Evans v. the United Kingdom Case and the Principles of Justice and Proportionality

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The European Convention for the Protection of Human Rights and Fundamental Freedoms from 1950 in art.8 explicitly states the right to privacy of personal and family life of each person. The intervention of the state authorities in exercising that right shall not be admitted except in cases stipulated in the law and in those necessary for a democratic society in the interest of national and public security or of the economic prosperity of the country, to prevent riots or crimes, to protect health and morality or the rights and freedoms of the others.

The European Court of Human Rights /ECtHR/ has not had the opportunity to pass judgment on the balance between the mother and father's interests when exercising the right to family life. From a legal point of view the question about the right to paternity has arisen in front of the ECtHR concerning abortion or the decision on an intentional ending of the pregnancy. What have been evincive are the arguments of the Court with respect to the case *Boso v. Italy*[1]. In this case the wife of the plaintiff decided to end the pregnancy in spite of her husband's objection and disagreement. The complainant has pointed out that there had been a violation of his rights to family life as a potential parent /art.8/, as there had been a violation of the right to the unborn child's life /art.2/. The complainant had been dissatisfied with the fact that the right to take the decision to end the pregnancy had been given entirely to the mother, without taking into account the father's objections. Moreover, according to the complainant, giving the opportunity to the wife to get an abortion has prevented his right to raise a family, respectively the right to paternity.

In its judgment on the 5th Sept, 2005 the European Court of Human Rights pointed out that the right to private and family life, stipulated in art. 8 of the ECHR, could not be interpreted so expansively so as to include the husband's right to be consulted with about the abortion, which his wife intended to have[2]. The court had accepted that each interpretation of the right to potential paternity under art.8 of the Convention, in the cases where the mother had intended to have an abortion shall also take into consideration her rights, as she has been the person most affected by the pregnancy and its continuation or ending.

The court also pointed out that in this particular case the abortion was performed in conformity with the legislation of Italy and was aimed at protecting the mother's health – i.e. the intervention when exercising the right to private and family life was justified, since it was necessary for the protection of the other person's rights and freedoms. In this instance the court adopted that the hypothesis of art.8, par.2 of the ECHR was present, hence there was no

[1] № 50490/99

[2] Par.254

violation of art.8 of the ECHR and consequently of art.14 of the Convention too, and therefore disallowed the complaint.

Several years later the European Court of Human Rights had the opportunity to pronounce judgment again on the proportionality of the interests of the potential mother, father and unborn child. It considered the case *Evans v. The United Kingdom*[3]. The complainant Natallie Evans, together with her partner Mr Johnston, asked for sterility treatment. About three months later, after beginning the treatment the couple were informed that Ms Evans had small cancer formations in her ovaries which led to their surgical excision. Before the operation, the couple were suggested on an opportunity for some ova to be selected to be used for in-vitro fertilization. The procedure was concurred with by the couple, as they were notified that each other's consent could be withdrawn at any time before implanting the embryo. Mr Johnston assured Ms Evans that he would like to be the father of their children, and he gave his consent that the ova be fertilized immediately with his spermatozoa. (It was clarified to Ms Evans that the clinic did not have the opportunity to freeze only ova, as this method had less chance of success). A month later six embryos were successfully made and frozen. Ms Evans had an operation to excise her ovaries and was advised to wait for two years before trying to implant some of the embryos into her uterus.

Meanwhile the relationship between the complainant and Mr Johnston broke down, and he notified the clinic in writing that he would like the created and frozen embryos to be destroyed. The managing board of the clinic themselves notified Ms Evans that they were obliged to satisfy Mr Johnston's desire to destroy the embryos. Ms Evans approached the British *High Court* with the claim that Mr Johnston to gave his consent for the embryos to be preserved and used later. She also pointed out that the embryos were under the protection of art. 2 of ECHR, as well as her rights were being infringed under art. 8 and art. 14 of the Convention. The court passed a temporary judgement on preserving the embryo till the case was concluded, but it rejected Ms Evans's claim. Her complaint referred to the Court of Appeal was also rejected, whereupon she appealed to the European Court of Human Rights. At first on 7th March 2006, her complaint was rejected by the 7-member commission of the ECtHR with five votes to two, and after that the Grand Chamber passed judgement on the case. In its judgement on 10th April, 2007 the Grand Chamber of the European Court of Human Rights in Strasbourg gave its own interpretation of art.2, art.8 and art. 14 of the ECHR.

