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The L Teaching Hospitals NHS Trust v Mr A, Mrs A, YA, ZA (By their Litigation Friend, The Official Solicitor), The Human Fertilisation and Embryology Authority, Mr B, Mrs B

Case No: HQ02X02475/FD02P00895

High Court of Justice Queens Bench Division

26 February 2003

Neutral Citation No.: [2003] EWHC 259(QB)

2003 WL 270761

Before: The President

Wednesday 26th February, 2003, Hearing dates : 20th, 21st and 22nd January 2003

Representation

Mr Robert Francis QC (instructed by Hempsons) for the Claimant.

Miss Eleanor Hamilton QC and Miss Elizabeth O'Hare (instructed by Lee and Priestley) for Mr and Mrs A.

Mr Peter Jackson QC (instructed by the Official Solicitor).

Miss Dinah Rose (instructed by Morgan Cole) for the Human Fertilisation and Embryology Authority.

Miss Judith Parker QC and Mr Charles Foster (instructed by Lester Morrill) for Mr and Mrs B.

Mr James Eadie (instructed by the Solicitor, the Department for Work and Pensions and the Department of Health) as Intervenor.

Mr Neil Garnham QC (instructed by the Treasury Solicitor) Advocate to the Court.

JUDGMENT

Dame Elizabeth Butler-Sloss, P. :

1. This case has been before the High Court of the Family Division on several occasions. I gave a short judgment on the 4th November 2002 (see [2003] 1FLR 412) setting out the facts which were then known. The main issue before the court at this hearing is to establish the legal parentage of YA and ZA (the twins). Everyone concerned with the problems which have arisen in this case agrees that the twins should remain with the family into which they were born, with Mr and Mrs A. It is clear from the facts now established that Mrs A gave birth to the twins and is their biological mother. It is equally clear from the DNA tests that Mr B is their biological father. Both families sought treatment within the provisions of the [Human Fertilisation and Embryology Act 1990](#) (the 1990 Act). In order to establish the legal parentage of the twins, it is necessary to consider whether certain provisions of the 1990 Act, principally [sections 28 and 29 and Schedule 3](#) , apply to the facts of this case. If [section 28\(2\) or \(3\)](#) applies, Mr A will be treated for all purposes as the father. If this case does not come within the provisions of [section 28\(2\) or \(3\)](#) , Mr B, as the biological father, will be the legal father. Because he was not married to the mother, however, he would not have parental responsibility for the twins

unless it was specifically conferred upon him. In the event that it becomes necessary to make any decisions to ensure the long-term welfare of the twins, the legal status of their parentage must be established. At birth, they were registered as the children of Mr and Mrs A. Mr B has made an application under [section 55A of the Family Law Act 1986](#), as amended, for a declaration of parentage. By agreement of all parties, I have adjourned that application generally.

The parties

2. I have been assisted greatly by the excellent written and oral submissions of all the counsel in this difficult case. Miss Parker QC, on behalf of Mr and Mrs B, submitted on the legislation that [sections 28\(2\) and \(3\)](#) did not apply and that Mr B was the legal father. Mr Eadie, on behalf of the Secretary of State for the Department of Health, (D of H), supported her submission. It was also supported by Miss Rose for the Human Fertility and Embryology Authority (the Authority), and by Mr Jackson QC for the Official Solicitor representing the twins. Miss Hamilton QC, for Mr and Mrs A, submitted that [section 28](#) applied and that, in accordance with the irrebuttable presumption provided by [section 28\(4\) and section 29\(1\)](#), Mr A was the legal father. She was supported by Mr Francis QC, for the L Teaching Hospitals NHS Trust, (the NHS Trust). Mr Garnham QC, instructed by the Attorney General as Advocate to the Court, very helpfully considered the submissions of all the other parties and submitted to the court that [section 28](#) did not apply to the facts of this case.

3. Before considering the competing arguments on the 1990 Act, the relevance of the European Convention and the [Human Rights Act 1998](#) to the 1990 Act and whether an issue of incompatibility arises, I shall set out a summary of the background facts surrounding the conception and birth of the twins which I largely take, with gratitude, from the skeleton argument provided by Miss Parker and her junior, Mr Foster.

The Background Facts

4. Mr and Mrs A and Mr and Mrs B attended at the Clinic run by the NHS Trust to undergo intracytoplasmic sperm injection techniques ("ICSI") using the eggs of the wife in each case and the sperm of the husband in each case.

5. Mr Leigh, giving evidence for the NHS Trust, in his fourth witness statement, dated 18th November 2002, stated that:

a) Mrs A consented to her eggs being used and mixed with her husband's sperm. She did not consent to her eggs being mixed with named or anonymous donated sperm. She consented to the placing of not more than two resulting embryos in her uterus. She consented to her eggs and any resulting embryo being used in her own treatment or in any research project. She refused to consent to her eggs or embryos being used in treating others.

b) Mr A consented to his wife's treatment, and confirmed his understanding that he would be the father of any resulting child. He consented to his sperm being used to treat his wife. He refused to consent to its being used to treat others or for research. He consented to his sperm being used to fertilise his wife's eggs in vitro and to the embryos developed from these eggs being used in the treatment of himself together with a named partner, his wife. He refused to consent to the embryos being used for the purpose of treatment of others but did consent to them being used in any project of research.

c) Mrs B consented to her eggs being mixed with her husband's sperm and two resulting embryos being placed in her uterus. She did not consent to her eggs being mixed with donor sperm, and did not consent to any spare embryos being used for research purposes.

d) Mr B consented to his wife's treatment and records that he understood that he would be the father of any resulting child. He consented to his sperm being used to treat his wife. He expressly refused to consent to his sperm being used in treating others or in any research project.

