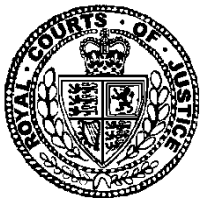

Neutral Citation Number: [2024] EWHC 3004 (Fam)

Case No: FD24F00021

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22 November 2024

Before:

MRS JUSTICE THEIS DBE

- -

Between:

'EF'	**Applicant**
- and -	
Human Fertilisation and Embryology Authority	**Interested Party**

- -
- -

Jenni Richards KC and Stephanie David (instructed by **Hill Dickinson LLP** and **LDMH Partners**) for the **Applicant**
Claire Watson KC (instructed by **Human Fertilisation and Embryology Authority**) for the **Interested Party**

Hearing: 21 October 2024

- -

Approved Judgment

.....

This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the applicant and members of his family must be strictly preserved. All persons, including representatives of the media and legal bloggers, must ensure that this condition is strictly complied with. Failure to do so may be a contempt of court.

Mrs Justice Theis DBE:

Introduction

1 The court is concerned with an application for a declaration by EF that it is lawful for him to use an embryo created using his sperm and his late wife's eggs in treatment with a surrogate. The application is founded on the European Convention of Human Rights (EHCR), given effect by the Human Rights Act 1998 (HRA 1998). Consequently it is outside the scheme set out by the Human Fertilisation and Embryology Act 1990 (HFEA 1990).

2 The Human Fertilisation and Embryology Authority (HFEA) are an interested party and oppose the application.

3 The embryo was created in 2017 during the course of treatment being undertaken by EF and AB at a clinic licensed by the HFEA and remains stored by them. Tragically, EF's wife, AB, died unexpectedly along with the couple's youngest daughter. It is against that background that this application is made.

4 In summary, the application is based on the decision preventing EF from using the remaining embryo which amounts to an interference (i) with his Article 8 rights, alone and as interpreted in light of Article 9, and (ii) with those rights when considered in the context of Article 14. Such interference with those rights, in the circumstances of this case, would be disproportionate and by s 3 HRA 1998 the court is required, so far as possible to do so, to read and give effect to primary and subordinate legislation in a way which is compatible with Convention Rights. What is sought here is a declaration to the effect that *'paragraph 1 of Schedule 3 to the 1990 Act should be construed pursuant to s 3 HRA 1998 to dispense with the need for written and signed consent'.*

5 The Applicants rely on the principles set out in the previous decision of this court in *Jennings v Human Fertilisation and Embryology Authority* [2022] EWHC 1619 (Fam). The Applicant's submit the WT form signed by AB is identical to the one signed in the

Jennings case where the court determined it was not sufficiently clear and therefore did not give Ms Choya sufficient opportunity to provide consent in writing to use of the embryos with a surrogate. The relevant form was revised by the HFEA following the decision in *Jennings.* In addition the Applicant says, like in *Jennings*, there is no ambiguity regarding AB's engagement in fertility treatment with the aim of achieving the birth of a child with her husband and no doubt she would have wished that process to continue after her death. This is different than the factual situation faced by Sir Andrew McFarlane in *G v Human Fertilisation and Embryology Authority* [2024] EWHC 2453 (Fam) where the general approach in *Jennings* was approved.

6 As well as considering the detailed evidence in the court bundle I heard oral submissions on 21 October 2024 and reserved judgment until today.

Relevant background

7 EF and AB grew up in Country G, they were each the eldest of three siblings in their respective families. They married in 2005.

8 They are each active members of the J religion which has as one of its core beliefs the sanctity of life and the divine purpose of all life forms. A priest from J religion has filed a detailed statement describing the couples' deep faith, in particular in the context of conceiving and raising a family evidenced by her reaction when she had an earlier miscarriage. AB believed every living being has a soul and in the J religion's belief in reincarnation, and considered the divine soul enters the embryos at the point of conception.

9 EF and AB discussed having children, they both came from large families, had three siblings and wished to replicate that pattern for themselves. Sadly, AB suffered a miscarriage in 2008. She became pregnant in 2009 but had medical complications during the pregnancy that resulted in X, their eldest daughter, being born at only six months gestation.

10 They wanted a sibling for X. They tried to conceive naturally for a number of years, were then advised to seek specialist advice and were referred to the King's Unit (the Clinic) in 2017.

11 Treatment commenced in 2017, two healthy embryos were created. Following an embryo transfer AB was confirmed pregnant in May 2017 and gave birth to Y shortly thereafter.

12 At their first consultation with the Consultant Gynaecologist the couple were advised about the proposed IVF treatment, the risks and the chances of success, the storage of embryos remaining after treatment and the availability of counselling. At the next consultation with nurse M, their consents were discussed.

13 The unexpected death was after Y's birth when AB and Y died.

Consent forms

14 Before the treatment commenced EF and AB were given a number of consent forms to sign. Some of them were pro forma HFEA consent forms, others were specific to the clinic.

HFEA MT Form

15 EF completed the HFEA MT Form '*Men's consent to treatment and storage form'* (version 4, 1 April 2015). AB completed the HFEA WT Form *'Women's consent to treatment and storage form'* (version 6, 20 April 2015).

16 The MT Form records a man's consent regarding certain uses of his sperm and storage of the embryos created with his sperm. In the event of the man's death or mental incapacity, the form states that:

"As part of your consent, you also need to decide what you would like to happen to your sperm, or embryos created outside the body with your sperm, if you die or lose the ability to decide for yourself (become mentally incapacitated). **Please note that if you**

would like your partner to use your sperm or embryos in the event of your death or mental incapacity, your partner should be named on this form. Your embryos may only be used within the storage period you consented to above." [emphasis added]

17 Sections 6.1 and 6.2 of the Form address, respectively, consent to sperm being used to create embryos for the partner's treatment; and consent to embryos (created using the man's sperm) being used for his partner's treatment. There are no equivalent provisions in the WT form.

18 In section 6.4, the Form addresses other uses for the patient's sperm or embryos, in the event of death or mental incapacity and states as follows:

> "**Other uses for your sperm or embryos**
>
> If you wish your sperm or embryos to be used in someone else's treatment if you die or become mentally incapacitated, please speak to your clinic for more information. Depending on your circumstances, you will need to complete one of the following:
> - "Your consent to donating your sperm" (MD form)
> - "Your consent to donating your embryos" (ED form), or
> - "Men's consent to the use and storage of sperm for embryos for surrogacy" (MSG form)." [emphasis added]

19 In completing this form EF consented to storage of the embryos for 10 years, and in the event of his death or mental incapacity for both his sperm and any embryos created with his sperm to be used in his partner's treatment. EF also consented to be being registered as the legal father of any child born as a result of his partner's treatment after his death. He did not consent to the use of his sperm or any embryos created with his sperm to be used for training purposes, including in the event of his death or mental incapacity.

