CASE OF EVANS v. THE UNITED KINGDOM

(Application no. 6339/05)

JUDGMENT

STRASBOURG

10 April 2007

This judgment is final but may be subject to editorial revision.

The case of **Evans** v. the United Kingdom,

The European Court of Human Rights, sitting as a Grand Chamber composed of:

Mr C.L. Rozakis, *President*,
Mr J.-P. Costa,
Sir Nicolas Bratza,
Mr B.M. Zupančič,
Mr P. Lorenzen,
Mr R. Türmen,
Mr V. Butkevych,
Mrs N. Vajić,
Mrs M. Tsatsa-Nikolovska,
Mr A.B. Baka,
Mr A. Kovler,
Mr V. Zagrebelsky,
Mrs A. Mularoni,
Mr D. Spielmann,
Mrs R. Jaeger,
Mr David Thór Björgvinsson,
Mrs I. Ziemele, *Judges*,
and Mr E. Fribergh, *Registrar*.

Having deliberated in private on 22 November 2006 and 12 March 2007,

Delivers the following judgment, which was adopted on the latter 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 Agents, Ms Emily Willmott and Ms Kate McCleery, Foreign and Commonwealth Office.

3. The applicant complained under Articles 2, 8 and 14 of the Convention that domestic law permitted her former partner effectively to withdraw his consent to the storage and use by her of embryos created jointly by them.

4. The application was allocated to the Fourth Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1.

5. 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 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. On 7 June 2005 the Chamber confirmed the above rulings (Rule 54 § 3).

6. On 7 March 2006, after a hearing dealing with both the question of admissibility and the merits (Rule 54 § 3), the Chamber composed of Mr J. Casadevall, President, Sir Nicolas Bratza, Mr M. Pellonpää, Mr R. Maruste, Mr K. Traja, Ms L. Mijovic and Mr J. Šikuta, judges, and Mr M. O'Boyle, Section Registrar, declared the application admissible and held, unanimously, that there had been no violation of Articles 2 or 14 of the Convention and by five votes to two that there had been no violation of Article 8. A joint dissenting opinion by Mr Traja and Ms Mijovic was appended to the judgment.

7. On 5 June 2006 the applicant requested the referral of the case to the Grand Chamber in accordance with Article 43 of the Convention. A panel of the Grand Chamber granted that request on 3 July 2006. On the same date, the President of the Court decided to prolong the indication to the Government made on 22 February 2005 under Rule 39 of the Rules of Court (see paragraph 5 above).

8. The composition of the Grand Chamber was determined according to the provisions of Article 27 §§ 2 and 3 of the Convention and Rule 24.

9. The applicant and the Government each filed submissions on the merits.

10. A hearing took place in public in the Human Rights Building, Strasbourg, on 22 November 2006 (Rule 59 § 3).

There appeared before the Court:

(a) for the Government

Ms Helen MULVEIN, *Agent,*

Mr Philip SALES, Q.C.

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,*

Ms Anita MURPHY O'REILLY, *Adviser,*

Ms Natallie **EVANS**, *Applicant.*

The Court heard addresses by Mr Sales and Mr Tolson, as well as their answers to questions put by Judges Spielmann, Türmen, Myjer, David Thór Björgvinsson, Costa and Zagrebelsky.

THE FACTS

THE CIRCUMSTANCES OF THE CASE

11. The applicant was born in October 1971 and lives in Wiltshire.

12. The facts, as found by Mr Justice Wall ("Wall J"), who heard the parties' oral evidence (see paragraph 20 below), are as follows.

A. The IVF treatment

13. On 12 July 2000 the applicant and her partner, J (born in November 1976), commenced treatment at the Bath Assisted Conception Clinic ("the clinic"). The applicant had been referred for treatment at the clinic five years earlier, when she was married, but had not pursued it because of the breakdown of her marriage.

14. 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.

15. 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 to withdraw his or her consent at any time before the embryos were implanted in the applicant's uterus (see paragraph 37 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.

16. Thereafter, the couple entered into the necessary consents, by signing the forms required by the 1990 Act (see paragraph 37 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."

17. 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. The High Court proceedings

18. In May 2002 the relationship broke down. 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 embryos should be destroyed.

19. The clinic notified the applicant of J's lack of consent to further use of the embryos and informing her that it was now under a legal obligation to destroy them, pursuant to paragraph 8(2) of Schedule 3 to the 1990 Act (see paragraph 37 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.

20. 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.

21. He concluded that under the terms of the 1990 Act, and as a matter of public policy, it had not been open to J to give an unequivocal consent to the use of the embryos irrespective of any change of circumstance, and that, as a matter of fact, J had only ever consented to his treatment "together" with the applicant, and not to her continuing treatment on her own in the event that their relationship ended. Wall J thus 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 on the basis that their relationship would continue. On 10 October 2001, J had been doing his best to reassure the applicant that he loved her and wanted to be the father of her children; giving a truthful expression of his feelings at that moment, but not committing himself for all time. Wall J observed that in the field of personal relationships, endearments and reassurances of this kind were commonplace, but they did not – and could not – have any

permanent, legal effect. In undergoing IVF with J, the applicant had taken the only realistic course of action open to her. Wall J continued:

"However, even if I am wrong about that, and even if an estoppel is capable of existing in the face of the Act, I do not, for the reasons I have given, think it would be unconscionable to allow [J] to withdraw his consent. It is a right which the Statute gives him within the clear scheme operated by Parliament. It was the basis upon which he gave his consent on 10 October 2001. It is perfectly reasonable for him, in the changed circumstances which appertain, not to want to father a child by Ms **Evans**."

22. 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 accepted that the relevant provisions of the 1990 Act interfered 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. 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.

