

FOURTH SECTION

CASE OF EVANS v. THE UNITED KINGDOM

(Application no. 6339/05)

JUDGMENT

STRASBOURG

7 March 2006

**THIS CASE WAS REFERRED TO THE GRAND CHAMBER,
WHICH DELIVERED JUDGMENT IN THE CASE ON
10 April 2007**

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Evans v. the United Kingdom,

The European Court of Human Rights (Fourth Section), sitting as a Chamber composed of:

Mr J. CASADEVALL, *President*,

Sir Nicolas BRATZA,

Mr M. PELLONPÄÄ,

Mr R. MARUSTE,

Mr K. TRAJA,

Ms L. MIJOVIĆ,

Mr J. ŠIKUTA, *judges*

and Mr M. O'BOYLE, *Section Registrar*,

Having deliberated in private on 27 September 2005 and 14 February 2006,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 6339/05) against the **United Kingdom** of Great Britain and Northern Ireland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a British national, Ms Natallie **Evans** (“the applicant”), on 11 February 2005.

2. The applicant, who had been granted legal aid, was represented by Mr M. Lyons, a lawyer practising in London. The British Government (“the Government”) were represented by their Agent, Ms E. Willmott, Foreign and Commonwealth Office.

3. On 27 February 2005 the President of the Chamber decided to indicate to the Government, under Rule 39 of the Rules of Court, that, without prejudice to any decision of the Court as to the merits of the case, it was desirable in the interests of the proper conduct of the proceedings that the Government take appropriate measures to ensure that the embryos, the destruction of which formed the subject-matter of the applicant’s complaints, were preserved until the Court had completed its examination of the case. On the same day, the President decided that the application should be given priority treatment, under Rule 41; that the admissibility and merits should be examined jointly, in accordance with Article 29 § 3 of the Convention and Rule 54A; and, under Rule 54 § 2 (b), that the Government should be invited to submit written observations on the admissibility and merits of the case.

4. On 7 June 2005 the Chamber confirmed the above rulings and decided to hold a hearing (Rule 54 § 3).

5. The hearing on admissibility and merits took place in public in the Human Rights Building, Strasbourg, on 27 September 2005.

There appeared before the Court:

(a) for the Government

Ms Emily WILLMOTT, *Agent*,

Mr Philip SALES,

Mr Jason COPPEL, *Counsel*,

Ms Karen ARNOLD,

Ms Gwen SKINNER, *Advisers*;

(b) for the applicant

Mr Robin TOLSON, Q.C.,

Ms Susan FREEBORN, *Counsel*,

Mr Muiris LYONS, *Solicitor*.

The Court heard addresses by Mr Sales and Mr Tolson, as well as their answers to questions put by Judges Bratza and Pavlovski.

THE FACTS

THE CIRCUMSTANCES OF THE CASE

6. The applicant was born in October 1971 and lives in Wiltshire. The facts, as found by Mr Justice Wall (“Wall J”), who heard the parties’ oral evidence (see paragraph 14 below), are as follows.

A. The IVF treatment

7. On 12 July 2000 the applicant and her partner, J, commenced treatment at the Bath Assisted Conception Clinic (“the clinic”). The applicant had been married and had been referred for fertility treatment at the clinic with her husband in 1995, but had not pursued it because of the breakdown of her marriage.

8. On 10 October 2000 the applicant and J were informed, during an appointment at the clinic, that preliminary tests had revealed that the applicant had serious pre-cancerous tumours in both ovaries, and that her ovaries would have to be removed. They were told that because the tumours were growing slowly, it would be possible first to extract some eggs for *in vitro* fertilisation (“IVF”), but that this would have to be done quickly.

9. The consultation of 10 October 2000 lasted approximately an hour in total. A nurse explained that the applicant and J would each have to sign a form consenting to the IVF treatment and that, in accordance with the provisions of the Human Fertilisation and Embryology Act 1990 (“the 1990 Act”), it would be possible for either of them to withdraw his or her consent at any time before the embryos were implanted in the applicant’s uterus (see paragraphs 27-30 below). The applicant asked the nurse whether it would be possible to freeze her unfertilised eggs, but was informed that this procedure, which had a much lower chance of success, was not performed at the clinic. At that point J reassured the applicant that they were not going to split up, that she did not need to consider the freezing of her eggs, that she should not be negative and that he wanted to be the father of her child. Wall J found that J gave these assurances in good faith, because at that time he loved the applicant, genuinely wanted a child with her and wanted to support her during a very difficult period (see also paragraph 15 below).

10. Thereafter, the couple entered into the necessary consents, by signing the forms required by the 1990 Act (see paragraph 29 below).

Immediately beneath the title to the form appeared the following words:

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

J ticked the boxes which recorded his consent to use his sperm to fertilise the applicant’s eggs *in vitro* and the use of the embryos thus created for the treatment of himself and the applicant together. He further ticked the box headed “Storage”, opting for the storage of embryos developed *in vitro* from his sperm for the maximum period of 10 years and also opted for sperm and embryos to continue in storage should he die or become mentally incapacitated within that period. The applicant signed a form which, while referring to eggs rather than sperm, essentially replicated that signed by J. Like J, she ticked the boxes providing for the treatment of herself and for the treatment “of myself with a named partner.”

11. On 12 November 2001 the couple attended the clinic and eleven eggs were harvested and fertilised. Six embryos were created and consigned to storage. On 26 November the applicant underwent an operation to remove her ovaries. She was told that she should wait two years before attempting to implant any of the embryos in her uterus.

B. J’s withdrawal of consent and the High Court proceedings

12. In May 2002 the relationship broke up. The future of the embryos was discussed between the parties. On 4 July 2002 J wrote to the clinic to notify it of the separation and to state that the stock of embryos should be destroyed.

13. The clinic notified the applicant of J’s withdrawal of consent to further use of the embryos and informing her that it was now under a legal obligation to destroy them, pursuant to section 8(2) of

Schedule 3 to the 1990 Act (see paragraph 29 below). The applicant commenced proceedings in the High Court, seeking an injunction requiring J to restore his consent to the use and storage of the embryos and a declaration, *inter alia*, that he had not varied and could not vary his consent of 10 October 2001. Additionally she sought a declaration of incompatibility under the Human Rights Act 1998 to the effect that section 12 of, and Schedule 3 to, the 1990 Act breached her rights under Articles 8, 12 and 14. She also pleaded that the embryos were entitled to protection under Articles 2 and 8. Interim orders were made requiring the clinic to preserve the embryos until the end of the proceedings.

14. The trial judge, Wall J, heard the case over five days and took evidence from, among others, the applicant and J. On 1 October 2003, in a 65 page judgment (*Evans v. Amicus Healthcare Ltd and others*, [2003] EWHC 2161 (Fam)), he dismissed the applicant's claims.

15. He concluded that J had not given consent to the continuing treatment of the applicant on her own and that there had been no consent on his part to the use of the embryos irrespective of any change of circumstance. He rejected the applicant's submission that J was estopped from withdrawing his consent, finding that both the applicant and J had embarked on the treatment in good faith on the basis that their relationship would continue. It did not, however, and in the changed circumstances of separation, it would be inequitable not to allow either party to change his or her mind and to withdraw consent to the treatment.