HFEA WT Form

20 The WT Form records a woman's consent to certain uses of embryos created with her eggs and their storage. In the event of a woman's death or mental incapacity, the WT Form also records a woman's consent to the use of her eggs or embryos created using her eggs for training purposes.

21 In contrast to the MT Forms, the WT Form did not record a woman's consent in the event of her death or mental incapacity to use of her eggs to create embryos in treatment or use of embryos created with her eggs in her partner's treatment.

22 The section of the WT Form entitled '*In the event of your death or mental incapacity'* states:

"**Other uses for your eggs or embryos**
If you wish your eggs or embryos to be used in someone else's treatment if you die or become mentally incapacitated, please speak to your clinic for more information. Depending on your circumstances, you will need to complete one of the following: • 'Your consent to donating your eggs' (WD form), • 'Your consent to donating embryos' (ED form), or • 'Women's consent to the use and storage of eggs or embryos for surrogacy' (WSG form)."

23 In contrast to the MT Form there is no reference to a partner's treatment in the preamble to section 6, which states as follows:

"As part of your consent, you also need to decide what you would like to happen to your eggs, or embryos created outside the body with your eggs, if you die or lose the ability to decide for yourself (become mentally incapacitated). Please note your embryos may only be used within the storage period you consented to above. If you do not give your consent in the below section, your eggs or embryos must be allowed to perish in the event of your death or mental incapacity and cannot be used for treatment."

24 AB named EF as her partner and consented to the use of her eggs to create embryos for her treatment and for the storage of the couple's jointly created embryos for a period of 10 years. AB did not consent to the use of her eggs or embryos for training purposes but in the event of her death or mental incapacity she consented to their use for that purpose.

25 The Clinic did not provide AB with a copy of the WSG Form or draw the couple's attention to any particular form, nor did any discussions take place with the Clinic in relation to the posthumous use of the embryo in the event that she died.

26 Given there was no option on the WT Form for posthumous use of the embryos in treatment EF's recollection was that AB consented, in the event of her death or mental incapacity, to the use of her eggs or their jointly created embryo for training purposes

because she would not have wanted them to be destroyed without a purpose, which was consistent with their shared view that an embryo is a precious life form.

27 The forms signed in this case are in the same terms as those considered in *Jennings* (albeit different versions) where I accepted the submission that the WT Form did not provide any opportunity for *'a woman to consent to a partner-created embryo being used for her partner's treatment if she dies'* and invited the HFEA to consider reviewing the form to provide greater clarity.

28 Following the decision in *Jennings* the HFEA has amended the form so that version 12 of the WT Form now states in the section *'In the event of your death'*:

> "As part of your consent, you also need to decide what you would like to happen to your eggs or embryos if you die.
>
> "In the event of your death, if you would like your partner to be able to use your eggs or embryos in their own treatment or in treatment with a surrogate, your partner must be named in section 2 of this form.
>
> "If a surrogacy arrangement would be required, you will need to receive relevant information, be offered counselling, undergo further screening tests and complete additional consent forms before you die. It is therefore vitally important that you and your clinic discuss posthumous use and the different treatment options in those circumstances. Please ask your clinic if they have not already discussed this with you.
>
> "The person named at section 2 of this form will be the only person able to use your stored eggs or embryos for treatment after your death. If you do not name a person at section 2 of this form, then no one will be permitted to use your eggs or embryos for treatment after your death."

At section 6.2, the form now states:

> "In the event of your death, do you consent to your embryos being used and stored for your partner's treatment?
> You should be aware that embryos can only be used if the sperm provider (your partner or sperm donor) has also given consent.
> If treatment would involve a surrogate, then additional consent forms and screening tests must have been completed before you die to allow treatment to take place. It is important to speak to your clinic about this."

AB's wishes

29 EF's evidence sets out why he is certain that AB's wish was that their jointly created embryo be used posthumously with a surrogate in the event of her death, if she had been given the chance to do so. He gives the following reasons in his written evidence for having that view:

(i) Although EF accepts he and AB never discussed the possibility of surrogacy in their own personal circumstances his evidence and that of the wider family and friends is that AB would have given that consent if she had been given the opportunity. They had discussed the use of the embryos by AB in the event of EF's death and, more generally, the importance of the possibility of having a baby in the event of an untimely death. AB was generally supportive of the progress with assisted conception and supported her sibling to freeze his sperm for future assisted conception and the posthumous use of their gametes in the context of looking at options during treatment.

(ii) AB wanted to use their remaining embryo to have a third child. Both EF and AB are one of three siblings. They had discussed having two or three children and wanted to replicate the pattern of their own families. EF reports AB was so pleased to have Y that she was considering back to back maternity leave and prior to the unexpected death had discussed arranging a gynaecological assessment as part of that process. This is supported by AB's father's evidence.

(iii) AB is a devout member of the J religion who believed in the principle of reincarnation and that an embryo is a precious life form.

30 EF's evidence about AB's wishes is supported by the detailed evidence filed by her wider family and friends.

Legal Framework

31 The Human Fertilisation and Embryology Act 1990 (as amended) (HFEA 1990) regulates the donation, storage and use of gametes and embryos. The legislation is supplemented by a Code of Practice issued by the HFEA pursuant to section 25 of the

HFEA 1990. The 8th Edition (v.9) of the HFEA Code of Practice (published in July 2016) was in force at the material time.

32 The relevant provisions regarding consent and the storage of embryos can be summarised as follows.

33 Section 3 HFEA 1990 provides that no person shall keep or use an embryo except in pursuance of a licence or in pursuance of a third party agreement.

34 Section 12(1)(c) HFEA 1990 requires that it is a condition of every licence granted that, except in relation to the use of gametes in providing basic partner treatment services or non-medical fertility service, the provisions of Schedule 3 to the HFEA 1990 are complied with.

35 The relevant part of Schedule 3 HFEA 1990 that relates to consent provides as follows:

> **Consent**
> 1. (1) A consent under this Schedule, and any notice under paragraph 4 varying or withdrawing a consent under this Schedule, must be in writing and, subject to subparagraph (2), must be signed by the person giving it.
> (2) A consent under this Schedule by a person who is unable to sign because of illness, injury or physical disability (a "person unable to sign"), and any notice under paragraph 4 by a person unable to sign varying or withdrawing a consent under this Schedule, is to be taken to comply with the requirement of sub-paragraph (1) as to signature if it is signed at the direction of the person unable to sign, in the presence of the person unable to sign and in the presence of at least one witness who attests the signature.
> (3) In this Schedule (a) "effective consent" means a consent under this Schedule which has not been withdrawn.
> […]
>
> 2.(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, (ba) use for the purpose of training persons in embryo biopsy, embryo storage or other embryological techniques, 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, any embryo or any human admixed embryo must— (a) specify the maximum period of storage (if less than the statutory storage period), (b) except in a case falling within paragraph (c),

state what is to be done with the gametes, embryo or human admixed embryo if the person who gave the consent dies or is unable, because the person lacks capacity to do so, to vary the terms of the consent or to withdraw it, and (c) where the consent is given by virtue of paragraph 8(2A) or 13(2), state what is to be done with the embryo or human admixed embryo if the person to whom the consent relates dies,

and may (in any case) specify conditions subject to which the gametes, embryo or human admixed embryo may remain in storage.