6. By a 'mistake' (which I shall call it despite its inadequacy as a description of what occurred), Mr B's sperm were injected into the eggs of Mrs A. She became pregnant with the twins of whom she is the genetic mother and Mr B is the genetic father. None of the four parties involved consented. Mr and Mrs A are both white and, after the birth of the twins, it became apparent that they were children of mixed race. Behind the legal arguments which occupied the court for three days lies a tragic human story of two families trying to come to terms with the consequences of the mistake. It is, however, necessary to engage in the legal arguments because the mistake raises the issue of the status of the children. I respectfully agree with Wilson J who said in [U v W \(Attorney General Intervening\) \[1997\] 2 FLR 282](#) at page 303

"... there is a particular need for certainty in provisions affecting status ..."

The legislation

7. At common law, Mr B has the status of an unmarried father. He would not have parental responsibility by virtue of [section 2\(2\)\(b\) of the Children Act 1989](#). The main argument in this case concerns the effect of the 1990 Act on the common law and the [Children Act](#). I turn now to the relevant provisions of the 1990 Act. The preamble sets out the purpose of the legislation

"An Act to make provision in connection with human embryos and any subsequent development of such embryos; to prohibit certain practices in connection with embryos and gametes; to establish a Human Fertilisation and Embryology Authority; to make provision about the persons who in certain circumstances are to be treated in law as the parents of a child; and to amend the [Surrogacy Arrangements Act 1985](#)."

8. A clear purpose of this aspect of the 1990 Act is to make provision for certain persons to be treated as parents. The main question is whether these facts fall within the scope of the 1990 Act so as to give Mr A the status of father of the twins.

9. [Section 1](#) describes the meaning of "embryo", "gamete" and associated expressions

(1) "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,

and, for this purpose, fertilisation is not complete until the appearance of a two cell zygote.

(2) This Act, so far as it governs bringing about the creation of an embryo, applies only to bringing about the creation of an embryo outside the human body; and in this Act —

(a) references to embryos the creation of which was brought about *in vitro* (in their application to those where fertilisation is complete) are to those where fertilisation began outside the human body whether or not it was completed there, and

(b) references to embryos taken from a woman do not include embryos whose creation was brought about *in vitro*.

(3) This Act, so far as it governs the keeping or use of an embryo, applies only to keeping or using an embryo outside the human body.

(4) References in this Act to gametes, eggs or sperm, except where otherwise stated, are to live human gametes, eggs or sperm but references below in this Act to gametes or eggs do not include eggs in the process of fertilisation."

10. [Section 2](#) sets out the meaning of the phrase 'treatment services' which is found in [section 28\(3\)](#).

(1) In this Act —

“treatment services” means medical, surgical or obstetric services provided to the public or a section of the public for the purpose of assisting women to carry children.

11. [Section 13](#) sets out the conditions of licences for treatment

(1) The following shall be conditions of every licence under paragraph 1 of Schedule 2 to this Act.

...

(5) A woman shall not be provided with treatment services unless account has been taken of the welfare of any child who may be born as a result of the treatment (including the need of that child for a father), and of any other child who may be affected by the birth.

(6) A woman shall not be provided with any treatment services involving —

- (a) the use of any gametes of any person, if that person's consent is required under paragraph 5 of Schedule 3 to this Act for the use in question,
- (b) the use of any embryo the creation of which was brought about *in vitro* , or
- (c) the use of any embryo taken from a woman, if the consent of the woman from whom it was taken is required under paragraph 7 of that Schedule for the use in question,

unless the woman being treated and, where she is being treated together with a man, the man have been given a suitable opportunity to receive proper counselling about the implications of taking the proposed steps, and have been provided with such relevant information as is proper.

(7) Suitable procedures shall be maintained —

- (a) for determining the persons providing gametes or from whom embryos are taken for use in pursuance of the licence, and
- (b) for the purpose of securing that consideration is given to the use of practices not requiring the authority of a licence as well as those requiring such authority.

12. [Section 27](#) gives the meaning of ‘mother’ for the purpose of the 1990 Act. It is [section 28](#) , however, which is crucial to the determination of the main issue. It gives the meaning of ‘father’ for the purpose of the 1990 Act.

(1) This section applies in the case of a child who is being or has been carried by a woman as the result of the placing in her of an embryo or of sperm and eggs or her artificial insemination.

(2) If —

- (a) at the time of the placing in her of the embryo or the sperm and eggs or of her insemination, the woman was a party to a marriage, and
- (b) the creation of the embryo carried by her was not brought about with the sperm of the other party to the marriage,

then, subject to subsection (5) below, the other party to the marriage shall be treated as the father of the child unless it is shown that he did not consent to the placing in her of the embryo or the sperm and eggs or to her insemination (as the case may be).

(3) If no man is treated, by virtue of subsection (2) above, as the father of the child but —

- (a) the embryo or the sperm and eggs were placed in the woman, or she was artificially inseminated, in the course of treatment services provided for her and a man together by a person to whom a licence applies, and

(b) the creation of the embryo carried by her was not brought about with the sperm of that man,

then, subject to subsection (5) below, that man shall be treated as the father of the child.

(4) Where a person is treated as the father of the child by virtue of 'subsection (2) or (3) above, no other person is to be treated as the father of the child.