16. As to the applicant's Convention claims, Wall J held in summary that an embryo was not a person with rights protected under the Convention, and that the applicant's right to respect for family life was not engaged. He did, however, accept that the relevant provisions of the 1990 Act did interfere with the private life of both parties, but held that it was proportionate in its effect, the foundation for the legislation being a treatment regime based on the twin pillars of consent and the interests of the unborn child (see further paragraphs 26-27 below). He considered it entirely appropriate that the law required couples embarking on IVF treatment to be in agreement about the treatment, and permitted either party to withdraw from it at any time before the embryo was transferred into the woman.

17. Wall J emphasised that the provisions of Schedule 3 to the Act (see paragraph 29 below) applied equally to all patients undergoing IVF treatment, irrespective of their sex, and concluded with an illustration of how the requirement for joint consent could similarly affect an infertile man:

“If a man has testicular cancer and his sperm, preserved prior to radical surgery which renders him permanently infertile, is used to create embryos with his partner; and if the couple have separated before the embryos are transferred into the woman, nobody would suggest that she could not withdraw her consent to treatment and refuse to have the embryos transferred into her. The statutory provisions, like Convention rights, apply to men and women equally.”

C. The Court of Appeal's judgment

18. The applicant's appeal to the Court of Appeal was dismissed in a judgment delivered on 25 June 2004 (*Evans v. Amicus Healthcare Ltd*, [2004] EWCA Civ 727).

The court held that the clear policy of the 1990 Act was to ensure the continuing consent of both parties from the commencement of treatment to the point of implantation of the embryo, and that “the court should be extremely slow to recognise or to create a principle of waiver that would conflict with the parliamentary scheme”. J was thus entitled to withdraw his consent as and when he did and such withdrawal prevented both the use and continued storage of the embryos. The court rejected the applicant's argument that J had concealed his ambivalence, thereby inducing her to go forward with him into couple treatment, holding this to be an unjustified challenge to the finding of the trial judge who had had the obvious advantage of appraising the oral evidence of the applicant, J, and the other witnesses (see paragraphs 14-15 above). The Court of Appeal was also informed by J's counsel that J's clear position in withdrawing his consent was one of fundamental rather than purely financial objection.

19. While there was an interference with the private lives of the parties, Lord Justices Thorpe and Sedley found it to be justified and proportionate, for the following reasons:

“The less drastic means contended for here is a rule of law making the withdrawal of [J's] consent non-conclusive. This would enable [the applicant] to seek a continuance of treatment because of her inability to conceive by any other means. But unless it also gave weight to [J's] firm wish not to be father of a child borne by [the applicant], such a rule would diminish the respect owed to his private life in proportion as it enhanced the respect accorded to hers. Further, in order to give it weight the legislation would have to require the Human Fertilisation and Embryology Authority or the clinic or both to make a judgment based on a mixture of ethics, social policy and human sympathy. It would also require a balance to be struck

between two entirely incommensurable things. ...

... The need, as perceived by Parliament, is for bilateral consent to implantation, not simply to the taking and storage of genetic material, and that need cannot be met if one half of the consent is no longer effective. To dilute this requirement in the interests of proportionality, in order to meet [the applicant's] otherwise intractable biological handicap, by making the withdrawal of the man's consent relevant but inconclusive, would create new and even more intractable difficulties of arbitrariness and inconsistency. The sympathy and concern which anyone must feel for [the applicant] is not enough to render the legislative scheme ... disproportionate."

20. Lady Justice Arden stated, by way of introduction, that:

"The 1990 Act inevitably uses clinical language, such as gametes and embryos. But it is clear that the 1990 Act is concerned with the very emotional issue of infertility and the genetic material of two individuals which, if implanted, can lead to the birth of a child. ... Infertility can cause the woman or man affected great personal distress. In the case of a woman, the ability to give birth to a child gives many women a supreme sense of fulfilment and purpose in life. It goes to their sense of identity and to their dignity."

Arden LJ noted that neither the Warnock Report nor the Green Paper which had preceded the legislation had discussed what was to happen if the parties became estranged during treatment (see paragraphs 23-27 below). However, she went on to find:

"Like Thorpe and Sedley LJ, I consider that the imposition of an invariable and ongoing requirement for consent in the 1990 Act in the present type of situation satisfies Article 8 § 2 of the Convention. ... As this is a sensitive area of ethical judgment, the balance to be struck between the parties must primarily be a matter for Parliament Parliament has taken the view that no one should have the power to override the need for a genetic parent's consent. The wisdom of not having such a power is, in my judgment, illustrated by the facts of this case. The personal circumstances of the parties are different from what they were at the outset of treatment, and it would be difficult for a court to judge whether the effect of [J's] withdrawal of his consent on [the applicant] is greater than the effect that the invalidation of that withdrawal of consent would have on [J]. The court has no point of reference by which to make that sort of evaluation. The fact is that each person has a right to be protected against interference with their private life. That is an aspect of the principle of self-determination or personal autonomy. It cannot be said that the interference with [J's] right is justified on the ground that interference is necessary to protect [the applicant's] right, because her right is likewise qualified in the same way by his right. They must have equivalent rights, even though the exact extent of their rights under Article 8 has not been identified.

The interference with [the applicant's] private life is also justified under Article 8 § 2 because, if [the applicant's] argument succeeded, it would amount to interference with the genetic father's right to decide not to become a parent. Motherhood could surely not be forced on [the applicant] and likewise fatherhood cannot be forced on [J], especially as in the present case it will probably involve financial responsibility in law for the child as well."

21. On the issue of discrimination, Lord Justices Thorpe and Sedley considered that the true comparison was between women seeking IVF treatment whose partners had withdrawn consent and those whose partners had not done so; Lady Justice Arden considered that the real comparators were fertile and infertile women, since the genetic father had the possibility of withdrawing consent to IVF at a later stage than in ordinary sexual intercourse. The three judges were nevertheless in agreement that, whatever comparators were chosen, the difference in treatment was justified and proportionate under Article 14 of the Convention for the same reasons which underlay the finding of no violation of Article 8. The Court of Appeal further refused leave to appeal against Wall J's finding that the embryos were not entitled to protection under Article 2, since under domestic law a foetus prior to the moment of birth, much less so an embryo, had no independent rights or interests.

22. On 29 November 2004 the House of Lords refused the applicant leave to appeal against the Court of Appeal's judgment.

RELEVANT NON-CONVENTION MATERIAL

A. Domestic law: the 1990 Act

23. The birth of the first child from IVF in July 1978 prompted much ethical and scientific debate in the **United Kingdom**, which in turn led to the appointment in July 1982 of a Committee of Inquiry under the chairmanship of Dame Mary Warnock DBE to "consider recent and potential developments in medicine and science related to human fertilisation and embryology; to consider what policies and safeguards should be applied, including consideration of the social, ethical and legal implications of these developments; and to make recommendations." The Committee reported in July 1984 (Cmnd 9314) and its recommendations, so far as they related to IVF treatment, were set out in a Green Paper issued for

public consultation. After receipt of representations from interested parties, they were included in a White Paper, *Human Fertilisation and Embryology: A Framework for Legislation*, published in November 1987 (Cm 259). The White Paper noted “the particular difficulties of framing legislation on these sensitive issues against a background of fast-moving medical and scientific development”. Nonetheless, following further consultation, the Human Fertilisation and Embryology Bill 1989 was published, and passed into law as the Human Fertilisation and Embryology Act 1990.

