

CASE LAW: Rights in Marriage
Paton v UK

*408 Paton v. United Kingdom
Application No. 8416/78

Before the European Commission of Human Rights
Eur Comm HR

(The Acting President, Mr.C. A. Norgaard;Messrs. Sperduti, Daver Opsahl, Polak, Frowein, Jörundsson, Dupuy, Tenekides, Trechsel, Kiernan, Klecker, Melchior and Carrillo.)

13 May 1980

1. Abortion. Whether father a victim (Art. 25).

A potential father is so closely affected by the termination of his wife's pregnancy that he may claim to be a victim [2].

2. Unborn child. Right to life (Art. 2).

Article 2 (1) is subject to an implied limitation justifying termination of a pregnancy in its early stages in order to protect the life and health of the woman at that stage [23].

3. Abortion. Failure to consult father. Denial of respect for family life (Art. 8).

In so far as the abortion interfered with the applicant's right to respect for family life, it was justified under Article 8 (2) as being necessary for the protection of the rights of the mother. The right to respect for family life cannot be interpreted so widely as to confer on the father a right to be consulted or to make applications about an abortion his wife intends to have performed [26-27].

The following cases are referred to in the decision:

1. Amekrane v. United Kingdom, Application No. 5961/72 (1973) 44 Coll. 101; 16 Yearbook 356.
2. Brüggemann and Scheuten v. Germany, Application No. 6959/75 (1978) 10 D. & R. 100; 3 E.H.R.R. 244.
3. Decision of 11 October 1974, Austrian Constitutional Court, Erk.Slg., No. 7400; [1975] Europäische Grundrechtezeitschrift 74.
4. Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52; 96 S.Ct. 2831; 49 L.Ed. 2d 788 (1976).
5. Paton v. British Pregnancy Advisory Service [1979] Q.B. 276; [1978] 3 W.L.R. 687; [1978] 2 All E.R. 987.
6. Roe v. Wade, 410 U.S. 113 (1973).
7. X v. Austria, Application No. 7045/75 (1977) 7 D. & R. 87.
8. X v. Belgium, Application No. 2758/66 (1970) 30 Coll. 11; 12 Yearbook 175.
9. X v. Norway, Application No. 867/60 (1961) 4 Yearbook 270; 6 Coll. 34.

Representation

Berkson & Berkson, solicitors, for the applicant. *409

DECISION AS TO ADMISSIBILITY

The Facts

1. The applicant is a citizen of the United Kingdom born in 1944. He is a steel worker by profession.
2. From his statements and the documents submitted by the applicant it appears that he was married to Joan Mary Paton on 10 October 1974. On 12 May 1978 he was told by his wife that she was eight weeks pregnant and intended to have an abortion. On 17 May 1978 the applicant applied to the High Court of Justice for an injunction to prevent the abortion from being carried out. The original defendants to the application were Dr. Peter Frederick Knight, the manager of the Merseyside Nursing Home at which two doctors had given certificates in accordance with section 1 of the Abortion Act 1967 (hereinafter called the '1967 Act'), and the applicant's wife.
3. Section 1 (1) of the 1967 Act permits the termination of a pregnancy by a registered medical practitioner if two registered medical practitioners find:
 - (a) that the continuance of the pregnancy would involve risk to the life of the pregnant woman, or of injury to the physical or mental health of the pregnant woman or any existing children of her family, greater than if the pregnancy were terminated; or
 - (b) that there is a substantial risk that if the child were born it would suffer from such physical or mental abnormalities as to be seriously handicapped.The certificate in the present case was issued under paragraph (a) (injury to the physical or mental health of the pregnant woman). [FN1]
4. The application was heard and decided by Sir George Baker, the President of the Family Division of the High Court of Justice, sitting at Liverpool on 24 May 1978. At the hearing leave was granted to amend the writ by deleting Dr. Knight and by adding as defendants the trustees and director of the British Pregnancy Advisory Service, by which the Merseyside Nursing Home was owned and operated.
5. In his oral submissions counsel for the applicant conceded that the 1967 Act had been complied with.
6. As to the question whether, in English law, the unborn child has a right to life, which could be invoked by the father, reference was *inter alia* made, on the one hand, to Roman law, where abortion without the father's consent was a crime, and, on the other, to the United States *410 Supreme Court's decision in *Planned Parenthood of Central Missouri v. Danforth* [FN2] where the Court, by a majority, held that the State of Missouri 'may not constitutionally require the consent of the spouse ... as a condition for an abortion ...'

