

Natallie Evans v Amicus Healthcare Ltd & Others

Case No: B1/2003/2329

Court of Appeal (Civil Division)

25 June 2004

Neutral Citation Number: [2004] EWCA (Civ) 727

2004 WL 1174355

Before: Lord Justice Thorpe Lord Justice Sedley and Lady Justice Arden

Friday 25th June 2004

On Appeal from High Court of Justice (Family Division)

Mr Justice Wall

FD02P01431

Representation

- Mr R Tolson QC and Miss S Freeborn (instructed by Withy King) for the Appellant.
- Mr K Moradifar (instructed by Messrs Davey Franklin Jones) for the Second respondent.
- Mr J Coppel (instructed by Office of the Solicitor to the Dept. of Health) for the Fourth Respondent.
- Miss D Rose (instructed by Morgan Cole) for the Fifth Respondent.

JUDGMENT

Lord Justice Thorpe:

1. The judge in the family justice system is ordinarily required to exercise an experienced discretion that seeks to achieve fairness between adults or the protection and welfare of children. It is to be emphasised that in this case Wall J had the comparatively unusual task of arriving at an outcome that was solely dependent upon the resolution of the law. His first task was to construe the relevant provisions of the Human Fertilisation and Embryology Act 1990 . His second task was to resolve whether the application of the statute once construed breached any of the appellant's rights under the ECHR to an extent that could not be justified by the Secretary of State.

2. The parties represented on this appeal are Natallie Evans, the appellant, Howard Johnston the second respondent, the Secretary of State for Health, the fourth respondent, and the Human Fertilisation and Embryology Authority, the fifth respondent. As in the court below, the appellant is represented by Mr Robin Tolson QC and Miss Freeborn, Howard Johnston by Mr Moradifar and Miss McKinlay, the Secretary of State by Mr Jason Coppel and the authority by Miss Dinah Rose.

3. The trial in the family division took place between the 30th June and 4th July 2003. The judgment is now reported at [2004] 2 WLR 713 . At the trial there were two claimants, Lorraine Hadley as well as Natallie Evans, and their claims were dismissed by a reserved judgment dated 1st October 2003. Mr Justice Wall refused permission to appeal on the 6th October and Natallie Evans' application to this court was filed on 8th December 2003. Her application was granted in part at an oral hearing on the 16th January 2004. Lorraine Hadley has elected not to appeal. Natallie Evans' appeal was argued on the 23rd /24th March. This judgment is written by me and LJ Sedley.

The Facts

4. The important date in the chronology is the 10th October 2001. At that date Natallie Evans and Howard Johnston were engaged. She was twenty-nine and he twenty-four. She had a previous childless marriage during the course of which she had been referred for treatment to improve her chances of conception. Howard Johnston had not been married. After the breakdown of her marriage

she and Mr Johnston became a couple. Accordingly she attended the clinic with him for the first time in July 2000. Her subsequent treatment culminated in the dramatic announcement on the 10th October that she had a cancerous tumour in both ovaries. However, the tumours were slow growing, thus presenting a narrow window of opportunity for the couple to undergo IVF treatment.

5. On any view the 10th October was a terrible day in Natallie Evans' life. First she had to comprehend that she was suffering from a potentially fatal operable cancer. Without interval for reflection or adjustment she had to engage in counselling as a prelude to IVF treatment at the clinic. As to the crucial events in the clinic Wall J heard oral evidence from the couple and from Mrs Spearman, one of the nurses in the clinic. The judge's essential findings on that evidence were that:—

- (a) Natallie Evans asked Mrs Spearman about the possibility of freezing her eggs as opposed to freezing fertilised embryos and was informed that that was not a possible procedure at that clinic.
- (b) At that juncture Mr Johnston reassured Ms Evans that they were not going to split up. She did not need egg freezing. She should not be negative. He wanted to be the father of her child.

6. Thereafter the couple entered into the necessary consents. The first was an internal consent form which regulated the relationship between the patients and the clinic. Much more significant were the forms which the couple signed to comply with the requirements of the Authority. The form is headed: "HFEA (00) 6 FORM FOR CONSENT TO STORAGE AND USE OF SPERM AND EMBRYOS". Miss Rose informed us that this a prescribed form, the authority having statutory power to prescribe forms by Directions. The form essentially reflects the provisions of the 1990 Act, and in particular the all-important schedule 3 to which we will come. Thus immediately beneath the title cited above appears the following warning:—

"N.B. Do not sign this form unless you have received information about these matters and have been offered counselling. You may vary the terms of this consent or withdraw this consent at any time except in relation to sperm or embryos which have already been used. Please insert numbers or tick boxes as appropriate."

7. Section 1 of the form is headed "Use". In relation to the use of his sperm Mr Johnston was presented with three options. For the first "(In treating a named partner)" he ticked the Yes box. For the second and third "(In treating others: In any project of research)" he ticked the No boxes.

8. In relation to consent to the use of his sperm to fertilise eggs in vitro and to the use of embryos developed from eggs he had the same three options. Again he ticked the Yes box in relation to the first option "(In the treatment of myself together with a named partner)" and the No box in relation to the other two options.

9. Mr Tolson makes some point of the fact that in section 2 headed "Storage" he opted for the maximum storage period of ten years and also opted for sperm and embryos to continue in storage should he die or become mentally incapacitated within that period.

10. The terminology of Ms Evans' form necessarily varies in its detail since she was consenting to the use of eggs rather than sperm. But her completion of the form essentially replicates Mr Johnston's. She ticked affirmatively the boxes providing for her own treatment and for "The treatment of myself with a named partner". She ticked negatively the other two options which are again in treating others and in any project of research.

11. Sadly as the treatment became imminent stresses developed between the couple. However on the 12th November both attended the clinic and eleven eggs were harvested and fertilised. From these six embryos were created and on the following day were consigned to storage.

12. On the 26th November 2001 Ms Evans underwent a successful operation for the removal of the tumours. Her subsequent treatment has been without setback. Her subsequent scans were clear and the independent medical expert concluded that she is able to carry a pregnancy normally. Of course unless she can use these six frozen embryos she has no prospect of bearing a child which is genetically hers.

13. On the 19th December Ms Evans was advised that she should wait two years before an embryo transfer should be attempted. However, sadly, on the 27th May 2002 the relationship between the

couple ended. During the break-up the future of the frozen embryos was inevitably discussed. On this discussion their evidence conflicted. Wall J preferred the evidence of Mr Johnston but this finding does not bear on the issues raised by this appeal.

14. On the 4th July 2002 Mr Johnston wrote to the clinic to notify them of the separation and to state that the embryos could be destroyed. His withdrawal of consent was reported to Ms Evans who, on 11th September 2002 issued proceedings and obtained an undertaking from the clinic to preserve the embryos until the determination of these proceedings.

The proceedings

15. By her claim Ms Evans sought an injunction requiring Mr Johnston to restore his consent to the use and storage of the embryos and declarations that:—

- (a) Mr Johnston has not and may not vary or withdraw his consent of 10th October 2001
- (b) the embryos may be stored throughout the remainder of the ten year period
- (c) Ms Evans may lawfully be treated with embryos during the storage period.

16. Additionally Ms Evans sought a declaration of incompatibility to the effect that Section 12 and Schedule 3 of the Act breach her Article 8, 12 and 14 rights. Finally it was pleaded that the embryos were entitled to protection under Articles 2 and 8 .

17. For the above recital of the facts we have drawn heavily upon the clear and comprehensive judgment of Wall J.

18. By his grounds of appeal Mr Tolson challenges the judge's construction of the expression "treatment together" within Schedule 3 of the Act. Equally he challenges the judge's construction of the phrase "used in providing treatment services" in paragraph 4(2)(a) of Schedule 3 to the Act. What Mr Tolson described as the meat of his appeal was his attack upon the judge's holding that the conceded interference in the private life of Ms Evans resulting from the judge's construction of Schedule 3 of the Act was "both necessary for the protection of the rights of both gamete providers and proportionate." Similar contentions are raised in relation to the statutory provisions for the storage of the embryos, as opposed to their use. Next Mr Tolson asserts that the judge was wrong to hold that Ms Evans was not discriminated against in the enjoyment of her Article 8 rights to private life contrary to Article 14 of the Convention. Finally Mr Tolson asserts that the judge wrongly held that Mr Johnston was not estopped from withdrawing his consent as expressed on 10th October on the grounds that an estoppel could not run in the face of the Act. He also challenged the judge's finding that on the facts no estoppel arose.

19. At the permission hearing the application in relation to estoppel and Article 2 was adjourned to the appeal. At the end of Mr Tolson's submissions we allowed him to continue to argue the estoppel point but refused permission on the Article 2 ground. Our reasons for refusing permission can be shortly stated. In our domestic law it has been repeatedly held that a foetus prior to the moment of birth does not have independent rights or interests: see *Re F (In Utero)* [1988] (Fam) 122 and *Re MB (Medical Treatment)* (1997) 2FLR 426 . Thus even more clearly can there be no independent rights or interests in stored embryos. In this respect our law is not inconsistent with the decisions of the ECHR . Article 2 protects the right to life. No Convention jurisprudence extends the right to an embryo, much less to one which at the material point of time is non-viable. Mr Tolson was prepared to accept that the Article 2 right would fail if both gamete providers wanted the embryo destroyed. Yet, as was pointed out to him, the right to life, where it exists, cannot be waived by its possessor, let alone by others. This simply illustrates the fallacy of invoking Article 2 in the present argument. Ms Evans' case is not about the right to life; it is about the right to bring life into being. Mr Tolson sought to rely on *Paton v. UK* (1980) 19 DR 244 . However by that decision an abortion conducted in the tenth week of pregnancy was not condemned. Mr Tolson is thus obliged to say that the court might condemn an abortion conducted at a later stage in pregnancy by recognising and upholding a right to life in the foetus. First that is mere speculation. Second we are not here considering the possible rights of a foetus late in pregnancy but the possible rights of embryos in storage. For all those reasons we concluded that this ground of appeal held no realistic prospect of success.

