

Female Convicts' Right to Biomedically Assisted Conception*

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In the prologue to his paper, the author presents a hypothetical case, posing a question whether a female convict serving a multi-year prison sentence in the Correctional Institution for Women in Požarevac, who cannot become pregnant naturally, could use a biomedically assisted fertilization procedure. The answer to that question implies an analysis of the Law on Biomedically Assisted Fertilization and the Instructions for the implementation of infertility treatment with biomedically assisted fertilization charged to mandatory health insurance funds. Before the author analyses the normative framework applied to the hypothetical case referred to in the prologue, he presents the facts related to the fertility rate in the Republic of Serbia in the introductory part of the paper. After establishing the conditions under which a woman can request biomedically assisted fertilization, it is necessary to determine whether the legislator in the Law on Execution of Criminal Sanctions has envisaged such a possibility. The next part of the paper is dedicated to a review of the mentioned normative framework through a hypothetical case, whereby the author deems necessary to analyse the judgment of the European Court of Human Rights in order to compare it with the situation in the Republic of Serbia regarding the exercise of this right. In the conclusion of the paper, the author presents certain dilemmas regarding the conditions under which a convicted woman can exercise her right to biomedically assisted fertilization, while encountering obstacles in practice.

KEYWORDS: female convict / right to biomedically assisted conception / *Dickson v United Kingdom*

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Prologue

The reason for writing this scientific paper is a hypothetical situation where a female convict, Marija Krstić, currently serving her multi-year prison sentence at the Correctional Institution for Women in Požarevac (hereinafter CI for women) for a grave offence against public transport safety referred to in paragraph 2 article 297 of the Criminal Code (Criminal Code), is unable to get pregnant, even though she has been using the right, referred to in article 97 of the Law on Execution of Criminal Sanctions (2019) to spend three hours every two months with her spouse Marko Krstić in separate premises of the Institution.

Wishing to become pregnant, she has opted for biomedically assisted fertilization (hereinafter BSF). In pursuance of that wish, the female convict Marija Krstić has asked her attorney to review the legal regulations in order to ascertain the ways she could go about using in vitro fertilization to have offspring.

Introduction

In their fight against infertility and population decline, countries all over the world have decided to engage all resources in order to improve the fertility rate, defined as the average number of children born by a woman during her reproductive period (15 to 49 years of age), excluding the influence of mortality (as it is assumed that all women of a certain generation will live to the age of 50) (Krstić & Vasić, 2022). In order for a simple replacement of generations to occur, it is necessary for the fertility rate to be 2.1 children per one female.

The situation regarding the fertility rate in the Republic of Serbia is dire. At the beginning of this century, a slight increase of fertility rate in the Republic of Serbia has been recorded. Thus, until the year 2005, it was in close to 1.6. However, there was already a decline in 2007 with the fertility rate of only 1.38. In the years that followed, the fertility rate has been slightly increasing. According to the latest available data, the fertility rate for 2019 was 1.52, and in 2022, it was 1.48. In 2022, the fertility rate was 1.5. If we compare these data with the fact that the fertility rate for a simple reproduction of the population must be 2.1, it is easy to explain that it is expected that 6 690 887 people live in the Republic of Serbia, per the 2022 population census, which is less by 6.9% compared to the year 2011. In absolute numbers, that is 49 000 people less (Krstić & Vasić, 2022).

Based on the above mentioned, it is obvious that the fight for higher fertility rate is laborious and long. At the same time, a wide range of measures need to be applied in order to encourage the population to have more offspring. One of those measures is reflected in the application of BSF at the expense of the state. Starting from the hypothetical case referred to in the prologue, numerous questions that

the author will try to answer have been raised. It is important to emphasize that one scientific article is not sufficient to consider other hypothetical situations when someone is incarcerated and wants to exercise the right to BSF, which only indicates the importance of the topic. At the same time, it should be emphasized that court decisions in this and similar situations will always provoke reactions from the general and professional public, regardless of their outcome.

Normative Framework in the Republic of Serbia Regarding the Right to Biomedically Assisted Fertilization

In 2017, the Republic of Serbia passed the Law on Biomedically Assisted Fertilization, thereby establishing a normative basis, in accordance with Article 1, regarding the methods, procedures, conditions and organisation of biomedically assisted conception activities, types of biomedically assisted conception procedures, exercising the right to biomedically assisted conception, supervision over the implementation of this law and the performance of state administration actions in the area of biomedically assisted fertilization, as well as other issues relevant for the implementation of biomedically assisted conception activities and procedures.