23. Wall J emphasised that the provisions of Schedule 3 to the Act (see paragraph 37 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

24. 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". Like Wall J, the Court of Appeal found that J had only ever consented to undergoing "treatment together" with the applicant, and had never consented to the applicant using the jointly-created embryos alone. Once the relationship had broken down, and J had indicated that he did not wish the embryos to be preserved or used by the applicant, they were no longer being treated "together". 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 paragraph 20 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.

25. While there was an interference with the private lives of the parties, Lords 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."

26. 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."

She continued:

"Like Thorpe and Sedley LJJ, 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 is 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."

27. On the issue of discrimination, Lords 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.

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

RELEVANT LAW AND PRACTICE

A. Domestic law: the 1990 Act

1. The Warnock Report

29. 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 the philosopher 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."

30. The Committee reported in July 1984 (Cmnd 9314). At that time, the technique of freezing human embryos for future use was in its infancy, but the Committee noted that it had already occurred and had resulted in one live birth, and recommended that clinical use of frozen embryos should continue to be developed under review by the licensing body (§ 10.3 of the Report). It went on, however, to recognise the potential problems arising from the possibility of prolonged storage of human embryos, and recommended that a couple should be permitted to store embryos for their own future use for a maximum of ten years, after which time the right of use or disposal should pass to the storage authority (§ 10.10). It further recommended that where, as a result, for example, of marital breakdown, a couple failed to agree how the shared embryo should be used, the right to determine the use or disposal of the embryo should pass to the storage authority (§ 10.13). Consistent with its view that there should be no right of ownership in a human embryo (§ 10.11), the Committee did not consider that one party to the disagreement should be able to require use of the embryo against the wishes of the other.

2. Consultation and the adoption of legislation

31. The Warnock Committee's recommendations, so far as they related to IVF treatment, were set out in a Green (consultation) Paper issued for public consultation. It was noted in the Green Paper (at § 35) that few comments had been received about the Committee's recommendation that the storage authority should assume the rights of use or disposal of an embryo where there was no agreement between the couple, and stressed that although this situation was unlikely to arise very often, it was important that there should be a "clear basis" for its resolution.

32. After receipt of representations from interested parties, the proposals on IVF were included in a White Paper (report), *Human Fertilisation and Embryology: A Framework for Legislation*, published in November 1987 (Cm 259). The White Paper recorded the Warnock Committee's recommendation that the right of use or disposal of a frozen embryo should pass to the storage authority in the event of disagreement between the couple concerned (§§ 50-51), but continued:

"Broadly, those who believe storage should be permitted were content with the Warnock recommendations. There were some, however, who considered that the 'storage authority' should not have the right of use or disposal unless specifically granted this by the donors. The Government shares this latter view and has concluded that the law should be based on the clear principle that the donor's wishes are paramount during the period in which embryos or gametes may be stored; and that after the expiry of this period, they may only be used by the licence holder for other purposes if the donor's consent has been given to this".

The White Paper indicated the Government's decision that the maximum storage period for embryos should be five years (§ 54). Then, in a section entitled "Donor's Consent", it set out the policy that a donor should have the right to vary or withdraw consent to the transfer of an embryo to a woman at any time before the embryo was used:

"55. The complexities connected with storage underline the importance of ensuring that, when couples embark on IVF treatment, or when gametes are being donated, the individuals involved have given their consent to the uses to which their gametes or embryos will be put.

56. The Bill will provide that gametes or embryos may only be stored with the signed consent of the donors; and may be used only by the licence holder responsible for storage for the purposes specified in that consent (e.g. for therapeutic treatment, [or for research]). Those giving consent should be provided with information about the techniques for which their gametes/embryos might be used and about the legal implications of their decision. As a matter of good practice, counselling should also be available to them.

57. Donors would have the right to vary or withdraw their consent before the gametes/embryos were used, but the onus would be on them to notify any change to the licence holder. A licence holder receiving notice of such a change will have a duty to inform any other licence holder to whom he has supplied the donor's gametes. (This situation might arise, for example, if a sperm bank supplied sperm to one or more treatment centres.) In the absence of any notification to the contrary, or notification of death, the licence holder must assume that the original consent still holds, and must act accordingly during the storage period. When this ends, he may only use or dispose of the embryos or gametes in accordance

with the specified wishes of the donors. If these are not clear, the embryo or gametes should be removed from storage and left to perish.

58. As far as embryos are concerned, these may not be implanted into another woman, nor used for research, nor destroyed (prior to the expiry of the storage time limit) in the absence of the consent of both donors. If there is disagreement between the donors the licence holder will need to keep the embryo in storage until the end of the storage period, after which time, if there is still no agreement, the embryo should be left to perish."

33. Following further consultation, the Human Fertilisation and Embryology Bill 1989 was published, and passed into law as the Human Fertilisation and Embryology Act 1990. The Bill substantially reflected the terms of the White Paper. The provisions dealing with consent did not prove controversial during its passage through Parliament.

3. The 1990 Act

34. In *R. v. Secretary of State for Health* ex parte *Quintavalle (on behalf of Pro-Life Alliance)* [2003] UKHL 13, Lord Bingham described the background to and general approach of the 1990 Act as follows:

"There is no doubting the sensitivity of the issues. There were those who considered the creation of embryos, and thus of life, *in vitro* to be either sacrilegious or ethically repugnant and wished to ban such activities altogether. There were others who considered that these new techniques, by offering means of enabling the infertile to have children and increasing knowledge of congenital disease, had the potential to improve the human condition, and this view also did not lack religious and moral arguments to support it. Nor can one doubt the difficulty of legislating against a background of fast-moving medical and scientific development. It is not often that Parliament has to frame legislation apt to apply to developments at the advanced cutting edge of science.

The solution recommended and embodied in the 1990 Act was not to ban all creation and subsequent use of live human embryos produced *in vitro* but instead, and subject to certain express prohibitions of which some have been noted above, to permit such creation and use subject to specified conditions, restrictions and time limits and subject to the regimes of control .... It is ... plain that while Parliament outlawed certain grotesque possibilities (such as placing a live animal embryo in a woman or a live human embryo in an animal), it otherwise opted for a strict regime of control. No activity within this field was left unregulated. There was to be no free for all".