The Statutory material

20. Before considering Mr Tolson's remaining grounds it is necessary to set out the crucial parts of

the Human Fertilisation and Embryology Act 1990 :—

- (1) No person shall
 - (a) bring about the creation of an embryo, or
 - (b) keep or use an embryo, except in pursuance of a licence.
- (1) The Authority may grant the following and no other licences-
 - (a) licences under paragraph 1 of Schedule 2 of this Act authorising activities in the course of providing treatment services,
 - (b) licences under that Schedule authorising the storage of gametes and embryos,
- 12 The following shall be conditions of every licence granted under this Act—
 - (c) that the provisions of Schedule 3 to this Act shall be complied with.
- (1) The following shall be conditions of every licence under paragraph 1 of Schedule 2 to this Act.
- (5) A woman shall not be provided with treatment services unless account has been taken of the welfare of any child who may be born as a result of the treatment (including the need of that child for a father), and of any other child who may be affected by the birth.

Licences for treatment

- (1) A licence under this paragraph may authorise any of the following in the course of providing treatment services—
 - (d) practices designed to secure that embryos are in a suitable condition to be placed in a woman or to determine whether embryos are suitable for that purpose,
 - (e) placing any embryo in a woman,
 - (g) such other practices as may be specified in, or determined in accordance with, regulations.

Consents to Use of Gametes or Embryos

20. Consent

1. A consent under this Schedule must be given in writing and, in this Schedule, “effective consent” means a consent under this Schedule which has not been withdrawn.

- (1) A consent to the use of any embryo must specify one or more of the following purposes—
 - (a) use in providing treatment services to the person giving consent, or that person and another specified person together,
 - (b) use in providing treatment services to persons not including the person giving consent, or
 - (c) use for the purposes of any project of research,

and may specify conditions subject to which the embryo may be so used.

- (2) A consent to the storage of any gametes or any embryo must—
 - (a) specify the maximum period of storage (if less than the statutory storage period), and
 - (b) state what is to be done with the gametes or embryo if the person who gave the consent dies or is unable because of incapacity to vary the terms of the consent or to revoke it, and may specify conditions subject to which the gametes or embryo may remain in storage.
- (3) A consent under this Schedule must provide for such other matters as the Authority may specify in directions.

(4) A consent under this Schedule may apply-

- (a) to the use or storage of a particular embryo or
- (b) in the case of a person providing gametes, to the use or storage of any embryo whose creation may be brought about using those gametes,

and in the paragraph (b) case the terms of the consent may be varied, or the consent may be withdrawn, in accordance with this Schedule either generally or in relation to a particular embryo or particular embryos.

20. Procedure for giving consent

(1) Before a person gives consent under this Schedule—

- (a) he must be given a suitable opportunity to receive proper counselling about the implications of taking the proposed steps and
- (b) he must be provided with such relevant information as is proper.

(2) Before a person gives consent under this Schedule he must be informed of the effect of paragraph 4 below.

20. Variation and withdrawal of consent

(1) The terms of any consent under this Schedule may from time to time be varied, and the consent may be withdrawn, by notice given by the person who gave the consent to the person keeping the gametes or embryo to which the consent is relevant.

(2) The terms of any consent to the use of any embryo cannot be withdrawn, once the embryo has been used—

- (a) in providing treatment services, or
- (b) for the purposes of any project of research.

20. Use of gametes for treatment to others

(1) A person's gametes must not be used for the purposes of treatment services unless there is an effective consent by that person to their being so used and they are used in accordance with the terms of the consent.

(2) A person's gametes must not be received for use for those purposes unless there is an effective consent by that person to their being so used.

(3) This paragraph does not apply to the use of a person's gametes for the purpose of that person, or that person and another together, receiving treatment services.

20. In vitro fertilisation and subsequent use of embryo

(1) A person's gametes must not be used to bring about the creation of an embryo *in vitro* unless there is an effective consent by that person to any embryo the creation of which may be brought about with the use of those gametes being used for one or more of the purposes mentioned in paragraph 2(1) above.

(2) An embryo the creation of which was brought about *in vitro* must not be received by any person unless there is an effective consent by each person whose gametes were used to bring about the creation of the embryo to the use for one or more of the purposes mentioned in paragraph 2(1) above of the embryo.

(3) An embryo the creation of which was brought about *in vitro* must not be used for any purpose unless there is an effective consent by each person whose gametes were used to bring about the creation of the embryo to the use for that purpose of the embryo and the embryo is used in accordance with those consents.

(4) Any consent required by this paragraph is in addition to any consent that may be required by

paragraph 5 above.

20. Storage of gametes and embryos

(1) A person's gametes must not be kept in storage unless there is an effective consent by that person to their storage and they are stored in accordance with the consent.

(2) An embryo the creation of which was brought about *in vitro* must not be kept in storage unless there is an effective consent, by each person whose gametes were used to bring about the creation of the embryo, to the storage of the embryo is stored in accordance with those consents.

(3) An embryo taken from a woman must be kept in storage unless there is an effective consent by her to its storage and it is stored in accordance with the consent.”

The arguments

21. Paragraph 2(1)(a) of Schedule 3 contrasts the provision of treatment services “to the person giving consent, or that person and another specified person together” with the provision of treatment services to persons not including the person giving consent or use for the purposes of research. The construction of this sub-paragraph has great bearing on the outcome of the appeal. In his general observations at the outset of his skeleton Mr Tolson recognises that the appellant must succeed on the first ground of appeal if success on grounds two and seven is to be meaningful. Mr Tolson's essential submission is that the judge was wrong to conclude that Mr Johnston had not effectively consented to the continuing treatment of Ms Evans on her own and that once they had withdrawn from joint treatment, they could not be said to be treated together. From those conclusions he submitted that Wall J wrongly held that in the events that had occurred there was no continuing consent from which Mr Johnston could be estopped from withdrawing. Mr Tolson submits that since there can be no dispute that effective consent operated at the dates of harvest and storage, continuing consent must be assumed. Otherwise the clinic would be subjected to an intolerable responsibility in having to investigate the state of the relationship between the couple, including whether, and to what extent, they remained together.

22. By agreement Miss Rose responded upon the points of statutory construction leaving Mr Coppel to respond to the Articles 8 and 14 points.

23. This is not the first time that Miss Rose has represented the authority and she has considerable expertise in this field. We accept her broad analysis that the twin pillars supporting the Parliamentary regulation of this difficult field were intended to be:—

- (a) the requirement for informed consent, capable of being withdrawn at any point prior to the transfer of the embryos to the woman receiving treatment
- (b) the focus on child welfare required by Section 13(5) .

24. In her skeleton argument Miss Rose summarises the material effect of Schedule 3 as follows:—

- “i) Those contemplating the storage and/or use of embryos created from their gametes must first be offered counselling;
- ii) They must specifically be informed of the circumstances in which consent to the storage or use of an embryo may be varied or withdrawn;
- iii) Consent given to the use of an embryo must specify whether the embryo is to be used to provide treatment services to the person giving consent, or to that person together with another, or to persons not including the person giving consent;
- iv) An embryo may only be stored while there is effective consent to its storage from both gamete providers, and in accordance with the terms of the consent;
- v) An embryo may only be used while there is an effective consent to its use from both gamete providers, and in accordance with the terms of that consent;
- vi) Consent to the storage of an embryo can be varied or withdrawn by either party

whose gametes were used to create the embryo at any time;

- vii) Consent to the use of an embryo cannot be varied or withdrawn once the embryo has been used in providing treatment services.”

25. This summary is in our judgment correct and we adopt it without qualification.

26. The concept of treatment together is not confined to Schedule 3 . It appears also in Section 4 and 28 . Section 4 , so far as relevant is in these terms:—

(1) No person shall—

(b) in the course of providing treatment services for any woman, use the sperm of any man unless the services are being provided for the woman and the man together or use the eggs of any other woman,

except in pursuance of a licence.”

27. The meaning of this portion of the Act must strike any ordinary reader as extremely obscure. However Miss Rose explains that the unless clause removes from the licensing provision a couple who attend together for IVF treatment and provide fresh sperm where the fresh sperm is used in treatment such as artificial insemination which does not involve the creation, keeping or use of an embryo outside the human body.

28. The purpose of Section 28 is to define the “father” in differing circumstances. Section 28(3)(a) refers to certain treatment “in the course of treatment services provided for her and a man together”.

29. In our judgment, and subject to what is said in paragraph 58 below, references to the provision of treatment services for a woman and a man together can be construed uniformly throughout the statute. In simple terms, “together” is an adverb qualifying the provision of treatment services to a woman and a man. The condition is satisfied provided and so long as the couple are united in their pursuit of treatment, whatever may otherwise be the nature of the relationship between them. Of course clinics can hardly be expected to investigate and pass judgment upon the physical, sexual, psychological and emotional togetherness of a couple, but it does not seem to us unrealistic to leave to the clinic the necessity to judge whether the couple remain united in their pursuit of IVF treatment. Indeed it can be said that that inquiry is but an element of the obligation created by Section 13(5) , namely the obligation to take account of the welfare of any child who may be born as a result of the treatment or who may be affected by the birth.

