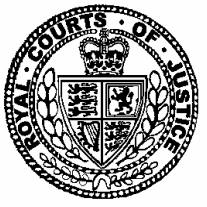


Neutral Citation Number: [2008] EWHC 2149 (Fam)

Case No: FD07P01377

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 03/10/2008

Before :

THE HONOURABLE MR JUSTICE CHARLES

Between :

L

Claimant

-and-

THE HUMAN FERTILISATION AND EMBRYOLOGY AUTHORITY

1st Defendant

SECRETARY OF STATE FOR HEALTH

2nd Defendant

Nicholas O'Brien (instructed by **Josiah - Lake**) for the **Claimant**
Dinah Rose QC and Claire Weir (instructed by **Morgan Cole**) for the **1st Defendant**
Marie Demetriou (instructed by **DWP/DH Legal Services**) for the **2nd Defendant**

Hearing dates: 29, 30 & 31 July 2008

- -

Judgment Approved by the court for handing down (subject to editorial corrections)

Charles J :

Preamble

1. I heard this case in public but made an order that the individuals involved should not be referred to by name or otherwise identified. The Claimant wishes to avoid identification. The issues include ones that are intensely private for her and her child. In my view that privacy should be respected and she should not be identified in any discussion of this judgment absent further order of the court permitting it.

2. The hearing was in public and this judgment is a public document because the issues raise matters of public interest.

3. There are two cases that are particularly relevant, one decided before the introduction of the European Convention on Human Rights (the Convention) into English law (and without reference to it) ***R v HFEA ex parte Blood*** [1999] Fam 151, and ***Evans v Amicus Healthcare Ltd and ors*** [2005] Fam 1, ***Evans v United Kingdom*** (2006) 46 EHRR 34. I shall refer to these cases as the ***Blood*** case and the ***Evans*** case. As appears from the second reference the ***Evans*** case went to the European Court of Human Rights, Grand Chamber.

4. The ***Blood*** case involved the retrieval, storage and export of gametes. The retrieval was carried out at a time when Mr Blood was in a coma. Following the decision of the Court of Appeal, in which it was held that the HFEA should reconsider its earlier refusal to do so, the HFEA gave permission for the export of the gametes. Mrs Blood now has a second child as a result of her insemination with those gametes abroad.

5. The ***Evans*** case involved a different situation. Ms Evans was diagnosed with a pre-cancerous condition of her ovaries and was offered IVF treatment prior to their removal. She and her partner signed the relevant forms which also indicated that in accordance with the Human Fertilisation and Embryology Act 1990 (the 1990 Act) either of them could withdraw consent at any time before the embryos were implanted. The couple attended a clinic and had treatment resulting in 6 embryos being stored. Later the couple's relationship ended and the man withdrew his consent to the embryos being implanted. This had the result that Ms Evans lost the chance of having a child to whom she would be genetically related. It was held that the embryos could not be implanted. The Grand Chamber was unanimous in concluding that there had been no violation of Article 2 and held by a majority (13 / 4) that there had been no violation of Article 8, or Article 14 taken in conjunction with Article 8.

6. The ***Evans*** case therefore involved a situation in which embryos had been created, the man had given and then withdrawn his consent. The central issue was whether his withdrawal of consent was decisive. It was held that it was.

7. Whereas the ***Blood*** case involved a situation in which the man did not have the capacity at the relevant time to give his consent to storage or use of his sperm and the result was that his sperm was retrieved, and stored in the UK and successfully used abroad after the death of Mr Blood.

8. A central issue in the ***Blood*** case was the exercise by the HFEA of a power conferred on it in connection with the export (and import) of gametes or embryos. That discretionary power enables the HFEA to grant a direction in an individual case permitting the export of sperm, and modifying, if appropriate, for the purposes of

export the provisions of the 1990 Act that set in mandatory terms licence conditions (including the consent provisions). By contrast, the HFEA has no power under the 1990 Act to make any direction modifying those licence provisions for the purposes of storage of gametes in connection with their use in the UK.

9. This power also plays a central part in the issue in this case. In my view issues as to its width as a matter of statutory construction, and limits on its exercise by reference to the underlying purposes of the power and of the 1990 Act are relevant. There are distinctions between a power that cannot be, or never will be, exercised to achieve a certain end, and one that will only rarely, if ever, be so exercised.

10. Retrieval without, shortly thereafter, use or storage in appropriate conditions renders the retrieved sperm useless. So in many (if not all) cases involving export for the discretionary power to permit export and a change in licence conditions to have any practical effect the sperm must be preserved and stored.

11. Immediate use of retrieved sperm would, as I understand it, be outside the licensing regime of the 1990 Act. So the HFEA is not directly concerned with the lawfulness of retrieval.

12. In the ***Blood*** case the sperm had been preserved as a result of arrangements made in an unexplored legal situation where the Court of Appeal expressed the view that humanity dictated that the sperm was taken and preserved first and legal argument followed.

13. In this case the sperm has been taken and preserved as a result of interim relief granted by the Court, initially out of hours but later continued. This has resulted in the existence of gametes retrieved from a dead man which could be used and which in practice can be the subject of a discretionary decision of the HFEA permitting export, so long as they continue to be stored pending that decision.

14. To my mind a problem in this case arises from the fact that before me the parties have not addressed in any detail how that sperm is to be preserved pending that discretionary decision if the Claimant fails to obtain the declarations she seeks.

Introduction

15. The Claimant, L, seeks the chance to secure fertility services in the UK, the EU/EEA or elsewhere using her deceased husband's (H's) gametes. She wishes to have the chance of a full genetic sibling for her daughter by her late husband. To do this she needs:

    (i) to preserve a sample of H's gametes; and if she cannot secure treatment here

    (ii) to have lawful authority to have those gametes exported for storage and use in a clinic overseas.

16. She seeks declaratory relief in respect of the provisions of the 1990 Act in respect of storage for use in and use in the UK, and in respect of storage for export and use abroad.

17. L was born in 1965 and is now 42. She married H (who was 11 years younger than her) in 2005 and they had a child in August 2006.

18. On 26 June 2007 H died in hospital after he had had an appendectomy. His death was completely unexpected and very understandably L and her husband did not have relevant discussions as to what should happen if he died when in hospital. His death was inevitably a great shock to L and I accept that the steps that she took in its immediate aftermath were motivated by the wishes of herself and her husband to have another child, her wish to have another child who by blood would be a full sibling to her existing child and time to think about whether she should pursue that course. To do this, urgent steps had to be taken to retrieve and preserve H's gametes. To this end an out of hours application was made to Macur J for declaratory relief on 26 June 2007. The hospital was notified of that application. The first Defendant (the HFEA) was not notified.

19. Macur J granted the following relief:

> " IT IS DECLARED THAT IT SHALL BE LAWFUL FOR
>
> 1. [The hospital] to retrieve sperm from the deceased [H] within 24 hours of his death provided that in so doing all due respect and dignity shall be accorded to, and that as little damage as possible is caused, to his body; provided that the procedure is to be carried out by a Consultant or such other medical professional or clinician that has experience of the relevant procedures involved and who will be able to do all that is necessary to ensure the future viability of the sperm retrieved. (The various procedures involved in the retrieval include surgical excision of the epididymis, irrigation or aspiration of the vas deferens, rectal probe electro-ejaculation and orchidectomy.) "
>
> 2. The sperm retrieved to be stored at [the Clinic or the Hospital] until further order of the court.
>
> IT IS DIRECTED THAT
>
> 3. The said application and this order shall be served upon ---------- the HFEA --------- the Human Tissue Authority by 4 p.m. on 27 June 2007.
>
> 4. The application be listed for further directions before Macur J on 29th of June 2007, time estimate 30 minutes."

20. The gametes were retrieved by the hospital on 27 June 2007 and were then transferred to the clinic where they are now stored (the Clinic).

21. On 29 June 2007 Macur J made a further order (which recites that she had read a letter from the solicitors acting for both the HFEA and the Human Tissue Authority) and contains the following provisions:

> "**It is ordered that**
>
> 1. The 2nd declaration made on 26 June 2007 shall remain in force until further order.

> 2. The application shall be read listed for directions in October 2007 before Mrs Justice Macur, ----------
>
> 3. The Applicant shall, not later than 14 days before the directions appointment, file and serve a full statement of evidence setting out all material upon which she relies as to H's wishes and a family to be identify any of H's surviving relatives together with a skeleton argument as to the legal basis of her claims for further relief "

22. The letter from the solicitors acting for the HFEA and the Human Tissue Authority pointed out that they did not believe that this was a matter that concerned the Human Tissue Authority because s. 53(1) Human Tissue Act 2004 has the effect that gametes are outside the regulatory remit of the Human Tissue Authority. They then pointed out that the storage and subsequent use (but not retrieval) of gametes is subject to the licensing requirements of the 1990 Act, and that s. 4 provides that the storage and subsequent use of gametes can only be carried out pursuant to a licence issued by the HFEA, and subject to the statutory conditions contained in ss. 12 to 14 of the 1990 Act, in particular s. 12(c), which provides that a condition of every licence granted under the 1990 Act is that the provisions of Schedule 3 are complied with. Schedule 3 contains the requirements for effective consent from the provider of gametes for the storage and subsequent use of gametes. They went on to say that they identified the relevant statutory provisions in an effort to assist, and that it was by no means clear that the HFEA would wish to intervene in these proceedings and that in their view the court had to determine whether the above requirements of the 1990 Act were satisfied and that was not a determination about which the HFEA has any discretion. They also pointed out that the HFEA were not aware of the facts giving rise to the retrieval and storage of the gametes and asked that any directions made provided liberty to the HFEA to intervene if it thought it appropriate to do so.

23. So this letter made it clear that, contrary to submissions made to Macur J on the out of hours application, the Human Tissue Act 2004 has no relevance.