Before we review who is entitled to biomedically assisted conception, it needs to be determined what is implied by it. Such biomedically assisted fertilization, according to Article 13, includes testing, obtaining, processing, freezing, thawing, preserving, storing and distributing reproductive cells, zygotes and embryos, as well as the import and export of reproductive cells. In this regard, there is a difference between in vivo and in vitro fertilization. In vivo fertilization can be performed in two ways. The first one includes the introduction of sperm into the female genital organs, while the second method consists in the introduction of egg cells together with sperm into the female genital organs. The joining of egg and sperm cells outside the woman's body for the purpose of creating a zygote, or embryo, and their transfer to the woman's reproductive organs is the essence of in vitro fertilization.

Having determined what BSF implies, we can now deliberate on who can exercise this right. Article 25 prescribes that any adult woman or man, with full legal and business capacity, who needs assistance through BSF procedures with treatment of infertility, living together with another person, in accordance with the law regulating family relations – spouses, i.e. common-law partners, able to perform his or her parental duties and in such a mental and social state that it can be reasonably expected that he or she would be able to perform his or her parental duties in accordance with the law and in the interest of the child, is entitled to a BSF procedure. The legislator expanded the potential beneficiaries of this right by exceptionally providing the option even for an adult woman who lives on her own,

with full legal and business capacity, capable of performing parental duties and in such a mental and social state that it can be reasonably expected that she would be able to perform her parental duties, in accordance with the law and in the interest of the child. At the same time, the right to the BSF procedure in homologous fertilization where reproductive cells of the spouse, i.e., extramarital partners are used, is also available to women and men with full legal and business capacity who have postponed the use of their reproductive cells due to the possibility of decline or loss of reproductive function, and who meet the conditions prescribed in paragraph 1 of this article.

Apart from the Law on Biomedically Assisted Fertilization, there are Instructions for the implementation of infertility treatment with biomedically assisted fertilization charged to mandatory health insurance funds (No. 450-1916/2023 of May 15, 2023). This document elaborates the legal provisions in more detail. Thus, in Article 1 of the Instructions, it is prescribed that an individual can be included in treatment of infertility by BSF, provided that the conditions of the Republic's Expert BSF Committee of the Ministry competent for health affairs are fulfilled. These conditions are the following: spouses, i.e. common-law partners who have exhausted other infertility treatment options, women with infertility diagnosis despite the adequate treatment, women who are not older than 45 at the time of obtaining the Certificate of fulfilment of the conditions for the BSF procedure, if ovarian function is still preserved, if the woman's body mass index is normal (BMI below 30), all forms of male subfertility with live or morphologically normal spermatozoa in the ejaculate, men with azoospermia with previously frozen material, women who have exhausted the possibilities of infertility treatments with their own reproductive cells, men with azoospermia who have no way of obtaining their own reproductive material, women without a partner but who wish to become parents, and both women and men who have previously had their reproductive cells/embryos frozen due to oncofertility.

Article 2 of the Instructions refers to the right to infertility treatment, where the number of treatment attempts by means of BSF is reviewed depending on whether the woman has or does not have a child, as well as whether she has a partner or not. Among other things, it is prescribed for a competent BSF committee in the health institution to be in charge of assessing whether the medical conditions for the implementation of the stimulated BSF procedure are fulfilled, based on the referral of the selected doctor-gynaecologist. A woman who has undergone infertility treatment by means of BSF is entitled to have embryos secured and frozen with a storage period of five years at the expense of the mandatory health insurance funds.

Article 3 of the Instructions prescribes the procedure with the selected doctor. Since there are various infertility treating methods, such as the stimulated BSF procedure and cryo-embryo transfer, we will explain both procedures in detail in the continuation of this paper. Regarding the first infertility treatment method, the

