

Evans v. United Kingdom, 43 E.H.R.R. 21 European Court of Human Rights Case Summary

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Evans v. United Kingdom, 43 E.H.R.R. 21

European Court of Human Rights

Case Summary

Eric Goodemote†

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Introduction

This case examined whether a British law requiring the consent of both genetic parents to the implantation of embryos created through *in vitro* fertilization (IVF) is consistent with Articles 2, 8, and 14 of the European Convention on Human Rights. This case specifically determined whether a British woman could, over her former boyfriend's objections, use frozen embryos that she had created with him to impregnate herself after losing her ovaries to cancer. The case also determined generally whether state parties to the European Convention on Human Rights could require

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sperm-donor consent to IVF treatment without violating citizens' rights to private life and freedom from discrimination on the basis of disability. This was the United Kingdom's first major case involving parties to an IVF treatment.¹

In 2002,² Natallie Evans³ of Wiltshire, England began an action in the Family Division of the High Court of Justice of England and Wales⁴ to prevent a fertility clinic from destroying frozen embryos that she had created through a 2000 IVF procedure with her then boyfriend, Howard Johnston. Evans and Johnston ended their relationship in 2002, and Johnston withdrew his consent to use the embryos, placing the clinic under a legal obligation to destroy them. Evans argued that the British Fertilisation and Embryology Act 1990, which mandated the destruction of the embryos, was incompatible with the European Convention on Human Rights because it denied the embryos' right to life, interfered with Evans's right to private life, and discriminated against women who rely on IVF treatment to have children *vis-à-vis* women who do not rely on such treatment. The Family Division dismissed claims that the Act violated the European Convention.⁵ The Court of Appeal of England and Wales again dismissed Evans's claims, including her human rights claims. On appeal, the European Court of Human Rights⁶ deferred to the judgments of the Family Division and the Court of Appeal on the questions of the embryos' right to life and the regulation of IVF treatment because these claims were within the margin of appreciation. The court also agreed with the domestic courts' judgments that any discrimination against women resulting from the 1990 Act was justified.

A. Legal Background

The birth of the first child conceived through an IVF procedure caused considerable scientific and ethical controversy in the United Kingdom.⁷ The ensuing debate resulted in the British Parliament's enactment of the

1. *Evans v. Amicus Healthcare Ltd.*, [2003] EWHC 2161 (Fam), 2004 2 W.L.R. 713, 717 (Eng.).

2. *See id.* at 716.

3. The cases do not use Evans's first name and refer to Johnston only as "J." Their full names can be found at The Family Law News Blog website. *The Family Law News Blog: Evans v. United Kingdom - Embryo Possession*, http://familylaw.typepad.com/family_law_news/2006/03/evans_v_united_.html (last visited Feb. 24, 2007).

4. A useful chart detailing the structure of the English and Welsh court system exists on the Her Majesty's Courts Service website. *See Her Majesty's Court Service - Structure of HMCS*, <http://www.hmccourts-service.gov.uk/aboutus/structure/index.htm> (last visited Feb. 19, 2007).

5. *See generally Evans*, 2 W.L.R. 713.

6. The European Court of Human Rights is charged with enforcing the provisions of the European Convention on Human Rights, a treaty signed by all members of the Council of Europe. *See European Court of Human Rights Frequently Asked Questions*, <http://www.echr.coe.int/ECHR/EN/Header/Applicants/Information+for+applicants/Frequently+asked+questions/>.

7. *Evans v. United Kingdom*, 43 E.H.R.R. 21, 415 (2006), available at <http://www.echr.coe.int/echr/>.

Human Fertilisation and Embryology Act 1990.⁸ The 1990 Act attempts to navigate complex ethical and religious concerns surrounding artificial means of procreation while remaining flexible enough to respond to rapid medical and scientific technological developments.⁹ In addition to general rules regulating fertility treatment,¹⁰ the Act requires the consent of both gamete¹¹ donors for the storage of embryos created through an IVF procedure.¹² The 1990 Act allows either gamete donor to withdraw consent to continued storage of IVF embryos until the embryo's implantation.¹³

The law on this subject is far from uniform around the world. The Council of Europe Convention on Human Rights contains a broad requirement that participants in medical procedures provide free and informed consent.¹⁴ Many European countries permit both parties to veto continuation of an IVF procedure up to the point of the embryo's implantation, while others limit the man's right to terminate the procedure depending upon the stage the procedure has reached or the nature of the man's relationship with the female gamete donor.¹⁵ In the United States, no federal statute governs the question of withdrawal of consent to use IVF embryos and few state legislatures have directly addressed the issue, making state courts decisions the primary sources of American law on the subject.¹⁶

8. *Id.* at 416. The 1990 Act was the result of the work of a Committee of Inquiry and public consultation. *Id.* at 427. The 1990 Act contains various clauses and schedules (or appendices), and this case primarily concerns itself with Schedule 3. For the sake of simplicity and to avoid the use of unfamiliar terminology, this summary will refer to the challenged law as the 1990 Act and not as any of its subdivisions except in footnotes.