24. The HFEA was in fact the second Defendant (and after the order on 29 June 2007 the only Defendant). The Department was joined later.

25. So on 29 June 2007 the declaration concerning storage was continued. And as the argument advanced on behalf of the Claimant on the out of hours application was shown to be misconceived the Claimant was directed to set out her argument at the directions hearing, which was set for a date that gave her time to consider her position.

26. In early October 2007 an application was made to the HFEA by the Clinic for permission to transfer the gametes abroad. Later in October 2007 the Claimant's skeleton argument / case summary (as directed by Macur J) was sent to the HFEA.

27. On 29 October 2007 there was a further directions hearing. The order made contains the following recital:

> " Upon the court noting that:

> (i) the [HFEA] will on 7 November be considering an application for permission under s. 24(4) HFEA 1990 to export gametes for use in treatment of the Applicant;
>
> (ii) that the outcome of that decision may affect the continuation of these proceedings and the need for the directions in paragraphs 2 to 4 below; and
>
> (iii) the court should have available to it all the relevant evidence before considering any further argument on whether it should determine the issue referred to at 2b below.
>
> It is ordered that:
>
> 1. The 2nd declaration made on 26 June 2007 (for the continuing storage of the gametes at the [Clinic]) shall remain in force until further order.
>
> 2. The [HFEA] shall not later than 4 p.m. on 20 December 2007 file and serve a full statement of evidence setting out all material which it intends to rely in answer to the application limited to evidence relating to the lawfulness of:
>
> a. The retrieval, storage and use of gametes in license treatment services in the UK; and
>
> b. The retrieval and storage of gametes for export. "

28. So part of the backdrop to that order was the consideration of the application for permission to export and the stance of the HFEA that these proceedings should be concerned with, and only with, storage and use in the UK, export being the subject of the application and possibly later judicial review. To my mind there was, and is, a lack of clarity as to the position of the parties relating to storage for, or pending a decision relating to, export.

29. On 7 November 2007 the application for export was adjourned by the HFEA's Regulation Committee pending the ruling of the court as to the lawfulness of the storage of the gametes.

30. In part as a result of observations I made, I heard submissions from both the Claimant and the HFEA as to stances taken by them in, and in respect of, this litigation. I do not think it necessary or appropriate for me to deal with them and thus the history of the proceedings in any more detail. It seems to me that the positions and perceptions of both sides are understandable and flow from:

    (i) the understandable frustration and emotional turmoil of the Claimant resulting from delay and the decision to adjourn consideration of her application for export when it was accepted that there was a discretion to permit it applying the ***Blood*** case. To my mind it is very understandable, particularly given her age, that the Claimant would feel that if, as was the case, export was permitted

by the HFEA in the ***Blood*** case, she too should have permission and thus the opportunity to use the gametes as soon as possible,

(ii) the difficulties for the decision maker caused by (a) the existence until set aside of the declarations made by Macur J and their effect whilst extant, (b) the Claimant's argument that a declaration of incompatibility should be made, (c) the Claimant's argument on the EC Treaty that the storage was (as declared in the interim by Macur J) lawful, and (d) the differences between this case and the ***Blood*** case and the result of that case, and

(iii) the difficulties in the underlying issues as demonstrated by the arguments before me, not least of which is the analysis of the reasoning and decision of the Court of Appeal in the ***Blood*** case and what turned out to be common ground that if a declaration of incompatibility was made, although the UK legislation would remain binding, the breach of Convention rights founding that declaration would be a relevant consideration for the decision maker.

31. However my analysis of the decision in ***Blood*** and the stance of the HFEA and the Department that (a) the question of whether or not the HFEA permits export of H's sperm is a future question, and (b) their position that storage without effective consent is unlawful (and constitutes a criminal offence) and on the width of the power conferred by s. 24(4) do not provide a complete answers to the case and any future exercise of discretion (and thus a "show stopper") gives rise to problems, and resulted in points not being argued, or fully argued, before me that may become relevant if a future decision of the HFEA on export is challenged. This has had the result that I express a number of preliminary views and reach my decision on one of the central points on the basis on which it was argued before me, namely that if I refuse the Claimant the relief she seeks H's sperm will be preserved pending a decision on the HFEA on export and so that decision will not be rendered redundant by the destruction of the sperm.

The facts relating to the wishes of H

32. It is of course correct for the Defendants to assert that there is no direct evidence of what H would have said if he had been asked whether he consented to his gametes being retrieved, stored and used after his death and that the source of the information upon which answers to that can be inferred is primarily the Claimant. It was indicated that cross examination of the Claimant was not sought. To my mind that is a proper recognition that the Claimant is to the best of her ability giving a truthful account of the events she describes in which she acknowledges that the vital questions were not asked of and answered by H. Even if they had been and H had indicated his agreement that consent may well not have had all the ingredients of a consent required by Schedule 3 of 1990 Act.

33. As no-one wanted to cross examine her the Claimant did not give evidence. I record should it become relevant that I accept that taken as a whole the written evidence, and in particular the following points namely that :

(i) L and her husband wanted more than one child, they were hoping for another child and had discussed this with friends,

(ii) 6 days before his death they had taken professional advice and H had raised the issue of IVF,

(iii) discussion between H and a friend who was ill, and

(iv) H's family have confirmed that they support the Claimant in her efforts to have another child using H's gametes

provides powerful support for the view that if H had been asked about the retrieval and use after his death of his sperm in an attempt to enable the Claimant to have another child he would have agreed. To my mind her now unchallenged evidence to this effect is at least as compelling as that advanced by Mrs Blood. In both cases the point can be made that the ethical issues involved are complex and difficult and there is inevitably uncertainty as to how a man, who wanted another child with his wife, would react to the question whether he would support and agree to his wife using his sperm after his death, or to her retrieving of his sperm when he could not consent to this and to her using it after his death.

34. The research and discussions relating to the 1990 Act show that these issues and uncertainties can have an impact on the woman who uses the sperm, any child produced by its use and any sibling of that child.

35. I also accept, and this was not disputed, that as the Claimant sees it the issues go the core of her private life.

Ethical issues

36. It is clear that a number of ethical, moral and religious issues arise in connection with the subject matter of the relevant legislation, and thus primarily the 1990 Act. It is also the case that detailed consideration has been given to such issues by the Department and Parliament. This involved reports, consultation and debate prior to the passing of the 1990 Act.

37. In *Evans* both the English Courts and the Grand Chamber refer to what was said by Lord Bingham of Cornhill in *R(Quintavalle) v S of S for Health* [2003] 2 AC 687 at paragraphs 11 to 13 confirming the sensitivity of the issues covered by the 1990 Act and its history (see for example Wall J at paragraphs 16 and 17 – [2005] Fam). Naturally, I accept this.

38. Wall J goes on to cite paragraph 8 of the speech of Lord Bingham in the *Quintavalle* case. This sets out the approach to be taken to the statutory construction of the 1990 Act having regard to its purpose, history and subject matter. I adopt it.

Proposed amendments to the 1990 Act

39. My attention was drawn to debate concerning proposed amendments to the 1990 Act, part of which related to the decision in the *Blood* case. Those amendments are at present included in a Bill that is due to return to the Commons for its report and third reading. It is therefore not yet law and there is a possibility that changes may be made to it.

40. As in *Evans* no objection was taken to the admission of this evidence, or of evidence of Departmental policy. At paragraph 56 in *Evans* the Court of Appeal draw attention to problems relating to the admissibility of such evidence as an aid to statutory construction. I confess my understanding is that such evidence is inadmissible for that purpose. Here the problems are compounded by the point that the discussion

relates to proposed amendments and post dates the Act. I record that I have not taken account of this evidence when considering issues of statutory construction.

41. The debate on the amendments does however confirm (should it be needed) the sensitivity of the underlying issues and the divergence of opinion about them, or aspects of them.

42. The possibility that the Claimant's MP may seek to raise again a proposed amendment, and a letter I was shown from Baroness Warnock, indicate that before the proposed amendments become law there may be changes directed to issues that arise in this case.

43. The discussion I was shown, and the withdrawal of the proposed amendment by the Claimant's MP, demonstrate that there is a body of opinion and material relating particularly to the autonomy of the individual (and other aspects of the moral, ethical and religious issues) that favour a result that would not enable the sperm of the Claimant's dead husband to be stored and used (see for example the response of the Minister of State to a proposed amendment to allow consent to be given to the posthumous storage and use of a man's sperm by his surviving spouse or partner which was that the right to decide whether to pass on one's biological heritage is a (sic) fundamental right and it should not be take away or superseded by the wishes of another person even those of a surviving partner).

44. The proposed amendments in the Bill do not include a recommendation that s. 24(4) of the 1990 Act be amended to make it clear that the HFEA's discretion cannot extend to the authorisation of the export of gametes which were unlawfully obtained (such a recommendation followed a review by Professor McLean that, amongst other things, pointed out legal uncertainties relating to the removal of gametes from persons who lack capacity or who are dead). The consideration and making of any such amendment would have required clarification of when gametes could lawfully be obtained (and stored) from a person who lacked capacity or who was dead.

45. In broad terms the relevant proposed amendments relate to the storage without effective consent of gametes of children and persons who lack capacity, who are expected to undergo medical treatment that is likely to cause a significant impairment of their fertility and, expressly in the case of a patient, who is likely to regain capacity to consent to storage (a child can be expected to do so on majority – if not before). These proposed amendments apply to gametes that are lawfully taken and therefore proceed on the basis that this can be done. They provide for storage thereafter without effective consent from the child or patient. They provide that gametes are not to be so stored after the death of the child or patient. They only relate to storage and do not cover use of the gametes which remains covered by the effective consent provisions.

46. These proposed amendments therefore provide only a limited exception to the requirement for effective consent to storage in defined circumstances involving medical treatment that will impair fertility. It appears from them that their purpose would be to permit later use, with effective consent, of gametes taken in those circumstances and thus to preserve the ability of that child or patient to procreate.

