

Supreme Court opines on limitations of GPs' freedom of conscience

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Legal background Opinion

The Supreme Court recently deemed that a municipality's termination of its agreement with a general practitioner (GP) after she refused to insert an intrauterine device (IUD) for a patient for reasons of conscience relating to her religion was invalid.

Legal background

The criterion for terminating an agreement with a GP is the same as that for terminating an employment agreement under Norwegian law (ie, it must be objectively justified).

The GP claimed that her termination was invalid because, among other things, it contravened Article 9 of the European Convention on Human Rights (ECHR) (freedom of thought, conscience and religion). Although the Supreme Court solved the matter on the basis of local law and the objectively justified criterion, it provided an *obiter dictum* regarding Article 9 of the convention.

Today, under Norwegian regulation, GPs who provide healthcare in the municipalities are prohibited from refusing to insert IUDs. The preparatory works for this prohibition discuss its legal basis in relation to the obligations set out in Article 9 of the ECHR. The Supreme Court commented on these discussions in its *obiter dictum*.

Opinion

The Supreme Court agreed with the preparatory works, which state that the prohibition constitutes the limitation of a doctor's rights under Article 9 of the ECHR. Such limitations are allowed only if they are "prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others" (Article 9(2) of the ECHR).

The fundamental aim of the Norwegian GP arrangement is to provide citizens with overall general medical practice services throughout their lives. On this basis, the Supreme Court agreed that the prohibition in question protects a legitimate aim, as it protects public health and the rights and freedoms of others. As the prohibition is set out in an administrative regulation, it also fulfils the requirement of being prescribed by law.

The Supreme Court went on to assess whether the prohibition was necessary in a democratic society and commented on the different circumstances that the preparatory works consider in this regard. The preparatory works state that even though a patient's rights may be protected by another GP who is willing to insert an IUD, in Norway, patients are entitled to have one GP who provides all general medical practice services to them throughout their lives. Further, the relationship of trust between a GP and their patient may be damaged if the patient is referred to another GP to have an IUD inserted on the basis of the first GP's conscience. Such a situation may also damage the patient's mental health or cause them to refrain from telling their GP about conditions resulting from the IUD or another form of contraception. Refusing to insert an IUD may therefore contravene the requirement for

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proper and thoughtful health services prescribed by Norwegian legislation.

The Supreme Court found that these were legitimate considerations and held that the courts must be reserved in their review of the political authorities' considerations of legitimate grounds, as the states have a wider margin of appreciation in the assessment of others' rights, including patient health and safety. However, such an assessment must also consider the fact that Article 9 of the ECHR is one of the foundations of a democratic society. In connection with these statements, the Supreme Court referred to the European Court of Human Rights' 13 January 2015 ruling in *Eweida v the United Kingdom*.

The Supreme Court also found that the circumstances represented in the preparatory works with regard to the assessment of the prohibition and Article 9 of the ECHR were in line with those which underline women's fundamental right to medical treatment provided for in Article 12 of the Convention on the Elimination of All Forms of Discrimination against Women. However, the Supreme Court also found that Article 12 of this convention does not limit the possibility of refraining from inserting an IUD; rather, in such cases, the assessment of a GP's freedom of thought, conscience and religion would be slightly different.

The Supreme Court concluded its *obiter dictum* by stating that, in future, the courts must assess opposing interests on a case-by-case basis. This was not done in the case at hand, as the Supreme Court solved this matter on the basis of local law.

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