9. The policy considerations behind the 1990 Act were, as summarized by Judge Wall at trial:

- (1) the female right of self-determination in relation to a pregnancy; (2) the primacy of consent accorded in the modern age to the need for freely given and informed consent to medical interventions; (3) the period over which IVF takes place; (4) the special significance of parenthood; (5) the interests of the child; (6) equality of treatment between the parties; (7) the promotion of the efficacy and use of IVF and related techniques; and (8) clarity and certainty in the relations between partners.

Evans, 2 W.L.R. at 755.

10. See generally Human Fertilisation and Embryology Act, 1990, c. 37 (Eng.).

11. A "gamete" is a sperm or an egg that unites with its counterpart to produce an organism. The courts consistently use this term to refer to Evans's and Johnston's contributions to the creation of the embryos. See Dictionary.com, Gamete, <http://dictionary.reference.com/search?q=gamete> (last visited Feb. 24, 2007).

12. See Human Fertilisation and Embryology Act, 1990, c. 37, sched. 3, ¶ 5 (Eng.).

13. See *id.*, sched. 3, ¶ 2.

14. See *Evans*, 43 E.H.R.R. at 422.

15. Belgium, Denmark, Finland, France, Germany, Greece, Iceland, Sweden, Switzerland, and Turkey, either through legislation or clinical practice, grant male gamete donors power to withdraw consent similar to that which exists in the United Kingdom. Austria, Estonia, and Italy allow the male to withdraw consent only up to the point of fertilization. In Hungary, a woman is entitled to proceed with the treatment even in the face of divorce or death of her male partner unless the parties contract otherwise. In Spain, men can only revoke consent if married to and living with the woman being treated. *Id.* at 420.

16. The Supreme Court of Tennessee held that it would consider the intentions of the parties or any agreements they may have made on the matter before balancing the

Some state courts have relied on policy considerations surrounding reproductive rights in making their decisions while others have turned to contract law by deferring to instruments drafted by the parties at the time of the original agreements to participate in the procedures.¹⁷

B. Facts

In 2000, Evans and Johnston were engaged in treatment at the Bath Assisted Conception Clinic because they experienced difficulties conceiving a child.¹⁸ Having a biological child was Evans's "overwhelming ambition."¹⁹ During an examination at the clinic, doctors discovered that she was developing ovarian cancer, and the only way she could conceive her own child would be for Evans and Johnston to undergo an IVF procedure because her ovaries had to be removed as quickly as possible.²⁰ A nurse at the clinic explained that under the 1990 Act, either party could withdraw consent to the continued storage of embryos created through IVF.²¹ Evans claims that she discussed the possibility of freezing some of her eggs for future use, but she decided against it upon hearing that the Bath Assisted Conception Clinic did not perform the procedure and that such a procedure would have a low chance of success. Further, when speaking with the nurse, Mr. Johnston assured Evans that they would not break up and that he was willing to be a father.²² As required by the 1990 Act, the couple signed forms indicating that they had received the relevant counseling and understood that consent to the use of the embryos could be withdrawn until they were used.²³ The consent forms also indicated that Johnston had consented to be treated "together" with Evans, and that he specifically declined consent to allow the clinic to treat Evans with the embryos alone or with someone else.²⁴ The procedure successfully created six embryos.²⁵ Evans and Johnston ended their relationship in 2002, but Evans argued that following their breakup Johnston agreed that she could continue to

relative interests of the parties. Courts in New York and Washington have also held that prior agreements by the parties take precedence, while Massachusetts and New Jersey allowed a man and a woman respectively to order the termination of treatment in spite of agreements to the contrary. *See id.* at 420-21 (citing *Davis v. Davis*, 842 S.W.2d 588, 572 (1992); *Kass v. Kass*, 673 N.Y.S.2d 350 (1998); *A.Z. v. B.Z.*, 725 N.E. 2d 1051 (2000); *J.B. v. M.B.*, 170 N.J. 9 (2001); *Litowitz v. Litowitz*, 146 Wash.2d 514 (2002)).

17. *See id.* at 421.

18. *See id.* at 411; BBC World News, *It's My Only Chance to Have a Baby*, <http://news.bbc.co.uk/2/hi/health/2250799.stm> (last visited Feb. 24, 2007).

19. *Evans*, 43 E.H.R.R. at 424.

20. *See* BBC World News, *supra* note 18.