The Effect of EU Law

47. I was provided by counsel for the Claimant with a helpful note as to the effect of directly applicable EU law. In short the position is that when a provision of UK law is inconsistent with a directly applicable Treaty obligation the national court disapplies the inconsistent national legislation. The position is therefore different to that which flows from a declaration of incompatibility with the Convention. This was common ground and flows from s. 2 European Communities Act 1972. I was also helpfully referred to high authority supporting the common ground namely: *R v Transport Sec ex p Factortame Ltd (No 2)* [1991] AC 603, in particular at 643-644 paragraphs 19, 20 and 23 (ECJ) and to Lord Bridge at 658G-659C, and to *R v Sec of State for Employment ex p EOC* [1995] 1 AC 1, in particular at 27.

48. The numbers of the relevant Treaty Articles have changed since *Blood*, but they are to the same effect and are directly applicable. Therefore I must consider whether the relevant requirements for, and relating to, effective consent as applied to storage pending export (or possible export) result in an unjustified interference with the relevant Treaty rights. If they do, I must disapply them, or appropriate parts of them.

The Statutory Scheme and related matters, EC Directives, Article 8 and the relevant Treaty Rights with some comments

49. These are referred to in the Schedule hereto. It is apparent that the need for (effective) consent and thus the respect that gives to the autonomy of the individuals involved plays a central part in the scheme.

Issues and the positions of the parties

50. It seems to me that a central issue is whether, and if so how, sperm retrieved from a man who has not given a consent that complies with the licence terms set by the 1990 Act (and cannot do so because he lacks capacity or is dead) can be lawfully stored pending a decision of the HFEA on their export for further storage and use. This is because absent storage in many, if not all, cases any use after export would be impossible and therefore the retrieval would be pointless. This approach focuses on the issues covered by the 1990 Act (storage and use) and not the earlier issues relating to the lawfulness of the retrieval.

51. Although not at the centre of the submissions, one approach is to consider what in the future a judge in the unenviable position of Macur J can do in respect of an application that the gametes of a man who lacks capacity, or who has died, should be retrieved and stored. This involves a consideration of whether the Court can authorise (a) retrieval of gametes so that they can be stored and used in the future, and (b) any such storage.

52. In the former case (incapacity) there may not be as much urgency as in the latter with the result that a decision of the HFEA on export could be made before retrieval of the gametes. But there will be many cases when the issues of retrieval and storage have to considered and decided urgently. In a case in which export is envisaged any decision of a judge would be part of the background to the decision of the statutory decision maker on export (the HFEA).

53. Unless the HFEA, as the statutory decision maker, can (and is prepared to) consider and decide issues relating to storage and export within the relevant timeframe (i.e. one that meets the urgency of the case, particularly as to storage) there would be a period or gap during which there is the potential for storage to be prevented because no

clinic, or other body, would be able to provide storage pursuant to the terms of its licence unless it was prepared to risk prosecution.

54. If the position is that the statutory decision maker cannot give a special direction that authorises storage in the UK pending export (or a decision on export in an appropriate time frame) then, absent an ability of the court to authorise that storage, the provisions of the 1990 Act, as matter of construction or of limitation on the proper exercise of the discretion given by s. 24(4) based on the underlying purposes of the legislation, have the practical effect that gametes cannot be exported.

55. So in my view the width (as a matter of construction, or exercise by reference to the underlying purposes of the 1990 Act) of the discretion conferred by s. 24(4) is of importance to the arguments advanced before me, and as the legal background to any future decision the HFEA may make on export of gametes.

56. In my view issues relating to the width of that discretion include the following:

(i) whether the HFEA does, or does not, have a power to grant a special direction that would have permitted storage in the UK, and then export, of H's sperm if it had been asked to do so before retrieval,

and, if the position is that it had such a power,

(ii) whether the HFEA could not as a matter of discretion by reference to the relevant statutory purposes, and/or the approach in ***Blood***, and/or for other reasons such as the effect of EC Directives, have properly exercised that power so as to permit storage for export and export of H's sperm,

and, if it could

(iii) how the power could be effectively exercised in urgent situations. And further

(iv) whether the HFEA can exercise its power under s.24(4) to permit storage of H's sperm pending the decision it says it will make on their export, and if it refused to do so whether the court could grant interim relief by reference to that refusal to preserve the existence of H's sperm pending a decision of the HFEA on export.

57. The arguments before me were not directed to those, and other, issues concerning the width of the power. This was in large measure because of the respective stances of the parties. The upshot of this, and my analysis of the ***Blood*** case and reading of the 1990 Act, is that (although there are a number of indicators as to what the position of the parties would be on those issues) I have concluded that I should only express preliminary views on them.

58. The position of the Claimant, is that a judge can grant relief to enable gametes to be available for use in the future by declaring that retrieval followed by storage pending export is lawful. To support this she relies on (a) the common law in respect of retrieval, and (b) the EC Treaty in respect of storage. It is accepted that a declaration of incompatibility would not enable the court to grant effective relief because it would not alter the 1990 Act. Rather it could be the catalyst to a change that might benefit another woman in the position of the Claimant.

59. The consequence of this is that the focus of the Claimant's case on lawfulness of storage is on storage for export, including storage pending a decision on export. Inherent in at least parts of that argument is a stance or hypothesis that the effect of the storage provisions of the 1990 Act is to render export of gametes that cannot be stored with effective consent impossible in practice. But this does not accord with my preliminary view and other parts of the Claimant's argument seemed to me to indicate a different approach and result.

60. The position of the Defendants is that a judge cannot, and in any event should not, grant such relief. At the heart of that argument are the assertions that:

    (i) absent appropriate (i.e. effective) consent the 1990 Act provides, and provides clearly as is shown by the ***Blood*** case, that such storage would be unlawful and a judge should not authorise it. (Their arguments did not address in any detail the question whether, absent the provisions of the 1990 Act, a judge could authorise the retrieval of gametes from a person who lacks capacity or who is dead), and

    (ii) it is for the HFEA, as the statutory decision maker, to determine whether or not to permit export with (or without) a variation of the conditions of the relevant licences and (a) its decision on that is a future question, and (b) the fact of the storage of H's sperm without effective consent, and its lawfulness during and after the expiry of interim declaratory relief, are factors for the HFEA to take into account.

61. But, in my view correctly, no-one criticised Macur J for making the orders she did in the circumstances presented to her. Indeed no application was made to discharge her interim order.

62. I was not addressed on the question how H's gametes were to be preserved pending the decision of the HFEA on export, save that:

    (i) the HFEA indicated in its skeleton argument that it would not initiate any regulatory action pending its decision on export, and

    (ii) in oral submission it was mentioned that the manner in which the embryos were preserved in the ***Evans*** case might be relevant, but I was not told what this was.

63. If my conclusion is that H's sperm cannot be lawfully stored, and thus preserved, by the grant of a declaration or other relief then notwithstanding the position of the Defendants that the HFEA will consider, and might grant a special direction, it seems to me that that conclusion is an effective "show stopper" unless (a) the HFEA's decision is made during the currency of this litigation and (lawful) preservation is based on the powers of the court to grant interim relief pending appeal, or (b) the Clinic is prepared to risk prosecution so that the situation exists as it did in ***Blood*** that the sperm is available for export, or (c) the HFEA has, and is prepared to exercise, a power to modify the relevant licence to permit storage without effective consent pending a decision by it on export (see ***Blood*** at 178A & 184C – [1999] Fam), where the possibility of the HFEA granting a special direction prior to retrieval was envisaged, or (d) in judicial review proceedings interim mandatory or declaratory relief is granted to preserve H's sperm pending a decision being made by the HFEA on export, or (e) the HFEA is otherwise able to make a decision that together with the

stance of the DPP and the clinic would, in practice, permit and result in storage, from now, of H's sperm so that its export can be considered in due course.

64. I do not know which, if any, of those methods the HFEA and the Department rely on to support their stance that (a) an effective decision on export (and storage relating to it) can be made, and may be made, in the future and thus (b) at this stage there is no "show stopper" argument and the question whether export (and storage relating to it) will be permitted is a future one for the HFEA.

65. To my mind there is the potential for tension between this stance and, should it be taken by the HFEA, a stance that the power conferred by s. 24(4) does not as a matter of construction, or discretion to promote the underlying statutory purposes, permit the HFEA to authorise storage of H's sperm in connection with export because there has not been effective consent. There is also in my view some tension and difficulty in a stance, should it be taken by the HFEA, that the power does not enable it to consider or grant in urgent situations an interim special direction to allow storage pending a decision on export, but it can and will exercise its discretion on export if as a matter of fact gametes have been unlawfully stored.

66. I accept that:

(i) the approach taken by the Court of Appeal in ***Blood*** lies behind these difficulties and tension, and that

(ii) in respect of them, and the approach taken on an exercise of the discretionary power conferred by s. 24(4), there is a difference between an assertion that there is no power to do what is sought and/or that the power can never be exercised in that way, and one that the power exists to do what is sought but it will not be exercised in that way in the given case, and will rarely, if ever, be exercised in that way in similar cases.

67. There are indications that the HFEA (and the Department) may not agree with the preliminary views I have formed as to the width of the discretion conferred by s.24(4), and the range of decision properly open to it under that discretion, these include:

(i) the arguments advanced before me on the legality of storage, and in particular the submission that storage was a purely domestic issue,

(ii) the formulation of submissions of the Department on Article 8 by reference to whether without effective consent gametes can be (a) stored, and (b) used in the UK, which may indicate a view that storage issues are common to both intended use in the UK and abroad,

(iii) the approach that, like the ***Blood*** case, this case a "one off" in which the HFEA can and will exercise its discretionary power relating to export on the basis that because of the exceptional and unexpected position in this case it, the Clinic and the court can proceed on the basis that there will be no prosecution, and an equivalent situation of storage being (incorrectly) declared lawful or of unlawful storage pending a determination of the HFEA on export will not happen again,

(iv) the guidance issued by the Chief Executive of the HFEA after the ***Blood*** case to licensed clinics indicating that, even if retrieval of gametes could be

justified on common law principles, they should not be retrieved where they could not subsequently lawfully be stored and used, and

(v) the letter written shortly after proceedings were issued by the solicitors for the HFEA indicating that it had no discretion in respect of relevant issues.

