all, a eugenic principle, whereas child protection is a legitimate function of government.³⁵

A linked question is that of whether the state, and in this situation, the Prison Service, have a legitimate interest in regulating access to resources to aid conception such as AI facilities. When the law in relation to assisted reproduction is being discussed it often relates to reproductive technologies such as in-vitro fertilisation (IVF) which is undoubtedly expensive; however, where prisoners' access to AI is concerned no such technological expense may be necessary. After all, it is possible to accomplish AI simply by a male prisoner handing over an appropriately filled receptacle to his partner during visiting time. Although not explicitly stated in *Mellor*, it is possible that the courts were considering the financial implications of creating a child, assuming that any child would impose a burden on the state. However, Lorraine Dickson argued that she is more than capable of supporting a child financially and there is nothing in these cases to indicate that

either of the women in these cases would not be capable of financially supporting any child.³⁶

The approach to procreation embodied in these cases sets a higher standard of proof of potential adequacy as parents for prisoners than any putative non-imprisoned parent usually has to undergo before conceiving a child. As Roger McIntire discussed in 1973, one does not require a license to be a parent.³⁷ This ‘policing of procreation’ is experienced by non-imprisoned couples seeking fertility services, and has been vigorously opposed by critics who argue for greater decisional privacy or, as it has been termed, ‘decisional liberty.’³⁸ It could be argued that the fact of imprisonment removes any right to autonomous decision making as to conception, in that imprisonment entails many manifestations of the loss of privacy; however, it is philosophically and legally difficult to justify the extension of this loss of autonomy to prisoners’ unconvicted partners. Couples who cannot conceive naturally are subject to having to satisfy a higher standard of proof to become parents than those who can conceive without assistance; the prisoners’ cases confirm that such a standard also applies to detained prisoners. It has been argued that ‘*we should each have the liberty to shield certain personal decisions from public scrutiny.*’³⁹ Perhaps most worryingly for those concerned with human rights, the decision as to whether the welfare test is satisfied is not made by a panel of appropriately qualified experts or professionals, as in the case of doctors and the Human Fertilisation and Embryology Authority, but by an administrative department of the Prison Service.

Conclusion

The discretionary nature of the decision to allow prisoners and their partners access to artificial insemination facilities means that there will continue to be potential for litigation especially in the light of ongoing academic debates around autonomy, privacy and rights in relation to personal decision-making. This is especially important in relation to the non-imprisoned partners of prisoners. It is unsurprising that the courts have chosen to interpret the rights of prisoners and their families in this way, since these attitudes reflect the shift towards harsher sentencing and penal policies in the UK and the USA⁴⁰. It remains to be seen, however, whether the principles expounded in the *Mellor* and *Dickson* cases will continue to govern prisoners’ and their partners’ access to artificial insemination facilities in the future.

¹ This issue is, significantly, briefly touched upon by Professor Emily Jackson in her groundbreaking and influential discussions of reproductive governance and autonomy: see, for example, Jackson, E. (2001) *Regulating Reproduction*, Oxford, Hart and Jackson, E. (2002) ‘Conception and the Irrelevance of the Welfare Principle’, *Modern Law Review*, Vol. 65, No.2, pp. 176-203. For a discussion of whether female prisoners should have the right to become pregnant, see Dunn, S. (2002) ‘The ‘Art’ of Procreation: Why Assisted Reproduction Technology Allows for the Preservation of Female Prisoners’ Right to Procreate’, *Fordham Law Review*, Volume 70, pp. 2561. It is important to note that although it would be more accurate to refer to the topic under discussion as relating to ‘permitting prisoners to attempt to become parents’ or ‘permitting prisoners’ family members the opportunity to attempt to conceive’ the case reports and subsequent articles tend towards an assumption that AI will lead to conception which is, of course, not always the case.

² For an example of its inclusion and a limited discussion in the context of family law see Diduck, A. and F. Kaganas (2006) *Family Law, Gender and the State*, London, Hart Publishing.

3 Goodwin v. Turner 702 F. Supp. 1452 (W.D.Mo.1988); Gerber v. Hickman 273.F.3d 843 (9th Cir.2001). See also Bozzuti, J. (2003) 'Judicial Birth Control? The Ninth Circuit's Examination of the Fundamental Right to Procreate in Gerber v. Hickman', St. John's Law Review, Vol. 77, pp.625-647; Roth, R. (2004) "'No New Babies': Gender Inequality and Reproductive Control in the Criminal Justice and Prison Systems', American University Journal of Gender, Social Policy and Law, Vol. 12, pp.391-424.

⁴ See Dan Kadison & Murray Weiss, Mob Sperm Bust, N.Y.Post, Dec. 3rd 2002, p.7.

5 Sutherland, E. (2003) 'Procreative Freedom and Convicted Criminals in the United States and the United Kingdom: is Child Welfare Becoming the New Eugenics?', Oregon Law Review, Vol. 82, pp.1033-1065.

6 This provision applies to male prisoners. As far as I am aware no similar applications have been made by female prisoners.

⁷ Note that the Prisons Ombudsman is not empowered to deal with complaints from families.

8 [2001] 3 WLR 533.

9 (1978) 13 DR 241

10 Williams (2002) 'Have the Courts Got it Right?- The Queen on the Application of Mellor v Secretary of State for the Home Department', Child and Family Law Quarterly, Vol. 14, No.2.