21. *See Evans*, 43 E.H.R.R. at 411. The clinic staff did not recall having discussed this with Evans but said that they would have told her that the clinic would not perform such a procedure and that it would have a low chance of success. *Evans*, 2 W.L.R. at 731.

22. *See Evans*, 43 E.H.R.R. at 411-12.

23. Specifically, Johnston's portion of the agreement consisted of separate consents to the use of his sperm to fertilize Evans's eggs and the storage of the embryos. *Id.* at 412.

24. *Evans*, 2 W.L.R. at 739-40.

25. *See Evans*, 43 E.H.R.R. at 412.

use the embryos on the condition that she sign an agreement absolving him of any financial or parental obligations to any children the procedure produced, terms which she says she accepted.²⁶ Nevertheless, the couple never signed such an agreement,²⁷ and in July of 2002 Johnston informed the clinic that he no longer consented to the storage of the embryos and requested that the clinic destroy them as required by the 1990 Act.²⁸

I. Trial Case

A. Overview

Upon receiving notification from the clinic that the embryos would be destroyed, Evans filed an action with the Family Division of the High Court.²⁹ Evans's action sought: (i) a declaration that Johnston could not alter the consent he had originally given to the storage of the embryos; (ii) an injunction requiring Johnston to restore his consent to the use of the embryos; (iii) a declaration that the embryos could be stored for the entire ten-year period permitted by the 1990 Act; (iv) a declaration that Evans could use the embryos for the entirety of the storage period; (v) a declaration that the challenged portion of the 1990 Act was incompatible with the Human Rights Act 1998; and (vi) an order that the embryos be preserved until the clinic changed its position and permitted her to use the embryos.³⁰ Evans also argued that her detrimental reliance on Johnston's representations that he wanted to be a father and that they would not split up estopped him from withdrawing his consent to the use of the embryos.³¹

Evans argued that the 1990 Act was incompatible with the European Convention on four grounds: (i) it interfered with her rights to private and family life under Article 8 of the Convention; (ii) it interfered with her right to start a family under Article 12; (iii) it discriminated against Evans as a disabled person requiring IVF treatment to get pregnant in violation of Article 14; and (iv) it interfered with the embryo's right under Article 2 and

26. BBC World News, *supra* note 18. Such an agreement would have been void under British law. *Evans*, 2 W.L.R. at 768 (citing the Child Support Act, 1991, c. 48 (Eng.)).

27. BBC World News, *supra* note 18.

28. *Evans*, 43 E.H.R.R. at 412.

29. *Id.*

30. *Evans*, 2 W.L.R. at 719. The Human Rights Act 1998 incorporates the provisions of the European Convention on Human Rights into British law. See *Rights Brought Home: The Human Rights Bill*, <http://www.archive.official-documents.co.uk/document/hoffice/rights/intro.htm>. This case summary will therefore discuss the 1998 Act challenge as a Convention challenge. The initial High Court proceeding was heard together with a similar IVF consent challenge by another woman, Lorraine Hadley. Hadley's ex-husband also withdrew his consent to use embryos created through an IVF procedure with his sperm. Unlike Evans, Hadley had a daughter from a previous relationship (she had since developed fertility problems) and did not appeal her case. BBC World News, *Woman 'Cannot use IVF Embryos'*, <http://news.bbc.co.uk/2/hi/health/3835291.stm> (last visited Feb. 24, 2007).

31. *Evans*, 2 W.L.R. at 720.

any applicable rights it might have under Article 8.³²

Johnston, on the other hand, contended that the 1990 Act gave him an unconditional right to withdraw consent to the storage of the embryos up to the point of use, and that use in this context meant implantation in Evans.³³ He further argued that rights under the Convention were not involved here, and that even if they were, the interference with Evans's Article 8 rights was justified in order to protect his own Article 8 rights.³⁴

The clinic did not take a position regarding Evans's claim, but it provided informative medical evidence.³⁵

The President of the Family Division³⁶ ordered that the Human Fertilisation and Embryology Authority³⁷ and the Secretary of State for Health³⁸ be joined as parties to the case because of its importance.³⁹ Both parties argued that the 1990 Act barred Evans's claim.⁴⁰ The two authorities reiterated the arguments that the 1990 Act allowed Johnston to revoke his consent and that the Act did not breach Convention rights.⁴¹ They also argued in the alternative that the consent given by Evans and Johnston was consent to be treated together, and the couple's separation rendered that consent no longer meaningful.⁴²

On October 1, 2003, Judge Wall of the Family Division dismissed Evans's claim.⁴³ Judge Wall addressed three issues: (i) whether the consent given to being treated together could still be effective after the couple's separation; (ii) whether the embryos had already been "used," making any further consent from Johnston unnecessary; and (iii) whether the challenged section of the 1990 Act was incompatible with provisions of the European Convention on Human Rights.⁴⁴

Having found no basis outside the Convention for a judgment in favor of Evans, Judge Wall considered the Convention claims, which he believed to be the most important parts of the case.⁴⁵

32. *Id.* at 719, 752.

