



## The Queen (on the application of IM and MM) v. Human Fertilisation and Embryology Authority

Case No. CO/3077/2014; [2015] EWHC 1706 (Admin)

**Country:** United Kingdom

**Region:** Europe

**Year:** 2015

**Court:** High Court of Justice, Queen's Bench Division, Administrative Court

**Health Topics:** Chronic and noncommunicable diseases, Informed consent, Sexual and reproductive health

**Human Rights:** Right to family life

### Facts

The issue of the case was whether AM, deceased daughter of IM and MM, gave sufficient informed consent to export her gametes to the U.S. to be fertilized there using a donor selected by her parents and used in the treatment of in vitro fertilization of her mother, IM. Even if it found that AM did not give sufficient informed consent, the claimants alleged that Human Fertilisation and Embryology Authority's (HFEA) refusal to export AM's gametes constituted a breach of Article 8 of the European Convention of Human Rights (Convention) the right to private and family life.

AM was diagnosed with bowel cancer in 2005. In January 2006, during her first remission, IM spoke with a gynecologist about freezing her embryos with donor sperm because she was concerned the radiotherapy she was undergoing may damage her womb. That visit included a conversation about her mother being a surrogate in the event the radiotherapy damaged AM's womb, though it was discussed in a hypothetical way and was not in the context of AM's death. The gynecologist advised AM to get counseling with the IVF team. However, her cancer had spread before that could happen, and she did not discuss the fertility treatment again until 2008.

In February 2008, AM returned to freeze her eggs. She signed a form consenting to treatment and retrieval of the eggs, but did not consent to mixing the eggs with sperm or to transferring her eggs into any female other than herself unless specific surrogacy consent had been agreed to. In addition to the form consenting to treatment, AM consented to the storage of her eggs for 10 years. The consent form was provided by HFEA. In the form, AM also indicated her consent for eggs to be stored for later use if she were to die or become mentally incapacitated. Immediately above the signature on the form was a statement indicating there was a separate form to indicate how one wanted one's eggs to be used; that form was never given to AM, nor requested by her or filled out.

IM said that she offered to carry a pregnancy for AM if the gynecologist , but the gynecologist told her and her daughter that it would not be a good idea for IM to carry the pregnancy. There was no further discussion about what AM wanted done with the eggs. After the IVF treatment, AM had a brief conversation with a cousin at the hospital during which her mother felt that AM had implied with a look that she and her mother had an understanding of what would happen if AM could not carry the pregnancy. In 2010, AM realized she wouldn't leave the hospital and would never be able to carry a child, so she told her mother that she wanted her to carry her babies and for IM and MM to bring them up because she wanted her genes to be carried on after her death. A close friend of AM confirmed by email that AM had told her she wanted IM to be her surrogate.

The claimant parents, IM and MM, originally wanted IM to be implanted with one or more of AM's eggs, which is not permissible under the Human Fertilisation and Embryology Act of 1990 (the Act) without written consent. Instead, they sought to export the eggs to New York to have the eggs fertilized by a sperm donor and implanted into IM there. The Act did not allow the export of the eggs without written consent, so the claimants applied for Special Direction from the HFEA Authority that would permit the eggs to be exported to New York. The HFEA refused to give Special Direction to export three times. Their decision was challenged in the case.

The Act defined effective consent as "consent which has not been withdrawn" and "must be signed by the person giving it." Before a person gave consent, he or she must "receive proper counseling about the

implications of taking the proposed steps and be provided with such relevant information as is proper. The Act did not allow any exceptions with respect to storage or treatment of gametes, but did give some flexibility to the export of gametes, and allowed the HFEA to modify the effective consent provisions.

## Decision and Reasoning

The Court held HFEA did not breach the rights of IM and MM under Article 8 of the Convention because AM had not given effective consent for them to use her gametes. The Court reasoned that HFEA's decision not to give Special Direction to export AM's eggs was based on a rational and lawful appraisal of the evidence. The claimants maintained the evidence was sufficient because the language of the WS form included AM's consent to posthumous storage of her eggs for later use, that based on the 2010 exchange between IM and AM the only person AM considered as a surrogate was her mother, that she had no partner and therefore knew a sperm donation would be required. The claimants also pointed out that AM hadn't known another form was required. The Court held that this was not sufficiently clear evidence that AM wanted her eggs used in the particular way IM and MM outlined on their application to HFEA. The Court further found no evidence that AM tried to find out more about the treatment or that she would have consented to an anonymous sperm donor who was not from the UK, that she considered export of her eggs overseas, or that she considered the legal and health implications of her mother acting as a surrogate.

The Court held that HFEA's decision was based on a lawful exercise of its powers to balance the complex issues of storage and use of gametes, in part by requiring effective written and informed consent of the gamete owner. Special Direction allows for HFEA to find effective consent even when the written part of the consent is missing, but informed consent is still required. By treating the question of consent as a whole, the Committee was unable to find a clear enough expression in AM's oral statements to constitute an informed consent.

## Decision Excerpts

The proposed posthumous use of her eggs was not shown to be exactly what A had wished for. There was a general expression of wishes to her mother, and to a friend about what should happen after her death, but between the wishes and their fulfillment lay many unconsidered and unresolved practical and legal issues of importance. Para 49.

There was no evidence that AM had ever contemplated or consented to the export of her eggs, or to a sperm donor, or [an] overseas sperm donor, or one selected by her parents, or had thought through and consented to the implications of foreign law governing the ability of the child to establish the identity of the father and to make contact. There was no evidence that AM had ever discussed the question of donor sperm with anyone. There was no evidence that she understood the implications for her mother's health or the legal implications of her mother acting as surrogate, namely that her mother would be the legal mother of her daughter's child. Para. 51