[…]

Procedure for giving consent

3. (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.

(2) Before a person gives consent under this Schedule he must be informed of the effect of paragraph 4 and, if relevant, paragraph 4A below.

[…]

In vitro fertilisation and subsequent use of embryo

6. (1) A person's gametes or human cells must not be used to bring about the creation of any embryo in vitro unless there is an effective consent by that person to any embryo, the creation of which may be brought about with the use of those gametes or human cells, being used for one or more of the purposes mentioned in paragraph 2(1)(a), (b) and (c) above.

(2) An embryo the creation of which was brought about in vitro must not be received by any person unless there is an effective consent by each relevant person in relation to the embryo to the use for one or more of the purposes mentioned in paragraph 2(1)(a), (b), (ba) and (c) above of the embryo.

(3) An embryo the creation of which was brought about in vitro must not be used for any purpose unless there is an effective consent by each relevant person in relation to the embryo to the use for that purpose of the embryo and the embryo is used in accordance with those consents.

[…]

(3E) For the purposes of sub-paragraphs (2), (3) and (3B), each of the following is a relevant person in relation to an embryo the creation of which was brought about in vitro ("embryo A")— (a) each person whose gametes or human cells were used to bring about the creation of embryo A, (b) each person whose gametes or human cells were used to bring about the creation of any other embryo, the creation of which was brought about in vitro, which was used to bring about the creation of embryo A, and (c) each person whose gametes or human cells were used to bring about the creation of any human admixed embryo, the creation of which was brought about in vitro, which was used to bring about the creation of embryo A."

36 As set out on behalf of EF, the requirements of an effective consent, as set out in the HFEA 1990, to use of an embryo created *in vitro* in treatment are that:

a. It must be in writing and signed;

b. It must be provided by each person whose gametes were used to bring about the creation of the embryo;
c. It must specify one or more of the purposes mentioned in paragraph 2(1)(a), (b), (ba) and (c) of Schedule 3;
d. The individual providing consent must have been "*provided with such relevant information as is proper*" within the meaning of para 3(1)(b) of Schedule 3;
e. The individual providing consent must have been given a suitable opportunity to receive proper counselling about the implications of taking the proposed steps;
f. The individual providing consent must specifically be informed of the circumstances in which consent to the storage or use of an embryo may be varied or withdrawn;
g. The consent must not have been withdrawn; and,
h. Consent is not automatically revoked on death or loss of capacity: *Mr and Mrs M v Human Fertilisation and Embryology Authority* [2017] 4 WLR 130 (Arden LJ) ('*M')* at [20]

37 The HFEA 1990 does not expressly address the consent which must be provided by a couple seeking to use a partner-created embryo in treatment with a surrogate. The statutory framework requires both the purposes mentioned in paragraph 2(1)(a) ('*use in providing treatment services to the person giving consent and another specified person together'*[1]) and 2 (1)(b) ('*use in providing treatment to persons not including the person giving consent'*) of Schedule 3 of the 1990 Act as set out in *Jennings*, at [85]

> "None of the purposes listed in paragraph 2(1) of Schedule 3 expressly deals with the situation where a partner-created embryo is used in treatment with a surrogate. The use of a partner-created embryo pursuant to a surrogacy arrangement involves providing treatment services to both the commissioning parents and the surrogate. Consequently, consent for use of a partner-created embryo in treatment with a surrogate must specify both the purposes mentioned in paragraph 2 (1)(a) ('use in providing treatment services to the person giving consent and another specified person together') and 2 (1)(b) ('use in providing treatment to persons not including the person giving consent') of Schedule 3 of the 1990 Act .

Code of Practice (8th edition v.9)

38 Section 3 of the Code deals with counselling; and provides that the centre should normally offer counselling after information has been provided about the services and before they consent *inter alia* to use of the embryos (para 3.1). Paragraph 3.4 addresses counselling in the context of donating embryos for the treatment of others; there is no mention of surrogacy (although this is dealt with in section 14 of the Code).

39 Section 4 sets out the information to be provided prior to consent and Section 5 of the Code is headed 'Consent to treatment, storage, donation, training and disclosure of information'; and, at paragraph 5.20, it sets out the requirement that a gamete provider is made aware that, unless their partner has been named, gametes and embryos cannot be used in treatment.

40 Section 14 deals with surrogacy. It sets out that parents involved in such arrangements must be screened in line with the requirement for gamete providers and that all those involved in surrogacy arrangements have been given sufficient information about legal parenthood and the legal implications of surrogacy arrangements.

41 Turning to the relevant provisions under the European Convention of Human Rights ("ECHR") and Human Rights Act 1998 ("HRA"), Article 8 of the ECHR provides:

> "(1) Everyone has the right to respect for his private and family life, his home and his correspondence.
> (2) There shall be no interference by a public authority with the exercise of this right except such as is in 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 rights and protections of others."

42 Section 3(1) HRA 1998 provides that:

> "Interpretation of legislation
> (1) So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights."

Submissions

43 As in *Jennings*, the focus of the submissions on behalf of EF is that the decision preventing him from using the remaining embryo in treatment with a surrogate

following AB's death is a significant interference with his Article 8 rights. In addition in this case, it is submitted the court should consider Article 8 as interpreted in the light of Article 9, and with those rights when considered in the context of Article 14.

44 It is submitted the statutory requirement that the necessary consent is provided in writing amounts to a significant interference with the Article 8 rights as it would:

(1) Deprive EF the opportunity of being the father in a genetic sense to a second child conceived from EF and AB's jointly created embryo which was described in *Jennings* [102] as being '*significant, final and lifelong'*.

(2) EF would be deprived of giving his only child, X, a sibling from her mother. This was important for EF and AB due to their family background and heritage and to X. X would not have the opportunity of having a biological sibling, even though that is something AB would have wanted.

45 In the context of Article 9:

(1) EF would be deprived of being able to honour or fulfil AB's religious wishes for the embryo to be used in accordance with her beliefs to give the life form a chance.

(2) If unused the embryo would be left to perish which is contrary to both EF and AB's strongly held religious beliefs.