30. We have also had regard to the Authority's Code of Practice. Section 25 of the Act requires the writing of a Code of Practice and Section 26 requires the Secretary of State's approval of the Authority's draft. Paragraph 3.11 of the fifth edition of the Code (in force at the relevant time and only just replaced by the sixth edition) demonstrates the obligation of the clinic to make enquiries of fathers to substantiate their continuing commitment. Paragraph 9.7 of the Code makes plain that the welfare of the child is a consideration that must continue to be taken into account at the implant stage.

31. Miss Rose also stresses the inter-connection between Section 28 and Schedule 3 . As she puts it, Section 28 cannot be divorced from Schedule 3 . She illustrates that submission by highlighting the direct reference to paragraph 5 of Schedule 3 in Section 28(6) and to the consequences of Section 28(2) and (4) which would result in the future husband being deemed the father were Ms Evans to remarry and were Mr Johnston to reinstate his consent. There would be the same consequence were Ms Evans to find a new partner: see Section 28(3) .

32. Given the effect of Section 28(2)–(4) the court enquired of Mr Moradifar, when he came to make his submissions, whether there was any prospect of his client agreeing to the continuing storage of the embryos to meet the possibilities that Ms Evans might remarry or find a new partner and Mr Johnston might reconsider his withdrawal of consent. Mr Moradifar made it plain that he had discussed these possibilities with his client, not only at the time of trial but in preparation for this appeal, and his client's clear position was one of fundamental rather than purely financial objection.

33. Mr Tolson's second ground depends upon the proper construction of “used in providing treatment services” in paragraph 4(2)(a) of Schedule 3 . His bold submission is to this effect: the process by

which the eleven eggs harvested on the 12th November 2001 were reduced to the six stored on the following day was the simple one of visual examination with the aid of a microscope. This, submits Mr Tolson, constitutes “use” for the purposes of paragraph 4(2)(a) . The respondents simply point out that, if that construction were right, it would neuter the right of withdrawal which the previous sub-section of paragraph 4 provides. It would in our judgment be almost absurd to adopt a construction the effect of which is to remove one person's right to withdraw consent on the very day that the embryos were created. We unhesitatingly uphold the construction of Wall J namely that the embryo is only used once transferred to the woman. This construction is both natural and free from anomalous consequences.

34. In relation to ground two of the appeal we would also record Miss Rose's submission that throughout the Act clear distinctions are drawn between the acts of creation, storage and use. Sections (1) and (3) together with paragraph 4(2) of Schedule 3 are concerned with use. Paragraph 6(1) of Schedule 3 is concerned with creation. With these distinctions in mind Mr Tolson's submission that the embryos are to be deemed to have been used on the day of their creation falls apart.

35. In relation to his estoppel ground Mr Tolson made some attempt to go behind the judge's findings, particularly as to what passed between the couple on the 10th October. He had obtained a transcript only of the evidence of Mr Johnston and emphasised passages during the course of the cross-examination in which Mr Johnston conceded that Ms Evans' desire for a baby had been greater than his. From that Mr Tolson sought to develop the submission that Mr Johnston had concealed his ambivalence, thereby inducing Ms Evans to go forward with him into couple treatment. Mr Tolson submitted that had she known his true state of mind and feeling she would have appreciated the risks of his withdrawing consent and, perhaps, elected for fertilisation of her eggs with donor sperm.

Conclusions on statutory construction

36. First we do not consider that any attack on the judge's findings of fact is justified. He heard three, if not four witnesses whose evidence touched in varying degrees on the points which Mr Tolson raises. The judge had the obvious advantage of appraising the oral evidence, at the end of which he made balanced and carefully considered findings. We, who have only the transcript of the evidence of one of those witnesses, are hardly in a position to differ from those findings.

37. Miss Rose is, in our judgment, right to stress that the clear policy of the Act is to ensure continuing consent from the commencement of treatment to the point of implant. Consent may be given subject to conditions. Consent may be varied. Consent may be withdrawn. Against that background the court should be extremely slow to recognise or to create a principle of waiver that would conflict with the Parliamentary scheme.

38. In reaching our conclusions on the construction of the Act we draw upon the judgment of this court, delivered by Hale LJ, in *Re R (a child)* (2003) 2 All ER 131 . Her exposition of the scheme of the Act in paragraphs 17 to 25 of the judgment answers many of the contentions advanced by Mr Tolson.

39. Another judgment of this court delivered by Lady Justice Hale is equally persuasive. The case is *U v. Centre for Reproductive Medicine* (2002) EWCA Civ. 565 . Again between paragraphs twenty-three and twenty-six of her judgment Hale LJ stresses the great importance that must be attached to the prescribed form completed in compliance with Schedule 3 of the Act. As she put it:—

“Hence a Centre having in their possession a form dealing with the matters with which it is required by schedule 3 to the 1990 Act to deal should be both entitled and expected to rely upon that form according to its letter, unless and until it can clearly be established that the form does not represent a valid decision by the person apparently signing it. The most obvious examples are forgery, duress or mistake as to the nature of the form being signed (*non est factum*). The equitable concepts of misrepresentation and undue influence may have a part to play but the courts should be slow to find them established in such a way as to supply a centre with a consent which they would not otherwise have.”

40. We have also had regard to the judgment of this court in *R (Quintavalle) v. HFEA (Tissue Typing)* (2002) EWCA Civ 667 . Our attention has been focussed on paragraph 111 within the judgement of Mance, LJ. In our judgement Miss Rose is entitled to derive support from the following sentence

within the paragraph:—

“The fact that *some* practices (e.g. a biopsy) designed to secure the suitable condition, or determine the suitability, of embryos to be placed in a woman involve use of an embryo does not mean that *all* practices for such a purpose involve “use” of the embryo, or therefore require to be licensed as activities under paragraph 1(1) of Schedule 2.”

41. In our judgment therefore, Mr Johnston was entitled by the terms of the Act to withdraw his consent as and when he did. The effect of his withdrawal of consent is to prevent both the use and the continued storage of the embryo fertilised with his sperm. Future treatment of the appellant would not be “treatment together” with Mr Johnston. We will come in a moment to the impact of the Human Rights Act on the case, but before doing so we turn to a question which arose in the course of argument.

The Secretary of State's intervention

42. The Secretary of State for Health was joined in these proceedings by order of the President following the issue of the claim. Because a declaration of incompatibility was sought, he was entitled by virtue of s.5 (2) of the Human Rights Act to be joined. But this is a case in which the court might in any event think it right, as the President clearly did, to give the Secretary of State an opportunity to make submissions about the construction of legislation affecting a material aspect of the public interest.

43. Accordingly the Secretary of State filed a 19-page witness statement. As is customary, the alter ego doctrine (see *Carltona Ltd v Commissioners of Works* [1943] 2 All ER 560) was relied on to enable him to speak through Edward Webb, the head of the section of the Department of Health responsible for policy on assisted conception and embryology. Mr Webb's witness statement contains evidence under the following heads:

- (1) The legislative history of the provisions of the Act which govern the giving and withdrawal of consent.
- (2) The policy justification for the regime of the Act whereby consent to the transfer of an embryo to a woman may be withdrawn at any time prior to that transfer.
- (3) Relevant legal practice in other Council of Europe states.
- (4) The legal status of embryos under the Act.

44. Under the first head, the legislative history, Mr Webb recounts the successive publications of the Warnock Report, the Green Paper and the White Paper, quoting material passages. He then quotes from the speech of the Lord Chancellor to the Upper House on the introduction of the Bill by way of explanation of the Government's intention in relation to consent. Mr Webb goes on to say this:

“15. ... there were, of course, a number of different options as to the fixing of the ‘point of no return’, at which consent to use of an embryo could no longer be withdrawn ... It was, however, decided that the Bill should permit an individual to withdraw consent to the use of an embryo which was in storage, at any point prior to the transfer of an embryo to a woman, and that was clearly reflected in the terms of Schedule 3.

16. The provisions of the Bill dealing with consent did not prove controversial during the passage of the Bill through Parliament. So far as I have been able to ascertain, the approach taken in Schedule 3 commanded widespread approval in Parliament, in that the text of Schedule 3 as enacted remained as the Government had intended when the Bill was introduced.”

45. Although no formal objection was taken before us to the admission of this evidence, Mr Coppel was pressed from the bench about its admissibility. In the absence of any intractable ambiguity of the sort contemplated in *Pepper v Hart* , it seemed at first sight an endeavour by the department of state responsible for drafting the legislation to introduce its own intentions as an aid to construction, something which is no more permissible in the construction of legislation than it is in the construction of contracts. The Court, perhaps anomalously, may have regard to certain antecedent public

documents — here, for example, the Warnock Report and the White Paper — but that is all.

46. There also seemed to be a risk that the passage we have quoted, by offering an evaluation of the attitude of Members to the Bill, would call in question proceedings in Parliament in breach of Article IX of the Bill of Rights 1689: “That the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament.” One has only to contemplate the possibility of Ms Evans' advisers seeking to advance a different analysis of the debates recorded in Hansard to appreciate the risk.