24. The solution recommended and embodied in the 1990 Act was to permit, subject to certain express prohibitions, the creation and subsequent use of live human embryos produced *in vitro*, subject to a number of conditions, restrictions and time limits.

25. Thus, by section 3(1) of the Act, no person shall bring about the creation of an embryo, or keep or use an embryo except in pursuance of a licence. The storage or use of an embryo can only take place lawfully in accordance with the requirements of the licence in question. The contravention of section 3 (1) is an offence (created by section 41(2)(a) of the Act).

26. One of the policy objectives of the 1990 Act was to promote the welfare of the child. Thus, section 13(5) provides:

“A woman shall not be provided with treatment services unless account has been taken of the welfare of any child who may be born as a result of the treatment (including the need of that child for a father), and of any other child who may be affected by the birth.”

27. The second important policy objective of the 1990 Act was to ensure that both gamete providers (i.e. the providers of the sperm and eggs) continued to consent from the commencement of the treatment until the implantation of the embryos. The primacy of continuing bilateral consent had been central to the Warnock Committee’s recommendations about the regulation of IVF treatment and although neither the Warnock Report nor the Green Paper had discussed what was to happen if the parties became estranged during treatment, the White Paper emphasised that donors of genetic material would have the right under the proposed legislation to vary or withdraw their consent at any time before the embryos were used.

28. By section 12(c) of the Act, it is a condition of every licence granted that the provisions of Schedule 3 to the Act, which deal with consent, shall be complied with.

29. Schedule 3 provides:

“*Consents to use of gametes or embryos*

Consent

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

2. — (1) A consent to the use of any embryo must specify one or more of the following purposes—

(a) use in providing treatment services to the person giving consent, or that person and another specified person together,

(b) use in providing treatment services to persons not including the person giving consent, or

(c) use for the purposes of any project of research,

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

(2) A consent to the storage of any gametes or any embryo must—

(a) specify the maximum period of storage (if less than the statutory storage period), and

(b) state what is to be done with the gametes or embryo if the person who gave the consent dies or is unable because of incapacity to vary the terms of the consent or to revoke it,

and may specify conditions subject to which the gametes or embryo may remain in storage.

(3) A consent under this Schedule must provide for such other matters as the Authority may specify in directions.

(4) A consent under this Schedule may apply—

(a) to the use or storage of a particular embryo, or

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

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

Procedure for giving consent

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.

Variation and withdrawal of consent

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) The terms of any consent to the use of any embryo cannot be varied, and such consent cannot be withdrawn, once the embryo has been used—

(a) in providing treatment services, or

(b) for the purposes of any project of research.

Use of gametes for treatment of others

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

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

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

In vitro fertilisation and subsequent use of embryo

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

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

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

(4) Any consent required by this paragraph is in addition to any consent that may be required by paragraph 5 above.

Embryos obtained by lavage, etc.

...

Storage of gametes and embryos

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

(3) An embryo taken from a woman must not be kept in storage unless there is an effective consent by her to its storage and it is stored in accordance with the consent."

30. The material effect of Schedule 3 was summarised in the judgment of Lords Justices Thorpe and Sedley as follows:

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

an embryo can be varied or withdrawn by either party whose gametes were used to create the embryo at any time; (vii) consent to the use of an embryo cannot be varied or withdrawn once the embryo has been used in providing treatment services.”

B. The position in other countries

1. *The Member States of the Council of Europe*

31. On the basis of the material available to the Court, including the “Medically Assisted Procreation and the Protection of the Human Embryo Study on the Solution in 39 States” (Council of Europe, 1998), the situation in the various Member States of the Council of Europe would appear to be as follows. In Denmark, France, Greece and Switzerland, the right of either party freely to withdraw his or her consent at any stage up to the moment of implantation of the embryo in the woman is expressly provided for in legislation; in the Netherlands, this rule is included in secondary legislation. In Belgium, Germany and Finland clinical practice appears to conform to this model, and it further appears that, as a matter of law or practice, in Iceland, Sweden and Turkey the male donor enjoys a similar power of veto to that afforded by the **United Kingdom**.

32. A number of countries have, however, regulated the consent issue differently. In Hungary, for example, in recognition of the fact that medically-assisted reproduction represents a far heavier burden for the woman than for the man, and absent any prior written agreement to the contrary, the woman is entitled to proceed with the treatment notwithstanding the death of her partner or the divorce of the couple. In Austria, Estonia and Italy the man’s consent can be revoked only up to the point of fertilisation, beyond which it is the woman alone who decides if and when to proceed. In Spain, the man’s right to revoke his consent is recognised only where he is married to and living with the woman.

2. *The United States of America*

33. The field of medically assisted reproduction is not regulated at federal level in the United States, and since few States have introduced laws concerning the subsequent withdrawal of consent by one party, it has been left to the courts to determine how the conflict between the parties should be resolved. There is, therefore, a series of judgments by State Supreme Courts regarding the disposal of embryos created through IVF.

34. In *Davis v. Davis*, (842 S.W.2d 588, 597; Tenn. 1992), the Supreme Court of Tennessee held in 1992:

“...disputes involving the disposition of pre-embryos produced by *in vitro* fertilization should be resolved, first, by looking to the preferences of the progenitors. If their wishes cannot be ascertained, or if there is dispute, then their prior agreement concerning disposition should be carried out. If no prior agreement exists, then the relative interests of the parties in using or not using the pre-embryos must be weighed. Ordinarily, the party wishing to avoid procreation should prevail, assuming that the other party has a reasonable possibility of achieving parenthood by means other than use of the pre-embryos in question. If no other reasonable alternatives exist, then the argument in favor of using the pre-embryos to achieve pregnancy should be considered. However, if the party seeking control of the pre-embryos intends merely to donate them to another couple, the objecting party obviously has the greater interest and should prevail.”

35. In *Kass v. Kass* (98 N.Y. Int. 0049), the couple had signed an agreement with the clinic which stipulated that, “in the event that we ... are unable to make a decision regarding the disposition of our frozen pre-zygotes”, the embryos could be used for research. When the couple separated, Mrs Kass sought to overturn the agreement and proceed to implantation. Although she prevailed at first instance (the court reasoning that just as a woman has exclusive control over her reproduction so should she have the final say in the area of IVF), the New York Court of Appeal decided that the existing agreement was sufficiently clear and should be honoured.

36. In *A.Z. v. B.Z.*, (2000, 431 Mass. 150 ; 725 N.E. 2d 1051) there was again a previous written agreement, according to which, in the event of separation, the embryos were to be given to the wife, who now wished to continue with the treatment, contrary to the wishes of the husband. However, the Supreme Court of Massachusetts considered that the arrangement should not be enforced because, *inter alia*, as a matter of public policy “forced procreation is not an area amenable to judicial enforcement”. Rather, “freedom of personal choice in matters of marriage and family life” should prevail.