33. *Id.* at 719.

34. *Id.* at 720.

35. *See id.*

36. The president, or head, of the Family Division was Dame Elizabeth Butler-Sloss. She was succeeded in January 2005 by Sir Mark Potter. *President of the Family Division Appointment*, <http://www.number-10.gov.uk/output/Page6902.asp>.

37. The 1990 Act created the Human Fertilisation and Embryology Authority to monitor, license, and regulate fertility clinics. <http://www.hfea.gov.uk/cps/rde/xchg/SID-3F57D79B-8A308198/hfea/hs.xsl/385.html>.

38. The Secretary of State for Health heads the Department of Health, the government department concerned with healthcare issues. *FAQ's about the HFEA - Fertility Treatment & Clinics*, <http://www.dh.gov.uk/Home/fs/en>.

39. *Evans*, 2 W.L.R. at 720.

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.* at 781.

44. *See generally id.*

45. *Id.* at 751. Specifically, Evans's attorneys challenged § 12(c) of the Act (requiring license to use embryos to comply with Schedule 3 of the 1990 Act) ¶ 6(3) of Schedule 3 (requiring consent of both donors to use of embryos), ¶ 8(2) of Schedule 3

B. Article 2 Claim

First, Judge Wall concluded that the challenged portions of the 1990 Act did not engage Article 2 of the Convention's guarantee that everyone has a right to life as Evans's counsel asserted.⁴⁶ Evans's counsel argued that while an embryo was not a human life, it nonetheless had a "qualified right to life," aspects of which required allowing it to live as long as either gamete donor wished and making it available for implantation.⁴⁷ While Judge Wall was unable to find case law on the point of personhood of an embryo, available cases held that a fetus was not a human life and had no interests separate from those of its mother.⁴⁸ If a fetus was not a person with a right to life, Judge Wall reasoned, an embryo could not possibly have such a right either.⁴⁹ Judge Wall observed further that even though issues surrounding the treatment and legal status of embryos were important, the fact that neither British nor European law recognized embryos as human lives made it inappropriate to deal with such questions under Article 2 of the Convention.⁵⁰

C. Article 8 Claim

The question of whether the provisions of the 1990 Act violated Evans's Article 8 rights to private life proved more complicated.⁵¹ Accord-

(requiring consent of both donors to storage of the embryos), and ¶ 4(1) of Schedule 3 (allowing variation or withdrawal of consent). See also European Convention on Human Rights arts. 2, 8, 14, Nov. 4, 1950, 213 U.N.T.S. 222. Additionally, Judge Wall held that implantation of the embryos in Evans could not constitute treatment "together" after the couple's breakup and noted that the examination of the implication for a potential child's welfare required by the 1990 Act could present a potential problem. *Evans*, 2 W.L.R. at 745. Judge Wall also rejected Evans' argument that by being created and stored, the embryos had already been "used" and that it was too late to withdraw consent. Judge Wall instead interpreted the creation and storage of the embryos as mere preparation for use. *Id.* at 750-51. Evans's promissory estoppel claim also failed to impress Judge Wall because such an agreement would be unenforceable in any case, and it was unclear that Evans relied on Johnston's promises (if in fact they were promises at all) given that no alternative existed for Evans to have a biological child. *Id.* at 775-79. These issues did not concern provisions of the European Convention and were not among those that Evans appealed to the European Court of Human Rights.

46. *Evans*, 2 W.L.R. at 752.

47. *Id.*

48. *Id.* at 752 (citing *In re F (in utero)* 1988 2 W.L.R. 1288; *Paton v. United Kingdom*, 3 E.H.R.R. 408 (1980)).

49. *Id.* at 753.

50. *Id.* at 753-54.

51. Article 8 of the European Convention on Human Rights states: "(1) Everyone has the right to respect for his private and family life, his home and his correspondence; and (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." European Convention on Human Rights, art. 8, Nov. 4, 1950, 213 U.N.T.S. 222. Judge Wall regarded private and family life as two separate matters, with this case only engaging the former, since both Evans and Johnston were adults living separately and the embryos were not people. *Evans*, 2 W.L.R. at 754.

ing to the Secretary of State for Health, policy considerations in favor of bright-line rules included the promotion of certainty and reduction of litigation in a sensitive area of law. These factors informed the strict consent rules in the 1990 Act.⁵² The head of the Department of Health, presenting these considerations on behalf of the secretary, credited these bright-line rules with the reduced frequency of this type of litigation as compared to the United States.⁵³