A. Regarding art. 2 of the Convention

Regarding art.2 of the ECHR the complainant claimed that the regulations in the English legislation, requesting the destruction of the embryos after the withdrawal of Mr Johnston's consent, violated the embryo's right to life. Art.2 of the Convention reads: "Everyone's right to life is protected by the law". The question of whether the text of art.2 comprises an unborn child has been raised in front of the ECtHR regarding the right to abortion, as disputed in lots of countries. The Strasbourg Court, in its 1980 judgment on the

[3] № 6339/05

case *Paton vs. The United Kingdom*[4], stated that art.2 did not guarantee unlimited right to life of an unborn child (foetus), and therefore the abortion of a 10-week foetus did not contradict art.2 if it was made in conformity with medical results. Analyzing the second sentence of art.2: "No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law", it is obvious that the authors of the Convention hardly had in mind the life of a foetus, while the exceptions, as mentioned in the second sentence, refer to the already born. Under the case *N. v. Norwey*[5] it was also confirmed that the interruption of a 14-week pregnancy did not violate art. 2 of the Convention, as it was pointed out that such a sphere was exclusively delicate and required both a delicate approach and trust in the national law of the respective country. In this sense, if the actions of the state authorities did not pass allowable limits, there was no reason to accept that there was a violation of art.2.

Looking back to the Evans case, the Grand Chamber has pointed out that there has been no common consent among the European countries regarding the issue of the moment that human life begins. In conformity with English legislation the embryo does not have independent rights and interests, and could hardly claim the right to life under art.2 of the Convention[6].

B. Regarding art. 8 of the Convention

Regarding art. 8 the Court accepted that "private life" is a term that refers to different aspects of the physical and social identity of the personality, including personality development as well as establishing and developing relationships with other persons and the surrounding world, and refers to the right to respect the decision of a particular person to be or not to be a parent. The law court stressed that the complainant did not attack those regulations or practices of national law that hindered her in becoming a mother – in a social, juridical or even physical sense – as she could even adopt a child or give birth to one through in-vitro method with donor gametes. The complainant attacked that British legislation that did not allow her to use the created together with Mr Johnston embryos, and thus deprived her of the right to have a child, genetically connected with her. The Grand Chamber of the ECtHR has accepted that the issue regarding the right to become a parent in the genetic sense refers to art.8 of the Convention[7].

The dilemma in the essence of the Evans case is connected with the principle of justice and it refers to two persons' rights as guaranteed by the Convention - satisfying one of them automatically leads to the rejection of other. If the embryos were allowed to be used by the complainant, it would mean that Mr Johnston would become a father against his will. But if the withdrawal of Mr Jonston's consent were to be be legally accepted, the complainant would be deprived of the opportunity to become a genetic parent[8].

[4] No 8416/78.
[5] No 17004/90.
[6] Par. 54 of the judgment.
[7] Par. 72
[8] Par. 73

The Grand Chamber has pointed out that the case had been not only a conflict between two persons, but the attacked act by the English legislation served broader interests – the interests of the society in general. Because of that, what is stipulated is the principle that in such cases it is important for both parents to give their consent, which will make things more clear and definite legally[9]. The principle of shared responsibility is highly important in English legislation. In September 2002, Prof. John Harris of the university of Manchester stated that during fertility treatment both partners' continuing consent was necessary at each level of the reproductive procedure. An eventual win of the case by Ms Evans would mean that the role of the man ends with inseminating the ovum[10].

The in-vitro fertilization method is fundamentally connected with exclusively delicate moral and ethical problems regarding the rapid development of medicine and science. As the issues related to the case Evans refer to spheres which the member states of the European Council do not have a common approach for, the ECtHR considers that the freedom of judgment given by a country-defendant, Great Britain in particular, should be comparatively greater[11], as the politics and the principles that shall be applied in these delicate and sensible fields should be defined by each country separately.

In the final analysis the Court, deeply sympathizing with the complainant, rejected the fact that her right to become a parent genetically should have great influence, and accepted that it should not be respected[12]. Taking into consideration such a claim would be to the detriment of not respecting Mr Jonston's unwillingness to have a child genetically connected with Ms Evans. The Court reckons that when there is a lack of a common approach among the European countries, the regulations of the national law should set a justified balance among competing interests, and in that case there is no violation of art.8 of the Convention.

C. Regarding art. 14 of the Convention

Art. 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms reads: „Exercising the rights and freedoms, stipulated in the Convention, should be provided without any discrimination, based on sex, race, skin complexion, religion, political and other convictions, national or social origin, belonging to a national minority, property, birth or some other indication."

Concerning art.14 of the Convention the complainant emphasized that this decree shall be interpreted with regard to art.7, pointing out that women, capable of conceiving without special treatment and help, did not undergo a control or influence on how the developed after the moment of fertilization, while a women using in vitro fertilization depended on the role of the sperm donor. The Court accepted that it was not necessary to pass judgement on the position of women using in vitro fertilization, as the reasons for the lack of violation of art.8 of the Convention represented a good and impartial justification for the lack of violation of art.14 too.

