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IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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IN THE MATTER OF THE MATRIMONIAL AND FAMILY PROCEEDINGS (NI) ORDER 1989

BETWEEN:

Ms A

Appellant

-and-

Ms J

Respondent

-and-

Mr O
The Attorney General for Northern Ireland
The Secretary of State for Health
The Departments of Finance and Health
The Official Solicitor for Northern Ireland

Notice Parties

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Mr Lavery QC and Ms G Murphy (instructed by McKeown and Co Solicitors) for the appellant
Ms Quinlivan QC and Ms M Rice (instructed by Phoenix Law Solicitors) for the respondent
Ms Smyth QC and Mr McCaughey (instructed by Aidan Quinn Solicitor) for Mr O
The Attorney General relied on written submissions
Ms Murnaghan QC and Mr Egan (instructed by the Crown Solicitor) for the Secretary of State
Dr McGleenan QC and Mr P McAteer (instructed by the Departmental Solicitor) for the Departments
Ms Connolly QC and Ms L Murphy instructed by the Official Solicitor

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Before: Treacy LJ, McCloskey LJ and Sir Declan Morgan

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Sir Declan Morgan (delivering the judgment of the court)

Anonymity

The parties in this judgment have been anonymised so as to protect the identity of the child to whom the proceedings relate. Nothing must be disclosed or published without the permission of the court which might lead to his identification or the identification of the various adults.

Background

[1] This is an appeal by A from a decision by O'Hara J refusing her application for a declaration of parentage of a child, R, of whom J is the mother, pursuant to Article 31B of the Matrimonial and Family Proceedings (Northern Ireland) Order 1989 ("the 1989 Order").

[2] A and J are a same-sex couple who commenced a relationship in the summer of 2012. In early 2014 they decided to have a child. They carried out searches enquiring about sperm donation on the internet as a result of which they met O who agreed to donate his sperm in spring 2014. As a result of artificial insemination using this sperm donation the child, R, was born in October 2014 prematurely. On 26 November 2014 J was registered as R's mother.

[3] It was agreed between A, J and O that R would be co-parented by A and J. J had changed her surname to that of A and the child also had that surname. It was further agreed that the child would be informed about the circumstances of his conception at a time that A and J considered was appropriate. The parties were further agreed that a joint residence order in respect of R should be made in favour of A and J. There was, however, a dispute between O and A and J about the extent of any contact that O should have with the child. In September 2015, A and J entered a civil partnership and two further children have been born to J. A is registered on each birth certificate as the other parent.

[4] On 16 September 2015 A petitioned for a declaration of parentage pursuant to Article 31B of the 1989 Order. A Notice of Incompatibility was served on 10 March 2021 contending that insofar as sections 42 and 43 of the Human Fertilisation and Embryology Act 2008 ("the 2008 Act") prohibited the making of a declaration of parentage the provisions were incompatible with the Article 8 and 14 Convention rights of the appellant. Similarly, it was contended that insofar as Article 31B did not provide for the making of such a declaration it also was incompatible with the said Convention rights.

The 2008 Act

[5] Prior to 1990 there was no legal regulation of artificial insemination by donation. In July 1982 Dame Mary Warnock was appointed to chair a "Committee

of Inquiry into Human Fertilisation and Embryology to examine the social, ethical and legal implications of recent, and potential developments in the field of human assisted reproduction" ("the Warnock Committee").

[6] The Warnock Committee had a broad membership comprising experts in law, medicine, social work, psychology and theology. The Committee recognised that this was an area in which there were competing moral values making it difficult to achieve common ground in relation to legislative proposals. In its report delivered in 1984 the Committee set out its approach to proposed legislation as follows:

> "In recommending legislation, then, we are recommending a kind of society that we can, all of us, praise and admire, even if, in detail, we may individually wish that it were different. Within the broad limits of legislation there is room for different, and perhaps much more stringent, moral rules. What is legally permissible may be thought of as the minimum requirement for a tolerable society. Individuals or communities may voluntarily adopt more exacting standards. It has been our business, however, to recommend how the broad framework should be established, within our particular area of concern."