46 The analysis of Article 14 needs to be viewed through the lens of the five questions in *Ghaidan* [2004] 2 AC 557 [133 – 134] set out by Baroness Hale:

"*133…. The original four questions were: (i) Do the facts fall within the ambit of one or more of the Convention rights? (ii) Was there a difference in treatment in respect of that right between the complainant and others put forward for comparison? (iii) Were those others in an analogous situation? (iv) Was the difference in treatment objectively justifiable? ie, did it have a legitimate aim and bear a reasonable relationship of proportionality to that aim?*

"*134. The additional question is whether the difference in treatment is based on one or more of the grounds proscribed—whether expressly or by inference—in article 14 .[…]* ."

47 Taking those question in turn, Ms Richards submits the decision preventing EF from using the embryo amounts to a breach of Article 8 rights (alone and together with Article 9) and Article 14. The facts in this case fall within Article 8. There is a difference in treatment between men and women who sign consent forms due to the difference in wording as women are deprived of the opportunity of consenting to the posthumous use by their male partners of their jointly created embryos. As a consequence, any male surviving partner is treated differently to any female surviving partner from a heterosexual relationship. The difference in treatment, which arises from omissions in the WT consent form, is not objectively justifiable.

48 Ms Richards submits that the evidence demonstrates that AB would have wanted EF to be able to use their partner created embryo in treatment with a surrogate.

49 EF and AB had been engaged in fertility treatment for a number of years and their intention would have been to use the remaining embryo for another child. Although there is no evidence that this issue was expressly discussed, due, Ms Richards submits, to the combined failings of the Clinic and the HFEA, it is clear from the evidence from EF, and AB's close family and friends that this is what she would have wanted.

50 In undertaking this exercise Ms Richards submits this accords with what the President said in *G v HFEA and SS for Health and Social Care [2024] EWHC 2453* at [86]

> *'…there is a need to evaluate the quality and clarity of the individual's wishes and it is relevant to use a comparison with what is required by the 1990 Act as part of the evaluation exercise'.*

51 Ms Richards outlined the evidential foundation stones for this evaluation as follows:

(1) AB provided written consent in the WT Form to the use of the embryos created using her eggs and EF's sperm in treatment services provided to her and EF together in accordance with sub-paragraph 2(1)(a) of Schedule 3.

(2) AB did not withdraw that consent and it was not automatically revoked on her death (see Schedule 3 paragraph 1(3) and *M v HFEA* [2017] 4 WLR 130 [20]).

(3) As a consequence, there is an extant consent from AB for the embryos created using her eggs and EF's sperm to be used in treatment services provided to her and EF together.

(4) In accordance with her religious beliefs that the divine spirit entered the foetus at the point of conception AB would have wanted EF to use the embryo rather than allow it to perish. AB consented to the use for training purposes in the event of her death but there were no other options in the WT form.

(5) AB wanted to use the remaining embryo and felt it important for Y to have a sibling.

(6) More generally, AB was supportive of the medical progress in assisted conception evidenced by the support she gave her brother during his treatment.

52 Ms Richards submits that based on this solid evidential foundation the court can infer that it was AB's clear wish that EF should be able to use their jointly created embryo in treatment with a surrogate in the event of her death. She did not record that wish in writing as she was not given the opportunity to do so and, as a consequence, effective consent was given notwithstanding the absence of it being recorded in writing.

53 Ms Richards does not take issue with the proposition that the requirement for consent in writing pursues a legitimate aim, the issue is whether this is sufficient to justify the very significance interference with EF's Art 8 rights. The burden is on the state to establish this within the proportionality framework of (i) is the legislative objective sufficiently important to justify limiting a fundamental right? (ii) are the measures that have been designed to meet it rationally connected to it? (iii) are they no more than is necessary to accomplish it? and (iv) do they strike a fair balance between the rights of the individual and the interests of the community? The key to this latter assessment is the proportionality between the effects of legislative measures on countervailing rights or interests and the objective that is achieved.

54 Ms Richards submits that in this case, the insistence on evidence in writing would be a disproportionate interference for the following four reasons: (i) The requirement for consent, rather than its form, is the lodestar to the legislative scheme and reflects the importance of personal autonomy. (ii) The evidence is that AB would have wanted EF to be able to use the embryo this way on her death. Consequently the need for consent

is not being undermined, rather it is being supported and would support the principle of the embryos being used in accordance with the wishes of both gamete providers which promotes the legislative objective. (iii) The only reason why there is no consent in writing from AB is because she was not given an opportunity to do so. (iv) This case has the same key characteristics as in *Jennings.*

55 Finally, Ms Richards submits, the court is able, within the meaning of s 3 HRA 1998, to read Schedule 3 HFEA1990 so as to enable consent to be provided other than in writing and s 3 HRA 1998 requires those provisions to be read in that way. The fundamental principle expressed in Schedule 3 HFEA 1990 is that wishes of gamete providers should be paramount, so the legitimate aim underpinning the requirement for consent within the statutory scheme is to ensure respect for individual autonomy and give effect to the wishes of gamete donors (see *Evans v United Kingdom(2008) 46 E.H.R.R. 34 , L v Human Fertilisation and Embryology Authority* [2008] EWHC 2149 [49] and *Jennings* [82] and [101]). Ms Richards would go further and submits that where there is clear evidence of a gamete provider's wishes, as with AB here, yet that person was not given an opportunity to put that consent in writing the requirement for consent may frustrate the primary legislative objective that a gamete providers wishes are respected.

56 The powers the court has under s 3 HRA 1998 are set out in *Ghaidan v Godin-Mendoza* [2004] 2 AC 557 at [32 – 33] which ensures the meaning is not *'inconsistent with a fundamental feature of legislation';* stressing that any meaning imported by a s 3 HRA 1998 reading must be *'compatible with the underlying thrust of the legislation being construed'* and must '*go with the grain of the legislation'*.

57 This was recognised in *Jennings* [104] and in *G* [76] the President stated:

> *'As her judgment shows, Theis J determined Mr Jennings application by holding that his ECHR Art 8 rights had been significantly interfered with and that the court was required by HRA 1998 to read down the relevant provisions of the HFEA 1990, Sch 3 in order to dispense with the requirement for written and signed consent. It is in that sense, namely that the statutory provisions will be vulnerable to being read down where it is necessary for the court to do so under the HRA 1998, that the Sch 3 requirements were 'not inviolable' in* Jennings; *the 'circumstances' which 'require[d] the court to intervene' were those which made it necessary for the court to act under HRA 1998, s 3(1)'.*

58 Ms Richards submits that within the meaning of s 3 HRA 1998 it is possible to read down Sch 3 HFEA 1990 to introduce an implied discretion to accept evidence of consent provided other than in writing where a failure to do so would result in a breach of Art 8 EHCR. Such an interpretation does not go against the grain of the legislation, the wishes of gamete providers would be upheld. Such a construction does not dispense with the requirement of consent, it provides it in another way in circumstances where there is clear evidence to support that as to the gamete provider's wishes and the only reason why there is not written consent is because there was no opportunity to do so. There is nothing in the legislative history that considered this situation and there have been other circumstances where a mandatory requirement has been the subject of an implied discretion within the scope of the s 3 HRA 1998 power.