37. This judgment was cited with approval by the Supreme Court of New Jersey, in *J.B. v. M.B.* (2001 WL 909294). Here, it was the wife who sought the destruction of the embryos while the husband wanted

them preserved for use with a future partner. Although constitutional arguments were advanced on behalf of the wife, the court declined to approach the matter in this way, reasoning that it was in any event not sure that enforcing the alleged private contract would violate her rights. Instead, the court subscribed to the view taken in the *Z.* case regarding public policy and ordered that the wife's wishes be observed.

38. In the final case in this series, *Litowitz v. Litowitz*, (48 P. 3d 261, 271), the Supreme Court of Washington decided in 2002 to adopt a contractual analysis and to honour the couple's agreement with the clinic not to store the embryos for more than five years.

4. *Israel*

39. In *Nachmani v. Nachmani* (50(4) P.D. 661 (Isr)) a childless Israeli couple decided to undergo IVF and then to contract with a surrogate in California to bear their child because the wife would not be able to carry the foetus to term. The couple signed an agreement with the surrogate, but not with the IVF clinic regarding the disposal of the embryos in the event of their separation. The wife had her last eleven eggs extracted and fertilised with her husband's sperm. The couple then separated, before the embryos could be implanted in the surrogate, and the husband, who had gone on to have children with another woman, opposed the use of the embryos.

The District Court found in favour of the wife, holding that the husband could no more withdraw his agreement to have a child than a man who fertilises his wife's egg through sexual intercourse. A five-judge panel of the Supreme Court reversed this decision, upholding the man's fundamental right not to be forced to be a parent. The Supreme Court reheard the case as a panel of eleven judges and decided, seven to four, in favour of the wife. Each judge wrote a separate opinion. The judges in the majority found that the woman's interests and in particular her lack of alternatives to achieve genetic parenthood outweighed those of the man. Three of the minority judges, including the Chief Justice, reached the opposite conclusion, emphasising that the wife had known that her husband's consent would be required at every stage and that the agreement could not be enforced after the couple had become separated. The fourth of the dissenters held that the man's consent was required before the obligation of parenthood could be imposed on him.

C. Relevant international texts

40. The General Rule stated in the Article 5 of the Council of Europe Convention on Human Rights and Biomedicine States as follows:

“An intervention in the health field may only be carried out after the person concerned has given free and informed consent to it.

This person shall beforehand be given appropriate information as to the purpose and nature of the intervention as well as on its consequences and risks.

The person concerned may freely withdraw consent at any time.”

41. Principle 4 of the principles adopted by the *ad hoc* committee of experts on progress in the biomedical sciences, the expert body within the Council of Europe which preceded the present Steering Committee on Bioethics (CAHBI, 1989), stated:

“1. The techniques of artificial procreation may be used only if the persons concerned have given their free, informed consent, explicitly and in writing, in accordance with national requirements...”

42. Finally, Article 6 of the Universal Declaration on Bioethics and Human Rights provides:

“Article 6 – Consent

a) Any preventive, diagnostic and therapeutic medical intervention is only to be carried out with the prior, free and informed consent of the person concerned, based on adequate information.

The consent should, where appropriate, be express and may be withdrawn by the person concerned at any time and for any reason without disadvantage or prejudice.”

I. ADMISSIBILITY OF THE APPLICATION

43. The applicant claims that the relevant provisions of the 1990 Act, which require her former partner's consent before the embryos made with their joint genetic material can be implanted in her uterus, violate her rights under Articles 8 and 14 of the Convention, and the embryos' right to life under Article 2. The Government submitted that the application should be dismissed as manifestly ill-founded on the grounds either that the applicant's complaints did not engage any of the rights relied on by her or that any interferences with those rights were justified in terms of the exceptions allowed by the Convention's provisions.

44. The Court considers that the application as a whole raises questions of law which are sufficiently serious that their determination should depend on an examination of the merits. No other ground for declaring it inadmissible has been established. The application must therefore be declared admissible. Pursuant to Article 29 § 3 of the Convention, the Court will now consider the merits of the applicant's complaints.

II. ALLEGED VIOLATION OF ARTICLE 2 OF THE CONVENTION

45. The applicant complained that the provisions of English law requiring the embryos to be destroyed once J withdrew his consent to their continued storage violated the embryos' right to life, contrary to Article 2 of the Convention, which reads as follows:

“1. Everyone's right to life shall be protected by law. ...”

46. The Court recalls, however, that in *Vo v. France* [GC], no. 53924/00, § 82, ECHR 2004-..., it held that, in the absence of any European consensus on the scientific and legal definition of the beginning of life, the issue of when the right to life begins comes within the margin of appreciation which the Court generally considers that States should enjoy in this sphere. Under English law, as was made clear by the domestic courts in the present applicant's case (see paragraphs 16 and 21 above), an embryo does not have independent rights or interests and cannot claim—or have claimed on its behalf—a right to life under Article 2.

47. There has not, accordingly, been a violation of that provision in the present case.

III. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

48. The applicant contended that the provisions of Schedule 3 to the 1990 Act, which permitted J to withdraw his consent after the fertilisation of her eggs with his sperm, violated her rights to respect for private and family life under Article 8 of the Convention, which states:

“1. Everyone has the right to respect for his private and family life ...

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.”

A. The parties' submissions

1. *The applicant*

49. The applicant emphasised that, since her ovaries had had to be removed to combat cancer, the embryos created with her eggs and J's sperm represented her only chance to have a child to whom she was biologically related. Through J's actions, her life's overwhelming ambition, to have a child, would be permanently frustrated. The State should not allow J to renege from his assurances with impunity. He had compromised his own freedom not to become a parent by agreeing to have the applicant's last eggs fertilised with his sperm. The primacy of an otherwise infertile woman's right to continue with IVF treatment had been recognised by the Israeli Supreme Court in *Nachmani v. Nachmani* (see paragraph 39 above), the only case known to the applicant where the circumstances had corresponded closely to her own.

50. Although she conceded that the State enjoyed a margin of appreciation in deciding whether or not it was in the public interest to legislate in the field of artificial conception, she maintained that the central issue was not the margin applicable to schemes in general, but whether, in the concrete circumstances of her own case, it was necessary and proportionate for the State to block the implantation in her of the embryos created with her eggs and J's sperm. Once the State had decided, through the statutory scheme, to permit couples to undergo IVF and create embryos for implantation, it moved from assessing the public interest to an area where the competing interests were essentially private: those of the gamete providers. In common with other areas where private interests clashed, and where the interest of one party might strongly outweigh that of the other, it was not an area for absolutes. The rules on consent in the 1990 Act, permitting of no exception in hard cases, and no balancing of the interests concerned, were unfair and disproportionate. The cases of *Pretty v. the United Kingdom*, no. 2346/02, ECHR 2002-III and *Odièvre v. France*, no. 42326/98, ECHR 2003-II, cited by the Government as judgments where the Court had accepted the legitimacy of "bright line" rules, were clearly distinguishable on their facts from the present case: thus, the law in issue in the *Pretty* case was designed to protect a large class of vulnerable persons, while under the 1990 Act it was only one other person (in the present case, J) whose rights were affected; as to the *Odièvre* case, it was argued that an important public interest had been involved in granting an overriding right to mothers to give birth anonymously and to preserve that anonymity, namely the discouragement of illegal abortions or the abandonment of children which might otherwise occur.