35. 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).

36. By section 14(4) of the Act, "the statutory storage period in respect of embryos is such period not exceeding five years as the licence may specify". This provision was amended by the Human Fertilisation and Embryology (Statutory Storage Period for Embryos) Regulations 1996, which came into force on 1 May 1996, and which provide, *inter alia*, that where, in the opinion of two medical practitioners, the woman in whom the embryo may be placed, or, where she is not one of the persons whose gametes are used to create the embryo, one of those

persons, is, or is likely to become, completely infertile prematurely, the storage period is extended until that woman is 55. Where, in the opinion of a single medical practitioner, the woman in whom the embryo may be placed, or one of the gamete providers, has or is likely to have significantly impaired fertility or has a significant genetic defect, the storage period is extended to 10 years, or until that woman is 55, whichever period is the shorter.

Both of the persons whose gametes are used to create the embryos are required to confirm in writing that they do not object to extended storage for the purposes of future treatment. The woman in whom any such embryo may be placed must be under 50 when storage commences.

37. 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 "consents to use gametes or embryos", shall be complied with. The High Court and Court of Appeal held, in the proceedings brought by the applicant (see paragraphs 20-27 above) that, as a matter of the construction of Schedule 3, "the embryo is only used once transferred to the woman".

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."

38. The material effect of Schedule 3 was summarised in the judgment of Lords Justices Thorpe and Sedley (see paragraph 25 above) 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 within the Council of Europe and in certain other countries

1. The Member States of the Council of Europe

39. 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) and the replies by the member States of the Council of Europe to the Steering Committee on Bioethics' "Questionnaire on Access to Medically Assisted Procreation" (Council of Europe, 2005), it would appear that IVF treatment is regulated by primary or secondary legislation in Austria, Azerbaijan, Bulgaria, Croatia, Denmark, Estonia, France, Georgia, Germany, Greece, Hungary, Iceland, Italy, Latvia, the Netherlands, Norway, the Russian Federation, Slovenia, Spain, Sweden, Switzerland, Turkey, Ukraine and the United Kingdom; while in Belgium, the Czech Republic, Finland, Ireland, Malta, Lithuania, Poland, Serbia and Slovakia such treatment is governed by clinical practice, professional guidelines, royal or administrative decree or general constitutional principles.

40. The storage of embryos, for varying lengths of time, appears to be permitted in all the above States where IVF is regulated by primary or secondary legislation, except Germany and Switzerland, where in one cycle of treatment no more than three embryos may be created which are, in principle, to be implanted together immediately, and Italy, where the law permits the freezing of embryos only on exceptional, unforeseen medical grounds.

41. In Denmark, France, Greece, the Netherlands 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 primary legislation. It appears that, as a matter of law or practice, in Belgium, Finland and Iceland there is a similar freedom for either gamete provider to withdraw consent before implantation.

42. A number of countries have, however, regulated the consent issue differently. In Hungary, for example, in the absence of a specific contrary agreement by the couple, the woman is entitled to proceed with the treatment notwithstanding the death of her partner or the divorce of the couple. In Austria and Estonia 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. In Germany and Italy, neither party can normally withdraw consent after the eggs have been fertilised. In Iceland, the embryos must be destroyed if the gamete providers separate or divorce before the expiry of the maximum storage period.

2. The United States of America

43. In addition, the parties referred the Court to case-law from the United States and Israel. The field of medically assisted reproduction is not regulated at federal level in the United States and few States have introduced laws concerning the subsequent withdrawal of consent by one party. It has, therefore, been left to the courts to determine how the conflict between the parties should be resolved and there are a number of judgments by State Supreme Courts regarding the disposal of embryos created through IVF.

44. 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.

But the rule does not contemplate the creation of an automatic veto."

45. 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.

46. 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.

47. 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 either to be donated to another couple or preserved for use by him 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, having taken into account the fact that the father was not infertile, the court subscribed to the view taken in the *A.Z*. case regarding public policy and ordered that the wife's wishes be observed.

48. Finally, in *Litowitz v. Litowitz*, (48 P. 3d 261, 271) the woman, who had had children before undergoing a hysterectomy, wished to use embryos created with her ex-husband's sperm and donor eggs for implantation in a surrogate mother. The ex-husband, however, wished the embryos to be donated to another couple. At first instance and on appeal the husband's view prevailed, but in 2002 the Supreme Court of Washington decided by a majority 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.

3. Israel

49. 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

50. 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.”

51. 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...”

52. 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."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 2 OF THE CONVENTION

53. In her original application and in her observations before the Chamber, 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. ..."

54. In its judgment of 7 March 2006, the Chamber recalled that in *Vo v. France* [GC], no. 53924/00, § 82, ECHR 2004-VIII, the Grand Chamber had 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, 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. There had not, accordingly, been a violation of that provision.

55. The Grand Chamber notes that the applicant has not pursued her complaint under Article 2 in her written or oral submissions to it. However, since cases referred to the Grand Chamber embrace all aspects of the application previously examined by the Chamber (*K. and T. v. Finland* [GC], no. 25702/94, § 140, ECHR 2001-VII), it is necessary to consider the issue under Article 2.

56. The Grand Chamber, for the reasons given by the Chamber, finds that the embryos created by the applicant and J do not have a right to life within the meaning of Article 2, and that there has not, therefore, been a violation of that provision.

II. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

57. 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 Chamber judgment

58. In its judgment of 7 March 2006 the Chamber held, in summary, that Article 8 was applicable, since the notion of "private life" incorporated the right to respect for both the decisions to become and not to become a parent. The question which arose under Article 8 was "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. Given that there was no international or European consensus with regard to the regulation of IVF treatment, the use of embryos created by such treatment, or the point at which consent to the use of genetic material provided as part of IVF treatment might be withdrawn; and since the use of IVF treatment gave rise to sensitive moral and ethical issues against a background of fast-moving medical and scientific developments, the margin of appreciation to be afforded to the respondent State must be a wide one.