59 Ms Watson KC, on behalf of the HFEA, resists the application. It acknowledges the profound personal tragedy at the heart of this application. The HFEA is required, pursuant to s 8(1)(cb) HFEA 1990 to *'promote in relation to activities governed by this Act, compliance with (i) requirements imposed by or under this Act, and (ii) the code of practice under section 25 of this Act'.* Ms Watson submits, consistent with the HFEA's statutory duty to promote compliance with the statutory scheme, the declaration sought should not be granted because:

(i) HFEA 1990 provides a clear and unambiguous framework for the use of embryos, which requires informed consent to be given in writing and to be signed.

(ii) It is common ground AB did not give such consent.

(iii) The evidence filed demonstrates AB had sufficient opportunity to provide effective consent.

(iv) The HFEA 1990 does not permit the exercise of any discretion in respect of the requirement for 'effective consent' and cannot be read down to remove the requirement for signed written consent without crossing the boundary from interpretation to amendment.

(v) Any interference with EF's Art 8 rights, either alone or together with Art 9 and/or 14, caused by the application of Sch 3 HFEA 1990 is necessary and proportionate to the underlying legislative objectives. The fact that the strict application of its requirements may result in individual hard cases does not make it disproportionate.

60 The importance of the manner and form of consent was acknowledged by the President in *G* at [76]

> *'The provisions which stipulate the manner and form in which valid consent is to be given under the HFEA 1990 are contained in Sch 3...HFEA1990, s 12(1)(c) requires that every licence issued to authorise treatment, storage or research under the Act must comply with Sch 3, which, in turn, requires that it 'must be in writing', be signed and it must state what is to be done with the gametes or embryo. Insofar as the term 'evidential rule' may suggest that these provisions are anything other than strict and essential requirements of the statutory scheme, such a suggestion is not sustainable.'*

61 Ms Watson outlines the detailed evidence about the consent requirements in Sch 3 HFEA 1990 as set out in the statement of Mr Thompson, which is summarised as follows:

(1) Paragraph 1 (1): A consent under this Schedule must be in writing and must be signed by the person giving it.

(2) Paragraph 1 (3) "effective consent" means written consent that has not been withdrawn.

(3) Paragraph 3: Before giving consent, a person must be given a suitable opportunity to receive proper counselling about the implications of taking the proposed steps, be provided with such relevant information as is proper and be informed that the terms of any consent may be varied and the consent may be withdrawn in accordance with paragraph 4.

(4) Paragraph 2(1): A consent to the use of any embryo must specify the purposes for which it is to be used, namely whether it is to be used in providing treatment to the person giving consent (or that person together with another), to persons not including the person giving consent or for training or research and may specify conditions subject to which the gametes or embryo may remain in storage.

(5) Paragraph 2(2) requires a consent to the storage of any gametes or embryo to specify the maximum period of storage and what is to be done with the gamete or embryo if the person who gave the consent dies or loses mental capacity.

(6) Paragraph 6(1) prohibits the use of a person's gametes to create an embryo in vitro unless there is an effective consent to the use of the embryo for one or more of the purposes set out in paragraph 2(1) (a) to (c).

(7) Paragraph 6(3) prohibits the use of an embryo created in vitro for any purpose unless there is an effective consent by each relevant person in relation the embryo to the use for that purpose and the embryo is used in accordance with those consents.

(8) Paragraphs 8(1) and (2) prohibit the storage of gametes or embryos created in vitro unless there is an effective consent to storage and the gametes or embryos are stored in accordance with the consent.

62 Chapter 5 of the Code of Practice reinforces the importance of consent and directs at 5.20 for centres to make gamete providers *'aware that if they were to die or become mentally incapacitated, the gametes and embryos cannot be used in treatment unless consent to use has been provided and their partner has been named…'.*

63 Ms Watson submits the material effect of Sch 3 HFEA 1990 was summarised in the judgment of the Court of Appeal in *Evans v Amicus Healthcare Ltd* [2004] EWCA Civ 727 [24]

'(i) Those contemplating the storage and/or use of embryos created from their gametes must first be offered counselling; (ii) they must specifically be informed of the circumstances in which consent to the storage or use of an embryo may be varied or withdrawn; (iii) consent given to the use of an embryo must specify whether the embryo is to be used to provide treatment services to the person giving consent, or to that person together with another, or to persons not including the person giving consent; (iv) an embryo may only be stored while there is effective consent to its storage from both gamete providers, and in accordance with the terms of the consent; (v) an embryo may only be used while there is an effective consent to its use from both gamete providers, and in accordance with the terms of that consent; (vi) consent to the storage of an embryo can be varied or withdrawn by either party whose gametes were used to create the embryo at any time; (vii) consent to the use of an embryo cannot be varied or withdrawn once the embryo has been used in providing treatment services.'

Later in [37] the court observed
'…the clear policy of the Act is to ensure continuing consent from the commencement of treatment to the point of implant…Against that background the court should be extremely slow to recognise or to create a principle of waiver that would conflict with the parliamentary scheme.'

64 In the present case, Ms Watson submits that the HFEA accept EF's Art 8 rights are engaged and the focus should be on those rights, and that the effect of Schedule 3 HFEA 1990 may tangentially touch on the right to manifest the J religious beliefs, but the case can and should be approached on the basis of Article 8 alone. She submits as the consent

requirements are general measures that apply equally to all, it cannot be said there is a difference in treatment based on gender and, she submits, as a consequence Art 14 is not engaged.

65 At [71] in *G* the President stated that the HFEA 1990 is:

'a general measure which is applicable to one and all in like manner with no facility for the evaluation of the individual merits of circumstances which may fall outside its strict requirements and no role for administrative or judicial discretion'

And continued at [72]

'A principal consequence of a general measure is that there will be some hard cases, where the individual merits of a claim to access the scheme generate sympathy, yet access must be refused due to a failure to comply with its strict requirements. The role of decision-makers in such circumstances was described in unambiguous terms by Hale LJ in the case of U:
'Centres, the HFEA and the courts have to respect that scheme, however great their sympathy for the plight of particular individuals caught by it.'
'There is a natural human temptation to try to bend the law so as to give her what she wants and what she truly believes her husband would have wanted. But we have to resist it.'"

66 Ms Watson submits that where the alleged interference with EF's Art 8 rights arises from general legislative measures, as in the present case, the correct approach is to consider proportionality at the level of the general measure, rather than at an individual level, necessitating a case by case examination.