procedure starts with an examination by a selected gynaecologist in case of the insured woman and by a selected GP in case of the insured man. The insured person-woman must have a properly certified insurance document, and must meet all the conditions prescribed by these Instructions. All this needs to be verified by the selected gynaecologist. Ultimately, the doctor must instruct the woman to have analyses and diagnostics performed such as microbiological tests (cervical swab for bacteria, vaginal swab for bacteria, chlamydia swab, bacterial vaginosis swab, HbsAg, HCV, HIV, TPHA-serology), *Toxoplasma gondii*, Rubella - serology, cervical screening (Pap smear, colposcopy), ultrasound examination by a vaginal probe, hormone testing from 2nd to 4th day from the menstrual bleeding onset, one time (FSH, LH, E2, Prolactin, Anti-Müllerian hormone-AMH), TSH, T3 and T4. At the same time, the gynaecologist must send the woman to complete the usual preparatory examinations before the procedure such as: blood type, Rh factor, blood work, urine, biochemical analyses and coagulation factor. It needs to be emphasized that having the necessary test done is not a condition for the procedure before the BSF committee. In other words, general tests are done immediately prior to the BSF procedure. In order for the procedure to be undertaken adequately and so that the doctors in charge of conducting the BSF can be certain of a particular woman's health, the hormone analysis, as well as the results of the swabs and the ultrasound, are valid for six months, while other analyses cannot be older than one year.

When a woman completes all the analyses and thus fulfils all the conditions for conducting the BSF, the gynaecologist issues referral forms to the insured person for the BSF committee in one of the institutions from the Health Institution Network Plan² and for the ultrasound examination that is performed during the assessment procedure at the BSF committee. The insured individual - man needs to do similar analyses, such as microbiological tests, spermogram and sperm culture. Since the subject of our research are the possibilities of implementing BSF, we will not explain in detail the conditions and the procedure necessary for the insured individual-man.

Another method of treating infertility called cryo-embryo transfer is similarly undertaken. However, in order to consider the procedure adequately, we will indicate everything that needs to be completed. Cryo-embryo transfer involves the transfer of thawed embryos to the uterus. The only difference is that all analyses cannot be older than one year. Also, the fulfilment of the conditions is determined

² Health Institution Network Plan includes: Gynaecology and obstetrics clinic of the University Clinical Centre of Serbia in Belgrade, Gynaecology and obstetrics clinic "Narodni front" in Belgrade, Gynaecology and obstetrics clinic of the University Clinical Centre of Vojvodina in Novi Sad, Gynaecology and obstetrics clinic of the University Clinical Centre of Niš, Gynaecology and obstetrics department of the General hospital in Valjevo, Gynaecology and obstetrics clinic of the University Clinical Centre of Kragujevac and Gynaecology and obstetrics department of the General hospital in Subotica.

by the BSF committee trained in a health institution in accordance with Article 31 of the Law on Biomedically Assisted Fertilization upon referral from the selected doctor. If we consult the text of the law, we will see that the above mentioned committee consists of a medical doctor, a specialist in gynaecology and obstetrics with a sub-specialization in fertility and sterility, i.e., narrow specialization in fertility and sterility, an embryologist, a graduate psychologist and a graduate of law appointed by the director of the authorised health department.

Article 5 of the Instructions regulates the procedure before the competent Committee for stimulated BSF. Based on the scheduled examination, the insured individual submits the necessary documentation. On this occasion, a photocopy of the discharge summary must be submitted in addition to the previously mentioned documentation if one of the BSF procedures has been used previously, all discharge summaries, if the insured individual-woman has undergone HSG, hysteroscopy, laparoscopy or laparotomy, complete medical documentation if insured individual-woman has suffered from or underwent surgery due to any disease, medical documentation on other medical conditions and related diseases for women with diminished ovarian reserve in case donor eggs are needed and medical documentation on other medical conditions for women without a partner in case donor sperm is needed. In addition, several forms must be filled out. A man needs to submit proof of fulfilment of the conditions with azerospermia in the form of a certificate issued by a health institution on frozen material for that specific individual and medical documentation on other medical conditions and diseases related to azerospermia in case donor sperm is needed.

Before the examination at the BSF committee, spouses, i.e., common-law partners, as well as an insured individual-woman without a partner, must fill out a form choosing the institution where they wish to have the BSF procedure. Likewise, they must provide a statement that they have no children from the existing union, i.e., that they have one child, proven by an extract from the birth register. The last statement refers to the consent of the spouses, or common-law partners, or the insured woman without a partner, to freeze the embryos if there is a possibility therefor.

The state ensures that a common-law union is proven by a certified declaration, stating that the purpose of giving the declaration was to exercise the right to BSF at the expense of the mandatory health insurance fund. The same declaration is made by an insured individual - a woman without a partner.