60. The 1990 Act 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. Its policy was to ensure continuing consent from the commencement of treatment to the point of implantation in the woman. 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 was undisputed that it was explained to them both that either was free to withdraw consent at any time before the resulting embryo was implanted in the applicant's uterus. As in *Pretty v. the United Kingdom*, no. 2346/02, ECHR 2002-III and *Odièvre v. France*, no. 42326/98, ECHR 2003-III, 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 sensitive field. Like the national courts, the Chamber did not find, therefore, that the absence of a power to override a genetic parent's withdrawal of consent, even in the exceptional circumstances of the applicant's case, was such as to upset the fair balance required by Article 8 or to exceed the wide margin of appreciation afforded to the State.

B. The parties' submissions

1. The applicant

61. The applicant accepted that there should be a regulatory scheme determining the use of reproductive medicine, but submitted that it was neither necessary nor proportionate to permit of no exceptions in the provision of a veto on the use of embryos to either gamete provider.

62. The female's role in IVF treatment was much more extensive and emotionally involving than that of the male, who donated his sperm and had no further active physical part to play in the process. The female gamete provider, by contrast, donated eggs, from a finite limited number available to her, after a series of sometimes painful medical interventions designed to maximise the potential for harvesting eggs. In the case of a woman with the applicant's medical history, she would never again have the opportunity to attempt to create a child using her gametes. Her emotional and physical investment in the process far surpassed that of the man and justified the promotion of her Article 8 rights. Instead, the 1990 Act operated so that the applicant's rights and freedoms in respect of creating a baby were dependent on J's whim. He was able to embark on the project of creating embryos with the applicant, offering such

assurances as were necessary to convince her to proceed, and then abandon the project when he pleased, taking no responsibility for his original decision to become involved, and under no obligation even to provide an explanation for his behaviour.

63. The impact of the consent rules in the 1990 Act was such that there would be no way for a woman in the applicant's position to secure her future prospects of bearing a child, since both a known and an anonymous sperm donor could, on a whim, withdraw consent to her use of embryos created with his sperm. Part of the purpose of reproductive medicine was to provide a possible solution for those who would otherwise be infertile. That purpose was frustrated if there was no scope for exceptions in special circumstances.

64. Whether the role of the State was analysed in terms of a positive obligation to take reasonable and appropriate measures to secure the individual's Article 8 rights, or as an interference requiring justification, it was clear from the case-law that a fair balance had to be struck between the competing interests. There was no necessity for legislation which failed to recognise that exceptional situations, requiring different treatment, might arise. This was a conflict primarily between the respective rights of two private individuals, rather than between the State and an individual, and the proper way to determine a conflict between individuals was by recourse to a court for judicial assessment of the respective positions. In the present case, the clinic was ready and willing to treat the applicant, and should be permitted so to do. The Chamber had overstated the obligation for which the applicant contended: she did not go so far as to claim a duty on the part of the State to ensure that she be permitted to proceed.

65. A fair appraisal of the *Nachmani* case (see paragraph 48 above) and the case-law from the United States of America (paragraphs 42-47 above) provided support for her argument. *Nachmani* was the closest case on its facts to her own, but the applicant's case was stronger, since she wished to have the embryos implanted in her own uterus, not that of a surrogate. All the decisions from the United States appeared either to apply, or at least to recognise, a test whereby there was a balance of rights and/or interests in the embryos. Moreover, only one of these cases was decided on the basis of a conflict between public policy and private rights, and the case-law therefore supported the applicant's contention that there was no public interest at stake. As for the position within the Council of Europe, the applicant pointed out that the Chamber appeared to have relied on material which was not available to the parties, although she accepted that there was no consensus in Europe as to whether, in the general run of cases, the man's consent could be revoked either at any time before implantation, or only up to the point of fertilisation. However, the applicant invited the Court to consider what evidence there was as to how any Council of Europe State would determine a case with the same facts as the present dispute. Just how “bright-line” were the rules even within the four States recorded in the Chamber judgment as permitting withdrawal of consent at any time up to implantation?

66. While the applicant accepted that, since the statutory maximum storage period had expired by the time of the hearing before the Grand Chamber, she was no longer the victim of J's direction to the clinic to remove the embryos from storage, she submitted that it was neither necessary nor proportionate to give such a power to a single gamete provider. Human embryos were special: this was the underlying philosophy of the 1990 Act. Yet the Act permitted only one of the couple on a whim to destroy the embryos created by both; even a family pet enjoyed greater protection under the law.

2. The Government

67. The Government argued that the Chamber had been incorrect in referring to J's having withdrawn the consent he had given to the use of his gametes or to the applicant's having sought to hold him to that consent. In fact, J had never consented to the treatment which the applicant wished to receive, and his consent had always been limited to treatment of the applicant together with him; in practical terms, the consent was predicated on their relationship continuing. When the relationship broke down and the applicant wished to continue with the treatment by herself, the consent which J had given did not extend to the new situation.

68. 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.

69. 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.

70. 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

1. The nature of the rights at issue under Article 8

71. 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 Grand Chamber agrees with the Chamber that “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 (see *Pretty,* cited above, § 61), incorporates the right to respect for both the decisions to become and not to become a parent.

72. It must be noted, however, that the applicant does not complain that she is in any way prevented from becoming a mother in a social, legal, or even physical sense, since there is no rule of domestic law or practice to stop her from adopting a child or even giving birth to a child originally created *in vitro* from donated gametes. The applicant's complaint is, more precisely, that the consent provisions of the 1990 Act prevent her from using the embryos she

and J created together, and thus, given her particular circumstances, from ever having a child to whom she is genetically related. The Grand Chamber considers that this more limited issue, concerning the right to respect for the decision to become a parent in the genetic sense, also falls within the scope of Article 8.

