R

v.

Human Fertilisation and Embryology Authority, ex parte Blood

COURT OF APPEAL, CIVIL DIVISION

LORD WOOLF MR, WAITE AND HENRY LJJ

6 February 1997.

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

The following judgment of the court was delivered.

LORD WOOLF MR.

The sad circumstances leading to this appeal are now well known. Mrs Blood, now nearly 33 years of age, married her husband, Stephen, in 1991. They had married according to the rites of the Anglican Church, using the traditional service contained in the 1662 Book of Common Prayer with its emphasis on the importance of the procreation of children within a marriage. However, it was only towards the end of 1994 that Mrs Blood and her husband decided actively to try and start a family. Unfortunately, on 26 February 1995 before Mrs Blood could conceive, her husband tragically contracted meningitis.

On 28 February 1995 Mrs Blood raised with the doctors the question of taking a sample of sperm by electro-ejaculation from her husband, who by that time was in a coma. The sample was taken on 1 March 1995 and was entrusted to the Infertility Research Trust (the IRT). A second sample was taken the following day shortly before her husband was certified clinically dead. Both samples of sperm are being kept by the IRT pending the resolution of these proceedings. The costs involved are being paid by Mrs Blood. She wants to use the samples to have her husband's child. However, so far, she has been frustrated in this desire because of the decisions which have been made under the provisions of the Human Fertilisation and Embryology Act 1990.

Section 5 of the 1990 Act establishes the Human Fertilisation and Embryology Authority (the authority). The authority believes that for Mrs Blood to be treated with her husband's sperm in this country would be contrary to the provisions of the 1990 Act. Although Mrs Blood is prepared to be treated abroad and the authority accepts it has a discretion to authorise the export of the sperm so that Mrs Blood could be treated abroad, the authority has decided it would not be appropriate for the necessary authority to be given for this to be done.

In view of the position adopted by the authority, Mrs Blood made an application for judicial review. That application came before Sir Stephen Brown P ([1996] 3 WLR 1176), who in a written judgment given on 17 October

1996 dismissed the application. Sir Stephen Brown P, however, gave leave to appeal.

On 24 October 1996 the members of the authority decided that they would give further consideration to Mrs Blood's request that her case should be made an exception to the authority's general directions on the export of sperm. At a meeting of the members of the authority on 21 November 1996, after careful and full consideration of the issues during two hours of discussion, the members, notwithstanding their sympathy for Mrs Blood, decided not to exercise their discretion to allow the export of the sperm. The decision was taken for the following reasons, which were duly conveyed to Mrs Blood:

'(a) Parliament has enacted a careful code allowing for the posthumous use of sperm only if specific requirements are met. In particular there is a clear requirement for the written and effective consent of a man, after he has had the opportunity to receive counselling and after he has had a proper opportunity to consider the implications of a posthumous birth. These important requirements were not satisfied in this case. (b) The Authority does not think that it would be right to allow Mrs Blood to export the sperm to avoid the specific requirements which prevent her from using the sperm in this country. The Authority noted that Mrs Blood has no prior connection with any country to which she wishes to export the sperm. (c) In the context of the use of genetic material, the Authority considers that any consent should be given in clear and formal terms by the person himself or herself and that the Authority is reluctant to seek to identify a person's wishes from the evidence of another person. (d) The Authority also bore in mind that Mr Blood had not given any consideration, let alone consent, to the export of his sperm to another country.'

Commendably before reaching its decision, the authority gave Mrs Blood's lawyers an opportunity to make further submissions and in accord with the 'cards face up' approach which it is appropriate to adopt on an application for judicial review, the authority made available to this court the material which was available to the members of the authority when they reached their decision. The approach adopted by the authority has enabled this court to consider material which was not before Sir Stephen Brown P, including a briefing paper, HFEA (96)(39), prepared for the use of the members.

The paper set out the issues under three heads. The heads are those adopted both on behalf of Mrs Blood in the court below and Sir Stephen Brown P in his judgment. They are: (1) treatment in the United Kingdom as a matter of statutory construction; (2) treatment abroad as a matter of domestic law; and (3) treatment abroad as a matter of Community law.

In this court, Lord Lester QC, on behalf of Mrs Blood, initially was content to regard the principle issues as being approximately the same but used different headings, which were: (1) the construction issue; (2) the domestic scrutiny issue; and (3) the European scrutiny issue.