68. At one stage it was thought that export and use in Belgium would be lawful. But it is now common ground that this is not the case and the Claimant has not identified a country in which it would be lawful. At present therefore the HFEA is not in position to consider an application which identifies a country, or countries, to which permission to export for storage and use is sought. The HFEA could however consider the position on the basis that such a country exists (albeit no doubt with the caveat that it would reserve its position to refuse permission on the basis of the position in the relevant foreign country), or, on my preliminary view, consider whether it would grant a special direction that rendered continued storage lawful for a defined period to permit a fully particularised application for export to be investigated and made.

69. It is common ground that conclusions reached in this case would be, or may be, relevant to the approach taken by the HFEA to the exercise of its discretionary statutory power, and it seems to me that, save for the issue relating to the grant of interim relief, issues relating to the width of the power can be dealt with on any future challenge to a decision of the HFEA, with the important proviso that the sperm is preserved pending that decision and during that challenge.

70. Having said that it seems to me, with I acknowledge the great benefit of hindsight, that it would probably have been sensible to seek declaratory relief on issues relating to the width of the discretionary power conferred by s. 24(4) even though they might only become relevant in determining whether the HFEA had taken the correct approach in law to the exercise of its discretion (in my view this would have been possible, see for example *Mercury Communications Ltd v D.G. of Telecommunications* [1996] 1 WLR 48). In any event, as I have said in my view these issues as to the width of the discretionary power conferred by s. 24(4), and limits on its exercise by reference to the relevant underlying statutory purposes, are relevant to a consideration of the *Blood* case and thus the issues put before me.

71. I agree with the submission of counsel for the HFEA that the respective positions of the parties mean that the following are relevant issues:

(1) Can the gametes be lawfully retrieved? As to this only the Claimant advanced a positive case. Both Defendants simply indicated that there were problems.

(2) Can the gametes be lawfully stored for the purpose of use in the UK? There was no argument that this was possible. The relevant argument was whether the position under the 1990 Act that they could not be was incompatible with the Convention.

(3) Can the gametes by lawfully stored for future storage and use in the EU (or abroad outside the EU)? As to this there were competing arguments as to the effect of the EC Treaty. So the arguments related to the lawfulness of storage in the UK for (i) future use in the EU, and then (ii) use after export in the EU, coupled with the pragmatic point that so long as that was being pursued as a

realistic possibility it had the practical effect that the gametes would be available for export elsewhere.

(4) Is the prohibition on storage contained in the 1990 Act incompatible with the Convention?

72. As I have indicated, in my view the width of the discretionary power conferred by s. 24(4) of the 1990 Act is relevant to Point (3).

73. In my view Point (4) has to be considered in the context of (a) envisaged use in the UK, and (b) envisaged use abroad. This is because the existence of the discretionary power vested in the HFEA by s. 24(4) to permit export means that in the latter situation the 1990 Act is not in absolute or bright line terms. This is so whatever the width of that discretion and it was inevitably common ground that the ***Blood*** case has the result that the power extends to the modification of the provisions relating to effective consent (even if only in very limited circumstances).

74. In my view there is overlap and inter connection between the above arguments. Although first in a logical sequence the question of whether the gametes can be lawfully retrieved becomes academic if they cannot be lawfully stored and I shall deal with them after the arguments relating to storage. It seems to me that potentially the position on retrieval is relevant to the exercise for the discretion under s. 24(4), but I am only in a position to express preliminary views on it.

75. I shall cover the arguments under headings, which I hope are self explanatory.

76. I pause to record that in this case:

(i) In my view correctly, there was no argument that the proposed treatment of the Claimant could be regarded as being provided for "the woman and the man together", which was an issue in both the ***Blood*** and ***Evans*** cases.

(ii) No Convention argument was based on Articles 13 or 14, although both are mentioned in the papers. Rather the argument was focused on and confined to Article 8.

(iii) It was common ground that Article 8 was engaged and that this case concerns the Claimant's right to respect for her private life in the manner explained by the Grand Chamber in ***Evans*** case (see paragraphs 71 and 72 – (2008) 46 EHRR, 34), and

(iv) it was common ground that the initial extraction, or "retrieval" of sperm is not regulated by the 1990 Act and remains governed by the common law, see the ***Blood*** case (in particular at 178 D/F – [1999] Fam).

The position in the UK (excluding the possibility of export)

77. In my judgment the 1990 Act sets an absolute, clear and bright line which prevents storage for use in the UK, and use in the UK, without effective consent. This is because there is no power given to the HFEA, or anyone else, to alter or mitigate the force of the provisions relating to the terms of licences relating to the need for such effective consent before gametes (and embryos) can be stored and used. This view was common ground and is confirmed by existing authority (and both the ***Blood*** and

the *Evans* cases). Indeed in the *Evans* case the underlying argument, and the position accepted by the English courts and the Grand Chamber, was that the 1990 Act was in absolute terms permitting of no exceptions.

78. Those terms (in this context) preclude the storage and use of H's sperm because he did not provide an effective (or indeed any express) consent to their storage and use after his death.

79. The *Evans* case related to the withdrawal of consent. In it the central question was not whether different rules might have been adopted but whether in striking the balance (and thus in making its choice) Parliament had exceeded the margin of appreciation. It was held that that margin of appreciation had to be wide both as to whether or not to enact legislation governing the sensitive moral and ethical issues involved, and as to the detailed rules it laid down.

80. It was in my view correctly recognised (particularly in respect of storage and use in the UK) by counsel for the Claimant that the *Evans* case presented the Claimant with considerable difficulties in advancing the argument that the absolute regime chosen by Parliament was incompatible with the Convention because of the approach taken to, and the decision reached on, the margin of appreciation in it.

81. Those difficulties are compounded by the comments and conclusion of the Court of Appeal in *Ofulue v Bossert* [2008] EWCA Civ 7 concerning the effect of a conclusion of the Strasbourg court on the compatibility of national legislation with a Convention right (see in particular paragraphs 31, 35, 37, 43, 52 and 53 of the judgment of Arden LJ).

82. Later in this judgment I express my preliminary view that those comments, and conclusions, do not go so far as to provide authority for the proposition that because the Strasbourg court has considered the 1990 Act in connection with the consent requirements a different aspect (and thus effect) of those requirements can never lead to a different conclusion on the margin of appreciation.

83. But, in any event, the *Ofulu*e case makes it clear that the English courts must not apply the test of legitimate aim and proportionality to each different case relating to storage and use of gametes and embryos under the 1990 Act, and thereby seek to make potentially fine distinctions by reference to specific facts. Rather, if my preliminary view is correct they should look at, and have regard to, the reasoning for the conclusion of the Strasbourg court on the application of the margin of appreciation to see whether what it did was to assess the issues as a general rule and not simply on the facts of the case and, if it did the former, whether the different situation in the later case could found a result that is so anomalous that it renders that result and effect of the legislation incompatible.

84. The Claimant argued that, although the margin of appreciation was wide, an absolute or bright line based on effective consent produced such an anomalous result on the facts of this case, by precluding the storage and use of H's sperm, that it was not sustainable and was therefore incompatible with Article 8.

85. This argument falls to be considered in the context (a) of storage for use in the UK (and subsequent use in the UK), and (b) of storage for export (and subsequent use abroad). At this stage I deal with the former.

86. Obviously there are differences in the facts, in particular that in the ***Evans*** both the man and the woman were alive, embryos were created and the man had withdrawn his consent, whereas here H never gave his consent and is dead. The facts here are therefore much closer to those in ***Blood*** in which the Convention was not considered, and the result at the end of the day was that Mrs Blood was able to use the sperm of her dead husband, and conceived a child by so doing.

87. The Claimant argued, and I agree, that in the factual context of this case the policy arguments relating to the protection of the mother and any child who may be born (and any other child who may be affected by the birth e.g. the sibling of that child) are less powerful than those relating to autonomy. This is because (a) L is happy to receive all relevant counselling and to take account of the welfare of any child who may be born (and any other child affected by the birth), and (b) under the statutory scheme it is for her (as an aspect of her autonomy) to decide in the light of the counselling whether to go ahead with use of the sperm. This argument of the Claimant gains some support from the proposed amendment to s. 13(5) of the 1990 Act to remove the words "including the need of the child for a father".

88. But the counselling required for an effective consent relates to both the man and the woman. So the lack of counselling for, and of an express consent from, the man could have knock on effects for both the woman, any child born and a child affected by the birth.

89. Also, and importantly, provisions requiring, and relating to, the man's express consent recognise and reflect his autonomy.

90. I reject the submission made on behalf of the Claimant that because H had died before any retrieval took place there is no balancing act to be carried out, or that his autonomy is not engaged. It seems to me that the need to respect the position and views of H, and take them into account both by reference to his autonomy, and the potential for knock on effects on others of there being no express consent from him, is at least in part recognised by the Claimant through (a) her arguments relating to H's wishes (and thus what he would have consented to), and (b) the part of her thinking that he would have wanted her to try to have another child who would genetically be a full sibling to their existing child.

91. More generally, in my view the nature of gametes and the purpose of their storage and use (i.e. to produce a child) means that in respect of issues relating to their retrieval, storage and use both (a) the autonomy of the donor, and (b) the potential knock on effects of their use without express and informed consent, are engaged after the death of the provider.

92. A fundamental issue is therefore whether the absolute and bright line rules relating to effective consent for storage for use in, and then use in, the UK as they relate to a dead person (and one who lacks capacity) are within the margin of appreciation.