73. The dilemma central to the present case is that it involves a conflict between the Article 8 rights of two private individuals: the applicant and J. Moreover, each person's interest is entirely irreconcilable with the other's, since if the applicant is permitted to use the embryos, J will be forced to become a father, whereas if J's refusal or withdrawal of consent is upheld, the applicant will be denied the opportunity of becoming a genetic parent. In the difficult circumstances of this case, whatever solution the national authorities might adopt would result in the interests of one or the other parties to the IVF treatment being wholly frustrated (cf. *Odièvre*, cited above, § 44).

74. In addition, the Grand Chamber, like the Chamber, accepts the Government's submission (see paragraph 68 above) that the case does not involve simply a conflict between individuals; the legislation in question also served a number of wider, public interests, in upholding the principle of the primacy of consent and promoting legal clarity and certainty, for example (compare, again, *Odièvre*, § 45). The extent to which it was permissible under Article 8 for the State to give weight to these considerations is examined below.

2. Whether the case involves a positive obligation or an interference

75. Although the object of Article 8 is essentially that of protecting the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective respect for private life. These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves. The boundaries between the State's positive and negative obligations under Article 8 do not lend themselves to precise definition. The applicable principles are nonetheless similar. In particular, in both instances regard must be had to the fair balance which has to be struck between the competing interests; and in both contexts the State enjoys a certain margin of appreciation (*Odièvre*, cited above, § 40).

76. 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, because the relevant provisions of the 1990 Act prevented the clinic from treating her once J had informed it that he did not consent. The Grand Chamber, however, like the Chamber, considers that it is more appropriate to analyse the case as one concerning positive obligations, the principal issue, as in the *Odièvre* case cited above, being whether the legislative provisions as applied in the present case struck a fair balance between the competing public and private interests involved. In this regard, the Grand Chamber accepts the findings of the domestic courts that J had never consented to the applicant using the jointly created embryos alone - his consent being limited to undergoing “treatment together” with the applicant (see paragraph 24 above). The Court does not find it of importance to the determination of the Convention issue, whether in these circumstances J is to be regarded as having “refused” rather than “withdrawn” his consent to the implantation of the embryos, as the Government argue (paragraph 67 above).

3. The margin of appreciation

77. A number of factors must be taken into account when determining the breadth of the margin of appreciation to be enjoyed by the State in any case under Article 8. Where a particularly important facet of an individual's existence or identity is at stake, the margin allowed to the State will be restricted (see, for example, *X. and Y. v. the Netherlands*, judgment of 26 March 1985, Series A no. 91, §§ 24 and 27; *Dudgeon v. the United Kingdom*, judgment of 22 October 1981, Series A no. 45; *Christine Goodwin v. the United Kingdom* [GC], no. 28957/95, § 90, ECHR 2002-VI; cf. *Pretty*, cited above, § 71). Where, however, there is no consensus within the Member States of the Council of Europe, either as to the relative importance of the interest at stake or as to the best means of protecting it, particularly where the case raises sensitive moral or ethical issues, the margin will be wider (*X., Y. and Z. v. the United Kingdom,* judgment of 22 April 1997, *Reports of Judgments and Decisions* 1997-II, § 44; *Frette v. France,* no. 36515/97, § 41, ECHR 2002-I; *Christine Goodwin,* cited above, § 85; see also, *mutatis mutandis*, *Vo*, cited above, § 82). There will also usually be a wide margin if the State is required to strike a balance between competing private and public interests or Convention rights (see *Odièvre*, §§ 44-49 and *Frette* § 42).

78. The issues raised by the present case are undoubtedly of a morally and ethically delicate nature, and in this connection the Court recalls the words of Lord Bingham in *Quintavalle* (see paragraph 34 above).

79. In addition, while the Court is mindful of the applicant's submission to treat the comparative law data with caution, it is at least clear, and the applicant does not contend otherwise, that there is no uniform European approach in this field. Certain States have enacted primary or secondary legislation to control the use of IVF treatment, whereas in others this is a matter left to medical practice and guidelines. While the United Kingdom is not alone in permitting storage of embryos and in providing both gamete providers with the power freely and effectively to withdraw consent up until the moment of implantation, different rules and practices are applied elsewhere in Europe. It cannot be said that there is any consensus as to the stage in IVF treatment when the gamete providers' consent becomes irrevocable (see paragraphs 39-42 above).

80. While the applicant contends that her greater physical and emotional expenditure during the IVF process, and her subsequent infertility, entail that her Article 8 rights should take precedence over J's, it does not appear to the Court that there is any clear consensus on this point either. The Court of Appeal commented on the difficulty of comparing the effect on J of being forced to become the father of the applicant's child and that on the applicant of being denied the chance to have genetically-related offspring (see paragraphs 25-26 above), and this difficulty is also reflected in the range of views expressed by the two panels of the Israeli Supreme Court in *Nachmani* and in the United States case-law (see paragraphs 43-49 above).

81. In conclusion, therefore, 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 *X., Y. and Z*, cited above, § 44).

82. The Grand Chamber, like the Chamber, considers that the above margin must in principle extend both to the State's decision whether or not to enact legislation governing the use of IVF treatment and, once having intervened, to the detailed rules it lays down in order to achieve a balance between the competing public and private interests.

4. Compliance with Article 8

83. It remains for the Court to determine whether, in the special circumstances of the case, the application of a law which permitted J effectively to withdraw or withhold his consent to the implantation in the applicant's uterus of the embryos created jointly by them struck a fair balance between the competing interests.