In the previous part of the paper, it is emphasized that the procedure for cryo-embryo transfer is conducted by a committee of the Republic Health Insurance Fund (hereafter RHIF). On that occasion, the same declarations are signed as before the BSF committee. In the event that there are no medical findings or diagnostics, the relevant RHIF medical committee instructs the insured individual-woman to supplement the documentation. The invitation procedure is

regulated by Article 7 of the Instructions. When the BSF committee, i.e., the competent medical committee of the RHIF, makes a positive decision, the RHIF Directorate submits a list of insured individuals-women to the health institution where the BSF procedure will be performed, based on the indicated wish of the insured individual. If the objective circumstances are such that the selected health institution is unable to perform the necessary procedure, the RHIF Directorate can reassign the insured individual to another health institution where the BSF procedure can be completed. The legislator prescribes a short term (three days) during which the selected health institution must schedule the date of the first consultative examination, and inform the Directorate thereof. After that, the branch is informed about the scheduled dates. The branch is obliged to send an invitation via registered mail regarding the referral to the BSF procedure. Thereafter, the insured individual reports to the selected doctor-gynaecologist, who issues the referral for inpatient treatment in the health facility specified in the invitation. Likewise, another way of informing about the scheduled date of the first consultative examination should be mentioned - through the eGovernment portal, if the insured individuals applied for the BSF procedure that way. However, the analysis of this method of application and delivery of the invitation to female convicts has its problems, since Internet, which is denied to incarcerated individuals, is mandatory for the use of the eGovernment functions.

In that case, the insured individual-woman with the invitation letter from the branch, the gynaecologist's referral, and the completed BSF-3 or BSF-8 form, depending on which procedure is being performed, reports to the competent medical committee with the aim of obtaining its assessment on the relevant form (OLK-12), whereby it is necessary to indicate whether the procedure is performed for the first or the second child, as well as whether the procedure is done with donor sperm or eggs.

Article 8 of the Instructions refers to the first consultative examination, scheduling admission, treatment, freezing of embryos, postponement and exclusion from the procedure. Per the first paragraph of the above mentioned article, insured individuals undergoing the stimulated BSF procedure report with all documents, findings and completed forms to the health care institution for the first consultative examination in order to have the BSF procedure done.

If, at the first consultative examination, it is established that the insured individuals fulfil all the conditions, an admission date for the BSF procedure is scheduled. In the event that, during the first consultative examination, it is determined that the insured individuals do not meet the conditions for the start of BSF or that the BSF procedure needs to be postponed due to medical reasons for longer than 12 months, the insured individuals will be excluded from the further procedure, and have a letter delivered explaining the reason for exclusion, and entering the reason for exclusion in the Republic Fund electronic application, referring the insured individual to re-evaluation of the BSF committee. The

legislator has foreseen the situation when insured individuals cannot appear for the scheduled BSF procedure due to justified reasons, in which case they must contact the health institution to determine a new date. Considering a similar procedure is also foreseen for the cryo-embryo transfer procedure, there is no need to explain it further.

The Position of Female Convicts During the Serving of the Prison Sentence

The position of convicted individuals is regulated by the Law on Execution of Criminal Sanctions (hereinafter LECS). When considering the subject of our research, article 13 needs to be mentioned, which stipulates, among other things, that there is a penitentiary institution for women in the Administration for the Execution of Criminal Sanctions, where prison and juvenile sentences are served. Related to that, the provisions of Article 15 should also be mentioned. Namely, it prescribes that the penitentiary institution for women is semi-open in terms of security level.

In order to understand the subject of our research, it is important to note that, according to Article 19, there is a healthcare service in institutions. Article 24 of LECS prescribes the competences of the healthcare service.

Thus, paragraph 1 prescribes that the healthcare service conducts health prevention activities, treats convicted and detained individuals, monitors hygiene and the quality of food and water, and participates in determining and implementing programmes for the treatment of convicted individuals, while paragraph 2 prescribes that each institution must have at least one doctor and two nurses, and that one psychiatrist must be provided. If hospital treatment is organised within the institution, it must have a doctor and hospital treatment resources with adequate professional training, necessary hospital premises and medical materials, accessories, devices and medicines available (paragraph 3). At the same time, paragraph 5 prescribes that the institution for women must have special equipment for the care of pregnant women, women in labour and treatment of women.

