

L v. (1) HFEA and (2) Department of Health

The judgment

On 3rd October 2008 the High Court (Mr Justice Charles) gave judgment in relation to the case of Mrs L. Mrs L's husband had died suddenly following routine surgery, and Mrs L had obtained a court order immediately after his death enabling sperm to be removed from his body and stored. The court order had been made during an emergency application to the court, to which the Authority was not a party. The order was made following a submission to the Court that the legal position established in *R v HFEA Ex Parte Blood (1997)*, relating to the harvesting and storage of gametes, had been changed by the Human Tissue Act 2004. This submission was made in error and the order made as a result of that submission has now ceased to have effect by the judgment of Mr Justice Charles. Before her husband died, he had not given his consent to the storage and use of his sperm after his death, as required by the Act.

The High Court was asked to declare that it would be lawful for her to continue to have the sperm stored, and to have fertility treatment in the United Kingdom using the sperm. The judgment considers, in particular, whether the consent requirements of the Act are compatible with the Human Rights Act 1998.

Mr Justice Charles decided that:

- Although, in the present case, the retrieval of the sperm was covered by the initial court order, there are considerable doubts about whether anyone, including a court, can properly authorise the removal of gametes from a dead person.
- Although, in the present case, the initial storage of the sperm was likewise covered by the initial court order, the court has no power to authorise storage where the deceased has not given the consent required by the Act. In future cases, therefore, the court should not grant an order authorising storage.
- The storage of L's husband's sperm is presently contrary to the Act, and unlawful.
- L cannot lawfully receive fertility treatment using the sperm in the United Kingdom, because her husband did not give the consent required by the Act.

- The consent requirements of the Act are compatible with the Human Rights Act 1998, and do not unduly interfere with L's right to respect for her private and family life.
- The HFEA retains a discretion to consider an application by L for permission to export the sperm outside the United Kingdom for treatment.
- The Act itself does not unjustifiably interfere with L's EU law right to travel to another Member State to receive services, although EU law may be relevant to the HFEA's consideration of any export application, depending on where the sperm is to be exported to.

The judge also expressed the preliminary view that the HFEA had the power to authorise storage of sperm pending consideration of an application for export. The HFEA disagrees with this view, which was not a final view in any event, and was not necessary for the resolution of the issues arising in the case.

Next steps

The HFEA will now consider any application presented to it on L's behalf seeking permission to export the sperm. That application will be determined having regard to all relevant factors, including, for example, any rights L may have under EU law, her right to respect for her private life, the fact that L did not give his consent before he died, and the reasons why that consent was not given, and the fact the sperm is currently stored contrary to the express requirements of the Act

Although the storage of the sperm is presently unlawful, the HFEA has decided, in the wholly exceptional circumstances of this case, that it will not take regulatory action against the clinic storing the sperm for a period of six months. The sperm will therefore continue to be stored, to enable submission and consideration of an application for export. The HFEA will keep the position under review with the clinic concerned.

Conclusions

- 1) Storage of gametes without written effective consent is a breach of licence condition and a criminal offence. Once sperm has been harvested it cannot survive without being stored (cryopreserved). Accordingly gametes which are to be used in posthumous treatment services will require storage. As previously confirmed by the Court of Appeal in *Blood*, gametes should not be harvested unless there is written effective consent to storage.
- 2) If an individual wishes to ensure that gametes are available for use in treatment services after death, the only effective way of ensuring that their wishes are met is to arrange for gametes to be harvested and stored at an HFEA licensed clinic during their lifetime.
- 3) The clinic will then be able to ensure that appropriate counselling is available and that all relevant information is provided prior to the gametes being harvested and stored. The clinic will also be able to ensure that written effective consent is provided which complies with the requirements of the 1990 Act.
- 4) The relevant information that a licensed clinic can provide will include confirmation that the gamete provider will not become the legal father of any child born as a result of the posthumous use of his gametes. However, it is possible for a deceased man's name to be entered in the birth register of the child, (although this does not give the child any legal rights such as inheritance or nationality). If this option is to be taken up, action is required in life, by both by the gamete provider and the woman to be treated. (More detailed guidance can be found on the HFEA website under the title "Deceased Fathers - How to Register a Man as the Father of a Child Conceived After his Death)."