Evans's counsel framed the 1990 Act's consent provisions as providing a "male veto" over the clinic's ability to store the embryos and a woman's ability to use them.⁵⁴ By permitting Johnston's withdrawal of consent to prevent Evans from using the embryos, the state was interfering with Evans's private life in a way not justified by the public interest needs described in Article 8.⁵⁵ Evans's counsel was willing to regard the regulation of the clinic and the adoption of relevant licensing and treatment standards for use of the embryo as within the state's legitimate interest, but counsel maintained that allowing Johnston to order the embryos destroyed after he had previously consented to their use served no public interest.⁵⁶

Evans's counsel also attempted to convince the court that the policy considerations behind the 1990 Act pointed to a conclusion in favor of Evans.⁵⁷ First, the policy consideration of allowing women to make their own determinations in matters of pregnancy dictated that Johnston not be permitted to withdraw his consent to the use of the embryos. After all, Evans's counsel argued, if a man's right to consent terminates when the embryo is created in a natural pregnancy, it should end after the embryo is created in an IVF pregnancy.⁵⁸ Second, the policy of furthering the primacy of consent would dictate that Johnston's right to give irrevocable consent, with his intention to do so being indicated by his reassurances to Evans, be honored by not permitting him to withdraw his consent.⁵⁹ Third, the policy of recognizing the special significance of parenthood would not be diminished by a decision in favor of Evans because men frequently become fathers without their consent, and the only public interest in whether men became fathers was their financial obligation to care for the child.⁶⁰ Fourth, as to the policy of equality between partners, allowing men to give irrevocable initial consent would not diminish their equality.⁶¹ Lastly, as to the policy of furthering certainty between the parties, Evans's counsel explained that a rule allowing a man to give irrevocable consent would be just as bright-line as the existing rule, and that in any case being

52. *Evans*, 2 W.L.R. at 755.

53. *Id.* at 755.

54. *Id.* at 756.

55. *Id.* at 756-57.

56. *Id.* at 757.

57. *Id.* at 758.

58. *Id.*

59. *Evans*, 2 W.L.R. at 758.

60. *Id.* at 758-59.

61. *Id.* at 759.

a bright-line rule did not automatically make a rule acceptable.⁶²

Additionally, Evans's counsel argued that the 1990 Act's bright-line rules could not be proportionate protections of the public interest for Article 8 purposes because they brooked no exceptions for the special circumstances of parties involved.⁶³ Evans's counsel focused on Article 8's requirement that interference with the right to private life needed to be *necessary* to protect public interest, claiming that the 1990 Act's consent provisions did not meet this requirement in Evans's case since there would have to be necessity to prevent Evans from becoming a mother.⁶⁴

Counsel for the Secretary of State for Health noted that situations like these were precisely those in which the European Court of Human Rights would grant the state a wide margin of appreciation.⁶⁵ Decisions made by democratically-elected governments in areas of social policy where no Europe-wide consensus exists were, according to the secretary's counsel, precisely the sort of decisions on which state's judgment should receive deference.⁶⁶ He also argued that there was no reason for the male's right to withdraw consent to terminate at the point of providing semen rather than at the point of implantation in the woman, particularly since it would be at the latter point that both a naturally impregnated woman and a woman impregnated through IVF treatment would be in the same position.⁶⁷ Moreover, counsel for the secretary argued that just because children are frequently born against the wishes of their fathers does not mean that this is a desirable outcome.⁶⁸ Counsel for the Secretary and Johnston further emphasized the Convention's Article 14 requirement that Convention rights apply without sex discrimination and that allowing the female gamete donor to have complete control over the fate of the embryo while in storage would be an inequitable solution compared with the existing rule allowing the male and female gamete donors an equal opportunity to veto use of the embryo.⁶⁹ Counsel for the secretary also defended the bright-line consent rule as designed to prevent litigation like this in the future and to allow parties to IVF treatment as well as treatment providers to be certain about how rules would apply.⁷⁰ Evans's personal circumstances of

62. *Id.*

63. *Id.* at 760 (citing *Regina (Mellor) v. Sec. of State for the Home Dept.* [2002] QB 13, 2001 3 W.L.R. 533).

64. *Id.* at 761-62.

65. *Id.* at 763 (citing "*H*" v. Human Fertilisation & Embryology Authority [2002] EWCA Civ 20). The concept of a "margin of appreciation" in European Court of Human Rights cases refers to the Court's practice of deferring to the judgment of the domestic authorities on human rights issues for which no Europe-wide consensus exists. See *Handyside v. United Kingdom*, 1 E.H.R.R. 737 (1976). The court commonly invokes deference in cases involving complex issues of social policy in which the Court believes that the domestic courts are in a better position to evaluate the issues in light of the needs of the domestic courts' society. HUMAN RIGHTS 564-66 (Louis Henkin et al. eds., 1999).