Although it is not strictly related to the subject of our research, the legislator provided that if a female convict has reached the sixth month of pregnancy or has a child under one year of age – the execution of the prison sentence can be postponed at most until the child reaches the third year of life (item 2 paragraph 1 Article 59 of the LECS). In this regard, we conclude that the BSF procedure is not prescribed as a basis for delaying the execution of a prison sentence. We are of the opinion that in the subsequent amendments to this legal text, this condition should be prescribed in order to enable women sentenced to prison to become pregnant, even though in the case of getting pregnant through the BSF procedure,

the grounds could also be applied in the case of a female convict who is already pregnant or has a child younger than one year.

Chapter VI of the LECS refers to the position of a convicted individual. Thus, Article 78 prescribes that pregnant women, women after childbirth and mothers who care for children are accommodated separately from other female convicts. The legislator also ensures, among other things, that pregnant women and women after childbirth are provided with appropriate nutrition prescribed by a doctor (Article 82). It should be noted that the legislator prescribes the right to visits in a special room (Article 94). Thus, a convicted individual is entitled to stay for three hours with her spouse, children or other close persons in the special rooms of the institution once every two months. Likewise, a female convict has the right to a leave from work due to pregnancy, childbirth and maternity, in accordance with the law that regulates employment relationship rights (Article 110).

The legislator also prescribes the healthcare of convicts in Article 113 of the LECS. The analysis of the title of the Article leads us to the conclusion that a female convict would not have the right to the BSF procedure. The reason for this conclusion lies in the fact that the healthcare of convicted individuals implies caring for the health of the convicted individual, not the treatment of infertility. Apart from the title of the Article, its content also leads us to the conclusion that the convicted individuals are not entitled to BSF. Thus, the legislator indicates that a convicted individual is entitled to healthcare in accordance with the law regulating healthcare and the provisions of this law. At the same time, a convicted individual can be provided with drugs from the positive list. Convicted individuals who cannot be provided with adequate healthcare within their institution, based on a doctor's recommendation, are referred to the Special prison hospital or another healthcare institution, and pregnant women are referred to maternity hospitals for childbirth. The fact that the legislator finds it adequate to specifically indicate that a pregnant woman is to be sent to the maternity hospital for childbirth, while no provision mentions a female convict who wants to get pregnant through the BSF procedure, leads us to the conclusion that female convicts would not be able to exercise their right to BSF. Article 114 of the LECS refers to the treatment of a convicted individual. By analysing the above mentioned article, we can conclude that the legislator did not prescribe the possibility of treating infertility through the BSF procedure in any paragraph. This further reinforces the position that the legislator does not have the possibility of female convicts becoming pregnant through the BSF procedure in mind.

However, in order to come to the right conclusion, Article 117 of the LECS should be mentioned. In the above mentioned Article, it is prescribed that the head of the institution can approve a specialist examination at the request of a convicted individual, if such examination has not been ordered by a doctor, with a previously obtained doctor's opinion on the reasons for the refusal. The examination costs will be charged to the convicted individual, unless the head of the institution

determines otherwise. In order to understand this article properly, it must be determined what is meant by a specialist examination. These examinations are determined when a doctor of internal medicine, i.e., a general practitioner makes an assessment about the importance of a certain patient being referred for a specialist examination with a doctor specialising in a certain branch of medicine (Sanitas Klinik, 2024). Specialist examinations include examinations with a cardiologist, endocrinologist, gastroenterologist, pulmonologist, rheumatologist, occupational medicine specialist, neurologist, ophthalmologist, otorhinolaryngologist, dermatologist, paediatrician, psychiatrist, urologist and gynaecologist. Considering that specialist examinations also include a gynaecological examination, it is necessary to determine what that implies. Since the gynaecological examination is only an initial diagnostic method in determining possible infertility of a female convict, a conclusion can be reached that the BSF procedure cannot be brought under the above mentioned legal norm.

Even though it is not directly related to the subject of the research, it is important to note that the legislator has taken the rights of female convicts with children into account. That way, a female convict who wishes to have a child through the BSF procedure, has legal protection in terms of taking care of the child, whereby she can keep the child in accordance with Article 119 until the end of her prison sentence, and at the latest until the second year of the child's life, after which period the child's parents decide and agree whether the child will be entrusted to the care of the father, other relatives or other persons. In the event that the parents do not agree or their agreement is not in the best interest of the child, the matter is decided by the court competent according to the place of residence, i.e., the mother's place of residence at the time of the conviction. Additionally, a female convict with a child is entitled to assistance of the institution's expert staff (Article 120). If a female convict does not want to take care of the child, it is provided with appropriate accommodation in a special room of the institution and professional care, corresponding to the standards of children's institutions. Delivery, care and accommodation of a female convict and care of her child at the institution are free of charge.