The State had not been obliged to intervene between the donors, and many States chose not to. Since it had decided to intervene, it was under a duty to introduce a scheme with sufficient flexibility to ensure respect for human rights.

51. In any event, the policies and principles claimed by the Government to underlie the 1990 Act (see paragraph 53 below) could be equally, or better, served either by allowing the parties to give an irrevocable consent at the moment of fertilisation or by allowing the man's withdrawal of consent to be overridden in exceptional cases. In this way a woman conceiving through IVF would have a greater right to self-determination and control over her fertility than under the present scheme and the welfare of the child would be promoted—since it must surely be in the interests of the potential child to be allowed to develop and be born to a good mother. It was pointed out that, in the recent Consultation Paper of August 2005, it was stated that, while the Government did not intend to change the law on the point, it could be argued that it would be more in line with natural conception if the woman were able to decide on the use of the embryo once it had been created.

52. The applicant contended that, once he had donated his sperm, J was not subject to any further medical intervention or treatment requiring his consent, and there would thus be no inequality of treatment between the parties if a man were held to his consent, there being no true comparison between the situation of the woman in refusing consent to the implantation of an embryo in her body or refusing to carry it to term and that of the man in withholding his consent to such implantation. The applicant would be content for J to play as little or as great a role as he wished in the life of any child of his. She had given an assurance not to seek any financial contribution from him and was willing to be bound by that promise in any way the State thought fit.

2. *The Government*

53. The Government contended that the 1990 Act served to promote a number of inter-related policies and interests—the woman's right to self-determination in respect of pregnancy once the embryo was implanted; the primacy of freely given and informed consent to medical intervention; the interests of any child who might be born as a result of IVF treatment; the equality of treatment between the parties; the promotion of the efficacy and use of IVF and related techniques; and clarity and certainty in relations between partners.

54. States were entitled to a broad margin of appreciation in this field, given the complexity of the moral and ethical issues to which IVF treatment gave rise, on which opinions within a democratic society might reasonably differ widely. There was no international or European consensus as to the point at which a sperm donor should be allowed effectively to withdraw his consent and prevent the use of his genetic material. Moreover, a wide margin should be applied since the national authorities were required to strike a balance between the competing Convention interests of two individuals, each of whom was entitled to respect for private life.

55. The fact that the law allowing either party to withdraw his or her consent up until the point of implantation of the embryo did not permit of exception (a “bright line” rule), did not in itself render it disproportionate. If exceptions were permitted, the principle which Parliament legitimately sought to achieve, of ensuring bilateral consent to implantation, would not be achieved. Complexity and arbitrariness would result, and the domestic authorities would be required to balance individuals’ irreconcilable interests, as in the present case.

B. The Court’s assessment

56. The Court observes at the outset that, like the Court of Appeal, it accepts the facts as found by the High Court, which had the benefit of hearing the witnesses in person (see paragraph 14 above). In particular, it accepts that J acted in good faith in embarking on the IVF treatment with the applicant, but that he did so only on the basis that their relationship would continue.

57. It is not disputed between the parties that Article 8 is applicable and that the case concerns the applicant’s right to respect for her private life. The Court agrees, since “private life”, which is a broad term, encompassing, *inter alia*, aspects of an individual’s physical and social identity including the right to personal autonomy, personal development and to establish and develop relationships with other human beings and the outside world (*Pretty*, § 61), incorporates the right to respect for both the decisions to become and not to become a parent.

58. In the domestic proceedings, the parties and the judges treated the issue as one involving an interference by the State with the applicant’s right to respect for her private life, since the relevant provisions of the 1990 Act prevented the clinic from treating the applicant once J had withdrawn his consent. The Court, however, considers that it is more appropriate to analyse the case as one concerning positive obligations. The State has chosen to establish, in the 1990 Act, a detailed legal framework authorising and regulating IVF treatment, the principal aim of which is to facilitate conception by women or couples who would otherwise find it impossible or difficult to conceive by ordinary means. The question which arises under Article 8 is whether there exists a positive obligation on the State to ensure that a woman who has embarked on treatment for the specific purpose of giving birth to a genetically related child should be permitted to proceed to implantation of the embryo notwithstanding the withdrawal of consent by her former partner, the male gamete provider.

59. The Court does not in any event find it to be of central importance whether the case is examined in the context of the State’s positive or negative obligations. The boundaries between the two types of obligation under Article 8 do not always lend themselves to precise definition and the applicable principles are similar. In both contexts, regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole, and in both cases the State enjoys a certain margin of appreciation (*X., Y. and Z. v. the United Kingdom*, judgment of 22 April 1997, *Reports of Judgments and Decisions* 1997-II, § 41). The breadth of this margin will vary in accordance with the nature of the issues and the importance of the interests at stake (*Pretty*, § 70).

60. The applicant argues that while the State may have a broad margin in deciding whether or not to intervene in the area of IVF treatment, once it does so, the relative importance of the competing interests entails that the State’s margin in deciding where to strike the balance is extremely limited or non-existent.

61. The Court observes that there is no international consensus with regard to the regulation of IVF treatment or to the use of embryos created by such treatment. As appears from the comparative material summarised above (paragraphs 31-39), while certain States have adopted specific legislation in this area, others have either not legislated, or have only partially legislated, relying instead on general legal principles and professional ethical guidelines. Again, there is no consensus as to the point at which consent to the use of genetic material provided as part of IVF treatment may be withdrawn by one of the parties; in certain States, it appears that consent may be withdrawn only up to the point of fertilisation, whereas in other States such withdrawal may occur at any time prior to the implantation of the embryo in the woman; in still other States the point at which consent may be withdrawn is left to the courts to determine on the basis of contract or according to the balance of interests of the two parties.

62. Since the use of IVF treatment gives rise to sensitive moral and ethical issues against a background of fast-moving medical and scientific developments, and since the questions raised by the case touch on areas where there is no clear common ground amongst the Member States, the Court considers that the

margin of appreciation to be afforded to the respondent State must be a wide one (see the above-mentioned *X., Y. and Z* judgment, § 44). In this regard, the Court is unable to accept the distinction drawn by the applicant between the intervention of the State in the field of IVF treatment, on the one hand, and its regulation of such treatment, on the other. The two questions are inseparably linked and the State's wide margin must in principle extend both to its decision to intervene in the area and, once having intervened, to the detailed rules it lays down in order to achieve a balance between the competing public and private interests.