66. *Evans*, 2 W.L.R. at 763.

67. *Id.* at 765.

68. *Id.*

69. *Id.* at 766-67.

70. *Id.* at 766.

wanting to have a child did not outweigh the policy concerns in favor of the bright-line rule because the effect of the 1990 Act, counsel for the secretary argued, was to allow Johnston to determine whether he would or would not be a father, not to deprive Evans of the chance to be a mother.⁷¹

Judge Wall found the 1990 Act's interference with Evans's private life proportionate to the policy goals and necessary to protect Johnston's right to protection from interference in his private life.⁷² In agreeing with the secretary and Johnston, Judge Wall dismissed Evans's characterization of Johnston's right to withdraw consent as a "male veto" because she shared that right with him.⁷³ Wall noted that section 13(5) of the 1990 Act required consideration of the welfare of any potential child and he did not relish the possibility of a child having a father who would not play any role in his or her life aside from providing financial support.⁷⁴ The weight of the policy considerations in favor of the bright-line rule persuaded Judge Wall that Evans's approach of allowing the male gamete donor to provide only irrevocable consent was inappropriate.⁷⁵ Wall further expressed a preference for deferring to Parliament's judgment in sensitive areas of law.⁷⁶

D. Article 12 Claims

Judge Wall quickly dismissed the Article 12 claim because it invoked many of the same arguments as the Article 8 claim.⁷⁷ Since Evans's dispute with Johnston did not involve marriage, Judge Wall pointed out that an Article 12 challenge would require the assumption that the right to start a family was a guarantee separate from the right to marry.⁷⁸ Even if he made that assumption, Judge Wall explained, all the state must guarantee is the right of access to IVF treatment—not actual access, affordability, or success—and by establishing the right of access to treatment, the 1990 Act met the requirements of Article 12.⁷⁹

E. Article 14 Claims

Judge Wall next examined the claim that the 1990 Act made Evans a victim of discrimination in violation of Article 14. Evans did not claim that Article 14 discriminates against women *vis-à-vis* men, but rather against women who, because of disability, need IVF treatment to conceive *vis-à-vis* women who do not.⁸⁰ Evans's counsel stated that the differences between Evans and a naturally pregnant woman, such as the fact that Evans's

71. *Id.*

72. *Id.* at 769.

73. *Evans*, 2 W.L.R. at 767.

74. *Id.* at 768 (citing Human Fertilisation and Embryology Act, c. 37, § 13(5)).

75. *Id.* at 769.

76. *Id.* at 769-70.

77. *Id.* at 770. Article 12 guarantees the right to marry and start a family. European Convention on Human Rights art. 12, Nov. 4, 1950, 213 U.N.T.S. 222.

78. *Evans*, 2 W.L.R. at 770.

79. *Id.*

80. *Id.* at 770-71.

embryo was outside the womb while a pregnant woman's embryo would be inside the womb, did not justify treating Evans differently by allowing the male gamete donor to order the disposal of the embryo.⁸¹ The Secretary countered that this case did not contain three out of the four necessary elements for an Article 14 discrimination claim.⁸² The Secretary's counsel argued that the comparison with a naturally pregnant woman was inappropriate because a woman who has become pregnant through an IVF procedure does have the same rights with respect to the embryo.⁸³ Evans was not pregnant with the embryo, however, so there was in fact no difference in treatment and Evans was not truly in an analogous position.⁸⁴ Moreover, the Secretary emphasized that the 1990 Act does not differentiate between disabled women in need of IVF treatment and those who are not disabled, since non-disabled women using IVF treatment would be subject to the same regulations; rather, the Act discriminates between men and women whose partners have withdrawn their consent to use the embryos and those who have not.⁸⁵ Judge Wall agreed with the Secretary and dismissed all Convention claims.⁸⁶

II. European Court of Human Rights Case

A. Appeal

Having lost at trial, Evans filed an appeal with the Court of Appeal⁸⁷ in December of 2003.⁸⁸ Although one of the three judges on the court agreed with Evans that in the matter of the Article 14 claim the true comparators were an infertile woman and a fertile woman, she felt that the different treatment was nevertheless justified, and the Court of Appeal did not reverse any of the judgments of Family Division.⁸⁹ In November 2004, the House of Lords refused Evans's appeal, leaving appeal against the United

81. *Id.* at 771.