A female convict with exceptionally good behaviour, who makes an effort and makes progress in the adopted treatment programme can be granted benefits by the head of the institution. Those benefits, such as leaves to go to the city, visits to family and relatives on weekends and holidays, leave from the institution for up to seven days during the year, use of an annual vacation outside the institution (paragraph 2 of Article 129), can be used so that the female convict could undergo the BSF procedure. Also, for particularly justified reasons, the head of the institution can grant a female convict an extraordinary leave or absence from the institution for up to seven days (paragraph 3 of Article 129), which points to the conclusion that the BSF procedure could be included in especially justified reasons.

In order to obtain a complete picture of the possibilities for a female convict who wants to but cannot have a child to undergo the BSF procedure, one must refer to the Rulebook on the House Rules of Penitentiary Institutions and District Prisons (hereinafter referred to as the Rulebook). The part of the Regulations related to healthcare needs to be mentioned in order to understand this issue. Even though Article 27 of the Rulebook lists a whole series of instruments a special room for performing health examinations must have, none of the items are related to the BSF procedure. At the same time, by analysing all the articles of the Rulebook that refer to the health protection of convicted individuals, we come to the conclusion that the legislator did not have the implementation of the BSF procedure in mind.

Also, the Rulebook further regulates in more detail the stay in a special room and the benefits that we have reviewed through the prism of the BSF procedure. Even though the stay in a separate room is not directly related to the BSF procedure, it may be relevant for a female convict's wish to get pregnant with her partner. Thus, according to Article 54 of the Rulebook, a convicted individual has the right to spend three hours with her spouse, children or other close persons once every three months in the special premises of the institution, whereby those premises must be spacious enough, well heated, lit, with the necessary furniture, bathroom and adapted for the stay of children. In terms of benefits, the legislator mentions everything already stated in the legislative text.

Application of the Normative Framework to a Hypothetical Case

Marija Krstić, a female convict serving a prison sentence in the Correctional Institution for Women in Požarevac, has received instructions from her attorney about the steps of a BSF procedure. After asking him how many times it is necessary to go to the gynaecologist in order to prepare the necessary documentation regarding the BSF procedure, it appears that she would have to leave the CI for women a total of six times to successfully complete the BSF procedure in the best case in the best-case scenario, with the procedure starting by visiting the selected doctor – gynaecologist. Since the administration of the Correctional Institution for Women provides visits by gynaecologists (Danas, 2024) to incarcerated women serving their prison terms, the question is whether that gynaecologist could perform the necessary examinations for the implementation of the BSF procedure. We come to the conclusion that the gynaecologist cannot perform the necessary analyses and diagnostics within the premises of the CI for women, but could only write a referral for them to be undertaken at a relevant laboratory outside the CI for women. The prison gynaecologist may still issue referrals to women for the BSF committee in one of the institutions from the Health Institution Network Plan. That is where the prison gynaecologist's possibilities in the BSF procedure end.

In other words, for other steps in the BSF procedure, the female convict Marija Krstić would have to leave the prison, which could pose a big problem, because there is no normative basis on the grounds of which a woman prisoner could demand that the authorities enable her to undergo the BSF procedure. At the same time, leaving the penitentiary institution means that the female convict Marija Krstić would need to be accompanied by a relevant number of Security Service members.