84. The fact that it is now technically possible to keep human embryos in frozen storage gives rise to an essential difference between IVF and fertilisation through sexual intercourse, namely the possibility of allowing a lapse of time, which may be substantial, to intervene between creation of the embryo and its implantation in the uterus. The Court considers that it is legitimate – and indeed desirable - for a State to set up a legal scheme which takes this possibility of delay into account. In the United Kingdom, the solution adopted in the 1990 Act was to permit storage of embryos for a maximum of five years. In 1996 this period was extended by secondary legislation to ten or more years where one of the gamete providers or the prospective mother is, or is likely to become, prematurely infertile, although storage can never continue after the woman being treated reaches the age of 55 (see paragraph 36 above).

85. These provisions are complemented by a requirement on the clinic providing the treatment to obtain a prior written consent from each gamete provider, specifying, *inter alia,* the type of treatment for which the embryo is to be used (Schedule 3, paragraph 2(1) to the 1990 Act), the maximum period of storage, and what is to be done with it in the event of the gamete provider's death or incapacity (Schedule 3, paragraph 2(2)). Moreover, paragraph 4 of Schedule 3 provides that "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 ..." up until the point that the embryo has been "used" (that is, implanted in the uterus; see paragraph 37 above). Other States, with different religious, social and political cultures, have adopted different solutions to the technical possibility of delay between fertilisation and implantation (see paragraphs 39-42 above). For the reasons set out above (paragraphs 77-82), the decision as to the principles and policies to be applied in this sensitive field must primarily be for each State to determine.

86. In this connection the Grand Chamber agrees with the Chamber that it is relevant that the 1990 Act 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, and the fruit of much reflection, consultation and debate (see, *mutatis mutandis*, *Hatton and others v. the United Kingdom* [GC], no. 36022/97, § 128, ECHR 2003-VIII).

87. The potential problems arising from scientific progress in storing human embryos were addressed as early as the Warnock Committee's Report of 1984, which recommended that a couple should be permitted to store embryos for their own future use for a maximum of ten years, after which time the right of use or disposal should pass to the storage authority. In the event that a couple failed to agree how the shared embryo should be used, the right to determine the use or disposal of the embryo should pass to the "storage authority". The subsequent Green Paper specifically asked interested members of the public what should happen where there was no agreement between a couple as to the use or disposal of an embryo, and the 1987 White Paper noted that those respondents who agreed that storage should be permitted were broadly in favour of the Committee's recommendations, but that some rejected the idea that the "storage authority" should be empowered to decide the embryo's fate in the event of conflict between the donors. The Government therefore proposed

“that the law should be based on the clear principle that the donor's wishes are paramount during the period in which embryos or gametes may be stored; and that after the expiry of this period, they may only be used by the licence holder for other purposes if the donor's consent has been given to this”. The White Paper also set out the detail of the proposals on consent, in a form which, after further consultation, was adopted by the legislature in Schedule 3 to the 1990 Act (see paragraphs 29-33 above).

88. That Schedule places a legal obligation on any clinic carrying out IVF treatment to explain the consent provisions to a person embarking on such treatment and to obtain his or her consent in writing (see paragraph 37 above). It is undisputed that this occurred in the present case, and that the applicant and J both signed the consent forms required by the law. While the pressing nature of the applicant's medical condition required her to make a decision quickly and under extreme stress, she knew, when consenting to have all her eggs fertilised with J's sperm, that these would be the last eggs available to her, that it would be some time before her cancer treatment was completed and any embryos could be implanted, and that, as a matter of law, J would be free to withdraw consent to implantation at any moment.

89. While the applicant criticised the national rules on consent for the fact that they could not be disapplied in any circumstances, the Court does not find that the absolute nature of the law is, in itself, necessarily inconsistent with Article 8 (see also the *Pretty* and *Odièvre* cases cited in paragraph 60 above). Respect for human dignity and free will, as well as a desire to ensure a fair balance between the parties to IVF treatment, underlay the legislature's decision to enact provisions permitting of no exception to ensure that every person donating gametes for the purpose of IVF treatment would know in advance that no use could be made of his or her genetic material without his or her continuing consent. In addition to the principle at stake, the absolute nature of the rule served to promote legal certainty and to avoid the problems of arbitrariness and inconsistency inherent in weighing, on a case by case basis, what the Court of Appeal described as “entirely incommensurable” interests (see paragraphs 25-26 above). In the Court's view, these general interests pursued by the legislation are legitimate and consistent with Article 8.

90. As regards the balance struck between the conflicting Article 8 rights of the parties to the IVF treatment, the Grand Chamber, in common with every other court which has examined this case, has great sympathy for the applicant, who clearly desires a genetically related child above all else. However, given the above considerations, including the lack of any European consensus on this point (see paragraph 79 above), it does not consider that the applicant's right to respect for the decision to become a parent in the genetic sense should be accorded greater weight than J's right to respect for his decision not to have a genetically-related child with her.

91. The Court accepts that it would have been possible for Parliament to regulate the situation differently. However, as the Chamber observed, the central question under Article 8 is not whether different rules might have been adopted by the legislature, 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.

92. The Grand Chamber considers that, given the lack of European consensus on this point, the fact that the domestic rules were clear and brought to the attention of the applicant and that they struck a fair balance between the competing interests, there has been no violation of Article 8 of the Convention.

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

93. In her application and in the proceedings before the Chamber, the applicant complained of discrimination contrary to Article 14 taken in conjunction with Article 8, reasoning that a woman who was able to conceive without assistance was subject to no control or influence over how the embryos developed from the moment of fertilisation, whereas a woman such as herself who could conceive only with IVF was, under the 1990 Act, subject to the will of the sperm donor.

94. In her observations to the Grand Chamber, however, the applicant submitted that her complaints under Articles 8 and 14 were inextricably linked, and that if the Court found that the impugned provision of domestic law was proportionate under Article 8, it should also find the scheme reasonably and objectively justified under Article 14.

95. The Grand Chamber agrees with the Chamber and the parties that it 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 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).