93. To my mind the essential ingredients of the reasoning of the Grand Chamber in ***Evans*** relating to those rules by reference to a withdrawal of consent applies with at least equal force to the situation in this case. I comment that even on the view of the minority it is far from clear that they would have concluded that a fair balance had not been struck in the circumstances of this case (i.e. the retrieval, storage and use of the sperm of a dead man).

94. Those essential ingredients are (a) the sensitive nature of the issues, (b) the width of the margin of appreciation, (c) the close consideration given to the legislation and (d) the existence of competing rights. To my mind, at the heart of the competition between the rights of those involved is the issue of autonomy and choice. Further, in my view, the differences between the impact and potential impact of the need for a continuing express (effective) consent in *Evans* and this case fall well short of founding an argument that, on the facts of this case, the need for effective consent to storage in the UK, for subsequent use in the UK, is incompatible with the Claimant's Convention rights.

Storage for use outside the UK, and subsequent use outside the UK

95. As I have mentioned in my view it cannot be said in this context that the legislation sets such an absolute, clear or bright line approach because of the discretion conferred by s. 24(4) of the 1990 Act.

96. As appears from comments made by the Lord Chancellor in a debate in the House of Lords on 13 February 1990 Hansard Columns 1300 and 1301 (and to my mind is in any event inherent in s. 24) the provisions relating to import and export, and the discretion given to the HFEA in that context, recognise that it makes no sense to attempt to legislate for what happens in foreign countries and that the HFEA should be given a discretion to deal with the alterations (if any) that should be made to licences in such cases having regard amongst other things to the situation in the relevant foreign country.

97. There was common ground that the reasoning of the Court of Appeal in the *Blood* case ([1999] Fam 151) is not easy to follow and apply. I agree.

98. As I understand it, the general position is that a court cannot authorise something that would be, or would involve the commission of, a criminal offence. Thus for example regulators cannot use or authorise the use of material obtained by them if the relevant statute has made such use a criminal offence (see *Rowell v Pratt* [1938] AC 101 at 105 and *B.C.C.I. v Price Waterhouse* [1998] Ch 84).

99. The effect of criminality was not argued before me. But, on my understanding of its effect, the problem it creates could be avoided by a special direction being made by the HFEA before storage, provided that it has the power to do so. To my mind this possibility is contemplated by the Court of Appeal in *Blood* at 178A and 184C. It is only the HFEA that is (arguably) empowered by the 1990 Act to give such a direction to avoid the commission of a criminal offence by the storing organisation (here the Clinic). I raised the question whether a special direction could have retrospective effect, and in my view correctly it was not asserted that it could.

100. I pause to add that, in my view correctly, it was not suggested that the Court could supply the necessary effective consent, or modify the relevant licence to dispense with the need for effective consent, on an interim or final basis. I return to this when commenting on the inherent jurisdiction.

101. The criminality point leads to practical problems because, as I have already mentioned, absent storage the prospects of gametes being available for use after export are limited, if not non-existent. Also, as is demonstrated by this case (and by examples given by the HFEA of circumstances in which the power to modify licence provision in connection with storage and export might arise – one of which related to

a couple who were in the UK on a short trip) the issue of whether gametes could be stored pending export and use abroad is likely to arise in unforeseen and urgent circumstances, particularly if a person is incapacitated and death is imminent, or the person has died. As I have mentioned, other situations may be less urgent but the imminence of death may mean that all of the steps normally required before an effective consent can be given might not be capable of performance.

102. The question therefore arises: How did Parliament intend the power to authorise storage (and subsequent export) to operate in cases of emergency, or when there is a need to provide for interim storage pending a decision on export? This turns on issues of statutory construction and any limitation on the power by reference to the principle that it must be exercised in furtherance of the underlying statutory purposes.

103. In considering whether Articles 59 and 60 (now 49 and 50) of the Treaty were infringed the Court of Appeal in ***Blood*** took a practical approach by reference to the reality of the situation arising from a refusal to permit export, namely that it prevents treatment. To my mind correctly it was not argued before me that such an approach was incorrect, or would be incorrect when considering the impact of Convention rights. It also founds the conclusion that absent a mechanism for allowing storage on an emergency basis, or otherwise when storage is needed to enable a decision on export to have practical effect, the width and effect of the discretionary power to permit export (and vary licence conditions) is severely restricted, unless the court can intervene to preserve retrieved gametes.

104. This can be demonstrated by considering what the result would have been if at the first stage of the reasoning in ***Blood*** relating to the infringement of the Treaty rights, rather than considering the practical effect of a refusal to permit export the Court of Appeal had considered the practical effect of the provisions requiring effective consent to storage absent an urgent and interim decision permitting storage whilst the HFEA considers an application for export for use. If that approach is taken, it seems to me that there is a powerful argument that in many cases the relevant practical effect of the legislation is that it prevents the export of gametes that cannot be stored with effective consent, unless there is an emergency procedure to permit such storage on an interim basis.

105. This practical result is recognised in the second part of the judgment on infringement when it is stated that there should be no cases in the future in which the HFEA is called upon to exercise its discretion when sperm has been stored without consent. Indeed those comments might be said to reflect a view that the discretion under s. 24(4) is limited, or properly limited, to cases where there has been storage with effective consent.

106. It might therefore be suggested that the Court of Appeal were having it both ways by:

(i) at 180H, concluding that because of the width of the discretion given to the HFEA there cannot be any question of the 1990 Act infringing the Treaty rights, and thus taking an approach that arguably envisages that the discretion can operate widely and therefore, in practice, the HFEA could permit export in all or most cases, and could do so when effective consent to storage and use had not been obtained, but

(ii) arguably concluding elsewhere (e.g. at 178D, 184C, 185C and 185G) that the discretion is limited to cases in which (a) sperm has been stored with effective consent, or (b) the HFEA has given a special direction that permits storage absent such consent, as to which they indicate that it is difficult to imagine reasons why the HFEA would do this,

(iii) proceeding on the pragmatic basis that as, for compelling reasons in that case, there would be no prosecution and the sperm would remain available for export if, on reconsidering the case, the HFEA decided to allow export (this was the case and it seems that the preservation was on the basis that the existing basis of storage based on the arrangement described at 178 C/D, which did not involve any orders of the court, was continued), and

(iv) therefore not fully addressing the issue of further storage pending a decision of the HFEA on export in other cases and the impact of that on the legal and practical effect, and width, of the discretion conferred by s. 24(4).

107. From that base in my view the Claimant's argument is that:

(i) the overall effect of the ***Blood*** case is that the legislation renders the export of gametes without effective consent to storage impossible or impracticable,

(ii) this was not expressly considered by the Court of Appeal in ***Blood***, in particular in the context of the impact that the discretionary power has on the relevant Treaty rights,

(iii) leaving aside the effect of the relevant Treaty rights the court cannot fill any gap pending a decision by the HFEA because it cannot (a) directly or indirectly authorise the commission of a criminal offence, or (b) give consent on behalf of H or modify the relevant licences, and therefore

(iv) the provision requiring effective consent to storage (pending a decision on export or an (interim) decision on storage) is an unjustified interference with her Treaty rights.

108. In my judgment the argument fails on a proper reading and application of the decision in the ***Blood*** case.

109. In my view the passage at 180H must be read, in the context of the judgment as a whole, and in particular the passages as to storage being unlawful absent effective consent, as referring to a power that was exercisable by the HFEA:

(i) whenever gametes were in existence (and thus had been stored) even though that storage was unlawful,

(ii) to allow export (and related storage) without there being effective consent on the basis that the fact that such storage had been or was unlawful was not a determinative factor (albeit that it had weight), and

(iii) prior to retrieval and storage.

110. It is the first and second aspects of this width of approach, namely that the power is exercisable when (and so long as) gametes are in existence and available for export

that founds the HFEA's stance that (a) this is in effect another (and unexpected) one off case in which it will exercise its discretion as it did after the judicial review in ***Blood***, and (b) the lack of effective consent (and thus illegality) is not a show stopper but is a relevant factor when it exercises its discretion. These aspects of the reasoning in ***Blood*** were effectively common ground between the parties.

111. The third aspect raises issues I have already mentioned concerning the width of the power.

112. As to them I also note that in ***Evans*** no point seems to have been made that the HFEA could or should be invited to alter the requirements of effective consent (there the withdrawal of consent) to allow export and the provisions relating to it were treated as an absolute and bright line. That position can be said to support a conclusion that

(i) the discretion does not extend to a modification of the provisions relating to effective consent or its withdrawal, or

(ii) the discretion only arises, or can only be exercised, when gametes or embryos have been and are being lawfully stored, or perhaps before the storage starts.

113. But it seems to me that it is arguable that a valid distinction can be drawn between the withdrawal of a consent (before or after an embryo is created) and an inability to consent, and that this distinction is reflected in the contractual approach referred to by the minority. A special direction overriding a stance taken by a person in accordance with (a) the explanation given when his consent was given, and (b) the terms of the legislation, is to my mind different to one dispensing with a consent that the relevant person is incapable of giving, or indeed, when it has been given but there is some technical error in it that cannot be remedied because the person can no longer do that.

114. It can also be said that such conclusions on limitations of the width of the power mentioned in paragraph 112 above, are supported by the passages at 184C and 185G referred to above or that those passages support a view that the power will never be exercised to allow storage pending export, or possible export of gametes.

115. But as I have mentioned, in my view correctly as a matter of statutory construction, the power was approached by the Court of Appeal in ***Blood*** as enabling all the mandatory provisions of licences, and thus those relating to effective consent, to be modified. This was part of the effective common ground before me.

116. My preliminary view is that, even if it is not part of the ratio in ***Blood***, the comments therein as to a direction being made prior to the sperm being obtained are highly persuasive authority in support of the conclusion that the power enables the HFEA to consider, and grant, a special direction that permits storage and export of gametes prior to them being retrieved, albeit with a steer that it will rarely, if ever, (but not never) do so if effective consent to such storage and use has not been given.