[7] Although there were dissenting opinions in respect of the proposals concerning surrogacy and research on embryos a common position was reached in respect of artificial insemination by donation. It was agreed that there should be a licensing system governing those holding gametes for artificial insemination by donation. Where sperm was provided to a licensed operator the sperm donor should have no parental rights. The person obtaining the donation should have access to information on ethnic origin and genetic health but should not have access to any information that might identify the donor. Where there was the written consent of the mother and non-donor husband the child should be the legitimate child both.

[8] This led to the passing of the Human Fertilisation and Embryo Act 1990 ("the 1990 Act"). That Act implemented the proposed licensing regime. The husband of the mother was treated as the father of the child whatever the circumstances of the donation unless it could be shown that he did not consent to the donation. The sperm donor did not acquire any parental rights if the donation was acquired from a licensed operator. Where the services of a licensed person were used by an unmarried couple the male was to be treated as the father of the child as long as there was written consent to the donation. In either case no other person was to be treated as the father of the child thereby excluding the donor. The welfare of the child was to be an overarching consideration. Access to information on ethnic origin and genetic health was to be available from a licensed clinic but no information identifying the donor was to be provided.

[9] The Warnock Committee recognised certain circumstances in which artificial insemination by donation occurred privately. One of those was in family situations where the donation might be made by a male relative, sometimes a sibling of the male partner. The other was in same-sex female relationships where some arrangement may have been made about the role of the person providing the sperm. In either case the donor of the semen was a legal parent but whether that person played any role in the upbringing of the child would depend on the particular circumstances. It is striking, however, that there was no attempt made to impose any regulatory regime in respect of those situations and subsequent legislation provided that the biological father of the child could acquire parental rights.

[10] The passing of the Civil Partnership Act 2004 required some reassessment of the 1990 Act. The United Kingdom Government produced a White Paper in December 2006 in which it proposed extending the range of people who could be identified as parents of the child, extending slightly the screening in relation to the gametes but not allowing sex selection, providing some information to gametes donors about the use of their donations and ensuring that donor conceived children could have access to information about donor conceived siblings as part of the information available to them when they reached 18. That resulted in the passing of the Human Fertilisation and Embryology Act 2008 ("the 2008 Act").

[11] Sections 42 to 45 of the 2008 Act deal specifically with who is to be treated in law as the parent of a child born to a woman in a same-sex relationship. At the time to which this appeal relates, by virtue of section 42, if the mother was a party to a civil partnership with another woman at the time of the artificial insemination, the other party to the civil partnership was to be treated as a parent of the child unless it was shown that she did not consent to the artificial insemination. That was the position irrespective of the circumstances of the artificial insemination and in particular whether or not the treatment was provided by a licensed operator. It was on that basis that the appellant was registered as the other parent of the two later children.

[12] The 2008 Act also provided in sections 43 and 44 for the situation where the same-sex female partners were not in a civil partnership. In those circumstances where the artificial insemination services were provided in the United Kingdom by a licensed person and written notice was given in advance by the mother and the other female consenting to the other female being treated as a parent then subject to the females not being within prohibited degrees of relationship as defined in section 58(2) of the 2008 Act the other woman was to be treated as a parent of the child.

[13] By virtue of section 45 where the other woman was treated as the parent of a child by virtue of section 42 or 43 no man could be treated as the father of the child. Where, therefore, these provisions were satisfied the biological father was excluded from acquiring rights as the father of the child.

[14] The Warnock Committee recognised that this was an area where there were competing moral and ethical views. The objective of the Committee was to find a solution which society could "praise and admire." That solution created certain bright line rules about the competing interests of those who provided the gametes necessary for the conception of the child and those who intended to care for the child in a loving relationship.