67 A general measure, she submits, may be proportionate if it pursues a legitimate aim and strikes the right balance between the interests of the individual and the interests of the community, even if it results in hard cases. Ms Watson submits the approach to be taken to the assessment of proportionately at a general level was articulated by the ECtHR in *Animal Defenders v UK* [2013] EMLR 28 at [108] and *Evans v UK* at [89] determining that in enacting Sch 3 HFEA 1990, Parliament had not exceeded the margin of appreciation afforded to it under Art 8.

68 Ms Watson submits this reasoning applies here. The requirements under Sch 3 HFEA 1990 of specific written and signed consent which permits no exception serve important legislative objectives and represent carefully considered choices by Parliament in the

interests of autonomy and legal and regulatory certainty and is clearly within the margin of appreciation afforded to it under the ECHR. Any dilution or waiver in response to individual circumstances would undermine those objectives and would *'require the HFEA or the clinic or both to make a judgment based on a mixture of ethics, social policy and human sympathy'* which*' would create new and even more intractable difficulties of arbitrariness and inconsistency'.* (*Evans v UK* [25])

69 In the alternative, Ms Watson submits, if proportionality does stand to be assessed by reference to the impact on EF's particular circumstances any interference with his Art 8 rights remains proportionate to the legitimate aims pursued by the legislation. In considering the proportionality assessment Ms Watson submits there is a need to balance the importance of the statutory objectives served by the requirements of consent, including the protection of AB's autonomy regarding her genetic material and legal and regulatory certainty, as well as the damage that may be caused to those interests by diluting or waiving the requirements or replacing the bright line rule with one requiring subjective case by case assessment on the merits.

70 Ms Watson submits that in respect of the floodgates argument, that was dismissed in Jennings, this case and G suggest such concerns may not have been without foundation.

71 Ms Watson's primary position is s 3 HRA 1998 has no application as Sch 3 HFEA 1990 is Convention compliant or, in the alternative, the provisions cannot be 'read down' as to do so would cross the constitutional boundary from interpretation to amendment and would undermine the cardinal principles that underpin the statutory scheme, namely personal autonomy and legal certainty.

72 Ms Watson submits *Jennings* was decided without reference to the *Animal Defenders* case which makes clear that proportionality is to be assessed at the level of the general measure rather than the level of the individual. Approached in that way Ms Watson submits the court was bound to conclude that in enacting the relevant consent requirements, Parliament did not exceed the margin of appreciations afforded to it under Article 8, the strict application of Sch 3 HFEA 1990 did not in fact constitute a disproportionate interference with EF's Art 8 rights and there is no basis for invoking s 3 HRA 1998.

73 Ms Watson submits, in response to the submissions on behalf of EF regarding evidence of AB's consent, that the WT Form completed by AB contained the following information:

'You are also legally required to record what you would like to happen to your eggs and embryos if you were to die or lose the ability to decide for yourself (become mentally incapacitated). Whilst this is perhaps not something you have considered, your clinic needs to know this so that they only allow your eggs and embryos to be used according to your wishes. If you are unsure of anything in relation to this, please ask your clinic.'

And

'6. In the event your death or mental incapacity
As part of your consent, you also need to decide what you would like to happen to your eggs or embryos created outside the body with your eggs if you die or lose the ability to decide for yourself (become mentally incapacitated)…

If you want your eggs or embryos to be used in someone else's treatment if you die or become mentally incapacitated, please speak to your clinic for more information. Depending on your circumstances, you will need to complete one of the following: "Your consent to donating your eggs (WD form), "Your consent to donating embryos" (ED form) or "Women's consent to the use and storage of eggs or embryos for surrogacy. (WSG Form)'

74 The statement from Dr S, Consultant in Gynaecology and Reproductive Medicine, states AB was offered counselling, but there was no evidence she attended that either before or during her fertility treatment. It also sets out the consent process undertaken with AB in 2017 which included a consultation with a full time Fertility Nurse Specialist who completed a consultation checklist and followed the procedure in place at the time which, Ms Watson submits, required sufficient information to enable them to give informed consent, an offer of counselling, information about how to vary or withdraw their consent and provision of a patient information leaflet entitled 'Freezing and Storing Embryos' which explains that patients should think about what they wanted to happen to their embryos in the event that they die or lose capacity.

75 Ms Watson submits that it is evident from the WT Form completed by AB she gave some thought to what she wanted to happen to her eggs and embryos in the event of her death or incapacity and decided to give her consent to use in training. EF confirms they discussed the fact that the MT Form allowed him to consent to posthumous use of the

embryos for his wife's treatment but there was no option to consent to this on the WT Form. From that discussion they did not raise this with the Clinic and AB did not complete a WSG Form consenting to the storage of eggs or embryos for surrogacy, despite the WT Form making clear that (i) she should speak to the clinic for more information if she wished her eggs or embryos to be used for someone else's treatment if she died; and (ii) she would need to complete another form or forms if she wanted to consent to the use of her eggs or embryos after her death other than for training purposes.

76 Ms Watson submits the absence of any counselling that was offered is significant as, for example, *'it is not known whether [AB] would have wanted the remaining embryo to be used in treatment with a surrogate where it would not have been possible at that time for her husband as a single applicant, to obtain a Parental Order under the [HFEA 2008].'* Ms Watson submits the absence of any discussion about the implications of giving consent to the use of the embryo in treatment with a surrogate must give rise to some doubt that AB would have consented to the use of her embryo in the way that is now proposed.

Discussion and decision

77 The issues raised in this case have very recently been put under the spotlight by the President in *G* when, having considered many of the same legal arguments as I have had in this case, as I did in *Jennings,* he set out *'Four preliminary observations*' as follows, due to their importance they are set out in full:

71. First, the HFEA 1990 is a general measure which is applicable to one and all in like manner with no facility for the evaluation of the individual merits of circumstances which may fall outside its strict requirements and no role for administrative or judicial discretion. In the words of Lord Bingham in Quintavalle, '[Parliament] opted for a strict regime of control. No activity within this field was left unregulated. There was to be no free for all.' The ECtHR has established that general measures of this nature can be compatible with the ECHR [Animal Defenders paragraph 106] and in Evans accepted that the HFEA 1990 is one such.

72. A principal consequence of a general measure is that there will be some hard cases, where the individual merits of a claim to access the scheme generate sympathy, yet access must be refused due to a failure to comply with its strict requirements. The role

of decision-makers in such circumstances was described in unambiguous terms by Hale LJ in the case of U:

'Centres, the HFEA and the courts have to respect that scheme, however great their sympathy for the plight of particular individuals caught by it.'
'There is a natural human temptation to try to bend the law so as to give her what she wants and what she truly believes her husband would have wanted. But we have to resist it.'