(5) Subsections (2) and (3) above do not apply —

(a) in relation to England and Wales and Northern Ireland, to any child who, by virtue of the rules of common law, is treated as the legitimate child of the parties to a marriage,

(b) (applies to Scotland only), or

(c) to any child to the extent that the child is treated by virtue of adoption as not being the child of any person other than the adopter or adopters.

(6) Where —

(a) the sperm of a man who had given such consent as is required by paragraph 5 of Schedule 3 to this Act was used for a purpose for which such consent was required, or

(b) 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.

(7) The references in subsection (2) above to the parties to a marriage at the time there referred to —

(a) are to the parties to a marriage subsisting at that time, unless a judicial separation was then in force, but

(b) include the parties to a void marriage if either or both of them reasonably believed at that time that the marriage was valid; and for the purposes of this subsection it shall be presumed, unless the contrary is shown, that one of them reasonably believed at that time that the marriage was valid.

(8) This section applies whether the woman was in the United Kingdom or elsewhere at the time of the placing in her of the embryo or the sperm and eggs or her artificial insemination.

(9) In subsection (7)(a) above, "judicial separation" includes a legal separation obtained in a country outside the British Islands and recognised in the United Kingdom.

13. [Section 29](#) provides for the effect of [sections 27 and 28](#)

(1) Where by virtue of section 27 or 28 of this Act a person is to be treated as the mother or father of a child, that person is to be treated in law as the mother or, as the case may be, father of the child for all purposes.

(2) Where by virtue of section 27 or 28 of this Act a person is not to be treated as the mother or father of a child, that person is to be treated in law as not being the mother or, as the case may be, father of the child for any purpose."

14. [Schedule 3](#) , headed 'Consents to Use of Gametes or Embryos,' provides for the necessary consents from the couples preparing to undergo this treatment.

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

- (1) A consent to the use of any embryo must specify one or more of the following purposes —
- (a) use in providing treatment services to the person giving consent, or that person and another specified person together,
 - (b) use in providing treatment services to persons not including the person giving consent, or
 - (c) use for the purposes of any project of research,

and may specify conditions subject to which the embryo may be so used.

- (2) A consent to the storage of any gametes or any embryo must —

- (a) specify the maximum period of storage (if less than the statutory storage period), 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,

and may specify conditions subject to which the gametes or embryo may remain in storage.

- (3) A consent under this Schedule must provide for such other matters as the Authority may specify in directions.

- (4) A consent under this Schedule may apply —

- (a) to the use or storage of a particular embryo, or
- (b) in the case of a person providing gametes, to the use or storage of any embryo whose creation may be brought about using those gametes,

and in the paragraph (b) case the terms of the consent may be varied, or the consent may be withdrawn, in accordance with this Schedule either generally or in relation to a particular embryo or particular embryos.

3 Procedure for giving consent

- (1) Before a person gives 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.

...

5 Use of gametes for treatment of others

- (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."

15. It was not necessary for Mr A to give 'effective consent', since the process was carried out by husband and wife and there was no intention to have a sperm donation from a third person. It was necessary for him to consent if [section 28\(2\)](#) applied and, in my judgment, the distinction between 'effective consent' and 'consent' is not of significance on the facts of this case.

16. I propose to consider first the meaning of [section 28\(2\)](#) and [section 28\(3\)](#) without looking at the impact of the [Human Rights Act](#) on the domestic legislation, and then turn to the relevant articles of the European Convention and the European jurisprudence and their effect, if any, upon the meaning of each subsection.

Hansard

17. I have been invited, by Mr Eadie and Mr Jackson, to look at the way in which [section 28](#) was introduced in the House of Lords and the relevant extracts from Hansard. I have also been provided with the Notes on Clauses. I have been strongly urged, principally by Mr Garnham, not to embark on that course, and I agree with his submission. In my judgment it is not necessary for me to invoke [Pepper v Hart \[1993\] AC 593](#) and seek assistance from the debate on the Bill, in particular, since Mr Garnham reminded me that I have to consider the meaning of the 1990 Act in the light of the Human Rights legislation and reference to Hansard would be of no assistance in that exercise. I was asked to look at the notes surrounding the Bill but I have come to the conclusion that it is not necessary to do so as an aid to interpretation.

Code of Practice

18. I have read the relevant Code of Practice , the 4th, issued by the Authority as guidance. Part 5 of that Code sets out the requirements of consent and the concept of legal fatherhood within the 1990 Act.

“Consent of the Husband or Male Partner and Legal Fatherhood

5.6 Centres should adopt the procedures described in the following paragraphs in the interests of preventing or resolving a dispute at a later stage about the fatherhood of a child. (Centres are also referred to paragraph 3.17(1), above.)

5.7 A woman's husband will be the legal father of a child born as a result of treatment using donated sperm, unless they are judicially separated or he can prove that he did not consent to the treatment. If a married woman is being treated with donated sperm, centres should explain the position and ask her whether her husband consents to the treatment. If he does, the centre should take all practicable steps to obtain his written consent. If the woman does not know, or he does not consent, centres should, if she agrees, take all practicable steps to ascertain the position and (if this is the case) obtain written evidence that he does not consent.

5.8 If a woman is being treated together with a male partner, using donated sperm, and she is unmarried or judicially separated or her husband does not consent to the treatment, her male partner will be the legal father of any resulting child. Centres should explain this to them both and record at each appointment whether or not the man was present. Centres should try to obtain the written acknowledgement of the man both that they are being treated together and that donated sperm is to be used. Centres should also explain that when a child is born to an unmarried couple the male partner may not have parental responsibility for that child ([Children Act 1989](#)). Unmarried couples concerned about how parental responsibility affects their legal rights should seek their own legal advice.”