[9] Par. 74
[10] IVF wrangle cases go to court, BBC News, Wednesday, 11 September, 2002
[11] Par. 81
[12] Par.90

Even before the verdict, British judge Wall presented an interesting example concerning the principle of justice and the presence or absence of discrimination from another point of view. For instance, in case a man is ill with testicular cancer which would lead to his sterility and his spermatozoa, preserved before the surgical intervention, are used to be made and preserved embryos along with his partner?. If the couple broke up before implanting the embryos in the female organism, it could scarcely be said that she could not revoke her decision about sterility treatment and give up implanting. The national law regulations, as well as the rights as guaranteed by the Convention, should be equally applied regarding men and women[13].

However, four judges had a particular opinion (which was?) as they did not agree with the conclusion that there were no violations related to the particular case of art.8 and art.14 concerning art.8 of the Convention[14]. The reasons given referred basically to the following:

First, both the Court and the parties agreed that art.8 could be applied to the particular case regarding the complainant's right to respect her right to private and family life, in particular to respect her wish to become a parent genetically. The Court adopted that one of the main case issues was whether the regulations of the national legislation, enforced in this case, could achieve a balance between the public and private interests (par.76). The judges, having a particular opinion, considered that the intervention of the country has been stipulated by law and was aimed at keeping the public peace, ethics and other persons' rights - they did not agree, however, that the intervention was necessary and proportionate to the specific case's circumstances. Applying national legislation in that case is not proportionate, for no balance between both parties' interests was possible regarding this particular case's circumstances – the judgement, being in favour of Mr Johnston's choice not to become a parent, suggested an absolute and final impossibility for Ms Evans to become a genetic parent.

Moreover the four judges emphasized that Ms Evans acted conscientiously, relying on Mr Johnston's initial assurances that he wished to be the father of her children. Furthermore, the request to destroy the embryos meant destroying the complainant's ova. The legislation of the United Kingdom did not succeed in reaching a necessary and wise decision in this regard either. On the one hand the legislative act gives the right to the woman to have a child genetically connected with her, but on the other hand the same act actually deprives her forever of having such an opportunity, giving priority to the presence of both parents' consent. Such an approach could hardly be compatible with the requirements of art.8 and the main purposes of the Convention, protecting human dignity.

Concerning the reasons given by judge Wall in connection with the question of the presence or absence of discrimination, the four judges have emphasized that women are in a particular state giving birth to children(?), including the cases when the legislation tackles the issues of artificial insemination.

[13] Par.23

[14] The Judges Tuemen, Tsatsa-Nikolovska, Spielmann and Ziemele.

It shall be taken into consideration that the Court in Strasbourg could base its arguments on national legislation in any case, in spite of the fact that this could seem at first paradoxical, since the European Convention for human rights has been established with regard to national law. It is not always easy to base arguments on the regulations of national law, especially when it concerns some of the rights guaranteed by the Convention. For example, there is always a discrepancy between the right to abortion and the child's right to life, and therefore lawyers in Europe find it difficult to solve a similar dilemma. In such cases, and when there is not a common approach among the states parties to the Convention, the ECtHR has relied on "the matter of some delicacy" [15] since the beginning of its activity, and has tended to acknowledge the discretionary right of each state to control the respective relations.

The principle of proportionality means, as the Court in Strasbourg[16] has had the opportunity to point out several times, that there should be a balance between the interests of society and the individual person's rights when interpreting the Convention and enforcing its decrees with regard to a particular case. It is evident by the analysis of art.8-11 that this principle is an intrinsic part of the Convention, where there are restrictions imposed on the same right under certain circumstances together with the consolidation of the individual right to the person. However, each restriction of the right as guaranteed by the convention should be proportional to what it aims at. The Court applies the principle of proportionality not only in cases where there exists in the decree text an explicitly foreseen opportunity to restrict the individual right, but also when there are no specific instructions in the Convention, and the Court concludes on its own that the given right admits some restrictions. However, the principle of proportionality shall not change the essence of the right guaranteed. It is enforced with regard to art.14 of the Convention, as the Court emphasizes[17] that in order to acknowledge the governmental intervention as a discriminatory one it is obviously necessary for the method of intervention not to correspond to the legal purpose due to which the respective intervention is necessary.

