

Case Number **31 B 997/2012**

13 March 2013

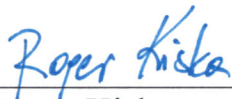
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Introduction

1. With regard to Case 31 B 997/2012, Alliance Defending Freedom [ADF] herein submits its guidance as to the proper legal recognition of the unborn child as relates to the instant criminal matter.

Alliance Defending Freedom is a global legal association with more than 2100 allied lawyers and a full time litigation team of over 40 lawyers. ADF has garnered consultative status at the United Nations and is accredited with the European Parliament, the Fundamental Rights Agency of the European Union (of which the author of this brief is an elected member of the Advisory Panel of the Agency), and the Organization for Security and Co-Operation in Europe. ADF has been involved in nearly 30 cases before the European Court of Human Rights and also been before the United States Supreme Court on numerous occasions. As a global leader in this area of law, ADF is uniquely suited to providing written testimony as to the personhood of the unborn child.

2. The following brief will outline the international treaty and case-law on the question of when personhood begins, particularly within the context of medical or scientific manipulation of embryonic stem cells and tissue. Second, the brief will provide an overview of comparative jurisprudence with regard to homicide laws that recognize unborn victims. As Alliance Defending Freedom does not have competency in the area of illegal medical or bio-engineered research and treatments, this brief will not delve into the details of criminal sanctions as relates to the defendants' activities in injecting the embryonic stem cells and tissues into patients without prior approval from the competent government ministry based on certifiable evidence and research that such treatments would not cause serious bodily harm or mortality to the clients being treated with the

injections. Suffice it to say however, such gross negligence and willful disregard for patient safety should be considered tantamount to attempted homicide.

International Law on the Unborn Child

3. The international treaty law and case-law pertaining to the use of embryonic stem cells and tissue for research and the personhood of the unborn child is very clear and instructive. First, the only international court ever to directly define when life begins has stated that it begins from conception. The Court of Justice of the European Union, last year in *Oliver Brüstle v. Greenpeace e.V.*¹, defined very clearly when life begins in a “preliminary ruling” under Article 267 TFEU.²
4. The case originated in Germany and came to the CJEU as a as a reference from the Bundesgerichtshof (German Federal Court of Justice). In the German courts, Greenpeace had argued that Professor Brüstle’s European patent was unpatentable because it involved the isolation and purification of cells which came from human embryonic stem cells: thus leading to the destruction of human embryos. In response, Professor Brüstle argued that the cells could be used to treat serious conditions such as Parkinson’s disease and that the patent should stand.
5. The German court stayed proceedings so that the CJEU could give the correct interpretation of Article 6(2)(c) of Directive 98/44/EC on the legal protection of biotechnological inventions.³
6. The CJEU was asked to answer three questions, which were essentially as follows: (i) What is meant by the term “human embryo”? (ii) What is meant by the expression “uses of human embryos for industrial or commercial purposes”? (iii) Is an invention unpatentable even though its purpose is not

¹ Case C-34/10, 18 October 2011. Available at: <http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=EN&Submit=rechercher&numaff=C-34/10>.

² Article 267 states that the CJEU shall have jurisdiction to give preliminary rulings concerning the interpretation of the Treaties or the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union. See the Treaty on the Functioning of the European Union. Available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:0047:0200:en:PDF>

³ OJ 1998 L 213, p. 13. Available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:1998:213:0013:0021:EN:PDF>

the use of human embryos, where it concerns a product whose production necessitates the prior destruction of human embryos or a process for which requires a base material obtained by destruction of human embryos?

7. The Court, adopting the opinion of the Advocate General,⁴ noted that the EU legislature had intended to exclude any possibility of patentability where respect for “human dignity” could be affected.⁵ Thus, the concept of the human embryo must be understood in a wide sense.⁶ Accordingly, the Court held that any human ovum must, as soon as fertilised, be regarded as a human embryo, since that fertilisation is such as to commence the process of development of a human being. Moreover, the Court held that the same classification must apply to a non-fertilised human ovum into which the cell nucleus from a mature human cell has been transplanted, and a non-fertilised human ovum whose division and further development have been stimulated by parthenogenesis.⁷ Regarding stem cells obtained from a human embryo at the blastocyst stage,⁸ the Court held that it is for the referring court to ascertain, in the light of scientific developments, whether they are capable of “commencing the process of development of a human being” and therefore are included within the concept of the human embryo.⁹ Thus, the Court—perhaps mindful of the fact that at present, stem cells obtained from a blastocyst are pluripotent and are incapable of developing into a human being—avoided stating that pluripotent cells are not regarded as human

⁴ Yves Bots, 10 March 2011. Available at: <http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=EN&Submit=rechercher&numaff=C-34/10>.