19. Although it is clear from paragraphs 5.7 and 5.8 that those drafting the Code of Practice treated [section 28\(2\)](#) as applying to married couples agreeing to the use of sperm from a donor who was not the husband and [section 28\(3\)](#) to couples who were not married to each other wishing to have children with the use of a sperm donor, the Code merely confirmed the conclusion to which I had already come.

20. The two most important principles to be found in the 1990 Act are the welfare of any children born by treatment under the provisions (see for instance [section 13\(5\)](#)), and the requirements of consent (see [Schedule 3\(5\)](#), [section 28\(2\)](#) and the statutory consent forms, and Annex C to the Code of Practice). Hale LJ said in [Mrs U v Centre for Reproductive Medicine \[2002\] EWCA Civ 565](#) at paragraph 24

“The whole scheme of the 1990 Act lays great emphasis upon consent. The new

scientific techniques which have developed since the birth of the first IVF baby in 1978 open up the possibility of creating human life in ways and circumstances quite different from anything experienced before then. These possibilities bring with them huge practical and ethical difficulties. These have to be balanced against the strength and depth of the feelings of people who desperately long for the children which only these techniques can give them, as well as the natural desire of clinicians and scientists to use their skills to fulfil those wishes. Parliament has devised a legislative scheme and a statutory authority for regulating assisted reproduction in a way which tries to strike a fair balance between the various interests and concerns. Centres, the HFEA and the courts have to respect that scheme, however great their sympathy for the plight of particular individuals caught up in it.”

21. Miss Hamilton pointed out that the 1990 Act and the Code of Practice laid heavy emphasis upon the welfare of the children resulting from treatment and, even if the adults consented, the treatment could not be embarked upon unless account has been taken of the welfare of any resulting child.

Section 28

22. [Section 28](#) potentially applies because this is a case of twins who have been carried by a woman, Mrs A, as the result of the placing in her of an embryo. It is, however, clear to me that the present situation where the sperm of a man has been placed in the eggs of a woman by mistake was not in the minds of those drafting the Bill or in Parliament's mind when it passed [section 28](#) .

23. Miss Hamilton accepted that the present situation was not contemplated by the legislators, but submitted that the court is not bound to assume that parliamentary counsel could foresee every possibility that might arise. Otherwise, as Arden LJ said in [Re S \(Freeing for Adoption\) \[2002\] EWCA Civ 798, \[2002\] 2 FLR 681](#) at paragraph 37, there would never be any problem of statutory interpretation for the court to resolve. Miss Hamilton suggested that the purpose of this part of the 1990 Act under the umbrella of welfare was to protect children born as a result of treatment. It was designed to prevent the man who donated sperm from attempting to be treated as the father and to ensure that the man who engaged in the treatment process was prepared to accept responsibility for the child of another man. As Miss Hamilton so graphically put it, children need fathers.

Section 28(2)

24. Looking superficially at [section 28\(2\)](#) , it might appear that Mr A could be the legal father of the twins, since, at the time of the placing in Mrs A of the embryo, Mrs A was a party to the marriage with Mr A and the creation of the embryo carried by her was not brought about with the sperm of Mr A. The application of [subsection \(2\)](#) , however, is subject to two provisos. The first is contained in [section 28\(5\)](#) and provides for the common law presumption of legitimacy of a child born to a mother during her marriage. In the present case, that presumption is displaced by the DNA tests which established that Mr B is the biological father of the twins.

25. The second proviso, contained in [subsection \(2\)](#) itself, is the requirement of the husband's consent. [Subsection \(2\)](#) applies unless it is shown that Mr A “did not consent to ... her insemination.” It is obvious that [section 28](#) is not relevant if the sperm given by Mr A was used since he is then the biological father and the twins are the legitimate children of Mr and Mrs A. The question is whether Mr A consented to the insemination of Mrs A by a third person (for the purposes of this argument, ‘a donor’).

26. Miss Hamilton submitted that on strict statutory interpretation Mr and Mrs A came within [subsection \(2\)](#) . It was not necessary in the case of a married couple for the husband to give ‘effective’ or written consent. There was a rebuttable presumption that he had consented. Miss Hamilton argued that Mr A gave a broad consent to the placing of an embryo sufficient to treat him as the father unless it could be shown that Mr A had not consented. He did not raise the issue nor seek to set aside the presumption.

27. The insurmountable problem, in my view, to that approach, is the question — to what did he consent? The whole procedure is governed by written consent forms which are filled in and signed by

both intended parents after careful discussion and counselling in the clinic. Mr A gave his written consent in the standard form which is at Annex C of the 4th Code of Practice . He consented to the 'course of treatment outlined above', as interpreted in [section 2\(1\)](#) . The 'course of treatment' to which he consented was that outlined in Mrs A's consent form. As I set out above, Mrs A consented to her eggs being used and mixed with her husband's sperm. She did not consent to her eggs being mixed with named or anonymous donated sperm. She consented to the placing of not more than two resulting embryos in her uterus.

28. Mr A certainly gave his consent to the placing in his wife of 'an embryo'. The embryo Actually placed in Mrs A was a fundamentally different embryo from one that might have been created by the use of Mr A's sperm. Mr A has indicated that he does not wish to seek to withdraw his consent and wishes to take advantage of the irrebuttable presumption set out in [section 28\(2\)](#) and become the legal father. It is not, however, a matter of endorsement by the husband of his consent. The question whether the husband consented is a matter of fact which may be ascertained independently of the views of those involved in the process. On the clear evidence provided in the consent forms Mr A plainly did not consent to the sperm of a named or anonymous donor being mixed with his wife's eggs. This was clearly an embryo created without the consent of Mr and Mrs A.