117. Further in my preliminary view, it would be remarkable if the position was that the width of the statutory discretion conferred by s. 24(4) (a) allowed a modification of all the licence provisions whilst retrieved gametes existed (as a result of lawful and unlawful/criminal storage), but (b) did not allow such a modification to be made prior to them being retrieved.

118. Whether the discretion would be exercised in a particular case (either before or after retrieval) to allow storage (or further storage) absent effective consent is a different question.

119. The question then arises whether the power conferred by s. 24(4) enables the HFEA before and after retrieval to grant a special direction authorising storage (or further storage) pending a decision by it on export.

120. My preliminary view is that (a) the language in which the power is conferred, its purpose and the absence of any express directions as to its exercise, and (b) the comments of the Court of Appeal at 178A and 184C in ***Blood***, found the conclusion that the power enables the HFEA to do this. Again whether it would do so in the exercise of its discretion in a particular case is a different question.

121. Further as mentioned earlier, unless the HFEA (and the Department) suggest a different way in which H's sperm can and will be preserved pending the HFEA's decision on export, an assertion that the HFEA does not have the power to make such an interim special direction creates at least the potential for tensions with its stance that (a) an effective decision on export is a future issue, and (b) there is a prospect that a decision permitting export will be made (i.e. there is no "show stopper" point).

122. It follows that my preliminary view is that the conclusion as to the width of the power carried forward by the Court of Appeal into its reasoning and conclusion that issues relating to the Claimant's Treaty rights only arise at the stage that the HFEA is considering the exercise of its power is that as a matter of construction of the 1990 Act that power enables the HFEA, before and after retrieval (and even if that is followed by unlawful/criminal storage) to modify the conditions of the relevant licences:

    (i) to permit storage in connection with a special direction allowing export, and

    (ii) to permit storage pending a special direction on storage,

    albeit that having regard to the underlying purpose of the power, and more generally the scheme and purposes of the 1990 Act, it would only rarely, if ever, do so. As to this limitation or qualification in my view it is arguable that a difference in approach between (i) and (ii) is appropriate to enable the HFEA to make a properly informed decision in all the circumstances of the given case.

123. Returning to the argument of the Claimant, in my view the express provisions of the 1990 Act make it clear that, as found by the Court of Appeal, absent a special direction storage without effective consent is not permitted and is made a criminal offence. Thus, as was common ground, the 1990 Act cannot be construed so as to permit storage absent effective consent pending an exercise of its discretion by the HFEA under s. 24(4).

124. In my judgment this means that ignoring the possibility of the court granting interim relief in judicial review proceedings relating to a refusal by the HFEA to exercise its power to permit what would otherwise be a criminal offence, the point in the Claimant's argument relating to the inability of the Court, applying English law without reference to the relevant Treaty rights, to fill the gap is correct because of its inability (a) to directly or indirectly authorise the commission of a criminal offence,

and (b) to give consent on behalf of H or to modify conditions of the relevant licences.

125. That takes one to the question whether the practical effect of the 1990 Act, namely that, absent a special direction by the HFEA permitting storage for the purposes of export (or whilst a special direction on export is being considered) without effective consent, such storage would be unlawful (and a criminal offence), is an unjustified interference with the Claimant's Treaty rights. If it is then the Court can, as the Claimant asks it to, declare that storage pending, and for the purposes of, export is lawful.

126. In my judgment the reasoning and conclusion in the ***Blood*** case read as a whole, and on the basis of my preliminary view on the conclusion as to the width of the power conferred by s. 24(4) taken and carried forward by the Court of Appeal into its reasoning (see paragraph 122 above), is binding authority (from that premise as to the width of the power) that:

(i) Parliament has given the HFEA (as the statutory decision maker) a discretion which has the result that the 1990 Act itself does not infringe the relevant Treaty rights,

(ii) the exercise of that discretion is governed by public law principles, and thus on the bases identified at p 184 A/B,

(iii) it is therefore at the stage of a challenge to a decision of the HFEA that issues in respect of Treaty rights arise.

127. Subject to the caveat mentioned later (see paragraph 139 hereof), if my preliminary view is wrong on the conclusion reached and applied by the Court of Appeal as to the width of the power, so long as on a pragmatic basis it can be shown in this case that there will be no prosecution, and H's sperm will be preserved pending a decision on export, again in my view the ***Blood*** case is binding authority to the effect that I must refuse the declaratory relief sought by the Claimant based on her argument that the 1990 Act infringes her rights under the Treaty. This is because that is what was decided in that case in effectively those practical circumstances.

128. That leaves the arguments advanced by the Claimant that the provisions of the 1990 Act relating to storage pending, and for, export are incompatible with the Convention. These arguments do not found a declaration that continued storage is lawful.

Pausing here

129. For the reasons I have given I have concluded that:

(1) The bases for the declarations sought by the Claimant that continued storage of H's sperm is lawful do not exist, and I therefore refuse to make them.

(2) The HFEA (and the Department) are correct, and the issue of whether or not H's sperm can be exported for use in treatment of L is a matter to be decided by the HFEA as the statutory decision maker.

130. But, those conclusions are reached on the basis that the point that the 1990 Act makes storage without effective consent (or a special direction) unlawful (and criminal) does

not, and will not, preclude the HFEA from making a decision that would in practice permit the export of H's sperm, and thus on the basis that pending its decision H's sperm will continue to be stored and thus will be available for export if, as in ***Blood***, the HFEA decide that this should be authorised by a special direction.

131. If that position is not confirmed to my satisfaction at the time this judgment is handed down I will take time to reconsider whether or not I should grant the Claimant the relief she seeks, or some of it. If that position is not so confirmed the unlawfulness of the storage, and thus the destruction or likely destruction of the sperm rendering any decision permitting export redundant would create a significant difference between this case and ***Blood*** and would arguably be an effective "show stopper".

132. My preliminary view is that to be so satisfied the storage would have to be pursuant to a special (and interim) direction, or an interim order in judicial review proceedings (which may necessitate communication with the DPP), or I would have to be satisfied that the Clinic would not be prosecuted and would continue to store the sperm (which may also require communication with the DPP).

133. So long as that result is reached in my view it is more appropriate to deal with the issues that arise, or may arise, in connection with points relating to my preliminary views in the context of any judicial review of a decision of the HFEA on, or relating to, export.

134. These issues may include a "show stopper" argument in the context of the decision on export. If a destination for export is still being sought I invite the HFEA to consider, as soon as is practical, whether it should identify and communicate any such point to the Claimant so that it can be tested as soon as is practicable. I accept that this would involve a provisional decision being made if a destination for export has not been identified, because other points by reference to the actual proposed destination could lead to a refusal.

Article 8 in connection with storage for use after export and use after export and the Treaty and Convention rights in the context of a future decision by the HFEA relating to export of H's sperm

135. In exercising its discretionary power the HFEA must consider both the Claimant's relevant Treaty and Convention rights. The relevant tests relating to justification of an infringement of Treaty rights (see ***Blood*** at 182C and 183F) and as to the margin of appreciation are similar and it seems to me that it would be unlikely that the decision maker would reach different conclusions in respect of their relevance and effect in respect of the overarching decision on export (and storage connected with it).

136. So, on the conclusions I have reached the impact of the Treaty and Convention rights arises in respect of the exercise of the discretion. That impact is a future question and therefore what follows under this heading are preliminary views expressed without the benefit of detailed argument. In reaching them I have not forgotten, as I have mentioned earlier, that the ***Evans*** case was argued, and decided, on the basis that the withdrawal of consent created an absolute bar.

137. If a statutory decision maker has been given a discretion without express guidance as to its exercise, and thus in unfettered terms (save for the requirement that it be exercised in accordance with, and thus to promote, the relevant underlying statutory purposes), different considerations apply to questions relating to justification and to

the margin of appreciation or choice of the decision maker, to those that arise when Parliament has itself, by the legislation made the choice in absolute terms. For example, for the reasons given by the Lord Chancellor Parliament has not covered individual cases by an absolute regime but chosen to give the HFEA a discretion. Further, by way of example, different considerations can also arise in respect of a general and a special direction given by the HFEA exercising its power (see ***Blood*** at 183H), with the result that in the latter case the promotion of the underlying scheme or purposes of the 1990 Act, or conformity with it, do not in the circumstances of the individual case justify, an infringement or curtailment of Treaty and Convention rights.

138. If, in exercising its discretion under s. 24(4), the HFEA is found to have correctly, as a matter of statutory construction or by reference to the underlying statutory purposes, put limits on the width of its power with the result that my preliminary views as to its width are found to be wrong (and the power is narrower), this could return the focus of argument to the inconsistency or incompatibility of the 1990 Act with the Claimant's Treaty and Convention rights.

139. This gives rise to the caveat I have mentioned earlier relating to the application of the decision in ***Blood***. It is that if, when considering the making of a special direction in respect of H's sperm, the HFEA correctly put such a restrictive limit on the width of its discretion under s. 24(4) of the 1990 Act this might warrant a reconsideration of the question whether the width of that power means that no question of the 1990 Act infringing the relevant Treaty rights arises.

140. Further such a limitation could provoke argument as to incompatibility between the 1990 Act (conferring such a limited discretion) and the Convention.