11 The most recent ruling in this ongoing legal dispute is *Kirk Dickson, Lorraine Dickson v. Premier Prison Service Ltd., Secretary of State for the Home Department* [2004] EWCA Civ 1477.

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

13 Hull Daily Mail [2003] 'Let Me Have Killer's Baby', September 6 2003, p.2.

14 He killed a man in a fight.

15 Williams, J. (2002) supra.

16 Proctor, P. (2003) 'Procreating from Prison: Evaluating British Prisoners' Right to Artificially Inseminate their Wives under the United Kingdom's New Human Rights Act and the 2001 Mellor case', Georgia Journal of International and Comparative Law, Winter 2003.

17 A vivid autobiographical account of conjugal visits in the US context is given in Bandele, A. (1999) *The Prisoner's Wife: a memoir*, New York, Washington Square Press.

18 See, for example, Coyle, A. (2002) 'A Human Rights Approach to Prison Management: A Handbook for Prison Staff', International Centre for Prison Studies, London.

19 See Hirst v. United Kingdom (Application No.74025/01).

20 [1983] 1 AC 1

21 [2000] 2 AC 115

22 Coyle, A. (2005) 'On being a prisoner in the United Kingdom in the 21st century. Does the Wilberforce judgement still apply?', Inaugural lecture, International Centre for Prison Studies, King's College London, 22nd March 2005.

23 Owen, T., S.Livingstone & A.Macdonald (2003) *Prison Law*, Third Edition, Oxford, Oxford University Press.

24 Williams, J. (2002) op. cit.; Sutherland, E. (2003) 'Procreative Freedom and Convicted Criminals in the United States and the United Kingdom: is Child Welfare Becoming the New Eugenics?', Oregon Law Review, Vol. 82, pp.1033-1065.

25 Proctor (2003) supra.

²⁶ Other inmates serving long sentences have been granted access to AI on the grounds that their wives would be too old to conceive on their release, including in one case, a drug smuggler serving a 17-year sentence (see Sunday Times (2002) 'Prisoners take up their right to father children from prison', December 15, p12.)

²⁷ The literature on this is extensive and documents a range of challenges faced by prisoners' partners and children both during the offender's custodial detention and also afterwards. A detailed discussion of this research is beyond the scope of this article, but for an informative summary see Murray, J. (2005) 'The effects of imprisonment on families and children of prisoners' in Liebling, A. and S. Maruna (eds.) *The Effects of Imprisonment*, Cullompton, Willan.pp.442-462.

28 Social Exclusion Unit (2002) *Reducing re-offending by ex-prisoners*, London, Social Exclusion Unit; Codd, H. (1998) 'Prisoners' Families: the 'Forgotten Victims,' Probation Journal, Vol.45, No.3 pp.148-154; Codd, H. (2000) 'Age, Role Changes and Gender Power in Family Relationships: The Experiences of Older Female Partners of Male Prisoners,' *Women & Criminal Justice*, Vol. 12 Issue 2/3.pp.63-93; Codd, H. (2002) 'The ties that bind': Feminist Perspectives on Self-Help Groups for Prisoners' Partners, *Howard Journal of Criminal Justice*, Vol.41, No.4, pp.334-347. Codd, H. (2003)

‘Women Inside and Out: Prisoners’ Partners, Women in Prison and the Struggle for Identity’, Internet Journal of Criminology. <http://www.flashmousepublishing.com>.

29 (1975) 2 D&R 105, cited in the Mellor judgment (*supra*).

³⁰ For a more detailed summary of the welfare principle in relation to children see Diduck and Kaganas (2006) *ibid.* pp. 301-334.

³¹ Jackson (2002) *ibid.* For an attempt to challenge the view that decisional privacy ought to be respected, see Laing, J. & Oderberg, D. (2005) ‘Artificial Reproduction, the ‘Welfare Principle’ and the Common Good’, *Medical Law Review*, Vol. 13, p.328.

³² Jackson (2002) *op.cit.*, p.201.

33 See Robertson, J. (2004) ‘Procreative Liberty and Harm to Offspring in Assisted Reproduction’, *American Journal of Law & Medicine*, Vol. 30, pp. 7-40.

34 Sutherland, E. (2003) ‘Procreative Freedom and Convicted Criminals in the United States and the United Kingdom: is Child Welfare Becoming the New Eugenics?’, *Oregon Law Review*, Vol. 82, pp.1033-1065.

³⁵ See Jackson (2002) *ibid.* p. 188. It can be argued that there are also aspects of government policy which can have an impact on reproductive decision-making, such as the laws on sexual behaviour and prohibited marriage within certain degrees of familial relationship, which, in addition to child protection, are a legitimate function of government.

36 Of course, if prisoners earned realistic wages for their work or were eligible for at least the statutory minimum wage then a proportion of those wages could be paid as child maintenance.

37 Although his article discussed this possibility in a tongue-in-cheek way: see McIntire, R.(1973) ‘Parenthood Training or Mandatory Birth Control: Take Your Choice’, *Psychology Today*, October, p. 34.

³⁸ See Jackson (2001) and (2002) *op.cit.*: Harris, J. (1998) ‘Rights and Reproductive Choice’ in J.Harris and S.Holm (eds.) *The Future of Human Reproduction*, Oxford, Clarendon Press.

³⁹ Jackson, 2002: p. 178.

40 See, for example, Pratt, J., Brown, D., Hallsworth, S., Brown, M. and W. Morrison (2005) *The New Punitiveness: Trends, theories, perspectives*, Cullompton, Willan.