Likewise, an additional problem in the implementation of the BSF procedure is the fact that it is done in accordance with the Instructions at the relevant health institution, based on the Health Institution Network Plan. The Gynaecology and obstetrics clinic of the University Clinical Centre of Serbia in Belgrade and the Gynaecology and obstetrics clinic "Narodni front" in Belgrade are in charge of admissions for insured women from the Braničevo administrative district. Since the CI for women is located in Požarevac, which belongs to the Braničevo administrative district, female convicts would need to be sent to the BSF committee in one of the two mentioned clinics. This means that Marija Krstić would need an official vehicle in order to leave the institution and be transported to Belgrade. At the same time, the BSF procedure implies that the insured individual, in our case the female prisoner Marija Krstić, has the right to choose the health institution where the necessary procedure will be done, based on the Republic Health Insurance Fund's contract on the provision of infertility treatment services in BSF procedures. Even though this contract is concluded for one year, and the list of institutions may vary, it is illustrative that the institutions are located in Belgrade, Novi Sad, Niš, Kragujevac, Subotica, Valjevo and Leskovac (Republic Health Insurance Fund, 2024). In other words, none of the institutions where the BSF procedure is conducted is located in Požarevac. The closest ones are in Belgrade, but there is a possibility that a female convicted may also choose health facilities located much further away from Požarevac, such as Leskovac, Subotica, Kragujevac or Valjevo.

Based on the above, we come to the conclusion that it is impossible to enable a convicted women currently serving a prison sentence, to undergo a BSF procedure, because the normative framework does not permit her to do so. In this regard, decisions of international courts must be consulted in order to see in which direction the attitudes regarding this issue are moving towards.

The International Framework Regarding the BSF Procedure

The *Dickson v The United Kingdom* judgment of the European Court of Human Rights, regarding Mr Kirk Dickson and his wife, is a guideline on how domestic authorities should think when it comes to artificial fertilization of individuals sentenced to prison terms. In the specific case, it was a prisoner, born in 1972,

sentenced to life imprisonment in 1994 for murder. The applicant had no children. During 1999, Mr Dickson met the applicant, while she was also serving a prison sentence, by correspondence through a prison pen pal network. The two started dating and got married in 2001. Ms Dickson has been released from prison in the meantime. The earliest possible date the applicant could be released according to the law was in 2009, when his wife would be 50 years old, and it would be almost impossible for her to get pregnant at that age. Since they both wanted to have a child together, the first applicant applied in October 2001 to be approved for artificial fertilization. In December 2002, the second applicant joined the application. Based on the length of the relationship and the earliest date of Mr Dickson's release from the penitentiary institution, their attorneys indicated in the request that it was unlikely that the applicants could have a child together without the use of artificial fertilization.

On May 28, 2003, the Secretary of State, in charge of deciding on this issue, refused their application, citing a number of reasons for rejection, such as their relationship not being tested in a normal environment of daily life, the absence of the father for a good period of the child's upbringing, doubts about the possibility of supporting the child, legitimate public concern that, should the applicant become a father through artificial fertilization, the deterrent elements of his sentence would be circumvented and the absence of an immediate support network for the mother and any child who might be conceived. After their appeal was refused by a higher instance, they turned to the European Court of Human Rights (hereinafter referred to as the Court) claiming that the policy of the Secretary of State on access to artificial fertilization was incompatible with their right to respect their private and family life, protected by Article 8 of the European Convention on Human Rights (hereinafter referred to as the Convention).

The Chamber of the Court rejected their claim, indicating that the domestic authorities had a wide margin of free assessment, and that the Secretary of State had taken into account all the facts of the case and had responded to the legitimate need to maintain public confidence in the penal system and to protect the welfare of every conceived child. In the end, the Court stated that it considers that there was no violation of the applicants' right to respect for their private life referred to in Article 8 of the Convention. However, the Grand Chamber of the Court made a different decision. Namely, the Grand Chamber stressed that the domestic authorities, embodied in the Secretary of State, had placed an excessively high burden of "exceptionalism" on the applicants, without weighing carefully the interests of the opposing parties, based on which there was a violation of the applicant's rights to respect for their private and family life. In the rationale of its decision, the Grand Chamber stated that every individual serving a prison sentence retained the rights prescribed by the Convention, so that any restriction of those rights had many justifications in each individual case. In this regard, the Grand Chamber stated that the justification for the restrictions of certain rights can

be reflected in the necessary and unavoidable consequences of imprisonment or in the adequate connection between the restrictions and the circumstances of the prisoner in question. On the other hand, restrictions cannot be based only on what would offend the public opinion.

Before the Court, the domestic authorities cited three reasons for rejecting the applicants' application, claiming that the loss of reproductive opportunities is an inevitable and necessary consequence of prison, that public confidence in the prison system would be shaken if the punitive and deterrent elements of the sentence were undermined by allowing prisoners guilty of serious criminal offences to become parents and that the long-term absence of a parent could have a negative impact on the conceived child and the society as a whole.