Counsel for the applicant observed:

I do not pretend to be, by size of shape or feat, a 'Foetal Advocate', but I have endeavoured, whilst I have been developing the submissions to your Lordship, to look at it in that context. If the foetus has some kind of right to have its life preserved it might be possible to spell out of that a derivative right in the father. Everything is against that particular notion. It comes to this: the Supreme Court's decision has got to be wrong, admittedly although they are in a different jurisdiction in dealing with different principles. The fact a man has got a right to father children, in the face of the Abortion Act does not entitle him to cause a wife whose health may be at risk to bear that risk and produce a child. The fact he has got some interest in the child has been urged by some of the authorities both in the Commonwealth and in America, but in this country they are against any such notion.

7. The President dismissed the application. He stated that an injunction could be granted only to restrain the infringement of a legal right; that in English law the foetus has no legal rights until it is born and has a separate existence from its mother, and that the father of a foetus, whether or not he is married to the mother, has no legal right to prevent the mother from having an abortion or to be consulted or informed about a proposed abortion, if the provisions of the 1967 Act have been complied with. [FN3]

8. The abortion was carried out within hours of the dismissal of the application.

Complaints

The applicant contends that the law of England and Wales violates:

- (1) Articles 2 and/or 5 of the Convention in that it allows abortion at all, and/or that it denies the foetus any legal rights;
- (2) Articles 6 and/or 8 and/or 9 of the Convention in that, if the provisions of the 1967 Act are complied with, it denies the father of a foetus, whether or not he is married to the mother:
 - (a) a right to object to a proposed abortion of the foetus; and/or
 - (b) a right to apply to the Courts for an order to prevent or postpone the proposed abortion; and/or
 - (c) a right to be consulted about the proposed abortion; and/or
 - (d) a right to be informed about the proposed abortion; and/or
 - (e) a right to demand, in a case where registered medical ***411** practitioners have given certificates under section 1 of the 1967 Act, that the mother be examined by a different registered medical practitioner or practitioners appointed by the father or by and upon his application to a designated court, tribunal or other body; and/or
 - (f) a right to demand that the registered medical practitioners, who examine the mother to decide whether or not to give certificates under section 1 of the 1967 Act, should be independent of the institution or organisation at or by which the abortion will be carried out should such certificates be given.

The applicant states that it is the *object* of his petition ‘to obtain the opinion of the European Court and the Commission of Human Rights upon the (above) contentions’ and ‘to secure such amendments of the law of England and Wales as may be necessary to remove such violations of the Convention that the Court and Commission may find presently exist’.

The applicant finally submits with regard to Article 26 of the Convention (exhaustion of *domestic remedies*) that his application to the High Court ‘was for an injunction. An abortion having been carried out on Mrs. Paton within hours of the dismissal of the application, it was not legally possible to pursue the application further. An injunction is an equitable remedy. It is a maxim of equity that equity does nothing in vain. Accordingly, the dismissal of the application on 24 May 1978 by the President of the Family Division of the High Court of Justice marked the exhaustion of the applicant’s domestic remedies’.

THE LAW

1. The applicant complains of the refusal, by the High Court of Justice, of his application for an injunction to prevent the termination of his wife’s pregnancy. He submits that the Abortion Act 1967, under which this abortion was authorised and eventually carried out, violates Articles 2 and/or 5, 6, 8 and 9 of the Convention.
2. The Commission accepts that the applicant, as potential father, was so closely affected by the termination of his wife’s pregnancy that he may claim to be a ‘victim’, within the meaning of Article 25 of the Convention, of the legislation complained of, as applied in the present case. The Commission here refers to its decision on the admissibility of Application No 2758/66. [FN4] The applicant in that case, a widow, complained that her husband had been killed in violation of Article 2 of the Convention, and the Commission assumed by implication that, for the purpose of that complaint, she fulfilled the ‘victim’ condition of Article 25. The Commission further recalls *412 that, in Application No. 5961/72, [FN5] it accepted, again by implication, that the widow and the children of Mohamed Amekrane could claim to be ‘victims’ – not only under Article 8, but also under Articles 3 and 5 of the Convention – of the measures taken against their late husband and father.
3. The Commission also accepts that the present applicant, by his unsuccessful application to the High Court for an injunction, has exhausted the only available ‘domestic remedy’ in the sense of Article 26 of the Convention.
4. The Commission, therefore, has to examine whether this application discloses any appearance of a violation of the provisions of the Convention invoked by the applicant, in particular Articles 2 and 8. It here recalls that the abortion law of High Contracting Parties to the Convention has so far been the subject of several applications under Article 25. The applicants either alleged that the legislation concerned violated the (unborn child’s) right to life (Article 2) or they claimed that it constituted an unjustified interference with the (parents’) right to respect for private life (Article 8). Two applications invoking Article 2 were declared inadmissible by the Commission on the ground that the applicants – in the absence of any measure of abortion directly affecting them by reason of a close link with the foetus – could not claim to be ‘victims’ of the abortion laws complained of. [FN6] One