47. Under his next head, the policy underlying the consent regime, Mr Webb sets out to explain “the policy basis for the rules” contained in Schedule 3 , something which is ordinarily a function of legal argument. Mr Webb continues:

“In the Secretary of State's view, the provisions of Schedule 3 to the Act ... serve to promote a number of inter-related policies and interests.”

Although this passage is in the present tense, it is apparent from the text which follows it that what is being described is what the original ministerial promoter of the legislation had in mind. This would ordinarily be no more admissible than what the present holder of the office has in mind.

48. Mr Webb goes on over the succeeding fourteen paragraphs of his witness statement to set out policy imperatives which support the construction favoured by the Secretary of State:

“21. ... In the Secretary of State's view it would be undesirable and unfair to insist that either party to IVF treatment be held to a consent which they may have given several years before when the circumstances of their lives were rather different.”

“24. The Secretary of State therefore takes the view that a male partner should be able to withdraw his consent to IVF treatment up to the point at which that possibility becomes inconsistent with the bodily integrity of the woman concerned.”

He concludes:

“31. ... That is why the Secretary of State opposes the private law claims of Ms Evans based on contract and estoppel. If such claims could be made, the consent regime in Schedule 3 to the Act, and all of the policies which underlie it, would be fatally undermined.”

49. In the light of this tendered evidence we have given some consideration, with the help of submissions from Mr Jason Coppel, who has ably represented the Secretary of State before us, to whether the Human Rights Act may have altered the accepted division between argument and evidence. Mr Coppel, whose own skeleton argument and oral submissions have been entirely proper in form and content, explains Mr Webb's evidence as conforming to the guidelines set by their Lordships' House in *Wilson v First County Trust Ltd* [2003] UKHL 40 , the leading case on the making of declarations of incompatibility under s. 4 of the Human Rights Act .

50. In *Wilson* three of their Lordships devoted sections of their speeches to the impact of the proportionality test on the conventions and case-law governing reference by the courts to Parliamentary records capable of illuminating legislative policy. Lord Nicholls (with whom Lord Scott expressly agreed) said this:

“[61] ... As to the objective of the statute, at one level this will be coincident with its effect But that it not the relevant level for convention purposes. What is relevant is the underlying social purpose sought to be achieved by the statutory provision. Frequently that purpose will be self-evident, but this will not always be so.

[62] The legislation must not only have a legitimate policy objective. It must also satisfy a ‘proportionality’ test. The court must decide whether the means employed by the statute to achieve the policy objective is appropriate and not disproportionate in its adverse effect. This involves a ‘value judgment’ by the court, made by reference to the circumstances prevailing when the issue has to be decided. It is the current effect and impact of the legislation which matter, not the position when the legislation came into force.

[63] When a court makes this value judgment the facts will often speak for themselves. But sometimes the court may need additional background information tending to show, for instance, the likely practical impact of the statutory measure and why the course adopted by the legislature is or is not appropriate. Moreover, as when interpreting a statute, so when identifying the policy objective of a statutory provision or assessing the 'proportionality' of a statutory provision, the court may need enlightenment on the nature and extent of the social problem (the 'mischief') at which the legislation is aimed. This may throw light on the rationale underlying the legislation.

[64] This additional background material may be found in published documents, such as a government white paper. If relative information is provided by a minister or, indeed, any other member of either House in the course of a debate on a Bill, the courts must also be able to take this into account. The courts, similarly, must be able to have regard for information contained in explanatory notes prepared by the relevant government department and published with a Bill. The courts would be failing in the due discharge of the new role assigned to them by Parliament if they were to exclude from consideration relevant background information whose only source was a ministerial statement in Parliament or an explanatory note prepared by his department while the Bill was proceeding through Parliament. By having regard to such material the court would not be 'questioning' proceedings in Parliament or intruding improperly into the legislative process or ascribing to Parliament the views expressed by a minister. The court would merely be placing itself in a better position to understand the legislation.

[65] To that limited extent there may be occasion for the courts, when conducting the statutory 'compatibility' exercise, to have regard to matters stated in Parliament."

51. Is the distinction between Parliamentary and extra-Parliamentary accounts of legislative intent technical only? Lord Hope in his speech in *Wilson* explained why it is not. He spoke ([110]) of "familiar constitutional principles" and went on:

"[111] One of these principles, which has repeatedly been emphasised, is that legislation is the exclusive responsibility of Parliament Another is that it is the intention of Parliament that defines the policy and objects of its enactments, not the purpose or intention of the Executive."

He went on, in a carefully reasoned passage, to endorse the use of Parliamentary materials for the purposes of s.4 of the Human Rights Act : see [112] to [118]. Lord Hobhouse did so too, but with this caveat:

"[139] ... Once one departs from the text of the statute construed as a whole and looks for expressions of intention to be found elsewhere, one is not looking for the intention of the legislature but that of some other source with no constitutional power to make law."

52. We recognise that there is a longstanding anomaly in the principle on which extraneous aids to construction are accepted. The resort to White Papers, endorsed long before *Pepper v Hart* by the decision of the House of Lords in *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenberg AG* [1975] AC 591 , is a resort precisely to statements of legislative intent by the Executive. It may be that White Papers are nowadays — that is since *Pepper v Hart* — to be regarded, like ministerial statements made in Parliament, as means by which Parliament informs itself in the course of the legislative process.

53. We are not at present persuaded, even so, that the speeches in *Wilson* will accommodate the full ambit of Mr Webb's witness statement in these proceedings. If it is open to a minister whose predecessor was administratively responsible for a Bill to give evidence for s.4 purposes of the departmental policy and intent behind the measure, it is not immediately obvious why a minister may not give evidence — potentially conclusive evidence — of what he or his predecessor intended in making a statutory instrument of which the meaning is being debated in court.

54. It appears from Lord Nicholls' speech that it is the proportionality of the legislative policy at the time of the challenge, not at the time of the enactment, which has to be determined. This is still relatively unexplored territory. In *Wilson* Lord Nicholls was able to note (at the end of [62]) that there

had been no suggestion of a relevant change of circumstances since 1974 when the statute under consideration was enacted. In the present case, what is novel is not the general situation in relation to in vitro fertilisation but the specificity of a case arising within it. This too would seem to be within the principle stated by Lord Nicholls. If the Human Rights Act is concerned with the protection of individuals from particular incursions by the state into fundamental rights now accorded to them by law, it must be open to a single individual to challenge as disproportionate the effect of legislation on her alone. But that is not to say that the state cannot rely on the generality of its policy and the needs of society as making its measure proportionate: it is simply to say that the interests of the many will not always or necessarily eclipse the rights of a few.

55. Mr Coppel has drawn our attention to two recent human rights cases in this court, in each of which departmental evidence was admitted and relied upon in the process of deciding whether legislation was compatible with Convention rights. In *R (on the application of Carson and Reynolds) v Secretary of State for Work and Pensions* [2002] EWCA Civ 797 [2003] 3 All ER 577, the court had to consider the Convention-compatibility of statutory provision for widows' benefit and widows' bereavement allowance. At [52] to [55] an important body of data, taken from the evidence of a senior civil servant, was cited and relied upon by Laws LJ in relation to the question whether the (discriminatory) granting of widows' pensions should have been discontinued earlier than it was. At [52] Laws LJ cites and founds upon data about the numbers of pensioners eligible for uprating should the appellants' arguments succeed, and at [79] he recites departmental testimony about the earning capacity and domestic independence of different age-groups (associated, it has to be said, with some evaluative comments which evidently drew heavy fire from the appellants' statistical expert).

56. Since no formal objection has been taken, we are not called upon to rule on the admissibility of Mr Webb's evidence. We do no more than record our concerns about it and express the hope that attention will be given to them in future proceedings on the construction of a statute to which the promoting department is a party. It does not appear that admissibility was in issue in the case noted in the previous paragraph. They may demonstrate no more than that, once the proportionality or discriminatory effect of legislation becomes an issue under the Human Rights Act, it may help the court to know the factual background against which the compatibility of the legislation with the Convention falls to be gauged. This would be unexceptionable, not as an aid to construction but as a means of testing compatibility. What remains to be decided if the occasion arises is the admissibility of evidence of departmental policy as an aid to the construction of a statute. The issue is a potentially important one which touches upon the separation of powers.

Article 8 of the Convention

57. Mr Tolson's contention is that the respect for private life commanded by Article 8 either requires a secondary or non-natural reading of the Act or, if this is not possible, creates an incompatibility which the court should declare.

58. The first limb of this submission can be briefly addressed. There is no available way of reading down the Act so as to make the withdrawal of Mr Johnston's consent immaterial to the continuation of Ms Evans' treatment. We say 'no available way' because this court in *Re R* [2003] 2 All ER 131 has construed the Act as meaning that "the embryo must be placed in the mother at a time when treatment services are being provided for the woman and the man together". Were it not for this, it might have been arguable that the recurrent use of the word 'together' following various references to 'a man and a woman' is simply a drafter's device to prevent 'and' from being read disjunctively. If this were the case, everything would continue to turn on consent; but the terms in which consent is obtained might well call for revision, since in its present prescribed form it assumes that the man and the woman must be 'together' in a sense more enduring than simply having been joint candidates for treatment. The questions about the prospective well-being of the child would of course remain. But once mutuality is required at the point where treatment services are being provided, the requirement of continuing consent is inescapable.