In response to intervention by the court, he accepted that the division of the issues in this way should not obscure the need for the authority, when considering the question of export, to apply the law as an amalgam of domestic and Community law. This is necessary because Community law is now part of our domestic law, at least when it has direct application as it

does in relation to the questions of Mrs Blood's treatment abroad. For this reason, in this judgment it is proposed, having made some general comments as to the structure of the

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1990 Act, to deal with the issues which the appeal raises in a different order and under somewhat different headings from those previously adopted. The headings are: (1) storage and use in this country; (2) the law which applies to the export of sperm; and (3) the validity of the authority's decision.

In considering the correctness of the approach adopted by the authority, it is the reasoned decision of 21 November which is the critical decision, although it obviously postdates both the application and the judgment which gave rise to this appeal. Both Mr Pannick QC, on behalf of the authority, and Lord Lester adopted this approach. To adopt any other approach would be inappropriate since if the later decision is lawful, the court as a matter of discretion would never give relief in relation to the earlier decision, and if the later decision is unlawful it is almost certain that the earlier decision would be equally unlawful though this may not have been apparent until the authority gave the reasons for its decision and disclosed the material on which the decision was taken.

THE STRUCTURE OF THE 1990 ACT

Before turning to the issues it is helpful to consider the general framework of the 1990 Act. The 1990 Act gave effect (with some variations) to the recommendations contained in the Report of the Committee of Inquiry into Human Fertilisation and Embryology (Cmnd 9314 (1984)) (the Warnock Report). The Act did, however, have other objectives, including amending the Adoption Act 1967, which are not germane to this appeal. The relevant provisions are those which regulate the keeping or use of gametes and embryos. 'Gametes' is a collective term which applies to unfertilised male sperm or female egg cells containing genetic material from only one of the potential parents. After fertilisation by the male sperm, the egg develops into an embryo. Section 1(1) of the 1990 Act provides:

'In this Act, except where otherwise stated—(a) embryo means a live human embryo where fertilisation is complete, and (b) references to an embryo include an egg in the process of fertilisation …'

The Act only applies to bringing about the creation or the keeping or use of an embryo outside the mother's body (s 1(2) and (3)). It also only applies to live gametes (s 1(4)).

In general, the Act achieves the desired degree of regulation by establishing a licensing system for the storage and use of gametes and embryos. It prohibits the storage or use of gametes or embryos except in pursuance of a licence. The authority is given the responsibility, inter alia, for the granting of licences to the institutions which will be responsible for storing or using the gametes or embryos. The individuals providing the gametes or embryos are not licensed.

As Lord Lester contends, the 1990 Act treats the use of sperm in connection with artificial insemination where there is a relationship between the man and woman providing the gametes more favourably than where there is no relationship. The Act does not confine the more favourable treatment to situations of artificial insemination using the sperm of a

husband (AIH). The more generous approach extends to artificial insemination with the sperm of a donor (AID), as long as the donor and the woman are 'treated together'.

In addition to its responsibility in relation to granting licences, the authority has responsibility for keeping treatment services under review. 'Treatment services' are defined in s 2(1) of the 1990 Act as meaning 'medical, surgical or obstetric services provided to the public or a section of the public for the purpose

of assisting women to carry children'. Paragraph 4 of Sch 1 to the Act requires between one-third and one-half of the members of the authority to be medical practitioners, persons concerned with the keeping or using of gametes or embryos, or persons who have been involved in the commissioning or funding of research as to such keeping and use. The authority is, therefore, at least in part a specialist body. It has power to issue general and particular directions (ss 23 and 24), and is required to maintain a code of practice, inter alia, giving guidance about the 'proper conduct of activities carried on in pursuance of a licence' and for the need for 'account to be taken of the welfare of children who may be born as a result of treatment services (including a child's need for a father)' (s 25).

Section 3 prohibits bringing about the creation of an embryo or keeping or using an embryo except in pursuance of a licence. The prohibitions in connection with gametes are contained in s 4. The outcome of the construction issue depends on the interpretation of s 4(1) and (2), the terms of which are:

'(1) No person shall—(a) store any gametes, or (b) in the course of providing treatment services for any woman, use the sperm of any man unless the services are being provided for the woman and man together or use the eggs of any other woman … except in pursuance of a licence.