141. As mentioned earlier my (preliminary) view is that the comments, and conclusions, in ***Ofulue*** ([2008] EWCA Civ 7) concerning the effect of a conclusion of the Strasbourg court on the compatibility of national legislation with a Convention right (see in particular paragraphs 31, 35, 37, 43, 52 and 53 of the judgment of Arden LJ) do not go so far as to provide authority for the proposition that because the Strasbourg court has considered the 1990 Act in connection with the consent requirements a different aspect (and thus effect) of those requirements can never lead to a different conclusion. This is because in my view in some cases (not ***Ofulue***) differences in the specific facts, and thus the application and effect of the relevant provisions, can have a significant impact on the legitimate aim and proportionality of the legislation. By reference to paragraph 52 in ***Ofulue***, in my view it is possible that against a different factual background results could be so anomalous as to render the margin of appreciation inapplicable. (This was not demonstrated in ***Ofulue***, where the conclusion of the Strasbourg court in the earlier case (***Pye***) did not turn on the specific facts, or on the fact that the land was unregistered - see paragraphs 54 and 55).

142. To my mind that conclusion, as to the effect of the comments and conclusion in ***Ofulue*** relating to an earlier decision based on the margin of appreciation, is supported by the need to carefully define the extent of any incompatibility between national legislation and the Convention.

143. So my (preliminary) view is that although there is force in the view that as an absolute bar by reference to withdrawal of a consent (and thus the absence of an effective consent) has been found to be within the margin of appreciation of Parliament, a

limited exception to that absolute approach would also be within it, the following issue merits further consideration namely, whether the following, namely:

(i) the general position relating to export and its involvement of different regimes in other countries,

(ii) the point that on its face the language of the 1990 Act gives the HFEA an unfettered discretion in particular cases where export is sought to enable changes to be made to the absolute regime set in respect of storage for use, and use in, the UK, and

(iii) the point that in the situation under consideration it has been found that, on a proper analysis applying English law, the width (and thus practical effect) of that power is severely restricted

lead to, or have the potential for leading to, such anomalous or harsh results that the margin of appreciation is inapplicable.

Common law powers / the inherent jurisdiction

Storage and use

144. I have already mentioned that in my view the court does not have common law powers, or an exercisable inherent jurisdiction, to enable it to supply a consent or modify a licence, in connection with storage and subsequent use of gametes, and that in my view correctly, it was not argued that it did. I am also of the preliminary view that it has no such powers to declare storage that does not comply with the terms of the 1990 Act lawful. I have based these conclusions on the proposition that such matters have been covered by Parliament with the result that any inherent, prerogative or common law jurisdiction in respect of them has been replaced by a statutory one (see for example *Laker Airways v Dep of Trade* [1977] QB 643 at 719 / 721, *A v Liverpool City Council* [1982] AC 363 and *Harrison v Tew* [1990] 2 AC 525). In this context it is not only the 1990 Act that supports this conclusion, because it is also supported by (a) the exclusion of gametes from the relevant material covered by the Human Tissue Act 2004 (s. 53(1)), and (b) s. 27(1)(h) of the Mental Capacity Act 2005, which provides that nothing in that Act permits a decision to be made on behalf of a person in respect of the giving of consent under the 1990 Act. In my view absent that provision the court (see s.16(2)), a deputy and a donee under a lasting power of attorney could have given such a consent.

145. In this case there is the added problem that H is dead. I return to this when dealing with retrieval of the gametes.

Retrieval of Gametes

146. It was, in my view correctly, common ground that this was not covered by the 1990 Act.

147. As I have mentioned no positive arguments were put in respect of this by the HFEA, or the Department, who contented themselves with referring me to helpful and informative extracts from the report of Professor McClean which indicated that in her view the position was uncertain.

148. Retrieval has of course now happened, and in that sense is water under the bridge and the declaration that it was lawful granted by Macur J was effectively a final declaration.

149. However it seems to me that the point whether the court has the power to make such a declaration (on a different basis to that used by Macur J) is arguably a relevant factor for the HFEA to take into account. Also the general stance taken by the HFEA and the Department in respect of a decision refusing permission to export would have a direct impact on any exercise by the court of its discretion (if it has one) to permit retrieval. This is because it would be pointless if the gametes could not be stored. This has a knock on effect on questions as to how an emergency situation would be dealt with in the future.

150. I appreciate that the HFEA, as the statutory decision maker, might wish to take the stance that the position as to retrieval was uncertain at common law, but it seems to me that it would have been helpful if the Department had advanced submissions on the issue of retrieval. This is because it seems to me that this case was an appropriate opportunity to address, and provide guidance as to, whether the court can grant effective relief relating to retrieval and/or whether effective authority can be given for it by, for example, L. Neither would be effective if storage was not possible.

151. As they were not fully argued I express only preliminary views on the retrieval issues.

152. There is clearly a distinction between (a) a person who lacks capacity (either a patient or a child), and (b) someone who has died. As to the former, as I understand the proposed amendments to the 1990 Act, they are based on the view that gametes can be lawfully retrieved from persons who lack capacity. It thus seems that the view has been taken that this can be done pursuant to orders by the court, or by effective permissions (under the Mental Capacity Act 2005 or the Children Act 1989, or by the exercise of powers given to a deputy or a donee of a lasting power of attorney or pursuant to parental responsibility).

153. The Claimant had initially submitted to Macur J that the retrieval of gametes from a dead person could be authorised under the Human Tissue Act 2004. It is now accepted that this is not so.

154. The Claimant now makes the brief submission (a) that at common law the ability to deal with the corpse of an adult was vested in the executor and the hospital at which the body was, and therefore it was lawful for the hospital and the Claimant as widow, to act to retrieve the sperm sample, and (b) that Macur J, by that part of her order, was accurately declaring the lawfulness of the proposed dealing with the deceased's body. In support of that the Claimant relied on s. 44 of the Human Tissue Act 2004, paragraph 17-39 of Clerk and Lindsell (19th edn), *R v Kelly* [1999] 1 QB 621, in particular at 630-631 and *Re Organ Retention Group Litigation* [2005] QB 506, in particular at para 161.

155. I do not accept that submission. In my view there are considerable doubts and uncertainties as to whether anyone, or the court, can authorise the removal of gametes from a dead person. In my view these need to be addressed by full argument before a court expresses a concluded view.

156. I am unconvinced that the saving provision in s. 44(4) of the Human Tissue Act 2004, which deals with "surplus tissue" that has come from a person's body in defined

situations is relevant when gametes are not retrieved and thereby become available in such a situation. So, it seems to me that consideration needs to be given to the point whether, as Parliament is taken to have enacted the 1990 Act and the Human Tissue Act 2004, with knowledge of the existing common law (and the uncertainties in it), its intention is to provide that their provisions (together with other statutory authorisations, if any) provide a complete code for the removal of material from a dead person, which does not permit the removal of gametes from a dead person's body in the circumstances of this case.

157. At 630H in *Kelly* Rose LJ says that if the principle that a corpse, nor parts of a corpse, are in themselves and without more capable of being property protected by rights is to be changed, that change must be made by Parliament.

158. So far as the common law is concerned I do not accept that the cases relied on by the Claimant provide authority for the proposition that the personal representatives (when known), a spouse or a hospital have power to remove, or authorise the removal of, gametes from a dead person. Generally it seems to me that the cases at common law have not addressed this point and those dealing with property in a body, or parts of a body, are not directed to the issue of removal of parts of a body, or the lawfulness of the relevant process to a body that can render it the subject of property. Rather they deal with the position after authorised or unauthorised removal. Also, it seems to me that an ability to object to parts of a body being removed does not necessarily carry with it an ability to authorise such removal.

159. In *Dobson v North Tyneside H.A.* [1997] 1 WLR 596 (referred to in both of the cases relied on by the Claimant) Peter Gibson LJ at 600 F/G says that if the next of kin do have some right to possession of a body there is no authority stating that the right is otherwise than for the interment or other proper disposition of the body. The cases relied on by the Claimant do not alter that assertion.

160. However at 631 C/E in *Kelly* Rose LJ remarks that the common law does not stand still. Those remarks are directed to human body parts becoming property for the purpose of s. 4 of the Theft Act 1968, and thus not to their removal. But it seems to me that the proposition has general application. Also the circumstances in which the inherent jurisdiction of the court can be exercised are not closed. However I was not referred to, and I am not aware of, a case in which the inherent jurisdiction has been exercised by reference to the best interests of a dead person. An approach by reference to the interests and rights of a surviving spouse including those under the Convention and the Treaty, and thus one to enable that person to make use of the gametes of another person, would also, so far as I am aware, be a novelty. Also it would give rise to the point whether any such jurisdiction has been suspended by the statutory codes.

161. Accordingly, at present I am not satisfied that it is possible to lawfully remove, or authorise the removal of, gametes from a dead person (who has not given an effective advanced consent to this).

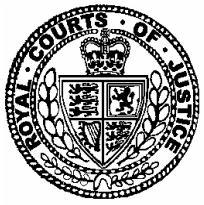
Miscellaneous

162. I have expressed a number of preliminary views and in doing so I have tried not to trespass on arguments by reference, for example to the statutory scheme and the effect of EC Directives, which may become live arguments in the future. I naturally regret

expressing preliminary views but have concluded that I cannot properly express my full reasoning without doing so.

163. I will circulate this judgment in draft. At the hearing set for its handing down I will deal with (a) any issue relating to the need for further argument and decisions before the confidentiality of this judgment is lifted and a final order is made, and (b) the detail of any final (or interim order) to be made (including the application to amend the particulars of claim).

164. I add that after this judgment had been circulated in draft I was provided with a copy of the judgment of Walker J in the ***Evans*** case ([2005] EWHC 1092 (QB)) which underpinned the continued storage in that case. That approach, as the HFEA indicated in submission might be the case (see paragraph 62 hereof), is reflected in the recitals to my order which I accept provide in practice that H's sperm will be preserved pending a decision on export by the HFEA in due course.



SCHEDULE TO JUDGMENT

The Statutory Scheme

1. The 1990 Act sets out the circumstances in which various forms of medically assisted procreation can lawfully take place in the UK. It establishes the HFEA as the statutory licensing authority (section 5). Sections 3 and 4 of the 1990 Act set out the activities governed by the 1990 Act, and provide that the following activities (amongst others) may only be carried out pursuant to a licence:

   (i) bringing about the creation of an embryo (section 3(1)(a));

   (ii) storing any gametes (section 4(1)(a));

   (iii) in the course of providing treatment services for any woman (i.e. assisted conception services) the use of any sperm other than partner-donated fresh sperm (section 4(1)(b) read with section 2(1)).