59. Is this statutory requirement then compatible with Ms Evans' right to respect for her private life? Article 8 provides:

59. Right to Respect for Private and Family Life

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Mr Tolson has not argued the family life limb.

60. It was held by Wall J and was accepted before us that the refusal of treatment is an interference with, and therefore a failure to respect, Ms Evans' private life. The respondents' answer is that the limitation of Ms Evans' right is prescribed by law and is necessary for the protection of the rights and freedoms of, in this case, Mr Johnston. The argument therefore turns on whether this limitation is one which is necessary in a democratic society — or, in the Strasbourg court's translation of that phrase, whether it is proportionate.

61. Mr Tolson's argument is not that it is disproportionate for the statute to require regard to be had to the question of Mr Johnston's consent but that it is disproportionate to make it decisive. He accepts that this would mean that in each case where consent was withdrawn the Authority or the clinic or both would have to evaluate the case for continuing with treatment in its absence. This is precisely why, in the respondents' contention, a bright line is justifiable, indeed essential.

62. We have set out earlier in this judgment what we recognise as the policy of the Act. Mr Coppel, whose argument is adopted by the Authority and by Mr Johnston, makes it his principal submission that the adoption of such a policy is “clearly within the area where the state will be accorded a broad discretion”. “The state authorities,” he submits, “are entitled to be accorded a broad margin of discretion in deciding where the balance should be struck”.

63. We consider propositions of this breadth to be a wrong starting point. The margin of appreciation (a solecism originating in the literal rendering in the English text of the decision in *Handyside v United Kingdom* (1976) 1 EHRR 737 of the French phrase ‘*marge d'appréciation*’, meaning margin of appraisal or judgment) is a tool by which the Strasbourg court gauges the relationship of a state's act to the Convention. It has no direct relevance to the process by which a court adjudicates, within a state, on the compatibility of a measure adopted by the executive or the legislature, for it is only at the end of that process that the state's act crystallises. This is why Lord Hope in *R v DPP, ex parte Kebilene* [2002] 2 AC 326, 381, took such care to distinguish the Strasbourg approach from what he characterised domestically as the discretionary area of judgment. Discretion implies a choice between two or more legitimate (and therefore proportionate) courses, and where Parliament has made such a choice the courts have no power of intervention under the Human Rights Act. To invoke a supposed “margin of discretion” by contrast is to collapse two distinct concepts into a single nebulous one.

64. What is therefore critical in deciding whether the point of intervention has been reached is the legitimacy, in Convention terms, of the choice that Parliament has made. As Lord Nicholls said in *Wilson* [70]:

“Assessment of the advantages and disadvantages of the various legislative alternatives is primarily a matter for Parliament. The possible existence of alternative solutions does not in itself render the contested legislation unjustified ... The court will reach a different conclusion from the legislature only when it is apparent that the legislature has attached insufficient importance to a person's Convention right ... The more the legislation concerns matters of broad social policy, the less ready will be a court to intervene.”

65. The last of these propositions is not gratuitous or freestanding. It follows logically from the preceding propositions, for this reason: while legislation modifying individuals' private law liabilities can be expected not to infringe their Convention rights without clear justification, legislation directed to the implementation and management of social policy may well have to infringe some individuals' Convention rights in the interests of consistency. But the test is the same in both cases: could a less drastic means have been used to achieve the chosen end without infringing the primary right of the claimant?

66. The less drastic means contended for here is a rule of law making the withdrawal of Mr Johnston's consent non-conclusive. This would enable Ms Evans to seek a continuance of treatment because of her inability to conceive by any other means. But unless it also gave weight to Mr Johnston's firm wish

not to be father to a child borne by Ms Evans, such a rule would diminish the respect owed to his private life in proportion as it enhanced the respect accorded to hers. Further, in order to give it weight the legislation would have to require the HFEA or the clinic or both to make a judgment based on a mixture of ethics, social policy and human sympathy. It would also require a balance to be struck between two entirely incommensurable things. Whatever decision was arrived at might be capable of being explained but would be practically impossible to justify.

67. Like Wall J, we agree that the two principles which visibly underpin Schedule 3 to the Act, neither of them objectionable in Convention terms, are the principle of female self-determination and the principle of consent. The two are articulated by requiring mutual consent to the point of implantation, but by thereafter giving the woman full control of the pregnancy. This protects not only the man but the woman from any compulsion to go through with the treatment. Its vice, from the present claimant's point of view, is that it accords no recognition to her now-or-never situation. But for the reasons we have given, it is not possible to construct an alternative system which would have that effect, would be Convention-compliant and would still be able to achieve the legitimate objectives of the legislation. It might be otherwise if one of those objectives were to fix consent at the moment of sperm donation; but the role of the court does not extend to intervention in legislative policy choice (the "discretionary area of judgment") save where the policy itself contravenes the Convention.

68. Mr Tolson has relied on authorities which undoubtedly illustrate the power of the court to intervene on human rights grounds where, for example, a policy adopted for the exercise of statutory powers, by being unnecessarily rigid, disproportionately infringes human rights. One example is *R (on the application of P and Q) v Home Secretary* [2001] FLR 1122, where it was held that an inflexible rule against mothers keeping their babies in prison beyond the age of 18 months could operate disproportionately. But such cases illustrate an uncontentious point, just as the decision in favour of a bright-line rule in *Pretty v United Kingdom* (2002) 35 EHRR 1, paras. 72–4, illustrates the same point from the other side.

69. The contentious point is whether the principle of proportionality has been infringed here. As Mr Coppel submits, there may be good reasons for a uniform regime: exceptions are not always necessary to comply with the requirement of proportionality. He goes on to argue that the fact that legislation may produce a harsh or unreasonable outcome in a particular case does not render it disproportionate. That may be right, but — at least if the outcome is a denial of a primary Convention right — the case for a bright-line rule requires careful examination. Adopting the synoptic test propounded by Hale LJ in *Re W and B* [2001] 2 FLR 582, para. 54(iii), for the generality of care cases, we ask ourselves "whether the proposed interference with the right to respect for private life is proportionate to the need which makes it legitimate". The answer, in our judgment, is that it does. The need, as perceived by Parliament, is for bilateral consent to implantation, not simply to the taking and storage of genetic material, and that need cannot be met if one half of the consent is no longer effective. To dilute this requirement in the interests of proportionality, in order to meet Ms Evans' otherwise intractable biological handicap, by making the withdrawal of the man's consent relevant but inconclusive, would create new and even more intractable difficulties of arbitrariness and inconsistency. The sympathy and concern which anyone must feel for Ms Evans is not enough to render the legislative scheme of Sch. 3 disproportionate.

Article 14 of the Convention

70. Mr Tolson's alternative argument, that the statute unjustifiably discriminates against Ms Evans in breach of Article 14, encounters insuperable difficulties of principle.

71. Article 14 provides:

71. Prohibition of Discrimination

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

72. The first question is: what is the material ground of discrimination here? Mr Tolson submits that it is Ms Evans' infertility as against that of fertile, or alternatively pregnant, women. The difficulty with this is that it is not the Act which discriminates against Ms Evans on this ground. It is the Act which,

conditionally, seeks to reverse nature's discrimination. What are under attack in these proceedings are the conditions on which it does so.

73. If therefore there is to be an Article 14 claim, it has to relate to the legislative discrimination between women seeking treatment whose partners have withdrawn their consent and those whose partners have not. Mr Tolson has not argued the case on this basis. While, however, we are not disposed to accept Mr Coppel's submission that failure under Article 8(2) means that Ms Evans cannot succeed under Article 14, the factors which render the material provisions proportionate under Article 8(2) also have the effect, in our judgment, of affording objective justification for the single form of discrimination of which complaint could logically have been made, that is to say discrimination on the basis of consent. And this, no doubt, is why the Article 14 case has not been argued on such a footing.

74. For these reasons we reject the claim under Article 14. On the alternative approach preferred by Arden LJ to Article 14, namely that the Act discriminates between women who can and women who cannot conceive through sexual intercourse, we would have held likewise that the discrimination is objectively justified for the reasons we have given under Article 8(2).

General remarks

75. For Ms Evans this is a tragedy of a kind which may well not have been in anyone's mind when the statute was framed. Where, as has happened here, the parties' confidence in each other's commitment proves ill-founded, there is nothing in the legislation to stop the woman trying again with another partner or with a donor. In fact, had there been any doubt about the durability of Mr Johnston's commitment, or even time for Ms Evans to reflect a little about the future, different boxes might have been ticked and the present impasse avoided. As Ms Rose accepted, Ms Evans might have chosen to have her eggs frozen (a risky procedure) or to have had her eggs fertilised by the use of donor sperm. What has brought about the present tragedy is Ms Evans' inability, because of the removal of her ovaries, to produce any more eggs for any of these purposes. In such a situation the simple requirement of continuing consent can work hardship of a possibly unanticipated kind.

76. We wish also to associate ourselves wholeheartedly with the remarks of Lady Justice Arden on this aspect of the case.

Conclusion

77. This appeal therefore fails.

Lady Justice Arden:

78. I have read in draft the judgments of Thorpe and Sedley LJJ. I gratefully adopt their statement of the facts. I agree that this appeal must be dismissed but in part for different reasons.