By carefully examining the arguments of the defendant state, the Grand Chamber considered that the first argument was not valid since the impossibility of reproduction was not necessarily an inevitable consequence of execution of a prison sentence. Regarding the second argument of the defendant state, the Grand Chamber of the Court considered that there was no place in the system of the Convention for deprivation of rights only on the basis of what could offend public opinion. Regarding the third argument, the Grand Chamber considered the welfare of the child as a basis. However, the child's welfare could not be a reason for couples who want to try to become parents, especially when one parent was free and able to provide care until the other parent was released from prison.

In the end, the Grand Chamber concluded that the requests for "exceptionality" were in conflict with the Convention. Namely, in the specific case, the Secretary of State never had an efficient way to assess the proportionality of the application, because the limits for the applicants were placed high, whereby violating the applicant's right to respect for private life.

As a consequence of the judgment of the Grand Chamber, the domestic authorities concluded that the decision on the right of convicts to artificial fertilization should still be entrusted to the Secretary of State, but in the meantime, it was decided that obtaining a permission would not be limited to exceptional circumstances only, whereby all factors would be taken into account equally. The following factors were mentioned: the child's welfare; wishes, consent and health status of both parties; the reasonableness of any delay, as well as considering the date of release of the convicted individual from prison, taking into account their ability to assume parental responsibility; data about the prisoner, including the risk of injury and other circumstances that may be an indicator that allowing the option of artificial fertilization was not in the public interest; the stability of the relationship between the prisoner and their partner and the degree of likelihood of continuation of the relationship after leaving the penitentiary institution and whether artificial fertilization was the only way the conception was likely to occur (Parliament, 2024).

After a review of the above mentioned factors, human rights activists expressed scepticism that most of them were based on public interest arguments, which the Grand Chamber considered would be illegitimate or unjustified if applied too widely. At the same time, a potential refusal of a female convict to become pregnant through artificial fertilization implied stating a clear and legitimate public interest that justified the rejection of that specific request, whereby it was unacceptable that the rejection was solely based on reasons such as the length of the individual prisoner's sentence, the type of criminal act committed or whether the relationship with the other parent is solid enough (Parliament, 2024).

Conclusion

Based on the above mentioned, it can be deducted that a female convict is not be able to realize her right to progeny if there is no chance for her to remain pregnant naturally. The Republic of Serbia, wanting to increase the number of newborns, has adopted the adequate normative framework. However, since the woman sentenced to prison is serving her sentence in the CI for women in Požarevac, where her rights are regulated by the LECS, per the provisions of which she is not entitled to BSF, it is clear that a precedent would be created if a convicted woman decided to use the right to BSF like other free women. We are of the opinion that in that case the state, guided by the relevant practice of the Court, would have to enable her to use her right to BSF.

Therefore, we conclude that the Republic of Serbia would have to allow a female prisoner to use her right to BSF, although we think that numerous difficulties and obstacles would present themselves in the realisation of that right. This leads us to the conclusion that it is necessary to work with the relevant service within the penitentiary institution in order to enable female convicts to exercise their right to BSF. On the other hand, abuse of this right could be expected, because a female convict who becomes pregnant and gives birth to a child would enjoy privileges in line with the existing normatives.

In addition to the analysed hypothetical situation, other situations that would produce similar or different legal consequences are also possible. In practice, there have been cases where convicts demand that their wives become pregnant through biomedically assisted fertilization. In this regard, the judgment of the US Federal Court in *Gerber v. Hickman* (291 F.3d 617 (9th Cir. 2002)) should be mentioned, in which a prisoner's right to procreation through artificial fertilization was decided. That particular case raised the question of whether a prisoner serving a life sentence without the possibility of parole has a constitutional right to obtain a sample of his sperm so that he can impregnate his wife through artificial fertilization. The court ruled with a negative judgment, justifying that the right to

procreation is not absolute (Walgenbach, 2002). Even though the judgment caused a lot of (un)justified controversy, such as the extent of the state's intervention in restricting the right to parenthood, having the influence on the spouses of prisoners, discrimination, the establishment of a balance between penological goals and human rights, we believe that the circumstances will bring about other situations where the court will have to deliberate through the prism of BSF rights. It is rightfully expected that similar questions will be raised in many countries in the world, whereby the decisions taken in the above mentioned judgments can serve as an indicator of the decision to be taken.

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