63. The Court next observes that the legislation at issue in the present case was the culmination of an exceptionally detailed examination of the social, ethical and legal implications of developments in the field of human fertilisation and embryology. The **United Kingdom** was particularly quick to respond to the scientific advances in this field. Four years after the birth of the first child conceived by *in vitro* fertilisation, an expert Committee of Inquiry was appointed under the chairmanship of Dame Mary Warnock DBE. After the Committee had reported, its recommendations, so far as they related to IVF treatment, were set out in a Green Paper issued for public consultation. After receipt of representations from interested parties, they were included in a White Paper and were eventually embodied in the 1989 Bill which became, after Parliamentary debate, the 1990 Act (see paragraph 23 above). Central to the Committee's recommendations and to the policy of the legislation was the primacy of the continuing consent to IVF treatment by both parties to the treatment (see paragraph 27 above). It is true that, as noted by Arden LJ, neither the Warnock Report nor the Green Paper discussed what was to happen if the parties became estranged during treatment. However, the White Paper emphasised that donors of genetic material would have the right under the proposed legislation to vary or withdraw their consent at any time before the embryos were used and, as the Court of Appeal found in the present case, the policy of the Act was to ensure continuing consent from the commencement of treatment to the point of implantation in the woman (*ibid.*, and see also paragraphs 18 and 20 above).

64. Thus, Schedule 3 to the 1990 Act places a legal obligation on any clinic carrying out IVF treatment to explain to a person embarking on such treatment that either gamete provider has the freedom to terminate the process at any time prior to implantation. To ensure further that this position is known and understood, each donor must by law sign a form setting out the necessary consents (see paragraphs 10 and 29 above). In the present case, while the pressing nature of the applicant's medical condition required that she and J reach a decision about the fertilisation of her eggs without as much time for reflection and advice as might ordinarily be desired, it is undisputed that it was explained to them both that either was free to withdraw consent at any time before any resulting embryo was implanted in the applicant's uterus.

65. The Court recalls that on several previous occasions it has found that it was not contrary to the requirements of Article 8 of the Convention for a State to adopt legislation governing important aspects of private life which did not allow for the weighing of competing interests in the circumstances of each individual case. While, as noted by the applicant, the nature of the legislation and the particular aspects of private life which were in issue in the *Pretty* and *Odièvre* cases (see paragraph 50 above) were different from those in the present case, the Court finds that, as in those cases, strong policy considerations underlay the decision of the legislature to favour a clear or "bright-line" rule which would serve both to produce legal certainty and to maintain public confidence in the law in a highly sensitive field. As the Court of Appeal observed, to have made the withdrawal of the male donor's consent relevant but not conclusive, or to have granted a power to the clinic, to the court or to another independent authority to override the need for a donor's consent, would not only have given rise to acute problems of evaluation of the weight to be attached to the respective rights of the parties concerned, particularly where their personal circumstances had changed in the period since the outset of the IVF treatment, but would have created "new and even more intractable difficulties of arbitrariness and inconsistency" (see paragraphs 19 and 20 above).

66. The Court is not persuaded by the applicant's argument that the situation of the male and female parties to IVF treatment cannot be equated and that a fair balance could in general be preserved only by holding the male donor to his consent. While there is clearly a difference of degree between the involvement of the two parties in the process of IVF treatment, the Court does not accept that the Article 8 rights of the male donor would necessarily be less worthy of protection than those of the female; nor does it regard it as self-evident that the balance of interests would always tip decisively in favour of the female party. In his judgment in the present case, Wall J noted that the provisions of Schedule 3 to the Act

applied equally to all patients undergoing IVF treatment, regardless of their sex, and observed that it would not be difficult to imagine an infertile man facing a dilemma similar to that which confronted the present applicant (see paragraph 17 above).

67. The Court, like the national courts, has great sympathy for the plight of the applicant who, if implantation does not take place, will be deprived of the ability to give birth to her own child. However, like the national courts, the Court does not find that the absence of a power to override a genetic parent's withdrawal of consent, even in the exceptional circumstances of the present case, is such as to upset the fair balance required by Article 8. As noted by Arden LJ (see paragraph 20 above), the personal circumstances of the parties are different from what they were at the outset of the treatment and, even in the present case, it would be difficult for a court to judge whether the effect on the applicant of J's withdrawal of consent would be greater than the impact the invalidation of that withdrawal of consent would have on J. The dilemma which would face a court is indeed well illustrated by the *Nachmani* case itself, on which the applicant relies (see paragraphs 39 and 49 above). In that case, at first instance the District Court found in favour of the woman, holding that the man could no more withdraw his agreement to have a child than if he had fertilised the egg through sexual intercourse. A five-judge panel of the Supreme Court of Israel then reversed the decision, upholding the man's fundamental right not to be forced to become a parent. The eleven-judge panel to which the cases was thereafter referred overturned the five-judge panel's decision, by a majority of seven to four: the judges in the majority found that the woman's interests and in particular her lack of alternatives to achieving genetic parenthood outweighed those of the man; the judges in the minority reached the opposite conclusion, emphasising that the woman had known that the man's consent would be required at every stage and that the agreement could not be enforced after the couple had become separated.

68. The Court accepts that a different balance might have been struck by Parliament, by, for instance, making the consent of the male donor irrevocable or by drawing the "bright-line" at the point of creation of the embryo. It notes in this regard that this latter solution has been adopted in a number of Member States of the Council of Europe (see paragraph 32 above). However, the central question in terms of Article 8 of the Convention is not whether a different solution might have been found by the legislature which would arguably have struck a fairer balance, but whether, in striking the balance at the point at which it did, Parliament exceeded the margin of appreciation afforded to it under that Article. In determining this question, the Court attaches some importance to the fact that, while, as noted above, there is no international consensus as to the point at which consent to the use of genetic material may be withdrawn, the **United Kingdom** is by no means alone among the Member States in granting to both parties to IVF treatment the right to withdraw consent to the use or storage of their genetic material at any stage up to the moment of implantation of the resulting embryo. The Court further notes a similar emphasis on the primacy of consent reflected in the relevant international instruments concerned with medical interventions (see paragraphs 31-42 above).

69. For the above reasons, the Court finds that, in adopting in the 1990 Act a clear and principled rule, which was explained to the parties to IVF treatment and clearly set out in the forms they both signed, whereby the consent of either party might be withdrawn at any stage up to the point of implantation of an embryo, the **United Kingdom** did not exceed the margin of appreciation afforded to it or upset the fair balance required under Article 8 of the Convention.

There has not therefore been a violation of Article 8 of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION TAKEN IN CONJUNCTION WITH ARTICLE 8

70. The applicant further complained of discrimination contrary to Article 14 taken in conjunction with Article 8. Article 14 provides:

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

She reasoned that a woman who was able to conceive without assistance was subject to no control or influence over how her fertilised eggs developed; from the moment of fertilisation she alone determined the future of the embryo. In contrast, the applicant, together with all women dependent on IVF to have

children, was at the whim of the sperm donor, who had the power under the 1990 Act to prevent her from having the embryos implanted.

71. The Government submitted that there was no discrimination under the 1990 Act between women who conceive through intercourse and those who use IVF, because the transfer to the woman of the embryo created *in vitro* was the equivalent of the fertilisation of the egg inside a woman following sexual intercourse. The 1990 Act did create a distinction between women undergoing IVF treatment before implantation of the embryo, on the basis of whether or not the male gamete provider continued to consent to the process, but, even if this distinction amounted to a relevant difference of treatment for the purposes of Article 14, it was objectively justified.