[15] After the publication of the Warnock Committee's Report in 1984 the government issued a Green Paper seeking views on the proposals and subsequently followed up with a White Paper in 1987 leading to the coming into force of the 1990 Act. The provisions for additional parental rights in the 2008 Act were preceded by a consultation leading to a further White Paper in 2006. It is clear, therefore, that the bright line legislative scheme now found in the 2008 Act was the product of extensive research by a body incorporating a wide range of interests and followed by extensive consultation recognising the moral and ethical issues involved.

Consideration

[16] The Supreme Court considered the treatment of legislation containing bright line rules in the context of the European Convention on Human Rights in *Re Gallagher* [2020] AC 185. Lord Sumption, giving the majority judgment, examined the legitimacy of legislating by reference to pre-defined categories at paragraph [48] where he set out with approval the following passages from the Grand Chamber decision in *Animal Defenders International v United Kingdom* [2013] 57 EHRR 21. At paragraph 106 – 110 that court observed:

> "106. It is recalled that a State can, consistently with the Convention, adopt general measures which apply to pre-defined situations regardless of the individual facts of each case even if this might result in individual hard cases (*Žd*anoka *v. Latvia* [GC], no. 58278/00, §§ 112-115, ECHR 2006-IV)…
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> 107. The necessity for a general measure has been examined by the Court in a variety of contexts such as economic and social policy (*James and Others v. the United Kingdom*, 21 February 1986, Series A no. 98; *Mellacher and Others v. Austria*, 19 December 1989, Series A no. 169; and *Hatton and Others v. the United Kingdom* [GC], no. 36022/97, § 123, ECHR 2003-VIII) and welfare and pensions (*Stec and Others v. the United Kingdom* [GC], no. 65731/01, ECHR 2006-VI; *Runkee and White v. the United Kingdom*, nos. 42949/98 and 53134/99, 10 May 2007; and *Carson and Others v. the United Kingdom* [GC], no. 42184/05, ECHR 2010). It has also been examined in the context of electoral laws (*Žd*anoka *v. Latvia* [GC], cited

above); prisoner voting (*Hirst v. the United Kingdom (no. 2)* [GC], no. 74025/01, ECHR 2005-IX; and *Scoppola v. Italy (no. 3)* [GC], no. 126/05, 22 May 2012); artificial insemination for prisoners (*Dickson v. the United Kingdom* [GC], no. 44362/04, §§ 79-85, ECHR 2007-V); the destruction of frozen embryos (*Evans v. the United Kingdom* [GC], no. 6339/05, ECHR 2007-I); and assisted suicide (*Pretty v. the United Kingdom*, no. 2346/02, ECHR 2002-III); as well as in the context of a prohibition on religious advertising (the above-cited case of *Murphy v. Ireland*).

108. It emerges from that case-law that, in order to determine the proportionality of a general measure, the Court must primarily assess the legislative choices underlying it (*James and Others*, § 36). The quality of the parliamentary and judicial review of the necessity of the measure is of particular importance in this respect, including to the operation of the relevant margin of appreciation (for example, *Hatton*, at § 128; *Murphy*, at § 73; *Hirst* at §§ 78-80; *Evans*, at § 86; and *Dickson*, at § 83, all cited above). It is also relevant to take into account the risk of abuse if a general measure were to be relaxed, that being a risk which is primarily for the State to assess (*Pretty*, § 74). A general measure has been found to be a more feasible means of achieving the legitimate aim than a provision allowing a case-by-case examination, when the latter would give rise to a risk of significant uncertainty (*Evans*, § 89), of litigation, expense and delay (*James and Others*, § 68 and *Runkee*, § 39) as well as of discrimination and arbitrariness (*Murphy*, at §§ 76-77 and *Evans*, § 89). The application of the general measure to the facts of the case remains, however, illustrative of its impact in practice and is thus material to its proportionality (see, for example, *James and Others*, cited above, § 36).

