



R v. Human Fertilisation and Embryology Authority, ex parte Blood

[1997] 2 All ER 687; [1997] 2 WLR 806; [1999] Fam 151

Country: United Kingdom

Region: Europe

Year: 1997

Court: Court of Appeal, Civil Division

Health Topics: Health care and health services, Health systems and financing, Informed consent, Sexual and reproductive health

Human Rights: Right to bodily integrity, Right to family life, Right to health

Facts

Mr. and Mrs. Blood were married and attempting to have a family. Unfortunately, Mr. Blood contracted meningitis and went into a coma prior to any conception, so Mrs. Blood requested that doctors take sperm by electro-ejaculation while Mr. Blood was in the coma. The doctors took two different samples, and Mr. Blood passed away soon after.

The Infertility Research Trust (IRT) maintained the samples, and Mrs. Blood sought permission to use the samples in order to conceive a child. The Human Fertilisation and Embryology Authority (the Authority) established by the Human Fertilisation and Embryology Act (the Act), believed that it would be contrary to the Act for Mrs. Blood to use her late husband's sperm. Mrs. Blood requested that the sperm be exported to Belgium, where she could obtain treatment under Belgium's laws, but the Authority also refused to export the sperm.

Mrs. Blood made an application for judicial review. The judge dismissed the application but allowed room for an appeal by Mrs. Blood. The Authority reconsidered her case in October 1996, but the members reconfirmed their decision to not allow the export of Mr. Blood's sperm concluding that (a) the Act's requirement that the donor provide written and effective consent for the posthumous use of sperm was not met, (b) Mrs. Blood should not be allowed to evade the domestic requirements by export of the sperm, (c) in the context of use of genetic material the Authority was reluctant to identify a person's wishes from the evidence of another person, and (d) Mr. Blood had neither considered nor consented to the export of his sperm. Mrs. Blood appealed the ruling.

Decision and Reasoning

The Court concluded that the case raised three issues: (1) storage and use in the United Kingdom, (2) the law which applied the export of the sperm; and (3) the validity of the Authority's decision.

With respect to issue (1), the Court ruled that Mr. Blood had not given effective consent under the Act to the preservation and storage of his sperm. Although such preservation and storage may have been unlawful, the Court held that no charges would be brought and this ruling would ensure that in the future a written consent would be required for the storage and treatment of sperm in case the man should die before treatment occurs. The Court then noted that the Act regarded the situation wherein a donor died prior to the use of his gametes as requiring special safeguards, which therefore meant that Mrs. Blood was not entitled to rely on a potential exception to the Act which would have allowed her to use the gametes as part of "treatment" with her late husband within the UK. The Court suggested that health practitioners in the future obtain consent from the male donor to continue treatment if he should die prior to sperm usage.

With respect to issue (2), the Court noted that the Authority's refusal to export the sperm effectively impeded Mrs. Blood from obtaining treatment in another European Community (EC) member state, however such impediment did not necessarily contravene Art 59 of the EC Treaty (requiring the abolition of restrictions on freedom to provide services within the EC) if the impediment was justified in accordance with certain principles. One such principle is that an impediment might be acceptable if necessary to prevent persons from evading the application of national legislation, as was the case here. Thus, Art 59 of the EC Treaty did not preclude the Authority from restricting export of the sperm.

With respect to issue (3), the Court noted that the Act left issues of public policy as to export to the Authority's discretion and that the Authority was therefore required to ask whether refusal of export, leading to Mrs. Blood's inability to obtain treatment, was justified. Ultimately, the Court found that the Authority's decision was flawed as it did not take into account Art. 59 of the EC Treaty or the fact that its concerns about creating a dangerous precedent for storing and using sperm without the man's consent would be mitigated by the reality that, after this court's ruling, there should be no further cases where sperm would be preserved without consent.

Thus, the Court held that, while the Authority could decide this case either for or against Mrs. Blood, her appeal must be allowed because it was unclear whether the Authority would have come to the same conclusion if it had taken into account the two factors previously ignored.

Decision Excerpts

“In the case where a wife wishes to receive artificial insemination services using sperm of her late husband, it is artificial to treat the refusal of permission to export the sperm as not withholding the provision of fertilisation treatment in another member state. From a functional point of view, the ability to provide those services is not only substantially impeded but made impossible.” (p. 700)

“The fact that storage cannot lawfully take place without written consent, from a practical point of view means that there should be no fresh cases. No licensee can lawfully do what was done here, namely preserve sperm in this country without written consent. If the authority had appreciated this, it could well have influenced its decision and, in particular, overcome its reluctance to identify Mr Blood's wishes on the basis of Mrs Blood's evidence and the material which she can produce to support that evidence. It would be understandable for the authority not to wish to engage on an inquiry of this nature where there can be other cases where the evidence is not so credible since it could lead to invidious comparisons. However, the position is different if this case will not create an undesirable precedent.” (p. 702)

“The facts of the case need not be repeated as they are well known. The Court of Appeal has allowed Mrs Blood's appeal because, although the authority's decision was correct that treatment in the United Kingdom could not take place without Mr Blood's written consent, the authority was not properly advised as to the importance of Community law as to treatment in Belgium. Mrs Blood has the right to be treated in Belgium with her husband's sperm unless there are good public policy reasons for not allowing this to happen. The authority also appears not to have had sufficient regard to the fact that in future it will not be possible for this problem to arise because under English law Mr Blood's sperm should not have been preserved as he had not given his written consent. If the sperm had not been preserved, it could not have been exported. (The court does not criticise the fact of preservation of the sperm in the circumstances of this case.) If the authority decide to reconsider the question of export of the sperm they will have to decide whether to allow the export or to refuse on grounds which are acceptable according to Community law.” (p. 703-704)