⁵ For example, recital 16 of the Directive states that “patent law must be applied so as to respect the fundamental principles safeguarding the dignity and integrity of the person”.

⁶ §34.

⁷ The Court noted that “although those organisms have not, strictly speaking, been the object of fertilisation, due to the effect of the technique used to obtain them they are, as is apparent from the written observations presented to the Court, capable of commencing the process of development of a human being just as an embryo created by fertilisation of an ovum can do so.” § 36.

⁸ This stage occurs approximately five days after fertilisation, where the embryo has developed to the point of having two different cell components and a fluid cavity.

⁹ § 37.

embryos. Instead the Court stated that if cells can commence the process of development into a human being, they must be protected within the concept of the human embryo.

8. Precisely stated, as to the first question before it, the Grand Chamber of the European Court of Justice ruled that in the context of European patent law, life begins from the moment of conception. It further held that conception marks the commencement of the process of development of the human being.
9. With regard to the second question, the Court held that “the exclusion from patentability concerning the use of human embryos for industrial or commercial purposes in Article 6(2)(c) of the Directive also covers use for purposes of scientific research.”¹⁰ Thus, only uses for therapeutic or diagnostic purposes which are applied to the human embryo and are useful to it may be patentable.
10. With regard to the third question, the Court noted that the removal of a stem cell from a human embryo at the blastocyst stage necessarily entails the destruction of that embryo. Accordingly, the Court held that “the Directive excludes an invention from patentability where the technical teaching which is the subject-matter of the patent application requires the prior destruction of human embryos or their use as base material, whatever the stage at which that takes place and even if the description of the technical teaching claimed does not refer to the use of human embryos.”¹¹
11. To understand the wider implications of the *Brüstle* judgment, we need to place it within the context of other case-law and define it in terms of other treaty obligations Member States have. The importance of the *Brüstle* decision is two-fold: first, it is the first intergovernmental court ruling stating that life must be protected from conception; second, the judgment helps to inform how the European Community (including Hungary) is to define human dignity within

¹⁰ § 46.

¹¹ § 52.

Article 1 of the Charter of Fundamental Rights of the European Union.¹² To this extent, we must also look to the Oviedo Convention on Human Rights and Bio-medicine.¹³ Article 1 of that treaty calls for the protection of human dignity and guarantees to everyone respect for their physical integrity within the context of biology and medicine. If we are to use the definition of human dignity as defined by the ECJ in *Brüstle* and apply it to the Oviedo Convention, which is binding on all European Union member states, the implications would be massive—both within the realm of scientific research and also in the context of defining protections afforded to the unborn child.

12. We must also note that the *Brüstle* judgment was not drafted in a vacuum. The guidelines of the European Patent Office were amended several years ago to have the identical protections put in place to protect the human embryo and not to commoditize components of the human body as was done by the defendants in this instant case.¹⁴ The Oviedo Convention, noted above, in a similar vein prohibits the commoditization of the human embryo and forbids the creation of embryos for research purposes.¹⁵ What we are therefore seeing in the development of law for the scientific community is an ever-increasing and robust protection of the unborn child from conception and an extremely conservative definition of human dignity.

¹² European Union, *Charter of Fundamental Rights of the European Union*, 7 December 2000, Official Journal of the European Communities, 18 December 2000 (2000/C 364/01), available at: <http://www.unhcr.org/refworld/docid/3ae6b3b70.html> [accessed 9 November 2011].

¹³ Council of Europe, *Convention on Human Rights and Biomedicine*, Oviedo, 4.IV.1997 (ETS 164). Available at: <http://conventions.coe.int/Treaty/en/Treaties/Html/164.htm>.

¹⁴ *Convention on the Grant of European Patents*, signed at Munich on 5 October 1973. Article 53 states: “European patents shall not be granted in respect of: (a) inventions the commercial exploitation of which would be contrary to “ordre public” or morality; such exploitation shall not be deemed to be so contrary merely because it is prohibited by law or regulation in some or all of the Contracting States.”