96. Consequently, there has been no violation of Article 14 of the Convention.

FOR THESE REASONS, THE COURT

1. *Holds*, unanimously, that there has been no violation of Article 2 of the Convention;

2. *Holds*, by thirteen votes to four, that there has been no violation of Article 8 of the Convention;

3. *Holds*, by thirteen votes to four, that there has been no violation of Article 14 of the Convention, taken in conjunction with Article 8.

Done in English and French, and delivered on 10 April 2007, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Erik Fribergh Christos Rozakis
Registrar President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the dissenting opinion of Mr Türmen, Mrs Tsatsa-Nikolovska, Mr Spielmann and Mrs Ziemele is annexed to this judgment.

C.L.R.
E.F.

JOINT DISSENTING OPINION OF JUDGES TÜRMEN, TSATSA-NIKOLOVSKA, SPIELMANN AND ZIEMELE

1. We voted against the finding that there has been no violation of Article 8 of the Convention and no violation of Article 14 of the Convention, taken in conjunction with Article 8.

2. In the instant case the applicant complained that the impact of the consent rules in the 1990 Act was such that there would be no way for a woman in her position to secure her future prospects of bearing a genetically related child. She explained that part of the purpose of reproductive medicine was to provide a possible solution for those who would otherwise be infertile. That purpose was frustrated if there was no scope for exceptions in special circumstances (see paragraphs 62-64 of the judgment).

3. The parties and the Court agreed that Article 8 was applicable and that the case concerned the applicant's right to respect for her private life (paragraph 71). The Court went on to say (paragraph 72) that the more specific issue concerning the right to respect for the decision to become a parent in the genetic sense also fell within the scope of Article 8. We agree with the Court's reasoning as concerns the applicability of Article 8 and the more specific issue at stake. We would like to underline the importance of the Court's statement as to the applicability of Article 8 in the circumstances of the case.

4. In its assessment the Court examined the nature of the rights at issue under Article 8 (paragraphs 71-74) and whether the case involved a positive obligation or an interference (paragraphs 75-76). On the first issue the Court stated that the case involved a conflict between the Article 8 rights of two private individuals (paragraph 73) and added that the impugned legislation also served a number of wider, public interests, in upholding the primacy of consent and promoting legal clarity and certainty (paragraph 74). Considering that it was more appropriate to analyse the case as one concerning positive obligations, the Court stated that the principal issue was whether the legislative provisions as applied in the present case struck a fair balance between the competing public and private interests involved (paragraph 76). Moreover, the Court considered that since the use of *in vitro* fertilisation ("IVF") treatment gave 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 touched on areas where there was no clear common ground amongst member States, the margin of appreciation to be afforded to the respondent State had to be a wide one (paragraph 81). This margin of appreciation must, according to the Court, in principle extend both to the State's decision whether or not to enact legislation governing the use of IVF treatment and, once having intervened, to the detailed rules it lay down in order to achieve a balance between the competing public and private interests (paragraph 82).

5. We are unable to subscribe to the Court's decision that it is more appropriate to analyse the case as one concerning positive obligations.

6. We see the case as one of interference with the applicant's right to respect for the decision to become a genetically related parent. We can accept that the interference was prescribed by law and had a legitimate aim in terms of the protection of public order and morals and the rights of others. But was this interference necessary and proportionate in the special circumstances of the case? We consider that the applicant's right to decide to become a

genetically related parent weighs heavier than that of J's decision not to become a parent in the present case. Our reasons are as follows:

i) The 1990 Act does not provide for the possibility of taking into consideration the very special medical condition affecting the applicant. We can agree with the majority that, in particular where an issue is of a morally and ethically delicate nature, a bright line rule may best serve the various – often conflicting – interests at stake. It has been said that "the advantage of a clear law is that it provides certainty." But it has also been admitted that "its disadvantage is that if it is too clear – categorical – it provides too much certainty and no flexibility".[1] Therefore, given the particular circumstances of the case, the main problem lies in the absolute nature of the "bright line rule".

ii) In the instant case the majority's approach resulted not simply in the applicant's decision to have a genetically related child being thwarted but in the effective eradication of any possibility of having a genetically related child, thus rendering any such decision now or at any later time meaningless.

7. Therefore, in our view the application of the 1990 Act in the applicant's circumstances is disproportionate. Because of its absolute nature, the legislation precludes the balancing of competing interests in this particular case. In fact, even though the majority accepts that a balance has to be struck between the conflicting Article 8 rights of the parties to the IVF treatment (paragraph 90), no balance is possible in the circumstances of the present case since the decision upholding J's choice not to become a parent involves an absolute and final elimination of the applicant's decision. Rendering empty or meaningless a decision of one of the two parties cannot be considered as balancing the interests. It is to be noted that the case is not about the possibility of adopting a child or hosting a donated embryo (see paragraph 72). Incidentally, J will still be able to take a decision to become a parent of his own child, whereas the applicant has had her last chance.

8. The applicant underwent surgery to remove her ovaries (26 November 2001). Therefore, the eggs that were extracted from her for IVF treatment were her last chance to have a genetically related child. J not only knew this fact very well, but also gave her an assurance that he wanted to be the father of her child. Without such an assurance, the applicant could have tried to seek other ways to have a child of her own. In paragraph 90 of the judgment, where the majority tries to strike a balance between the rights and interests of the applicant and of J, no weight is given to this "assurance" element, that is, to the fact that the applicant acted in good faith, relying on the assurance given to her by J. The decisive date was 12 November 2001: the date when the eggs were fertilized and six embryos created. From that moment on, J was no longer in control of his sperm. An embryo is a joint product of two people, which, when planted into the uterus, will turn into a baby. The act of destroying an embryo also involves destroying the applicant's eggs. In this sense too, the British legislation has failed to strike the right balance.

9. The particular circumstances of the case lead us to believe that the applicant's interests weigh more heavily than J's interests and that the United Kingdom authorities' failure to take this into account constitutes a violation of Article 8.