29. Miss Hamilton and Mr Francis, on behalf of the NHS Trust, argued that the use of Mr B's sperm for the eggs of Mrs A was by way of a mistake which did not vitiate the meaning of [subsection \(2\)](#) . Mr Eadie argued that such a mistake was fatal. I was asked to look at a number of cases where mistakes were held not to be fundamental and a number of other cases where they were. In my judgment, this line of cases does not assist me, since the mixing of the sperm of Mr B with the eggs of Mrs A was not within the contemplation of either family and was entirely contrary to the written consents given by Mr A. This mistake went to the root of the whole process and has had irreparable consequences. The concern of Mr Francis that, if the court found that a fundamental mistake had occurred in this case so as to exclude the application of [section 28\(2\)](#) , in cases where there had been trivial errors the application of [section 28\(2\)](#) would also be excluded, is misconceived. Mistakes may well occur during the process for other families undergoing the treatment which may be contrary to the provisions of the 1990 Act but which are not fundamental. In those cases the consent will probably not be vitiated. This mistake was, I hope, exceptional and of an entirely different significance and severity from minor breaches. I am satisfied that, on the proper interpretation of [section 28\(2\)](#) in the absence of any consideration of the Human Rights legislation and its jurisprudence, Mr A did not consent to the placing in his wife of the embryo which was Actually placed. Accordingly, [section 28\(2\)](#) does not apply.

Section 28(3)

30. Miss Hamilton argued that the literal wording of [subsection \(3\)](#) covered the present circumstances. In a situation where no man is treated as the father by virtue of [subsection \(2\)](#) , if [subsection \(3\)\(a\)](#) applied to married men as well as unmarried men and the court was satisfied that Mr and Mrs A were treated together by a person to whom a licence applies, then on a strict statutory interpretation, [subsection \(3\)](#) would apply. She submitted that Wilson J was in error in *U v W* (above) in holding that [subsection \(3\)](#) applied only to a man who was not married to the woman (see page 291h). Treatment together was a course of conduct and it would be wrong in the context of treatment not to look at the whole enterprise. She urged a robust interpretation of 'treatment together,' in keeping with the approach taken in other decisions of the Court of Appeal and the High Court to which I shall turn below. She recognised that the strict interpretation that she submitted did not sit comfortably with the Code of Practice which clearly presumed a distinction between married men within [section 28\(2\)](#) and unmarried men within [section 28\(3\)](#) . A literal interpretation would, however, cover the situation and meet the welfare requirements of the children who saw Mr A as their father. She suggested that, if the facts of this case took it outside [section 28](#) , then this part of the Act was incompatible with the [Human Rights Act](#) . She suggested that it would be possible for the court to be human rights compliant if her interpretation of [subsection \(3\)](#) was adopted.

31. I have found [section 28\(3\)](#) more difficult to interpret than [section 28\(2\)](#) . The first question is whether it was intended to apply to husbands or whether it was designed solely to deal with efforts to have children by those who were not married to each other. [Subsection \(3\)](#) requires in the case of the placing of an embryo in the woman that it was 'in the course of treatment provided for her and a man together by a person to whom a licence applies and the creation of the embryo was not brought about with the sperm of that man'. [Subsection \(2\)](#) , although limited to husbands, appears to be broader

than [subsection \(3\)](#) . The husband is to be treated as the father, unless it is shown that he did not consent, that he 'opted out.' In [subsection \(3\)](#) the boot is on the other foot. The acceptance of fatherhood has to be shown. The man has to show commitment and that commitment has to be demonstrated by his Active involvement. In other words, he must 'opt in.' Further in [subsection \(2\)](#) , in contrast to [subsection \(3\)](#) , it does not have to be shown that the husband played an Active part in the course of treatment provided for his wife and him together by a person to whom a licence applies. I understand that some treatment under the 1990 Act can be given at home and not by a person to whom a licence applies. Such treatment could not be carried out under [subsection \(3\)](#) (see U v W (above), where the treatment was carried out in Rome).

32. Mr Eadie reminded me that by normal statutory interpretation, the court would expect the Parliamentary draftsman to deal with the larger group before the smaller. Consequently it would be odd for a married man to be covered both by [subsection \(2\)](#) and [subsection \(3\)](#) . It would not be necessary for a married man to come within [subsection \(3\)](#) unless it was shown that he had not consented. It is not necessary to show consent in [subsection \(3\)](#) to the use of a sperm donor. There has to be treatment together by the man and the woman. Mr Garnham submitted that Parliament expressly provided in [subsection \(2\)](#) the circumstances in which the husband would not be held to be the father and it would be extraordinary if [subsection \(3\)](#) could nonetheless achieve that effect. He suggested that the better view was that [subsection \(3\)](#) did not cover husbands. I agree with Mr Garnham's final submission and that [section 28\(3\)](#) was not intended to include husbands.

33. Since the hearing, I have seen the judgments of the Court of Appeal in re R (a child) 19th February 2003 which dealt with [section 28\(3\)](#) . I am reassured in my conclusions that [section 28\(3\)](#) was not intended to apply to husbands by paragraphs 20 and 21 of the judgment of Hale LJ

"We start from the proposition, advanced by Mr Jackson for the child's guardian, that section 28(3) is an unusual provision, conferring the relationship of parent and child on people who are related neither by blood nor by marriage. Conferring such relationships is a serious matter, involving as it does not only the relationship between father and child but also between the whole of the father's family and the child. The rule should only apply to those cases which clearly fall within the footprint of the statutory language.