(2) A licence cannot authorise storing or using gametes in any circumstances in which regulations prohibit their storage or use.

As to the meaning of 'store', s 2(2) provides assistance. It provides:

'References in this Act to keeping, in relation to embryos or gametes, include keeping while preserved, whether preserved by cryopreservation or in any other way; and embryos or gametes so kept are referred to in this Act as “stored” (and “store” and “storage” are to be interpreted accordingly).'

Cryopreservation is preservation by freezing, the only method of 'keeping' possible when the 1990 Act was passed.

Section 12 sets out what are to be the 'conditions' of every licence granted under the Act. One of these is condition (c), which requires compliance with the provisions of Sch 3 to the Act. Schedule 3 is headed 'Consents to use of gametes or embryos'. Paragraphs 1 and 2 deal with the form of consent and provide, so far as relevant:

'1. A consent under this Schedule must be given in writing and, in this Schedule “effective consent” means a consent … which has not been withdrawn.

2 … (2) A consent to the storage of any gametes or any embryo must—(a) specify the maximum period of storage, and (b) state what is to be done with the gametes or embryo if the person who gave the consent dies or is unable because of incapacity to vary the terms of the consent or to revoke it …'

Paragraph 3 deals with the procedure for giving consent:

'(1) Before a person gives a 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 …'

The use of gametes for the treatment of others is dealt with in para 5 in the following terms:

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'(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.'

The exception in para 5 is the counterpart of the exception in s 4(1)(b).

The storage of gametes is controlled by para 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.'

In this case, there was no effective consent under the 1990 Act.

Sections 23 and 24 enable the authority to give directions as to particular matters. Section 24(4) deals with the import and export of gametes and embryos. So far as concerns exports, it is in these terms:

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

This subsection gives to the authority a broad discretion to give directions allowing the export of gametes and to lay down the conditions under which that export is to take place.

General directions as to export were given by the authority in August 1991. These directions do not assist Mrs Blood. They require the person who provides gametes to have given and not withdrawn consent in writing to them being exported, and provide that before giving such consent that person must have been given a written notice that the law governing the use of gametes and the parentage of any resulting child may not be the same abroad. Furthermore,

the directions require that the gametes should not be exported 'if they could not lawfully, or should not, be used in the United Kingdom' for the purpose for which they are being exported. But the authority has power to vary or revoke the general directions, or to give directions to a particular person relating to a particular case—such as Mrs Blood.

(1) Storage and use in this country

Having referred to the statutory provisions and general directions which are relevant, it is now possible to resolve the 'construction issues'. These are as to what are the requirements of the 1990 Act as to storage and treatment and whether they have been complied with in the case of Mr Blood's sperm. Here Community law plays no part.

The parties have provided extra statutory material intended to help on the issues as to the construction of the 1990 Act. However, it is not necessary to refer to that material to resolve the issues which we have to decide.

[1997] 2 All ER 687 at 695

Turning therefore to the provisions of s 4(1), the first comment that can be made is that it makes a different provision for the storage of gametes from that made for the use of the male gamete, ie sperm.

As to storage, s 4(1) makes it clear that it must always be pursuant to a licence. That means that storage can only take place lawfully in accordance with the requirements of the licence which for the present purposes are those contained in Sch 3. This means that there must be a consent in writing (paras 1 and 8), which complies with paras 2(2) and 3, before the storage can lawfully take place.

The position as to storage

Sperm can be used fresh or after it has been preserved. Its life, if not preserved is extremely limited, a matter of a few hours. If it is preserved, then it is being stored for the purposes of the 1990 Act and, therefore, is subject to the requirements of a licence. This is made clear by the definition of keeping or preserving sperm contained in s 2(2). The Act, therefore, takes the preservation process as the beginning of storage. This is understandable since preservation involves the processing of gametes and Parliament has required that this should be done subject to the control of the licensing process. The result is that in the ordinary way, no preservation can take place unless the required written consents exist. This would also apply in the case of the preservation of sperm intended for export unless a particular direction was obtained prior to preservation which permitted the storage to take place notwithstanding that there were not the requisite consents.