¹⁵ *Convention on Human Rights and Biomedicine*, Oviedo, 4.IV.1997 (ETS 164). Available at: <http://conventions.coe.int/Treaty/en/Treaties/Html/164.htm>. Article 18 states: (1) Where the law allows research on embryos *in vitro*, it shall ensure adequate protection of the embryo. (2) The creation of human embryos for research purposes is prohibited.”

13. The defendants actions in the instant case are far more egregious in that the commoditization of the embryo here was not for the purpose of scientific research or promotion of general health, but purely for profit and with disdain shown both to the unborn children used as cell and tissue farms and to the patients who received the therapy at their own grave risk.
14. The case-law of the European Court of Human Rights in areas dealing with procreation has likewise been equally conservative. In December 2010, the Grand Chamber of the European Court of Human Rights, in *A., B., and C. v. Ireland* held that member states themselves were allowed to define their own laws protecting the unborn child and stating that abortion was not a “right” under the Convention.¹⁶ In October 2001, the Grand Chamber took the identical position in finding that Austria did not violate the Convention by prohibiting the use of sperm from a donor for in vitro fertilisation and ova donation in general.¹⁷ Its reasoning, in part, was that the best interests of the unborn child were compelling enough to prohibit these two forms of artificial procreation.
15. When we review these decisions all together, having come from the two most authoritative courts in Europe all within a time frame of less than one year, what we see is a major paradigm shift in how we define human life and human dignity and the legal protections that stem from that.
16. Prior to the *Brüstle* ruling, European courts had been silent on when human life began. For example, in *VO v. France* the European Court of Human Rights avoided answering the question, stating that “the issue of when the right to life begins comes within the margin of appreciation which the Court

¹⁶ ECHR, *A., B., and C. v. Ireland* [G.C.], application no. 25579/05, [2010] ECHR 2032, §§ 233-237.

¹⁷ ECHR, *S.H. and others v. Austria* [G.C.], App. no. 57813/00, judgment of 03 Nov 2011 §§ 105, 115.

generally considers that States should enjoy in this sphere.¹⁸ Similarly, in *Brüstle*, the CJEU noted that the “definition of human embryo is a very sensitive social issue in many Member States, marked by their multiple traditions and value systems” and furthermore “the Court is not called upon, by the present order for reference, to broach questions of a medical or ethical nature.”¹⁹

17. Nevertheless, the CJEU did hold that the definition of the human embryo must be understood in a wide sense, and went on to provide legal protection for that embryo. The ruling does lend support to the propositions that: (i) human life begins at conception; (ii) the human embryo is worthy of protection; (iii) and that the argument that the embryo is “not yet human” in certain stages of development is no longer valid. Thus, the Court’s reasoning will be a persuasive authority for future cases involving the human embryo. The authority of the judgment should also be used as a guide post in the instant matter, particularly in light of Hungary’s own protection of the unborn child before birth as enshrined in its new Constitution.²⁰ Clearly, in line with the plain meaning of Article II of the Constitution, the actions of the defendants did violence towards the human dignity of the children harvested for cells and tissue. Furthermore, as both embryonic and foetal life enjoy protection from the moment of conception, the nature of the crimes against the dignity of these unborn children should be used as a serious aggravating factor in the sentencing procedure.
18. Other international treaties likewise call for the protection of the unborn child and its inherent dignity. The International Covenant on Civil and Political Rights²¹ protects the right to life of “every human being,” which does not exclude the pre-born. And although the Covenant acknowledges that the death penalty can be imposed upon adult men and women

¹⁸ (2005) 40 EHRR 259 § 82.

¹⁹ § 30. Similarly, see Case C-506/06, *Mayr* § 38.

²⁰ Article II states: “Human dignity shall be inviolable. Every human being shall have the right to life and human dignity; embryonic and foetal life shall be subject to protection from the moment of conception.”

²¹ United Nations, *International Covenant on Civil and Political Rights*, GA res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 52, UN Doc. A/6316 (1966); 999 UNTS 171; 6 ILM 368 (1967).

who merit it according to national laws, executing pregnant women is prohibited. As all other adult women may be subject to the death penalty, this clause *must* be read as recognizing the value of life in the mother's womb, giving the pre-born a status independent from that of the mother. Indeed it is difficult to see any other way that this provision can be interpreted.