2. Section 4(1), creates a general prohibition on the unlicensed use of gametes, and provides, so far as is relevant, that:

   > No person shall - store any gametes, or ... use the sperm of any man unless the services are being provided for the woman and the man together ... except in pursuance of a licence.

3. Section 11 entitles the HFEA to grant licences. Section 12 provides in mandatory terms the conditions to be included in every licence granted under the Act. Section 12(c) requires that licences only be granted in compliance with Schedule 3 to the 1990 Act.

4. Schedule 3 provides, so far as is relevant:

   > 1. A consent under this Schedule must be given in writing and, in this Schedule "effective consent" means a consent ... which has not been withdrawn ...
   >
   > 2. (2) A consent to the storage of any gametes ... must –
   >
   > (a) specify the maximum period of storage ... 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 ...
   >
   > 3. (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.

4. (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) ----------

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

(2) ----------

6. ----------

7. ----------

8. (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) ----------

5. "Storage" of sperm pursuant to the 1990 Act means preservation, whether by cryopreservation or otherwise: section 2(1).

6. Any storage or use of gametes otherwise than in pursuit of a valid licence constitutes an offence under s.41(2)(b) of the 1990 Act, which provides:

> A person who- ... keeps or uses any gametes in contravention of section 4(1)(a) or (b) of this Act ... is guilty of an offence.

No prosecution can be brought without the consent of the DPP (s. 42) and s. 41(10) and (11) provide defences in the following terms:

> "(10) It is a defence for a person ("the defendant") charged with an offence of doing anything which, under section 3(1) or 4(1) of this Act, cannot be done except in pursuance of a licence to prove -
>
> (a) that the defendant was acting under the direction of another, and
>
> (b) that the defendant believed on reasonable grounds -

> (i) that the other person was at the material time the person responsible under the licence, a person designated by virtue of section 17(2)(b) of this Act as a person to whom a licence applied, or a person to whom directions had been given by virtue of section 24(9) of this Act, and
>
> (ii) that the defendant was authorised by virtue of the licence or directions to do the thing in question.
>
> (11) It is a defence for a person charged with an offence under this Act to prove -
>
> (a) that at the material time he was a person to whom a licence [or third party agreement] applied or to whom directions had been given, and
>
> (b) that he took all such steps as were reasonable and exercised all due diligence to avoid committing the offence."

7. Sections 23 and 24 of the 1990 Act enable the HFEA to give specific directions as to particular matters. Anything done by a person in pursuance of directions is to be treated for the purposes of the Act as done in pursuance of a licence (see section 23(3)).

8. Section 24(4) deals with the export of gametes and embryos, and enables the HFEA to dispense with the need for compliance with s.12(c) and thus Schedule 3 of the 1990 Act. Section 24(4) provides so far as is relevant:

> Directions may authorise any person to whom a licence applies ... to send gametes or embryos outside the United Kingdom in such circumstances and subject to such conditions as may be specified in the directions, and directions made by virtue of this subsection may provide for sections 12 to 14 of this Act to have effect with such modifications as may be specified in the directions.

9. The HFEA issues two types of directions: General and Special. General Directions apply generally to licensed clinics; Special Directions may be issued in cases not falling within the scope of the General Directions. (The Claimant is seeking a Special Direction for export from the HFEA, since she cannot satisfy the requirements of the General Directions issued by the HFEA regarding export).

General directions

10. The HFEA has issued the following General Directions regulating the export of embryos and gametes.

11. General Direction 1991/8 governed the export of gametes until July 2007. It provided, in particular, that the person who provided the gametes to be exported must have given, and not withdrawn, their consent in writing to their being exported, and that before giving consent the person must have been provided with a written notice saying that the law governing the use of gametes and the parentage of any resulting

child may not be the same abroad as it is the UK. (The Claimant was therefore unable to satisfy this requirement).

The 1990 Act: parentage provisions

12. Section 28 of the 1990 Act sets out provisions as to who will be the father of a child born as a result of treatment services. Following amendments to the Act in 2003, a man may be treated as the father of a child resulting from assisted conception treatment undertaken after the man's death. In relation to deaths occurring after 18 September 2003, however, the man must have consented to the use of his sperm after his death and to being treated as the father of any resulting child (see s 28(5A). The right to be treated as the father is limited to the right to be registered as the father in the Register of Births, and does not carry with it any other legal rights, such as rights of succession or nationality (see s 28(5A) read with s28(5l)).

13. (The HFEA maintain that as no such consent was provided by the Claimant's husband prior to his death, he could not be registered as the father of any resulting child in the Register of Births).

14. The amendments to the 1990 Act to enable a man to be treated, in the circumstances above, as the father of a child, resulting from assisted conception treatment undertaken after his death, were by way of insertion of new subsections (5A) and (5B) into section 28 of the 1990 Act.

15. As originally enacted, section 28(6) of the 1990 Act provided that where (a) the sperm of a sperm donor was used in treatment services, or (b) where sperm, or embryos created with that sperm, were used posthumously, in neither case would the man be treated as the father of the child.

    (I agree with the HFEA that (a) this reflected the clear policy decision in the White Paper that sperm donors and those whose sperm was used posthumously (even with consent, as provided for in the 1990 Act) should not be treated as the fathers of any resulting children: see White Paper, paras. 59 and 88, (b) this section has no bearing on the issue of the consent to be given by posthumous donors and does not "acknowledge the possibility that sperm might be used after [the sperm donor's] death without consent", (c) rather, it provides that, even in circumstances where the required statutory consent has been given, a posthumous donor is not (save in the limited circumstances now set out in sections 28(5A) and (5B) of the 1990 Act, and discussed above) to be regarded as the father of the resulting child, and (d) it would apply, for example, in a case where the donor had given the required consent to his sperm being used after his death, but had not given consent to being treated for the purpose of the 1990 Act as the father of any resulting child (as required by section 28(5A(d)(ii)); or in a case where a donor had consented to the use of his sperm after his death, but he and his partner had not commenced treatment services and were not married at the time of his death.)

EC Directives

16. Up to 7 July 2007 section 24(3) of the 1990 Act additionally gave the HFEA the power to authorise the keeping of gametes or embryos by a person to whom a licence applies in the course of their carriage to or from any premises (The HFEA maintains that the statutory scheme therefore required a clinic wishing to export sperm to be authorised both (a) to export the sperm, and (b) to keep it in the course of carriage.)

17. Pursuant to this power, General Direction 1991/8 additionally authorised the keeping of sperm in the course of their carriage between licensed premises and their foreign destination.

18. Between March 2004 and October 2006 the European Parliament and Council passed three Directives regulating various activities concerning human tissues and cells. These are jointly referred to as the "EU Tissue and Cells Directives" ('EUTCD'). Directive 2004/23/EC of 31 March 2004 ('the First Directive') lays down common safety and quality standards for the donation, procurement, testing, processing, preservation, storage and distribution of human tissues and cells. Article 6 of the First Directive establishes a system of mandatory accreditation or licensing for establishments within Member States carrying out any of these activities on human tissue or cells intended for human application (including clinics providing assisted conception).

19. In relation to consent, Article 13(1) of the First Directive provides that "the procurement of human tissues or cells shall be authorised only after all mandatory consent or authorisation requirements in force in the Member State concerned have been met". The Annex to the First Directive requires, in relation to deceased donors, that "all information must be given and all necessary consents and authorisations must be obtained in accordance with the legislation in force in Member States".

20. To the extent that the requirements of the EUCTD applied to gametes and embryos they were implemented in the United Kingdom by means of amendments to the 1990 Act. The need for accreditation within the EEA was reflected in amendments to section 24 of the 1990 Act, and, in particular, by the insertion of a new section 24(3A) governing the keeping of gametes and embryos intended for human application. (The HFEA maintain that section 24(3A) now only gives it a discretion to authorise keeping of gametes in the course of carriage to another EEA state where they are being carried between licensed premises in the UK and tissue establishments accredited, designated, authorised or licensed under the laws, or other measures, of that State, in accordance with the requirements of the EUTCD.) This amendment entered into force on 7 July 2007.

21. With effect from 31 March 2008 the HFEA issued revised, fuller General Directions, revoking and replacing General Direction 2007/4. General Direction 2007/6 remains in force. General Direction 2008/2 governs the export of gametes and embryos to Gibraltar and the EEA. It reiterates the requirements of accreditation set out in General Direction 2007/6, and the requirements of consent, donor information and the need for treatment to be lawful in the UK, which were set out as far back as General Direction 1991/8.

22. (The HFEA maintains that when its Regulation Committee considers the Claimant's application for a Special Direction it will need to be satisfied that any clinic identified by her as a receiving clinic is accredited and licensed according to the requirements of the EUTCD. The Claimant may at that stage dispute this.)

Article 8 of the Convention

23. This provides that:

> "1. Everyone has a 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 is 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. ”

The relevant articles of the EC Treaty

24. These are Articles now 49 and 50 (and were Articles 59 and 60 when ***Blood*** was decided). They provide so far as is relevant;

> “49. Within the framework of the provisions set out below, restrictions on freedom to provide services within the Community shall be prohibited in respect of nationals of Member States who are established in a State of the Community other than that of the person to whom the services are intended.
>
> 50 Services shall be considered to be "services" within the meaning of this Treaty where they are normally provided for remuneration, in so far as they are not governed by the provisions relating to freedom of movement for goods, capital and persons.
>
> Services shall in particular include: ---------- (d) activities of the professions.”

25. It is accepted, as it was in ***Blood***, that these articles give the Claimant a right directly enforceable by her (and therefore as part of English law) to receive medical treatment in another member state.