It follows that Mr Blood's sperm should not, in fact, have been preserved and stored. Technically therefore, an offence was committed by the licence holder as a result of the storage under s 41(2)(b) of the 1990 Act by the licensee. There is, however, no question of any prosecution being brought in the circumstances of this case and no possible criticism can be made of the fact that storage has taken place because Professor Cook of the IRT was acting throughout in close consultation with the authority in a perfectly bona fide manner, in an unexplored legal situation where humanity dictated that the sperm was taken and preserved first, and the legal argument followed. From now on, however, the position will be different as these proceedings will clarify the legal position. Because this judgment makes it

clear that the sperm of Mr Blood has been preserved and stored when it should not have been, this case raises issues as to the lawfulness of the use and export of sperm which should never arise again.

Treatment

The question of the lawfulness of the storage is quite separate from the lawfulness of the taking of the sperm from Mr Blood as he lay unconscious. The 1990 Act does not deal with this and the propriety of the treatment involved in taking the sperm in this case is governed by common law principles relating to the patient's consent to the electro-ejaculation which have not been argued before us. It is, therefore, not necessary to make any comment about this. But the authority made it clear that though they did not make an issue of this point, they should not be taken as accepting that proper consent was given to that procedure.

The fact is that whether or not it was proper to do so, treatment was being provided to Mr Blood even though he was unconscious when the sperm was obtained. The next question is, therefore, as to whether the obtaining of the sperm amounted to treatment services, which were being provided for Mr and

Mrs Blood together in the sense that s 4(1)(b) refers to the provision of services 'for the woman and man together'.

If Mr Blood had survived and the sperm had been immediately used as part of a course of treatment for himself and his wife while he was still alive, then the exception to the requirement of a licence for this treatment under s 4(1)(b) would apply. Furthermore, as it would not be necessary for the treatment to be 'in pursuance of a licence' there would be no statutory requirements for the consent of Mr Blood to its use because the treatment would be outside the statutory control. In this situation, the fact that Mr Blood was unconscious would only be relevant to questions of the legality of the consent given on his behalf under the common law. As already indicated, treatment of a patient who is unaware of what is happening is not in itself a contravention of the 1990 Act. The important question is whether this position is altered as a result of Mr Blood dying before the sperm was used for the treatment of Mrs Blood. It is the time of treatment which is critical under s 4(1)(b).

In answering this question, it is to be borne in mind that s 4(1)(b) creates a criminal offence. In addition, s 4(1)(b) can interfere with Mrs Blood's ability to have a child by her former husband. Both these considerations suggest that a narrow interpretation should be given to its provisions. Lord Lester prays in aid s 28(6) as indicating that the 1990 Act contemplates the use of a person's sperm after his death. Section 28(6) provides that when—

'the sperm of a man, or any embryo the creation of which was brought about with his sperm, was used after his death, he is not to be treated as the father of the child.'

While this subsection clearly presupposes that there will be the use of the sperm posthumously, this provision does not provide any assistance either way as to the ambit of the exception to the general prohibition against use of sperm contained in s 4(1)(b). Section 28(6)(b) would apply to cases where it was not necessary to rely on the exception to s 4(1)(b) because the man providing the sperm had given the necessary consent required by Sch 3.

Lord Lester also relies on Re B (parentage) [1996] 2 FLR 15. In that case, the father had donated sperm which was intended for the insemination of the mother, but prior to insemination taking place he had parted from the mother and at that stage his consent was not sought to the actual insemination. The question which arose for consideration by Bracewell J was as to whether in these circumstances, the mother and father were being treated together for the purposes of para 5(3) of Sch 3 to the 1990 Act. The exception in para 5(3) to the requirement for an effective consent where the man and woman are receiving treatment services together, is to be interpreted in the same way as the exception to s 4(1)(b).

Bracewell J came to the conclusion that although the father's relationship with the mother had ended by the time the actual insemination was carried out they were being treated together. In the court below, Sir Stephen Brown P regarded the decision in that case as being one where—

'the whole of the facts indicated that he [the father] was a willing consenting party to the treatment which they had commenced together when the sperm sample was taken and that he had not subsequently withdrawn his deemed consent.' (See [1996] 3 WLR 1176 at 1182.)

[1997] 2 All ER 687 at 697

This being so, the exception applied and the man and the woman were being 'treated together' at the critical time. This is the correct view of this case and it therefore provides no assistance to Lord Lester.