73. *Second, when reviewing the 1990 Act in 2008, Parliament maintained its rigid structure, at the centre of which is the requirement for informed consent, recorded and signed in the stipulated form. The domestic courts have upheld the strictness of the scheme. Judicial interpretation of it's clear terms has been limited in England and Wales to the case of R(M) where the Court of Appeal clarified that, for effective consent, an individual need only be given 'such relevant information as is proper' (in the words of Sch 3) rather than 'all' relevant information, and that what information was 'proper' might change with the circumstances and over time. The scheme itself has, for over three decades, been operated by clinics, the HFEA and, where required, by the courts by strict application of its clear requirements. Any judicial determinations which have held that circumstances outside the terms of the HFEA 1990 scheme are lawful have not been made under that Act but under the HRA 1998 by applying the ECHR.*

74. *This leads on to the third matter that requires emphasis which is the need to maintain a firm distinction between those cases within the scheme, which do not rely on the ECHR, and those outside of it which must rely on the ECHR if they are to succeed. There is a clear danger of conflating these two separate categories and reading across judicial decisions which have been taken outside the scheme as if they were taken as part of the statutory regime. The list of points drawn from the authorities by Ms Fottrell (set out at paragraph 38) demonstrates the danger of conflating, or failing to acknowledge, these two distinct routes to treatment. Insofar as, in previous reported cases, courts have taken the specific courses adumbrated in the five points in that list they have done so outside the HFEA 1990 scheme and have done so in the circumstances of a particular individual whose Art 8 rights have, on the facts of a specific case, been engaged to the extent that the court has used its power under the HRA 1998 to read down, or otherwise relax, the strict provisions in HFEA 1990, Sch 3. There is a danger in constructing such lists if it is suggested that they represent a general and accepted extension of the court's jurisdiction for all cases, when they are no more than examples of specific approaches that a court has been prepared to take when evaluating and then, if justified, acting upon the need to avoid a breach of an individual's rights under the ECHR in that case.*

75. *Fourthly, it is necessary to offer clarification of the words of Theis J in Jennings where she described the requirement of written consent in the HFEA 1990 as 'an evidential rule with the obvious benefits of certainty but it is not inviolable where the circumstances may require the court to intervene'.*

76. *The provisions which stipulate the manner and form in which valid consent is to be given under the HFEA 1990 are contained in Sch 3 [set out at paragraph 19 above]. HFEA 1990, s 12(1)(c) requires that every licence issued to authorise treatment, storage or research under the Act must comply with Sch 3, which, in turn, requires that*

it 'must be in writing', be signed and it must state what is to be done with the gametes or embryo. Insofar as the term 'evidential rule' may suggest that these provisions are anything other than strict and essential requirements of the statutory scheme, such a suggestion is not sustainable. Further, it would be an error to read Theis J's reference to the 'rule' being 'not inviolable' as holding that it is open to a clinic, the HFEA or a court within the statutory scheme to waive the requirement for effective consent that complies with the specific terms of Sch 3. The key parts of the judgment in Jennings read as a whole demonstrate that Theis J did not make her decision within the statutory scheme by demoting the status of the Sch 3 requirements to that of rules which may be waived in any case. As her judgment shows, Theis J determined Mr Jennings' application by holding that his ECHR Art 8 rights had been significantly interfered with and that the court was required by HRA 1998 to read down the relevant provisions of HFEA 1990, Sch 3 in order to dispense with the requirement for written and signed consent. It is in that sense, namely that the statutory provisions will be vulnerable to being read down where it is necessary for the court to do so under the HRA 1998, that the Sch 3 requirements were 'not inviolable' in Jennings; the 'circumstances' which 'require[d] the court to intervene' were those which made it necessary for the court to act under HRA 1998, s 3(1).

77. Finally, the authorities are clear that informed consent is the cornerstone of the HFEA 1990 scheme. For there to be informed consent, it is necessary that the consenting individual has been sufficiently informed by the provision of 'such relevant information as is proper' [Sch 3, para 3(1)(b)] – in addition to being given an opportunity to receive proper counselling about the implications of taking the proposed steps. It is necessary to stress these two aspects of the scheme in order to avoid the focus being solely upon the fact of consent, as opposed to the need for that consent to be 'informed'.

78 The key point being made by the President was the need to maintain a firm distinction between those cases within the scheme, which do not rely on the ECHR, and those outside of it which must rely on the EHCR if they are to succeed. He warned against the risks of conflating the two and emphasised that the central part of my decision in *Jennings* demonstrates that I did not make my decision *'within the statutory scheme by demoting the status of the Sch 3 requirements to that of rules which may be waived in any case'*. As the President continued I *'determined Mr Jennings' application by holding that his ECHR Art 8 right had been significantly interfered with and that the court was required by HRA 1998 to read down the relevant provisions of HFEA 1990, Sch 3 in order to dispense with the requirement for written and signed consent. It is in that sense, namely that the statutory provisions will be vulnerable to being read down where it is necessary for the court to do so under the HRA 1998, that the Sch 3 requirements were 'not inviolable' in Jennings; the 'circumstances' which 'require[d] the court to intervene' were those which made it necessary for the court to act under HRA 1998, s 3(1).'*

79 Having set out those ground rules the President in *G* then went on to consider the evidence of informed consent on the particular facts in *G*. Having done so he observed at [86]

> 86. *It is important to be clear as to the purpose of evaluating the state of N's wishes with respect to the use of her frozen eggs at the time of her death. In this context, as elsewhere, there is a danger of conflating what the HFEA 1990 scheme requires with wider circumstances which may be relevant and important when considering an individual's rights under ECHR, Art 8. Here the court is engaged in the latter exercise, but, as the domestic authorities demonstrate, there is a need to evaluate the quality and clarity of the individual's wishes and it is relevant to use a comparison with that which is required by the 1990 Act as part of that evaluation exercise.*

80 Having considered the factual circumstances in the only three domestic cases on point in the last 10 years, which included *Jennings*, the President stated in *G* at [90] setting out his reasons for refusing the declaration sought in that case:

> 90. *Comparison between the nature and clarity of the evidence as to the deceased's wishes in each of these cases – which are the only three domestic authorities on the point – and the evidence in the present case is striking. In each of the three cases there was no ambiguity as to the deceased's engagement in fertility treatment with the aim of achieving the birth of a child with their spouse or enduring partner, and no doubt that they wished for that process to continue with the use of their gametes even after their death. In the present case the evidence is of a wholly different order. N was not engaged in fertility treatment. There is no account of N discussing either the source of male gametes or how a surrogate might be chosen. She is not recorded as expressing any wish concerning the upbringing of any child born through the use of her eggs, other than for her mother to look after them.*

81 Little is going to be gained by re-stating the relevant legal principles when they have recently been so fully set out in *G* and with such clarity.

82 Turning to the circumstances of this case. There is no issue between the parties that EF's Art 8 rights are engaged, that is accepted by Ms Watson on behalf of the HFEA.