72. The Court has found above that the applicant's rights under Article 8 of the Convention were engaged, and Article 14 is therefore applicable.

73. For the purposes of Article 14 a difference in treatment between persons in analogous or relevantly similar positions is discriminatory if it has no objective and reasonable justification, that is, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised. Moreover, the Contracting States enjoy a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment. Discrimination may also arise where States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different (*Pretty*, § 88).

74. The Court is not required to decide in the present case whether the applicant could properly complain of a difference of treatment as compared to another woman in an analogous position, because it considers, in common with the Court of Appeal, that the reasons given for finding that there was no violation of Article 8 also afford a reasonable and objective justification under Article 14 (see, *mutatis mutandis*, *Pretty* § 89).

75. Consequently, there has been no violation of Article 14 of the Convention in the present case.

IV. RULE 39 OF THE RULES OF COURT

76. The Court recalls that, in accordance with Article 44 § 2 of the Convention, the present judgment will not become final until (a) the parties declare that they will not request that the case be referred to the Grand Chamber; or (b) three months after the date of the judgment, if reference of the case to the Grand Chamber has not been requested; or (c) the Panel of the Grand Chamber rejects any request to refer under Article 43 of the Convention.

77. It considers that the indication made to the Government under Rule 39 of the Rules of Court (see paragraphs 3-4 above) must continue in force until the present judgment becomes final or until the Panel of the Grand Chamber of the Court accepts any request by one or both of the parties to refer the case to the Grand Chamber under Article 43 of the Convention.

FOR THESE REASONS, THE COURT

1. *Declares* the application admissible, unanimously;
2. *Holds*, unanimously, that there has been no violation of Article 2 of the Convention;
3. *Holds*, by five votes to two, that there has been no violation of Article 8 of the Convention;
4. *Holds*, unanimously, that there has been no violation of Article 14 of the Convention, taken in conjunction with Article 8;
5. *Decides* to continue to indicate to the Government under Rule 39 of the Rules of Court that it is desirable in the interests of the proper conduct of the proceedings that the Government take appropriate measures to ensure that the embryos are preserved until such time as the present judgment becomes final or further order.

Done in English, and notified in writing on 7 March 2006, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Michael O'BOYLE Josep CASADEVALL
Registrar President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the joint dissenting opinion of Mr K. Traja and Ms L. Mijović is annexed to this judgment.

J.C.
M.O'B.

JOINT DISSENTING OPINION OF JUDGES TRAJA AND MIJOVIĆ

While we follow the majority's conclusions regarding Article 2 and Article 14 taken in conjunction with Article 8 of the Convention we are, nevertheless, unable to join them in their finding of non-violation of Article 8 of the Convention taken on its own, for the following reasons:

1. The Court, in our view, gives excessive weight to public policy considerations and to the State's margin of appreciation, without paying due attention to the nature of the individual rights in conflict. The 1990 Act, which imposes a blanket ban on IVF treatment in the case of unilateral withdrawal of consent, is found to be in conformity with the requirements of Article 8 of the Convention, the argument being that "... it was not contrary to the requirements of Article 8 of the Convention for a State to adopt legislation governing important aspects of private life which did not allow for the weighing of competing interests in the circumstances of each individual case" (§ 65 of the judgment). The precedents applied in the judgment are the *Pretty* and *Odièvre* cases. Despite the differences between those cases and the present, the Court went on to find that the "bright-line" rule was acceptable, since it was based on strong policy considerations, namely the need to produce legal certainty and to maintain public confidence in the law in a highly sensitive field.

We think that the essence of the case lies in the very particular nature of the applicant's situation, which is not of a kind best decided on the basis of a "bright-line" rule. Even at first sight, the private interests in the *Pretty* and *Odièvre* cases are different from those at stake here.

Pretty can be distinguished on the ground that it was held in that case that no Convention "right to death" could be extrapolated. In *Evans*, on the contrary, the issue is about a right to procreate which is, as the Court has accepted, part of the applicant's right to respect for her private life (§ 57). The *Pretty* acceptance of a "bright line" rule has no bearing in the *Evans* case because the Convention context of the "right to death" and that of "the right to reproduce through IVF" are wholly different.

The analogy with the *Pretty* case fails, also, in another respect. As the Court accepted, the "bright-line" rule in that case allowed for flexibility by authorizing the Director of Public Prosecutions to decide not to prosecute and by allowing lesser penalties to be imposed (§ 76). So, a more flexible law was provided in cases involving assisted suicide, where the Convention excludes a "right to death", whereas in the *Evans* case, where the right to reproduce through IVF falls within the ambit of Article 8 as a defensible right, the relevant domestic law is wholly rigid!

The difference between *Odièvre* and *Evans*, on the other hand, is that in the first case the conflict between the two private persons concerned the anonymity of the mother, whereas in the present case the conflict concerns IVF procreation, a right which goes in the direction of respect for life as “... a higher-ranking value...”(*Odièvre*, § 45). Since the extent of the State’s obligation will depend on the particular aspect of private life that is at issue (see *X and Y v. the Netherlands*, judgment of 26 March 1985, Series A no. 91, p. 12, § 24), the applicant’s particularly important interest, in the circumstances of her case, deserves a fairer balancing than that struck by the 1990 Act.

2. The Court found that the creation of embryos using the applicant’s last eggs and J’s sperm was based on the consent of both parties, who were informed that, if one of them withdrew consent, the embryos would be destroyed by the clinic. The Court looked at the case by partly and shortly balancing the interests of both parties and found that J could not be compelled to become the father of an undesired child and that the applicant could not seek enforcement of an already withdrawn consent in order to have a child with her former partner (§ 67).

In so doing, the Court, like the domestic courts, found that the balance struck by the 1990 Act was fair because the legislature, within its margin of appreciation, had seen it appropriate to impose a general ban on procreation through IVF in case of lack of mutual consent, allowing no exception to the rule. The real question, however, is whether in striking such a rigid balance the legislature was right to give the party withdrawing consent a totally controlling position and to accord that party’s Article 8 right a presumptive value. We think that the exceptional situation of the applicant, who has no other means of having a genetically-related child, should have been made a matter of a deeper consideration by the domestic authorities, and that they were under an obligation to secure her right to become mother in her exceptional circumstances. Denying the implantation of the embryos amounts in this case not to a mere restriction, but to a total destruction of her right to have her own child. In such a case the Convention case-law is clear and does not allow a State to impair the very essence of such an important right, either through an interference or by non-compliance with its positive obligations. We do not think that a legislative scheme which negates the very core of the applicant’s right is acceptable under the Convention.

3. The dilemma between the applicant’s right to have a child and J’s right not to become a father cannot be resolved, in our view, on the basis of such a rigid scheme and the blanket enforcement by the law of one party’s withdrawal of consent. The dilemma should instead be resolved through careful analysis of the circumstances of the particular case, to avoid the unjust preservation of one person’s right by negating the rights of the other.

We find that in the present case the conflict is more acute between the individual interests than between the private and public interest, although both sets of interest are intertwined. While we do not deny the public interest in regulating IVF treatment to facilitate conception by couples who cannot easily or at all conceive in the ordinary way and to protect the individuals where they have conflicting rights, we consider that, given the facts of this case, the particular private life interests at stake here should be made the focus of the Court’s analysis.