The 1990 Act clearly regards the situation where the donor of the gametes dies before their use as being one which requires special safeguards. Thus, under para 2(2)(b) of Sch 3, a consent must state what is to happen to gametes if the donor dies. There are also the different provisions in the Act as to paternity where the father dies contained in s 28(6). This, together with the obvious difficulty in regarding a person who is dead as being treated together with someone else, means it is really not possible to regard treatment as being together for the purposes of s 4(1)(b), once the man who has provided the sperm has died. And, in any event, the exception to the need for written consent in the case of gametes for 'treatment together' only applies where the sperm is used at once and so does not need to be preserved. The keeping of sperm requires written consent under s 4(1)(a) and the terms of the licence.

This means that in this case, because of the effect of the section, Mrs Blood is not entitled to rely on the exception to s 4(1)(b) or to para 5 of Sch 3. Accordingly, the authority and Sir Stephen Brown P are correct so far as treatment in the United Kingdom is concerned. The absence of the necessary written consent means that both the treatment of Mrs Blood and the storage of Mr Blood's sperm would be prohibited by the 1990 Act. The authority has no discretion to authorise treatment in the United Kingdom. The decision of Bracewell J is a decision to which she was entitled to come on its special facts as indicated by Sir Stephen Brown P. Where there is no insurmountable hurdle such as the death of the donor of the sperm, the question of whether a man and a woman are being treated together will, in most circumstances be a question of fact to be determined by the fact finding tribunal, which in the case of litigation, will be the court.

Having established the facts so far as use in this country is concerned, all the courts and the authority can do is give effect to the clear language of the 1990 Act. Our decision means that, unless fresh sperm are being used, there will always be a need for a written consent which complies with the schedule. It seems, therefore, that in the future, those who are responsible

for treating a man and woman together should take the precaution of having the necessary consent not only to storage but also to enable that treatment to continue if the man should have the misfortune to die before the sperm is used.

(2) The law which applies to the export of sperm

It has already been pointed out that s 24(4) of the 1990 Act gives a discretion to the authority as to when and subject to what conditions to permit any person to whom a licence applies to export sperm in any particular case. The authority has made general directions on this subject but those directions do not prevent the authority making a specific direction permitting export in any particular case.

It is a particular direction which Mrs Blood seeks. Mr Pannick, on behalf of the authority, accepts that under arts 59 and 60 of the EC Treaty, Mrs Blood as a citizen of the Community has a right, which is directly enforceable by her (and therefore part of English law) to receive medical treatment in another member state. It is submitted on behalf of Mrs Blood that the authority's prohibition of the export of her late husband's sperm is an infringement of the freedom to provide (and receive) cross-border services in other member states. Those

articles are not relevant to receiving treatment in a non-member state such as the United States.

There cannot be any question of the 1990 Act itself infringing those articles. Because of the width of the discretion given to the authority, the authority is in a position by granting consent to avoid any issue of any possible infringement of arts 59 and 60 arising. The possibility of infringing Mrs Blood's rights under those articles arises when the authority refuses consent for export as it has done in this case or imposes conditions on the consent which it gives. Her rights would be infringed if the authority misdirects itself as to the effect of those articles or comes to a decision which contravenes them.

Mr Pannick submits that there is no possible infringement here because Mrs Blood is entitled to receive what treatment she likes in Belgium or elsewhere. He contends that all that is being refused is the export of the gametes and that cannot amount to infringement of her rights under arts 59 and 60 of the Treaty.

Mr Pannick's approach does not make sufficient allowance for the reality of the situation. It is to this which regard has to be had when considering the entitlement to the provision of services under art 59. The refusal to permit exports prevents Mrs Blood having the only treatment which she wants.

The Court of Justice of the European Communities in Society for the Protection of Unborn Children Ireland Ltd v Grogan Case C-159/90 [1991] ECR I-4685 were faced with the problems arising as a result of the prohibition on abortion in Ireland. Student associations were publishing information in Ireland concerning the availability of medical termination of pregnancy in the United Kingdom and the means of contacting certain clinics where abortions are lawfully carried out in the United Kingdom. At issue was the consistency of the prohibition of this activity with arts 59 and 60 of the Treaty. The Court of Justice decided that the provision of the information was not an economic activity which fell within the articles and, therefore, did not determine the issues which would be directly applicable to the

outcome of this appeal. However, Advocate General Van Gerven did so. Having concluded that—