82. *Id.* at 771-72 (citing *Regina (Hooper) v. Sec. of State for Work & Pensions* [2003] 2 EWCA 813, 1 W.L.R. 2623, which provided the following questions to determine if there has been discrimination: (1) Do the facts fall within one or more of the substantive Convention provisions? (2) If so, was there different treatment as respects that right between the complainant on the one hand and other persons put forward for comparison? (3) Were the chosen comparators in an analogous situation to the complainant's situation? (4) If so, did the different treatment have an objective and reasonable justification? The secretary's counsel said that Evans' case only met the first criterion).

83. *Id.* at 772.

84. *Id.*

85. *Evans*, 2 W.L.R. at 772.

86. *Id.*

87. The Court of Appeal of England and Wales hears appeals from the High Court and several other trial courts. *Court of Appeal*, <http://www.hmcourts-service.gov.uk/cms/1235.htm>.

88. *Evans v. Amicus Healthcare Ltd.*, [2004] EWCA 727, 2004 3 W.L.R. 681, 72 (Eng.).

89. *Id.* at 103-04.

Kingdom to the European Court of Human Rights as her final option.⁹⁰

The European Court of Human Rights considered: (i) whether Evans's appeal was application was admissible at all; (ii) whether the 1990 Act violated any Article 2 right to life held by the embryo; (iii) whether the 1990 Act violated Evans's Article 8 right to private life; and (iv) whether Evans was the victim of discrimination in violation of Articles 8 and 14 together.⁹¹ The Court reviewed the relevant portions of the Convention and briefly surveyed the laws of Europe, the United States, and Israel on the subject.⁹²

B. Admissibility and Article 2 Claim

Judging that Evans raised sufficiently serious questions of law, the Court briefly and unanimously dismissed the United Kingdom's argument that Evans's claim was so manifestly ill-founded that it was inadmissible.⁹³ The Court also unanimously dismissed Evans's Article 2 claim because the question of when human life begins was within the government's margin of appreciation.⁹⁴ The United Kingdom did not recognize embryos as human lives and, therefore, the 1990 Act did not violate Article 2.⁹⁵

C. Article 8 Claim

A five-to-two majority of the Court found that the 1990 Act was within the margin of appreciation for the purposes of Article 8.⁹⁶ In addition to emphasizing its wide margin of appreciation, the state argued that the Court had previously decided that bright-line rules in cases like this were acceptable,⁹⁷ allowing exceptions in cases like Evans's would frustrate Parliament's legitimate policy objective of ensuring bilateral consent to IVF treatment.⁹⁸ Evans admitted that the state had a wide margin of appreciation in legislating on IVF treatment, but counsel argued that since the state had decided to permit IVF treatment, it had now moved into an area where private, rather than public, interests were being balanced.⁹⁹ Evans asserted that because the state chose to intervene in the balancing of private interests when it did not have to do so, it had to adopt a more flexible scheme than that offered by the 1990 Act.¹⁰⁰ Evans also factually distinguished

90. *Evans*, 43 E.H.R.R. at 415. For a case to receive consideration by the European Court of Human Rights, an applicant must exhaust all possibilities of domestic remedy. *European Court of Human Rights Frequently Asked Questions*, *supra* note 6.

91. *Evans*, 43 E.H.R.R. at 409-10. The court also ordered that the embryos be preserved until the judgment was final.

92. *Id.* at 419-22.

93. *Id.* at 423.

94. *Id.* (citing *Vo v. France*, 40 E.H.R.R. 12 (2005)).

95. *Id.*

96. *Id.* at 410.

97. *Id.* at 424-25 (citing *Odièvre v. France*, 38 E.H.R.R. 43 (2004), which involved keeping the identity of parents who give children up for adoption secret, and *Pretty v. United Kingdom*, 35 E.H.R.R. 1 (2002), which involved the right to die).

98. *Evans*, 43 E.H.R.R. at 424-25.

99. *Id.* at 424.

100. *Id.* at 425.

the cases in which the Court had previously permitted bright-line rules: *Pretty* because it dealt with a large class of claimants, and *Odièvre* because it involved a more obvious public interest.¹⁰¹

In holding for the state on the Article 8 claim, the Court characterized Evans's argument as a claim that the margin of appreciation diminishes when the state is balancing the interests of individuals.¹⁰² The Court stressed that it was deferring to the judgment of domestic authorities in an area where no European consensus existed and where medical technology and ethical issues were highly sensitive.¹⁰³ In such an area, the Court reasoned, the margin of appreciation extended to both the regulation of IVF treatment in general and the intervention in this case in particular.¹⁰⁴ The Court also recounted that the 1990 Act was the result of detailed examination of the issues by Parliament, which consciously decided to adopt a policy of allowing parties to withdraw consent up to the point of implantation.¹⁰⁵ The Court also rejected Evans's argument that her case was distinct from *Pretty* and *Odièvre*, and it found that the overriding principle from those cases was that states are entitled to enact rules without exceptions for hard cases so as to ensure that the public could have confidence in the law in difficult circumstances.¹⁰⁶ Furthermore, the Court did not find it self-evident that the man and woman in an IVF consent case should not be treated equally or that the balancing of interest could not necessarily fall in favor of the man.¹⁰⁷ Rather, the Court acknowledged that the United Kingdom's courts or Parliament could have balanced the interests otherwise, as did the Israeli Supreme Court in *Nachmani v. Nachmani*,¹⁰⁸ but, like many other members of the Council of Europe, it did not.¹⁰⁹

