CONSTITUTIONAL COURT OF SOUTH AFRICA

AB and Another v Minister of Social Development

CCT 155/15
Date of judgment: 29 November 2016

MEDIA SUMMARY

The following explanatory note is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.

On 29 November 2016, the Constitutional Court handed down judgment in an application for confirmation of a High Court order that declared section 294 of the Children's Act unconstitutional.

The first applicant, AB, is medically unable to fall pregnant using her own gametes, or with the assistance of donated gametes by way of *In Vitro* Fertilisation (IVF). Between 2001 and 2011, she underwent 18 IVF cycles which were all unsuccessful in helping her fall pregnant. AB considered a surrogate motherhood agreement. However, she was informed that as a single woman incapable of donating a gamete, she could not legally enter into a surrogacy agreement as section 294 of the Children's Act requires the gametes of at least one commissioning parent to be used in the conception of the child contemplated by the surrogacy agreement.

With the assistance of the second applicant, the Surrogacy Advisory Group, AB challenged the constitutionality of section 294. The High Court held that the section unjustifiably limits AB's rights to equality, dignity, autonomy, privacy and reproductive healthcare. For this reason, it declared the section unconstitutional and invalid.

In accordance with section 172(2)(a) of the Constitution, the applicants approached the Constitutional Court for confirmation of the order of invalidity made by the High Court. In their view, families without a parent-child genetic link are just as valuable as families with such a link in our constitutional dispensation. The Surrogacy Group also drew a distinction in its written submissions between what it terms, the "Class" and the "Subclass". The Surrogacy Group argued that section 294 of the Children's Act separately infringes the rights of members of the Class to equal protection before the law,

human dignity, "reproductive autonomy" and privacy. Additionally, as members of the Subclass, persons like AB are unfairly discriminated against and are denied access to reproductive healthcare. The applicants further assert that none of the justifications offered by the respondent, Minister of Social Development, for the limitation of rights have merit and the purpose of section 294 contended for by the state cannot qualify as a "legitimate government purpose" in our constitutional dispensation.

The Minister opposed the confirmation of constitutional invalidity. She submitted that none of the rights enumerated by the applicants are limited by section 294. The Minister argued that even if the rights are limited, the limitations are justifiable in an open and democratic society based on human dignity, equality and freedom. She asserted that section 294 exists for the protection of the best interests of children and prevents commercial surrogacy and the commodification of children.

The Centre for Child Law was admitted as *amicus curiae* (friend of the Court). It submitted that the "genetic origin" is something that belongs to the prospective child. Further, it insisted that the risk to children's self-identity and self-respect – their dignity and best interests – is all-important. Section 294 is accordingly rationally connected to the purpose of ensuring that children know their genetic origin, an approach that is supported by international law.

In the majority judgment written by Nkabinde J (Mogoeng CJ, Moseneke DCJ, Bosielo AJ, Jafta J, Mhlantla J and Zondo J concurring), it was acknowledged, at the outset, that the case was complex and required sensitivity. The majority highlighted that at its core, the matter concerned the power of the state to regulate the assistive reproductive opportunities available to those who are conception and pregnancy infertile, to have children of their own. The judgment held that this matter was not about whether the statutory requirement of a genetic link in that section had relevance to the legal conception of family. In deciding the confirmation application regard must be had to the text of the impugned provision, to determine its legislative objects. It held that the regulatory scheme in chapter 19 must be considered in the context of the Children's Act, as a whole.

The majority found that the differentiation between the genetic link requirement in section 294 of the Children's Act and the IVF regulations is rational. The requirement of donor gamete(s) within the context of surrogacy indeed served a rational purpose of creating a bond between the child and the commissioning parents or parent. The majority therefore did not endorse the conclusion of the High Court that section 294 constituted an irrational legal differentiation that violated section 9(1) of the Constitution. Furthermore, it held in terms of section 9(3), that the impugned provision did not disqualify commissioning parents because they are infertile – it afforded infertile commissioning parents the opportunity to have children of their own by contributing gametes for the conception of the child. But if that parent cannot contribute a gamete, the parent still had available options afforded by the law.

The majority traced the scope of the right in section 12(2)(a) of the Constitution, and held that the focus of the right to reproductive autonomy is on the individual woman's own body and not the body of another woman. It therefore found that the interpretation contended for by the applicants was unduly strained and therefore, the attack on section 294 based on section 12(2)(a) had to fail. Similarly, on an assessment of the facts and despite the conclusion reached in the High Court, the majority held that the genetic link requirement does not prevent AB and members of the Subclass from enjoying the right to have access to health care services in terms of section 27(1). Furthermore, the Court held that the provision does not limit AB's right to privacy as contended for by the applicants. The disqualification in terms of section 294 arose from AB's biological and medical conditions. She could still, in theory, bring herself within the ambit of section 294 by entering into a partnership relationship with someone whose gamete may be used for the conception of the child as contemplated in the agreement.

Accordingly, the majority judgment upheld the Minister's appeal and declined to confirm the declaration of constitutional invalidity in respect of section 294 of the Children's Act.

The minority judgment of Khampepe J (Cameron J, Froneman J and Madlanga J concurring), found that section 294 violated the right to make decisions concerning reproduction and the right to equality. It determined that by preventing those who are both conception and pregnancy infertile from ameliorating the negative effects of their infertility through surrogacy, the provision harms their psychological integrity. It held that the provision unfairly discriminates on the basis of both pregnancy and conception infertility.

The minority held that the limitation was not reasonable and justifiable. It found that the provision did not prevent the proliferation of "designer babies", nor did it guard against the commercialisation of surrogacy as contended for by the Minister. The judgment showed further that it is section 41 of the Children's Act that prevented children born of surrogacy from knowing their "genetic origin", rather than section 294. The minority judgment also found that as the best interests of the child was a flexible standard, it cannot always be the case that it was better for a child to have never been born, than to be born without a "genetic link" to one of its parents. It further held that surrogacy and adoption were not sufficiently similar processes to justify the limitation of constitutional rights. It emphasised that it is inappropriate to entrench any particular form of family and that AB should not be compelled to seek a partner to have a child, as a multitude of family formations are woven through South African society.

The minority judgment would have confirmed the declaration of invalidity and suspended it for 18 months to enable the Legislature to remedy the unlawful position.