'the medical operation, normally performed for remuneration, by which the pregnancy of a woman coming from another Member State is terminated in compliance with the law of the Member State in which the operation is carried out is a (cross-border) service within the meaning of Article 60 of the EEC Treaty',

he went on to consider whether the prohibition of the distribution of information fell within the scope of arts 59 and 60 of the Treaty. The Advocate General having posed the question—

'whether that right of Community citizens to receive services in another Member State encompasses the right to receive, unimpeded, information in one's own Member State about providers of services in the other Member State',

concluded that the question must be answered in the affirmative (see [1991] ECR I-4685 at 4708, 4712 (paras 10, 18)). He therefore came to the conclusion—

'that national rules which, albeit not discriminatory, may, overtly or covertly, actually or potentially impede intra-Community trade in services fall in principle within the scope of Articles 59 and 60 of the EEC Treaty.' (See [1991] ECR I-4685 at 4715 (para 21).)

[1997] 2 All ER 687 at 699

The Advocate General however went on to point out that he had said 'in principle'—

'advisedly, because such national rules may nevertheless be compatible with the said Treaty provisions where they are justified by imperative requirements of public interest … In addition, I conclude that in principle Community citizens derive from Articles 59 and 60, where they are applicable, the right to obtain information regarding services lawfully provided in another Member State …' (See [1991] ECR I-4685 at 4715 (para 21).)

He then went on to deal with the question of the justification of potentially infringing national rules, recognising the public policy objectives where the policy choice involves a 'fundamental ethical value judgment', where the individual states 'must be allowed' to determine—

'within the limits set by Community law, what is to be understood by public policy and public morality. It is for each Member State to define those concepts with its "own scale of values".' (See [1991] ECR I-4685 at 4728 (para 37).)

This illustrates the two-stage process in the application of Community law where it has direct effect. First, the court or decision-taker must consider whether the challenged actions or decisions are an infringement of the relevant cross-border rights of the affected Community citizen, and then whether they are justified by the legitimate requirements of the state whose actions or decisions are challenged.

The first question of infringement must be approached on a practical (functional) basis.

In Alpine Investments BV v Minister Van Financien Case C-384/93 [1995] All ER (EC) 543, [1995] ECR I-1141 Advocate General Jacobs made some comments of general application as to the effect of art 59 of the Treaty. The Alpine case dealt with a different situation from that

which exists here because it involved restrictions which were imposed by one member state prohibiting financial intermediaries established there from contacting potential clients in another state by telephone. Allowance, therefore, must be made when considering the opinion of Advocate General Jacobs for the very different circumstances. However, the Advocate General stated ([1995] All ER (EC) 543 at 553, [1995] ECR I-1141 at 1154–1155 (paras 46–48):

'46 … art 59 prohibits even non-discriminatory restrictions imposed by the member state of destination. It would be incongruous if the opposite view were taken with regard to restrictions imposed by the member state of origin …

47. Whether a rule of the member state of origin constitutes a restriction on the freedom to provide services should be determined by reference to a functional criterion, that is to say, whether it substantially impedes the ability of the persons established in its territory to provide intra-Community services. It seems to me that that criterion is consonant with the notion of an internal market and more appropriate than the criterion of discrimination.

48. From the point of view of the realisation of the internal market, what matters is not whether the rules of a member state are discriminatory but whether they have an adverse effect on its establishment or functioning. The

[1997] 2 All ER 687 at 700

court has held in Gaston Schul Douane Expediteur BV v Inspecteur der Invoerrechten en Accijnzen, Roosendaal Case 15/81 [1982] ECR 1409 at 1431–1432 (para 33) that the concept of the common market involves the elimination of all obstacles to intra-Community trade "in order to merge the national markets into a single market bringing about conditions as close as possible to those of a genuine internal market". National rules, whether of the "importing" or of the "exporting" member state, which substantially impede the exercise of the freedom to provide services adversely affect the establishment and functioning of the internal market and therefore fall within the scope of the Treaty.' (Our emphasis.)

What is there said as to the freedom to provide services applies equally to the freedom to benefit from those services—but always subject to justification on public policy grounds by the challenged state.

A similar approach was indicated in the judgment of the Court of Justice in Customs and Excise Comrs v Schindler Case C-275/92 [1994] 2 All ER 193 at 228, [1994] ECR I-1039 at 1093 (para 43), where the Court of Justice said:

'43 … national legislation may fall within the ambit of art 59 of the Treaty, even if it is applicable without distinction, when it is liable to prohibit or otherwise impede the activities of a provider of services established in another member state where he lawfully provides similar services.'