The wording of section 28 makes it clear that the time at which the legal paternity is created is the time when the embryo or the sperm and eggs which subsequently result in the birth of the child are placed in the woman. Section 28(2) expressly refers to the mother being married at that time. Section 28(3) expressly refers back to section 28(2) for the purpose of ensuring that the mother's husband is excluded from paternity. This suggests that they both refer to the same time. Section 28(3) also focuses on the Act of placing the embryo or sperm and eggs in the mother, further suggesting that the question whether this is done 'in the course of treatment services provide for her and a man together' should be answered at that time and no other."

The Court of Appeal clearly did not consider that [section 28\(3\)](#) applied to husbands.

Treatment together

34. There has been, as Miss Hamilton has submitted, a robust interpretation of the concept of 'in the course of treatment services provided for her and a man together'. I was asked to apply certain passages in the judgment of Bracewell J in [Re B \(Parentage\) \[1996\] 2 FLR 15](#) and of Lord Woolf MR in R v Human Fertilisation and Embryology Authority, ex parte Blood [1997] 2 WLR 806 . Hale LJ said at paragraph 18 in re R (above) that she did not consider that either decision (above) helped in construing the similar language used in a very different context and I respectfully adopt that approach to the very particular facts of this case.

35. Miss Hamilton sought to show that Wilson J came to the wrong conclusion about treatment together' and that I should decline to follow his decision. Mr Garnham reminded me that the definition of treatment together in [section 2\(1\)](#) was to assist the woman to carry a child and pointed to a need to concentrate on the purpose of undergoing treatment. He submitted that if it was found that there was no consent to treatment under [subsection \(2\)](#) , it was impossible to see how there could be treatment together for that purpose.

36. In U v W (above), Wilson J found that the couple, who were not married to each other, had

received treatment services together but that the licence provisions had not been observed. He said at page 294

“I have no doubt that there is a mental element inherent in the notion of ‘treatment together’ and that, if the respondent had believed at all material times that the treatment which was being provided in which his sperm alone was to be used, Dr A’s treatment of the applicant with donor sperm would not have amounted to services provided for them together.”

37. He was satisfied, however, that the above hypothesis did not fit the facts of that case. I agree with Mr Garnham’s submissions and with the passage from the judgment of Wilson J cited above. His hypothesis applies to the facts of the present case. A fundamental error resulting in the use of the sperm of another in place of the use of sperm of the man taking part in the treatment must vitiate the whole concept of ‘treatment together’ for the purposes of the 1990 Act. I am therefore satisfied, even if [section 28\(3\)](#) could be construed as applying to married couples as well as unmarried couples, that Mr and Mrs A were not being treated together within the meaning of the subsection. Accordingly, [section 28\(3\)](#) cannot cover the present facts.

Section 28(6)

38. I should, for completeness, refer to [section 28\(6\)](#). On the assumption that Mr B was a donor of sperm, [section 28\(6\)](#) might apply if he had given such consent as is required by [paragraph 5 of Schedule 3](#), that is to say that he was not to be treated as the father of the twins. It is clear, however, from the consent forms filled in and signed by Mr B, which have been produced to the court, that he did not consent to his sperm being used to fertilise the eggs of Mrs A or anyone else other than his wife. His gametes were therefore not used in accordance with the terms of the consent given by him.

The Human Rights Act and the European Convention on Human Rights

39. I have heard submissions on articles 6, 8, 12 and 14 of the European Convention. In my judgment the articles of the Convention other than article 8 are not infringed and it is not necessary for me to explore them further. Clearly, however, article 8 is engaged and I shall therefore look in turn at the positions of Mrs B, Mr B, Mrs A and Mr A, and the twins.

Article 8

40. Miss Parker argued that both Mr and Mrs B had a right to respect for family life in relation to the twins. Miss Hamilton accepted that neither marriage nor living together were necessarily a requirement for establishing family ties. In [Kroon v Netherlands \(1994\) 19 EHRR 263](#) the European Court held that

“... exceptionally other factors may ... serve to demonstrate that a relationship has sufficient constancy to create *de facto* ‘family ties’.”

41. In that case there were three subsequent children. Article 8 makes no distinction between the legitimate and illegitimate family (see *Marckx v Belgium* (1979) 2 EHRR 330).

Mrs B

42. She is the wife of Mr B. She has no blood relationship with the twins and in so far as she has a right it is derived from her husband. She is, nonetheless, deeply involved in the consequences of the mistake which must be a source of great distress for her. Miss Parker submitted that the twins were the children of her husband and her feelings for her husband would extend to his children and this would engage her right to respect for a family life with them. She has, of course, had no *de facto* relationship with the twins and, in my judgment, her article 8 rights are not engaged at all.

Mr B

43. In view of my decision that [sections 28 and 29](#) of the 1990 Act are not applicable to the facts of this case, a consideration of whether Mr B has rights under article 8(1) is largely academic. All the submissions, except those of Miss Parker on behalf of Mr and Mrs B, emphasised that Mr B did not have a right to respect for family life in relation to the twins. If that submission be wrong, in my judgment, Mr B's alleged article 8(1) right has not in any event been infringed since his status as biological father is not to be displaced by the 1990 Act. In case, however, these proceedings go further, I shall give my views briefly.