As what was held up was came into force of Protocol 14 of the European Convention for the Human Rights and respectively joining the European Union to the ECHR, the member states of the EU took steps towards drawing their own catalogue of the main human rights and freedoms. The Charter of fundamental rights of the European Union was adopted by the European Council in Nice in December 2000, and amended and added to Strasbourg in December 2007. What has been adopted in the Charter of fundamental rights is the so called principle of the indivisibility of human rights – for the first time civil, political, economic and social rights are equally considered and established in a common way. Those right included in the charter are grouped by new criteria – on the basis of their subject regarding the integration process and their connection with the basic values of the Union (Benoit-Rohmer, 2009). There are rights from both groups in each part of the Charter – dignity, freedom, equality, esprit de

[15] *N. v. Norwey*
[16] For ex., par. 89 of the case *Soering v. The United Kingdom*.
[17] *Belgian Linguistics case*, p. 34.

corps, citizenry and justice. In part I „Dignity" the right to life is stipulated. As for the matter of abortion it is difficult to reach consent among the state members, the premature ending of the pregnancy as well as the right to life of the unborn child shall not be established in the Charter and the issue shall be resolved by the member states. Among the other rights in part I, what is of great interest is the so called bioethical rights – the prohibition of eugenic practices, the prohibition on making the human body and its parts as such a source of financial gain, as well as the prohibition of the reproductive cloning of human beings /art.3 of the Charter/.

Since now there has existed no case where the European Court of Justice (ECJ) has passed judgement that a given right as guaranteed by the Convention cannot be applied within Community law. However, for each particular case, for each particular right it depends on the will of the Court in Luxembourg if it will be accepted that a given basic right is a part of the legal system of the European Union. In order that a court ruling is to be enacted the ECJ pronounces its own judgment on the respective right or interprets one or another text of the ECHR, i.e not the ECtHR but the ECJ interprets the specific features of the respective right and its connection to the particular case. There is a risk in such a situation of establishing different practices when applying one and the same decree of the Convention, respectively regarding one and the same human rights on behalf of the ECtHR and the ECJ. As Prof. Florence Benoit-Rohmer states, there is a discrepancy in the practice of the both legal authorities regarding the inviolability of the home (Benoit-Rohmer, 2009). Whereas the ECtHR refers the inviolability not only to the private dwelling but also to the business one, the ECJ accepts that the inviolability of the home does not refer to business dwellings. Such differences are very rare and for the last years there regular meetings have been arranged of the judges from Strasbourg and Luxembourg in order to achieve one and the same interpretation of the law.

In conclusion, looking back to the *Evans case* it could be pointed out that increasing the opportunities related to the IVF and crioconservation will inevitably lead to new legal and ethical issues. Recently science has emphasized that children that were born from frozen embryos were more rarely prematurely born or retarded than the in-vitro babies born from non-frozen embryos. It is thought that crioconservation could increase with 15% the number of the successful in-vitro attempts, as freezing the embryos allow a complete test of the embryos to be done as well as a choosing of the ones with a greater chance of procuring a healght pregnancy. As it is known, however, the frozen embryo is a result of the initiative of two persons – a man and a woman, which sets conditions of potential legal issue in the case that one of the parties wishes to decide the embryo's fate without asking the other party.

Unfortunately, European practice has not worked out unique criteria regarding these issues. In some countries withdrawing the consent up to the moment of implanting the embryo in the mother's organism has been legislatively stipulated. In Hungary, for example, the woman has the right to continue the procedure in-vitro regardless of the husband's death or a divorce. In Austria and Estonia a man's consent could be withdrawn until the moment of fertilization. Then woman takes independent decision on the continuation of the procedure. In Germany and Switzerland it is allowed that no more than three embryos within a cycle of

treatment which according to the common rule shall be implanted together and immediately. In Italy freezing embryos is generally forbidden except in the explicitly mentioned hypotheses. In all cases making and preserving embryos is a problem that raises a number of legal and ethical issues that require a careful and balanced approach to resolve.

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Summary

This article examines a very controversial and unsettled area of international law. It discusses a case recently decided by the International Court of Human Rights in Strasbourg. The dilemma central to the case *Evans v. The United Kingdom* is connected with moral issues and it involves a conflict between the granted by the European Convention rights of two private individuals: the applicant and Mr. Johnston. Moreover, each person's interest is entirely irreconcilable with the other's, since if the applicant is permitted to use the embryos, Mr. Johnston will be forced to become a father, whereas if Johnston's refusal or withdrawal of consent is upheld, the applicant will be denied the opportunity of becoming a genetic parent. In the difficult circumstances of this case, whatever solution the national authorities might

adopt would result in the interests of one or the other parties to the IVF treatment being wholly frustrated. Since the use of IVF treatment and crioconservation gives rise to sensitive moral and ethical issues against a background of fast-moving medical and scientific developments, and since the questions raised by the case touch on areas where there is no clear common ground amongst the Member States, the European Court of Human Rights considers that the margin of appreciation to be afforded to the respondent State must be a wide one.

Keywords: Human rights, paternity, in vitro fertilization (IVF treatment), principle of proportionality.