application, [FN7] invoking Article 8, was declared admissible by the Commission, in so far as it had been brought by two women. The Commission, and subsequently the Committee of Ministers, concluded that there was no breach of Article 8. [FN8] That conclusion was based on an interpretation of Article 8 which, *inter alia*, took into account the High Contracting Parties' law on abortion as applied at the time when the Convention entered into force. [FN9]

The question whether the unborn child is covered by Article 2 was expressly left open in Application No. 6959/75 [FN10] and has not yet been considered by the Commission in any other case. It has, however, been the subject of proceedings before the Constitutional Court of Austria, a High Contracting State in which the Convention has the rank of constitutional law. In those proceedings the Austrian Constitutional Court, noting the different view expressed on this question in legal writings, found that Article 2 (1), first sentence, interpreted in the context of Article 2, paras. (1) and (2), does not cover the unborn life. [FN11]

6. Article 2 (1), first sentence, provides: 'Everyone's right to life *413 shall be protected by law' (in the French text: 'Le droit de toute personne à la vie est protégé par la loi'). The Commission, in its interpretation of this clause and, in particular, of the terms 'everyone' and 'life', has examined the ordinary meaning of the provision in the context both of Article 2 and of the Convention as a whole, taking into account the object and purpose of the Convention.

7. The Commission first notes that the term 'everyone' ('toute personne') is not defined in the Convention. It appears in Article 1 and in Section I, apart from Article 2 (1), in Articles 5, 6, 8 to 11 and 13. In nearly all these instances the use of the word is such that it can apply only postnatally. None indicates clearly that it has any possible prenatal application, although such application in a rare case – e.g. under Article 6 (1) – cannot be entirely excluded.

8. As regards, more particularly, Article 2, it contains the following limitations of "everyone's" right to life enounced in the first sentence of paragraph (1):
– a clause permitting the death penalty in paragraph (1), second sentence: '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'; and
– the provision, in paragraph (2), that deprivation of life shall not be regarded as inflicted in contravention of Article 2 when it results from 'the use of force which is no more than absolutely necessary' in the following three cases: 'In defence of any person from unlawful violence'; 'in order to effect a lawful arrest or to prevent the escape of a person lawfully detained'; 'in action lawfully taken for the purpose of quelling a riot or insurrection'.
All the above limitations, by their nature, concern persons already born and cannot be applied to the foetus.

9. Thus both the general usage of the term 'everyone' ('toute personne') of the Convention (para. 7 above) and the context in which this term is employed in Article 2 (para. 8 above) tend to support the view that it does not include the unborn.

10. The Commission has next examined, in the light of the above considerations, whether the term ‘life’ in Article 2 (1), first sentence, is to be interpreted as covering only the life of persons already born or also the ‘unborn life’ of the foetus. The Commission notes that the term ‘life’, too, is not defined in the Convention.

11. It further observes that another, more recent international instrument for the protection of human rights, the American Convention on Human Rights of 1969, contains in Article 4 (1), first and second sentences, the following provisions expressly extending the right to life to the unborn:

Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception.

12. The Commission is aware of the wide divergence of thinking on the question of where life begins. While some believe that it starts **414* already with conception others tend to focus upon the moment of nidation, upon the point that the foetus becomes ‘viable’, or upon live birth.

13. The German Federal Constitutional Court, when interpreting the provision ‘everyone has a right to life’ in Article 2 (2) of the Basic Law, stated as follows: [FN12]

Life in the sense of the historical existence of a human individual exists according to established biological and physiological knowledge at least from the 14th day after conception (Nidation, Individuation)... The process of development beginning from this point is a continuous one so that no sharp divisions or exact distinction between the various stages of development of human life can be made. It does not end at birth: for example, the particular type of consciousness peculiar to the human personality only appears a considerable time after the birth. The protection conferred by Article 2(2) first sentence of the Basic Law can therefore be limited neither to the ‘complete’ person after birth nor to the foetus capable of independent existence prior to birth. The right to life is guaranteed to every one who ‘lives’; in this context no distinction can be made between the various stages of developing life before birth or between born and unborn children. ‘Everyone’ in the meaning of Article 2 (2) of the Basic Law is ‘every living human being’, in other words: every human individual possessing life; ‘everyone’ therefore includes unborn human beings.