D. Article 8 Dissent

Two judges dissented from the Court's judgment on Article 8. First, the dissenters argued, the Court failed to appreciate that the interests at stake when the Court endorsed the bright-line rules in *Pretty* and *Odièvre* were vastly different from those in this case.¹¹⁰ They also pointed out that, in *Pretty*, the bright-line rule prohibiting assisted suicide was not disproportionate, in part because it provided for flexibility in sentencing.¹¹¹ Here, the law provided no flexibility. The dissent could not understand

101. *Id.* at 424-25.

102. *Id.* at 426-27.

103. *Id.* at 427-28.

104. *Evans*, 43 E.H.R.R. at 427-28.

105. *Id.* at 427-28.

106. *Id.* at 428.

107. *Id.* at 428-29.

108. *Id.* at 429 (citing CA 5587/93 *Nachmani v. Nachmani* [1995] IsrSC 50(4) P.D. 661, which held in a similar case that the woman's interest in using her last opportunity to have a biological child outweighed the man's interests).

109. *Id.* at 429.

110. *Id.* 431-32.

111. *Id.* at 432 (citing *Pretty*, 35 E.H.R.R. at 39).

why the majority approved a bright-line rule that allowed flexibility in a case that involved the “right to death,” which is not directly guaranteed by the Convention but only inferred from Article 2, while, with an uncompromising rule, it eliminated the right to be treated with IVF, which the dissent believed to fall more directly within the ambit of Article 8.¹¹² The dissent regarded the state’s act of prohibiting the implantation of the embryo as destroying Evans’s right to have a child,¹¹³ and the dissenting judges would have preferred that the Court balance the interests of both Evans and Johnston.¹¹⁴ The two judges also noted that the clarity and certainty of a bright-line rule do not excuse the rule if it happens to be a bad one.¹¹⁵ The dissent concluded that a fair balancing of the individual interests in this case should yield a rule whereby

the interests of the party who withdraws consent and wants to have the embryos destroyed should prevail (if domestic law so provides), unless the other party: (a) has no other means to have a genetically-related child; and (b) has no children at all; and (c) does not intend to have recourse to a surrogate mother in the process of implantation.¹¹⁶

E. Article 14 Claim

The Court unanimously did conclude that the 1990 Act did not violate Article 14 in conjunction with Article 8. The Court noted that differences in treatment that objectively and reasonably were justified were not discrimination under Article 14, and that states enjoyed a margin of appreciation in determining what differences in circumstances justify differences in treatment.¹¹⁷ The Court found that the same reasons for dismissing the Article 8 claim showed that the different treatment objectively was justified.¹¹⁸

Conclusion

In concluding that (i) the definition of human life is within the margin of appreciation; (ii) states have a broad margin of appreciation in deciding how to regulate consent matters in IVF treatment; (iii) states are entitled to decide that policy considerations justify bright-line rules as opposed to consideration of individual cases; and (iv) allowing withdrawal of consent to use IVF embryos is not discrimination against women who rely on IVF treatment to have a biological child, the European Court of Human Rights recused itself from the controversy of how long male gamete donors should have to withdraw their consent to IVF implantation and declined to impose a uniform solution in an area where domestic courts in different states

112. *Evans*, 43 E.H.R.R. at 432.

113. *Id.* at 433.

114. *Id.* at 433-34.

115. *Id.* at 435-36.

116. *Id.* at 426 (italics in original).

117. *Id.* at 430.

118. *Id.*

have balanced the issues differently. Thus, the Court decided not only that the state has the privilege of regulating IVF treatment but also that the state can appropriately choose how to balance the conflicting interests of parties that can arise in such treatment, even at the individual level.

Further, the judgment involves issues in the United Kingdom beyond those derived directly from the European judgment—particularly because the domestic courts found the policy concerns involved to be so strong. The decision involves contract law in the field of reproductive sciences since the trial and appellate court decisions endorsed by the European Court have judged the strength of the policy concerns such that they can override contractual agreements between individuals. Indeed, the courts have found that policy strong enough to justify its operation in all circumstances as a bright-line rule. This decision is bound to have interesting consequences at both the frontiers of medical science and the law.