19. Likewise, an ordinary reading of the language in the Convention on the Rights of the Child²² also favours the protection of pre-born life. Article 1 of the Convention defines a child as “every human being below the age of eighteen years.” It thus defines a ceiling, but not a floor, as to who is a child. In other words, it pointedly does *not* say that the status of “child” attaches at the time of birth. Moreover, the Convention explicitly recognizes the child before birth as a rights-bearing person entitled to special need and protection. The Preamble recognizes that “the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, *before as well as after birth.*”²³ Although this preamble is not binding, it certainly provides necessary interpretive context.²⁴

20. It is therefore beyond legal doubt that what was done to the foetuses in the Kaposvár clinic was criminal and infringed on the rights and dignity of both the unborn children and their mothers solely for the purpose of financial gain. International law, particularly more recent Convention law such as the Oviedo Convention, were created precisely because states foresaw that criminal situations like this might arise and should not be tolerated. This Court is bound by international

²² United Nations, *Convention on the Rights of the Child*, , G.A. Res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989), *entered into force* 9.2.1990.

²³ Emphasis added.

²⁴ The Vienna Convention states the rule of interpretation that, “The context...shall comprise...the text, including its preamble and annexes.” Vienna Convention art. 31(2).

precedent and consensus to condemn the criminal activities of the defendants with the most severe penalties available under Hungarian law.

Comparative Foetal Homicide Laws

21. In this court's role as fact finder and in deciding the ultimate criminal sentence for the defendants, comparative jurisprudence with regard to foetal homicide laws in other jurisdictions provides a helpful basis when analyzing the utter lack of respect for unborn human life and dignity shown by the defendants. Foetal homicide laws are defined as statutes which bring criminal liability for homicide in the intentional or grossly negligent death of an unborn child.
22. In the United States, for example, 38 states have enacted foetal homicide laws. Among them, 35 states recognize the rights of the "unborn child" as a legal entity which could be subject to homicide. 25 of these recognize the offense of foetal homicide from the moment of conception.²⁵ Federally, the United States has adopted the *Unborn Victims of Violence Act* of 2004 providing for criminal penalties in relation to 68 federal crimes where the unborn child *in utero* is injured or killed.²⁶ Either unlawful abortion or abortion for unlawful purposes, even if the pregnant woman consents to the abortion, still may be construed as foetal homicide.²⁷ Clearly under comparative jurisprudence, the act of harvesting cells and tissues from aborted infants for profit, as in the instant matter, even where the mothers consented, would run afoul of foetal homicide laws.

²⁵ National Conference of State Legislatures. <http://www.ncsl.org/issues-research/health/foetal-homicide-state-laws.aspx>. Accessed on 01 March 2013.

²⁶ 18 USC § 1841 (2004).

²⁷ See e.g. *Women's Medical Professional Corporation v. Taft*, 2003 FED app. 0446P (6th Cir. 2003).

23. The United States has also enacted legislation specific to the issue at hand in the instant case. The Foetus Farming Prohibition Act of 2006²⁸ criminally prohibits the act of harvesting tissue or cells from fetuses and used for foetal tissue implants or stem cell therapy. In the instant matter, the harvesting of the tissue and cells from unborn children is all the more egregious since the therapies in question have never been clinically tested or approved. Therefore the utter disdain for life shown by the defendants extended both to the unborn victims and to the clients being treated by intravenous infusion of the cells.
24. The English have similar provisions in their statutory law regarding the killing of an unborn child *in utero*. The Crimes Act of 1958 defines “child destruction” as the crime of killing a child capable of being born alive before it has a separate existence.²⁹

Conclusion

25. In conclusion, this memorandum outlines that international case law and treaty law are clear that life begins from conception and that the use of embryonic stem cells and tissue in a way which violates the human dignity of the unborn child is criminally unacceptable. Beyond criminally violating the rights and dignity of the unborn child, the injections performed in the instant case, done at the clinic in Kaposvár, were never properly tested nor approved by the Hungarian government and could have had serious, if not mortal, consequences to the clients. Finally, as comparative jurisprudence evidences, foetal homicide laws may be used as a yard stick in criminal sentencing based on the utter egregiousness of the charges at hand.

²⁸ S. 3504 (109th): Foetus Farming Prohibition Act of 2006.

²⁹ Bernard Knight (1998), *Lawyer's Guide to Forensic Medicine (2nd Ed.)*, Routledge, pp.70. ISBN 1-85941-159-2.

The gross negligence involved in the treatments and utter disdain for both the human life of the aborted children or the clients, all for the sole purpose of financial profit, should be punished with the most serious sentences available to this court. The facts of the instant case so shock the conscience as to warrant the most serious of criminal punishments.