But the national authorities must be given 'a sufficient degree of latitude' to determine the moral or religious or ethical values which it regards appropriate in its territory (see [1994] 2 All ER 193 at 229–230, [1994] ECR I-1039 at 1095–1098 (paras 52–63)).

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.

However, the fact that there is interference with the freedom to provide services does not mean that art 59 is infringed. It means no more than the second stage has been reached and the interference has to be justified in accordance with the well-established principles if it is not to contravene art 59. Those principles are correctly summarised by Lord Lester in the case of an administrative decision as being that the decision must be non-discriminatory, it must be justified by some imperative requirement in the general interest, it must be suitable for securing the attainments of the objects which it pursues and it must not go beyond what it is necessary to attain that objective. One justification which is recognised by the authorities which is relied on by Mr Pannick is that the member state is going no further than is necessary to prevent persons from evading the application of national legislation (see R v Immigration Appeal Tribunal, ex p Secretary of State for the Home Dept Case C-370/90, [1992] ECR I-4265 at 4286, 4295 (paras 14, 24)).

Furthermore, the provision of services in relation to artificial insemination raise difficult ethical and moral considerations which member states can appropriately feel it is necessary to protect by imposing regulations to prevent abuse and undesirable practices occurring.

Accordingly, Parliament was acting well within its powers in passing the 1990 Act, with its requirement for informed written consent from the donor before

gametes were stored. And the authority were rightly faithful to and acting consistently with the clear intention of Parliament in giving the 1991 directions imposing a general restriction on export. But arts 59 and 60 give Mrs Blood the right to seek a particular direction permitting export in her case, under ss 23 and 24 of the 1990 Act.

Article 59 cannot, therefore, be relied on as preventing the authority from imposing any restriction on the export of sperm, where a particular direction is sought, and in each case it is a question of degree whether the restriction is justified by the considerations to which reference has already been made. This, in the first instance, is a question for the authority. The courts will only intervene in one of two situations. First, where the authority does not comply with the usual administrative law standards which are enforced by judicial review, including directing themselves correctly as to the law. Secondly, where the authority's decision wrongly evaluates the considerations Lord Lester identified to an extent which goes beyond the margin of appreciation Community law allows in the case of administrative decisions of this sort.

Finally, as to the law on export, it is important to stress that unless the question of export is raised with the authority before the sperm is obtained from the donor and the authority, for reasons it is difficult to imagine, dispenses with the requirement for consent before storage, storage will be unlawful without that consent and so, in practice, it will only be sperm stored with consent which will be capable of being the subject of export.

(3) The authority's decision in this case

It is now, therefore, necessary to turn to the actual decision of the authority in this case. In giving its reasons for its latest decision, the members of the authority clearly attached importance to the briefing paper prepared for their use. This is made clear by the fact that, at the end of the paper there is set out the submissions which Mr Pannick advanced before Sir Stephen Brown P to justify the decision of the authority to refuse to make an exception in the case of Mrs Blood. Those reasons follow very closely the four reasons given by the authority when it reached its further decision. It is, therefore, significant that the background paper although it makes reference to Lord Lester's argument on Community law contains only a short paragraph which deals with this subject. This records that Sir Stephen Brown P—

'found that Community law did not assist the Applicant noting that Parliament had specifically considered the issues of public policy underlying the need for written consent.'

This is hardly a satisfactory summary of the position in relation to art 59.

Parliament did not place any express restriction on the authority's discretion. Parliament by the 1990 Act had left issues of public policy as to export to be determined by the authority. It is the authority's decision that, therefore, has to be capable of being justified in relation to art 59. In coming to its decision, the authority was required to take into account that to refuse permission to export would impede the treatment of Mrs Blood in Belgium and to ask whether, in the circumstances, this was justified. The material which was placed before the authority in order to assist them to perform this task is known. Unfortunately, it makes no mention of this requirement.