109. It follows that the more convincing the general justifications for the general measure are, the less importance the Court will attach to its impact in the particular case…

110. The central question as regards such measures is not, as the applicant suggested, whether less restrictive rules should have been adopted or, indeed, whether the State could prove that, without the prohibition, the

> legitimate aim would not be achieved. Rather the core issue is whether, in adopting the general measure and striking the balance it did, the legislature acted within the margin of appreciation afforded to it (*James and Others v. the United Kingdom,* § 51; *Mellacher and Others v. Austria*, § 53; and *Evans v. the United Kingdom* [GC], § 91, all cited above)."

[17] The scheme of the 2008 Act is to recognise first the commitment to family life made by those entering into a marriage or civil partnership by treating the parties to the relationship as the parents unless it is demonstrated that the other person did not consent. Secondly, in cases where the same-sex couple not in a civil partnership or marriage wish to parent the child without reference to the donor the option of using a licensed clinic satisfies that requirement. Thirdly, there are various reasons why those involved may want to take a different approach in relation to the identity of the donor and the role that the donor should play in the child's life. The legislation permits such a course and in light of the circumstances which may cause parties to go down that route there is no attempt to alter the legal position of the donor.

[18] In addition to the position of the adults it is also important to bear in mind the consequences for the child once born. Lady Hale addressed this in *Re G* [2006] 4 All ER 241. This was a case about artificial insemination by donation involving a same-sex female relationship prior to the 2008 Act. They arranged for insemination using sperm from an unknown donor at a clinic abroad. At paragraph [9] Lady Hale commented:

> "Many might see this as the more responsible choice, not only for safety reasons, but to avoid the sort of confusion and conflict that arose in Re D (contact and parental responsibility lesbian mothers and known father) [2006] 2 EWHC (Fam) [2006] 1 FCR 556. It does mean that the couple and their wider families are the only family that the child at that stage have and in most cases that must be what they both intend."

There was no hint of criticism of the overall scheme. She then went on to comment at paragraph 32 *et seq* on the significance of the fact of parenthood describing the difference between gestational, genetic and psychological parents. The purpose of the 2008 Act was to provide clarity and an opportunity to define those roles in the upbringing of the child.

[19] The appellant, supported by J, contended that the failure to provide a mechanism for her to be registered as the parent of R constituted a breach of her right to family life under Articles 8 and 14 ECHR and further that the said failure also constituted a breach of both the private and family life of R.

[20] Article 8 ECHR provides as follows:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 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."

[21] The learned trial judge accepted that the appellant's family life was engaged by the failure to enable her to become registered as R's parent and no party took issue with that finding in the course of this appeal. We are inclined to accept that the exclusion of the appellant's name on the birth certificate of R affects the family life of A and J. For the reasons we set out below we do not consider that this affects the upbringing of R.

[22] The appellant's case has been presented as a case involving a positive obligation. Whether construed as a positive obligation case or one based on the interference with a Convention right the essential issue is the striking of a fair balance. We consider that the assessment of that fair balance required by Article 8 in this case must be carried out in respect of the legislative scheme as a whole. In examining the scheme it is important, first, to recognise that this is an area of sensitive and conflicting moral, religious and ethical views in which states will often enjoy a wide margin of appreciation.

[23] Secondly, the legislative scheme was the result of a careful and lengthy analysis by a range of interests resulting in a detailed report which provided the basis for consultation within the community. Thirdly, this is a scheme which has been the subject of direct consideration by Parliament resulting in primary legislation. In an area of this kind Parliament is the proper body to exercise the margin of appreciation.

[24] Fourthly, in substance the appellant's case resolves to the proposition that where there is an enduring relationship in the course of which one party avails of artificial insemination by donation there is a positive obligation to ensure that the other party can be registered on the birth certificate with the exclusion of any rights of the donor. That raises, of course, the issue of what constitutes an enduring relationship. Is it to be considered at the time of insemination and if so is it to be affected by events that have occurred thereafter whether before or after the birth? What criteria are to be applied in determining whether a relationship is enduring?