14. The Commission also notes that, in a case arising under the Constitution of the United States, [FN13] the State of Texas argued before the Supreme Court that, in general, life begins at conception and is present throughout pregnancy. The Court, while not resolving the difficult question where life begins, found that, ‘with respect to the State’s important and legitimate interest in potential life, the “compelling” point is at viability’.

15. The Commission finally recalls the decision of the Austrian Constitutional Court mentioned in paragraph 6 above which, while also given in the framework of constitutional litigation, had to apply, like the Commission in the present case, Article 2 of the European Convention on Human Rights.

16. The Commission considers with the Austrian Constitutional Court that, in interpreting the scope of the term ‘life’ in Article 2 (1), first sentence, of the Convention, particular regard must be had to the context of the Article as a whole. It also observes that the term ‘life’ may be subject to different interpretations in different legal instruments, depending on the context in which it is used in the instrument concerned.

17. The Commission has already noted, when discussing the meaning of the term ‘everyone’ in Article 2 (para. 8 above), that the limitations, in paragraphs (1) and (2) of the Article, of ‘everyone’s’ right to ‘life’, by their nature, concern persons already born and cannot be applied to the foetus. The Commission must therefore examine whether Article 2, in the absence of any express limitation concerning the foetus, is to be interpreted:

***415** – as not covering the foetus at all;

– as recognising a ‘right to life’ of the foetus with certain implied limitations; or

– as recognising an absolute ‘right to life’ of the foetus.

18. The Commission has first considered whether Article 2 is to be construed as recognising an absolute ‘right to life’ of the foetus and has excluded such an interpretation on the following grounds.

19. The ‘life’ of the foetus is intimately connected with, and cannot be regarded in isolation from, the life of the pregnant woman. If Article 2 were held to cover the foetus and its protection under this Article were, in the absence of any express limitation, seen as absolute, an abortion would have to be considered as prohibited even where the continuance of the pregnancy would involve a serious risk to the life of the pregnant woman. This would mean that the ‘unborn life’ of the foetus would be regarded as being of a higher value than the life of the pregnant woman. The ‘right to life’ of a person already born would thus be considered as subject not only to the express limitations mentioned in paragraph 8 above but also to a further, implied limitation.

20. The Commission finds that such an interpretation would be contrary to the object and purpose of the Convention. It notes that, already at the time of the signature of the Convention (4 November 1950), all High Contracting Parties, with one possible exception, permitted abortion when necessary to save the life of the mother and that, in the meanwhile, the national law on termination of pregnancy has shown a tendency towards further liberalisation.

21. Having thus excluded, as being incompatible with the object and purpose of the Convention, one of the three different constructions of Article 2 mentioned in paragraph 17 above, the Commission has next considered which of the two remaining interpretations is to be regarded as the correct one – i.e. whether Article 2 does not cover the foetus at all or whether it recognises a ‘right to life’ of the foetus with certain implied limitations.

22. The Commission here notes that the abortion complained of was carried out at the initial stage of the pregnancy – the applicant’s wife was ten weeks pregnant – under section 1 (1) (a) of the Abortion Act 1967 in order to avert the risk of injury to the physical or

mental health of the pregnant woman. It follows that, as regards the second of the two remaining interpretations, the Commission is in the present case not concerned with the broad question whether Article 2 recognises a 'right to life' of the foetus during the whole period of the pregnancy but only with the narrower issue whether such a right is to be assumed for the initial stage of the pregnancy. Moreover, as *416 regards implied limitations of a 'right to life' of the foetus at the initial stage, only the limitation protecting the life and health of the pregnant woman, the so-called 'medical indication', is relevant for the determination of the present case and the question of other possible limitations (ethic indication, eugenic indication, social indication, time limitation) does not arise.

23. The Commission considers that it is not in these circumstances called upon to decide whether Article 2 does not cover the foetus at all or whether it recognises a 'right to life' of the foetus with implied limitations. It finds that the authorisation, by the United Kingdom authorities, of the abortion complained of is compatible with Article 2 (1), first sentence because, if one assumes that this provision applies at the initial stage of the pregnancy, the abortion is covered by an implied limitation, protecting the life and health of the woman at that stage, of the 'right to life' of the foetus.