The Human Fertilisation and Embryology Act 1990

79. This Act was passed following the publication of the *Report of the Committee of Inquiry into Human Fertilisation and Embryology* under the chairmanship of Dame Mary Warnock DBE ("the Warnock Report") (Cmnd 9314) (July 1984), consideration of the responses to a consultation paper issued by the Department of Health and Social Security under the title of *Legislation on Human Infertility Services and Embryo Research* (Con 46, 1986) ("the consultation paper") and the publication of a White Paper, *Human Fertilisation and Embryology: A framework for legislation* (Cm 259) (November 1987) ("the white paper"). A primary object of the 1990 Act is to regulate the creation, use and storage of human embryos outside the body. Thorpe and Sedley LJJ have set out certain provisions of the 1990 Act. This appeal principally concerns the statutory restrictions on the use of embryos. In outline, the 1990 Act stipulates that the Human Fertilisation and Embryology Authority ("the Authority") may grant licences to provide treatment services (that is, medical treatment to assist women to have children) but it is a condition of such licences that a person's genetic material is not used except in accordance with a subsisting consent given in writing: see sections 2(1) and 11 of, and schedule 3 to, the 1990 Act. Section 11 and schedule 3 are set out in the judgment of Thorpe and Sedley LJJ.

80. The 1990 Act inevitably uses clinical language, such as gametes and embryos. But it is clear that what the 1990 Act is concerned with is the very emotional issue of infertility and the genetic material

of two individuals, which, if implanted, can lead to the birth of a child.

81. Infertility can cause the woman or man affected great personal distress. In the case of a woman, the ability to give birth to a child gives many women a supreme sense of fulfilment and purpose in life. It goes to their sense of identity and to their dignity.

82. Science has made many remarkable advances in recent years. Among them is in vitro fertilisation ("IVF"). This enables a woman to conceive a child in circumstances where in the past this would have been impossible or nearly impossible, as where a woman ovulates only very occasionally. The treatment is perhaps unpleasant and certainly intrusive, but the result is to give a woman who is not fertile the chance of being on the same footing as one who is.

83. Miss Dinah Rose, for the Authority, submits that there are two pillars in the 1990 Act, the interests of the child and the consent of the two persons who are to be the parents of the child and consent to be treated together or to the use of their genetic material. In *Leeds Teaching Hospital NHS Trust v A* [2003] 1 FLR 412, Dame Elizabeth Butler-Sloss P described these two matters as "the two most important principles to be found in the Act". In relation to consent, the Warnock Report, whose recommendations were substantially implemented by the 1990 Act, stated:

83. "Consent"

3.5 We feel it to be very important that time and consideration should be devoted to explaining fully to prospective patients and, where necessary to their partners, the details of any infertility treatment they are to undergo. No such treatment should be undertaken without the fully informed consent of the patient and this should, in the case of more specialised treatment, normally be obtained in the presence of someone not associated with the procedures ..."

84. The requirement to consider the interests of the child is in section 13(5) of the 1990 Act, which Thorpe and Sedley LJ have set out. The Act does not, in fact, define "child". If the life of a child began before the relative embryo was transferred to a woman, it would always (or very nearly always) be in the interests of the child for the embryo to be so transferred unless the mother had contracted some disease which would deprive the child of any meaningful standard of life when born. If indeed the life of a child began before transfer of the relative embryo to a woman, the genetic father would never have any ability to withdraw his consent after the embryo had been created. Nor could an embryo ever be destroyed. However, it is clear that the 1990 Act draws a distinction between an embryo and a child.

85. It is understandable that even in legislation about the procreative freedom of two adults there must be a requirement to take account of the interests of the child. Put another way, it is the policy of the 1990 Act that children should not be brought into the world simply to satisfy the wishes of their genetic parents, or other human beings. There may, quite separately, be plenty of scope for argument about what the interests of the child involve. Over the course of time, views about what is in the interests of a child have changed. Thus, for instance, at one point in time it was thought that it was important that the child should know where his or her home was. Today, the courts often approve shared care arrangements which permit the parents to take very nearly equal shares in caring for the child so that the child will spend nearly half its time in one place and the remainder in another. Parliament has not prevented developments in the law in that regard.

86. It is less easy, however, to find the statutory requirement for consent. As the judgment of Thorpe and Sedley LJ shows, the requirement for the consent of the genetic parents is not in the substantive sections of the 1990 Act but tucked away in a schedule incorporated into the 1990 Act by the provisions regulating the conditions on which licences may be granted under the 1990 Act. I pause to remark that this seems to me to be a periphrastic way for Parliament to identify one of the twin pillars of the 1990 Act. Then the issue is, consent to what? In normal sexual intercourse, a man gives his sperm voluntarily but is not thereafter in a position to prevent the consequent birth of a child. Parliament would obviously wish to require the consent of any person who gave his sperm or on whom legal paternity was to be imposed at the start of the treatment services. But the question whether his consent is required at any later stage in the treatment is left comparatively obscure. It depends on the meaning of the provision of treatment services to two persons "together" and of the word "use" in relation to an embryo.

87. This issue is not simply a question of words. Words could have been chosen to reflect any particular policy. The underlying question is: what is the policy to which the provisions of the 1990 Act give expression? On this, the position is that there is little material demonstrating pre-legislative consideration of the question whether the father's consent should be to all stages in the treatment. The Warnock Report does not deal with this issue: it states that both parties will give their consent to seek treatment (paragraphs 3.5 and 4.23). But at no stage does the Report discuss what is to happen if the parties become estranged during treatment. Nor was anything said about this matter in the consultation paper. Nor have we been taken to any admissible statement in Hansard. The only admissible pre-legislative material is in the White Paper. Paragraphs 57 and 58 of this document state that donors would have the right under the proposed legislation to vary or withdraw their consent "before the gametes/embryos were used", and that it would not be possible for embryos to be destroyed without both donors' consent. However, there is no explanation for these proposals.

88. There are a number of possible reasons for requiring the consent of the genetic father at all stages. It can be said that it is important to involve the male at all stages so as to ensure that he will be involved in the upbringing of the child. No doubt that is a very good idea in principle but the genetic father can equally withdraw his consent after implantation. Moreover, it is not to be assumed that the child cannot properly be brought up without two parents. Another approach might be that the father has some rights of property in his genetic material. But the question posed by this case is, why should he have any right of property in this regard since he would not have had any right of property if sexual intercourse had taken place in the normal course of events?

89. As Thorpe and Sedley LJ have explained, the court asked Mr Johnston, the genetic father in this case, whether he would consent to the storage of the embryos in question in case Miss Evans met another partner who would become the legal father of any child resulting from implantation of the embryos. Mr Johnston in that event would not have legal responsibility for such a child. Mr Kambiz Moradifar, for Mr Johnston, told the court that Mr Johnston did not agree to this on the grounds of principle. He does not want to know there is a child of his growing up in some other town. So the wider issue arises whether in a world in which many people have come to accept a woman's right of choice as to whether she should have a child or not the genetic father should have the equivalent right — a right greater than that conferred by nature. Should there be a continuing requirement for consent when there is no link between mere biological parenthood and legal responsibility? Is it to be supposed that, if a father in this situation some years after the birth of the child met the child, in whom the spark of human life had by then been kindled by his ex-partner, he would be bound to say "I wish you had never been"? These are difficult questions. However, it may be that the answer to the question posed at the end of the previous paragraph is that, if the father were to reject the child, that could be distressing for both parties. Indeed, even without meeting the child, the father's own freedom of action may be inhibited by feelings of guilt or even responsibility, for instance if the mother became unable to look after the child. This may also be part of the rationale for a continuing requirement for the father's consent to use or storage of his genetic material, if that is what the 1990 Act indeed provides.

90. Ms Evans wants the freedom to have the embryos containing her genetic material transferred to her. She wants to exercise her reproductive liberty in this way. The courts respect freedoms for many reasons, not least because to do so demonstrates respect for the dignity of each individual as a human being. The difficulty for Ms Evans is that the genetic material is now not simply hers alone. If the 1990 Act contained no restriction, or if there had been no Act, the courts might well say that the father had given his consent.

91. A feature of modern society is that conditions are changing very rapidly. Only in 1978 was it possible for a child to be conceived by IVF and for the hope of parenthood to be given by technology. Parenthood is one of the great privileges and joys of life. Not all adults want it, but for those who do want it, it is, and I repeat, one of the privileges and joys of life. Moreover, many women feel parenthood gives them an assurance of their position in society. Parenthood is a very important matter to women, even today. The United Kingdom was one of the first countries to have legislation regulating IVF treatment, and the model of regulation which Parliament chose was a detailed and comprehensive one: (see *R (Quintavalle) v Secretary of State for Health* [2003] 2 AC 687). The position in the United Kingdom may be contrasted, for instance, with that in the United States, where IVF treatment is not regulated: see generally Bartholet, E, *Family Bonds* (1999), Chapter 9 and *Medically Assisted Procreation and the Protection of the Human Embryo: comparative study on the situation in 39 states* (Council of Europe) (1998), exhibited to the witness statement of Mr Edward Webb filed on behalf of the Secretary of State for Health.

“Treatment together”

92. It is important to recognise the centrality of this issue in this case. Even if the requirement for Mr Johnston's continuing consent is satisfied or the fact of its withdrawal is overcome, the embryos resulting from the genetic material of Ms Evans and Mr Johnston cannot be implanted in Ms Evans unless it can be said that the implantation would be part of services provided to Mr Johnston and Ms Evans “together”. This was the limitation in the consent provided by Mr Johnston: see paragraph 8 of the judgment of Thorpe and Sedley LJ. It is accepted by all parties that this word must have the same meaning as in sections 4(1)(b) and 28(3) of, and paragraph 2(1)(a) of schedule 3 to the 1990 Act. Curiously, when treatment services are provided to a man and woman together a licence is only required for the purpose of storing genetic material: section 4(1)(a)(b). Moreover, paragraph 2(1)(a) of schedule 3, unlike section 4(1)(b), does not require that the persons receiving treatment together should be a man and a woman.