83 The evidence of AB's wishes with respect to the use of her frozen eggs at the time of death is, in my judgment, she would have wanted EF to be able to use their partner created embryo in treatment with a surrogate. EF and AB had been engaged in fertility treatment over a number of years and intended to use the remaining embryo for another child. Although AB did not directly discuss what would happen to the embryo in the

event of her death that is due to the same deficits in the WT Form as this court found in *Jennings* [82], [92] and [104] which are equally applicable in this case.

84 In this case by completing the WT Form AB consented to the use of her eggs to create embryos for use in her treatment, she named EF as her treatment partner and the WT Form she completed provided clear evidence of her written consent to the use of her partner created embryo in treatment services provided to her and EF together. AB did not withdraw that consent and it was not revoked. The evidence from EF, taken together with the wider detailed evidence of AB's family and friends, fully supports the conclusion that AB wanted to use their remaining embryo to have a third child.

85 I reject the submission by Ms Watson that the references in the WT Form to other forms (such as the WSG Form), the fact that AB consented to the use of the embryo for training purposes in the event of her death or incapacity and that AB did not take up the counselling offered, which may have informed her of the inability of EF to be able to secure a parental order in the event of a child being born following treatment with a surrogate, undermine the inferences the court is able to draw regarding AB's consent. The reference to the WSG Form is insufficiently clear in the circumstances (*Jennings* [90]), the consent to the use of the embryo for training purposes in the event of her death or incapacity was consistent with AB's religious and spiritual beliefs and I am satisfied she was given no other informed choice in the circumstances of this case. The reliance on what the content of any counselling may have contained is not only speculative but, in any event, there could have been legal options other than a parental order, such as adoption.

86 I am satisfied that the appropriate inference to draw on the evidence is that AB consented to EF being able to use their partner-created embryo in treatment with a surrogate in the event of her death and would have recorded this in writing had she been given the opportunity to do so. As the President confirmed in *G* the court can, *'and should be prepared to, draw appropriate inferences concerning consent from reports of conversations had with the deceased'* [92].

87 I am equally satisfied that AB was not given the opportunity to consent to EF being able to use their partner created embryo in treatment with a surrogate in the event of

her death due to an omission in the HFEA scheme. This is for largely the same reasons set out in *Jennings [88, 90-91]* supported by the changes to the WT Form the HFEA made after *Jennings* to provide the clarity that *Jennings* set out was required.

88 In this case AB was not provided with a WSG or ED form, or clearly told about the need to complete them in order to evidence her consent to the posthumous use of her embryos by EF. The Clinic's standard operating procedures on taking consent prior to a procedure or treatment did not address surrogacy at all save for a reference to different options being set out in the form. Also, the HFEA relevant patient information leaflet at the time under the section entitled 'what happens if one of us dies' makes no reference to surrogacy or the posthumous use of a jointly created embryo by the man.

89 The important question the court needs now to consider is whether in the circumstances of this case the interference with EF's Art 8 rights is disproportionate. I reject the submission made by Ms Watson that this course is not open on an individual basis as the alleged interference arises from a general legislative measure with the consequence that that the approach to be taken to the assessment of proportionality should be at a general level. Similar arguments were raised in *Jennings* (see for example [66, 67, 68 and 72]). In *G* the President did not suggest that, in principle, the approach taken in *Jennings* was wrong. There is no evidence to support any floodgate submissions, there have been relatively few cases that raise these issues and on the rare occasions when they do there can be recourse to the court.

90 In my judgment, there is no dispute that the requirement that consent be in writing pursues a legitimate aim, the issue is whether that aim is sufficiently weighty to justify the very significant interference with EF's Art 8 rights, making due allowance for the margin of appreciation. The requirement of consent is the cornerstone of the HFEA 1990 which reflects the importance of personal autonomy and giving effect to an individual's wishes. The evidence establishes that AB would have wanted EF to be able to use the embryo with a surrogate in the event of her death, which seeks to support rather than undermine the importance of consent and personal autonomy which, in turn, promotes the fundamental objective of the legislative scheme. AB was unable to record her consent to this treatment as she was not given the opportunity to do so through no fault of her own. The insistence on written consent would, in the particular

circumstances of this case defeat rather than promote this objective of the legislative scheme. In circumstances where the interference with EF's Art 8 rights would be significant, final and lifelong there are no countervailing factors to justify the interference as, in the circumstances, permitting the application would not undermine a fundamental objective of the statutory scheme. I accept Ms Richards' submission that *'to fail to respect compelling evidence of a donor's wish, in circumstances where she was not given an opportunity to record that wish in writing as a result of (a) the lack of clarity in the HFEA's pro forma forms and (b) the failure of the [Clinic] to provide her with relevant information, would constitute a disproportionate interference with [EF's] rights under Article 8'.*

91 In accordance with the principles set out in *Ghaidan* it is possible within the meaning of s 3 HRA 1998 to read Sch 3 HFEA 1990 so as to enable the evidence of consent to be provided other than in writing and as that reading is possible the provisions of s 3 HRA 1998 requires the court to read those provisions in that way.

92 The fundamental principle expressed in Sch 3 HFEA 1990 is the wishes of gamete providers should be paramount. Consequently, the legislative aim underpinning the requirement for consent within the statutory scheme is to ensure respect for individual autonomy and give effect to the wishes of gamete donors (see *Evans v United Kingdom* [89] and *L v Human Fertilisation and Embryology Authority.*

93 In considering its powers under s 3 HRA 1998 the court cannot adopt a meaning *"inconsistent with a fundamental feature of legislation*" (*Ghaidan*, [33]); any meaning imported by a section 3 HRA 1998 reading must be "*compatible with the underlying thrust of the legislation being construed*" and must "*go with the grain of the legislation*". Pursuant to s. 6 HRA 1998, the court itself has a duty to act compatibly with Convention Rights.

94 This was the approach I adopted in *Jennings* [104]. That approach, which involved the court determining that there had been a significant interference with the applicant's Art 8 rights and that the court was required to read down the relevant provision, was cited by the President in *G* at [76] without disagreement with the principle or the framework.

95 Applying those principles in the particular circumstances of this case, I am satisfied Sch 3 HFEA 1990 should be read down to introduce an implied discretion for the court to accept evidence of consent provided other than in writing where a failure to do so would result in a breach of Art 8. This conclusion does not go against the *grain* of the legislation, it supports the fundamental principle that the wishes of gamete providers should be paramount. It does not dispense with the requirement of consent, it provides for the possibility of it being provided other than in writing in circumstances where there is clear evidence of the gamete providers wishes and the only reason written consent was not given was due to the lack of opportunity to do so. There is nothing in the legislative history that suggests this situation was considered by Parliament.

96 In the light of my conclusion founded on Art 8, it is not necessary for the court to go on to consider the rights under Arts 9 and 14 ECHR.