10. Once again, we would like to emphasize that we agree with the majority that the 1990 Act *per se* is not contrary to Article 8 and that the consent rule is important for IVF treatment. We agree that, looking at the relevant legislation of the other States, different approaches

emerge and that the Court is justified in saying that there is no European consensus on the details of regulation of IVF treatment. As we have said, however, we see the instant case differently since its circumstances make us look beyond the mere question of consent in a contractual sense. The values involved and issues at stake as far the applicant's situation is concerned weigh heavily against the formal contractual approach taken in this case.

11. Given the importance of the matter and the extreme nature of her situation, it is difficult for us to infer anything from the fact that she knew that "as a matter of law, J would be free to withdraw consent to implantation at any moment" (paragraph 88). Surely one is not suggesting that Ms **Evans** – in addition to all that she had to go through – was also contemplating the probability of J withdrawing his consent. It is once again obvious that the case does not sit comfortably with the formal scheme of law that has been applied to it.

12. A sensitive case like this cannot be decided on a simplistic, mechanical basis, namely, that there is no consensus in Europe, therefore the Government have a wide margin of appreciation; the legislation falls within the margin of appreciation; and this margin extends to the rules it lays down in order to achieve a balance between the competing public and private interests.

Certainly, States have a wide margin of appreciation when it comes to enacting legislation governing the use of IVF. However, that margin of appreciation should not prevent the Court from exercising its control, in particular in relation to the question whether a fair balance between all competing interests has been struck at the domestic level.[2] The Court should not use the margin of appreciation principle as a merely pragmatic substitute for a thought-out approach to the problem of proper scope of review.[3]

13. To conclude, unlike the majority we consider that the legislation has not struck a fair balance in the special circumstances of the case. Where the effect of the legislation is such that, on the one hand, it provides a woman with the right to take a decision to have a genetically related child but, on the other hand, effectively deprives a woman from ever again being in this position, it inflicts in our view such a disproportionate moral and physical burden on a woman that it can hardly be compatible with Article 8 and the very purposes of the Convention protecting human dignity and autonomy.

14. Concerning Article 14 of the Convention we would like to say the following:

It could be that for the purposes of Article 14 the closest comparator is an infertile man, which was the example given by the trial judge, Wall J (paragraph 23). However, even this comparison does not illustrate the whole complexity of the instant case. It is recognised by those international institutions with a specific mandate to focus on the rights of women that it is justified and necessary to address "the health rights of women from the perspective of women's needs and interests in view of distinctive features and factors which differ for women in comparison to men, such as: (a) biological factors ..., such as their ... reproductive function ... (CEDAW General Recommendation No. 24 (20th session, 1999))". A woman is in a different situation as concerns the birth of a child, including where the legislation allows for artificial fertilisation methods. We believe therefore that the proper approach in the instant case was that adopted under Article 14 in the case *Thlimmenos v Greece*, recognising that different situations require different treatment.[4] We see the circumstances of the applicant in this light not least because of the excessive physical and emotional burden and effects[5] caused

by her condition, and it is on this basis that we voted for a violation of Article 14 in conjunction with Article 8.

[1] See M.-B. Dembour, *Who Believes in Human Rights? Reflections on the European Convention*, Cambridge, Cambridge University Press, 2006, p. 93.

[2] We would like to point out that in the recent judgment of *Associated Society of Locomotive Engineers & Firemen (ASLEF) v. the United Kingdom*, no. 11002/05, § 46, 27 February 2007, the Court restated the role of this margin clearly: "Finally, in striking a fair balance between the competing interests, the State enjoys a certain margin of appreciation in determining the steps to be taken to ensure compliance with the Convention (amongst many authorities, *Hatton and Others v. the United Kingdom* [GC], no. 36022/97, § 98, ECHR 2003-VIII). However, since this is not an area of general policy, on which opinions within a democratic society may reasonably differ widely and in which the role of the domestic policy-maker should be given special weight (see *e.g. James and Others v. the United Kingdom*, judgment of 21 February 1986, Series A no. 98, p. 32, § 46, where the Court found it natural that the margin of appreciation "available to the legislature in implementing social and economic policies should be a wide one"), the margin of appreciation will play only a limited role."

The approach adopted in *ASLEF* takes into account the views of national parliaments to a "healthy" extent (in giving it special weight) when it comes to setting out a general policy to be contrasted with decisions on the basic rights of individuals (in the context of their individual applications) which, according to the above, would require a limited role for the margin of appreciation. In the ***Evans*** case the majority grants a wide margin of appreciation, relying heavily on general policy issues, and extends this wide margin of appreciation to the detailed rules the State lays down in order to achieve a balance between the competing public and private interests (see paragraphs 81-82 of the judgment and paragraph 4 *in fine* of our joint dissenting opinion). Just like most cases before this Court, the ***Evans*** case is not a case about general policy only; it is a case about important individual interests. In our view, the majority has placed excessive weight on such general policy issues forming merely the background to this case (see section 3 (The margin of appreciation), in particular paragraph 81) and has not undertaken a sufficient *ad hoc* balancing exercise in section 4 (Compliance with Article 8, paragraphs 83-92).

[3] R. St. J. Macdonald, "The Margin of Appreciation", in *The European System for the Protection of Human Rights*, (R. St. J. Macdonald et al. [eds.], 1993), 83, at pp. 84 and 124, quoted by E. Brems, "The Margin of Appreciation Doctrine in the Case-Law of the European Court of Human Rights", *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht,* 1996, at p. 313. See also the critical appraisal of the "margin of appreciation" theory by M. R. Hutchinson, "The Margin of Appreciation Doctrine in the European Court of Human Rights", *International and Comparative Law Quarterly*, 1996, 638-50.

[4] *Thlimmenos v. Greece* [GC], no. 34369/97, ECHR 2000-IV.

[5] C. Packer, "Defining and Delineating the Right to Reproductive Choice", *Nordic Journal of International Law*, 1998, pp. 77–95, at p. 95.

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