Turning next to consider the reasons given by the authority bearing this in mind, the position appears to be as follows. (1) The first reason given by the

authority is a correct statement that in this case there has not been compliance with the 1990 Act in relation to storage or use in the United Kingdom. This is the starting point for the subsequent reasoning which is the essence for the explanation why the authority was not prepared to exercise its undoubted discretion to permit export in Mrs Blood's favour. It was a permissible and proper starting point: in giving a particular direction, the authority is using delegated powers, which should be used to serve and promote the objects of the legislation, which clearly attach great importance to consent, the quality of that consent, and the certainty of it. The authority must balance that against Mrs Blood's cross-border rights as a Community citizen. (2) The second reason, by referring to the fact that Mrs Blood has no prior connection with any country to which she wishes to export the sperm, ignores the fact that she has the right to receive treatment in Belgium and that Parliament has placed no restriction on the authority's discretion to permit this. It, therefore, tends to confirm that the authority was unaware of the extent of those cross-border rights. (3) The third reason given by the authority, is based on the desirability of the consent being in clear and formal terms. This is unexceptional. However, it does not acknowledge that the evidence that Mrs Blood puts forward that her husband would have given his consent in writing if he had had the opportunity to do so is compelling. (4) The fourth reason given by the authority that Mr Blood had not considered or given his consent to the export of his sperm is a consideration to which the authority was entitled to have regard.

Parliament has delegated to the authority the responsibility for making decisions in this difficult and delicate area, and the court should be slow to interfere with its decisions.

However, the reasons given by the authority, while not deeply flawed, confirm that the authority did not take into account two important considerations. The first being the effect of art 59 of the Treaty. The second being that there should be, after this judgment has been given, no further cases where sperm is preserved without consent. The authority is not to be criticised for this because, in relation to the law, it was dependant upon the guidance it received. However, the fact remains that having not received the appropriate guidance, the authority did not take into account two matters which Mrs Blood is entitled to have taken into account.

From the argument before us and those reasons, it is reasonably clear that it was a concern of the authority that if they gave Mrs Blood consent to export, this would create an undesirable precedent which could result in the flouting of the 1990 Act. While as already indicated this can, in the appropriate case, be a legitimate reason for impeding the provision of services in another member state it is a consideration which can not have any application here. 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.

If the authority had taken into account that Mrs Blood was entitled to receive treatment in Belgium unless there is some good reason why she should not be allowed to receive that treatment, the authority may well have taken the view that as the 1990 Act did not prohibit this, they should given their consent. The authority could well conclude that as this is a problem which will not reoccur there is not any good reason for them not to give their consent. If treated in Belgium, Mrs Blood is proposing to use a clinic which in general terms adopts the same standards as this country. The one difference being that they do not insist upon the formal requirements as to written consent which are required in this country. The need for formal requirements is not obvious in this situation.

Apart from the effect of Community law, the authority's view of the law was correct. It is not possible to say even taking into account Community law that the authority are bound to come to a decision in Mrs Blood's favour. What can be said is that the legal position having received further clarification, the case for their doing so is much stronger than it was when they last considered the matter. The second decision cannot stand because it is by no means clear that the authority would have come to the same decision if it had taken into account these two additional considerations. The appeal must, therefore, be allowed. As to what relief should be granted in the light of this judgment can be determined after we have had the opportunity of hearing submissions of counsel.

In this case, there is no need to make a reference to the Court of Justice for the European Communities. The principles to be applied are clear. Any difficulty relates to their application.

If the authority is to reconsider their decision it will have to direct itself correctly as to the law, that is the law including Community law. This will involve starting from the premise that to refuse to allow the export of the sperm is contrary to art 59 of the Treaty unless there are appropriate reasons to justify this. The onus is, therefore, on the authority to provide reasons which meet the standards set by Community law. In deciding whether it can be justified, the authority are entitled to take into account the public interest. The authority will also have to take into account the nature of the present case; again a matter of which it was not aware when it came to its recent decision.

It is unnecessary to consider whether the present reasons would have passed the scrutiny to which they could be subject under Community law since the underlying decision is flawed. It will, however, be apparent from what has been stated that this is unlikely.

It is regrettable if the agonising situation of Mrs Blood will be prolonged by this judgment. Unfortunately, her case raises problems for which there are no clear precedents and in relation to which the law is only clarified by the passage through the courts. This is bound to be a slow process even where the courts have done their best to ensure expedition.

The issues we have considered were complicated and, in those circumstances, we thought it would assist if there was a short summary of our judgment prepared. The summary reads:

'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.'

Appeal allowed.