Should this apply to any relationship? These are issues which are plainly capable of leading to dispute and litigation.

[25] In examining the scheme it is also necessary to take into account that the statutory scheme includes the availability of a joint residence order under Article 8 of the Children (Northern Ireland) Order 1995 ("the 1995 Order") and with the consent of the mother a parental responsibility order under Article 7 (1A) of the 1995 Order which would give the appellant the rights, duties, powers, responsibilities and authority of a parent. That ensures, subject to the court being satisfied about the welfare of the child, that the person in the relationship who is not the mother has a full role to play in the upbringing of the child.

[26] It is regrettable that artificial insemination by donor was not available in this jurisdiction on the National Health Service until 2019. In her statement of evidence the appellant indicated that she and the mother considered going through a clinic but unfortunately felt it was prohibitively expensive at the time. In her statement she does not identify the cost although we were told in the course of the hearing by counsel that it was £1400. There is no evidence about the means of the appellant or J or whether their researches caused them to consider approaching charities or other sources of funding. It remains the position, however, that the objective that the appellant now seeks to secure was available to her under the statutory scheme.

[27] All of these features support the conclusion that the fair balance test is strongly against any interference with the statutory scheme and we reject, therefore, the suggestion that sections 42 and 43 of the 2008 Act are incompatible with the appellant's Article 8 rights.

[28] The appellant also pursued a claim for incompatibility based upon Article 14 of the Convention which states:

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

[29] We were invited to apply the series of tests set out by this court in *Re Aaron Sterritt's Application* [2021] NICA 4 at paragraph [68]:

> "Does the case fall within the ambit of any of the substantive Convention rights invoked?
>
> Does the claimant possess either a status expressly specified in Article 14 or some "*other status*" falling within its embrace?

> Is the claimant the victim of differential treatment when compared with others in analogous situation?
>
> Is such differential treatment on the ground of the claimant's Article 14 protected status?
>
> Applying the *relevant test*, has the public authority concerned discharged its burden of establishing justification for the differential treatment, by the demonstration of one of the specified legitimate aims and a proportionate means of achieving this?"

[30] We consider that the ambit test is satisfied by the engagement of Article 8. The comparator upon which the appellant relies is a person who is married or in a civil partnership where registration as a parent can take place regardless of whether the child was conceived through artificial insemination in a licensed clinic or elsewhere. We accept that this is a difference of treatment based upon marital status. The appellant also identified this as a difference of treatment based upon the birth status of R. We also accept the submission that the difference in treatment is based on that status.

[31] The issues of analogous situation and justification can be dealt with together. Justification in this case must also depend upon an analysis of the statutory scheme rather than the individual circumstances of the appellant. The cases indicate, however, that the effect on the appellant is a factor to be taken into account in looking at the scheme.

[32] We consider that the arguments advanced in relation to Article 8 essentially apply here also. By virtue of Articles 7 and 8 of the 1995 Order the appellant can play a decisive role in the upbringing of the child, R, and a full part in the family life of the children. We accept that the inability to register on the birth certificate is a source of frustration and disappointment to the appellant but that does not justify setting aside this carefully constructed statutory scheme.

Article 31B of the Matrimonial and Family Proceedings Order (Northern Ireland) 1989 ("the 1989 Order")

[33] The application for the declaration of parentage is made under Article 31B of the 1989 Order which provides:

> "31B.-(1) Subject to the provisions of this Article, any person may apply to the High Court, a county court or a court of summary jurisdiction for a declaration as to whether or not a person named in the application is or was the parent of another person so named.

> (2) A court shall have jurisdiction to entertain an application under paragraph (1) if, and only if, either of the persons named in it for the purposes of that paragraph-
>
> (a) is domiciled in Northern Ireland on the date of the application, or
>
> (b) has been habitually resident in Northern Ireland throughout the period of one year ending with that date…
>
> (5) Where an application under paragraph (1) is made and one of the persons named in it for the purposes of that paragraph is a child, the court may refuse to hear the application if it considers that the determination of the application would not be in the best interests of the child."