93. As the appellant points out, “treatment together” cannot mean literally together. In *Re R (a child)* [2003] 2 All ER 131, this court had to determine whether the person, who had agreed to receive treatment services together with the mother of a child born as a result, was the father for the purposes of section 28(3) of the 1990 Act even though the couple had separated. The putative father had never withdrawn his consent to treatment together. This court held that, as the couple were not receiving treatment services together at the time of the transfer of the embryo to the woman, the person who sought legal paternity did not acquire that status under section 28(3). This decision followed that of Bracewell J in *Re B* [1996] 2 FLR 15 where Bracewell J spoke of a “joint enterprise”. This court in *Re R* expressed some disapproval of the translation by Wilson J of the requirement for receiving “treatment together” into a requirement for receiving treatment “as a couple”. In so far as this imposed some additional requirement, it constituted an unjustifiable gloss on section 28.

94. The effect of the provision of treatment services together in section 28 is a very different from its effect in schedule 3, paragraph 2(1)(a). Parliament is unlikely to have intended a person to be able to claim legal paternity in respect of a child with whom he has no biological or other connection other than that he signed a consent to become his or her father under different circumstances in the past. Nonetheless, since in an Act of Parliament words are in general to be given the same meaning, the jurisprudence in *Re R* as to the meaning of “together” in section 28(3) must inform this court's approach to the same term in schedule 3, paragraph 2(1)(a). It follows that the consent to the provision of treatment services together must be consent to each and every stage of the provision of the treatment services. Accordingly, if the consent is not formally withdrawn, but those who formerly sought treatment “as a joint enterprise” no longer do so, the consent is inoperative as the treatment services would no longer be within those described in the consent.

95. The licence holder will not commit an offence under section 4(1) as a result of a consent becoming ineffective, provided that he had taken all reasonable steps and exercised all due diligence to avoid committing an offence (see section 41(11) of the 1990 Act).

96. My conclusion means that, on the construction which I have placed on “together” in schedule 3, paragraph 2(1)(a), Ms Evans cannot succeed on this appeal even if she shows that the consent was never withdrawn, unless she can succeed in showing that the structure of consents required by schedule 3 is incompatible with her Convention rights or must bear some other construction in order to be compatible with her Convention rights.

97. The requirement for treatment together appears to reflect an expectation that, if two persons are jointly involved in the creation of an embryo and its transfer to the woman, both will be responsible for the upbringing of the child when born. As I have sought to show, this aim is not necessarily achieved simply by a requirement for two people to be involved together at that stage. It may one day be possible for a child to have only one genetic parent. Even now, there is no need for a child to be brought up by two persons and very often these days this does not happen. However, the appellant has not argued that the word “together” must be given a contemporary meaning to reflect this change in social conditions and accordingly this is not an argument on which it would be appropriate for me to express a view in this case.

98. In effect the argument of Mr Robin Tolson QC, for Ms Evans, on this point removes any function for the word “together”. On his argument it adds nothing to the requirement for consent.

99. Once the meaning of treatment “together” has been determined, it becomes a question of fact whether there would in the present case be treatment “together”. In my judgment, Mr Johnston and

Ms Evans would plainly not be united in their quest for treatment services and accordingly Mr Johnston's consent would not cover implantation of the embryos into Ms Evans.

100. Accordingly, for similar reasons to those given by the judge, I consider that the judge came to the right conclusion on this point.

“Use”

101. In the case of IVF, schedule 3 draws a distinction between the creation, storage and use of an embryo: see paragraphs 2 and 3 of schedule 6. Mr Tolson seeks to persuade the court that “use” of an embryo occurs effectively as soon as the embryo is created, that is when the embryos are selected for storage. He invokes paragraph 1(1)(d) of schedule 2. This describes the various sorts of activities that can be licensed. Paragraph 1(1)(d) describes one such activity as “practices designed to secure that embryos are in a suitable condition to be placed in a woman or to determine whether embryos are suitable for that purpose.” These activities can, as Mr Tolson submits, only fall within the class of activities constituting “use” on the basis of the 1990 Act's threefold classification. The judge did not accept this argument: he held that paragraph 1(1)(d) of schedule 2 was equally apt to describe processes preparatory to “use”. I agree. However, the Authority have to accept that “use” is not limited to transfer to a woman. For instance, in *R (Quintavalle) v Human Fertilisation and Embryology Authority* [2004] QB 168 (which, like the judge, I will call *Quintavalle (tissue typing)*), the removal of a single cell from an embryo was held to be the “use” of an embryo which the Authority could licence. On the question whether the carrying out of tests on the cell so removed, constituted use, only Mance LJ expressed a view. In his judgment, this did not amount to use of an embryo. This shows that the concept of “use” has limits.

102. However, the provisions of paragraph 4(2)(a) have to be read and construed against the fact that, by inference from the principle of the primacy of consent in the Warnock Report and the Act, the aim of the provision is to identify the last point in time when a consent can be withdrawn. There can, therefore, only be one “use” for the purpose of this paragraph. Since paragraph 4(2)(a) provides by implication that the withdrawal of consent by the person who provided the genetic material is ineffective after “use”, the court should, in determining which “use” is the “use” for the purpose of paragraph 4(2)(a), approach the matter on the basis that the relevant use is the last practicable “use” for the purpose of barring the withdrawal of consent. This approach is consistent with permitting the genetic parents maximum control over the use of their own genetic material.

103. In the context of the withdrawal of consent (schedule 3, para.4), in my judgment, “use” refers to the final stage. That construction is one which gives greatest respect to the genetic parents as individuals. On the appellant's construction, Ms Evans could not now withdraw her consent and the question would arise whether the embryo could still be transferred to her if Mr Johnston insisted.

104. The meaning of “use” (and that of “together”) for the purposes of schedule 3 is not, in my judgment, as the judge thought, a question of fact but a question of law, being a question of the true interpretation of the Act.

105. In any event, in Ms Evans' case the treatment could not properly be described as “use”. All that happened was that the embryos were inspected visually to remove abnormal ones. This is in reality simply a process preliminary to the use of an embryo.

Article 2

106. Article 2 of the Convention provides that “Everyone's right to life shall be protected by law.” Mr Tolson recognises that an embryo has no right to life in the sense that a human being has such a right. He submits that an embryo has a qualified right to life, that is a right to life which is consistent with his mother's wishes. Neither Convention jurisprudence nor English law provides a clear cut answer to the question: at what point does human life attain the right to protection by law? For many purposes, the viability of a foetus is taken as the benchmark for determining the legal status of a child. Under the Abortion Act 1967, as amended by the 1990 Act, the legal benchmark is twenty-four weeks. At that point, however, a child may today survive: approximately 20% to 30% of such babies survive. Abortions are not permitted after the twenty-four weeks' stage unless there is a substantial risk of foetal disability or a substantial risk to the life or health of the mother. We do not have any scientific detail and so I proceed on the basis that while an embryo has the potential to become a person it is not itself that person: further changes must take place.

107. In my judgment, an embryo has no qualified right to life. This court rejected the argument that a foetus had a right to life protected by Article 2 in *Re F (in utero)* [1988] Fam 122. So far as an embryo created by IVF is concerned, the claim to a right to life must be weaker. The 1990 Act does not recognise any such right, whether absolute or qualified in the way Mr Tolson submits, since the embryo must be destroyed after ten years or if either party withdraws their consent to storage. (In the different context of Article 8 and within the field of artificial insemination ("AID"), the Strasbourg court has accorded member states a wide margin of appreciation with respect to the recognition of the rights of social parents, noting the lack of consensus between member states with regard to some of the ethical issues arising from AID: *X, Y and Z v United Kingdom* (1997) 24 EHRR 143. The 1998 Council of Europe report suggests a similar lack of consensus in relation to the ethical issues arising from IVF.) In all the circumstances, I do not consider that the 1990 Act in denying the embryo even a qualified right to life is incompatible with the Convention. In sum, the embryo has no right to life which trumps the right to choose of a person whose ongoing consent to its use or storage is required under the 1990 Act.

Article 8

108. It is common ground that Article 8, which has already been set out by Thorpe and Sedley LJ, is engaged because Ms Evans' bodily integrity (private life) is affected. I do not consider that she could assert any right to family life with a future child whose embryo has yet been transferred to her. However, I agree with the judge that, by regulating the circumstances in which Ms Evans can have an embryo transferred to her, the state has interfered with Ms Evans' private life for the purposes of Article 8. The assumption made by all parties is that Article 8 is engaged to the extent that the 1990 Act purports to regulate any right they would otherwise have to use an embryo. No distinction has been drawn between the requirement for consent at the start of treatment and the requirement for ongoing consent. In other words, argument has not been addressed to the question whether the requirement for ongoing consent (as opposed to the requirement for consent before treatment starts) is necessary in order to ensure compatibility with the Convention.