44. Mr B is the biological father of the twins in circumstances in which he has had no opportunity to forge any relationship with them. Although he was clearly not a consenting sperm provider other than in a treatment process with his wife, it is, on the facts of this sad case, only the use of his sperm that connects him with the twins. In *M v the Netherlands* (1993) 74 D&R 120 the European Commission declared inadmissible a case on somewhat stronger facts than the present. In that case, the biological father agreed to be a sperm donor to a lesbian couple and after the birth of the child visited regularly and babysat on occasions. When he sought greater contact with the child and the couple broke off contact with him, his application to the courts was dismissed. On his application to the European Court, the Commission rejected it out of hand and stated at paragraph 1 of the judgment

“Family life ... implies close personal ties in addition to parenthood ... The Commission considers that the situation in which a person donates sperm only to enable a woman to become pregnant through artificial insemination does not of itself give the donor a right to respect for family life with the child.”

45. This was so despite the degree of contact M had had with the child. In this case, although Mr B was not a consenting donor, his contact with the twins has been non-existent. The approach of the Commission in *M* endorses its earlier decision in *K v United Kingdom* (1986) 50 D&R 199 . That judgment stated at page 207 that family life depends upon

“the real existence in practice of close personal ties.”

46. In *Re H; Re G (Adoption: Consultation of Unmarried Fathers)* [2001] 1 FLR 646 , I said at paragraph 38

“Not every natural father has a right to respect for his family life with regard to every child of whom he may be the father (see also [McMichael v United Kingdom \(1995\) 20 EHRR 205](#)). The application of Art 8(1) will depend upon the facts of each case.”

47. Miss Parker submitted that the decision of Scott Baker J in *Rose v Secretary of State for Health and Human Fertilisation and Embryology Authority* [2002] EWHC 1593 (Admin) and of the European Court in [Mikulic v Croatia \(4th September 2002; application number 53176/99; \[2002\] 1 FCR 720\)](#) should lead me to a contrary conclusion. In my judgment, *Rose* can be distinguished. It was a situation of children born by artificial insemination seeking to find their personal paternal identity which was an important part of their genetic makeup. The effect of *Rose* is limited to confirming the article 8(1) right of a child to establish details of his or her identity. I do not therefore consider that *Rose* extends the principle to the right of the parent as well as the right of the child. In *Mikulic* , the issue was the establishing of paternity by a child and the effect upon her personal identity which equally does not have the same effect upon the father.

48. Mr B does not have a right to respect for his family life which might have been breached if Mr A had been able to establish his presumption of fatherhood. I do not consider it necessary to go on to consider his right to respect for his private life, which Miss Hamilton accepts exists, since I do not consider it is sufficiently engaged by the issues in this case.

Mrs A and Mr A

49. Mrs A is the natural, biological mother of the children and it is beyond argument that her rights under article 8(1) are clearly engaged in this case. Mr A is in the position of the father and has established a close relationship with the twins whom he regards as his children. His rights are therefore also clearly engaged under article 8(1) (see for instance, *X Y & Z v United Kingdom* (1997) 24 EHRR 263 paragraphs 36 and 37). My interpretation of [sections 28 and 29](#) constitutes an interference with those rights of Mr and Mrs A. Mr A has been deprived of the presumption that he is the legal father. Miss Hamilton suggested that the infringement of their rights was not saved by article 8(2) and was incapable of being remedied.

50. The questions that I have to consider are: whether it is necessary to try to fit the facts of this case into [section 28\(2\) or \(3\)](#) ; whether it is indeed possible to do so; and, if not, whether consequently I am compelled to grant a certificate of incompatibility under [section 4 of the Human Rights Act 1998](#) , or whether article 8(2) would apply — in particular, whether there are other legal remedies that would meet the breach of Mr and Mrs A's article 8(1) rights. Miss Hamilton argued that the interference with the rights of Mr and Mrs A could not adequately be met by invoking alternative domestic family remedies. I do not agree with her submission on this issue.

51. In my judgment it is not necessary to strain the language of [section 28\(3\)](#) to meet the rights of Mr and Mrs A, nor is it necessary to consider the question of incompatibility (see below). Within the domestic family legislation there are remedies which can underpin and protect the position of Mr A with respect to the twins. Those remedies include applications by Mr and Mrs A for [section 8](#) orders under the [Children Act 1989](#) , the most immediate of which would be to make a residence order which would give Mr A parental responsibility. I made a residence order to Mr and Mrs A during the hearing of this case. Mr B does not have and cannot obtain parental responsibility without the agreement of Mrs A or a court order under [section 4 of the Children Act 1989](#) . He is not, as I understand it, seeking to make that application. Mr B is the legal father of children born outside a marriage, and he can therefore make a [section 8](#) application by virtue of [section 10\(4\) of the Children Act](#) . It is clearly a case to remain in the High Court. Such an application, if made, would be decided under the provisions of the [Children Act](#) , in which the welfare of the children is paramount (see [section 1\(1\)](#)).

Adoption

52. I recognise that, if [sections 28\(2\) and \(3\)](#) do not apply to Mr A, there is no legal mechanism that can make him the legal father of the twins unless there is an adoption order. Mr and Mrs A can apply under the [Adoption Act 1976](#) to adopt the twins. Miss Hamilton submitted that there would be an infringement of Mrs A's right if she was obliged to apply with Mr A for an adoption order. She would lose her right to be the natural and legal mother of the twins by becoming their adopted mother. Mr A would lose his right to be regarded as the legal father of the twins under the 1990 Act. She suggested that it could not be assumed that an adoption order would be made. In any event the period up to the conclusion of the adoption proceedings would be stressful and would in itself discriminate against and infringe the human rights of both Mr and Mrs A. She referred to paragraph 55 of the judgment of the European Court in *Marckx v Belgium* (above).