[34] It is apparent, therefore, that the best interests of the child is a consideration which needs to be taken into account in considering a declaration. We have already set out the various ways in which the appellant will play a full part in the upbringing of the child, R. On balance we do not consider that the absence of the name on the birth certificate causes an interference with R's family life. We accept, however, that it does constitute an interference with the private life of R in terms of his identity. That interference has a direct effect in terms of inheritance but unlike the situation in Mennesson v France and Labassee v France (24/6/14) does not have an effect on fundamental matters such as citizenship.

[35] Article 34 of the 1989 Order imposes a constraint on the making of a declaration:

> "34. - (1) Where on an application for a declaration under this Part the truth of the proposition to be declared is proved to the satisfaction of the court, the court shall make that declaration unless to do so would manifestly be contrary to public policy."

We have already spent some time setting out the public policy arrangements in the 2008 Act and in light of those Article 34 appears to prevent the making of a declaration. The appellant submitted, however, that case law supported the view that there was a degree of flexibility in the statutory scheme which could allow for the making of the declaration. We now turn to those cases.

[36] The first case is *X v Y (St Bartholomew's Centre for Reproductive Medicine) (intervening)* [2016] 1 FLR 544. In this case an unmarried couple had attended at the

licensed clinic to avail of artificial insemination by donation. A child was born in 2013 and the couple proceeded on the basis that both were legal parents. An audit of the clinic was subsequently carried out by the Human Fertilisation and Embryology Authority ("HFEA") and it was discovered that consent forms in relation to the father demonstrating that consent had been obtained prior to fertilisation were not retained by the clinic.

[37] Theis J heard evidence about the procedures within the clinic and the attendance of the couple at the clinic prior to fertilisation. The judge concluded on the balance of probabilities that written consent had been provided prior to the treatment but that it was no longer available. It was a breach of the licensing conditions for the clinic not to retain the written consent but the treatment had been provided under the licence as required by the statute despite the breach. The judge made the declaration of parentage sought recognising that it was contrary to the certainty which Parliament had intended to establish in this situation to refuse to do so because the clinic had not retained the records.

[38] The second case was the decision of the President of the Family Division in *A, B, C, D, E, F, G and H* [2015] EWHC 2602 (Fam); [2016] 1 All ER 273. This case concerned issues which had arisen in a number of clinics. In some cases consent forms had been mislaid. In other cases there were errors in the consent form where people had signed in the wrong place or made obvious errors when referring to other people. The third issue concerned the use of a form other than that provided by the HFEA and the effect that had in relation to whether the treatment was provided in accordance with a licence.

[39] The President was satisfied in each of the cases on the balance of probabilities that consent had been established prior to the commencement of the treatment and that parole evidence was admissible in order to establish the fact of written consent. On those occasions where forms were used other than those provided by the HFEA the content of those forms satisfied the statutory requirement demonstrating consent. The President considered that obvious errors in the forms would be corrected by construction and where it was available rectification of the forms could be achieved.

[40] In our view neither of these cases justify any departure from the public policy approach established by the 2008 Act. It would be directly contrary to that public policy to make declarations on a case-by-case basis introducing the uncertainty and confusion which the statutory scheme sought to avoid. Public policy prevents the making of a declaration of parentage.

Conclusion

[41] In agreement with the learned trial judge we do not consider that sections 42 and 43 of the Human Fertilisation and Embryology Act 2008 or Article 31B of the Matrimonial and Family Proceedings (Northern Ireland) Order 1989 are

incompatible with the appellant's Article 8 or 14 Convention rights. We also agree for the reasons given that O'Hara J was correct not to make a declaration of parentage in this case. The appeal is, therefore, dismissed.