109. The next question is whether the interference is justified under Article 8(2). In the 1990 Act Parliament has taken the view that each genetic parent should have the right to withdraw their consent for as long as possible. It was not inevitable that Parliament should take that view. Subject to the possible effect of the Convention, Parliament could have taken the view that, as in sexual intercourse, a man's procreative liberty should end with the donation of sperm but that, in the light of the woman's unique role in making the embryo a child, she should have the right to determine the fate of the embryo. But Parliament did not take that view. Nor did Parliament take the view that the court should have any power to dispense with the requirement for consent of both parties, even when circumstances occur which were not envisaged when the original arrangements were made.

110. Like Thorpe and Sedley LJ, I consider that the imposition of an invariable and ongoing requirement for consent in the 1990 Act in the present type of situation satisfies Article 8(2) of the Convention. The requirement is supported by the arguments set out in the evidence of Mr Edward Webb, particularly the argument based on the primacy of consent. As this is a sensitive area of ethical judgment, the balance to be struck between the parties must primarily be a matter for Parliament: see the passage from the speech of Lord Nicholls in *Wilson v First County Trust Ltd (No.2)* [2004] AC 816, [70] set out in the judgment of Thorpe and Sedley LJ, paragraph [63]. Parliament has taken the view that no-one should have power to override the need for a genetic parent's consent. The wisdom of not having such a power is, in my judgment, illustrated by the facts of this case. The personal circumstances of the parties are different from what they were at the outset of treatment, and it would be difficult for a court to judge whether the effect of Mr Johnston's withdrawal of his consent on Ms Evans is greater than the effect that the invalidation of that withdrawal of consent would have on Mr Johnston. The court has no point of reference by which to make that sort of evaluation. The fact is that each person has a right to be protected against interference with their private life. That is an aspect of the principle of self-determination or personal autonomy. It cannot be said that the interference with Mr Johnston's right is justified on the ground that interference is necessary to protect Ms Evans' right, because her right is likewise qualified in the same way by his right. They must have equivalent rights, even though the exact extent of their rights under Article 8 has not been identified.

111. The interference with Ms Evans' private life is also justified under Article 8(2) because, if Ms Evans' argument succeeded, it would amount to interference with the genetic father's right to decide not to become a parent. Motherhood could surely not be forced on Ms Evans and likewise fatherhood cannot be forced on Mr Johnston, especially as in the present case it will probably involve financial

responsibility in law for the child as well.

112. Mr Tolson argues that the legislative policy is disproportionate. I do not agree. We are not dealing with a ministerial policy but with a person's consent. In those circumstances, I consider that it is Convention compliant for the legislature to have a policy which respects that individual's consent and admits no exception to this policy.

113. Mr Tolson also argued that both parties' consent should logically be required *not* to store an embryo since this involves its destruction. Indeed, the Warnock Report recommended this approach. The White Paper also proposed this approach (see above). But the legislature has taken another approach, and the policy in this area is, as I have already stated, primarily a matter for Parliament. I consider that it was entitled so to do balancing the possibility that a genetic parent might change their mind against such factors as the emotional burden that uncertainty in the meantime would bring.

114. I am mindful that Thorpe and Sedley LJ are concerned that Mr Webb's evidence contains matters which may in constitutional terms be improper. This issue has not been fully argued. I accept that the substance of these matters could have been presented as submissions, but in the absence of full argument I find it difficult to see why they cannot equally be included in the evidence served on behalf of the Secretary of State. The court has to form a view as to whether the interference with Ms Evans' private life is justified in order to determine whether the 1990 Act violates Ms Evans' Convention rights. This is part of the process of interpretation since, if the 1990 Act does violate Ms Evans' Convention rights, the court must consider whether the 1990 Act can be given a strained meaning so as to have effect in a manner which is compatible with her Convention rights (Human Rights Act 1998, section 3). If such rights are violated, and the Act cannot be interpreted to have the effect mentioned, then the court may make a declaration of incompatibility (Human Rights Act 1998, section 4). If any party submits that there is relevant evidence on the question of (say) proportionality or legitimate aim (being questions which are often essential steps in determining when a Convention right has been violated by an enactment), it must be put in evidence in an appropriate way. Mr Webb's evidence sets out the legislative history of the provisions of the 1990 Act which govern the giving and withdrawal of consent (including an explanation of the history of material differences between the Warnock Report and the 1990 Act). He also sets out the matters which the Secretary of State considers to be the ethical and practical considerations favouring the present consent regime in the 1990 Act. It therefore goes beyond matters of submission, but it is not suggested that the Secretary of State's views could bind the court's judgment on these matters. For completeness, I should add that Mr Webb also deals in his witness statement with the legal practice in other member states of the Council of Europe (see above), and with the legal status of embryos.

115. I do not read Mr Webb's evidence as evidence as to the intention of the Secretary of State at the time of the passing of the 1990 Act but rather as an account of the present Secretary of State's views as to the policy considerations justifying the consent requirements of the 1990 Act. It is not an attempt to involve the court in the proceedings in Parliament at the time of the Bill. Since the court is concerned with the question whether the legislation is Convention-compliant as of the date of giving judgment, the court is not confined to the intention of Parliament as expressed in the 1990 Act, or to ascertaining the purpose of legislation solely from the provisions of the 1990 Act or any Royal Commission or other report leading to the enactment or any statement from Hansard which may be admissible. The observations of Lord Nicholls in *Wilson v First County Trust Ltd (No.2)* , paragraphs 63 to 66 are primarily concerned with the use which courts may properly make of statements in Parliament and they do not, as I read them, state that only such statements and statements in explanatory notes accompanying legislation or published documents, such as a White Paper, are the only sources of evidence relevant to the issue whether legislation is or is not Convention-compliant. As I have said, the evidence of Mr Webb is not put forward on the basis that the Secretary of State's views conclude any issue on this appeal, but to inform the court. For these reasons, my provisional view is that Mr Webb's evidence is admissible and that it is not liable to be impugned on the grounds of constitutional impropriety.

Article 14

116. Article 14 is set out in the judgment of Thorpe and Sedley LJ. The appellant does not need to establish a violation of Article 8 in order to be able to rely on Article 14 : see *Mendoza v Ghaidan* [2004] UKHL 30 . It is sufficient that she can bring herself within "the ambit of" Article 8 , and she can do that in this case as it is common ground that Article 8(1) is engaged. The appellant contends that she is discriminated against as an infertile woman. The remaining issues are: whether there is a

difference in treatment in respect of the enjoyment of her Article 8(1) right between the appellant and the person she puts forward for comparison, whether that person is in an analogous situation, and if so, whether the difference is justifiable.

117. The contentious issue is the identity of the correct comparator, that is the person in an analogous situation with whom the appellant can draw a comparison and demonstrate discrimination. The analogous situation in this case is that of natural conception, that is of the creation of an embryo naturally as a result of normal sexual intercourse. On the basis of that analogy, is the correct perspective that of the (biological) mother or that of the (biological) father? If the relevant perspective is that of a woman who conceives naturally, there is no discrimination because the donation of sperm through sexual intercourse is equivalent to that of the transfer of the embryo to her, and the moment of conception is equivalent to that of implantation. No embryo has yet been transferred to Ms Evans. However, the issue of discrimination in this case arises in the context of the question whether the genetic father can withdraw his consent. Accordingly, it seems to me that the focus should be on the father and the position of a fertile woman and an infertile woman in relation to the father. Seen from that perspective, there is discrimination between the position of Ms Evans and that of a woman who conceives through normal sexual intercourse. The genetic father is allowed to withdraw his consent in IVF later than he could do so in ordinary sexual intercourse.

118. However, even if this is the correct analysis for the purpose of determining whether discrimination within Article 14 exists, there is no violation of Article 14 if the discrimination is objectively justifiable. In this case, in my judgment, the provision permitting withdrawal of the genetic father's consent prior to transfer of the embryo to a woman would be so justified for the reasons given in the discussion of Article 8 above.

119. It is interesting to note that there are other respects in which the 1990 Act discriminates between women who can conceive naturally and those who undergo IVF treatment. For instance, the requirement in section 13(5) of the 1990 Act to take account of the interests of the child is not one which prevents a fertile woman (or man) from exercising their reproductive freedom. The 1990 Act clearly (and, I suggest, for good reason) discriminates between fertile and infertile adults in this respect.

Estoppel

120. In my judgment, the judge was correct in law to rule that Mr Johnston could not be estopped from exercising his statutory right to withdraw his consent. A person may give up a right created by statute for his benefit only, but here the right of withdrawal is granted in recognition of the dignity to which each individual is entitled. Such must include an individual's right to control the use of their own genetic material. In my judgment, it would be contrary to public policy for courts to enforce agreements to allow use of genetic material. Accordingly, Mr Tolson's submission on this point must, in my judgment, be rejected.

Disposition

121. For the reasons given above, I would dismiss this appeal.

122. One conclusion that I would draw from this case is that couples seeking IVF treatment should consider reaching some agreement about what is to happen to their embryos if they separate and also if the genetic father dies before transfer of the embryo to the woman. In this case, the only reference to separation in the form of consent was a statement that the appellant and Mr Johnston understood that "on cessation of our domestic relationship ... we understand that the storage and use of embryos must be reviewed". Any agreement between the parties would be subject to the 1990 Act, but early discussion could avoid heartbreak at a later stage.

Order: Appeal dismissed; application for permission to appeal to the House of Lords refused; stay granted; no order for costs, save detailed assessment of publicly funded costs, appellants application to House of Lords to be pursued expeditiously.

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