4. As noted in the majority judgment, the Court had the opportunity to look at the US and Israeli courts’ relevant case-law. We consider that the contract approach, aimed at enforcing the initial terms of consent, is not fully in conformity with the spirit of the Convention, because civil law considerations are not always the best means to secure Convention rights. The contract approach is a “bright-line” rule, also, and it does not take into account the specific social and psychological aspects of such cases.

The other way of approaching the case is by considering, in the first place, the competing public-policy and private interests, which is the approach adopted by the Court. The case can be dealt with on these grounds, but, again, some balancing of the applicant’s and her partner’s rights is inevitable. It is said that the 1990 Act protects J’s right not to become a father against his will, and rightly so, because it is in the public interest not to force anyone to procreate. But, on the other hand, the applicant’s right to have a child through IVF, is, also, a right worthy of protection. The absolute power of the party who withdraws his or her consent entails that the other party loses all autonomy in respect of his or her genetic material, which, according to the principles said to underlie the domestic law, is also contrary to a paramount public interest. Public policy works both ways. While the continuing consent of both parties is equally important in the eyes of the national law, which, as shown by Wall J, applies equally to all patients undergoing IVF treatment, regardless of sex (§ 66 of the judgment), the difference in the private parties’ situations can be

established and better assessed only if the Court, as is its usual approach, considers the case from the standpoint of conflicting rights.

5. This approach relativises the Court's argument based on the lack of European consensus in such matters. Indeed, the fact that different States strike the balance at different points (up to the creation of the embryo or up until the point of implantation) is not decisive if we consider that what counts most is how best to secure the conflicting rights of individual parties. We believe that the **duty to protect** everyone's right to respect for private life should not be made to depend on any European consensus, however sensitive the matter may be. The consensus concerns the different **means** of achieving the protection of such rights, but the result should always be that such important rights, one way or another, are protected. The Court has reiterated that "... the choice of the means calculated to secure compliance with Article 8 in the sphere of the relations of individuals between themselves is in principle a matter that falls within the Contracting States' margin of appreciation. In this connection, there are different ways of ensuring "respect for private life" (*Odièvre* § 46). The Court has never said that the choice of private life interests to protect can wholly and unconditionally remain a matter for the State, or that every approach could be justified because of the margin of appreciation or the lack of European consensus.

So, the **United Kingdom** chose to strike the balance by allowing for the possibility to withdraw consent up to the point of implantation of the embryo. Other countries, such as Austria and Italy, have decided that the revocation of consent can be effective only up to the point of fertilisation. This is within their margin of appreciation, but the duty to strike a fair balance between individual rights in conflict remains nevertheless the same invariable and imperative requirement under the Convention for all member States.

6. We think that, in special circumstances such as the present case, it would be fairer to seek a solution by taking into account the specific rights in the specific situation. Here the differences between, as well as the burden imposed on, each party seem to us of the utmost importance. This case-specific test should rely upon a careful balancing of the private interests at stake with a view to protecting the essence of the rights from being destroyed. While the applicant has no other way of having a genetic child, her partner, J, may have children with another woman and so satisfy his need for parenthood. The balancing exercise might lead to a different conclusion if the applicant had another child or the possibility of having a child without using J's genetic material.

The lack of any alternative way for the woman to reproduce, once the man had withdrawn his consent, was one of the crucial arguments relied on by the Israeli Supreme Court in *Nachmani v. Nachmani*, a case similar to the present. In the *Nachmani* case the majority of the Supreme Court decided in favour of the woman, who was in the same position as Ms **Evans**, by applying the test of "least harm", which is an approach we find useful, though insufficient.

In a wider context, we note that the applicant's partner, J, had nothing to fear from the risk that the applicant could use the embryos with a surrogate mother (she intended to implant them in her own uterus), as has happened in some American cases. The involvement of a surrogate has been one of the reasons why the American courts have declined to enforce contracts on public policy grounds; but, we have to underline, such issues of public policy do not apply here. From this point of view also, the present case differs from *Odièvre*, where the Court found that the conflict of interests should not be dealt with "... in isolation from the issue of the protection of third parties..." (§ 44) So, J's legitimate interest to be protected from the undue interference of a third party, such as a surrogate, simply did not exist.

7. Similarly, we find little weight in the good faith argument advanced by the domestic courts and accepted by our Court. J's good faith, when the applicant was also in good faith, is not a point that makes the withdrawal of his consent more sacred and deserving of respect. On the contrary, without blaming J for his withdrawal, he is nevertheless the only person that, under the 1990 Act, can cause the applicant irreparable harm. The good faith argument is apparently based on contractual considerations. What if he had acted in bad faith? The rigid scheme of the law would not allow for any exception even in such a case. But probably the Court would feel obliged to take it into account, thus accepting an exception to the rule! Such logic would force the Court to look at the facts of the individual case, as we do here.

8. Unlike the majority, we are not satisfied of the "quality" of the domestic law, as "quality of law" is understood in our case-law. Of course, a "bright-line" rule, though offering blunt choices, can remain at the same clear and certain. However, it is curious to see how a defective law can be said to have struck a fair balance between competing individual rights, or even between individual rights and public interests.

The 1990 Act has no answer on a number of crucial points. As noted by Arden LJ, the law is silent as regards what is to happen when parties become estranged during IVF treatment or separate or divorce. It follows that the applicant was not given an adequate indication of the rules applicable in her circumstances and, due to this omission in the law, she was not able to regulate properly her conduct (*Silver and Others v. the United Kingdom*, §§ 86-88).

Any “bright-line” rule must be tested from the perspective of securing Convention rights. The fact that the case is analysed as one concerning positive obligations and not as one involving an interference by the State with the applicant’s right, should make no difference as to the requirement for law of a certain quality. If the case had been decided as one involving the State’s interference, as the domestic courts did, then the Court would feel the need to review the quality of the law. The same must apply when the case is seen from the angle of positive obligations.

9. To sum up, as accepted in the Court’s case-law, the States enjoy a certain margin of appreciation in dealing with competing private life interests of individuals, and therefore the rule is that domestic regulation should, in principle, be upheld, even in cases where the legal scheme is based on a “bright-line” rule. Exceptions, however, should be allowed where, in the circumstances of the case, the rigid application of such a rule could lead to irreparable harm or to the destruction of the essence of one party’s rights. “Bright-line” legislation is exceptional in the European context and, therefore, must be strictly scrutinized by the Court. We consider that in certain, specific, circumstances, the relative importance of one of the parties’ interests entails that it should be allowed to override the interest of the other party.

In conclusion, if we apply these principles to the case in hand, the correct approach in our view would be as follows: **the interests of the party who withdraws consent and wants to have the embryos destroyed should prevail (if domestic law so provides), unless the other party (a) has no other means to have a genetically-related child; and (b) has no children at all; and (c) does not intend to have recourse to a surrogate mother in the process of implantation.** We think this approach would strike a fair balance between public and private interests, as well as between conflicting individual rights themselves. This test is neutral, because it can equally apply to female and male parties.

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