53. In accordance with the [Adoption Rules 1984, rule 15\(3\)](#) , and the guidance given in decisions such as *Re H ; Re G* (above), the court may direct that any other person be made a respondent to the process and Mr B could be made a respondent in the discretion of the court. As a father without parental responsibility Mr B could not be treated as a parent under [section 16\(1\)\(b\)\(ii\) and \(2\)\(b\) of the Adoption Act](#) . There would therefore be no statutory opposition to the adoption application and the court would focus solely on its fundamental duty under [section 6 of the Adoption Act](#) to promote the welfare of the twins throughout their childhood, and would make an adoption order if it is shown to be in the best interests of the twins to do so.

54. In my judgment the interference with the exercise of the rights of Mr and Mrs A under article 8(1) is in accordance with the law. It can properly be cured by the legal remedies available in our domestic law. The interference is necessary in a democratic society and pursues the legitimate aim of protecting the rights and freedoms of others, in this case the twins. It is proportionate in its aim to provide the necessary protection of the twins whose rights and welfare must predominate (see for instance [Johansen v Norway \(1997\) 23 EHRR 33](#)).

The Twins

55. Under article 8 a court must consider the position of children under two separate heads, their rights and their welfare. In the present case, the twins' rights and welfare are intertwined. The twins unquestionably have rights (see *Marckx v Belgium* (above)). They are clearly entitled to respect for their family life with their mother, Mrs A, and with Mr A whom they regard as their father. Through no fault of theirs, they have been born children of mixed race by a mistake which cannot be rectified. Their biological mother and their biological father are not married and cannot marry. They may not be able during their childhood to form any relationship with their biological father. They have inherited two cultures but, in reality, can only gain real benefit from one during their childhood. Of all the parties who have undoubtedly suffered from this mistake, the twins, who at present know nothing of it, have had their human rights most obviously and seriously infringed. Prior to this hearing they had a loving, stable and secure family. Mr A is registered as their father on the birth certificate. The application of [sections 28 and 29](#) would, as Miss Hamilton submitted, give the twins the certainty that Mr A is their legal father. If [section 28](#) applies they would have a complete sense of belonging to Mr A. If [section 28](#) is found not to apply then there is a period of uncertainty which is to their detriment. She suggested that their rights would be infringed by the adoption process and by being given the status of adopted children. They would be different from other donor sperm children and this would underline the mistake which occurred in this case. I agree that it is imperative that their rights and their welfare are secured and protected. In [Children Act](#) proceedings their welfare would be the paramount consideration and, similarly, in adoption proceedings the duty of the court would be to promote their welfare throughout their childhood.

56. In my judgment the twins' rights to respect for their family life with their mother and Mr A can be met by appropriate family or adoption orders and those orders would be proportionate to the infringements of their rights. The effect of the decision of the court that [sections 28 and 29](#) do not apply to their case does not create any greater difficulty for the twins than the unfortunate circumstances surrounding their conception and birth. Although they lose the immediate certainty of the irrebuttable presumption that Mr A is their legal father, they will remain within a loving, stable and secure home. They also retain the great advantage of preserving the reality of their paternal identity. In [Re H and A \(Paternity: Blood Tests\) \[2002\] 1 FLR 1145](#), Thorpe LJ said at paragraph 29

"I do not consider that that factual distinction begins to displace the points of principle to be drawn from the cases: first, that the interests of justice are best served by the ascertainment of the truth and secondly, that the court should be furnished with the best available science and not confined to such unsatisfactory alternatives as presumptions and inferences."

57. I respectfully agree and am certain that the truth in this case is more important to the rights of the twins and their welfare than a fictional certainty. This is not a sperm donor case and should not be treated as such when considering the position of the twins. To refuse to recognise Mr B as their biological father is to distort the truth about which some day the twins will have to learn through knowledge of their paternal identity. The requirement to preserve the truth will not adversely affect their immediate welfare nor their welfare throughout their childhood. It does not impede the cementing of the permanent relationship of each of them with Mr A who will Act as their father throughout their childhood. In my judgment the infringement of the twins' article 8(1) rights is met by the application of article 8(2) and it is proportionate to those rights for this court not to apply [section 28\(2\) or \(3\)](#).

Certificate of Incompatibility

58. I am entirely satisfied that the issue of potential incompatibility of the 1990 Act with the Human Rights legislation does not arise in respect of any of the parties to these proceedings. As I have set out above, the rights of Mr and Mrs B are not infringed. In relation to the rights of Mr and Mrs A, it would be possible, if I was compelled to do so by my duty to ensure the compatibility of domestic legislation with the [Human Rights Act](#), so to construe [section 28\(3\)](#) as to squeeze into it the present situation and thereby avoid a situation of incompatibility. But more to the point, there are alternative routes through domestic family legislation which can give to Mr and Mrs A adequate protection and relief from the unhappy situation in which they find themselves. The twins require love, security and protection within their existing family, all of which can be ensured by domestic legislation and they do not require, nor would it be to their advantage, for there to be any consideration of incompatibility.

Conclusion

59. For all the reasons which I have set out above, I shall not make a declaration that Mr A is the legal father. I shall not make a declaration of incompatibility of the 1990 Act under [section 4 of the Human Rights Act](#) . I shall adjourn the application of Mr B under [section 55A of the Family Law Act](#) . I shall hear submissions as to whether I should make any other declarations as sought by the NHS Trust or the Authority.

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