24. The Commission concludes that the applicant's complaint under Article 2 is inadmissible as being manifestly ill-founded within the meaning of Article 27 (2).

25. In its examination of the applicant's complaints concerning the Abortion Act 1967 and its application in this case, the Commission has next had regard to Article 8 of the Convention which, in paragraph (1), guarantees to everyone the right to respect for his family life. The Commission here notes, apart from his principal complaint concerning the permission of the abortion, the applicant's ancillary submission that the 1967 Act denies the father of the foetus a right to be consulted, and to make applications, about the proposed abortion.

The Commission also observes that the applicant, who under Article 2 claims to be the victim of a violation of the right to life of the foetus of which he was the potential father, under Article 8 invokes a right of his own.

26. As regards the principal complaint concerning the permission of the abortion, the Commission recalls that the pregnancy of the applicant's wife was terminated in accordance with her wish and in order to avert the risk of injury to her physical or mental health. The Commission therefore finds that this decision, in so far as it interfered in itself with the applicant's right to respect for his family life, was justified under paragraph (2) of Article 8 as being necessary for the protection of the rights of another person. It follows that this complaint is also manifestly ill-founded within the meaning of Article 27 (2).

27. The Commission has next considered the applicant's ancillary complaint that the Abortion Act 1967 denies the father of the foetus a right to be consulted, and to make applications, about the proposed abortion. It observes that any interpretation of the husband's and potential father's right, under Article 8 of the Convention, to respect for his private and family life, as regards an abortion which his wife *417 intends to have

performed on her, must first of all take into account the right of the pregnant woman, being the person primarily concerned in the pregnancy and its continuation or termination, to respect for her private life. The pregnant woman's right to respect for her private life, as affected by the developing foetus, has been examined by the Commission in its Report in the *Brüggemann and Scheuten* case. [FN14] In the present case the Commission, having regard to the right of the pregnant woman, does not find that the husband's and potential father's right to respect for his private and family life can be interpreted so widely as to embrace such procedural rights as claimed by the applicant, *i.e.* a right to be consulted, or a right to make applications, about an abortion which his wife intends to have performed on her. The Commission concludes that this complaint is incompatible *ratione materiae* with the provisions of the Convention within the meaning of Article 27 (2).

28. The Commission does not find that any of the other provisions invoked by the applicant (Articles 5, 6 and 9 of the Convention) are relevant for the examination of his complaints.

For these reasons, THE COMMISSION *declares* this application inadmissible.

(c) Sweet & Maxwell Limited (1981) 3 E.H.R.R. 408

Notes:

[FN1] In an affidavit submitted to the High Court the applicant's wife stated *inter alia*: 'My marriage was increasingly unhappy ... and ... has broken down irretrievably. I left the plaintiff on legal advice as I feared for my safety and we live apart ... and in future I will live as a single woman ... Because of the plaintiff's behaviour life with him became increasingly impossible and my health suffered and I am receiving treatment from my doctor ... I could not cope and I verily believe that for months I have been close to a nervous breakdown.'

[FN2] 428 U.S. 52 (1976).

[FN3] See *Paton v. British Pregnancy Advisory Service* [1979] Q.B. 276.

[FN4] X v. Belgium (1970) 30 Coll. 11; 12 *Yearbook* 175.

[FN5] *Amekrane v. United Kingdom* (1973) 44 Coll. 101; 16 *Yearbook* 356.

[FN6] X v. Norway (1961) 4 *Yearbook* 2706 Coll. 34 (App. No. 867/60); and X v. Austria (1977) 7 D. & R. 87 (App. No. 2045/75).

[FN7] *Brüggemann and Scheuten v. Germany* (1978) 10 D. & R. 100 (App. No. 6959/75), 3 E.H.R.R. 244.

[FN8] *Ibid.* at p. 122.

[FN9] *Ibid.* at p. 117, para. 64 of the Commission's Report.

[FN10] *Ibid.* 116, para. 60.

[FN11] Decision of 11 October 1974, Erk. Slg. (*Collection of Decisions*) No. 7400, [1975] *Europäische Grundrechtezeitschrift* 74.

[FN12] Judgment of 25 February 1975, Appendix VI to the Commissioner's Report in the *Brüggemann and Scheuten* case, CI 1 b of the grounds.

[FN13] *Roe v. Wade*, 410 U.S. 113 (1973).

[FN14] *Supra*, paras. 59 *et seq.*